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# Fourth Amendment Localism

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# Fourth Amendment Localism\*

WAYNE A. LOGAN†

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## INTRODUCTION

American policing, like American politics,<sup>1</sup> is a decidedly local affair.<sup>2</sup> While the image of federal “G-Men” might preoccupy the public imagination, in reality, local police have long dominated law enforcement,<sup>3</sup> reflecting the needs, values, and characteristics of the communities they serve,<sup>4</sup> under circumstances “inextricably enmeshed in local politics.”<sup>5</sup>

Over time, however, local responsiveness has been tempered by two countervailing forces. The first was the movement, beginning in the 1930s,<sup>6</sup> to professionalize police forces and decouple departments from local political influence.<sup>7</sup> The second has been the Supreme Court’s effort to exert federal constitutional control over state and local police, allowing the Court to confidently proclaim in 1961 that the Fourth Amendment was “enforceable in the same manner and to like effect” nationwide.<sup>8</sup>

Of late, however, several leading criminal justice scholars have urged a different course, arguing that policing needs more, not less, local political influence, and that local preferences are deserving of judicial deference. One group, which I call the “New Democratists” because they inspire historic parallel to Jeffersonian ideals of localized, small-scale participatory governance in “little republics,”<sup>9</sup> advocates judi-

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1. See THOMAS P. O’NEIL & GARY HYMEL, *ALL POLITICS IS LOCAL AND OTHER RULES OF THE GAME* (1994).

2. See Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 877 (2015) (“[P]olice departments are overwhelmingly funded by local governments and governed by the local political process. Localism may be American policing’s most distinctive characteristic.”).

3. See SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA: AN INTRODUCTION* 62–63 (7th ed. 2011) (noting that of the roughly 18,000 law enforcement agencies nationwide, almost 13,000 are local, rather than county, state, or federal).

4. See WAYNE R. LAFAYE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 1.10(c) (4th ed. 2015) (“[T]he criminal justice system was structured from the outset to ensure that the administration of the criminal law was responsive to the views of the local community. . . . [B]road grants of discretionary authority provided substantial leeway for administrative variations that reflected the differences in local communities.”).

5. EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 638 (1999); see also William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y 665, 665 (2002) (“The defining characteristic of American criminal law enforcement—the characteristic that most distinguishes it from law enforcement elsewhere in the developed world—is its localism.”).

6. ROBERT M. FOGELSON, *BIG-CITY POLICE* 219–68 (1977); DAVID ALAN SKLANSKY, *DEMOCRACY AND THE POLICE* 38 (2008); NAT’L COMM’N ON LAW OBSERVANCE & ENFORCEMENT, *REPORT ON POLICE* 1–5 (1931).

7. See, e.g., James Q. Wilson, *The Police and Their Problems: A Theory*, 12 PUB. POL’Y 189, 191 (1963) (criticizing “political meddling . . . facilitated by local control of police forces”).

8. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

9. See Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in 2 *ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS* 390 (Lester J. Cappon ed., 1959); see also KERMIT HALL, *THE MAGIC MIRROR* 64 (1989) (observing that in the Framing Era “republicanism” commonly was “equated [with] localism and decentralization of power”).

cial deference to laws and policies resulting from local democratic processes. According to the chief proponents of this view, Professors Dan Kahan and Tracey Meares, constitutional regulation of discretionary policing should reflect “the values and insights of the communities in which such policing is taking place.”<sup>10</sup> More recently, Professor Andrew Taslitz argued that “Fourth Amendment law should vary based on geographic concerns,” because otherwise there comes risk of “silencing” local political sentiment, especially that of poor urban minority communities.<sup>11</sup>

Another group, building upon the earlier work of Professor Anthony Amsterdam and others,<sup>12</sup> which Professor Andrew Crespo has referred to as the “burgeoning” group of “New Administravists,”<sup>13</sup> urges localization but looks less to direct democracy than administrative rule making by local governments. Scholars in this camp maintain that courts, instead of assessing the substantive constitutional merits of a policy, should ask whether the process undertaken to craft the policy satisfied prerequisites of administrative rule making, such as public notice and comment procedures.<sup>14</sup> According to Professors Christopher Slobogin<sup>15</sup> and Barry Friedman,<sup>16</sup> among others,<sup>17</sup> shifting the policy-making locus is sensible both because police departments are in fact executive agencies and doing so will promote governmental transparency, democratic accountability, and public engagement.<sup>18</sup>

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10. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998); see also Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197; cf. Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1418 (2017) (“Democratic localism is essential for the proper functioning of the criminal system because the criminal justice principles embodying substantive constitutional norms can only be defined through community interactions at the local level.”).

11. Andrew E. Taslitz, *Fourth Amendment Federalism and the Silencing of the American Poor*, 85 CHI.-KENT L. REV. 277, 279 (2010).

12. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 416–28 (1974); see also Kenneth Culp Davis, *An Approach to Legal Control of the Police*, 52 TEX. L. REV. 703, 725 (1974); Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990); Carl McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659, 690 (1972).

13. Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2058–59 (2016).

14. See *id.* at 2058 (“[T]he model would shift courts from serving as sources of substantive judicial oversight . . . courts would oversee the *procedural* validity of law enforcement behavior by determining whether the decisionmaking and conduct of such actors comply with basic standards of transparency and democratic accountability.” (emphasis in original)).

15. Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016).

16. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015).

17. E.g., Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515 (2000); Eric J. Miller, *Challenging Police Discretion*, 58 HOW. L.J. 521 (2015); John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016); Andrew D. Selbst, *Disparate Impact in Big Data Policing*, 52 GA. L. REV. 109 (2017).

18. See *infra* notes 151–167 and accompanying text.

Whether such benefits can actually be achieved remains open to question, given the significant political process concerns of small-scale governance identified by Madison<sup>19</sup> and the political pathologies known to plague criminal justice policy making more generally.<sup>20</sup> Although the Supreme Court has expressed faith in the power of local political forces to curb police overreach,<sup>21</sup> its faith has been tested by real-world occurrences such as the NYPD's "stop and frisk" policy, targeting mainly poor and minority neighborhoods,<sup>22</sup> and discriminatory policing in Ferguson, Missouri,<sup>23</sup> and Baltimore, Maryland.<sup>24</sup>

Yet even assuming that such difficulties can be overcome, an even more fundamental question looms: should Fourth Amendment norms be localized? This Article seeks to press the pause button in the ongoing academic commentary and does so by tapping into legal literatures that have grown alongside (but distinct from) those just described. Professors David Barron<sup>25</sup> and Richard Schragger<sup>26</sup> have advocated "local constitutionalism," positing the beneficial role that local preferences can play in shaping federal constitutional norms. Although they acknowledge that localities themselves are nonsovereign entities<sup>27</sup> underserving of constitutional deference in a formal sense,<sup>28</sup> like the criminal justice scholars noted above, they invoke the many instrumental benefits of decentralization.<sup>29</sup>

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19. THE FEDERALIST NO. 10, at 63–64 (James Madison) (Clinton Rossiter ed., 1961) (warning of the increased power of "factions" in small democratic units to "execute their plans of oppression"); see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 1 THE FOUNDERS' CONSTITUTION 644, 646 (Phillip B. Kurland & Ralph Lerner eds., 1987) (expressing same concern).

20. See David Jaros, *Flawed Coalitions and the Politics of Crime*, 99 IOWA L. REV. 1473 (2014).

21. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001) (attaching importance to the "political accountability[] of most local lawmakers and law-enforcement officials").

22. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

23. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 9–14 (2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/CB88-VUD8>].

24. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/Y6X9-W6EP>].

25. David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 561–63 (1999).

26. Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

27. See, e.g., David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 390 (2001) ("As a formal legal matter, the federal Constitution does not treat local governments as anything approximating coequal sovereigns. States have the power to approve and establish local governments.").

28. See *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).

29. See, e.g., Barron, *supra* note 25, at 382 ("There is a value in ensuring that local jurisdictions have the discretion to make the decisions that their residents wish them to make. The value inheres in the traditional advantages that attend decentralization. These include more

Similarly, Professor Mark Rosen has urged local “Tailoring” of constitutional norms.<sup>30</sup> Rosen asserts that “One-Size-Fits-All is not an intrinsic part of American constitutionalism,”<sup>31</sup> noting *inter alia* the “community standards” test employed by local juries when assessing whether material is obscene for First Amendment purposes.<sup>32</sup> Professor Joseph Blocher, in a recent *Yale Law Journal* article entitled *Firearm Localism*, applied the model to the Second Amendment, citing the historic prevalence of stricter gun control laws in urban areas and the existence of a less restrictive “gun culture” in rural areas.<sup>33</sup> Finally, the Supreme Court has often deferred to local government preference when resolving constitutional questions<sup>34</sup> in areas such as educational policy<sup>35</sup> and land use and zoning,<sup>36</sup> which, like policing,<sup>37</sup> constitute core aspects of local governance.<sup>38</sup>

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participatory and responsive government; more diversity of policy experimentation; more flexibility in responding to changing circumstances; and more diffusion of governmental power, which in turn checks tyranny.”).

30. See Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1636 (2005) [hereinafter Rosen, *Surprisingly Strong*]; Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1169 (1999) [hereinafter Rosen, *Nonuniform Constitution*].

31. Rosen, *Surprisingly Strong*, *supra* note 30, at 1636.

32. Rosen, *Nonuniform Constitution*, *supra* note 30, at 1150 (citing and discussing *Hamling v. United States*, 418 U.S. 87 (1974); *Miller v. California*, 413 U.S. 15 (1973)).

33. See Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013) (arguing that “future Second Amendment cases can and should incorporate the longstanding and sensible differences regarding guns and gun control in rural and urban areas, giving more protection to gun rights in rural areas and more leeway to gun regulation in cities”).

34. See Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL’Y REV. 187, 218 (1996) (“Court decisions have recognized the key role of localities without explicitly saying so. This is particularly true when one considers the federalist values of local decision making, citizen participation, and responsiveness to diverse community needs, all of which occur far better on the municipal than on the state level.”).

35. See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (“[L]ocal control over the operation of schools . . . has long been thought essential to the maintenance of community concern and support for public schools and to the quality of the educational process.”).

36. See, e.g., *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 440 (2002) (“[T]he Los Angeles City Council is in a better position than the judiciary to gather and evaluate data on local problems.”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 297–98 (2000) (“The city council members, familiar with commercial downtown Erie . . . can make particularized, expert judgments about the resulting harmful secondary effects.”).

37. See DANIEL L. SKOLER, *ORGANIZING THE NON-SYSTEM: GOVERNMENTAL STRUCTURING OF CRIMINAL JUSTICE SYSTEMS* 77 (1977) (calling policing the most “local” of all criminal justice activities).

38. See ROBERT L. LINEBERRY, *EQUALITY AND URBAN POLICY: THE DISTRIBUTION OF MUNICIPAL PUBLIC SERVICES* 10 (1977) (“The services performed by municipalities are those most vital to the preservation of life (police, fire, sanitation, public health), liberty (police, courts, prosecutors), property (zoning, planning, taxing), and public enlightenment (schools, libraries).”).

If localism works for the First and Second Amendment, and for due process vis-à-vis educational and land use policy, why not for policing and the Fourth Amendment doctrine that regulates it? Should localism be constitutionally transsubstantive, as the Fourth Amendment itself is relative to the substantive criminal law?<sup>39</sup> Or, are the privacy and bodily security rights and other critically important interests that the Fourth Amendment protects sufficiently distinct, such that they should not be allowed to hinge on the preferences of local political branch actors?

This Article examines these and other questions and proceeds as follows. Part I examines the several ways in which Fourth Amendment rights already, as a practical matter, reflect localism. Variations in substantive criminal law among localities (not just states), for instance, directly affect the authority of police to search and seize individuals. So too do geographic differences and resources at the disposal of police departments.<sup>40</sup> As a practical matter, contrary to the common assumption of the Court<sup>41</sup> and commentators,<sup>42</sup> Fourth Amendment rights can and already do differ among localities.

Part II surveys the efforts of the criminal justice scholars noted above—the “New Democratists” and the “New Administrativists”—that would add to this variation in a new and significant way. Together, the groups make a compelling case for their own particular brand of localism: without question, increasing public input on policing policy and promoting governmental accountability and transparency are laudable goals. There should be no mistaking, however, the radical quality of their proposed changes. Advocates not only would have the political branches, not courts, be the primary expositors of limits on police authority.<sup>43</sup> They would also have the locus of constitutional understanding be pushed “all the way down” to local governments,<sup>44</sup>

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39. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001).

40. See *infra* Part I.

41. See *infra* notes 55–58 and accompanying text.

42. See, e.g., Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117, 1145 (2017) (“The Fourth Amendment is one size-fits-all. A rule that applies to the Grainfield, Kansas, police department also applies at the FBI Headquarters in Washington, D.C.”).

43. This is a position recently advanced by some vis-à-vis Congress and state legislatures regarding police use of emerging technologies that affect privacy interests. E.g., *Riley v. California*, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004). But see, e.g., Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 533–37 (2013) (noting that legislatures are often dominated by law enforcement interests and the unwillingness of legislatures to amend “obviously flawed and outdated provisions”).

44. Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 23 (2010) (asserting that “localities represent better sites for pursuing federalism’s values because they are closer to the people, offer more realistic options for voting with one’s feet, and map more closely into communities of interest.” (emphasis in original)).

affording localities not only the power to enforce constitutional norms (itself a controversial proposition),<sup>45</sup> but actually to define them.

Part III considers the benefits and detriments of Fourth Amendment localism. To advocates, a chief virtue of localism lies in its capacity to tailor constitutional norms to local needs and preferences, resulting in a possible broadening of constitutional protection.<sup>46</sup> History teaches, however, that local government public safety policies, certainly including policing, can be harsh and repressive, and localism would ascribe constitutional weight to such policies. More problematic still, in time, local political actors, mindful that courts will defer if democratic or administrative processes appear adequate, could well be emboldened to adopt even more repressive policies.

Another potential benefit of localism is that it holds promise of beneficial experimentation, akin to that envisioned by Justice Brandeis,<sup>47</sup> and more recently invoked by Professors Dorf and Sabel in their model of “democratic experimentalism.”<sup>48</sup> The benefits of experimentalism, however, hinge on the wherewithal of policy makers and the subject matter in question. Local governments number in the tens of thousands<sup>49</sup> and vary significantly in their capabilities and resources.<sup>50</sup> This not only raises concern about the quality of experiments undertaken; it creates conditions ripe for freeriding if localities simply replicate one another’s policies, which is itself an outcome inconsistent with the experimentalist enterprise.

Finally, localism might be embraced because it serves to enhance the overall satisfaction of citizens, who as Charles Tiebout famously theorized will choose to reside in communities that best satisfy their preferences.<sup>51</sup> Indeed, because it is often easier to exit a locality than a state or nation, localism would appear to have promise. Yet the comparative ease of relocation is often less than it seems, especially for poor community members, who frequently bear the brunt of policing policy. Even more problematic, the Tieboutian model fails to take into account the propensity of local governments to impose negative externalities on their peers.

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45. See Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1 (2012).

46. See, e.g., Barron, *supra* note 25, at 611 (asserting that “[b]y broadening the range of permissible constitutional interpreters, local constitutionalism might broaden the range of constitutional protections”).

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

48. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

49. Today there are over 90,000 local government units of varied size and nature. CARMA HOGUE, U.S. CENSUS BUREAU, GOVERNMENT ORGANIZATION SUMMARY REPORT: 2012 (2013), [http://www2.census.gov/govs/cog/g12\\_org.pdf](http://www2.census.gov/govs/cog/g12_org.pdf) [<https://perma.cc/9V7J-QDNC>].

50. See DANIEL R. MANDELKER, DAWN CLARK NETSCH, PETER W. SALSICH, JR. & JUDITH WELCH WEGNER, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 32 (5th ed. 2002) (“A basic fact about local governments in the United States is their great diversity with respect to such matters as legal nature, size, area, functions, and organizations, both within and among states . . .”).

51. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956).



Unlike taxes, public parks, and other local public goods, criminal justice policy (including policing) can be motivated by a desire to expel or discourage entry of individuals, which raises race-to-the-bottom concerns.

Part IV considers whether Fourth Amendment localism is nevertheless viable in some shape or form.<sup>52</sup> It makes the case that the Fourth Amendment is not a good candidate, highlighting the many important ways in which the cluster of rights it protects differs in kind from other Bill of Rights provisions, the First and Second Amendments in particular. Judicial deference becomes even more problematic when one considers that the Supreme Court has long refused to second-guess political branch decisions concerning the reach of criminal codes,<sup>53</sup> which enable and condition the authority of police to search and seize individuals.<sup>54</sup>

Given this exceptionalism, if localism is to have a place anywhere in constitutional norm making it should be in elevating the scope of Fourth Amendment protections afforded individuals. Doing so would avoid the many difficulties created by unqualified localism, such as when an individual travels to a right-restrictive locality and, without notice, is subject to a diminution in Fourth Amendment rights. It would also achieve the many instrumental benefits of localism, such as public participation, governmental accountability, and transparency. Under the more circumscribed approach advocated, no dilution of individual rights would occur; indeed, if the local experiment caught on with other localities, there would be an aggregate increase in constitutional protection. While effectuating such a change would not be free of difficulty, it would enable Fourth Amendment doctrine to secure the benefits of localism yet avoids its many pitfalls.

#### I. SUBNATIONAL CONSTITUTIONALISM

Since the nation's origin, a tenet of federal constitutional law has been that rights apply uniformly nationwide,<sup>55</sup> avoiding "arbitrarily variable protection."<sup>56</sup> To allow otherwise would "change the uniform 'law of the land' into a crazy quilt,"<sup>57</sup> leading to "jarring and discordant judgements" that Justice Story thought "deplorable."<sup>58</sup>

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52. As Robert Mikos has observed, "[T]he case for or against localism is rarely as clear cut as in the highly stylized hypothetical commonly employed in the classroom." Robert A. Mikos, *Marijuana Localism*, 65 CASE W. RES. L. REV. 719, 726 (2015).

