



Examining Cities, Constitutions, and the Connections Between Them

RICHARD SCHRAGGER'S WORK RANGES WIDELY—FROM the nuts and bolts of municipal government to constitutional and political theory, from mayors to Supreme Court justices. That is what you might expect from someone who is interested in cities, constitutions, and their intersection. Schragger's work is sometimes described as local government law, but that is too confining a category. He is really interested in how political communities are created and sustained. That has led him to write about the role of local, decentralized institutions in a federal democracy and the relationship between governments at different scales. His work uses geography, sociology, economics, political science, history, and legal theory to explore the concept of self-government.

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How did he get here? Schragger would blame it on his father and grandfather, both lawyers who worked in and with state and local

governments in Trenton, New Jersey. He would also have to credit the constitutional theory courses he took as an undergraduate, and the local government law class he took at Harvard Law School. And finally, he would point to his interest in race and poverty, which has led him to ask why America has so often failed to build livable, just, integrated cities.

His first full-length article, “The Limits of Localism,” 100 *Mich. L. Rev.* 371 (2001), addresses a number of these themes through an exploration of *Chicago v. Morales*, a Supreme Court case that struck down a city ordinance that banned loitering by gang members in certain inner-city Chicago neighborhoods. *Morales* engendered a continuing debate in criminal law scholarship about the devolution of constitutional law to the neighborhood level, with some scholars arguing that local communities should be able to depart from constitutional norms under certain circumstances.

Schragger’s article identifies three accounts of community that provide the most common theoretical grounds for local autonomy. Then, using the insights of legal geography, the article critiques each account. Law is often “boundary creating,” Schragger contends, borrowing from Robert Cover—it marks us in legal, social, and literal space as insiders or outsiders, members or nonmembers, citizens or noncitizens. While boundaries create citizens (or aspire to do so), they must also, by definition, create noncitizens. They are therefore invariably destructive of the ideal of a wider community. Schragger concludes that if we want to defend particular policies, we cannot do so by invoking some non-controversial notion of “community” or “autonomy” but must do so based on the merits of the policies themselves, that is, on substantive grounds. In the case of *Morales*, the invocation of “community” hid the true costs of the anti-loitering ordinance on outsiders.

In “The Role of the Local in the Doctrine and Discourse of Religious Liberty,” 117 *Harv. L. Rev.* 1810 (2004), Schragger makes a substantive claim that points in a different direction—this time, it is in the context of church-state relations, and he argues in favor of local authority. The conventional wisdom is that local political institutions are often hostile

to religious minorities and therefore particularly in need of central oversight—judicial or otherwise. Schragger argues just the opposite.

He claims that local government—and more generally the decentralization of power—is a robust structural component of religious liberty. He concludes that the chief threat to religious liberty is the exercise of centralized power generally, either to benefit religion as a class or to burden it. Schragger’s central point is that the scale of government matters when considering the substantive goals of the religion clauses. Once one pays attention to scale, it becomes clear that our fear of local government is as misplaced as our trust in centralized oversight.

Schragger’s work emphasizes the role of local institutions in a system often presumed to have only two levels—state and federal. In this way, his scholarship is an antidote to public law’s fixation with federalism. That cities, towns, counties, and school districts are central to our lives is obvious, but the myth of a two-tiered federalism still dominates constitutional law and scholarship. In “Reclaiming the Canvassing Board: *Bush v. Gore* and the Political Currency of Local Government,” 50 *Buffalo L. Rev.* 393 (2002), Schragger shows how this constitutional blindness is built into judicial doctrine and how distrust of local institutions is built into our constitutional culture. Schragger claims that this distrust is unwarranted and in tension with our professed commitment to self-rule. “I’m not a romantic about local government—it is often beset by serious political pathologies,” says Schragger. “But we miss hugely important insights if we act like local institutions are at best unimportant or at worst threatening.”

The relative power of local institutions is the subject of two other articles, one on same-sex marriage and the other on the power of mayors in a federal system. In “Cities as Constitutional Actors: The Case of Same-Sex Marriage,” 21 *Va. J.L. & Pol.* 147 (2005), Schragger considers San Francisco’s recognition of gay marriage and offers a reading of Supreme Court precedent that provides room for local governments to resist state-level commands under certain circumstances. Specifically, Schragger argues that a form of constitutional localism is currently embedded in the

Court's jurisprudence and that it can be read to protect local autonomy when cities seek to enforce certain kinds of equal treatment guarantees. This "decentralized equal protection" would provide San Francisco some constitutional traction in challenging California's preemption of the city's same-sex marriages.

