

Why the Local Matters: Federalism, Localism, and Public Interest Advocacy



Liman Public
Interest Program
Yale Law School

Why the Local Matters: Federalism, Localism, and Public Interest Advocacy

*Papers from the Eleventh Annual Liman Colloquium
at Yale Law School, 2008*

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CONTENTS

ABOUT THE CONTRIBUTORS.....iii

INTRODUCTION: ACTION ACROSS THE LANDSCAPE OF FEDERALISM 1

Kathleen Claussen

Class of 2010, Yale Law School; Member, Arthur Liman Public
Interest Program Student Board

Adam Grogg

Class of 2010, Yale Law School; Member, Arthur Liman Public
Interest Program Student Board

Sarah French Russell

Associate Research Scholar in Law and Clinical Lecturer in Law,
Yale Law School; Director, Arthur Liman Public Interest
Program

I. THE ROLE OF LOCAL LEADERSHIP: REVISING THE HISTORY AND UNDERSTANDING THE PRESENT

Civil Rights History Before, and Beyond, Brown11

Risa Goluboff

Professor of Law, Professor of History, Caddell & Chapman
Research Professor, University of Virginia School of Law

American Federalism and the American Civil Liberties Union 21

Norman Dorsen

Stokes Professor of Law, and Co-Director, Arthur Garfield Hays
Civil Liberties Program, New York University Law School;
former President, American Civil Liberties Union

Susan N. Herman

President, American Civil Liberties Union; Centennial Professor of
Law, Brooklyn Law School

II. STATES AND CITIES AS ADVOCATES FOR THE PUBLIC INTEREST

The Progressive City39

Richard C. Schragger

Professor of Law, Class of 1948 Professor in Scholarly Research in
Law, University of Virginia School of Law

<i>San Francisco and the Rising Culture of Engagement in Local Public Law Offices</i>	51
Kathleen S. Morris	
Visiting Assistant Professor, Rutgers School of Law—Camden (2009 – 2010); Founding Executive Director, San Francisco City Attorney’s Affirmative Litigation Task Force	

<i>Local Leadership and National Issues</i>	67
Richard Briffault	
Joseph P. Chamberlain Professor of Legislation, Columbia Law School	

III. COORDINATION, BOTH VERTICAL AND HORIZONTAL

<i>New Federalism(s): Translocal Organizations of Government Actors (TOGAs) Reshaping Boundaries, Policies, and Laws</i>	83
Judith Resnik	
Arthur Liman Professor of Law, Yale Law School	

<i>Congressional Authority and Constitutional Default Rules in the Horizontal Federalism Context</i>	101
Gillian E. Metzger	
Professor of Law, Columbia Law School	

<i>States Rule! or, States’ Rules</i>	115
Robert Hermann	
Partner, DelBello Donnellan Weingarten Wise & Wiederkehr, LLP	

IV. DEFINING THE PUBLIC INTEREST: THE ROLE AND NETWORKS OF STATE COURTS

<i>What Are the Locals Up To? A Connecticut Snapshot</i>	129
Ellen Ash Peters	
Former Chief Justice, Connecticut Supreme Court	

<i>State Supreme Courts as Places for Litigating New Questions</i> ...	137
Randall T. Shepard	
Chief Justice, Indiana Supreme Court	

<i>State Courts in the Global Marketplace of Ideas</i>	153
Margaret H. Marshall	
Chief Justice, Supreme Judicial Court of Massachusetts	

AFTERWORD: ALTERNATIVE VISIONS OF LOCAL, STATE, AND NATIONAL ACTION..... 167

James E. Tierney	
Director, National State Attorneys General Program, Columbia Law School	

APPENDICES: *LIMAN AT THE LOCAL LEVEL*, MARCH 6–7, 2008, YALE LAW SCHOOL

<i>Colloquium Program</i>	173
<i>Colloquium Participants</i>	177

Editorial Board

Kathleen Claussen & Adam Grogg, Class of 2010, Yale Law School
 Rachel Deutsch & Ethan Frechette, Class of 2009, Columbia Law School

About the Contributors

Richard Briffault is Joseph P. Chamberlain Professor of Legislation at Columbia Law School. He is the coauthor of *Cases and Materials on State and Local Government Law* (West Pub. 7th ed. 2009).

Kathleen Claussen is a member of the Yale Law School Class of 2010 and of the Arthur Liman Public Interest Program Student Board. She received her B.A. from Indiana University as a Wells Scholar, and her M.A. from Queen's University Belfast as a Mitchell Scholar. At Yale, Kathleen is co-Editor-in-Chief of the *Yale Journal of International Law* and a Coker Fellow.

Norman Dorsen is Frederick I. and Grace A. Stokes Professor of Law, Co-Director of the Arthur Garfield Hays Civil Liberties Program, and Counselor to the President at New York University. He was President of the American Civil Liberties Union from 1976 to 1991.

Risa Goluboff is Professor of Law and History and Caddell & Chapman Research Professor at the University of Virginia. Her scholarship focuses on the history of civil rights, labor, and constitutional law in the 20th century. She is a 2009 recipient of the John Simon Guggenheim Foundation Fellowship in Constitutional Studies and the author of *The Lost Promise of Civil Rights*, which won the Order of the Coif Biennial Book Award for 2010 and the James Willard Hurst Prize for the best work of sociolegal history in 2007 from the Law and Society Association. Professor Goluboff holds degrees from Harvard (A.B.), Yale (J.D.), and Princeton (M.A./Ph.D.), and she clerked for Guido Calabresi of the U.S. Court of Appeals for the Second Circuit and Stephen G. Breyer on the U.S. Supreme Court.

Adam Grogg is a member of the Yale Law School Class of 2010. He received his B.A. from Williams College in 2004 and his M.Phil. from Oxford University, where he was a Marshall Scholar, in 2006. At Yale, Adam is Vice President for Publicity and Outreach of the American Constitution Society, an Editor of the *Yale Journal of Law and the Humanities*, and a member of the Arthur Liman Public Interest Program Student Board.

Susan N. Herman is the President of the American Civil Liberties Union and Centennial Professor of Law at Brooklyn Law School. Her publications include a book on the interplay of federalism and anti-terrorism programs (*Terrorism, Government, and Law: National*

Authority and Local Autonomy in the War of Terror (2008)), *The Right to a Speedy and Public Trial* (2006) (part of a series on the Constitution), sections of other books, and numerous articles in law reviews and non-legal publications on topics relating to the Constitution, the Supreme Court, criminal procedure, and law and literature.

Robert Hermann is a partner at DelBello Donnellan Weingarten Wise & Wiederkehr, LLP, in White Plains, New York, and served from 2007 – 2009 as the Director of the Governor’s Office of Regulatory Reform in New York.

Margaret H. Marshall is Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts. Before her appointment to the bench in 1996, Chief Justice Marshall was Vice President and General Counsel of Harvard University, and prior to that a partner in the Boston law firm of Choate, Hall & Stewart. Chief Justice Marshall is a 1976 graduate of the Yale Law School and a member of the Yale Corporation. She was born and educated in the Republic of South Africa, graduating from the University of Witwatersrand (Johannesburg) in 1966. Chief Justice Marshall came to the United States in 1968.

Gillian Metzger is Professor of Law at Columbia Law School. Her scholarship focuses on the intersection of administrative and constitutional law, with a specialization in federalism and privatization. Her prior articles include: *Administrative Law as the New Federalism*, 57 Duke L.J. 2023 (2008); *Congress, Article IV, and Interstate Relations*, 120 Harv. L. Rev. 1468 (2007); *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873 (2005); and *Privatization As Delegation*, 103 Colum. L. Rev. 1367 (2003).

Kathleen S. Morris was the founding Executive Director of the Affirmative Litigation Task Force at the San Francisco City Attorney’s Office. She also co-founded the San Francisco Affirmative Litigation Project at Yale Law School and was a Visiting Lecturer at Yale in the Spring of 2008. Ms. Morris has taken leave from the City Attorney’s Office to spend the 2009 – 2010 academic year writing and teaching at Rutgers School of Law—Camden, where she is a Visiting Assistant Professor.

Ellen Ash Peters, a graduate of Swarthmore College and the Yale Law School, was a member of the Yale Law School faculty from 1956 to 1978

and a justice of the Connecticut Supreme Court from 1978 to 2000. She was Chief Justice from 1984 – 1996.

Judith Resnik is Arthur Liman Professor of Law at Yale Law School and Founding Director of the Arthur Liman Public Interest Program. Her recent books include *Migrations and Mobilities: Citizenship, Borders, and Gender*, co-edited with Seyla Benhabib (2009), and *Federal Courts Stories*, co-edited with Vicki C. Jackson (2009). Her recent essays include *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, co-authored with Joshua Civin and Joseph Frueh, 50 Ariz. L. Rev. 709 (2008).

Sarah French Russell is an Associate Research Scholar in Law, a Clinical Lecturer in Law, and Director of the Arthur Liman Public Interest Program at Yale Law School. At Yale, she has co-taught clinical courses including Complex Federal Litigation, Prison Legal Services, the Criminal Defense Project, and the Supreme Court Advocacy Project. She joined Yale Law School in 2007 from the Federal Public Defender's Office in New Haven where, as an Assistant Federal Defender, she represented indigent clients in federal court at the trial and appellate levels. Ms. Russell clerked for Chief Judge Michael B. Mukasey in the Southern District of New York and for Judge Chester J. Straub on the Court of Appeals for the Second Circuit. She earned her B.A., magna cum laude, from Yale College and her J.D. from Yale Law School.

Richard C. Schragger is Professor of Law and Class of 1948 Professor in Scholarly Research in Law at the University of Virginia School of Law. His scholarship focuses on the intersection of constitutional law and local government law, federalism, urban policy, and the constitutional and economic status of cities. In 2009 he was the Samuel Rubin Visiting Professor at Columbia Law School.

Randall T. Shepard is Chief Justice of the Indiana Supreme Court. He received his A.B. from Princeton University in 1969, his J.D. from Yale University in 1972, and his LL.M. from the University of Virginia in 1995. He is a former Chair of the Conference of Chief Justices.

James E. Tierney served as the Attorney General of Maine for ten years and is now the Director of the National State Attorneys General Program at Columbia Law School.

Introduction: Action Across the Landscape of Federalism

Kathleen Claussen¹
Adam Grogg²
Sarah French Russell³

On March 6 and 7, 2008, the Arthur Liman Public Interest Program at Yale Law School hosted the Eleventh Annual Liman Public Interest Colloquium, *Liman at the Local Level: Public Interest Advocacy and American Federalism*. Scholars, advocates, students, judges, and government officials explored the role of actors at all levels of governance across the history of public interest advocacy in the United States and transnationally.⁴ This volume widens the conversation and brings the in-person discussions at the Colloquium to a broader audience in print form.

In discussions of constitutional law and public interest advocacy, federalism is often posited as an obstacle. The legacy of the Civil War and of the Second Reconstruction of the 1960s leads some to presume that the federal structure can slow or obstruct progressive reforms. This

¹ Member of the Class of 2010, Yale Law School, and of the Arthur Liman Public Interest Program Student Board.

² Member of the Class of 2010, Yale Law School, and of the Arthur Liman Public Interest Program Student Board.

³ Associate Research Scholar in Law and Clinical Lecturer in Law, Yale Law School; Director, Arthur Liman Public Interest Program.

⁴ The Colloquium began by exploring the roles of state and local government lawyers in furthering the public interest and then looked to the history of local leadership and advocacy. Subsequent panels considered horizontal and vertical federalism, examining coordination across states as well as the pros and cons of national preemption. In other sessions, participants discussed the roles and networks of state courts as compared to federal courts and examined the challenges and opportunities for advocacy organizations working within the federal structure of the United States. Participants included local and state government lawyers, public interest advocates from both national and local offices, and state and federal judges. Also joining the discussion were students, current and former Liman Fellows, and scholars from Yale Law School, Emory University, Columbia Law School, New York University, and the University of Virginia. The Colloquium's program is included at the end of this volume.

volume explores how reconsideration of the history of both civil rights movements and contemporary lawmaking prompts different evaluations of federalism—as an opportunity as well as, sometimes, a barrier.

We begin with a look backward, tracing the history of public interest advocacy through a federalist lens and focusing in particular on the work of the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP). Risa Goluboff, Norman Dorsen, and Susan Herman examine the connections between local and national advocacy. Through exploring conflicts and coordination between local chapters of these organizations, national offices, and advocates focused on particular problems in specific places, Goluboff, Dorsen, and Herman show how the federal structure of the United States affected the shape and content of public interest advocacy.

Goluboff's essay describes the critical role played by individuals bringing cases through organizations like the NAACP or other avenues to the state courts. The civil rights narrative is often told from a national perspective; Goluboff brings into focus state court decisions and legislation before *Brown v. Board of Education*. Courts in states such as California, Connecticut, Delaware, Kansas, and New York ruled in favor of access for African Americans to labor unions, marriage, life insurance, public accommodations, golf courses, and higher education. Moreover, before *Brown*, a number of state legislatures passed anti-discrimination statutes, primarily in the context of employment, and created an administrative apparatus for adjudicating discrimination cases. Thus, by examining the local roots that motivated major shifts in civil rights advocacy and policy, Goluboff documents how conventional depictions of the civil rights movement oversimplify the landscape and fail to do justice to the full range of activists, legislation, and litigation that propelled the movement forward.

Whereas Goluboff situates the individual in local level advocacy, Dorsen and Herman focus on the role of a major national organization that operates largely through local affiliates. Dorsen and Herman describe how the federated structure of the ACLU allows it to coordinate both horizontally (across states) and vertically, with the national office providing “back-up” for state-based affiliates and attempting to set national policies and priorities. Dorsen and Herman note that the ACLU does not have a uniform, national policy on the kinds of federalism questions that themselves routinely surface in litigation, such as those regarding preemption, observing that “federalism-based limits do not have a consistent civil liberties valence.” In other words, one cannot assume acontextually that either national laws or state laws would secure individual rights. The ACLU therefore has avoided broad pronounce-

ments on federalism principles that would embody an *ex ante* preference for state or federal lawmaking. The result is room for experimentation, in a federalist spirit.

The contributions of Richard Briffault, Kathleen Morris, and Richard Schragger shift the focus to the place that cities occupy in the contemporary legal landscape. These authors consider the ways in which state and local actors work together through formal and informal means and the effects of these collaborations on national policy. As Schragger points out, until the New Deal, cities were primary sites for progressive policy innovation. But as the rhetoric of decentralization and local control evolved, champions of labor rights, environmental protection, gender equality, and other progressive causes concentrated more on national-level legislative reform. Schragger argues that this national focus misses opportunities, given that today's urban populations are younger, more racially and ethnically diverse, better educated, and more affluent than their rural counterparts. Thus, Schragger identifies how demographic and economic trends have made cities particularly ripe for innovations in redistributive policies.

As these three essays underscore, vertical federalism and national preemption are legal structures in which the place of the city is negotiated. All three authors question assumptions that local governments are derivative and subordinate and show instead how they are often policy innovators. The question then becomes under what conditions local governments *ought* to be given the full breadth of decision making options. When should local actors intervene to address large-scale social and economic problems and through what forms of action?

Schragger argues that rather than providing a second-best solution to national problems, cities are the primary sites for policy experimentation. His examples include the living wage movement and San Francisco's efforts to provide universal health coverage. Morris likewise asserts that cities, and in particular city attorneys, can cultivate a culture of engagement that will propel the progressive agenda through affirmative civil law enforcement. She describes the development of the San Francisco City Attorney's Affirmative Litigation Task Force and provides examples of how that unit has taken on questions of national importance with local roots, by identifying public policy questions of particular relevance to San Franciscans (including the environment, health care, reproductive rights, banking and credit practices, childhood nutrition, and workers' rights) and working to ensure that laws are adequately enforced in those areas. Briffault is more skeptical of a claim that cities are intrinsically sources of progressive innovation, pointing, for example, to the fact that some cities exercise their local authority to target immigrants, advance sprawl and economic segregation, and con-

tribute to traffic congestion. He concludes that the answer is heavily context-dependent but that, historically, local innovation has often come from the apathy or indifference of other governmental levels.

Theories of the functions and contributions of vertical federalism extend across states and beyond the national borders, often “domesticating” policies or laws sometimes posited as “foreign.” Judith Resnik offers a different cut by arguing the need to recognize “new federalism(s)” in the efforts of localities, states, and translocal organizations of government actors (“TOGAs”) to debate and adopt laws and advocacy positions based in sources both local and global. Resnik surveys examples ranging from toxic toys to human rights to climate change in arguing that essentialist notions of the “truly local” and the “truly national” ought to give way to more flexible and permeable understandings of lawmaking, migrating and seeping across borders. A reconfiguration of the legal landscape that incorporates the diverse roles of states and localities requires understanding that federalism in the United States should be understood in the plural, for it has no singular form.

Gillian Metzger draws our attention to the sometimes overlooked but vital horizontal dimension of federalism concerned with state-to-state relations, in contrast to the vertical dimension’s concern with state-federal relations. Metzger argues that horizontal federalism’s popularity is “on the rise” as a result of both increased interest in interstate cooperation’s potential and the failure of the federal government to adequately address a range of core public concerns, such as global warming. Arguing from constitutional text and structure and in the context of expanding federal regulation, Metzger observes that horizontal and vertical federalism are closely intertwined. She concludes that while Congress has significant power to authorize interstate discrimination in the face of judicially enforceable default rules that prohibit it, states also have broad leeway to cooperate horizontally to tackle pressing law and policy questions.

Robert Hermann points to another under-analyzed aspect of federalism: the rules and regulations that state agencies promulgate. Predicting that states’ rule-making authority is likely to increase in the coming years, thanks to a growing realization (in courts and legislatures) that national preemption does not always serve national interests, Hermann encourages public interest advocates to develop an understanding of the power and limitations of state regulations and a practice of appropriately using them to implement progressive agendas in housing, the environment, access to courts, and other fields.

Three state court leaders, Chief Justices Margaret H. Marshall, Ellen Ash Peters, and Randall T. Shepard, address head-on a thread that runs

throughout the volume: the use of state courts by public interest advocates to give new meaning to rights. The justices explore what makes state courts different from their federal counterparts and how those structural distinctions can provide significant opportunities to advance public interest agendas.

As the justices note, state constitutions are often more detailed than the federal Constitution and include a wider range of rights. Furthermore, state court judges preside over a wider range of cases than do federal judges as they handle vastly greater volumes of litigation. (The state courts hear some 25-40 million disputes a year, while the federal courts hear about 350,000 civil and criminal cases and another million-plus bankruptcy petitions.)

Given this breadth of state law interaction with activities ranging from the personal to the commercial, the Honorable Margaret Marshall, Chief Justice of the Supreme Judicial Court of Massachusetts, describes how state courts are specially positioned to respond to emerging issues of rights. Moving south to Connecticut, the Honorable Ellen Ash Peters, former Chief Justice of that state's Supreme Court, discusses the common-law tradition of state courts, the ways in which state courts are considerably more focused on facts than are federal courts, the practical impact of their judgments, and how embedded state judges are in many aspects of the functions of state government. The Honorable Randall Shepard, Chief Justice of the Supreme Court of Indiana, traces the renaissance of state constitutional jurisprudence that took place in the late 1970s and 1980s and that has brought state constitutional activity more prominently into the public discourse. He illustrates how the state judiciaries have contributed, often before their federal counterparts, to the development of constitutional rights in areas ranging from slavery and same-sex marriage. As the justices detail how state courts approach novel issues of rights, in what ways state courts have distinct roles from federal courts, and how young lawyers are (or are not) educated in the jurisprudence of the state courts, they emphasize their view that federalism can function to secure "greater liberty" for Americans.

The pieces that comprise this volume—which come from government lawyers, members of the judiciary, advocates, and scholars—share the perspective that states and localities are important sources of law, practices, and advocacy. We hope that this collection of essays helps to underscore the roles that have been played—and could be played—as well as the potential collaborations across governments and public interest initiatives.

We conclude with a note about this publication, which is itself another form of inter-jurisdictional collaboration. This monograph is a joint effort between the Arthur Liman Public Interest Program at Yale Law School and the National State Attorneys General Program at Columbia Law School. The Liman Program, founded in 1997 to honor Arthur Liman,⁵ supports the work of law students, law school graduates, and undergraduate and graduate students from six universities, all of whom work to respond to problems of inequality and to improve access to justice. The Program funds year-long public interest fellowships for Yale Law School graduates and summer social justice law fellowships for undergraduate and graduate students from six universities. Yale Law students assist Fellows in their work and participate in the Liman Public Interest Workshop, a weekly seminar held at the Law School. Every year, the Program also organizes the Liman Colloquium, which brings together advocates, scholars, and students from across the country for a day-long discussion about emerging issues of theory and advocacy. More information about the Liman Program is available at <http://www.law.yale.edu/liman>.

The National State Attorneys General Program at Columbia Law School is a legal research, education, and policy center that examines the implications of the jurisprudence of state attorneys general. Working closely with attorneys general and their staff, students, academics, and other members of the legal community, the Program is active in the development and dissemination of legal information that state prosecutors are able to use in carrying out their civil and criminal responsibilities. The Program's website is: http://www.law.columbia.edu/center_program/ag.

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⁵ A nationally known and highly respected attorney in private practice, Arthur Liman also served in a wide range of public service positions. He was chief counsel to the New York State Special Commission on Attica Prison; President of the Legal Aid Society of New York and of the Neighborhood Defender Services of Harlem; Chair of the Legal Action Center in New York City; Chair of the New York State Capital Defender's Office; and Special Counsel to the United States Senate Committee Investigating Secret Military Assistance to Iran and the Nicaraguan Opposition.

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I. THE ROLE OF LOCAL LEADERSHIP: REVISING THE HISTORY AND UNDERSTANDING THE PRESENT

Civil Rights History Before, and Beyond, *Brown*

Risa Goluboff*

The legal history of civil rights is one of the best known stories in constitutional law. It generally goes something like this: A group of lawyers in the National Association for the Advancement of Colored People (NAACP) spent decades engineering a challenge to segregation in public primary and secondary education. In 1954, in *Brown v. Board of Education*, the United States Supreme Court declared such segregation unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. That victory ushered in a new era of constitutional protection for civil rights.

That (oversimplified) story is fine so far as it goes. But it only goes so far. Even in its more sophisticated versions, the narrowness of the conventional civil rights story leaves the impression that civil rights advocacy—and perhaps, by extension, public interest advocacy generally—is pursued by national public interest organizations in the single national venue of the United States Supreme Court.¹ Consider just how narrow that story is. First, it focuses on a single organization: the NAACP. Even more specifically, it takes as its main actor a single part of that organization: the legal department. Second, it emphasizes a single litigation strategy of the NAACP: the quest to end school segregation. Third, the conventional history centers on a single, national institutional venue: the Supreme Court of the United States. Fourth, it is tied to a single constitutional provision: the Equal Protection Clause of the Fourteenth

* Professor of Law and History and Caddell & Chapman Research Professor, University of Virginia School of Law. Thanks to Rich Schragger as well as Judith Resnik, Kathleen Claussen, and the rest of the folks who made the Liman conference and this volume possible.

¹ See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1977); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950* (1987). For similar Supreme Court-focused but more critical depictions of the story, see, for example, DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); and GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

Amendment. And finally, it depicts the use of that doctrinal approach in a single arena: education.

The narrowness of that scope barely begins to do justice to the rich history of how advocates of all stripes have struggled for racial equality in this country. Outside the legal academy, scholars have documented the wide variety of actors, communities, organizations, institutions, venues, issues, agendas, and goals that have comprised what has come to be called “the long civil rights movement.”² These histories of civil rights begin not with the single event of *Brown*, but with a whole range of activists, protests, legislation, and litigation from across the many “locals” that make up this nation. These histories reveal the diversity of approaches in the struggle for civil rights.

Sadly for the flowering of public interest advocacy, much of that history has failed to permeate constitutional law books, legal histories, or the legal imagination. In the law, for the most part, *Brown* continues to reign. Recently, legal scholars have begun to de-center *Brown*, and what they have found is that the same diversity of approaches to the African American freedom struggle that characterized its non-legal aspects characterized the legal aspects as well.³ Looking beyond the narrow confines of the conventional legal history reveals a plethora of efforts for creating social change through legal means. Looking beyond *Brown* creates new possibilities for social change efforts today by providing alternative models from the past.⁴

Stepping away from the conventional story only slightly, for example, it becomes apparent that *Brown* and its companion cases comprise only one of many examples of the Supreme Court protecting civil rights in the 1940s and 1950s. The Supreme Court’s cases vindicating black civil rights concerned various aspects of economic, social, and political

² Jacquelyn Dowd Hall, *The Long Civil Rights Movement and the Political Uses of the Past*, 91 J. AM. HIST. 1233, 1235 (2005).

³ See, e.g., TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: COURTS AND COMMUNITIES IN THE CIVIL RIGHTS MOVEMENTS (forthcoming 2010); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

⁴ Though this essay explores civil rights beyond *Brown* in many ways, it does not go beyond the African American freedom struggle. There is an increasingly rich legal literature on the civil rights struggles of many other groups that is unfortunately beyond the scope of this essay. See, e.g., MARK BRILLIANT, COLOR LINES: CIVIL RIGHTS STRUGGLES ON AMERICA’S “RACIAL FRONTIER,” 1945-1975 (2002).

life in Jim Crow America: peonage,⁵ union discrimination,⁶ police brutality,⁷ voting rights,⁸ residential segregation,⁹ and interstate transportation,¹⁰ in addition to education¹¹ at all levels. And they involved a variety of constitutional and statutory provisions: the Thirteenth Amendment, the Due Process Clause of the Fifth Amendment, the Peonage Act of 1867, the Civil Rights Act of 1866, the Interstate Commerce Act of 1887, and the Railway Labor Act of 1926, in addition to the Equal Protection Clause of the Fourteenth Amendment.¹² The single-minded, *Brown*-driven focus of the conventional story overlooks these other aspects of civil rights claims, other constitutional and statutory bases for civil rights, and other possibilities for civil rights advocacy today.

Beyond the Supreme Court, state courts often provided hospitable targets for lawyers seeking to create and protect civil rights. Indeed, a number of state courts were well ahead of the Supreme Court in dismantling at least parts of Jim Crow. The California Supreme Court was probably the most protective of civil rights in the years before *Brown*. During and just after World War II, the court went some way toward protecting black workers' ability to find work and join previously segre-

⁵ See *Pollock v. Williams*, 322 U.S. 4, 25 (1944); *United States v. Gaskin*, 320 U.S. 527, 529 (1944); *Taylor v. Georgia*, 315 U.S. 25, 31 (1942).

⁶ See *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202–204, 208 (1944); *Tunstall v. Bhd. of Locomotive Firemen*, 323 U.S. 210, 213–214 (1944).

⁷ See *Screws v. United States*, 325 U.S. 91, 101–102, 107–113 (1945).

⁸ See *Smith v. Allwright*, 321 U.S. 649, 663–666 (1944).

⁹ See *Barrows v. Jackson*, 346 U.S. 249, 260 (1953); *Shelley v. Kraemer*, 334 U.S. 1, 18–21, 23 (1948).

¹⁰ See *Henderson v. United States*, 339 U.S. 816, 824–26 (1950); *Morgan v. Virginia*, 328 U.S. 373, 385–86 (1946); *Mitchell v. United States*, 313 U.S. 80, 97 (1941).

¹¹ See *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641–42 (1950); *Sweatt v. Painter*, 339 U.S. 629, 633–36 (1950); *Sipuel v. Bd. of Regents*, 332 U.S. 631, 632–33 (1948).

¹² See also *Railway Labor Act*, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151–188 (2000 & Supp. II 2002)); *Interstate Commerce Act* of 1887, ch. 104, 24 Stat. 379 (codified as amended in scattered sections of 49 U.S.C. (2000 & Supp. II 2002)); *Peonage Act* of 1867, ch. 187, § 1, 14 Stat. 546 (codified as amended at 42 U.S.C. § 1994 (2006)); *Civil Rights Act* of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1981 (2006)).

gated and discriminatory unions.¹³ In 1948, almost twenty years before the United States Supreme Court would do so in *Loving v. Virginia*, the California Supreme Court struck down that state's antimiscegenation law.¹⁴ Though California was perhaps the most active, it was not alone in taking steps to protect civil rights, often long before the Supreme Court's decision in *Brown*. Several other state courts vindicated African American claims for access to unions, life insurance, public accommodations, golf courses, and higher education.¹⁵ The narrow focus on the U.S. Supreme Court thus obscures the importance of state courts in civil rights advocacy in the past and hence leads today's advocates to overlook the potential in these other legal venues.

Moving even further beyond *Brown* institutionally reveals, in fact, the limitations of the court-centeredness of the traditional narrative. Civil rights advocates knew that courts were not the only institutional battleground for challenging the various mechanisms that maintained racial inequality. A number of state legislatures in northern states, for example, passed antidiscrimination statutes of various kinds in the decade before *Brown*. In 1945, New York passed the Ives-Quinn Act, which prohibited discrimination in employment and created an administrative apparatus for adjudicating discrimination cases.¹⁶ Numerous states and localities followed suit in the years that followed.¹⁷ In the decade before

¹³ *Williams v. Int'l Bhd. of Boilermakers*, 165 P.2d 903, 905 (Cal. 1946); *James v. Marinship Corp.*, 155 P.2d 329 (Cal. 1944).

¹⁴ *Perez v. Lippold*, 198 P.2d 17 (Cal. 1948).

¹⁵ *See, e.g.*, *Int'l Bhd. of Elec. Workers Local 35 v. Comm'n on Civil Rights*, 102 A.2d 366 (Conn. 1953) (unions); *Parker v. Univ. of Del.*, 75 A.2d 225 (Del. Ch. 1950) (higher education); *Betts v. Easley*, 169 P.2d 831, 838 (Kan. 1946) (unions); *Odom v. East Ave. Corp.*, 34 N.Y.S.2d 312 (Sup. Ct. 1942) (public accommodations); *Gillespie v. Lake Shore Golf Club*, 91 N.E.2d 290 (Ohio App. 1950) (golf course); *Lange v. Rancher*, 56 N.W.2d 542 (Wis. 1953) (life insurance).

¹⁶ N.Y. CIV. RIGHTS LAW § 43 (McKinney 2005) (original version enacted in 1940 and amended in 1945).

¹⁷ *See, e.g.*, 1945 N.J. Laws, ch. 169; N.J. STAT. ANN. § 18:25-1 (West Supp. 1946); 1945 Ind. Acts ch. 325; IND. CODE ANN. § 40-2301 (LexisNexis Supp. 1945); 1945 Wis. Sess. Laws, ch. 490; 1946 MASS. GEN. LAWS, ch. 368; MASS. ANN. LAWS ch. 6, § 56 (LexisNexis Supp. 1946). *See generally* ANTHONY S. CHEN, *THE FIFTH FREEDOM: JOBS, POLITICS, AND CIVIL RIGHTS IN THE UNITED STATES, 1941-1972* (2009); Anthony S. Chen, *The Party Of Lincoln and the Politics of State Fair Employment Practices Legislation in the North, 1945-1964*, 112 AM. J. SOC. 1713 (2007); Alex Elson & Leonard Schanfield, *Local Regulation of Discriminatory Employment Practices*, 56 YALE L.J. 431

Brown, fair employment and other civil rights laws could be found across much of the North, Midwest, and West—from New Mexico to Rhode Island, from Duluth, Minnesota to Surfside, Florida.¹⁸

The passage of these laws suggests three lessons for today's advocates. First, these laws show how state-level advocacy can succeed in protecting civil rights even where national efforts may fail. At the same time these states were passing their fair employment and other civil rights laws, civil rights proponents in the United States Congress were stymied from doing the same by the power of southern congressmen and senators. Second, such legislation shows how education—on which the NAACP focused in *Brown*—was only one of many pressing issues for African Americans in the 1940s and 1950s. Labor and economic rights were particularly salient, and many of these state and local laws made special interventions into segregated, segmented, and discriminatory labor markets. Finally, these laws created administrative agencies that served, and can still serve, as alternatives to the judicial model of civil rights protection.

Outside the North and West, in the belly of the Jim Crow beast, even the southern states offer examples of civil rights advocacy beyond *Brown*. Prior to 1954, moderates across the South were moving slowly toward desegregation. Frequently in negotiation with local elite African Americans (often themselves alienated from the NAACP), white moderates began to take baby steps toward ending certain kinds of segregation and discrimination in the postwar era.¹⁹ In this context, *Brown* had the effect of radicalizing southern politics, forcing moderate whites to choose sides. Unsurprisingly, most chose the vigorous defense of segregation over the political suicide of civil rights protection.²⁰ Exploring the state-level politics of civil rights and desegregation thus sheds new light

(1947); David Engstrom, *The Lost Origins of American Fair Employment Law: State Fair Employment Practices Bureaus and the Politics of Regulatory Design, 1943-1964* (2005) (unpublished Ph.D. dissertation, Yale University). There are numerous state cases vindicating these statutory rights. *See, e.g.*, *Denny v. Dorr*, 78 N.E.2d 114 (Ill. App. Ct. 1948); *State v. Katz* 40 N.W.2d 41 (Iowa 1949); *People v. Bob-Lo Excursion Co.*, 27 N.W.2d 139 (Mich. 1947).

¹⁸ AMERICAN JEWISH CONGRESS & NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *CIVIL RIGHTS IN THE UNITED STATES IN 1951: A BALANCE SHEET OF GROUP RELATIONS* (1951); AMERICAN JEWISH CONGRESS & NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *CIVIL RIGHTS IN THE UNITED STATES, 1953: A BALANCE SHEET OF GROUP RELATIONS* (1954).

¹⁹ *See, e.g.*, BROWN-NAGIN, *supra* note 3.

²⁰ KLARMAN, *supra* note 1.

on the question of the Court's role in social change, particularly as to whether *Brown* hastened or slowed the end of segregation.²¹

Looking beyond the centralized narrative of *Brown* requires not only exploring alternative governmental sites of contestation, but also actors other than the NAACP's lawyers. The focus on Thurgood Marshall and the lawyers with whom he worked at the NAACP obscures the work of so many other groups and individuals. The National Urban League, the Congress of Racial Equality, the United States Department of Justice (DOJ), the American Civil Liberties Union, the National Lawyers' Guild, and a number of labor organizations all worked toward civil rights change on both a national level and through local chapters, affiliates, and offices. Beyond these national organizations, civil rights activists formed hundreds of purely local and issue-specific organizations across the country. Whether it was the San Francisco Committee Against Discrimination and Segregation, organized to challenge segregation in the Bay Area shipyards during World War II, or the United Defense League, which organized the Baton Rouge bus boycott of 1953, civil rights advocates at the local level continuously organized to fight segregation, discrimination, and inequality.

These other lawyers and organizations differed from the NAACP in constituency, goals, tactics, resources, and doctrinal arguments. In the Civil Rights Section of the DOJ, for example, the claims of southern African American farmworkers took central stage. The lawyers of the Section used the Thirteenth Amendment's prohibition against involuntary servitude as a way of redressing the labor-based and economic claims of some of the poorest workers in the poorest region.²² Following a different path, pragmatic black lawyers in pre-*Brown* Atlanta sought to maintain the kind of economic self-sufficiency that African American elites had managed to enjoy under Jim Crow, to expand the political influence of African Americans, and to preserve black personal autonomy.²³ Each organization, in each community, offers up a different mix of advocacy styles and advocacy lessons.

Moreover, the narrowness of the *Brown* story simplifies and obfuscates much of the rich variety of advocacy within the NAACP itself. The legal department was located in New York City, but the organization

²¹ Legal scholars have explored this question of *Brown*'s impact on social change more than they have engaged most of the other issues discussed here. *See, e.g.,* BELL, *supra* note 1; KLARMAN, *supra* note 1; ROSENBERG, *supra* note 1.

²² *See* GOLUBOFF, *supra* note 3.

²³ BROWN-NAGIN, *supra* note 3.

maintained branches across the nation. The activities of the NAACP branches varied in every conceivable way, which at times brought the branches into some conflict with the national organization.²⁴ Such variance in civil rights vision also appeared in conflicts between the legal department and other departments within the NAACP's national office. Walter White, the executive director of the NAACP, and Thurgood Marshall debated the relationship between the legal department's activities and those of the rest of the organization. In particular, Marshall and his lawyers wrangled with others in the association over which issues would be "legal" for lawyers to litigate and which "political" for lobbyists in the Washington D.C. office to promote.²⁵ Eventually, conflicts over this question would lead to a more formal, institutional division between NAACP lawyers and other staff of the organization shortly after *Brown* itself. Those conflicts suggest the need for both cooperation and a division of labor among civil rights advocates—they suggest that recognition of difference as well as commonality can go a long way toward creating social change tailored to particular times, places, and needs.

Finally, the conventional *Brown*-focused story overlooks one of the most important groups of actors in the creation of social change: the clients or would-be clients who pressed civil rights claims on the lawyers to begin with. What lawyers imagined the interests of their constituency to be and what the constituents themselves imagined their interests to be were not always the same. The socioeconomic distance between NAACP lawyers and other African Americans before *Brown* exacerbated structural divisions between lawyers and clients. It was not just that NAACP lawyers had better educations and greater legal knowledge. The NAACP lawyers also had a uniquely middle-class perspective on Jim Crow. They encountered it largely in exclusion from hotels, transportation, restaurants, and bar associations. Many other African Americans experienced Jim Crow, however, not only as a legal racial regime, but as a formal and informal economic regime. They felt it in their inability to get jobs, or at least good jobs, in their inability to exercise mobility and autonomy.

²⁴ See, e.g., MARTHA BIONDI, *TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY* (2003); JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994); GLENN T. ESKEW, *BUT FOR BIRMINGHAM: THE LOCAL AND NATIONAL MOVEMENTS IN THE CIVIL RIGHTS STRUGGLE* (1997); ADAM FAIRCLOUGH, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA, 1915-1972* (1995); CHARLES M. PAYNE, *I'VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* (1996); BARBARA RANSBY, *ELLA BAKER & THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION* (2003).

²⁵ See GOLUBOFF, *supra* note 3.

They understood Jim Crow as a system that subordinated them racially and exploited them economically, and they urged the lawyers they contacted to challenge Jim Crow in all of these many guises.

Indeed, lawyers responded to these pleas in the decade before *Brown*. Prior to *Brown*, the material inequalities of Jim Crow—especially within the labor market and the economy—had been central to civil rights advocacy. Outside of the NAACP, the Department of Justice emphasized the claims of agricultural and domestic workers. State legislative efforts emphasized fair employment practice laws. State courts, as well as the Supreme Court, provided protections for African American workers. In the NAACP itself, lawyers were interested in labor as well as education issues. They took cases pursuing economic advancement within Jim Crow as well as those intended to end segregation outright. They challenged private and state supported segregation and discrimination as well as state mandated inequality. They used due process-based right to work as well as equal protection-based desegregation arguments on the basis of the Fourteenth Amendment.

Ultimately, the NAACP focused its litigation strategy on the story we know: the challenge to segregated public education. In doing so, it filtered out some claims and pushed for others. The choices the NAACP lawyers made were good ones from the standpoint of their success in *Brown*. But their very success, and the stories we keep repeating about it, has erased so many other stories. It has not only erased the stories of civil rights before *Brown*, but it has shaped the stories we have told in its aftermath. We tend to ask, “If we succeeded in *Brown*, why has more not changed?” If *Brown* dismantled Jim Crow and led to civil rights success, then we need to account for the vast racial inequalities that remain by looking outside the law. If, however, Jim Crow was a many-headed hydra only some of *Brown* destroyed, then the civil rights story is not nearly so pessimistic. Some of the many attacks law launched against Jim Crow succeeded, some failed, and some were never pushed far enough by those with resources to know what their fortunes would have been. To the extent that remaining race-related economic inequality results from a failure to challenge the economic aspects of Jim Crow, civil rights advocacy today may be able to redress such harms.

It thus distorts the whole picture of Jim Crow and civil rights to assume that what the NAACP did in *Brown* was all that was happening in civil rights advocacy before *Brown*. Widening the lens of legal and constitutional history to include civil rights advocacy among state courts and legislatures, lay people, other lawyers, other organizations, and even other actors within NAACP before 1950 reveals alternative conceptions of civil rights. The inclusion of the many locals in the national narrative

opens up the future of civil rights advocacy and constitutional understandings by revealing the diversity of their past.

American Federalism and the American Civil Liberties Union

Norman Dorsen and Susan N. Herman***

The United States federalist system has a national government with defined and limited powers and fifty state governments with broad powers of their own, plus the District of Columbia and territories. Inevitably, these powers sometimes overlap or conflict. For more than two centuries, the challenge of federalism has been to develop mechanisms for distributing powers and responsibilities in an optimal manner.

The American Civil Liberties Union (ACLU), founded in January 1920, has a similar structure—a national organization (“National”) with fifty-one affiliates (“affiliates”) and a few nationally-run chapters¹—and has faced a similar set of issues.

If there were no national organization of the ACLU, each state civil liberties organization would presumably be free to litigate any issue that arose within its borders, subject only to self-restraint. Indeed, even though there has been a national ACLU from the beginning, a majority of lawsuits and legislative initiatives have been brought by the ACLU’s local affiliates. But for several reasons, allocating these responsibilities entirely to the affiliates could not work. The ACLU, like the United States, needs a national superstructure. In the first place, many civil liberties issues arise under statutes of the United States that apply throughout the country. Obviously, a single affiliate could bring an action challenging or supporting a federal statute. But which state? Should there be a dash to the courtroom to see who gets there first? Or should the affiliate with the best lawyer or most experience with an issue take the ball? Who would referee if several affiliates were interested and had competent lawyers?

* Stokes Professor of Law, and Co-Director, Arthur Garfield Hays Civil Liberties Program, New York University Law School; former President, American Civil Liberties Union.

** Centennial Professor of Law, Brooklyn Law School; President, ACLU, 2008 – present; former constitutional law student of Norman Dorsen.

¹ The ACLU generally has one affiliate per state, as well as in the “National Capital Area” (District of Columbia). Some states (California, Missouri, and Pennsylvania) have more than one affiliate; other states (North Dakota, South Dakota, and Wyoming) or territories (Puerto Rico) have ACLU chapters run by National.

Federal constitutional issues also demand coordination. The ACLU has initiated cases challenging the constitutionality of thousands of government actions, including restrictions on abortion, discrimination against racial and other minorities, and restrictive welfare or employment practices. Affiliate lawyers from many states could bring a lawsuit on these issues. But the question would arise, again, as to which affiliate would take precedence and how that would be decided.²

Looking back to the founding of the United States, we know that the colonies first decided to establish a weak national government under the Articles of Confederation, and then a stronger one under the Constitution. The ACLU's history is different. The national organization came first, and it created state affiliates over the ensuing decades, initially rather slowly—although from the beginning many local civil liberties “committees” were active—and more rapidly in the 1960s and 1970s.³

The ACLU's structure raises two broad questions related to federalism: First, in the work of defending and advancing civil liberties in the United States, what are appropriate roles for the national and local organizations? Second, what is the appropriate allocation of decision-making about key issues such as a) litigation and other programs, b) distribution of money, and c) representation in governance?

