



How liberal courts help conservatives states stay free

Some red states top freedom rankings because their legislatures can't do what they want. Too bad blue states don't get the same help.

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A new study says that New Hampshire is the freest state in the country, followed by Alaska, Oklahoma, Indiana, and South Dakota.

New York is the least free state by a large margin, followed by California, Hawaii, New Jersey, and Maryland.

For some readers, the immediate reaction will be that conservative states get the highest ratings and liberal states the lowest. That's not quite true: New Hampshire and Alaska are generally regarded as libertarian-leaning more than conservative, and very conservative states such as Alabama and Mississippi score pretty far down.

It's not that the study focuses just on economic freedom, as some analyses do. The "[Freedom in the 50 States](#)" report by political scientists William Ruger and Jason Sorens, just published by the Cato Institute, where I work, covers both economic and personal freedom, from taxes and regulation to imprisonment rates, gay marriage, and marijuana.

Those of us in cosmopolitan coastal states may still wonder if places like Oklahoma and Indiana are where we'd find the personal and economic freedom we crave.

Here's one explanation: The federal courts prevent conservative states from taking away a lot of the freedoms they'd like to, while they're much more tolerant of intrusions on freedom found in liberal states.

Take Oklahoma, for instance. Its personal freedom score improved in this edition of the report because in 2014 a federal judge struck down the state's ban on same-sex marriage. In the next edition, lots of conservative states will have better scores because of the 2015 Supreme Court decision overturning all such state laws.

Marriage bans aren't the only thing that conservative states are prevented from doing. Another federal court found that Oklahoma's ban on considering [sharia law](#) in judicial decisions was religious discrimination in violation of the First Amendment. In 2008 the Supreme Court struck down Louisiana's law prescribing the death penalty for the [rape of a child](#). Oklahoma, Texas,

South Carolina, Georgia, and Montana also had such laws. Fourteen states, mostly in the South and once again including Oklahoma, had laws banning homosexual acts until the Supreme Court struck them down in 2003.

Go back another generation, and we recall the Court striking down laws requiring school segregation and banning interracial marriage.

In all these cases, federal courts, interpreting the U.S. Constitution, have prevented conservative states from denying their citizens' individual rights. And thus those states get higher scores on the "Freedom in the 50 States" ranking.

Courts have been less likely to find that intrusions on freedom by liberal states violate the Constitution. States are generally free to set their own tax and regulatory policies. In 2005 the Supreme Court notoriously declined to restrict a local government's power to take property through eminent domain.

In two decisions, in 2008 and 2010, the Court did limit a state's ability to impose restrictive gun control laws. The 2010 decision, striking down a law in Chicago, improved Illinois's ranking on personal freedom. More generally, the Second Amendment and the Court's insistence on protecting the individual right to bear arms probably prevent some liberal Democratic states from enacting gun bans.

James Madison, the principal author of the Constitution, said that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive." Judges don't get it right in every case, but over the years they have protected Americans' rights and freedoms from lots of intrusions by legislatures and executives.

So take heart, my coastal cosmopolitan friends. Maybe the flyover states aren't really more libertarian in spirit than the East and West coasts. Maybe they've just had their own bad ideas slapped down by the Supreme Court more often. And who knows, maybe if the Supreme Court took economic liberties as seriously as personal freedom, the big Eastern and Western states would once again be the wide-open, fast-growing places they were when they got big and prosperous in the first place.

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