

# CENTERING CITIES IN CONSTITUTIONAL CONTESTATION

Louis Cholden-Brown<sup>†</sup>

ABSTRACT .....	653
I. THE PREAMBLE.....	654
II. FIRST AMENDMENT: ASSEMBLING A CONSTITUTIONAL VISION OF LOCAL ASSEMBLAGES .....	658
III. SECOND AMENDMENT: ARMING LOCALITIES WITH TOOLS OF CONSTITUTIONAL ENFORCEMENT.....	674
IV. THIRD AMENDMENT: SOLDIERING ONWARD.....	689

## ABSTRACT

While local governments are generally not conceptualized as integral components of the federal constitutional structure, they exercise an under-recognized role in the development of American political rights as the primary orderers of civil society. Indeed, localities, as units closest to the ground, are best equipped to expose the informal and invisible norms of the Constitution, which is subject to constant contestation in the everyday administrative activities of sub-national governance. This article demonstrates cities' constructive role in discerning constitutional limitations and providing additional content to federal and state constitutional rights, which are partially dependent on local action. Localities serve as the providers of most of the services, including schooling and voting, or enforcers of most of the sanctions, such as anti-discrimination and criminal procedure statutes, which yield these public questions. This extent of daily operationalizing makes them uniquely well-positioned to give content to and rulify constitutional protections.

---

<sup>†</sup> Thank you to Dean John Feerick, Nestor Davidson, Robin Lenhardt, and all the attendees at the 2019 Amending America's Unwritten Constitution Symposium and 2024 Symposium on Setting New Standards: The Vital Role of State Constitutional Rights in Safeguarding Democracy as well as the staff of the *Syracuse Law Review* and EAZ. This project took half a decade, in no small part because of my own vagaries of life but in equal measure because the rights I began writing about in 2018 are not the same ones recognized in some corners today. *Pa'lante*.

## I. THE PREAMBLE

The federal constitutional text does not afford cities any explicit recognition.<sup>1</sup> At the founding, no legal distinction separated municipal corporations from other lay corporations.<sup>2</sup> The Supreme Court did not first distinguish between public and private corporations until 1819, and the present legal status of localities was not firmly established until after 1850.<sup>3</sup> This exclusion had led the courts to deem them “constitutional non-entities.”<sup>4</sup> Despite the incredibly limited traditional conception of the non-role of cities in federal constitutional order, the “political means of going at the local level first is familiar in American politics,” and when suffragists “were unable to achieve the vote statewide, they did it on a cities first approach” before securing the Nineteenth Amendment.<sup>5</sup> Indeed, virtually every national movement to change equity norms began with local policymaking as a testing ground.<sup>6</sup>

In reality, localities, as units closest to the ground, are best equipped to expose both the content of the written Constitution’s “majestic generalities,” including the unenumerated rights of the Ninth Amendment, unspecified privileges and immunities of the Fourteenth, and the invisible norms of the Constitution.<sup>7</sup> Each are subject to

---

1. Cities, localities, and municipalities are used interchangeably to refer to the 89,004 local governments within the United States. See *Local Governments by Type and State: 2012 Census of Governments*, U.S. CENSUS BUREAU (Sep. 26, 2013), [https://www2.census.gov/govs/cog/2012/formatted\\_pre-lim\\_counts\\_23jul2012\\_2.pdf](https://www2.census.gov/govs/cog/2012/formatted_pre-lim_counts_23jul2012_2.pdf).

2. See Gerald Frug, *Cities and the Constitution*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 256 (1986).

3. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 629 (1819); Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 241 (1985).

4. See Daniel Weinstock, *Cities and Federalism*, in *FEDERALISM AND SUBSIDIARITY* 259 (James E. Fleming & Jacob T. Levy eds., 2014); David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2220 (2006).

5. Oral Argument at 12:15, *Romer v. Evans*, 517 U.S. 620 (1996) (Ginsburg, J.), available at [https://apps.oyez.org/player/#/rehnquist10/oral\\_argument\\_audio/20884](https://apps.oyez.org/player/#/rehnquist10/oral_argument_audio/20884).

6. Heather Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695, 1711, 1713 (2017) (“[S]ocial movements have long depended heavily on federal and local politics to change the equality norms, using state and local policymaking as an organizing tool, a rallying cry, a testing ground for their ideas.”).

7. William J. Brennan, Jr., Speech at the Georgetown University Text and Teaching Symposium (Oct. 12, 1985), [https://www.thirteen.org/wnet/supremecourt/democracy/sources\\_document7.html](https://www.thirteen.org/wnet/supremecourt/democracy/sources_document7.html). Compare with Transcript of Oral Argument at 11, *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019) (No. 17-1299), <https://www.oyez.org/cases/2018/17-1299>.

constant contestation in the everyday administrative activities of sub-national governance; indeed, New York City Department of Social Services benefit terminations procedures yielded “[o]ne of the most iconic cases in the so-called due process revolution . . . .”<sup>8</sup> In a constitutional order characterized by multiple governing authorities with experimental authority, cities sit at the center of contestation of constitutional values.<sup>9</sup> They are key arbiters of the accessibility and mutability of rights through the implementation of core societal functions, including voter registration, maintenance of schools, policing functions, land use regulation, and professional licensing.<sup>10</sup> The language of “open-textured” or “open-ended” individual rights clauses invites developing rules to implement continuously revealed underlying norms in particular circumstances that create collisions of constitutional ambiguity and necessity.<sup>11</sup> Cities contribute to the refinement of constitutional meaning and give identity to components such as equality and liberty, belonging, cognizable harms, and public concerns.<sup>12</sup>

Due to the “incompleteness” of the federal Constitution, which is reliant on mechanisms established in subfederal governing documents and cedes all but its enumerated powers to the sphere of local regulation, the rights at the center of whose realization localities sit extend not merely to those enumerated or found within the penumbras of the U.S. Constitution.<sup>13</sup> Also implicated are textually indistinct provisions recodified elsewhere and interpreted more broadly or those singularly codified by the states and local governments themselves in constitutions and charters that either exceed their federal parallels or enumerate protections repeatedly rejected by the Supreme Court that become

---

8. See AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 98 (2012); Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 607 (2017) (discussing *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

9. Lawrence Gene Sager, *Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 89 (1981).

10. *Id.*

11. See William Kaplin, *The Process of Constitutional Interpretation: A Synthesis of the Present and a Guide to the Future*, 42 RUTGERS L. REV. 983, 1004 (1990); Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927, 994–97 (2002); John F. Preis, *Constitutional Enforcement by Proxy*, 95 VA. L. REV. 1663, 1668 (2009).

12. See Nan D. Hunter, *Varieties of Constitutional Experience: Democracy and the Marriage Equality Campaign*, 64 UCLA L. REV. 1662, 1705 (2017); Robin A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527, 1576 (2011).

13. Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 27, 38 (1982).

“important locus for constitutional meaning and civic identity, rendering fundamental choices about governmental structure, political process, and individual rights more salient and doctrinally significant.”<sup>14</sup> In many jurisdictions, the baseline for criminal procedure, religious liberty, and freedom of speech varies from the minimalism of the federal judiciary and is accompanied by rights to education, social welfare, housing, conservation, and labor protections.<sup>15</sup> By constitutionalizing protections from dangerous forms of work, the right to collective bargain, mandates for the regulation of railroad and warehouse prices, a right to an active, welfarist state, and an obligation for a interventionist and protective government, the authors demonstrated that intrusiveness and threats to private property were not the most salient concerns of large segments of the populace to whom these restrictions and protections meant little without responses to more immediate dangers including poverty, economic imbalance, and labor oppression.<sup>16</sup> Yet, the brevity of the provisions granting these rights and questions about their self-execution ensure that recognition of these rights still requires supplementation, while their application to non-state actors obligates enforcement throughout bureaucracy.<sup>17</sup>

Accepting that cities possess unique experiential expertise as constitutional interpreters does not consign us to an ahistorical, uniformly positive conception of a locality as affirming and extending rights-based norms, as we need not blind ourselves to local governments’

---

14. Nestor M. Davidson, *Local Constitutions*, 99 TEX. L. REV. 839, 839 (2021).

15. See 50 *Constitutions*, U. OF WIS. L. SCHOOL’S STATE DEMOCRACY RSCH. INITIATIVE, 50constitutions.org (last visited Apr. 10, 2025). The right to housing, for instance, is concretized in part through non-discrimination policies protecting the LGBTQ, criminal justice involved, recipients of public assistance, and previously unhoused, and the provision of counsel. Together they actualize a substantive and procedural right to remain that provides equal dignity, citizenship, privacy, and autonomy to renters. See Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 257 (2015); see also Risa E. Kaufman, Martha F. Davis & Heidi M. Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 774 (2014).

16. EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES* 11 (2018).

17. See Oliver A. Pollard III, *A Promise Unfulfilled: Environmental Provisions in State Constitutions and the Self-Execution Question*, 5 VA. J. NAT. RES. L. 351, 364 (1986). See, i.e., *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979); *Dublirer v. 2000 Linwood Avenue Owners, Inc.*, 103 A.3d 249, 251 (N.J. 2014).

weaknesses to take them seriously.<sup>18</sup> Localities were key sources of resistance to the civil rights movement, and their proximity to the polis presents the greatest potential for oppression.<sup>19</sup> Rather, contestations unfold in a “complex reality” in which cities engage in a dialectic, creating new institutional frameworks and entrenching older frameworks that trigger change in the nation’s political commitments and the constitution as known by the people for better or worse.<sup>20</sup> Policy debates about the maintenance or reform of institutions affecting the distribution of wealth and economic power have been imbued with constitutional significance and politics since the framers’ generation.<sup>21</sup>

Following this introductory Part establishing, and critiquing, the traditional conception of localities in the constitutional order, Part II demonstrates how the proximity of local government to the public and unique characteristics of local administration grant special insight into popular values and responsiveness to norm-rejection. Part III delineates the varied tools utilized by municipal corporations to shape rights-access through constructing both core concepts and regulating adjacent to fundamental rights, while Part IV closes with a consideration of the benefits and risks of this local experimentation to the Constitution as experienced throughout the nation as a whole.

---

18. Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1892 (2004).

19. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1980 (2008); Jonathan Chait, *Why the Worst Governments in America Are Local Governments*, N.Y. MAG. (Sept. 7, 2014), <https://nymag.com/intelligencer/2014/09/ferguson-worst-governments.html>; see also David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 UNIV. PA. L. REV. 487, 610–11 (1999) (“[C]urrent doctrine . . . tends to [characterize] local governments [as] uniquely liable for the commission of constitutional wrongs.”) [hereinafter *Cooley’s City*].

20. Michèle Finck, *The Role of Localism in Constitutional Change: A Case Study*, 30 J.L. & POL. 53, 58 (2014); Kate Andrias, *Building Labor’s Constitution*, 94 TEX. L. REV. 1591, 1620–21 (2016); but see Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L.J. 924, 938 (2020).

21. See William E. Forbath, *A Political Economy the Constitution Requires*, LPE BLOG (Oct. 23, 2019), <https://lpeproject.org/blog/title-tk/>; see also William E. Forbath, *Workingman’s Constitution*, CAMPAIGN STOPS BLOG, N.Y. TIMES (July 5, 2012, 9:57 PM), <https://archive.nytimes.com/campaignstops.blogs.nytimes.com/2012/07/05/workingmans-constitution>.

## II. FIRST AMENDMENT: ASSEMBLING A CONSTITUTIONAL VISION OF LOCAL ASSEMBLAGES

The vertical integration of government which abdicates administrative responsibility of many rights and regimes to cities, ensures that cities “perform an affirmative, structural role in protecting individual constitutional rights at the more mundane level of constitutional doctrine.”<sup>22</sup> Rather than slaves of superior governments, in carrying out daily routine functions, local governments make constant decisions implicating constitutional principles and “regulate shoulder to shoulder” with states and the federal government with power against each.<sup>23</sup> From time, place, and manner restrictions for rallies, policies on the permissible use of force, and reproductive health access at public facilities to school busing to remedy historic segregation and zoning actions prohibiting adult uses, it is cities that implement the edicts of the courts, Congress, and the statehouse.

