

COMMENT

The Federalism Challenges of Impact Litigation by State and Local Government Actors

In the October Term 2001, the Ohio Attorney General's Office filed thirty-six briefs in the U.S. Supreme Court,¹ thereby participating in more than a third of that Term's cases. Of those, thirty-four were amicus briefs.² While striking, this high level of involvement by a state attorney general's office in constitutional litigation to which the state is not a party is no longer an aberration. Rather, it is part of a growing trend among state and local government actors of taking a more active role in constitutional and Supreme Court litigation.³ This Comment examines the important implications for federalism of the increased prominence of these government attorneys in constitutional litigation. More specifically, it illustrates a tension between the adoption of an affirmative litigation model by state and local government actors and the democracy-enhancing values fostered by federalism. The Comment concludes by proposing some possible corrective measures.

The argument proceeds in four Parts. Part I examines the recent rise to prominence of a set of state and local government litigators—namely, state attorneys general, state solicitors general, and city attorneys. Part II establishes a federalism framework through which to evaluate the trend identified in Part I, grouping the values advanced by federalism loosely into the diversity theory and the self-governance theory. Under the diversity theory, the existence of different state practices has two distinct virtues: it both fosters “state laboratories” for the testing of innovative policy proposals and allows for the

1. David M. Gormley, *State Solicitor: An Appellate Lawyer's Dream*, 10 OHIO ST. B. ASS'N SEC. NEWSLETTER 9, 10 (2003).

2. Ohio filed a brief as a party only in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), and *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002).

3. See *infra* Part I.

tailoring of policies to citizens' varying tastes and situations. Under the self-governance theory, the importance of state and local government is preserved in order to encourage democratic participation in governance by the citizenry.

Part III demonstrates the tension between some forms of affirmative litigation undertaken by state and local attorneys and the values promoted by federalism under these two theories. This examination will proceed through two case studies. The first discusses the amicus brief filed by the Attorney General of Texas, joined by twenty-nine other state attorneys general, in *District of Columbia v. Heller*,⁴ the case reviewing the District of Columbia's handgun ban. The second reviews the California Attorney General and San Francisco City Attorney's recently filed suit to invalidate Proposition 8,⁵ the ballot initiative that amended the state constitution of California to prohibit gay and lesbian marriage. Each of these examples involves state action that this Comment will argue conflicts with the purposes of federalism outlined in Part II: Texas's amicus brief in *Heller* represents a use of state power to impose uniformity on state laws that is in tension with the diversity theory, while the San Francisco City Attorney's suit to invalidate a state ballot initiative is at odds with the justifications for federalism put forth by the self-governance theory.

Part IV briefly proposes some potential reforms. Rather than patterning their offices after public interest law firms, this Comment proposes that state actors embrace the model of federal prosecutors in order to avoid partisan capture. First, they should establish a cadre of career appellate lawyers likely to span several administrations. Second, they should impose upon themselves—or state legislators should impose upon them—the discipline of primarily accepting cases through agency referral.

I. THE INCREASED PROMINENCE OF STATE AND LOCAL ACTORS IN FEDERAL CONSTITUTIONAL LITIGATION

Three classes of state and local government attorneys have assumed a newly prominent role in affirmative constitutional litigation in recent years. First, since the mid-1970s, state attorneys general have filed increasing numbers of amicus briefs in the U.S. Supreme Court under the aegis of the National Association of Attorneys General.⁶ Second, in the past ten years, a

4. 128 S. Ct. 2783 (2008).

5. CAL. CONST. art. I, § 7.5.

6. Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298 (1987).

dozen states have established the office of state solicitor general,⁷ the occupant of which is charged with state appeals in front of the Supreme Court and with other critical appeals.⁸ Finally, a new generation of city attorneys, exemplified by the San Francisco Office of the City Attorney, has become increasingly involved in constitutional and Supreme Court litigation.⁹

Indeed, in recent years, states have appeared as amici in “more than a third of the cases that the Supreme Court considers on the merits.”¹⁰ Concomitantly, each of these institutions has begun to recruit top appellate legal talent in increasing numbers,¹¹ with many seeing it as “a new road to professional advancement—and face time at the U.S. Supreme Court.”¹²

