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# 50 Bright Stars: An Assessment of Each State's Constitutional Commitment to Limited Government

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## EXECUTIVE SUMMARY

In an era of burgeoning federal government power, state constitutions are full of untapped potential; many provide stronger protection of individual freedoms than does the federal constitution. But realizing that potential requires recognizing its existence and assessing which state constitutions offer the best opportunities for securing the principles of limited government. To that end, this report ranks each state in the United States according to its constitutional commitment to the principles of limited government from a classical liberal perspective.

Using the U.S. Constitution and federal court system as a baseline, this report assesses each state's constitutional jurisprudence for its commitment to limited government. This assessment reveals that every state in the union has a stronger textual and precedential commitment to individual liberty and fiscal responsibility under their state constitutions than does the federal government. Strong constitutions, however, are a necessary but not sufficient condition for securing limited government. Accordingly, the report also ranks each state's constitutional commitment to freedom with a supplemental assessment of each state's judicial and political culture.

Based on a combined assessment of each state's jurisprudential and judicial environments, the states that are most committed to securing limited government under their constitutions are Alabama, Alaska, Arizona, Idaho, Kentucky, Michigan, Minnesota, Nebraska, Ohio, Tennessee, Utah and Wisconsin. Further, even taking into consideration the reputed higher quality of the federal judiciary, 48 of the 50 states offer a better environment for securing limited government under their constitutions in state court than can be found in federal court under the U.S. Constitution alone. Only Massachusetts and West Virginia fall below the federal baseline. Taking into consideration the findings of a recent Mercatus Center study of economic freedom among the 50 states, which serves as a proxy for the freedom friendliness of each state's political culture, this report reveals that principles of limited government are most secure under the constitutions of Arizona, Alabama, Idaho and Tennessee.

This report can help guide individuals and businesses to states where their liberty and property are likely most secure under state law. It also will help scholars, philanthropists, think tanks, and public interest law firms focus resources in states where the return on investment is likely to be greatest. However, this does not mean low ranking states should be written off. Instead, in states where an adverse political culture and decades of faithless judicial interpretation have weakened textually strong constitutions such as Washington, Georgia, Florida, and Missouri, citizens should focus resources on advocating the classical liberal vision of their state constitutions by supporting courageous members of the judiciary who are willing to enforce that vision.

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# *50 Bright Stars: An Assessment of Each State's Constitutional Commitment to Limited Government*

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## Introduction

*The central question of this review was whether or not each state's constitution and judicial climate secure or potentially secure liberty and fiscal responsibility to a greater extent than the federal constitution.*

This report analyzes all 50 state constitutions to broadly identify those states most likely and least likely to furnish strong constitutional protection of the principles of limited government. These principles include the preservation of individual autonomy and the maintenance of strong legal constraints on government's size and scope. The central question of this review was whether or not each state's constitution and judicial climate secure or potentially secure liberty and fiscal responsibility to a greater extent than the federal constitution. The project's findings were made relative to the protections of the federal constitution *as currently enforced by the U.S. Supreme Court*—a baseline that leaves much to be desired from a classical liberal perspective. Indeed, it must be further emphasized that state constitutional jurisprudence everywhere is presently quite far removed from the limited government ideal. Although states are ranked in the tables and charts that follow, even the highest ranked state should not be viewed as an ideal model of classical liberal constitutionalism; even the lowest ranked state should not be viewed as totalitarian. Instead, our review of each state's constitutional jurisprudence is only a triage meant to distinguish between each state's relative constitutional commitment to classical liberalism. It is important to recognize that some aspects of this report unavoidably rely upon subjective judgment calls based on professional experience.

Subject to these caveats, this report can help guide citizens and businesses to the states where their liberty and property are likely the most secure. Equally important, in difficult economic times, this report should help freedom oriented scholars, philanthropists, think tanks, and public interest law firms focus their resources on developing freedom friendly constitutional jurisprudence in states where the return on investment is likely to be greatest. Likewise, this report and ranking may be regarded as a call to action for citizens of low ranking states to reexamine their state constitutions and redouble their efforts to advocate a constitutionally limited state government through the appointment or election of courageous members of the judiciary who are willing to enforce the original meaning of their state constitutions.

## Project Overview: Seeking the Classical Liberal Republic Among State Constitutions

This report assesses each state's constitutional jurisprudence and judicial environment relative to the federal baseline through the lens of the Lockean-

Jeffersonian-Madisonian political philosophy that animated the founders of the United States.[2] This philosophy arose from the intellectual ferment of Europe's Enlightenment period. It holds, in essence, that the proper purpose of government is to secure the protection of what Thomas Jefferson called "rightful liberty," i.e., the protection of "unobstructed action according to our will within limits drawn around us by the equal rights of others."[3] As such, in the classical liberal tradition, "rightful liberty" is "negative" in that it demands nothing more than respect for boundaries within which people are left free to enjoy their lives, properties and to pursue their happiness. This is in contrast to the contemporary liberal idea that government should secure "positive" liberty—i.e., "freedom from want" or "access to health care," the fulfillment of which affirmatively requires seizing other people's property, services and money against their will, through the force of government mandates and wealth redistribution.[4]

But the classical liberal political philosophy not only advances a position on the nature of government and rightful liberty, it also focuses on the practical mechanisms of government—how to structure government so that it will effectively secure rightful liberty for generations. The practical art of statecraft from a classical liberal perspective organizes government around foundational laws that seek to minimize the corrupting influence of power, the abuse of power and also the undue influence of factions (what we call "special interests" today).

For classical liberals, the foundational laws of government must first recognize that broad popular assent (if not actual consent) is the foundation of government power—not legal custom, social status, heredity or the divine right of kings. Second, government powers must be defined, limited and separated to diffuse, balance and check the concentration of coercive power in minorities or majorities. This "mixed" government is what classical liberals mean when they describe a state or nation as a "republic."[5]

In short, the classical liberal republic is a thoroughly limited government that is founded on popular sovereignty, devoted to securing "rightful liberty," and geared to preventing tyranny. Against this standard, we reviewed each state's constitutional jurisprudence and judicial environment to evaluate its commitment to securing limited government. We started with an assessment of the text of each state constitution in comparison to the text of the U.S. Constitution. Next, we analyzed legal interpretations of that text in published legal precedent. Then, we assessed the receptivity of each state's judicial environment to principles of limited government as a matter of state constitutional law. Finally, we supplemented these assessments with a recent Mercatus Center study ranking states relative to their respect for economic freedom, which served as a proxy for evaluating each state's politico-cultural commitment to limited government.

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The results of these assessments are discussed in detail later, but they show that 48 states furnish an environment in which the principles of limited government are more secure under their constitution than under the U.S. Constitution as currently interpreted in federal court—notwithstanding the reputed higher quality of the federal judiciary. In fact, only Massachusetts and West Virginia

fall below the federal baseline. When we compare the results of this review with the Mercatus Center's study, it is revealed that Arizona's constitution is among the strongest guarantors of individual liberty.

**Assessing the Text of State Constitutions**

Using primary sources, law review articles, constitutional treatises, and relevant case law, each state's constitution was first reviewed for specific textual provisions falling into 10 limited government categories:

1) Free Speech: Encompasses all guarantees of free speech, expression and association typified by the First Amendment to the U.S. Constitution;

2) Property Rights: Encompasses provisions targeted expressly to property rights protections and protections of rights directly incident to property rights, such as those typified by the Fourth, Fifth and Fourteenth Amendments to the U.S. Constitution;

3) Substantive Due Process: Comprises general guarantees of "rightful liberty" in addition to free speech and property rights such as encompassed by the Fifth, Ninth and Fourteenth Amendments to the U.S. Constitution;

4) Equal Protection: Includes guarantees that the law and governmental action will be uniformly, generally and equally applied to all similarly situated individuals, typified by the Fourteenth Amendment to the U.S. Constitution;

5) General Negative Individual Rights: Encompasses specific, discrete guarantees of freedom from government coercion, such as specific guarantees of the right to privacy (protections against unreasonable search and seizure are placed in this category, rather than under property rights, when not framed as a right to security in one's person, effects, and home), the right to pursue specific occupations, the right to bear arms, religious freedom, etc.;

6) Contracts Clause: Encompasses guarantees of enforcement of existing contracts typified by the contracts clause of the U.S. Constitution;

7) Structural Government Restrictions: Includes restrictions that structurally limit the powers of the branches of government without directly protecting individual liberties including anti-delegation, checks, balances, separation of powers doctrines, and restrictions on the power to create legal monopolies;

8) Subsidy Restrictions: Encompasses provisions that ban the use of government funds or credit by private individuals or entities;

9) Fiscal Restraints: Comprises balanced budget requirements, population and inflation related restraints, and supermajority restraints on taxing and spending; and,

10) Taxpayer Standing: Refers to legal authority for individuals to enforce provisions based solely on their status as a taxpayer.