Localities’ proximity to the polity breeds unique interpretative knowledge (and the opportunity for mischief).<sup>24</sup> They have the most extensive governmental interactions with the polis and, thereby, through activities “particularly rich with constitutional hazard,” are likelier to identify, or undermine, the protections and prohibitions of the Constitution.<sup>25</sup> Such constant interactions, “as overseer of daily activity, promoter of civic participation, and supporter of fundamental rights,” require diffuse adjudications of vastly varying scales through policy, purchases, and administrative acts.<sup>26</sup>

It is cities that must rulify constitutional principles, reducing them into enforcement processes “essential both to effectuate current policy and to inform future policy.”<sup>27</sup> While localities only possess the authority to assert limited constitutional rights in litigation against their state creators, they can sue private entities, some of which have

---

22. *Cooley’s City*, *supra* note 19, at 489 n.6; Justin Weinstein-Tull, *Abdication and Federalism*, 117 COLUM. L. REV. 839 (2017); Preis, *supra* note 11, at 1729; Kaplin, *supra* note 11, at 987.

23. See Robert Cooter, *Gerken’s Federalism 3.0: Better or Worse Than It Sounds?*, 105 CAL. L. REV. 1725, 1728 (2017); Gerken, *supra* note 6.

24. See *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816).

25. Sager, *supra* note 9, at 55 n.112; see Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 391 (2018).

26. Amy C. Torres, “*I Am Undocumented and A New Yorker*”: *Affirmative City Citizenship and New York City’s IDNYC Program*, 86 FORDHAM L. REV. 335, 345 (2017); Logan, *supra* note 25, at 400.

27. Jill E. Habig & Joanna Pearl, *Cities as Engines of Justice*, 45 FORDHAM URB. L.J. 1159, 1168 (2018).

arms throughout the nation, that violate their local norms.<sup>28</sup> In addition, localities may capitalize on their market participant power as buyer, seller, landlord, or financier to reshape conduct and rights far beyond their territorial bounds;<sup>29</sup> the year-old demise of the extraterritoriality doctrine within dormant commerce clause jurisprudence only strengthens the permissibility of localities prohibiting wares from companies engaged in practices deemed immoral, such as low-wages, or discriminatory against queer folx, and through such exclusion enforce their constitutional vision upon such market participants.<sup>30</sup>

Similarly, some innovative tools proliferating locally “depend on regulatory powers exclusive to subnational governments.”<sup>31</sup> Localities serve as the providers of most of the services, including schooling and voting, or enforcers of most of the sanctions, such as anti-discrimination and criminal procedure statutes, which yield these public questions.<sup>32</sup> Both federal and state law encourage envelope-pushing conduct by local administrators to ensure the effective discharge of

---

28. See Kathleen Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1 (2012); Barron, *supra* note 4, at 2232–33. See generally Sarah L. Swan, *Plaintiff Cities*, 71 VAND. L. REV. 1227 (2018); see Habig & Pearl, *supra* note 27, at 1189 (“When properly viewed as part of the policymaking lifecycle, law enforcement [by litigation] by municipalities is a natural—and essential—part of the democratic process.”); Zachary D. Clopton & Nadav Shoked, *The City Suit*, 72 EMORY L. J. 1351, 1356 (2023).

29. See Louis Cholden-Brown, *Planes, Trains and Trucks: Applying the Market Participant Exception to the Government as Proprietary Owner of Hubs of Commerce*, 14 CHARLESTON L. REV. 1, 1–3 (2020); RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 150 (2016).

30. See Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 371 (2023); Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court’s Vision of the Police Power in the Age of Globalization*, 42 HOUS. L. REV. 637, 676 (2005).

31. Olatunde C.A. Johnson, *The Local Turn: Innovation and Diffusion in Civil Rights Law*, 79 LAW & CONTEMP. PROBS. 115, 116 (2016).

32. See *infra* notes 89–91; Justin Weinstein-Tull, *A Localist Critique of Shelby County v. Holder*, 11 STAN. J. C.R. & C.L. 291, 296 (2015) (“Local governments are at the heart of election law because states delegate substantial election administration responsibilities to them.”); Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 414 (2002) (“Local control of voting is a long-standing tradition; like local control of education, it has an independent constitutional value.”); Louis Cholden-Brown, *Local Poll Site, National Implications*, 13 ELON L. REV. 109, 114 (2020) [hereinafter *Local Poll Site*]; *Kansas v. Carr*, 577 U.S. 108, 129 (2016) (suggesting state courts preside over many millions more criminal cases than their federal counterparts and so are more likely to identify protections important to a fair trial).

devolved duties, which requires the constant adjudication of when far enough passes.<sup>33</sup>

Antidiscrimination ordinances, or their repeal, represented not just expressions of constitutional vision, either of suspect classes or of First Amendment rights, but also policy determinations regarding the use of resources.<sup>34</sup> Criminal statutes, such as bias enhancers and the selective use of laws governing both public and private conduct, also seek to enforce local constitutional visions of protected classes and rights.<sup>35</sup> Local action and indispensable “attributes of sovereignty” regularly implicates core rights from police surveillance and violence to property seizures in the name of law enforcement or condemnation, and security in one’s self and health.<sup>36</sup>

For instance, the right to vote, “a fundamental political right, . . . preservative of all rights” simply does not exist unless governments affirmatively administer elections and, by dint of size and, thanks to the contrived nature of our democracy, geographic location, the capacity and impact of these franchise-framing actions varies.<sup>37</sup> Voting has no private-market substitute; the government is the only potential provider of the right and its administrative obligation is not ancillary to the right to vote but rather foundational to it.<sup>38</sup> Electoral adequacy is comprised of three subsidiary components- adequate funding, competent management, and inclusive democratic structures- that largely fall to municipalities.<sup>39</sup> Local governments are responsible for funding elections, selecting poll sites, managing voter rolls, and administering

---

33. See Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 619 (2006); *Dore v. Tugwell*, 84 So. 2d 199, 202 n.5 (La. 1955) (distinguishing an executive official’s contention that a statute is unconstitutional, which is an impermissible ground for nonenforcement, from her argument that one possible interpretation of the statute is unconstitutional, which is a permissible ground for enforcing the statute in way that comports with such a construction).

34. See Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 258 (1997).

35. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2226 (2002).

36. Erin B. Bernstein, *Health Privacy in Public Spaces*, 66 ALA. L. REV. 989, 1015 (2015); JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 289 (2021).

37. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Local Poll Site*, supra note 32, at 146.

38. See Joshua S. Sellers & Justin Weinstein-Tull, *Constructing the Right to Vote*, 96 N.Y.U. L. REV. 1127, 1159–68 (2021).

39. *Id.*

voter ID laws. Federal law directly obligates local agencies to participate in voting registration, and the VRA preclearance regime listed individual counties.<sup>40</sup> Localities limit the franchise by imposing poll taxes or literacy tests, and defining crimes of “moral turpitude” or mental incapacity to exclude voters.<sup>41</sup>

Yet, they also drove efforts to eliminate property requirements and grant women the right to vote, and continue to expand suffrage to additional populations, extending the franchise to youth, non-citizens, non-resident property owners, or felons.<sup>42</sup> “We do not have one uniform election system but thousands of local precincts all running Election Day simultaneously[,]” with annually changing rules that, taken together, significantly impact how we run our democracy.<sup>43</sup> While decentralization has the purported benefits of rendering it difficult for one party to seize control of the entire national or statewide election apparatus, ensuring flexibility in responding to unique local situations, and fostering direct accountability, as with other rights, local authority presents myriad opportunities for constitutional interpretation and under-enforcement.<sup>44</sup> Bureaucratic determinations continue to “single-handedly translate voter action into virtually final electoral outcomes” as differential treatment of potential voters, impinging on the guarantees of both the Fourteenth and Twenty-Sixth Amendments, implicate the composition of the electorate and the nature of democratic political representation.<sup>45</sup> “[T]he costs of discriminatory election administration” is projected far beyond the territorial limits of the offending locality as both established policies and enforcement decisions make it “marginally more difficult (or easier)” for groups to vote in every election cycle and in the aggregate turn elections.<sup>46</sup> Vote denial, dilution, or guarantee measures emerge from the procedures and frequency by

---

40. 28 C.F.R. § 51 app. 1 (2025).

41. See Drew Desilver, *Anti-Poll Tax Amendment is 50 Years Old Today*, PEW TRUST (Jan. 23, 2014), <https://www.pewresearch.org/fact-tank/2014/01/23/anti-poll-tax-amendment-is-50-years-old-today/> (“Virginia, Mississippi and Texas allowed cities and counties to impose local poll taxes on top of the state charge.”); *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 53–54 (1959); *Local Poll Site*, *supra* note 32, at 110–11.

42. See Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1039 (2017).

43. Joshua A. Douglas, *Local Democracy on the Ballot*, 111 NW. U.L. REV. ONLINE 173, 173 (2017).

44. *Local Poll Site*, *supra* note 32, at 112.

45. *Id.* at 112 (quoting *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2315 (2005) [hereinafter *Toward a Greater State Role*]).

46. *Id.* (quoting *Toward a Greater State Role*, *supra* note 45, at 2330, 2318).

which local boards purge “inactive” voters; the accessibility, hours and proximity of voting locations and ensuing wait-times; and the provision of interpretation services, poll-worker training, selection of voting systems, and registration locations or systems, at-large redistricting schemes, campaign finance reform and the implementation of ranked-choice voting.<sup>47</sup> Systemic strain, including inadequate resources or mismanagement, and intentional efforts to impede or undermine the right to vote likewise present opportunities for constitutional interpretation and non-enforcement that affect the “governance not just of that state but also of the entire nation.”<sup>48</sup>

The breadth of these activities is betrayed by the scope of the constitutional cases that have reached the Supreme Court with localities as defendants, including the majority of zoning jurisprudence, religion, and policing (though the captions obscure the employer of the instigating officer).<sup>49</sup> Cases captioned with a city defendant are really no more than challenges to smaller constitutional decision-making by lawmakers, executives, or administrative entities. Localities play both self-evident and sub-rosa roles in actualizing diverse textual and peripheral rights,<sup>50</sup> by protecting access, recognizing suspect classifications, remediating past wrongs, or preserving constructs against

---

47. *See id.*

48. Sellers & Weinstein-Tull, *supra* note 38, at 1159–68; *see* Danielle Lynch, *Colwyn Judge Out to Register Voters*, DELCO TIMES (Aug. 20, 2021, 4:10 AM), <https://www.delcotimes.com/2012/08/08/colwyn-judge-out-to-register-voters/> (quoting Christopher Broach Jr.: “[A]s judge of elections in Precinct 1 of Colwyn Borough . . . I will not comply with the new voting laws as they are unconstitutional.”); Evan H. Caminker, *States’ Duty Under the Federal Elections Clause and a Federal Right to Education*, 55 LOY. U. CHI. L.J. 403, 437 (2023) (citing *U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779, 886 (1995) (Thomas, J., dissenting)).

49. While most criminal cases probably ensued with an arrest by local law enforcement and an exercise of prosecutorial discretion by a local D.A., *Bond v. United States*, 572 U.S. 844, 864–65 (2014) (“[W]e have traditionally viewed the exercise of state officials’ prosecutorial discretion as a valuable feature of our constitutional system.”), some major cases implicating other core rights, including privacy, association and federalism, were the result of law enforcement behavior, *see Eisenstadt v. Baird*, 405 U.S. 438 (1972), *Printz v. United States*, 521 U.S. 898 (1997), *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), whether D.A.s or sheriffs function as arms of the state or the county differs widely, *see* Karen M. Blum, *Support Your Local Sheriff: Suing Sheriffs Under § 1983*, 34 STETSON L. REV. 623 (2005).

50. *Cooley’s City*, *supra* note 19, at 612 (“Local governments, the political structures that govern our lives on a daily basis, may be the means through which we discover our constitutional rights.”); *Griswold v. Connecticut*, 381 U.S. 479, 479, 482, 484 (1965) (without “peripheral rights,” the “specific rights” enumerated in the constitution would be “less secure”); *see also infra* note 79 and accompanying text (discussing regulating “adjacent” to rights).

evolving norms, through “toleration as well as compulsion.”<sup>51</sup> In this latter category, I place the policing, both by law enforcement and other city entities, of gender, sexual, and racial norms through the use of vagrancy, loitering, and cross-dressing statutes, to name a few. Such roles have evolved with societal expectations through an overlapping tetraptych of staying out, respecting, affirming, and then saving minority rights and identities.<sup>52</sup>

Municipal search and seizure precepts constrain both local and federal law enforcement’s constitutional behavior.<sup>53</sup> Even under recent Second Amendment jurisprudence, “local experimentation with reasonable firearms regulations” continues;<sup>54</sup> in addition to a plethora of legislation that banned possession, manufacture, transport, or sale of specific or all firearms, some localities sought to require households to maintain firearms;<sup>55</sup> and “modern religion clause jurisprudence has been—to a significant degree . . . a jurisprudence . . . of municipal regulation.”<sup>56</sup> Cities have been fertile venues for regulation both seeking to constrain reproductive health access, through total bans, targeted civil and criminal regulation of abortion providers, mandatory counseling, waiting periods and parental consent, and ensure access, through establishing buffer zones and other anti-harassment legislation, mitigation of collateral impacts of the decision to seek care, ordinances to combat misleading practices by pregnancy service centers and prohibitions on discrimination on the basis of reproductive choices.<sup>57</sup> Pre-*Dobbs* Supreme Court abortion jurisprudence reserved a significant amount of power to the “state” to regulate the when, where, and how of obtaining abortions, wherein local governments were permitted to set the ceiling for access rights above the federal

---

51. Though I use these in a different manner, this typology is heavily influenced by William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 468–91 (2001).

