

PART THREE

Taming  
the Beast

## 10

## Fighting Big Government at the Local Level

IT WAS NOT supposed to be this way, with state and local governments running roughshod over individual liberties. Whatever the nostalgic apologists for “states’ rights” might contend, state and local governments were intended to be the guardians of individual liberty, not its assailants. Likewise, state and federal courts were supposed to ensure that governments at every level were restricted to the appropriate boundaries of power, rather than indulging presumptions in favor of the exercise of government power.

As the preceding pages chronicle, James Madison’s warning 225 years ago could have been penned today: “The legislative department is everywhere extending the sphere of its

activity and drawing all power into its impetuous vortex.” Madison urged that it is therefore “against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.”<sup>1</sup> Sage advice in 21st-century America.

The framers, of course, constructed precisely the constitutional safeguards that Madison and his compatriots urged for the security of liberty. And for a time, and to an extent, they worked. Until the early 20th century, legislators spent much of their time debating not only the substance of proposed legislation, but whether they possessed the requisite authority to enact such legislation in the first place. Indeed, the 14th Amendment itself was adopted due to congressional concerns and presidential warnings about congressional power to enact civil rights protections. Today, legislators rarely question their authority to enact legislation regarding almost any matter.

Likewise, state and federal courts traditionally examined carefully whether legitimate governmental authority existed to curtail the exercise of individual liberty.<sup>2</sup> Since the 1930s, in most contexts courts instantly presume the government’s authority and presume constitutionality of laws and regulations.<sup>3</sup>

How can we rein in rapacious government? It would be nice if we had elected officials who understood that in a free society, there are limits to the proper exercise of government powers—and if we had elected officials who abided those limits. Likewise, Americans in general are responsible for our own calamity, for not only do we not insist on government leaders who respect the limits of authority, but too often we demand that government solve all manner of problems it is not equipped to address, or, even worse, that it manipulate the burdens and benefits of life to our personal advantage.

Such is human nature, whose excesses our republican form of government is supposed to curb.

If the elected branches of government are unlikely to adequately safeguard liberty, where can we turn? For better or worse, the main recourse is the courts.

It is true that courts themselves too often have been the handmaidens of big government, ushering in welfare entitlements, racial preferences, and the like. Only relatively recently have principled activists in the freedom movement turned their attention to the courts, and the results by and large have been encouraging. There are two types of judicial activism: where the courts exceed the judicial power and take on executive or legislative powers, and create new rights or entitlements unknown to the Constitution; and a second, even worse variety, where courts refuse to enforce rights that are in the Constitution. We have made important strides in recent years curbing both types of judicial activism; and if those trends are to continue, we must play an active role in the advocacy process.

Some might argue that recourse to judicial intervention is profoundly undemocratic. To the contrary, the courts in a republican form of government are an essential *part* of the democratic process, for they act to constrain the inherent democratic impulse toward larger government and the invasion of individual rights. That is not to say that courts always do perform that democratic checking function, but rather that they should. Moreover, for better or worse, courts are our best hope in reestablishing some firm tethers on the exercise of government power.

As my colleague Steve Simpson puts it,

That the problem of faction still exists today, despite the framers' efforts to avoid it, should serve as a warning sign.

Something has gone wrong in our constitutional system. Courts bear a large part of the responsibility. They have allowed government to grow far beyond its intended size and scope. With government doing as much as it does today, the opportunities for abuse are many. If courts are not going to limit the size of government, they must be prepared at the very least to limit its abuses. Yet they cannot discharge this vital responsibility if they refuse to judge.<sup>4</sup>

And, of course, courts cannot judge unless we ask them to. To eradicate grassroots tyranny, we must become ever more active in the courts, advocating creatively and persuasively to reestablish proper boundaries of government power.

When I speak of action to protect liberty in the courts, I mean three types of courts: federal courts, state courts, and the court of public opinion. I will address each of those outlets in turn.

### **Federal Courts**

If the purpose of the 14th Amendment can be summed up in one phrase, it would be this: to enlist the national government, and in particular the federal courts, in the eradication of grassroots tyranny. As described in the early chapters, the libertarian framers of the 14th Amendment understood that the Constitution had one major structural deficiency: that state and local governments were not adequately constrained in their propensity to violate the constitutional rights of their own people. So the federal courts were called upon to create a check upon that propensity.

Sometimes they do, and too often they do not. But freedom advocates will find within our national constitution an array of protections of individual rights and restraints on the power of government that can be wielded against local tyr-

anny. Some are tried and true, such as the First Amendment's guarantees of freedom of speech and religion. Others, such as the privileges or immunities clause and the prohibition against impairment of contracts, are badly in need of revival.