In "Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System," 115 *Yale L.J.* 2542 (2006), Schragger explores the relationship between the federal structure and local executive power. Schragger asks why big city mayors in the United States are relatively weak institutional actors and suggests that constitutional federalism is partly to blame. Under America's distinctive form of federalism, cities are granted a great deal of autonomy but given little capacity to address their most intractable problems.

Each of these articles ask: What are the legal and institutional capacities of local governments in a federal system? What should those capacities be? And what does (and should) the Constitution say about it? Schragger thinks this is where the action is. "Constitutional scholars have written pages and pages about 'what is truly local and what is truly national,' (to quote Justice Rehnquist from *United States v. Morrison*), but cities and other 'truly local' institutions are often invisible to mainstream public law scholarship and to our students. That is a mistake. Local government is where government policies are felt most directly, and where racial, economic, and social policy meets the road."

Schragger recognizes that the invocation of localism has often served to entrench and mask inequality. But he argues that decentralization can also have a powerful egalitarian and democratic valence. In "The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940," 90 *Iowa L. Rev.* 1011 (2005), Schragger explores this aspect of localism in the economic sphere. He tells the history of the popular opposition to chain stores in the United States in the 1920s and 1930s, and places this opposition in the context of the shift from Lochnerian jurisprudence to the New Deal. During that period, chain store opponents, including Justice Louis Brandeis, argued that the

chains were undermining the small, independent retailer and destroying America's small towns. They argued that the concentration of economic capital in large corporate entities threatened democratic citizenship. These localist and decentralist arguments were taken seriously by state legislatures, many of which adopted anti-chain store tax laws, and by Congress, which adopted amendments to the federal antitrust laws. The Supreme Court considered a number of chain store tax cases during the late 1920s and 1930s, one of which—*Liggett v. Lee*—resulted in one of Brandeis's most famous dissents.

In “The Anti-Chain Store Movement . . .”, Schragger uncovers an alternative history of progressive political and economic localism. He observes that Brandeis's defense of the small retailer was the outgrowth of a political philosophy that emphasized both political decentralization and economic deconcentration. For Brandeis and other decentralist intellectuals of the time, the “curse of bigness” was the concentration of wealth in big corporations and the concentration of power in big government. The New Dealers made peace with both, however, and by the 1940s localist arguments became the province of states-righters and segregationists. Although this meant that Brandeis's alternative was marginalized, Schragger believes that a form of progressive decentralization is still possible.

His most recent scholarship explores this possibility, focusing on the twin themes of political and economic decentralization. In “Cities, Economic Development, and the Free Trade Constitution,” 94 *Va. L. Rev.* 1091 (2008), Schragger argues that we have misunderstood the nature of the American common market and the constitutional rules that govern that market. While constitutional doctrine focuses on inter-state trade in defining the parameters of the national free market, the bulk of internal U.S. trade takes place between cities and in and between metropolitan areas. By looking at the free trade constitution from the perspective of the city, Schragger forces us to radically rethink the constitutional doctrines that are relevant to preserving the common market. For example, local land use ordinances, which the Supreme Court rarely reviews for their protectionist effects, are central instruments in the cross-border control of

persons, goods, and capital. Once local governments are brought to the fore, a whole set of doctrinal inconsistencies and contradictions emerge, as well as a new understanding of the actual contours of the “free trade” constitution. That constitution looks nothing like the one that we are accustomed to seeing—the one in which states are the sole focus of attention.

A forthcoming article continues with this theme. “Mobile Capital, Economic Regulation, and the Democratic City,” 123 *Harv. L. Rev.*—(forthcoming 2009), considers the appropriate scale for economic regulation. Despite the conventional wisdom that sub-national governments cannot effectively control or redistribute capital, Schragger observes that cities have increasingly sought to do both. His article describes these efforts, which include putting conditions on the entry of development dollars through contract, excluding capital through anti-chain and anti-big box store laws, and redistributing from capital to labor through local minimum wage laws and other labor-friendly legislation. This new “regulatory localism” is noteworthy because it challenges the proposition that industrial policy, redistribution, and other responses to global economic restructuring must be addressed at the national level. It also challenges the proposition that local economic development policies must necessarily be biased in favor of corporate capital.