These questions are of considerable moment because of the ACLU's primacy in protecting Americans' civil liberties. There are hundreds of other fine organizations doing similar work, but most of them are smaller, focus on only one or a few issues, and have fewer resources. Additionally, the fact that the ACLU is a membership organization with an affiliate structure enhances its effectiveness on a national scale. How the ACLU fares affects the rights of everyone who lives in this country.

I. Enforcing Rights

What are the “civil liberties” the ACLU defends? Almost everyone has a sense, intellectual or visceral or both, that liberties include rights to speech and religion, to fair procedures if charged with a crime, to a right of privacy, a right to property, and to non-discriminatory treatment, at least by the government. But how broad are these protections?

² The same coordination issues can arise when the ACLU raises a constitutional claim on behalf of a defendant, as in *Gideon v. Wainwright*, 372 U.S. 335 (1963), or *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ Analogously, state affiliates have created their own subdivisions—chapters in cities or regions of their states to address local matters—with limited authority.

What is “privacy” or “property,” and what limits are there on “free speech?” What other civil liberties are there and how are they identified? Unless the ACLU has a systematic and credible approach to defining its agenda, the public as well as the courts would lose confidence in the organization.

At the ACLU, the National and affiliate boards of directors make careful determinations about how to define “civil liberties” as a predicate to staff action. While the ACLU consists of clearly defined National and affiliate offices, the ACLU’s civil liberties work cannot be neatly divided into national and local spheres. National lawyers initiate challenges to federal statutes and lobby Congress and federal agencies. Local issues often implicate the federal government, and thus affiliates will also be affected and will lobby their own members of Congress. And because people interact more frequently with local governmental actors, such as school and law enforcement officials, ACLU affiliates handle a large majority of civil liberties matters—including those of great federal constitutional significance. For example, the ACLU of Pennsylvania successfully argued that a program of teaching creationism in Dover, Pennsylvania, public schools was unconstitutional, establishing a precedent that other jurisdictions can follow.⁴ The ACLU affiliate in Southern California sued the state for failing to provide California public school students with the basic necessities of an education, raising arguments under the state constitution as well as under federal law.⁵

In many such cases National plays a back-up role, often deploying lawyers situated in National ACLU “projects” that have been created over the years in many areas such as reproductive freedom, national security, race discrimination, and sex discrimination.⁶ Project lawyers assist the affiliates in challenging state as well as federal laws and actions.

⁴ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005); see ACLU, *Kitzmiller et al v. Dover Area School District*, <http://www.aclupa.org/legal/legaldocket/intelligentdesigncase/> (last visited Mar. 25, 2009).

⁵ See First Amended Complaint for Injunctive and Declaratory Relief, *Williams v. California*, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), available at <http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf>. See generally *Decent Schools for California: Williams v. State of California*, <http://www.decentschools.org/> (last visited Mar. 25, 2009).

⁶ State affiliates create projects, too. For example, the ACLU of Michigan created a Lesbian Gay Bisexual Transgender Project to defend LGBT people against discrimination in Michigan custody cases, and in its schools. See ACLU, *Lesbian Gay Bisexual & Transgender Project of the ACLU of Michigan*, <http://www.aclumich.org/courts/lgbt-project> (last visited Mar. 25, 2009).

Thus, a successful challenge to an anti-immigrant ordinance in Hazleton, Pennsylvania, was a collaboration between the Pennsylvania affiliate and the National Immigrants' Rights Project.⁷ The Capital Punishment Project provides attorneys to litigate capital cases, as evidenced by a recent reversal of a death sentence in a Tennessee state appeals court.⁸ The National Prison Project also frequently collaborates with affiliates attacking the constitutionality of state prison conditions.⁹ And the National legal department regularly works with affiliate lawyers to prepare appellate briefs when affiliate cases are appealed to the U.S. courts of appeals or the Supreme Court.¹⁰ Collaboration runs in both directions. While the affiliates get back-up, National looks to affiliates to identify local issues that are of national importance or that will probably arise in more than one state. National's Women's Rights Project, for example, has challenged sex-segregated schools in Georgia, Kentucky, and Louisiana, with the collaboration of the affiliates involved.¹¹

Collaboration is also horizontal. A success in one state can inspire action elsewhere, in the form of follow-up litigation or lobbying. After the successful litigation against Hazleton's anti-immigrant ordinance, for example, an ACLU affiliate in San Diego joined with the other two California affiliates and other organizations to persuade California to prohibit local anti-immigration ordinances as a matter of state statutory law.¹²

⁷ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

⁸ *Tennessee v. Taylor*, No. M2005-01941-CCA-R3-DD, 2008 Tenn. Crim. App. LEXIS 200 (Tenn. Crim. App. Mar. 7, 2008); *see also* ACLU, *State of Tennessee v. Taylor*, <http://www.aclu.org/capital/mentalillness/30356res20070717.html> (last visited Mar. 25, 2009).

⁹ *See, e.g., Graves v. Arpaio*, No. CV-77-0479-PHX-NVW, 2008 U.S. Dist. LEXIS 85935 (D. Ariz. Oct. 22, 2008); *see also* Press Release, ACLU, *ACLU In Court Today Challenging Conditions At Maricopa County Jail* (Aug. 12, 2008), *available at* <http://www.aclu.org/prison/conditions/36387prs20080812.html>.

¹⁰ Lead counsel in an ACLU Supreme Court case sometimes will be from the affiliate where the case arose and sometimes from the National legal department or a National project.

¹¹ *See* ACLU, *Sex Segregated Schools: Separate and Unequal*, <http://www.aclu.org/womensrights/edu/30129res20070614.html> (last visited Mar. 25, 2009).

¹² *Assem. 976, 2007–2008 Leg., Reg. Sess. (Cal. 2007)* (codified at CAL. GOV'T CODE § 12955 (Deering 2008)); *see also* Press Release, ACLU, *California First State to Prohibit Anti-Immigrant Ordinances* (Oct. 11, 2007), *avail-*

Because of its federalist structure, the ACLU simultaneously enjoys the advantages of local expertise and the ability to coordinate and sequence challenges around the country. And because of its collaborative model, the ACLU does not have to define the “local” and the “national” as separate categories of cases. Local cases have connotations for other jurisdictions, and national cases have local consequences. This does not mean that there are never jurisdictional issues. Occasionally conflicts arise, as we discuss below. But when it comes to the substantive work of defending civil rights and civil liberties, the ACLU’s cooperative federalism model has proven effective.

In addition to echoing the United States’s federalist structure in its allocation of responsibilities, the ACLU has learned to use that structure advantageously in its work. When the U.S. Supreme Court has rejected a civil liberties claim or is likely to do so, National and affiliates petition state courts and legislatures to provide protection through state law. Thus, in the California case on education adequacy, the ACLU invoked state constitutional law to ensure rights for schoolchildren that would have been difficult and perhaps impossible to obtain under federal law.¹³ And in a notable instance of coordination, after the U.S. Supreme Court decided that it was acceptable for states to fund childbirth but not abortions,¹⁴ National campaigned to support women’s right to choose to terminate a pregnancy through state law and, working with affiliates, was successful in litigation or lobbying efforts in ten states.¹⁵

Using the structures of federalism and its own resources creatively, the ACLU has developed its own “laboratory” approach, in the language of Justice Brandeis’s well-known reference to the “happy” fact that a single state may, if its citizens choose, “try novel social and economic experiments without risk to the rest of the country.”¹⁶ Or invoking James Madison, the ACLU takes advantage of the “dual security” that the U.S. federalist system creates for liberty by encouraging states and

able at <http://www.aclu.org/immigrants/discrim/32203prs20071011.html>.

¹³ See *Decent Schools for California*, *supra* note 5.

¹⁴ *Williams v. Zbaraz*, 448 U.S. 358 (1980).

¹⁵ See ACLU, *The ACLU’s Role in Securing Public Funding for Abortion*, <http://www.aclu.org/reproductiverights/lowincome/26926res20060928.html> (last visited Mar. 25, 2009). The coalition of which the ACLU was a part also succeeded in three additional states.

¹⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

the federal government to enunciate individual rights.¹⁷ Liberty may find an oasis in particular places, as when women in some states can exercise their right to choose to terminate a pregnancy regardless of their income, in spite of the Supreme Court's failure to protect that right. Liberty may also spread from the laboratory of one state to others.

II. Constitutional Federalism

The Tenth Amendment to the U.S. Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁸ This amendment is the cornerstone of state sovereignty and an important basis of judicial claims of authority to invalidate congressional action as inconsistent with the federal structure.

For many decades beginning in the late nineteenth century, the Supreme Court regularly struck down socially progressive statutes, usually enacted by Congress under its Commerce power in Article I of the Constitution, as exceeding that power by infringing state sovereignty. Well-known examples include cases invalidating statutes that regulated child labor, in 1918,¹⁹ and that governed the maximum hours and minimum wages of workers in the coal industry, in 1936.²⁰ In 1937, the New Deal Supreme Court adopted a new Commerce Clause jurisprudence and began overruling its prior decisions.²¹ Then, after a lapse of almost sixty years, the Court resurrected the old approach when it held in 1995 that Congress lacked power to declare a gun-free zone near schools,²² and again in 2000 when it held that Congress lacked power to offer a federal court forum to victims of gender-motivated violence.²³ More recently, and arguably somewhat inconsistently, in 2005 the Supreme Court upheld a federal statute criminalizing the use of locally grown marijuana as

¹⁷ THE FEDERALIST NO. 51 (James Madison). See generally Norman Dorsen, *Separation of Powers and Federalism: Two Doctrines with a Common Goal: Confining Arbitrary Authority*, 41 ALB. L. REV. 53 (1976).

¹⁸ U.S. CONST. amend. X.

¹⁹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

²⁰ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²¹ See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

²² *United States v. Lopez*, 514 U.S. 549 (1995).

²³ *United States v. Morrison*, 529 U.S. 598 (2000).

a valid exercise of the Commerce power and as trumping California's law permitting the use of marijuana for medicinal purposes.²⁴

The ACLU did not take a position on the federalism issues in these cases because there were perceived civil liberties risks in championing any general theory of federalism-based limits on Congress's powers. For example, if the ACLU were to argue that Congress has adequate power to enact gun control legislation, it might then be difficult for the organization to maintain, despite differences in the constitutionally relevant facts, that Congress cannot preempt California's medical marijuana law or ban particular methods of performing abortions.²⁵ Recognizing that federalism-based limits do not have a consistent civil liberties valence²⁶ permits the ACLU to focus on the rights and liberties that are at issue in a given controversy. Thus, in a case addressing whether the U.S. Attorney General could constitutionally invoke federal drug laws to regulate doctors acting under Oregon's Death with Dignity Act,²⁷ the ACLU brief did not discuss federalism. Rather, the ACLU argued that the Attorney General had exceeded his authority under the Controlled Substances Act,²⁸ a claim ultimately accepted by the Supreme Court.²⁹

A related federalism issue is whether states and localities can resist federal enforcement within their own jurisdictions. The Supreme Court said in the medical marijuana case that since Congress has sufficient Commerce power to prohibit marijuana, federal agents can enter the state to enforce the federal law over state objections. Because in the past the ACLU had vigorously resisted the argument that local segregationists should be empowered to resist federal attempts to end racial segregation or enforce voting rights, arguing against federal authority to enforce drug laws was unattractive even though the result in the marijuana

²⁴ *Gonzales v. Raich*, 545 U.S. 1 (2005).

²⁵ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

²⁶ See Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, in *TERRORISM, GOVERNMENT, AND LAW: NATIONAL AUTHORITY AND LOCAL AUTONOMY IN THE WAR ON TERROR* 48, 61 (Susan N. Herman & Paul Finkelman eds., 2008) (hereinafter Herman & Finkelman).

²⁷ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

²⁸ See Brief of the American Civil Liberties Union and the ACLU of Oregon as Amici Curiae in Support of Respondents, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 04-623), available at http://www.aclu.org/images/asset_upload_file516_21277.pdf.

²⁹ *Gonzales v. Oregon*, 546 U.S. at 274-275.

case would have been consistent with ACLU policies. Here again the ACLU did not present a general theory under the Tenth Amendment.

The Bush Administration's anti-terrorism efforts raised new questions regarding the ACLU's skepticism about states' rights arguments. While the organization supported federal preemption of discriminatory state laws during the civil rights era, the federal government's enforcement activities after 9/11 were, in the view of the ACLU, abusive and contemptuous of civil liberties. In the fall of 2001, for example, the Administration detained hundreds of Muslim men, some of whom had been arrested for minor immigration violations, others of whom were being detained as "material witnesses." The Administration resisted the ACLU's Freedom of Information Act request for information about how many people had been detained and where they were being held, and the ACLU achieved only limited success in challenging that position in court.³⁰ When it then appeared that the federal government had contracted with New Jersey county jails for detention space, the ACLU of New Jersey invoked a local law that required wardens to reveal the identities of those being held.³¹ A state court ordered the warden to comply with the state law.³² While an appeal of this decision was pending, the federal immigration commissioner issued an interim regulation prohibiting such disclosure on the ground that it would compromise national security. An appellate court found that this federal regulation preempted the New Jersey law.³³ The ACLU did not make a general federalism-based claim in favor of the New Jersey law, but rather argued (unsuccessfully) only that the federal regulation was procedurally defective and therefore should not preempt.

The so-called "War on Terror" also led the ACLU to explore political avenues under our federal system as an alternative to judicial challenges or as a response to unfavorable judicial decisions. For instance, when the ACLU found it difficult to litigate problematic surveillance provisions of the Patriot Act and even more difficult to win the few lawsuits that courts would consider, it helped to organize opposition to the Patriot Act at the local level. Over 400 cities, towns, and villages as well as

³⁰ See *Ctr. for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

³¹ See Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail Is It Anyway*, in Herman & Finkelman, *supra* note 26, at 102, 104–05.

³² *Id.* at 122 n.20.

³³ *Id.* at 124 n.35.

eight states adopted resolutions as a result of this campaign.³⁴ The resolutions did not make the radical federalism-based claim that state or local law enforcement officials had the power to resist federal surveillance. Instead, among other things, the resolutions urged each jurisdiction's senators and representatives to reconsider the Patriot Act. The resolutions also declared certain forms of surveillance to be contrary to local understandings of constitutional principles, and urged that legal representation be provided for librarians who were asked for information by federal officials.³⁵ The resolutions did not encourage outright defiance of federal anti-terrorism efforts, or take the position of the eighteenth century Virginia and Kentucky Resolutions that the states should have the final word about what violates the federal Constitution. Instead, they promoted a grassroots challenge to the federal surveillance program by declaring that the localities would not actively collaborate with federal enforcement of its provisions. Arcata, California, went so far as to mandate a fine of \$57 for any Arcata employee who assisted in federal surveillance efforts.³⁶ While states have no authority to resist federal officials entering their territory to enforce federal laws, it is equally clear that under the Tenth Amendment federal authorities may not "commandeer" state or local officials to assist in the enforcement process.³⁷

In another instance of lawful resistance to federal overreaching, the ACLU of Oregon engaged in a successful political campaign against Portland's participation in a joint federal/local anti-terrorism task force. The ACLU argued that Portland's elected officials would be unable to prevent city employees who participated in the task force from violating state law that was more protective of certain associational and privacy rights than federal law. After considerable public discussion, Portland

³⁴ See Bill of Rights Defense Committee, Resolutions Passed, <http://bordc.org/resolutions.php> (last visited Mar. 25, 2009). The resolutions issue from jurisdictions comprising some eighty-five million people. BILL OF RIGHTS DEFENSE COMMITTEE, GRASSROOTS OPPOSITION TO THE USA PATRIOT ACT (2007), available at <http://www.bordc.org/resources/alphalist.pdf>.

³⁵ For a sample resolution, see Bill of Rights Defense Committee, Sample Resolution, <http://www.bordc.org/involved/sample-res.php> (last visited Mar. 26, 2009).

³⁶ See Arcata, Cal., An Ordinance of the City Council of the City of Arcata Amending the Arcata Municipal Code to Defend the Bill of Rights and Civil Liberties, No. 1339 (Apr. 2, 2003) (codified at ARCATA, CAL., CODE §§ 2190–2195 (2009)), available at <http://www.bordc.org/detail.php?id=119>.

³⁷ See *Printz v. United States*, 521 U.S. 898 (1997).

withdrew from the task force.³⁸ Similarly, although it has proved impossible so far to litigate the constitutionality of intrusive surveillance by the National Security Agency,³⁹ the ACLU asked state public utilities commissions to investigate whether telecommunications companies licensed in their states had failed to comply with local law by agreeing to spy on their customers.⁴⁰ In each of these instances, when no branch of the federal government was willing and able to restrain anti-terrorism activities that infringed civil liberties, the ACLU sought to employ federalism as a “dual security” by asking state and local governments to resist federal encroachment and to campaign for new federal policies.

III. ACLU Governance in a Federalist Structure

Every large and complex organization has internal conflicts and tensions, and the ACLU is no exception. Many of these differences are unrelated to federalism. For example, over the years the ACLU Board of Directors has played an active role in setting civil liberties policy for the organization, distinguishing it from many other nonprofit boards which focus on governance, fundraising, and networking. It is not surprising—indeed it is healthy—that members of the ACLU staff, who are experts in their fields, sometimes question the Board’s formulation of civil liberties policy or claim that a policy enacted by the Board unduly confines the staff’s discretion in particular cases. Conversely, Board members have occasionally thought that the staff was too involved in matters within the Board’s province. These issues are worked out in the ACLU through clarification of policy and informal give and take.

The most important institutional tensions at the ACLU have arisen between National and affiliates. Over the years, and sometimes only after long debate, the organization has resolved many fundamental questions regarding representation on the Board, division of resources, and decision-making on litigation and other initiatives. In each case, care-

³⁸ See Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, in Herman & Finkelman, *supra* note 26, at 78.

³⁹ See, e.g., *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008) (vacating favorable District Court order on the ground that plaintiffs did not have standing to raise a challenge to the surveillance program).

⁴⁰ See, e.g., Press Release, ACLU, MCLU and Maine Residents Call on State Officials to Investigate NSA Spying (June 12, 2006), *available at* <http://www.aclu.org/safefree/nsaspying/26042prs20060612.html>.

fully constructed procedures achieved what formal definition of “local” and “national” interests could not.

A. Representation on the Board of Directors⁴¹

At the beginning, the ACLU did not have a Board of Directors. The organization was run by a small staff headed by Roger Baldwin, the principal founder of the ACLU, who was called the “director.” There were eight officers, including a chairman, two vice chairmen, and a counsel. There was a large National Committee of prominent advisors, perhaps sixty people, almost all of whom were Easterners, most from New York. The Committee met semi-annually to review the work of the staff and officers, but it had little authority.

The ACLU’s 1933 annual report contains perhaps the first reference to a Board of Directors. The Board consisted of thirty-four individuals, including Baldwin and nine other officers. Inspection of the names reveals that, as with the National Committee, a strong majority of Board members were from New York; a few were from other places on the East Coast, and one was from California. The division of authority between the Board and the staff is not made explicit.⁴² By the 1950s, the Board had grown to thirty-six members, and still had a strong New York, East Coast tilt.

In the meantime, ACLU affiliates and local committees were growing in size and importance, and there was increasing dissatisfaction with a system that concentrated authority in New York while more and more of the work was done elsewhere. Matters came to a boil at the 1964 Biennial Conference.⁴³ The unusual solution was the creation of two boards, the old “New York” Board that met frequently throughout the year, and a new plenary Board, comprised of the old Board plus affiliate representatives, that met in plenary session semi-annually. The National Committee remained in place, as it does presently under the title of the National Advisory Council, but it has become mainly a way for the ACLU to publicize the names of prominent supporters.

The dual-board system was a cumbersome arrangement and it came undone during a bitter dispute in 1968 over whether the ACLU should

⁴¹ Internal documents relied on throughout Part III are on file with the authors.

⁴² Presently, staff and Board are strictly separate.

⁴³ For many years, the Biennial Conference, now defunct, brought together a large, reasonably representative group of ACLU leaders from across the country, and had the authority to reverse decisions of the Board of Directors.

represent leaders of the opposition to the Vietnam War, including Dr. Benjamin Spock and Rev. William Sloane Coffin, who had been charged with criminal conspiracy. The old, “New York” Board considered the matter and voted against directly representing the defendants, choosing instead to file an amicus brief. After strong protests from ACLU members around the country who believed that the case could be handled better by ACLU lawyers, a special plenary meeting of the larger Board was held, and the decision of the smaller board was overturned. This sensational event soon led to an amendment to the ACLU constitution that abolished the smaller Board and provided for a single Board composed of at-large members elected by the national ACLU constituency and one additional Board member elected by each ACLU state affiliate.

As the number of state affiliates increased over time, the Board’s size eventually grew to 83 members—a largely unforeseen and, some might argue, unfortunate consequence of the enduring single board structure. But like Congress, the ACLU Board is both large and representative of national and local constituencies. Having some members elected at-large by a national constituency and others elected by individual affiliates assures that the Board will be aware of both national and local consequences of its actions and can credibly resolve national-local disagreements.

B. Division of Funds

If a person in Indiana sends fifty dollars to the National office in New York in order to join the ACLU, should the Indiana affiliate have a right to any of the money? Conversely, if the check is sent to the headquarters of the Indiana affiliate, should National receive a share? Where should the money go if a foundation in California makes a grant to the ACLU for work on immigration issues? Questions like these troubled the organization for many decades. In the late 1950s or early 1960s a system of “primary membership responsibility” was instituted in which the entity that brought in the money through a mailing or personal contact would retain a larger share of the funds. While providing a sort of rough justice, this system was counterproductive because it led the two entities to compete rather than cooperate, and it sometimes left the smallest affiliates with meager resources to respond to major threats to civil liberties in some of the most hostile parts of the country. Recognizing this problem, and in the wake of a financial crisis that escalated after the ACLU advocated Nazi Party members’ right to march in Skokie, Illinois, a committee and then the Board worked in the late 1970s to negotiate a comprehensive scheme to share donations.

As the policy eventually adopted by the Board explained, the financial rules were designed “to eliminate, to the fullest extent possible, disincentives to sound fundraising practices” and “to maximize overall net income by eliminating rules that tended to encourage competitive fundraising between the National Office and affiliates.” Among the prominent features of this elaborate set of rules are the following: All ACLU members are considered members of both National and the relevant affiliate. Affiliates agree to share income with National and National agrees to share with affiliates according to a complex but clearly defined formula. And the revised policy provides a methodology for resolving affiliate-National and affiliate-affiliate disputes.

The product of difficult and long negotiations, these rules resulted in a financially unified organization no longer plagued by continual competition over contributions and able to support the neediest affiliates. A monitoring process resulting in periodic updates to the rules, along with cooperative fundraising, has helped not only to deter disputes, but to raise more income and to share it more equitably throughout the nation.

C. Policymaking

Like the U.S. states, ACLU affiliates enjoy a great deal of autonomy to develop their own substantive civil liberties policies and interpretations, and to apply them within their own jurisdictions even when they diverge from policies adopted by the National Board. The ACLU of Southern California, for example, regards “civil liberties” as encompassing a greater range of socioeconomic rights than does National; the New York Civil Liberties Union’s double jeopardy policy differs from that of National. The ACLU may open itself to charges of inconsistency, but the fact that affiliates are autonomous means that they, again like states, can tailor their policies to accommodate local conditions. Affiliates generally agree about the components of civil rights and civil liberties, but not always. The ACLU Constitution characterizes this federalist philosophy as “general unity rather than absolute uniformity.”

Conflicting policies or interpretations of policies can come to a head in the Supreme Court. One such situation occurred in 1950, when the Maryland affiliate asked the Court to review a case involving the question of whether a radio station that had broadcast inflammatory information about a criminal defendant was protected by the First Amendment, or whether its rights were trumped by the defendant’s right to a fair trial; National filed on the opposing side. As it happened, the Su-

preme Court declined to hear the case.⁴⁴ More recently, the Northern California affiliate, together with National, filed a Supreme Court amicus brief in *Nike, Inc. v. Kasky*,⁴⁵ arguing that an application of California's unfair competition and false advertising laws to Nike's ads violated the First Amendment. The California affiliates split on whether this was the right position: Southern California wanted to argue that the application of California law should be regarded as constitutional. After a vigorous internal debate, National proceeded to file its brief.⁴⁶ Southern California, having failed to persuade National to change its position, did not sign on to the National/Northern California brief, and did not file a brief of its own.⁴⁷

To resolve such conflicts, the National Board adopted a policy granting the National Legal Director carefully delineated authority regarding action before the Supreme Court. If there is no National policy on a given issue, or if an affiliate wishes to act in conformity with a National policy, the affiliate may file a petition, brief, or amicus brief after "consulting" the Legal Director. If an affiliate wishes to file an amicus brief taking a position inconsistent with that of existing National policy, the affiliate must seek the "consent" of the Legal Director. There are multiple levels of checks and balances: the Legal Director must consult with

⁴⁴ *Balt. Radio Show, Inc. v. State*, 67 A.2d 497 (Md. 1949), *cert. denied*, 338 U.S. 912 (1950).

⁴⁵ 539 U.S. 654, 655 (2003) (dismissing writ of certiorari as "improvidently granted").

⁴⁶ Brief of the American Civil Liberties Union and the ACLU of Northern California as Amici Curiae in Support of Petitioner, *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), *available at* <http://www.aclu.org/FilesPDFs/nike.pdf>.

⁴⁷ Conflicts can also occur between affiliates and their local chapters. In 1976, for example, there was a conflict between the Southern California affiliate and its San Diego chapter over a racial incident at a Marine base. White Marines suspected of being members of the Ku Klux Klan were attacked by a group of African-American Marines. The black Marines were court-martialed, and the white Marines were transferred to a different base. The Southern California affiliate decided to represent the black Marines because their court-martial had due process problems, while the San Diego chapter decided, without consulting with the affiliate, to represent the white Marines because they were subjected to involuntary transfer for their political affiliations. In the end, the affiliate and chapter, after intense debate, decided to support both groups of Marines. *See* SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 332 (2d ed., S. Ill. Univ. Press 1999) (1990).

the elected Board General Counsel in deciding whether to allow an affiliate to file an amicus brief; if the Legal Director denies an affiliate's request, the affiliate may appeal to the National Board or the Executive Committee according to a specified process and subject to an enunciated standard of review. Again, the ACLU has used collaboration and process to address national-local tensions rather than trying to define circumscribed spheres of operations.⁴⁸

Conclusion

The U.S. government was born as a federalist system that encompassed the entire country. The ACLU, on the other hand, developed such a system incrementally. This paper focuses on the different ways in which federalist values and realities, both external and internal to the ACLU, increase the organization's ability to achieve its overarching goal of protecting and advancing Americans' civil liberties.

The ACLU has not adopted an explicit theory of federalism under the Tenth Amendment because any such theory could have negative as well as positive consequences for civil liberties. In its work, the ACLU has used the structures of federalism creatively, as a means rather than as an end. Internally, the ACLU has employed a collaborative model of federalism, relying on an intricate process that engages the National Board, affiliate boards, and National and affiliate staffs. The local matters to the ACLU, but so does the national.

⁴⁸ For a discussion of the President's role in ACLU policy-making, see Norman Dorsen, *Nadine Strossen and the ACLU*, 41 TULSA L. REV. 661, 668-73 (2006).

II. STATES AND CITIES AS ADVOCATES FOR THE PUBLIC INTEREST

The Progressive City

Richard C. Schragger*

Introduction

In the last decade or so, cities have become sites for a flowering of progressive policy developments. Some of these policy developments seek to regulate local economic circumstances in the absence of federal or state activity. Municipal living wage campaigns, local health care mandates, and local labor-friendly ordinances are examples.¹ Some address controversial social or regulatory questions in an attempt to generate policy movement at higher levels of government. San Francisco's recognition of same-sex marriage is an example,² as is the adoption of the Kyoto environmental protocols by numerous municipalities.³ The surge of local activity across many fields is a function of a growing dissatisfaction with national responses to these problems and a renewed energy and aggressiveness at the local level.

These municipal policy developments raise a number of questions about the relationship between progressivism and decentralization. That relationship has been complicated for two reasons. First, progressives tend to be leery of federalism for political reasons—in the twentieth century, the rhetoric of local and state autonomy has primarily been used by

* Professor of Law, Class of 1948 Professor in Scholarly Research in Law, University of Virginia School of Law. This essay is based on a paper given at the Eleventh Annual Liman Colloquium, *Liman at the Local Level: Public Interest Advocacy and American Federalism*, at Yale Law School, March 6–7, 2008. Thanks to Risa Goluboff for reading previous drafts and to Judith Resnik, James Tierney, Sarah Russell, the Liman Public Interest Program at Yale Law School, and the National State Attorneys General Program at Columbia Law School for working so diligently to publish this collection of essays. Rachel Deutsch provided excellent and timely editing assistance.

¹ For a recent account of local economic legislation, see Richard Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. (forthcoming Dec. 2009) (unpublished manuscript, on file with author).

² See Richard Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

³ See Judith Resnik, Joshua Civin, & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709 (2008).

conservatives to attack progressive legislation at the national level. Second, progressives often view local policymaking as either unreliable or a second-best solution to large-scale social, economic, or regulatory problems. A conventional view is that federal legislation is necessary to prevent sub-national governments from racing to the bottom in social and economic policy, or that, even absent a race to the bottom, local regulation is an imperfect or partial approach to large-scale problems that can only be handled at a national or global scale.

This Essay will address both these sets of concerns by way of advocating a progressive decentralism that has its roots in the urban reforms of the early twentieth century. I argue that cities are not merely appropriate sites for a resurgent progressive politics, but are, in fact, particularly reliable sites for such a politics. For this reason, I am quite skeptical of centralized regulation that undermines local experimentation. My skepticism depends on a political assumption—that progressive policies will likely find root in urban places and that cities will do better than larger-scale governments in advancing progressive, democratic ends.

Progressives and Decentralization

Progressives' wariness of decentralized power is understandable in light of the history of the latter half of the twentieth century. That era witnessed two signal national movements with enormous centralizing effects—the New Deal and the black civil rights struggle. National power expanded exponentially in response to a nationwide economic crisis that states and localities were ill equipped or unprepared to address. It further expanded to protect the rights of individuals and groups who were shut out of local or state political processes and who were particularly vulnerable on account of their subordinated economic, social, and political status. The expansion of federal power over the course of the late twentieth century in areas like education, environment, and health and human services continued under Republican and Democratic administrations, though that expansion was resisted—at least rhetorically—by political conservatives, states' rights activists, and anti-government libertarians. The political right's association with decentralization and the political left's association with centralization continue. The Supreme Court's federalism decisions reflect these ongoing ideological divisions.

The political economy of decentralization did not always look this way. It is easy to forget that early twentieth-century reformers were often opposed to centralization. Progressive decentralization flowered during a period when federal courts were undermining progressive leg-

isolation at the state and local level—often in the economic sphere.⁴ Proponents of progressive labor laws, minimum wage ordinances, health and safety laws, publicly-provided housing, progressive taxation, and redistributive municipal services were pursuing these efforts on the state and local levels in large part because they were having success there. But large-scale business organizations operating on the national scale sought uniform national laws that would likely be friendly to business and hostile to labor. Reformist efforts at the municipal level were often overridden by counter-reformist efforts at the state level; reformist efforts at the state level were often overridden by counter-reformist forces at the national level. Thus, Louis Brandeis's progressive instincts led him, in *Erie v. Tompkins*,⁵ to reject a federally-constructed common law, the continued existence of which would permit conservative federal courts to override local and state progressive tort, contract, and labor law.⁶

Prior to the New Deal, the primary sites for progressive law and legislation were state and local. The New Deal's expansion of federal power was thus difficult for progressive decentralists to assimilate, and they broke with the Roosevelt Administration over the centralizing thrust of his programs. As Brandeis famously declared after he voted with the majority in *Schechter Poultry*⁷ to strike down Roosevelt's National Industrial Recovery Act:

This is the end of this business of centralization and I want you to go back and tell the President that we're not going to let this government centralize everything. As for your young men, you call them together and tell them to get out of Washington—tell them to go home, back to the states. That is where they must do their work.⁸

That the twentieth-century political left began by being skeptical of centralization but ended up embracing it is not surprising. The New Deal, the civil rights struggle, the environmental movement, and the

⁴ See generally Daniel Rogers, *In Search of Progressivism*, 10 REV. AM. HIST. 113 (1982).

⁵ 304 U.S. 64 (1938).

⁶ See generally EDWARD PURCELL, *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (2000).

⁷ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁸ PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 352 (1984) (internal quotation marks omitted).

struggles for gender equality, worker protections, and labor rights have been in large part premised on the notion that local decisionmakers are suspect. In part this is because, as I have noted, the rhetoric of decentralization has been captured by anti-government conservatives. But it also stems from the deeply-held belief that local reform is unreliable because states and localities are likely to engage in races to the bottom in worker protection, environmental quality, and redistribution. Local reform also seems a second-best approach to problems that appear to be national in scope. If one can obtain nationwide progressive regulations, why not do so?

The belief that federal law is presumptively better for progressives than state or local law is a product of its historical time, however.⁹ We now know that the federal government can pursue conservative policies as much as it can pursue progressive ones. We also know that cities and states can pursue progressive policies as much as they can pursue conservative ones. There is increasing evidence that large-scale social and economic problems can be addressed at the local and state levels, that races to the bottom are not a necessary corollary to federalism, and that national regulation might be more likely to favor large-scale corporate interests than the kinds of constituencies progressives often care about.

Certainly the federal government is unique in its capacity to engage in massive counter-cyclical spending. Because it is the only level of government empowered to print money, it will always have a central role in macro-economic policymaking. Nevertheless, regulation other than fiscal stimulus might be usefully decentralized. Cities and states have been pursuing universal health care, recognizing same-sex marriage, adopting increasingly robust pollution standards, funding stem-cell research, and adopting pro-worker policies. When the federal government has abdicated or gotten out of the way, states and localities have filled the regulatory space. No doubt there are races to the bottom in some areas; but there are also races to the top.

Nor should decentralized lawmaking be considered a second-best solution to national problems. The localness of regulatory initiatives is their greatest strength, permitting regulatory innovation to start small and develop as efforts are made and programs are improved upon. There are great advantages to this type of experimentation, as Brandeis most famously recognized.¹⁰ This is not to say that federal regulation has

⁹ See Richard Thompson Ford, *The New Blue Federalists: The Case for Liberal Federalism*, SLATE, Jan. 6, 2005, <http://www.slate.com/id/2111942/>.

¹⁰ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“[A] single courageous state may . . . serve as a laboratory[.]

been a failure. Across many arenas it has had successes. But the problems of urban poverty, health care, education, and worker rights—to name a few—have not been solved by large-scale federal regulatory and redistributive programs. Indeed, if we were not before, we are now quite (healthfully) skeptical that any of those problems are susceptible to a single national solution.

The political left is no stranger to decentralization. Left-leaning communitarians (think: “small is beautiful”), participationists, anti-corporatists, anti-monopolists, populists, and progressive decentralists—all have been robust (though somewhat marginalized) throughout the twentieth century.¹¹ Certainly, not all of these movements were “liberal” in the sense that we have come to use the term.¹² Nevertheless, the urban-based reform efforts of the Progressive Era represent a useful model for today’s political left. It reminds us that the rhetoric of decentralization is not—and should not be—the sole province of states’ rights activists and anti-government conservatives.

In fact, the rhetoric and practice of decentralization is being deployed to defend San Francisco’s health care regulations, California’s fuel economy standards, and a whole host of other local and state initiatives. Politically speaking, the battle has moved to where it was during the Progressive Era. Increasingly, the question is whether courts will find that more centralized legislation overrides progressive local legislation.

Progressive Cities

What is most notable about the new regulatory localism is that it is being led in many cases by cities. This should not be altogether surpris-

and try novel social and economic experiments without risk to the rest of the country.”). For a discussion of Brandeisian localism, see Richard Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1045 (2005).

¹¹ Examples of current advocacy for left-leaning decentralization in the legal academy include David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003); Ford, *supra* note 9; Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); and Charles F. Sabel & Michael C. Dorf, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

¹² For example, Progressive Era reformers were not necessarily liberal on race. See Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as the People’s Lawyer*, 105 YALE L.J. 1445, 1453 (1996).

ing. In the first part of the twentieth century—before states and the federal government had generated the elaborate administrative apparatus that is the hallmark of the modern welfare state—cities were the primary providers of social services, housing, sanitation, parks, and schools. Progressive Era reformers were often municipal reformers, focusing their energies on assisting workers and the poor in the great industrial cities. Even during the New Deal, cities played a central role. Mayors exercised a great deal of influence in designing New Deal programs and obtaining federal funds,¹³ though they were fighting an economic tide that was slowly draining them of economic and political power. This relationship became increasingly centralized, as large national bureaucracies took over the task of providing social welfare to the masses, across large distances and geographies.

City politics has always been more reliably progressive than national or state politics. But the cities became marginalized throughout the latter half of the twentieth century as suburbanization created a vast political region that was neither urban nor rural. In the wake of the backlash against the War on Poverty—the last real attempt at a national urban policy—the strategy of both parties has been mostly to ignore the cities and court the suburbs. “Urban” policy—with its images of poor black people—has been shunned.

But that suburban focus may be shifting as cities gain renewed economic and political clout. There has been an urban resurgence in the last twenty or so years as cities have begun to stem the population losses of the previous half century and residents and money have poured back into urban centers. While not all cities are doing well, certain cities have become economic titans again. Other cities have at least seen their fortunes stabilize.

Cities’ newfound economic stability has been accompanied by significant local experimentation, as they seek to address policy problems like global warming, labor rights, and health care provision. States are acting too, but the locus of many emerging progressive developments has been in the cities. There are a number of reasons for this. First, cities are operating in an environment increasingly favorable to urbanism and attuned to residents’ desire for livable, walkable, diverse places. Not only New York, Chicago, and Los Angeles, but also places like Pittsburgh, Albuquerque, Denver, Atlanta, Raleigh, and Lexington are pros-

¹³ See DONALD HAIDER, *WHEN GOVERNMENTS COME TO WASHINGTON: GOVERNORS, MAYORS, AND INTERGOVERNMENTAL LOBBYING* 2-6 (1974); Richard Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 *YALE L.J.* 2542 (2006).

pering. And while not all of this growth is occurring in the city proper—much is still occurring in the suburbs—cities are now much more integrated into regional economies. Young people especially are attracted to urban environments.

Second, cities often contain the large institutions that power the knowledge economy: colleges and universities, hospitals and health-care facilities, law firms, banks, financial and technology firms. Cities are the smartest places in the country. On the whole, cities generate higher gains for an educated workforce; higher rates of education are recorded in cities and are correlated with higher rates of local wealth.¹⁴ Cities thus often contain the highest proportion of college-educated and advanced-degree-holding residents in the region.¹⁵

Third, cities are the most diverse places in the country. In many of the largest cities, minorities are now half the population.¹⁶ And cities that are welcoming to immigrants have tended to see their economic fortunes rise faster than those that are not. Some of that might have to do with urban dwellers' attitude toward strangers. There is some evidence that urban residents are more tolerant of difference and that this tolerance has economic benefits.¹⁷

A young, educated, wealthy, and diverse population tends to be more progressive politically than other demographic groups. It is also a population that can be politically energized. The city is thus an ideal site for a resurgent progressive politics. We have seen this in places like Seattle, Portland, New York, and San Francisco. That is not to say that all cities are dominated by progressives. But progressive policies will more likely find root in urban places and cities will often do better than larger-scale governments in advancing progressive, democratic ends.

Of course, the federal government and the states can also pursue progressive ends. Barack Obama's recent election may portend a new progressive ascendance in the capital. But even with a center-left governing majority in Washington, we might be skeptical of centralized

¹⁴ See Edward L. Glaeser, *Growth: The Death and Life of Cities*, in *MAKING CITIES WORK: PROSPECTS AND POLICIES FOR URBAN AMERICA* 22, 39-41 (Robert P. Inman ed., 2009).

¹⁵ See Timothy Egan, Op-Ed., *The Party of Yesterday*, N.Y. TIMES, Oct. 26, 2008, at WK14, available at <http://www.nytimes.com/2008/10/26/opinion/26egan.html>.

¹⁶ See Sam Roberts, *In Biggest U.S. Cities, Minorities Are at 50%*, N.Y. TIMES, Dec. 9, 2008, at A28, available at <http://www.nytimes.com/2008/12/09/us/o9survey.html?ref=us>.

¹⁷ See RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* (2005).

power. As we have seen, national politics is highly fluid. Gains made at the federal level can be reversed quite dramatically in a short time. And without an overwhelming national progressive majority, national legislation is likely to be less transformative than local legislation. The compromises necessary to generate consensus at the national level often dilute the best progressive legislation. Moreover, regulatory federalism comports with the political left's stated philosophy of participatory self-government and grass-roots mobilization. It also insulates it from charges of political overreaching.¹⁸

As for states, they too are places of potential progressive energy, though perhaps not as reliable. State legislatures can be dominated by suburban or rural interests whose agendas are incompatible with the large urban centers. There are thus good reasons for progressives to follow the cities instead of the states. It is the cities that are most likely to pursue progressive ends.

Preemption

The pursuit of such ends will invariably invite a political and, more pointedly, a legal response. In particular, counter-reformist forces will look to state and federal law to limit municipal experimentation. Consider efforts to override local minimum or living wage laws, local health care mandates, or local labor-friendly legislation.¹⁹ State home rule doctrines that limit local regulation to "matters of local concern" or broad preemptive readings of statutes are the instruments for challenging local experimentation.²⁰

San Francisco's defense of its health care ordinance against ERISA preemption is just one high-profile example.²¹ The city's ordinance requires local businesses to provide a certain amount of health care to

¹⁸ Cf. John Schwartz, *From the New Administration, Signals of Broader Role for States*, N.Y. TIMES, Jan. 29, 2009, at A16, available at <http://www.nytimes.com/2009/01/30/us/politics/3ofederal.html> (discussing "progressive federalism").

¹⁹ See Schragger, *supra* note 1.

²⁰ For an argument for why home rule should be more robust and preemption more narrowly construed, see Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253 (2004). See also Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371 (2008).

²¹ See *Golden Gate Rest. Ass'n v. City and County of San Francisco*, 546 F.3d 639 (9th Cir. 2008).

their employees or pay into a city fund for that purpose.²² The case pits traditional progressive groups like labor unions and welfare-rights organizations against local and national business interests. The latter favor national regulation because it tends to reduce regulatory costs. More centralized regulation is also preferable to business because it will arguably be more favorable to the regulated industries. That may be because business interests have a greater ability to influence Congress than do welfare-rights groups.²³

That is not to say that the corporate embrace of national legislation has been consistent throughout the rise of the administrative state or that progressives have always championed local law. Businesses have resisted centralized regulation when it was more onerous than state or local regulation. And progressives have favored preemption when it appeared that states would otherwise set a lower standard in enforcing labor, environmental, or other laws. The strategy of shifting scales of government to achieve policy ends is not restricted to any particular interest group. This may explain why the judicial alignments in preemption cases in the Supreme Court do not track a consistent left-right ideology.

Nevertheless, recent indications are that business interests are actively seeking to use national law to override local law and that the Supreme Court is inclined to side with them.²⁴ Progressives would do well to favor a skeptical view of preemption and other doctrines that take away power from sub-national governments.