52. I am indebted to Urvashi Vaid, z”l, for the use of this foursome.

53. See Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1230 (2015).

54. *McDonald v. City of Chicago*, 561 U.S. 742, 784–85 (2010); see also Dave Fagundes & Darrell A. H. Miller, *The City’s Second Amendment*, 106 CORNELL L. REV. 677, 677, 720 (2021).

55. See, i.e., WEST HOLLYWOOD, CA., MUNICIPAL CODE § 9.04.200 (repealed by Ord. 01-593); KENNESAW, GA., ORDINANCE § 34-21 (2009); DENVER, COLO., REV. MUN. CODE art. IV, § 38-130 (1989).

56. Schragger, *supra* note 18, at 1813.

57. Louis Cholden-Brown, *Reproductive Rights Charter*, 96 U. DET. MERCY L. REV. 557, 565–67 (2019); see also Kaitlin Ainsworth Caruso, *Abortion Localism and Preemption in a Post-Roe Era*, 27 LEWIS & CLARK L. REV. 585 (2023).

floor.<sup>58</sup> These structuring attempts unfolded against a backdrop of robust state-level abortion regulation and city-state preemption conflicts. These attempts reflected recognition by both reproductive rights proponents and antagonists that cities affected the lives not only of municipal denizens, but many more, irrespective of their place of residence, as the predominant provider given the limited availability of reproductive health services in rural and suburban communities.

City legislatures and human rights commissions have led the way in defining equality and nondiscrimination, sometimes in response to silence or even rejection by the courts in institutions like schools and universities that lie beyond the state itself but often act as private governments.<sup>59</sup> By sharpening the stories told about race's societal role, localities produce alternatives to the "very thin, formalistic account of equality" advanced by the Supreme Court.<sup>60</sup> Public sex segregation and regulation of gender performance buttressed compulsory heterosexuality by seeking to create "sexuality-free zones," contributing to the sexual objectification of ciswomen, the persecution of nonconformity, and the degradation of the associational rights of both.<sup>61</sup> By destabilizing prevailing notions of bodily difference, challenging dominant conceptions of masculinity as well as femininity, and subverting assumptions about the need for sexual privacy, localities provided access to the public sphere, and freedom from sexual norms, and transformed institutions from athletic fields to bathrooms.<sup>62</sup> Accommodations law, unique for its distributive element of positive rights compelling affirmative action, conceptualizes care as an infrastructure upon which our constitutional order's economy and social life are dependent.<sup>63</sup> Its systems are, in turn, dependent upon the government's

---

58. *Reproductive Rights Charter*, *supra* note 57, at 558 (citing *Roe v. Wade*, 410 U.S. 113, 163 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and quoting Melissa Batchelor Warnke, *Can Cities Save Our Reproductive Rights from the Grabby Hands of Donald Trump?*, THE NATION (Nov. 1, 2017), <https://www.thenation.com/article/can-cities-save-our-reproductive-rights-from-the-grabby-hands-of-donaldtrump/>).

59. See Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L. REV. 78, 104 (2019); Blake Emerson, *The Constitution of Social Progress*, LPE PROJ. BLOG (June 30, 2020), <https://lpeproject.org/blog/the-constitution-of-social-progress/>.

60. Robin A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. CIV. RTS. & CIV. LIBERTIES 265, 291 (2011).

61. Sepper & Dinner, *supra* note 59, at 84.

62. *Id.*

63. Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1781 (2022).

affirmative provision of the means of survival to remedy the dignitary and material harms of monopolistic exclusion.<sup>64</sup> Policies and laws that repress forms of collective care and support exacerbate the precarity of the oppressed, who are otherwise guaranteed by the public no more than what they can get in private.<sup>65</sup> This situation leaves only those with privilege, whether employment, wealth, or education, exercising rights despite the disparate racialized impacts.<sup>66</sup>

The conception of the Constitution as grounded in negative rights, prohibiting governmental interference with private behavior, neglects the as-necessary duties of commission as restraint.<sup>67</sup> Rather than having their hands tied, localities must also work to secure rights through active planning, regulation, budgeting, and monitoring.<sup>68</sup> Inaction or nondecision can be just as determinative as an affirmative act<sup>69</sup> when individual assertion of claim to the protections of a fundamental right instead invites private violence where the law runs out, extirpating such rights despite the Court's acknowledgement that government exists specifically to protect persons and property from such violence.<sup>70</sup> Sometimes that private negation is explicitly pursued by municipalities for the "zone of fearful uncertainty in which rights holders can no longer exercise legal entitlements for fear of costly or violent counteraction sanctioned by law" induced.<sup>71</sup> To secure a constitutionally-rich society, it falls to localities to ensure economic

---

64. Julie C. Suk, *An Equal Rights Amendment for the Twenty-First Century: Bringing Global Constitutionalism Home*, 28 YALE J.L. & FEMINISM 381, 430 (2017).

65. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 192 (1989).

66. See *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647 (2021); but see *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015); Shirley Lin, *Learning from Movements*, BOS. REV. (May 29, 2024), [https://www.bostonreview.net/forum\\_response/learning-from-movements](https://www.bostonreview.net/forum_response/learning-from-movements).

67. Dorfman, *supra* note 63, at 1781; Katharine G. Young, *The New Managerialism: Courts, Positive Duties, and Economic and Social Rights*, in CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? (2022).

68. Young, *supra* note 67, at 135; STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 54 (1999).

69. M. David Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B.C. L. REV. 763, 767 (1980) (discussing how *Arlington Heights v. Metropolitan Housing Development Corporation* was attacking a refusal to rezone).

70. JAMAL GREENE, HOW RIGHTS WENT WRONG 3 (2021); see *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 195 (1989); Sarah L. Swan, *Public Duties for the New City*, 122 MICH. L. REV. 315, 317 (2023).

71. Aziz Z. Huq, *The Private Suppression of Constitutional Rights*, 101 TEX. L. REV. 1259, 1312 (2023).

security, check private power, and invest in material and cultural infrastructure.<sup>72</sup> The affirmative protection of physical and legal safety converts rights into duties that live within a locality's responsibility to all comers and the constitutional inclusion mandate built upon the task of abolishing the badges and incidents of slavery.<sup>73</sup> Many of these obligations extend beyond governance of the state's own organs but into the crevices of private law, including torts, contracts, property, and commercial law, that structure power through the provision of dignity and self-determination in the workplace, housing, and against creditors.<sup>74</sup> How localities design property law, "a quasi-constitutional framework for social life . . . fundamental to social life, moral norms, political power and the rule of law," and implement corporate stakeholder governance either brings denizens, visitors, and market participants together in generative exchange or spirits capital extracted from their sweat, blood, and intellect away from communal accountability.<sup>75</sup> Work to subvert physical exclusion of others, challenges to local property entitlements or corporate personhood, warrants or permits for occupiers to remain in place, establishment of worker cooperatives, impairment of usurious obligations or denunciation of unfair or abusive terms disrupts private ordering that serves "the wealth of the few over the welfare of the many" and provisionally acquiescing in the upenders' conceptions of legal meaning and rights.<sup>76</sup> Important constitutional values and essential aspects of our constitutional culture require municipal participation through whose services the rights on the books

---

72. *Id.*

73. See Abigail Burman, *Abortion Sanctuary Cities: A Local Response to the Criminalization of Self-Managed Abortion*, 108 CALIF. L. REV. 2007, 2052 (2020).

74. See Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 560, 622 (2021); Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U.L. REV. 985, 992, 1034 (2024); Katrina Forrester & Jedediah Britton-Purdy, *Out from Emergency*, DISSENT (July 3, 2018), [https://www.dissentmagazine.org/online\\_articles/out-from-emergency-infrastructure-climate-state-nature-politics/](https://www.dissentmagazine.org/online_articles/out-from-emergency-infrastructure-climate-state-nature-politics/).

75. Joseph William Singer, *Property as the Law of Democracy*, 63 DUKE L.J. 1287, 1287, 1299 (2014); see Anne Choike, *A New Urban Front for Shareholder Primacy*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 79, 127–28 (2019); Christine A. Desan, *Property, Money, and the Claim of Capital: A Foreword to Jamee Moudud, Legal and Political Foundations of Capitalism: The End of Laissez-Faire?* 1 (Harv. Pub. L. Working Paper No. 24-20, 2024), <https://ssrn.com/abstract=4935037>.

76. Christopher Serkin, *Affirmative Constitutional Commitments: The State's Obligations to Property Owners*, 2 BRIGHAM-KANNER PROP. RTS. CONF. J. 109, 115 (2013); see Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 266–67 (2015).

are perceived, provided (potentially inequitably), managed, distributed, facilitated, and made inaccessible as they become rights in practice or action.<sup>77</sup> Through their actions, cities both define the availability of rights of access, including to marriage, abortion, and guns,<sup>78</sup> generally through noninterference or implementing “adjacent” variations such as voter registration and identification requirements and waiting periods,<sup>79</sup> and proactively enforce equal protection through human rights and criminal law.<sup>80</sup> These include the right to counsel, which in twenty-seven states municipalities are called upon to adequately fund and where funding shortfalls which lead public defenders to refuse cases or trigger extended delays in securing counsel or the “brain drain” precipitated by the incommensurate salaries provided to public defenders places their clients at a constitutionally significant disadvantage and deprive defendants of Sixth Amendment rights<sup>81</sup> and is expanded beyond indigent defense to encompass municipal interpretations of what *Gideon* and due process require notwithstanding *Lassiter* and *Turner*.<sup>82</sup> Also impacted by these enforcement choices are the rights of expression, exercise, association, or speech, the bounds of which are often contingent on community standards,<sup>83</sup> the right to travel both between jurisdictions without violence and convey

---

77. See Dave Fagundes & Darrell A. H. Miller, *The City's Second Amendment*, 106 CORNELL L. REV. 677, 690–91 (2021); Danielle S. Rudes et al., *Rights-in-Between: Resident Perceptions of and Accessibility to Rights Within Restricted Housing Units*, 55 L. & SOC'Y REV. 296, 312 (2021).

78. See Joseph Blocher & Noah Levine, *Constitutional Gun Litigation Beyond the Second Amendment*, 77 NYU ANN. SURV. AM. L. 175, 176 (2022) (noting constitutional gun rights emanate not only from the Second Amendment, but also derive from the Due Process Clause, Takings Clause, and the First Amendment).

79. See Joseph Blocher, *Disuniformity of Federal Constitutional Rights*, 2020 U. ILL. L. REV. 1479, 1482, 1490 (2020).

80. See Finck, *supra* note 20, at 81.

81. See *State, County and Local Expenditures for Indigent Defense Services Fiscal Year 2008*, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS BAR INFORMATION PROGRAM, Nov. 2010; Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1133 (W.D. Wash. 2013); Kellyn Brown, *Trying to Find Parity in the Courtroom*, BOZEMAN DAILY CHRON. (Jul. 9, 2004), [https://www.bozemandailychronicle.com/news/trying-to-find-parity-in-the-courtroom/article\\_fc4247e4-55fe-567e-8cd7-ad3043134a5e.html](https://www.bozemandailychronicle.com/news/trying-to-find-parity-in-the-courtroom/article_fc4247e4-55fe-567e-8cd7-ad3043134a5e.html).

82. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 31–32 (1981); *Turner v. Rogers*, 564 U.S. 431, 448 (2011).

