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State Constitutions and the Protection of Rights

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State constitutions and the protection of rights



JOHN GREABE
Constitutional Connections

Last month, the Pennsylvania Supreme Court issued an important ruling on partisan gerrymandering – the practice of redrawing electoral districts in a manner that favors the incumbent political majority. The court invoked a provision of the Pennsylvania constitution that promises “free and equal” elections to hold that Pennsylvania’s congressional districts were products of an unconstitutional partisan gerrymander.

Pennsylvania Republicans (the architects and beneficiaries of the gerrymander) sought emergency review in the United States Supreme Court, arguing that the Pennsylvania court’s ruling violates federal law. But their appeal was denied, and the Pennsylvania court has since ordered that a new map drawn by a nonpartisan expert adviser be used in the November 2018 election. Most believe that use of the new map would yield a multiple-seat pickup for Democrats in the

Pennsylvania congressional delegation this fall.

In a column published last summer, I explained why legal challenges to partisan gerrymandering under the federal constitution are uphill battles. In short, several members of the United States Supreme Court believe that partisan gerrymandering claims raise “political questions” that are not susceptible to judicial review. Moreover, other members of the

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court who believe that such claims can be entertained have not been able to agree on a standard for judging them.

Thus, although the court is reconsidering its precedents on the issue this term, it remains unclear whether partisan gerrymandering claims will be subject to judicial review under federal law.

But the Pennsylvania Supreme Court's ruling reminds us that constitutional innovation and enforcement are not the exclusive province of federal law. Indeed, as the example from Pennsylvania shows, state constitutions can be significantly more protective of rights than the federal constitution.

First, state constitutions frequently authorize state courts to issue rulings in circumstances where the federal Constitution places barriers on federal judges. Under article III of the federal Constitution, federal courts may only hear "cases" and "controversies." The Supreme Court has interpreted these terms to bar federal courts from issuing advisory opinions or, to return to the example of partisan gerrymandering, deciding "political questions."

But the case-or-controversy requirement does not apply to state courts, and many state constitutions are far more permissive in terms of inviting judicial intervention into the issues of the day.

Second, state constitutions protect a number of rights that are not recognized by the federal Constitution. For example, as noted above, the Pennsylvania Supreme Court anchored its partisan gerrymandering ruling on a provision of the Pennsylvania constitution promising "free and equal" elections. The federal Constitution contains no such language.

Third, state constitutions

may be more protective of rights even when parallel rights are protected by the federal Constitution. An example from New Hampshire law is illustrative.

Both the federal and New Hampshire constitutions protect against governmental intrusions into spaces where one has a subjective expectation of privacy that is objectively reasonable. The United States Supreme Court has held that, under federal law, this right does not bar the police from searching one's curbside trash without a warrant. In the court's view, one does not maintain an objectively reasonable expectation of privacy in material that one has left out for a trash collector and thus "abandoned."

But the New Hampshire Supreme Court has construed the parallel provision of the state constitution more broadly. The court has held that one retains a privacy interest in discarded garbage, and that it is a violation of the state constitution for the police to search one's trash without a warrant. Thus, under current law, a warrantless search of a New Hampshire resident's trash would violate the state constitution, but not the federal Constitution.

The trash example is but one of many ways in which the New Hampshire Constitution has been interpreted to be more protective of rights than the federal Constitution. Another example, drawn from the same criminal procedure context (and in the news recently), involves drug-sniffing dogs.

Under federal law, the police may subject a properly stopped motor vehicle to a canine drug-sniff without violating the constitution. But not so under state law. Rather, under the New Hampshire Constitution, the police must have a reasonable and articulable suspicion that a vehicle contains evidence of a controlled-

substance offense before subjecting it to a canine drug-sniff.

Also, the New Hampshire Constitution frequently requires a warrant for the search of a vehicle in circumstances where the federal Constitution does not. And under New Hampshire law, evidence obtained as the result of a defective search warrant cannot be introduced in court, even if the police were objectively reasonable in relying on the warrant.

Under the federal Constitution, in contrast, a police officer's good-faith and reasonable reliance on a defective search warrant permits evidence obtained as a result of the search to be admitted in court.

Finally, the New Hampshire Constitution protects a number of rights other than criminal procedure rights that are not protected under the federal Constitution.

For example, the New Hampshire Supreme Court has interpreted the state Constitution to create a judicially enforceable right to a state-funded, adequate elementary and secondary education. No such right has been recognized under the federal Constitution.

In addition, the state constitution is more protective of the right not to be discriminated against on the basis of one's sex or gender than the federal constitution.

In thinking about the enforcement of constitutional norms, one should not forget the greater protections and more generous access to court that often are supplied by state constitutions.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civics Education.)