

DAVID J. BARRON

## Why (and When) Cities Have a Stake in Enforcing the Constitution

**ABSTRACT.** This Essay examines independent constitutional interpretation from the bottom up. It focuses on San Francisco's recent challenge to the California ban against same-sex marriage and the judicial response it provoked in *Lockyer v. City & County of San Francisco*. The Essay argues against the conventional view that cities either have no distinctive role in interpreting the Constitution or that their interpretations should be considered suspect, even dangerous. But it also contends that cities should generally be permitted to decline to enforce state laws on constitutional grounds, or to challenge their constitutionality in court, only when they do so in order to expand the scope of local policymaking discretion. Thus, the Essay concludes that the problem with San Francisco's disregard of California's marriage laws was not (as the California Supreme Court suggested in *Lockyer*) 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. Thus, while San Francisco may have seemed to strike a blow for city power when it took the Constitution into its own hands, a deeper consideration of the controversy suggests that advocates of decentralization should have little reason to cheer the city's actions.

**AUTHOR.** Professor of Law, Harvard University. I would like to thank Sam Bagenstos, Jerome Barron, Richard Fallon, Jerry Frug, Heather Gerken, Jack Goldsmith, Marty Lederman, Dan Meltzer, Martha Minow, Richard Schragger, and Larry Tribe for extremely helpful comments, and Ashley Aull for outstanding research assistance. Thanks as well to the participants in the faculty workshops at the George Washington University Law School and Boston University and also to the participants in the symposium at Yale Law School.



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**INTRODUCTION**

Debates over who should interpret the Constitution usually concern the horizontal distribution of authority among the three branches of the federal government. But our nation is also separated vertically. What, then, if we consider independent constitutional interpretation from the bottom up? To do so, I focus on cities, the lowest level of government in the constitutional structure. Cities are rarely thought of as independent constitutional interpreters, no doubt because they are not mentioned in the Founding text and because they are assumed to be mere creatures of their states. In addition, the standard view is that the higher up one goes, the less passion and the more reason enters into interpretation. Thus, to the extent that cities are recognized as potential independent constitutional interpreters, their interpretations are typically considered suspect, even dangerous.<sup>1</sup>

There are indications, however, that a different view is gaining ground. A growing body of scholarship now emphasizes the important and constructive role that cities could play in resolving contemporary constitutional disputes. My own argument on behalf of local constitutionalism,<sup>2</sup> Richard Schragger's recent study of the role of the local in the "doctrine and discourse" of religious liberty,<sup>3</sup> and Heather Gerken's defense of dissenting through local decision-making<sup>4</sup> all identify cities as useful participants in constitutional contestation.

Cities themselves, moreover, have recently asserted their independent interpretive authority in ways that defy their stereotyped role as obstacles to constitutional enforcement.<sup>5</sup> The most salient recent examples involve city

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1. See, e.g., Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373, 1418-23 (1978) (arguing that the Court's reluctance to review local zoning decisions jeopardizes "substantial constitutional values"); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 105-15 (noting the Court's use of Jeffersonian rhetoric favoring local sovereignty in cases rejecting equal protection challenges).
  2. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487 (1999).
  3. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).
  4. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).
  5. See, e.g., An Ordinance of the Council Amending, Modifying, and Re-enacting Article 99 of the Codified Ordinances of the City of Huntington, as Revised, Concerning People's Bill of Rights (Oct. 13, 2003), available at <http://www.bordc.org/detail.php?id=380> (amending the Bill of Rights of the City of Huntington, West Virginia, in reaction to "the restriction of civil liberties by the United States").

officials disregarding state law bans on same-sex marriage on the ground that they violate the constitutional guarantee of equality.<sup>6</sup> Such city/state constitutional clashes do not involve a contest for interpretive authority between political branches *within* a level of government. They concern the scope of vertical rather than horizontal interpretive independence.

This Essay explores this general issue through San Francisco's recent challenge to the California ban against same-sex marriage and the judicial response it provoked in *Lockyer v. City & County of San Francisco*.<sup>7</sup> In doing so, I discuss in some detail the substantial and intriguing body of case law—of which *Lockyer* is the most significant recent decision—that deals precisely with the scope of cities' power to raise constitutional challenges against their states,<sup>8</sup> but which even scholars who are quite sympathetic to an expanded constitutional role for cities have thus far largely ignored.

Significantly, the debate in *Lockyer*—reflecting the terms of the debate within this body of law more generally—largely tracks conventional assumptions about the constitutional status of cities, portraying them alternately as invisible or dangerous. I argue that this way of thinking about cities' constitutional enforcement power is mistaken. By emphasizing the distinction between cities and states, I argue that cities are well positioned to make state and federal constitutional arguments that are aimed at expanding the scope of local policymaking discretion. Courts should thus recognize a broader range of circumstances in which city officers may appropriately decline to enforce state statutes, and, relatedly, they should reject current

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6. Officials in cities including San Francisco, California; New Paltz, New York; and Multnomah County, Oregon used their governmental power to effectuate same-sex marriage in derogation of state law bans. See Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 148-49 (2005) (describing these local actions). As this list indicates, counties as well as cities have been involved in such constitutional activity. For purposes of this Essay, I use the term "city" to refer to all general-purpose governments below the state level, and thus include "counties" when applicable. I should note that school boards present a complicated case. In one sense, they are just local administrative agencies, given their limited substantive jurisdiction. At the same time, however, they are also often separately elected and have their own powers of taxation.

7. 95 P.3d 459 (Cal. 2004).

8. Professor Gerken, *supra* note 4, adverts to the possibility that local dissenting action may be subsequently reversed by state officials, but she does not address whether local officials should be bound by such reversals. Nor is her focus exclusively on the strongest form of what she terms dissent—when a local government acts in contravention of state law—as it is here.

interpretations of state and federal law that impose general bans on cities' ability to sue their states for constitutional wrongs.<sup>9</sup>

At the same time, my emphasis on cities' distinctive legal status leads me to defend important limits on their independent interpretive authority. When a city's constitutional claim, if accepted, would not expand local policymaking discretion but instead bind every locality to follow a single course, then its interpretive independence from the state should be, as Justice Jackson wrote in a related context, "at its lowest ebb."<sup>10</sup> Cities that make such constitutional claims are not practicing *local* constitutionalism at all. They are attempting to take discretion *away* from other cities by replacing the constraints of state statutes with the constraints of the state constitution or Federal Constitution. Cities have no sufficient interest in pressing these constitutional claims—whether through refusals to enforce state statutes or suits seeking to invalidate them—and thus generally should be barred from doing so.

Indeed, for these reasons, I argue that the California Supreme Court was right to conclude in *Lockyer* that San Francisco could not disregard the state's same-sex marriage ban. In my view, however, the 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. Thus, while

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9. I do not argue that the Federal Constitution, of its own force, compels states to recognize the measure of interpretive freedom for cities that I favor, even when the constitutional right in question is a federal one. I am inclined to think that states are free to impose much greater restrictions on local constitutional enforcement authority if they so desire. But that fact does not diminish the import of the inquiry. While each state could in theory resolve the issue by passing legislation, or adopting a state constitutional amendment, clearly specifying the authority of local officials to enforce the state constitution or Federal Constitution, no state has done so. Instead, state courts have drawn on general principles of constitutional interpretive authority in fashioning the law for their own states precisely because they have received so little guidance from either state statutes or the text of their own state constitutions. See Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565 (2006). Thus, my focus is on reforming the extensive body of judge-made law that in fact now governs these issues by challenging the logic that underlies them. Of course, states are not free to alter Article III standing requirements, but because the federal constitutional text is hardly clear as to whether cities should have standing to sue their states, here, too, judges have stepped into the breach by drawing on general constitutional principles.
10. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

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Are these parameters for local constitutional action attractive? After all, San Francisco has long been the locus of the gay rights movement in the United States, and thus its Mayor plainly believed that the state marriage laws struck directly at the city itself in a way that other state law commands did not. Why, then, should San Francisco have been permitted to press a constitutional claim only if it would have entitled each city to decide marriage qualifications for itself? Indeed, isn't this proposed constraint fundamentally at odds with constitutionalism itself, given the Constitution's professed desire to create a more perfect *union*?

In defending this constraint, I am necessarily taking a position about the purposes of city power. But that is unavoidable. As I explain, one's views about the proper scope of local constitutional enforcement depend not only on one's willingness to conceive of cities as visible and constructive constitutional interpreters, but also on what one believes the proper ends of local power should be. Thus, while it may be tempting to defend local constitutionalism by conceiving of cities as critical staging grounds from which politically powerless minority groups may make themselves nationally visible<sup>11</sup> I suggest that cities are better viewed as sites for small-scale political contestation and problem-solving on matters that are within their capacity to resolve through the exercise of their own policymaking authority. For that reason, I favor a legal structure that would permit cities to press constitutional claims in order to make policy for themselves, but that would otherwise restrict their ability to do so.