A good example of how to effectively litigate against grassroots tyranny in the federal courts is the campaign to restore economic liberty as a fundamental civil right.<sup>5</sup> When I filed my first case in this area in 1987, economic liberty was a jurisprudential wasteland. As described in chapter 4, the U.S. Supreme Court had not struck down a regulation of entry into a business or profession under the 14th Amendment in about 50 years. The keys to reversing that trend were two: finding the right legal theories and finding the right case.

As discussed earlier, economic liberty was intended to be protected under the privileges or immunities clause of the 14th Amendment. But given the overwhelming weight of adverse precedents, no lower federal court would seriously entertain a privileges or immunities claim against an economic regulation. The vindication of the privileges or immunities clause and overturning of the dreaded *Slaughter-House Cases* would be the long-range jurisprudential goal of the economic liberty campaign; but until that day occurred, we would have to find more viable legal theories.

For the moment, the strongest arguments seemed to be the equal protection and due process guarantees of the 14th Amendment. In some instances, the courts had invalidated local laws that divided opportunities on the basis of arbitrary lines.<sup>6</sup> And in others, courts had struck down laws in which the rules governing access to opportunities were hopelessly skewed. It was upon those slender reeds that we would attempt to construct a jurisprudence of economic liberty.

In finding the right first case, I hoped to find an outra-

geous barrier to economic opportunity that it would be all but impossible for the government to defend. I found it in the pages of the *Washington Post Magazine*, in the person of a man whose name seemed to belong in an Ayn Rand novel: Ego Brown.

In the mid-1980s, Brown had been a bureaucrat toiling for the U.S. Navy. But he always had aspired to operate a business of his own. He discovered his niche in the thousands of scuffed shoes pounding the pavement in the nation's capital.

Brown quit his job and invested in an elegant street-corner shoeshine stand, which he erected at the busy corner of 19th and M Streets. He bought a tuxedo that would become his trademark, and aided by a flamboyant personality, began offering the "Ego Shine" to passersby.

The business was so popular that he decided to expand. But there wasn't enough of a margin to employ his own staff. So naturally, he decided to franchise. But not just to anyone: His franchisees came from the ranks of the homeless, to whom he offered a tuxedo, a shoeshine stand, training, and a chance to lift themselves out of poverty. Brown's efforts were so successful that social workers began referring enterprising homeless people to him.

But in the District of Columbia, it seems no good deed goes unpunished. District police officers dusted off an old Jim Crow-era law, designed to keep blacks from achieving economic emancipation, that forbade shoeshine stands on public streets. One could sell hot dogs, flowers, or photo opportunities with cardboard politicians, but not a shoeshine.

Ego Brown was my first client as a public-interest lawyer. Together we challenged the ban on street-corner shoeshine stands. The District's lawyers refused to provide *any* rationale for the law, maintaining that they need not do so under applicable constitutional precedents. As a result, the federal dis-

strict court struck down the law as a violation of equal protection. “A court would be shirking its most basic duty,” the court declared, “if it abstained from both an analysis of the legislation’s articulated objective and the method that the legislature employed to achieve that objective.” Applying the test, the court concluded that “we would have to ‘strain our imagination’ to justify prohibiting bootblacks from the use of public space while permitting access to virtually every other type of vendor.”<sup>7</sup>

The *Brown* decision became the building block for other favorable economic liberty decisions, providing courts a rationale by which to apply a means/ends analysis to measure whether constraints on marketplace entry either serve nefarious objectives or are excessive in their scope. Applying that framework, a federal district court in Texas struck down Houston’s anti-jitney law on behalf of entrepreneur Alfredo Santos, who wanted to start a jitney commuter service using his off-duty taxicab. The ordinance was enacted in 1905 when streetcar companies lobbied to outlaw their jitney competitors. “The purpose of the law was protectionism in its most glaring form,” declared Judge John Rainey. “The ordinance has long outlived its ill-begotten existence.”<sup>8</sup>

Since then, my colleagues and I have successfully litigated challenges against California’s cosmetology law on behalf of African hairstylists<sup>9</sup> and against Tennessee’s casket monopoly.<sup>10</sup> We have a long way to go before economic liberty routinely receives the judicial protection it deserves and was intended to have. Indeed, full protection for economic liberty likely will necessitate the U.S. Supreme Court overturning the *Slaughter-House Cases*. But these jurisprudential baby steps, taken with strategically selected cases featuring sympathetic clients and outrageous restraints on economic liberty, are slowly but surely rebuilding the legal foundations for the



revival of a fundamental but often-forgotten civil right. Freedom advocates should employ similar tactics in other areas to protect individual liberty against grassroots tyranny.