Schragger’s article makes us rethink a whole set of assumptions about which levels of government are equipped to handle large-scale shifts in the economy. And it further advances a claim that would have been familiar to Brandeis and the decentralist intellectuals of the Progressive Era. Schragger argues that the division of authority between cities, states, and the federal government is best understood as a reaction to the political pathologies that arise from the government-business relationship. Legal scholars who write about the division of authority among levels of government often miss this central insight. When lawyers debate the vertical distribution of powers, they often do not see that distribution as a proxy for regulating the relationship between private capital and public power. Schragger argues, however, that the question of how power is allocated among levels of government is secondary to the question of how

government power is allocated vis-à-vis capital—in particular, vis-à-vis large-scale, mobile capital.

The relationship between public and private power, between democracy and capital, looms large for Schragger. He argues that we cannot understand our constitutional culture without understanding how the market economy shapes political institutions and vice versa. An effort along these lines is Schragger's most recent article, entitled "Rethinking the Theory and Practice of Local Economic Development," 77 *Chi. L. Rev.*—(forthcoming 2010). There, Schragger argues that scholars' policy prescriptions have to be based in a realistic account of how city economies form, grow, prosper, and decline. Much of the economic theory that informs local government law scholarship is too simplistic, he contends, because it assumes a competitive model of economic development. Schragger urges scholars to think harder about how cities work and what institutional arrangements might make them work better in a market economy in which private enterprise is the main driver of prosperity.

Thinking hard about the role of local institutions in our constitutional and economic order has been Schragger's scholarly preoccupation. "We can learn so much simply by shifting scales," Schragger observes. "Legal doctrine has to be made with attention to its actual operation on the ground, in the places that we live, in the communities that we build." Schragger has staked out a scholarly agenda that takes localism seriously and that challenges the conventional wisdom about the limitations and possibilities of local self-government. "In the 1960s and 1970s there was a real scholarly effort—in law schools and out—to think about how we construct and think about cities, the people who live in them, and their welfare. Those issues are again on the table. Young local government law scholars are generating new ideas in the field. And we are seeing more nuanced accounts of how democracy and economy operate across local, state, and national scales." For a scholar of cities and constitutions, especially one with Schragger's vision and energy, it is an exciting time. ❧

EXCERPTS

The Role of the Local in the Doctrine and Discourse of Religious Liberty

117 *Harv. L. Rev.* 1810 (2004)

THE ANTIMAJORITARIAN CHARACTER OF THE RELIGION CLAUSES is their most salient feature. America's extraordinary religious pluralism, scholars often argue, is the direct result of a system of religious freedom that at the very least prevents majorities from imposing norms of religious exercise on minorities. What has been somewhat surprising is scholars' and courts' inattention to the location and institutional character of these majorities. At the Founding, the Religion Clauses limited the power of the federal government to enact a national religion—"Congress shall make no law," reads the First Amendment. Until the advent of the Supreme Court's modern Religion Clause jurisprudence, with the application of the First Amendment to the states in the 1940s, states were free to regulate religion and religious exercise, limited only by their own constitutional provisions. Since incorporation, however, much of Religion Clause doctrine has been preoccupied with neither federal nor state governments, but rather with local ones: city councils that adopt Sunday closing laws or sponsor religious displays in front of city hall; school boards that provide busing or equipment to students in religious schools, that restrict access by religious groups to school property, or that permit a prayer at a graduation ceremony; zoning boards that deny a church's permit to expand or that allow churches an exemption from applicable local land-use ordinances.

In short, modern Religion Clause jurisprudence has been to a significant degree a product of religious conflicts within smaller polities—a jurisprudence (putting it more prosaically) of municipal regulation.

Because the post-incorporation Court has never made a distinction among levels of government—local, state, or federal—when considering Establishment or Free Exercise Clause challenges, constitutional theorists have rarely treated this locational fact as significant. This Article seeks to remedy that oversight. In exploring the implications of a constitutional commitment to religious freedom in a nation of towns, it argues that the predominantly local character of Religion Clause disputes should have theoretical and doctrinal significance. It seeks to conceptualize the role of the local in the doctrine and discourse of religious liberty.

The fact that much of Religion Clause doctrine has been forged in conflicts that directly implicate the traditional powers of local government is not surprising. Individuals and communities of individuals tend to wrestle with the relationship between church and state at close quarters. In one case, a small Texas town wants to come together and pray at community civic events, like a football game. In another case, a city seeks to display a religious symbol in front of the town hall. These efforts concern, at least for the combatants, the moral virtue—even the salvation—of a particular community. At stake is the soul of a specific place. Witness the Florida town that declared by mayoral proclamation that Satan was banned from the city limits. Like mayors placing the Ten Commandments at the doorsteps of city hall, the town leaders placed markers containing the declaration at the entry points to the city. These and other attempts at creating communities of virtue are not ambitious; they stop at the city limits. Participants assert a modest agenda, to do “what [is] best for [our] town.”

