

LOCAL EVIDENCE IN CONSTITUTIONAL INTERPRETATION

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Abstract

The Supreme Court frequently relies on state law when interpreting the U.S. Constitution. What is less understood is the degree and manner in which the Supreme Court and other federal courts look not to state law, but to local law. Although it has largely gone unnoticed, there is a robust practice of acknowledging and accounting for local law in the course of constitutional interpretation. To take an example, one area in which the Supreme Court has examined local enforcement patterns is in death penalty jurisprudence. In 2015, Justice Stephen Breyer, dissenting in *Glossip v. Gross*, cited to empirical data to raise an Eighth Amendment arbitrariness concern with geographic variation in local practice, where in a five-year period, “just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide.” In other rulings, judges seek to minimize constitutional interpretations that might disrupt local law and practice. As is done with respect to states, judges take into account whether local practices are outlying or common. Judges also look to local law and practice to inform the development of constitutional norms. This Article analyzes and defends reliance on local law and practice in constitutional interpretation—not to advocate localism or deference to local government—but as evidence in constitutional interpretation. Using local evidence in constitutional law is particularly important at a time in which empirical research on county-level data is providing a wealth of information that can better inform constitutional law.

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Introduction

The Supreme Court frequently relies on state law when interpreting the U.S. Constitution.¹ When doing so, the Justices take look to state law for a range of purposes: counting the number of states adopting a type of law to assess “national consensus”;² interpretation to minimize disruption of existing state practice;³ enforcing the constitution against outlier states;⁴ generally asking whether a constitutional rule raises federalism concerns; and asking whether an interpretation of the constitution comports with traditional notions of due process or “fundamental” rights. Less understood is the degree and manner in which the Court and other federal courts look not just to state law, but to local law. In this Article, I argue that local law and practice provides important evidence in constitutional interpretation.

When should local evidence matter for constitutional purposes? That is the subject of this Article. Counties and cities are not sovereigns in the same way that states are. For some purposes, federal courts treat local law as just a subset of state law. However, just as state practices can matter when assessing constitutional questions, so can local practices, notwithstanding local governments’ lack of independent sovereignty. Courts sometimes seek, for example, to interpret constitutional provisions so as to minimize disruption of local practices. Courts sometimes take into account whether local government practices are outlying or common. Courts sometimes assess local rules or practices to develop new norms. I do not argue here for a version of localism—that the local deserves interpretation—I do argue that local government can and should matter more in constitutional interpretation—at a time in which empirical research on local-level data is providing a wealth of information that can inform the law.⁵

¹ Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards,”* 57 U.C.L.A. L. REV. 365 (2009); Note, *State Law as “Other Law”: Our Fifty Sovereigns in the Federal Constitutional Canon,* 120 HARV. L. REV. 1670 (2007).

² *Roper v. Simmons*, 543 U.S. 551, 562-64 (2005).

³ *Employment Division v. Smith*, 494 U.S. 872, 890 (1990) (noting that “a number of states” had laws with exceptions for the type of peyote use at issue).

⁴ See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6 (1996).

⁵ See, e.g. Brandon L. Garrett, Alexander Jakubow, and Ankur Desai, *The American Death Penalty Decline*, 105 J. CRIM. L. & CRIMINOLOGY 561 (2017) (analyzing twenty-five years of death sentencing data at local level and describing relevance for constitutional doctrine). I do not argue local practices necessarily deserve deference or constitutional rules should necessarily be “tailored” to accommodate local practices, but rather that local practices and rules should matter as important evidence in constitutional interpretation. See also Part III, *infra*. For prominent arguments that local constitutional norms deserve deference, see, e.g. David Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 561-63 (1999); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-*

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One area in which the Supreme Court has prominently suggested that “counting counties” may be a useful exercise is in the Eighth Amendment context. In 2015, Justice Stephen Breyer raised the issue directly in his dissent in the case of *Glossip v. Gross*:

Geography also plays an important role in determining who is sentenced to death.... Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide.⁶

Justice Breyer then discussed a growing body of empirical research examining the changing local geography of the death penalty and called for full briefing on the question whether the death penalty is now a cruel and unusual punishment, under the Eighth Amendment.⁷ Why focus on counties as outliers and not states? Justice Breyer argued that focusing on local government shows how “unusual” the death penalty has become, and how arbitrary its imposition has become, citing to empirical studies examining local factors such as the preferences of local prosecutors, adequacy of local defense resources, and racial distribution within counties.⁸ Justice Breyer has repeated those concerns in a recent dissent from denial of certiorari.⁹

This analysis powerfully demonstrates how local government practices can matter as evidence in constitutional reasoning. In the Eighth Amendment context, in which the focus for many decades has been on the “evolving standards of decency” in our country, the Supreme Court has at times insisted that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”¹⁰ Such judicial assessment of “national consensus” and

Sex Marriage, 21 J.L. & Pol. 147 (2005); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1636 (2005); Joseph Blocher, *Firearm Localism*, 123 YALE L. J. 82, 85 (2013).

⁶ *Glossip v. Gross*, 135 S.Ct. 2726, 2761 (2015) (Breyer, J. dissenting).

⁷ *Id.* at 2761-62.

⁸ *Id.* at 2762 (citing studies finding that county disparities may be due to “the power of the local prosecutor,” as well as “the availability of resources for defense counsel” and “the racial composition of and distribution within a county”).

⁹ *Sireci v. Florida*, 137 S. Ct. 470 (2016) (J. Breyer, dissenting from denial of certiorari) (“The number of yearly executions has fallen from its peak of 98 in 1999 to 19 so far this year, while the average period of imprisonment between death sentence and execution has risen from 12 years to over 18 years in that same period.”) (citing Death Penalty Information Center (DPIC), *Facts about the Death Penalty*, at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (updated Dec. 7, 2016); Dept. of Justice, Bureau of Justice Statistics, T. Snell, *Capital Punishment, 2013—Statistical Tables*, p. 14 (rev. Dec. 19, 2014) (Table 10); DPIC Execution List 2016, at <http://www.deathpenaltyinfo.org/execution-list-2016>.”).

¹⁰ *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (“[F]irst’ among the “objective indicia that reflect the public attitude toward a given

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“evolving standards of decency,” has its critics, who argue that state law is not the place to look; death sentencing is linked to the preferences of local prosecutors, jurors, and judges.¹¹ In part for that reason, scholars have assembled a large body of empirical research examining local-level death sentencing practices.¹² That data can inform doctrine, whether one agrees with Justice Breyer’s assessment of the modern death penalty or not.

