

ACLU CIVIL LIBERTIES PANEL: STATE CONSTITUTIONALISM

“THERE’S NO PLACE LIKE HOME”: SUPER-SIZING THE STATE CONSTITUTION’S BILL OF RIGHTS

by
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Though the subject matter of Constitutional Law with respect to civil liberties once consisted almost exclusively of a study of the United States Supreme Court’s jurisprudence regarding the first, fourth, fifth, sixth, and fourteenth amendments to the United States Constitution, the last few decades have seen a significant expansion in the use of State Constitutionalism in this area. By interpreting state constitutional provisions independently and differently from counterpart provisions in the federal bill of rights, states have assumed a primary role in expanding civil liberties and limiting unwarranted governmental intrusion into personal affairs. This Article examines two of Hawaii’s successes in using State Constitutionalism to define and enforce civil rights: the application of Hawaii’s equal protection law to the claimed

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right of same-sex couples to marry and the intersection of Hawaii search-and-seizure law and the police practice known as “walk and talk.”

I.	INTRODUCTION	774
II.	HAWAII STATE CONSTITUTIONALISM	775
	A. <i>Equal Protection and Same-Sex Marriage</i>	776
	B. <i>Search, Seizure, and “Walk and Talk”</i>	779
III.	CONCLUSION.....	781

I. INTRODUCTION

In 1969, in the interstice between the end of the Warren Court and the debut of the incoming Burger Court, which was precisely when I took my basic law school Constitutional Law courses, state constitutions were invisible. The subject matter of Constitutional Law with respect to civil liberties consisted almost exclusively of a study of the United States Supreme Court’s jurisprudence regarding the first, fourth, fifth, sixth, and fourteenth amendments to the United States Constitution. No one gave a thought to, much less cared about, constitutionally speaking, state courts and constitutions, being (as we believed then) merely the hiding places of parochial troglodytes and racist bigots. “States’ rights” was a pejorative term, the mantra of the aforementioned parochial troglodytes and racist bigots who railed, on the sovereign states’ behalf, against the Supreme Court’s use of the federal bill of rights as a means of extending civil liberties and federally guaranteed protections to the ill-defended and oppressed victims of those very same sovereign but tyrannical states.

It was therefore prescient and a tad ironic that two years earlier, in 1967, the Supreme Court of Hawaii, the high court of the nation’s newest state, quietly slipped a footnote—gratuitous in the sense that the court relied exclusively on United States Supreme Court precedent to affirm the appellant’s criminal conviction—into *State v. Texeira*; the footnote posited the proposition that:

[T]he Hawaii Supreme Court, as the highest court of a sovereign state, is under the obligation to construe the state constitution, not in total disregard of federal interpretations of identical language, but with reference to the wisdom of adopting those interpretations for our state. As long as we afford defendants the minimum protection required by federal interpretations of the Fourteenth Amendment to the Federal Constitution, we are unrestricted in interpreting the constitution of this state to afford greater protection.¹

The *Texeira* proposition amounted to a somewhat incomplete articulation of one of the best ideas implicit in American federalism—the doctrine of State Constitutionalism. Professor Jennifer Friesen’s

¹ 433 P.2d 593, 597 n.2 (Haw. 1967).

exhaustive and encyclopedic treatise, *State Constitutional Law*,² describes the construct in the following manner:

In thousands of decisions, the supreme courts of the fifty states have interpreted their state constitutions to grant claims of individual rights and liberties that were not protected by the United States Constitution, as interpreted by the Supreme Court. State courts have always been free to interpret state constitutional provisions independently and differently from any counterpart provisions in the federal bill of rights, even when state and federal provisions closely resemble one another. Their freedom and power to do so, however, has never been exercised so frequently as during the past few decades.

Courts in many states conduct an independent analysis of state constitutional rights claims as a matter of course, without regard to current trends in the Supreme Court. . . . In addition to well-publicized decisions that uncouple state Bills of Rights from their federal counterparts—often to grant more rights to the citizen, or restrain government more—state courts enforcing state charters have been steadily interpreting provisions that are uniquely or primarily guaranteed by state rather than federal law. . . .