Our assessments largely exclude matters of criminal procedure. This was due to the lack of a clear consensus among classical liberals in regard to matters of constitutional law in the context of

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criminal law. Instead, emphasis was placed on identifying express textual protections for: 1) political liberty such as free speech and association rights; 2) economic liberty including the freedom to engage in peaceful and economically productive activities; 3) the republican structuring of government with provisions for separating powers and providing checks and balances between the branches of state government; and, 4) fiscal responsibility.

Using these criteria, it was rarely difficult to textually or contextually identify pro-limited government constitutional provisions; the judgment calls involved in the classification process dealt predominantly with classifying provisions into one limited government category or another. However, assessing the strength of constitutional provisions in each category was primarily and unavoidably an exercise of subjective professional judgment. Based on the assumption that such subjective judgment was likely to be more reliable in identifying those states that fall within extreme ranges of strong and weak textual commitments to securing limited government, a uniform method of assessing and ranking the relative strength of constitutional provisions was devised.

Specifically, for each of the 10 limited government categories we assigned a score of either zero, one or two. A score of zero denoted equivalency to analogous provisions of the U.S. Constitution, a score of one was assigned for a definite possibility of advancing individual freedom and fiscal responsibility above this federal baseline, and a score of two was given where there was a definite likelihood of advancing individual freedom and fiscal responsibility above the federal baseline. The absence of any state constitutional provisions in a given category yielded a numerical finding of zero because the default in those categories was assumed to be the baseline of the U.S. Constitution. The presence of state constitutional provisions in a given category were then reviewed to determine whether they textually or contextually (in light of related provisions) provided additional guarantees of limited government principles in addition to or otherwise augmenting related provisions of the U.S. Constitution. If so, we assigned an initial score of one or two depending on the strength of the text in light of related provisions.

In particular, where state constitutional provisions in a given category were identical or nearly identical to those of the U.S. Constitution, they would be assessed a one. A score of two was assessed only if both the text of the provision in question and related provisions clearly justified a strong interpretation of protections above the federal baseline.

*However, assessing the strength of constitutional provisions in each category was primarily and unavoidably an exercise of subjective professional judgment.*

For example, relative to the category of "substantive due process," which concerns the general protection of individual liberty from government interference—or "rightful liberty" in Thomas Jefferson's words—Alabama's state constitution provides:

* Art. 1, Sec. 1: "That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."

* Art. 1, Sec. 2: "That all political power is inherent in the people, and

all free governments are founded on their authority, and instituted for their benefit; and that, therefore, they have at all times an inalienable and indefeasible right to change their form of government in such manner as they may deem expedient."

* Art. 1 Sec. 35: "That the sole object and only legitimate end of government is to protect the citizen in the enjoyment of life, liberty, and property, and when the government assumes other functions it is usurpation and oppression."

* Art. 1 Sec. 36: "That this enumeration of certain rights shall not impair or deny others retained by the people; and, to guard against any encroachments on the rights herein retained, we declare that everything in this Declaration of Rights is excepted out of the general powers of government, and shall forever remain inviolate."

*Consequently, although both the Alabama and U.S. constitutions intend to secure rightful liberty, there is no doubt that, as a textual matter, the articulation of that concept is much more robust in the Alabama Constitution.*

By contrast, the U.S. Constitution provides only the following textual guarantees of rightful liberty:

* Amend. 5: "No person shall . . . be deprived of life, liberty, or property, without due process of law."

* Amend. 9: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

* Amend. 14: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...."

As shown, the textual differences between the two constitutions are stark. Unlike the Alabama Constitution, the U.S. Constitution has no express articulation of the nature of republican government. Moreover, the guarantee of rightful liberty also is more vaguely articulated. Consequently, although both the Alabama and U.S. constitutions intend to secure rightful liberty, there is no doubt that, as a textual matter, the articulation of that concept is much more robust in the Alabama Constitution. All other things being equal, the text of the Alabama Constitution justifies the prediction that Alabama state courts will likely protect "rightful liberty" above the federal baseline. That is why we assigned Alabama's substantive due process provisions a score of two.

Table 1 shows the strength of each state's constitutional provisions in each of the 10 limited government categories. The last column, which sums the scores in each limited government category, provides an overall picture of the textual strength of each state constitution. Interestingly, Connecticut, Vermont, Rhode Island and New Hampshire have the textually weakest state constitutions in the nation. But even more notable, given the state's unique history, is our discovery that Louisiana's constitution is textually one of the strongest in the nation.

**Table 1: Textual Strength of State Constitutional Protections in 10 Categories**

| Table 1 | FS[6] | PR[7] | SDP[8] | EP[9] | GNIR[10] | CC[11] | SGR[12] | SR[13] | FR[14] | TS[15] | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Alabama | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 15 |
| Alaska | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 1 | 2 | 0 | 14 |
| Arizona | 1 | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 16 |
| Arkansas | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 1 | 16 |
| California | 1 | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 16 |
| Colorado | 1 | 2 | 2 | 0 | 1 | 1 | 2 | 2 | 2 | 0 | 13 |
| Connecticut | 2 | 1 | 1 | 1 | 1 | 0 | 0 | 0 | 1 | 0 | 7 |
| Delaware | 1 | 1 | 1 | 0 | 1 | 0 | 2 | 2 | 2 | 0 | 10 |
| Florida | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 15 |
| Georgia | 1 | 1 | 2 | 1 | 2 | 1 | 2 | 2 | 2 | 0 | 14 |
| Hawaii | 1 | 1 | 1 | 2 | 2 | 0 | 1 | 1 | 2 | 0 | 11 |
| Idaho | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Illinois | 1 | 1 | 2 | 1 | 2 | 1 | 2 | 1 | 2 | 0 | 13 |
| Indiana | 2 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 16 |
| Iowa | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Kansas | 1 | 1 | 2 | 2 | 2 | 0 | 1 | 2 | 2 | 0 | 13 |
| Kentucky | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 15 |
| Louisiana | 2 | 2 | 1 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 16 |
| Maine | 2 | 2 | 2 | 1 | 1 | 1 | 1 | 1 | 2 | 0 | 13 |
| Maryland | 2 | 1 | 2 | 1 | 1 | 0 | 2 | 2 | 2 | 0 | 13 |
| Massachusetts | 1 | 1 | 2 | 1 | 1 | 0 | 2 | 2 | 2 | 0 | 12 |
| Michigan | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 2 | 16 |
| Minnesota | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 15 |
| Mississippi | 1 | 1 | 2 | 0 | 1 | 1 | 2 | 1 | 1 | 0 | 10 |
| Missouri | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Montana | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 0 | 2 | 0 | 13 |
| Nebraska | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 1 | 0 | 14 |
| Nevada | 1 | 1 | 2 | 1 | 1 | 1 | 2 | 2 | 2 | 0 | 13 |
| New Hampshire | 1 | 1 | 2 | 2 | 1 | 0 | 1 | 0 | 0 | 0 | 8 |
| New Jersey | 2 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 15 |
| New Mexico | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| New York | 1 | 1 | 2 | 2 | 1 | 0 | 2 | 2 | 2 | 0 | 13 |
| North Carolina | 1 | 0 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 14 |
| North Dakota | 2 | 1 | 2 | 2 | 2 | 1 | 1 | 2 | 2 | 0 | 15 |
| Ohio | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Oklahoma | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |

| Table 1 | FS[6] | PR[7] | SDP[8] | EP[9] | GNIR[10] | CC[11] | SGR[12] | SR[13] | FR[14] | TS[15] | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Oregon | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Pennsylvania | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Rhode Island | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 0 | 9 |
| South Carolina | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 15 |
| South Dakota | 1 | 1 | 2 | 2 | 2 | 1 | 2 | 0 | 2 | 0 | 13 |
| Tennessee | 1 | 1 | 2 | 1 | 1 | 1 | 2 | 2 | 2 | 0 | 13 |
| Texas | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Utah | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |
| Vermont | 1 | 1 | 2 | 1 | 1 | 0 | 1 | 0 | 0 | 0 | 7 |
| Virginia | 1 | 1 | 2 | 2 | 2 | 1 | 1 | 2 | 2 | 0 | 14 |
| Washington | 1 | 2 | 2 | 2 | 2 | 1 | 2 | 2 | 2 | 0 | 16 |
| West Virginia | 1 | 1 | 2 | 1 | 1 | 1 | 2 | 2 | 2 | 0 | 13 |
| Wisconsin | 1 | 1 | 2 | 1 | 2 | 1 | 2 | 2 | 2 | 0 | 14 |
| Wyoming | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 2 | 2 | 0 | 14 |