What claims can cities make in their defense? They can appeal to the value of local, participatory democracy, to the experimental logic of federalism, to the principle of subsidiarity, to the benefits of diversity, to the idea—championed by early twentieth-century progressive decentralists—that the exercise of small-scale regulatory power is almost always preferable to the exercise of large-scale regulatory power. The defense of localism need not be couched in anti-government rhetoric. A forceful

²² *See id.*

²³ For a more nuanced description of the relative influence of business interests and welfare-rights groups, see Roderick Hills, *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007).

²⁴ *See, e.g.*, Catherine M. Sharkey & Samuel Issacharoff, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006); *see also* *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007) (holding that under the National Bank Act, Wachovia's mortgage business, though conducted through a subsidiary, was subject to oversight only by the federal Office of the Comptroller of the Currency, preempting any oversight by state regulators).

defense of localism is one based in the transformative potential of local politics and policy efforts.²⁵

The advocates of national uniformity will trot out all the usual arguments for broad preemptive readings of federal statutes. The central one is efficiency based. Advocates argue that permitting thousands of local governments to adopt wildly different regimes will increase costs, cause significant problems of administration, and hurt both producers and consumers.

This efficiency argument often seems quite compelling, especially when the regulations of thousands of local governments seem to be at issue. But it is flawed. It assumes that localities will rush to adopt highly costly local regulatory regimes once they are freed from the strictures of uniform law. But this is simply not the case. Most local governments are cautious and not inclined to impose costs on business or residents. In fact, economic theory predicts that local regulation will be fairly limited because businesses and residents are highly mobile. Cities will thus only adopt those regulations that will not frighten off firms and residents.²⁶ Indeed, conventional economic theory favors a diversity of regulatory approaches. To the extent that there is a marketplace in location for firms and residents, allowing local regulatory variation is theoretically more efficient than disallowing it.²⁷ Increasing the regulatory choices available to firms and residents can enhance welfare.

Local regulation is not only good for social welfare; it is good for democracy. Broad preemptive readings of statutes do nothing to force activity in the legislative branches. Local initiatives are often a response to a regulatory vacuum, an urgent need, and a frozen or stalemated political process at the state or national level. San Francisco's attempt to provide health care to all its citizens certainly fits this bill. Merely by challenging the status quo and the natural political inertia that comes with it, local regulatory activity will stimulate political action at the state and national levels.²⁸ Business groups will suddenly be awakened and

²⁵ Cf. Catherine L. Fisk & Michael M. Oswalt, *Preemption and Civic Democracy in the Battle over Wal-Mart*, 92 MINN. L. REV. 1502 (2008).

²⁶ See, e.g., Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

²⁷ See *id.* One should be careful to distinguish between cities and suburbs when thinking about the positive welfare effects of inter-jurisdictional competition. Suburbs often engage in activities that injure central cities. For a critique, see Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824 (2003) (book review).

²⁸ See Hills, *supra* note 23.

they will do what they always do—seek legislative relief at other levels of government. Grassroots progressive organizations will be energized to defend their local gains and extend them.

An important side benefit of local law-making is that it generates a political base from which to start the engines of reform—a place from which to develop strategies and policies to tackle difficult social problems. Tocqueville was right when he observed that “local institutions are to liberty what primary schools are to science; they bring it within people’s reach, they teach people how to use and enjoy it.”²⁹ As with all rising political movements, it is necessary for progressives to establish territorial and governmental beachheads from which to move into the broader political community. Local ordinances can demonstrate the feasibility of particular initiatives, paving the way for adoption in other localities and states.

There is nothing to stop states and Congress from legislatively overriding local efforts. But many of the arguments going forward will be made in courts and will involve claims about the current limits on local power or the preemptive effect of existing state or federal legislation. Those judicially-centered counter-efforts will be successful unless progressives adopt a substantive account of decentralized power that directly addresses and celebrates the role of local governments in our constitutional scheme.³⁰ Progressives have often run away from decentralization because it has been used by those with anti-regulatory agendas. But an approach to cities and states that accepts both the sometimes pro-regulatory and sometimes anti-regulatory valence of the exercise of decentralized power is not to be feared. For progressives, it is important that there is a political base from which to start reform. That base is increasingly the city.

Conclusion

In his 1905 book, *The City: The Hope of Democracy*, Frederick Howe asserted that reformers would do best by focusing on urban reform and then generating a reformist politics from there. “Every city will be an experiment station, offering new experiences to the world,” he wrote.³¹ Louis Brandeis echoed that claim, arguing in 1914 and again during the great financial crises of the 1930s that states and localities

²⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 55 (Henry Reeve trans., Schoken Books 2d ed. 1961) (1835).

³⁰ See, e.g., Schragger, *supra* note 2.

³¹ FREDERICK C. HOWE, *THE CITY: THE HOPE OF DEMOCRACY* 303 (1905).

were best able to respond to “the insistent demand for political and social invention.”³²

The renewed and strengthened city, the rise of progressive and inventive mayors, the concentration of smart, politically active people in urban locations—all suggest the possibility and potential of a new urban-based progressive politics. Legal thinkers sympathetic to such a politics need to articulate a localism that is not hostile to government but that is also not biased toward centralized power. This task is made more difficult if progressives focus solely on gaining and regaining power in Washington, D.C. Progressive decentralization has been a robust political tradition, but the post-New Deal left has yet to come to terms with it. Much of the action now is taking place in the cities. That is where progressives should go—that is, to quote Brandeis, “where they must do their work.”

³² Schragger, *supra* note 10, at 1047 (internal quotation marks omitted).

San Francisco and the Rising Culture of Engagement in Local Public Law Offices

Kathleen S. Morris*

Imagine the following scenario. A nationally-renowned think-tank issues a report revealing that in dozens of American cities, two so-called “payday lending” companies are offering installment loans at more than four hundred percent annual interest, financially crippling thousands of working poor families. The report identifies City X as among those most plagued. The applicable state laws, which cap interest rates on installment loans at thirty-six percent, are not being enforced. The state attorney general has not acted, perhaps because he has limited resources and these lenders are concentrated in cities, not dispersed across the state. Class action and non-profit law firms have not filed suit on behalf of consumers, perhaps because they cannot recoup their attorneys’ fees. Assuming that City X has a typical local public law office, is it likely to sue to stop the lenders’ illegal and harmful practices? Legally, can it? Should it?

Local government officials, including city attorneys, typically operate within carefully circumscribed limits. Courts and scholars sometimes assume that constitutional or other legal structures dictate those limits.¹

* Visiting Assistant Professor, Rutgers School of Law—Camden (2009 – 2010); Visiting Lecturer, Yale Law School, Spring 2008; Founding Executive Director, San Francisco City Attorney’s Affirmative Litigation Task Force; Deputy City Attorney, City and County of San Francisco (on leave, 2009 – 2010). For helpful comments and conversations, I would like to thank Heather K. Gerken, Richard C. Schragger, Michelle Wilde Anderson, Giulia Good Stefani, Adam Grogg, Dirk Schenckan, Buck Delventhal, Danny Chou, Rafal Ofierski, Peter Keith, Christine Van Aken, Erin Bernstein, Meredith Osborne, and Shawn Fong. I would also like to thank the participants in the 2008 Liman Colloquium, the current and former members of the Affirmative Litigation Task Force, and the Yale and Berkeley law students who participated in Task Force projects, to whom I dedicate this Essay. The opinions expressed here are mine alone; they do not reflect the views of the City and County of San Francisco, the San Francisco City Attorney’s Office, or City Attorney Dennis Herrera. This Essay is intended as an introductory sketch. I develop these ideas further in *Local Government Standing for the Twenty-First Century* (forthcoming 2011), and *Cities and Counties as Constitutional Enforcers* (forthcoming 2011).

¹ See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). But see

But often it is institutional culture, not legal barriers, that bounds city and county law office activities.

Drawing on the example of San Francisco, this Essay examines plaintiff-side public policy cases filed by cities and counties. It explores the gap between the law and policy cases city attorneys typically bring and the authority they actually have. It introduces two basic ideas: First, cities are often culturally indifferent (or even resistant) to bringing affirmative cases even when they are not legally restrained from undertaking such work.² Second, some state laws, including California's, authorize city attorneys to sue not only on behalf of their cities ("City Cases") but also on behalf of constituents ("Constituent Cases"). I argue that City Cases and Constituent Cases represent equally legitimate and desirable exercises of local government power.

I. Responsive Culture Versus the Culture of Engagement

A. Background on San Francisco

San Francisco³ is fairly described as a fifty-square-mile not-for-profit corporation with more than 800,000 constituents and an annual budget of nearly \$6 billion. It serves two different but equally important

Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986) (noting that the U.S. Supreme Court has developed contradictory lines of authority on the subject of local sovereignty). For related analyses of the Court's doctrine, see Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 417 (1990); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 995-1000 (2007); and Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 394, 407 (2002). See generally Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. (forthcoming 2010) (noting the legal community's increased focus on local government power rather than powerlessness).

² While the San Francisco City Attorney's Office is not the only public law office that has engaged in affirmative litigation over the years, it has moved most decisively to develop and institutionalize a culture of engagement.

³ San Francisco is unusual in that it is both a city and a county. However, for ease of discussion, throughout this Essay I refer to local public entities as "cities" rather than "cities and counties," and to San Francisco as a "city" rather than a "city and county."

roles: it is a public management corporation, and it is a unit of representative democracy.

In its role as a public management corporation, San Francisco runs a port, an international airport, power and water systems, and two major hospitals. It maintains buildings, roads, bridges, sidewalks, and other infrastructure. It provides housing and mass transportation. It owns and manages several libraries and museums, acres of parks and gardens, and a zoo.

In its role as a unit of representative democracy, San Francisco is similarly busy. It organizes elections involving federal, state, and local candidates, and ballot measures. Its elected and appointed officials work to meet immediate needs and pursue the long-term common good. San Francisco's government employs a familiar division of labor: The Mayor executes and the Board of Supervisors legislates; the District Attorney prosecutes and the Public Defender defends the criminally accused.

For his or her part, the City Attorney—who is elected, and operates, independently of the Mayor and the Board of Supervisors—has the formidable job of advising and defending the more than 25,000 City officials and employees who perform the functions listed above. Dennis Herrera, City Attorney from 2002 through the present, oversees a public law office of approximately 180 deputy city attorneys and 140 staff.

B. The Traditional “Responsive Culture”

City attorneys' offices are generally invisible to the public and even to law students and lawyers. Their invisibility is due at least in part to what I call their responsive culture: for reasons yet unknown, most city attorneys see their role as primarily or exclusively responsive. They respond to client problems with legal (but rarely policy) advice. They respond to lawsuits by defending their cities in court. They respond to citizens complaining of city code violations with informal mediation or a court order. They may occasionally sue to enforce their cities' contract rights, but they do not behave as local agents of federal or state civil law enforcement.⁴

Indeed, most city attorneys appear to believe that the officials they advise and represent—not they—are responsible for tracking daily life in the city and diagnosing problems; and that attorneys general, non-profit legal organizations, and plaintiff's law firms—not they—are responsible for enforcing civil and constitutional laws. Their responsive orientation

⁴ For a glimpse of city attorney activities nationwide, see the International Municipal Lawyers Association, <http://www.imla.org> (last visited Apr. 1, 2009).

is similar to that of a typical in-house corporate counsel, but unlike that of a typical state attorney general, who provides advice and defense but also serves as a watchdog over, and champion of, the public interest.⁵

C. The Rising “Culture of Engagement”

Over the past three decades, the San Francisco City Attorney’s Office has gradually moved away from a responsive cultural norm and toward what I call a culture of engagement: While continuing to provide critical responsive legal services to the City, the Office has added a robust federal and state civil law enforcement function, thus operating as if it were a local attorney general.

San Francisco took major strides toward developing a culture of engagement under former City Attorney Louise Renne, who served from 1986 to 2002. Although the City Attorney’s Office had filed a smattering of affirmative cases in the decades before she arrived, Renne revolutionized the concept of what a city, and its chief counsel, should do. Under Renne’s leadership, the City Attorney’s Office sued title insurance companies to reclaim funds misappropriated from the City and other insureds.⁶ It sued tobacco companies to recover the additional health care costs San Francisco incurred as a result of their predatory business practices.⁷ It sued lead paint manufacturers to force them to remove their product from every building within city limits.⁸ Renne’s approach to developing a public policy litigation docket was informal and ad hoc: If a news item, constituent, public official, or city employee brought an issue to the Office’s attention, and Renne thought it was important and could be resolved through litigation, her office would bring a case.

Renne’s successor, Dennis Herrera, took a conceptual and institutional leap forward in 2006 by creating the Affirmative Litigation Task Force, an inter-office think tank composed of some twenty deputy city attorneys. Its mandate is threefold: to identify major problems affecting

⁵ For a glimpse of attorney general activities nationwide, see the National Association for Attorneys General, <http://www.naag.org> (last visited Apr. 1, 2009).

⁶ *State v. Old Republic Title Co.*, No. CGC-98-993507 (Cal. Super. Ct. Mar. 9, 1998).

⁷ *City and County of San Francisco v. Philip Morris*, No. C-96-2090 DLJ, 1998 U.S. Dist. LEXIS 3071 (N.D. Cal. Mar. 3, 1998); *People v. Philip Morris*, No. CGC-96-980864 (Cal. Super. Ct. Sept. 5, 1996).

⁸ *See County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

the City and its constituents; to conduct factual and legal investigations; and, where appropriate, to recommend affirmative litigation to the City Attorney. The Office has continued to perform its traditional functions—all deputy city attorneys, including Task Force members, still advise and defend City clients—but the Task Force members institutionalized the City Attorney’s added role as champion of the local public interest.

The Task Force began its work by identifying general public policy issues of concern to San Franciscans, such as the environment, health care, reproductive rights, banking and credit practices, childhood nutrition, and workers’ rights. It then divided the issues among its members and started reaching out to city officials, community groups, non-profit and plaintiff’s law firms, think tanks, and the California Attorney General’s office, to learn whether and how the City could add value to existing efforts. Finally, and most important to its ultimate productivity, the Task Force established partnerships with Yale and Berkeley law schools. Those collaborations allowed deputy city attorneys to gain precious research assistance from talented law students, who in turn got the opportunity to be mentored by those deputies and work on innovative cases.⁹

By taking such a comprehensive and aggressive approach to affirmative litigation, Herrera sent two clear signals: first, that he intended to enforce the law, and second, that he intended to make the City and its constituents heard on the major public policy and legal issues of the day.

Indeed, under Herrera’s leadership, the City Attorney’s Office has filed cases that ask such nationally resonant questions as whether the State may exclude same-sex couples from civil marriage,¹⁰ whether a state may terminate the Medicaid-funded benefits of juveniles in detention centers,¹¹ whether the State may sanction gender rating in the health insurance industry,¹² whether major bond insurance companies

⁹ For a description of the partnership, see Press Release, Yale Law School, YLS Partners with San Francisco City Attorney and Boalt Law School in Affirmative Litigation Working Group (Dec. 19, 2006), *available at* <http://www.law.yale.edu/news/4016.htm>.

¹⁰ *City and County of San Francisco v. State*, No. CGC-04-429539 (Cal. Super. Ct. Mar. 11, 2004). Upon appeal to the California Supreme Court, this case was consolidated with five others to form *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (hereinafter *In re Marriage Cases*).

¹¹ *City and County of San Francisco v. State*, No. CGC-07-468241 (Cal. Super. Ct. Oct. 16, 2007) (hereinafter *Medi-Cal*).

¹² *City and County of San Francisco v. Poizner*, No. CGC-09-484410 (Cal. Super. Ct. Jan. 27, 2009).

are knowingly selling worthless insurance to cities,¹³ and whether a national credit card company and its designated arbitration forum have colluded to create an illegal judgment mill.¹⁴

The San Francisco City Attorney's Office is not alone: the culture of engagement is rising among local public law offices. A number of localities, including New York, Washington, D.C., Los Angeles, Seattle, Newark, Chicago, and Santa Clara County, have undertaken or shown interest in civil law enforcement. And in some ways, the timing is right: on the heels of the economic collapse, the electorate is more aware than ever of the critical need for robust law enforcement; and on the heels of the Obama campaign, the nation is teeming with energetic, idealistic young law students and lawyers seeking opportunities to serve the public good.

II. Legal Questions

A. City Cases Versus Constituent Cases

The basic legal question this Essay poses is whether a city attorney's office, at least in California, may engage so aggressively in civil law and policy litigation.

Scholars of city power often place lawsuits by cities into two categories: (1) suits against their own states; and (2) all other suits.¹⁵ I find it more analytically useful to categorize city suits not according to who has been sued in a particular case, but rather, whose interests the case seeks to vindicate. Viewed this way, city suits fall into two different categories: (1) those brought primarily to vindicate the city's direct institutional interests as a market participant or a public corporation ("City Cases");

¹³ *City and County of San Francisco v. AMBAC Fin. Group*, No. CGC-08-480708 (Cal. Super. Ct. Oct. 8, 2008).

¹⁴ *People v. Nat'l Arbitration Forum*, No. CGC-08-473569 (Cal. Super. Ct. Mar. 24, 2008) (hereinafter *NAF*); see also Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUS. WK., June 15, 2008, at 72, available at http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm.

¹⁵ See David J. Barron, *Why (And When) Cities Have A Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

and (2) those brought primarily to vindicate the interests of some or all of the city's constituents ("Constituent Cases").¹⁶

City Cases, even those brought against the state, are relatively non-controversial; cities don't seem to scare people when they sue to protect their direct interests, even when they invoke constitutional norms. But Constituent Cases are an entirely different matter. Whether filed against private entities, the state, or the federal government, Constituent Cases are more likely to be criticized as exceeding the City's legal or political authority.

Initially, one may be tempted to hypothesize that such criticisms are rooted in the controversial nature of some Constituent Cases (for example, San Francisco's constitutional challenges to the federal Partial-Birth Abortion Ban Act¹⁷ and California's marriage statutes¹⁸ and Proposition 8¹⁹). But, in fact, only a few of San Francisco's Constituent Cases center on hot-button social issues. Most deal with important but relatively uncontroversial topics such as lender abuse,²⁰ unlawful arbitration practices,²¹ public funding of juvenile health care,²² and unfair pharmaceutical industry practices.²³ One must therefore assume that critics are uncomfortable with Constituent Cases in general, and address their concerns.

¹⁶ The City Case versus Constituent Case distinction echoes the proprietary actor versus governmental actor distinction that runs through the law. *See, e.g.*, *Puget Sound Power & Light Co. v. City of Seattle*, 291 U.S. 619, 629–631 (1934), *County of Inyo v. Pub. Utils. Comm'n*, 604 P.2d 566, 570 (1980).

¹⁷ *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd sub nom. Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom. Gonzales v. Carhart*, 550 U.S. 124 (2007) (hereinafter *Planned Parenthood*) (challenging 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2006))).

¹⁸ *In re Marriage Cases*, *supra* note 10.

¹⁹ *Strauss v. Horton*, 2009 Cal. LEXIS 5416 (June 17, 2009) (hereinafter *Horton*).

²⁰ *People v. Check 'n Go*, No. CGC-07-462779 (Cal. Super. Ct. Apr. 26, 2007) (hereinafter *Check 'n Go*).

²¹ *NAF*, *supra* note 14.

²² *Medi-Cal*, *supra* note 11.

²³ *San Francisco Health Plan v. McKesson Corp.*, No. 1:08-CV-10843-PBS (D. Mass. May 20, 2008).

B. Standing

The U.S. Constitution, the California Constitution, and the San Francisco Charter do not expressly limit a city's ability to sue in a representative capacity. Federal case law raises questions—the U.S. Supreme Court, for example, has described cities as “political subdivisions . . . created by the States ‘as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them,’”²⁴ suggesting that cities are mere component parts of their states, and thus can never sue them—but this view cannot be squared with the vertical power distribution in many state constitutions, including California's.²⁵ The U.S. Constitution does not grant the federal courts, or any other branch of the federal government, plenary authority to distribute power within the states. Such authority lies with the people, who distribute state and local power, horizontally and vertically, via their state constitutions. Accordingly, the U.S. Supreme Court's view of what a city “is,” or what powers localities do or do not have, is relevant only for purposes of federal law.

With no express constitutional or charter limitations on the City's power to sue, we turn to generally applicable standing requirements. In federal court, two independent constitutional rules place limits on Constituent Cases. First, federal courts may only hear cases that satisfy the so-called “case or controversy” requirement embedded in Article III of the U.S. Constitution. Accordingly, the City may only pursue federal cases on behalf of its constituents when it satisfies the requirements of Article III.²⁶ Second, even when cities satisfy Article III, federalism principles limit their ability to bring *federal* constitutional challenges against their own states in either state or federal court.²⁷

Turning to California law, the California Constitution does not contain a “case or controversy” requirement, and California law does not prohibit localities from suing the State. Accordingly, a California city may bring a Constituent Case to enforce state law in state court, against

²⁴ *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)). *But see supra* note 1 (listing articles that discuss the Court's competing doctrines on local government sovereignty).

²⁵ *See* CAL. CONST. art. XI, §§ 3(a), 4(g), 7, 11(a).

²⁶ *See Int'l Union v. Brock*, 477 U.S. 274, 281-282 (1986).

²⁷ *See Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *Star-Kist Foods v. County of Los Angeles*, 719 P.2d 987, 989-990 (Cal. 1986).

any defendant, as long as it has statutory or common law standing to sue. To cite a few examples, the San Francisco City Attorney can sue in the name of the People of the State of California to abate a public nuisance,²⁸ or to enjoin any business practice that is illegal or contrary to public policy.²⁹ He or she may also challenge State acts under statutory or constitutional law as long as the City either has a “beneficial interest” in the case’s outcome³⁰ or has brought the case to vindicate the general public interest rather than its own.³¹ These examples make clear that, at least in California, cities have broad legal authority to pursue a wide range of Constituent Cases, against a wide range of defendants including the State, in state court.

III. Normative Questions

Even if cities have standing, *should* they pursue Constituent Cases? What is a locality’s proper role vis-à-vis its constituents, other units of representative democracy, and private entities, and how do localities’ law offices fit into that picture?

A. Arguments in Favor of the Culture of Engagement

(1) *The culture of engagement is good for local constituents.* When city attorneys look out for local interests, local residents win. San Franciscans are direct beneficiaries of the City Attorney’s efforts to force payday lenders and arbitration sponsors, for example, to comply with California laws. In suing Check ’n Go and Money Mart,³² the City Attorney’s Office addressed illegal activity—installment loans with annual interest rates ten times those allowed under California law—that constitutes a well-documented, national problem,³³ but one with severe local

²⁸ See CAL. CIV. PROC. CODE § 731 (West 2008); CAL. GOV’T CODE § 36900 (West 2008).

²⁹ See CAL. BUS. & PROF. CODE § 17204 (West 2008).

³⁰ See CAL. CIV. PROC. CODE § 1085 (West 2008) (California’s general writ of mandate statute).

³¹ This standing arises under California’s general common law “public right / public duty” doctrine. See *Green v. Obledo*, 624 P.2d 256, 266-267 (Cal. 1981).

³² See *Check ’n Go*, *supra* note 20.

³³ See Editorial, *391 Percent Payday Loan*, N.Y. TIMES, Apr. 13, 2009, at A20, available at <http://www.nytimes.com/2009/04/13/opinion/13mon2.html>.

impact: San Francisco has the unfortunate distinction of being the California city most highly saturated with fringe financial establishments. Similarly, the City Attorney's case against the nation's largest credit card issuer and the National Arbitration Forum³⁴ tackles a national issue that has local ramifications.

Moreover, compared to the entities typically relied on to pursue affirmative litigation, local public law offices are uniquely accessible and accountable.³⁵ They are more likely to respond to citizen petitions than are faraway federal and state attorneys general. Their focus is broader than those of non-profits and plaintiff's contingency counsel, and unlike such offices, they are democratically accountable. The culture of engagement empowers city constituents by placing within easy reach a public interest law firm whose mandate is to attend to law and policy priorities. Adding local government law offices to the nation's informal structure for affirmative litigation ensures a more transparent and democratic regime.

Finally, the culture of engagement is good for local constituents because it provides a collective counterweight to federal and state majorities and corporate power. In San Francisco, it has made deputy city attorneys unafraid to question, and where necessary, to take on powerful public and private interests. Local constituents win when localities have the confidence and practical ability to protect them from overreach by other, often more powerful, forces.

(2) *The culture of engagement strengthens local governance.* As public law offices engage more vigorously and consistently in law and policy debates, they bond more powerfully with their clients and constituents. A proactive city attorney inspires city departments and residents to remain sensitive to possible legal violations and stay in closer touch with their public law office. Engaged public law offices, in turn, form new alliances and find new ways to collaborate with neighborhood groups, federal and state attorneys general, non-profit organizations, think tanks, and plaintiff's lawyers.

A city attorney office's commitment to robust law enforcement also may, over time, draw dissenters into local government, enriching internal debate. Dissenters are drawn to intellectually energetic environments. And as Heather Gerken has observed, when "dissenters" become

³⁴ See *NAF*, *supra* note 14.

³⁵ See Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 *YALE L.J.* 2542, 2577 (2006) ("[T]he city is directly accountable and accessible to the citizenry in ways that other levels of government are not").

“deciders,” they “no longer enjoy the luxury of the critic: inaction. They must figure out how to put their ideas into practice, negotiate a compromise, and, most importantly, live with the consequences of their critique.”³⁶ And for their part, city employees are forced to confront dissenting views in deciding to pursue or not pursue particular cases. By drawing dissenters into the public fold, the culture of engagement infuses local public law offices with better information and more intellectual diversity, energy, and focus.

(3) *The culture of engagement enriches the marketplace of ideas.* When a city attorney’s office engages in affirmative litigation, it opens an additional forum—the courts—in which a city may speak its unique collective truth. To provide just one example, as part of the City’s marriage equality case,³⁷ the San Francisco Human Rights Commission provided a declaration describing its decades-long effort to maximize local legal and political equality regardless of sexual orientation. The City Controller detailed how marriage discrimination has reduced local taxes and diminished City coffers. None of the other parties to the case—not even the other localities—could have provided San Francisco’s unique perspective on these issues (nor, for that matter, could San Francisco have provided theirs).

The nation would surely benefit from hearing its cities’ perspectives, on an ongoing basis, on a wide range of public issues. The point is not that cities would always be right, but rather that the diversity of viewpoints that cities would bring to state and national tribunals would immeasurably enrich public debate.

B. Arguments Against the Culture of Engagement

(1) *The culture of engagement distorts local governance.* Some argue that the culture of engagement may lead a city to wrongly prioritize affirmative litigation over more essential services. But while there is no question that litigation is costly, a carefully-constructed affirmative litigation docket should pay for itself with recouped damages, costs, and civil penalties. Moreover, affirmative litigation is a good indirect investment because, over time, robust law enforcement deters activities that cause economic harm to businesses, constituents, and the city as a whole.

³⁶ Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1778 (2005).

³⁷ See *In re Marriage Cases*, *supra* note 10.

Others argue that the culture of engagement undermines good governance because city attorneys will abuse their authority and choose cases for political rather than policy reasons. But a politically shrewd city attorney will not pursue frivolous litigation simply to make news or help friends: wasting public funds creates bad publicity, to say the least, and leads to a decline in political support. In the end, the courts, the city budget process, the press, and the people (via elections)³⁸ serve as rigorous checks on the dangers of legal and political tomfoolery.

Still others argue that the culture of engagement is anti-localist because it encourages cities to seek statewide remedies, with the counter-intuitive consequence of undermining local authority. David Barron has written that when a city seeks to enforce state law within its limits, it does not “expand the scope of its legal authority . . . to address local issues through the practice of local politics,” but rather, to the contrary, it “call[s] upon higher-level institutions to enforce norms that all localities then will be compelled to obey.”³⁹ Richard Schragger suggests that localities should set their own policies, free from state interference, which suggests they should not file lawsuits with extra-territorial consequences.⁴⁰ These versions of localism appear to prize local autonomy over access to federal and state law protections at the local level.

It is true that one city’s successful challenge to the constitutionality of a state statute takes *some* autonomy away from other cities. But what is wrong with a system of government that maximizes discretion at the local level while ensuring that federal and state law—the products of legitimate democratic processes that include local perspectives—remain as floors beneath which none may sink? Constituents should not have to choose between a governmental structure that respects local prerogatives and one that permits their local law office to vindicate their rights under state and federal law. The culture of engagement envisions a localism in which local civil law enforcement authority is maximized and serves the local populace.

(2) *The culture of engagement is an illegitimate exercise of local government power.* Others argue that cities lack the legitimacy to sue on behalf of their constituents and bind them to positions with which some may disagree. To them, when a city attorney’s office files a Con-

³⁸ If the city attorney is appointed rather than elected, then the political check applies to the appointing person or body (e.g., the mayor, city council, or board of supervisors) but still acts as a restraint.

³⁹ See Barron, *supra* note 15, at 2247-2248.

⁴⁰ See Schragger, *supra* note 15, at 147-148, 185.

stituent Case it is only truly “representing” the agreeing subset, not a majority or the entire constituency, because not everyone has had a chance to sign off on the docket.

To begin, the idea of a locally-elected official having full discretion to form an affirmative litigation docket and file cases on behalf of his or her constituents is not new. A generally accepted model where locally -elected and -funded officials file Constituent Cases and participate in law and policy debates exists in the criminal context in the form of district attorneys. It takes only a small leap to imagine a parallel cadre of city attorney’s offices that file Constituent Cases to enforce civil law.

Turning more directly to the legitimacy question, Constituent Cases fall into two categories: law enforcement cases (such as the payday lending case⁴¹) and public policy or “impact” cases (such as the marriage equality case⁴²). With respect to the former, it is hard to see why a city attorney enforcing civil laws would be any less legitimate a representative than a district attorney, whose legitimacy in enforcing criminal laws is unquestioned. Political victories yield both city and district attorneys the privilege of prosecutorial discretion. In exercising that discretion, both represent the entire constituency, not just those who favor a particular decision. And in either case, if a majority of the local populace disagrees with that exercise of discretion, it can say so at the ballot box.

With respect to public policy cases, another analogy is instructive: why is a city attorney a less legitimate representative than, say, a private non-profit organization? City residents directly impacted by a particular Constituent Case are akin to people whose interests are pursued by non-profits. In both examples, represented persons may well disagree with the organization’s position on a particular issue or strategy, and while they can petition, they are ultimately subject to the organization’s chosen legal strategy and bound by the result in court. If anything, the city residents who have a stake in the outcome in a given case are better positioned than are nonprofits’ constituents: the former wield democratic power as they pressure the city attorney to prosecute the matter as they deem best.

(3) *The culture of engagement is bad for business.* Still others argue that increasing the number of market regulators is likely to create compliance headaches for businesses, lead to inconsistent application of the laws, and chill innovation. These claims ring true, but, on the other hand, consistent law enforcement would also likely create greater certainty in the marketplace and enable businesses to plan more efficiently.

⁴¹ See *Check ‘n Go*, *supra* note 20.

⁴² See *In re Marriage Cases*, *supra* note 10.

Moreover, the political checks on city attorney power might be sufficient to discourage them from engaging in excessively anti-business practices, ensuring that the benefits of local engagement outweigh any risks. In any event, corporate concerns about burdensome laws are probably best directed to the legislatures that craft them, not the lawyers who enforce them.

(4) *The culture of engagement only makes sense for “liberal” localities.* Finally, skeptics argue that the culture of engagement—an inherently progressive concept, they say—would only work in progressive cities or counties like San Francisco.

I disagree. The culture of engagement embraces no ideology other than a belief in robust good government, at all levels and at all times. Local politics and policy priorities would—indeed, should—shape each city’s affirmative litigation docket. Atlanta’s agenda will not resemble Chicago’s, which will not resemble San Diego’s, and so forth. Cities, after all, can be “laboratories,” too.⁴³

Others claim that the culture of engagement cannot spread because most local public law offices cannot handle complicated cases.⁴⁴ But only some affirmative litigation is truly complex; a rational city attorney will gravitate toward cases within his or her office’s particular competency. And to the extent the “local incompetence” point is valid, it argues for enhancing the quality of local public law offices, not hobbling them. As Richard Schragger has noted, parochialism is self-reinforcing;⁴⁵ the converse is equally true. At the San Francisco City Attorney’s Office, meaningful, innovative work has attracted and retained some of the most sought-after legal talent in the country. If seeded nationally, the culture of engagement would draw outstanding, public-minded law students and lawyers into local public law offices, boosting the overall quality of those offices and improving public representation nationwide.

* * *

Why are public law offices often marked by a responsive culture rather than a culture of engagement? It may be that city attorneys tend to view their clients primarily as public management corporations

⁴³ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁴ See generally Schragger, *supra* note 1, at 393, 394, 404-405 (describing claims that cities and their officials are invidious and incompetent, and cannot be trusted with real power).

⁴⁵ See Schragger, *supra* note 35, at 2542, 2578.

rather than units of representative democracy. More generally, perhaps they perceive their cities (rightly or wrongly) as lacking the legal, political, economic, and human resources to pursue affirmative litigation. But if localities could overcome these barriers, as San Francisco has over time, our nation would reap benefits in the form of more competent and vigorous local governance, a more energetic citizenry, and a richer marketplace of ideas.

Local Leadership and National Issues

Richard Briffault*

I. Introduction: Local Governments as Policy-Makers

In recent years, local governments across the country have taken on a host of problems often seen as matters of national or state concern, including political reform, public health, employment relations, domestic relations, climate change, and immigration regulation. These city and county actions challenge the usual assumption that local governments are largely subordinate to their states, limited to providing basic services, and unable to play a real policy-making role.

In the context of political innovation, for example, local governments have taken the initiative on campaign finance reform, with more than fifteen cities and counties adopting some form of public financing of candidates for local office.¹ Local governments have also taken a leading role in experimenting with alternative voting systems that can provide a greater voice for minor parties or minority groups.² With respect to promoting the public health, local initiatives have included stringent indoor smoking controls and regulation of the sale of tobacco;³ restrictions on the use of trans fats in restaurants⁴ and requirements that chain restaurants disclose the calorie content of the food on their menus;⁵ and, until the Supreme Court's *Heller* decision, efforts to limit the possession of firearms.⁶ Turning to the regulation of the workplace, some local governments have enacted Living Wage measures which set a higher mini-

* Joseph P. Chamberlain Professor of Legislation, Columbia Law School.

¹ STEVEN M. LEVIN & TIFFANY S. MOK, CENTER FOR GOVERNMENTAL STUDIES, LOCAL PUBLIC FINANCING CHARTS, 2007 (2007), available at http://www.cgs.org/images/publications/pub_fin_local_2007.pdf.

² See, e.g., Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006).

³ RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 429-435, 437-439 (7th ed. 2009).

⁴ See, e.g., Anemona Hartocollis, *Restaurants Prepare for Big Switch: No Trans Fat*, N.Y. TIMES, June 21, 2008, at B1.

⁵ See, e.g., N.Y. State Rest. Ass'n v. New York City Bd. of Health, 545 F. Supp. 2d 363 (S.D.N.Y. 2008).

⁶ See, e.g., BRIFFAULT & REYNOLDS, *supra* note 3, at 336-341, 344-348.

minimum wage than mandated by federal or state law⁷ and so-called “pay-or-play” measures that would require firms to either provide their employees with health insurance or pay a tax to support government health care programs.⁸

Local domestic relations innovations have included bans on sexual-preference-based discrimination, the extension of employee dependent benefits to same-sex partners, domestic partnership registries, and—most dramatically—efforts to authorize same-sex marriage.⁹ On climate change, more than 900 mayors have signed the U.S. Conference of Mayors Climate Protection Agreement, in which they committed to meet or exceed within their cities the Kyoto Protocol goals for greenhouse gas reduction.¹⁰ Although actual municipal actions have generally fallen short of this ambitious aspiration, many cities have sought to reduce greenhouse gas emissions within their borders through green building codes, greater investment in mass transit, and zoning and land use planning decisions aimed at promoting compact, mixed-use development.¹¹

As for immigration, some local governments have sought to go beyond federal enforcement efforts and take action against unauthorized immigrants by penalizing employers who hire them or denying them access to certain public facilities and benefits. Other localities have taken a more welcoming stance by organizing day labor centers or adopting so-called “sanctuary laws” that bar local law enforcement officers from inquiring into the immigration status of individuals they question.¹² The city of New Haven now issues official identification cards to unauthorized immigrants who can prove residence in the city.¹³

⁷ See, e.g., *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. Ct. App. 2005).

⁸ See, e.g., *Golden Gate Rest. Ass’n v. City & County of S.F.*, 546 F.3d 639 (9th Cir. 2008).

⁹ See, e.g., BRIFFAULT & REYNOLDS, *supra* note 3, at 348-357.

¹⁰ See Mayors Climate Protection Center, U.S. Conference of Mayors Climate Protection Agreement, <http://www.usmayors.org/climateprotection/agreement.htm> (last visited Sept. 21, 2009).

¹¹ See, e.g., Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253 (2009).

¹² See BRIFFAULT & REYNOLDS, *supra* note 3, at 1154-1157.

¹³ See Rob Gurwitt, *Welcome Mat: While Other Places Crack Down on Illegal Immigrants, New Haven is Gambling on a Softer Approach*, GOVERNING, Dec. 2008, at 33-37.

The rise or, more accurately, the renewal of local government policy activism is not necessarily politically progressive. As just noted, some local actions concerning immigration are aimed at enhancing laws against unauthorized immigrants. Many local land use regulations have sought to exclude the poor or minorities and have contributed to sprawl, traffic congestion, and the high cost of housing. Some local governments have sought to promote firearm ownership even as others have sought to restrict it.¹⁴ Nor is local activism limited to big cities like New York or San Francisco, or unusual places, such as college towns like New Haven. Smaller cities, county governments, and a host of ordinary communities have sought to restrict tobacco use, promote green construction, and improve conditions for low wage workers.

Local policy activism provides an important reminder that the United States is a system with multiple levels of government, with governments at each level enjoying relatively broad powers to act over a wide range of activities. The federal government gets most of the attention, but much domestic policy-making occurs at the state and local levels. Local government, in particular, is too often ignored, even though the vast majority of public services are provided by localities, the vast majority of public employees are employed by local governments, and the vast majority of opportunities for participation in public life—such as running for office, campaigning for or against a ballot proposition, or appearing before such key governing institutions as the school board, the zoning commission, or the town meeting—are at the local level.

Local activism also reminds us that many important issues are not intrinsically national, state, or local but have elements of all three. Political reform, gay rights, tobacco, and immigration may be national concerns, but they have distinct local components. Local governments have special interests in the integrity of their internal political processes, the health and safety of their residents, and the rights of members of their communities. Thus, local governments have long regulated local elections, prohibited nuisances, provided services, and regulated economic activity within their boundaries.

With federal, state, and local governments all active with respect to the same subjects, there are likely to be conflicts. Different levels of government can pursue different goals, and the actions of one level of government can interfere with the programs of others. These conflicts have both a legal and a political dimension. Indeed, the legal and the political are often intertwined, with the resolution of the legal issues turning on the analysis of political values. Part II of this essay looks at the legal sources of local power to adopt policy innovations and then at the legal

¹⁴ See BRIFFAULT & REYNOLDS, *supra* note 3, at 348.

issues that arise when local law-making comes into conflict with action by the state. This Part, and the paper more broadly, focuses exclusively on the judicial treatment of state-local conflicts because federalism issues have generally received significant attention while state-local questions are less frequently examined. Part III discusses the political values implicated by local innovation and state-local conflicts along with the role of these values in resolving the legal questions raised in Part II. Part IV concludes by considering the role of local innovation in light of changing political conditions.

II. The Legal Structure of Local Innovation

A. Home Rule

In the American federal system, there is no inherent right of local self-government. Rather, as a matter of both federal constitutional law¹⁵ and state law, local governments derive their existence, their territorial scope, their functions, and their powers from their states. Some scholars have claimed that, as a result of this rule, local governments are legally powerless. In fact, virtually all states have created substantial numbers of local governments and endowed many of them with significant policy-making authority. Sometimes the authority derives from a specific statute giving local governments power to act with respect to a specific subject, such as land use planning and zoning. Sometimes the authority comes from broader state laws giving local governments—or significant categories of local governments, like cities or counties—the general power to adopt laws advancing the health, safety, and well-being of local residents.¹⁶ Most states have amended their constitutions to give at least some local governments a substantial degree of law-making authority. This broad delegation of law-making authority, whether by state constitutional provision or by state legislation, is known as home rule.

Home rule has two critical components. First, it enables local governments to undertake actions over a range of important issues without having to run to the state for specific authorization. This facet of home rule—sometimes known as home rule *initiative*¹⁷—gives local governments power to engage in policy-making concerning local matters. In

¹⁵ *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

¹⁶ *See, e.g., State v. Hutchinson*, 624 P.2d 1116 (Utah 1980).

¹⁷ *See, e.g., GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* 7 (1985).

practice, it undoes an older notion—known as Dillon’s Rule—that limited local government authority to matters expressly granted by the state or to matters clearly implied in the express grant. With home rule initiative, local home rule governments can act generally with respect to local matters. The second strand of home rule provides *immunity*,¹⁸ that is, protection of local actions with respect to local matters from displacement by state law. Under home rule immunity, local government actions can prevail even in the face of conflicting state laws. Home rule immunity thus enables local government actually to trump its nominal hierarchical superior, the state.

Early versions of home rule sought to provide home rule municipalities with both initiative and immunity powers with respect to “local” or “municipal” affairs. In an early decision applying Missouri’s pioneering home rule provision—which applied only to the city of St. Louis—the United States Supreme Court referred to St. Louis as an “imperium in imperio” or a government within a government,¹⁹ and the term “imperio” continues to be used to describe home rule provisions that extend both initiative and immunity to local governments.

In theory, by combining initiative and immunity, imperio home rule provisions can establish extensive local autonomy. In practice, that autonomy is often limited. With basic terms like “local” or “municipal” usually left undefined, imperio home rule turns the legal scope of local self-government into a matter for the courts. Some state courts construe local power narrowly, particularly when local governments rely on home rule to immunize their actions from state interference. In those cases, courts were particularly tempted to constrain the meaning of “local” or “municipal.” But these narrowing interpretations in immunity cases sometimes had the effect of causing judges to read the same language just as narrowly in cases dealing with the scope of local initiative. As a result, many home rule advocates became concerned that the imperio model fails to provide an adequate basis for local law-making. In the middle of the twentieth century they developed a new home rule formulation, which was embraced by the American Municipal Association (later the National League of Cities) and the National Municipal League, which provided that a city or other home rule locality could “exercise all legislative powers and perform all functions not expressly denied” by state law. This home rule framework is sometimes known as “legislative” home rule because the power to determine the scope of local home rule

¹⁸ *Id.*

¹⁹ *City of St. Louis v. W. Union Tel. Co.*, 149 U.S. 465, 468 (1893).

is up to the state legislature.²⁰ Legislative home rule presumes that a home rule local government has all the power the state legislature could give it unless and until the legislature takes a power away from the locality. This approach creates a stronger presumption in favor of home rule initiative, but at the price of providing no home rule immunity.

B. Local Initiative

In practice, many state home rule provisions blur these two theoretically sharp distinctions and combine imperio and legislative language. No constitutional formula can determine what courts will actually do in contested cases. Courts in imperio home rule states can allow their localities a lot of initiative, while courts in legislative home rule cases can interpret the scope of local initiative narrowly even in the absence of legislative prohibition. It is dangerous to generalize across our fifty-state system.