During the same era that has seen a historic expansion of state constitutional rights, individual rights secured by the federal Constitution, as interpreted by the United States Supreme Court, have stabilized or receded. As the Court has retreated from the rights-expanding philosophy of the Warren Court era, state courts have been asked to assume once again a primary role in enforcing civil rights and liberties by interpreting provisions long available in state constitutions but rarely, until the last few decades, invoked by the bench or bar. Nearly every state supreme court has contributed in some degree to the revival of state Bills of Rights, although some do so only occasionally.³

II. HAWAII STATE CONSTITUTIONALISM

I am proud to say that Oregon and Hawaii have been at the forefront of the aggressive use of State Constitutionalism as a tool for expanding civil liberties and limiting unwarranted governmental intrusion into personal affairs. Because time does not permit a more thorough examination, I will focus in a very summary way on two of Hawaii’s salient successes, leaving the Oregon discussion to Judge Schuman and Professor Kanter.⁴ The successes relate, first, to the application of Hawaii

² JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES* (4th ed. 2006).

³ *Id.* at § 1.01[1] (footnotes omitted).

⁴ See David Schuman, *Using State Constitutions to Find and Enforce Civil Liberties*, 15 LEWIS & CLARK L. REV. 783 (2011); Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights*, 15 LEWIS & CLARK L. REV. 799 (2011).

protection of the laws” or “the enjoyment of the person’s civil rights” and from discriminating against the person “in the exercise thereof because of,” among other things, “sex.”¹⁶ The relevant Hawaii marriage statute, on its face, “discriminate[d] based on sex against the [plaintiff] couples in the exercise of the civil right of marriage, thereby implicating . . . article I, section 5.”¹⁷ Because sex was a “suspect category” for purposes of equal protection analysis under article I, section 5, the discrimination embedded in the Hawaii marriage statute was subject to the “strict scrutiny” test.¹⁸ “It therefore follow[ed] . . . that (1) [the marriage statute was] presumed to be unconstitutional (2) unless [the DOH, as a state agent, could] show that (a) the statute’s sex-based classification [was] justified by compelling state interests and (b) the statute [was] narrowly drawn to avoid unnecessary abridgments of the [plaintiff] couples’ constitutional rights.”¹⁹

Accordingly, the *Baehr* court vacated the circuit court’s order and judgment and remanded the matter to the circuit court for trial, at which the DOH would bear the burden of overcoming the marriage statute’s presumptive unconstitutionality.²⁰ Foreseeably, the DOH failed to meet its burden on remand, and following a trial in late 1996, the circuit court entered findings of fact, conclusions of law, and an order and judgment conferring a resounding victory on the *Baehr* plaintiffs.²¹

So, is same-sex marriage alive and well in Hawaii, which gave birth to it in the first place? Uh, no. The DOH immediately appealed the circuit court’s judgment, and, while the appeal was pending in our court, the electorate ratified a proposed amendment to the Hawaii Constitution in 1998, which added article I, section 23 to the state’s Bill of Rights and provided that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.”²² The legislature has seen fit to reserve marriage to opposite-sex couples, although in May of this year, after much parliamentary maneuvering, the legislature did send to the governor a civil unions bill, which would have extended to same-sex couples a legal status entitling them to all the state-conferred rights, benefits, duties, and responsibilities that the state afforded married opposite-sex couples.²³ The governor, at the conclusion of much political theater, vetoed the bill this past July.²⁴

¹⁶ HAW. CONST. art. I, § 5.

¹⁷ *Baehr*, 852 P.2d at 59.

¹⁸ *Id.* at 67.

¹⁹ *Id.*

²⁰ *Id.* at 68.

²¹ *Baehr v. Miike*, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Cir. Ct. Dec. 3, 1996).

²² HAW. CONST. art. I, § 23.

²³ H.R. 444, 25th Leg. (Haw. 2009).

²⁴ *Civil unions: Lambda Legal and ACLU file lawsuit against state*, HAW. INDEP., July 29, 2010, <http://www.thehawaiiindependent.com/story/civil-unions-lambda-legal-and-aclu-file-lawsuit>.