## I. LOCKYER AND THE STANDARD TERMS OF DEBATE

The recent contest between San Francisco and California over same-sex marriage provides a useful means of exploring the scope of local constitutional enforcement. That is because each side put forth its arguments in stark fashion. The city did not argue that either the California or the United States Constitution clearly prohibited the state's ban on same-sex marriage; rather, the city defended its decision to take the Constitution into its own hands in very broad terms. These terms applied to all executive officers, from the

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11. Cf. Gerken, *supra* note 4 (characterizing San Francisco's action as an important means of "dissent" that contributed to the national conversation over the constitutionality of same-sex marriage).

President down, and included any instance in which they believed in good faith that a statute was unconstitutional. For its part, the California Supreme Court was no less sweeping in rejecting the city's authority to assert such a constitutional claim, suggesting that such a power could be exercised by a non-judicial actor in only the rarest of cases. Thus, a careful examination of the dispute is unusually instructive. It reveals not only the logical problems with the traditional arguments both for and against the recognition of executive constitutional review as a general matter, but also the continuing influence of the conventional assumption that cities are, constitutionally speaking, either invisible or dangerous.

A. *The Political and Procedural Context in Lockyer*

President Bush's 2004 State of the Union address touched off the local/state battle over same-sex marriage in California by endorsing a federal constitutional amendment defining marriage as being between a man and a woman. As it happened, San Francisco Mayor Gavin Newsom was in the Capitol for the President's address.<sup>12</sup> Upon hearing it, the Mayor resolved to use his own local executive authority to stake out a contrary constitutional view.<sup>13</sup> The Mayor had an opening to do so because California vests marriage-licensing authority with the clerk in local governments like San Francisco.<sup>14</sup> Convinced that the state constitutional requirement of equal protection prohibited the ban, Mayor Newsom wrote a letter to the San Francisco clerk, whom he generally oversaw,<sup>15</sup> setting forth his conclusion.<sup>16</sup> Soon thereafter, San Francisco began processing marriage licenses for same-sex couples and issued over 4000 before the *Lockyer* litigation halted the practice.<sup>17</sup>

The State Attorney General responded with a suit to enjoin the city from issuing same-sex marriage licenses and to declare void the licenses already issued. The California Supreme Court ordered San Francisco to refrain from issuing additional licenses until the case was resolved. San Francisco officials complied with the order and began preparing a defense that, by this time, invoked both the equal protection clause of the California Constitution and the

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12. See Tad Friend, *Going Places*, NEW YORKER, Oct. 4, 2004, at 42.

13. *Id.*

14. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 469-71 (Cal. 2004).

15. See *id.* at 471.

16. *Id.* at 464-65.

17. *Id.* at 465.

Equal Protection Clause of the U.S. Constitution.<sup>18</sup> Just as the nation’s chief executive had set forth his views about the constitutionality of same-sex marriage, local executives from San Francisco—the city that is, in effect, the capital of gay America—were about to set forth theirs.

Before doing so, however, the city officials had to overcome an important hurdle. The California Supreme Court raised a significant threshold question:

[W]hether a local executive official who is charged with the ministerial duty of enforcing a state statute exceeds his or her authority when, without any court having determined that the statute is unconstitutional, the official deliberately declines to enforce the statute because he or she determines or is of the opinion that the statute is unconstitutional.<sup>19</sup>

If the city exceeded its power, the court concluded, the city could not “compel” the court to resolve a constitutional question by violating a state statute and then appealing to the state constitution or the Federal Constitution as a defense to a mandamus action.<sup>20</sup> Thus, the legal question presented in *Lockyer* did not concern the merits of San Francisco’s claim that the ban on same-sex marriage was unconstitutional. It concerned only the legitimacy of the city’s decision to act on that local constitutional conclusion in advance of a judicial decision affirming it.

### *B. Invisible Cities with Broad Enforcement Powers*

The San Francisco officials defended their action on the ground that all executive branch actors, including those much higher up the constitutional chain of command, possess the authority to review the constitutionality of the statutes they are charged with enforcing.<sup>21</sup> They made no claim, therefore, that

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18. *Id.* at 466-67 (recounting the procedural history of the case). The Mayor’s constitutional position was bolstered by two recent decisions: *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that the Massachusetts Constitution conferred equal marriage rights on same-sex couples), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating a state statute criminalizing sodomy), on which *Goodridge* heavily relied.

19. *Lockyer*, 95 P.3d at 462.

20. *Id.* at 472.

21. *Id.* at 485, 492. If the state marriage statutes were in fact null and void, it would not necessarily mean that local officials possessed the affirmative power to issue marriage licenses to same-sex couples. It might mean that they lacked authority to marry anyone. But since a court would likely be acting legitimately if it remedied the unequal treatment by including the excluded class rather than depriving all persons of the benefit at issue, so



their status as city representatives gave them any unique claim to interpretive authority. In this respect, they accepted the standard assumption about the place of local governments in the constitutional structure. Rather than portraying cities as both visible *and* constructive constitutional interpreters, the city officials participated in their own invisibility. They contended that they owed a duty to comply with a central dictate that was even more powerful than a state statute, namely, the state and federal constitutional requirement that local officials marry same-sex couples.<sup>22</sup> Their stated interest, then, was in fulfilling a local duty to obey central commands as faithful agents of the state. Indeed, the city's brief did not refer either to its own sizeable gay population or to its own long and unique history of promoting civil rights for gays.<sup>23</sup>

There is some support for the city's notion that a power of constitutional review inheres in the executive. A large literature, for example, addresses whether the President may disregard statutes pursuant to his oath and his Article II duty to ensure that the laws be faithfully executed.<sup>24</sup> The chief question seems to concern the breadth of this power rather than its existence.<sup>25</sup> There is, however, a big difference between the constitutional status of a city's mayor and that of the President of the United States. Indeed, those who take the broadest view of the President's power to judge the constitutionality of statutes usually subscribe to a strong view of his authority to compel subordinate executive branch officials to follow his interpretation.<sup>26</sup> It might be thought, then, that a city should have no more interpretive independence from its superior—the state—than the ordinary federal executive branch official has from the President.

The San Francisco officials addressed this concern in part by emphasizing that a statute that violates the Constitution cannot be enforced because it no longer controls. As Justice Field succinctly put it, “[a]n unconstitutional act is

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would a city, assuming it had the power to determine that the Constitution had been violated.

22. *Id.* at 485.

23. Brief for Respondents, *Lockyer*, 95 P.3d 459 (No. S122923).

24. See, e.g., Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105.

25. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994). But see David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61 (arguing for a narrower scope for the nonenforcement power).

26. Compare Michael Stokes Paulsen, *Who Owns the Government's Attorney-Client Privilege?*, 83 MINN. L. REV. 473, 481 (1998) (endorsing the view that the President has the Article II power to “countermand or displace the decisions of all subordinate executive officers”), with Paulsen, *supra* note 25 (arguing for a broad presidential nonenforcement power).

not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.”<sup>27</sup> From this premise, some state courts have concluded,<sup>28</sup> an executive officer has no choice but to decline to enforce a statute he believes to be unconstitutional because a statute that violates the state constitution or Federal Constitution is void and thus literally does not exist. But if the issue is *whether* an official may adjudge a state statute to be unconstitutional, then it hardly suffices to conclude that he may do so because unconstitutional laws are not laws at all. The question remains as to why an executive officer should be permitted to make the determination that a statute he is charged with following is without legal force or effect.<sup>29</sup>

The San Francisco officials offered a partial response by arguing that federal supremacy compelled them to disregard any state law that they believed conflicted with the *Federal Constitution*.<sup>30</sup> Ironically, the intellectual origins of this argument may be traced to Justice Story, a strong nationalist who is often mistaken for an unqualified defender of judicial supremacy.<sup>31</sup> Even though Story has been identified as a leading foe of extra-judicial constitutional interpretation, his view is actually more complex. Justice Story feared that state and local officers would be inclined to resist federal constitutional limitations, and thus he sought to empower those officials who were willing to act against

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27. *Norton v. Shelby County*, 118 U.S. 425, 442 (1886).

28. See, e.g., *State ex rel. Test v. Steinwedel*, 180 N.E. 865, 866-67 (Ind. 1932) (quoting *Norton* and citing other state courts adopting this view).

29. Others have reached the same conclusion by a slightly different route, namely, that the courts cannot compel the enforcement of an unconstitutional law. See, e.g., *Holman v. Pabst*, 27 S.W.2d 340 (Tex. Civ. App. 1930). Shifting the focus to the power of the court to compel enforcement, however, does not advance the analysis. State courts routinely enforce statutes against private persons without inquiring into their constitutionality. It is not generally thought, for example, that courts may sua sponte raise constitutional objections that are not presented by the parties. If a court may enforce a statute that might later be adjudicated unconstitutional, then why should it not be able to grant a mandamus petition prior to a constitutional ruling?

30. *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 492 (Cal. 2004).

31. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004). Justice Story’s view has also garnered contemporary support. In a concurring opinion, Seventh Circuit Judge Frank Easterbrook rejected an assertion by a state insurance commission that it lacked the power to determine the federal constitutionality of the statutes it administered. Judge Easterbrook concluded that the Supremacy Clause, of its own force, precludes states from barring their officers from carrying out their duty to ensure the constitutionality of their binding acts. *Alleghany Corp. v. Haase*, 896 F.2d 1046, 1054 (7th Cir. 1990) (Easterbrook, J., concurring).

type.<sup>32</sup> In doing so, Justice Story took a view of federal supremacy that was arguably even stronger than the one set forth by the Court in *Cooper v. Aaron*,<sup>33</sup> in which it controversially asserted that state and local officials were bound to comply with the authoritative interpretations of the Supreme Court, even when those officers were not specifically bound by a judgment.<sup>34</sup> Justice Story's theory, like San Francisco's, went further by contending that state and local executives' duty to obey the Constitution extended even to matters about which no authoritative judicial interpretation had been offered.