In general, relying on state law when interpreting the federal constitution may not always be the most appropriate way to capture the question whether a federal constitutional rule would unduly inhibit state action. It is a far more settled practice to examine state law when interpreting constitutional rights than to examine local law.¹³ However, critics have long been concerned that nose-counting of state laws can be a strained or artificial exercise,¹⁴ and that doing so undervalues federal constitutional norms, and it can conversely overvalue state government norms that do not fit federal constitutional values well.¹⁵

There is not just one way in which the Supreme Court and federal courts rely on patterns in state law. Perhaps most noteworthy was its departure from rote head-counting in *Atkins v. Virginia*, where the majority emphasized: “It is not so much the number of these States that is significant, but the consistency of the direction of change.”¹⁶ Sometimes a more forgiving minority practice is selected because it is seen as less disruptive as a constitutional floor than the approach adopted by the majority of states. Justice Harlan famously defended such rulings as “born of the need to cope

sanction” are statutes passed by society’s elected representatives.” It is also telling that both of those rulings were later reversed when state legislation changed. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

¹¹ See Lain, *supra*, at n.7-8 (citing critics); Robert J. Smith, Bidish J. Sarma, Sophie Cull, *The Way the Court Gauges Consensus*, 35 CARDOZO L. REV. 2397 (2014); Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: “Still in Search of A Unifying Principle”?*, 73 U. PITT. L. REV. 107 (2011).

¹² See Garrett, Jakubow, & Desai, *supra* note 5; see also Brandon L. Garrett, *End of its Rope: How Killing the Death Penalty can Revive Criminal Justice* (Harvard University Press, 2017) (presenting statistical analysis of death sentencing from 1990 to 2015); Lee Kovarsky, *Muscle Memory and the Local Concentration of Capital Punishment*, 66 DUKE L. J. 259 (2016) (examining county-level concentration of death sentences).

¹³ Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 112 (Basic Books 2012); Michael J. Klarman, *From Jim Crow to Civil Rights* 453 (Oxford 2004); Jeffrey Rosen, *The Most Democratic Branch: How the Courts Serve America* 4 (Oxford 2006).

¹⁴ For critics, see Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091-93, 1106 (2006). For defenses, see Roderick M. Hills, Jr., *Counting States*, 32 HARV. J. L. & PUB. POL’Y 17 (2009); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142-46 (2006).

¹⁵ Wayne A. Logan, *Creating a “Hydra in Government”: Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 89 (2006).

¹⁶ *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

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with national diversity under the constraints of the incorporation doctrine.”¹⁷ For that reason, the Court at times ratifies the practice of a minority of states. In other instances, as David Strauss describes, the Court adopts a “modernizing” rule, to strike down infrequently enforced and outdated law.¹⁸

While sometimes taking account of state law, in other situations, Supreme Court Justices have raised concerns as to competence of federal judges to assess state law. “The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar,” as the majority put it in *Michigan v. Long*.¹⁹ Consistency is another reason why judges may fear considering the content of state law. Deference to “the vagaries of state criminal law,” for example, can result in a “crazy quilt” rather than “uniform law of the land.”²⁰

As I will describe in Part II of this Article, there are important examples of robust use of local evidence in constitutional law. I classify four types of use of local evidence in constitutional law, in which courts: (1) examine patterns of local law and practice, including in criminal procedure cases, and most prominently in the death penalty area; (2) examine best practices at the local level to influence the appropriate constitutional floor, including in the Fourth Amendment area; (3) examine county-level enforcement to assess whether a state law is an outlier that is rarely enforced at the local level; (4) use local remedies and needs to inform constitutional norm-development, including in the Fourteenth Amendment cases. In Part II, I explore examples of each.

Indeed, I will argue that the concern with judicial ability to assess local practices has been honored largely in the breach. To provide one high profile example, the Supreme Court’s ruling in *Bush v. Gore*, heavily emphasized the inconsistencies in practices for conducting the Presidential vote recount from county to county, and also among recount teams within single counties.²¹ The ruling has been strongly criticized and its precedential value is unclear from the text of the ruling itself.²² However, the concern with arbitrary and discriminatory practice and patterns is far from unique to the election law

¹⁷ *Williams v. Florida*, 399 U.S. 78, 136 (1970) (Harlan, J., concurring).

¹⁸ David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 878-79 (2009).

¹⁹ *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

²⁰ *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2584 n.9 (2008); *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring).

²¹ *Bush v. Gore*, 531 U.S. at 106.

²² Markenzy Lapointe, *Bush v. Gore: Equal Protection Turned on its Head, Perhaps for a Good Though Unintended Reason*, 2 WYO. L. REV. 435, 479 (2002); David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1427, 1452-74 (2006). The Court stated that its ruling was “limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. 531 U.S. at 109. See also see generally Chad Flanders, *Please Don’t Cite this Case!: The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141 (2006).

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context.²³ Indeed, looking at law and practices at the local level may sometimes answer objections to relying on state-level law or practice. States may not be the most accurate signals of state legal practice in situations when decisionmaking is more focused at the local level.²⁴

In Part III, I turn to the methodological issues raised by using local evidence in constitutional interpretation. The decision whether to defer to local practices or not should itself be evidence-based. For example, the frequent lack of good data about county practices can be a real obstacle to using such evidence to inform constitutional interpretation. Judicial reliance on local law and practice should not be, and sometimes has been, quite anecdotal and ill-informed. This Article describes burgeoning research examining county-level data and assesses the state of that research and the areas in which further data is needed. Ultimately, in this Article, I set out an empirical research and a constitutional law agenda for better use of local evidence in constitutional interpretation.

I. DISAGGREGATING THE STATES

Examination of state law is pervasive in constitutional law, despite concerns raised concerning the competence of federal judges to assess state law and the relevance of state law to federal constitutional interpretation questions. Many of the most significant Supreme Court rulings interpreting the U.S. Constitution do so while citing evidence from state law. Often the Justices include in their analysis some discussion of the numbers of states adopting law consistent or inconsistent with the advanced constitutional interpretation. Some of the reasons for examining state law have to do with the states as sovereigns, and therefore the reasoning would not support similarly examining the content of local law. However, when one examines that analysis more closely, many of the reasons for focusing solely on state-level lawmaking are not sovereignty-related, and as sovereignty-based reasons start to erode, the case for a sharp distinction between the treatments of state and local practices weakens. This Part begins with an overview of the uses of state law in constitutional interpretation and then it turns to the normative rationales for that usage, before turning to the sources for law at the local level.

²³ For a Note arguing that *Bush v. Gore* should inform analysis of the constitutionality of the death penalty, see Andrew Ditchfield, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801 (2007).

²⁴ There is another advantage of relying on local government that I develop in Part III: unlike state governments which have sovereign immunity and cannot be sued for damages for violating the constitutional rights of individuals, local governments are liable, and could therefore be more accountable and likely to adhere to constitutional norms.