Nevertheless, it is fair to say that the scope of local initiative has grown and courts have been willing to sustain local power to act with respect to a host of matters not clearly or uniquely local. This willingness has included tolerance for local regulation of the possession of assault weapons;²¹ local domestic partnership ordinances and prohibitions on discrimination based on sexual preference;²² local living wage ordinances;²³ and local campaign finance regulation.²⁴ In permitting such local measures, courts have found that local autonomy is not limited to matters that are uniquely local, that is, confined to a particular locality, but also extends to issues and problems that can arise in localities throughout a state. Moreover, in the face of the argument that home rule

²⁰ Unfortunately, the “legislative home rule” phrase can give the misleading impression that it applies to home rule authorized by ordinary legislation, as opposed to a state constitutional provision. In fact “legislative home rule” is typically provided by a state constitutional home rule amendment.

²¹ *See, e.g.,* *Richmond Boro Gun Club, Inc. v. City of N.Y.*, 896 F. Supp. 276 (E.D.N.Y. 1995) (upholding New York City law criminalizing the possession and transfer of certain assault weapons); *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993) (upholding ordinance banning possession and sale of assault weapons).

²² *See, e.g.,* *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997); *Tyma v. Montgomery County*, 801 A.2d 148 (Md. 2002).

²³ *See, e.g.,* *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149 (N.M.Ct. App. 2005).

²⁴ *See, e.g.,* *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980).

leads to disuniformity of policy within the state, courts have often been willing to find that interlocal policy variation attributable to differences in local needs, circumstances, and preferences is entirely acceptable and is, indeed, consistent with the very logic of home rule.²⁵

Home rule initiative is certainly not unconstrained. Very few states give local governments home rule with respect to taxation and finance. Many states, following the recommendation of the National Municipal League (“NML”), prohibit their local governments from enacting “private or civil law governing civil relationships.” This rather opaque and ambiguous provision has been treated as barring localities from addressing core features of contract, tort, property, and family law, as well as other basic determinants of legal rights and duties. Some courts have relied on the provision to bar local rent control ordinances—on the theory that they regulate the civil landlord-tenant relationship—or ordinances regulating the conversion of residential rental units to condominiums, again on the theory that such local rules address private property relationships. Yet courts have also frequently upheld local anti-discrimination ordinances—even though they affect employer-employee and landlord-tenant relations—as well as local housing safety and building construction codes and tenant protection measures. The NML ban on local laws dealing with civil relationships provides an exception for local laws that do so “as incident to the exercise of an independent [local] power,” and many courts have treated local anti-discrimination, housing, or workplace ordinances as “incident to” the general police power grant.²⁶

As the leading study of the so-called “private law exception” has found, in practice the question of local power to adopt so-called private or civil laws as a matter of home rule initiative is often obviated by the existence of extensive state legislation on private law subjects.²⁷ Whether or not a locality could adopt its own same-sex marriage ordinance in the absence of state marriage laws, for example, is a moot point since all states have marriage laws that define who can be married and to whom. In other words, in most jurisdictions the local initiative question with respect to private or civil rights quickly becomes a question of whether the local measure is in conflict with, and thus preempted by, state law.

²⁵ See, e.g., *Kalodimos v. Vill. of Morton Grove*, 470 N.E.2d 266 (Ill. 1984).

²⁶ See BRIFFAULT & REYNOLDS, *supra* note 3, at 365-368.

²⁷ See Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 U.C.L.A. L. REV. 671 (1973).

Indeed, as a general matter, the principal issue affecting the scope of local authority is whether the local action conflicts with state law, and what happens when such a conflict arises.

C. Immunity: Conflict and Preemption

(1) Conflict

In imperio home rule states, local governments can win some state-local conflicts. The state constitution may provide that some matters are primarily of local concern, so that state law must give way when it is inconsistent with a local law.²⁸ So, too, state courts may find that some matters are of mixed state and local concern and may determine that in certain circumstances the local interest is dominant and should prevail.²⁹ However, although a handful of state courts, like those in California and Colorado, provide a significant degree of protection for local decision-making, in most states, whatever form of home rule the state constitution provides, the state typically prevails in the event of a state-local conflict. (Of course, in legislative home rule states, local governments have no protection when a local measure is inconsistent with a valid state law. The absence of immunity results from the very definition of legislative home rule.)

(2) Preemption

The real question then in most states and most cases is whether the state law and the local law are actually in conflict. That is known as the preemption question. In most states, the only real home rule “immunity” local governments enjoy is the interstitial one that grows out of the judicial interpretation of when a state law is inconsistent or in conflict with a local one. This is not a true immunity, of course, but preemption doctrines can limit the impact of state actions on local laws and thereby provide some breathing room for independent local policy-making.

State courts generally interpret state-local “conflict” to mean that the local ordinance is inconsistent with state law. Some cases of claimed inconsistency are relatively easy to decide. State and local laws are inconsistent when they give conflicting commands such that both laws cannot be obeyed. A state law requiring driving on the right clearly conflicts with a municipal ordinance requiring driving on the left. So, too, a

²⁸ See, e.g., *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008).

²⁹ See, e.g., *Johnson v. Bradley*, 841 P.2d 990 (Cal. 1992); *Fraternal Order of Police, Colo. Lodge #27 v. City & County of Denver*, 926 P.2d 582 (Colo. 1996).

local law purporting to legalize something the state prohibits—such as possession of a small amount of certain drugs—is inconsistent with the state’s law. A second easy case occurs when the state expressly provides by statute that all local laws on a certain subject are precluded.

Most cases are harder. The typical, more difficult case arises when the state regulates an area but does not expressly prohibit additional local regulation, and the local government then adds further regulation. The state and local laws are not literally inconsistent. Someone can comply with both state and local laws simultaneously, and the state has not prohibited local law on the subject. Nevertheless, the additional local regulation burdens activity permitted by the state. If the state’s policy is to allow activity that satisfies state law to go forward unhindered, then the local law is inconsistent with state policy. But if the state policy is merely to set a regulatory floor, and if the state is unconcerned about additional local regulation, then there is no state-local conflict, and the local law would not be preempted.

The question of whether some state regulation precludes additional local regulation comes up all the time—in the contexts of environmental protection, food safety regulation, laws dealing with tobacco, even the criminal law. Do state anti-pollution requirements prevent a city from adopting tougher local restrictions? Does a state speed limit preclude a lower local one? Does a state law requiring restaurants and places of public accommodation to provide separate smoking and non-smoking areas preempt a local ordinance banning smoking in places of public accommodation?³⁰ Does a state anti-discrimination law that provides an exemption for private clubs conflict with a local anti-discrimination ordinance that applies to some private clubs?³¹

There is no consistent approach to preemption across the states, or even within individual states. Some state courts have held, as the New York Court of Appeals once did, that when a “local law results in a situation where what would be permissible under State law becomes a violation of the local law” conflict exists, and the local law must give way.³² Such an approach would significantly narrow local autonomy. If any limited state prohibition is held to constitute an affirmative authorization of all conduct not prohibited, then, once the state has passed a law on a matter—and there are few matters that have not received state legislative attention—all local action beyond mere duplication of the state

³⁰ See, e.g., *Steffes v. City of Lawrence*, 160 P.3d 843 (Kan. 2007); *Amico’s Inc. v. Mattos*, 789 A.2d 899 (R.I. 2002).

³¹ See *N.Y. State Club Ass’n v. City of N.Y.*, 69 N.Y.2d 211 (1987).

³² *Wholesale Laundry Bd. of Trade, Inc. v. City of N.Y.*, 12 N.Y.2d 998 (1963).

law would be preempted. Indeed, even the New York court has come to recognize the narrowing effect of such an approach and in recent years has tended to reject a finding of outright conflict where a locality merely adopts a more extensive regulation than the state.³³ At the opposite extreme, a few states, like Illinois and Montana, have constitutional provisions that affirm that a local government may act “concurrently with the state” and that state law will not be treated as preemptive unless the legislature so declares. In these states preemption is supposed to be a legislative, not a judicial, matter, although even in those states the courts have sometimes implied preemption notwithstanding the absence of an express legislative statement of intent to preempt.

Most courts in most states most of the time neither require express preemption nor treat laws that add requirements to state laws as necessarily in conflict with state law. Rather, preemption is treated as a question of legislative intent, which is resolved in a multifaceted relatively ad hoc inquiry. Courts attempt to discern the state legislature’s purpose and whether the local measure frustrates that purpose. This may involve resort to legislative history, although that is rarely dispositive. Courts also look to the scope of state regulation. Extensive state legislative attention to a subject, including, for example, the creation or use of a state administrative agency to carry out legislative policy, is more likely to lead to a finding that the state has “occupied the field” to the exclusion of local action—although the exact dimensions of the “field” occupied by the state will be subject to debate. State laws that formally license or affirmatively permit regulated private conduct may be more likely to be treated as preempting further local regulation of the same conduct, although a judicial finding that state and local laws are aimed at different, even if overlapping, evils can save the local measure from invalidation.³⁴

Frequently, preemption decisions—whether explicitly or implicitly—involve the resolution of a conflict between the political values served by local autonomy and those served by state preemption. Courts make judgments about whether a matter is best determined at the state level exclusively, or whether state law can coexist with varying local laws. The political values at stake are considered in the next Part.

³³ See, e.g., *Council for Owner Occupied Hous., Inc. v. Koch*, 61 N.Y.2d 942 (1984).

³⁴ See BRIFFAULT & REYNOLDS, *supra* note 3, at 439.

III. The Politics of Preemption

All preemption questions are at least to some degree political. With many policy issues subject to legislation at multiple levels of government, the loser of a political battle at one level always has the incentive to try again at another level. Employees or consumers or environmentalists frustrated in their quest for more extensive state-level regulation of employers, producers, or polluting enterprises can try to get what they want from local governments. If they succeed, then the employers, producers, or firms have an incentive to obtain state legislation barring the local measure. In an imperio home rule state, this may then lead to a judicial determination of which level of government should prevail. Even in a legislative home rule state, courts will have an important role to play if the state law is not expressly preemptive. In these conflict and preemption cases, courts will generally avoid making a policy judgment about the relative merits of the competing state and local laws (although such a policy judgment may be at work beneath the surface of judicial consideration). But they may engage in a different kind of political judgment that considers the different values supporting state, in contrast to local, decision-making.

The case against preemption generally relies on support for the value of interlocal variation and the possibility of local innovation and experimentation. Support for interlocal variation reflects the judgment that distinctive local needs, circumstances, and preferences make it sensible for policies to vary from place to place. These variations may be based on population size or density (urbanness), topography, local wealth or poverty, demographics, types of local housing or industry, or simply local differences in political ideology. Where these interlocal differences appear to justify interlocal policy differences, courts may be less likely to find preemption. Similarly, courts may be less likely to find preemption when they think that local action permits useful innovations or experiments that could be copied by other local governments and, ultimately, the state as a whole.

By contrast, a court is more likely to find preemption when it finds that local regulation has significant external effects beyond the boundaries of the regulating locality or determines that multiple, varying local rules would impose unacceptable costs on the rest of the state. Local decisions are justified, in part, by the ability of the people affected by those decisions to participate in the local political process and by the fact that the consequences of those decisions are largely borne by members of the local community. To the extent that a local government's actions burden outsiders unrepresented in the local political process, those actions lack legitimacy. Given the large numbers of local governments near each

other in most metropolitan areas, local regulations are likely to have at least some effects beyond their borders and to affect the region as a whole. As a result, some externalities have to be accepted if there is to be any room for local action. But if the external effects are large enough, action at the local level begins to seem doubtful, and the case for state preemption grows.

Apart from external effects, the decisions of multiple local governments to adopt different rules concerning the same subject can impose costs. People or businesses can be subject to the rules of multiple localities. Many people live in one locality, work in another, and pass through still others during the course of their daily activities. Goods pass through multiple localities, and many firms have offices or outlets in multiple communities. People also frequently relocate from one community to another. Laws that vary significantly from place to place can burden individuals or enterprises that undertake activities in several places, or that frequently move from place to place. There can be costs in complying with different laws simultaneously, and even in learning about varying local laws and determining what actions must be taken to come into compliance. Certain interlocal variations—in zoning rules or tax rates—have become customary and may be deemed acceptable, but others, such as those dealing with health and safety standards, may be seen as unduly burdensome. Indeed, a central question for preemption is whether the benefits of permitting local tailoring of laws to particular needs, circumstances, and benefits are outweighed by the costs of disuniformity across a region or state—whether by the legislature when it passes a law, or by a court when it considers the relationship between state and local laws.

As this suggests, the question of preemption is to a considerable extent a quasi-empirical one. With legislatures generally better than courts at making these quasi-empirical judgments, there is some argument that preemption ought to be a matter for legislative determination, with courts declining to imply preemption when the legislature has failed to expressly call for it. However, there will still be a need for a judicial resolution of these competing values in imperio states that provide some immunity for local decision-making. Consideration of the extent of external effects, the costs of disuniformity, and the benefits of locally-tailored action will help courts decide whether a matter is primarily for state or for local determination. Alternatively, even in the absence of express preemption courts may conclude that extensive state regulation of a subject underscores the value for statewide uniformity or reduces the benefits to be gained from local innovation or experimentation.

Ultimately, it may not be possible to have a consistent position on state-local conflicts and preemption. Recognition of the democratic value and substantive benefits of local innovation counsels in favor of giving local governments wide space for action and against any presumption of preemption. But a concomitant recognition that some matters ought to receive uniform treatment and that local action can impose costs on people not represented in local government means that there will be some areas in which preemption is appropriate. Legal questions of state-local conflict and preemption cannot be wholly separated from either the political values implicated by local autonomy or the substantive political concerns triggered by specific policy conflicts.

IV. Conclusion

Local innovation plays a surprisingly important role in addressing national problems. This both reflects a broader scope for local home rule initiative than many scholars have assumed is the case and argues for maintaining and expanding that local power. But the ultimate scope of local authority, and especially local power to resist the conflicting policy determinations of higher levels of government, is uncertain. The case for local autonomy is strongest when the upper levels of government are inactive, whether because the issue in question is particularly pressing in some localities but not especially salient elsewhere; because the upper levels of government are hobbled by political conflicts over the issue; or because of uncertainty over just how to address the issue and over whether a uniform state or national treatment is appropriate or required. When there is state or national lack of interest or gridlock, local action can address a problem where it is most acute and demonstrate the efficacy (or lack of it) of specific policies. Local successes can build political support for state or national actions, and local failures can spark the search for different solutions. Different actions by different localities can enable policy analysts to assess the costs and benefits of different approaches and judge which would work better for the state or the nation, or whether varying treatments would be better still. Over time, local innovation and experimentation can mobilize a consensus that would support state or national action.

Once an upper level government acts, however, the continued space for local variation becomes less certain. At the very least, the upper level government's policy might set a floor for rights or regulations, requiring compliance even in those localities which might have preferred no governmental action on the subject at all. Beyond that, once the upper level of government has considered the range of local experiences and adopted a policy of its own, there may be less to be gained from local in-

novation and experimentation and more to be lost from interlocal disuniformity. Variation particularly burdens individuals and firms subject to multiple local jurisdictions. Moreover, state-local and local-local cooperation in advancing shared policy goals may also be promoted by a consistent set of rules.

This is not to say that upper level policy-making always requires preemption of local government. Depending on the nature of the policy, a floor-but-not-ceiling approach may make sense, with the state or nation mandating minimum regulation and local governments free to do more in light of local preferences or circumstances. Alternatively, the upper level government may set a template for action, with local governments free to vary from it so long as local action is consistent with state or national goals. There may still be continued benefits from local experimentation even when the state or national course has been set, and local variation that does not impose external costs may be entirely justified.

The main point is that the costs and benefits of local autonomy are likely to vary according to the degree to which the state or national government is also actively engaged in addressing the political, economic, or social needs that have triggered local action. Local activism may be particularly sparked by state or national indifference or apathy, and the possibility of such upper level inaction underscores the benefits of giving local governments the legal and political capacity to address these problems. But when upper level governments are also actively engaged in tackling pressing problems, questions of intergovernmental coordination, policy coherence, and compliance costs are likely to become more central. Local capacity to engage in policy-making will always be critical, but the scope given to local autonomy is likely to vary according to both the policy matter in question and the surrounding political context.

III. COORDINATION, BOTH VERTICAL AND HORIZONTAL

New Federalism(s): Translocal Organizations of Government Actors (TOGAs) Reshaping Boundaries, Policies, and Laws

Judith Resnik*

I. Precautions in Labeling: How Federalism Creates Pathways to Intertwine the “Domestic” and the “Foreign”

In recent years, local governments across the country have taken on a host of problems often seen as matters of national or state concern, including political reform, public health, employment relations, domestic relations, climate change, and immigration regulation. These city and county actions challenge the usual assumption that local governments are largely subordinate to their states, limited to providing basic services, and unable to play a real policy-making role.

When questions arise at the national level in the United States about the potential harms of new products or manufacturing processes, the response is to undertake what is termed “risk analysis,” aimed to provide a utilitarian weighing of costs and benefits.¹ In contrast, in many countries in the world, regulatory regimes attend to an idea called the “precautionary principle,” often credited to work in the 1970s in Germany on consumer and environmental protection.² By the end of twentieth century, the “precautionary principle” had been codified in legislation at both the national and transnational level. As the Swedish Unified Environmental Code of 1998 put it, “precautionary measures [were to] . . . be undertaken as soon as there is reason to believe that an activity or measure can cause harm or inconvenience with respect to human health or to the environment.”³ The European Union had, by

* Arthur Liman Professor of Law, Yale Law School.

¹ See generally Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293 (2003). That process has its critics. See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2005).

² JULIAN MORRIS, RETHINKING RISK AND THE PRECAUTIONARY PRINCIPLE 1–21 (2000).

or to the environment.”³ The European Union had, by then, also adopted that approach.⁴

So had San Francisco. In 2003, its Board of Supervisors concluded that, in light of its residents’ rights to a “healthy and safe environment,” its new environmental code would incorporate the “precautionary principle” as local law.⁵ As that ordinance explains, the precautionary principle requires consideration of “less hazardous options” to do as little damage as possible to human health and the environment.⁶ To implement this obligation, in 2005, San Francisco committed to using its “power to make economic decisions involving its own funds as a participant in the market place . . . consistent with its human health and environmental policies.”⁷ Manufacturers were told to disclose the alternative substances that could have been used in the creation of various products.

Return for a moment to Europe, where concerns were emerging about chemicals (called phthalates) that are used in toys and cosmetics to make plastics flexible and fragrant.⁸ In 2003, the EU issued a direc-

³ See 3 § Environmental Code of 1998 (SFS 1998: 811) (Swed.).

⁴ See, e.g., Maastricht Treaty on the European Union, Sept. 21, 1994, 31 I.L.M. 247, 285–86. See generally Elizabeth Fisher, *Opening Pandora’s Box: Contextualizing the Precautionary Principle in the European Union*, in UNCERTAIN RISKS REGULATED: FACING THE UNKNOWN IN NATIONAL, EU AND INTERNATIONAL LAW 21 (Michelle Everson & Ellen Vos eds., 2009).

⁵ S.F., Cal., Ordinance 171-03 (July 3, 2003). Other California cities have followed San Francisco’s lead. See, e.g., Berkeley, Cal., Ordinance 6,911-NS (Apr. 20, 2006); Mendocino County, Cal., Policy No. 43, Finding (D) (June 2006).

⁶ S.F., Cal., Ordinance 171-03 § 3, Sec. 100(F).

⁷ S.F., Cal., Ordinance 115-05, § 2, Sec. 200(A) (June 17, 2005). For an intricate analysis of the costs and benefits associated with localities tackling issues that arguably exceed their borders, see Richard Briffault, *Local Leadership and National Issues*, in this volume, *supra*. Kathleen Morris looks specifically at the efforts of the San Francisco City Attorney and locates the motivation for local action on national and global issues in a “culture of engagement.” See Kathleen Morris, *San Francisco and the Rising Culture of Engagement in Local Public Law Offices*, in this volume, *supra*.

⁸ See Commission Directive 92/59, 1992 O.J. (L228) 24 (EEC).

tive prohibiting those chemicals in cosmetics manufactured after 2004.⁹ A year later, a ban on use in children's toys became permanent.¹⁰

Those regulations inspired some lawmakers in California who, in 2004, proposed a bill that defined a "prohibited substance" to include those substances prohibited by the "European Parliament and the Council of Europe."¹¹ Subsequently, when the California legislature enacted its "toxic toy" legislation in 2007, that reference (and much else) was deleted.¹² That law (paralleled by one in San Francisco¹³) specified that "no person or entity shall manufacture, sell, or distribute in commerce any toy or child care article that contains "certain chemicals," to wit, phthalates.¹⁴ Similar bills have been introduced in several states, including Maine, Massachusetts, Michigan, New York, and Oregon,¹⁵ and have been enacted in Vermont and Washington.¹⁶ Along the way, some business groups challenged localities' authority and argued that federal law preempted subnational regulation.¹⁷ In August 2008, the focus shifted to the national level when Congress regulated chemicals in toys directly and also recognized an arena for state regulation.¹⁸

⁹ See European Parliament and Council Directive 2003/15, 2003 O.J. (L66) 26 (EC).

¹⁰ See European Parliament and Council Directive 2005/84, 2005 O.J. (L344) 40 (EC).

¹¹ A.B. 2025, 2003–2004 Reg. Sess. (Cal. 2004) (as amended Apr. 12, 2004).

¹² See A.B. 1108, 2006–2007 Reg. Sess. (Cal. 2007).

¹³ S.F., Cal., Ordinance 120-06 (Dec. 1, 2006), *amended by* Ordinance 86-07 (Apr. 27, 2007).

¹⁴ CAL. HEALTH & SAFETY CODE § 108937(b) (West 2009).

¹⁵ See Nat'l Caucus of Env'tl. Legislators, Phthalates: Enacted Laws, Introduced Bills (As of 10/17/07), [http://www.ncel.net/news_uploads/179/Phthalate - Enacted-Introduced10-17-07.doc](http://www.ncel.net/news_uploads/179/Phthalate-Enacted-Introduced10-17-07.doc) (last visited Nov. 8, 2009).

¹⁶ See 2008 Vt. Acts & Resolves No. 171 (codified at VT. STAT. ANN. tit. 18, § 1511 (2008)) (approved May 24, 2008); 2008 Wash. Legis. Serv. Ch. 288 (S.S.H.B. 2647) (West) (codified at scattered sections of WASH. REV. CODE § 43.70.660 and Title 70) (approved April 1, 2008).

¹⁷ Two lawsuits, one in state and one in federal court, challenged the 2006 San Francisco ordinance, but because of local and national legislation, neither resulted in court rulings on the merits of the arguments. *See, e.g.*, Stipulation of Voluntary Dismissal Without Prejudice, Toy Indus. Ass'n v. San Francisco, No. C-06-7111-SC (N.D. Cal. Nov. 13, 2008).

¹⁸ See Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 108(d), 122 Stat. 3016, 3037 (codified at 15 U.S.C. § 2057c(d) (2006)). Section 108 both prohibited the sale of children's toys with certain chemi-

I have just provided an example of the role played by “the foreign” in the making of “local” law, as well as of the role that cities and states take in shaping “national” law. San Francisco and California have, in essence, served as a route by which a piece of Europe’s regulatory law became domesticated inside the United States. This example is both recent and in a context (consumer protect safety) less often identified as one inflected with transnational lawmaking. Yet it is part of an ongoing and long pattern, as can be seen by turning from toxic toys to human rights and climate change.

In 1981, the Convention on the Elimination of All Forms of Discrimination Against Women, or CEDAW as it has come to be known, entered into force.¹⁹ CEDAW requires signatory states to take action in political, social, economic, and cultural fields to “ensure the full development and advancement of women” so as to enable them to have “human rights and fundamental freedoms on a basis of equality with men.”²⁰ More than 180 countries have ratified the basic provisions of CEDAW, albeit sometimes with reservations as to particular aspects.²¹ President Jimmy Carter signed CEDAW for the United States in 1980,²² but subsequent administrations have either not succeeded in achieving, or have not tried to secure, Senate ratification. Opposition in the United States has been couched in the language of jurisdiction and sovereignty. As one of the Senators opposing ratification argued, ratifying would entail “surrendering American domestic matters to the norm setting of the international community.”²³

cals and provided that its rules shall not be “construed to preempt or otherwise affect any State requirement with respect to any phthalate alternative not specifically regulated in a consumer product safety standard.” *Id.*

¹⁹ Convention to Eliminate All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981).

²⁰ *Id.* art. 3.

²¹ See Division for the Advancement of Women, Department of Economic and Social Affairs, United Nations, CEDAW: States Parties, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Nov. 3, 2009).

²² See 126 CONG. REC. 29,358 (1980) (recording the signing on July 17, 1980; the Senate received the Convention on November 12, 1980); President’s Message to the Senate Transmitting the Convention on the Elimination of All Forms of Discrimination Against Women, 16 WEEKLY COMP. PRES. DOC. 2715 (Nov. 12, 1980).

²³ *Treaty Doc. 95-53: Convention on the Elimination of All Forms of Discrimination Against Women, Adopted by the U.N. General Assembly on December 18, 1979, and Signed on Behalf of the United States of America on*

But as is the case of my opening example—the precautionary principle and toxic toys—to look only at the national level is to miss a lot of the action. By 2004, forty-four U.S. cities had passed legislation relating to CEDAW.²⁴ By 2009, nineteen counties and eleven states had endorsed ratification, with proposals to do so pending in others.²⁵ Most of those provisions are *expressive*—calling for the United States to ratify CEDAW. But a few take a different tack that turns “transnational” law into “local” law. Once again, San Francisco provides an example of local *incorporation*. As the Board of Supervisors of the City and County declared:

[CEDAW], an international human rights treaty, provides a universal definition of discrimination against women and brings attention to a whole range of issues concerning women’s human rights The City shall work towards integrating gender equity and human rights principles into all of its operations, including policy, program and budgetary decision-making. The Commission shall train selected departments in human rights with a gender perspective.²⁶

The purpose is to “[i]ntegrate gender into every city department to achieve full equality for men and women” in areas ranging from public works to parks to probation.²⁷ In transnational parlance, that technique is what the United Nations, the Council of Europe, and the Commonwealth Secretariat call “gender mainstreaming,” aimed at ensuring that

July 17, 1980: Hearing Before the S. Comm. on Foreign Relations, 107th Cong. 14-15 (2002) (statement of Sen. Michael Enzi).

²⁴ CEDAW: THE TREATY FOR THE RIGHTS OF WOMEN 73-74 (Leila Rassekh Milani, Sarah C. Albert & Karina Purushotma eds., 2004).

²⁵ See CEDAW: Treaty for the Rights of Women, The Role of the United States, http://www.womenstreaty.org/facts_usrole.htm (last visited Nov. 10, 2009). Discussion of other local enactments can be found in Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564, 1640 n.365 (2006) (hereinafter Resnik, *Law’s Migration*).

²⁶ S.F., CAL., ADMIN. CODE § 12K.1 (2005).

²⁷ See SFGOV, SAN FRANCISCO COMMISSION ON THE STATUS OF WOMEN: CEDAW ACTION PLAN (2003), available at http://www.sfgov.org/site/cosw_page.asp?id=17146.

all social policy decisions are made with attention to their effects on women and men.²⁸

Turn to another issue: climate change. In 1997, meetings in Kyoto, Japan, produced an agreement, called the Kyoto Protocol, to address global warming through a framework relying on certain timetables to reduce greenhouse gas emissions.²⁹ In 1998, President William Jefferson Clinton signed the Protocol for the United States.³⁰ His efforts were met with a great deal of opposition, exemplified by the Committee to Preserve American Security and Sovereignty (COMPASS), a group of former government officials who came together to appraise the Kyoto proposals. In 1998, COMPASS issued a critical report, *Treaties, National Sovereignty, and Executive Power: A Report on the Kyoto Protocol*.³¹ As the report's Executive Summary explained, the Kyoto Protocol raised "serious concern" because it was the result of the activism of "politically unaccountable" NGOs, which opened the door to new uses of power by the Executive, and more generally "impinge[d] on our national sovereignty." One of the report's key arguments—that joining the Protocol would undermine the "legitimate exercise of U.S. sovereign decision making"³²—is a position also seen in conflict over CEDAW. This stance, *sovereignism*, insists on a nation's right to define and delineate law-making.³³

What is at stake in the effort to categorize something as either "domestic" or "foreign"? The objectors to Kyoto explain that the stakes are about *power* and *process*. The report argues that the Kyoto Protocol attempts to "convert decisions usually classified as 'domestic' for purposes

²⁸ See, e.g., CHRISTINE CHINKIN, GENERAL MAINSTREAMING IN LEGAL AND CONSTITUTIONAL AFFAIRS: A REFERENCE MANUAL FOR GOVERNMENTS AND OTHER STAKEHOLDERS (2001).

²⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22, available at http://unfccc.int/essential_background/kyoto_protocol/items/1678.php.

³⁰ *Id.*

³¹ COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, TREATIES, NATIONAL SOVEREIGNTY, AND EXECUTIVE POWER: A REPORT ON THE KYOTO PROTOCOL (1998), available at <http://jamesvdelong.com/articles/environmental/kyoto.html>.

³² *Id.*

³³ For discussion, see Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT'L J. CONST. L. (I-CON) 33 (2008).

of U.S. law and politics into ‘foreign’ decisions that would then give undue power to the Executive Branch, thereby limiting the powers of Congress, local governments, and private entities.³⁴ Further, COMPASS charged that the Kyoto agreement would also give power to courts, including state courts, empowered through customary international law to create a new “super-national source of binding legal rules.”³⁵ These concerns often come under the rubric of a “democratic deficit.”

Given the insistence on the “domestic” nature of the issues, what happened on the “domestic” front is again illuminating. After a presidential election in which the Republicans gained control of the White House, President George W. Bush withdrew American support.³⁶ In February 2005, the Kyoto Protocol went into effect with a group of 141 countries that had ratified it.³⁷ But many local officials did not share President Bush’s views. The day the Kyoto Protocol became law for its ratifying countries, Seattle Mayor Greg Nickels launched the U.S. Mayors Climate Protection Agreement,³⁸ which aims to involve cities in adopting the Kyoto Protocol. By the June 2005 meeting of the U.S. Conference of Mayors, 141 mayors had signed the Agreement—paralleling the 141 countries that had ratified Kyoto.³⁹ These mayors sought to “meet or exceed Kyoto Protocol targets . . . in their own communities,” to encourage federal and state governments to “meet or beat” Kyoto targets, and to have Congress pass bipartisan legislation to create an emissions trading system.⁴⁰ By October 2009, one thousand mayors, repre-

³⁴ COMM. TO PRESERVE AM. SEC. & SOVEREIGNTY, *supra* note 31.

³⁵ *Id.* For additional discussion of the role of state courts in enforcing both local and global norms, see Margaret H. Marshall, *State Courts in the Global Marketplace of Ideas*, in this volume, *infra*; Randall T. Shepard, *State Supreme Courts as Places for Litigating New Questions*, in this volume, *infra*; and Ellen Ash Peters, *What Are the Locals Up To? A Connecticut Snapshot*, in this volume, *infra*.

³⁶ See *U.S. Rejection of Kyoto Protocol Process*, 95 AM. J. INT’L L. 647, 647-649 (2001).

³⁷ See U.S. Conference of Mayors Climate Protection Center, U.S. Mayors’ Climate Protection Agreement, <http://www.usmayors.org/climateprotection/agreement.htm> (last visited Nov. 10, 2009).

³⁸ See Office of the Mayor of Seattle, U.S. Mayors Climate Protection Agreement, <http://www.seattle.gov/Mayor/Climate/> (last visited Nov. 10, 2009).

³⁹ See U.S. Conference of Mayors Climate Protection Center, *supra* note 37.

⁴⁰ U.S. Conference of Mayors, The U.S. Mayors Climate Protection Agreement (As endorsed by the 73rd Annual U.S. Conference of Mayors meeting, Chicago, 2005), available at <http://usmayors.org/climateprotection/documents/mcpAgreement.pdf>.

senting towns and cities whose combined populations number about 86 million, had endorsed that program.⁴¹

Those who wrote the COMPASS report had argued that transnational activity undercut local democratic practices in the United States. But the interaction between the promulgation of the Kyoto Protocol and national reluctance proved a spur, prompting a sequence of democratic iterations in which policies have been openly examined across the United States. These transparent debates have resulted in politically elected officials' championing features of Kyoto. Moreover, they took what had been conceived of in 1970 as a nation-to-nation problem and turned it into an issue of translocal governance.

II. Majoritarian Transnationalism via Federalism(s)' Many Ports of Entry

A summary of the propositions that emerge from these examples is in order. First, efforts to essentialize a certain kind of problem as intrinsically, always, and exclusively to be decided by a particular level of government are doomed to fail, as many of today's challenges have local, national, and global dimensions. Whether the problems are toys in children's hands (or mouths), unequal treatment of women, or the quality and temperature of the air, one cannot presume that they belong to a particular level of governance—that they are “truly national” or “truly local,” to borrow Chief Justice Rehnquist's proposed divisions.⁴² These issues are both local and national, as well as domestic and foreign.

Second, transnational policies, often challenged as undermining domestic sovereignty because they violate democratic majoritarian principles, are not necessarily counter-majoritarian. Many of the policy making efforts discussed above are deeply democratic, in the sense that they spring either from referenda enacted by majorities or from agendas of popularly-elected presidents, governors, mayors, and city council members. To the extent sovereigntist opposition rests on majoritarianism, it can demonstrate no such theoretical or empirical underpinnings.

⁴¹ See Press Release, U.S. Conference of Mayors, 1000th Mayor: Mesa, AZ Mayor Scott Smith Signs the U.S. Conference of Mayors Climate Protection Agreement (Oct. 2, 2009), *available at* <http://www.usmayors.org/pressreleases/uploads/1000signatory.pdf>.

⁴² See *United States v. Morrison*, 529 U.S. 598, 618 (2000). See generally Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001).

Sometimes, sovereigntist positions win popular initiatives to erect boundaries, and other such attempts fail.

Third, none of these examples represent a departure from federalist traditions in the United States. The pattern I have sketched can be found repeatedly during the twentieth century. Examples of translocal-transnational efforts that have both internal and external effects include initiatives seeking to alter the conduct of the Vietnam War, the Gulf War, and the conflicts in Northern Ireland and the Middle East, to promote nuclear disarmament, to protect against land mines, to end apartheid in South Africa, to help provide restitution for Holocaust victims, to enhance gun control, and to try to stop the war in Iraq, genocide in Sudan, and sweatshop labor. Given the range, “municipal foreign policies are here to stay.”⁴³

Moreover, examples of “law’s migration” go back to earlier centuries. The eighteenth and nineteenth century iterations include the Due Process Clause of the U.S. Constitution (built from English, French, and state laws making the point that liberty and property ought not to be deprived arbitrarily), the abolition movement (a worldwide effort in which localities such as Baltimore, Maryland and Birmingham, England played central roles),⁴⁴ and the women’s suffrage movement that moved from “the margin to the center.”⁴⁵ In short, as an empirical matter, “foreign law” has had a major impact on American constitutional law through various channels, both judicial and majoritarian.⁴⁶ Over time, the origins of rules blur. Certain legal precepts now seen to be foundational ought to be labeled “made in the USA” knowing that—like other “American” products—their parts and designs were produced abroad.

Thus, and fourth, opponents of the Kyoto Protocol, CEDAW, and the precautionary principle were and are *correct* to worry about transnational influences on domestic policies and laws. Deep inside the local, one can often see the global. Sometimes—as in the first version of California’s toxic toys legislation, in San Francisco’s CEDAW provisions, and in the Mayors’ Climate Control program—outside influences are ex-

⁴³ Michael H. Shuman, *Dateline Main Street: Local Foreign Policies*, FOREIGN POL’Y, Winter 1986-1987, at 154, 171; see also Susan N. Herman, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201 (2004).

⁴⁴ Resnik, *Law’s Migration*, *supra* note 25, at 1584-1588.

⁴⁵ See John Markoff, *Margins, Centers, and Democracy: The Paradigmatic History of Women’s Suffrage*, 29 SIGNS 85, 104 (2003).

⁴⁶ I am not the first to turn to the import/export image. See Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988).

pressly named. Other times—as in the 2007 bill on toxic toys that passed the California legislature—the texts are silent but the dialogues can be found in legislative histories, cross country comparisons, and background information. Legal borders, like physical ones, are permeable, and seepage is everywhere.

Fifth, showing that sovereigntism does not work to erect impermeable borders ought not to be read to be dismissive of the ideas within sovereigntism. Sovereigntists ask important questions about political and legal legitimacy. They ground their arguments on claims that the sources of law (footnotes and all) are important to the identity of nation-states.⁴⁷ When conflicts emerge about the ownership of and the connection to a particular legal regime, they demonstrate that law is a social practice imbedded in our collective identity. Hence, the insistence of sovereigntists that law is identitarian is an admirable facet of American life, in which law functions as an affiliative mechanism.

Moreover, while sovereigntism in the United States has tended to be isolationist, that quality is not intrinsic in the idea of sovereigntism. Another form of sovereigntism, which could be termed inclusivist or dialectical, is illustrated by the South African Constitution, insistent that South Africa's own identity as a nation-state is tied up with its role as a respected member of the "family of nations."⁴⁸ One of the ways that South Africa's Constitution builds in connections to other countries is through its direction to its constitutional judges to consider international law when interpreting its bill of rights.⁴⁹ Thus, sovereigntism can be dialectical (taking one's own laws seriously through interrogating them against other legal regimes and welcoming interaction and affiliation), but the U.S. version has tended to be promoted as exclusive and isolationist.

III. New Federalism(s): Twentieth Century National, State-Based Institutions

Having sketched some of the continuities over the centuries that localities have played in U.S. lawmaking, I turn to newer iterations of what I have termed "federalism(s)"—to capture the variations within the construct of "federalism." Above, I cited a policy on climate change that

⁴⁷ See Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover*, 17 YALE J.L. & HUMAN. 17 (2005).

⁴⁸ See S. AFR. CONST. 1996 pmbl.

⁴⁹ See *id.* ch. 2, § 39.

was adopted by an entity called the U.S. Conference of Mayors. That organization, founded in 1933,⁵⁰ is one of several organizations of local and state officials.⁵¹ Others on that list include the National League of Cities (NLC, founded in 1964),⁵² the National Conference of State Legislatures (NCSL, founded in 1975),⁵³ the National Governors Association (NGA, founded in 1908),⁵⁴ the National Association of Attorneys General (NAAG, founded in 1907),⁵⁵ the National Association of Counties (NACo, founded in 1935),⁵⁶ the Conference of Chief Justices (CCJ, founded in 1949),⁵⁷ the National Conference of Commissioners on Uniform State Laws (NCCUSL, founded in 1889),⁵⁸ the International City/County Management Association (ICMA, founded in 1914),⁵⁹ the

⁵⁰ See U.S. Conference of Mayors, About the U.S. Conference of Mayors, <http://www.usmayors.org/about/overview.asp> (last visited Nov. 10, 2009).

⁵¹ Other NGOs, while not consisting of local and state *officials*, are nonetheless also organized in a federalist structure, with local and state components. For a description and analysis of how the American Civil Liberties Union is structured along these lines, see Norman Dorsen & Susan N. Herman, *American Federalism and the American Civil Liberties Union*, in this volume.

⁵² See NAT'L LEAGUE OF CITIES, 75 YEARS: OPPORTUNITY, LEADERSHIP, GOVERNANCE: FROM LAWRENCE, KANSAS TO THE 21ST CENTURY 1 (1999); National League of Cities, About NLC, http://www.nlc.org/INSIDE_NLC/aboutnlc.aspx (last visited Nov. 10, 2009).

⁵³ See National Conference of State Legislatures, About the National Conference of State Legislatures, <http://www.ncsl.org> (click "About Us") (last visited Nov. 10, 2009).

⁵⁴ See National Governors Association, About the National Governors Association, <http://www.nga.org> (click "About") (last visited Nov. 10, 2009).

⁵⁵ See National Association of Attorneys General, About NAAG, http://www.naag.org/about_naag.php (last visited Nov. 10, 2009).

⁵⁶ See National Association of Counties, About NACo, http://www.naco.org/Template.cfm?Section=About_NACo (last visited Nov. 10, 2009).

⁵⁷ See NAT'L CTR. FOR STATE COURTS, HISTORY OF THE CONFERENCE OF CHIEF JUSTICES 13, 16-17 (1993), available at <http://ccj.ncsc.dni.us/HistoryPt1.pdf>.

⁵⁸ See Allison Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 LAW & CONTEMP. PROBS. 233, 235-36 (1965); National Conference of Commissioners on Uniform State Laws, <http://www.nccusl.org/Update/> (last visited Nov. 10, 2009).

⁵⁹ See ICMA, About ICMA, <http://www.icma.org> (click "About ICMA") (last visited Nov. 10, 2009).

National Association of Towns and Townships (NATaT, founded in 1963),⁶⁰ and the National Congress of American Indians (NCAI, founded in 1944).⁶¹ Some coordination among these groups is provided by a group called the Council of State Governments (CSG, founded in 1933).⁶²

As their names describe, these various organizations are generally organized not by an interest (such as climate control or women's rights) but by the political units of this federation—by the level of jurisdiction (federal, state, county, city) or the kind of office (governor, attorney general, legislator, mayor). These entities, which mirror the tiered structure of American federalism(s),⁶³ are voluntary organizations of government officials that gain political legitimacy because they “represent” (in some fashion) facets of governmental institutions.

These organizations take positions and generate some collective actions by state officials. But they are not exactly “GOs”—governmental organizations—in that they are voluntary and in some sense “private” organizations that speak for such entities but do not bind the government units from which their officials come. Nor does the nomenclature of “NGOs”—nongovernmental organizations—capture them, for it is the persona of their members as “governmental” that generates the political capital for the group. Moreover, these organizations are public and private in a financial sense as well, in that their resources include support ranging from taxpayer moneys to private grants and corporate sponsorships. As one scholar of municipal associations put it, they are “part interest groups, part associations, part institutions of government.”⁶⁴ Hence, my acronym “TOGAs”—translocal organizations of government officials—to capture both that they are distinct from NGOs and GOs and come cloaked in a form of state-based authority.

⁶⁰ See National Association of Towns and Townships, About Us, http://www.natat.org/about_us.html (last visited Nov. 10, 2009).

⁶¹ See National Congress of American Indians, History, <http://www.ncai.org/About.8.o.html> (last visited Nov. 10, 2009).

⁶² See E. Norman Sims, *The Council of State Governments: A National Information Provider*, 3 GOV'T INFO. Q. 407, 407-408 (1986).

⁶³ See Theda Skocpol, Marshall Ganz, & Ziad Munson, *A Nation of Organizers: The Institutional Origins of Civic Voluntarism in the United States*, 94 AM. POL. SCI. REV. 527 (2000).

⁶⁴ Bertram Johnson, *Associated Municipalities: Collective Action and the Formation of the State League of Cities*, 29 SOC. SCI. HIST. 549, 560 (2005).