53. See *Whren v. United States*, 517 U.S. 806, 818 (1996) (refusing to identify when a criminal code might become so "exorbitant" as to justify constitutional regulation).

54. See *infra* note 65 and accompanying text.

55. See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (Marshall, C.J.) (averring the "necessity of uniformity" regarding federal constitutional matters); THE FEDERALIST NO. 2, at 38–39 (John Jay) (Clinton Rossiter ed., 1961) ("[W]e have uniformly been one people; each individual citizen everywhere enjoying the same national rights, privileges, protection.").

56. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004).

57. *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring); see also *State v. Hempele*, 576 A.2d 793, 816 (N.J. 1990) (O'Hern, J., concurring in part and dissenting in part) ("The fourth amendment is the fourth amendment. It ought not to mean one thing in Trenton and another across the Delaware River in Morrisville, Pennsylvania.").

58. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (Story, J.).

In reality, however, federal constitutional rights, perhaps especially in the Fourth Amendment context, have always varied.<sup>59</sup> Evidence of this dates back to the Framing Era, when the search and seizure authority of federal agents depended on the preferences of first colonial and then state governments.<sup>60</sup> Today, subnational variation stems from a variety of sources, including the differing views of courts. While state and lower federal courts must defer to the nation's "one Supreme Court,"<sup>61</sup> they can vary on Fourth Amendment questions not decided by the Court.<sup>62</sup> And even with matters ostensibly decided by the Court, lower courts have interpretative latitude.<sup>63</sup>

In sum, Fourth Amendment law resembles something less than an invariable judge-made "detailed code of criminal procedure."<sup>64</sup> This Part elaborates on this empiric reality, and does so by shifting focus, examining the many even more organic ways, from the bottom up, that police search and seizure authority—and thus the Fourth Amendment rights of citizens—can vary.

#### A. Substantive Law

Criminal codes at once reflect the normative preferences of a jurisdiction and condition the search and seizure authority of its police. As Professor Wayne LaFare long ago recognized, "the substantive criminal law is not merely a list of 'thou-shall-nots' directed at the citizenry; it is also in large measure a definition of

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59. See *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (noting that "[n]onuniformity is . . . an unavoidable reality in a federalist system" and asserting that a "fundamental interest" exists in preserving subnational authority that cannot be constrained by "any general, undefined federal interest in uniformity").

60. See Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229 (2015).

61. U.S. CONST. art. III, § 1; see also *Elmendorf v. Taylor*, 23 U.S. (10 Wheat.) 152, 160 (1825) ("[T]he construction given by this Court to the constitution and laws of the United States is received by all as the true construction . . .").

62. See Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235 (2014) (discussing varied Fourth Amendment positions adopted by state appellate courts and federal circuit courts within the same circuit based on concurrent federal constitutional interpretive authority); see also Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137 (2012) (discussing varied Fourth Amendment positions adopted by different federal circuit courts of appeal).

63. See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 10–11 (1994) ("Deciding what a precedent means will frequently depend on the particular normative values and assumptions each judge brings to the interpretive enterprise."); see also Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501 (2008) (noting instances where state courts strayed from Court doctrine); Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227 (2008) (noting instances where state courts apply doctrine in a narrower fashion than the Court).

64. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965).

the job of the several police agencies in the state.<sup>65</sup> Because of this, variations in criminal codes affect the power of police to search and seize individuals.

In contrast to areas such as commercial law, which have become increasingly homogeneous over time,<sup>66</sup> criminal law is marked by considerable diversity: “crimes,” the Supreme Court observed in *Rochin v. California*, “are what the laws of the individual States make them.”<sup>67</sup> Variation exists not only in the particular behaviors criminalized<sup>68</sup> but also in the definitions of mutually proscribed misconduct.<sup>69</sup> States also vary in the punishments they prescribe, which can affect the power of police to conduct warrantless entries of suspects’ homes<sup>70</sup> and conduct investigative stops.<sup>71</sup>

Importantly, moreover, localities within states enjoy significant criminal law-making authority.<sup>72</sup> Operating pursuant to delegated home rule authority<sup>73</sup> and subject to the only modest limits typically imposed by state preemption doctrine,<sup>74</sup> local governments enact distinct laws, or modify existing state laws, tailored to their unique conditions and challenges.<sup>75</sup> Adding to this diversity, urban localities in particular in recent years have enacted laws operative within particular “zones,” affording police increased enforcement wherewithal for misconduct such as prostitution and drug-related offenses.<sup>76</sup>

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65. Wayne R. LaFave, *Penal Code Revision: Considering the Problems and Practices of the Police*, 45 TEX. L. REV. 434, 436 (1967).

66. See Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 267 (2003) (noting that state commercial law “has become close to a single, unified body of law”).

67. 342 U.S. 165, 168 (1952).

68. See Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 259 (2005) (providing examples of distinctions).

69. See Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 76–77 (2006).

70. See *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984) (terming punishment the “best indication” of constitutional reasonableness).

71. See, e.g., *Gaddis ex rel. Gaddis v. Redford Twp.*, 364 F.3d 763, 771 n.6 (6th Cir. 2004) (allowing stop when reasonable suspicion exists of completed felony but not misdemeanor).

72. For fuller discussion of this phenomenon, see Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001).

73. See DALE KRANE, PLATON N. RIGOS & MELVIN HILL, *HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 2* (2001) (“[T]he ideal of home rule is defined as the ability of a local government to act and make policy in all areas that have not been designated to be of statewide interest through general law, state constitutional provisions, or initiatives and referenda.”). On the varied nature and extent of home rule authority exercised by local governments, see Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1125–27 (2007).

74. See generally Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 17–27 (2006) (discussing limited state exercise of preemption authority).

75. See 1 SANDRA M. STEVENSON, *ANTIEAU ON LOCAL GOVERNMENT LAW* § 21.05[2], at 21–22 (2d ed. 2000) (“The reality is that state legislatures seldom legislate on all or general concerns, and a social and political vacuum would exist if a home rule entity desired to impose controls on those matters within its own borders and was not permitted to do so.”).

76. Robert L. Scharff, Note, *An Analysis of Municipal Drug and Prostitution Exclusion Zones*, 15 GEO. MASON C.R.L.J. 321 (2005).

Finally, localities contribute to variability by opting out of otherwise applicable state criminal law. Perhaps the most notable recent example of this relates to possession of small amounts of marijuana. While several states have legalized or decriminalized possession,<sup>77</sup> localities in states where possession remains a crime have either decriminalized possession<sup>78</sup> or directed local police to accord it a “lowest law enforcement priority.”<sup>79</sup>

In short, the substantive law authority of police to search and seize varies considerably not only between states, but among localities within states, resulting in corresponding variation in Fourth Amendment protections.

### B. Geography

Another factor driving Fourth Amendment variability is place. To begin, not only do the Amendment’s protections typically not apply outside the United States,<sup>80</sup> but they are limited at and near the nation’s borders.<sup>81</sup> At the border, individuals are subject to routine detention without individualized suspicion of wrongdoing,<sup>82</sup> and the “thumbs are on the scale” in assessing whether reasonable suspicion exists to seize individuals near borders.<sup>83</sup> As the Court noted in *Arvizu v. United States*,<sup>84</sup> “[w]e think it quite reasonable that a driver’s [behaviors] . . . might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona).”<sup>85</sup> By the same token, individuals on boats, depending on location, can enjoy lessened Fourth Amendment protection,<sup>86</sup> as do individuals at domestic airports.<sup>87</sup>

Being associated with a particular state can also have an impact on one’s rights. Anyone visiting Florida, for instance, should be aware that the Sunshine State is a “drug source state,” which can affect police assessments of possible criminal activity.<sup>88</sup> Similarly, a car with California license plates can raise justifiable suspicion

77. See *Main: State Info*, NORML <http://norml.org/states> [<https://perma.cc/D85J-WPFG>].

78. See Wayne A. Logan, *After the Cheering Stopped: Decriminalization and Legalism’s Limits*, 24 CORNELL J.L. & PUB. POL’Y 319, 326 (2014).

79. *Lowest Law Enforcement Priority Jurisdictions*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/lowest-law-enforcement-priority-jurisdictions> [<https://perma.cc/74F9-GLCA>].

80. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990); see also Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 364 (2015) (noting that “territoriality is a critical factor in assessing both the reach of the Fourth Amendment and the scope of the government’s authority to search and seize”).

81. See generally 5 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 10.5 (5th ed. 2015).

82. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985).

83. *Id.* at 558.

84. 534 U.S. 266 (2002).

85. *Id.* at 275–76.

86. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983).

87. See, e.g., *United States v. Lawson*, 374 F. Supp. 2d 513, 521 (E.D. Ky. 2005).

88. *Illinois v. Gates*, 462 U.S. 213, 243 (1983).

when the car is in Milwaukee, Wisconsin, in December.<sup>89</sup> So too can traveling between particular cities.<sup>90</sup>

Where one is located in a particular community can also be important, especially if the area is a “high crime area.”<sup>91</sup> In *Illinois v. Wardlow*, the Court made this clear when it held that while running from police alone does not suffice as a basis for police to stop an individual, flight in a high crime area does.<sup>92</sup> As a consequence, as one commentator recently observed, “the young man in the Bronx gets bent over a patrol car while the young man in Upper Manhattan jogs home unmolested.”<sup>93</sup>

Policing, moreover, is known to concentrate on particular public spaces; a person on a street corner is more likely to catch the eye of police than an individual inside a building or within a gated community. Privacy, as William Stuntz noted, “is something that exists only in certain types of spaces; not surprisingly, the law protects it only where it exists.”<sup>94</sup> A person able to buy or rent a stand-alone house, with a yard qualifying as physical curtilage, enjoys more privacy protection than someone residing in an apartment building with a common hallway.<sup>95</sup> “[I]t is simple realism,” Judge Posner wrote, “that people who live in rural areas or have wealth will have more physical privacy than people who live in cities . . . and that therefore they will derive more protection from the Fourth Amendment.”<sup>96</sup>

Finally, variation is baked into the Fourth Amendment by institutional and governmentally demarcated space. The Supreme Court has held, for instance, that public school students have a lowered expectation of privacy when at school.<sup>97</sup> Authorities wishing to search them need only have “reasonable grounds” (not probable cause) to believe they violated a law or school rule.<sup>98</sup> Likewise, individuals entering special enclaves such as military bases<sup>99</sup> and tribal lands<sup>100</sup> enjoy a lowered expectation of privacy.

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89. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

90. *See United States v. Sokolow*, 490 U.S. 1, 3 (1989); *see also* Charles E. Cox, Jr., *Constitutional Criminal Procedure*, 65 *MERCER L. REV.* 891, 899 n.76 (2014) (citing other instances).

91. *See, e.g., Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *Adams v. Williams*, 407 U.S. 143, 144 (1972).

92. *Wardlow*, 528 U.S. at 124.

93. Andrew Dammann, Note, *Categorical and Vague Claims that Criminal Activity Is Afoot: Solving the High-Crime Area Dilemma Through Legislative Action*, 2 *TEX. A&M L. REV.* 559, 561 (2015). The Supreme Court has yet to define the criteria used to define a “high crime area,” which often hinges on whether “officers say it’s a high crime area.” *United States v. Montero-Camargo*, 208 F.3d 1122, 1143 (9th Cir. 2000) (en banc) (Kozinski, J., concurring).

94. William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 *GEO. WASH. L. REV.* 1265, 1266–67 (1999) (“It follows that people who have money have more Fourth Amendment protection than people who don’t.”).

95. *See id.* at 1270.

96. *United States v. Redmon*, 138 F.3d 1109, 1132 (7th Cir. 1998) (Posner, J., dissenting).

97. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656–57 (1995).

98. *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

99. *See, e.g., United States v. McCarthy*, 38 M.J. 398, 401–03 (C.M.A. 1993) (upholding right of military police to conduct warrantless searches on military bases).

100. *See, e.g., Hopi Tribe v. Kahe*, 21 *Indian L. Rep.* 6079, 6079–80 (Hopi Tribal Ct. 1994)

*C. Resources*

Variability in Fourth Amendment rights can also stem from basic local differences in resources. Like other aspects of the criminal justice system,<sup>101</sup> policing is highly sensitized to resources and decisions regarding their allocation. More police on the payroll correlates with more police deployed to search and seize, and department or even precinct-level tactical deployment decisions affect when, how, and where police-citizen contact occurs.<sup>102</sup>

A department's financial wherewithal to purchase technological tools can also significantly affect the likelihood of being searched and seized.<sup>103</sup> Today, over ninety percent of police departments serving jurisdictions of 250,000 or more residents employ "crime mapping" technology, allowing police to direct attention and resources to particular areas,<sup>104</sup> yet only sixty percent of smaller jurisdiction agencies do so.<sup>105</sup> Similar variation is evident with "predictive policing" technologies, which employ computer software to analyze large data sets from disparate sources to predict where criminal activity might occur.<sup>106</sup> Finally, access to technology can affect the duration of police seizures,<sup>107</sup> as well as their intrusiveness, given variations in department access to military-grade equipment and readiness to deploy SWAT teams.<sup>108</sup>

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(stating that the probable cause standard for searches and seizures is to be based on considerations unique to the Hopi Tribe).

101. Funding for provision of counsel to indigent criminal defendants is one notable example. See Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Criminal Defense*, 52 ARIZ. L. REV. 219 (2010).

102. With the New York City Police Department's "stop and frisk" policy, concentrated in particular neighborhoods, being a prominent example. See Shannon Portillo & Danielle S. Rudes, *Construction of Justice at the Street Level*, 10 ANN. REV. L. & SOC. SCI. 321 (2014).

103. See Elizabeth E. Joh, *Policing by Numbers: Big Data and the Fourth Amendment*, 89 WASH. L. REV. 35 (2014).

104. Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas"*, 63 HASTINGS L.J. 179, 189 (2011).

105. *Id.*

106. DAVID ROBINSON & LOGAN KOEPKE, *STUCK IN A PATTERN: EARLY EVIDENCE ON "PREDICTIVE POLICING" AND CIVIL RIGHTS 2* (2016). Predictably, dedicating more police attention and resources to an area can result in the self-fulfilling and perpetuating result of an area being targeted on an ongoing basis. See BERNARD HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* 147–50 (2007).

107. See *Rodriguez v. United States*, 135 S. Ct. 1609, 1618 (2015) (Thomas, J., dissenting) (noting that "if a driver is stopped by an officer with access to technology that can shorten a records check, then he will be entitled to be released from the stop after a shorter period of time than an individual stopped by an officer without access to such technology").

108. See Kara Dansky, *Local Democratic Oversight of Police Militarization*, 10 HARV. L. & POL'Y REV. 59 (2016); see also Bruce Smith, *Prosecutor: Death of Man Shot by Police Was 'Senseless'*, SAN DIEGO UNION-TRIB. (Jan. 7, 2015, 12:05 AM), <http://www.sandiegouniontribune.com/sdut-arguments-open-in-murder-trial-of-white-ex-police-2015jan07-story.html> (discussing local police officer's decision to use lethal force, instead of a Taser, due to small size and lack of resources of local department).

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In short, even though the Supreme Court presumes that the Fourth Amendment applies uniformly across the land,<sup>109</sup> and refuses to consider that Fourth Amendment rights should be allowed to “vary from place to place,”<sup>110</sup> the empiric reality is that Fourth Amendment rights do vary. Next, the discussion turns to the work of scholars whose recommendations would add to this diversity in a new and significant way.

## II. THE LOCALISTS

Fourth Amendment doctrine has long been the target of harsh criticism. In 1971, Justice Harlan, pointing to “serious distortions and incongruities,” urged that it be “overhaul[ed].”<sup>111</sup> Over time, multiple commentators have joined in the critique,<sup>112</sup> condemning inter alia the Supreme Court’s reliance upon and faulty understanding of Framing Era history,<sup>113</sup> its efforts to define what qualifies as “unreasonable,”<sup>114</sup> and understanding of the Amendment’s basic purpose.<sup>115</sup> They have also lamented what has been called the “incredible shrinking Fourth Amendment,”<sup>116</sup> which too often tilts in favor of police authority,<sup>117</sup> and its frequent divorce from real-world

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109. See *supra* notes 55–58 and accompanying text.

110. *Whren v. United States*, 517 U.S. 806, 815 (1996).

111. *Coolidge v. New Hampshire*, 403 U.S. 443, 490–91 (1971) (Harlan, J., concurring).

112. See, e.g., Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 204 (1993) (calling doctrine “illogical, unprincipled, ad hoc, and theoretically incoherent”); Kerr, *supra* note 43, at 809 (“With so many decided cases and so few agreed-upon principles at work, trying to understand the Fourth Amendment is a bit like trying to put together a jigsaw puzzle with several incorrect pieces.”).

113. See, e.g., Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895 (2002); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

114. See, e.g., Barry Friedman & Cynthia Benin Stein, *Redefining What’s “Reasonable”*: *The Protections for Policing*, 84 GEO. WASH. L. REV. 281, 284 (2016) (“All the Supreme Court has provided by way of guidance is a growing litany of vague and indeterminate phrases and legal tests.”).

115. See, e.g., Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303 (2010); Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503 (2007); Luke M. Milligan, *The Forgotten Right To Be Secure*, 65 HASTINGS L.J. 713 (2014).

116. Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

117. See, e.g., Friedman & Ponomarenko, *supra* note 16, at 1890 (“Although there are exceptions, for the most part today the Justices adopt a posture of extreme deference in policing cases, one that is very difficult to explain as a matter of constitutional theory.”); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 817 (2012) (“Constitutional rights, by their nature, take law enforcement interests into account ex ante and therefore are inevitably drafted to provide generous minimum standards for law enforcement conduct.”).

empirics.<sup>118</sup> Worse yet, the Court has struggled, not altogether successfully, to craft doctrine amid rapidly changing technologies expanding police authority.<sup>119</sup>

In response, scholars have advanced a variety of institutional options less dependent on judicial prerogative. This Part surveys two foremost efforts taking shape in recent years, one urging reliance on the outcomes of direct democracy, exercised by local political bodies, the other looking to laws and regulations adopted by local administrative rule-making authorities.