*Each state's case law in the 10 categories was reviewed to determine whether pro-limited government precedent exists, remains open to development, or has been effectively foreclosed by settled precedent.*

**Assessing the Interpretation of State Constitutions**

Our review next assessed the strength of each state's constitutional precedent, and whether the current interpretation of each state's constitution genuinely offers the possibility of greater security for the principles of limited government than does federal constitutional jurisprudence. In particular, each state's case law in the 10 categories was reviewed to determine whether pro-limited government precedent exists, remains open to development, or has been effectively foreclosed by settled precedent.[16] In general, this involved determining whether state courts recognize the possibility of interpreting state constitutions as furnishing greater protection for liberty than the federal constitution, whether courts enforce state constitutional provisions through a meaningful level of judicial review (i.e., whether the scrutiny applied to legislation by the judiciary actually involves the consideration of evidence, versus something akin to the most deferential version of the federal rational basis test), and identifying leading examples of pro-limited government precedent. Additionally, where taxpayer standing was not protected by specific constitutional provisions, research was performed to determine whether and to what degree the common law in each state allowed individuals to enforce constitutional provisions based solely on their status as taxpayers.

The federal precedential baseline against which we considered each state's constitutional case law is specified below:

1) Free Speech case law was evaluated against the federal precedential baseline of *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), *Metromedia, Inc. v. San Diego,* 453 U.S. 490 (1981); *Central Hudson Gas & Elec. Corp. v. Public Serv Comm'n of N. Y.*, 447 U.S. 557 (1980), *Buckley v. Valeo,* 424 U.S. 1 (1976);

2) Property Rights case law was evaluated against the federal precedential baseline of *Kelo v. City of New London,* 545 U.S. 469 (2005), *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,*535 U.S. 302 (2002), *Dolan v. City of Tigard,* 512 U.S. 374 (1994), *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987), *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978), *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967), *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926);

3) Substantive Due Process case law was evaluated against federal precedential baseline of *United States v. Carolene Products Co.,* 304 U.S. 144 (1938), *Nebbia v. New York,* 291 U.S. 502 (1935); *Slaughter-House Cases,* 83 U.S. 36 (1872);

4) Equal Protection case law was evaluated against such federal precedent as *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456 (1981), and *Williamson v. Lee Optical of Okla., Inc.,* 348 U.S. 483 (1955);

5) General Negative Individual Rights case law was evaluated against such federal precedent as *District of Columbia v. Heller,* 128 S.Ct. 278 (2008), *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872 (1990), and the absence of comparable federal jurisprudence;

6) Contracts Clause case law was evaluated against the federal precedential baseline of *Energy Reserves Group, Inc. v. Kansas Power & Light Co.,* 459 U.S. 400 (1983);

7) Structural Government Restrictions case law was evaluated against the federal precedential baseline of *Mistretta v. United States,* 488 U.S. 361 (1989), and the absence of comparable federal jurisprudence;

8) Subsidy Restrictions case law was evaluated against the absence of comparable federal constitutional law;

9) Fiscal Restraints case law was evaluated against the absence of comparable federal constitutional law; and,

10) Taxpayer Standing case law was evaluated against *Flast v. Cohen,* 392 U.S. 83 (1968).

An initial score of one, based on the constitutional text as shown in Table 1, would be reduced to zero if our review of the literature yielded governing precedent that refused to meaningfully enforce the related provisions of a state constitution above the federal baseline. By contrast, an initial score of one would be increased to two if the same review yielded viable precedent indicating the related provisions would likely be enforced above the federal baseline. Likewise, an initial score of zero in a category, due to the absence of unique textual protections in the state constitution above the federal baseline, might be increased to one or two based on the same review. (Typically this would happen in states such as Wisconsin or Minnesota that reject the most deferential forms of federal rational basis judicial review, or in states that defer to the common law for relevant protections such as in the case of taxpayer standing under Arizona state law.)

*An initial score of one, based on the constitutional text as shown in Table 1, would be reduced to zero if our review of the literature yielded governing precedent that refused to meaningfully enforce the related provisions of a state constitution above the federal baseline.*

For example, relative to our assessment of Alabama's constitutional commitment to protecting "substantive due process," we

discovered the recent case of *State v. Lupo,* 984 So.2d 395 (Ala. 2007), which struck down regulations governing the practice of interior design. Then we discovered that the application of such rigorous scrutiny to economic regulations reflected a long line of precedent, including *Mount Royal Towers, Inc. v. Alabama State Bd. of Health,* 388 So.2d 1209 (Ala. 1980), which specifically observed, "Alabama is not alone among the states in exercising a more rigorous judicial scrutiny of state economic regulations." These cases have not been expressly overruled. They afford much greater protection for "substantive due process" freedoms than can be found in the vast majority of federal cases interpreting the Fifth and 14th Amendments, much less the Ninth Amendment. Taken together, we decided to maintain Alabama's original textual assessment score of two, as shown in Table 2 below, based on our judgment that there remains a definite likelihood that freedoms in the category of "substantive due process" will be enforced above the federal baseline.

Table 2 lists the adjustments we made to the scores for each state constitution shown in Table 1 based on our review of constitutional precedent. The total column shows the aggregate precedential enhancement or diminishment of the textual strength of each state constitution's limited government provisions. Significantly, legal precedent has undermined the textual strength of California's constitution more than any other state. Indeed, in most cases, the solid limited government orientation of state constitutions has been substantially diminished by faithless interpretation. There is, however, at least one point of light—courts in New Hampshire have used their power to interpret their bare bones state constitution to tap its potential for securing the principles of limited government.

*There is, however, at least one point of light—courts in New Hampshire have used their power to interpret their bare bones state constitution to tap its potential for securing the principles of limited government.*

**Table 2: Adjustments Made to Textual Strength of State Constitutions Based on Case Law Review**

| Table 2 | FS | PR | SDP | EP | GNIR | CC | SGR | SR | FR | TS | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Alabama | 0 | 0 | 0 | -1 | -1 | 0 | -1 | -1 | -1 | 1 | -4 |
| Alaska | 0 | 1 | -1 | 0 | 0 | 0 | 0 | -1 | -1 | 2 | 0 |
| Arizona | 1 | 0 | -1 | -1 | 0 | 0 | 0 | 0 | -1 | 1 | -1 |
| Arkansas | 0 | 1 | -1 | -1 | -1 | 0 | -1 | -1 | -1 | 1 | -4 |
| California | 1 | -2 | -1 | -2 | -1 | 0 | -2 | -2 | -1 | 2 | -8 |
| Colorado | 1 | -1 | -1 | 0 | 0 | -1 | 0 | -2 | 0 | 1 | -3 |
| Connecticut | -1 | -1 | 0 | 0 | 1 | 0 | 0 | 0 | 0 | 1 | 0 |
| Delaware | 0 | 1 | 0 | 0 | 0 | 0 | -1 | -1 | -1 | 1 | -1 |
| Florida | 0 | 1 | 0 | 0 | -1 | 1 | -1 | -1 | 0 | 1 | 0 |
| Georgia | 0 | 0 | 0 | -1 | -1 | 1 | -1 | 0 | -1 | 2 | -1 |
| Hawaii | 0 | -1 | -1 | -1 | 0 | 0 | 0 | -1 | -1 | 1 | -4 |
| Idaho | 0 | 0 | 0 | -1 | 1 | 1 | -1 | 0 | 0 | 0 | 0 |
| Illinois | 1 | 1 | 0 | -1 | -1 | -1 | -2 | 0 | -1 | 1 | -3 |