These governmental “interest groups” were formed during the twentieth century to protect localities from national encroachments, to forward municipal agendas in Washington, and to engender contacts for similarly situated individuals. With the nationalization and globalization of the economy, TOGAs have broadened their horizons, entering into accords and forging links with other subnational entities around the world in a fashion that one commentator argued went beyond the ability of the national government to “control, supervise, or even monitor.”⁶⁵ As a group of researchers assessing state legislation in 2001 and 2002 put it, state governments are “taking on the world” by considering hundreds of bills related to globalization, trade, immigration, climate control, and human rights.⁶⁶ What these researchers also found was that “legislative policy activists often belong to networks and organizations that link legislatures across state boundaries and that aid in the diffusion of policy ideas from state to state.”⁶⁷

TOGAs typically define themselves as bi-partisan, as they broker information.⁶⁸ In this respect, they are both clearinghouses and repositories, as well as sometimes research and educational institutions. Through the information they collect, the conferences they run, and the services that they provide, these organizations can create norms for office holders and shape policy preferences. And, as I have shown, TOGAs are conduits for border crossings, state to state, state to federal, and internationally.⁶⁹ Moreover, U.S. TOGAs are also part of alliances forging ties with their counterparts in other countries,⁷⁰ such as cities or province-state relationships focused on climate change.⁷¹

The content of those ties, the agendas, and the political valences vary. Above, I cited examples of local policies on toxic toys, CEDAW,

⁶⁵ EARL H. FRY, THE EXPANDING ROLE OF STATE AND LOCAL GOVERNMENTS IN U.S. FOREIGN AFFAIRS 128 (1998).

⁶⁶ Timothy J. Conlan, Robert L. Dudley & Joel F. Clark, *Taking On the World: The International Activities of American State Legislatures*, 34 PUBLIUS: J. FEDERALISM, Summer 2004, at 183.

⁶⁷ *Id.* at 196.

⁶⁸ See generally Sidney Tarrow, *Transnational Politics: Contention and Institutions in International Politics*, 4 ANN. REV. POL. SCI. 1 (2001).

⁶⁹ See, e.g., GLOBAL NETWORKS, LINKED CITIES (Saskia Sassen ed., 2002).

⁷⁰ See, e.g., Nicole Bolleyer, *Federal Dynamics in Canada, the United States, and Switzerland: How Substates' Internal Organizations Affects Inter-governmental Relations*, 36 PUBLIUS: J. FEDERALISM 471 (2006).

⁷¹ See Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071 (2008).

and global warming, all of which could be termed progressive or liberal. But the political stances of TOGAs ought not to be assumed to be inherently stable or necessarily tilted toward one direction of the political spectrum.⁷² An example comes from contemporary immigration law. While I live in New Haven, a “sanctuary city,” other localities have implemented anti-immigrant initiatives.⁷³ Diversity of viewpoints, in the name of subnational entities, can also be found in virtually all of the Supreme Court’s major federalism cases; state-based actors can be found filing amici briefs on opposite sides, arguing that a particular provision was or was not appropriate in light of federalism(s) commitments.⁷⁴

These translocal institutions are legally and politically intriguing for the United States because they are *national* but not part of the *federal* government. They are also deeply federalist in the sense that these entities are themselves artifacts of U.S.-style federalism(s), and they obtain both their identity and some of their import from the fact of federalism(s). Moreover, many of the policies that they help to disseminate—like those involving green house gas emissions or investment divestiture—end up in court through challenges arguing that they poach on the prerogatives of the nation and that, therefore, those forms of lawmaking are preempted.

While TOGAs are artifacts of the federal structure of the United States and sometimes bump up against it, they also require reconsideration of some of the stock precepts of legal federalism—prompting my nomenclature of “federalism(s).” Many law-based discussions posit each state to function as a single, isolated actor, always to be treated on an equal footing with other states and sometimes in competition with another state through races to the bottom and now, with climate control, races to the top. Less attention is paid to the many joint actions undertaken by states, either at the formal level of the Constitution’s “Compact Clause” requiring congressional approval⁷⁵ or more frequently through

⁷² For a discussion of the relationship between progressivism and decentralization, see Richard Schragger, *The Progressive City*, in this volume.

⁷³ See, e.g., *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856 (9th Cir. 2009), *petition for cert. filed sub nom. U.S. Chamber of Commerce v. Candelaria*, 78 U.S.L.W. 3065 (U.S. July 24, 2009) (No. 09-115); *Lozano v. City of Hazelton*, 496 F. Supp. 2d 477 (M.D. Pa. 2007).

⁷⁴ See Judith Resnik & Joshua Civin, *When States Disagree: Discourse, Discord, and Disaggregation in the Supreme Court’s Federalism Jurisprudence* (2005) (unpublished manuscript, on file with author).

⁷⁵ See U.S. CONST. art. I, § 10, cl. 3.

coordinated initiatives, such as multistate executive orders and other informal administrative agreements more flexible than compacts.

The term “horizontal federalism”—state-to-state interaction—has recently gathered some attention within the legal academy,⁷⁶ but more of the focus is on single state-to-state exchanges (such as issues related to the Full Faith and Credit Clause) and less is on the role played by local officials working in concert. Turning to the “vertical dimensions,” one finds discussions of “cooperative federalism,” by which is meant national programs with state or city-based implementation or shared regulatory authority.⁷⁷ One also can find some interest in regional efforts.⁷⁸

Translocal action, that crosses both vertical and horizontal dimensions at the same time, making diagonal marks on a federal grid, requires reappraisal of the propriety of always conceiving of states in the singular rather than appreciating their role as a collective national force. Instead of models of exclusive areas of competencies and categorical classifications, the focus should shift to the interdependencies and interaction.⁷⁹ And, rather than federalism(s) being proffered as a barrier to the “foreign,” federalist processes through these organizations serve as mechanisms by which to domesticate the “foreign.”

IV. Pluralizing Federalism(s)

I have argued that new developments in federalism—the growth of translocal organization of government actors—ought to require us to reconceive U.S. federalism(s) and appreciate the joint venturing that alters the matrix. But just because transnationalism (a) has a long history, (b) is unstoppable, and (c) has, on some metrics, political legitimacy, does not exhaust the questions that need to be considered. This brief

⁷⁶ See, e.g., Gillian Metzger, *Congressional Authority and Constitutional Default Rules in the Horizontal Federalism Context*, in this volume; Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

⁷⁷ See, e.g., Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542 (2006).

⁷⁸ See, e.g., Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1 (2000); Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006).

⁷⁹ See Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1 (2007).

overview is not the place in which to assess these translocal activities, nor to elaborate arguments about the questions of national preemption that they have helped to spawn. My purpose here is to shift the narratives of American federalism(s) to appreciate the subnational conduits of transnational laws and to invite analyses of the kinds of judgments that TOGAs make, their internal processes, and the effects of their actions on policies local, national, and global.

As we have entered a new century, the relevant participants in policy debates extend, on the public side, beyond the three branches of the national government and the states, acting either solo or coordinated through Congress. Translocal organizations like the National League of Cities, the U.S. Conference of Mayors, and the collectives of state attorneys general, governors, and state legislators, are all exemplary of the multiplication of “national” players, rooted in states yet reaching across them. That multiplicity is part of the federalist vision, seeking solace in knowing that competition about ideas and responses exists at the national level that will enliven debates about what the shape of regulation should be.

To be enthusiastic about multiple layers of policymaking on these issues is not to suggest that positions taken at local collectives or through transnational work are necessarily to be celebrated, any more than one can presume that national regulation is necessarily wise. Further, in terms of democratic theory and concerns about fairness, transparency, and accountability, much more needs to be said about what can be gained and lost with the development of subnational quasi-public organizations engaged in policymaking even as their work is democratically engaged in generating public minded public service.

What this brief foray also aims to underscore is that the effort to assert unilateral sovereign control, unaffected by local or transnational rules, cannot succeed. As various rulemakers try to codify a set of problems as “national,” the world in which they are operating belies the truth of that category. The mayors are acting because the problems are local as well as global. Instability surrounds efforts to enshrine distinctions between “commerce” and “manufacturing,” between “direct” and “indirect” effects on commerce, what falls within or beyond the “police powers” of states, and what is “domestic” and what is “foreign.” A sense of the sovereign center, equated with the national government of the United States, exercising exclusive authority to set regulatory parameters, is ephemeral. Pulls from localities, working hard to help people obtain goods and services with a measure of security, and the transformation of political orders outside our borders, make plain that most of our problems—the economy, the environment, physical safety, and national

security—do not respect the boundaries of our shores. The U.S. federal system is rich with mechanisms for both importation and exportation, and our joint challenge is to understand which norms we want to claim and proudly embrace as definitionally part of “our” law.

Congressional Authority and Constitutional Default Rules in the Horizontal Federalism Context

*Gillian E. Metzger**

The Constitution imposes a number of constraints on the ability of states to discriminate against or enter into relationships with each other. At the same time, the Constitution provides Congress with power to authorize interstate discrimination and interstate relationships that the states could not otherwise undertake. The result is a constitutional system of horizontal federalism that combines antidiscrimination default rules with broad congressional authority to reshape interstate relations.

In the main, the constraints the Constitution imposes on interstate relationships are prohibitions on interstate discrimination. Most famously, under the Dormant Commerce Clause, states are prohibited from adopting measures that discriminate against interstate commerce.¹ Similarly, the Privileges and Immunities Clause of Article IV bars states from imposing special burdens or restrictions on citizens of other states in many contexts, absent substantial justification.² Some protections against interstate discrimination take a more positive form, in that they impose certain affirmative obligations on states in their dealings with one another rather than simply prohibiting discrimination. Into this category fall other provisions of Article IV, such as the requirements that states accord full faith and credit to other states' laws and judgments or that states extradite fugitives sought by other states.³

In addition, the Constitution precludes states from engaging in certain actions with each other or with interstate effects, notwithstanding that these actions are nondiscriminatory. Examples of such provisions include the Fourteenth Amendment's Privileges or Immunities Clause, which is read as protecting the rights of United States citizens, whether residents of a state or not, to cross the state's borders and to change their state of residence.⁴ Also included are some of Article I, Section

* Professor of Law, Columbia Law School.

¹ See, e.g., *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1808-1809 (2008).

² See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 296-299 (1998).

³ See, e.g., U.S. CONST. art. IV, §§ 1, 2.

⁴ See, e.g., *Saenz v. Roe*, 526 U.S. 489, 500-504 (1999).

10's prohibitions, such as the prohibitions on states entering into agreements or compacts with other states absent congressional consent.⁵

These constraints on interstate relationships represent the horizontal dimension of federalism, while the parameters of the relationship between the federal and state governments constitute the vertical dimension. Over our nation's history, vertical federalism has been the more popular sibling, with the balance of power between nation and states forming a recurring topic of political disputation and legal debate. Yet horizontal federalism has periodically received its own share of attention, reflecting the importance that interstate relations holds for a system in which states stand as quasi-sovereigns, with the federal government being both supreme and (on paper, anyway) limited in its powers. We are now in a period when horizontal federalism's popularity is on the rise, reflecting both increased interest in interstate cooperation's potential as a system of governance and failure to date of the federal government to address a number of core public concerns, such as global warming.

Although the division between vertical and horizontal federalism is analytically helpful, it is often exaggerated. Rather than representing independent constitutional phenomena, vertical and horizontal federalism are best understood as intertwined elements of a single constitutional structure. This intertwined character is notably evident in the constitutional interstate constraints described above, a number of which are expressly subject to congressional override or paired with express grants to Congress of power over interstate relations. Perhaps the most important such grant is Article I's provision to Congress of power "[t]o regulate Commerce . . . among the several States," which the Supreme Court has long held allows Congress to authorize state discrimination against interstate commerce.⁶ The clearest textual acknowledgment of Congress's ability to waive interstate constraints comes in Article I, Section 10, which expressly grants to Congress power to sanction certain otherwise prohibited forms of state interaction. In addition, Article IV contains a number of grants of authority to Congress which affect interstate relations, such as the Effects Clause's provision that "Congress may by

⁵ U.S. CONST. art. I, § 10, cls. 2, 3.

⁶ U.S. CONST. art. I, § 8, cl. 3; see Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1467, 1480-1482 (2007).

general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”⁷

Interestingly, however, recognition of Congress’s centrality to interstate relations has yet to fully permeate horizontal federalism doctrine. The most prominent doctrinal recognition of Congress’s importance comes in the Dormant Commerce Clause context, with the Supreme Court long holding that Congress’s power to regulate interstate commerce allows it to authorize state discrimination against interstate commerce that otherwise would be unconstitutional. Yet at other times the Court has appeared to downplay Congress’s role. Two examples concern the scope of Congress’s power to authorize interstate discrimination and the role of Congress in approving interstate compacts. The Court has repeatedly left open whether Congress can authorize states to violate Article IV’s interstate antidiscrimination prohibitions, an issue brought to the fore by Congress’s enactment of the Defense of Marriage Act (DOMA), which authorizes states to refuse to recognize laws and judgments of other states that relate to same-sex marriage. By contrast, although the Court has never questioned Congress’s power to approve interstate compacts, it has repeatedly refused to invalidate interstate compacts that lack such congressional consent.

In what follows, I analyze these last two issues and argue that while congressional approval should not be required for most interstate agreements, Congress should be understood to enjoy broad power to authorize interstate discrimination. These conclusions result from a model of constitutional horizontal federalism that sees constitutional constraints directly enforced by the Court as anti-interstate discrimination default rules that Congress, given its special role in interstate relations, can waive. Absent interstate discrimination, however, states should be given broad leeway to structure their interactions as they see fit, subject to congressional override. An additional important consideration in setting horizontal federalism doctrine is the reality of the essentially unlimited constitutional scope of federal authority today. With expanding federal preemption and federal administrative regulation increasingly limiting the states’ ability to govern meaningfully, horizontal

⁷ U.S. CONST. art. IV, § 1, cl. 2; *see also* Metzger, *supra* note 6, at 1485-99 (discussing other grants of power to Congress in Article IV and their interstate implications). Section 10’s prohibition on states imposing import and export duties could also be included in this category, as such duties could fall equally on in-state and out-of-state producers, but it is currently viewed as relating more to foreign relations or as aimed at combating interstate discrimination. *See* *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 621-37 (1997) (Thomas, J., dissenting).

federalism doctrines that grant the states more room to operate are important in preserving an overall federal-state balance.

Interstate Discrimination and Congressional Power⁸

The place to start in analyzing Congress's power to authorize interstate discrimination is the Dormant Commerce Clause. As mentioned, the Court has long held that Congress can authorize states to engage in conduct that, absent such congressional authorization, would clearly violate the Dormant Commerce Clause. The basis for this authority is the same as that from which Dormant Commerce Clause limitations on the states are inferred: Congress's power under Article I to regulate interstate commerce. In upholding such congressional override authority, the Court has underscored the plenary scope of Congress's Commerce Clause power. According to the Court, this "power over commerce would be nullified to a very large extent" were Congress, acting "alone or in coordination with state legislation," subject to Dormant Commerce Clause prohibitions.⁹ Although congressional authorization of discriminatory state measures might seem at odds with the constitutional decision to vest power over interstate commerce with Congress and not the states, the Constitution imposes remarkably few federalism-based constraints on how Congress wields its commerce power. In particular, Congress itself can legislate in non-uniform ways and can also mandate prohibitions on interstate commerce. Forcing Congress to require interstate discrimination when it concludes such discrimination is potentially beneficial, rather than allowing Congress to leave the decision to discriminate to the states, hardly seems to advance the constitutional interest in national union.

This well-established precedent acknowledging Congress's Article I power to authorize Dormant Commerce Clause violations cannot be easily reconciled with the standard view that Congress lacks power to authorize violations of Article IV's Privileges and Immunities Clause. Critically, many Article IV decisions involve economic activities with a clear interstate link and thus represent activities that are subject to congressional regulation under the commerce power. The main basis given for doubting congressional override authority in the Article IV Privileges and Immunities Clause context is textual: Not only does this Clause impose express prohibitions on interstate discrimination (unlike those of

⁸ This section is largely a summary of arguments I have made elsewhere in greater depth. See Metzger, *supra* note 6.

⁹ *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 422 (1946).

the Dormant Commerce Clause, which are inferred), but in addition the Privileges and Immunities Clause (unlike the other sections of Article IV) contains no reference to Congress.¹⁰ The flaw with this textual argument is that it focuses on the text of the Privileges and Immunities Clause in isolation from the remainder of the Constitution. In fact, given their overlapping topical scope, the Article I Commerce Clause does represent a grant of authority to Congress to regulate much of the subject matter to which the Privileges and Immunities Clause applies. Indeed, the Court has noted that the Privileges and Immunities and Commerce Clauses share a “mutually reinforcing relationship” and “common origin in the Fourth Article of the Articles of Confederation.”¹¹ Moreover, despite the lack of any express statement to that effect, the Court has long inferred that Congress has authority to enforce Article IV’s extradition clauses, which along with the Privileges and Immunities Clause are contained in Section 2 of the article.¹²

Much the same argument for congressional power to authorize interstate discrimination can be made in regard to Article IV’s Full Faith and Credit Clause. Here, however, the argument for congressional power is strengthened by the Effects Clause’s broadly-phrased grant of full faith and credit enforcement authority to Congress. Notably, the limitations imposed on the states under either of these provisions of Article IV are nowhere expressly extended to Congress. For example, no restriction parallel to the Privileges and Immunities Clause is present in Article I, Section 9, where other limits on Congress’s exercise of its enumerated powers are found. Similarly, nothing in the text of the Effects Clause expressly precludes Congress from providing that certain classes of laws and judgments should receive less effect than they would under the Full Faith and Credit Clause independent of congressional action.¹³ Instead, the Constitution contains several textual acknowledgments—in the remainder of Article IV and in Section 10 of Article I—of the central role that Congress plays in interstate relations. The historical record of Article IV’s drafting and invocation during slavery debates in

¹⁰ See U.S. CONST. art. I, § 2, cl. 1; see also sources cited in Metzger, *supra* note 6, at 1490 n.81.

¹¹ *Hicklin v. Orbeck*, 437 U.S. 518, 531-532 (1978).

¹² See *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 104 (1861); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-616, 619 (1842); see also *California v. Superior Court*, 482 U.S. 400, 407 (1987) (adhering to *Dennison*’s view of congressional power).

¹³ For discussion of arguments to the contrary, see Metzger, *supra* note 6, at 1493-1498.

the nineteenth century also supports the conclusion that Congress enjoys broad power over interstate relations, including the power to authorize interstate discrimination.¹⁴

Most persuasive, however, are the structural arguments for assigning such authority to Congress. As the national elected body containing representatives from all the states, Congress is institutionally the best equipped to determine when interstate discrimination is justified.¹⁵ And sometimes discrimination will be justified—for example, as the best way to meet different states’ needs and achieve state regulatory goals. Interstate discrimination may also advance national interests in union by offering a mechanism by which to mediate and diffuse interstate disagreement. Institutional limits on Congress’s ability to act quickly, in particular the difficulty of getting legislation enacted given the constitutional requirements of bicameralism and presentment, offer additional security because they lessen the likelihood that Congress will act to sanction interstate discrimination absent substantial support in both houses and presidential agreement. Yet these institutional limitations—and the evidence demonstrating that states do sometimes seek to advance their parochial interests at the expense of other states and the rest of the nation—also provide a strong basis for allowing the courts to enforce constitutional prohibitions on interstate discrimination absent congressional action.

Instead, the appropriate constitutional model for interstate relations that emerges from this analysis is one of judicially enforceable default rules prohibiting interstate discrimination but subject to congressional override. Under this model, Congress should be understood to have broad power to impose interstate requirements that have not been held by the courts to be constitutionally mandated and to authorize state actions that would otherwise be found to violate horizontal federalism requirements, such as those requirements contained in Article IV. To be

¹⁴ The historical evidence is somewhat ambiguous, given the important role that Article IV’s discrimination prohibitions were understood to play in preserving national union, but nonetheless offers substantial additional support for such a claim of congressional power. *See id.* at 1507-1511.

¹⁵ *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 92 (1984) (“[W]hen Congress acts, all segments of the country are represented, and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one.”); *see also* William Cohen, *Congressional Power To Validate Unconstitutional Laws: A Forgotten Solution to an Old Enigma*, 35 STAN. L. REV. 387, 406 (1983).

sure, some congressional interstate enactments remain beyond the constitutional pale. For example, an effort by Congress to prevent states from imposing residency requirements for voting or state office-holding may well pose too great a threat to state autonomy to accord with our federalism structure, and a congressional measure singling out a particular state's laws and judgments for less recognition would violate the Effects Clause's "general laws" requirement. But beyond prohibiting these extreme measures, which Congress is hardly likely to enact in any event, the Constitution's horizontal federalism requirements appear to leave Congress free to structure interstate relations as it sees fit.

What limits exist on Congress's interstate relations power come instead from the individual rights provisions of the Constitution. It is well-established that Congress itself lacks authority to violate such provisions, even when otherwise acting under its enumerated powers. Equally true, however, is that Congress's special stature as the political representative of the nation does not give it any special competency or institutional expertise in discerning when individual constitutional rights are appropriately waived—unless these rights are limited to the interstate context. As a result, the relevant constitutional constraint on Congress's power to structure interstate relations is not Article IV but rather the Fourteenth Amendment. Congress can override the horizontal federalism protections of Article IV but lacks power to authorize states to violate the Fourteenth Amendment.¹⁶

Interstate Agreements and Preservation of the Federal-State Balance

This analysis of Congress's power to authorize interstate discrimination forms a useful background for considering the appropriate congressional role with respect to interstate compacts. Little doubt exists about Congress's power to authorize or prohibit interstate compacts. That is

¹⁶ This understanding of Congress as lacking power to authorize Fourteenth Amendment violations accords with the Constitution's grant to Congress of power "to enforce" the Fourteenth Amendment's demands, U.S. CONST. amend. XIV, § 5, and also with precedent. *See Saenz v. Roe*, 526 U.S. 489, 507-08 (1999) (rejecting the claim that congressional authorization rendered constitutional a measure found to violate the right to travel protection by the Fourteenth Amendment's Privileges or Immunities Clause). This result similarly follows from recognition that almost all individual rights receiving strong protection under the Fourteenth Amendment also apply directly to Congress through the Fifth Amendment. For a discussion of this point, see Metzger, *supra* note 6, at 1528.

not surprising given the clarity of the Constitution's text on this issue: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power"¹⁷ More surprising, in light of the constitutional text, is the line of Supreme Court precedent upholding the validity of most interstate agreements and compacts notwithstanding the absence of congressional approval. By the end of the nineteenth century the Court had concluded that the requirement of congressional consent does "not apply to every possible compact or agreement between one state and another."¹⁸ This view persists, and the Compact Clause is currently read to require congressional approval only of interstate "agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'"¹⁹ Congressional consent is thus unnecessary for "modes of interstate cooperation that do not enhance state power to the detriment of federal supremacy."²⁰ No interstate agreements appear to have been invalidated for lack of congressional consent under this test.²¹

Acknowledging that its approach deviates from the Compact Clause "[r]ead literally,"²² the Court has justified its approach as reflecting the purpose underlying the Clause:

By vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to

¹⁷ U.S. CONST. art I, § 10, para. 3, cl.3.

¹⁸ *Virginia v. Tennessee*, 148 U.S. 503, 517-519 (1893). In an earlier decision, the Court held that congressional approval was necessary to validate an informal extradition agreement between Canada and the Governor of Vermont, *see Holmes v. Jennison*, 14 Pet. (39 U.S.) 540, 578 (1840), but other courts did not apply such a requirement of congressional approval to interstate compacts, even before the Supreme Court concluded it was unnecessary in *Virginia*. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 464-467 (1978).

¹⁹ *U.S. Steel*, 434 U.S. at 471 (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369 (1976)).

²⁰ *Id.* at 460.

²¹ *See* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 289 (2003).

²² *U.S. Steel*, 434 U.S. at 459.

ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority.²³

The Court's willingness to prioritize underlying purpose over seemingly clear constitutional text—"any Agreement or Compact"—has led some to critique current Compact Clause doctrine as illegitimate.²⁴ Yet appearances of textual clarity can be deceiving, as "agreement" and "compact" arguably were terms of art not intended to encompass every form of interstate agreement.²⁵ The textual critique loses further force in light of the wide variety of forms that interstate cooperation can take, including not just formal interstate compacts but also informal one-time measures, such as joint lawsuits or enforcement actions; independent but parallel state actions, such as adoption of uniform laws or reciprocal legislation; and ongoing state consultation and coordination through translocal organizations of government actors.²⁶ If nothing else, the term "agreement" would need to be read extremely broadly to include all these forms of interstate cooperation.²⁷ Moreover, the net effect of expanding the Clause's reach to some but not all instances of interstate cooperation is more likely to be a shift towards greater use of uncovered measures rather than an increase in congressional consent, given the difficulties involved in obtaining the latter.

More potent are structural criticisms, specifically the arguments that the Court's approach insufficiently heeds both the horizontal feder-

²³ *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *Virginia*, 148 U.S. at 519.

²⁴ See Greve, *supra* note 21, at 289.

²⁵ See David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 79-81 (1965).

²⁶ See CAROLINE N. BROUN ET AL., THE EVOLVING USE AND CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER'S GUIDE 15-25 (2006); Note, *State Collective Action*, 119 HARV. L. REV. 1855, 1860-1864 (2006); see also Judith Resnik, Joshua Civin, & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 728-758 (describing such translocal organizations and identifying a number of the most well-known, such as the National Governors Association).

²⁷ See *Virginia*, 148 U.S. at 519 ("The terms 'agreement' and 'compact,' taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects," including "those to which the United States can have no possible objection or have any interest in interfering with. . .").

alism concerns raised by interstate agreements and the role Congress should play in structuring interstate relations. A striking feature of current doctrine is its insistence that congressional consent is needed only when interstate agreements threaten the federal government's power vis-à-vis the states. Yet interstate agreements can also pose dangers to the horizontal balance of power among the states, for example by imposing significant externalities on nonparticipating states or allowing some states greater power over policy by virtue of their single or combined voice.²⁸ The arguments above suggest that Congress is the institution best situated to determine when such recalibration of horizontal federalism relationships is justified—and certainly better situated to make a fair assessment than the states involved.

Nonetheless, these structural criticisms of the Court's current approach are ultimately unpersuasive. They fail to recognize the important constraining role played by judicially enforced prohibitions on interstate discrimination, prohibitions that only Congress can waive. Interstate agreements that facially discriminate against interstate commerce or impose costs disproportionately on nonparticipating states—for example, by granting participating states special market advantages or setting prices in a way that benefits them to the detriment of outsiders—will likely be found to violate the Dormant Commerce Clause. As a result, such measures still will require congressional approval, even though this requirement does not flow from the Compact Clause. To be sure, the Dormant Commerce Clause offers little protection against interstate agreements that simply burden interstate commerce but are found to be nondiscriminatory, and whether a measure is discriminatory is sometimes a matter of debate.²⁹ Indeed, interstate collective action can shape discrimination determinations, as the Court appears particularly loath to invalidate state measures on Dormant Commerce Clause grounds when those measures are a common feature of state governance.³⁰ But interstate agreements that most blatantly export costs and impose divisive barriers among states will be precluded.

In addition, these criticisms exaggerate the degree to which current doctrine precludes Congress from playing a role in regard to interstate agreements and interstate cooperation. Congress retains a powerful role

²⁸ See Greve, *supra* note 21, at 322-327; *State Collective Action*, *supra* note 26, at 1855-1856.

²⁹ See *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1808-1809 (2008); Metzger, *supra* note 6, at 1505 n.143.

³⁰ See *Davis*, 128 S. Ct. at 1815-1816.

with its ability to disapprove agreements. True, the need to enact disapproval legislation rather than simply refuse to approve an agreement undermines the ability of an agreement's opponents to derail it. But the posture of needing to disapprove does not necessarily undermine Congress's voice in shaping interstate agreements. The possibility of congressional disapproval is likely sufficient to lead states at least to consult with congressional leaders, and a striking number of interstate agreements are submitted for congressional approval notwithstanding the limited contexts in which congressional consent is required.³¹ Given Congress's disapproval power, current doctrine will have little effect for agreements that enjoy broad congressional support or opposition. Where it will make a difference is in regard to agreements on which Congress is more closely divided; these are more likely to go forward if the onus is on Congress to disapprove rather than approve. This is true not only of interstate agreements but of most forms of interstate cooperation and state regulation generally, which are similarly subject to the possibility of congressional "disapproval" in the form of preemptive federal legislation.

Thus, the real structural question is whether doctrine should foster or impede interstate agreement and cooperation at the margin. Here, I think a strong case can be made for fostering interstate agreements. There are, to begin with, the standard arguments in favor of federalism that are equally applicable here: interstate agreements foster self-governance and efficient regulation by allowing states to develop regulatory solutions tailored to their shared needs and preferences, provide opportunities for regulatory experimentation from which the nation as a whole may benefit, and offer a mechanism for checking the federal government.³² While states could perhaps achieve these goals through independent regulatory efforts, interstate coordination allows them to

³¹ E-mail from Amy Vandervort-Clark, Policy Analyst, The Council of State Gov'ts, to Megan Crowley, Research Assistant to Gillian Metzger, Professor of Law, Columbia Law Sch. (Feb. 27, 2009, 12:12 EST) (on file with author) (providing data compiled by Adam Nye, indicating that seventy percent of active regulatory compacts have Congressional approval and that of a total 250 interstate compacts, including inactive compacts and those not yet approved by states, approximately forty-seven percent have received Congressional approval). The high level of submission of compacts for congressional approval may also reflect the amorphousness of the current test and the difficulty involved in predicting whether a particular agreement will encroach on or interfere with federal supremacy. *See* Engdahl, *supra* note 25, at 70.

³² *See, e.g.,* Gregory v. Ashcroft, 501 U.S. 452, 458-459 (1991).

pool information and resources, address interstate externalities, and avoid potentially harmful interstate competition. By creating enforceable obligations to other states, interstate compacts in particular provide a guarantee of commitment and continuity that may be needed for some regulatory mechanisms to work.³³ Moreover, a generous approach to states' ability to enter into interstate agreements absent congressional approval not only encourages avowed interstate compacts, but also frees other forms of interstate cooperation from the potential chilling effect of being challenged as illicit compacts for which congressional consent is needed.

Thus, current doctrine's encouragement of interstate agreement and cooperation helps ensure the vibrancy of horizontal federalism, particularly when coupled with the protections of judicially enforced anti-interstate discrimination rules. Equally important, this approach serves the cause of vertical federalism. Our contemporary constitutional order is one of largely unlimited federal regulatory power. As a result, the biggest challenge facing vertical federalism today is managing the phe-

³³ See BROUN ET AL., *supra* note 26, at 26-30 (2006). The classic accounts extolling the advantages of interstate agreements are Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 704-718, 729 (1925); and FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE INTERSTATE COMPACT SINCE 1925*, at 102-26 (1951). Jill Hasday has underscored that the flip side of such continuity and commitment is a potential loss of democracy in the states involved, particularly with regard to interstate compacts that create ongoing regulatory schemes and administrative agencies, because the states lack the ability to end these arrangements. See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 7-11 (1997); see also Greve, *supra* note 21, at 327-330 (arguing that interstate compacts that create ongoing regimes impose agency costs and that the commissions implementing such compacts are poorly monitored). I am not convinced that the loss to self-government is as great as she suggests. Not only does some political accountability remain through the states' power to appoint the leaders of compact agencies, but such agreements often include withdrawal provisions, Congress retains the ability to terminate such arrangements through preemptive legislation, and states' powers of self-governance are also enhanced by gaining control over harms coming from other states. The recent Great Lakes-St. Lawrence River Basin Water Resources Compact is particularly interesting in this regard, given its mechanisms to allow participating states to enjoy substantial ongoing control over water use decisions. See Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 413, 435-448 (2006).

nomenon of concurrent federal-state authority and guarding against excessive federal preemption.³⁴ Coordinated state actions are a central part of the anti-preemption project, as such actions are more likely to exert a constraining force on Congress, federal agencies, and courts than are individual state measures. It is not just that states have greater political strength when acting together; in addition, successful cooperative efforts allow states to demonstrate that preemption may not be needed to achieve desired levels of regulatory uniformity as well as the costs preemption imposes on state governance. A doctrine that encourages interstate cooperation better counterbalances the federal government's current dominance than one that makes congressional approval a prerequisite for such interstate arrangements.

Conclusion

The constitutional system that emerges from this analysis of doctrines on interstate discrimination and interstate agreements is one that underscores the interplay of horizontal and vertical federalism. Horizontal federalism constraints, in the form of judicially enforced prohibitions on interstate discrimination, are centrally important in guarding against interstate exploitation and ensuring that our national union is not undermined by interstate rivalry. But an equally important component of our horizontal federalism system is Congress, which enjoys broad authority to structure interstate relations to best meet state needs and national interests. Judicially enforced horizontal federalism constraints are thus best understood as constitutional default rules subject to congressional override. Moreover, recognition of the inevitable intersection of horizontal and vertical federalism underscores the need to set these default rules with an eye to preserving the overall federal-state balance. Doctrinal rules that foster interstate cooperation offer a potentially important tool for preserving the vibrancy of states as institutions of governance. Moreover, in a context marked on the one hand by judicially enforced protections against interstate discrimination and on the other by broad congressional power to oversee interstate relations, such cooperation poses little threat to constitutional structural principles of national union and interstate equality.

³⁴ See, e.g., Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 8 (2007); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2048-2050 (2008); Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1762-1799 (2005).

States Rule! or, States' Rules

*Robert Hermann**

Many people and groups in upstate New York are fired up about outdoor wood boilers (OWBs, in the parlance). An OWB is a freestanding combustion unit located outside a structure, such as a house, that needs to be heated. Your typical OWB resembles a small shed, built to accommodate logs up to five feet in length, along with a short chimney which releases gases resulting from combustion. The unit, surrounded by a water reservoir, heats water for a forced air or radiant heating system; one OWB can heat several buildings. Farmers and rural homeowners oppressed by energy costs are partial to their OWBs. Some neighbors and environmental groups, joined by public health officials, oppose OWBs because of the particulate pollutants that they emit. No federal or state statutes regulate OWBs.

New York's Attorney General recommended that the state adopt OWB testing requirements and emissions limits to protect public health.¹ Anti-OWB forces persuaded the state's environmental agency to start the process for proposing a rule that would effectively ban OWBs by setting standards that cannot be met with current technology.² Farm groups, rural citizens and the OWB industry mobilized to halt the momentum for the proposed rule, which touches on issues of rural lifestyle,

* Robert Hermann was from 2007 to 2009 the Director of the Governor's Office of Regulatory Reform in New York, and has experience in private, governmental and public interest litigation. He was assisted in this article by acting director Amelia Foell-Stern, who has more than two decades of experience at this office.

¹ OFFICE OF THE N.Y. ATTORNEY GEN., SMOKE GETQS IN YOUR LUNGS: OUTDOOR WOOD BOILERS IN NEW YORK STATE (2008), *available at* <http://www.oag.state.ny.us/bureaus/environmental/pdfs/Smoke%20Gets%20in%20Your%20Lungs%20Revised%20March%202008.pdf>.

² Regulatory Agenda - NYS Dept. of Environmental Conservation, 31 N.Y. Reg. 89, (Jan. 7, 2009), *available at* <http://www.dec.ny.gov/regulations/36816.html> (planned regulation of "Outdoor Wood-Fired Hydronic Heaters" in 2009); Outdoor Wood Boilers – NYS Dept. of Environmental Conservation, <http://www.dec.ny.gov/chemical/51986.html> (last visited Nov. 23, 2009). By contrast, neighboring Vermont recently adopted by regulation a partial ban on OWBs. Vt. Agency of Natural Resources, Environmental Protection Regulations § 5-204 (effective October 1, 2009), *available at* http://www.vtwoodsmoke.org/OWB_Ph2_Reg.pdf.

poverty, public health, and environmental protection. Rules, great and small, do matter. It tends to follow that organized advocacy on rule-making matters, too. Here is a look at why these lessons are of particular moment to public interest advocates.³

I. State rule-making matters to those served by public interest advocates.

States play a central, at times primary, role in regulating and providing funding for activities in key policy areas: criminal justice and corrections; social services; health care; discrimination in housing, employment, and education; and environmental protection. Formal state agency rules can usefully be thought of as interstitial statutes. They have proven to be formidable weapons in the state executive arsenal. To a state agency or governor, the most alluring advantage of rule-making is that it is unilateral, unconstrained by the pesky imperatives of legislative compromise.⁴

Unilateral executive power to fix the bounds of acceptable conduct is exercised today not only through formal rules and regulations, which require notice, analysis, and public comment, but also through agency circulars or “guidances” that explain, interpret, and at times expand upon statutes and regulations.⁵ Executive orders can also regulate the

³ Those who advocate for societal interests or goals that are distinct from their own financial or otherwise tangible self-interest are here called “public interest advocates,” whatever their favored cause may be. This includes specialized, cause-oriented organizations, such as the Center for Responsible Lending, as well as the client-service civil legal services organizations, such as the Legal Aid Society of New York City, that receive government and private funds to assist people in poverty.

⁴ This needs to be qualified by the legal principle that rules cannot be *ultra vires* and by the recognition that some states have a formal mechanism for legislative oversight of agency rule-making. In New York, for example, the Legislature has a bicameral, bipartisan Administrative Regulations Review Commission with that function, although the commission has been relatively inactive for many years. N.Y. LEGIS. LAW § 87 (McKinney 2009).

⁵ See, e.g., NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, GUIDELINES FOR INSPECTING AND CERTIFYING SECONDARY CONTAINMENT SYSTEMS OF ABOVEGROUND PETROLEUM STORAGE TANKS AT MAJOR OIL STORAGE FACILITIES (DRAFT) (2008), available at http://www.dec.ny.gov/docs/remediation_hudson_pdf/der17.pdf. In 2007, the anti-regulatory Bush Administration, in order to increase White House oversight of such back-door lawmaking, clamped down on federal agencies’ growing use of

behavior of affected parties.⁶ (For the purpose of this discussion, all of these executive actions are lumped together as “rules.”)

States’ authority and opportunity to make rules is likely to increase in the next few years. During the presidency of George W. Bush, as federal agencies methodically stripped away protections for those who own homes, buy on credit, or enjoy clean air and water, many states stepped up to fill in the breach. Federal agencies countered, aggressively relying on the principle of preemption. A prominent example is the Environmental Protection Agency’s denial in late 2007 of a waiver sought by California and fourteen other states to allow them to mandate reduced levels of greenhouse-gas emissions from motor vehicles.⁷ Less well-known are the many steps the federal government took before the subprime loan crisis to prevent states from regulating practices that led to mortgage lending abuses.⁸ For example, in 2003 the Comptroller of the Currency barred state officials from looking into predatory bank lending practices or otherwise exercising “visitorial powers” over national banks.⁹ Likewise, the Office of Thrift Supervision ruled in 2004 that a federally-chartered thrift need not comply with an Ohio law that required the bank’s exclusive agents based in Ohio to adhere to state li-

guidances as back-door regulations. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

⁶ See, e.g., Executive Order No. 12: Representation of Child Care Providers, N.Y. COMP. CODES R. & REGS. TIT. 9 § 6.12 (2007), continued by Executive Order No. 9, 30 N.Y. Reg. 79 (July 9, 2008) (permitting unionization of 60,000 persons paid in any part by state funds to provide home-based care for the children of working parents); see David L. Gregory, *Labor Organizing by Executive Order: Governor Spitzer and the Unionization of Home-Based Child Day-Care Providers*, 35 FORDHAM URB. L.J. 277 (2008).

⁷ California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption of California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008).

⁸ See generally Symposium, *Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 NW. U. L. REV. 503 (2008).

⁹ 12 C.F.R. § 7.4000 (2008). See also Preemption Determination and Order, 68 Fed. Reg. 46,364 (Aug. 5, 2003) (ruling that the Georgia Fair Lending Act could not be applied to nationally-chartered banks); Office of the Comptroller of the Currency, Interpretive Letter No. 999 (Aug. 2004), available at <http://www.occ.treas.gov/interp/aug04/int999.doc>.

censing and registration procedures before they could serve as mortgage lending and banking agents.¹⁰

Today, it is evident that recent federal preemption of state regulation has harmed the public. It is a false uniformity which insists that everyone do nothing. Thankfully, a coalition of national public interest and consumer protection groups has asked the federal Office of Information and Regulatory Affairs (OIRA) to curtail federal efforts to bar states from implementing solutions for local problems unless the state activity is demonstrably and significantly incompatible with the federal government's role as defined by Congress.¹¹ It seems probable that this will happen.¹²

II. Public interest advocates too often ignore state rule-making.

Federal agencies' regulatory activities are monitored closely by public interest groups.¹³ Regrettably, this is often not the case at the state

¹⁰ 12 C.F.R. § 560.2(b), upheld in *State Farm Bank v. Reardon*, 539 F.3d 336 (6th Cir. 2008).

¹¹ Letter from Nan Aron, President, Alliance for Justice, et al., to Peter Orszag and Cass Sunstein, Executive Office of the President-Elect (Jan. 13, 2009), available at http://www.citizen.org/print_article.cfm?ID=18309.

¹² President Obama, ten days after assuming office, issued a memorandum supporting the concept of centralized regulatory review and directing the head of OMB, to whom the head of OIRA reports, to consult with agencies and make recommendations within 100 days for improving the review process. Memorandum of Jan. 30, 2009, 74 Fed. Reg. 5977 (Feb. 3, 2009). OMB in turn sought public comment about what a new Executive Order should contain. *Federal Regulatory Review*, 74 Fed. Reg. 8819 (Feb. 26, 2009). It has received many such comments from a wide range of groups. Office of Management and Budget, Public Comments on OMB Recommendations for a New Executive Order on Regulatory Review, <http://www.reginfo.gov/public/jsp/EO/fedRegReview/publicComments.jsp> (last visited Nov. 23, 2009).

¹³ For example, ProPublica, an organization devoted to public interest journalism, tracked the so-called "midnight regulations" issued in the final months of the Bush Administration. See Joaquin Sapien & Jesse Nankin, *Midnight Regulations*, PROPUBLICA, Nov. 18, 2008, <http://www.propublica.org/special/midnight-regulations>. Organizations such as the Sierra Club criticize regulations. See Press Release, Sierra Club Criticizes New Regulations for Grazing on Public Lands (Feb. 4, 2004), available at <http://www.sierraclub.org/pressroom/releases/pr2004-02-04a.asp>. They also ar-

level. (A notable exception is the environmental area, where nonprofits have been relatively well funded and have enjoyed steady access to government decision makers.) Public interest advocates need to seize a growing opportunity to use the states' rule-making processes in a sophisticated, nuanced way. State regulators hear regularly from organized business and labor groups and their lobbyists. State regulators hear less frequently from those who would speak for the poor, or for victims of proscribed discrimination, or for those under- or ill-served by governmental programs. Just as public interest advocates will be pressing federal agencies to adopt more activist, enlightened regulatory schemes, they should petition state regulators, too. They often will find regulators with open minds and sympathetic ears.

In New York, public interest advocates have been active in the state rule-making process:

- Advocacy by low- and middle-income tenant groups before a state agency yielded a regulation which, by construing an ambiguous statute, resulted in keeping tens of thousands of rent-regulated apartments in the state's affordable housing portfolio.¹⁴
- A broad coalition of environmental groups was closely involved in shaping the state's comprehensive regulations establishing a multi-state cap-and-trade system for greenhouse gas emissions from power plants.¹⁵ That this scheme was established wholly by rule has led to litigation challenging it as *ultra vires*.¹⁶
- Interest on short-term lawyer accounts is the major state source of funds for programs that provide civil legal help to those below the poverty line. Civil legal services and bar groups campaigned for years to change state regulations dictating the interest rates

gue for new ones. See Press Release, Sierra Club, Global Warming Legal Action: EPA Must Regulate Carbon Pollution (Apr. 27, 2006), *available at* <http://www.sierraclub.org/pressroom/releases/pr2006-04-27.asp>.