### State Constitutions

State constitutions, not the federal constitution, were intended to provide the main protection for individual liberty. But for all the talk among conservatives and libertarians about federalism, most freedom advocates think instinctively—sometimes exclusively—in terms of federal court litigation in protecting individual liberty. Federal court litigation provides the potential benefit of more broadly applicable precedents. But state constitutions present a largely untapped treasure trove in terms of restraints on the power of state and local governments and protections for individual liberty.\*

Liberal activists discovered the potential of state constitutions decades ago. The key legal principle at work in such litigation is that although the national constitution provides the *floor* for the protection of individual rights, state courts may construe their own constitutions to go *above and beyond* those protections. In more than a dozen states, for instance, liberal activists have succeeded in convincing state courts to construe their own constitutions to guarantee a fundamental right to education and to require some equality of spending.<sup>11</sup> Expansive tort liability, greater protections for criminal defendants, and the right to gay marriage are all examples of

\*For precisely that reason, the Institute for Justice in 2001 began opening state chapters to supplement its national litigation agenda by focusing exclusively on litigating under state constitutions to combat grassroots tyranny at its source. IJ's first two state chapters are in Phoenix and Seattle. I drew the hardship duty of moving from Washington, DC, to Phoenix to open the first chapter and direct the overall state chapters project from 2001 to 2004.

results liberal activists have obtained through strategic litigation under state constitutions.

Freedom advocates have been slower to discover and litigate strategically under state constitutions, but the potential is boundless. State constitutions are libertarian nirvana.

One major difference between federal and state litigation is access to the courts. “Standing” to sue in federal courts is severely circumscribed, even if a law is blatantly unconstitutional. Taxpayers generally do not have standing under the federal constitution; rather, plaintiffs attempting to challenge a law in federal court must demonstrate a discrete, particularized injury that the public at large does not sustain in equal measure. Likewise, some issues are deemed “political questions” that can only be resolved by the elected branches of government. For example, taxpayers generally cannot challenge federal spending programs even if they exceed the proper boundaries of congressional power.

By contrast, most state courts freely confer standing upon taxpayers to challenge almost any unconstitutional exercise of government power. That is why, for instance, taxpayers can challenge the building of sports arenas under state constitutions. Likewise, while federal courts presume the constitutionality of governmental decision making, under most state constitutions, municipalities are strictly limited to powers expressly provided by state law. So if a local government cannot point to an express source of power, a state court will strike down an enactment on the principle of *ultra vires* (i.e., it is outside the government’s corporate power).

But best of all are express provisions in state constitutions that limit government power or protect individual liberty that often go far beyond similar provisions in their federal counterpart. Remember that just as with the U.S. Constitution, constitutions in the original states often were written by

statesmen who were deeply imbued in the principles of liberty. Those state constitutions in turn often provided a model for later state constitutions. During the Progressive era, when many western states adopted their constitutions, the framers often exhibited profound skepticism about the exercise of government power, and inserted provisions in state constitutions creating the power of voter initiative and recall, and constraints on the creation of monopolies.

State constitutions typically have rich preambles that set the tenor for their interpretation. While the federal constitution did not explicitly incorporate the Declaration of Independence, for instance, no fewer than 35 state constitutions expressly protect the right to life, liberty, and property (or pursuit of happiness). Article I, section 1 of the Alaska Constitution is illustrative of this practice:

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, and the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Likewise, article I, section 1 of the Constitution of the state of Washington states, “All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.” To make the matter even more pointed, article I, section 32 of the Washington Constitution reminds that “[a] frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.” Similar provisions abound in other state constitutions.

At least 15 state constitutions contain protections of equal privileges and immunities. Article I, section 20 of the Oregon Constitution provides, “No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not belong to all citizens.” State courts are free to—and in many cases do—interpret their own privileges and immunities clauses more generously than the U.S. Supreme Court has interpreted the 14th Amendment privileges or immunities clause. To the same end, at least nine states expressly forbid state-created monopolies. The North Carolina Constitution, which was inspired by John Locke, provides in article I, section 34, “Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.”

State constitutions restrict governmental powers in other ways. About 40 state constitutions prohibit legislatures from enacting “special” or “local” legislation—in other words, pork-barrel spending. If only such a provision existed in the federal constitution! Properly applied, such provisions prohibit the legislature from including in general budget bills projects that apply only to a given locality or circumstance, instead requiring separate enactment of such legislation. Similarly, at least 41 state constitutions protect the obligation of contracts. No fewer than 14 state constitutions contain express prohibitions against the taking of private property for private use.