| Table 2 | FS | PR | SDP | EP | GNIR | CC | SGR | SR | FR | TS | Total |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Indiana | -1 | 0 | -1 | -1 | -1 | 0 | -1 | -1 | -1 | 0 | -7 |
| Iowa | -1 | -1 | 0 | -1 | 0 | 0 | -1 | -1 | -1 | 0 | -6 |
| Kansas | 0 | -1 | -1 | -1 | -1 | 0 | 0 | -1 | -1 | 0 | -6 |
| Kentucky | 0 | 1 | 0 | 0 | -1 | 0 | -1 | -1 | -1 | 2 | -1 |
| Louisiana | -1 | 0 | 0 | 0 | 0 | -1 | 0 | 0 | 0 | 1 | -1 |
| Maine | -1 | -1 | -2 | -1 | 0 | 0 | 0 | -1 | -1 | 1 | -6 |
| Maryland | -1 | 0 | -1 | 0 | 0 | 0 | -1 | 0 | 0 | 1 | -2 |
| Massachusetts | 0 | -1 | -1 | 0 | -1 | 0 | -1 | -1 | -1 | 0 | -6 |
| Michigan | 0 | 1 | -1 | 0 | 0 | 0 | -1 | -1 | -1 | 0 | -3 |
| Minnesota | -1 | -1 | 0 | 0 | 0 | -1 | -1 | -1 | -1 | 2 | -4 |
| Mississippi | 0 | 1 | -1 | 0 | 0 | 0 | -1 | 0 | 0 | 2 | 1 |
| Missouri | 0 | -1 | -2 | -1 | 0 | 0 | 0 | -1 | -1 | 2 | -4 |
| Montana | 1 | -1 | 0 | -1 | 0 | -1 | -1 | 0 | -1 | 1 | -3 |
| Nebraska | -1 | 1 | -1 | -1 | -1 | 0 | 0 | 0 | 0 | 2 | -1 |
| Nevada | 0 | 0 | -1 | -1 | 0 | 0 | -1 | -1 | -1 | 0 | -5 |
| New Hampshire | 0 | 1 | -1 | 0 | 0 | 0 | 0 | 0 | 0 | 2 | 2 |
| New Jersey | -1 | 0 | -1 | -1 | 0 | -1 | -1 | -1 | -1 | 1 | -6 |
| New Mexico | 0 | -1 | -1 | -1 | 0 | 0 | -1 | -1 | -1 | 0 | -6 |
| New York | -1 | -1 | -1 | -1 | 0 | 0 | -1 | -2 | -1 | 1 | -7 |
| North Carolina | 0 | 0 | 0 | -1 | 0 | 0 | -1 | -1 | -1 | 2 | -2 |
| North Dakota | -1 | 0 | -1 | -1 | -1 | 0 | 0 | -1 | -1 | 1 | -5 |
| Ohio | -1 | 1 | -1 | -2 | 1 | 0 | 0 | -1 | 0 | 2 | -1 |
| Oklahoma | -1 | 0 | -1 | -1 | 0 | 1 | -1 | -1 | 0 | 1 | -3 |
| Oregon | 1 | -1 | -1 | -1 | 0 | 0 | -1 | -1 | -1 | 1 | -4 |
| Pennsylvania | -1 | 0 | 0 | -1 | 0 | 0 | 0 | -1 | -1 | 1 | -3 |
| Rhode Island | 0 | -1 | -1 | -1 | 0 | -1 | -1 | 0 | 0 | 1 | -4 |
| South Carolina | -1 | 1 | -1 | -1 | -1 | 1 | 0 | -1 | -1 | 2 | -2 |
| South Dakota | 0 | 0 | -1 | -2 | -1 | -1 | -1 | 0 | 0 | 2 | -4 |
| Tennessee | 0 | 0 | 0 | 0 | 0 | 0 | 0 | -1 | -1 | 1 | -1 |
| Texas | 0 | 0 | -1 | -1 | 0 | -1 | -1 | -1 | -1 | 1 | -5 |
| Utah | 0 | 0 | 0 | 0 | 0 | 0 | 0 | -1 | 0 | 1 | 0 |
| Vermont | 0 | 0 | -1 | 0 | 1 | 0 | 0 | 0 | 0 | 0 | 0 |
| Virginia | -1 | 0 | 0 | -1 | -1 | -1 | 0 | -1 | -1 | 2 | -4 |
| Washington | 1 | 0 | -1 | -1 | -1 | -1 | -1 | -1 | -1 | 2 | -4 |
| West Virginia | 0 | 0 | -1 | 0 | 0 | -1 | -1 | -1 | -1 | 1 | -4 |
| Wisconsin | -1 | 0 | 0 | 0 | -1 | 0 | -1 | -1 | -1 | 2 | -3 |
| Wyoming | 0 | -1 | -1 | 0 | 0 | 0 | 0 | 0 | -1 | 1 | -2 |

Finally, Table 3 lists the overall evaluation of each state's constitutional text and precedent, combining the assessments made in Tables 1 and 2.

**Table 3: Overall Textual and Precedential Assessment of Strength of State Constitutions**

| Table 3 | FS | PR | SDP | EP | GNIR | CC | SGR | SR | FR | TS |
|---|---|---|---|---|---|---|---|---|---|---|
| Alabama | 1 | 1 | 2 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| Alaska | 1 | 2 | 1 | 2 | 2 | 1 | 2 | 0 | 1 | 2 |
| Arizona | 2 | 2 | 1 | 1 | 2 | 1 | 2 | 2 | 1 | 1 |
| Arkansas | 1 | 2 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 2 |
| California | 2 | 0 | 1 | 0 | 1 | 1 | 0 | 0 | 1 | 2 |
| Colorado | 2 | 1 | 1 | 0 | 1 | 0 | 2 | 0 | 2 | 1 |
| Connecticut | 1 | 0 | 1 | 1 | 2 | 0 | 0 | 0 | 1 | 1 |
| Delaware | 1 | 2 | 1 | 0 | 1 | 0 | 1 | 1 | 1 | 1 |
| Florida | 1 | 2 | 2 | 2 | 1 | 2 | 1 | 1 | 2 | 1 |
| Georgia | 1 | 1 | 2 | 0 | 1 | 2 | 1 | 2 | 1 | 2 |
| Hawaii | 1 | 0 | 0 | 1 | 2 | 0 | 1 | 0 | 1 | 1 |
| Idaho | 1 | 1 | 2 | 1 | 2 | 2 | 1 | 2 | 2 | 0 |
| Illinois | 2 | 2 | 2 | 0 | 1 | 0 | 0 | 1 | 1 | 1 |
| Indiana | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 0 |
| Iowa | 0 | 0 | 2 | 1 | 1 | 1 | 1 | 1 | 1 | 0 |
| Kansas | 1 | 0 | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 0 |
| Kentucky | 1 | 2 | 2 | 2 | 1 | 1 | 1 | 1 | 1 | 2 |
| Louisiana | 1 | 2 | 1 | 2 | 2 | 0 | 2 | 2 | 2 | 1 |
| Maine | 1 | 1 | 0 | 0 | 1 | 1 | 1 | 0 | 1 | 1 |
| Maryland | 1 | 1 | 1 | 1 | 1 | 0 | 1 | 2 | 2 | 1 |
| Mass. | 1 | 0 | 1 | 1 | 0 | 0 | 1 | 1 | 1 | 0 |
| Michigan | 1 | 2 | 1 | 2 | 1 | 1 | 1 | 1 | 1 | 2 |
| Minnesota | 0 | 0 | 2 | 2 | 2 | 0 | 1 | 1 | 1 | 2 |
| Mississippi | 1 | 2 | 1 | 0 | 1 | 1 | 1 | 1 | 1 | 2 |
| Missouri | 1 | 0 | 0 | 1 | 1 | 1 | 2 | 1 | 1 | 2 |
| Montana | 2 | 0 | 2 | 1 | 2 | 0 | 1 | 0 | 1 | 1 |
| Nebraska | 0 | 2 | 1 | 1 | 1 | 1 | 2 | 2 | 1 | 2 |
| Nevada | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 1 | 1 | 0 |
| New Hamp. | 1 | 2 | 1 | 2 | 1 | 0 | 1 | 0 | 0 | 2 |
| New Jersey | 1 | 1 | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 1 |
| New Mexico | 1 | 0 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 0 |
| New York | 0 | 0 | 1 | 1 | 1 | 0 | 1 | 0 | 1 | 1 |
| N. Carolina | 1 | 0 | 2 | 1 | 2 | 1 | 1 | 1 | 1 | 2 |