This newly prominent role for state actors did not arise spontaneously. In the case of state attorneys general, for example, this increased interest in constitutional and Supreme Court litigation resulted from a concerted effort on the part of Chief Justice Warren Burger to increase the prowess of state lawyering before the Court in the wake of a series of state defeats in federalism cases to which he had dissented.¹³ The position of state solicitor general, in turn, has been created by attorneys general to “improve the quality of advocacy” at the appellate level and to “promote the orderly development of law.”¹⁴

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7. Peter Page, *State Solicitor General Appointments Open Doors for Appellate Practitioners*, NAT'L L.J., Aug. 18, 2008, <http://www.bradleyarant.com/pdf/00508080008Bradley.pdf>. Indeed, between 1987 and 2001, “the number of states with solicitors [grew] from eight to twenty-four.” James R. Layton, *The Evolving Role of the State Solicitor: Toward the Federal Model?*, 3 J. APP. PRAC. & PROCESS 533, 534 (2001).
 8. See, e.g., Attorney General of Texas, Office of Solicitor General (Apr. 7, 2009), http://www.oag.state.tx.us/agency/solicitor_general.shtml (stating that the Texas Office of Solicitor General was “[e]stablished in January 1999” to “handle[] those appeals determined to be most significant to Texas and to the development of federal and state jurisprudence”).
 9. See, e.g., Press Release, S.F. Office of the City Att’y, Herrera’s U.S. Supreme Court Brief Blasts Federal Abortion Ban as an ‘Episode of Congressional Defiance’ (Sept. 20, 2006), http://www.sfgov.org/site/city_attorney_page.asp?id=99160 (describing the San Francisco City Attorney’s role as intervenor-respondent in a challenge to the congressional Partial Birth Abortion Ban Act in the Supreme Court).
 10. Layton, *supra* note 7, at 552.
 11. See, e.g., Page, *supra* note 7.
 12. Tony Mauro, *Stating Their Case*, AM. LAW., Aug. 18, 2003, at 63, 63, available at <http://www.law.com/jsp/article.jsp?id=1059980472625>.
 13. Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 752 (2008). The first of these defeats was *Fay v. Noia*, 372 U.S. 391 (1963).
 14. Layton, *supra* note 7, at 542, 552.

II. TWO THEORIES OF FEDERALISM

Under most theories of federalism, the existence of strong state actors is a prerequisite to the health of the federal system.¹⁵ This Comment argues, however, that state actors can undermine the “distinction between what is truly national and what is truly local”¹⁶ as surely as can federal actors, with serious repercussions for the values promoted by the federal system.

There are many justifications for federalism.¹⁷ The most common can be grouped loosely into what this Comment will call the diversity theory and the self-governance theory. As Part III explains, the current model of litigation undertaken by state and local governmental actors has the potential to come into conflict with federalism norms under both theories.

Under the diversity theory, federalism’s central benefit is in allowing a thousand flowers to bloom. In areas where there is no unified federal policy or legislation, states in a federal system are free to legislate and make policy independently. This state freedom has the virtue of allowing creative policy proposals to be tested. In Justice Brandeis’s words, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁸ Further, state freedom allows policies to be tailored to the individual preferences and situations of citizens in different locales. “[L]ocal laws can be adapted to local conditions and local tastes, while

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15. This is true of those theories championing states rights that stress the degree to which “Congress’ authority is limited to those powers enumerated in the Constitution.” *United States v. Morrison*, 529 U.S. 598, 610 (2000). Alexander Aleinikoff and Robert Cover’s “dialectical federalism,” under which federalism’s value derives from the dynamic interactions between state and federal actors, also takes this view. Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).
 16. *United States v. Lopez*, 514 U.S. 549, 567-68 (1995).
 17. See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 107-40 (1995); Heather K. Gerken & Jessica Bulman-Pozen, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009) (“As with many vaguely defined constitutional mandates, we need a set of mediating principles to translate ‘Our Federalism’ into manageable legal doctrine.”).
 18. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *FERC v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part) (“[T]he 50 States serve as laboratories for the development of new social, economic, and political ideas.”); Akhil Reed Amar, *Five Views of Federalism: “Converse-1983 in Context,”* 47 VAND. L. REV. 1229, 1233-36 (1994) (describing the “laboratory” theory, under which states are “[e]xperimenters” and “[e]ducators”).

a national government must take a uniform—and hence less desirable—approach.”¹⁹

Under the self-governance theory, federalism is lauded for encouraging democratic participation in governance through the existence and growth of strong state political institutions. This view is best expressed by Justice O’Connor in her concurring opinion in *FERC v. Mississippi*: “In addition to promoting experimentation, federalism enhances the opportunity of all citizens to participate in representative government If we want to preserve the ability of citizens to learn democratic processes through participation in local government, citizens must retain the power to govern, not merely administer, their local problems.”²⁰ Endorsing this view, Akhil Amar describes state and local government as “offer[ing] citizens clinical seminars in democratic self-government.”²¹ On this account, federalism’s virtue is in allowing greater citizen participation than would a single centralized government.