#### A. “New Democratists”

In the late 1990s, Professors Dan Kahan and Tracey Meares authored a series of provocative articles urging direct democratic control over the regulation of police. Focusing in particular on urban areas, Kahan and Meares argued that poor and minority residents in such areas wielded greater political voice and influence than in the past and that police forces and leadership were increasingly diversified, alleviating historic concern over enactment of laws permitting police overreach.<sup>120</sup> They also asserted that local democratic preferences warranted deference both because they reflected local needs and conditions<sup>121</sup> and because the risk of abusive policies being adopted was lessened as their effects would be internalized by the community itself.<sup>122</sup> Kahan and Meares reasoned that “insofar as [local] policies *do* burden average members of the community, there is much less reason for courts to doubt the determination of politically accountable officials that these policies strike a fair balance between liberty and order.”<sup>123</sup>

Entitling their article *The Coming Crisis in Criminal Procedure*, Kahan and Meares wrote that it was “now time to construct a *new* criminal procedure, one uniquely fitted to the conditions that currently characterize American social and political life and that are likely to characterize it into the foreseeable future.”<sup>124</sup> In this new regime, judicial aversion for local democracy was no longer warranted.<sup>125</sup> New doctrine must “recognize the legitimate function of discretionary policing techniques

118. See, e.g., Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227 (2015); Lee Epstein, Barry Friedman & Geoffrey R. Stone, *Foreword: Testing the Constitution*, 90 N.Y.U. L. REV. 1001, 1024 (2015); Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 915 (2009).

119. See, e.g., *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring) (stating that it “may be necessary to reconsider” the third party doctrine because the “approach is ill suited to the digital age”).

120. Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998).

121. *Id.* at 1161–65, 1177–80.

122. *Id.* at 1172–76; see also *id.* at 1168 (“Inner city supporters . . . do not seek to exclude and cast out offenders; rather they seek policing methods that will assist them in the project of restoring community life. Their support of the new policing is, in fact, an outgrowth of their concern for their community’s youth, not of hostility toward them.” (emphasis in original)).

123. *Id.* at 1172–73 (emphasis in original).

124. *Id.* at 1153 (emphasis in original).

125. *Id.* at 1155–59.



in combatting inner-city crime, and also the competence of inner-city communities to protect themselves from abusive police behavior.”<sup>126</sup> Kahan and Meares urged

connect[ing] constitutional doctrine to the values and insights of the communities in which such policing is taking place . . . . A doctrine that listens to the answers of the citizens who have the most at stake would be the beginning of both wisdom and legitimacy for a new regime of criminal procedure.<sup>127</sup>

Later that same year, after the Illinois Supreme Court invalidated an anti-gang loitering ordinance enacted by the Chicago City Council,<sup>128</sup> Professors Meares and Kahan published a follow-up article condemning the court’s decision as a relic of “antiquated procedural thinking.”<sup>129</sup> They traced the political history of the ordinance, distinguishing it from instances in the past when, in the South especially, “institutionalized racism fully justified the Court’s suspicion of democratic politics.”<sup>130</sup> Meares and Kahan advocated a new constitutional calculus, one requiring judicial deference when the effect of a local law is felt by local denizens themselves: “Instead of viewing all law-enforcement techniques with suspicion, courts should ask whether the community has internalized the burden that a particular law imposes on individual freedom. If it has, the court should presume that the law does not violate individual rights.”<sup>131</sup>

Their arguments did not go unchallenged. Professors Albert Alschuler and Stephen Schulhofer disputed the history of the Chicago ordinance provided by Meares and Kahan, asserting that it was in fact controversial and contested by various community groups.<sup>132</sup> They also warned of the “appealing but highly manipulable rhetoric of ‘community,’” with its “attractions of a sense of place, shared values, and neighborhood empowerment.”<sup>133</sup> “Which community counts,” they asked, “the minority community or the residents of the highest crime wards? And what procedures should be used to sort through the conflicting preferences held by members of either one of these groups?”<sup>134</sup> Even more fundamentally, Alschuler and Schulhofer argued, “[o]ur Constitution does not permit a majority to limit individual rights simply by offering to share the burden.”<sup>135</sup> The Framers “enacted a Constitution that guaranteed rights, not to collectivities, but to individuals.”<sup>136</sup>

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126. *Id.* at 1154.

127. *Id.* at 1184.

128. *City of Chicago v. Morales*, 687 N.E.2d 53, 59 (Ill. 1997), *aff’d*, 527 U.S. 41 (1999).

129. Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197.

130. *Id.* at 205.

131. *Id.* at 209.

132. Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Procedures or Bedrock Rights?: A Response to Professors Meares and Kahan*, 1998 U. CHI. LEGAL F. 215, 217–20.

133. *Id.* at 216.

134. *Id.* at 241; *see also id.* at 242 (“The concept of community . . . provides almost limitless opportunities for creative redefinition and manipulation.”).

135. *Id.* at 240.

136. *Id.* at 244; *see also* Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 834 (1999)

Professor David Cole similarly disputed the premise that the changing composition of urban police departments diminished the threat of police overreach.<sup>137</sup> This was because “someone will always be the loser [in police enforcement], and [] the losers will generally be those without effective political power.”<sup>138</sup> Cole also dismissed the view that the potential for abuse was mitigated because communities shared a “linked fate,” inasmuch as the “average citizen” would not be the typical target of police.<sup>139</sup> Finally, he reasoned, that deference “to ‘the community’ means simply to favor the majority’s interests over the minority’s within that community, hardly a principled way to resolve a constitutional dispute.”<sup>140</sup>

Professor Alafair Burke, drawing on her experience as a “neighborhood prosecutor” in Portland, Oregon, questioned whether equal access and participation can be ensured, noting that even the appearance of consensus was often illusory.<sup>141</sup> This is because “every community, however defined, has its outsiders ‘whose complaints are least likely to be heard by the rest of the community.’”<sup>142</sup> Burke noted how she would “massag[e] public perception of the community,”<sup>143</sup> adding that policies adopted themselves might not truly reflect community preference, but rather

may very well be viewed by the community as the lesser of policy evils in a world where politically feasible alternatives are limited by the broader majority. . . . [I]nner-city communities do *not*—even with the increased political power that Kahan and Meares attribute to them—have the ability to shape the governance of their communities as they might truly see fit.<sup>144</sup>

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(“The Constitution places limits on the government’s ability to conduct social experiments that sacrifice minority freedoms to enhance the welfare of the majority.”).

137. David Cole, *Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1081–82 (1999).

138. *Id.* at 1082.

139. *Id.* at 1068 (citing Kahan & Meares, *supra* note 10, at 1165, 1175–76).

140. *Id.* at 1087.

141. Alafair S. Burke, *Unpacking New Policing: Confessions of a Former Neighborhood District Attorney*, 78 WASH. L. REV. 985, 1005 (2003).

142. *Id.* (quoting Cole, *supra* note 137, at 1083).

143. *Id.* at 1007; *see also id.* (citing the example of “Richard,” an African-American retiree who would attend community meetings and “could be counted on to vocalize a predictably pro-police stance at critical city council meetings and other decisionmaking sessions. Preparing for such meetings always involved a phone call to Richard to ensure his participation”).

144. *Id.* at 1009 (emphasis in original). Other scholars have since echoed Burke’s concern over the democratic processes and inclusiveness of locally generated criminal justice policy. *See, e.g.*, LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 177 (2008) (noting, based on field observations, that “local crime politics is a mess of self-interested, frustrated groups . . . . They seem to know little about policy solutions they want and even less about how to get them.”); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 380 (2005) (noting that local processes “rely on groups of volunteers that are not representative of the community and . . . are prone to being dominated by a vocal and active minority”).

Despite the foregoing criticisms, democratic localism in criminal justice policy has its proponents. In two recent books, Professors William Stuntz<sup>145</sup> and Stephanos Bibas<sup>146</sup> urged that local government actors and citizens play a more prominent policy-making role.<sup>147</sup> Professor Andrew Taslitz, in turn, has argued that “Fourth Amendment law should vary based on geographic concerns,” because otherwise there comes risk of “silenc[ing] the political voice of poor urban racial minorities” who enjoy most political influence within the local (not state or federal) legislative arenas.<sup>148</sup>

B. “New Administrativists”

Charting an alternate course, several scholars have urged that courts defer to rules regulating police when the rules result from local executive and quasi-executive entities. In *Democratic Policing*,<sup>149</sup> Professor Barry Friedman and Maria Ponomarenko mounted arguably the broadest argument in this vein, focusing on “enforcement methods,” such as use of drones, car license plate readers, and other bulk data surveillance tools, or “Stingrays”; police resort to Tasers and pepper spray; use of drunk-driving checkpoints; and knock-and-announce.<sup>150</sup>

Friedman and Ponomarenko assert that “[i]t is both unacceptable and unwise for [law enforcement agencies] to remain aloof from the democratic processes that apply to the rest of agency government . . . policing policies and practices should be governed through transparent democratic processes such as legislative authorization and public rulemaking.”<sup>151</sup> Doing so is necessary not only because of the judiciary’s fail-

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145. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* (2011).

146. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

147. See, e.g., *id.* at 146–47 (urging “[c]ollaborative, open decision-making, in consultation with local residents” in a variety of policy areas, which would promote community buy-in and temper police overreach, citing Meares and Kahan in support); STUNTZ, *supra* note 145, at 283 (“Local neighborhoods should exercise more power . . . as they once did.”); see also Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1452 (2017) (“In reviewing local laws, policies, and police and prosecutorial actions, judges might consider the degree to which they reflect community or neighborhood preferences based on inclusive, responsive, and autonomous processes, deferring more to those that do.”).

148. Taslitz, *supra* note 11, at 279–80. Building upon this faith, one student commentator recently urged that city councils designate particular spaces as “high crime areas” per *Wardlow*. Dammann, *supra* note 93, at 574 (“[A]s a democratically elected body, city councils’ high-crime designations would carry the weight of the political process and would thus be more deserving of judicial deference.”); *id.* at 577 (“[T]he democratically elected representatives of those citizens should have a voice in deciding whether their Fourth Amendment rights will be diminished.”).

149. Friedman & Ponomarenko, *supra* note 16.

150. *Id.* at 1848, 1851, 1878, 1883.

151. *Id.* at 1832. While they mainly focus on administrative agency-like processes, the authors maintain that democratic authorization, however obtained, is what is important. See *id.* at 1834 (“Such authorization can come through specific legislation. It can be the product of administrative notice-and-comment rulemaking, in which public participation is welcomed. Or . . . new means of soliciting democratic engagement may be required.”).

ure to effectively regulate police; it is because “judicial review . . . can never substitute for popular control. The regulation of police involves profound policy questions that must be resolved in democratically accountable ways.”<sup>152</sup> Moreover, “opening rulemaking to local community participation will bring voices into the process that may have had no outlet thus far. . . . [T]hose who live in heavily-policed communities have strong views about police practices. . . . What they lack is a formal mechanism through which to make their voices heard.”<sup>153</sup>

The authors acknowledge that local policy outcomes will not always favor civil liberties. However, they reason that “[i]f existing rules are too deferential to the interests of police . . . it is hard to see that they will necessarily get worse. The hope is that with public participation, controversial practices will be moved in a better direction.”<sup>154</sup> When addressing the constitutionality of a regulation, courts should “focus on identifying [political] process failures, should refuse to defer to policing actions that lack a sufficient democratic pedigree, and offer safe harbors for those that are authorized through democratic means.”<sup>155</sup>

More recently, Professor Christopher Slobogin has urged judicial deference to local administrative rules in the narrower context of programmatic searches and seizures, such as auto roadblocks, drug-testing programs, DNA sampling, and mass data collection (which he collectively refers to as “panvasive”).<sup>156</sup> In *Policing as Administration*, Slobogin asserts that the litmus test for assessing the constitutionality of a regulation should be whether the requisites of the administrative law-making process are satisfied.<sup>157</sup> Like Friedman and Ponomarenko, Slobogin identifies a number of crucial instrumental benefits accruing:

[Applying administrative law] principles would improve democratic accountability and counter the usual law enforcement orientation of legislative bodies by requiring public input prior to implementation, agency rationalization of the program, implementation that is both consistent with the stated rationale and that is evenhandedly carried out, and legislative authorization that is sufficiently specific to satisfy a court that a representative body considers the program permissible.<sup>158</sup>

A court faced with a challenge to a policy regulation would apply a “hard look” standard of review, first asking whether the local rule making is legislatively

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152. *Id.* at 1836.

153. *Id.* at 1879–80.

154. *Id.* at 1879.

155. *Id.* at 1836.

156. Christopher Slobogin, *supra* note 15, at 93; *id.* at 96 (“Because . . . panvasive searches and seizures are policy-driven, group-based, and suspicionless, they are legislative in nature. They are carried out in aid of a generally applicable regime that, if promulgated by any other agency, would be considered a form of rule governed by administrative law principles.”).

157. *Id.* at 95 (“[C]onstitutional law should largely be beside the point. . . . Instead, the concrete rules governing panvasive techniques should be viewed through the entirely different prism of administrative law.”).

158. *Id.* at 149; *see also id.* at 152 (asserting that the foregoing requirements, “enforced by the courts, would be consistent with the Fourth Amendment’s central goal—embodied in its reasonableness requirement”).

authorized<sup>159</sup> and then assessing “whether the police department has followed a rational procedure that produced a rational policy consistent with legislative directives and whether the policy is implemented in an evenhanded manner.”<sup>160</sup>

Professor Erik Luna in an earlier article also urged an administrative path, advocating adoption of “enforcement principles” to guide discretionary decisions of police regarding enforcement low-level offenses.<sup>161</sup> Luna outlined a process whereby police leaders and various public officials identify “troublesome areas of selective enforcement,” and generate principles to guide enforcement of such offenses, which would “be publicized and feedback would be solicited from community members in an open forum or town meeting.”<sup>162</sup> “Based on community input and political debate, law enforcement would formally and publicly adopt those principles that withstood scrutiny and would instruct frontline officers on the import and application of the principles.”<sup>163</sup> With greater transparency and citizen participation, Luna reasoned, would come increased community respect for legal commands and for the police that enforce them.<sup>164</sup>

More recently, Professor John Rappaport urged “[s]hifting rulemaking responsibility from the Court to political actors” to “writ[e] conduct rules to govern street-level officers.”<sup>165</sup> Doing so will allow community buy-in, experimentation, and the tailoring of police regulations to “local needs and resources.”<sup>166</sup> Andrew Selbst, focusing in particular on use of predictive policing methods involving “big data,” advocated judicial reliance on the expertise of local departments in the development of algorithms informed by public input.<sup>167</sup>

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159. Such legislation, for instance, regarding auto checkpoints or license plate recognition systems, would specify the “persons or activities” to be regulated, and the “harm” to be prevented. *Id.* at 148.

160. *Id.* at 121; *see also id.* at 135 (“[T]he most pertinent aspects of [administrative] law for panvasive police conduct are the notice-and-comment requirement, the requirement that rules be adequately explained in writing, the requirement that rules be implemented evenhandedly, and the requirement that rules not exceed the relevant legislative authorization.”). Professor Slobogin notes that local governments are not typically subject to the requirements of the Administrative Procedures Act (APA), but asserts that “they are not necessarily immune from the dictates of administrative procedure.” *Id.* at 121 n.153; *see also id.* at 135 (arguing that local departments should be subject to the APA when “carrying out panvasive actions in service of state or federal criminal law”).

161. Luna, *supra* note 17.

162. *Id.* at 603.

163. *Id.*

164. *Id.* at 527; *see also* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1167 (2000) (“By expounding guidelines in an open forum, subject to public commentary and debate, law enforcement . . . empowers the citizenry through sharing information and collaborating on appropriate policing principles.”).

165. Rappaport, *supra* note 17, at 212, 232.

166. *Id.* at 236.

167. Selbst, *supra* note 17, at 182.

### C. Summary

Taken together, the foregoing scholarly camps, while each advocating a shift away from judge-centric decision making, chart distinct paths. The New Democratists urge judicial deference to local democratic preferences regarding both discretionary (“suspicion-based”) policing targeting individuals and programmatic (i.e., “suspicionless”) searches focusing on the public as a whole,<sup>168</sup> despite the significant political process difficulties noted earlier.<sup>169</sup>

New Administrativists, for their part, urge deference to rules and regulations generated by local government administrative units, yet at times (Professor Slobogin in particular) limit their focus to programmatic policing. Friedman and Ponomarenko maintain that courts should defer when “police decisions about enforcement methods . . . represent considered, fact-based judgment formulated with democratic input.”<sup>170</sup> They should “only refuse to accord deference to policing rules that lack a democratic pedigree”<sup>171</sup> and are not the “product of sound democratic processes.”<sup>172</sup> They emphasize that no deference should be accorded when there exists “constitutional doubt” about a policy, yet fail to specify when such scrutiny should be triggered. They also fail to specify what precisely qualifies as a “democratic pedigree” or when “sound democratic processes” are in evidence.<sup>173</sup>

For Professor Slobogin, so long as administrative rule-making prerequisites are satisfied, “constitutional law should largely be beside the point . . . functioning only as a backstop protection for fundamental liberties and as an exhortation that panvasive actions be reasonable.”<sup>174</sup> Again, it remains unclear when a court’s constitutional oversight role would be triggered but it is evident that local government compliance with administrative law expectations neutralizes cause for searching judicial scrutiny.<sup>175</sup> Nor are the procedural trappings of such a regime spelled out

168. See *infra* notes 120–131 and accompanying text.

169. See *supra* notes 132–148 and accompanying text.

170. Friedman & Ponomarenko, *supra* note 16, at 1892.

171. *Id.* at 1901.

172. *Id.* at 1898.

173. On the tendency of voters to lack knowledge regarding the policy positions taken by their local candidates and officials more generally, see David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007).