83. *Miller v. California*, 413 U.S. 15, 30 (1973); see ZACKIN, *supra* note 16, at 113.

oneself through a polis without molestation,<sup>84</sup> and the prohibition on cruel and unusual punishment, with it being a local elected official who seeks the assent of a local jury, with all the ensuing issues explicated above, to impose the death penalty.<sup>85</sup> Likewise, the right to a representative jury is often culled by local prosecutors upon the call of a clerk from lists of voters, from which people of color were often missing, or based on personal relationships, creating a venire unrepresentative of the community.<sup>86</sup> The D.A., another local official, strikes individual jurors, creating a deficient final panel violating rights all around and depriving many of a tenet, albeit an obligation, of citizenship.<sup>87</sup> The arbitrary exclusion of jurors, based on race, gender, or orientation, “causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.”<sup>88</sup> It is for this reason, that Barron’s comment that “to the extent scholars root the practice of constitutionalism in ‘local’ institutions other than states, they generally ignore local governments in favor of ‘local’ institutions such as the jury,” misconstrues how the jury is itself a contrived product of local government.<sup>89</sup>

Education, while not a fundamental right, is, in the words of *Brown*, “the very foundation of good citizenship,” and integral to the exercise of many other rights.<sup>90</sup> Education bears a “substantial relationship” to Constitutional guarantees by preparing children to exercise First Amendment rights, “both as a source and as a receiver of information and ideas,” and be “self-reliant and self-sufficient participants in society.”<sup>91</sup> Local control over the operation of schools is

---

84. *United States v. Guest*, 383 U.S. 745, 758, 759 (1966); see also JAMES W. LOEWEN, *SUNDOWN TOWNS: A HIDDEN DIMENSION OF AMERICAN RACISM* 4 (2005); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

85. See Eskridge, *supra* note 51, at 480

86. See *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Giles v. Harris*, 189 U.S. 475, 482 (1903) (Montgomery County, Alabama unlawfully refused to register more than 5,000 qualified African-American voters); *Smith v. Texas*, 311 U.S. 128, 132 (1940) (commissioner called people he knew to create a racially discriminatory grand jury).

87. Gilad Edelman, *Why Is It So Easy for Prosecutors to Strike Black Jurors?*, *NEW YORKER* (June 5, 2015), <https://www.newyorker.com/news/news-desk/why-is-it-so-easy-for-prosecutors-to-strike-black-jurors>.

88. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994); see *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479, 485 (9th Cir. 2014) (extending *Batson v. Kentucky* holding that a prosecutor’s use of a peremptory challenge may not be used to exclude jurors based solely on their race to sexual orientation).

89. *Cooley’s City*, *supra* note 19, at 490 n.7.

90. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

91. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 112 (1973).

essential both to “the maintenance of community concern” and to “the quality of the educational process.”<sup>92</sup> As a state constitutional right generally conceived of as having a collective, rather than individual, nature, localities must ensure sufficient funding and educators, safe facilities, and rigorous and culturally responsive curricula to achieve the mandate for a sound basic education, creating literate citizens.<sup>93</sup>

Sexual and other privacy rights are implicated by the surveilling expansion of smart cities, the sale of personally identifiable student information, and administrative and carceral intrusions into the family (in its many nonmarital permutations) homestead.<sup>94</sup> Through poll taxes and literacy tests, voter ID and poll site selection, translated ballots or interpretation, and vote dilution or manipulation through districting, localities limit the impact of the franchise, another core component of citizenship.<sup>95</sup> This one-two punch of jury and voting exclusions effectively curtails participation in the process by which laws were made and laws and rights enforced.<sup>96</sup> Local definitions of property and liberty inform the conception of due process.<sup>97</sup> These obligations pervade many of the decisions undertaken to promote or hinder the prior rights with constitutional experience shaped by the Due Process Clause and 1st Amendment as much as equal protection, and (de)construct such constitutionally-significant institutions as citizenship, marriage, and “otherness” (which yields suspect classifications).<sup>98</sup> Cities both created their own domestic partnership, civil union, or mutual commitment regimes and recognized lawful same-sex

---

92. *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) (citing *Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972)); see Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 *How. L.J.* 705, 718–27 (2004) (tracing the origins and longevity of the value of local control in the education context).

93. Book bans from school libraries are one recent phenomenon that may run afoul of the sound basic education obligation.

94. See Ira S. Rubinstein, *Privacy Localism*, 93 *WASH. L. REV.* 1961, 1964–65 (2018).

95. See Pema Levy, *Civil Rights Groups Target Majority-Black Georgia County Seeking to Shutter Most Polling*, *MOTHER JONES* (Aug. 20, 2018), <https://www.motherjones.com/politics/2018/08/civil-rights-groups-target-majority-black-georgia-county-seeking-to-shutter-most-polling-places/>.

96. See *Local Poll Site*, *supra* note 32, at 111; Eskridge, *supra* note 35, at 2311–12.

97. Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 *GA. L. REV.* 77, 94–95 (1982).

98. See Eskridge, *supra* note 35, at 2386.

marriages performed elsewhere.<sup>99</sup> In an earlier generation, it was the criminal persecution of populations that signaled their status as different, whereas, in the most immediate generations, it is the promulgation of antidiscrimination statutes and a resurgence of bathroom policing.<sup>100</sup> Family is integral to rights, as illustrated by *Griswold*, which established the right to privacy in the context of the marital unit, but is narrowed or expanded by city action, which defines its permissible ambits for protection, from excluding criminally-justice involved family members from public housing and zoning ordinances banning multigenerational families to early efforts granting queer families succession rights to rent-stabilized leases.<sup>101</sup> Present regimes preserving single-family zoning, perpetuating intrusive racialized and class-stratifying child welfare investigations and removals, or providing state support to address the economic, gendered, and socialized structures of multiple-partner fertility and other complex families.<sup>102</sup>

Local government acts to expand or contract the discursive boundaries of citizenry, the individuals whose substantive outcomes are considered relevant to the political community and therefore protected or improved despite potentially being excluded from political rights.<sup>103</sup> This battle for inclusion is central to the contestation over the meaning of the “people” in whose name the Constitution functions,

---

99. See TUCSON, AZ. CODE OF ORDINANCES ch. 17, art. IX § 72, (2013) (originally domestic partnership registry adopted in 2003, converted to civil unions in 2013); SALT LAKE COUNTY, UT. CODE OF ORDINANCES ch. 2.10, § 2.10.010 (2016); N.Y.C. Local Law 24 § 3, N.Y.C. ADMIN. CODE § 3-245 (2002); see also Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 147 (2005) (“[T]he Court’s equal protection doctrine might require that local governments be permitted to make marriage eligibility determinations, at least with regard to gays and lesbians.”).

100. See Steven Corfman, *Enacting Gender Identity Antidiscrimination Ordinances: Local Legislation as a Civil Rights Frontier*, 37 WOMEN’S RTS. L. REP. 203, 221 (2016); Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1038–39 (7th Cir. 2017), *cert. dismissed sub nom.* Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 138 S. Ct. 1260 (2018).

101. See Moore v. City of East Cleveland, 431 U.S. 494, 508 (1977) (Brennan, J., concurring) (“The Constitution cannot be interpreted . . . to tolerate the imposition by government upon the rest of use of white suburbia’s preference in patterns of family living”); see also R.A. Lenhardt & Clare Huntington, *Forward*, 85 FORDHAM L. REV. 2551, 2552 (2017); Ann Cammett, *Reflections on the Challenge of Inez Moore: Family Integrity in the Wake of Mass Incarceration*, 85 FORDHAM L. REV. 2579, 2583, 2585 (2017); Braschi v. Stahl Associates Co., 543 N.E.2d 49, 51 (N.Y. 1989); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

102. See Lenhardt & Huntington, *supra* note 101, at 2554–56.

103. See Emily R. Chertoff, *Citizenship Federalism*, 81 MD. L. REV. 503, 533 (2022); Burman, *supra* note 73, at 2034.

and to whom rights are reserved and who enjoys certain privileges and immunities.<sup>104</sup> Citizenship is constructed of both benefits and obligations, encompassing factors beyond federally bestowed legal status, including a sense of belonging or an ability to participate fully in society.<sup>105</sup> This multidimensionality of rights, public engagement, and identity hints that localities can either facilitate or hinder residents' ability to exercise rights and privileges that extend beyond conventional understandings of citizenship.<sup>106</sup> But formal inclusion is shallow in the face of preclusion from the enjoyment of substantive economic and social freedoms, including rights of privacy, liberty, and dignity, and protections for substantive rights are equally superficial if not available to all. The maladministration of public goods such as housing and healthcare through fragmentation and decentralization to local jurisdictional boundaries, which "define[] the 'public' to whom these goods are actually accessible," thereby constructs exclusion or inclusion and effectively citizenship.<sup>107</sup> Discrimination and animus on the basis of race, sex, orientation, or class each represent ways of enforcing the boundaries of the political community.<sup>108</sup> Recent jurisprudence condones laws regulating social and physical disorder by targeting those engaged in routine activities of daily living in public spaces including the unsheltered, queer and trans communities, undermining their very existence through the stigmatizing effects of criminalization, and the economic losses produced by the criminal legal system even absent conviction;<sup>109</sup> likewise, loopholes in rights-expanding caselaw such as *Lawrence* are weaponized to continue to stigmatize the disproportionately queer working class and unstably housed through public intercourse enforcement that valorizes procreative vaginal sex.<sup>110</sup> Work law, despite stacking materially and power

---

104. See K. Sabeel Rahman, *Constitutional Law 101: An LPE Primer*, LPE PROJ. BLOG (Nov. 19, 2018), <https://lpeproject.org/blog/constitutional-law-101-a-primer-for-the-law-and-political-economy-blog/>.

105. See Torres, *supra* note 26, at 338, 342.

106. *Id.* at 342; Rose Cuisson Villazor, "Sanctuary Cities" and Local Citizenship, 37 FORDHAM URB. L.J. 573, 580 (2009).

107. K. Sabeel Rahman, *Constructing Citizenship: Exclusion and Inclusion Through the Governance of Basic Necessities*, 118 COLUM. L. REV. 2447, 2452 (2018).

108. See *id.* at 2451.

109. City of Grants Pass v. Johnson, 603 U.S. 520, 521 (2024); Shoshana Coalson, *After Grants Pass: Housing Animus*, 49 NYU REV. L. & SOC. CHANGE (2024) (forthcoming).

110. Jordan Carr Peterson, *The Walking Dead: How the Criminal Regulation of Sodomy Survived Lawrence v. Texas*, 86 MO. L. REV. 857, 882, 883 (2021).

distributing public roles, including “policer of private law; high-road (constitutional) actor; market actor; investigator; adjudicator; litigator, and expert” upon the state, excludes whole sectors, occupations, business sizes, wage arrangements, and geographical areas from the basic tenets of economic citizenship.<sup>111</sup> Expanded voting eligibility for school board elections or participatory budgeting also provide elements of citizenship through suffrage.<sup>112</sup> Formal inclusion and protections of substantive rights are superficial when some are denied the enjoyment of fundamental economic and social freedoms, such as rights to privacy, liberty, and dignity.

Local civil servants primarily “‘run the Constitution’ [and] reduce its grand principles to practice by their actions both routine and extraordinary.”<sup>113</sup> Judicial decrees followed by underenforcement places upon municipal officials an obligation to “labor under constitutional constraints dictated by the guarantee of minimal political justice.”<sup>114</sup> Through their daily decisions generally made “informally, undramatically, and deep in the recesses of bureaucracies,” the “law-on-the-books meets the law-in-action,” generating the lived Constitution.<sup>115</sup> Conscious or unconscious standards adopted by local officials become constitutional law through the judiciary’s deferential approach; narrow interpretations of the Constitution secured by prosecutors foment “Blue-on-Black” violence.<sup>116</sup> The bifurcation between author and administrator renders resistance possible and requires the latter to assume the role of interpreter.<sup>117</sup> While they “may not argue

---

111. Gali Racabi, *Excluded but Equal*, 33 WM. & MARY BILL RTS. J. 209, 251 (2024); Shirley Lin, *Race, Solidarity, and Commerce: Work Law as Privatized Public Law*, 55 ARIZ. ST. L.J. 813, 860 (2023).

112. See SAN FRANCISCO, CA., CHARTER § 13.111 (2017) (establishing the eligibility for non-citizen parents or caregivers to vote for the Board of Education); see also *Participatory Budgeting*, N.Y.C. COUNCIL (2024), <https://council.nyc.gov/pb/>.

113. JOHN A. ROHR, CIVIL SERVANTS AND THEIR CONSTITUTIONS 141 (2002).

114. Aaron J. Saiger, *Constitutional Partnership and the States*, 73 FORDHAM L. REV. 1439, 1444–46 (2005).

115. ROBERT KAGAN, REGULATORY JUSTICE ix (1978); Danielle S. Rudes, *Rights-In-Between: Resident Perceptions of and Accessibility to Rights Within Restricted Housing Units*, 55 L. & SOC’Y REV. 296, 296 (2021).