III. IN TENSION WITH THE AIMS OF FEDERALISM: TWO CASE STUDIES

As the following case studies demonstrate, aggressive affirmative litigation undertaken by state and local governmental actors has the potential to come into conflict with the justifications of both the diversity theory and the self-governance theory. To elucidate this point, this Comment focuses on Texas’s participation in the *District of Columbia v. Heller* and the California Attorney General and San Francisco City Attorney’s response to the passage of Proposition 8.

A. *States as Amici Curiae* in *District of Columbia v. Heller*

In 2008, the Supreme Court established that the Second Amendment endows citizens with an individual right to bear arms.²² It was aided in its analysis by an amicus brief filed by the Attorney General and Solicitor General

19. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (reviewing RAUL BERGER, *FEDERALISM: THE FOUNDERS’ DESIGN* (1987)).

20. 456 U.S. at 789-90 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part).

21. Amar, *supra* note 18, at 1234.

22. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008).

of Texas on behalf of thirty states,²³ arguing that the District of Columbia's "firearms regulations are unconstitutional."²⁴ While the amici's requisite statement of interest focused most heavily on potential abridgement of their own citizens' Second Amendment rights,²⁵ the states' actual interest was to bring other states into conformity with their own practices—an aim in direct conflict with the diversity theory of federalism.

The amici's statement represented their interest in the case to be its "potential impact on their citizens' [Second Amendment] constitutional rights."²⁶ The states continued, "The individual right to keep and bear arms is protected by the United States Constitution and the constitutions of forty-four States. Given the significance of this fundamental right, the States have a substantial interest in ensuring that the Second Amendment is accorded its proper scope."²⁷ The implication is that the states do not wish to be forced to abridge or narrow the right to bear arms enshrined in their constitutions. This argument, however, lacks force; states are in no way forbidden from granting their citizens a right *more expansive* than the right granted to them by the federal government.²⁸ Even if *Heller* had held that the federal government grants only a collective right to bear arms, that holding would merely have affirmed the federal government's power to impose regulations on territories under its control, like the District of Columbia and Guam.²⁹ As a matter falling under the state's police power, Texans' individual right to bear arms would still be firmly entrenched in their state constitution.³⁰

23. Brief of the States of Texas et al. as Amici Curiae in Support of Respondent, *Heller*, 128 S. Ct. 2783 (No. 07-920) [hereinafter *Heller* Brief of the States].

24. *Id.* at iii.

25. *Id.* at 1.

26. *Id.*

27. *Id.*

28. In the eminent domain context, for example, see National Conference of State Legislatures, Eminent Domain 2006 State Legislation (Nov. 2007), <http://www.ncsl.org/programs/natres/emindomainlego6.htm> (describing the passage of legislation in twenty-eight states circumscribing the government's ability to exercise its eminent domain power in the wake of *Kelo v. City of New London*, 545 U.S. 469 (2005)).

29. See, e.g., Ilya Somin, *Locked Liberties*, LEGAL TIMES, July 28, 2008, at 42, 43 ("*Heller* applies only to the District of Columbia and other territories controlled by the federal government."). Even a potential companion case incorporating a narrow reading of the Second Amendment against the states would only permit Texas and other states to regulate firearms, not force them to do so.

30. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (holding that federal regulation of guns in a school zone under the Commerce Clause would give Congress "a general police power of the sort retained by the States"). Indeed, the majority's reasoning in *Lopez* is broad

The real motive behind the states' filing of an amicus brief followed:

The *amici* States believe that the court of appeals's decision—that the Second Amendment protects an individual right to keep and bear arms—is correct and fully consistent with the Framers' intent. Moreover, the District of Columbia's categorical gun ban is markedly out of step with the judgment of the legislatures of the fifty States, all of which protect the right of private citizens to own handguns.³¹

That is, the states in question—largely Western and Southern states³²—disagreed with the interpretation of the Second Amendment underlying the District of Columbia's law both as a matter of constitutional interpretation and of policy. To prevent the District's erroneous interpretation from being codified by the Court and given force to allow other states to regulate firearms, the states filed an amicus brief to try to influence the Court's outcome.