¹⁴ Press Release, New York State Division of Housing & Community Renewal, Spitzer Takes Action to Preserve Affordable Housing (July 16, 2007), *available at* <http://nysdhcr.gov/pressroom/preserve.htm>.

¹⁵ Press Release, New York State Executive Chamber, Governor Spitzer Unveils Cutting-Edge Global Warming Regulations (Oct. 24, 2007), *available at* <http://www.state.ny.us/governor/press/1024071.html>; see Regional Greenhouse Gas Initiative, Participating States, <http://www.rggi.org/states> (last visited Apr. 7, 2009).

¹⁶ *Indeck Corinth, L.P. v. Paterson*, No. 369/2009 (Sup. Ct. Saratoga Co.).

paid on these funds, winning rule changes in 2007 that increased several-fold their financing.¹⁷

- Legal services and community groups representing low-income homeowners struggling with subprime or predatory loans consulted with the state's Banking Department, at the Department's invitation, on regulations about registering home mortgage loan bankers, brokers, and servicers.¹⁸

But these represent the exceptions, not the norm. In some instances, it was the agency that sought out advocacy groups, rather than vice versa. Advocates, however, cannot depend on regulators' contacting them early on, before the agency and/or the governor become wedded to regulatory choices they have already made. Public interest partisans need to take the initiative rather than rely on agency program and legal staff to conceive of and develop new rules and programs.

III. Advocates need to understand what state rule-making can do.

It is vital for civic-minded advocacy groups to understand how agencies make decisions that affect their constituents. State agencies move toward categorical policy change in three ways: by a) establishing new internal priorities and procedures (management); b) writing and applying their own administrative standards that affect the behavior of regulated parties (rules); and c) proposing, based on the agency's expertise, that the legislature create new laws (statutes). While legislative change may appear more far-reaching and desirable, agencies may be more receptive than the legislature to new policy proposals for political reasons. Progressive agency rule-making, however, is unlikely to emerge from a conservative state administration, although there may be exceptions.¹⁹

¹⁷ N.Y. COMP. CODES R. & REGS. TIT. 21 § 7000 (2007); Press Release, New York State Executive Chamber, New State Regulations to Increase Funding for Civil Legal Assistance to Eligible Poor New Yorkers (May 31, 2007), *available at* <http://www.ny.gov/governor/press/0531071.html>.

¹⁸ *E.g.*, N.Y. COMP. CODES R. & REGS. TIT. 3 § 420 (2007); *see* N.Y. BANKING LAW §§ 599 -a to -r (McKinney 2009).

¹⁹ Former three-term New York Governor George Pataki was strongly anti-regulatory, except when it came to environmental and parkland issues. He was the force behind New York's lead participation in the Regional Greenhouse Gas Initiative. Press Release, New York State Department of Environmental Conservation, DEC Announces Final Model Rule to Help States

But even well-intentioned agency leadership in a progressive administration, left to its own devices and buffeted by many cross-currents, may be distracted from advancing a progressive agenda. Even worse, agencies may propose what seem to be enlightened measures, such as curtailing pollution-belching OWBs, only to be reminded by advocates for other citizens, such as struggling farmers, that the public interest is pluralistic.

Public interest groups, therefore, need to add to their advocacy tool bags a thorough understanding of agencies' rule-making authority. That starts by charting not only the familiar terrain but, more importantly, the outer reaches of statutory authority that agencies can impact through rule-making. Each regulatory proposal must be approached from the vantage point that different statutory schemes grant different agencies very different scopes of rule-making authority. Broadly enumerated or judicially acknowledged agency powers and responsibilities, for example, may support a range of salutary policy regulations that the agency could be urged to adopt.²⁰

Even when the desired policy change is outside the agency's authority to implement, the door may still be open to rule-making ingenuity. Imaginative disassembling and tinkering can produce a feasible regulation that furthers some if not all of the objectives sought by public interest advocates. For example, a simple agency requirement that an industry report performance or incident data about an unregulated activity may lay the factual and political groundwork to justify subsequent legislative efforts to bring about substantive regulation.

IV. Advocates need to master a state's distinct rule-making apparatus.

Public interest advocates often fail to understand how to engage a state's apparatus for rule-making. This is particularly vital for national organizations that espouse their point of view before not only the federal government but also numerous states, such as the Consumer Federation of America.²¹ States make rules in very different ways. Massachusetts

Implement RGGI (Aug. 15, 2006), *available at* <http://www.dec.ny.gov/press/12440.html>.

²⁰ WASH. ADMIN. CODE title 162 (2009), illustrates how a state agency can use its statutory authority to issue broad anti-discrimination regulations.

²¹ For example, CFA proposes at both the federal and state levels to restrict all-terrain vehicles. Consumer Federation of America, Health & Safety: ATVs, <http://www.consumerfed.org/topics.cfm?section=Health%20and%20Safety&topic=ATVs> (last visited Sept. 20, 2009).

has no central office charged with superintending agency rule-making and broadly allows agencies to issue rules after a public hearing.²² Minnesota has a central office to review rules only as to form, and the Governor plays a limited role in rule-making.²³ In California,²⁴ Colorado,²⁵ and New York,²⁶ specialized regulatory offices ensure gubernatorial involvement and compliance with state administrative procedure for rule-making. Procedures include requirements that proposed rules be necessary, non-duplicative, clear, authorized, and consistent; result from sound analysis; and be informed by public comment and, in some instances, a public hearing.

Even within a state, various agencies create rules in different ways. Some have rule-making staff who prepare all rules, whereas in others substantive area teams prepare rules within their province (e.g., the solid waste team decides whether solid waste rules are needed, and, if so, what they should be). Large agencies may have multiple internal checks and levels of review before a rule can be seriously considered; they may or may not seek or allow public input while these reviews are proceeding. Advocates should know and understand the agency and relevant rule-review actors.

An essential part of that watchfulness is keeping tabs on whatever rule-making the particular agency, perhaps unduly influenced by adversaries, is considering. Advocacy organizations ought to be conversant with such resources as online state registers that periodically detail proposed rule-makings, and state agencies' annual agendas for contem-

²² MASS. GEN. LAWS ch. 30A, § 2 (2009).

²³ MINN. STAT. §§ 14.07, 14.14 (2009); see PAUL M. MARINAC, OFFICE OF THE REVISOR OF STATUTES, RULEMAKING IN MINNESOTA—A GUIDE (2006), *available at* https://www.revisor.leg.state.mn.us/revisor/pubs/arule_drafting_manual/ruleguide.htm#_Toc151177249.

²⁴ See CAL. GOV'T CODE § 11349.1(a) (West 2008); see also OAL Checklist, Regular APA Rulemaking, http://www.oal.ca.gov/pdfs/checklist/Regular_Checklist_051308.pdf (last visited Apr. 9, 2009) (a useful very detailed checklist of rule making steps in California).

²⁵ See Colo. Administrative Procedure Act, COLO. REV. STAT. § 24-4-103(2.5)(a) (2008).

²⁶ See New York Administrative Procedure Act, N.Y. A.P.A. LAW § 202 (McKinney 2009); Executive Order 20: Establishing the Position of State Director of Regulatory Reform, N.Y. COMP. CODES R. & REGS. TIT. 9, § 5.20 (2009), as continued by Executive Order 9, N.Y. COMP. CODES R. & REGS. TIT. 9, § 7.9 (2009).

plated regulatory action.²⁷ Some information may be gleaned by monitoring agency websites or by attending conferences, hearings, or workshops where regulators speak.

Interacting regularly with an agency is helpful; every successful lobbyist knows this to be true.²⁸ It is not enough to send letters or issue impassioned press releases. Effective public interest advocates make it a practice to meet regularly with key regulators, become expert resources available to help them, and say good things about them publicly, especially to the media, when praise is even arguably warranted.

Further, if a state's regulatory procedure entails a second-level review by a specialized rule-making office and/or governor's counsel (as in New York), proponents need to factor this into their strategy. Second-level regulatory review exists in large part because agencies' zeal for proposed rules sometimes leads them to tilt the table in making their mandated findings, such as those regarding a proposed rule's fiscal impact and costs vs. benefits. A centralized executive review may substantially alter the substance and text of proposed rules. State law may enable the legislature to delay or rescind rule-making.²⁹ An advocate's failure to appreciate this multi-stage process is akin to a litigator's failure to understand appeals.

V. Cost-benefit analysis may be critical.

Although it is central to assessing regulatory policy, cost-benefit analysis remains controversial, largely because of its history in the area of environmental protection. To some veterans of Bush regulatory pol-

²⁷ The New York Administrative Procedure Act requires agencies to publish their regulatory agendas online whenever feasible. N.Y. A.P.A. LAW § 202-d(1)(c) (McKinney 2009). *See, e.g.*, <http://www.dos.state.ny.us/info/register.htm>; <http://www.oal.ca.gov/notice.htm>; <http://www.maine.gov/sos/cec/rules/agendas.html>; <http://www.ipcb.state.il.us/SLR/RulemakingsPendingBeforetheBoard.asp>; <http://www.ipcb.state.il.us/SLR/Semi-AnnualRegulatoryAgenda.asp>.

²⁸ Advocates before state agencies may be subject to lobbyist registration and disclosure requirements, especially if they receive more than a threshold amount in compensation or reimbursement for expenses. *E.g.*, N.Y. LEGIS. LAW § 1-e (McKinney 2009) (\$5,000 threshold).

²⁹ *See, e.g.*, IOWA CODE §§ 7.17, 17A.4, 17A.5, 17A.6, 17A.8 (2008); OHIO REV. CODE ANN. § 101.35 (West 2008).

icy, indeed, the concept of cost-benefit analysis is a heartless, revanchist pretext for not regulating.³⁰

Explicitly or covertly, most states rely on some form of cost-benefit analysis in rule-making. Both New York and Colorado expressly require cost-benefit analysis, but Colorado erects far higher hurdles to agency rule-making than does New York in terms of the findings that must be made after the cost-benefit analysis and before a rule can be adopted.³¹ California's central regulatory office closely reviews fiscal impacts; it does not specifically mandate full-scale cost-benefit analysis, but it asks for detailed factual findings that bear on cost-benefit analytical issues.³²

Advocates are not wrong when they persist in viewing cost-benefit analysis as the rubric under which those who oversee government regulators can please or appease interest groups that have little use for public interest advocacy. Reform groups and commentators harshly criticized in those terms the issuance of a 2009 executive order in New York calling for a gubernatorial-level reexamination of existing rules at selected agencies that regulate health, safety and environmental con-

³⁰ RICHARD L. REVESZ & MICHAEL A. LIVERMORE, *RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH* (2008). Cost-benefit hurdles erected by the Bush White House often proved insurmountable. *See, e.g.*, SUSAN DUDLEY, OFFICE OF MANAGEMENT AND BUDGET & SHARON HAYS, OFFICE OF SCIENCE AND TECHNOLOGY POLICY, *UPDATED PRINCIPLES FOR RISK ANALYSIS* (2007), *available at* <http://www.whitehouse.gov/omb/assets/omb/memoranda/fy2007/m07-24.pdf>. *See generally* Cass Sunstein, *Your Money or Your Life*, NEW REPUBLIC, Mar. 15, 2004, at 27 (reviewing FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (2004)).

³¹ Compare the specific requirements of Colo. Administrative Procedure Act, COLO. REV. STAT. §24-4-103(2.5)(a) (2008), with the more general dictates of New York Executive Order 20: Establishing the Position of Director of Regulatory Reform, N.Y. COMP. CODES R. & REGS. TIT. 9, § 5.20(III)(1)(f) (2009), and NEW YORK STATE GOVERNOR'S OFFICE OF REGULATORY REFORM, *COST-BENEFIT ASSESSMENT IN RULEMAKING: A GUIDE FOR STATE AGENCIES* (2008), *available at* http://www.gorr.state.ny.us/AgencyInfo/Cost-Benefit_Guide_July2008.pdf.

³² *See* OAL Checklist for Notice Review, *available at* <http://oal.ca.gov/res/docs/pdf/checklist/NoticeReviewChecklist.PDF>. California law does, however, require the agency issuing the rule to find that no other one would be as effective yet less burdensome. CAL. GOV'T CODE § 11346.5(a)(13) (West 2008).

cerns.³³ The advocates, however, are often more nimble at critiquing an unwelcome *fait accompli* than in initiating and advancing regulatory proposals of their own. If they wish to do so, public interest advocates need to accept the importance of cost-benefit and regulatory impact analyses, and at least learn to speak the language. They may gain legitimacy in opposing a proposed industry-friendly rule governing, say, debt collection practices by demonstrating that its foreseeable impacts have been missed, its projected costs have been miscalculated, or its anticipated benefits have been misperceived. If advocates cast their arguments purely in rhetorical or legal terms, rather than the analytical ones called for by cost-benefit guidelines, they will not adequately help their allies within government make a case for the proposed rule.

VI. Rule-making may advance the public interest more effectively than litigation.

The need for public interest advocates to immerse themselves in rule-making by agencies that regulate their clients' interests is made apparent by a comparison to the advocacy route more frequently chosen by lawyers: litigation. This seems especially apropos because progressive judicial activism will likely remain a scarce commodity for the foreseeable future.

Compared to litigation, rule-making is more predictable, quicker, and affordable. When it has a distinct perspective to offer, a public interest group, for example, may find that an agency charged with complex rule-making will appreciate and rely on a well-considered written submission about a proposed or needed rule even if the group's perspective is decidedly at odds with the agency's, as long as the presentation is more knowledge- than rhetoric-based.

³³ See N.Y. Exec. Order No. 25, Establishing A Regulatory Review and Reform Program, *available at* http://www.ny.gov/governor/executive_orders/exeorders/eo_25.html; Press Release, Environmental Advocates of New York, Groups Call on Governor Paterson to Rescind Executive Order 25, Put Public Interest Before Special Interests (Aug. 13, 2009), *available at* <http://www.eany.org/news/08132009.html>; Rebecca Bratspies, *Paterson's Executive Order: Win for Industry, Loss for Public Health and Safety*, CPRBLOG, Aug. 13, 2009, <http://www.progressivereform.org/CPRBlog.cfm?idBlog=10A0BB6D-C7F1-9EFD-B436DF4197F40CoE>.

Consider these points of comparison between courtroom and regulatory advocacy:

	Litigation	Regulation
Who gets to be heard upfront on the issue?	The public is not invited.	APA rules: notice, outreach, input, cost-benefit.
What's the ticket to get into the game?	Someone's bad action or inaction.	A better idea.
How long does it take?	It's slow.	It's fast(er).
Institutional barriers?	Hard to overcome: precedent, standing, no injunctive relief, cost.	Possible do-over if, for example, you've overstepped your authority or messed up APA.
Who decides?	You don't know who before you're committed.	You can get to know agencies' decision makers in advance.
How much can you control the outcome?	You have little control over remedy: how little or much, who's covered, etc.	The policy you sign on to is the policy you want or can defend, details and all.
How do you win?	You need the judge(s) to agree with you.	You need the boss to agree and courts to defer.
How bad is the downside?	Some court rulings make bad law. The legislature may use the pending suit to delay its taking up the issue.	If a court or the legislature rejects your rule change, you've lost nothing by trying, and still may be able to write a good but different rule.

This matrix is, of course, oversimplified in order to illustrate that for those who seek institutional change, especially if they own law licenses, the most familiar path—to the courthouse—may not be the shortest or surest.

In sum, agency rule-making presents a valuable opportunity for public interest advocates to shape reform. It is difficult enough to bring about progressive social policy through law without ceding one of the most promising forums to the competition.

IV. DEFINING THE PUBLIC INTEREST: THE ROLE AND NETWORKS OF STATE COURTS

What Are the Locals Up To? A Connecticut Snapshot

*Ellen Ash Peters**

Comparisons between state and federal courts on the grand scale are difficult undertakings. The manifest differences between the federal law of the 9th Circuit and the federal law of the 4th Circuit pale in comparison to the huge differences in the law of the states across this complex nation.

This impressionistic description of Connecticut courts does not purport to provide any insight on state courts generally. Indeed, diversity among state courts makes them particularly useful as laboratories for judicial innovation and experimentation. Although state court administrators, through institutions like the National Center for State Courts,¹ have the opportunity to learn from each other, we all prize our local judicial cultures.

What strikes me as particularly significant about Connecticut jurisprudence is the regularity with which the facts are dispositive to judicial outcomes and the distinctive way in which Connecticut allocates responsibility for fact-finding. I do not mean personal facts such as those that seemed so significant to the legal realists, as described by my one-time Yale Law School colleague, Jerome Frank, in *Courts on Trial*.² The facts that are determinative of judicial outcomes are facts of record or facts of which the court can take judicial notice. Within that universe, the facts that the court chooses to highlight are of particular interest because they reflect the court's reasoned appraisal of the real-life consequences of judicial choices.

* Former Chief Justice, Connecticut Supreme Court.

¹ The National Center for State Courts aims "to improve the administration of justice through leadership and service to state courts, and courts around the world" by providing research, consulting, and educational programs to state court leaders, and by advocating their issues before Congress. National Center for State Courts, http://www.ncsconline.org/D_About/index.htm (last visited Sept. 13, 2009).

² JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

State Constitutional Law

State constitutional law cases are not part of the regular diet of Connecticut state courts. Unlike the federal courts, Connecticut courts still function, most of the time, as common law courts, where the operative principles are more often derived from fact-bound precedents than from authoritative texts. No phrase occurs more often in our state case law than “under the circumstances of this case.” This common law mindset also informs our consideration of the broadly stated paradigms of federal and state constitutional law. While we may borrow the analytic framework of parallel federal constitutional principles from the majority and the dissenting opinions of the United States Supreme Court, in applying this framework to reach a final decision, we continue to look hard at the facts of record.

Search and seizure cases are a good window into state constitutional law because they come up so often. Two examples illustrate how important the facts are to their resolution.

Our state constitution uniquely provides that a person has been “seized,” so that the police must justify their intrusion, if a reasonable person in the defendant’s position would have believed that he or she was not free to leave.³ In *State v. Oquendo*,⁴ the Connecticut Supreme Court applied that provision to a defendant’s late-hour interrogation by a police officer on a public street. The officer, on patrol in a marked police cruiser, pulled his cruiser over next to the defendant to question him and his companion and to ask the defendant to turn over a duffel bag that he was holding. Instead, the defendant fled. The court focused on “all the circumstances, including the lateness of the hour, the fact that [the police officer] was armed and the fact that there was no one other than the defendant and [his companion] in the vicinity.”⁵ In the view of the court, “a reasonable person in the defendant’s position would not have believed that he was free to ignore [the officer’s] instructions and walk away.”⁶ Accordingly, although the court accepted the trial court’s description of what had occurred, it overturned that court’s characterization of the scene as a consensual encounter and required the state to

³ CONN. CONST. art. I, §§ 7, 9; see *State v. Ostroski*, 186 Conn. 287, 291-292, 440 A.2d 984, (1982), *cert. denied*, 459 U.S. 878 (1982) (citing *United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980)).

⁴ 223 Conn. 635 (1992).

⁵ *Id.* at 653.

⁶ *Id.*

establish that the officer's seizure of the defendant was based on a reasonable and articulable suspicion of criminal behavior.⁷ The facts of record were dispositive.

A different factual consideration played a role in the Connecticut Supreme Court's appraisal of the desirability of recognizing, under our state constitution, a good faith exception to excuse errors in police applications for search warrants. In *State v. Marsala*,⁸ the court focused on the effect that a good faith exception would have on the care with which police officers prepare the documentation that underlies applications for search warrants. Connecticut routinely assigns to trial court judges, in rotation, the responsibility for approving search warrant applications, often at their homes in the middle of the night. The judges must be able to take the allegations in the applications and the documentation at face value. The members of the Supreme Court, recalling their on-call duties, declined to interpolate into our constitutional law an exception that might dissuade police efforts from devoting the greatest possible care and attention to providing sufficient accurate information establishing probable cause for search and seizure warrants.⁹

Constitutional law cases under our state constitutional provision for equal protection¹⁰ furnish other, more recent, illustrations of the significance of the underlying facts. These cases arise less frequently, but when they do, they present the most difficult and controversial issues that courts are called upon to resolve.

Connecticut's school segregation case had been in litigation for five years before it reached the Connecticut Supreme Court. In reviewing the briefs before oral argument in *Sheff v. O'Neill*,¹¹ the Supreme Court observed that the record did not clearly establish which of the trial court's extensive findings of fact were disputed on appeal and which were not. Before addressing the legal merits of the appeal, the court held a special hearing after which it directed the parties "to prepare a joint stipulation of all relevant undisputed facts and to assist the trial court in making findings of fact on matters upon which the parties could not agree."¹² Ultimately, the court's majority opinion relied entirely on the facts in the

⁷ *Id.*

⁸ 216 Conn. 150 (1990).

⁹ *Id.* at 171.

¹⁰ CONN. CONST. art. I, § 20.

¹¹ 238 Conn. 1 (1996).

¹² *Id.* at 7-8. Superior Court Judge Harry Hammer's diligence in the pursuit of fact-finding, both before and after the Supreme Court's remand, was extraordinary.

joint stipulation to rule that de facto segregation of Hartford school children violated their constitutional right to a free public education that did not subject them to the injurious consequences of racial and ethnic isolation.¹³

In 2008, the Connecticut Supreme Court addressed the state constitutional law of equal protection in the context of gay rights. In *Kerrigan v. Commissioner of Public Health*,¹⁴ the majority of the court focused its attention on whether, as the trial court had held, the enactment of state statutes affording same-sex couples the rights to enter into a civil union meant that the plaintiffs were not constitutionally harmed by their inability to marry. In its reversal of the trial court, the court repeatedly referred to factual evidence of “the long and undisputed history of invidious discrimination that gay persons have suffered.”¹⁵ By contrast, the court noted the *absence* of evidence that heterosexual couples would willingly give up their constitutionally protected right to marriage in exchange for the bundle of legal rights that the legislature has denominated a civil union.¹⁶

These cases are the leading Connecticut state constitutional law cases of recent years. In each of them, the legal analyses that determined their outcome were framed by, and responsive to, the court’s contextual reading of the precise factual setting in which the case arose. Professor Karl Llewellyn, some fifty years ago, in *The Common Law Tradition: Deciding Appeals*, described appellate judging as a search for the rules that fit the court’s “situation-sense” of the underlying facts.¹⁷ That description seems to me to capture a good deal of the process by which controversial cases get decided in Connecticut.

The Finders of the Facts

Connecticut law is surely not unusual among the states in its insistence on grounding its jurisprudence in the facts of the case. What is unusual is Connecticut’s allocation of responsibility for the finding of the facts. In our state, the Supreme Court “*cannot* find facts; that function is, according to our constitution, our statute, and our cases, exclu-

¹³ *Id.* at 43.

¹⁴ 289 Conn. 135 (2008).

¹⁵ *Id.* at 150.

¹⁶ *Id.* at 153 n.16.

¹⁷ KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 122 (Wm. S. Hein Publishing 1996) (1960).

sively assigned to the trial courts.”¹⁸ The constitutional provision is section 1 of article V of the Connecticut Constitution.¹⁹ The statute is General Statutes § 51-199,²⁰ and the cases are legion.

The leading case is *Styles v. Tyler*,²¹ in which a majority of Connecticut’s highest court, then denominated the Supreme Court of Errors, relied on the history of the adoption of the Connecticut Constitution in 1818²² to conclude that “the certainty of our jurisprudence as well as the security of parties litigant depends upon confining the jurisdiction of a court of last resort to the settlement of rules of law.”²³ That principle, the court held, was embedded in our constitution because the constitution itself established two courts and the character of their jurisdiction, “one with a supreme jurisdiction in the trial of causes, and one with a supreme and final jurisdiction in determining in the last resort the principles of law involved in the trial of causes.”²⁴

The Supreme Court officially shed the “of Errors” designation in its title in 1956 and an amendment to the Practice Book in 1978 adopted the current rule authorizing appellate review of factual findings that are “clearly erroneous in view of the evidence and pleadings in the whole record.”²⁵ As one leading commentator has noted, however, *Styles v. Tyler*

¹⁸ *Weil v. Miller*, 185 Conn. 495 (1981) (emphasis added).

¹⁹ As amended, article V, section 1 of the Connecticut Constitution provides: “The judicial power of the state shall be vested in a supreme court, an appellate court, a superior court, and such lower courts as the general assembly shall, from time to time, ordain and establish. The powers and jurisdiction of these courts shall be defined by law.” The text is essentially the same as that which appears in the constitution of 1818 except that “an appellate court” was added in 1982.

²⁰ General Statutes § 51-199 provides that the Supreme Court “shall have final and conclusive jurisdiction of all matters brought before it according to law, and may carry into execution all its judgments and decrees and institute rules of practice and procedure as to matters before it.” CONN. GEN. STAT. § 51-199 (2008).

²¹ 64 Conn. 432 (1894).

²² For a brief description of Connecticut’s constitutional history leading up to the adoption of the constitution of 1818, see Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1549-1552 (1997). Until 1818, the legislature’s upper house was the state’s appellate tribunal. *Id.* at 1550.

²³ *Styles*, 64 Conn. at 447.

²⁴ *Id.* at 450.

²⁵ CONN. PRACTICE BOOK § 60-5 (2008).

still exerts an influence on appellate review in this state: “Litigants have more difficulty convincing state as opposed to federal appellate judges that trial court findings are clearly erroneous.”²⁶ In practice, a finding of clear error almost always depends upon a showing that there was *no* evidence to support the trial court’s finding. If there is any evidence to support a finding, the reviewing court cannot reverse unless it is “left with the definite and firm conviction that a mistake has been committed.”²⁷

The Supreme Court’s inability to find facts, which limits as well the authority of the Appellate Court, has special significance for appeals in which a litigant asks the court to examine the record at trial and to add findings of fact that the trial court did not make. Our appellate courts routinely resist such suggestions: “An appellate court cannot find facts or draw conclusions from primary facts found, but may only review such findings to see whether they might be legally, logically and reasonably found.”²⁸

Recognizing these well-established constraints on appellate jurisdiction, the Connecticut Rules of Appellate Procedure authorize litigants to file motions for articulation asking the trial court to fill perceived gaps in the trial court’s memorandum of decision.²⁹ In practice, what once may have been viewed as an opportunity to strengthen an adequate record has virtually become a requirement to make sure that the record fully represents all that was litigated at trial and all that was not. Although the Supreme Court, on rare occasions, has itself ordered a remand for an articulation,³⁰ the Appellate Court has regularly declined to do so.³¹ In effect, the motion for articulation has reinforced the historical disinclination of Connecticut appellate courts to play a role in the determination of the facts.

²⁶ WESLEY W. HORTON, *THE HISTORY OF THE CONNECTICUT SUPREME COURT* 100 (2008).

²⁷ *Verspyck v. Franco*, 274 Conn. 105, 113 (2005) (quoting *Sargent v. Smith*, 272 Conn. 722, 728-29 (2004)). I must acknowledge my personal discomfort with the Supreme Court’s holding because, in the Appellate Court, I wrote the majority opinion coming to the opposite conclusion. *Verspyck v. Franco*, 81 Conn. App. 646 (Conn. App. Ct. 2004), *rev’d*, 274 Conn. 105.

²⁸ *Katz Realty v. Norwalk Fabricators*, 14 Conn. App. 396, 401 (1988).

²⁹ CONN. PRACTICE BOOK § 66-5 (2008).

³⁰ *See, e.g., State v. Byrd*, 233 Conn. 517 (1995).

³¹ *See, e.g., Kosinski v. Carr*, 112 Conn. App. 203 (Conn. App. 2009).

Connecticut jurisprudence depends, fundamentally, on findings of fact that, for all practical purposes, are unreviewably established by its trial courts. This division of labor has remained virtually unchanged for more than one hundred years. Perhaps this history ought to cause us to focus more attention on how trial courts find the facts that are so determinative of the outcome on appeal as well as at trial. The risks attendant to cross-cultural identifications come to mind.³² Furthermore, although we have embraced the principle of transparency in the administration of our courts, we have not ventured to inquire into what transpires in the jury room or indeed to take steps to assist the jury in its fact-finding function.³³ Another Liman Colloquium, at some other time, might want to pursue such agendas, which undoubtedly are easier to identify than to address and resolve.

³² The recent exoneration of James Calvin Tillman by virtue of a belated DNA test after eighteen years of incarceration underscores the reality that eyewitness identification is not always reliable. See Matt Burgard & Elizabeth Hamilton, *Dogged Pursuit Freed Inmate; Lawyers Kept Up Hunt Until Finding Key DNA*, HARTFORD COURANT, June 11, 2006, at A1; see also Steven B. Duke, Op-Ed., *Eyewitness Testimony Doesn't Make It True*, HARTFORD COURANT, June 11, 2006, at C1, available at <http://www.law.yale.edu/news/2727.htm> ("The DNA revolution that began in the late 1980s has dramatically demonstrated how utterly unreliable eyewitness identifications are. About 200 people convicted of violent crimes have been exonerated by DNA evidence in the past two decades. About 80 percent have been the victims of eyewitness misidentification.").

³³ It is telling that, although for many years we have promulgated standard jury instructions, we have never promulgated standard jury interrogatories.

State Supreme Courts as Places for Litigating New Questions

*Randall T. Shepard**

State courts and federal courts are rather different places when considered as potential sites for cases presenting new questions. One of the differences between them is fairly widely recognized, and it is more important. After the Warren Court's long run nearly brought state constitutional jurisprudence to extinction, the recent renaissance in the field has made state courts an interesting place to litigate.

A second difference has to do with the institutions themselves. There is a much higher turnover among state judges than there is among federal judges, creating a larger cadre of judicial officers who have not yet settled in to particular views of how various statutes and constitutional provisions work. And on average, state judges are relatively younger than the federal trial and appellate judges before whom litigators might bring various claims. Finally, many state courts present diversified personnel rosters, certainly at the courts of last resort. I argue here that this presents rich opportunity for intellectual engagement.

The Rebirth of State Constitutions

Remarkably for a nation whose constitutional framework changes only slowly, the United States has experienced two recent dramatic reversals in the relationship between state protection and federal protection of individual liberties. During the middle of the twentieth century, federal doctrine nearly eclipsed state constitutional law. Then, by the end of the century, the latter reclaimed much of the high ground it formerly occupied. Some of this shift was as much a story about institutional competition as it was about jurisprudential evolution.

Notwithstanding prompt adoption of ten amendments to the Federal Constitution, the bills of rights in state constitutions remained the principal forces in protecting American civil liberties for a century and a half. While Madison had argued that the federal restraints should bind both national and state governments, he did not prevail. The First Congress, taking up these questions in 1791, specifically rejected efforts to

* Chief Justice, Indiana Supreme Court.

insert provisions in the Bill of Rights limiting state authority.¹ If there had ever been any doubt that the federal Bill of Rights was not a limitation on state activities, that doubt vanished when the U.S. Supreme Court heard a case in which one John Barron argued that the City of Baltimore had violated his rights under the Fifth Amendment. Chief Justice John Marshall made quick work of Barron's claim: "Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and would have expressed that intention."²

Even after the adoption of the Civil War amendments, federal due process and equal protection were deemed to require only fundamental fairness in state procedures. In the familiar *Slaughter-House Cases* of 1873, the Supreme Court held that the Fourteenth Amendment did not add to any rights, privileges, or immunities of the citizens of the several states.³ Eleven years later in *Hurtado v. California*, the Court declared that "[d]ue process of law" referred to "that law of the land in each State, which derives its authority from the inherent and reserved powers of the State."⁴

Thus, Americans who thought their rights had been violated regularly went to state court and frequently found vindication. The Indiana Supreme Court, for example, spent forty years asserting its authority in the fight against slavery. The very first volume of that court's decisions records its ruling in *State v. Lasselle*,⁵ an appeal by a slave known only as Polly, whose owner had been granted a writ of habeas corpus returning Polly to his possession. The Indiana court set this writ aside and directed that Polly be freed, observing that "the framers of our constitution intended a total and entire prohibition of slavery in this State; and

¹ 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1053 (1971). Thus, the First Amendment commences by saying, "*Congress* shall make no law." U.S. CONST. amend. I; see *Duncan v. Louisiana*, 391 U.S. 145, 173 (1968) ("[E]very member of the Court for at least the last 135 years has agreed that our Founders did not consider the requirements of the Bill of Rights so fundamental that they should operate against the states.") (Harlan, J., dissenting). People had little fear that governments close to home in state capitals would deprive them of their freedoms. See LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES* 32-33 (1958).

² *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833).

³ 83 U.S. (16 Wall.) 36 (1872).

⁴ 110 U.S. 516, 535 (1884).

⁵ 1 Blackf. 60 (Ind. 1820).

we can conceive of no form of words in which that intention could have been more clearly expressed.”⁶ The Indiana court likewise later barred contracts of indenture and invalidated the state’s runaway slave law.⁷

The spirit of individual liberty likewise motivated state court action in other fields. When the Wisconsin Supreme Court held that indigent criminal defendants were entitled to counsel at public expense in 1859, it acknowledged that it could not find any provision in the state constitution or statutes expressly providing such assistance.⁸ Still, it noted the right to appear with counsel and said, “[I]t would be a reproach upon the administration of justice, if a person, thus upon trial, could not have the assistance of legal counsel because he was too poor to secure it.” Similar sentiments had prompted declarations about the right to counsel at public expense in Indiana in 1854 and Iowa in 1850.⁹

The Federal Rights Revolution Unleashed

By the middle of the twentieth century, however, the national Bill of Rights was more commonly deployed against states than against the federal government, and state constitutions in general were swept nearly into obscurity. The cause of this transformation can be best explained in one word: race. Race was at the heart of the Civil War amendments. The sponsors of the Fourteenth Amendment were largely motivated by a desire to protect the Civil Rights Act of 1866.¹⁰

⁶ *Id.* at 62. State constitutions frequently enumerate what modern dialogue calls “human rights” in provisions located outside the “Bill of Rights.” So it was with Indiana’s slavery provisions. Another common example of rights in the body of state constitutions is the right to a free public education, enumerated in article eight of the Maryland Constitution of 1867, for instance.

⁷ *Donnell v. State*, 3 Ind. 480 (1852); *Case of Mary Clark*, 1 Blackf. 122 (Ind. 1821).

⁸ *Carpenter v. Dane*, 9 Wis. 274 (1859).

⁹ *Webb v. Baird*, 6 Ind. 13 (1854); *Hall v. Washington County*, 2 Greene 473 (Iowa 1850). The Indiana case and other advancements in criminal law are detailed in Susan K. Carpenter, “*Conspicuously Enlightened Policy*”: *Criminal Justice in Indiana*, in DAVID J. BODENHAMER & RANDALL T. SHEPARD, *THE HISTORY OF INDIANA LAW* (David J. Bodenhamer & Randall T. Shepard eds., Ohio Univ. Press 2006).

¹⁰ 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981, 1982 (2006)). A description of the role of the Civil Rights Act in adoption of the Fourteenth Amendment may be found at Randall T. Shepard, *Land Use in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847, 857-860 (1988).

For several decades, the nation's courts deployed the Fourteenth Amendment largely for this purpose. In *Ex parte Virginia*, for example, the Supreme Court held that the Fourteenth Amendment was a sufficient constitutional basis for a federal indictment of a state judge who excluded blacks from jury lists.¹¹ In *Yick Wo v. Hopkins*, the Court granted relief to a defendant who violated a facially benign California statute that in actual practice discriminated against Chinese laundries, saying: "[W]hatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured by the petitioners . . . by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States."¹² Generally, though, the Court declined to use the Amendment for more sweeping purposes.

Around the turn of the twentieth century, however, judges began to assert that the Fourteenth Amendment gave them the power to enter orders against state and local governments for violations of the federal Bill of Rights. Most observers regard the 1897 decision in *Chicago, Burlington & Quincy Railroad Co. v. Chicago*¹³ as the beginning of what eventually became the "incorporation doctrine." The City of Chicago had adopted an ordinance setting one dollar as the amount of damages a railroad should receive when a new public street crossed its tracks. The Court struck down the ordinance, saying that the railroad was entitled to "just compensation," a Fifth Amendment concept, because just compensation was an essential element of Fourteenth Amendment due process. Similarly, in 1925 the Supreme Court ruled in *Gitlow v. New York*¹⁴ that the Fourteenth Amendment limited a state's regulation of free speech and free press, incorporating elements of the First Amendment. Thereafter, a little at a time, the Court held that various provisions of the Bill of Rights were incorporated into the Fourteenth Amendment, and thus enforceable against the states.

It was not railroad crossing condemnations or even free press protection that led federal judges in the mid-twentieth century to use the Fourteenth Amendment in new and expansive ways. The reason for this expanded use is the same reason the amendment was enacted in the

¹¹ 100 U.S. 339 (1880).

¹² 118 U.S. 356, 374 (1886).

¹³ 166 U.S. 226 (1897) (applying Fourteenth Amendment due process requirements to a state court proceeding on the taking of land).

¹⁴ 268 U.S. 652 (1925).

first place. The civil rights movement of the 1950s and 1960s brought case after case to the Supreme Court in which African Americans sought redress for grievances suffered at the hands of segregation-minded whites. Many of these grievances arose in criminal cases where the prosecutor, the victim, the judge, and the jury were all white and the defendant was black. Even the highest state courts in the South were unwilling to take cognizance of the potential for injustice in such proceedings. Indeed, one might argue that the Fifth and Sixth Amendments were incorporated because of the old Supreme Court of Alabama. That court alone offered up a series of decisions we now remember partly because they have the word Alabama in the caption, such as *Boykin v. Alabama*, and *Powell v. Alabama*,¹⁵ to name just two. Whether it was school desegregation, criminal defense rights, or prison reform, the Supreme Court cut down its own precedent like so much wheat. In the process, state constitutional law, and state constitutions and lesser rules of law were rendered nearly irrelevant by a galloping nationalization of a wide variety of matters.¹⁶

A Renaissance in State Constitutional Law

This judicial gallop eventually abated for two reasons. First, the Supreme Court's composition shifted throughout the 1970s and 1980s, a period in which Republican presidents made multiple appointments. Their appointments produced a Court much less likely than its predecessors to expand federal judicial supervision of state governments and state courts. Second, a number of state judges emerged who were dedi-

¹⁵ *Boykin v. Alabama*, 395 U.S. 238 (1969) (articulating standards for determining voluntariness of guilty plea); *Powell v. Alabama*, 287 U.S. 47 (1932) (granting a right to assistance of counsel in preparing for trial). Indeed, as authors G. Alan Tarr and Mary Cornelia Aldis Porter have written, the Supreme Court of Alabama in the days of the segregated South may have "provided a particularly singular catalyst for the fashioning of federal constitutional principles." G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* 89 (1988) (citing *Powell*). See also *NAACP v. Alabama*, 377 U.S. 288 (1964) (right of association); *Norris v. Alabama*, 294 U.S. 587 (1935) (right to an unbiased jury).

¹⁶ The need for close supervision of state governments by federal judges under the incorporation doctrine has greatly diminished. The diversification of the bench in the South, for instance, featured African Americans on the supreme courts in Alabama, Arkansas, Florida, and North Carolina by the early 1980s.

cated to a renaissance in state constitution jurisprudence.¹⁷ This renaissance produced hundreds of appellate opinions, scores of journal articles, and dozens of books.

A good many law scholars credit Justice William Brennan with launching the renewal of state constitutional law and hail Brennan's 1977 article in the *Harvard Law Review*¹⁸ as "the starting point of the modern re-emphasis on state constitutions."¹⁹ However, Justice Brennan spent much of his time on the U.S. Supreme Court brushing aside various state constitutional rulings. It might therefore be more accurate to credit Brennan along with Oregon's Justice Hans Linde.²⁰ Linde had been a professor of law at the University of Oregon before his appointment to that state's high court. He argued in a 1979 lecture at the University of Baltimore that state court judges confronting a constitutional question should always examine it under their own state constitution before analyzing it under the Federal Constitution. A third member of this pantheon might be Justice Robert Utter of the Washington Supreme Court. Utter helpfully pointed out that state constitutions were relatively lengthy and commonly newer than the federal documents and were thus capable of application to particular modern political issues.²¹

¹⁷ One early proponent, Justice Thomas Hayes of the Vermont Supreme Court, complained about the rote repetition of "federal buzz words memorized like baseball cards" and said of state constitutions, "One longs to hear once again of legal concepts, their meaning and their origin." *State v. Jewett*, 146 Vt. 221, 223; 500 A.2d 233 (1985).

¹⁸ William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1977).

¹⁹ David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1197 n.1 (1992) (noting that at least one influential commentator laid the groundwork almost a decade earlier) (citing Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970)).

²⁰ This was the view of Glenn Harlan Reynolds, *The Right To Keep and Bear Arms Under the Tennessee Constitution: A Case Study in Civic Republican Thought*, 61 TENN. L. REV. 647, 647 (1994) ("[T]wo important articles started the trend: one by Justice Hans Linde, of the Oregon Supreme Court, and one by Justice William J. Brennan, Jr., of the United States Supreme Court." (citing Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980)) (footnotes omitted)).

²¹ Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW 239 (Bradley D. McGraw ed., 1985); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State*

Justice Brennan's own renewed interest in state constitutions actually predated his 1977 article; the true genesis of his changed perspective is easy to identify. The change in the Supreme Court's composition meant that by the mid-1970s, Justice Brennan began to find himself on the losing end of cases. He concluded that the rights revolution was over as far as the Supreme Court was concerned and candidly announced in the 1975 case of *Michigan v. Mosley*²² that liberals and civil libertarians should take the war to a different venue. Dissenting in a search and seizure case was a relatively novel experience for Brennan, and he used his dissent to remind state judges that they had the power "to impose higher standards governing police practices under state law than is required by the Federal Constitution."²³ The timing of this plea was hardly a coincidence. During the 1975 Term, Justice Brennan wrote twenty-six dissenting opinions, his second-highest number for that decade. In cases disposed of during that Term by written opinion, he cast fifty-six dissenting votes, which tied his record for that decade.²⁴

Justice Brennan's 1975 conversion ultimately became the stuff of folklore because of his own considerable standing. On the other hand, there were both scholars and judges working this idea long before Justice Brennan. New legal scholarship on state constitutions began to appear as early as the late 1960s, much of it providing the intellectual foundation for the renaissance ahead.²⁵

More important to real-world litigants, state courts exercised their constitutional authority in a variety of settings well before Justice Brennan's exhortation. Where no parallel federal provision existed, for example, the state constitution regularly provided the sole basis for a con-

Courts Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds, 63 TEX. L. REV. 1025 (1985).

²² 423 U.S. 96 (1975).

²³ *Id.* at 120.

²⁴ Of course, this represented both "rights cases" and others. For a more detailed description of this trend, see Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 422 n.8 (1996).