116. Brandon Hasbrouck, *The Unconstitutional Police*, 56 HARV. C.R.-C.L. L. REV. 239, 241 (2021).

117. Cf. Brenner Fissell, *Police-Made Law*, 108 MINN. L. REV. 2561, 2562 (2024) (identifying police as active participants in the expansion of their own power rather than merely downstream recipients of extraneously conferred authority through writing the laws they enforce); STEPHEN BREYER, REGULATION AND ITS REFORM 346 (1982) (agencies often operate as “little legislatures” where they both create and subsequently enforce laws, policies, and rules).

explicitly over the Constitution in their daily work,” they are outsized participants in the “interpretative community that gives the Constitution its meaning.”<sup>118</sup> Through their labors, the text is made real as abstract constitutional principles are transformed into “felt reality;” it is practice that legitimizes and shapes constitutional values.<sup>119</sup> Localities’ critical role in structuring political discourse and debate over the most contentious public issues makes them uniquely well-positioned to articulate and implement substantive constitutional principles.<sup>120</sup> Through “the elaboration of constitutional meaning,” administrators create and govern based upon entrenched constitutional rules and norms crafted from a “mix of constitutional and statutory interpretation, and of legal, intellectual, and political motives,” without public consultation, deliberation, and accountability, creating a baseline of citizen rights.<sup>121</sup>

Creating government structures is necessary to vindicate citizens’ claims to equal economic rights and opportunities;<sup>122</sup> “[b]ecause these problems arise from complex systems of social organization, they must be addressed through a complex system of political organization, namely bureaucracy.”<sup>123</sup> Administration is “not just a functionally necessary supplement[] to the system of rights but implications already contained in rights.”<sup>124</sup> An incumbent development to the elaboration of rights is the institution of government structures necessary

---

118. Alec C. Ewald, *The Way We Vote: The Local Dimension of American Suffrage* 13 (2009).

119. *Cooley’s City*, *supra* note 19, at 572; Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 12 (1934).

120. *Cooley’s City*, *supra* note 19, at 491 (identifying several such public questions including the proper means of “overcoming racial stratification, securing quality public education, or protecting disfavored groups from private discrimination”).

121. Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 BOSTON UNIV. L. REV. 519, 522 (2015); David E. Bernstein, “Administrative Constitutionalism”: *Considering the Role of Agency Decision-Making in American Constitutional Development*, 38 SOC. PHIL. & POL’Y 109, 128 (2021); Joanna L. Grisinger, *Municipal Administrative Constitutionalism: The New York City Commission on Human Rights, Foreign Policy, and the First Amendment*, 167 UNIV. PA. L. REV. 1670, 1670–71 (2019).

122. See Katharine Jackson, *Democracy, Bureaucracy, and Rights*, LPE PROJ. BLOG (Apr. 25, 2022), <https://lpeproject.org/blog/democracy-bureaucracy-and-rights/>.

123. BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 1 (2019) (“Democracy requires administration to address the social problems the people identify.”)

124. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 134 (1996) (trans. by William Rehg).

to their vindication, from the public education system to implement educational rights to the taxing authority to fund economic supports.<sup>125</sup>

The regulatory state is “a site of democratic action” and legal meaning-making that helps to “constitute the public’s law, providing fora in which the abstract commands of statutes are constructed with due consideration of the entitlements, interests, and self-understandings of those the laws bind or otherwise affect.”<sup>126</sup> These distributional obligations expositied from the Guaranty Clause and the commitment outlined in the Thirteenth, Fourteenth, and Fifteenth Amendments call for active measures across arenas of governance to secure political, economic, and social inclusion and to challenge the racial hierarchy that shaped the original Constitution and expound a constitutional vision at odds to the Supreme Court’s hostility to the redistribution of social and economic power.<sup>127</sup> This duty extends beyond antidiscrimination and voting rights, to encompass a duty to ensure decent work and remuneration, freedom from unfair competition, a decent home, and social insurance as proposed in FDR’s Second Bill of Rights and eliminating those aspects of the criminal justice system that fuel and perpetuate mass incarceration, while preserving individual constitutional protections.<sup>128</sup>

### III. SECOND AMENDMENT: ARMING LOCALITIES WITH TOOLS OF CONSTITUTIONAL ENFORCEMENT

Localities have a series of affirmative and dissent tools to effectuate their constitutional vision. While resistance is unlikely to

---

125. See Jackson, *supra* note 122.

126. K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 141 (2016); Ryken Grattet & Valerie Jenness, *The Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime*, 39 L. & SOC’Y REV. 893 (2005); EMERSON, *supra* note 123, at 13.

127. See Robert S. Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307 (2024); K. Sabeel Rahman, *Reconstructing Democracy*, DEMOCRACY, Dec. 6, 2018, <https://democracyjournal.org/arguments/reconstructing-democracy/>; William E. Forbath & Joseph Fishkin, *Constitutional Political Economy for a Democracy, Not an Oligarchy*, LPE PROJ. BLOG (Apr. 18, 2022), <https://lpeproject.org/blog/constitutional-political-economy-for-a-democracy-not-an-oligarchy/>.

128. See Forbath & Fishkin, *supra* note 127; Brandon Hasbrouck, *Movement Constitutionalism*, 75 OKLA. L. REV. 89, 112 (2022) (the creation of new institutions that address the material and economic security of all Americans, liberating them from the cycles of poverty, abuse, and addiction that undergird criminalized behavior are a prerequisite to formally end carceral violence); see Ric Simmons, *Constitutional Double Standards: The Unintended Consequences of Reducing Police Presence*, 91 GEO. WASH. L. REV. 817, 819 (2023).

engender constitutional consensus, it can provide gridlock, slowing the enforcement of the suspect policy, or offer real-world examples of principles in practice, thereby permitting a majoritarian consensus to unfold or shaming the same into a shift in position.<sup>129</sup> Defiance in the face of declarations of impermissibility, including maintenance of segregated spaces or issuance of gay marriage licenses, telegraphs a rejection of judicial supremacy. Bulletproofing techniques, like literacy tests (which seek to undermine bans on racial voting exclusions) or freedom of choice school selection plans (which permit individual perpetuation of segregation), deploy tactics that facially comply. The decision of which laws to enforce, which groups to target for investigation, and which to let slide recalibrates and even abandons the impression of the rule of law. These actions effectuate personal visions of permissible or impermissible behavior, with each perspective resisting via a different set of tools. Likewise, outsourcing of resistance has allowed the solicitation of private violence and conspiracies in the streets and the courts while escaping constitutional accountability for the ensuing torts or tort claims; private leases to subvert desegregation mandates for schools and public facilities and land transfers to preserve sectarian or Confederate symbols and monuments fall within this category of dissent along with mob rule and SB8 analogues.<sup>130</sup> Alternatively, especially repugnant or disturbing displays of official resistance paradoxically contribute to a renewed respect for the law.<sup>131</sup> Through resolutions expressing reprimand, aimed at “unblocking clogged political channels and triggering political discourse”<sup>132</sup> as well as legislation and citizen-referenda, localities signal constitutional values and invoke constitutional language. Even where unsuccessful, these endeavors, as I wrote elsewhere, performatively “capitalize on emergent public fervor and imagery to invite constitutional change and force introspection of individual values.”<sup>133</sup> These

---

129. See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 101, 126 (2005).

130. See Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U.L. REV. 601 (2013).

131. *Id.* at 651.

132. *Id.* at 604; see Lori Riverstone-Newell, *Bottom-Up Activism: A Local Political Strategy for Higher Policy Change*, 42 PUBLIUS 401, 406 (2012).

133. Cholden-Brown, *supra* note 57, at 574–75.

legislative expressions, in some instances articulating defiance<sup>134</sup> or satire,<sup>135</sup> provide meaning to conceptions of dignity,<sup>136</sup> liberty,<sup>137</sup> equality,<sup>138</sup> and rights,<sup>139</sup> unfrozen by relatively “specific original meanings or a deposit of concrete historical practices” as of the Bill of Rights or Reconstruction Amendments.<sup>140</sup>

Thus, while facially void of constitutional values, as the U.S. Constitution only “addresses economic inequality weakly and

---

134. For examples of local school boards clashing with the Supreme Court’s school-prayer decisions, see Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 741 n.127 (2009).

135. See, e.g., Luke Johnson, *Wilmington City Council Passes Resolution Urging ‘Personhood’ Rights for Sperm*, HUFFINGTON POST (Mar. 2, 2012, 3:28 PM), [http://www.huffingtonpost.com/2012/03/02/wilmington-city-council-sperm-egg-personhood\\_n\\_1316924.html](http://www.huffingtonpost.com/2012/03/02/wilmington-city-council-sperm-egg-personhood_n_1316924.html).

136. See Steve Sanders, *Dignity and Social Meaning: Obergefell, Windsor, and Lawrence as Constitutional Dialogue*, 87 FORDHAM L. REV. 2069 (2019); LOUISVILLE-JEFFERSON, KY., CODE OF ORDINANCES § 92.01 (1994) (“Certain practices must be prohibited . . . as necessary to protect individuals’ personal dignity and insure freedom from humiliation . . . .”); LINDEN, MICH., CODE OF ORDINANCES § 93.02 (2013) (“In recognition of the inherent dignity and equal and inalienable rights of all members of the human family, it is the policy of the city in the exercise of its police power for the public safety, public health, and general welfare to assure equal opportunity to all persons . . .”).

137. See, e.g., CULVER CITY, CAL., CHARTER pmbl. (“The People of the City of Culver City, by popular vote, have enacted this Charter to establish a responsive, efficient, effective and accountable government through which all voices in our diverse community can be heard; to ensure fair representation and distribution of government resources; to provide a safe and harmonious environment for our mutual well-being; and to promote the principles of liberty, equality and home rule.”); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 102 (Eduardo Nolla ed., James T. Schleifer trans., 2012) (“Town institutions are to liberty what primary schools are to science; they put it within the people’s reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not the spirit of liberty.”).

138. See, e.g., S.F., CAL., CHARTER pmbl. (“In order to . . . assure equality of opportunity for every resident: We, the people of the City and County of San Francisco, ordain and establish this Charter as the fundamental law of the City and County.”).

139. See, e.g., LAFAYETTE, COLO., CODE OF ORDINANCES ch. 43, art. IV (2024) (“Climate Bill of Rights”); LOWER BURRELL, PA., ch. 266 art. VI (1999) (“Taxpayers Bill of Rights”); N.Y.C. ADMIN. CODE § 9-139 (2025) (“Bill of Rights for Incarcerated Individuals”); see also Lori Riverstone-Newell, *The Diffusion of Local Bill of Rights Resolutions to the States*, 45 ST. & LOC. GOV’T REV. 14 (2013); ANCHORAGE, ALASKA, CHARTER art. II (2019); ATLANTA, GA., CHARTER ORD. No. 2001-13.

140. Linda C. McClain & James E. Fleming, *Toward a Liberal Common Good Constitutionalism for Polarized Times*, 46 HARV. J.L. & PUB. POL’Y 1123, 1128–29 (2023).

indirectly,”<sup>141</sup> municipal economic justice policies and legislation, like paid sick leave, and other soft controls including housing, education, social services, and family law become means by which government, through incentives and disincentives, also significantly impact the barriers to access for certain constitutional rights.<sup>142</sup> Therefore, government attends to the constitutional stakes of the economic needs and means to survive of its citizenry necessary for the enjoyment of all other fundamental rights, not only by protecting individual freedom to choose among existing economic options, but also by facilitating public and private collective action to improve people’s choices by changing the terms, conditions, and quality of the available economic choices. Consequently, the contingent rights for not only denizens but “the neighbors with whom they share the urban space” depend on the extent to which the locality ensures economic security, checks private power, and invests in material and cultural infrastructure that foster dignity and self-determination in the realms of the work, home, and against creditors.<sup>143</sup>

The value of this exercise is not limited to whether the burden imposed by the formal bounds of the law, but also how the policy interacts with political and financial forces beyond the government’s control, and how it takes advantage of them, is justifiable to a court.<sup>144</sup> Instead, the legality of a policy is not dispositive of how government may promote or “thwart [a right] on the ground.”<sup>145</sup> As such, this piece is only interested in the first two prongs of any conventional analysis, defining first whether the right exists and its scope, and secondly

---

141. Laura T. Kessler, *Getting Class*, 56 BUFF. L. REV. 915, 915 (2008).

142. See Sarah Holder, *The Fight for Paid Sick Leave Moves South*, CITYLAB (Feb. 21, 2018), <https://www.citylab.com/equity/2018/02/the-fight-for-paid-sick-leave-moves-south/553760/>; Rick Su, *Immigration, Federal Authority, and City Hall*, HARV. L. REV. BLOG (Oct. 19, 2017), <https://harvardlawreview.org/blog/2017/10/immigration-federal-authority-and-city-hall/>.