How can freedom advocates use such provisions to protect liberty? Ideally, they can take such provisions out of jurisprudential mothballs and invest them with their intended meaning, again using compelling cases to illustrate the concerns about excessive government power that animated the framers.

A good illustration is the Institute for Justice’s crusade

against eminent domain abuse. As noted in chapter 5, the U.S. Supreme Court essentially excised the public use limitation on the eminent domain power out of the Fifth Amendment. Hence, federal challenges to the exercise of eminent domain typically are unavailing. So we turned to state constitutions: not only to express provisions limiting the eminent domain power, but to due process principles that ought to constrain government power as well.

To begin the battle, in light of volumes of adverse case precedents, we felt that we needed to find a truly outrageous factual scenario; one with a villain so heinous that a court might feel obliged to constrain local government's rapacious confiscatory appetites. Central casting provided us with precisely the antihero we needed: Donald Trump.

Trump decided that he wanted a parking lot for his limousines adjacent to his casino in Atlantic City. Occupying the property he coveted were a little Italian restaurant named Sabatini's, a gold shop, and a home owned by a feisty lady, Vera Coking. They didn't want to sell. That's fine, said Trump: I'll have Atlantic City use its eminent domain power to take the property. And the city did just that, reasoning that whatever was good for casinos was good for Atlantic City.

Along the way, our litigation campaign had some help. Not only did ABC's John Stossel feature the plight of Vera Coking along with a clip of Donald Trump angrily walking out of his interview, but Garry Trudeau's *Doonesbury* spent an entire week chronicling Trump's greedy efforts (though, with typical artistic license, Trudeau had Trump trying to hire a hit man to knock off the Sabatinis in addition to wielding the power of eminent domain).

In the end, the New Jersey state trial court found that the intended use of the property was private, not public, and it enjoined the city's use of eminent domain. As the *New York*

*Times* described the victory, “It was a case that pitted a widowed homemaker and the owners of two small businesses against the state and Donald J. Trump, one of the brashest personalities in the casino business. And today, the little guys won.”<sup>12</sup>

That precedent, in turn, fueled IJ’s efforts in Pennsylvania, Connecticut, New York, Ohio, Arizona, Mississippi, and elsewhere to curb eminent domain abuse. Although state courts are not bound by decisions outside of their own states, they often find decisions in other states persuasive, especially when construing similar constitutional provisions. As a result, it is possible—as IJ’s eminent domain abuse efforts illustrate—to conduct a national litigation campaign to advance individual liberty relying on the constitutional protections of the 50 states.

State constitutions can provide an effective safeguard against grassroots tyranny. We have barely tapped their potential. We need badly to start doing so.

### Court of Public Opinion

Too often freedom advocates eschew the last of the three venues, assuming that the media are monolithically hostile to freedom. Whatever their politics, the media exhibit one overarching characteristic: skepticism. As the Donald Trump story above illustrates, the media can provide a powerful weapon in the fight for freedom.

At the Institute for Justice, we have worked assiduously to improve the odds in our cases by litigating aggressively in the court of public opinion.\* Lawsuits can be important teaching

\*IJ is enormously lucky to have two consummate communications professionals, John Kramer and Lisa Andalaro Knepper, who choreograph our efforts in the court of public opinion with extraordinary skill and passion.

vehicles. The image of James Meredith walking with federal escorts into the University of Mississippi during the 1950s was probably more significant in expanding freedom than the underlying lawsuit that won him that right. Moreover, media attention can transform cases that lose in the court of law into winners in the real world.

A good example are two economic liberty cases my colleagues and I litigated in the mid-1990s. The first was the case of Taalib-din Uqdah and Pamela Ferrell, two black entrepreneurs who wanted to open an African hairstyling salon in Washington, DC, called Cornrows & Co.<sup>13</sup> Their efforts, which included hiring and training unemployed people, paying taxes, and providing a popular service to consumers in the nation's capital (including many of its politicians), were rewarded by a knock on the door by a District of Columbia police officer bearing an order: Shut down or go to jail. The crime, of course, was braiding hair without the requisite cosmetology license.

The federal judge assigned to the case was sympathetic, and even compared Uqdah and Ferrell's plight to something that might occur in the Soviet Union. (I replied that we were actually thinking of seeking economic asylum for our clients in Russia because these days it seems to value economic liberty more than our own country.) But he ruled against the plaintiffs, finding the weight of case law overwhelmingly against them.