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A. Uses of State Law in Constitutional Interpretation

The Supreme Court has looked to state law in a number of different ways and using a range of different methods. There are a series of important questions to ask about when and whether state law should be used, and none of these questions have answers that are consistent across areas of Supreme Court doctrine. These questions include:

What type of consensus matters?

State law may or may not be a useful measure depending on what type of consensus matters for constitutional purposes. The Eighth Amendment, the Supreme Court has long held, “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”²⁵ Whether state law is a good or bad marker for the standards of decency in society is a difficult question.

When is current state law relevant and when is old state law relevant?

In *Glucksberg v. Washington*, the Court noted how few states permitted assisted suicide in finding the asserted due process right as not “fundamental.”²⁶ A “fundamental” right might demand quite a bit of consensus, and perhaps over a long period of time, to obtain that status. In other areas, the Court is more concerned with current practice and whether a new constitutional interpretation or rule might disrupt it. In Fourth Amendment cases, the Court may assess reasonableness of searches by examining state legislation, regarding subjects as diverse as warrantless arrests and state rules of evidence.²⁷ In Sixth Amendment cases, the Court has cited to state practices regarding size of juries, or whether factfinding is by a judge or a jury.²⁸ In its Sixth Amendment ruling on state statutes permitting judicial imposition of the death penalty, in *Ring v. Arizona*, the Court noted how “the great majority of States responded to this Court’s Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.”²⁹

What if the law in the states is in flux?

²⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

²⁶ 521 U.S. 702 (1997).

²⁷ E.g. *Payton v. New York*, 445 U.S. 573, 600 (1980); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961).

²⁸ *Ring v. Arizona*, 536 U.S. 584, 607-8 (2002); *Williams v. Florida*, 399 U.S. 78, 98 (1970).

²⁹ *Ring v. Arizona*, 536 U.S. 584, 607-08 (2002).

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To take a prominent example, in *Bowers v. Hardwick*, the Supreme Court noted that about half the states at that time criminalized homosexual sodomy.³⁰ In *Lawrence v. Texas*, the Court overruled *Bowers* and found that the *Bowers* court had wholly “overstated” the prior practice, by focusing on which states had laws on the books, and not at how often such laws were actually enforced.³¹ In the Eighth Amendment area, in which the Court is focused on contemporary standards of decency, in recent cases, the Court has examined not just a count of how many states have statutes on the books, but the “direction” of movement among state legislatures to or from some type of statute. The Court has also focused on subsets of states as relevant when considering the degree of state law adoption of a type of measure. For example, the Court has noted that there would be little need for states in which, for example, no executions have been carried out in decades, to reconsider their death penalty statutes, and therefore such statutes might not “count” when taking the measure of the law in the states.³²

What evidence should be cited of the existence or usage of state law?

In the substantive due process context and in equal protection cases, the Supreme Court has similarly focused on how many states have statutes on the books, but sometimes the Court does more than “nosecount.” The Justices sometimes also ask, as noted, whether those statutes are enforced, and what are the numbers of sentences actually imposed under those statutes (if they are criminal statutes).³³ The Justices have also asked whether to count a state with a statute on the books, but which has been found unconstitutional by the state supreme court.³⁴ Timing can also matter. The Justices have asked how recently adopted state statutes were, perhaps treating statutes that have lingered on the books for a long time as a relic of an earlier era, but more recent adoption as a sign that a type of statute retains popularity.

What level of state law adoption matters?

The underlying constitutional right at issue may demand more or less strength of state evidence. In the Eighth Amendment cases concerning the

³⁰ *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986).

³¹ 539 U.S. at 571.

³² *Atkins*, 536 U.S. at 316.

³³ *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003); *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967); *Enmund v. Virginia*, 458 U.S. 782, 796 (1982) (noting that there were only three individuals on death row in the U.S. in the relevant category of non-direct participant felony murderers).

³⁴ See *Kennedy*, 554 U.S. at 423-25 (not counting Florida where although the state death penalty statute includes child rape as death eligible, “where the Supreme Court of Florida held the death penalty for child sexual assault to be unconstitutional.”)

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death penalty, for example, the Supreme Court refers to “national consensus” as the standard. That standard can call for very strong evidence of state law and practice. However, the Justices have disputed whether that consists in a majority of the states, or a majority of the relevant death penalty states, or something far more demanding than that. For example, in *Kennedy v. Louisiana*, the Court emphasized: “44 States have not made child rape a capital offense.”³⁵ Yet that was an overstatement in the sense that many of those were not states that any longer retained the death penalty for any criminal offenses. In *Graham v. Florida*, the Court identified thirteen states banned life without parole for at least some juvenile offenses, but the Court found that the practice nevertheless violated the Eighth Amendment.³⁶ Strict nose-counting clearly is not the only explanation of those outcomes.

As the Sections that follow will discuss, these same questions are important when the courts look to local practices when interpreting the Constitution. However, these questions have not been asked or answered as openly or with as much attention to methodological concerns.

B. Norms and Nose-counting

What are the purposes of assessing state law during constitutional interpretation? In some areas, such as the Eighth Amendment cases concerning whether punishment is cruel and unusual, the doctrine itself asks about the existence of “national consensus” on an issue, and it therefore calls for some assessment of state law.³⁷ In *Glucksberg*, the Court asked how many states permitted assisted suicide when asking whether a candidate for substantive due process protection was a “fundamental” right.³⁸ State law was evidence of how lawmakers treated the right.

In other areas, though, the doctrine does not as clearly call for such an assessment, and the courts find it valuable for other reasons. One reason courts may look to state law is to assess not whether state law already recognizes a right and therefore federal law should follow, but to assess what degree of disruption would result if a new federal right or interpretation of the constitution is adopted. In other contexts, judges may defer to state practices because they believe that state judges or lawmakers may have more expertise in an area and may be more likely to have the correct answers. Justice Sotomayor in *Kansas v. Carr* emphasized this function of federalism-based deference in a ruling regarding a Kansas procedure in death penalty

³⁵ 554 U.S. at 423.

³⁶ 560 U.S. 48, 62 (2010).

³⁷ 554 U.S. at 423.

³⁸ 521 U.S. 702 (1997).

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trials.³⁹ Justice Sotomayor explained: “[The role of state courts as innovators] is particularly important in the criminal arena because 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.”⁴⁰ Similarly, Eric Posner and Cass Sunstein have argued that broadly held interpretations or views may not only deserve deference, but they may be more likely to be correct.⁴¹ The states may be laboratories for experimentation that over time reach sound or even correct answers.

