

**HEALTH CARE FREEDOM ACT:**  
**Constitutional Amendment or Statute?**

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We are unaware of any federalism clash in which the U.S. Supreme Court has discussed the greater effect of a state's interest when it is expressed through its constitution as opposed to a statute. However, the Court strongly has established that state constitutions may protect individual rights to a greater degree than their federal counterpart.

The paradigm case in this regard involved the right of individuals to petition in privately owned shopping centers. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the U.S. Supreme Court held that the First Amendment does not protect such a right on private property. The California Constitution, however, was interpreted to provide such a protection. In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the U.S. Supreme Court addressed the question of whether the right to petition in a private shopping center recognized under the California Constitution constituted a taking of property under the Fifth Amendment. Writing for the majority, Justice Rehnquist found that literally there was a taking of the shopping center owners' "right to exclude others." But he concluded that a state may "exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." *Id.* at 81-83. In other words, although the Fifth Amendment ordinarily would trump a state enactment, the Court held that it must yield to the broader protection of free-speech rights guaranteed by the state constitution.

Ironically, one of the greatest proponents of using constitutions as a bulwark for liberty was former Justice William Brennan, who authored two highly influential law review articles on the subject. William J. Brennan Jr., "State Constitutions and the Protection of Individual Rights," 90 *Harvard Law Review* 489 (1977); and "The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights," 61 *N.Y.U. Law Review* 535 (1986). Between 1970 and his second article in 1986, Brennan recounted that state courts had interpreted their own constitutions more broadly than the U.S.

Supreme Court had interpreted the federal constitution in more than 250 decisions. *Id.* at 548. That trend revealed that “the state laboratories are once again open for business.” *Id.* at 550. “This rebirth of interest in state constitutional law,” Brennan proclaimed, “should be greeted with equal enthusiasm by all who support our federal system, liberals and conservatives alike.” *Id.*

Although Brennan was speaking specifically to state constitutions that were interpreted more broadly than the federal constitution, and not about conflicts between state constitutions and federal law, the principle of state constitutions as guardians of individual liberty is firmly embedded in the jurisprudence of federalism. The effect of a state making a protection of liberty part of its organic law is sure to have greater resonance in a federalism conflict than a statute, although either will trigger such a conflict.

Moreover, of course, state constitutional amendments foreclose state laws that violate the rights that are guaranteed. By contrast, a statute adopted by one legislature cannot bind the next.