Thus, the battle for marriage equality continues to rage in Hawaii. The ACLU of Hawaii and Lambda Legal have jointly filed a lawsuit in state court on behalf of several committed same-sex couples,²⁵ and, depending on the outcome of the imminent general election, we may well have a new governor who has already declared that he would sign a civil-unions bill identical to the one that was vetoed earlier this year.²⁶ We may also have a new governor who has already declared that he would veto such a civil-unions bill.²⁷ Be all of that as it may, I suggest that, given its context, *Baehr v. Lewin* qualifies as one of the more robust exercises in State Constitutionalism that this country has witnessed to date.

B. Search, Seizure, and “Walk and Talk”

I turn now to a second instance of State Constitutionalism—the Hawaii Supreme Court’s application of state search and seizure law—in assessing the lawfulness of a police tactic often dubbed “walk and talk,” a practice that mightily offended me during my trial court days but that the United States Supreme Court facilitated and approved (impliedly and expressly) in a trio of cases: *Florida v. Royer*,²⁸ *California v. Hodari D.*,²⁹ and *Florida v. Bostick*.³⁰ I characterized those cases in a concurring opinion as creating a “surreal and Orwellian world . . . in which the fourth amendment to the United States Constitution seems to have atrophied to the condition of a vestigial organ.”³¹ In our own trio of cases—*State v. Quino*,³² *State v. Kearns*,³³ and *State v. Trainor*³⁴—the Hawaii Supreme Court later repudiated *Royer*, *Bostick*, and *Hodari D.*, and killed the use of walk-and-talk as a means of gathering incriminating evidence for use in drug prosecutions in our state courts.

As of the early 1990s, walk-and-talk, Hawaii-style, looked like this:

The Honolulu Police Department's Narcotics/Vice Airport Detail (HPD) utilize[d] a "walk and talk" drug interdiction program in order to arrest drug smugglers and to seize any narcotics they might be carrying on their persons or in their luggage. This "walk and talk" program [initially did] not employ any type of "drug

25 *Id.*

²⁶ *Gay Marriage an Issue in Hawaii Gov. Race*, ADVOCATE.COM, Oct. 3, 2010, http://www.advocate.com/News/Daily_News/2010/10/03/Gay_Marriage_an_Issue_in_Hawaii_Gov_Race.

²⁷ *Id.*

²⁸ 460 U.S. 491 (1983).

²⁹ 499 U.S. 621 (1991).

³⁰ 501 U.S. 429 (1991).

³¹ State v. Quino, 840 P.2d 358, 365 (Haw. 1992) (Levinson, J., concurring) (citations omitted). One of the side benefits of State Constitutionalism is that you get to insult the United States Supreme Court with impunity.

³² 840 P.2d 358 (Haw. 1992).

³³ 867 P.2d 903 (Haw. 1994).

³⁴ 925 P.2d 818 (Haw. 1996).

courier profile” or require the officers to have a reasonable suspicion that a person [might] be in possession of illegal drugs, or [might] be engaged in criminal activity. Instead, members of the detail [were] trained to engage in “consensual encounters” whereby airline passengers [were] approached and, in a “conversational manner,” requested to consent to a search of their luggage or person.

The HPD train[ed] its officers to approach a passenger in the following manner: (1) the officer first observe[d] passengers arriving from an illegal drug “source city”; (2) the officer then approach[e]d a passenger at random and identifie[d] himself as a police officer; (3) the officer ask[ed] the passenger if he would agree to talk to him; (4) the officer then ask[ed] whether the passenger ha[d] disembarked from the targeted flight; (5) after receiving oral affirmation, the officer ask[ed] the passenger for his identification and airline ticket; (6) the officer ask[ed] the passenger if he [was] carrying any narcotics; (7) upon receiving a negative answer, the officer request[ed] “consent” to search the passenger’s carry-on and check-in luggage; and, (8) if the inspection [was] fruitless, the officer then ask[ed] the passenger whether he ha[d] any narcotics on his person and request[ed] “consent” to pat down the passenger.³⁵