| Table 3 | FS | PR | SDP | EP | GNIR | CC | SGR | SR | FR | TS |
|---|---|---|---|---|---|---|---|---|---|---|
| North Dakota | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| Ohio | 0 | 2 | 1 | 0 | 2 | 1 | 2 | 1 | 2 | 2 |
| Oklahoma | 0 | 1 | 1 | 1 | 1 | 2 | 1 | 1 | 2 | 1 |
| Oregon | 2 | 0 | 1 | 1 | 1 | 1 | 1 | 1 | 1 | 1 |
| Pennsylvania | 0 | 1 | 2 | 1 | 1 | 1 | 2 | 1 | 1 | 1 |
| Rhode Island | 1 | 0 | 0 | 0 | 1 | 0 | 0 | 1 | 1 | 1 |
| S. Carolina | 0 | 2 | 1 | 1 | 1 | 2 | 2 | 1 | 1 | 2 |
| South Dakota | 1 | 1 | 1 | 0 | 1 | 0 | 1 | 0 | 2 | 2 |
| Tennessee | 1 | 1 | 2 | 1 | 1 | 1 | 2 | 1 | 1 | 1 |
| Texas | 1 | 1 | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 1 |
| Utah | 1 | 1 | 2 | 2 | 1 | 1 | 2 | 1 | 2 | 1 |
| Vermont | 1 | 1 | 1 | 1 | 2 | 0 | 1 | 0 | 0 | 0 |
| Virginia | 0 | 1 | 2 | 1 | 1 | 0 | 1 | 1 | 1 | 2 |
| Washington | 2 | 2 | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 2 |
| West Virginia | 1 | 1 | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 1 |
| Wisconsin | 0 | 1 | 2 | 1 | 1 | 1 | 1 | 1 | 1 | 2 |
| Wyoming | 1 | 0 | 1 | 2 | 1 | 1 | 2 | 2 | 1 | 1 |

*It is important to emphasize that the methodology used to generate the scores shown in Table 3 did not include a specific categorical assessment of the jurisprudential strength of anti-limited government constitutional provisions found in many state constitutions.*

It is important to emphasize that the methodology used to generate the scores shown in Table 3 did not include a specific categorical assessment of the jurisprudential strength of *anti*-limited government constitutional provisions found in many state constitutions. For example, we did not specifically assess the adverse impact on the security of principles of limited government caused by provisions granting or declaring the state's power or duty to maintain a healthful environment, to conserve natural resources or to hold them in public trust.[17] Likewise, notwithstanding the fiscal irresponsibility that is often attributed to public schooling, we omitted an assessment of the adverse impact of constitutional guarantees of public schooling. This was a difficult decision over which we vacillated based on the thoughtful commentaries of peer reviewers. Ultimately we were convinced that these assessments of arguably anti-limited government constitutional provisions (and others like them) should be excluded for three reasons.

First, it was unclear whether state constitutional guarantees of public education were contrary to historical classical liberal conceptions of limited government.[18] In any event, we believed it was unnecessary to decide this question because all states have such provisions and, consequently, such an assessment would not have had a material impact on relative ranking among the states against the federal baseline.

Second, it was believed unlikely that strong and consistent enforcement of limited government provisions, which we did assess, would coexist in jurisdictions that also supported strong and consistent

enforcement of anti-limited government provisions. And if disputes over conflicting limited and anti-limited government provisions did occur in constitutional jurisprudence, we believed it likely that such disputes would be revealed in the very same precedent we considered in assessing the strength of the limited government provisions. For example, where we did encounter strong enforcement of anti-limited government provisions, such as in Montana, we accounted for that conflict in our assessment of the strength of the impacted limited government provisions.

Third, we found that, as a general rule, any additional authority given to states to regulate private conduct in their state constitutions through grants or declarations of additional power or positive rights or entitlements did not appear to furnish a layer of intrusion into rightful liberty that substantially exceeded the baseline intrusion of federal agencies. These agencies included the Army Corps of Engineers, already acting under expansive interpretations of the Commerce Clause, the Spending Clause or the Necessary and Proper Clause of the U.S. Constitution.[19] Therefore, for purposes of ranking each state's constitutional commitment to securing principles of limited government relative to the federal baseline, our overall assessment of the strength of limited government provisions was generally believed to be a reasonable inversely related proxy for an assessment of the strength of any anti-limited government provisions.

*For example, where we did encounter strong enforcement of anti-limited government provisions, such as in Montana, we accounted for that conflict in our assessment of the strength of the impacted limited government provisions.*

**Findings and Analysis**

Based on the foregoing assessments, Table 4 ranks each state's constitutional commitment to securing limited government from a classical liberal perspective relative to the federal baseline. It does so based on the average of the 10 limited government categories shown in Table 3.[20]

**Table 4: Overall Textual and Precedential Ranking of Strength of State Constitutions**

| | | | |
|---|---|---|---|
| 1. Arizona | 1.5 | 13. Arkansas | 1.2 |
| 2. Florida | 1.5 | 14. North Carolina | 1.2 |
| 3. Louisiana | 1.5 | 15. Tennessee | 1.2 |
| 4. Alaska | 1.4 | 16. Washington | 1.2 |
| 5. Kentucky | 1.4 | 17. Wyoming | 1.2 |
| 6. Utah | 1.4 | 18. Alabama | 1.1 |
| 7. Idaho | 1.4 | 19. Maryland | 1.1 |
| 8. Georgia | 1.3 | 20. Minnesota | 1.1 |
| 9. Michigan | 1.3 | 21. Mississippi | 1.1 |
| 10. Nebraska | 1.3 | 22. Oklahoma | 1.1 |
| 11. Ohio | 1.3 | 23. Pennsylvania | 1.1 |
| 12. South Carolina | 1.3 | 24. Wisconsin | 1.1 |

| | |
|---|---|
| 25. Colorado | 1 |
| 26. Illinois | 1 |
| 27. Missouri | 1 |
| 28. Montana | 1 |
| 29. New Hampshire | 1 |
| 30. North Dakota | 1 |
| 31. Oregon | 1 |
| 32. Virginia | 1 |
| 33. Delaware | 0.9 |
| 34. Indiana | 0.9 |
| 35. New Jersey | 0.9 |
| 36. South Dakota | 0.9 |
| 37. Texas | 0.9 |

| | |
|---|---|
| 38. West Virginia | 0.9 |
| 39. California | 0.8 |
| 40. Iowa | 0.8 |
| 41. Nevada | 0.8 |
| 42. New Mexico | 0.8 |
| 43. Connecticut | 0.7 |
| 44. Hawaii | 0.7 |
| 45. Kansas | 0.7 |
| 46. Maine | 0.7 |
| 47. Vermont | 0.7 |
| 48. Massachusetts | 0.6 |
| 49. New York | 0.6 |
| 50. Rhode Island | 0.5 |

Table 4 confirmed many of our expectations, but also turned up a few surprises. As we expected, Arizona and other states with constitutions that comprehensively secured limited government textually—such as Idaho, Kentucky, Michigan, and Minnesota accounted for some of the best legal environments for securing limited government principles. States with the least comprehensive constitutions on paper—Vermont, Connecticut, and Rhode Island—generated relatively poor legal environments. But many of the best constitutions on paper did not yield a correspondingly strong jurisprudential commitment to principles of limited government—including California, Indiana, Iowa, Missouri, Massachusetts and Washington. These findings indicated that a pro-limited government constitution is a necessary, but certainly not a sufficient, condition for a strong state constitutional commitment to limited government. Further complicating our findings was that states not known for their fidelity to limited government—such as Arkansas, Florida and Louisiana—rose quite high in the rankings. We concluded that our ranking of the strength of each state's constitutional commitment to securing limited government was not complete without also assessing each state's judicial environment and political culture.