One might assume that a useful component of federalism would involve some deference to state lawmaking, including by asking whether some type of state law is a common one, for which a constitutional challenge might disrupt accepted state practice. However, even from the perspective of federalism, some have criticized the use of information about state law in constitutional interpretation. One source of criticism relates to what was discussed above: that it is hard to decide in any objective fashion what counts as sufficient consensus among the states.⁴² Others more broadly argue that state constitutionalism should be robust and is an important source for informed law.⁴³ These debates, even if they have not been resolved and involve deeper questions about the role of evidence and federalism in constitutional interpretation, are far more developed than debates about the role of evidence and localism in constitutional interpretation.

C. Counting Localities

There are more than 39,000 localities in the United States, with over 19,000 municipal governments, over 16,500 townships, and over 3,000 counties, according to the most recent U.S. Census Bureau data.⁴⁴ When referring broadly to localities or counties in this Article, I include other types of local administrative units, particularly incorporated municipalities or

³⁹ *Kansas v. Carr*, 136 S. Ct. 633, 647–48 (2016) (“We intervene in an intrastate dispute between the State’s executive and its judiciary rather than entrusting the State’s structure of government to sort it out... And we lose valuable data about the best methods of protecting constitutional rights—a particular concern in cases like these, where the federal constitutional question turns on the ‘reasonable likelihood’ of jury confusion, an empirical question best answered with evidence from many state courts.”).

⁴⁰ *Kansas v. Carr*, 136 S. Ct. at 648.

⁴¹ Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142-46 (2006).

⁴² Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1091-93, 1106 (2006).

⁴³ For a defense see Roderick M. Hills, Jr., *Counting States*, 32 HARV. J. L & PUB. POL’Y 17 (2009). For a broader argument in favor of robust state constitutionalism, see Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

⁴⁴ National League of Cities, *Number of Municipal Governments and Population Distribution* (last visited January 11, 2018), at <http://www.nlc.org/number-of-municipal-governments-population-distribution>.

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cities, as well as parishes, districts, and other types of units. One criticism of a legal focus on federal law and particularly constitutional law is that it ignores how central local government units are to the day-to-day lives of residents.⁴⁵ Local government can inform state law and state constitutional law, although to varying degrees depending on the structure of lawmaking in any given state and the practical reality of state politics.⁴⁶

That said, local government does not have the same sovereign status as state government. As the Supreme Court has often stated: “States traditionally have been accorded the widest latitude in ordering their internal governmental processes.”⁴⁷ Local government entities are “political subdivisions such as cities and counties are created by the State,” and they exist “as convenient agencies for exercising such of the government powers as may be entrusted to them.”⁴⁸ Constitutional provisions do limit the power and authority of the state over local entities. For example, equal protection and voting rights may not be infringed upon. However, the background presumption is that local entities are creatures of state law. For that reason, the Court has often emphasized state law sources as more authoritative and permanent. The Supreme Court has also sometimes suggested that local government is less to be trusted in matters of constitutional interpretation. As the Court put it, “small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account.”⁴⁹ If so, as I develop, looking at whether local practices are atypical should matter in the analysis, and similarly, that local practices are common and representative should matter in the analysis. The decision whether to defer to local practices or not should be evidence-based.

D. Localism without Evidence

Despite the contingent status of local government entities, in a series of cases, Supreme Court Justices have emphasized the importance of local autonomy in constitutional interpretation. There is a large literature on localism and the degree to which the Court emphasizes it, and localism is not my subject in this Article. What is important to note, however, is that typically in opinions that do describe a need to defer to local government decisions, the Court does not solicit or attempt to measure the views of local

⁴⁵ See Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & PUB. POL’Y Rev. 187, 218 (1996) (“the Court’s decisions have recognized the key role of localities without explicitly saying so.”)

⁴⁶ Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627 (2001).

⁴⁷ *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 475 (1982).

⁴⁸ *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978); *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

⁴⁹ *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637-38 (1943).

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government, necessarily, but nevertheless interprets the constitution to defer to local interests.⁵⁰

Such rulings, deferring to the local in a largely uncritical fashion, are exactly what I would argue that the Supreme Court and federal courts should not be doing. When turning from the national to the local, sometimes the Court has emphasized that a diversity of local practices is unproblematic or should be embraced. For example, the Supreme Court ruled in *Missouri v. Lewis* that “[i]f diversities of laws . . . may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.”⁵¹ The Court has approved funding laws that provide very different resource levels to public schools, based on county districting.⁵² Instead, I would argue, the Court should conduct a careful examination of that variation in resource levels and assess whether it is non-arbitrary or not.

In other areas, the Supreme Court has avoided discussing the local government implications or bases for its rulings, and such rulings also raise the concern that local evidence is not even being considered. Scholars have argued that the Court discusses the local when it is convenient and ignores the local when it is not convenient; Joan Williams has called this a type of “forum-shifting,” not by litigants, but by “shifting power among different levels of government.”⁵³ Professor Richard Schragger has argued that local government is an important but neglected constitutional actor in the Establishment Clause context where “much of Religion Clause doctrine has been forged in conflicts that directly implicate the traditional powers of local government.”⁵⁴ Schragger criticizes the Supreme Court for not distinguishing between national and local regulation of religion, and that doing so can invite more damaging centralized regulation, as opposed to local municipal power.⁵⁵

⁵⁰ Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 84 (1986) (“Given that the fourteenth amendment allows courts to limit state sovereignty in order to vindicate federal constitutional rights, why should the sovereignty of localities, which are mere subdivisions of states, limit the reach of the fourteenth amendment when states’ sovereignty cannot?”).

⁵¹ 101 U.S. 22, 31 (1879). See also *Hayes v. Missouri*, 120 U.S. 68, 71-72 (1887). See also *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (“While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the lawmaking power; and so long as the regulation in question is not shown to be clearly unreasonable and arbitrary, and operates uniformly upon all persons similarly situated in the particular district, the district itself not appearing to have been arbitrarily selected, it cannot be judicially declared that there is a deprivation of property without due process of law, or a denial of the equal protection of the laws, within the meaning of the 14th Amendment.”).

⁵² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54-55 (1973).

⁵³ Williams, *supra* note 49, at 87-88.

⁵⁴ Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004).

⁵⁵ *Id.* at 1818.