174. Slobogin, *supra* note 15, at 95.

175. See *id.* (stating that the “concrete rules governing panvasive techniques should be viewed through the entirely different prism of administrative law”); *id.* at 134 (“[A] rule that has cleared the relevant administrative law hurdles might [be] provide[d] a constitutional safe harbor.”); *id.* at 151 (asserting that “[a] regulatory regime based on administrative law principles would . . . avoid subjecting departmental decisions to detailed second-guessing by the judiciary.”). Professor Rappaport similarly writes that while courts “must promise (and deliver) meaningful deference to policy makers’ solutions,” they need not defer when “politically created safeguards fail to sufficiently protect the Constitution’s values,” yet fails to elaborate on this critically line of demarcation. Rappaport, *supra* note 17, at 256, 262. More recently, Andrew Selbst, addressing local police agency adoption of predictive policing procedures, acknowledges the appeal of judicial review but objects to “shift[ing] responsibility . . . from a combination of policing agencies and public comment to the courts.” Selbst, *supra* note 17, at

with specificity, a matter of considerable importance given the undeveloped and uneven state of local administrative law more generally.<sup>176</sup> Local administrative units, moreover, vary enormously in their quality and expertise<sup>177</sup> and political accountability.<sup>178</sup>

Finally, New Administrativists, as Professor Slobogin acknowledges, also tend to overlook significant political process problems that can mire criminal justice policy making.<sup>179</sup> Like the New Democratists they also fail to pay due regard to the important variations in the structures and working dynamics of local governments and officials,<sup>180</sup> which can have critical importance in the ways in which law and policy is formulated.<sup>181</sup> Nor should it be overlooked that voter engagement in local election contests is even less than in state and national elections.<sup>182</sup> Low turnout undercuts the localist presumption of superior political accountability and participatory democracy,<sup>183</sup> as well as the likelihood of minority political leaders being elected.<sup>184</sup>

Notwithstanding these shortcomings, the efforts of scholars in both camps to increase governmental transparency and accountability are to be commended.<sup>185</sup>

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176. See Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 572 (2017) (noting that “the precise procedural requirements binding local agencies are often surprisingly murky”). Of note, the distinctiveness of local governments precludes their administrative law from being a simple body-double of the federal government’s. *Id.* at 574–576; see also *id.* at 614 n.227 (noting “the risk of too quickly equating the familiar institutional structures of federal administrative agencies with a local government structure that can vary significantly.”).

177. See *id.* at 30, 41–43, 55.

178. See *id.* at 49–50; see also *id.* at 63–64 (noting that local agencies vary in their relation to political leaders and that it therefore “may be difficult to hold mayors and city council members and other local elected officials directly accountable for administrative actions”).

179. Slobogin, *supra* note 15, at 119 (noting that “the new administrativists are unduly sanguine about the ability of legislatures and their delegates to avoid catering to law enforcement interests”).

180. In this respect they share a fault of local government law scholars more generally. See David Schleicher, *Local Government Law’s “Law and \_\_\_” Problem*, 40 FORDHAM URB. L.J. 1951, 1954 (2013) (noting inter alia that “there has been too little focus on studying the incentives of local officials or strategic interaction between such officials inside existing governmental structures”).

181. See, e.g., Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. (forthcoming 2018) (highlighting the ways in which the unicameral local governing arrangement, in place virtually nationwide, can lack democratic participation and internal checks and balances).

182. Curtis Wood, *Voter Turnout in City Elections*, 38 URB. AFF. REV. 209, 223 (2002) (estimating that voter turnout in large urban elections is less than thirty-four percent).

183. See *supra* notes 120–131, 151–173 and accompanying text.

184. Zoltan Hajnal & Jessica Trounstone, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515, 524 (2005).

185. See EDWARD R. MAGUIRE, ORGANIZATIONAL STRUCTURE IN AMERICAN POLICE AGENCIES 31, 76, 90, 99 (2003) (discussing opacity in development of police departmental policies). As Rachel Harmon has noted, this lack of accountability is exacerbated by the massive amount of funding that local police secure from the federal government. Harmon, *supra* note 2.

So too are their goals of increasing citizen input on policing policy, which has long been lacking,<sup>186</sup> and urging greater regulation of police practices more generally.<sup>187</sup>

Arguably, these functional benefits alone warrant the unconditional embrace of localism. As discussed next, however, even assuming that local processes operate as advocates hope, according constitutional deference to local policy preferences is problematic for a variety of reasons.

### III. ASSESSING LOCALISM'S LIMITS

Allocating constitutional norm-making authority to local political units shares an obvious parallel to federalism, which “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society.”<sup>188</sup> Federalism, which of course pertains to states,<sup>189</sup> ideally “increases opportunity for citizen involvement in democratic processes; [] allows for more innovation and experimentation in government; and [] makes government more responsive by putting States in competition for a mobile citizenry.”<sup>190</sup> Localism, as Professor Richard Briffault has observed, not only serves these goals,<sup>191</sup> it actually enhances the prospect of them being satisfied.<sup>192</sup> As Dean Daniel Rodriguez put it, localism is “the intrastate analogue of federalism in American constitutional law.”<sup>193</sup> This Part assesses the extent to which the instrumental goals of localism, whatever their effect in other contexts, play out in the Fourth Amendment context.

#### A. Tailoring

A foremost benefit of localism is its capacity to permit policy and practice to reflect local needs and norms. As Justice Black wrote almost a half century ago:

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186. Luna, *supra* note 17, at 587–90 (noting that in poor, inner city communities many lack political voice at ballot box and that notice and comment might mitigate this problem).

187. Thanks to Professor Christopher Slobogin for highlighting this benefit.

188. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

189. *See Smith v. Robbins*, 528 U.S. 259, 272 (2000) (noting an “established practice of permitting the States, within the broad bounds of the Constitution, to experiment with solutions to difficult questions of policy”).

190. *Gregory*, 501 U.S. at 458; *see also id.* (stating that federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society”).

191. *See* Richard Briffault, “What About the ‘Isms’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1315 (1994) (“These virtues of federalism—participation, diversity, intergovernmental competition, political responsiveness, and innovation—are, of course, among the very values regularly associated with local autonomy.”).

192. *Id.* at 1316 (“If grass-roots participation, intergovernmental competition, political responsiveness, subnational diversity, and innovation are promoted by the relatively small number of relatively large states, then these values out to be far more effectively advanced by the empowerment of the far larger number of much smaller local governments.”).

193. Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 627 (2001). For an extended discussion of the parallel, see Rick Su, *Intrastate Federalism*, 19 U. PA. J. CONST. L. 191 (2016).



It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs . . . . [Courts should observe the] ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow.<sup>194</sup>

With the Fourth Amendment, such pluralism arguably has even more appeal because, as Professor Andrew Taslitz put it, “[t]he [Supreme] Court has defined reasonableness as a balancing of state against individual interests, and it seems logical that those interests can vary geographically.”<sup>195</sup>

But tying federal constitutional norms to local political preferences carries risks. While local governments over time have evinced progressive views, for instance recognizing gay rights and enacting antidiscrimination ordinances,<sup>196</sup> and tempering enforcement of and penalties associated with possessing small amounts of marijuana,<sup>197</sup> one need not look far for examples of heavy-handedness. Indeed, not long ago localities aggressively targeted gays for criminal law enforcement<sup>198</sup> and made no pretense of fair treatment of subpopulations such as African<sup>199</sup> and Chinese-Americans.<sup>200</sup> More recently, localities have resorted to an array of

194. *Powell v. Texas*, 393 U.S. 514, 547–48 (1968) (Black, J., dissenting); *see also* *City of Chicago v. Morales*, 527 U.S. 41, 114–15 (1999) (Thomas, J., dissenting) (“[T]he people who will have to live with the consequences of today’s opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Mrs. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs.”); *id.* at 100 (attaching importance to fact that challenged ordinance resulted from a “democratic process” that included “extensive hearings” where “[o]rdinary citizens” spoke of neighborhood problems).

195. Taslitz, *supra* note 11, at 302; *see also* Barron, *supra* note 25, at 595–96 (“[E]xpress recognition of local constitutionalism may engage local communities more directly in the public practice of constitutional interpretation and accord constitutional recognition to the diverse conceptions of constitutionalism that local communities embrace.”).

196. Yishai Blank & Issi Rosen-Zvi, *The Geography of Sexuality*, 90 N.C. L. REV. 955 (2012); Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 J. L. & POL. 53 (2014).

197. Logan, *supra* note 78, at 325–27.

198. William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1038–45 (1997).

199. *See, e.g.*, *Comm’rs of Washington v. Frank*, 46 N.C. 436, 437 (1854) (upholding local law for disorderly conduct that imposed a fine on white violators and “thirty-nine lashes” for blacks). In backing the law, the North Carolina Supreme Court emphasized the importance of localization, stating:

Different regulations are required in different localities . . . . Slaves compose so large a portion of the population of our towns and villages that, in passing rules and regulations for their government, much must be left to the judgment and discretion of those who are to enforce them, in their application to particular cases.

*Id.* at 440–41.

200. WILLIAM J. COURTNEY, *SAN FRANCISCO’S ANTI-CHINESE ORDINANCES, 1850–1950* (1956).

“loitering with intent” laws,<sup>201</sup> along with aggressive, proactive policing strategies such as “zero tolerance.”<sup>202</sup> Homeless individuals,<sup>203</sup> immigrants,<sup>204</sup> and convicted sex offenders<sup>205</sup> have also been singled out, and recent revelations of police overreach in New York, Baltimore, and Ferguson attest to local propensity for excess.<sup>206</sup>

Localities have also unabashedly used the criminal justice system to extract fees and surcharges from criminal offenders, especially poor and minority community members suspected of engaging in low-level offenses.<sup>207</sup> Similar zeal is evidenced in local efforts to secure DNA samples from individuals, independent of state or federal regulatory oversight.<sup>208</sup>

The foregoing examples are not provided to make the categorical case for local oppressiveness; rather, they highlight Madison’s well-justified concern over local factionalism,<sup>209</sup> what Professor Timothy Zick has called the “geography of purification.”<sup>210</sup> At the same time, local law enforcement officials, whose job it is to maintain

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201. Logan, *supra* note 72, at 1450.

202. Susan A. Bandes, *The Challenges of “Quality of Life” Policing for the Fourth Amendment*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA* 45 (John T. Parry & L. Song Richardson eds., 2013).

203. Harry Simon, *Towns Without Pity: Constitutional and Historical Analysis of Official Efforts To Drive Homeless Persons from American Cities*, 66 *TUL. L. REV.* 631 (1992).

204. Lindsay Nash, *Expression by Ordinance: Preemption and Proxy in Local Legislation*, 25 *GEO. IMMIGR. L.J.* 243 (2011); Rick Su, *Local Fragmentation as Immigration Regulation*, 47 *HOUS. L. REV.* 367 (2010).

205. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 *IOWA L. REV.* 1, 5–13 (2006).

206. See *supra* notes 22–24 and accompanying text. Nor, it should be noted, are such variations limited to localities within different states. See, e.g., Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 *AM. POL. SCI. REV.* 605, 609 (2014) (categorizing U.S. cities on a political spectrum and ranking San Francisco the least conservative in its policy preferences and ranking Anaheim among the nation’s ten most conservative cities).

207. Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 *U. ILL. L. REV.* 1175, 1185–96 (2014).

208. Jason Kreag, *Going Local: The Fragmentation of Genetic Surveillance*, 95 *B.U. L. REV.* 1491 (2015). Local governments, freed of the actual fiscal cost of imprisoning individuals (typically absorbed by states), have also been prime drivers of the nation’s decades-long cycle of mass imprisonment. See W. David Ball, *Tough on Crime (On the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates—and Why It Should*, 28 *GA. ST. U. L. REV.* 987, 992–93 (2012).

209. See *supra* note 19 and accompanying text; see also BRIAN E. DOLLERY & JOE L. WALLIS, *THE POLITICAL ECONOMY OF LOCAL GOVERNMENT* 12–13, 39–70 (2001) (surveying forms of political process failure among local governments); cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 522–23 (1989) (Scalia, J., concurring) (noting the “social reality . . . that racial discrimination against any group finds a more ready expression at the state and local level than at the federal level”); Jamison E. Colburn, *Localism’s Ecology: Protecting and Restoring Habitat in the Suburban Nation*, 33 *ECOLOGY L.Q.* 945, 953 (2006) (asserting that “localism is more typically factional, opaque, and self-dealing in nature.”).

210. Timothy Zick, *Constitutional Displacement*, 86 *WASH. U. L. REV.* 515, 576 (2009); see also *id.* at 607 (“Territoriality is being used by governments to punish, control, restrict, segregate, brand, demonize, and de-legalize certain persons and groups.”).

public safety and are rewarded for doing so, are not naturally predisposed to vigilance when it comes to civil liberties.<sup>211</sup>

In short, history teaches that the very proximity of local decision makers to perceived social ills is at least as likely to inspire harshness as the tempered response optimistically hoped for by Meares and Kahan and others.<sup>212</sup> Practicing federalism “all the way down,” as Professor Gerken acknowledges, is thus a “two-edged sword,”<sup>213</sup> giving effect to repressive and progressive policies alike. This can be so even when, as a formal matter, local democratic or administrative processes function properly and boast the proper “pedigree.”<sup>214</sup>

Therein lies the rub of equating political responsiveness, transparency, and accountability with constitutional propriety.<sup>215</sup> Substituting majoritarian preference for constitutional analysis, as the New Democratists would have it, is not only contrary to the antimajoritarian purpose of the Fourth Amendment.<sup>216</sup> It would permit “the political branches to govern without legal constraint,”<sup>217</sup> creating what might be called a “majoritarian difficulty.” As Professor John Ely observed, “it makes no sense to employ the value judgements of the majority as the vehicle for protecting minorities from the value judgments of the majority.”<sup>218</sup> And simply because a local populace might be inured to the negative consequences of a policy or practice,<sup>219</sup> the

211. See Harmon, *supra* note 117, at 811 (“[Police] chiefs are usually better rewarded for maintaining order and reducing crime than for protecting civil rights.”).

212. See *supra* notes 120–131, 145–148 and accompanying text.

213. Gerken, *supra* note 44, at 47; see also *id.* (“Federalism reimagined thus reveals that the benefits of minority control can extend not just to Southern racists, but to blacks and Latinos . . .”).

214. Friedman & Ponomarenko, *supra* note 16, at 1837.

215. Cf. David H. Bayley, *Community Policing: A Report from the Devil’s Advocate*, in COMMUNITY POLICING: RHETORIC OR REALITY 225, 237 (Jack R. Greene & Stephen D. Mastrofski eds., 1988) (“Local accountability does not substitute for professional, independent oversight. Quite the contrary, it makes it more necessary. Americans especially have been naïve about this, believing that rectitude was assured by local control. Responsiveness may be achieved in this way, but not propriety under law.”).

216. See Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 330 (2016) (“[T]he United States is made up of heterogeneous groups, some of which are more powerful than others. In that context, the Fourth Amendment should be a bulwark for unpopular persons and minority groups—a source of countermajoritarian rights.”). But see George C. Thomas, III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 158 (1993) (disputing “anti-majoritarian” view of Fourth Amendment).

217. *Boumediene v. Bush*, 553 U.S. 723, 765 (2008); see also Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1601–02 (2010) (noting that reliance upon public surveys and positive law “does smack of putting search and seizure law up for a vote, which runs against the constitutional grain”).

218. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 69 (1980); see also Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 298 (Robert A. Rutland & Charles F. Hobson eds., 1977) (noting that liberty is threatened not so much by arbitrary acts of government, at odds with those governed, as “acts in which the government is the mere instrument of the major number of the constituents”).

219. See, e.g., *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring)

courts need not be.<sup>220</sup> Finally, cutting courts out of the equation raises obvious concern when a local law or policy impacts persons outside the locality who lack political voice in formation of the policy.<sup>221</sup>

The New Administrativists' reliance on satisfaction of administrative rule making presents similar difficulty. Simply checking the boxes of administrative process regularity, itself difficult to assess,<sup>222</sup> risks substituting what might be mere regulatory window dressing<sup>223</sup> for substantive constitutional analysis by a court.<sup>224</sup> An example of the practical effect of such deference is seen with programmatic searches and seizures. Doctrine governing them is already thought unduly skewed in favor of government,<sup>225</sup> turning on whether the "primary purpose" of a challenged strategy is crime control or administrative in nature.<sup>226</sup> Little reason exists to think that jurisdictions will resist characterizing a particular search or seizure as the latter, to redeem a

("And even if the public does not welcome the diminution of privacy that new technology entails, they may eventually reconcile themselves to this development as inevitable."); *see also* Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 *MISS. L.J.* 1309, 1311 (2012) (noting the public's unwitting acceptance of a "surveillance society").

220. *See* *People v. Hauseman*, 900 P.2d 74, 78 (Colo. 1995) (stating that "strict adherence to standard police department procedures . . . does not necessarily satisfy the Fourth Amendment reasonableness standard").

221. *See infra* notes 330–331 and accompanying text.

222. *See, e.g.*, Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 *UCLA L. REV.* 1300, 1333–52 (2016) (discussing reliance on questionably representative groups when assessing public participation in rule making).

223. In defending his model, Professor Slobogin, for instance, evinces less than total confidence that notice-and-comment citizen input will actually occur. Slobogin, *supra* note 15, at 139 (noting that the process will afford "at least a patina of democratic participation"); *id.* at 139 n.257 (stating that "some participation is better than none"). Friedman and Ponomarenko, in the conclusion of their article, modestly offer that "[e]ven small steps in the direction of democratic accountability would go a long way toward a saner system of regulating the police." Friedman & Ponomarenko, *supra* note 16, at 1907.

224. Andrew Crespo has described the regime envisioned by New Administrativists as one: in which constitutionally grounded judicial review is largely replaced by an administrative framework built around law enforcement self-regulation. Rather than judging the lawfulness of law enforcement actions directly, courts . . . would instead judge the processes by which law enforcement actors judge themselves, ensuring that those processes adhere to basic norms of transparency and democratic accountability, but otherwise deferring to law enforcement actors when it comes to the substantive validity of the decisions, policies, and actions that those actors pursue.