*These findings indicated that a pro-limited government constitution is a necessary, but certainly not a sufficient, condition for a strong state constitutional commitment to limited government.*

**Assessing Each State's Judicial Environment**

Based on nearly 40 years of combined professional experience, the attorneys at the Goldwater Institute believe that the quality of a given court system's judicial environment is of equal practical importance as the law itself. In other words, regardless of the textual or precedential strength of each state's constitution, the competence, impartiality and dominant philosophy of each state's judiciary are crucial factors in assessing a state's real-world commitment to limited government principles. For example, any effort to enforce constitutional law in the state courts of Louisiana or West Virginia likely entails significant challenges that

are unlikely to be found in Minnesota or Wisconsin even if the applicable law and precedent were exactly the same. Accordingly, in addition to the 10 limited government categories discussed above, all of which aimed at assessing each state's jurisprudential environment, we added assessment categories for judicial quality and philosophy to control for their positive and negative impact on limited government jurisprudence that each state's judicial environment entails.

Based on our judgment that nearly all state constitutions textually secure limited government principles predominantly from a Lockean-Jeffersonian-Madisonian perspective, it was generally assumed that greater judicial impartiality and competence would tend to lead to greater security for limited government principles. This may be an overly optimistic assumption, but it has some scholarly support.[21] We then assessed judicial quality using a scientific survey of the reputed impartiality and competence of state judiciaries published by the U.S. Chamber of Commerce in 2007.[22] We next assumed that the federal judiciary is generally more impartial and competent, on average, than the state judiciary and would, therefore, have a mean score of four out of five, or a B rating, as used in the Chamber's survey assessment scale.[23] This assumption also was based on the reputation the federal judiciary has among Goldwater Institute and other attorneys. We then scaled down each state's mean score for judicial impartiality and competence, as reported by the U.S. Chamber of Commerce, by subtracting four points, so that zero would represent the federal baseline. Next, we averaged the measures of impartiality and competence to achieve a single numerical finding to place in the category of judicial quality. Our judicial assessments generated negative scoring to clearly signal when the quality of a given state's judiciary is reputedly less than that of the federal judiciary and also to maintain our use of zero to represent the federal baseline in all of our findings.

For example, Alabama's mean score of 3.2 for judicial impartiality and 3.2 for judicial competence as reported by the U.S. Chamber of Commerce[24] was reduced by four, to -0.8 for judicial impartiality and -0.8 for judicial competence. These two numbers were then summed and the average of the two, -0.8, was utilized as the numerical finding for judicial quality.

*In addition to considering the opinions of attorneys at the Goldwater Institute, we confidentially contacted knowledgeable attorneys for their assessments of the dominant constitutional philosophy of state supreme courts.*

Second, in addition to considering the opinions of attorneys at the Goldwater Institute, we confidentially contacted knowledgeable attorneys for their assessments of the dominant constitutional philosophy of state supreme courts. This informal methodology was utilized because we did not believe a random or blind scientific survey would likely target the most knowledgeable attorneys. Also, confidentiality was needed to ensure shared opinions were candid. Based on this informal survey, each state supreme court's reputed dominant judicial philosophy was assessed with whole number numerical findings of either minus one, zero or one. States with a current supreme court that reputedly tended to be less limited government oriented than the current U.S. Supreme Court were given a minus one. State supreme courts that were reputedly equivalent to the current U.S. Supreme Court, ideologically ambiguous or unknown, were assigned a zero, and those that were reputedly more limited government oriented than the current U.S. Supreme Court received a plus one.

Table 5 contains our findings regarding the judicial environment of each state relative to the federal baseline based on the foregoing assessments of judicial quality and philosophy.

**Table 5: Strength of State Judicial Environment**

| Table 5 | Judicial Quality | Judicial Philosophy |
|---|---|---|
| Alabama | -0.8 | 1 |
| Alaska | -0.6 | 0 |
| Arizona | -0.2 | 0 |
| Arkansas | -0.65 | 0 |
| California | -0.45 | 0 |
| Colorado | -0.15 | 0 |
| Connecticut | -0.2 | 0 |
| Delaware | 0.3 | 0 |
| Florida | -0.5 | -1 |
| Georgia | -0.35 | -1 |
| Hawaii | -0.6 | 0 |
| Idaho | -0.35 | 0 |
| Illinois | -0.85 | 0 |
| Indiana | -0.2 | 0 |
| Iowa | -0.1 | 0 |
| Kansas | -0.1 | -1 |
| Kentucky | -0.5 | 0 |
| Louisiana | -1.15 | 0 |
| Maine | 0.1 | 0 |
| Maryland | -0.15 | 0 |
| Mass. | -0.35 | -1 |
| Michigan | -0.35 | 1 |
| Minnesota | 0.05 | 1 |
| Mississippi | -1.1 | 1 |
| Missouri | -0.4 | -1 |

| Table 5 | Judicial Quality | Judicial Philosophy |
|---|---|---|
| Montana | -0.55 | 0 |
| Nebraska | -0.1 | 0 |
| Nevada | -0.5 | -1 |
| New Hamp. | -0.05 | 0 |
| New Jersey | -0.3 | 0 |
| New Mexico | -0.6 | 0 |
| New York | -0.15 | -1 |
| N. Carolina | -0.25 | 0 |
| North Dakota | -0.2 | 0 |
| Ohio | -0.35 | 1 |
| Oklahoma | -0.6 | 0 |
| Oregon | -0.1 | 0 |
| Pennsylvania | -0.4 | 0 |
| Rhode Island | -0.55 | 0 |
| S. Carolina | -0.55 | 0 |
| South Dakota | -0.15 | 0 |
| Tennessee | -0.15 | 0 |
| Texas | -0.8 | 1 |
| Utah | -0.2 | 0 |
| Vermont | -0.4 | 0 |
| Virginia | -0.1 | 0 |
| Washington | -0.25 | -1 |
| West Virginia | -1.4 | -1 |
| Wisconsin | -0.15 | 1 |
| Wyoming | -0.5 | 0 |

Table 6, below, ranks all 50 states based on their judicial environment score, which is the average of the findings in the judicial quality and judicial philosophy subcategories shown in Table 5. Averaging ensured that assessments of judicial quality and judicial philosophy were given equal weight (we believe such equal weighting conservatively estimated the impact of judicial philosophy on a state's constitutional commitment to limited government principles). A score of zero indicates a state judicial environment that is comparable to that of the federal court system, a score greater than zero indicates a state judicial environment that is better than that of the federal court system, and a score of less than zero indicates a state judicial environment that is worse than that of the federal court system.

**Table 6: State ranking of Judicial Environment**

| | | | |
|---|---|---|---|
| 1. Minnesota | 0.525 | 26. Idaho | -0.175 |
| 2. Wisconsin | 0.425 | 27. Pennsylvania | -0.2 |
| 3. Michigan | 0.325 | 28. Vermont | -0.2 |
| 4. Ohio | 0.325 | 29. California | -0.225 |
| 5. Delaware | 0.15 | 30. Kentucky | -0.25 |
| 6. Alabama | 0.1 | 31. Wyoming | -0.25 |
| 7. Texas | 0.1 | 32. S. Carolina | -0.275 |
| 8. Maine | 0.05 | 33. Montana | -0.275 |
| 9. New Hamp. | -0.025 | 34. Rhode Island | -0.275 |
| 10. Nebraska | -0.05 | 35. Alaska | -0.3 |
| 11. Oregon | -0.05 | 36. Oklahoma | -0.3 |
| 12. Virginia | -0.05 | 37. New Mexico | -0.3 |
| 13. Iowa | -0.05 | 38. Hawaii | -0.3 |
| 14. Mississippi | -0.05 | 39. Arkansas | -0.325 |
| 15. Tennessee | -0.075 | 40. Illinois | -0.425 |
| 16. Maryland | -0.075 | 41. Kansas | -0.55 |
| 17. Colorado | -0.075 | 42. Louisiana | -0.575 |
| 18. South Dakota | -0.075 | 43. New York | -0.575 |
| 19. Arizona | -0.1 | 44. Washington | -0.625 |
| 20. Utah | -0.1 | 45. Georgia | -0.675 |
| 21. North Dakota | -0.1 | 46. Massachusetts | -0.675 |
| 22. Indiana | -0.1 | 47. Missouri | -0.7 |
| 23. Connecticut | -0.1 | 48. Florida | -0.75 |
| 24. N. Carolina | -0.125 | 49. Nevada | -0.75 |
| 25. New Jersey | -0.15 | 50. West Virginia | -1.2 |