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The local preferences of counties and cities do seem to matter more, and receive more explicit acknowledgment by the Supreme Court, in areas that are seen as traditionally subject to such local regulation. Justice William J. Brennan famously asked in *San Diego Gas & Electric v. City of San Diego*, “If a policeman must know the Constitution, why not a planner?”⁵⁶ The Supreme Court’s rulings regarding zoning decisions and land use matters adopted a highly deferential standard, making it unnecessary to engage much with the content of local law; the idea was to defer to local preferences.⁵⁷

Then again, the Court’s direction is not fully consistent in the land use and takings area either. More recent rulings have adopted less deferential standards in rulings concerning the Takings Clause and so-called regulatory takings in which local land use regulations affect property.⁵⁸ Such rulings may reflect an abiding concern with localism: that the local does not deserve deference if localities are abusing the rights of individuals or of groups. In dissent in the 2013 ruling in *Koontz v. St. Johns River Water Management District*, Justice Elena Kagan expressed the concern that the Court by relaxing its traditional deference “threaten[] to subject a vast array of land-use regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny.”⁵⁹

My focus is not on when localism should matter, but that the question whether and how to defer to the local should be, in my view, informed by empirical evidence. As described in this part, there is a literature and a practice of relying on state evidence when considering the role of federalism in constitutional interpretation. The relevance of evidence in considering the role of localism raises different questions. If deference risks constitutional rights violations in the view of the majority, then it is understandable that such deference would be restrained, but more must be known about the variation and content and the effects of local government policies. In the next Part, I turn to a series of concrete examples in which local evidence is considered in constitutional law, at varying levels of sophistication and for several different purposes.

II. EXAMPLES OF LOCAL EVIDENCE IN CONSTITUTIONAL LAW

The use of local evidence in constitutional law is in fact a robust part of constitutional practice, if not theory. In this Part, I turn to areas in which constitutional law is to some degree already informed by local law and

⁵⁶ 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

⁵⁷ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁵⁸ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

⁵⁹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2604 (2013) (Kagan, J. dissenting).

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practice. Sometimes local sources inform the courts. At other times, to be sure, they do not. Indeed, the Supreme Court has sometimes expressed skepticism at the value of examining local practices at all. The result of that analysis can suggest a “crazy quilt” of local practices that are not suited to inform the “uniform law of the land.”⁶⁰ Nevertheless, before deciding what the uniform rule should be, even if it is just a constitutional floor, it is important, I argue, to understand what the local practices are, whether they are uniform or a “crazy quilt,” and what that means for the rule one might adopt at the federal level.

In this Part, I make the case that looking to local government is not only possible and sometimes done, but it can significantly advance constitutional analysis and interpretation. It can make constitutional law better. In Part III, I will then turn towards a more principled and empirically informed approach towards relying on local government evidence, which is so lacking in the Supreme Court’s largely inconsistent approach towards the problem.

In this Part, I classify four types of use of local evidence in constitutional law, in which courts: (1) examine patterns of local law and practice, most prominently in the death penalty area; (2) examine best practices at the local level to influence the appropriate constitutional floor, including in the Fourth Amendment area; (3) examine county-level enforcement to assess whether a state law is an outlier that is rarely enforced at the local level; (4) use local remedies and needs to inform constitutional norm-development, including in the Fourteenth Amendment cases.

Before turning to examples of each of those four types, I note as a preliminary matter that local governments cannot invoke the U.S. Constitution as against states under the rule of *Hunter v. City of Pittsburgh*.⁶¹ That rule ensures local government actors are not, directly, constitutional actors as against states. However, local government actors are nevertheless crucial constitutional litigants. Local government can be sued and held civilly accountable for federal constitutional violations by its officials, without the benefit of state sovereign immunity, under the Supreme Court’s doctrine in *Monell v. Department of Social Services*.⁶² As a result of

⁶⁰ *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2584 n.9 (2008); *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring).

⁶¹ 207 U.S. 161, 178 (1907). For an insightful critical analysis of the doctrine, see Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1 (2012); see also David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2232 (2006); Heather K. Gerken, *Dissenting by Deciding*, 57 Stan. L. Rev. 1745 (2005); Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 395-96, 407-09 (2002). See also *Gomillion v. Lightfoot*, 364 U.S. 339, 344-45 (1960) (“Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution.”)

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

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that doctrine interpreting the central civil rights statute, cities and counties are common defendants in constitutional litigation. A range of constitutional doctrines developed by taking interests of local government into account because local government is the litigant. Several such doctrines are developed in this Part.

Local evidence can also inform constitutional law; that is the subject of this Part. Should local laws, policies, or legal practices matter when conducting constitutional interpretation? There are any number of constitutional rulings that happen to involve challenges to municipal ordinances or local government actors that do not dwell on the subject. If local government should matter, how should it matter? After all, some answers to the questions posed about the use of state law in constitutional cases would come out differently if the court was focused instead upon counties as the relevant unit of inquiry. For some questions, state law may seem distant from the locus of local decisionmaking. Counties may be particularly important areas for focus in matters in which law and policymaking is itself focused at the local level. For example, criminal law, land use, and even areas often seen as federal, like immigration enforcement, are all heavily impacted by local level decisions.⁶³ As I will describe in this Part, a careful analysis of local practices can improve decisionmaking and add valuable information to constitutional interpretation and analysis.

A. Constitutional Criminal Procedure

In general, criminal justice is highly localized in the United States: it is a fragmented system. Although state law defines criminal offenses and sentences, with states running prisons,⁶⁴ the larger work of arresting offenders, charging them, convicting them, and supervising them post-conviction, falls to counties. The trial courts, prosecutor's offices, police agencies, defense offices, are all usually governed almost entirely locally. County priorities and policies matter enormously, as to style of policing, charging decisions by prosecutors, resources for defense lawyers, and approaches adopted by judges. For those reasons, constitutional criminal procedure is a particularly ripe area for careful consideration of the local in

⁶³ On immigration enforcement and wide variation in local practice as between different large urban counties, see Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126 (2013) ("American criminal justice plays out at the local level. At the same time, federal immigration enforcement increasingly takes place in partnership with local police, prosecutors, jailers, and probation officers. The consequences of this new dynamic are surprisingly understudied."); see also David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 202 (2012).

⁶⁴ For a critique of this tendency, see W. David Ball, *Why State Prisons?* 33 YALE L. POL'Y REV. 75 (2014).

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interpretation. As the sections that follow will describe, several areas are important examples of use of local evidence in constitutional interpretation.

1. Local Enforcement Patterns and the Eighth Amendment

The death penalty is an area subject to a complex body of constitutional regulation under the Eighth Amendment, in particular. One reason why the death penalty is an area that can particularly benefit from local constitutional interpretation is that in its decades-long modern jurisprudence, the Supreme Court has increasingly looked not just to state-level practices but also local practices. These cases provide an example of the first type of use of local evidence that I set out in this Part: examining patterns of local law and practice in criminal procedure cases.