But this sweeping position has real problems, even putting to one side the dicta from a century-old Supreme Court case that appears to reject it.<sup>35</sup> The Supremacy Clause does state that "all executive . . . Officers . . . of the several States" shall be bound by their oaths to "support this Constitution,"<sup>36</sup> but supporting the Constitution does not necessarily entail assuming interpretive powers that have not been granted by state law. State judges, for example, are clearly obliged to enforce federal law. It is not generally thought, however, that lower state courts may ignore higher state court precedent that takes a different view from their own of what the Federal Constitution demands. Perhaps a state would violate the Supremacy Clause by denying executive officials the power to refuse to enforce a state statute even if the Supreme Court had already struck down a similar statute in another state. *Cooper* surely suggests as much. But it does not follow that a state similarly violates the Supremacy Clause when it bars executive officers from making independent constitutional judgments on the basis of their own good faith assessments. Equating the case of a clear constitutional violation with that of a contested one seems unwarranted.

The city officials offered a final, more practical reason to permit the assertion of executive interpretive independence—namely, that no great harm would result from permitting them to do so.<sup>37</sup> They noted that city officials

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32. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 345 (Fred B. Rothman Publ'ns 1991) (1833) ("Whenever . . . [local functionaries] are required to act in a case not hitherto settled by any proper authority, these functionaries must, in the first instance, decide each for himself, whether, consistently with the constitution, the act can be done.").

33. 358 U.S. 1 (1958).

34. See *id.* at 18.

35. *Smith v. Indiana*, 191 U.S. 138 (1903) (stating that the question whether state and local ministerial officers may raise constitutional defenses to mandamus actions was one of "local" and not federal law).

36. U.S. CONST. art. VI, cl. 3.

37. See Brief for Respondents, *supra* note 23, at 21-22.

would generally be advised by counsel and that their constitutional interpretations would ultimately be reviewed by the courts. Here, the city's argument resonated with the reasoning of some state courts, which have noted that, because officials who disregard statutes on constitutional grounds will likely be advised "by able counsel" and be acting in good faith, there is little to be gained from forestalling the resolution of the constitutional dispute until a private party brings a post-enforcement challenge.<sup>38</sup> Better instead, these courts contend, to decide the matter in one suit rather than two. But this logic also is not obvious. If state courts make plain that constitutional defenses may not be raised in mandamus actions, then the need for the mandamus action itself would be substantially reduced and the two-suit problem rendered much less acute.<sup>39</sup>

### C. *Invisible Cities with Limited Enforcement Powers*

In rejecting the San Francisco officials' position, the California Supreme Court also proceeded as if city officials were no different from other state officials. To the extent that the court did recognize cities as distinct and visible governmental institutions, moreover, it viewed them with special suspicion.

The majority's key argument was that the power to determine the constitutionality of a state statute is presumptively a judicial function.<sup>40</sup> This argument has a firm footing in the state courts. Consider *City of Memphis v. Shelby County Election Commission*, a recent decision of the Tennessee Supreme Court.<sup>41</sup> The case concerned the authority of local election officials to refuse to place a proposed city referendum on the local ballot. If approved, the referendum would have authorized the city to impose a new tax, but the election officers refused to certify the question because they believed the state

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38. *E.g.*, *State ex rel. Test v. Steinwedel*, 180 N.E. 865, 867 (Ind. 1932).

39. Minnesota has developed a line of precedent suggesting that constitutional defenses should be entertained only in cases in which there is a strong public interest in the underlying constitutional issue. But that test has not proven coherent. *Compare* *Mower County Bd. of Comm'rs v. Bd. of Trs. of Pub. Employees Ret. Ass'n*, 136 N.W.2d 671, 675 (Minn. 1965) (finding no public interest in a case arising out of employer contributions to the Public Employees Retirement Association), *and* *State ex rel. Clinton Falls Nursery v. Steele County Bd. of Comm'rs*, 232 N.W. 737, 739 (Minn. 1930) (finding that the duty of ministerial officers charged with attaching lands to certain school districts and prorating bonded indebtedness affecting such lands did not "involve a public interest"), *with* *Port Auth. of St. Paul v. Fisher*, 132 N.W.2d 183, 195 (Minn. 1964) (finding sufficient public interest in a proposed lease of public lands to a private corporation).

40. *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 482-85 (Cal. 2004).

41. 146 S.W.3d 531 (Tenn. 2004).

constitution barred the local use of such a tax. The Tennessee Supreme Court ordered the officials to place the item on the ballot, holding that “determining the substantive constitutionality of such measures is a function reserved for the judicial branch of government.”<sup>42</sup> The court went on to say that the state legislature lacked the state constitutional power to grant such independent interpretive authority to executive officers because “a legislative action vesting executive branch agencies with the authority to determine the constitutionality of statutes would violate the separation of powers doctrine.”<sup>43</sup>

This view plainly makes no distinction between high state officials and local ones. Indeed, in 1922, the Florida Supreme Court used the same logic to overturn the refusal by the Florida State Board of Equalizers—which counted the Governor as a member—to enforce a state statute on constitutional grounds.<sup>44</sup> But the problem with this contention is that the line between judicial and executive functions is notoriously unclear. Indeed, the California Supreme Court itself made an exception in *Lockyer* for cases of clearly unconstitutional laws or ones that would impose personal liability on the implementing official.<sup>45</sup> It is hard to see how the formal claim that constitutional review is a judicial function can admit of such exceptions. And if the claim is meant merely to express a pragmatic concern about creeping executive encroachment on judicial authority, then it seems wildly overdrawn. Executive officials in such cases almost always concede that they will be bound by a judicial ruling, once issued.

The *Lockyer* majority also relied on the argument that executive offices are created by statute and for that reason cannot engage in constitutional review.<sup>46</sup> To be sure, certain state officers—a governor or an attorney general, for example—may be entitled to assess the constitutionality of a statute by virtue of express state constitutional authorizations to take care that the laws be faithfully executed. Most executive officials, however, are merely creatures of

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42. *Id.* at 536.

43. *Id.* at 537 (quoting *Richardson v. Tenn. Bd. of Dentistry*, 913 S.W.2d 446, 453 (Tenn. 1995)) (internal quotation marks omitted) (original emphasis omitted).

44. *State ex rel. Atl. Coast Line Ry. Co. v. State Bd. of Equalizers*, 94 So. 681 (Fla. 1922).

45. For example, executive officials might refuse to implement a statute if the constitutional violation was clear and already determined by a court, *Lockyer*, 95 P.3d at 487; or when doing so was necessary to permit a court to resolve the constitutional matter in a timely manner; or when implementing the statute would have immediate adverse consequences, such as when a local official would otherwise be subject to personal damages liability or the marketability of a bond would be harmed absent resolution of the constitutional question, *id.* at 483.

46. *See id.* at 476.

the state legislature. Why, then, should one assume the legislature would wish them to undermine the laws they pass? Ultimately, however, the assumption that the legislature intended to deny executive officials the power to determine the lawfulness of the statutes they are charged with enforcing is just a guess. State courts that take a broad view of the local constitutional enforcement power, for example, have not been countermanded statutorily. This area is likely one, therefore, in which legislative intention is largely unknowable because legislators have simply not considered the question.

Finally, like other state courts, the California Supreme Court augmented its legalistic arguments with more practical ones. It contended that state government could hardly go on if executive officers were permitted to question the constitutionality of the state statutes that otherwise bind them.<sup>47</sup> Additionally, it expressed concern that executive officers would decide constitutional questions without the benefit of adversarial contestation. Thus, their decisions would disregard the interests of other parties with a stake in the resolution of the constitutional issues.<sup>48</sup> But here, too, the claims seem overdrawn. Some states have taken a broader view of the executive nonenforcement power but have not ceased to function, and the availability of the mandamus suit itself arguably ensures the possibility of at least some adversary testing.

At the close of its analysis, the *Lockyer* majority did finally consider the significance of the *local* status of the executive officials. But it did so only in order to confirm the rightness of its presumption that they should enforce the state law and wait for a private party to challenge that law's constitutionality.<sup>49</sup> The court was untroubled by the prospect that this course of action would make San Francisco the defendant in a case in which it wished to be the plaintiff. Indeed, the court seemed intent on ensuring that local officers would

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47. See *id.* at 491; *State v. Heard*, 18 So. 746, 752 (La. 1895) (“[T]he most inextricable confusion would inevitably result, and produce such collision in the administration of public affairs as to materially impede the proper and necessary operations of government.”) (internal quotation marks omitted); *Mower County Bd. of Comm’rs v. Bd. of Trs. of Pub. Employees Ret. Ass’n*, 136 N.W.2d 671, 676 (Minn. 1965) (“To permit public officials who have no duty to interpret or administer a law endowed with the presumption of constitutionality to assail that law as an excuse for their own failure or refusal to act under a statute clearly imposing only ministerial obligations would result in chaos.”).