In the past, such ambitions often partook of territorial claims. And though religion no longer “runs with the land” as it did when explorers would claim aboriginal lands for crown and church (thus subsuming the inhabitants under both), we have not been able to banish territoriality entirely. As historian Martin Marty has observed, the religious history of the United States must be understood in the context of place and space—as the negotiation and competition between the state and religion (and among religions) for territory, both in the sense of defensible geo-

graphic boundaries and defensible social and cultural room to maneuver. Implicit in this observation is that the American experiment in pluralism is only truly tested under conditions of urbanity. The frontier permitted escape from intolerance, a space for religious exercise that would otherwise be anathema to one's neighbors. The Mormons made free exercise by migrating to a place where no one else was (though ultimately it failed to protect them). In contrast, the ghetto provides sanctuary when there is no open expanse available for migration. It also seriously circumscribes liberty by physically defining the limits of toleration.

The modern principle of religious tolerance rejects the frontier and the ghetto. That is to say that American-style religious pluralism is not based on grants of territorial autonomy to religious groups, but is instead premised on accommodating religious belief and exercise right here in our midst. It is this "in our midst" quality of religious liberty that has troubled the Court in its attempts to reconcile the competing values of assimilation and autonomy, inclusion and exit, neutrality and separatism. The difficulty is that "in our midst" also means "in our backyard." The Religion Clauses are cosmopolitan but, as James Wilson declares, "people are by nature locals."

What is the role of the local in the doctrine and discourse of religious liberty? The usual parochialism story is that local political institutions are often hostile to religious minorities and therefore particularly in need of central oversight—judicial or otherwise. This Article questions this conventional wisdom. It argues that local government—and more generally the decentralization of power—is a robust structural component of religious liberty. First, the dispersal of political authority prevents the amassing of power to benefit or burden religion in any one institution, thus guarding against governmental overreaching. Second, the dispersal of political authority gives local governments the ability to serve as counterweights to private religious power, thus preventing religious overreaching.

The first claim is based on the Madisonian view that religious faction is a particularly virulent form of faction. Disestablishment has often

been understood as the primary mechanism for ensuring that no one religious faction can gain undue power in the whole. Underappreciated by most scholars and theorists, however, is the protective role played by the dispersal of political authority. Political decentralization ensures that the national councils do not have a monopoly on the power to regulate religion. And the fragmentation of government authority encourages the formation of religious groups, a necessary precondition for the robust competition among sects that prevents any one sect from gaining political dominance in the whole. The chief threat to religious liberty, I contend, is the exercise of centralized power generally, either to benefit religion as a class or to burden it. The Court's Religion Clause jurisprudence should therefore be more skeptical of federal and state regulations that touch on religion than of similar local regulations.

The second claim—that the dispersal of authority gives local governments the ability to serve as counterweights to private religious power—suggests a role for the local that is currently at odds with an individual-rights-based approach to religious liberty. Instead of treating government as monolithic and religious rights as invariant—to be defined in the first instance by the judiciary—the decentralization approach views local governments as valuable sites of civic association with a role in articulating local constitutional norms. Indeed, by paying close attention to where most conflicts over religious liberty take place, we can excavate the nature of the relationship between city and church, community and faith, civic commitments and religious ones. The interplay of religious and civil authority and the accommodation of each occurs locally, among neighbors, in communities. Judicial or legislative actions that bypass local institutions have the effect of undermining an important institutional location for the articulation of public norms and values. This devaluation of the local is dangerous because it enhances private power to the detriment of public power; it degrades the local community as a civic counterweight to religious power. On this argument, local governments are appropriate sites—not the only sites, certainly, but central and overlooked sites—for the negotiation of church-state relations. ❧

Mobile Capital, Local Economic Regulation, and the Democratic City

123 *Harv. L. Rev.*—(forthcoming 2009)

ECONOMIC LOCALIZATION IS BEING DRIVEN BY A DECENTRALIZED labor movement, urban anti-poverty organizations, opportunities in municipal law, political alliances with progressive city mayors, a localist economic ideology, and the urban resurgence. These efforts are emphatically post-industrial; in this atmosphere it may be possible for cities to regulate in ways that nations and states cannot—to leverage place-dependent value and constrain or redistribute capital. This nascent localization of economic policy coincides with the rise of the region as an important economic unit and the relative decline of the nation-state as a central regulator of economic life. Even if there was the political will to generate a new relationship between capital and democracy, it is far from clear that the nation can or is in a better position than cities to deliver. Indeed, a progressive economic localism is one possible answer to the dislocations that accompany globalization.