In the past, as noted, the Supreme Court looked to states and not localities. The Justices had highlighted for Eighth Amendment purposes how “first among the objective indicia that reflect the public attitude toward a given sanction are statutes passed by society’s elected representatives.”⁶⁵ Rulings therefore asked how many states adopted death penalty statutes of a given type to assess what contemporary attitudes are towards them. The Supreme Court’s concern that the death penalty may be imposed arbitrarily in a manner that “smacks of little more than a lottery system”⁶⁶ or that is “so wantonly and so freakishly imposed”⁶⁷ dates back to its ruling in *Furman v. Georgia*, finding the death penalty unconstitutional in 1972, only to reverse course in *Gregg v. Georgia* and companion cases in 1976, having been assured that new more detailed state-level statutes would make death sentences more predictable and informed.⁶⁸ Focusing on state death penalty statutes, Supreme Court had not often cited to county-level death sentencing practices in its Eighth Amendment cases.

However, this largely state-level focus has changed over time. The Court has increasingly cited to the practices of sentencing juries and charging practices by prosecutors as relevant in addition to state-level statutes. Thus, dissenting in *Roper v. Simmons*, Justice Antonin Scalia noted: “[W]e have, in our determination of society’s moral standards, consulted the practices of sentencing juries: Juries maintain a link between contemporary community values and the penal system that this Court cannot claim for itself.”⁶⁹ The concern with the practical reality of jury decisionmaking dates back to the *Furman v. Georgia* ruling itself. Justice Thurgood Marshall, in his opinion,

⁶⁵ *Stanford v. Kentucky*, 492 U.S. 361 (1989).

⁶⁶ 408 U.S. 238, 293 (1972) (Brennan, J. concurring).

⁶⁷ 408 U.S. at 310 (Stewart, J. concurring).

⁶⁸ 428 U.S. 153, 195 (1976) (stating that “the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”).

⁶⁹ 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

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emphasized that state statutes are not a sufficient guide to current death penalty practices: “Legislative ‘policy’ is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them.”⁷⁰ In other rulings, the Justices have more strongly emphasized presence or absence of state statutes as the best evidence for current death penalty practices.

The Eighth Amendment relevance of counties is changing, as the increasingly fine-grained data about death sentencing practices makes its way into the courts. As noted in the Introduction, in a dissent in 2015, Justice Breyer raised the issue directly in *Glossip v. Gross*, writing:

Geography also plays an important role in determining who is sentenced to death.... Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide.

Justice Breyer added that where, “The Eighth Amendment forbids punishments that are cruel and unusual. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual.” Justice Breyer called for full briefing on the question whether the death penalty is now cruel and unusual, under the Eighth Amendment, and when that briefing occurs, “data-driven arbitrariness review” may take on a more prominent role, with the availability of detailed county-level data on death sentencing.⁷¹

Not only is the doctrine amenable to local-level analysis, but there is a growing body of empirical data available to inform the doctrine. In recent years, just a few dozen counties have accounted for the bulk of death sentences imposed nationwide. Scholars have conducted detailed research collecting data on the use of the death penalty at the county level; the data was not available before they began to do so, as the federal government only reports state-level data on death sentencing. The first study to do so comprehensively, the landmark “Broken System” study led by Professor James Liebman, Valerie West, and Jeffrey Fagan examined death sentences from 1977 through 1995, and found a concentration of death sentences in a small minority of counties.⁷² The researchers noted, “Even in Texas, nearly 60% of its counties did not impose a single death sentence in the period.”⁷³ A

⁷⁰ 408 U.S. 238, 314 (1972) (Marshall, J., concurring).

⁷¹ Smith, *supra* note xxx, at 254. Professor Smith also called for collection more detailed charging data regarding potentially capital cases in order to better examine what factors influenced county-level processing and outcomes in death-eligible cases. *Id.* at 256.

⁷² James Liebman & P. Clarke, *Minority Practice, Majority’s Burden: The Death Penalty Today*, 9 *Ohio State Journal of Criminal Law* 255, 312 (2012).

⁷³ *Id.* at 264. Further, data analysis of appellate and post-conviction reversals showed that state courts were more likely to overturn death sentences from urban than rural and small-

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more recent report analyzing executions in 1976, including from data collected by Professor Frank Baumgartner, found that only 2% of counties in the U.S. were responsible for a majority of the cases, and 85% of the counties in the U.S. had not had a single execution in over 45 years.⁷⁴

A study by Professor Robert J. Smith of recent death sentences between 2004 and 2009 found even greater concentration, as death sentences have declined in number, noting that: “The geographic distribution of death sentences reveals a clustering around a narrow band of counties: roughly 1% of counties in the United States returned death sentences at a rate of one or more sentences per year from 2004 to 2009.”⁷⁵ Thus, Smith noted, Los Angeles County, California sentenced more people to death in 2009 as the entire state of Texas, and Maricopa County, Arizona sentenced more than the entire state of Alabama.⁷⁶ Crossing county lines can make a huge difference; for example, the chances of being sentenced to death in Baltimore County were 13 times higher than in Baltimore City, when Maryland had the death penalty.⁷⁷ In Texas, Harris County accounts for the vast bulk of the states death row, far out of proportion to its population or to the numbers of murders occurring in the County.⁷⁸ A “small set of counties” are imposing death sentences, and this means that “it is the practices, policies, habits and political milieu of local prosecutors, jurors and judges that dictate whether a given defendant in the United States—whatever his crime—will be charged, tried, convicted and sentenced capitally and executed.”⁷⁹ What explains which counties are the most prone to impose death sentences?

Brandon Garrett, Alexander Jakubow and Ankur Desai recently conducted research analyzing the entire period of modern death sentencing, collecting data at the county-level on death sentencing from 1990 through present. That data is described in an empirical article and in a recent book, titled, “End of its Rope: How Killing the Death Penalty Can Revive Criminal Justice.”⁸⁰ The researchers describe a dramatic decline in death sentencing,

town jurisdictions. Andrew Gelman et al., *A Broken System: The Persistent Pattern of Reversals of Death Sentences in the United States*, 1 J. Empirical Legal Stud. 209, 247 (2004).

⁷⁴ Frank R. Baumgartner, *The North Carolina Database of U.S. Executions*, U. N.C. Chapel Hill, Department Pol. Sci., available at <http://www.unc.edu/~fbaum/Innocence/executions.htm>; Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, Death Penalty Information Center (October 2013), <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

⁷⁵ Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. Rev. 227, 228 (2012).

⁷⁶ Id. at 233.

⁷⁷ Raymond Paternoster et al., *An Empirical Analysis Of Maryland’s Death Sentencing System With Respect To The Influence Of Race And Legal Jurisdiction* 30-31 (2003).

⁷⁸ Dieter, *supra*, at 13-14.