But at the same time, the battle was raging in the court of public opinion. Crusading television reporter John Stossel profiled Uqdah and Ferrell's plight in a segment entitled "Rules, Rules, Stupid Rules." District of Columbia bureaucrats have a high threshold for embarrassment, but Stossel's biting exposé managed to exceed it. While the case was pending on appeal, with the government having won the opening

round, the District of Columbia capitulated, and deregulated cosmetology. Today, not only is Cornrows & Co. a thriving business, but dozens of other hair braiding salons operate openly and lawfully, contributing mightily to the economic well-being of our capital city.

In the midst of the hair braiding struggle, my partner Chip Mellor was litigating on behalf of Leroy Jones, who wanted to start a taxicab business in Denver.<sup>14</sup> Jones, who is African American, and three partners who were African immigrants, were driving for the ubiquitous Yellow Cabs. But like many people who work for others, they aspired to go into business for themselves. They realized that there was a huge untapped market in Denver, specifically low-income neighborhoods for which taxicab service was needed but often unavailable. So Jones and his partners set out to start a new co-op company, Quick-Pick Cabs, that would primarily serve low-income areas of Denver and provide better working conditions and benefits for drivers.

Jones and his colleagues had everything they needed: capital, know-how, experience, and a market niche. Everything, that is, except a piece of paper called a “certificate of public convenience or necessity.” Jones applied for the certificate, presenting the company’s credentials and petitions signed by hundreds of would-be customers. But the Colorado Public Utilities Commission responded with the same decision it had given every applicant for a taxicab license since World War II: application denied. Denver already had three taxicab companies. In order to satisfy the standard of public convenience and necessity, taxicab applicants did not have to show merely that they were qualified and that a market demand existed that the other companies were not adequately serving. They had to demonstrate that the other companies *could not* serve the market—a nearly impossible standard to meet.



So instead of pursuing their share of the American Dream as business owners, Jones and his partners—who by now were fired by Yellow Cab—were forced to toil in lesser employment, such as hawking soft drinks at Mile High Stadium or working in a convenience store.

The Institute for Justice filed a lawsuit on the entrepreneurs' behalf—and lost. Despite compelling and sympathetic facts, the federal district court found that the exacting legal standard could not be met. But the case attracted such visibility in the court of public opinion—editorials in the *Wall Street Journal*, a segment on CBS News “Eye on America,” and other outlets—that the state capitulated while the case was on appeal, and deregulated entry into the Denver taxicab market.

While all of that was going on, in the darkest days when it appeared that they would never be able to fulfill their dreams, Jones and his partners realized that their fight was not just about themselves, but part of a bigger battle for economic liberty—the birthright of every American. So they took the symbolic step of changing the name of their company, from Quick-Pick Cabs to Freedom Cabs. And today, a fleet of 50 Freedom Cabs serves customers across Denver. It is therefore fitting to make a brief commercial announcement to the reader: The next time you are in Denver, take a freedom ride in Freedom Cabs.

These cases demonstrate what is possible in the fight against petty tyranny at the local level. The percentage of successful challenges chronicled in this book surely far exceeds the proportion of triumphs against grassroots tyranny in the real world, but I hope they demonstrate that with creativity and perspicacity, victory is possible. As the number and visibility of such victories increase, perhaps state and local government officials will begin to exercise some self-restraint, and so many such battles will no longer be necessary.

Perhaps. But until then we must use every resource at our disposal to protect the American legacy of freedom, and to pass it along to our children in better shape than we found it. That goal is not an easy one. The government has both its own plentiful resources (also known as our tax dollars at work) as well as those of the powerful interests who invariably benefit from grassroots tyranny. The most potent tools we can array in response are the constitutions, federal and state, and the light of day, which exerts the same withering effect on government abuse as sunshine does on a vampire.

But the first step is to get involved. Many of us are involved in national politics, but too few of us are involved at the level at which government affects us most directly—the local level. The threat to freedom is great, to be sure; but when the government takes action that truly affects our lives, that face of government oppression will far more likely belong to a local bureaucrat than to the president. It's remarkable how brazen and unfettered local government has become—especially considering that, at the local level, one person truly can make a difference.

The odds are always against citizen David as he or she battles the governmental Goliath. But my colleagues and I draw inspiration from the words of Thomas Paine, an American revolutionary who persevered against far greater odds than we face today:

*Tyranny, like hell, is not easily conquered; yet we have this consolation with us, that the harder the conflict, the more glorious the triumph.*<sup>15</sup>