In light of these phenomena, we need to reframe our approach to city power. The conventional approach to the allocation of powers between the federal, state, and local governments involves assessing those governments' relative competences and the political effects of particular allocations. These debates occur, however, with little consideration of the allocation of power as between government and capital. Debates about decentralization make little sense without reference to the private-side exercise of economic power as well as the public-side exercise of regulatory power. The relevant question is: How is the city's power exercised vis-à-vis capital—in particular, vis-à-vis large-scale, mobile capital? That question should inform how we conceive of local power and how we think about local economic policy.

We should start by complicating our understanding of the relative

vulnerabilities of city and capital. The disciplining view of capital mobility is skeptical of the exercise of local power—it assumes that government power will often be deployed to exploit unless there are some constraints. Liberty, on this account, is the exercise of rights against—and the operation of markets free from—direct government intervention or interference. One implication of this view is that where exit does not provide sufficient discipline, legal limits on city power are appropriate to prevent exploitation of property owners, corruption, and other political process flaws of local urban democracy. Courts and legislatures should step in to prevent local oppression of the vulnerable; local authority is thus appropriately limited.

When one turns away from the dominant conception of rights and markets, however, a different idea of vulnerability emerges. A competing political tradition tells us that governments are also vulnerable to markets, though this vulnerability tends to be less visible. Indeed, the vulnerability of the city to mobile capital is often interpreted as the reverse—the vulnerability of capital to local government.

Kelo [v. New London] is a nice example: mobile capital dictates the terms of New London’s economic strategy, but the salient and legally-cognizable act was the government’s invasion of the homeowners’ property rights. The liberal economic order has the necessary tools to prevent the public sphere from invading a protected private sphere—the language of rights does most of this work. But we have more trouble understanding when the private sphere is invading the sphere of the public—that is, we have more trouble preventing the distortion of public decision-making for private ends. Explicit corruption or capture of public processes can be guarded against, but the form of corruption that worries those concerned with capital’s political power—the narrowing of the public sphere, the loss of political and economic independence, government policy driven by unaccountable and unelected economic actors—is more difficult to articulate. The sense that government has lost the power to control the chief determinants of citizens’ well-being—sometimes described in terms of “democracy deficits”—drives local economic reform efforts like the minimum wage ...

Our difficulty in articulating this concern reflects the pervasiveness of the negative conception of rights as trumps to be asserted against government invasions. That difficulty also stems from the fact that we have come to discount the notion of the common good itself; the “public” no longer exists, but is an amalgam of private interests. Indeed, our current theories of democratic process—dominated as they are by public choice—tend to undermine the idea of an identifiable democratic public at all. The democratic public either does not exist or has no interests that can be invaded by private-side rights-bearers.

But this one-sidedness masks the central problem, which is that the political pathologies of local government are, in significant part, a function of local government’s relationship to capital. Indeed, both concerns—the public invasion of rights and the private corruption of the public good—have and continue to be dominant problems in the city-business relationship. Recall that the original 19th century limitations on city power were a means of restraining giveaways to mobile capital; the counter-movement to limit state authority was motivated by similar concerns that business-dominated interests were corrupting good municipal government. Limiting municipal power to intervene in the private marketplace by enforcing a rigid public/private distinction and adjusting the city’s powers vis-à-vis higher level governments have been the two primary ways of dealing with the pathologies of the city-business relationship. These conceptual narratives continue to dominate the current law of local government.

Those efforts are quite imperfect, however. More importantly, they appear unable to effectively cabin the politics of capital attraction, retention, and exploitation. That is because the relationship between the legal regulation of the city and mobile capital is not a linear one. The city develops in tandem with private investment, commercial activity, and capital formation—city power cannot be disentangled from the power of private economic activity. Mobile capital operates through the instruments of local government; the rules that bind the latter might well be for the purpose of binding the former. Reformers legitimately worry that

public power will be used as an instrument for private gain, but private gain is the city's lifeblood.

The notion of city power is thus more complicated than it appears. Cataloguing the powers or limitations of municipal government does not tell us very much. Rather, one needs to ask how lodging authority to make certain kinds of decisions at a particular level of government—federal, state, or local—affects the city-business relationship. Indeed, the city power debate—to the extent it only looks at the legal powers of cities vis-à-vis other levels of government—is somewhat beside the point. Local “autonomy” is not an available option: first, because the city and private investment are inextricably linked; and second, because different allocations of legal authority as between the city, state, and federal governments will have different (and not always predictable) consequences for the city's vulnerability to private-side control and manipulation. ❧

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