

# THE YALE LAW JOURNAL

HEATHER K. GERKEN<sup>†</sup>

## Of Sovereigns and Servants

### INTRODUCTION

The essays in this Symposium occupy two distinct scholarly realms: local government law and the separation of powers. Unsurprisingly, the contributors are preoccupied with different questions. The local government scholars writing about executive power tend to emphasize the ways in which it might invigorate weak city governments,<sup>1</sup> while those we would typically term executive power scholars are—with two noteworthy exceptions<sup>2</sup>—mostly interested in figuring out how to tame an overly energetic national executive.<sup>3</sup> If the academic world is divided between lumpers and splitters, the conference would seem to confirm the intuitions of the latter. A closer look, however, reveals several interesting opportunities for cross-pollination.

The goal of this brief Commentary is to offer a general conceptual frame for connecting some of the localist and nationalist strands in this Issue. It does so by bumping the analysis up one level of generality in order to identify two institutional fixes common to both the local government law essays and executive power essays. One relies on the “power of the sovereign”; the other

---

<sup>†</sup> Professor of Law, Yale Law School. Thanks to Bruce Ackerman, David Barron, Daryl Levinson, Bill Marshall, Richard Schragger, and David Simon for helpful comments and suggestions. Elyse Cowgill provided excellent research assistance.

1. E.g., Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2570-76 (2006).
2. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280 (2006); Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006).
3. E.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

relies on the “power of the servant.” What these concepts add to the debate is a bit of shared terminology—a way of capturing a set of distinctions that run through large portions of constitutional law (and other areas as well).<sup>4</sup> They thus allow us to compare and contrast the markedly varied policy proposals offered by four of the Symposium’s participants<sup>5</sup> and serve as the basis for some quite preliminary and necessarily truncated observations about the debates taking place in this Issue.

### **I. CONNECTING THE DOTS: TWO INSTITUTIONAL MODELS FOR CORRECTING POWER IMBALANCES**

Though the local government and executive power scholars focus on a similar problem—correcting a perceived power imbalance—the contexts in which that imbalance arises are quite different. The local government law scholars are largely worried about what we might call a federalism problem—weak cities in need of protection against an overweening state and/or national government. The executive power scholars, in contrast, are primarily concerned with the balance of power among three nominally coequal branches of government. Put more succinctly, the local government scholars are focused on vertical power imbalances whereas the executive power scholars worry about horizontal inequities.<sup>6</sup> The fixes for these power imbalances, according to the contributors to this Issue, similarly involve a vertical or horizontal redistribution of power.

What connects these disparate scholarly projects is the institutional correctives the contributors suggest for addressing the power imbalance. The first and more conventional fix harnesses what one might call “the power of the sovereign.” This familiar strategy relies on sovereignty or its functional equivalent to mediate the relationship between two institutional actors. For scholars proposing a vertical corrective, the power of the sovereign is a variant

- 
4. Needless to say, the ideas behind these terms are not new. To the contrary, scholars in both fields have explored these institutional fixes in far greater depth and nuance than I could hope to offer here.
  5. Given space constraints, here I will focus on the essays by David Barron, Neal Katyal, Bill Marshall, and Richard Schragger.
  6. For a useful discussion of these differences, see David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2220–21 (2006). This description necessarily simplifies the nature of these institutional relations. In those areas in a federal system where the states are sovereign, of course, they are no longer in a truly hierarchical relationship with the national government. Similarly, even under a separation-of-powers scheme, the executive serves as Congress’s agent (with Congress’s power over the executive branch subject to certain limitations).

of federalism. By casting the lower-level institution as sovereign, federalism creates a formally or informally delineated zone of autonomy to protect against undue interference from above. David Barron, for instance, argues that we should preserve space for urban policymaking,<sup>7</sup> expanding or maintaining the city's de facto sovereignty.<sup>8</sup> For scholars proposing a horizontal fix, the power of the sovereign similarly relies on zones of autonomy. Here, however, the institutional actors are roughly coequal members of government—mimicking the classic separation-of-powers model—rather than institutions placed on different rungs of the constitutional hierarchy. Bill Marshall, for instance, proposes the creation of an independent Federal Attorney General.<sup>9</sup> Thus, in both its horizontal and vertical forms, the power of the sovereign relies on autonomy and separation to ensure that ambition is able to counteract ambition.