The states' desire to see their interpretation of the Second Amendment adopted by the Court and to strike down firearm regulations in other states should give us pause. Indeed, the first of those desires highlights the potential problem of capture by a special interest group.³³ While there is no evidence that such capture occurred here, it would generally be possible for an interest group, having installed one of its members as state solicitor general, to use that

enough to dispel any theory that the Texas amicus filing stemmed from worries about potential preemption of Texas firearm regulation as a result of an adverse decision in *Heller*. The *Lopez* majority criticized the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q) (2000), for being “a criminal statute that by its terms has nothing to do with ‘commerce,’” *Lopez*, 514 U.S. at 561, noting that “[u]nder our federal system, the ‘States possess primary authority for defining and enforcing the criminal law,’” *id.* at 561 n.3. (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993)). The Court then criticized the statute for “displac[ing] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question.” *Id.* Such reasoning would apply a fortiori in cases where a state had explicitly protected the right to bear arms and federal preemption of the police power was also at issue.

31. *Heller* Brief of the States, *supra* note 23, at 1.

32. *Id.*

33. This idea of capture by a special interest group should be distinguished from “capture” by a political party or governing majority. As elected officials, state attorneys general are intrinsically political; it is a feature, rather than a bug, that the Texas Attorney General is generally a Republican and that the New York Attorney General is generally a Democrat. In such cases, the political actions of these actors have a certain democratic legitimacy. This is different in kind, however, from the potential capture of the office by an Attorney General acting as an agent of, say, the National Rifle Association or NARAL Pro-Choice America, who did not gain office as a result—or at least, not wholly as a result—of his affiliation with such a group.

position to circumvent normal rules and understandings governing the filing of amicus briefs. Unlike private parties, states are granted automatic leave to file amicus briefs in any case before the Supreme Court by the Federal Rules of Appellate Procedure.³⁴ While the Rules are rarely an obstruction to the filing of an amicus brief—most sophisticated parties grant blanket consent to anyone wishing to file an amicus brief—their purpose is to ensure that only those whose interests are genuinely at stake participate in litigation.³⁵ Capture of the office of state solicitor general or state attorney general could allow for automatic filing of amicus briefs by ideological parties whose briefs might otherwise be screened out by the parties. More seriously, it would allow interest groups to throw the full weight of their state's name behind a brief written to advance their ideological agenda.

With respect to the second desire—seeking to strike down the District of Columbia's gun ban—the tension with the diversity theory is clear. The states were concerned not with their own regulations, but with the regulations of other states and territories, which they sought to bring into conformity with their own regulations. The freedom granted to the states by the federal system was thus used to undermine a benefit of the federal system, which depends on a diversity of policies and regulations.

B. The San Francisco, Los Angeles, and Santa Clara County Challenge to Proposition 8

In 2008, the California Supreme Court struck down state laws limiting marriage to opposite-sex couples as a violation of the state's constitution.³⁶ In response, Californians voted later that year to ratify Proposition 8, overturning the decision of the Supreme Court and amending the state constitution³⁷ so that “[o]nly marriage between a man and a woman is valid or recognized in California.”³⁸

34. FED. R. APP. P. 29(a) (“The United States or an officer or agency thereof, or by a State, Territory or Commonwealth may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that the parties have consented to its filing.”).

35. See FED. R. APP. P. 29 advisory committee's note (Committee Notes on Rules—1998 Amendment).

36. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

37. CAL. SEC. OF STATE DEBRA BOWEN, STATEMENT OF VOTE, NOVEMBER 4, 2008, GENERAL ELECTION 62 (2008) [hereinafter STATEMENT OF VOTE], available at http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