48. See *Lockyer*, 95 P.3d at 491; *Thoreson v. State Bd. of Exam’rs*, 57 P. 175, 178 (Utah 1899) (“To allow mere ministerial officers [to refuse to perform an act required by statute] . . . would be deciding a constitutional question, affecting the right of third parties, at the instance of officers whose duties are merely ministerial, and who have no direct interest in the question, and cannot, in any event, be made responsible.”).

49. *Lockyer*, 95 P.3d at 491.

not feel entitled to decide constitutional questions. The court explained that the sheer number of local public officials charged with carrying out state ministerial duties posed a real threat to the uniform application of state law.<sup>50</sup> It further noted that most local executive officers “have no legal training and thus lack the relevant expertise to make constitutional determinations.”<sup>51</sup> The court concluded with a classic reason for denying local power, namely, that a decentralized approach to lawmaking usually harms minorities.<sup>52</sup>

#### *D. Conclusion*

It is not surprising that San Francisco tried to cover its distinctiveness or that the California Supreme Court ignored the city’s distinct status as a democratic polity except to identify it as a cause for concern. The view that localism threatens constitutionalism runs deep. The last thing the city wanted the court to think was that its refusal to obey the state statute was influenced by *local* politics, and the court could not see how localism accorded with constitutionalism. Still, the conception of the city as a mere functionary of a higher government, or else as a threat to the rule of law, is a decidedly partial one.<sup>53</sup> Thus, perhaps the argument for approving of actions like San Francisco’s should rest on an effort to distinguish the city from the state and to highlight its unique legal status. It is that possibility that both the city and the California Supreme Court failed to consider.

## II. LOCAL CONSTITUTIONALISM RECONSIDERED

There are two ways in which the distinctive legal status of cities might justify affording them an important degree of latitude to challenge the constitutionality of state statutes. Each draws on a distinct—indeed, opposing—conception of the legal status of cities. The first emphasizes the uniquely subordinate status of cities but paradoxically uses that very fact to justify giving city officers *more* interpretive freedom than higher-level governmental officials. The second emphasizes the independence of city officers as representatives of an entirely distinct democratic polity and uses that fact to argue that local officials have a cognizable stake in the outcome of

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50. *Id.*

51. *Id.* at 490.

52. *Id.* at 499.

53. See generally Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980) (describing the important democratic role that cities may play).

constitutional disputes with their own states. Ultimately, a variant of the latter claim provides the best defense of a city's constitutional enforcement authority, even as it highlights a choice between two different reasons for valuing cities as important components of the constitutional structure.

*A. Local Subordination as a Basis for Local Interpretive Freedom*

State control over cities is, as a matter of federal constitutional law, extremely broad. "The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised," the Supreme Court has said, "rests in the absolute discretion of the State."<sup>54</sup> For that reason, the state may "at its pleasure . . . modify or withdraw all such powers."<sup>55</sup> More recently, the Court has emphasized that cities are mere "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.*'"<sup>56</sup>

Such language makes it odd to think that cities may assert constitutional positions that undermine state statutory requirements. Why would the state create a subordinate entity that could challenge its authority either in court or through a decision not to enforce a state statutory command? Moreover, this language makes it quite clear that state officials are superior and local officials are inferior, and it is conventional to assume that the best people will be in the top job. That was a key reason for creating the extended republic.<sup>57</sup>

Nonetheless, the plainly subordinate status of cities does mitigate some oft-stated concerns about the dangers that attend the recognition of independent local interpretive authority. Indeed, at the limit, the uniquely subordinate status of cities may even provide a basis for concluding that federal civil rights law requires states to permit cities to refuse to enforce state statutes they believe are unconstitutional.

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54. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

55. *Id.*

56. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter*, 207 U.S. at 178) (emphasis added).

57. See THE FEDERALIST NO. 10 (James Madison).



1. *State Control Mitigates the Threat That Independent Local Constitutional Interpretation Poses to the Rule of Law*

In the course of defending “localist constitutionalism,” Richard Schragger argues that the concentration of power itself poses a substantial threat to liberties protected by the Bill of Rights.<sup>58</sup> From this perspective, the prospect of local nonenforcement is arguably less threatening to the rule of law than central nonenforcement. The very power that high-level officials possess makes it more likely that their disregard of state statutes will have significant consequences. Surely the concern that the personal opinion of a single official will remake the legal order is heightened when that official is in a position to exert authority over the whole state. It is one thing for a single city to issue same-sex marriage licenses; it is another if the state’s Secretary of Health orders all local clerks to begin marrying same-sex applicants forthwith.

In addition, there is little risk that a city will remain a scofflaw for long. The fact that cities are not fully sovereign means that municipal taxpayers enjoy relaxed standing requirements in suits against their cities for disobeying the law.<sup>59</sup> They can challenge any unauthorized local expenditure. By contrast, states cannot be so easily challenged on the basis of such a generalized grievance, nor can the federal government.<sup>60</sup> In addition, as a practical matter, a city official runs a greater risk than a state official of being subject to a mandamus action for refusing to comply with state law.

Although the fact that cities have so little power might make their constitutional resistance more tolerable, the sheer number of cities means that the local exercise of nonenforcement power—as well as the local filing of constitutional suits—will disrupt the expected uniform implementation of state statutes. No one doubts that a city may defend a mandamus action by arguing that the statutory requirement is unclear, but authorizing cities to assert a constitutional defense—even when statutory commands are clear—may open Pandora’s box. Given the notoriously open-ended character of many constitutional provisions, the range of cases in which a constitutional objection to a statute could be raised is vast. Thus, there is a price to making the state spend energy fighting the erroneous constitutional claims of local officials.

In short, the fact that cities are securely in the grip of state control helps counterbalance the common assumption that city officials’ independent

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58. See Schragger, *supra* note 3.

59. See Nancy C. Staudt, *Taxpayers in Court: A Systematic Study of a (Misunderstood) Standing Doctrine*, 52 EMORY L.J. 771, 803-04 (2003).

60. *Id.* at 795, 803-04.

interpretations pose a greater threat than the interpretations of state officials. This argument does not, however, ultimately provide affirmative support for the recognition of local constitutional enforcement power.

2. *Section 1983 Liability as a Basis for Recognizing Local Interpretive Independence*

A related contention about the uniquely subordinate legal status of cities provides stronger support for cities' authority to challenge state statutes on constitutional grounds. The claim rests on cities' unique risk of liability for committing federal constitutional wrongs. The main source of that risk is the most important federal civil rights statute, 42 U.S.C. § 1983. That risk, in turn, presents a strong argument that § 1983 implicitly authorizes cities to challenge the constitutionality of the state statutes they otherwise are required to enforce.

Section 1983 makes a "person" acting under color of state law subject to liability for violating federal rights, including federal constitutional rights.<sup>61</sup> The Supreme Court in *Monell*<sup>62</sup> famously construed the term "person" to permit cities, but not states, to be sued. That holding drew support from the historical connection between municipal and private corporations. Well into the nineteenth century, cities were conceived of as corporate bodies rather than full-fledged public governments.<sup>63</sup> On that basis, the Supreme Court held long ago that cities were not entitled to the Eleventh Amendment immunity from nonconsensual suits in federal court that states enjoy.<sup>64</sup>

But because cities are governments rather than private businesses, the Court, in finding cities subject to suit, declined to transport private tort law notions of liability onto them. Instead, the Court granted cities immunity from respondeat superior liability by holding that cities would not have to answer for every one of the actions taken by their employees in the course of carrying out municipal functions. Cities would be liable under § 1983 only for official actions, policies, or customs.<sup>65</sup>

In consequence, cities found themselves in a unique and more vulnerable position than either states or individual local officers. The Court granted states

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61. 42 U.S.C. § 1983 (2000).

62. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

63. See Frug, *supra* note 53, at 1090-1101.

64. See *Lincoln County v. Luning*, 133 U.S. 529 (1890) (denying municipal corporations protection under the Eleventh Amendment).

65. See *Monell*, 436 U.S. at 707-08.

absolute immunity out of deference to their sovereignty,<sup>66</sup> and it granted qualified immunity to individual local governmental officials, when sued in their personal capacity, out of deference to those officials' status as private individuals.<sup>67</sup> Thus, individual officials and officers are personally liable for damages liability only when their actions are in contravention of a clearly established federal right.<sup>68</sup> By contrast, the city may be sued for damages even for actions that reasonably appear to conform to federal law at the time they were taken. The sole protection that *Monell* grants cities is the requirement that the plaintiff demonstrate that the city itself—and not some lower level officer acting outside of official city policy—was actually responsible for the legally questionable action. If the city is responsible for the constitutional wrong, however, then it is liable in damages, no matter how unforeseeable the judgment of unconstitutionality might have been at the time of enforcement.