143. Martha F. Davis, *Design Challenges for Human Rights Cities*, 49 COLUM. HUM. RTS. L. REV. 27, 28 (2017).

144. Mary Ziegler, *The New Negative Rights: Abortion Funding and Constitutional Law After Whole Woman’s Health*, 96 NEB. L. REV. 577, 622 (2018); see *Maier v. Roe*, 432 U.S. 464, 475 (1977) (“There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity . . . .”); see, e.g., Burman, *supra* note 73, at 2008 (detailing the hurdles and costs associated with accessing an abortion, including provider identification and scheduling, mandatory ultrasound costs, procedure cost, and travel costs, childcare costs, lost wages for multiple appointments in waiting period states).

145. Justin Weinstein-Tull, *State Bureaucratic Undermining*, 85 U. CHI. L. REV. 1083, 1084–85 (2018).

whether the activity infringes on, abridges, or disparages that right.<sup>146</sup> The justifiability of such infringement, which can vary based on the local context, is ultimately not normatively crucial to this framework, for even if sufficiently tailored to survive requisite scrutiny, it still fundamentally alters the right as accessed or experienced.

Rather than being few and precious, rights are ubiquitous, comprised of many clashing elements, and operationalized by cities through a series of governmental and proprietary tools.<sup>147</sup> Through sovereign acts that shape and constrain activities adjacent and integral to rights, local governments play an underrealized role in constructing core concepts and operationalizing rights-access, thereby making these rights real. In addition to laws enacted, what they choose to fund or buy, allow to be built where, how they elect to enforce (including through civil and criminal litigation) or not, and the policies they set for public employees and property, render cities the primary structurer and gatekeeper of rights and contour access by limiting what, who, where, how, when, who knows, and at what cost.<sup>148</sup>

Through (non)enforcement of suspect laws or court decisions, cities entrench their constitutional vision, both the maintenance of old and the innovation of new.<sup>149</sup> This method of interpretation draws on both

---

146. See Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 867 (1994); Drury D. Stevenson, *Shall Not Be "Infringed"*, 20 KAN. L. REV. 101, 102 (forthcoming 2025) ("The verb 'infringed' occurs only once in the Bill of Rights: in the Second Amendment. The other nine amendments use other words to describe violations of rights, such as 'prohibiting,' 'abridging,' 'violated,' 'deprived,' 'taken,' 'deny,' or 'disparage.'").

147. See GREENE, *supra* note 70, at xv. Cf. Kathleen Morris, *Rebel Cities, Bully States: A New Preemption Doctrine for an Anti-Racist, Pro-Democracy Localism*, 65 HOWARD L.J. 225, 243 (2021) (identifying "twelve non-regulatory government tools . . . (a) contracts with private entities; (b) contracts with other public entities; (c) litigation; (d) taxing and spending; (e) eminent domain; (f) divestment; (g) self-management (h) passive non-compliance; (i) domestic political organizing; (j) international engagement; (k) lobbying; and (l) speech.").

148. See Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1443 (2009) (adopting this framework for the Second Amendment).

149. See Tara Mikkilineni, Note, *Constitutional Default Rules and Interbranch Cooperation*, 82 N.Y.U. L. REV. 1403, 1424 (2007) (reacting to the default rule articulated by the Court in *Wade* that counsel was required at a lineup to protect a defendant's Sixth Amendment rights, Congress enacted 18 U.S.C. § 3502 to overrule the Court's holding but law enforcement officials ignored the statute, convinced it was illegal); Milligan, *supra* note 20, at 938.

anti-commandeering and “uncooperative federalism.”<sup>150</sup> Diverse and divisive invocations of sanctuary city frameworks through “effort[s] to mobilize citizens in an act of constitution-making outside of the courts” set bounds on the exercise of powers.<sup>151</sup> Rather than merely symbolic, these declarations, by embracing concrete action to petition the government for redress, prohibiting the use of funds, and authorizing the filing of lawsuits or engaging in prosecutorial nullification, can “cripple access to . . . constitutional rights” or foment confusion about legal practices.<sup>152</sup>

This construct, which finds roots in local resistance to the Fugitive Slave Act, extends beyond the immigration context to localities seeking to protest firearm and reproductive health laws.<sup>153</sup> However, neither implicates the same issues of cooperation. In the firearm context, localities and officials refuse to enforce background check

---

150. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009) (“[S]tates use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”); see Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2635 (2006); Huyen Pham, *The Constitutional Right Not to Cooperate—Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1374 (2006).

151. Darrell Miller, *Second Amendment Sanctuary Counties*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (June 7, 2019), <https://firearmslaw.duke.edu/2019/06/second-amendment-sanctuary-counties>.

152. Stephen P. Halbrook, *Virginia’s Second Amendment Sanctuaries: Do They Have Legal Effect?*, 33 REGENT U. L. REV. 277, 288–89, 309 (2020); see Emma Janssen, *Red-State Abortion Tactics Push Into Deep-Blue Illinois*, THE AM. PROSPECT (Oct. 9, 2024), <https://prospect.org/health/2024-10-09-red-state-abortion-tactics-deep-blue-illinois/>; G. Wayne Miller, *Burrillville Council Says Raimondo’s Coronavirus Orders Are Unconstitutional, Declares “First Amendment Sanctuary”*, THE PROVIDENCE J. (June 25, 2020, 10:39 AM), <https://www.providencejournal.com/story/news/coronavirus/2020/06/25/burrillville-council-says-raimondos-coronavirus-orders-are-unconstitutional-declares-first/42437749/>; MICHELE GOODWIN, *POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD* 3 (2020).

153. See Daniel Farbman, *“An Outrage upon Our Feelings”: The Role of Local Governments in Resistance Movements*, 42 CARDOZO L. REV. 2097, 2101–02 (2020) (discussing vote of the Marshfield town meeting to offer sanctuary and encourage fugitives to violently oppose the national imperative of recapture, Chicago vote to prohibit the police from “render[ing] any assistance for the arrest of fugitive slaves” . . . other Northern towns and cities felt compelled to pass resolutions promising to assist the federal government in enforcing the law”); Katie Kull, *St. Louis Ordinance Seeks to Preempt Missouri Abortion Laws*, BOS. GLOBE (Feb. 23, 2017), <https://www.bostonglobe.com/news/nation/2017/02/23/louis-ordinance-seeks-preempt-missouri-abortion-laws/PW7rsc0BXj285b1bvVVIHM/story.html>.

laws,<sup>154</sup> while elsewhere, municipalities declare themselves a sanctuary for the unborn.<sup>155</sup> An earlier contrary precedent could arguably be found in Ann Arbor, Michigan, which in 1990 adopted a ballot initiative declaring the city one of “reproductive freedom,” and in anticipation of a repeal of *Roe*, instituted a token \$5 civil analogue to the Michigan criminal abortion statute.<sup>156</sup> These regimes privilege localities that seek to create more permissive regulatory regimes through non-enforcement over those that aspire to stricter controls. They allow the former to dilute the law elsewhere due to the mobility of citizens and certain regulated goods, denying the latter the full benefits of its policies.<sup>157</sup>

Frontline staff, or street-level bureaucrats, are foundational to how laws and policies operate in action and reserve for themselves the discretionary authority to determine what amounts to a constitutional violation and what remains protected even in the absence of controlling doctrine.<sup>158</sup> The “routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out,” delivering benefits and sanctions in ways that “structure and delimit” lives and opportunities.<sup>159</sup> Judicial decisions often establish guidelines that leave sensitive interpretative judgments to the jurisdiction whose activities were at issue until the courts speak on the issues that newly arise.<sup>160</sup>

---

154. See Brianna Provenzano, *What Happens If Sheriffs Refuse to Enforce State Gun-Control Laws?*, PACIFIC STANDARD, (Mar. 13, 2019), <https://psmag.com/social-justice/what-happens-if-sheriffs-refuse-to-enforce-state-gun-control-laws/>.

155. See Cholden-Brown, *supra* note 57, at 560 n.25 (discussing resolutions in Roswell and Effingham).

156. See *id.* at 571.

157. See Holly Tice, *Outside the Second Amendment: Preemption, Constitutional Sheriffs, and the Undermining of State and Local Firearm Regulation*, 56 COLUM. HUMAN RTS. L. REV. (Mar. 28, 2024) (forthcoming).

158. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE 3 (1980); see, e.g., *Pittsburgh DA Stephen Zappala Vows to Protect Abortion Rights*, 90.5 WESA (Jul. 10, 2018, 4:00 PM), <https://www.wesa.fm/politics-government/2018-07-10/pittsburgh-da-stephen-zappala-vows-to-protect-abortion-rights>; Ernest A. Young, *Welcome to the Dark Side - Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1282 (2004) (discussing local reactions to the PATRIOT ACT that forbade their officers to cooperate with federal officials in enforcement of measures that violate federal constitutional rights, reserving “for themselves the authority to determine what amounts to a violation of federal rights.”).

159. LIPSKY, *supra* note 158, at xii, 3–4 (emphasis in original).

160. Kaplin, *supra* note 11, at 987.

Policies limiting access to protected services or activities at public facilities or on public property constrain the spaces available to exercise rights, generating in their wake logistical and financial hurdles to private realization, and broadcast an otherizing constitutional vision. Employment policies for the fourteen million local government workers,<sup>161</sup> such as hiring, including the exclusion of suspect classes via the civil service system, benefits provided, like reproductive health coverage, and the First Amendment protections extended to employees, shape the ability of such staff, and by extension their families, to exercise protected rights not merely during the workday.

Notwithstanding repeated judicial decrees that licensing constitutional rights under broadly discretionary ordinances is impermissible,<sup>162</sup> the licensing of rights is extensive, from permitting assemblages to licensing marriages. Some rights can only be exercised with the aid of a licensed individual, whether a marriage officiant, physician, or attorney. Licensure can also allow governments to achieve otherwise unconstitutional objectives, including denying building permits, notwithstanding the Taking Clause prohibiting mandating the non-improvement of property, to refuse entry, or make the provision of protected services financially unfeasible.<sup>163</sup> Thusly, governments, through permits, permit rights to be realized.<sup>164</sup> Generally applicable approvals, such as certificates of occupancy, can also be leveraged to inhibit the initial operation of providers of protected rights; the prioritization of enforcement of these same regulatory schemes similarly can hinder continued operations through vacate orders and costly

---

161. See Sarah Andersen et. al., *Annual Survey of Public Employment & Payroll Summary Report: 2023*, U.S. CENSUS BUREAU (May 16, 2024), [https://www.census.gov/content/dam/Census/library/publications/2024/econ/2023\\_summary\\_brief.pdf](https://www.census.gov/content/dam/Census/library/publications/2024/econ/2023_summary_brief.pdf).

162. See, e.g., *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 226 (1990) (“[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.” (quoting *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969))).

163. See, e.g., Jason Mason Pieklo, *Anti-Choice Groups Try ‘Texas Playbook’ in Attempt to Block Health-Care Access in California*, REWIRE (May 18, 2015, 5:22 PM), <https://rewirenewsgroup.com/2015/05/18/anti-choice-groups-try-texas-playbook-attempt-block-health-care-access-california/>.

164. See Eugene Volokh, *Licenses to Exercise Constitutional Rights*, WASH. POST (May 15, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/05/15/licenses-to-exercise-constitutional-rights/>.

remediations.<sup>165</sup> Similarly, governments that value the rights furthered by such uses may exempt nonconformity to ensure their continued availability.<sup>166</sup> The availability of licenses can express equality values. Marriage licenses, probably the most prominent example, have a long history at the center of gay marriage contestations, dating back half a century,<sup>167</sup> and anti-miscegenation fights.<sup>168</sup> LGBT New Yorkers were historically unable to obtain licenses to operate taxicabs,<sup>169</sup> but now licenses are revoked from drivers discriminating against the same.<sup>170</sup> Liquor and cabaret licenses were withheld to constrain the associational rights of the queer, femme, and colored,<sup>171</sup> and barriers were erected or dismantled for the alteration of birth certificates and other identity documents that police gender identity and expression.<sup>172</sup>

---

165. See, e.g., Cholden-Brown, *supra* note 57, at 567 (discussing attempts to deny Planned Parenthood an occupancy permit); see *Yick Wo v. Hopkins*, 118 U.S. 356, 369–71 (1886).

