

Full Court Press: Pursuing rights protection in state court

When the Supreme Court denies individual rights, state courts can, and often do, provide more protection

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James LaRue is the director of public libraries in Douglas County, which lies just southeast of Denver. But his job as a public employee did not stop him from joining a lawsuit against the county's new school voucher program. When LaRue heard that the school board of his son's high school had instituted a voucher program, he was upset. "We think this is...fundamentally mistaken," said LaRue.

LaRue and his wife Suzanne joined a lawsuit challenging the program as plaintiffs in 2011. That was nearly a decade after the Supreme Court had approved school vouchers in a case in Ohio. "The Supreme Court...made decisions that were based on federal law," noted LaRue. The intentions of the Douglas County lawsuit, he explained, were "not to redo the Supreme Court case but to say that this is not okay in Colorado."

As a plaintiff, LaRue learned what many Americans don't know—that the Supreme Court is not supreme on everything. State courts have the authority to protect civil rights as well, and when the Supreme Court denies a right, state courts often fill the void.

"There are really two kinds of decisions that come from the United States Supreme Court," explained Robert Williams, an expert in state constitutional law at Rutgers University School of Law. In the first type of decision, the Supreme Court grants a right. "That's the kind of case most people are familiar with...It's the law of the land. It [has] to be followed by every state, every state court judge, every police officer," said Williams.

In the second type of Supreme Court decision, the Court decides that a certain right is not protected by the Constitution—that, for example, the right to free speech does not include a right to obscene speech. That denial, though, isn't the end of the matter. State courts can sometimes provide greater protection of individual rights than the Supreme Court. "That kind of decision most people think ends the matter but it doesn't," said Williams. "It, in effect, leaves the question up to the 50 states."

For roughly three decades, people have been going to state courts after Supreme Court losses. Exactly how many cases, though, is not known. Academics once tracked the number of state lawsuits brought after Supreme Court decisions, but Williams admits the number rose so high that "they quit."

This strategy has undone several contentious Supreme Court decisions in individual states. In 1976, the Supreme Court declared that the death penalty was constitutionally permissible. In 2004, New York's highest state court prohibited the death penalty and removed all prisoners from death row. It based its decision on the state constitution.

Eminent domain is another example. In 2005, the Supreme Court ruled that government entities can seize private land for the sake of economic development. Advocates of private property rights were appalled by the ruling known as *Kelo v. New London*. They turned to state courts. “We go to state court now because under *Kelo* that’s all we have left...it’s the only game left to us,” said Richard Komer, senior attorney at the Institute for Justice, a libertarian public interest law firm. In Ohio, Komer’s strategy worked. In 2006, the Supreme Court of Ohio effectively reversed the Supreme Court’s decision, ruling that the Ohio Constitution does not consider economic development a permissible purpose for taking private land.

The state challenges pursued after the Supreme Court’s death penalty and eminent domain rulings show how the public can channel its disapproval into state court litigation. With public approval of the Supreme Court at 46 percent—a 15 percent decline from two years ago, according to a recent Gallop poll—many Americans are not too pleased with the high court. State litigation is often the most viable avenue to strike back at unfavorable Supreme Court rulings. Amending the federal Constitution is forbiddingly difficult. In more than 200 years, only 27 new amendments have been added to the Constitution—out of 11,372 attempts.

Citizens can await new appointments to the Supreme Court. But Justices, even those with strong judicial philosophies and beliefs, tend to respect precedent and uphold previous Supreme Court decisions. Indeed, according to modest estimates, the Supreme Court has overturned its own opinions only 166 times in tens of thousands of rulings.

Under these circumstances, state courts often provide a good means for retaliation. This phenomenon is never more visible than in the case of school voucher litigation.

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In 2002, the Supreme Court ruled that the federal Constitution allows publically funded school vouchers to be spent at religious schools. Advocates of the constitutional right to the separation of church and state disagreed. They thought government dollars should not be spent at religious schools.

Like James LaRue, the Colorado library director, they fought back. In each state, their challenges pointed to the state’s constitution not the federal one. In 2011 alone, school voucher programs in both Indiana and Colorado faced challenges in state court. And, as state legislatures in Pennsylvania and New Jersey considered school voucher programs, opponents rallied coalitions and prepared for lawsuits in state court if the programs passed.

The Supreme Court’s school vouchers decision, then, impeded further challenges under the federal Constitution. It did not put an end to challenges against school voucher programs entirely; state courts were a fertile frontier for litigation by school vouchers opponents.

Indeed, a few days after the Supreme Court's school vouchers ruling in 2002, Barry Lynn, executive director of the Washington, D.C.-based Americans United for Church and State, envisioned using state courts to guard the separation between church and state. Lynn wrote in his organization's magazine, "Now that the Supreme Court has upheld vouchers for private religious schools, state constitutional provisions barring tax aid to religious schools provide an important second line of defense."

All other things being equal, civil liberties issues are more likely to be litigated in federal courts. After all, federal judges are generally better educated and better insulated from politics. State judges, on the other hand, are vulnerable. In 2010, for instance, three Iowa state Supreme Court judges, who legalized gay marriage in the state, were removed from the bench by a recall vote.

But, in school vouchers all things are not equal. Without easy access to federal courts, individuals and interest groups face a decision—give up the cause or turn to the states. Pragmatic, they turn to the states. Today, school voucher litigation is almost entirely carried out in state courts. State constitutions provide school voucher opponents with fodder for their arguments. In most states, that's the Blaine Amendment. Blaine Amendments forbid public funds from going to religious institutions or schools; thirty-seven states have them.

Each state court decision is helpful and instructive for fellow state courts. As Heather Weaver, staff attorney at the American Civil Liberties Union Program on Freedom of Religion and Belief, describes, state court decisions "give people pause in other states in implementing voucher programs." Indeed, the Douglas County ruling cited both a 2009 Arizona state Supreme Court decision and a 2006 Florida state Supreme Court decision.

When the Colorado District Court ruled in favor of LaRue and struck down the Douglas County voucher program last August, it pointed to Colorado's constitutional prohibition on "appropriation[s]...to any denominational or sectarian institution." The Colorado court and the United States Supreme Court did not see eye-to-eye—in Colorado, school vouchers are unconstitutional.

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State courts have always had this power, but lawyers have been leveraging it more often in the last thirty years.

Under Chief Justice Earl Warren, the Supreme Court was a bastion of rights protection. The Warren court granted poor citizens the right to an attorney; held that each person deserved equal Congressional representation; and ruled that separate racial accommodations are not equal. Because many of the Warren court's decisions granted rights, there was rarely the opportunity—or the need—to seek further protection in the states.

But, as Greg Lipper, litigation counsel at Americans United for Separation of Church and State, quipped, “The Warren court was a long time ago.”

As Presidents Nixon, Reagan, and Bush filled the federal judiciary and the Supreme Court with conservative judges, fewer rights were granted at the federal level. That’s brought more opportunities for state courts to assert their influence, and it’s an opportunity courts have often seized. A more conservative federal judiciary means “there’s much more tendency to go to state court,” said Williams.

But, that opportunity is not ironclad. State constitutions are relatively easy to amend. For instance, in 1993, the Hawaii state Supreme Court recognized the right to gay marriage. Five years later, voters passed an amendment that restricted marriage to heterosexual couples.

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Even the Supreme Court has placed its stamp of approval on this strategy. In several rulings, Justices have encouraged state courts to protect the rights that the Supreme Court did not. “Every believer in...federalism,” wrote Justice William Brennan in a Harvard Law Review article, “must salute” state courts that assert their independence and choose to provide greater protection of civil rights than the Supreme Court