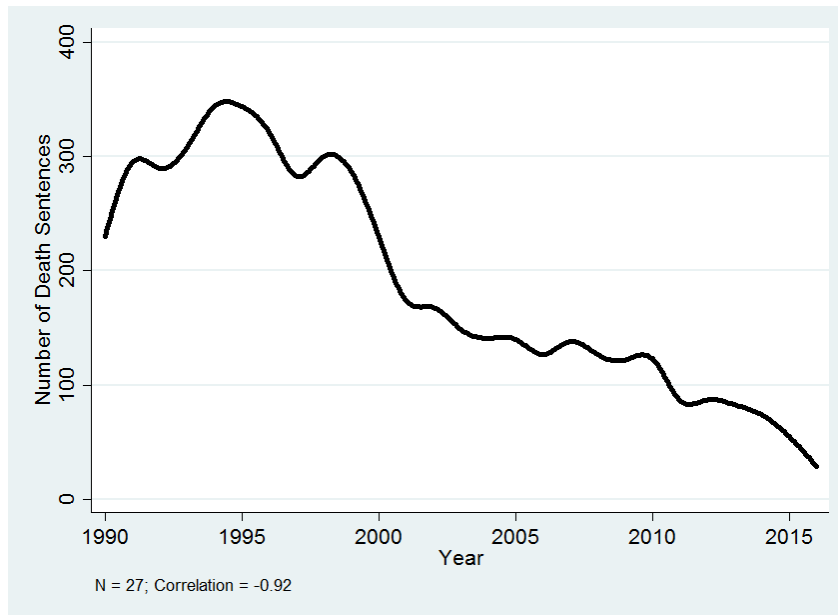
⁷⁹ Liebman, *supra* note xxx at 262 (reporting “from 1973 to 1995, sixty-six counties imposed 2569 of the 5131 total death sentences.”).

⁸⁰ Garrett, Jakubow, Desai, *supra* note xxx, at 561; Brandon L. Garrett, *End of its Rope: How Killing the Death Penalty can Revive Criminal Justice* (Harvard University Press, 2017).

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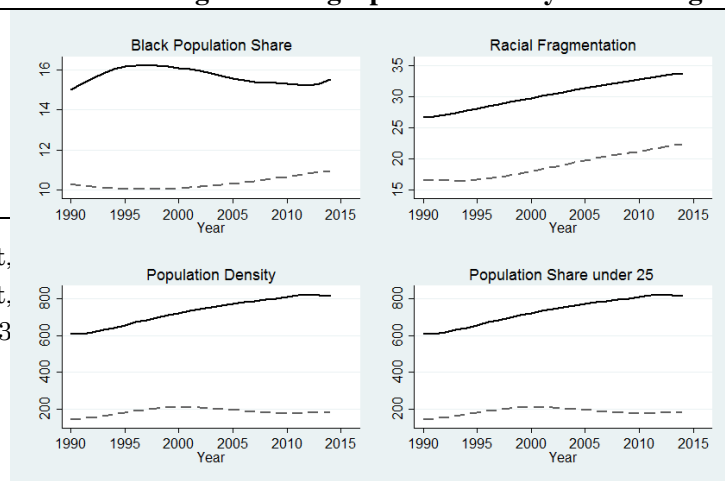
where only thirty-nine people were sentenced to death in 2017 and only thirty-one in 2016, record lows, as compared with over 300 sentenced to death in the 1990s. Only twenty-eight counties sentenced people to death in 2016, as compared with over two hundred counties per year in the 1990s. The figure below displays the number of counties that imposed death sentences from 1990 through 2016.⁸¹

Fig. 1. Number of Counties with Death Sentences, 1990-2016



In this empirical work, Garrett, Jakubow, and Desai describe how death sentencing has almost entirely disappeared in rural America over the space of fifteen years. In the past decade, death sentencing has become a fixture in only a scattered group of larger, more populous and urban counties.⁸² The figure below illustrates the growing population density among the shrinking group of counties that impose death sentences. The counties are also increasingly racially fragmented and have relatively larger black populations.

Fig. 2. Demographic Trends by Sentencing Status⁸³



⁸¹ Garrett,

⁸² Garrett,

⁸³ *Id.* at 13

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Death sentencing occurs in counties with higher murder rates, but it is counties with more white victims of murder that engage in more death sentencing, while black homicide victimization is not correlated with death sentencing.⁸⁴ Finally, counties that impose death sentences exhibit a powerful inertia effect, where death sentencing is strongly associated with prior county-level death sentencing.⁸⁵

These results have implications for constitutional regulation of the death penalty. They also raise the question whether the death penalty has become arbitrary under the Eighth Amendment.⁸⁶ To date, such arguments have largely not been considered in the courts. To be sure, the Supreme Court has considered and rejected empirical evidence concerning death sentencing patterns before, and this raises the concern that even now that more research has been done, that country-level patterns may not matter to the Justices in the future. In its ruling in *McCleskey v. Kemp*, the Supreme Court considered a state-specific study of Georgia death sentencing patterns.⁸⁷ The data showed a strong correlation between the race of the victim and the likelihood that a defendant would be sentenced to death. The Justices emphasized that this data was focused at the state level, and not the county or the case in which the defendant had been sentenced.

In fact, in *McCleskey*, county-level data displayed the same race disparity. The particular county, Fulton County, Georgia, in which Warren McKleskey was prosecuted, had 32 death-eligible prosecutions, and a defendant killing a white victim was 3.6 times more likely to get the death penalty than if the victim was black.⁸⁸ The Justices, however were more broadly skeptical of such empirical data, particularly where there is so much discretion build into a range of decisionmakers, such as the prosecutor, the judge, and the jurors, who make decisions whether to bring cases and ultimately what sentence to impose. The Justices' reasoning rejected the relevance of empirics, and only modestly engaged with the reality of local practice and dynamics when making sentencing decisions.

Does local evidence when used in constitutional interpretation more faithfully apply the command of the Eighth Amendment? Perhaps the modern empirical case provides a more powerful demonstration of arbitrariness in death sentencing, based on county-level data and a steep decline in the use of the death penalty. County lines are highly salient if not completely determinative in practice. Should they matter under the Constitution? This is not an argument based on localism, or a notion that

⁸⁴ *Id.*, *supra*, at Part II.C.

⁸⁵ *Id.*, *supra*, at Part II.E.

⁸⁶ *Id.* at Part III.D.

⁸⁷ Such data was most prominently the subject of the Supreme Court's ruling in *McCleskey v. Kemp*, 481 U.S. 279, 287 (1987).

⁸⁸ Baldus et al, 232, in *Death Penalty Stories*.

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localities deserve deference. Indeed, these data show that outlier localities do *not* deserve deference because their practices are grossly out of line with that of other localities, even in leading death sentencing states. These disparities raise a constitutional concern under the Eighth Amendment that the imposition of the death penalty has become far more “unusual” and arbitrary than in the past. That outlier concern places the approach in the third category of use of local evidence, where the patterns in local enforcement may show that the state law is itself an outlier that is rarely used. This concern is all the more severe when one looks at how few counties even within the most seemingly staunch death penalty states that currently impose death sentences. Whether Justices other than Justice Breyer will want to address these concerns in future years is an open question.