Crespo, *supra* note 13, at 2051. In this respect, proponents align with advocates of "administrative constitutionalism," entailing a greater agency role in the interpretation and implementation of constitutional norms. *See, e.g.*, Gillian E. Metzger, *Administrative Constitutionalism*, 91 *TEX. L. REV.* 1897 (2013).

225. *See, e.g.*, Eve Brensike Primus, *Disentangling Administrative Searches*, 111 *COLUM. L. REV.* 254, 296–97 (2011) (asserting that the Court's balancing is "conducted in a way that systematically favors the government").

226. *See* *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (requiring courts to distinguish searches and seizures that have as their "primary purpose . . . [the] detect[ion] . . . of ordinary criminal wrongdoing" from those that do not).

search, when a reviewing court must simply sign off on whether administrative rule-making requirements were satisfied.<sup>227</sup>

More problematic still, local governments, mindful of the undemanding judicial scrutiny entailed in “hard look” review,<sup>228</sup> a deferential standard that might or might not be apt to accord a particular local agency,<sup>229</sup> could be emboldened to pursue policies that they otherwise would not if subject to traditional judicial constitutional scrutiny. As Professor Orin Kerr recently observed in arguing against use of privacy legislation as a substitute for judicial analysis:

If courts look to legislation to interpret the Fourth Amendment, . . . legislation will take on constitutional importance. The prospect that courts will interpret the Constitution differently *ex post* will tend to influence the legislation that the elected branches enact *ex ante*. The resulting feedback loop provides a significant argument for independence.<sup>230</sup>

Professor Richard Re makes a similar point in critiquing an argument advanced in support of the view that state and local positive law (e.g., trespass) should govern whether police engage in a search. Re notes that doing so would make doctrine “contingent and jurisdictionally variable”<sup>231</sup> and would “create an incentive for lawmakers to adjust privacy protections for private parties so as to expand the power of law enforcement.”<sup>232</sup> As Re observes, “when democratic pathologies arise, the positive law model would have perverse effects, causing defects in regular lawmaking to curb the Fourth Amendment.”<sup>233</sup>

Ultimately, moreover, the resulting feedback loop stands little chance of being tempered by the states where localities are situated.<sup>234</sup> State legislatures, as Nestor Davidson has observed, “are particularly sensitive to local political communities, and because states in the first instance create and empower localities, states may be bound

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227. See, e.g., Pieter S. de Ganon, Note, *Noticing Crisis*, 86 N.Y.U. L. REV. 573, 596–98 (2011) (discussing the Court’s failure to critically examine government representations that a problem against which search is directed, for example, a drug “crisis” warranting suspicionless school drug testing, is supported by factual record).

228. Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423, 447 (2016) (noting that “‘hard look’ review at its most demanding remains an inquiry only into reasonableness, not desirability or wisdom”); see also Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1356–57 (2016).

229. See Davidson, *supra* note 176, at 623 (“Legislative standards that might be acceptable when given to a deeply resourced, professionally staffed traditional agency may become more troubling when community members are tasked with the decision making.”).

230. Kerr, *supra* note 42, at 1158 (emphasis added).

231. Re, *supra* note 216, at 321.

232. *Id.*

233. *Id.* at 329.

234. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 112 (1990) (“State legislatures and state and federal courts have proven unwilling to limit local power or alter the structure of state-local relations, even after the effects of local autonomy in promoting interlocal inequality and local parochialism have been demonstrated.”).

too easily by the shortcomings of their own creations.<sup>235</sup> Legislative reluctance is especially likely in light of the fact that local governments pay for policing,<sup>236</sup> a matter squarely within their police power authority.<sup>237</sup> Finally, given the likely absence of political pressure by business interests, one should not expect to see states rush to preempt local policing policy, as seen with rent control or smoking bans,<sup>238</sup> or efforts to limit fracking.<sup>239</sup> Likewise, because policing policy typically lacks high political salience, we should not expect to see state-level governmental intervention, as has occurred with a hot button issue such as firearms possession.<sup>240</sup>

Nor is pushback likely to come from state and local judges,<sup>241</sup> who are often subject to election<sup>242</sup> and perhaps inclined to local fealty.<sup>243</sup> As noted earlier, courts make little use of preemption and conflict doctrine to limit local government authority to enact low-level criminal laws,<sup>244</sup> and their appetite for intervention is even less likely

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235. Nestor Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1019 (2007).

236. JEFFREY L. BARNETT & PHILLIP M. VIDAL, U.S. CENSUS BUREAU, STATE AND LOCAL GOVERNMENT FINANCES: 2011, at 7 (2013), <https://www.census.gov/prod/2013pubs/g11-alfin.pdf> [<https://perma.cc/C5EA-VV68>] (noting that nationwide local governments spent \$83.5 billion on police services in 2011, ranking just education as the greatest budgetary focus); *id.* at 4 (noting that local governments spend almost seven times as much on policing as do states).

237. *See, e.g., City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (recognizing the broad power of municipalities in the protection of public health and safety). Although remote, the prospect of state intervention regarding local control over public safety policy is not beyond the realm of possibility. *See, e.g., Van Gilder v. City of Madison*, 267 N.W. 25, 32 (Wis. 1936) (noting historic local police power authority but stating that “it would be within the competency of the Legislature if it so desired to entirely rearrange the law of the state with respect to these matters”); *see also* KRANE ET AL., *supra* note 73, at 1 (“Where the line between an appropriate sphere of local action and the authority of state government is drawn has been a source of continuous conflict in state capitals.”).

238. *See* Diller, *supra* note 73, at 1139 (recounting recent instances by state legislatures in these areas).

239. *See* Courtney Walmer, Note, *Governing Hydraulic Fracturing Through State-Local Dynamic Federalism: Lessons from a Florida Case Study*, 42 FLA. ST. U. L. REV. 867, 869–70 (2015) (discussing state preemption legislation).

240. *See* Blocher, *supra* note 33, at 133 (discussing widespread state laws preempting local limits on gun possession).

241. *See* Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENVER U. L. REV. 1337, 1356 (2009) (“[S]tate courts have long affirmed the police powers of home rule local governments to promote health, safety, and welfare . . .”).

242. Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How To Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 489 (2012) (noting that approximately ninety percent of state and local judges face election of some kind).

243. Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 902, 907 (2013) (noting that state judges often align with the local rather than state interests).

244. *See supra* notes 72–75 and accompanying text.

regarding local efforts to regulate their police forces.<sup>245</sup> Nor will federal courts exercise oversight; habeas corpus is unavailable in the Fourth Amendment context<sup>246</sup> and direct review by the U.S. Supreme Court is unlikely given its increasingly paltry docket.<sup>247</sup>

Finally, it should not escape attention that local policing policy, as with local policy making more generally,<sup>248</sup> can be heavily influenced by profit-motivated private industry. For instance, it is now commonplace for private data companies to help in the collection, storage, and analysis of data,<sup>249</sup> and police departments rush to secure the latest surveillance technology created and marketed by private vendors.<sup>250</sup>

Another example is found in ongoing efforts by local departments to develop DNA databases, with firms eager to capitalize on business opportunities characterized by one vendor as “enormous.”<sup>251</sup> When local databases operate independently of state and federal guidelines, police enjoy much freer rein to secure samples,<sup>252</sup> operating under a “more is better” mentality that benefits both law enforcement (touting potential crime control advantages) and the businesses (profits as a result of expansion).<sup>253</sup>

In this environment, pressure is predictably mounting to expand the scope of individuals from whom DNA can be collected. In 2013, the Supreme Court allowed

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245. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 452 (1990) (contending that a “[l]ocalist ideology . . . cripple[s] the willingness of states to take a statewide perspective and displace local authority when considerations of equity or efficiency make it appropriate to do so.”).

246. *Stone v. Powell*, 428 U.S. 465 (1976).

247. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1251 (2012) (stating that “the Court hears fewer cases these days than in any other time in [its] modern history” and providing data in support). Courts, moreover, have rejected claims that variable laws within a state raise equal protection concern. *E.g.*, *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 230 (1964); *Missouri v. Lewis*, 101 U.S. 22, 31 (1880); *City of Baton Rouge v. Williams*, 661 So. 2d 445, 451 (La. 1995).

248. See Davidson, *supra* note 176, at 604 (identifying as a key defining feature of local agencies the “permeability of the line between public and private within local agencies”); *id.* at 608 (discussing infusion of private actors in work of local agencies).

249. See Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 547 (2016).

250. See Murphy, *supra* note 43, at 536 (“Most technological surveillance devices are developed, marketed, and maintained by private sector industries, not nonprofit or government entities.”); Matt Richtel, *A Police Gadget That Tracks Phones? Shhh! It’s Secret*, N.Y. TIMES (Mar. 15, 2015), <https://www.nytimes.com/2015/03/16/business/a-police-gadget-tracks-phones-shhh-its-secret.html> [<https://perma.cc/3TCN-BZ66>] (discussing promotion and sale of “StingRay” devices to local departments, which are used to track the location of cell phones without a warrant).

251. Kreag, *supra* note 208, at 1507 (quoting Bode Technology Vice President for Sales and Marketing).

252. *Id.* at 1502–03.

253. *Id.* at 1512.

police, acting without a warrant, to secure DNA from those arrested for “serious offenses.”<sup>254</sup> Expanding this limit would have obvious benefits for industry. As Jason Kregag has observed:

Large [DNA database] firms . . . view local law enforcement databases as potential revenue streams, particularly because they promise to promote the use of DNA beyond violent crimes (sexual assaults and homicides) to property crimes. These firms see a business opportunity in processing the evidence swabs collected from property crimes. Indeed, in marketing their products, they trumpet the studies that have highlighted DNA’s promise for solving these crimes.<sup>255</sup>

A locality, hearing the combined pitch of police administrators and business interests, understandably would be susceptible of persuasion in favor of expansion.<sup>256</sup> Collection of familial DNA samples, which allow police to use the DNA of innocents to identify suspects,<sup>257</sup> would likely follow a similar path. Yet experience teaches that any political resistance to these policy shifts would most likely come from those most directly affected, politically marginalized segments of the locality without much influence.<sup>258</sup>

### *B. Experimentation*

Another touted benefit of localism is its capacity to foster experimentation.<sup>259</sup> Just as “a single courageous State may . . . serve as a laboratory” and undertake “novel social and economic experiments” from which other states can draw lessons,<sup>260</sup> so too can local governments.<sup>261</sup> Recently, the construct made famous

254. *Maryland v. King*, 569 U.S. 435, 465 (2013).

255. Kregag, *supra* note 208, at 1521.

256. Risk of political capture, it should be noted, is perhaps especially pronounced at the local government level, with its typical smaller-sized, unicameral legislative structure and lesser participatory democracy and lack of checks and balances, compared to bicameral bodies operative in the state and federal realms. *See Kazis, supra* note 181, at 69–73. Possibly exacerbating matters, local legislative elections are also less subject to partisan competition, compared to their state and federal legislative counterparts. *See Schleicher, supra* note 173. Local elections are also often marked by lower voter turnout. *See supra* note 182.

257. Wayne A. Logan, *Government Retention and Use of Unlawfully Secured DNA Evidence*, 48 TEX. TECH. L. REV. 269, 277 (2015).

258. *See supra* notes 132–144 and accompanying text; *see also* Kregag, *supra* note 208, at 1539 (“[T]he local citizens who perceive the positive benefits of a local DNA database—reduced crime—are more than likely not the same citizens who bear the burdens of local databases.”).

259. *See, e.g.,* Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1487, 1498 (1987) (“decentralization allows for innovation and competition in government” and provides sub-federal entities “greater opportunity and incentive to pioneer useful changes”).

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

261. *See* Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 43 (2006) (noting that “if the fifty states are laboratories for public policy formation, then



by Justice Brandeis has figured in Professors Michael Dorf and Charles Sabel's "democratic experimentalism,"<sup>262</sup> whereby "power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstance," with the solutions shared regionally and nationally.<sup>263</sup>

Presuming that one accepts that constitutional rights are ripe for experimentation,<sup>264</sup> the viability of the model rests on several key assumptions. One is that a local decision-making unit possesses expertise to formulate and implement policy worthy of deference.<sup>265</sup> As John Rappaport has noted, however, the assumptions underlying this purported superiority in the policing context are "contingent and qualified."<sup>266</sup> This is so for several reasons, including that political influences "may cause policy makers 'to use the information they possess in distorted ways';<sup>267</sup> the tendency of law enforcement to undervalue individual rights;<sup>268</sup> and the lack of expertise of most politicians in policing matters.<sup>269</sup> Indeed, lending prescriptive weight to local expertise can be seen as especially problematic today. As leading policing scholar David Bayley has observed, "[s]ince the 1980s, the challenges of managing the police have become dramatically more complex in ways that are not recognized either by the police or the public."<sup>270</sup> According to Bayley, "[t]he public is now demanding a voice in policing at precisely the moment that policing has become unprecedentedly more complicated."<sup>271</sup>

Professor Michael Livermore, in his recent article *The Perils of Experimentation*, echoes this concern, noting that the benefits of "inquiry cannot be carried out in the abstract, and sound analysis must be based on careful attention to a wide range of policy and political dynamics."<sup>272</sup> He urges "a healthy dose of

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surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation and reform").

262. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

263. *Id.* at 267.

264. *But see* *Duncan v. Louisiana*, 391 U.S. 145, 170 (1968) (Black, J., concurring) ("I have never believed that under the guise of federalism the States should be able to experiment with protections afforded our citizens through the Bill of rights."); *Truax v. Corrigan*, 257 U.S. 312, 338 (1921) ("The Constitution was intended, its very purpose was, to prevent experimentation with the fundamental rights of the individual.").

265. *See, e.g.*, Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 82 (2011) ("Experimentalism emphasizes stakeholder participation to elicit and reconcile the diverse views and interests of people distinctively affected by and knowledgeable about the matters in issue.").

266. Rappaport, *supra* note 17, at 232.

267. *Id.* at 233 (quoting ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 86–87 (2009)).

268. *Id.*

269. *Id.*; *see also* SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY* 8 (2005) (noting that most elected officials lack expertise in policing matters).

270. David H. Bayley, *The Complexities of 21st Century Policing*, 10 POLICING 163, 163 (2016); *id.* at 166 ("[I]t is obvious that the management of policing has become dramatically more complicated in ways that are not generally recognized.").

271. *Id.* at 170.

272. Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636, 708 (2017);

public choice skepticism concerning how information will be put to use,<sup>273</sup> citing policing as an example.<sup>274</sup> Although he does not elaborate, Livermore is justified. As commentators have long recognized, the political pathologies at play in the criminal justice policy-making process are acute and pervasive.<sup>275</sup> With policing in particular, jurisdictions have incentive to adopt aggressive policies that are inhospitable to perceived undesirables.<sup>276</sup> Increasingly pronounced social and economic segregation within and between localities,<sup>277</sup> certainly inclusive of suburban enclaves,<sup>278</sup> exacerbates the phenomenon.

Another basic concern relates to the viability of the experimentalist model itself. Over thirty years ago, Professor Susan Rose-Ackerman recognized that political leaders, wary of negative results possibly attending an experiment, will free-ride on

*see also id.* at 666 (“[I]t is worth inquiring into whether the relevant policy context is one in which the creation of information is likely to have salutary effects on the policymaking process . . . where there is little potential benefit and greater downside risk, enthusiasm for experimentation should wane.”).

273. *Id.* at 652.

274. *Id.* at 658–59; *see also* Briffault, *supra* note 234, at 115 (“The sharp differences among local governments and the concomitant differences in local needs and abilities render general claims about the value, as well as the extent, of local autonomy difficult to sustain. . . . [O]nce the political and economic setting in which contemporary local governments function is considered, the normative case for localism becomes considerably less compelling.”).

275. *See supra* note 20 and accompanying text.

276. *See* Doron Teichman, *The Market for Criminal Justice: Federalism, Crime Control, and Jurisdictional Competition*, 103 MICH. L. REV. 1831, 1834 (2005). Research by Adam Winkler examining state, local, and federal laws challenged on free speech grounds reflects this parochial local tendency, which Professor Winkler attributed to a desire “to please locally powerful interest groups by restricting the speech of disfavored minorities.” Adam Winkler, *Free Speech Federalism*, 108 MICH. L. REV. 153, 179–80 (2009). Winkler concluded:

The problem is that choice and diversity are not necessarily values that should be encouraged when it comes to fundamental rights. The right to free speech is supposed to be enjoyed equally by all citizens, regardless of their place of residence. In the traditional understanding of the First Amendment, the citizen choice that is valued is that which comes from unfettered debate in the marketplace of ideas. If state and local governments can restrict speech, the channels of dialogue are restricted and choice diminished, not enhanced.

*Id.* at 183.

277. *See* Claude S. Fischer, Gretchen Stockmayer, Jon Stiles & Micahel Hout, *Distinguishing the Geographic Levels and Social Dimensions of U.S. Metropolitan Segregation, 1960–2000*, 41 DEMOGRAPHY 37, 54 (2004); Daniel T. Lichter, Domenico Parisi & Michael C. Taquino, *Toward a New Macro-Segregation? Decomposing Segregation Within and Between Metropolitan Cities and Suburbs*, 80 AM. SOC. REV. 843, 844 (2015).