²⁵ Robert Force, *State "Bills of Rights": A Case of Neglect and the Need for a Renaissance*, 3 VAL. U. L. REV. 125 (1969); see also Vern Countryman, *Why a State Bill of Rights?*, 45 WASH. L. REV. 454 (1970); Jerome B. Falk, Jr., *The State Constitution: A More Than "Adequate" Nonfederal Ground*, 61 CAL. L. REV. 273 (1973); Lawrence M. Newman, Note, *Rediscovering the California Declaration of Rights*, 26 HASTINGS L.J. 481 (1974); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271 (1973).

stitutional challenge.²⁶ State constitutions were also pertinent where a parallel federal provision had not been incorporated into the Fourteenth Amendment, such as the Fifth Amendment right to indictment only through a grand jury or the Second Amendment right to bear arms.²⁷ The state constitution was also deployed where a parallel federal provision had been construed in such a way that it clearly did not apply to the facts of a given case.²⁸ In still other instances, state supreme courts heard cases involving claims under parallel federal and state constitutional provisions and gave the state constitutional claim independent consideration.²⁹

Of course, the level of scholarship reflected in such opinions varied enormously. Some high-quality work provided early foundation for further jurisprudential refinement of state constitutions, while other judicial efforts were woefully inadequate. A commendable example of the former type was the Georgia Supreme Court's 1962 decision on the subject of free expression, *K. Gordon Murray Productions, Inc. v. Floyd*.³⁰ The Georgia Supreme Court invalidated a provision of Atlanta's municipal code that required exhibitors of motion pictures to obtain prior approval for each film they showed from a state Board of Motion Pictures Censors. Designed to prevent exhibition of obscene films, the ordinance nevertheless subjected all films to the screening process. The Georgia court first concluded that the ordinance did not violate the First Amendment. It then proceeded to a detailed consideration of the state's free expression provision, crafted in its own special way:

No law shall ever be passed to curtail or restrain the liberty of speech, or of the press; any person may speak, write and publish his sentiments, on all subjects, being

²⁶ *See, e.g.*, *Landes v. Town of N. Hempstead*, 231 N.E.2d 120 (N.Y. 1967) (granting protection against disenfranchisement).

²⁷ *See, e.g.*, *Simonson v. Cahn*, 261 N.E.2d 246 (N.Y. 1970) (right to grand jury); *Commonwealth v. Davis*, 343 N.E.2d 847 (Mass. 1976) (right to keep and bear arms). The Supreme Judicial Court noted tersely with a string cite that the Second Amendment was not relevant to the case, even if it should be incorporated into the Fourteenth Amendment at some future time. *Id.* at 850-51.

²⁸ *See, e.g.*, *State v. Moore*, 483 P.2d 630 (Wash. 1971) (protection against self-incrimination).

²⁹ *See, e.g.*, *State v. Burkhardt*, 541 S.W.2d 365 (Tenn. 1976) (right to counsel).

³⁰ 125 S.E.2d 207 (Ga. 1962).

responsible for the abuse of that liberty. Protection to person and property is the paramount duty of government, and shall be impartial and complete.³¹

After analyzing this discrete text and reflecting on the history of free speech case law under the Georgia Constitution, the court invalidated the ordinance because it subjected *all* motion pictures to prior approval, not just obscene ones.

In some respects the federal judiciary has thought of the recent renaissance as a matter of little consequence. In *United States v. Singer*, evidence seized by sheriffs' deputies in Wisconsin, arguably in violation of the Wisconsin Constitution, was passed along to the United States Attorney for use in prosecution. Singer sought suppression of this evidence on the ground that the Wisconsin officers had violated Wisconsin's bill of rights. This was a plausible request, as the Supreme Court had held in 1960 that state courts could not admit evidence ruled inadmissible in federal court, then handed on a "silver platter" to state prosecutors.³² The U.S. Court of Appeals for the Seventh Circuit brushed away this argument, saying simply that Wisconsin law was "irrelevant," and directed admission of the evidence.³³ The Seventh Circuit had excellent company. Considering whether a federal district court could order a tax increase in Kansas City to finance the judge's crafted effort to entice white parents to move back into the urban schools, Justice Byron White brushed aside the taxation provisions of the Missouri Constitution. Justice White said that the provisions "hinder[ed] the process" of shaping the district court's plan for integrating the city's schools.³⁴

Around the turn of the twenty-first century, the Rehnquist Court provided renewed force to state law and state constitutions. Two very different cases reflect this contribution.

In 1942, the Court had held that an Ohio farmer who grew crops on his own land and consumed them on the same farm was part of interstate commerce and subject to congressional regulation under the Commerce Clause.³⁵ For most of the ensuing half century, the Court

³¹ *Id.* at 212 (quoting GA. CONST. of 1945, art. 1, § 1, ¶ 15).

³² *Elkins v. United States*, 364 U.S. 206 (1960).

³³ 943 F.2d 758 (7th Cir. 1991).

³⁴ *Missouri v. Jenkins*, 495 U.S. 33 (1990). I have spelled out reasons why this general course is unwise. Randall T. Shepard, *In a Federal Case, Is the State Constitution Something Important or Just Another Piece of Paper*, 46 WM. & MARY L. REV. 1436 (2005).

³⁵ *Wickard v. Filburn*, 317 U.S. 111 (1942).

gave Congress every reason to imagine that the Commerce Clause empowered it to legislate on anything that moved and most of what did not. Chief Justice William H. Rehnquist believed that such breadth of authority was not consistent with the notion of a government of enumerated powers. The Court sustained the Rehnquist view in *United States v. Lopez*,³⁶ in which a student was convicted under the federal Gun-Free School Zone Act after bringing a handgun to school for a fellow student who intended to use it in a gang war. The Rehnquist Court vacated young Lopez's conviction, holding that Congress had exceeded its authority under the Commerce Clause. The Act did not purport to regulate commerce across state lines, wrote Chief Justice Rehnquist. If mere possession of a gun could be deemed somehow connected to other activities in commerce across state lines, he said, the commerce power would be imbued with more or less infinite reach.

The *Lopez* decision was highly unpopular in a Congress that believed in the breadth of its own authority and the members of which wished to be seen as tough on violence in schools. The collective effect of *Lopez* and other decisions that restrained the authority of Congress, however, was to foster the impression generated during the Reagan Presidency that the action was "being returned to the states." If anything, this bolstered the interest in state legislation and state constitutions.

A little further on, the Court's decision in *Kelo v. City of New London*³⁷ propelled resort to state constitutions. Municipal authorities in Connecticut had decided to condemn land in preparation for a multiuse economic development project, and Suzette Kelo resisted the acquisition of her home. Most condemnees were largely concerned with whether the compensation they were offered was adequate. Mrs. Kelo argued instead that taking her home for economic development was not seizure for a "public use" under the Takings Clause in the Fifth Amendment to the U.S. Constitution.

The Court declined to impose on state governments a uniform federal definition of public use through the Fifth and Fourteenth Amendments. It let stand Connecticut's condemnation of the Kelo home. The Court's decision to defer to state decisionmakers drew broad criticism from advocates of private property rights, and opponents of easy condemnation sought relief in state legislation and state constitutions. Two state courts responded by placing limits on the taking of private land in

³⁶ 514 U.S. 549 (1995).

³⁷ 545 U.S. 469 (2005).

excess of the *Kelo* announcement of the minimum federal requirement – or rather the lack of such requirement – contained in the Fifth Amendment.³⁸ These decisions represented a new instance of state courts offering greater rights protection than federal courts, the very result William Brennan had in mind.

Wading into Deeper Water

The momentum of the state constitutional renaissance has, if anything, pushed forward to new fields that have brought state constitutional activity more prominently into general public discourse. Close to the front of this story have been the decisions of three state high courts holding that their state charter requires equal rights for gay couples.

Late in 1999, the Vermont Supreme Court heard the case of three same-sex couples, each of which had lived together in relatively long relationships, ranging from four to twenty-five years. These couples had requested marriage licenses. When their requests were denied, they filed suit contending that Vermont's statutes about marriage violated the state constitution's provision declaring that "government is, or ought to be, instituted for the common benefit, protection, and security," and not for the advantage of single persons or sets of persons.³⁹ Looking back at the social and political moment of the constitution's adoption in 1777, and examining Vermont's history and similar provisions in the immediate past colonial history, the court discerned that the American Revolution had unleashed a powerful movement towards "social equivalence" and observed that Vermont's impulse in this regard produced perhaps the most radical constitution of the Revolution. The justices concluded that exclusions from the "common benefit" of marriage were not warranted under any of the arguments advanced by the state and held that same-sex couples were entitled to something akin to marriage, "domestic partnership" or "registered partnership," leaving it to the legislature to craft a new law.⁴⁰

As in Vermont, several Massachusetts same-sex couples with lengthy relationships challenged the state's refusal to issue marriage licenses. The Massachusetts courts had held at least since 1810 that marriage was a union between a man and a woman as husband and wife.⁴¹

³⁸ See, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115 (Ohio 2006); *Bd. of County Commissioners v. Lowery*, 136 P.3d 639 (Okla. 2006).

³⁹ VT. CONST. ch. I, art. 7.

⁴⁰ *Baker v. State*, 170 Vt. 194, 744 A.2d 864 (1999).

⁴¹ *Milford v. Worcester*, 7 Mass. 48 (1810).

In 2003, the Supreme Judicial Court of Massachusetts cited general due process and equal protection requirements, without quoting the actual provisions of the state constitution or elaborating on history, in declaring that limiting the benefits of marriage to opposite-sex couples “violates the basic premises of individual liberty and equality under law protected by the Massachusetts Constitution.”⁴² Asked later by the state Senate whether pending legislation to authorize “civil unions” carrying all the legal rights of marriage might suffice, the court said that using a term different than marriage would consign same-sex couples to an inferior and discriminating status.⁴³

In New Jersey, the state supreme court ruled unanimously that gay couples were entitled to legal recognition of their union, disagreeing only on whether the legislature should be allowed to use a word other than “marriage.”⁴⁴ It decided by a vote of four to three to allow the legislature to decide what word to use. Of course, not every state court found that its constitution contained the right to same-sex unions. Litigating license applicants lost cases in New York and Indiana.⁴⁵

In each of these cases, the members of the tribunal correctly acknowledged in writing that the question before them implicated ancient and deeply-held beliefs among the citizenry. The Vermont decision alone set off multiple efforts to amend state constitutions. Opponents of same-sex marriage initiated ballot questions amending state constitutions to prevent future court decisions authorizing gay unions. Voters in eleven states adopted such proposals in November 2004, just six months after the new Massachusetts same-sex marriage law took effect. Conservative states like Mississippi and liberal states like Oregon were among the eleven. Referenda in which Americans choose to overrule their courts, even on substantial matters, are at once both utterly legitimate and very cautiously undertaken. Plebiscites engineered by political operatives for short-term gain, by contrast, represent a threat to fair and impartial and independent courts.

⁴² *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

⁴³ *Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (2004).

⁴⁴ *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (2006).

⁴⁵ *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Hernandez v. Robles*, 7 N.Y.3d 33, 855 N.E.2d 1 (2006).

It Matters That the Institutions Are Different

Quite aside from the multiple sources of law to which one may appeal in a state court as distinct from a federal court, the judicial institutions themselves are vastly different as places for litigating new questions. These differences are not typically the stuff of longitudinal research but are readily apparent to the careful observer.

The difference between the state and federal systems that is most plain is the stark difference in size and caseload. Despite all the talk about the growing federalization of state law, the fact is that the overwhelming majority of lawsuits brought in the nation's courts of first instance continue to be brought in state courts. Over one hundred million cases are filed each year in state courts.⁴⁶ These numbers dwarf the size of the federal system, which receives about two million cases a year.⁴⁷ There are nearly thirty thousand state trial judges,⁴⁸ sitting in more than three thousand courthouses.⁴⁹ There are a fair number of states whose court systems, standing alone, exceed the size of the federal system.⁵⁰ More litigants, more questions, and more tribunals all make for additional instances in which courts are accustomed to hearing novel arguments.

Beyond the role played by the sheer scale of state court organizations, I focus here on the differences in the courts that issue binding

⁴⁶ COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2004, at 13-14 (Richard Y. Schauffler et al. eds., 2005), *available at* http://www.ncsconline.org/D_Research/csp/2004_Files/EW2004_Main_Page.html (hereinafter EXAMINING STATE COURTS) (charting number of state court cases from 1994 to 2003).

⁴⁷ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 11 (2005), *available at* <http://www.gov/judbus2005/contents.html> (hereinafter JUDICIAL BUSINESS) (listing combined criminal, civil, and bankruptcy filings for the twelve-month period ending September 30, 2005 at over 2.1 million, which was slightly inflated by a record number of bankruptcy filings as debtors scrambled to initiate process before major reforms took effect).

⁴⁸ EXAMINING STATE COURTS, *supra* note 46, at 16 (charting number of state trial judges from 1994 to 2003).

⁴⁹ U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS: VOL. 1, NO. 1, GOVERNMENT ORGANIZATION 4 (2002), *available at* <http://www.census.gov/prod/2003pubs/gc021x1.pdf> (listing number of county governments, which roughly corresponds to number of courthouses).

⁵⁰ EXAMINING STATE COURTS, *supra* note 46, at 22, 32, 42 (totaling civil, domestic relations, and criminal cases in each of the fifty states).

precedent in published opinions. These state tribunals exhibit at least three characteristics that set them aside from their federal counterparts.

First, the highest courts of the states experience relatively high turnover as compared to, say, the federal circuits. For example, New York's highest court has seven members. The most senior member of that court has now served just nine years. The average tenure is four years. By contrast, the judges of the U.S. Court of Appeals for the Second Circuit, whose jurisdiction includes New York, have an average tenure of ten years, and the most senior active member of that court has served seventeen years. Occasionally, events will produce truly heavy turnover. Of the Florida Supreme Court's seven members, for example, four were appointed during 2008 or 2009. The Chief Justice, who serves by virtue of possessing the greatest seniority among justices who have not yet served as chief, was appointed to the court in 1998. By contrast, the Eleventh Circuit, which encompasses Florida, is led by a judge appointed in 1986, and the average term of service of its judges is about eighteen years. The upshot of all this from a litigator's point of view is that there are more often judges sitting on state courts of last resort who have not yet experienced the need to tease out every issue that comes before them.

Second, state courts of last resort have become places where women and members of minority groups are substantially represented. When the Minnesota Supreme Court became a majority-female court in 1991, it was national news. When that occurs today, it rarely makes the headlines. Looking at just the leaders of state high courts, one can understand the change. The directory of chief justices issued during summer 2008 showed, just among the fifty states and the District, nineteen women, six African Americans, two Hispanics, and an Asian American, with only a bit of double-counting due to minority women. Since then, new female chiefs have arrived in Rhode Island, Michigan, and Louisiana. While one is never sure that the gender or racial composition of a tribunal makes a difference in cases, there are few who doubt that it does.

Third, returning to the matter of scale, the simple existence of so many separate court systems generating jurisprudential policy makes for great opportunity. There are simply more laboratories than there are in a world with thirteen circuits. State high courts, like their federal cousins, regularly borrow from each other, using good ideas and forms of analysis that lawyers cite in appellate proceedings.

Citizens Are Safer with Dual Sovereigns

Can there really be any doubt that Americans have benefited enormously throughout our national history from the decision of the founders to embrace Montesquieu's idea that a society could find stability and prosperity through dispersing power among competing centers of authority? Surely the country is a better place, a place of greater liberty, because we have clung to federalism and separation of powers and the notion that we are a nation of dual sovereigns, national and state. At the end of the day, this safeguard, long a prominent part of the American experiment, seems certain to find sustaining power in the efforts of scholars and litigators and state judges to do what lies within them to make their own communities safe, prosperous, and decent places.

State Courts in the Global Marketplace of Ideas

*Margaret H. Marshall**

“Law, like engineering, changes fast.” So observed the late United States Supreme Court Justice William O. Douglas in his 1974 autobiography.¹ The law of the internet was unknown then. A robust European Union, much less an impressive body of European Union law, was still on the horizon. Environmental law, sexual harassment law, cable broadcast law—all were in their infancy.

Although law indeed changes fast, we know that technological and social advances worldwide will continue to spur demands for new laws, and new ways of thinking about law. Law’s frontiers will expand in ways heretofore unimagined. One example: The phenomenon of multinational law firms serving multinational clients, often before newly created international or transnational tribunals, raises urgent questions about, among other things, legal ethics (Which country or entity’s code of professional conduct governs the lawyers’ actions?) and the trans-jurisdictional licensing of lawyers (Who decides?).

Cutting-edge transnational legal issues are hotly debated in the halls of our most influential law schools. Yet something is missing. That something is an understanding of state courts in the evolving legal landscape. To be sure, the existence of state courts in our federal scheme is a topic generally well covered in our law schools. However, because the work of state courts is rarely an independent topic of study, far less well understood is their historic and ongoing role as portals of innovation, incubators of new directions in the law—state courts as indispensable players in forming national, and I would argue global, consensus.

Sheer numbers tell the story, at least in part. These are the statistics for 2006, the latest date for which readily-accessible comparative data are available. The total number of cases filed in the federal district and appellate courts was 402,489.² In state courts, 46.8 million cases were

* Chief Justice, Supreme Judicial Court of Massachusetts. I gratefully acknowledge the many thoughtful contributions of Sandra E. Lundy, Senior Staff Attorney, Supreme Judicial Court, to the development of this Essay.

¹ WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* 169 (1974).

² Federal Court Management Statistics, 2006 (year ending Sept. 30), <http://www.uscourts.gov/cgi-bin/cmsd2006.pl> (District Courts) and <http://www.uscourts.gov/cgi-bin/cmsa2006.pl> (Appellate Courts) (last visited Sept. 20, 2009).

filed in 2006, not including traffic offenses.³ It is conventionally estimated that each year at least ninety-five percent of all litigation in the United States takes place in state courts, as do the vast majority of jury trials, the “lungs” of democracy, in John Adams’s words. Most civil and criminal cases filed in state courts will not make headlines. But more than a few state court decisions will change legal and social paradigms.

Some examples: *Perez v. Sharp*⁴ was the 1948 California state case declaring laws banning interracial marriage to be unconstitutional; it laid the groundwork for the United States Supreme Court’s similar decision in *Loving v. Virginia*⁵ nineteen years later. The court on which I serve has a long, proud history of expanding the boundaries of human liberties. The first constitutional matter decided by the Massachusetts Supreme Judicial Court was brought by a runaway slave claiming his freedom under the terms of the new Massachusetts Constitution. Three years after the Massachusetts Constitution was ratified, the court concluded in 1783 that slavery was “repugnant” to the constitutional guarantees of equality and freedom, and that “slavery is inconsistent with our . . . Constitution.”⁶ It was the first time a court anywhere had abolished slavery.

Massachusetts courts were the first, or among the first, to recognize the right of workers to form unions to improve wages and working conditions,⁷ a decision that flew in the face of settled law deeming such associations criminal conspiracies; to invalidate the use of peremptory challenges based on race⁸; and to provide counsel for indigent defendants in criminal cases.⁹ You also may recall a recent case concerning same-sex marriage.

³ NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS, 2007: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (2008), *available at* http://www.ncsconline.org/D_Research/csp/CSP_Main_Page.html.

⁴ 32 Cal. 2d 711 (1948), *reported sub nom* *Perez v. Lippold*, 198 P.2d 17 (1948).

⁵ 388 U.S. 1 (1967).

⁶ *See* 13 PROC. MASS. HIST. SOC’Y 282, 292-294 (1875).

⁷ *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842).

⁸ *Commonwealth v. Soares*, 387 N.E.2d 499 (Mass. 1979).

⁹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

The role of state courts in shaping the legal landscape is not confined to questions of personal liberty. State court decisions on other matters also have been game-changers. Consider *MacPherson v. Buick Motor Co.*,¹⁰ a 1916 case before New York's highest court, which announced what for its time was a radical proposition: an automobile manufacturer could be liable to the purchaser of an automobile for a defective product, even though the manufacturer and the consumer had no contractual relationship with one another. The *MacPherson* analysis was initially rejected by many state courts. Yet today no one seriously argues that a retail customer cannot recover from an automobile maker for a defective product.

Today, just as in 1916, state-court adjudication can and does start legal revolutions, revolutions with broad economic and social consequences. Yet remarkably, my informal survey of hundreds of class offerings by our nation's top ten law schools in the 2008-2009 academic year reveals one course devoted exclusively to state court litigation, and only two more referring to state courts in a title. Of course state law cases present themselves in legal textbooks, and much litigation in law school legal clinics occurs in state courts. But with rare exception, courses focusing on the comprehensive, systematic study of how state courts advance legal developments are absent from our most prestigious law schools.

There are many reasons for this neglect: a student body drawn from many states; the dizzying array of procedural, structural, and substantive differences among state courts; and an entrenched bias that federal court litigation is both intellectually and substantively more challenging than state court litigation.¹¹ My aim here is not to offer a paean to state courts, but rather to point out the disconnect between the goal of influential law schools to train law's future leaders and the puzzling fact that those same schools ignore state courts as fertile ground for the development of legal principles.

The omission is particularly unfortunate today: While state courts historically have been important change agents in the formation of a national consensus on legal matters, now they are posed to reprise that role in the development and transmission of transnational legal norms. Understanding why this is so requires some brief historical background.

¹⁰ 111 N.E. 1050 (N.Y. 1916).

¹¹ See, e.g., Robert F. Williams, *State Constitutional Law: Teaching and Scholarship*, 41 J. LEGAL EDUC. 243, 247 (1991) ("In recent years, educators in law and political science have noted the absence of state constitutional law in the [law school] curriculum and called for courses and materials on the subject.").

Prior to World War II, the United States, the world's first constitutional democracy, stood alone among nations in its chosen form of government, in which written guarantees of individual and property rights are enforced by a neutral, independent, co-equal branch of government, the judicial branch. A more popular form of democratic government was the parliamentary model, in which the law of the parliament, the people's voice, reigned supreme. Under a parliamentary system, it is not possible for judges to say "no" to executive and legislative actors. No matter how oppressive the legislation, the role of the judge is to enforce duly-enacted laws. In a constitutional democracy, on the other hand, the judge's role is to impartially review whether government action transgresses the boundaries established by the nation's charter of government, its constitution, and if so, to restrain or forbid the government action.

The painful experience of World War II and of the totalitarian regimes associated with it—including the apartheid regime of my native South Africa—illuminated for the world that independent constitutional review is central to a free and thriving nation. Constitutional democracy with constitutional courts has become the international norm from India to Japan, from South Africa to Canada to Estonia, Cyprus, Chile, Ireland, Sweden, Fiji, and beyond.

As the courts of new constitutional democracies set to work, they looked first to the United States, and then increasingly turned to each other, for sources of authority and guidance. This process was spurred and continues to be accelerated by modern technology. Access to the internet gives everyone from Jacksonville to Java a gateway to the best thinking of the world's most renowned judges and legal scholars. International conferences, an increasingly common occurrence, stimulate global jurisprudential dialogue. And as the world's lawyers and judges and scholars read and discuss one another's work, transnational legal norms begin to emerge. I am speaking here not of the norms embodied in treaties and international fora, but of what in an earlier day we called the customary law of nations. Transnational legal norms are legal concepts that transcend fixed geographical boundaries and become a jurisprudential *lingua franca*. Transnational norms of commerce, intellectual property, due process, state power, human rights—in countless direct and indirect legal "conversations" swirling around us, the international legal community, representing a diversity of personal and property in-

terests, works its way toward consensus.¹² State courts play a vital, if largely unrecognized, role in shaping and transmitting transnational legal norms.

Consider the influence of state court adjudication abroad. While American law students, in their search for persuasive authority, principally focus their sights on federal law, our colleagues around the world cast a broader net. *Evans v. United Kingdom*,¹³ for example, decided by the European Court of Human Rights in 2007-2008, concerns an English couple who had had their frozen embryos extracted and stored by a clinic for future use. The issue confronting the justices was whether the man's attempt to withdraw his consent for his ex-partner's use of the couple's stored embryos outweighed her rights to life, reproductive choice, and freedom from discrimination guaranteed by the European Charter of Human Rights. Both the parties and the justices paid close attention to a handful of United States state court decisions, including *A.Z. v. B.Z.*,¹⁴ decided by my court in 2000. There we held that the woman's procreative right must yield to the man's right not to be forced to procreate. The *A.Z. v. B.Z.* case itself was considered in light of an Israeli decision on similar facts.¹⁵ The decision of the European Court of Human Rights echoed that of *A.Z. v. B.Z.*. From Israel to Massachusetts to the United Kingdom to the European Court of Human Rights, a judicial conversation about reproductive choice, and to a larger extent about human dignity, took shape, each voice having impact on the evolving dialogue.

State court decisions also play a decisive role in what Judith Resnik has called the international "migration and sharing of constitutional norms."¹⁶ *State v. Makwanyane*,¹⁷ decided in 1995, is the Constitutional

¹² Some modern constitutions, such as the South African Constitution, expressly direct judges to consider international law when construing domestic constitutional issues. S. AFR. CONST. 1996, ch. 2, § 39(1) ("When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (3) may consider foreign law.").

¹³ 46 Eur. H.R. Rep. 34 (2008).

¹⁴ 725 N.E.2d 10514 31 Mass. 150 (Mass. 2000).

¹⁵ See Janie Chen, Note, *The Right to Her Embryos: An Analysis of Nahmani v. Nahmani and Its Impact on Israeli In Vitro Fertilization Law*, 7 CARDOZO J. INT'L & COMP. L. 325 (1999).

¹⁶ Judith Resnik, *Law as Affiliation: "Foreign" Law, Democratic Federalism, and the Sovereignism of the Nation-State*, 6 INT'L J. CONST. L. 33, 46 (2008).

Court of South Africa's seminal holding on the death penalty. That punishment, the Justices held, violates South Africa's constitutional ban on cruel, inhuman, or degrading punishment. *Makwanyane* is principally grounded, as one would expect, in a close analysis of the circumstances surrounding the adoption of the South African Constitution. But the opinions drew significantly on decisions from the high courts of Massachusetts and California.¹⁸ The Justices cited these two state court decisions for more than evidence of the weight of international consensus on the death penalty. They relied on the reasoning of these opinions in their efforts to articulate a constitutional basis for prohibiting capital punishment.

Surprisingly, in foreign cases presenting no highly-charged constitutional issues, foreign courts have found models of guidance and authority in state court decisions. Again, examples abound. In the 1996 case *M.C. Metha v. Kamal Nath & Ors.*,¹⁹ the Indian Supreme Court undertook an extended analysis of three Massachusetts decisions, among others, in incorporating the public trust doctrine into Indian property law. In *Dart Industries, Inc. v. The Decor Corporation Pty Ltd.*,²⁰ a 1994 case, the Australian Supreme Court looked to the decisional law of Massachusetts and other states to determine damages in a patent infringement case.

The use of state court decisions abroad is, among other things, a testament to two features of American jurisprudence in particular. First is the vitality of federalism. A central feature of American federalism, of course, is its allowance for a diversity of decisional law among the states on issues of general concern. Second is the synthetic method of legal analysis characteristic of the common law that makes state court decisions particularly interesting to foreign jurists.

¹⁷ 1995 (3) SA 391 (CC), *available at* <http://law.gsu.edu/ccunningham/fallo3/DeathPenalty-SouthAfrica-Makwanyane.htm>.

¹⁸ *See, e.g., id.* at paras. 91 (citing to *People v. Anderson*, 493 P.2d 880 (Cal. 1972)), 92 (citing to *Dist. Attorney for the Suffolk Dist. v. Watson*, 381 Mass. 648 (1980)).

¹⁹ (1996) 10 S.C.R. (Suppl.) 12, *available at* <http://judis.nic.in/supreme-court/helddis3.aspx>.

²⁰ (1994) 179 C.L.R. 101.

I. Federalism

Each U.S. state is independently sovereign, autonomous in its own sphere, so long as it takes no action illegal under federal law. Our fifty autonomous state courts and fifty sovereign state constitutions are the products of highly localized conditions and customs, to be sure. But it would be shortsighted to mistake this localization for provincialism. More accurate is the famous description of former United States Supreme Court Justice Louis Brandeis. Our state courts, he said, have a unique ability “to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.”²¹ “It is one of the happy incidents of the federal system,” he continued, that “a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²² Today’s state court “experiment” may be—or not—tomorrow’s status quo.

A related aspect of our federalist system that may make state court decisions attractive to foreign judges is that state constitutions, unlike the federal constitution, often contain “positive rights” provisions. Such provisions tell governments what they must do, while “negative rights” provisions tell government what they must not do. The right to an adequate public education, for example, is among the most common of positive law provisions in state constitutions, and in many foreign constitutions.²³ State court judges, like our counterparts in other contemporary constitutional democracies, are often called upon to interpret such positive rights provisions against a backdrop of limited public resources. Our search for solutions to a common problem make us natural allies.

²¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²² *Id.*

²³ Compare S. AFR. CONST. 1996, ch. 2, § 29 (1) (“Everyone has the right (a) to a basic education, including adult basic education; and (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.”) with ILL. CONST., art. X, § 1 (“A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.”).

II. The nature of state court analysis

There is a second reason that state court decisions have global resonance, while acting as engines of innovation in the United States. To an extent virtually unknown in the federal courts, state court judges are common law judges. Because we are deeply rooted in the common law, we are fluent in its cardinal principle of law's plasticity. The common law adapts to changing realities with a disciplined incrementalism. Grand principles of our constitutional law—from freedom of speech to freedom from cruel and unusual punishment—are rooted in the common law. Our fundamental tort principles—such as comparative negligence or strict liability—are rooted in the common law.

Because of its ordered adaptability, the common law is an ideal medium through which to fashion practical rules from evolving circumstances. In *Goodridge v. Department of Public Health*, my court redefined the common law meaning of marriage to preserve the constitutionality of the marriage statutes. The ruling built on years of prior decisions that slowly, inexorably but without design, moved the common law in a particular direction. *Adoption of Tammy*,²⁴ for example, which we decided ten years before *Goodridge*, held that, in the absence of a statutory definition of “parent” in our adoption law, we would read the word “parent” to include people of the same sex who wished to adopt together.²⁵

Working with the interplay of statute, constitution, and the common law—that is what state court judges do every day. And that is one reason why foreign judges look to state courts, and state courts look to each other, to adapt the general principles of Anglo-American jurisprudence to actual experience. The methodology of the common law has in a sense become the grammar of our new global conversation about law's reach. Foreign courts, and foreign lawyers, not infrequently find in state decisional law a rich source for the importation of new legal values. Is the opposite also true? Might not state courts emerge as a significant conduit for the importation of transnational legal norms?²⁶ One unfortu-

²⁴ 619 N.E.2d 315 (Mass. 1993).

²⁵ *Id.* at 212.

²⁶ At present, a fiery debate rages among the Justices of the United States Supreme Court concerning the legitimacy of American courts' reliance on the law of other nations or international bodies to interpret domestic federal law. Regardless of one's views of the merits of this current debate, we can all readily agree, as Professor Vicki Jackson notes, that our federal courts have “been slower than some other national courts to become familiar with

nate result of the new nativist bent of the United States Supreme Court, as many commentators have documented, is that the Court is losing its influence among the world's constitutional courts.

State courts are not burdened by the view that the United States has a special destiny among nations, the so-called exceptionalist view. State courts have shown an increasing willingness to consider transnational legal principles in resolving issues of domestic law, including state constitutional law. As a general matter, state court judges are finely attuned to law beyond our own borders. Even where Massachusetts constitutional law is concerned, I find it helpful to consider relevant opinions of state courts whose own constitutions may be a hundred or more years younger, and whose states may be very different from Massachusetts, such as Montana or Oregon. The important principles of our civil and criminal law, developed through the common law, know no boundaries. Other states' court decisions provide guidance, perspective, inspiration, reassurance, or cautionary tales. Consideration of transnational legal principles fits nicely within the natural comparativist bent of state jurists.

That is a good thing, because state courts are increasingly drawn into transnational litigation in many areas of the law. Family law and commercial real estate development are quintessentially local, state-court matters. Yet today the domestic relations lawyer who knows nothing about the Hague Convention on the Civil Aspects of International Child Abduction or the business litigator unaware of the Hague Convention on Taking Evidence Abroad on Civil or Commercial Matters can hardly be deemed competent in their respective spheres. Recently I had occasion to review cases decided by my court in the past few years touching on foreign and international law. I was as surprised as anyone by the results. Here are two of the many cases involved. When an Indian national residing temporarily in Massachusetts claimed that the Massachusetts Juvenile Court had no jurisdiction to declare him an unfit parent and to approve the adoption of his daughter, also an Indian national, by a Massachusetts couple, we had occasion to consider, among other things, art. 21 of the United Nations Convention on the Rights of the Child and art. 37, the consular notification provision, of the Vienna Convention.²⁷ When a criminal defendant claimed he had been kidnapped from Guyana by Massachusetts police, we construed Section 28 of Guy-

and discuss, distinguish, or borrow from related constitutional approaches of other nations and systems." Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 18 (2004).

²⁷ Adoption of Peggy, 767 N.E.2d 29 (Mass. 2002).

ana's Immigration Act and the Extradition Treaty between the United States and the United Kingdom.²⁸

No area of domestic law is untouched by legal globalization. State courts, in the best common-law tradition, look beyond our national borders in a variety of cases in which local and national law may already be developed, offering unparalleled opportunities to align domestic law with emerging transnational legal norms. The 2008 California decision on same-sex marriage invokes numerous international human rights treaties and foreign constitutions as persuasive authority for the proposition that the right to marriage and a family life is a basic human right.²⁹ The West Virginia Supreme Court invoked the Universal Declaration of Human Rights in faulting the United States Supreme Court's refusal to find a fundamental right to education.³⁰ The Florida Supreme Court looked to the United Nations Convention on the Law of the Sea in considering whether the owners of a "cruise to nowhere" owed sales and use taxes to the state for cruise activities.³¹ In considering whether a parent had a right to use "moderate or physical force" on his or her child without incurring criminal liability, Maine's Supreme Judicial Court gave extended consideration to a case on the same issue decided by the European Court of Human Rights.³²

There is enormous transformative potential here. Yet I would be remiss if I conveyed the impression that state courts are in robust health, ready to respond to global challenges. They are not. Central to the states' participation in national and international legal dialogue, central to federalism itself, and central to the rule of law, is the ability of state courts to continue functioning as independent, impartial, respected arbiters of the law. This fundamental role of state courts is under attack. I briefly describe here two sources of that assault.

First, what had been state substantive law has been increasingly federalized. With alarming frequency, the bubbling-up process of state court innovation is being stifled by both judicial and legislative federalization. In *Troxel v. Glanville*³³ in 2000, the United States Supreme Court undertook to set out due process requirements for decisions in-

²⁸ *Commonwealth v. Diaz*, 730 N.E.2d 845 (Mass. 2000).

²⁹ *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

³⁰ *Pauley v. Kelly*, 255 S.E.2d 859, 864 n.5 (W. Va. 1979).

³¹ *Fla. Dept. of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954 (Fla. 2005).

³² *State v. Wilder*, 748 A.2d 444 (Me. 2000).

³³ 530 U.S. 57 (2000).

volving grandparent visitation, heretofore a subject confined to state courts. The result was a jumble of opinions, concurrences, and dissents that has created a virtual cottage industry about *Troxel's* meaning. Perhaps the Justices cut off the debate among state courts too quickly?

And Congress? Increasingly, it has required, or attempted to require, that a wide array of cases that formerly could be heard in state courts be heard in federal courts exclusively. Examples include many class actions, cases involving risk insurance for terrorism-related damages and recovery for harm caused by medical drugs, and gun manufacturer liability. What are the long-term costs—jurisprudential and otherwise—of this mandated shift to the federal courts?

Now for the second threat facing state courts: highly politicized judicial elections and retention battles. Space limitations do not permit me to address this serious problem in detail. For that, you may wish to read the report of the American Bar Association's Commission on the 21st Century Judiciary, on which I served.³⁴

Here is a quick overview of what we face.

Forty-seven states (Massachusetts is not among them) select some or all of their judges by popular vote. Approximately eighty-seven percent of state judges, trial and appellate, are chosen or reappointed in this fashion. Since the late 1980s, special interest groups increasingly have targeted judicial appointments in order to advance their own narrow agendas, and are pouring huge amounts of money into supporting certain candidates for judicial office and opposing others. The upshot? More campaigning, more advertising, more campaign money—a lot more campaign money—and an endless barrage of attack ads and editorials, frequently castigating a judge up for reappointment or reelection for a particular decision. The nonpartisan judicial watchdog group Justice at Stake noted, for example, that in the race for a seat on the Illinois Supreme Court in 2004, two candidates “combined to raise over \$9.3 million.”³⁵ More than \$5.3 million dollars was spent on the 2008 race for a seat on Alabama's Supreme Court.³⁶

³⁴ ABA, JUSTICE IN JEOPARDY: REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY (2003).

³⁵ DEBORAH GOLDBERG ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A “TIPPING POINT”—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL 14-15 (Jesse Rutledge ed., 2005).

³⁶ Eric Velasco, Alabama High Court Race Again Garners Most Expensive Pricetag in U.S., BIRMINGHAM NEWS, Jan. 31, 2009, at 1A, available at <http://www.al.com/news/birminghamnews/metro.ssf?/base/news/1233393347292240.xml&coll=2>.

Behind this influx of judicial campaign money, behind the attention of special interest groups, is the assumption that justice is for sale. In 2008, the *New York Times* highlighted a case, currently on appeal before the United States Supreme Court, in which the West Virginia Supreme Court overturned a \$50 million damage award against a company.³⁷ The deciding vote was cast by a justice who had received campaign contributions of \$3 million from the company. Is it little wonder that the public, lawyers, and even judges believe that campaign money leads to conflicts of interest for judges or that it influences judicial decisions?

Add to all this an extraordinary decision of the United States Supreme Court, decided in 2002, *Republican Party of Minnesota v. White*.³⁸ The case began when a candidate for a seat on the Minnesota Supreme Court distributed campaign literature criticizing the judicial decisions of his opponent—on crime, welfare, abortion, and other issues. By a bare majority, and over scathing dissents, the Justices concluded that the provision of Minnesota’s Code of Judicial Conduct that prohibited a “candidate for a judicial office, including an incumbent judge,” from “announc[ing] his or her views on disputed legal or political issues” violated the First Amendment. The decision effectively permits state court judges to campaign on undertaking to rule a certain way in cases that may come before them.

Federalization and highly politicized judicial campaigns are not isolated phenomena. They are part of one of the most disturbing developments I have seen since I graduated from law school: an all-out assault on the judiciary as an independent, counter-majoritarian arm of government. The assaults on state courts are particularly troublesome because so much judicial business is conducted in those fora. Remember—at least ninety-five percent. If state courts fail, justice in America fails.

³⁷ Adam Liptak, *Rendering Justice with One Eye on Re-election*, N.Y. TIMES, May 25, 2008, at 1. The case, *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S. Ct. 2252 (2009), was decided by the Justices on June 8, 2009. Writing for the 5-4 majority, Justice Anthony Kennedy concluded, among other things, that the Due Process Clause required the Justice to recuse himself because, viewed objectively, the risk of actual bias on the Justice’s part was “too high to be constitutionally tolerable.” *Id.* at 2259 (citation omitted).

³⁸ 536 U.S. 765 (2002).

When judges have to look over their shoulders before deciding a case—or worse, when they make an implied promise to look over their shoulder before deciding a case—and when litigants enter the courtroom hoping their attorney has contributed enough to a judge’s election coffers, we are in trouble, deep trouble.

State courts have a vital role to play in upholding the rule of law by resolving disputes of citizens in a fair and neutral manner. In so doing, they can serve a vital role in the migration of constitutional norms. But the rule of law is not self-sustaining. It depends on each one of us, lawyer and non-lawyer, for its protection. You do not need a legal education or a political science background to write letters to newspapers and to public officials decrying judicial campaign abuses, to support judicial appointment reform efforts, and to educate yourself and your community about your state court judges and state courts. If we do not step up to the challenge, the resulting vacuum will be filled by those who would pervert state courts as fair and impartial tribunals. In that case, the loss to the process of legal innovation will pale beside the threat to the rule of law.

Pay heed, for justice itself “is at stake.”³⁹

³⁹ Justice at Stake, A National Partnership Working for Fair and Impartial Courts, <http://faircourts.org> (last visited Sept. 20, 2009).

Afterword: Alternative Visions of Local, State, and National Action

James E. Tierney*

The Eleventh Annual Liman Public Interest Colloquium convened at a time when the relations between the national government and state and local governments were at an all time low because of federal executive branch efforts to seriously limit state and local regulatory initiatives. The Colloquium participants, however, offered an alternative vision of the role of state and local governments and, in a series of thoughtful and creative papers, argued that “local matters.”

Twenty months later, with a new executive administration, state and local government regulatory efforts have enjoyed a renewed vitalization. Through a series of decisions by the U. S. Supreme Court and a sweeping Memorandum issued by President Obama, the potential for state and local public interest advocacy has broadened significantly.

Three times in October Term 2008, the Supreme Court ruled in favor of state laws in cases raising questions of federal preemption. On December 15, 2008, the U.S. Supreme Court ruled that a state law prohibiting deceptive tobacco advertising was not preempted by a federal law that regulated cigarette advertising.¹ Again, on March 4, 2009, the Supreme Court ruled against an attempt to preempt state law in a personal injury action against a pharmaceutical company that a jury had concluded failed to include an appropriate warning label on a drug, even though the drug had met all the labeling requirements of the U. S. Food and Drug Administration.² Three months later, on June 29, 2009, in the most closely watched federalism case of the Term, the Court again ruled for the states, saying that state enforcement authorities were not precluded from investigating national banks for violating predatory lending laws, even though the federal banking regulator and the banking industry fought hard to preempt state enforcement efforts.³

Most important, on May 20, 2009, President Barack Obama issued an Memorandum to all members of his Administration reversing the po-

* Director of the National State Attorneys General Program at Columbia Law School.

¹ See *Altria Group v. Good*, 129 S. Ct. 538 (2008).

² See *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

³ See *Cuomo v. Clearing House Ass’n*, 129 S. Ct. 2710 (2009).

sition of his predecessor and ordering that “preemption of state law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the states and with a sufficient legal basis for preemption.”⁴ As President Obama explained, “State law and national law often operate concurrently to provide independent safeguards for the public. Throughout our history, state and local governments have frequently protected health, safety and the environment more aggressively than has the national government.”⁵

In light of these events, this volume takes on a freshness and relevancy that could not have been predicted at the time of the Colloquium. President Obama, who came to office after long personal experience as a state and local public advocate, has expressly embraced state and local governments as important allies, stating that “in our Federal system, the citizens of the several states have distinctive circumstances and values, and that in many instances it is appropriate for them to apply to themselves rules and principles that reflect these circumstances and values.”⁶

As Massachusetts Chief Justice Margaret Marshall notes, rapid changes in the law are first seen and analyzed in state judicial forums which deal with ten times the number of cases that appear in the federal system. Former Connecticut Chief Justice Ellen Ash Peters and Indiana Chief Justice Randall Shepard expand on this theme. Their contributions present a compelling historical description of how state constitutional interpretations by state courts have dealt with new issues in ways that eventually influenced the rest of the country in solving difficult legal issues.

The authors of these papers hope that their efforts will be a step forward in the reversal of this federal myopia. Attorneys general, state court jurisprudence, the role of local public interest groups in influencing legal reform and rulemaking—each remains an understudied theme in academic literature and underexamined in our law schools.