166. See *Yick Wo*, 118 U.S. at 369–71.

167. See *Singer v. Hara*, 522 P.2d 1187, 1189 (Wash. Ct. App. 1974) (finding County Auditor's 1971 denial of license did not, inter alia, violate the Constitution); Kyle Harris, *Clela Rorex Planted the Flag for Same-Sex Marriage in Boulder Forty Years Ago*, WESTWORD (Aug. 13, 2014), <https://www.westword.com/news/clela-rorex-planted-the-flag-for-same-sex-marriage-in-boulder-forty-years-ago-5882967>.

168. See *Roldan v. Los Angeles County*, 18 P.2d 706, 707 (Cal. Ct. App. 1933).

169. LILLIAN FADERMAN, *THE GAY REVOLUTION: THE STORY OF THE STRUGGLE* 224 (2016) (The NYC Taxi and Limousine Commission required LGBT applicants for hack licenses to submit psychiatric evaluations).

170. See Aris Folley, *NYC Taxi Officials Seek to Revoke License of Uber Driver for Kicking Same-Sex Couple Out of Car*, THE HILL (June 14, 2018, 9:53 AM), <https://thehill.com/blogs/blog-briefing-room/news/392242-nyc-taxi-officials-seek-to-revoke-uber-drivers-license-for/>.

171. See GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940*, at 341 (1994); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 913–14 (1979); Nick Sibilla, *How Liquor Licenses Sparked the Stonewall Riots*, REASON (June 28, 2015, 10:00 AM), <https://reason.com/2015/06/28/how-liquor-licenses-sparked-stonewall/> (“Gay bars were crucial in the fight for equal rights, which is why they kept getting shut down by the government.”); N.Y.C. Local Law 214 § 4, N.Y.C. ADMIN. CODE § 17-502 (2017) (repealing NYC Cabaret Law which required a license for dancing and was used to shutter Harlem clubs with interracial dancing and later LGBT establishments).

172. See N.Y.C. Local Law 163, N.Y.C. ADMIN. CODE § 17-167.1 (2018) (altering procedures for amending sex designation on birth records and providing for a third gender marker); *Frequently Asked Questions*, IDNYC, <https://www1.nyc.gov/site/idnyc/frequently-asked-questions/frequently-asked-questions.page> (last visited Mar. 3, 2025) (An IDNYC card applicant may “designate [their] gender as ‘Female,’ ‘Male,’ or ‘X’ to designate a gender that is neither male nor female, or ‘Not Designated’ to leave this field blank.”).

Permits for public spaces are, generally unsuccessfully, tied to antidiscrimination tenets.<sup>173</sup> Firearm licensure<sup>174</sup> and voter registration requirements<sup>175</sup> are both “decidedly reactive: directed and defined by those seeking to limit the right[s], rather than by those who advocate for [the rights]”<sup>176</sup> and vest power in local officials to determine qualifications and hurdles for experiencing protected activities.

The zoning power, uniquely held by local government, in addition to the apparent takings implications, is just one of many spatial practices utilized to restrict access to constitutionally protected activities and govern constitutive families.<sup>177</sup> “[T]he daily maintenance and definition of space” by “[s]treet-level bureaucrats, like police officers,” perpetuates segregation and contributes to the creation of “microclimates of racial meaning” by present and past racial violence and “persistent structural inequality.”<sup>178</sup> Before 1948, police engaged in *official* spatial exclusion through enforcement of racially restrictive covenants and “sundown town” ordinances; in later years, such practices, though illegal, verged no less on statutory practice.<sup>179</sup> Geographic space, and the carving up thereof, intersects with race, class, gender, and other stratification markers to render spatial inequity requiring redress as in *Brown*.<sup>180</sup> Through zoning regulations that establish and spatially transfer norms of order to residents, localities regulate access to a community, promote preferred uses of physical spaces, and exclude undesirable uses of space, along with associated

---

173. See, e.g., *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 561 (1995).

174. See *Peruta v. County of San Diego*, 824 F.3d 919, 939 (9th Cir. 2016) (upholding county sheriff policies determining “good cause” sufficient to secure a license for concealed carry); *Chief of Police of City of Worcester v. Holden*, 26 N.E.3d 715, 724 (Mass. 2015) (upholding determination by police chief that history of domestic violence failed “suitable person” standard); *Kelly v. Klein*, 946 N.Y.S.2d 218, 219–20 (N.Y. App. Div. 2012) (eligibility requirements for pistol license did not infringe upon applicant’s Second Amendment rights).

175. See *Local Poll Site*, *supra* note 32, at 134–35.

176. Sellers & Weinstein-Tull, *supra* note 38, at 1127.

177. See *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting) (“After all, a policeman must know the Constitution, then why not a planner?”).

178. See Monica C. Bell, *Anti-Segregation Policing*, 95 N.Y.U. L. REV. 650, 683, 717 (2020) (quoting Geoff Ward, *Microclimates of Racial Meaning: Historical Racial Violence and Environmental Impacts*, 2016 WIS. L. REV. 575, 603, 606–11 (2016)).

179. *Id.* at 702.

180. Lisa R. Pruitt, *Spatial Inequality as Constitutional Infirmary: Equal Protection, Child Poverty and Place*, 71 MONT. L. REV. 1, 11 (2010).

individuals.<sup>181</sup> Localities zone out adult theatres, firearms dealers and gun ranges, and constitutive families.<sup>182</sup>

The local “zoning” power includes the obligation to both designate local districts for municipal elections and classify precincts for the effective administration of the vote.<sup>183</sup> Localities also deploy local zoning measures to recategorize abortion clinics as hospitals or other special uses requiring discretionary approvals, or ban them from certain zoning districts to prevent their operation.<sup>184</sup> Public officials supportive of reproductive rights have also been accused of utilizing zoning to dampen the message of opponents.<sup>185</sup> Municipal zoning both shapes the ideological and physical dimensions of community character. It defines family and “functional family,” through the construction of social norms which exclude of female-headed households and reinforce heteronormative presumptions.<sup>186</sup> The manipulation or gerrymandering of school attendance boundaries through the mixed use of zoned and open enrollment schools (as well as the sorting of students into academic tracks via discriminatory testing and screening, presence or absence of culturally responsive curricula, racially disparate disciplinary practices, and commitment to diverse educator workforces) encourage or alleviate residential racial and ethnic segregation

---

181. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 374, 375, 405 (2001).

182. *See, e.g.,* Renton v. Playtime Theatres, Inc., 475 U.S. 41, 43 (1986); Teixeira v. Cty. of Alameda, 873 F.3d 670, 673 (9th Cir. 2017); Ezell v. City of Chicago, 846 F.3d 888, 890 (7th Cir. 2017); Moore v. City of East Cleveland, 431 U.S. 494, 495–96 (1977).

183. *Local Poll Site*, *supra* note 32, at 130.

184. Cholden-Brown, *supra* note 57, at 567–68 n.65, 66, 69–71 (detailing the use of conditional use permits and exclusion from specific zoning districts); Martha F. Davis, “*Down Where the Grass Grows*”: *Municipal Abortion Policies After Dobbs*, 95 U. COLO. L. REV. 477, 486, 489 (2024). Despite similar contemporaneous laws being immediately invalidated in other New York localities, a 1971 ordinance remained on the books in Hempstead until 2022. *See* Frank Rizzo, *Town Rescinds Abortion Zoning Law*, MANHASSET PRESS (Sept. 16, 2022), <https://manhassetpress.com/town-rescinds-abortion-zoning-law>.

185. Cholden-Brown, *supra* note 57, at 568 n.72–74 (noting rezoning denials in Raleigh and South Bend and claims of selective enforcement against pro-life organizations).

186. Sarah L. Swan, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831, 837 (2022); Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 1 (2020).

both within classrooms and in housing market equilibriums, with implications for constitutional rights like sound basic education.<sup>187</sup>

While robust, municipal use of their procurement, disposition, and leasing authority is not unfettered.<sup>188</sup> The government generally may not discriminate based on a contractor's speech or expressive association.<sup>189</sup> Nonetheless, procurement has been used, *inter alia*, to shape the treatment of LGBT employees,<sup>190</sup> ensure non-discrimination,<sup>191</sup> and alter the firearms market.<sup>192</sup> Living wage and benefits requirements for contractors<sup>193</sup> and mandated provision of emergency contraception to rape victims in the emergency department of contracted hospitals themselves function as right accessibility promoters.<sup>194</sup> These proprietary powers permit intervention into the shape of labor markets, access to consumer credit, and the ubiquity of arbitration clauses. Corporations forego rights for the opportunity to enrich themselves of the public business and bounty; individuals are coerced by contracts to rent into family structures and behaviors. Through interlocal agreements, governments "not only exchange basic services and pursue technocratic efficiencies [but] also create new policies, announce substantive priorities, and establish new governance

---

187. See, e.g., Eliza Shapiro, *Lawsuit Challenging N.Y.C. School Segregation Targets Gifted Programs*, N.Y. TIMES (Mar. 9, 2021), <https://www.nytimes.com/2021/03/09/nyregion/nyc-schools-segregation-lawsuit.html>.

188. See *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 510 (2d Cir. 1995) ("To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals—just as if it were a private party."); *but see* *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 691–93 (5th Cir. 1999) (articulating two-part test for establishing action as proprietary).

189. See *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 686 (1996).

190. See N.Y.C. ADMIN. CODE § 6–126 (repealed 2023).

191. See NASHVILLE, TENN., ORDINANCE No. BL2008–161, § 4.46.010 (2008).

192. See Scott Gast, *Gun Control's "Third Way": State and Local Gun Purchase Preference Plans and the Dormant Commerce Clause*, 88 VA. L. REV. 167, 170 (2002) ("promoting a 'third way,' in addition to legislation and litigation, 'to ensure that the gun industry will produce safer guns and take more responsibility for its products' by using state and municipal 'financial leverage to encourage gun companies to do what is right.'").

193. See Marni von Wolpert, *City Governments Are Raising Standards for Working People—and State Legislators Are Lowering Them Back Down*, ECON. POL'Y INST. (Aug. 26, 2017), <https://www.epi.org/publication/city-governments-are-raising-standards-for-working-people-and-state-legislators-are-lowering-them-back-down/>.

194. See N.Y.C. ADMIN. CODE § 6–125.

frameworks;” the expansion or dissolution of policing jurisdictions provides certain inmates rights while declining to extend the same to others.<sup>195</sup>

Through litigation seeking answers to constitutional questions or prosecution of national figures, localities assert their vision of rights and impose sanctions against non-adherents.<sup>196</sup> The “regulation by litigation” authority of local prosecutors, law departments, or administrative agencies reshapes industry practices and reforms institutions, contributing to local and national rights access, expansion, and contraction.<sup>197</sup> Threats of prosecution or indictment often intentionally directly target populations at their moments of greatest vulnerability, and the discretion afforded means that charging decisions, and subsequent sentences, have racialized impacts.<sup>198</sup> Defensive postures, municipal causes of action, and indemnification policies adopted by localities encourage continued constitutional violations, impose burdens and costs on rights-seekers, or further deterrence goals, and allow constitutional law to develop further.<sup>199</sup> Direct and derivative liability not only compensates victims, but also disincentivizes individual constitutional rights violations, and requires localities to prejudge the permissibility of regimes abdicated upon them before consciously choosing to enforce and expose themselves to suit.<sup>200</sup>

---

195. Daniel B. Rosenbaum, *The Local Lawmaking Loophole*, 133 YALE L.J. 2613, 2613 (2024); see also Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2348 (2020).

196. See Swan, *supra* note 28, at 1285.

197. ANDREW P. MORRISS, BRUCE YANDLE & ANDREW DORCHAK, *REGULATION BY LITIGATION I* (2009).

198. See Jack Healy, *Arrested, Jailed and Charged with a Felony. For Voting.*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/us/arrested-voting-north-carolina.html> (“I don’t think he targeted black people. But if you cast that net, you’re going to catch more African-Americans.”).

199. See Alexander Reinert, et al., *New Federalism and Civil Rights Enforcement*, 116 NW. U. L. REV. 737, 757–58 (2021); see also Josephine McGuire, *“There’s a New Sheriff in Town”: Why Granting Qualified Immunity to Local Officials Acting Outside Their Authority Erodes Constitutional Rights and Further Deteriorates the Doctrine*, 32 WM. & MARY BILL RTS. J. 541, 542 (2023) (“[A]s the [QI] defense is granted to bad acting low-level officials one by one across the country, fundamental constitutional rights are slowly eroded.”).