Against this legal backdrop, when a city official performs the ministerial duty of enforcing a state law that may be unconstitutional but is not clearly so, the city risks damages liability under § 1983. To be sure, one could argue that *Monell*'s official custom or policy requirement protects the city. According to that requirement, a city may escape liability if the duty it carries out is state-imposed and non-discretionary. The state that imposed the duty—rather than the city that is required to carry it out—arguably is the responsible governmental actor. *Monell* did not consider this argument, however. In establishing the official policy or custom requirement, *Monell* sought to protect cities from respondeat superior liability. But a case like *Lockyer* raises the distinct issue of respondeat *inferior* liability, namely, whether a city official, when acting as a ministerial functionary of the state, is responsible for the state's policy.

Precisely because *Monell* does not address that issue, the lower court case law is unclear. The Ninth Circuit has held that the official policy or custom requirement does not apply if a plaintiff seeks prospective injunctive relief from a city's policy because *Monell* was primarily concerned with protecting the local treasury. Thus, cities may be sued under § 1983 for enforcing an unconstitutional state law, though plaintiffs may not recover damages.<sup>69</sup> The Ninth Circuit's reasoning, however, cannot be right. Dispensing with the official policy or custom requirement in *all* injunctive actions would, as the

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66. See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890).

67. See *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Butz v. Economou*, 438 U.S. 478 (1978); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

68. See *Harlow*, 457 U.S. at 818.

69. See *Chaloux v. Killeen*, 886 F.2d 247, 251 (9th Cir. 1989).

Seventh Circuit explains, effectively make cities responsible for individual actions that are in fact against official city policy.<sup>70</sup> Why make the city subject to suit for a choice made by a low-level official that the city itself never countenanced?

But even if one accepts the Seventh Circuit's rejection of the distinction between a suit for damages and a suit for an injunction, the question remains whether local enforcement of a state command satisfies the official custom or policy requirement. It is possible to conceive of a city's decision to comply with state law as an official policy of the city. Moreover, the prospect of states cutting off avenues for redress by cleverly enlisting local officials to implement state policies is worrisome. A central policy underlying the federal imposition of municipal liability, after all, is to deter cities from engaging in unconstitutional conduct.<sup>71</sup>

The judgment that cities should be liable for enforcing unconstitutional state statutes, however, has direct implications for the scope of local nonenforcement authority. How else can the city internalize the deterrent effect that the imposition of liability is intended to create other than by declining to carry out the state-imposed duty? Thus, if a city, but not a state, can be sued for damages for violating the Constitution, perhaps a city official, but not a state one, should have the power to avoid the constitutional wrong by declining to enforce the state law. We have seen that even state courts that generally reject an executive nonenforcement power permit an exception, as a matter of state law, when the local official would face personal damages liability.<sup>72</sup> Presumably that exception includes cases in which the personal liability would be imposed pursuant to § 1983 for the violation of a clearly established federal right. But if that is so, then it would appear that the exception should also apply to cities that would face damages liability under § 1983, even though such liability could be imposed for violations that were not clear at the time they were taken, and even though the damages would be imposed on the city budget rather than the local official's personal pocketbook. The fiscal impact on a city of such a damages judgment could, after all, be quite consequential.

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70. See *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 468-69 (7th Cir. 2001). See generally Jessica R. Manley, Comment, *A Common Field of Vision: Municipal Liability for State Law Enforcement and Principles of Federalism in Section 1983 Actions*, 100 NW. U. L. Rev. 967, 978-84 (2006) (reviewing lower federal court case law concerning this issue).

71. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000).

72. See *supra* text accompanying note 45.

Perhaps, then, courts should interpret § 1983 to require this result in those states that deny their cities the authority to decline to enforce state statutes that they believe to be unconstitutional. The law of qualified immunity itself is only a judge-made gloss on § 1983 and is designed to serve the policies presumed to underlie the statute. A rule recognizing a local power not to enforce state law so as to avoid the liability that the federal civil rights statute would otherwise impose seems quite consonant with those same policies. The California Supreme Court overlooked this possibility because it focused on the larger question of executive officer liability. But cities are different. Their quasi-sovereign status makes them, unlike officers generally, subject to damages for committing constitutional wrongs even when there is no clearly established precedent to put them on notice. Thus, city officials have reasons to be especially careful in enforcing state statutes they believe to be unconstitutional.

Intriguing as this possibility is, however, at the present time § 1983 does not clearly impose damages liability on cities for enforcing an unconstitutional state statute in the course of performing their ministerial duty. For that reason, cities do not necessarily face the dilemma sketched above. Until § 1983 develops along these lines, it is hard to say that the federal statute of its own force requires states to recognize the local exercise of a nonenforcement power.

### *B. Local Independence as a Basis for Local Interpretive Freedom*

The flip side of the argument just considered begins from the premise that cities are not purely administrative components of state government. One certainly finds evidence in state law that cities represent distinct, democratic communities of interest. Even the Supreme Court of the United States has at times described cities this way.<sup>73</sup> Just as the uniquely subordinate status of cities provides some reason to question the standard assumption that local officials should, if anything, have less interpretive freedom than higher-level ones, so, too, does the independent status of cities.

#### *1. Local Independence as a Source of Special Constitutional Insight*

The central claim underlying the popular constitutionalism movement in recent scholarship is that constitutional interpretation depends on more than

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73. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926) (holding that the “governing authorities [of the Village of Euclid], presumably represent[] a majority of [the Village’s] inhabitants and voic[e] their will”); see also Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1889 (1994) (describing this view of local space as “opaque” rather than “transparent”).

the practice of lawyerly craft. Democratic communities deserve deference to their constitutional judgments. A city's claim to independent interpretive authority, therefore, could rest on its status as a democratic polity with its own lived history. If constitutional insight comes from the "people themselves,"<sup>74</sup> then the very fact that cities are so close to the ground is a reason to believe that they should be good at discerning constitutional limitations.

This argument might at first seem more persuasive with respect to state constitutional enforcement than federal constitutional enforcement, given that many state constitutions expressly protect local powers while the Federal Constitution makes no mention of cities at all. Nevertheless, there is a long tradition in our federal constitutional culture of recognizing the important role that cities play. The constitutional treatise writer Thomas Cooley articulated this point of view well when he described "the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils" and in so doing to create the "living and breathing spirit, which supplies the interpretation of the words of the written charter."<sup>75</sup> One still finds traces of this idea in modern federal constitutional argumentation.

An example is Justice Marshall's dissent in *City of Richmond v. J.A. Croson Co.*, a case that invalidated the City of Richmond's affirmative action set-aside program on equal protection grounds.<sup>76</sup> Though holding that cities did not have the power to enact such programs, the Court noted that Congress might have the power to enact such a program through Section 5 of the Fourteenth Amendment, which specially assigns Congress the function of enforcing Section 1's equality guarantee. Justice Marshall's dissent responded by emphasizing the special insight into the meaning of equality that the City of Richmond would have. As the former capital of the Confederacy, it possessed a lived sense of racial history, and this sense, Marshall contended, gave the city a special kind of interpretive expertise that would make it more sensitive to constitutional wrongs than higher-level governments. Thus, Marshall could not see why such a city should be less entitled than the federal government to adjudge the degree of remediation that Jim Crow required.<sup>77</sup>

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74. See KRAMER, *supra* note 31; see also RICHARD D. PARKER, *HERE, THE PEOPLE RULE* (1994) (arguing for a populist conception of constitutional law).

75. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 107 (1871) (Cooley, J.).

76. 488 U.S. 469 (1989).

77. See *id.* at 529. The City of Santa Cruz's amicus brief in *Lockyer* suggested that cities, by virtue of their closeness to the community and their responsibility for carrying out myriad governmental functions—from law enforcement to schooling—are acutely aware of the social consequences of constitutional judgments. For that reason, the city argued, cities

A powerful objection to permitting cities to decline to enforce state statutes, however, relates to the ambiguous nature of constitutional rights. Roderick Hills puts the point this way:

[I]f a municipality prohibits anti-gay discrimination in ways that might arguably encroach on private associations' religious freedom or freedom of association, should the federal courts suppress state laws that preempt such local laws? It is not obvious . . . whether such [local] laws should be understood as broadening constitutional liberty (by expanding the concept of "state action" to encompass certain public accommodations) or narrowing constitutional liberty (by contracting the associational rights of the private organization . . .).<sup>78</sup>

As Hills recognizes, this problem is not uniquely local. The same difficulty arises with respect to Congress's exercise of its Section 5 power. One might contend, as Hills does, that Congress has "resources that local governments typically lack, including staff counsel who specialize in constitutional issues, access to a broad array of legal and other experts, and the visibility of a prominent national forum."<sup>79</sup> But only the last of these "resources" directly relates to the kind of democratic capacity that Cooley and the advocates of popular constitutionalism say are critical to interpreting the basic charter. And whatever else one may say about San Francisco's action in marrying same-sex couples, the city hardly lacked the visibility of a prominent national forum.

Nonetheless, the claim that the status of cities as independent, democratic communities makes them legitimate constitutional interpreters is largely a defensive claim. Such an argument usefully complicates the familiar (and often reflexive) assumption that the lower down the governmental chain one goes, the less sound the constitutional interpretation will be. But it does not do more. There still are reasons to think that cities will often be no better constitutional interpreters than the state legislators whose laws they would disregard or challenge. Justice Marshall, in other words, may supply a reason why courts should defer to the constitutional judgments of local governments in the same way that they would defer to higher-level governments, but he does not explain why cities should be able to countermand the constitutional

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might be expected to have insight into the actual lived consequences of a ban on same-sex marriage well before the state as a whole would. See Brief for City of Santa Cruz as Amicus Curiae Supporting Respondents, *Lockyer v. City & County of San Francisco*, 95 P.3d 459 (Cal. 2004) (No. S122923).

78. Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 220 n.91 (2005).

79. *Id.*

judgments of those higher-level governments. The question thus remains: Why should cities be able to raise constitutional challenges to state statutes that they would otherwise be bound to enforce?

## 2. *Local Independence and Cities' Stake in Constitutional Enforcement*

The bare interest in ensuring state compliance with constitutional requirements would not seem to be a sufficient reason for permitting officials, local or otherwise, to disregard state statutes. The universal interest in ensuring compliance with the law, for example, does not confer standing in the federal courts on everyone who believes the Constitution has been violated.<sup>80</sup> The general assumption is that a party must be harmed in order to raise a constitutional claim. Not surprisingly, therefore, courts that reject local constitutional interpretive independence (including the California Supreme Court) often support their view by asserting that city officials have no “personal stake” in enforcing the Constitution.<sup>81</sup> Because the constitutional rights that city officials seek to enforce ultimately belong to private persons, these courts conclude, a city suffers no injury if it must wait for someone else to raise the constitutional objection.

But precisely because cities are independent governments, representing separate democratic communities, it seems wrong to characterize their interest in constitutional enforcement as simply a generalized interest in ensuring compliance with the law. Might not cities have a special interest in constitutional enforcement that ordinary citizens do not? If so, what is that interest?

One way of getting some purchase on that question is to consider the body of law that generally addresses a sovereign government’s standing to sue. The law of *parens patriae* standing indicates that a city does have an interest in enforcement, even absent a classic “private” injury, that goes beyond its generalized interest in ensuring that the law is obeyed. But the law of *parens*

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80. See *United States v. Richardson*, 418 U.S. 166, 173-74 (1974).

81. *Lockyer*, 95 P.3d at 484. In *Smith v. Indiana*, 191 U.S. 138 (1903), the Supreme Court held that a local auditor who raised a constitutional objection to a state law had no Article III standing because his interest was in protecting the local taxpayers, and thus the right was theirs rather than his. *Id.* at 149. The Supreme Court later held, in *Board of Education v. Allen*, 392 U.S. 236 (1968), that local school board members had standing to challenge a state law on establishment law grounds. The Court seemed to justify this conclusion, however, on the members’ personal interest in avoiding removal from office by the State Commissioner of Education rather than a more general local governmental interest in protecting the constitutional rights of local citizens. *Id.* at 241 n.5.



patriae standing also indicates that this interest can be conceptualized in two very distinct ways: The first emphasizes the governmental interest in acting as a guardian of the rights of its own residents, and the second stresses a government's interest in maintaining its own capacity to serve as a forum for democratic contestation and policymaking.

The Supreme Court cases that consider the issue of *parens patriae* standing typically do not involve suits by cities,<sup>82</sup> but they are still instructive. A government's standing to sue in *parens patriae*, the Court has said, may be justified by the government's legitimate interest in "the general well-being of its residents."<sup>83</sup> Governments need not show, therefore, that their own residents could not have brought the claim. These cases rest on the Court's recognition of the special "quasi-sovereign"<sup>84</sup> protective function that governments perform and of governments' legitimate interest in asserting that function in court.

Indeed, on that basis, the Court in *Alfred L. Snapp & Son, Inc. v. Puerto Rico* upheld Puerto Rico's standing to sue private companies in *parens patriae* for violating federal labor and immigration laws.<sup>85</sup> The claimed violations directly deprived fewer than 800 Puerto Rican residents of job opportunities, but the Court concluded that the alleged violations stigmatized the Puerto Rican workforce, a harm that the Commonwealth of Puerto Rico had a unique interest in preventing. As the Court explained:

Just as we have long recognized that a State's interests in the health and well-being of its residents extend beyond mere physical interests to economic and commercial interests, we recognize a similar state interest in securing residents from the harmful effects of discrimination. This Court has had too much experience with the political, social, and moral damage of discrimination not to recognize that a State has a substantial interest in assuring its residents that it will act to protect them from these evils.<sup>86</sup>

But while the Court has relied on the government's protective function in upholding *parens patriae* standing in suits charging private parties with

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82. See generally Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387 (1995) (describing the Supreme Court case law concerning *parens patriae* standing).

83. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 607 (1982).

84. *Id.* at 601; see also Woolhandler & Collins, *supra* note 82, at 455 (describing the scope of state standing under *parens patriae* cases).

85. *Alfred Snapp*, 458 U.S. at 609.

86. *Id.*

violating federal statutes, it has rejected *parens patriae* standing predicated on a similar governmental interest in state suits challenging the constitutionality of federal statutes. The federal government, the Court contends, is the “ultimate *parens patriae* of every American citizen.”<sup>87</sup> The state, in other words, cannot claim for itself an interest in protecting persons for whom the defendant is equally responsible. “It cannot be conceded,” the Court succinctly explained in *Massachusetts v. Mellon*, “that a State, as *parens patriae*, may institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof.”<sup>88</sup>

Thus, the Court requires a government to identify some additional interest beyond its protective function in contesting the constitutionality of a federal statute. One that suffices is the state’s interest in preserving its ability to exercise its own lawmaking powers.<sup>89</sup> The state’s peculiar interest in constitutional enforcement against a higher-level government, on this view, inheres in ensuring that its residents may decide through state government all matters that the constitutional structure is designed to ensure that they may so decide.

Although these *parens patriae* cases concern the standing of states rather than cities, their reasoning seems applicable to local governments. Cities, like higher-level governments, plainly have a “quasi-sovereign” interest in protecting the well-being of their residents. Moreover, a city would seem to have no less of an interest than its state in protecting its own lawmaking powers from central infringement. To be sure, the Supreme Court has broadly stated that cities have no constitutional rights that states are bound to respect,<sup>90</sup> but those decisions do not mean that cities have no protection from state power.<sup>91</sup> While every local government is subject to state control to a greater degree than any state is subject to federal control, no city is as thoroughly under the thumb of the state as a matter of state law as the state creature metaphor suggests.<sup>92</sup> Similarly, the Supreme Court’s sweeping

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87. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966).

88. 262 U.S. 447, 485 (1923).

89. See *Woolhandler & Collins*, *supra* note 82, at 467; see also *Katzenbach*, 383 U.S. at 324 (permitting the state to challenge the Voting Rights Act, a federal statute, on federalism grounds).

90. See *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

91. See *Barron*, *supra* note 2, at 506-09 (discussing these cases and their limits).

92. As a matter of state law, cities enjoy a number of legal protections from state statutory attempts to restrict local lawmaking discretion. See GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, *LOCAL GOVERNMENT LAW* 168-226 (4th ed. 2006); David J. Barron, A

embrace of the state creature metaphor does not mean that there are no federal law limits on states' ability to restrict city powers. Sometimes federal statutes "dissect" the state and confer rights and privileges directly on cities that states may not take away without running afoul of the Supremacy Clause.<sup>93</sup> In addition, some federal constitutional protections appear to contain a localizing component.<sup>94</sup>

Once one recognizes the basis of a city's interest in asserting constitutional claims in court, moreover, it is not that much greater a step to recognize the basis of a city's interest in refusing to enforce that statute in advance of a judicial decision. This is because, in many cases, the line between nonenforcement and judicial contestation will be thin. There are no doubt cases in which nonenforcement takes a form—perhaps by moving too far from the status quo—that precludes its legitimate exercise. The marrying of same-sex persons when prohibited by state statute may even be such a case, but there are certainly a number of readily imaginable circumstances in which nonenforcement may well be the least disruptive path, pending judicial resolution.<sup>95</sup>

While the Court's *parens patriae* cases suggest that the local interest in constitutional review rests on more than a desire to enforce compliance with higher law, they also reveal that this interest can be described in two very distinct ways. One way to see the practical import of the distinction between these ways is to consider how it would apply to the dispute in *Lockyer* itself. The first idea, namely that cities have an interest in protecting their residents' rights, would appear to support San Francisco's decision to decline to enforce

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*Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 398-400 (2001); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990).

93. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201 (1999).
94. An important line of federal equal protection doctrine, for example, may be understood as prohibiting states from restricting local efforts to combat private discrimination without at the same time mandating that cities undertake such efforts. See Barron, *supra* note 2, at 550; Schragger, *supra* note 6, at 147-48. In one case, *Washington v. Seattle School District No. 1*, 458 U.S. 457, 487 n.31 (1982), the Court even determined, without discussing the standing issue, that a local government was the prevailing party and was thus entitled to have the state pay its attorney fees.
95. It is noteworthy that, in these cases, the local agency's or official's refusal to obey an assertedly unconstitutional statute had the effect of preserving the status quo, pending judicial resolution of the matter. Indeed, it would seem strange if a city could challenge a state law prohibiting a local school assignment plan that is designed to increase racial integration only *after* reassigning all of its students. See *Seattle Sch. Dist.*, 458 U.S. at 474-75.

the state's same-sex marriage ban, while the second idea, namely that cities have an interest in preserving their own local policymaking discretion, would not.