Finally, Table 7 provides our overall assessment of the strength of each state's constitutional commitment to principles of limited government from a classical liberal perspective, which we generated by averaging the jurisprudential and judicial environment scores shown in both Tables 4 and 6.[25]

Taking into consideration each state's jurisprudential and judicial environment, as shown in Table 7, 48 out of 50 states still offered a better legal environment for securing principles of limited government in state court under their state constitution than can be found in federal court under the U.S. Constitution alone. Only

**Table 7: 50 State Ranking, Overall Jurisprudential and Judicial Environment for Securing Principles of Limited Government**

| | | | |
|---|---|---|---|
| 1. Minnesota | 0.8125 | 26. North Dakota | 0.45 |
| 2. Michigan | 0.8125 | 27. Arkansas | 0.4375 |
| 3. Ohio | 0.8125 | 28. South Dakota | 0.4125 |
| 4. Wisconsin | 0.7625 | 29. Indiana | 0.4 |
| 5. Arizona | 0.7 | 30. Oklahoma | 0.4 |
| 6. Utah | 0.65 | 31. Maine | 0.375 |
| 7. Nebraska | 0.625 | 32. Iowa | 0.375 |
| 8. Idaho | 0.6125 | 33. New Jersey | 0.375 |
| 9. Alabama | 0.6 | 34. Florida | 0.375 |
| 10. Kentucky | 0.575 | 35. Montana | 0.3625 |
| 11. Tennessee | 0.5625 | 36. Georgia | 0.3125 |
| 12. Alaska | 0.55 | 37. Connecticut | 0.3 |
| 13. North Carolina | 0.5375 | 38. California | 0.2875 |
| 14. Delaware | 0.525 | 39. Illinois | 0.2875 |
| 15. Mississippi | 0.525 | 40. Washington | 0.2875 |
| 16. Maryland | 0.5125 | 41. New Mexico | 0.25 |
| 17. South Carolina | 0.5125 | 42. Vermont | 0.25 |
| 18. Texas | 0.5 | 43. Hawaii | 0.2 |
| 19. New Hampshire | 0.4875 | 44. Missouri | 0.15 |
| 20. Oregon | 0.475 | 45. Rhode Island | 0.1125 |
| 21. Virginia | 0.475 | 46. Kansas | 0.075 |
| 22. Wyoming | 0.475 | 47. Nevada | 0.025 |
| 23. Colorado | 0.4625 | 48. New York | 0.0125 |
| 24. Louisiana | 0.4625 | 49. Massachusetts | -0.0375 |
| 25. Pennsylvania | 0.45 | 50. West Virginia | -0.15 |

Massachusetts and West Virginia fell below the federal baseline. The top 10 ranked states are Minnesota, Michigan, Ohio, Wisconsin, Arizona, Utah, Nebraska, Alabama, Kentucky, Tennessee, Idaho, and Alaska (there are more than 10 states listed because in a few instances two or more states shared the same assessment score). The bottom 10 states are Washington, New Mexico, Vermont, Hawaii, Missouri, Rhode Island, Kansas, Nevada, New York, Massachusetts and West Virginia. But even this ranking would not be complete without a frank and thorough assessment of each state's politico-cultural commitment to principles of limited government.

**Assessing Each State's Political Culture**

*Arizona, Alabama, Tennessee and Idaho are the only states in the top 10 overall rankings of both this report (Table 7) and the Mercatus Center's economic freedom study (Table 8).*

Assessing political culture is a difficult and imprecise task and we are unaware of any effort to measure or rank the politico-cultural freedom friendliness of all 50 states. However, an excellent proxy for that assessment has been provided by the Mercatus Center's recent study, *Freedom in the 50 States: An Index of Personal and Economic Freedom.*[26] Rather than rank states based on assessments of their constitutional jurisprudence and judicial environment relative to the federal baseline, the Mercatus Center's study ranked states based on the extent to which the totality of their regulatory, fiscal and social policies actually establish personal and economic freedom of the sort envisioned by advocates of a consistent limited government philosophy. Consequently, the Mercatus Center's rankings are likely far more a function of political culture than are the rankings in this report. The most relevant ranking in the Mercatus Center's study for purposes of assessing the politico-cultural receptivity of states to limited government, as measured here, is its ranking of economic freedom. This is based on assessments of regulatory and fiscal policy that conform to the classical liberal consensus upon which this report relies, rather than its overall freedom ranking, which assesses all aspects of government action from a distinctly modern libertarian philosophical perspective. The Mercatus Center's economic freedom rankings are shown in Table 8.[27]

Notably Arizona, Alabama, Tennessee and Idaho are the only states in the top 10 overall rankings of both this report (Table 7) and the Mercatus Center's economic freedom study (Table 8). From a classical liberal perspective, these states would appear to enjoy the strongest state constitutional commitment to principles of limited government in the nation, taking into consideration jurisprudential, judicial and politico-cultural factors measured directly or by proxy. By contrast, six states, namely New Mexico, Vermont, Hawaii, Rhode Island, New York and West Virginia appear in the bottom 10 overall rankings of both studies. Among all 50 states, it is fair to conclude the members of this "dirty half-dozen" are likely the least constitutionally committed to securing limited government.

**Recommendations**

These rankings give an indication of each state's constitutional commitment to limited government. While they are relative and not absolute they can help individuals, businesses, and political organizations decide where to live, do business and allocate resources. Individuals and businesses seeking the greatest degree of security under the law in their economic and political liberty in the near term should obviously consider relocating to those

**Table 8: 50 State Ranking Economic Freedom (Mercatus Center Study)**

| | | | |
|---|---|---|---|
| 1. South Dakota | 0.385 | 26. North Carolina | 0.041 |
| 2. New Hampshire | 0.345 | 27. Nebraska | 0.036 |
| 3. Colorado | 0.337 | 28. Louisiana | -0.012 |
| 4. North Dakota | 0.315 | 29. Illinois | -0.025 |
| 5. Idaho | 0.257 | 30. Mississippi | -0.032 |
| 6. Georgia | 0.253 | 31. Minnesota | -0.075 |
| 7. Tennessee | 0.225 | 32. Ohio | -0.081 |
| 8. Texas | 0.225 | 33. Kentucky | -0.086 |
| 9. Missouri | 0.21 | 34. Maryland | -0.11 |
| 10. Alabama | 0.2 | 35. Wisconsin | -0.111 |
| 11. Arizona | 0.19 | 36. Oregon | -0.113 |
| 12. Iowa | 0.177 | 37. Massachusetts | -0.133 |
| 13. Virginia | 0.175 | 38. Connecticut | -0.142 |
| 14. Utah | 0.164 | 39. Arkansas | -0.148 |
| 15. Michigan | 0.161 | 40. West Virginia | -0.177 |
| 16. Indiana | 0.159 | 41. Washington | -0.219 |
| 17. Oklahoma | 0.144 | 42. Rhode Island | -0.267 |
| 18. Kansas | 0.126 | 43. New Mexico | -0.288 |
| 19. Pennsylvania | 0.12 | 44. Hawaii | -0.295 |
| 20. Wyoming | 0.098 | 45. Vermont | -0.31 |
| 21. Montana | 0.096 | 46. New Jersey | -0.337 |
| 22. South Carolina | 0.062 | 47. Alaska | -0.343 |
| 23. Nevada | 0.058 | 48. California | -0.351 |
| 24. Delaware | 0.052 | 49. Maine | -0.406 |
| 25. Florida | 0.047 | 50. New York | -0.596 |

states that are consistently top-ranked, such as Arizona, Alabama, Tennessee and Idaho. Still, it should not be forgotten that the rankings in Table 7 are based on overall *averages* of findings. Even the lowest ranking state may have particularly good constitutional jurisprudence in a discrete area of constitutional law—such as free speech—which may be of greater importance to a given person, organization or business than other principles of limited government. Moreover, many states have strong jurisprudence advancing negative liberties but not strong jurisprudence advancing fiscal responsibility and vice versa. Accordingly, individuals and businesses who place a greater weight on negative liberty or fiscal responsibility should consider producing their own rankings of states based on preferred

combinations or weightings of the assessments found in tables three and five.