200. See Brandon L. Garrett, *Local Evidence in Constitutional Interpretation*, 104 CORNELL L. REV. 855, 890 (2019); see also Samuel P. Tepperman-Gelfant, *Constitutional Conscience, Constitutional Capacity: The Role of Local Governments in Protecting Individual Rights*, 41 HARV. C.R.-C.L. L. REV. 219, 220, 222 (2006) (“[T]he regime of constitutional tort liability requires local governments to disobey [state] laws under some circumstances”); Dina Mishra, *Municipal*

Localities possess \$1.9 trillion in annual purchasing power,<sup>201</sup> and the funding of, as well as investment in, governmental and private activities realizes rights by converting a negative restraint into a positive right.<sup>202</sup> While courts recognize a difference between denying and defunding constitutional rights, rights can be stripped of support even where they cannot be regulated.<sup>203</sup> The “government may decline not only material support, but also expressive support” of constitutionally protected conduct.<sup>204</sup> Cities can express dissent by refusing to fund necessary services, or locales with suspect policies.<sup>205</sup> Some rights, like the right to counsel for the indigent, are contingent on public funds, while others are contingent upon third parties reliant on the public fisc.<sup>206</sup> Some negative rights against long-term deprivations impose affirmative duties to spend on food, medical care, and lawyers in the wake of custody or prosecution;<sup>207</sup> while withholding rights from the imprisoned functions as a resource of bureaucrats, elsewhere localities demand individuals forego rights in lieu of these carceral encounters.<sup>208</sup> The significant costs associated with certain rights mean that some protections are constantly at risk of bankruptcy, especially as

---

*Interpretation of State Law as “Conscious Choice”: Municipal Liability in State Law Enforcement*, 27 YALE L. & POL’Y REV. 249, 252–53 (2008).

201. See *State and Local Expenditures*, URBAN INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/state-and-local-expenditures> (last visited Apr. 24, 2025).

202. See generally Phillip M. Kannan, *Logic from the Supreme Court that May Recognize Positive Constitutional Rights*, 46 U. MEMPHIS L. REV. 637 (2016) (arguing that negative rights can be rearticulated into apparent positive rights).

203. See NELSON TEBBE, *RELIGIOUS FREEDOM IN AN EGALITARIAN AGE* 21 (2017).

204. *Id.* at 197.

205. See, e.g., Adam Shinar, *Dissenting from Within: Why and How Public Officials Resist the Law*, 40 FLA. ST. U. L. REV. 601, 640 n.207 (2013) (“In Virginia’s Prince Edward County, when courts ordered the admission of black students, the county simply refused to appropriate money for the operation of public schools.”); see also Memorandum from Carmen Chu, San Francisco City Adm’r, to Dep’t Heads, City Fin. Officers, Contracting Officers (Feb. 19, 2021) (prohibiting city-funded travel and contracting in states that allow discrimination against LGBT individuals).

206. See Cholden-Brown, *supra* note 57, at 559–60 n.19, n.21 (discussing localities who declined to fund non-therapeutic abortions or providers who provided abortion).

207. See Caminker, *supra* note 48, at 416; see also David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1234–35 (2002).

208. See Rudes et al., *supra* note 77, at 314; see also Kate Weisburd, *Rights Violation as Punishment*, 111 CALIF. L. REV. 1305, 1305 (2023).

localities struggle with dire financial circumstances.<sup>209</sup> As such, scarcity functions as sure a deterrent as regulation.

As “the right to ‘life, liberty, and the pursuit of happiness’ is meaningless to a person who is hungry, homeless[,] and cold,” an assurance that one can obtain the means to survive is necessary for the enjoyment of all other fundamental rights.<sup>210</sup> Localities must attend to the constitutional stakes of their citizenry’s economic needs and aspirations.<sup>211</sup> Vast income, wealth, and opportunity inequalities prevent residents from equal participation in the political community and “impe[] access to basic goods that are the foundation of dignity and standing in one’s own eyes and in the eyes of the community.”<sup>212</sup> Therefore government must advance economic power not only by protecting individual freedom to choose among existing economic options, but also by facilitating public and private collective action to improve people’s choices by changing the terms, conditions, and quality of the available economic choices.<sup>213</sup> The government’s provision of basic services, not only directly to a denizen but also “to the neighbors with whom they share the urban space,” shapes contingent rights.<sup>214</sup> Similarly, the enforcement of immigration laws against undocumented persons and laws that inspire racial or ethnic profiling have spillover effects that may implicate constitutional rights for those not directly targeted.<sup>215</sup> Civil and political rights, such as the dignity

---

209. See Ed Kilgore, *Bankrupting the Vote*, WASH. MONTHLY (Apr. 26, 2012), <https://washingtonmonthly.com/2012/04/26/bankrupting-the-vote/>.

210. Melinda R. Bird, *Towards an Economic Bill of Rights: Economic Rights as Legal Rights*, 40 GUILD PRAC. 33, 33 (1983) (first citing *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937); then citing *Serrano v. Priest*, 487 P.2d 1241, 1255–56 (1971)).

211. See William E. Forbath, *The Distributive Constitution*, DEMOCRACY (2011), <https://democracyjournal.org/magazine/22/the-distributive-constitution/>.

212. *Id.*; see also BLAKE EMERSON, *THE PUBLIC’S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 1 (2019) (identifying “monopolistic firms, asymmetries of information, and transaction costs that impede fair exchange; industrial practices that degrade our environment and threaten our survival; institutions of education, employment, policing, and housing that entrench racial hierarchies; and cultures of gender domination in the school and the workplace that harm and humiliate students and employees.”).

213. See Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for “We the People”*, 35 YALE L. & POL’Y REV. 271, 272 (2016).

214. Davis, *supra* note 143, at 28.

215. See Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 52–53 (2018).

value of procedural protections, are likewise indivisible and interdependent with economic and social rights.<sup>216</sup>

#### IV. THIRD AMENDMENT: SOLDIERING ONWARD

Despite the attention and anger directed at the hegemonic Supreme Court, most constitutional warfare plays out instead on the ground in the many localities that comprise our union in the “brick and mortar” of facility sitings, the designation of trading partners, the signage of courthouses and schoolyards, and the districting of elections, which all minimize, discriminate amongst, or mediate competing rights.<sup>217</sup> These actions of affirmation or rebellion trigger a mimetic process and compel dialogue.<sup>218</sup>

Rather than simply “islands of private parochialism which are likely to frustrate the effective enforcement of federal constitutional rights,”<sup>219</sup> one by one, in conversation and contestation with other local assertions of constitutional vision, municipal endeavors seek to shape the contours of a contested right; rather than imposing its constitutional vision on other localities, a city that is victorious in its constitutional interpretation vindicates an existing right.<sup>220</sup> Yet, cities also foster or mute citizen interpretations of rights by suppressing ideas, information, radical proposals, access to public space, and expressive organizations,<sup>221</sup> during the civil rights movement, trespass, disturbing the peace, and loitering laws were each deployed against sit-ins and civil rights protestors.<sup>222</sup> In seeking to protect one right, often attempts to protect groups disabled by the activity from participating in the

---

216. See Risa E. Kaufman, Martha F. Davis & Heidi M. Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772, 774, 807 (2014).

217. See, e.g., Swan, *supra* note 186, at 887; GREENE, *supra* note 70, at xvii–xviii.

218. See Massaro & Milczarek-Desai, *supra* note 215, at 14; Richard C. Schragger, *Localism All the Way Up: Federalism, State-City Conflict, and the Urban-Rural Divide*, 2021 WIS. L. REV. 1283, 1286 (“through localism all the way up,” conflict at the metropolitan scale drives important aspects of our national political life”).

219. *Cooley’s City*, *supra* note 19, at 488.

220. Morris, *supra* note 28, at 29.

221. See, e.g. Eskridge, *supra* note 35, at 2389; *Bates v. City of Little Rock*, 361 U.S. 516, 519 (1960) (ordinances regulating subversive organizations like NAACP by requiring submission of membership lists).

222. See generally *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (sit-in protestors arrested under criminal trespass law); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965) (selective buying protestor arrested under a loitering statute); *Gregory v. City of Chicago*, 394 U.S. 111 (1969) (desegregation protestors arrested for disorderly conduct).

community's political, social, and intellectual life, others, including the purported aggressor's First Amendment rights, can be negatively implicated.<sup>223</sup> Buffer zones to protect access to healthcare facilities, mandated disclosures for pregnancy service centers, and bias-motivated crime enhancements inhibit or compel speech and association for the regulated parties despite their valiance to some.<sup>224</sup> Cities are integral to operationalizing constitutional rights through a series of governmental and proprietary tools that either directly regulate protected activity or grant untethered discretion to some agent to determine access through restraints, conditions or burdens that can become unconstitutional. While some of the tools available to localities are shared with other levels of government, other tools are unique to local governments, which utilize them to informally amend or protect the Constitution. Cities possess the potential to make each right either accessible or illusory, whether through direct regulation or policies that encumber or dismantle economic barriers. They also contribute to the constitutional discourse by signaling their values through resolutions and affirming their rights in the face of attack via litigation. They can achieve results beyond their own borders using the power of the purse and "co-opt . . . opposition," "purchase acquiescence," and nullify rights by conditioning benefits necessary for survival and the enjoyment of any other rights on their sacrifice.<sup>225</sup> Even localities that lack physical access within their bounds, whether due to restrictive regulations or other barriers, retain economic justice and judicial avenues to support right-seekers, constituent or nationwide. The overt and incidental use of these distinctly local generative and ministerial powers permeating with discretion to interpret and (de)actualize rights is pervasive throughout the local delivery of services and sanctions inherent to our civil order, thereby rendering cities, contrary to generalized conceptions, the primary shapers of constitutional composition through their embrace of a substantially thin or substantively robust duty of actualization.<sup>226</sup>

The duty for these secondary regulations is recurrently devolved onto localities through thousands of municipal ordinances not merely

---

223. See Eskridge, *supra* note 35, at 2154.

224. See *Bruni v. City of Pittsburgh*, 283 F. Supp. 3d 357 (W.D. Pa. 2017); *Evergreen Ass'n v. City of New York*, No. 20-CV-0580, 2025 U.S. Dist. LEXIS 21804 (E.D.N.Y. Feb. 6, 2025); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

225. Robert Cover, *Federalism and Administrative Structure*, 92 YALE L.J. 1342, 1343 (1983); see *Comm. to Defend Reprod. Rts. v. Meyers*, 625 P.2d 779, 799 (Cal. 1981).

226. See Caminker, *supra* note 48, at 426.

recognizing substantive and procedural rights, but creating rules and institutions that underscore both constitutionalism's potential and limitations. Ultimately, localities assume the front-line duty to restrain the degradation of natural resources, diminution of climate change accelerants, and desertion of environmental justice communities through direct governmental action and regulation of private parties. The contention by some authors that localities leave their environmental authority unexercised by focusing on the explicit naming of such intent in the zoning arena neglects the extensive nature to which it permeates daily administrative decisions with both positive and deleterious impacts, a perhaps unrealized "all in government" approach, on the local, regional, and frankly global, environs. Instead, localities are essential actors within the landscape of dynamic environmental federalism and multiscale governance, as the place where environmental law began. Through command-and-control regimes, economic incentives, ethnocentric ordinances that seek to diminish corporate power and state and federal authority, or land use-based adaptation actions including affirmative litigation, symbolic signaling, and proprietary decisions, localities constitute the environmental governance assured in sub-federal statements of rights and combat legislation that might otherwise command them to ignore their mandate.

This constant contestation and experimentation, however, does generate intentionally massive externalities contrary to the ever-quoted Brandeisian dissent's claims about a lack of "risk to the rest of the country."<sup>227</sup> These decisions, policies, and laws do not play out in "insulated chambers" as Holmes likewise claimed,<sup>228</sup> but rather in an immensely porous and absorbent constitutional context in which the dispensing, if artfully, with a fundamental right in one corner of the nation carries substantial risk to the rest of the country.<sup>229</sup> While experiments in climate policy, sometimes the experiment of discovering the impact of denying climate change, have readily seen global impacts as the greenhouse gas emissions cause damage to health and property across the nation (and the globe),<sup>230</sup> experiments in vote

---

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

228. *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

229. See Jodi L. Miller, *Are States "Labs of Democracy" Yes and No*, N.J. STATE BAR FOUND. (Nov. 2, 2021), <https://njsbf.org/2021/11/02/are-states-labs-of-democracy-yes-and-no/>; see also John M. Golden & Sanford Levinson, *Splitting the Atom of False Scientism in Constitutional Law*, 66 ARIZ. L. REV. 1 (2024).

230. See, e.g., *City & Cnty. of Honolulu v. Sunoco L.P.*, 153 Haw. 326, 340 (Haw. 2023).

dilution are only sometimes acknowledged as the tipping point in the occupant of the Presidency, and protections for a marital union in one locale responsible for the obligation of another to afford requisite comity and dignity.