A second, counterintuitive institutional fix proposed in this Issue relies on what I term “the power of the servant” to check a power imbalance. This fix depends on the ability of an institutional actor placed somewhere down the chain of command to influence the decision-maker who is nominally the boss. Unlike the sovereign, the servant lacks autonomy and, if push comes to shove, must cede to the higher authority. The power of the servant thus stems mainly from dependence: The fact that the higher authority *needs* the servant to perform a task creates space not just for discretionary decision-making, but also for bureaucratic pushback. On this view, the stronger the connective tissues that bind the master and servant, the more likely it is that the servant will be able to cajole, bargain with, even place demands upon the master. It is not merely that power runs in both directions. The power of the servant also rests on the assumption that familiarity will breed trust—conferring a sort of community standing on the servant, as I argue below, and thereby further augmenting the servant's ability to influence the master. The power of the servant, in short, depends on administrative overlap, not division; on integration, not isolation.

---

7. See *id.* at 2247-49.

8. Cities, of course, generally lack the formal guarantees of sovereignty that “our federalism” affords states. But most states cede cities some local autonomy either as a matter of formal state guarantee or institutional practice. See Schragger, *supra* note 1, at 2556-57.

9. Marshall, *supra* note 3, at 2471-78. Note that Marshall's essay nonetheless assumes that the Governor will generally remain more powerful than the Attorney General despite their shared placement in the governance hierarchy. See, e.g., *infra* note 28.

### A. Empowering Cities

To ground this analysis a bit, consider the two local government law essays in this Issue. David Barron's typically nuanced argument favors a sovereignty model for strengthening cities. He asserts that San Francisco's decision to issue marriage licenses to same-sex couples should not have been premised on federal constitutional grounds.

Arguing against the conventional view of San Francisco's actions, he observes,

[T]he problem with San Francisco's disregard of California's marriage laws was not (as the court suggested) that its action was too localist, but rather that it was not localist enough. San Francisco was not seeking freedom from state law so that its officers could adopt a distinct, local marriage policy for San Franciscans. Instead, the city claimed that higher law *required* all local officers to grant, rather than deny, licenses to same-sex couples seeking to marry.<sup>10</sup>

Barron thus argues that "local constitutional challenges that seek simply the substitution of one central directive for another are of less import, as a structural matter, than those that attempt to afford cities the space to make their own choices through the practice of local politics."<sup>11</sup> Sovereignty, Barron contends, empowers cities; the generation of additional state or federal mandates does not. Not only could such mandates narrow the policymaking space afforded to urban decision-makers, but undue engagement with state or national politics might dissipate energy better devoted to local concerns.<sup>12</sup>

Local government law scholar Richard Schragger, in contrast, is intrigued by the possibilities associated with the power of the servant. Noting the many ways in which a city's fate depends on its ability to influence higher levels of government,<sup>13</sup> Schragger argues that "there is no necessary relationship between the formal decentralization of power and the actual exercise of

---

10. Barron, *supra* note 6, at 2222.

11. *Id.* at 2249.

12. Thanks to David Barron for emphasizing this point in our discussions.

13. Schragger, *supra* note 1, at 2556-64. Schragger has pursued strands of this argument elsewhere in a thought-provoking debate with Rick Hills in which the authors examine different models of local power. See Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

political influence, between ‘legal localism’ and ‘political localism.’”<sup>14</sup> He points to a study of the powerful French mayoralty, noting,

For most of France’s modern history, financial power and legal authority were officially concentrated in the hands of the central state, with localities merely fulfilling state mandates. But “the ability of the central state to achieve its territorial goals depended upon the active consent and co-operation of local elected officials.”<sup>15</sup>

Schragger continues by noting that in the United States, “the formal independence of the local, state, and federal governments means that state and federal governments rarely need the direct cooperation or assistance of local officials to achieve state or national aims.”<sup>16</sup> Drawing on Justice Breyer’s dissent in *Printz v. United States*,<sup>17</sup> Schragger observes that the French example raises questions about the Supreme Court’s decision in *Printz*, which “treat[s] subfederal governments as bureaucratically (and formally) autonomous,” something that “does not necessarily lead to increased local power.”<sup>18</sup> Elsewhere, he argues that the power of mayors in the regional and national competition for resources “is constrained by their lack of a national political role.”<sup>19</sup>

Schragger thus argues that a sovereignty solution—a federalist system designed to protect urban autonomy—may not strengthen cities as effectively as a more centralized model, in which a city could take advantage of the potential power of the servant.<sup>20</sup> In his words, because mayors are not “direct participants in state and federal policymaking” but “outsiders to it,” they lack the type of “ongoing relationships with federal elected officials or federal bureaucracies” that make lobbying for resources more effective.<sup>21</sup> Consistent

---

14. Schragger, *supra* note 1, at 2561-62.

15. *Id.* at 2561 (footnotes omitted) (quoting Walter Nicholls, *Power and Governance: Metropolitan Governance in France*, 42 URB. STUD. 783, 788 (2005)). Schragger does observe, however, that another difference in institutional practice may at least partially account for this phenomenon: “[I]n France, elected officials can hold local and national political office simultaneously.” *Id.* at 2569.