38. CAL. CONST. art. I, § 7.5.

On November 5, 2008—the very next day—the City Attorneys of San Francisco and Los Angeles, as well as the Santa Clara County Counsel, filed a suit “for a writ of mandate with the California Supreme Court to invalidate Proposition 8,”³⁹ arguing that the proposed change to the Constitution would “devastate[] the principle of equal protection.”⁴⁰ They were joined a week later by the Los Angeles County Board of Supervisors,⁴¹ then by several other counties and cities,⁴² and eventually by the Attorney General of California.⁴³ The Supreme Court of California consolidated their case with those filed on behalf of three gay and lesbian couples by the American Civil Liberties Union, the National Center for Lesbian Rights, and Lambda Legal.⁴⁴

As of the writing of this Comment, the outcome of the suit is uncertain.⁴⁵ Regardless of the outcome, however, the suit’s filing comes into tension with federalism’s self-governance values in three ways. First, the suit seeks to use courts to undo the results of a democratic process that was, by all accounts, healthy—that is, a process that did not involve significant allegations of voter fraud, drew large numbers of voters, and involved high rates of political

39. Press Release, Office of the S.F. City Att’y, Herrera Joined by Los Angeles, Santa Clara Counterparts in Suing To Invalidate Prop. 8 (Nov. 5, 2008), <http://pdfserver.amlaw.com/ca/prop81106.pdf>.

40. *Id.*

41. Molly Hennessey-Fiske, *Emotional Board of Supervisors Backs Prop 8. Challenge*, L.A. NOW, Nov. 12, 2008, <http://latimesblogs.latimes.com/lanow/2008/11/the-los-angeles.html>.

42. These parties include the counties of Alameda, Marin, San Mateo, and Santa Cruz, as well as the cities of Fremont, Laguna Beach, Oakland, San Diego, Santa Cruz, Santa Monica, and Sebastopol. Answer to Second Amended Petition for Writ of Mandate; Return to Order to Show Cause, City & County of S.F. v. Horton, No. S168078 (Cal. Dec. 19, 2008), available at <http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/s168078-answer-amend-petition.pdf>.

43. Justin Ewers, *California Attorney General Jerry Brown Asks Court To Overturn Prop 8*, U.S. NEWS & WORLD REP., Dec. 22, 2008, <http://www.usnews.com/articles/news/politics/2008/12/22/california-attorney-general-jerry-brown-asks-court-to-overturn-prop-8.html>.

44. Maura Dolan & Tami Abdollah, *Gay Rights Supporters File 3 Lawsuits Against Prop 8*, L.A. TIMES, Nov. 6, 2008, at A23.

45. Oral argument was heard March 5, 2009. See Press Release, Judicial Council of Cal., Supreme Court To Hear Oral Argument in Prop. 8 Cases on March 5, 2009 (Feb. 3, 2009), <http://www.courtinfo.ca.gov/presscenter/newsreleases/NR08-09.pdf>. An opinion is due to be rendered within ninety days of oral argument. California Courts, Proposition 8 Cases, <http://www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm#newsreleases> (last visited May 2, 2009).

participation in the form of activism and campaigning on both sides.⁴⁶ Second, it seeks to move the sphere of debate about a fundamental issue from the level of the political to the level of the legal—that is, it encourages citizens to debate publicly not the important question of the nature of marriage, but rather the more technical and workmanlike question of the interaction between the state constitution’s equal protection clause and the constitutional amendment process. It is these questions—and not questions about morality, politics, and their intersection—that will yield legal fruit. Finally, it moves the locus of decisionmaking from 13.7 million Californians⁴⁷ to the cadre of government and public interest lawyers representing each side.

Both of these aspects of the city attorneys’ impact litigation strategy put them in tension with the self-governance theory of federalism. The creation and passage of a ballot initiative to amend the state constitution is a quintessential act of democratic self-governance at the state level.⁴⁸ For state actors to use affirmative litigation to attack a ballot initiative undermines democratic self-governance by replacing the democratic will of the people with the judgment of a small set of government actors.⁴⁹ Thus, such affirmative litigation uses state actors’ sphere of freedom to undermine the states’ role as democratic seminars. Moreover, it has the potential to undermine the ballot

46. Lisa Leff, *California Voters Approve Gay-Marriage Ban*, ABC NEWS, Nov. 5, 2008, <http://abcnews.go.com/Politics/wireStory?id=6185755>.