278. On the impact of land use controls, tax policy, and the like with particular regard to the creation and proliferation of suburbs, *see* COLIN GORDON, MAPPING DECLINE: ST. LOUIS AND THE FATE OF THE AMERICAN CITY 9–10 (2009); SIDNEY PLOTKIN, KEEP OUT: THE STRUGGLE OF LAND USE CONTROL (1987). Not all suburbs, of course, are the same in their socioeconomic or racial composition as the concept “melting pot suburbs” denotes. WILLIAM H. FREY, DIVERSITY EXPLOSION: HOW NEW RACIAL DEMOGRAPHICS ARE REMAKING AMERICA 159 (2014).

the experiments of others.<sup>279</sup> Risk of free-riding, Professors Brian Galle and Joseph Leahy observed more recently, is especially likely when the policy or practice in question is relatively easy to replicate.<sup>280</sup>

Professor Slobogin acknowledges that not all local governments will have the wherewithal to generate their own policies,<sup>281</sup> and will “piggyback on policies developed by their larger counterparts and other policy organs.”<sup>282</sup> When this occurs, however, the public participation and tailoring that proponents posit as critically important is short circuited,<sup>283</sup> and jurisdictions could well adopt ill-suited policies.<sup>284</sup> Worse yet, policies might remain in place as a result of ossification, a problem long recognized by administrative law scholars.<sup>285</sup>

On the other hand, if in fact localities do engage in experimentation, there can be difficulties. As a threshold matter, they might not learn of one another’s experiments and outcomes. Professor Hannah Wiseman, echoing concerns of other scholars,<sup>286</sup> has noted the problem of “regulatory islands,” which lack necessary information on “the suite of potential policy approaches already tried or proposed—not to mention information about implementation processes and the results of policy processes.”<sup>287</sup> With policing policy in particular, there is reason to expect that localities will engage in competitiveness,<sup>288</sup> not the cooperative spirit necessary for sharing to take place.<sup>289</sup>

279. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 615–16 (1980); see also Koleman S. Strumpf, *Does Government Decentralization Increase Policy Innovation?*, 4 J. PUB. ECON. THEORY 207, 208 (2002) (“Experiments benefit not just the innovating government but also potential imitators, and so local governments have an incentive to free-ride off their neighbors.”).

280. Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1346 (2009).

281. See Slobogin, *supra* note 15, at 135.

282. *Id.*; see also Friedman & Ponomarenko, *supra* note 16, at 1888 (“[I]t is simply not the case that each local department is going to have to draft a set of rules from the ground up. There already are examples of model rules governing many aspects of policing. . . . These rules may serve as a model for other communities. Most likely there will be convergence toward best practices.”); Rappaport, *supra* note 17, at 246 (“[W]e should not expect, in practice, to see as many constitutional rule sets as there are law enforcement jurisdictions.”).

283. See *supra* notes 120–131, 157–167 and accompanying text.

284. Cf. Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1172 (2014) (noting that borrowing by states of codified codes “[i]n the criminal context . . . is particularly problematic, because legislative borrowing makes penal law and sanctions too far removed from local community values and needs”).

285. See, e.g., Richard J. Pierce, Jr., *Rulemaking Ossification Is Real: A Response to Testing the Ossification Thesis*, 80 GEO. WASH. L. REV. 1493, 1494 (2012) (noting that “[o]ssification is a real problem that has a wide variety of serious adverse effects.”).

286. See, e.g., Galle & Leahy, *supra* note 280, at 1351 (questioning the “assumption that jurisdictions can easily obtain information about the experiments of others”); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1423 (2011) (recognizing that governmental actors need but often lack information regarding the “likely consequences of different courses of action”).

287. Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1691 (2014).

288. See Teichman, *supra* note 276, at 1836.

289. As former New York and Los Angeles Police Chief William Bratton put it: “We don’t [cooperate]. Law enforcement is the most turf-based institution in America. And when you

The experiments themselves, moreover, can present another concern: an indeterminacy of scale problem. While advocates do not specify which level of government, or entity, should bear responsibility for norm creation, they appear to focus on municipalities,<sup>290</sup> which number in the tens of thousands.<sup>291</sup> Local constitutionalists, for their part, appear amenable to accepting neighborhoods<sup>292</sup> or even sublocal “special purpose institutions” as worthy norm-creators.<sup>293</sup> If the goal is to ensure participation and optimize the likelihood of consensus,<sup>294</sup> micro-ization of political unit is sensible,<sup>295</sup> yet as noted earlier even defining “community” can be pose major challenges.<sup>296</sup>

Presuming this definitional challenge is surmounted, the multitude of local preferences will present major practical difficulty.<sup>297</sup> Professor John Rappaport acknowledges the risk of creating “a patchwork of regulations that will be unduly complex and difficult for the Court to oversee,”<sup>298</sup> embroiling the judiciary in a “Whac-a-mole” scenario of perpetually reviewing policies.<sup>299</sup> But he dismisses this as “really an objection to our federal system, in which state and local authorities exercise police powers. Regulation of law enforcement is not a uniquely federal concern that cannot be effectively treated without national intervention.”<sup>300</sup>

have upwards of 19,000 separate police forces in a purposely decentralized law-enforcement environment, it’s a lot of individual turf to protect.” Robert Keough, *Bill Bratton on the New Crime Paradigm*, COMMONWEALTH (Jan. 1, 2002), <http://commonwealthmagazine.org/uncategorized/bill-bratton-on-the-new-crime-paradigm> [<https://perma.cc/E4XD-XGND>].

290. See Friedman & Ponomarenko, *supra* note 16, at 1854; Meares & Kahan, *supra* note 10, at 211; Slobogin, *supra* note 15, at 126, 135.

291. See HOGUE, *supra* note 49.

292. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 460–61 (2001) (“The logic of neighborhood constitutionalism requires that states defer to city norms, . . . and that neighborhoods defer to block-level norms as long as the criteria for deference are met.”). For an early argument in favor of a neighborhood-level system of governance, including police functions, see Richard Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973).

293. Gerken, *supra* note 44, at 29.

294. JEFFREY M. BERRY, KENT E. PORTNEY & KEN THOMSON, REBIRTH OF URBAN DEMOCRACY 95–98 (1993) (urging use of neighborhood councils for this reason); Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 U. COLO. L. REV. 137, 180–81 (2008).

295. See Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1349 (2014) (noting presumption guided by “instinctive belief that smaller is more beautiful”).

296. See *supra* notes 132–144 and accompanying text (discussing varied definitions of “community”); see also STEVE HERBERT, CITIZENS, COPS, AND POWER: RECOGNIZING THE LIMITS OF COMMUNITY 55, 72–89 (2006) (noting that police departments define “community” differently than residents); Burke, *supra* note 141, at 1004 (“[I]t is not obvious that residents of a geographically-defined region comprise a ‘community’ in anything other than the most superficial sense.”).

297. See Taslitz, *supra* note 11, at 302 (“Of course, there are administrative costs associated with having local variations in rules, and those can be reasons to prohibit such variations in some instances.”).

298. Rappaport, *supra* note 17, at 246.

299. *Id.* at 261.

300. *Id.* at 246.

Increased judicial caseloads, however, will not be the only problem. Localism eliminates a key benefit of traditional federalism—it provides a hierarchical order for decisional deference: federal law (when it applies) is supreme, otherwise states hold sway. With localism, states are no longer privileged in the federalism equation,<sup>301</sup> leaving the multitude of non-sovereign (or at best semi-sovereign) local political units to govern preferences.<sup>302</sup> When this occurs the power of states to order their own internal governance structures is undermined,<sup>303</sup> something the Supreme Court has frowned upon.<sup>304</sup> At the same time, cutting states out of the political oversight dynamic has risks of its own, as seen in the ways by which local policing policy has been driven by funding and equipment directly provided by federal agencies.<sup>305</sup>

### C. Tiebout Sorting and Externalities

Closely related to experimentation is the expectation that decentralization will increase the menu of governmental policies from which a mobile citizenry can choose.<sup>306</sup> Under political scientist Charles Tiebout's famous model, individuals will "vote with their feet" and live in areas aligned with their public good preferences.<sup>307</sup> This in turn, the theory goes, will result in efficient sorting of preferable government

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301. See Davidson, *supra* note 235, at 980 ("The prevailing view of local governments is one of formal legal powerlessness, subject to plenary state authority. In the federalism context, this view takes the states as unitary entities within which local governments serve as merely convenient instrumentalities of the states, imbued with, at best, reflected sovereignty."). *But see* Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 964–78 (2010) (noting cases where Supreme Court attributed local governments semi-sovereign or at least autonomous status).

302. See, e.g., Davidson, *supra* note 235, at 977 n.62 ("It would be possible to argue that localities have no constitutional status whatsoever, but this Article describes their status as 'quasi-constitutional' in recognition of the independent role that the Court has, at times, accorded local governments in constitutional law.").

303. See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

304. See, e.g., *Alden v. Maine*, 527 U.S. 706, 749 (1999) (renouncing federal capacity to "turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will"); see also Davidson, *supra* note 235, at 986 (noting that "the Court is increasingly intimating that internal political ordering is a fundamental attribute of state sovereignty" and citing cases in support). *But see id.* at 999–1000 (citing and discussing instances where the Court upheld interferences with ordering of state-local relations).

305. Harmon, *supra* note 2, at 872.

306. *Gregory*, 501 U.S. at 458.

307. Tiebout, *supra* note 51, at 418 ("[A]t the local level . . . the consumer-voter moves to that community whose local government best satisfies his set of preferences.").

policies,<sup>308</sup> and a higher degree of overall preference satisfaction,<sup>309</sup> as local governments “compete” for residents.<sup>310</sup> Individuals unhappy with a policy can exercise what Albert Hirschman termed an “exit option.”<sup>311</sup>

Here, presuming the existence of actual policy variation,<sup>312</sup> localism proponents enjoy an important practical advantage insofar as it is typically easier and less costly to exit a locality than it is to exit a state or nation.<sup>313</sup> Noting this, Professor Robert Cooter has gone so far as to argue that “[t]he ‘exit principle’ implies the ‘federalism of individual rights,’ by which I mean that courts should tolerate more interference with individual liberty when the effects are localized.”<sup>314</sup>

Although influential, Tiebout’s “pure theory” has been criticized over the years.<sup>315</sup> One concern is that exit is often directly related to economic wherewithal,<sup>316</sup> a point

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308. *Id.*; see also Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 944–45 (1988) (positing that ease of exit at the local level “underlies de Tocqueville’s esteem for decentralized administration” and that “exit from a locality that has acted invidiously is largely salutary, as it informs the original municipality that its policies require reform”).

309. See WALLACE E. OATES, *FISCAL FEDERALISM* 11–13 (1972).

310. See Todd E. Pettys, *Competing for the People’s Affection: Federalism’s Forgotten Marketplace*, 56 VAND. L. REV. 329, 332, 382 (2003).

311. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 2 (1970); see also Richard Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 19 (1986) (arguing that local regulation of speech is less likely to be onerous because exit is an option); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 882–87 (1983) (discussing exit in context of local control of land use decisions).

312. See *supra* Part II.A, B.

313. See Rosen, *Surprisingly Strong*, *supra* note 30, at 1606–07 (“In general, it is easier to exit smaller polities than larger polities,” given the greater moving costs associated with distance of a change of residence, and less disruption to work, social, family, and other practical accoutrements of daily life).

314. ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 323 (2000); see also Rosen, *Surprisingly Strong*, *supra* note 30, at 1610–11 (“Generally speaking, there is less need for judicially enforced constitutional protections at lower levels of government, where exit costs are lower.”); Kevin J. Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1285 (1991) (“Because withdrawal from the local community is easier . . . it is less distasteful for a local government to subject its members to community decisions. People who disagree with the choices of a particular community can seek a community more compatible with their values or they can choose to live in no community at all.”).

315. See, e.g., Vicki Been, *“Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 515–18 (1991); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 267–72 (1993); Paul W. Rhode & Koleman S. Strumpf, *Assessing the Importance of Tiebout Sorting: Local Heterogeneity from 1850 to 1990*, 93 AM. ECON. REV. 1648 (2003).

316. See Briffault, *supra* note 245, at 420 (noting that mobility “is constrained by a variety of economic . . . factors that tend to affect poorer people more than affluent ones”).

with particular salience with policing given its predominant focus on poor and minority community members.<sup>317</sup> Another is the failure of Tiebout's model to take sufficient account of the ways in which local policies impose negative externalities, or spillovers, on other localities.<sup>318</sup>

Unlike lower taxes, public parks, and the like, which Tiebout posited as bases to attract "consumer-voters," criminal justice policy can be motivated by a desire to expel.<sup>319</sup> As a consequence, the prospect of exit does not function to temper policy overreach.<sup>320</sup> Rather, exit—of potential undesirables—could well be the goal. If crime-prone individuals (whether residents or visitors) commit crimes elsewhere,<sup>321</sup> the displacement qualifies as a negative externality or spillover,<sup>322</sup> militating against localization.<sup>323</sup> The upshot is that local governments, while often oblivious to their externalities,<sup>324</sup> in this instance have an affirmative interest in generating

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317. Although criminal procedure rights might seem an unlikely motivating factor in voting with one's feet, it is not unprecedented, as evidenced in the migration of southern African-Americans to the North from the late nineteenth through the mid-late twentieth century. See DANIEL M. JOHNSON & REX R. CAMPBELL, *BLACK MIGRATION IN AMERICA: A SOCIAL AND DEMOGRAPHIC HISTORY* 84–85 (1981).

318. See Briffault, *supra* note 245, at 426–27; Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1834 (2003). Suffice it to say, not all externalities are negative in nature. See, e.g., Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 62–63 (2014) (arguing that political units can, by adopting a minority position, such as with gay rights, "generate friction" and "spur[] democratic engagement").

319. See *supra* notes 198–206 and accompanying text.

320. See Rosen, *Surprisingly Strong*, *supra* note 30, at 1611 (identifying as an optimal condition for tailoring "the threat of exit tam[ing] polities' policy choice").

321. See ELIZABETH NEWLON, *SPILLOVER CRIME AND JURISDICTIONAL EXPENDITURE ON LAW ENFORCEMENT: A MUNICIPAL LEVEL ANALYSIS* (2001); Kate J. Bowers & Shane D. Johnson, *Measuring the Geographical Displacement and Diffusion Benefit Effects of Crime Prevention Activity*, 19 J. QUANTITATIVE CRIMINOLOGY 275 (2003); William C. Wheaton, *Metropolitan Fragmentation, Law Enforcement Effort and Urban Crime*, 60 J. URB. ECON. 1 (2006).

322. On spillovers resulting from decentralization more generally see, for example, Briffault, *supra* note 191, at 1321 ("[V]irtually by definition, an increase in decentralization increases the possibility of spillovers" that impose costs on unrepresented parties.); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1355 (2006) (recognizing situations "when the experiments of democracy within one state's borders have spillover effects that adversely affect citizens of other states").

323. See Guillaume Cheikbossian & Nicolas Marceau, *Why Is Law Enforcement Decentralized?* 3 (CIRPEE, Working Paper No. 07-19, 2007), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1007699](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1007699) [<https://perma.cc/CFT3-CBS2>] ("[W]e note that provided law enforcement entails displacement or diffusion, then it is likely that there would be benefits to its centralization as a central authority could internalize negative—spatial displacement— . . . externalities between regions."); see also Briffault, *supra* note 245, at 427–28 ("Thus, full internalization of all local actions and full participation for all those affected by local decisions would tend to require larger local units. Yet both economic and political localism are predicated on the smallness of local governments.").

324. See Briffault, *supra* note 245, at 434 ("Local governments will not, as long as they need not, take extralocal effects into account, give a voice to nonresidents affected by local

them. Indeed, to the extent a policy renders a jurisdiction more attractive to potential capital investment,<sup>325</sup> one should expect to see a race-to-the-bottom scenario familiar in other contexts.<sup>326</sup> Left unchecked, local control over police, and judicial deference to local policy, could well engender a toxic state of affairs long ago envisioned by political scientist James Q. Wilson whereby police are made an “instrument of inter-neighborhood conflict.”<sup>327</sup>

Nor, finally, should such externalities be conceived in insular terms. Given the transitoriness of modern life, nonresidents traveling to or through a jurisdiction will feel the effects of policy. As Professor Richard Briffault observes:

[P]eople are regularly involved in more than one locality in the course of their daily lives. We are not just a mobile society; we are also a commuter society. Most people no longer reside in the locality in which they work, and they no longer confine their weekly travel, shopping, social, cultural or other routine activities to the community in which they reside.<sup>328</sup>

Functionally, people who pass through are political outsiders who, even though their liberty and privacy can be negatively affected by a policy, will likely have no say in its creation.<sup>329</sup> Indeed, it could be the case that outsiders are singled out for

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actions, internalize externalities, make compensatory payments for negative spillovers or transfer local wealth to other communities in the region to ameliorate fiscal disparities.”)

325. See Nicolas Marceau & Steeve Mongrain, *Competition in Law Enforcement and Capital Allocation*, 69 J. URB. ECON. 136, 137 (2011).

326. See, e.g., Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685 (2009). Competition here is not fueled by a desire to loosen regulation, such as occurs when localities wish to lure an industry; rather, competitiveness manifests in localities adopting harsher regulations to make themselves less attractive to potential offenders.

327. JAMES Q. WILSON, *VARIETIES OF POLICE BEHAVIOR: THE MANAGEMENT OF LAW AND ORDER IN EIGHT COMMUNITIES* 283–91 (2d ed. 1978).

328. Briffault, *supra* note 245, at 413. Jerry Frug has written that we should attach less significance to boundaries, urging recognition of a “postmodern conception of localities” that will encompass individuals’ nonresidential connections, such as to employment locations, schools, and social ties. Frug, *supra* note 315, at 304–38.

329. Briffault *supra* note 245, at 426–27 (“[L]ocal borders cut across densely packed and economically and socially intertwined metropolitan areas, virtually guaranteeing that there will be externalities and that some people, namely nonresidents, will be excluded from participating in the decisions of one of the region’s many local governments though they are intimately affected by these decisions.”); cf. Anderson, *supra* note 301, at 933 (noting how local borders can change to exclude certain citizen subpopulations); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1860–61 (1994) (arguing that permitting local governments to demarcate boundaries and self-define can result in exclusion and racial oppression).



targeting,<sup>330</sup> neutralizing the internalization of policy effects that Kahan and Meares regard as a critical tempering influence.<sup>331</sup>

#### IV. WHITHER FOURTH AMENDMENT LOCALISM

As noted at the outset, the viability of localism must be assessed in terms of its actual workings, not simply hypothesized classroom discussion.<sup>332</sup> In this vein, it is worth acknowledging that even stalwart proponents can be less than categorical in their support. Professor Rosen, for instance, writes that we should merely “soften the categorical presumption of One-Size-Fits-All to a rebuttable presumption, so that the merits of One-Size-Fits-All versus Tailoring can be examined in the incremental manner that is the common law’s wisdom.”<sup>333</sup> Rosen thus leaves open whether “every constitutional guarantee” is amenable to tailoring.<sup>334</sup> Professor Blocher is similarly qualified, writing that “there is a general presumption in favor of national [rights] uniformity, and the reasons for diverging from that uniformity are always specific to the right involved.”<sup>335</sup> “[T]he question of whether any particular right should be locally tailored is ultimately a specific and normative one.”<sup>336</sup>

This Part considers whether the Fourth Amendment is one such constitutional zone. Concluding that it is not as a general matter, discussion then turns to consideration of whether in some shape or form tailoring, and the localism on which it depends, holds promise.