16. *Id.* at 2563.

17. 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

18. Schragger, *supra* note 1, at 2563.

19. *Id.* at 2546.

20. Schragger is, of course, quite careful to avoid overclaiming, as he specifically refuses to argue that “a unitary state or a more ‘cooperative’ federal system would necessarily serve cities and their mayors better.” *Id.* at 2563.

21. *Id.* at 2562.

with his observations, Schragger's institutional fix for urban weakness is to take advantage of the power of the servant by further integrating city officials in state and national governance, thereby increasing the connective tissues that bind higher- and lower-level decision-makers.

*B. Harnessing the Federal Executive*

If we look to two of the contributors on the executive power side of the Symposium, we can also discern efforts to harness the power of the sovereign and the power of the servant to check an increasingly powerful executive branch. Bill Marshall offers a solution that straightforwardly relies on the power of the sovereign—bicameralism for the executive branch. He suggests that “[a]n independent attorney general, in the form of the state divided executive, may . . . be an appropriate model from which to reconstruct a workable system of intrabranch checks and balances”<sup>22</sup> and shows how a similar division of power at the state level has worked in practice.

Neal Katyal's essay, in contrast, relies on both the power of the servant and the power of the sovereign to limit the President's power. The main thrust of Katyal's essay is that we should take advantage of lower-level administrators and bureaucratic overlap to tame an overly energetic executive.<sup>23</sup> Consistent with the servant model, he suggests strategies for increasing presidential dependence on the bureaucracy, such as reporting and consultation mandates.<sup>24</sup>

Interestingly, however, although Katyal wants checks to emanate from competing bureaucratic servants, he self-consciously relies on the power of the sovereign—a separation-of-powers scheme—as an institutional fix (hence the title of his essay). Thus, even as Katyal seeks to increase the ties between the President and his underlings, his proposed reforms seem designed primarily to turn bureaucracies into quasi-sovereigns, protecting them from undue interference by the President and making it harder for the President to overrule their decisions.<sup>25</sup>

While Katyal terms his proposal “internal separation of powers,” in fact it looks more like internal federalism. After all, unlike Marshall, Katyal never

---

22. Marshall, *supra* note 3, at 2478-79.

23. Katyal, *supra* note 3, at 2317.

24. *Id.* at 2327, 2339-42.

25. *Id.* at 2329-35 (proposing rules that would protect agency bureaucrats from presidential retaliation and undue political influence); *id.* at 2337-39 (discussing protective measures for a proposed “Director of Adjudication”).

proposes creating a competing institutional actor coequal to the President. Under his scheme, checks on the President emanate instead from subsidiary executive actors, just as the checks from federalism are supplied by the states. Even the language Katyal uses to describe his proposal resonates with the language of federalism: a system of overlapping bureaucracies with unique internal cultures that serve as “laboratories” and foster interagency “competition.”<sup>26</sup> One might even draw an (admittedly rough) analogy between the measures Katyal suggests to empower agency actors—allowing the President to override lower-level decision-makers but not demand their public acquiescence—and some weak variant of the anticommandeering principle.

## CONCLUSION

Using the notions of sovereign and servant to examine the contributions to this Issue, we can find connections between the seemingly disparate policy proposals the authors offer. The long-term hope, of course, is that this type of transsubstantive vocabulary might allow us to draw from the extensive work scholars have already generated in thinking about these institutional design questions in fields like local government law, federalism, and the separation of powers and say something more systematic about these institutional fixes *across* disciplines.<sup>27</sup> Given space constraints, however, I will close simply by suggesting two modest ways in which these conceptual categories might help us work through some of the ideas raised by the contributors.

First, the categories offered here highlight a common dilemma for those relying on a sovereignty model in a context where “hard” or formal protections of autonomy cannot be had. It is not difficult, after all, to believe that a sovereignty model will usually give more powers to local actors than a centralized system. But what happens when one blends a federal system and a centralized system? Consider, for instance, Barron’s and Katyal’s essays. Both favor a sovereignty model in a context in which *de jure* sovereignty does not exist, as the autonomy of neither cities nor bureaucracies is protected by the type of formal guarantees accorded to states or to the three branches of

---

26. *Id.* at 2317, 2325.