47. Statement of Vote, *supra* note 37.

48. Ballot initiatives, of course, have come under criticism as being subject to manipulation. For a vivid account, see Arthur Lupia, *Dumber than Chimps? An Assessment of Direct Democracy Voters*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 66 (Larry J. Sabato, Howard R. Ernst & Bruce A. Larson eds., 2001); see also K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045, 1048-49 (2007) (citing ballot initiatives as “susceptible to lobbyist influence,” stating that “[m]oney may also play at least as corrosive a role in initiative campaigns as it does in representative elections,” and emphasizing that “[p]artisan politics also have become a part of the initiative experience”). Nonetheless, neither the democratic status of the ballot initiative nor its effect on participation is disputed. Rather, “[r]esearch shows that initiative propositions increase turnout.” DuVivier, *supra*, at 1049. Indeed, “forty-nine of the fifty states [now] require that amendments to [their] constitutions be submitted to a statewide vote.” *New Progressive Party v. Colon*, 779 F. Supp. 646, 659 (D.P.R. 1991). The initiative has been approvingly called the “most democratic of procedures.” *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting).

49. This is not to deny the important role affirmative litigation plays in policing the procedural legitimacy of ballot measures. Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (arguing for the importance of judges in enforcing procedural rights). Nor is it to say that democratic self-governance is the highest good. In many situations, other higher values should unquestionably be advanced—potentially through affirmative litigation—at the cost of some degree of democratic self-governance.

initiative system more broadly. Citizens contemplating the massive efforts necessary to pass a successful ballot initiative may well refrain from future initiatives that a small group of powerful government lawyers has the power to overturn.

IV. CONFORMING LITIGATION BY STATE AND LOCAL GOVERNMENT ACTORS TO FEDERALISM PRINCIPLES: THE FEDERAL PROSECUTOR MODEL

Many—if not most—offices of state solicitors general model themselves explicitly on their federal counterpart, the Office of the U.S. Solicitor General.⁵⁰ In addition, there are many similarities between state attorneys general, solicitors general, and city attorneys and their federal counterparts in the Department of Justice (DOJ). For example, state attorneys general, like prosecutors, enjoy a broad range of discretion in investigating and charging crimes.⁵¹ Like prosecutors, whose client is justice, the primary role of state attorneys general is “to represent the public interest and not simply ‘the machinery of government.’”⁵²

Despite their resemblance to DOJ attorneys, however, the state and local government attorneys’ litigation strategies and focus differ markedly from the federal government attorneys to whom they are analogous. The Civil Rights Bureau in the Office of the New York State Attorney General, for example, “conducts affirmative litigation, investigations, and policy initiatives in the areas of reproductive rights, disability rights, police misconduct, and discrimination in employment, mortgage lending, housing, public accommodations, and other sectors.”⁵³ In addition, the Bureau

50. See, e.g., Attorney General of Texas, *supra* note 8 (“[T]he Texas OSG is expressly modeled after the Office of the Solicitor General at the U.S. Department of Justice.”).

51. William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 *YALE L.J.* 2446, 2452 (2006) (“Many state attorneys general have significant authority to investigate both governmental and non-governmental misconduct. Attorneys general also play an important role in criminal law enforcement, with some state offices having direct prosecutorial powers or supervisory authority over law enforcement officers.”).

52. *Id.* at 2456.

53. Symposium, *A Conversation on Federalism and the States: The Balancing Act of Devolution*, 64 *ALB. L. REV.* 1091, 1127 (2001) (detailing a biography of Civil Rights Bureau Chief Andrew G. Celli, Jr.).

employs an ‘impact litigation’ model to court cases, drafts and proposes civil rights-related legislation for consideration by the State Legislature, releases reports, and facilitates educational seminars on civil rights controversies around the state . . . [and] assists the New York State Solicitor General in the preparation and submission of amicus briefs in civil rights cases of interest to the State.⁵⁴

In short, many of these state and local government actors have adopted the model of public interest law firms in conducting impact litigation and submitting amicus briefs to the Supreme Court with an eye toward changing the course of law.⁵⁵

By contrast, many sections of the DOJ commence affirmative civil actions—usually in the form of civil prosecutions and enforcement actions—only at the behest of an executive agency.⁵⁶ Even the U.S. Solicitor General, who among all government advocates has the strongest claim to be charged with independently interpreting the Constitution—or, rather, interpreting the Constitution in accordance with the executive branch’s views, as opposed to the judicial branch’s views⁵⁷—has “rarely challenged Supreme Court precedent,” focusing instead on defending government policies by reference to existing precedent.⁵⁸

Adopting a DOJ-like model of litigation would help state and local government attorneys to better serve federalism values that are sometimes slighted by the pursuit of impact and affirmative litigation. This can be accomplished in two ways: first, through institutional changes designed to

54. *Id.*

55. The federalism implications of adopting this affirmative litigation model are only troubling, however, in the context of litigation in federal courts or on federal questions. That some states choose to employ a state solicitor with an active agenda of impact litigation on the purely *state* level—without any federal externalities—is merely an example of the diversity of governance and policing practices chosen by different states.