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330. Such a prospect would be especially likely when a locality stands to secure financial benefit, such as with the forfeiture of property like vehicles. *See, e.g.*, *Horton v. City of Oakland*, 98 Cal. Rptr. 2d 371, 375 (Ct. App. 2000) (discussing Oakland vehicle forfeiture program and noting that “the adverse effect of the ordinance on transient citizens of the state” does not “outweigh the benefit to the municipality”). Aggressive targeting of nonlocal motorists for traffic tickets affords another obvious example. *See, e.g.*, Tony Briscoe & Joe Mahr, *Suburban Speed Traps? See Where Out-of-Towners Are Most Likely To Get Ticketed*, CHI. TRIB. (June 10, 2016, 11:28 AM), <http://www.chicagotribune.com/news/ct-speeding-tickets-non-residents-met-20160609-story.html> [<https://perma.cc/MG9T-VA5X?type=image>].

331. *See supra* Part II.A.

332. *See supra* note 52 and accompanying text.

333. Rosen, *Surprisingly Strong*, *supra* note 30, at 1637.

334. *Id.* at 1516; *see also id.* at 1611 (asking “should every constitutional guarantee be amenable to Tailoring? Are there any firm floors below which a constitutional protection could not be Tailored? If so, what justifies them?”).

335. Blocher, *supra* note 33, at 132; *see also* Gerken, *supra* note 44, at 59 (advocating the “maintaining [of] a decentralized system but fighting out, issue-by-issue, the areas where we think national values cannot be compromised”); Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <https://newrepublic.com/article/62124/defense-looseness> [<https://perma.cc/XBF4-7QT4>] (“[N]ationaliz[ing] an issue in the name of the Constitution calls for an exercise of judgment . . . [in cases where] uniform national policy would override differences.”).

336. Blocher, *supra* note 33, at 88; *see also id.* at 127 (noting that instances to date of doctrinal tailoring “can be explained based on considerations specific to the right at issue”). Professor Nestor Davidson, in urging “localist administrative law,” likewise cautions against reflexive trans-substantive application. Davidson, *supra* note 176, at 610.

*A. Fourth Amendment Exceptionalism*

The Fourth Amendment is the most commonly litigated constitutional provision,<sup>337</sup> not simply because of the many millions of searches and seizures conducted by police annually,<sup>338</sup> but because of the important role it plays in protecting individual rights and enabling operation of American constitutional democracy.

## 1. Individual Interests

The Amendment's structural role in limiting the power of police to intrude on individuals' lives is of obvious critical importance.<sup>339</sup> Being searched or seized by police amounts to an accusation of criminal wrongdoing, with understandable traumatic effect.<sup>340</sup> One must submit to forcible domination by a government agent,<sup>341</sup> even when actually innocent of any wrongdoing.<sup>342</sup>

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337. THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* xix (2014).

338. In 2014, police executed more than eleven million arrests, a conservative number because the data exclude arrests for many less serious offenses. *Crime in the United States 2014: Persons Arrested*, FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/persons-arrested/main> [<https://perma.cc/QF2Z-5B8F>]. An estimated forty million people had contact with police in 2008. CHRISTINE EITH & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE STATISTICS, *CONTACTS BETWEEN POLICE AND THE PUBLIC, 2008* (2011), <http://www.bjs.gov/content/pub/pdf/cpp08.pdf> [<https://perma.cc/63R3-J8WQ>].

339. See David Alan Sklansky, *Too Much Information: How Not To Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1113 (noting that the Fourth Amendment helps ensure "respect that others, including governmental officers, show for an individual's sphere of personal sovereignty. Violations of that respect are important not just as a matter of principle but because of the tangible effects they can have both on the victim's sense of security and peace of mind").

340. William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064 (1995) ("The real harm . . . arises from the indignity of being publicly singled out as a criminal suspect and the fear that flows from being targeted by uniformed, armed police officers."); see also Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1486–87 (1996).

341. Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1489; see also Laurent Sacharoff, *The Relational Nature of Privacy*, 16 LEWIS & CLARK L. REV. 1249, 1276 (2012) ("When the police stop a person on the street or in her car and search either, or when they enter and search a home by virtue of at least the color of authority, they say, essentially, 'I have power over you.'").

342. Innocents, however, understandably experience particular aggrievement. Hugo M. Mialon & Sue H. Mialon, *The Effects of the Fourth Amendment: An Economic Analysis*, 24 J.L. ECON. & ORG. 22, 27 (2007) (asserting that dignitary cost suffered by search of the innocent is greater than the guilty because the latter "cannot feel as badly that this penalty was not deserved"). Data collected in connection with the New York City Police Department's "stop and frisk" policy attest to this reality. During an eight-year period (2004–2012) police conducted 4.4 million investigative detentions, performing weapons frisks more than half the time, yet, had very low "hit rates" (less than 1% for illegal weapons and 12% for any wrongdoing

Even being stopped by police when driving can be an “invasive, frightening, and humiliating” experience.<sup>343</sup> Being subject to an investigative detention on the street similarly denies personal autonomy and freedom of movement,<sup>344</sup> and can lead to a “frisk” for weapons,<sup>345</sup> described by the Court as a “serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.”<sup>346</sup>

An arrest is even more intrusive, coercive, and embarrassing,<sup>347</sup> and provides police the automatic right to search the arrestee’s body and “grab area.”<sup>348</sup> When taken to a detention facility, which is often unsanitary and dangerous,<sup>349</sup> arrestees can be subject to a strip search, even if no reason exists to suspect they possess a weapon or contraband.<sup>350</sup> During the booking process authorities can forcibly compel blood and DNA samples containing highly personal information,<sup>351</sup> which the Supreme Court has acknowledged can foster “anxiety” among those targeted.<sup>352</sup> An arrest can have a variety of immediate financial hardships<sup>353</sup> and time away from work can jeopardize employment.<sup>354</sup> It can also adversely affect housing, occupational licensure, and student loan opportunities,<sup>355</sup> impacting arrestees and their dependents alike.<sup>356</sup>

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whatsoever). *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558, 574 (S.D.N.Y. 2013). Survey results highlight the significant negative psychological and emotional impact on those targeted, aggravated by the use of force and the feeling of being singled out due to one’s race. Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321 (2014).

343. *Heien v. North Carolina*, 135 S. Ct. 530, 544 (2014) (Sotomayor, J., dissenting).

344. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1309 (1990).

345. *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

346. *Id.* at 17; *see also id.* at 24–25 (“Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security . . .”).

347. *See United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (describing arrest as “a serious personal intrusion regardless of whether the person seized is guilty or innocent”); *United States v. Marion*, 404 U.S. 307, 320 (1971) (describing arrest as “a public act that may seriously interfere with the defendant’s liberty . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends”).

348. *United States v. Robinson*, 414 U.S. 218, 224, 235 (1973).

349. *See, e.g.*, Matt Pearce, *Missouri Cities, Including Ferguson, Sued over ‘Grotesque’ Jail Conditions*, L.A. TIMES (Feb. 9, 2015, 5:37 PM), <http://www.latimes.com/nation/la-na-ferguson-lawsuit-20150209-story.html> [<https://perma.cc/X6LT-WFKM>].

350. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 339 (2012).

351. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2177–78 (2016).

352. *Id.* at 2178 (noting that a blood draw “places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple [blood alcohol concentration] reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure [alcohol content], the potential remains and may result in anxiety for the person tested.”).

353. Logan & Wright, *supra* note 207, at 1177.

354. Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 313–14 (2016) (noting various adverse financial consequences of arrest).

355. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1107–09 (2013).

356. Harmon, *supra* note 354, at 316–17.

Finally, not only can arrestees expect to be publicly shamed by having their “mug shot” posted on websites operated by police departments,<sup>357</sup> newspapers,<sup>358</sup> and other commercial entities.<sup>359</sup> They run the risk of suffering physical harm<sup>360</sup> and even death.<sup>361</sup>

## 2. Structural Democratic Interests

More broadly, the Fourth Amendment protects a cluster of interests that are integral to the functioning of civil society. As Justice Frankfurter noted in *Wolf v. Colorado*, where the Court deemed the Fourth Amendment “implicit in the concept of ordered liberty,”<sup>362</sup> “[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”<sup>363</sup> The Fourth Amendment, as Professor Morgan Cloud observed,

operates in a concrete dimension, regulating the power of government to intrude physically upon people and their property. But it also operates in a more abstract dimension . . . [It] enacts a vision of the individual as an autonomous agent, empowered to act and believe and express himself free from government interference.<sup>364</sup>

By its terms, the Amendment protects “the people.”<sup>365</sup> Without its protection, even the factually innocent—the “group for whom the Fourth Amendment’s protections ought to be most jealously guarded”<sup>366</sup>—can be deterred from public engagement,<sup>367</sup> refraining from going places, engaging in certain behaviors, or meeting with

357. Jess Bidgood, *After Arrests, Quandary for Police on Posting Booking Photos*, N.Y. TIMES (June 26, 2015), <https://www.nytimes.com/2015/06/27/us/after-arrests-quandary-for-police-on-posting-booking-photos.html> [<https://perma.cc/2V73-72RY>].

358. See, e.g., MUGSHOTS GAINESVILLE, <http://mugshotsgainesville.com> [<https://perma.cc/UR29-R6J8>] (website containing pictures and information regarding individuals “taken into custody by local law enforcement”).

359. See, e.g., *Most Recent Florida Bookings*, ARRESTS.ORG, <http://florida.arrests.org> [<http://perma.cc/6TMV-QSFE>].

360. Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force 3* (Nat’l Bureau of Econ. Research, Working Paper No. 22399, 2016) (noting resort by police to slapping, grabbing, and pushing individuals into the wall or onto the ground).

361. Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 160 n.1 (2016) (citing recent instances of deadly force).

362. 338 U.S. 25, 27 (1949) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

363. *Id.*; see also Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 23 (2003) (“The Fourth Amendment protects core interests essential to human flourishing, interests in privacy, property, and freedom of movement.”).

364. Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 619 (1996).

365. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects . . . shall not be violated . . .”).

366. *Maryland v. King*, 569 U.S. 435, 482 (2013); see also Colb, *supra* note 340, at 1476–1502; Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1244–48 (1983); Reinert, *supra* note 341, at 1491–93.

367. What Jane Bambauer recently called being subject to “hassle”: “the chance that the

particular individuals.<sup>368</sup> When covert surveillance by police is involved, the effect can at once be more subtle and pervasive.<sup>369</sup> As Justice Sotomayor recently noted, in the context of government use of a GPS tracking device placed on a suspect's car, "[a]wareness that the Government may be watching chills associational and expressive freedoms."<sup>370</sup>

On the streets, the Fourth Amendment guards against police behaviors that can be corrosive of community. In some communities, police officers can be the only governmental representatives with whom residents regularly interact.<sup>371</sup> When this is so, and police behave in a manner thought unfair, there can come disenchantment with "the system," diminishing community members' willingness to engage in civic life,<sup>372</sup> including voting.<sup>373</sup> Disengagement can also have a negative effect on public safety, undermining neighborhood collective efficacy in deterring crime<sup>374</sup> and reducing individuals' inclination to assist police.<sup>375</sup>

In short, reading the Amendment in isolation, simply in the criminal procedure context, in Akhil Amar's words, gives short shrift to "how the Fourth Amendment

police will stop or search an innocent person against his will." Jane Bambauer, *Hassle*, 113 MICH. L. REV. 461, 464 (2015); see also *id.* at 466 ("Hassle measures how much pain an investigatory program will impose on the innocent even when the program is moderately successful at detecting crime.").

368. See LU-IN WANG, DISCRIMINATION BY DEFAULT: HOW RACISM BECOMES ROUTINE 104 (2006) (noting that minorities in particular engage in aversive behaviors "to avoid being detained becom[ing] a part of their daily lives" (emphasis omitted)); L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1520 (2011) (noting how the "limited nature of constitutional protections against government searches . . . deters law-abiding persons from engaging in behavior that is not barred under the criminal code").

369. See Christopher Slobogin, *A Defense of Privacy as the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 TEX. TECH L. REV. 143, 162 (2015) ("Widespread technological surveillance clearly has stultifying effects, effects that are best described as a consequence of feeling that one has no privacy or anonymity.").

370. *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring); see also Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 127 (2008) (defining insecurity as "the stifling apprehension and oppression that people would justifiably experience if forced to live their personal lives in fear of appearing 'suspicious' in the eyes of the state"). For social science research supporting this point, see Nicole B. Cásarez, *The Synergy of Privacy and Speech*, 18 U. PA. J. CONST. L. 813, 853–59 (2016).

371. See AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 55–56 (2014).

372. Amy E. Lerman & Vesla M. Weaver, *Staying Out of Sight?: Concentrated Policing and Local Political Action*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2014, at 202, 206; Robert J. Sampson, *When Things Aren't What They Seem: Context and Cognition in Appearance-Based Regulation*, 125 HARV. L. REV. F. 97, 105 (2012).

373. LERMAN & WEAVER, *supra* note 371, at 222–23.

374. See Robert J. Sampson, *Neighborhood Effects, Causal Mechanisms, and the Social Structure of the City*, in ANALYTIC SOCIOLOGY AND SOCIAL MECHANISMS 227, 232 (Pierre Demeulenaere ed., 2011).

375. See generally TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS (2002) (discussing how negative citizen interactions with police and police misconduct can lessen citizen willingness to assist police).

connects up with the rest of the Constitution.”<sup>376</sup> As Professor Monrad Paulsen recognized over fifty years ago: “All the other freedoms, freedom of speech, of assembly, of religion, of political action, pre-suppose that arbitrary and capricious police action has been restrained.”<sup>377</sup>

### 3. Comparative Distinctiveness

The Fourth Amendment’s distinctiveness is also evidenced by comparing its constitutional role and application with the First and Second Amendments, the chief points of reference for constitutional localists.<sup>378</sup>

As noted at the outset, whether material is obscene, and hence undeserving of First Amendment protection, is determined on a community-by-community basis.<sup>379</sup> The government’s power to intrude on a person’s First Amendment right is, however, protected by an important institutional body: the jury (both grand and petit). A jury, comprised of individuals residing in the local vicinage, decides whether the material challenged is obscene.<sup>380</sup> Juries, since the nation’s origin have guarded against government overreach,<sup>381</sup> including perhaps most especially in the freedom of expression context, as witnessed in Framing Era prosecutions for seditious libel.<sup>382</sup> By comparison, courts alone decide whether the police violated the Fourth Amendment in a criminal case.<sup>383</sup>

376. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 2 (1997). Indeed, it is no coincidence that the Framing Era search of John Wilkes, a polemicist targeted by the British crown for criminal libel, figured centrally in the creation of both the First and Fourth Amendments. Sacharoff, *supra* note 341, at 1257, 1260; *see also* Marcus v. Search Warrant, 367 U.S. 717, 724–29 (1961) (recognizing historic connection between free speech and press and police authority and noting that “unrestricted power of search and seizure could also be an instrument for stifling liberty of expression”).

377. Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 255, 264 (1961); *see also* Crocker, *supra* note 115, at 308 (noting that the Fourth Amendment “protects a political ‘right of the people’ to organize community life free from pervasive government surveillance and interference”); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1241 (1988) (Fourth Amendment rights “create the environment necessary for other freedoms to flourish”).

378. On the utility and limits of constitutional “borrowing” or analogical constitutional reasoning more generally, *see* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012).

379. *See supra* note 32 and accompanying text.

380. *See* *Hamling v. United States*, 418 U.S. 87, 104 (1974). Material is obscene if, taken as a whole, it (1) “appeals to the prurient interest”; (2) “depicts or describes” sexual conduct in a “patently offensive way”; and (3) “lacks serious literary, artistic, political, or scientific value.” *Miller v. California*, 413 U.S. 15, 24 (1973). The jury is charged with assessing the first two prongs, with a juror “entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes.” *Hamling*, 418 U.S. at 104.

381. *See, e.g., Lewis v. United States*, 518 U.S. 322, 335 (1996) (Kennedy, J., concurring) (“The primary purpose of the jury in our legal system is to stand between the accused and the powers of the State.”).

382. *See supra* note 376.

383. *See* 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR,

An argument grounded in the First Amendment's Establishment and Free Exercise Clauses would be equally unpersuasive. Professor Richard Schragger has offered a compelling account of the key norm-setting, constitutional role local governments play in protecting both clauses. As he notes, "the Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment."<sup>384</sup> In this way, localization protects free exercise and prevents religious establishment: "The decentralization of political authority—and specifically local government—is a structural component of religious liberty."<sup>385</sup> The local operation of the Fourth Amendment, on the other hand, has never been regarded as playing such a structural role.

Finally, an analogy to the Second Amendment would lack merit for different reasons. Professor Joseph Blocher, drawing support from First Amendment-obscenity localism,<sup>386</sup> argues that cities should be afforded leeway to enact firearm-restrictive laws, allowing rural areas to afford residents more Second Amendment protection.<sup>387</sup> Blocher bases his argument on two main points. First, in general, urban and rural areas have distinct public safety needs and "gun cultures," politically and sociologically, with urban areas often being more amenable to imposing limits on gun possession rights.<sup>388</sup> Second, building upon the originalist perspective used by the Court in *Heller*<sup>389</sup> and *McDonald*,<sup>390</sup> Professor Blocher notes instances of what he sees as an urban-rural dichotomy, dating back to before the Framing Era, manifest in greater limits imposed on the rights of urban gun owners,<sup>391</sup> owing in large part to the "particular risks of gun use in densely populated areas."<sup>392</sup>

Assuming the accuracy of Professor Blocher's account,<sup>393</sup> the model lacks persuasive force here. On the sociocultural question, it remains an open question

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CRIMINAL PROCEDURE § 10.5(b), at 613 (4th ed. 2015). Juries do of course play a role in Fourth Amendment-based civil rights actions against police and their departments. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223 (2009).

384. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004).

385. *Id.* at 1831; *see also id.* at 1815 (arguing that decentralization "views local governments as valuable sites of civic association with a role in articulating local constitutional norms").

386. Blocher, *supra* note 33, at 90.

387. *Id.* at 104.

388. *Id.* at 90–107.

389. *See* *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008) (invalidating District of Columbia's ban on firearm possession in the home).

390. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 792 (2010) (Scalia, J., concurring) (holding that Second Amendment applies to states and localities and invalidating local law banning firearm possession in the home).

391. Blocher, *supra* note 33, at 108–21.

392. *Id.* at 99–100.

393. *See* Michael P. O'Shea, *Why Firearm Federalism Beats Firearm Localism*, 123 YALE L.J. ONLINE 359, 365 (2014) (noting that "many of the prohibitions Blocher lists were simply general prohibitions on discharging firearms in settled areas," not limiting possession of firearms).

whether geographic distinctions exist over the proper meaning and application of the Fourth Amendment. While it might be true that individual residents of different geographic domains harbor varying views, it cannot be said with any degree of certainty that distinct “cultures” exist.<sup>394</sup> Nor does history provide an analytic justification for tailoring. Even assuming the propriety of Fourth Amendment originalism,<sup>395</sup> the historical record provides scant support for a localist orientation. While Professor Michael Mannheimer has made a persuasive case that in 1791 federal search and seizure authority varied significantly on the basis of subnational preferences,<sup>396</sup> the variability emanated from and reflected variations at the state—not the local—level.<sup>397</sup>

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In sum, the Fourth Amendment protects a range of critically important rights affecting individuals, their communities, and civic life more generally. This is not to say that the First and Second Amendments do not hold equal importance. Nor is it to say that Fourth Amendment judge-made doctrine has always been an effective guardian of citizen rights,<sup>398</sup> or that it is the sole or perhaps even primary limit on police behavior.<sup>399</sup> And, certainly, Fourth Amendment doctrine should not be frozen in amber, oblivious to evolving public preferences as expressed in local democratic or administrative processes. Rather, it is to say that Fourth Amendment protections differ in ways that counsel against judicial deference to local preference. Indeed, the differences are such that some parents, fearing for the safety of their children when engaging with police, feel obliged to have “the talk” with them beforehand,<sup>400</sup> a need hard to envisage with liberties protected by the First and Second Amendments.

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394. For instance, residents of perhaps more politically conservative areas, such as suburbs, might in theory support aggressive policing and limited Fourth Amendment rights, but they might not do so when they themselves are on the receiving end. By the same token, those of a more libertarian bent might object in principle. See RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND PRIVACY OF WE THE PEOPLE* (2016).

395. See *supra* note 113 and accompanying text; see also, e.g., M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief That Gave It Birth*, 85 N.Y.U. L. REV. 905, 915 (2010) (“[T]he common law of 1791, which Justice Scalia casually refers to as though it were a single, clearly defined body of rules, was actually derived from a variety of authorities and differed from jurisdiction to jurisdiction.”).

396. See Mannheimer, *supra* note 60, at 1232.

397. See *id.* Professor Mannheimer notes, moreover, that, at least until the 1930s, federal statutory law dictated that the search and seizure power of federal agents be informed by state law. *Id.* at 1290–91.

398. See *supra* notes 111–119 and accompanying text.

399. See Harmon, *supra* note 2 (noting the many rules, policies, and regulations that operate subconstitutionally on police).

400. Jeannine Amber, *The Talk: How Parents Raising Black Boys Try To Keep Their Sons Safe*, TIME (July 29, 2013), <http://content.time.com/time/magazine/article/0,9171,2147710,00.html> [<https://perma.cc/P2Y9-RMNM>].



B. “Leveling Up” Fourth Amendment Doctrine

Having made the case that Fourth Amendment localism is ill-advised, is it foregone that strict national uniformity is the only alternative? In answering, it must first be acknowledged that Fourth Amendment doctrinal uniformity has always been more myth than reality. As Part I demonstrated, whether the Justices like it or not, Fourth Amendment rights do “vary from place to place and time to time,”<sup>401</sup> subjecting citizens to “arbitrarily variable protection.”<sup>402</sup>

This variability, what Ronald Dworkin in another context referred to as “checkboard laws,”<sup>403</sup> generates a number of concerns. Perhaps most important, basic rule of law expectations are undercut. While state search and seizure constitutional norms can and do vary,<sup>404</sup> here it is the federal Fourth Amendment that varies, defying, in Justice O’Connor’s words, the expectation that “a single sovereign’s laws should be applied equally to all.”<sup>405</sup>

While troubling in principle, the variation and indeterminacy it spawns can have major practical importance in individuals’ everyday lives. It is one thing to have rights vary based on one’s passing into a discernible zone, such as a military base, Indian reservation, or public school building,<sup>406</sup> or even crossing a state jurisdictional boundary.<sup>407</sup> It is quite another thing, in our highly mobile society, for rights to hinge on the inchoate bounds of “community” (or, indeed, town or city given the typical lack of clear demarcation).<sup>408</sup>

When the nature and scope of Fourth Amendment rights vary, one “cannot know the scope of . . . constitutional protection,”<sup>409</sup> a deficit assuming particular importance when individuals become subject to a regulatory regime that is more rights restrictive than they are accustomed to. More problematic still, such expectations are subject to the vicissitudes of political branch agendas, which of course can quickly change.

401. *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (quoting *Whren v. United States*, 517 U.S. 806, 815 (1996)).

402. *Devenpeck v. Alford*, 543 U.S. 146, 154 (2004).

403. RONALD DWORKIN, *LAW’S EMPIRE* 178–84 (1986).

404. See generally Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 *MISS. L.J.* 225 (2007) (surveying instances where state courts interpret their state constitutions differently than the federal Fourth Amendment).

405. Sandra Day O’Connor, *Our Judicial Federalism*, 35 *CASE WESTERN RES. L. REV.* 1, 4 (1984); see also RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 130 (2001) (noting that Americans’ “sense of national identity as a people literally constituted by the Constitution . . . [is] linked indissolubly with ideals of common constitutional rights”); Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 *VA. L. REV.* 1243, 1249 (1999) (“A central feature of the rule of law is its horizontal consistency of application.”).

406. See *supra* notes 97–100 and accompanying text.

407. See Eunice Hyunhye Cho, *Whose Borders? Regulating Migration Across Local and National Boundaries*, 6 *STAN. J. C.R. & C.L.* 165, 168–69 (2010).

408. See Davidson, *supra* note 235, at 1024 n.284 (noting difficulty associated with distinguishing jurisdictional boundaries among suburbs, exurbs, and central cities).

409. *New York v. Belton*, 453 U.S. 454, 460 (1981); see also, e.g., *State v. Kock*, 725 P.2d 1285, 1287 (Or. 1986) (emphasizing need for citizens to “have their constitutional rights spelled out as clearly as possible”).

Because of this, if Fourth Amendment localism is to have a place anywhere, it should be when it functions in a liberty-enhancing manner. Something like this approach was advocated by Justice Stevens, who in several decisions argued that state courts, when construing and applying the federal constitution, should be empowered to adopt a more right-generous position than the Supreme Court.<sup>410</sup> Justice Stevens reasoned that state courts should, as they do when interpreting their own state constitutions, have the ability to provide their citizens with more in the way of federal constitutional protection, allowing rights to be tailored “in the light of local conditions,”<sup>411</sup> without impact on other states.<sup>412</sup> According to Justice Stevens, “[f]ederal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.”<sup>413</sup>

The approach has been endorsed by a number of commentators<sup>414</sup> and has considerable appeal. First, while adopting it would generate constitutional variability, it would avoid the travel-notice difficulties just noted. For example, assume that a locality acquires new technology that can, from afar, detect guns on the bodies of passersby (without touching them physically).<sup>415</sup> Assume further that, while the question of whether use of the device constitutes a search (requiring a warrant) has yet to be addressed by the Supreme Court,<sup>416</sup> the local government—by means of popular vote or a process satisfying administrative law requirements—requires that a warrant be secured.

If police were to use the device to scan a pedestrian, without first securing a warrant, and an unlawful gun were discovered, a reviewing court would deem the warrantless search unreasonable under the Fourth Amendment. If, on the other hand, police failed to secure a warrant and used the device on an individual to discover an unlawful gun in another locality, which did not elect to impose a warrant requirement, a reviewing court would not be obliged to defer to the local preference.

Such an approach would allow the benefits touted by localists—enhanced public participation, democratic accountability, transparency, and experimentation—to accrue. With respect to the latter, for instance, local governments could experiment

410. See, e.g., *Kansas v. Marsh*, 548 U.S. 163, 200–01 (2006) (Stevens, J., dissenting); *Delaware v. Van Arsdall*, 475 U.S. 673, 695–97 (1986) (Stevens, J., dissenting); *California v. Carney*, 471 U.S. 386, 396–98 (1985) (Stevens, J., dissenting).

411. *Ponte v. Real*, 471 U.S. 491, 502 (1985) (Stevens, J., concurring in part).

412. *Marsh*, 548 U.S. at 201 (Stevens, J., dissenting) (“[N]o other State would have been required to follow the [Kansas] precedent if it had been permitted to stand [by the Supreme Court].” (quoting *California v. Ramos*, 463 U.S. 992, 1030 (1983) (second alteration by Justice Stevens))).

413. *Brigham City v. Stuart*, 547 U.S. 398, 409 (2006) (Stevens, J., concurring).

414. See, e.g., Thomas H. Lee, *Countermajoritarian Federalism*, 74 *FORDHAM L. REV.* 2123, 2132 (2006); Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 *MINN. L. REV.* 1, 75–76 (2007).

415. See Thermal Matrix USA, *ACT Concealed Weapon Detection System*, OFFICER.COM, <http://www.officer.com/product/10050107/thermal-matrix-usa-act-concealed-weapons-detection-system> [https://perma.cc/PG9E-U59U] (describing “ACT Concealed Weapons Detection System”).

416. *But cf. Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that use of a thermal-imaging device aimed at the exterior of a home constitutes a search, requiring that police first secure a warrant).

with a policy that is more protective of individual rights, and, because any ill effects of the policy would be felt most directly in the locality itself (for instance, in the form of possibly increased criminal activity), they would actually be internalized.<sup>417</sup> Presuming experimentalism functions as it should,<sup>418</sup> a locality could thus serve as a norm entrepreneur vis-à-vis other localities in a given state and other states as well.<sup>419</sup>

Finally, deferring to local rights-enhancing norms would mitigate a long-held concern about the effect of federal constitutional incorporation doctrine, voiced most famously by Justice John Marshall Harlan (II). In a number of Warren Court-era decisions Harlan worried that providing “elbow room [to States] in ordering their own criminal systems”<sup>420</sup> would result in the watering down or dilution of federal rights when applied to the federal government and other states.<sup>421</sup> Under the approach advocated no dilution would occur; indeed, if the local policy caught on elsewhere, there would be an accumulated increase in protections.<sup>422</sup>

Adopting such an approach would of course not be immune to critique. For one thing, it would, as Justice Scalia observed when jousting with Justice Stevens, “benefit[] criminal defendants” alone.<sup>423</sup> It would also institutionalize disuniformity, not only between states, but also within states, and, because infusion of the local norm would affect the Fourth Amendment, it would bind not only state courts but federal courts in the jurisdiction as well.<sup>424</sup>

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417. See *supra* notes 259–265 and accompanying text; cf. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 280–92 (1996) (asserting that disuniformity is not problematic so long as a state court position does not externalize costs to other states).

418. See *supra* notes 47–48 and accompanying text.

419. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 20–21 (2007) (praising local experimentation in federalism context as “political entrepreneurship”).

420. *Williams v. Florida*, 399 U.S. 78, 118 (1970) (Harlan, J., dissenting).

421. See *Ker v. California*, 374 U.S. 23, 45–46 (1963) (Harlan, J., concurring) (stating that “if the Court is prepared to relax Fourth Amendment standards in order to avoid unduly fettering the States, this would be in derogation of law enforcement standards in the federal system”); see also George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Bill of Rights and Criminal Procedure*, 100 MICH. L. REV. 145, 167 (2001) (maintaining that incorporation has resulted in dilution of the Bill of Rights’ original rigorous regime of federal rights).

422. Cf. Gerken & Holtzblatt, *supra* note 318, at 62–63 (arguing that interjurisdictional norms can “generate friction, and friction has its uses in a democratic system” because it can “spur[] democratic engagement”).

423. *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring). *But see* *Florida v. Myers*, 466 U.S. 380, 387 (1984) (Stevens, J., dissenting) (urging the Court to be “ever mindful of its primary role as the protector of the citizen and not the warden or the prosecutor” and that “[t]he Framers surely feared the latter more than the former”).

424. Cases filed in federal court, it is worth noting, often result from initial arrests executed by state or local police enforcing state or local law. Wayne A. Logan, *Erie and Federal Criminal Courts*, 63 VAND. L. REV. 1243, 1245–46 (2010). Also, it is not uncommon for state, local, and federal agents to coordinate enforcement efforts. See Wayne A. Logan, *Dirty Silver Platters: The Enduring Challenge of Intergovernmental Investigative Illegality*, 99 IOWA L. REV. 293, 308 n.96 (2013).

Adopting the model would also present the practical challenge of differentiating a liberty-enhancing, from liberty-curtailling, local policy. As a practical matter, doing so should not be too difficult. Violation by police of a local norm, embodied in a limit on their authority or a requirement they must satisfy, would suffice. The job of the judiciary, however, might not always be quite so clear cut. For example, a court could be faced with a local policy that at once broadens the liberty of some and correspondingly impairs the liberty of others. The Supreme Court has faced the difficulty on several occasions, requiring the balancing of one right against another.<sup>425</sup> Precisely how the competing demands would be resolved is beyond the scope of discussion here, but, as noted, the undertaking is not without judicial precedent.

Finally, the shift would necessitate a change of heart by the Supreme Court, which has charted an inconsistent course with localism. With programmatic searches and seizures, such as auto inventories and auto checkpoints, the Court has signaled its willingness to defer to local policy makers.<sup>426</sup> With suspicion-based policing, on the other hand, the Court has refused to allow application of the Fourth Amendment to turn on local rules regulating police, deeming them constitutional “trivialities.”<sup>427</sup> Aligning the two doctrinal areas would be an added benefit of going local in the limited manner outlined above.

#### CONCLUSION

Academic commentary regarding the Fourth Amendment finds itself at a curious place. Just as the world is becoming increasingly globalized in its orientation, as witnessed in the extraterritorial application of U.S. criminal law<sup>428</sup> and global constitutionalism,<sup>429</sup> several leading scholars have argued in favor of localizing the regulation of police search and seizure authority.<sup>430</sup> In doing so, they point to a variety of instrumental benefits, including tailoring of policy to fit the preferences and needs of local communities, as well as increased governmental transparency, accountability,

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425. See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609, 626 (1984) (right of state to bar discrimination outweighs private club’s right to bar women and men over certain age); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (balancing woman’s right to terminate pregnancy with spouse’s right to exercise veto).

426. See, e.g., *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990) (deferring to “governmental officials who have a unique understanding of, and a responsibility for, limited public resources”).

427. *Whren v. United States*, 517 U.S. 806, 815 (1996) (dismissing importance of local police violating department regulation that permitted plainclothes officers to execute traffic stops only in certain situations).

428. See PETER ANDREAS & ETHAN NEDELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 5 (2006).

429. See Kal Raustiala, *The Geography of Justice*, 73 *FORDHAM L. REV.* 2501, 2504 (2005) (condemning “legal spatiality” for being “at odds with contemporary concepts of jurisdiction, with the intensifying trend of globalization, and with our most cherished principles of constitutionalism”).

430. With respect to information gathering more generally in the global context, concern has arisen that reactionary governments indulge in “data localism” to make it easier to get information on and surveil their citizens. Andrew Keane Woods, *Against Data Exceptionalism*, 68 *STAN. L. REV.* 729, 751–53 (2016).

experimentation, and civic engagement. Localism, moreover, reflects the practical reality that local governments dominate the everyday lives of Americans,<sup>431</sup> affecting crucial policy areas such as land use, education, and public safety more generally.

With public safety, however, and Fourth Amendment doctrine limiting police authority in particular, localism presents considerable difficulty. Most problematic is when local preferences, instantiated in Fourth Amendment doctrinal norms, have liberty-infringing effect. For this reason, if localism is to figure anywhere, it should be to hold police accountable for violation of locally generated limits on their authority.<sup>432</sup> Otherwise, localization of Fourth Amendment doctrine, advanced as a tonic for current inadequacies of judge-made doctrine, could well be far worse than the disease itself.

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431. See Barron, *supra* note 25, at 490 (“[O]ur towns and cities are what we know them to be: important political institutions that are directly responsible for shaping the contours of ‘ordinary civic life in a free society.’” (quoting *Romer v. Evans*, 517 U.S. 620, 631 (1996))); Briffault, *supra* note 191, at 1318 (“In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision.”).

432. Indeed, the likelihood of localities, especially large urban municipalities, acting to expand rights in such a manner could well be on the upswing in response to the increasingly conservative state and national political landscape. See Corey Brettschneider, *Local and State Government Can Protect the Constitution from Trump*, TIME (Nov. 30, 2016), <http://time.com/4584803/donald-trump-states-rights> [<https://perma.cc/X2SX-VVYV>]. Thanks to Professor Joe Blocher for highlighting this possibility.