Individuals and organizations that are interested in supporting public policy research and strategic litigation to advance limited government principles can use these rankings to guide the investment of resources in states that fall outside of the highest rankings. Those who are willing to tolerate the risk of an adverse judicial environment should consider looking for states that have strong constitutional language, as indicated in Table 1, and underperforming jurisprudence, as indicated in Table 2, but which are not so precedentially statist as to be monolithically adverse to securing principles of limited government under their constitution. These diamonds in the rough may include Delaware, Mississippi, South Carolina, Texas, Wyoming, Colorado, Louisiana, Pennsylvania, North Dakota and Arkansas. Those willing to risk everything for the possibility of a huge reward should think of California and Washington, both of which have textually magnificent state constitutions that have all but disintegrated through faithless judicial interpretation.

*Individuals and organizations that are interested in supporting public policy research and strategic litigation to advance limited government principles can use these rankings to guide the investment of resources in states that fall outside of the highest rankings.*

## Conclusion

Forty-eight out of 50 states offer better legal environments for securing the principles of limited government under their state constitutions than can be found in federal court under the U.S. Constitution. Only Massachusetts and West Virginia fail to make the cut. Nevertheless, Arizona, Alabama, Tennessee and Idaho are in a class by themselves. They are the only states that rank among the top 10 in this report and on the Mercatus Center ranking of economic freedom. We should note, however, that Arizona, Alabama, Tennessee and Idaho are far from ideal constitutional republics. This report indicates only that these states *might* systematically secure limited government principles above the current federal baseline. That these states rank highly only underscores the extent to which other states—and constitutional jurisprudence in general—have abandoned principles of limited government. In a very real sense, Arizonans and the residents of a handful of other states hold the flame of liberty in their hands—a flame with the illumination of a match-light, not a torch. Whether or not we can keep that flame alive, grow it, and spread its illumination across the nation depends critically upon focusing limited resources where they will have the greatest impact. America is a nation of 50 constitutional republics—if we can keep it.

NOTES

1) The Author is grateful for the valuable comments provided by Professor Robert Natelson, as well as Attorneys Ilya Shapiro and Anthony Sanders.

2) *See generally* Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 54-60 (Princeton University Press, 2004); Douglas B. Rasmussen, Why Individual Rights?, in *Individual Rights Reconsidered: Are the Truths of the U.S. Declaration of Independence Lasting?* 35, 39, 113, 119–26 (Tibor R. Machan ed., Hoover Institution, 2001); James Madison, On Property, in *Madison: Writings* 515 (Jack Rakove ed., Library of America, 1999); John Locke, "Second Treatise of Civil Government" (1690), in *Two Treatises of Government* § 57 (Peter Laslett ed., Cambridge University Press, 1967); Thomas Jefferson, First Inaugural Address, Washington, D.C. (Mar. 4, 1801), http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm; James Madison, Federalist No. 10, Federalist No. 47, and Federalist No. 51, in *The Federalist* (J. and A. McLean, 1788).

3) Thomas Jefferson, letter to Isaac H. Tiffany, 1819, available at http://memory.loc.gov/master/mss/mtj/mtj1/051/0440/0462.jpg (stating "[o]f liberty I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add 'within the limits of the law,' because law is often but the tyrant's will, and always so when it violates the right of an individual.")

4) David Kelley, *A Life of One's Own: Individual Rights and the Welfare State* (Cato Institute, 1998).

5) Carl J. Richard, *The Founders and the Classics: Greece, Rome and the American Enlightenment* 130-41 (Harvard, 1994) (demonstrating that Jefferson, Madison, Hamilton and Adams were all advocates of the mixed government conception of the "republic").

6) Free Speech.

7) Property Rights and equivalents.

8) Substantive Due Process Rights and equivalents.

9) Equal Protection rights and equivalents.

10) General Negative Individual Rights.

11) Contracts Clause and equivalents

12) Structural Government Restrictions.

13) Subsidy Restrictions and equivalents.

14) Fiscal Restraints.

15) Taxpayer Standing.

16) With the crucial assistance of Attorney Jackson Moll, law clerk Jason R. Doucette and intern John Robb, between May 2008 and April 2009, the Author conducted original electronic research on Westlaw.com of the text of each state constitution, including review of cases yielded by relevant term searches and annotations, consulted James A. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (University of Chicago Press, 2005), reviewed treatises in the series *Reference Guides to the State Constitutions of the United States* (Greenwood Publishing Group, 1990-2007), verified analyses concerning state constitutional provisions in *Budget Processes in the States*, National Association of Budget Officers (January 2002), and cite checked the valuable research contained in Anthony Sanders, the *"New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic*

*Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for its Recent Decline*, 55 Am. U. L. Rev. 457 (2005).

17) Ala. Const. amend. 543; Alaska Const. art. VIII, § 2; Fla. Const. art. II, § 7; Ga. Const. art. III, § VI, par. II(a)(1); Haw. Const. art. IX, § 8, art. XI, § 1; Illinois Const. art. XI, §§ 1, 2; Mass. Const. art. of amend. XLIX, par. 1, 2; Mich. Const. art. IV, § 52; Mont. Const. art. IX, § 1; N.M. Const. art. XX, § 21; N.Y. Const. art. XIV, §§ 3-5; Pa. Const. art. I, §§ 2, 27; R.I. Const. art. I, § 17; Texas Const. art. XVI, § 59; Va. Const. art, XI, §§ 1, 2.

18) Thomas Jefferson supported public schooling at the state level based on the argument that a minimally educated populace was needed to ensure the maintenance of a republican form of government. This would seem to support the argument that state guaranteed public education is not necessarily inconsistent with historical classical liberalism. However, Jefferson also wanted strict local control over schooling at the ward level. Letter of Thomas Jefferson to Joseph Cabell, Feb. 2, 1816, reprinted in *The Writings of Thomas Jefferson* (Memorial Edition 1904), volume 14, pp. 420-21. Moreover, Jefferson opposed compulsory schooling. Letter of Thomas Jefferson to Joseph Cabell, Sept. 9, 1817, reprinted in *id.*, p. 423. A public school system meeting these requisites would be vastly different from the typical system found in the states today. This suggests that the state constitutional guarantee of public education, *as typically applied*, offends classical liberalism.

19) *See generally* Robet Meltz, *Right to a Clean Environment Provisions in State Constitutions, and Arguments as to a Federal Counterpart*, CRS Report RS20084 (Feb. 23, 1999) (observing that despite state constitutional provisions granting a personal right to environmental protection, Illinois, Hawaii, Massachusetts and Pennsylvania state courts have not recognized the right to environmental protection as self-executing against private action or private property).

20) Averaging of limited government categories implicitly gives constitutional provisions that directly secure individual freedom substantially more weight as a class in determining the ranking of state constitutional jurisprudence than guarantees of fiscal responsibility or other structural means of protecting individual freedom. This weighting is based on the Author's judgment that direct protections for individual freedom are substantially more important to securing principles of limited government than indirect protections. Nevertheless, the relative weighting of limited government categories either as a class or individually is fairly debatable within a reasonable range. Accordingly, the Goldwater Institute has contracted with a website designer to develop and publish an interactive program that will allow the reader to assign their own weighting to the assessments in each assessment category. It is anticipated that the program will be available to the public at http://www.goldwaterinstitute.org concurrently with the publication of this report.

21) *See generally* Russell S. Sobel and Joshua C. Hall, *The Effect of Judicial Selection Process on Judicial Quality: The Role of Partisan Politics*, Cato Journal, Vol. 27, No. 1 (Winter 2007) (documenting an inverse correlation between judicial quality and eminent domain filings).

22) U.S. Chamber of Commerce, 2007 State Liability Systems Ranking Study (April 16, 2007).

23) U.S. Chamber of Commerce,

2007 State Liability Systems Ranking Study 38-87 (Tables 21-70).

24) U.S. Chamber of Commerce, 2007 State Liability Systems Ranking Study 38 (Table 21).

25) Because both sets of data comprised assessments made relative to the federal baseline of zero, we regarded the overall jurisprudential and judicial environment scores as sufficiently commeasurable to average.

26) William P. Ruger & Jason Sorens, Freedom in the 50 States: An Index of Personal and Economic Freedom (Mercatus Center George Mason University, 2009).

27) *Id.* at 17 (Table IV).

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