I should mention, as a rhetorical footnote, that the relevant governing federal and state constitutional language is identical, except for some archaic capital letters and unnecessary commas in the federal provision and a key phrase added in 1968 to the Hawaii provision. The fourth amendment to the United States Constitution, of course, provides in pertinent part that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”³⁶ Article I, section 7 of the Hawaii Constitution provides in relevant part that “[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures *and invasions of privacy* shall not be violated; and no warrants shall issue but upon probable cause.”³⁷

Put succinctly, our court dispatched walk-and-talk as a facilitator of drug prosecution under state law via the following analysis. “[A] person is ‘seized’ in the constitutional sense if, from an objective standpoint and given the totality of the circumstances, a reasonable person would have believed that he or she was not free to leave.”³⁸ Thus, “a person is seized . . . when a police officer approaches [a] person for the express or implied purpose of investigating him or her for possible criminal violations and begins to ask for information.”³⁹ Our court therefore held

³⁵ *Quino*, 840 P.2d at 360 (footnote omitted).

³⁶ U.S. CONST. amend. IV.

³⁷ HAW. CONST. art. I, § 7 (emphasis added).

³⁸ *Trainor*, 925 P.2d at 824 (citing *Quino* and *Kearns*).

³⁹ *Kearns*, 867 P.2d at 907.

that “once [a] stop turn[s] from general to inquisitive questioning, a reasonable person . . . would not . . . believe[] that he [or she] was free to ignore the officer’s inquiries and walk away” and that a seizure had taken place within the meaning of article I, section 7 of the Hawaii Constitution.⁴⁰ Such a seizure could not be justified as a *Terry*-style “investigative stop” arising out of “reasonable suspicion” because truly random walk-and-talk interactions, by their very nature, would not involve “specific and articulable facts which, taken together with rational inferences from those facts,” would warrant a person “of reasonable caution . . . in believing that criminal activity was afoot.”⁴¹ Even walk-and-talk encounters purporting to rely on drug courier profiles failed to generate reasonable suspicion because “the supposed characteristics of drug couriers, even considered in combination, describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures” were such a foundation to be deemed sufficient.⁴² Walk-and-talks cannot be immunized from constitutional scrutiny on the basis that they are “consensual” unless: “(1) prior to the start of questioning, the person encountered [is] informed that he or she ha[s] the right to decline to participate in the encounter and could leave at any time, and (2) the person thereafter voluntarily participate[s] in the encounter.”⁴³ Walk-and-talks cannot be consensual, however, even if the investigating officer admonishes the target that he or she is free to leave, because the position in which the target is placed is “inherently coercive and [is] calculated to overbear [the target’s] will and critically impair his [or her] capacity for self-determination.”⁴⁴ Given such circumstances, the prosecution cannot meet its burden of proving that the target “voluntarily submitted to the investigative encounter.”⁴⁵ So, based on the foregoing, the walk-and-talk procedure violates the proscription against unreasonable searches, seizures, and invasions of privacy set forth in article I, section 7 of the Hawaii Constitution, and any evidence obtained pursuant to that procedure is subject to suppression.

III. CONCLUSION

As I said earlier, time constraints have limited me to only a smattering of Hawaii’s jurisprudence in which the appellate courts have relied on the state constitution to extend and expand the rights and protections perceived by the United States Supreme Court to reside in the federal constitution. So I close with an “amen” to Professor Friesen’s observation:

⁴⁰ *Quino*, 840 P.2d at 364.

⁴¹ *Trainor*, 925 P.2d at 826 (citations and emphasis omitted).

⁴² *Id.* at 826–27 (citations and internal quotation marks omitted).

⁴³ *Id.* at 828 (quoting *Kearns*).

⁴⁴ *Id.* at 831.

⁴⁵ *Id.* at 830 & n.10, 831.

Independent application of the state Bill of Rights offers advantages for individual litigants and courts, both for legal practice and for legal theory, and strengthens, over the long term, the vitality of civil rights in a federalist system. It also offers challenges to the craft of lawyering and judging. When existing state constitutional precedent is underdeveloped or heavily dependent on federal analogues, courts and attorneys have unique opportunities to participate in making new constitutional law.⁴⁶

They should take advantage of that unique opportunity.

⁴⁶ FRIESEN, *supra* note 2, at § 1.01[1] (footnote omitted).