As we have seen, the Court in *Alfred Snapp* seemed to suggest that some governments have a peculiar interest in protecting the rights of certain classes of persons. In *Alfred Snapp*, the overlap between the government of Puerto Rico and the class of Puerto Ricans was virtually definitional. This will not invariably be the case. For example, in addition to San Francisco's Mayor, the legislative body for Multnomah County, Oregon, also refused to comply with its state's same-sex marriage ban, and so, too, did the Mayor of New Paltz, New York. Did those local officials have a stake in the constitutional outcome akin to Puerto Rico's in protecting against discrimination on the basis of Puerto Rican ethnicity in *Alfred Snapp*? Is a longstanding local commitment to progressive politics enough to distinguish a city's interest in enforcement from a general interest in ensuring compliance with the law? But whatever the outer limits of the protective function idea may be, some cases will seem to be well within its bounds. It was hardly a coincidence that San Francisco was the first city to defy its state's same-sex marriage ban given its longstanding history of gay rights activism and its sizeable gay population. Like Puerto Rico, San Francisco could have contended that it had an interest in challenging the state's same-sex marriage ban as a consequence of its peculiar interest in "securing residents from the harmful effects of discrimination."<sup>96</sup> Why, then, conclude that its interest was, in fact, too generalized to justify a local constitutional challenge to state power?

By contrast, San Francisco could not have relied in *Lockyer* on its interest in protecting its own policymaking discretion. The city was not contending that the constitutional requirement of equality, in either the California or the Federal Constitution, mandated that marriage qualifications for same-sex couples be determined locally. Rather than attempting to free itself from a state command, the city sought to substitute one central command for another. Indeed, San Francisco's argument suggested that not even states have discretion over this marriage qualification, since the Federal Constitution's Equal Protection Clause binds states as well as cities.

Perhaps San Francisco could have pressed a constitutional claim regarding same-sex marriage that would have required marriage qualifications to be determined locally. The Supreme Court's decision in *Romer* invalidated on equal protection grounds a statewide measure that prohibited localities from adopting ordinances barring discrimination on the basis of sexual

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96. *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 609 (1982).

orientation.<sup>97</sup> Some, including myself, have read that decision to contain a localist dimension,<sup>98</sup> but, even so, *Romer* is not easily applied to this context. In *Romer*, there was no question that the city possessed general policymaking authority in the area,<sup>99</sup> and thus the subsequent state preemption seemed to lack a legitimate justification and to be driven by animus. Qualifications for marriage, by contrast, have long been singled out as a quintessentially non-local topic by those who have sought to define the scope of constitutional home-rule measures.<sup>100</sup> Thus, it is hard to contend that this restriction on local power is rooted in any animus toward a particular group. The state's interest in precluding local decision-making in this area seems to rest on quite legitimate concerns about inter-local variation. Not surprisingly, therefore, San Francisco did not assert a *Romer*-esque defense of its actions.

### III. DEFINING A CITY'S STAKE IN CONSTITUTIONAL ENFORCEMENT

Given the different consequences that would follow from these distinct conceptions of a city's stake in constitutional enforcement, how should one

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97. *Romer v. Evans*, 517 U.S. 620, 623 (1996).

98. See Barron, *supra* note 2, at 493-94; see also Lawrence Rosenthal, *Romer v. Evans as the Transformation of Local Government Law*, 31 URB. LAW. 257 (1999) (describing the holding in local constitutionalist terms); Schragger, *supra* note 6, at 167-71 (same). Indeed, a panel of the Sixth Circuit has read *Romer* similarly, concluding that, while a statewide measure prohibiting local efforts to ban discrimination on the basis of sexual orientation is unconstitutional, a similar citywide prohibition is valid. *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 300 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998); see also *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 518 U.S. 1001 (1996) (Scalia, J., dissenting from denial of certiorari) (distinguishing between the statewide ban and the citywide ban).

99. See *Romer*, 517 U.S. at 623-24 ("The impetus for the amendment . . . came in large part from ordinances that had been passed in various Colorado municipalities. . . . which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services.").

100. See, e.g., *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 471 (Cal. 2004) ("[T]here can be no question but that marriage is a matter of 'statewide concern' rather than a 'municipal affair,' and that state statutes dealing with marriage prevail over any conflicting local charter provision, ordinance, or practice.") (internal citations omitted); *Schaefer v. City & County of Denver*, 973 P.2d 717, 718 (Colo. Ct. App. 1998); *Baker v. Allen*, 66 S.E.2d 618, 627-28 (S.C. 1951); see also HOWARD LEE MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916) (identifying marriage as a state rather than local issue). Administration of marriage licensing by local officials seems to be a result of administrability and historical custom. See generally 2 GEORGE ELLIOTT HOWARD, *A HISTORY OF MATRIMONIAL INSTITUTIONS* 401-81 (1904) (describing local marriage licensing and recording customs in the colonies).

choose between them? Indeed, why should one choose at all? Why should cities not have a stake in enforcement as a result of their interest in both asserting their protective function *and* preserving their own policymaking authority from central preemption?

As a descriptive matter, current law provides more support for a city's interest in protecting its own policymaking discretion from state interference than it does for a city's interest in protecting the constitutional rights of its residents from state infringement. The law of *parens patriae* standing already makes that very distinction with respect to states' capacity to challenge federal statutes, and it is hard to see why cities should have a broader power to assert constitutional claims against their states than states should have against the federal government. But is there a normative reason to prefer that the city base its interpretive independence on its interest in preserving its discretion to make decisions for itself rather than on its interest in asserting its protective function? If so, is there a reason for imposing a limit on what counts as a legitimate city interest in constitutional enforcement that would reflect the law's respect for, rather than its hostility to, local power?

My own view is that such a normative reason does exist. The protective function view of local power is, in a deep sense, anti-localist. It does not seek to establish cities as places within which policies can be debated and revised at the local level. It instead conceives of cities as staging grounds for larger battles over the scope of state or federal constitutional rights protection. It thus encourages cities to see themselves as enclaves within which minority groups can congregate to press their own dissenting views of the constitutional limitations that should be placed on the policymaking discretion of all governments, including cities.<sup>101</sup> The city's function, in the protective function

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101. For a strong argument that takes a more favorable view of localism as a protection for out groups, see Gerken, *supra* note 4. See also Ankur J. Goel et al., Comment, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control and the Implications of Being Darker Than Brown*, 23 HARV. C.R.-C.L. L. REV. 415 (1988). For a critique of the idea that localism should foster enclavism, see Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 922-25 (1999). Ford's critique of connecting localism to the empowerment of out-groups, however, leads him to a very different view from the one set forth here. Ford contends that constitutional equality norms that have the effect of expanding local discretion should be disfavored because they will promote enclavism. But unless Ford means to suggest that all equality norms must be discovered at, and defined by, central governments, and in a manner that admits of no inter-local variation, then it is not clear why he should be concerned. The fact that a norm of equality may take a form that precludes central preemption of local attempts to stamp out discrimination does not mean that it *requires* that such political efforts be undertaken locally. By providing room for local experimentation, the equality norm may permit other localities to copy the ordinances that are adopted earlier by neighboring communities, and such independent local action may

model, is not to address the problems over which the city has policymaking power or to expand the scope of its legal authority so that it may decide how best to address local issues through the practice of local politics. Rather, the city's function is to call upon higher-level institutions to enforce norms that all localities then will be compelled to obey. There is certainly a place for such norms. Cities should not be free to do as they please. But it is problematic to encourage local institutions to conceive of themselves—as San Francisco plainly did in *Lockyer*—as mere subjects of central commands, even if such commands are of a constitutional dimension.

A key obstacle to effective decentralization, after all, is the lack of confidence that local officials have in their own capacity to address the problems that concern them. Too often, local officials come to believe that the creative assertion of local authority is not worth attempting because the general legal environment is hostile to the exercise of local power. In this way, local officials come to take an even narrower view of their actual legal powers than the law requires. They also come to believe that, given their own relative powerlessness, the real problems they face are in fact of state or national concern and thus that the only real solutions to them require the exercise of state or national power. The legal affirmation of the protective function notion, therefore, has a potentially corrosive effect on local power. It reinforces the all too common belief that local institutions are ultimately little more than claimants on the resources and authority of the higher-level governments that alone have the capacity to make a real difference in people's lives.

For this reason, the prevailing distinction in the law of *parens patriae* standing—which recognizes government standing when it is predicated on a defense of local policymaking discretion rather than on the protection of individual residents' rights—may be justified with reference to the familiar separation of powers construct that ambition should check ambition. The vertical distribution of power, for all of its problems, creates spheres of resistance to broadly held views and thus creates opportunities for social discovery that might otherwise be foreclosed. Justice Brandeis's famous description of subnational governments as laboratories of democracy, through which new ideas can be tested and proven so that they may ultimately be appropriated by higher levels of government, well captures the point.<sup>102</sup> But the experimentalist idea assumes that local forums will remain open for local political contests to occur rather than that each locality will be vying to compel

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even lead to the subsequent statewide or nationwide political passage of such measures. In other words, the exercise of local power may be one important route through which a universal norm of the kind that Ford favors comes to be recognized.

102. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

preemptive central action of a kind that they favor. For that reason, 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. By permitting cities to challenge their states on constitutional grounds only when they seek to preserve their own policymaking powers, the law would affirm the stake that all of us have in a constitutional structure that preserves room for the vigorous practice of local politics. And, in doing so, it would, in a modest way, encourage cities to remember to act locally.

To be sure, recognition of a city's distinct interest in preserving local lawmaking discretion probably would not have aided San Francisco in *Lockyer*. But a city foreclosed from resorting to a constitutional claim that it must marry all same-sex couples because higher law demands that it do so might also be encouraged to think creatively about how it could use its own existing local powers to protect same-sex couples. Some cities, including San Francisco, did just that through the passage of domestic partnership ordinances and the like. In defending their right to adopt such measures, these cities have argued for a narrow view of the preemptive effect of state marriage law precisely in order to defend their local policymaking discretion.<sup>103</sup> Such local efforts to create a space for local decision-making—and to restrict the ambit of state control over same-sex relationships—stand in stark contrast to San Francisco's attempt to expand the scope of the state's control over marriage, even though, as a matter of substance, all of these efforts share the substantive goal of expanding the rights of same-sex couples. Indeed, the current state and national movement for the recognition of same sex marriage is as strong as it is in significant part because local communities, using their own local lawmaking powers in a creative and aggressive way, had laid the groundwork by establishing precedents for the legal recognition of same-sex unions.

In addition to encouraging cities to rely on their own lawmaking powers to bring about change, this way of defining cities' interest in constitutional enforcement would also have more direct legal consequences. It would mean, most obviously, that cities could raise constitutional defenses in mandamus

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103. See *City of Atlanta v. McKinney*, 454 S.E.2d 517, 523-25 (Ga. 1995) (Carley, J., concurring in part and dissenting in part) (concluding that a local domestic partner registry ordinance was preempted by state marriage laws); *Arlington County v. White*, 528 S.E.2d 706, 709-10 (Va. 2000) (Hassell, J., dissenting in part and concurring in judgment) (arguing that a county lacked the authority to provide benefits to the same-sex partner of a municipal employee because the county's recognition of a same-sex union was impliedly preempted by state marriage law).



whenever they did so in good faith to preserve their own lawmaking authority, a proposition that the *Lockyer* court did not clearly endorse and that other state courts—which are equally wary of nonjudicial constitutional review—have been reluctant to affirm. This expansion of local power would have salutary practical consequences. It would give cities a tool for precipitating judicial determinations of the scope of the constitutional protections they enjoy, and thus it would provide them with a useful means of framing legal challenges in terms that would make the protection of local policymaking discretion the key entitlement at stake in the eyes of the court. The local exercise of such authority should, at least at the margins, increase cities' ability to obtain final judicial rulings that protect local policymaking discretion from central preemption.

The recognition of a constitutional interest in protecting local policymaking discretion would also expand cities' ability to obtain standing to bring suits that seek legal redress from central encroachment. Under this approach, for example, federal courts would have no basis for ruling, as the Sixth and Ninth Circuits have, that cities have no standing in any circumstances to sue their states in federal court for violating federal constitutional requirements.<sup>104</sup> Moreover, if this view of the city's interest in constitutional enforcement were to take hold, then even federal courts that take a more liberal view of the scope of the city's standing to raise federal constitutional challenges to state law would still seem too chary. The Fifth and Tenth Circuits, for example, have limited cities' standing to cases that involve claims under the Supremacy Clause and other structural restrictions on state power, such as the Dormant Commerce Clause.<sup>105</sup> But there is no reason to confine standing to suits predicated on the enforcement of such purely structural provisions. As *Romer* suggests, even individual rights provisions like the Equal Protection Clause may bar state attempts to preempt local power in some circumstances. Other precedents indicate that the First Amendment may similarly protect cities from

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104. See Brian P. Keenan, Note, *Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law?*, 103 MICH. L. REV. 1899, 1903 (2005).

105. See *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 628-30 (10th Cir. 1998) (holding both that a political subdivision has standing to sue the state under the Supremacy Clause and distinguishing standing under the Supremacy Clause from a general rule denying standing for political subdivisions suing their creator states); *Rogers v. Brockett*, 588 F.2d 1057 (5th Cir. 1979) (holding that a political subdivision may bring a claim against the state when the claim is based on a controlling federal law and when the political subdivision is a beneficiary of that law). *But see City of Moore v. Atchison, Topeka & Santa Fe Ry. Co.*, 699 F.2d 507, 511-12 (10th Cir. 1983) (recognizing that political subdivisions lack standing to challenge a state statute on equal protection grounds).

state preemption in some instances.<sup>106</sup> Local claims to enforce these constitutional limitations on central power, even though they have an individual-rights dimension, should be treated no less favorably than the purely structural protections these courts already permit cities to sue to enforce.

Moreover, such a change in the law would remove barriers that cities face in seeking access not only to *federal* courts but also to state courts. For example, the New York Court of Appeals, in holding that the City of New York had no legal capacity to bring a constitutional challenge against the state's system of school financing, endorsed the "traditional principle throughout the United States . . . that municipalities and other local governmental corporate entities and their officers lack the legal capacity to mount constitutional challenges to acts of the State and State legislation."<sup>107</sup> The court's opinion identified some exceptions that mitigate the force of this conclusion,<sup>108</sup> and the dissent even argued that the city's actions fell within one of these exceptions because, without adequate financing, the city would be liable for failing to provide an adequate education as required by the state constitution.<sup>109</sup> But the majority rejected that contention on the ground that the city could not be deemed liable for the state's inadequate funding and thus had no reason to fear being sued.<sup>110</sup> This debate over the applicability of the exception for cases in which a municipality risks liability, however, misses the larger point. Fundamentally, New York City was arguing that the state had unconstitutionally infringed its constitutionally protected interest in assuming responsibility for providing an adequate education to its residents. A constitutional claim of this kind certainly implicates a city's interest in protecting the exercise of its own lawmaking powers. The whole point of the suit was that the city would have more power

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106. *City of Boston v. Anderson*, 439 U.S. 1389 (1978) (Brennan, J., in chambers) (granting the city's application for a stay of the state court ruling barring the use of municipal funds to support a statewide referendum concerning changes in the property tax system).

107. *City of New York v. State*, 86 N.Y.2d 289, 289 (1995).

108. It held, for example, that a city does have the legal capacity to sue if there is an express state statute authorizing the suit; if state legislation impinges on the city's "proprietary interest in a specific fund of moneys"; if the city's claim is that the state has violated the state constitutional guarantee of home rule; or if the claim is that the state has forced compliance with a state statute that forces the city "to violate a constitutional proscription." *Id.* at 291-92 (citations omitted).

109. *Id.* at 296 (Ciparick, J., dissenting).

110. *Id.* at 295 ("Surely, it cannot be persuasively argued that the City officials in question should be held accountable either under the Equal Protection Clause or the State Constitution's public Education Article by reason of the alleged State underfunding of the New York City school system over which they have absolutely no control.").

to provide a vital service to its residents if a different state law system for financing local education was in place. Such a claim goes to the heart of the question of how much power cities should be able to exercise at the local level. For that reason, it should suffice as a predicate for a local constitutional challenge.

Expanding cities' standing to bring such court challenges would do more than enable cities to be included in the caption on case filings. Cities are often fiscally strapped, but they may possess greater resources than individual private plaintiffs could draw upon if they alone were permitted to bring suit. The protection of a city's constitutionally vested policymaking powers should not be left solely to private individuals who may lack the capacity or incentive to defend them vigorously. In addition, the presence of a local governmental plaintiff can help to reframe the constitutional issue from one in which judges are being asked to invalidate the will of the majority to one in which they are being asked to protect a local democratic polity's freedom to make decisions for itself. Thus, the number of judicial rulings that enforce constitutional limitations on the preemption of local policymaking discretion may be expected to increase as the scope of cities' standing to sue their states on constitutional grounds expands.

## **CONCLUSION**

By altering state and federal law along the lines suggested here, a city's authority to engage in constitutional review would be expanded, but it would not be unlimited. A good faith local judgment that a state statute violated either the state or the Federal Constitution would not, in and of itself, provide a basis for a city either to disregard it or to challenge it in court. The limits that would constrain local constitutional enforcement, however, would not rest on the conventional judgment that cities are either constitutionally invisible or dangerous. They would instead reflect the law's respect for the constitutional importance of protecting the exercise of local power from unwarranted central efforts to stifle it. This way of understanding cities' stake in constitutional enforcement highlights the extent to which constitutional law (both state and federal) creates spaces within which new, constitutionally optional policies may be tried out locally so that they might migrate in surprising ways.

There is only one state constitution that binds any particular city, and there is only one Federal Constitution that binds all of them. But these constitutions sometimes limit central power in order to promote discretion at the lowest levels of government. In consequence, a city should be entitled to assert its status as an independent, democratic polity that is capable of, and interested in, interpreting the state constitution or the Federal Constitution to enforce limits

on central power. In this way, cities would be encouraged to see their constitutional role as relating to the practice of local politics itself rather than to the submission to state or national constitutional commands that are intended ultimately to restrict their powers.