56. See, e.g., U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 5-12-111(a) (1997) (noting that, in the environmental context, “as a matter of policy and practice, civil prosecutions are initiated at the request of” the relevant agency head); see also Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 562 (2003) (“In [civil actions], DOJ will not proceed without a client Indeed, the most plausible reading of the statutes is that DOJ *could not* proceed in a civil case without the agency even if it wanted to.”).

57. See John O. McGinnis, *Principle Versus Politics: The Solicitor General’s Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 804-06 (1992) (reviewing CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1991)).

58. *Id.* at 807.

depoliticize office culture, and second, through self-imposed or statutory procedural requirements about the cases in which state and local attorneys can become involved.

The first of these suggestions—changes in institutional culture—can be achieved in a variety of ways. Perhaps the most promising of these is the establishment of a cadre of civil servants to work as assistants to the state attorney general and state solicitor general. The U.S. Solicitor General draws institutional support, continuity, and stability from the career appellate lawyers in his office.⁵⁹ For example, the deputies in the U.S. Solicitor General's Office are apportioned between political deputies, who are appointed, and career deputies, who rise through the ranks of the civil service.⁶⁰ State solicitors general, on the other hand, have generally lacked this resource.⁶¹ The development of career deputies and assistants in the offices of state solicitors general and state attorneys general would allow attorneys spanning several administrations to act as a nonpartisan anchor in those offices, catalyzing a change in institutional culture.

Second, there may be room for reform extending beyond the cultural to the legal. State solicitors general differ from their federal counterparts in that

many of the cases in which the state solicitors are filing briefs are cases in which no single state agency has a particular interest. These are cases in which the state would not be likely to participate unless led by a solicitor who takes an expansive view of both the law and her responsibilities.⁶²

Calling for state solicitors general to limit their dockets to those cases referred by state agencies—or imposing that restriction statutorily—would allow such actors to impose the self-discipline of limiting their own discretion. If such self-cabining—which could, after all, require a state solicitor general to excise many of the most interesting and consequential cases from his docket—proved to be beyond the level of self-restraint reasonably to be expected of appellate litigators, however, it could be imposed statutorily. Such a statutory restriction could be positive or negative; given resource constraints, merely

59. Layton, *supra* note 7, at 551.

60. Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, LAW & CONTEMP. PROBS., Spring 1998, at 83, 84.

61. *Id.*

62. *Id.* at 552.

requiring state solicitors general to handle all agency appeals could crowd out affirmative litigation.

Such decisions, however, would not be without cost; while imposing restrictions on affirmative litigation by state actors could cure some federalism ills, it could also strip these offices of the very cases that have attracted young, talented attorneys to them. A talent-drain of this sort in state government poses the risk of weakening the states' litigation power in the many cases where legitimate state interests are unquestionably at stake. In light of this risk, any steps taken to remedy the federalism problems engendered by overactivity on the part of state and local attorneys would have to be taken gingerly, with proper respect for the potential damage to the federal system that could be incurred either through overactivity or underactivity on the part of state actors.

CONCLUSION

It is a truism that federalism requires a balance of power between state and federal actors. Indeed, it has often been observed that imbalance in favor of a too-powerful federal government signifies the weakness of the federal system. On such an argument, national activity undertaken by state actors is taken as a sign of robust federalism.⁶³ This Comment has sought to demonstrate a complementary point: overactivity on the part of state and local actors, too, can bespeak an unbalanced federalism. In the case studies reviewed, however, it is not national power that suffers from overactive state and local actors, but rather the values advanced by the *localism* of a federal system. That is, not just federal actors, but state and local actors, too, can undermine the policy experimentation and democratic participation promoted by a multiplicity of local and state governments. To foster a healthy federalism, then, both state actors as well as federal actors must learn—whether through cultural or statutory change—to exercise restraint.

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63. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006).