With this contextual backdrop, the essays in this volume explore the contributions of institutions of many kinds to local and state advocacy. From the historical perspective that Risa Goluboff supplies, demonstrating the importance of non-federal civil rights advocacy, to the present

⁴ Memorandum on Preemption for the Heads of Executive Departments and Agencies, DAILY COMP. PRES. DOCS., 2009 DCPD No. 00384 (May 20, 2009), *available at* http://www.whitehouse.gov/the_press_office/Presidential-Memorandum-Regarding-Preemption/.

⁵ *Id.*

⁶ *Id.*

efforts of city attorneys general that Kathleen Morris describes, the volume brings attention to the less-well-traveled paths of progressive change. As many contributors note, local government, in particular, is too often ignored, even though the vast majority of opportunities in public life—such as running for office, campaigning for or against a ballot proposition, or appearing before such key governing institutions as the school board, the zoning commission, or the town meeting—are at the local level. Outside the government, Norman Dorsen and Susan Herman outline the role and structure of the ACLU, noting that it is the ACLU's role to fight for civil liberties in whatever forum exists.

Richard Schragger and Robert Hermann focus further on the sites of progressive policy developments. Schragger's paper focuses on city government as a developer of policy. He notes correctly that "cities have become sites for a flowering of progressive policy developments" in a wide variety of substantive areas. Robert Hermann brings to light the potential uses of state rule-making and carefully outlines concrete examples where state rule-making results in progressive innovation without the uncertainty and costs inherent in lengthy litigation.

Other contributors take up the matter of interaction across and within intergovernmental relationships. Gillian Metzger's paper takes up the thorny constitutional issue of federal constraints on interstate relationships and horizontal federalism alongside Richard Briffault's discussion of vertical federalism and the inconsistencies of preemption. Judith Resnik adds to these layers, finding "new federalism(s)" in the efforts of localities, states, and translocal organizations of government actors (or TOGAs) to bring attention to progressive advocacy issues from both local and global sources.

Each essayist in this volume articulates the impact on progressivism of the work done by state and local actors—actors whose potential for making a difference is undervalued in legal scholarship and in the law school curriculum. The proclivity for action among chief law enforcement officers of each state, for example, indicates their willingness to become, in Morris's words, "champion[s]" of public interest, little studied in the literature or the classroom. Still, federal and state courts have come to understand the unique role of state attorneys general in protecting the citizens of their state. Their decisions and a history of common law empowerment created the opportunity for state attorneys general to become key advocates on a host of important issues.

The clear result is that for the last thirty years, state attorneys general have led other levels of government in working to promote a cleaner environment, limit deception and unfairness in the marketplace, and establish meaningful regulation of tobacco products. While some of these efforts generated victories before the U.S. Supreme Court, many have come to fruition in lower courts, as evidenced by the recent decision of

the Second Circuit to allow state nuisance suits against mid-western utility companies as part of an effort to combat global warming.⁷

It is often the state attorney who stands as a last chance defender of the public interest when the federal government abandons or ignores its obligation to protect the citizenry from the abuses and excesses of the unscrupulous within the private sector. These headline courtroom victories, however, are only part of the day-to-day advocacy by state attorneys general who often achieve real success without recourse to litigation. Indeed, attorneys general and their staffs, like other institutions noted by the authors in this collection, are working every day to create a fairer and safer world for us all to live in.

In sum, the contributors to the Eleventh Annual Liman Public Interest Colloquium and to this publication share President Obama's belief that "local matters," making each of these papers in this modest effort extraordinarily relevant. Each presents both a contemporary and historical analysis that is of practical and theoretical importance to the public interest of today and tomorrow. Most importantly, our current President and his administration are reaching out to those who believe in local and state action. President Obama clearly believes that this is a time when all Americans must look past jurisdictional divisions and toward producing policies that actually work to improve the lives of our citizens. While the overwhelming consensus of this compendium of papers is that "local matters," the real truth is that it all matters if we are willing to make it so.

⁷ See *Connecticut v. Amer. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009).

APPENDICES

Liman at the Local Level, March 6–7, 2008, Yale Law School

Colloquium Schedule

Colloquium Participants



Liman at the Local Level: Public Interest Advocacy and American Federalism

The Eleventh Annual Liman Public Interest Colloquium

March 6–7, 2008 • Yale Law School

Colloquium Schedule

THURSDAY, MARCH 6, 2008

4:15 - 4:25 pm **Welcome**

Harold Hongju Koh, Dean, Yale Law School

4:30 - 6:15 pm **States and Cities as Advocates for the Public Interest**

This panel will examine the role of state attorneys general, city attorneys, and other state and local officials in advocating for the public interest. Our questions include: How do these actors decide what types of affirmative cases to bring? How and when are they criticized for bringing affirmative cases? Outside of litigation, what are the types of tools and leverage that they have? What types of coordination do they do with other state and local officials? How is their work assisted or impeded by federal action?

Speakers

Richard Blumenthal, Attorney General, Connecticut

Robert Hermann, Director, New York Governor's Office of Regulatory Reform

Dennis Herrera, San Francisco City Attorney

William Marshall, Solicitor General of Ohio and William Rand Kenan, Jr.,

Distinguished Professor of Law, University of North Carolina School of Law

James Tierney, Director of the National State Attorneys General Program and

Lecturer-in-Law, Columbia Law School

Moderator: Judith Resnik, Arthur Liman Professor of Law, Yale Law School

FRIDAY, MARCH 7, 2008

9:00 - 10:30 am **Revising the History and Understanding the Present: The Role of Local Leadership**

This panel will explore the history of public interest advocacy in the United States in the twentieth century and discussed modern trends. Our questions include: What role have localities played in developing progressive change? What is the relationship between local and national action? When have state and local actors been affirmatively pressing for the expansion of regimes of rights and

when have they been defending against such expansions? What is the contemporary landscape?

Speakers

Risa Goluboff, Professor of Law, Professor of History, University of Virginia School of Law

Tracey Meares, Walton Hale Hamilton Professor of Law, Yale Law School

Paul Samuels, Director/President, Legal Action Center

Sid Wolinsky, Director of Litigation, Disability Rights Advocates

Stephanie Biedermann, Liman Fellow, Disability Rights Advocates

Moderator: Drew S. Days III, Alfred M. Rankin Professor of Law, Yale Law School

10:45 am - 12:15 pm Coordination Across States: Horizontal Federalism

State and local actors increasingly are coordinating their efforts and priorities through informal means, formal interstate agreements, and translocal organizations such as the National Association of Attorneys General, the United States Conference of Mayors, the National League of Cities, the National Conference of State Legislatures, the National Governors' Association, the National Commissioners on Uniform State Law, the International Municipal Lawyers Association, and the National Conference of Chief Justices of State Courts. Our questions include: How do these horizontal efforts affect national policies? Local action? What kinds of problems are they particularly effective at addressing? What are the reach and limits of their regulatory authority? How are they financed? In what contexts have translocal organizations spearheaded challenges to federal legislation or regulation or coordinated defenses to local actions? What power does Congress have, through the Full Faith and Credit and Compact Clauses or otherwise, in regulating interstate relationships?

Speakers

Robert B. Ahdieh, Professor of Law and Director, Center on Federalism and Intersystemic Governance, Emory Law School

Robin Golden, Selma M. Levine Clinical Lecturer in Law, Yale Law School

Gillian Metzger, Professor of Law, Columbia Law School

Kathleen Morris, Executive Director, Affirmative Litigation Task Force, San Francisco City Attorney's Office

Moderator: Robert Solomon, Clinical Professor of Law and Supervising Attorney and Director of Clinical Studies, Yale Law School

12:30 - 2:00 pm

Defining the Public Interest: The Role and Networks of State Courts

This panel of jurists will consider questions including: Do state courts have a distinct role in furthering the public interest? How do state courts approach novel issues of right? How do state judges weigh the rulings and doctrinal developments of other states courts and of the federal courts? What is the impact of the fact that state courts, by tradition and practice, are still common law courts engaged in law development in areas that are not directly governed by statutes? What is the impact of state court judges, by and large, having term appointments that require re-election or reappointment? What are the effects of federal limitations on habeas corpus, as state court criminal cases receive little federal review and exhibit great diversity at the same time that federal executive agencies interpose severe limitation on state efforts at social experimentation, such as medical marijuana and end-of-life options?

Speakers

The Vantage Point of the States

Margaret H. Marshall, Chief Justice, Massachusetts Supreme Judicial Court

Ellen Ash Peters, former Chief Justice, Connecticut Supreme Court

Randall T. Shepard, Chief Justice, Indiana Supreme Court

Comments from the Federal Courts

Janet C. Hall, U.S. District Judge, District of Connecticut, Chair of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States

Moderator: Sia Sanneh, Liman Fellow, Legal Action Center

2:15 - 3:45 pm

Mapping Public Interest Advocates onto the Federal Structure of the United States: Conflicts and Coordination, Local Chapters and National Offices

What challenges do advocates face in working within a federal system? How have social movements developed organizations (such as the American Civil Liberties Union, the NAACP Legal Defense Fund, the National Organization for Women, the Federalist Society, and the American Constitution Society) to use law to bring about change? What are the organizational structures of successful social movements? When have the positions and priorities of national and local offices conflicted and how have these conflicts been resolved?

Speakers

Norman Dorsen, Stokes Professor of Law and Counselor to the President, New York University; President, ACLU, 1976-1991

Dan Freeman, Liman Fellow, New York Civil Liberties Union

Michael Kavey, Liman Fellow, Lambda Legal Defense & Education Fund

Dennis Parker, Director, ACLU Racial Justice Program
Dorian Warren, Assistant Professor, Department of Political Science
and School of International and Public Affairs, Columbia University
Moderator: Jamie Dycus, Liman Fellow, ACLU Racial Justice Program

**4:00 - 5:30 pm Vertical Federalism: The Pros and Cons of
National Preemption**

This panel will consider the benefits and drawbacks of national and state pre-emption through a focus on a few areas such as immigration, workers' rights, and the environment. We will also discuss the ways in which federal action can facilitate local innovation, how local change sparks national action, the effects of state preemption on local interests, and the potential for collaboration among local, state, and national actors.

Speakers

Richard Briffault, Joseph P. Chamberlain Professor of Legislation,
Columbia Law School
Leah Fletcher, Liman Fellow, Natural Resources Defense Council
Judith Resnik, Arthur Liman Professor of Law, Yale Law School
Benjamin I. Sachs, Joseph Goldstein Fellow and Lecturer in Law,
Yale Law School
Richard C. Schragger, Class of 1948 Professor in Scholarly Research in Law,
University of Virginia School of Law
Michael Wishnie, Clinical Professor of Law, Yale Law School
Moderator: Raquiba Huq, Liman Fellow, Legal Services of New Jersey



Liman at the Local Level: Public Interest Advocacy and American Federalism

The Eleventh Annual Liman Public Interest Colloquium

March 6–7, 2008 • Yale Law School

Colloquium Participants

Robert B. Ahdieh

Professor of Law and Director, Center on Federalism and Intersystemic Governance, Emory Law School

Robert B. Ahdieh is a graduate of Princeton University's Woodrow Wilson School of Public and International Affairs and Yale Law School. He served as a law clerk to Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit before his selection for the Honor's Program in the Civil Division of the U.S. Department of Justice. Ahdieh's work has appeared in the *Michigan Law Review*, the *NYU Law Review*, and the *Southern California Law Review*, among other journals. Ahdieh's scholarly interests revolve around questions of regulatory design. His particular emphasis has been on various non-traditional modes of regulation, including in the face of overlapping jurisdictional authority and regulatory dependence. During the 2007-2008 academic year, Ahdieh is a Visiting Professor and the Microsoft/LAPA Fellow at Princeton University's Program in Law and Public Affairs.

Stephanie Biedermann

2007 – 2008 Liman Fellow, Disability Rights Advocates, Berkeley, CA

Stephanie Biedermann graduated *summa cum laude* from Princeton University in 2004 and from Yale Law School in May 2007. Biedermann is spending her Liman Fellowship year at Disability Rights Advocates in Berkeley, California. She is working on developing a unique emergency preparedness project to make public entities aware of the critical importance of addressing the needs of people with disabilities when planning for, and responding to disasters. When disasters occur, people with disabilities are among those most likely to suffer because they cannot access critical information, transportation, evacuation, or mass shelter services. Biedermann is working with local governments to ensure that people with disabilities receive equal access and protection in the event of an emergency, as required by state and federal law.

Richard Blumenthal

Attorney General, Connecticut

First elected in 1990, Richard Blumenthal is currently serving a fifth term as Connecticut Attorney General. Blumenthal's aggressive law enforcement for consumer protection, environmental stewardship, labor rights, and personal privacy has helped to reshape the role of state attorneys general nationwide, and has helped to recover hundreds of millions of dollars for Connecticut taxpayers

and consumers each year. Blumenthal was U.S. Attorney for Connecticut, the state's chief federal prosecutor, from 1977 to 1981 -- prosecuting drug traffickers, organized and white collar crime, civil rights violators, consumer fraud and polluters. He served in the Connecticut House of Representatives from 1984 to 1987 and in the State Senate from 1987 to 1990. Blumenthal graduated from Harvard College (Phi Beta Kappa, *magna cum laude*) and from Yale Law School. He was a law clerk to U.S. Supreme Court Justice Harry A. Blackmun.

Richard Briffault

Joseph P. Chamberlain Professor of Legislation, Columbia Law School

Richard Briffault is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School, where he first joined as a member of the faculty in 1983. After receiving his B.A. from Columbia University in 1974 and his J.D. from Harvard in 1977, where Briffault was a Developments editor for the *Harvard Law Review*, he clerked for the Honorable Shirley M. Hufstедler of the U.S. Court of Appeals for the Ninth Circuit between 1977 and 1978. Between 1978 and 1980, Briffault was an Associate at Paul, Weiss, Rifkind, Wharton & Garrison, and was subsequently Assistant Counsel to the Governor of the State of New York between 1980 and 1982. Briffault has held a number of positions in public interest organizations. He served as a consultant to the New York City Charter Revision Commission (1987 to 1989) and the New York State Commission on Constitutional Revision (1993 to 1994). He was a visiting scholar at the Taubman Center for State and Local Government, John F. Kennedy School of Government, Harvard University (1996 to 1997) and Executive Director of the Special Commission on Campaign Finance Reform of the Association of the Bar of the City of New York (1998 to 2000). Briffault's publications include *Our Localism*, (Columbia Law Review 1990); *The Local Government Boundary Problem in Metropolitan Areas*, (Stanford Law Review 1996); *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, (Rutgers L.J. 2003); *Localism and Regionalism*, (U. Buffalo L. Rev. 2000); *Home Rule and Local Political Innovation* (J. Law & Politics 2006).

Drew S. Days III

Alfred M. Rankin Professor of Law, Yale Law School

Drew S. Days, III joined the faculty at Yale Law School in 1981. At Yale, his teaching and writing have been in the fields of civil procedure, federal jurisdiction, Supreme Court practice, antidiscrimination law, comparative constitutional law (Canada and the United States), and international human rights. He was the founding director of the Orville H. Schell Jr. Center for Human Rights at Yale Law School in 1988 and served as its director until 1993. He was a staff member of the NAACP Legal Defense Fund, the Assistant Attorney General for Civil Rights in the Carter Administration, and U.S. Solicitor General in the Clinton Administration. Days is the author of two volumes on United States Supreme Court jurisprudence, practice, and rules: *Moore's Federal Practice, Third Edition*, and most recently, of *'Feedback Loop'*:

The Civil Rights Act of 1964 and Its Progeny. Days is an honors graduate from Hamilton College and received his LL.B. degree from Yale.

Norman Dorsen

Frederick and Grace A. Stokes Professor of Law and Counselor to the President, New York University

Norman Dorsen is the author or editor of many articles and books and served as president of the American Civil Liberties Union from 1976 to 1991. Between 1969 and 1976, he was General Counsel to the ACLU, and he participated in dozens of Supreme Court cases arguing, among others, matters that won for juveniles the right to due process, upheld constitutional rights of nonmarital children, and advanced abortion rights. He helped write petitioner's brief in *Roe v. Wade* and appeared amicus curiae in the *Gideon*, *Pentagon Papers*, and *Nixon Tapes* cases. Dorsen was the founding president of the Society of American Law Teachers in 1972. He was also the chair of the Lawyers Committee for Human Rights from 1996 to 2000 and the founding president of the U.S. Association of Constitutional Law, an affiliate of the International Association of Constitutional Law. He has chaired two U.S. Government commissions and received many awards and honorary degrees including the Presidential Eleanor Roosevelt Award for Human Rights and the first triennial award of the Association of American Law Schools for "lifetime contributions to the law and to legal education." He is a Fellow of the American Academy of Arts and Sciences and a member of the Council on Foreign Relations. Dorsen received his B.A. (1950) from Columbia University; an L.L.B. (1953) from Harvard University.

Jamie Dycus

2007 – 2008 Liman Fellow, Racial Justice Program, American Civil Liberties Union, New York, NY

Jamie Dycus is a 2006 graduate of Yale Law School. He also holds an M.A. in Secondary Education from the University of Mississippi and a B.A. from Stanford University. Prior to law school, Dycus taught middle- and high-school English for six years. Between 2006 and 2007, he clerked for the Honorable Raymond J. Dearie of the Eastern District of New York. As a Liman Fellow, Dycus has joined the ACLU's Racial Justice Program in New York, where he works on the interaction between schools and prisons in Mississippi. At present, the juvenile justice system is too often a tool for maintaining discipline in Mississippi's public schools. Using a range of advocacy strategies, Dycus seeks to alter that approach.

Leah Fletcher

2007 – 2008 Liman Fellow, Natural Resources Defense Council, San Francisco, CA

Leah Fletcher graduated *magna cum laude* from Harvard College in 2000. She is a 2005 Yale Law School graduate, who clerked for the Honorable Jeremy Fogel in the Northern District of California and for Justice Carlos Moreno on the California Supreme Court. Fletcher's Liman Fellowship is in the energy

program of Natural Resources Defense Council (NRDC) in San Francisco. Her role is to provide legal analysis and strategy as NRDC and other environmental groups develop and propose implementing regulations for California's recently enacted global warming legislation. Under this legislation, the state is required, by 2020, to reduce its global warming emissions to 1990 levels.

Daniel Freeman

2007 – 2008 Liman Fellow, NY Civil Liberties Union, New York, NY

Dan Freeman graduated *magna cum laude* from Yale College in 2004 and from Yale Law School in May 2007. Freeman works at the New York Civil Liberties Union in New York City. His Liman project focuses on comprehensive reform of the New York Justice Courts, which are courts of original jurisdiction outside of New York City for civil matters less than \$15,000, infractions, misdemeanors, and initial proceedings in felonies. These courts have received a good deal of publicity in light of reports of unfair process. Using an array of advocacy methods, Freeman hopes to help reform these courts so that their procedures comply with constitutionally-guaranteed rights to due process and fair trial.

Robin Golden

Selma M. Levine Clinical Lecturer in Law, Yale Law School

From 2003 to 2007, Golden was the Chief Operating Officer of the New Haven Board of Education, where she oversaw all operational departments of a public school district serving 21,000 students. A graduate of both Yale Law School (J.D., 1998) and Yale College (B.A., 1979), Golden clerked for Justice Richard Palmer of the Connecticut State Supreme Court following graduation from law school. After her clerkship, Golden was Deputy Director of the New Haven Housing Authority. Before entering law school, Golden had a career in non-profit fundraising and management, culminating in a successful capital campaign to build and endow the Slifka Center for Jewish Life at Yale.

Risa Goluboff

Professor of Law, Professor of History, University of Virginia

Risa Goluboff joined the faculty at the University of Virginia in 2002. After earning her J.D. from Yale Law School, Goluboff clerked for the Honorable Guido Calabresi of the U.S. Court of Appeals for the Second Circuit and for Supreme Court Justice Stephen Breyer. Goluboff received her A.B. *summa cum laude* from Harvard in 1994 and spent the following year teaching at the University of Cape Town (South Africa) as a Fulbright Scholar. While at Yale Law School, Goluboff was Senior Editor for the *Yale Law Journal* and Articles Editor for the *Yale Journal of Law and the Humanities*. Goluboff earned her M.A. in History with distinction in 1999 and her Ph.D. in 2003, both from Princeton University. A legal historian, Goluboff's research and publications focus on civil rights, labor, and constitutional law in the 20th century. Goluboff won the 2004 Law and Society Association Dissertation Prize for her scholarship on civil

rights in the 1940s. She recently published her first book, *The Lost Promise of Civil Rights* (Harvard University Press, 2007). She is also co-editor (with Myriam E. Gilles) of *Civil Rights Stories* (Foundation Press, 2008).

Janet C. Hall

United States District Judge for the District of Connecticut

Judge Hall was sworn in as a United States District Judge for the District of Connecticut on October 14, 1997. She received an A.B. degree, *magna cum laude*, from Mount Holyoke College in 1970 and a J.D. from New York University School of Law in 1973, where she was a Root-Tilden Scholar. From 1980 until her appointment in 1997, Judge Hall was first an Associate, and, in 1982, was named Partner at the Hartford office of Robinson & Cole, where she concentrated her practice on civil litigation. Prior to this period, she served in the United States Department of Justice Antitrust Division from 1975 to 1980, except for a brief period in 1979 when she served as a Special Assistant United States Attorney in the Eastern District of Virginia. After graduation from law school, she was associated with the firm of Hale & Dorr in Boston from 1973 to 1975. Active in both the Federal Bar Council and the Connecticut Bar Association, she served as Chair of the Federal Bar Council from 1995 to 1997. Judge Hall has also served as a Director of the Connecticut Bar Foundation and a Trustee of Mount Holyoke College. She is currently the Chair of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States.

Robert Hermann

Director, New York State Governor's Office of Regulatory Reform

Robert Hermann is Director of New York Governor Eliot Spitzer's Office of Regulatory Reform, which oversees all state agency rule making. Since graduating from Yale Law School, he has worked in the legal profession for thirty-eight years, nearly half of which has been in private law practice, litigating business and government disputes in New York. Hermann served under Attorney General Robert Abrams in state government, as New York's Solicitor General and as chief of the Public Advocacy Division. In addition, he practiced public interest law as head of criminal law reform at New York City's Legal Aid Society and as, legal director of the Puerto Rican Legal Defense & Education Fund, as well as when the head of the Public Interest Law Clinic and a teacher at NYU Law School. Hermann is the author of works on legal topics ranging from fee-shifting in civil rights lawsuits to indigent criminal defense representation. He also serves as the board chair at Legal Services for the Hudson Valley.

Dennis Herrera

City Attorney, San Francisco

Dennis Herrera is the first Latino ever to hold the Office of City Attorney in San Francisco. Since his election in 2001, he has gained national recognition for leading an unconventional public law office with a national reputation for aggressive legal tactics. Herrera has made good on his pledge to defend the integrity of public institutions; to expand neighborhood protection efforts; and to

enhance local government accountability to citizens and taxpayers. However, it has been several of his bolder, affirmative litigation efforts for which Herrera's office has earned its national reputation. He filed the first government litigation in American history to challenge the constitutionality of marriage laws that discriminate against gay and lesbian couples, in a case that is now before the California Supreme Court. Herrera intervened as the nation's only municipality in seeking to strike down the Bush Administration's federal abortion ban. In November 2006, Herrera's motion for San Francisco's first-ever civil gang injunction was permanently granted by the San Francisco Superior Court against a violent street gang that had threatened the safety of residents in areas of the Bayview Hunter's Point district for more than a decade. Since then, the City Attorney's office has been awarded two more civil gang injunctions against four notoriously violent street gangs in areas of the Mission and the Western Addition neighborhoods. Herrera is a graduate of Villanova University and George Washington University School of Law.

Raquiya Huq

2007 – 2008 Liman Fellow, Legal Services of New Jersey, Edison, NJ

Raquiya Huq graduated *magna cum laude* from Princeton University in 2003 and from Yale Law School in May 2007. Huq is spending her Fellowship year at the Edison office of Legal Services of New Jersey. Working on immigration cases, Huq plans to help develop a unit specially focused on issues related to gender, specifically handling claims of victims of domestic abuse, female genital mutilation, rape, forced marriages, honor killing threats, and other forms of gender-related violence.

Michael Kavey

2007 – 2008 Liman Fellow, Lambda Legal Defense & Education Fund, New York, NY

Michael Kavey is a graduate of Yale College and graduated from Yale Law School in 2004. He also holds an M.A. in Spanish from Middlebury College. After law school, he clerked for the Honorable Sonia Sotomayor of the Second Circuit Court of Appeals and the Honorable Gerard E. Lynch of the District Court for the Southern District of New York. Having developed a passion for civil rights work as a high school gay rights advocate, his fellowship at Lambda Legal Defense and Education Fund enables him to spearhead an expansion of the organization's work on behalf of lesbian, gay, bisexual and transgender youth who face discrimination and harassment at school.

Harold Hongju Koh

Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School

Harold Hongju Koh is Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at Yale Law School, where he has taught international law,

human rights, and civil procedure since 1985 and has served since 2004 as the fifteenth Dean. From 1998 to 2001, he served as Assistant Secretary of State for Democracy, Human Rights and Labor. A graduate of Harvard College, Oxford University (where he was a Marshall Scholar), and Harvard Law School (where he was Developments Editor of the *Harvard Law Review*), he went on to serve as law clerk to Judge Malcolm Richard Wilkey of the D.C. Circuit, and Justice Harry A. Blackmun of the U.S. Supreme Court. Before coming to Yale in 1985, he practiced law at the Washington law firm of Covington & Burling and at the Office of Legal Counsel at the U.S. Department of Justice. He has written more than 80 articles and authored or co-authored eight books, including *Transnational Legal Problems* (with H. Steiner & D. Vagts) and *The National Security Constitution*, which won the American Political Science Association's award as the best book on the American Presidency. Koh has been awarded nine honorary doctorates and two law school medals and has received more than twenty-five awards for his human rights work, including representation of Haitian refugees before the U.S. Supreme Court (described in Brandt Goldstein, *Storming the Court: How A Band of Yale Law Students Fought the President and Won* (2005)). Koh is a Fellow of the American Philosophical Society and the American Academy of Arts and Sciences, an Honorary Fellow of Magdalen College, Oxford, a Visiting Fellow at All Souls College, Oxford, and a member of the Council of the American Law Institute. He has served as an Editor of the *American Journal of International Law* and the Foundation Press Casebook Series. He has received Guggenheim and Century Foundation Fellowships and sat on the boards of directors or overseers of Harvard University, the Brookings Institution, National Democratic Institute, Human Rights First, Human Rights in China, and the American Arbitration Association. He has been named by *American Lawyer* magazine as one of America's 45 leading public sector lawyers under the age of 45, and by *A Magazine* as one of the 100 most influential Asian-Americans of the 1990s. He has given several dozen named lectures at universities around the world, and received the 2005 Louis B. Sohn Award from the American Bar Association and the 2003 Wolfgang Friedmann Award from Columbia Law School for his lifetime achievements in International Law.

Margaret H. Marshall

Chief Justice, Supreme Judicial Court, Massachusetts

A native of South Africa, Chief Justice Marshall graduated from the University of the Witwatersrand, Johannesburg in 1966. She was elected president of the National Union of South African Students in 1966 and served in that capacity until 1968, when she came to the United States to pursue her graduate studies. She received a master's degree from Harvard University, and her J.D. from Yale Law School. Chief Justice Marshall practiced law in Boston for sixteen years, becoming a partner in the Boston law firm of Choate, Hall & Stewart. Before her appointment to the Supreme Judicial Court, she was Vice President and General Counsel of Harvard University. First appointed as an Associate Justice of the Supreme Judicial Court in November, 1996, she was named as Chief Justice in September, 1999, by Governor Argeo Paul Cellucci, and began her term on October 14, 1999, following her confirmation by the Governor's Council. Chief Justice Marshall is the second woman to serve on the Supreme Judicial

Court in its more than 300 year history and the first woman to serve as Chief Justice.

William P. Marshall

Solicitor General, Ohio; William Rand Kenan, Jr. Distinguished Professor of Law, University of North Carolina School of Law

William Marshall received his law degree from the University of Chicago and his undergraduate degree from the University of Pennsylvania. Marshall served as Deputy White House Counsel and Deputy Assistant to the President of the United States during the Clinton Administration, where he worked on issues ranging from freedom of religion to separation of powers. He has published extensively on constitutional law issues and is a nationally recognized First Amendment scholar. He is also a leading expert on federal judicial selection matters and on the interrelationship between media, law, and politics. He teaches media law, civil procedure, constitutional law, First Amendment, federal courts, and the law of the presidency. He began serving as Solicitor General of Ohio in 2007.

Tracey Meares

Walton Hale Hamilton Professor of Law, Yale Law School

Tracey Meares received her B.S. in General Engineering from the University of Illinois and her J.D. from the University of Chicago Law School. Upon graduation, Meares clerked for Judge Harlington Wood, Jr. of the U.S. Court of Appeals for the Seventh Circuit. She then served as an Honors Program Trial Attorney in the Antitrust Division in the United States Department of Justice before joining the University of Chicago law faculty in 1994. She was the Max Pam Professor of Law and the Director of the Center for Studies in Criminal Justice at the University of Chicago when she left to join Yale in January of 2007. Her research and teaching interests center on criminal procedure and criminal law policy, with a particular emphasis on empirical investigation of these subjects.

Gillian Metzger

Professor of Law, Columbia Law School

Gillian Metzger joined the Columbia law faculty in 2001. She teaches constitutional and administrative law as well as a seminar on federalism. Her publications include *Gellhorn and Byse's Administrative Law: Cases and Comments* (Foundation Press; joined as editor with Peter L. Strauss, Todd D. Rakoff, and Cythia R. Farina, 2007), *Congress, Article IV, and Interstate Relations*, (Harvard L. Rev. 2007), *Facial Challenges and Federalism*, (Columbia 2005), and *Privatization As Delegation*, (Columbia L. Rev. 2003). Prior to coming to Columbia, Metzger served as a law clerk to Justice Ruth Bader Ginsburg of the U.S. Supreme Court and Judge Patricia M. Wald of the U.S. Court of Appeals for the District of Columbia Circuit. She also worked as an attorney in the Democ-

racy Program at the Brennan Center for Justice at NYU School of Law, where she was instrumental in bringing litigation challenging Florida's permanent disenfranchisement of felons and assisted in efforts to defend campaign finance reform measures. Metzger received her J.D. from Columbia in 1995, where she was executive articles editor of the *Columbia Law Review*, and also has a B. Phil. (masters) in philosophy from Oxford. She received her B.A. from Yale in 1987.

Kathleen Morris

Executive Director of the San Francisco City Attorney's Affirmative Litigation Task Force; Attorney on the City's Complex and Special Litigation Team; Visiting Lecturer at Yale Law School

Kathleen Morris was lead counsel for San Francisco in the so-called "partial-birth abortion" case and is a member of the team challenging California's discriminatory marriage laws. Morris has a Master of Social Science from the University of Edinburgh, Scotland and a law degree from the University of California, Berkeley. After law school, she clerked for Ninth Circuit judge Sidney R. Thomas and worked as an associate at the San Francisco law firms of Altshuler Berzon LLP, and Howard, Rice, Nemerovski, Canady, Falk & Rabkin. Morris serves on the Ninth Circuit's Attorney Admission Fund Committee, and is an active member of the Northern District Chapter of the Federal Bar Association and of the American Constitution Society.

Dennis Parker

Director, American Civil Liberties Union's Racial Justice Program

In 2006, Dennis Parker became the Director of the American Civil Liberties Union's Racial Justice Program. Prior to joining the ACLU, Parker was the Chief of the Civil Rights Bureau in the Office of New York State Attorney General Eliot Spitzer, where he oversaw the enforcement of anti-discrimination laws in housing, employment, voting, public accommodations, and credit. He spent fourteen years at the NAACP Legal Defense and Education Fund, where he supervised the litigation of scores of cases throughout the country in matters involving elementary and secondary education, affirmative action in higher education, and equal educational opportunity. Parker also worked with the New York Legal Aid Society. He authored the 1993 edition of the *Fair Housing Litigation Handbook* and wrote a chapter in this year's *Awakening from the Dream: Civil Rights Under Siege and the New Struggle for Equal Justice*. He teaches Race, Poverty, and Constitutional Law at Columbia University. He is a graduate of Middlebury College and of Harvard Law School.

Ellen Ash Peters

Former Chief Justice, Connecticut Supreme Court

A 1951 graduate of Swarthmore College, Judge Peters received her law degree from Yale Law School in 1954. After a year of clerking for Chief Judge Charles E. Clark of the United States Court of Appeals for the Second Circuit, and then another year as a Research Associate at the University of California Law School

at Boalt Hall, she returned to Yale to begin her teaching career of twenty-two years at that school. She was appointed an Associate Justice of the Connecticut Supreme Court in 1978 and named Chief Justice in 1984. During her term as Chief Justice, she headed the Conference of Chief Justices and the National Center for State Courts. She served as Senior Justice for some years prior to her mandatory retirement from the Court in 2000. She is now a Judge Trial Referee and sits with the Appellate Court. She has published a casebook, a primer, and numerous articles, in such publications as the *Yale Law Journal*, the *Connecticut Law Review*, the *Michigan Law Review* and the *New York University Law Review*. She has numerous honorary degrees. She was a member of the Board of Managers of Swarthmore College and an Alumni Fellow of the Yale Corporation. She is currently a member of the Council of the American Law Institute, the Council of the American Philosophical Society, and of the American Academy of Arts and Sciences.

Judith Resnik

Arthur Liman Professor of Law, Yale Law School

Judith Resnik teaches about federalism, procedure, feminism, and local and global interventions to diminish inequalities and subordination. Her writings include *Trial as Error*, *Jurisdiction as Injury: Transforming the Meaning of Article III* (Harv. L. Rev. 2000), *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry* (Yale L.J. 2006); and *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism* (Emory L.J. 2008). Resnik has chaired the Sections on Procedure, on Federal Courts, and on Women in Legal Education of the American Association of Law Schools. She is a Managerial Trustee of the International Association of Women Judges and the founding director of Yale's Arthur Liman Public Interest Program and Fund. Currently, she serves as a Co-chair of the Women's Faculty Forum of Yale University. In 2001, she was elected a fellow of the American Academy of Arts and Sciences, and in 2002, a member of the American Philosophical Society. In 2008 she received the Distinguished Scholar Award from the Fellows of the American Bar Foundation. Resnik is a graduate of Bryn Mawr and of NYU Law School, where she was a Hays fellow.

Sarah French Russell

Director of the Arthur Liman Public Interest Program and Lecturer in Law, Yale Law School

Sarah French Russell joined Yale Law School in 2007 from the Federal Public Defender's Office in New Haven where, as an Assistant Federal Defender, she represented indigent clients in federal court at the trial and appellate levels. Russell clerked for Chief Judge Michael B. Mukasey in the Southern District of New York and for Judge Chester J. Straub on the Court of Appeals for the Second Circuit. She earned her B.A., *magna cum laude*, from Yale College and

her J.D. from Yale Law School. Her interests include the problems of access to justice, criminal procedure, sentencing, and gender and equality.

Benjamin I. Sachs

Joseph Goldstein Fellow and Lecturer in Law, Yale Law School

Benjamin Sachs teaches Emerging Trends in Labor Law at Yale Law School. He has served as Assistant General Counsel to the Service Employees International Union in Washington, D.C. and as Staff Attorney for the Workplace Justice Project in Brooklyn, NY. In 2007, he won the Yale Law School Teaching Award from Yale Law Women. Sachs received his J.D. from Yale Law School and his B.A. from Oberlin College.

Paul Samuels

Director/President, Legal Action Center, New York

Paul Samuels has participated in ground-breaking litigation defending the rights of people with alcohol and drug histories, HIV disease and criminal records; worked on and overseen numerous advocacy campaigns to combat discrimination, expand services, reform sentencing laws, and effect other important public policy advances; testified before numerous Congressional and state legislative committees; lectured in more than twenty-five states; and served on numerous national and state advisory groups. Samuels has received a number of awards, including the Robert Wood Johnson Innovator Award (2002), The Betty Ford Award, AMERSA (1998), New York City Coalition of Alcoholism and Substance Abuse Organizations (1997), Veritas Villa (1995), New York State Association for Alternative Sentencing Programs (1994), and National Association of State Alcohol and Drug Abuse Directors (1992 and 1994). Samuels joined the staff of the Legal Action Center while a law student in 1976, became a staff attorney upon graduation from Columbia Law School in 1979, Executive Vice President in 1983, and Director/President in 1992. He is a graduate of Harvard College.

Sia Sanneh

2007 – 2008 Liman Fellow, Legal Action Center, NY

Sia Sanneh graduated *magna cum laude* from Columbia University in 2001 and from Yale Law School in 2007. She also holds an M.A. from Columbia Teachers College. Between 2001 and 2004, Sanneh taught seventh and eighth grades in Washington Heights, New York, as part of the Columbia Urban Educators Program. Sanneh is spending her Liman Fellowship year at the Legal Action Center (LAC) in New York City, conducting research into the use of criminal sanctions for disciplinary infractions in New York City public schools. She is evaluating the long-term effects of school-based arrests and the effects of these policies on students in New York City. She is developing recommendations and advocacy strategies that focus on the collateral consequences of these school discipline policies.

Richard C. Schragger

Professor of Law, Class of 1948 Professor in Scholarly Research in Law
University of Virginia School of Law

A scholar of local government law, land use, and legal theory, Richard Schragger returned to Virginia after a year as a visiting professor at the Georgetown University Law Center. Before joining the faculty, he was a visiting professor at Quinnipiac University School of Law in Hamden, Connecticut and a visiting scholar at Yale Law School. His publications and research interests focus on questions of scale and power in democratic theory, constitutional law, and property. Schragger graduated *magna cum laude* from Harvard Law School. He was supervising editor of the *Harvard Law Review* and editor of the *Harvard Civil Rights-Civil Liberties Law Review*. After clerking for the Honorable Dolores Sloviter, Chief Judge of the U.S. Court of Appeals for the Third Circuit, Schragger joined the Washington, D.C. firm, Miller, Cassidy, Larroca & Lewin where he represented clients in First Amendment, employment, and appellate litigation.

Randall T. Shepard

Chief Justice, Indiana Supreme Court

Randall T. Shepard was appointed to the Indiana Supreme Court by Governor Robert D. Orr in 1985, at the age of thirty-eight. He became Chief Justice of Indiana in March 1987. Shepard graduated from Princeton University *cum laude* and from the Yale Law School. He earned a Master of Laws degree in the judicial process from the University of Virginia. Shepard was Judge of the Vanderburgh Superior Court from 1980 until his appointment. He earlier served as executive assistant to Mayor Russell Lloyd of Evansville and as special assistant to the Under Secretary of the U.S. Department of Transportation. Shepard was also a trustee of the National Trust for Historic Preservation. He served as chair of the ABA Appellate Judges Conference and of the Section of Legal Education and Admissions to the Bar. During fiscal year 2005-06, Shepard served as President of the National Conference of Chief Justices. Shepard was recently appointed by Chief Justice John Roberts to serve on the Judicial Conference Advisory Committee on Civil Rules. Shepard formerly served on the Committee on Federal-State Jurisdiction. He teaches periodically at the law schools of NYU and Yale.

Robert A. Solomon

Clinical Professor of Law and Supervising Attorney and Director of Clinical Studies, Yale Law School

Robert Solomon has taught at Yale Law School since 1985. His subjects are poverty, and housing and community development. Among his publications are *Building a Segregated City: How We All Worked Together* and *Ending Welfare Mythology As We Know It*. Solomon has a B.A. from Rutgers University (1969)

and a J.D. from George Washington University (1972). He served as Executive Director of the New Haven Housing Authority from 1999 to 2002.

James E. Tierney

Director of the National State Attorneys General Program, Lecturer-in-Law,
Columbia Law School

James E. Tierney served as the Attorney General of Maine from 1980 until 1990. He currently practices as a consultant to attorneys general and others on state regulatory structures and multi-state initiatives. Tierney is a graduate of the University of Maine and its School of Law. During his ten years as Attorney General of Maine, Tierney played an active role in the National Association of Attorneys General (NAAG), including service on NAAG's Executive Board and various committees. Both while in office and since his departure, Tierney has instructed newly elected state attorneys general on the effective performance of their office. Tierney has held a variety of special appointments, including serving as Special Counsel to the Attorney General of Florida during the contested 2000 Presidential election. He has served as a Special Prosecutor in Pennsylvania, Minnesota, and Vermont and, on behalf of NAAG, has authored an analysis of the operations of state grand jury practice throughout the United States. Tierney was a Wasserstein Fellow at Harvard Law School and has been a guest lecture at many law schools about the office of state attorney general. He has also taught at Boston College Law School, Northeastern Law School and the University of Maine School of Law. Tierney served on the Board of the American Judicature Society and was a member of the Board of Commentators of the Courtroom Television Network where he appeared regularly as a guest. In April of 2006, Tierney was selected as the Public Interest Professor of the Year at Columbia Law School.

Dorian T. Warren

Assistant Professor, Department of Political Science and the School of International Public Affairs, Columbia University

Dorian T. Warren specializes in the study of inequality and American politics, focusing on the political organization of marginalized groups. His research and teaching interests include race and ethnic politics, labor organizing & politics, urban politics, American political development, public policy, and social science methodology. Warren received his B.A. from the University of Illinois and his M.A. and Ph.D. from Yale University. He was a post-doctoral scholar and Visiting Faculty at the Harris School of Public Policy at the University of Chicago and has received research fellowships from the Ford Foundation, the Joseph S. Murphy Institute for Worker Education and Labor Studies, and from the University of Notre Dame. Warren is a Faculty Affiliate at the Institute for Research in African-American Studies and a Faculty Fellow at the Institute for Social and Economic Research and Policy.

Michael Wishnie

Clinical Professor of Law, Yale Law School

Prior to coming to Yale Law School, Michael Wishnie was Professor of Clinical Law and Co-Director of the Arthur Garfield Hays Civil Liberties Program at New York University School of Law. Previously, he served as a Skadden Fellow at the ACLU Immigrants' Rights Project, as a staff attorney at the Brooklyn Neighborhood Office of The Legal Aid Society, and as a law clerk to Judge H. Lee Sarokin, Justice Harry A. Blackmun, and Justice Stephen G. Breyer. His scholarship and clinical practice has centered on immigration law, labor & employment issues, and constitutional civil rights. Before earning his J.D. from Yale Law School in 1993, Wishnie spent two years teaching in the People's Republic of China.

Sid Wolinsky

Co-founder and Director of Litigation, Disability Rights Advocates, Berkeley, CA

Sid Wolinsky is a specialist in class action and high-impact litigation, and in rights of people with disabilities, both nationally and internationally. In recent years, he has specialized in legal issues involving students with learning disabilities and health care rights of disabled people. He was the Director of Litigation and a co-founder of Public Advocates, Inc. and the first Director of Litigation at San Francisco Neighborhood Legal Assistance Foundation. Wolinsky has twice been a Senior Fulbright Scholar (Hungary, 1993; Malaysia, 1981). He was an adjunct guest lecturer at Boalt Hall School of Law, Hastings College of the Law and King Hall at U.C. Davis. Mr. Wolinsky graduated from Yale Law School in 1961 and from Princeton University in 1958.