27. Consider, for instance, Bruce Ackerman’s efforts to synthesize separation-of-powers scholarship with the insights of administrative law, see Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000), or the efforts of David Barron, Richard Briffault, and Rick Hills to draw together the insights of local government law and federalism scholarship, see David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001); Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006); Hills, *supra* note 13.

government. The question raised by both essays, then, is how sticky the informal protections are and how easily de facto sovereignty can be overridden. If a higher-level decision-maker can easily trump any decision made by the institutional actor in question, will it be better to pursue the kind of integrative solution that Schragger proposes in his essay? Or does the push for de facto autonomy provide a needed corrective by allowing lower-level actors to buttress their power as servants?<sup>28</sup> These kinds of questions have been thoroughly canvassed in a number of scholarly fields, of course, but it would be interesting if one could say something useful about these questions across fields.

Second, the vocabulary this Commentary provides helps us untangle the many meanings embedded in the word “power.” Consider, for instance, Barron and Schragger’s disagreement about the gay marriage controversy in California. Barron argues that those who think of San Francisco’s issuance of same-sex marriage licenses as a triumph of local power have missed the fact that San Francisco’s invocation of higher law ultimately deprived the city of the power to make policy at the local level.<sup>29</sup> Schragger, in contrast, celebrates Mayor Newsom because he “not only laid claim to a role in interpreting the California and Federal Constitutions (thus challenging the authority of the judiciary), but he also asserted a populist vision of the mayoralty that did not accept its relatively weak constitutional status.”<sup>30</sup>

How, one might ask, can Schragger sensibly view Newsom as asserting urban power if Barron is right that San Francisco’s claim depended wholly on its insistence that it was bound by federal law? If urban power stems solely from policymaking autonomy – from the power of the sovereign – Barron has it right. But if one thinks there is power associated with the role of the servant, as Schragger obviously does, these claims can be reconciled. Indeed, even if one agrees with Barron’s reading that San Francisco was, in fact, relying on its

---

28. For instance, Bill Marshall describes how protecting an attorney general’s autonomy even within a limited realm may also affect those areas in which she remains a servant. *See, e.g.*, Marshall, *supra* note 3, at 2468 (suggesting that the existence of an independent attorney general could help “promote[] fuller decision-making before governmental action by assuring consideration of a wider range of concerns than if the Governor acted alone”); *id.* at 2474 (“[A] President who must work through an independent attorney general, for example, to initiate an extensive program of warrantless electronic surveillance or detention of American citizens may be stilled in his efforts.”). For an analysis of how the anticommandeering principle may serve such a role in the federalism context, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 856 (1998).

29. *See supra* text accompanying notes 10–12.

30. Schragger, *supra* note 1, at 2574.

status as mere “functionary of the state,”<sup>31</sup> one could still view San Francisco’s decision as an assertion of urban power.

San Francisco was relying on the power of the servant. The city’s emphasis on its fealty to federal law, rather than autonomy from federal interference, reminded us of the ties that bind the national and the local. By affirming its membership in the national body politic in this way, San Francisco asserted its standing to take part in the debate on gay marriage.

While it might seem counterintuitive to think that an emphasis on the city’s subordination to federal law could lend that assertion power, we often see such a phenomenon within the dissent tradition. For instance, as a number of influential theorists have observed, what gives civil disobedience power is its dual character: a minor infraction of the law paired with a declaration of fidelity to higher law.<sup>32</sup> Similarly, asserting one’s status as a citizen or member of the community is a common form of political theater used by those engaged in dissenting speech.<sup>33</sup> We may pay more attention to a social critic if she is “one of us,”<sup>34</sup> as Michael Walzer explains. “Critical distance is measured in inches,” writes Walzer, because an effective critic must be “[a] little to the side, but not outside” of the community.<sup>35</sup>

The power of the servant, in short, gives an institutional actor a different kind of standing than the legal variant about which Barron writes. Being part of a community gives one standing—in the colloquial sense of the word—to criticize the community. Conversely, an insistence on sovereignty or separateness—precisely what Barron argues confers legal standing on cities—may undermine a city’s standing to speak on issues of state or national importance. Sovereignty inhibits the city’s ability to assert the power associated with connectedness and interdependence, a power that may ultimately be just as important to the community the city represents.

---

31. Barron, *supra* note 6, at 2236.

32. See, e.g., MARTIN LUTHER KING, JR., *Letter from Birmingham City Jail*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 289 (James Melvin Washington ed., 1986); JOHN RAWLS, *A THEORY OF JUSTICE* § 55, at 319 (rev. ed. 1999).

33. See, e.g., STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 25 (1999); Robert N. Strassfeld, “*Lose in Vietnam, Bring the Boys Home*,” 82 N.C. L. REV. 1891 (2004) (documenting the strategy Vietnam protesters used to counter their opponents’ equation of dissent and disloyalty).

34. MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 39 (1985).

35. *Id.* at 61.