2. Local Norm Development and the Fourth Amendment

The Fourth Amendment doctrine regulating the use of force by police, including deadly force, is another area in which local constitutional interpretation is ripe for reconsideration. This area is one in which courts have sometimes, but not often, used the second category that I describe in this Part: courts have examined best practices at the local level to influence the appropriate constitutional floor. In deciding whether to recognize a due process right, in criminal procedure cases, the Court typically does not conduct a cost benefit analysis under *Mathews v. Eldridge*, but rather asks whether it is a fundamental right that has been traditionally protected by states. Sometimes, however, the Court also looks at local government rules, not to assess their usage empirically, but rather to survey what is accepted local practice. The Fourth Amendment is a surprising example, but the way in which the Court has looked at local government practices has changed over time in a way that provides a troubling object lesson.

One prominent example of local constitutional interpretation is *Tennessee v. Garner*, a seminal case regarding the use of deadly force by police officers under the Fourth Amendment, which prohibits unreasonable searches and seizures. The Supreme Court noted that: “In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions.”⁸⁹ The case itself involved a police officer shooting a non-dangerous fleeing felon, as permitted under a state statute and the traditional common law rule. But the Court carefully examined police department policies and did not simply rely on state statutes. The Court noted that “[a majority of police departments in this country have forbidden the use of deadly force against nonviolence suspects.”⁹⁰ The Court mentioned examples of police policies, including the New York City Police Department and those of forty-four other law

⁸⁹ 471 U.S. 1 (1985).

⁹⁰ *Garner*, 471 U.S. at 10-11.

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enforcement agencies. The Court also cited research on best practices by police organizations such as International Association of Chiefs of Police and the accreditation criteria of the Commission on Accreditation for Law Enforcement Agencies.⁹¹ Thus, the Court used local practices to inform best practices in the Fourth Amendment area, that themselves informed the constitutional rule adopted.

The ruling in *Garner* was something of a high-water mark, though, in the attention that the Supreme Court paid to local police practices. In the decades since, the Justices have instead emphasized discretion of individual officers, rather than police department-level practices and supervision. In doing so, the Justices have disregarded evidence that a particular police department's policy or practices are outlier practices that are dangerous, unwise, or unusual among professional police departments.

For example, in its ruling in *Scott v. Harris*, the Justices reviewed the decision by an officer to end a high speed chase by running a vehicle off the road, which resulted in severe injuries to the driver.⁹² The Justices did not discuss best practices in any way, and suggested that what is right may depend on what is reasonable in the circumstances.⁹³ The Justices never engaged with, much less discussed, policing literature on the dangers of permitting high speed chases at all, much less using ramming techniques to end them in a potentially highly dangerous fashion. Only Justice Stevens in dissent discussed alternative means for ending high speed chases.⁹⁴

Had the Justices engaged with local practices, the opinion in *Scott v. Harris* would have looked very different. The International Association of the Chiefs of Police policy stated that: "Officers may not intentionally use their vehicle to bump or ram the suspect's vehicle in order to force the vehicle to a stop off the road or in a ditch."⁹⁵ Moreover, as Seth Stoughton and I have discussed, the record was replete with evidence of poor local policy, supervision and training.⁹⁶ Many other recent Supreme Court rulings on police use of force have done the same. The Justices' ruling in *Sheehan*, like that in *Harris*, entirely failed to engage with what well-trained officers should do, and what the practices are in professional agencies, for engaging with mentally ill individuals.⁹⁷

There are many structural features of modern civil rights litigation that draw attention away from questions of sound local government policy and practice, than the manner in which the Justices interpret rights. Litigation often focuses on the conduct of individual officers and not on local

⁹¹ *Garner*, 471 U.S. at 18-19.

⁹² 550 U.S. 372, 382 (2007).

⁹³ *Id.*

⁹⁴ *Harris*, 550 U.S. at 396-97, 397 n.9.

⁹⁵ Garrett and Stoughton, *supra* note xxx, at 235.

⁹⁶ *Id.* at 234-36.

⁹⁷ *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777-78 (2015).

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government-level policy, supervision, and training.⁹⁸ However, as cases like *Garner* show, there is room in the doctrine to focus on what sound local police practices are, and to use sound police practices to inform the constitutional doctrine. The constitutional rule may be a floor, but it need not undermine local government efforts run professional police departments.

B. Local Outliers and Substantive Due Process

In rulings concerning substantive due process rights regarding marriage, procreation, family relationships, education, sexual orientation, and other privacy and autonomy-related rights, the Supreme Court has sometimes looked not just to state law but local practices and enforcement, to get a broad sense whether a type of practice is an outlier practice. In that context, the Court has typically not relied on detailed information concerning local practices. However, local government practices have still played an important role in the development of the doctrine. These cases provide an example of the third category that I develop in this Part: courts examining county-level enforcement to assess whether a state law is an outlier that is rarely enforced at the local level.

In *Bowers v. Hardwick*, the Court upheld state anti-sodomy laws and noted, using state head-counting that about half the states had criminalized sodomy.⁹⁹ In *Lawrence v. Texas*, the Court overruled *Bowers*, and found that the *Bowers* court at “overstated” the prior practice, including by focusing on state law and because since that ruling, states had moved away from prohibiting same-sex conduct.¹⁰⁰ The Court emphasized how rarely any of those laws on the books were used; even at the time of *Bowers*, states like Georgia “had not sought to enforce its law for decades.”¹⁰¹

What Justice Kennedy could have highlighted was that it was local prosecutors who were declining to bring cases to enforce state laws; local decisionmakers had made anti-sodomy statutes moribund. Justice Kennedy wrote that: “In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.”¹⁰² Again, that non-enforcement would primarily be at the local prosecution level. Justice Kennedy added: “The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.”¹⁰³ In Texas, that non-enforcement would be based on decisions chiefly by elected district

⁹⁸ Garrett and Stoughton, *supra* note xxx, at 236-38.

⁹⁹ *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986).

¹⁰⁰ 539 U.S. 558, 570-71 (2003).

¹⁰¹ *Id.* at 572.

¹⁰² *Id.* at 573.

¹⁰³ *Id.*

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attorneys. In a concurring opinion, Justice Sandra Day O'Connor similarly emphasized how rarely the law had been enforced.¹⁰⁴

The Supreme Court's ruling in *Romer v. Evans* was based on the impact that a Colorado constitutional amendment had on disabling any local laws from providing anti-discrimination protection based on homosexual, lesbian, or bisexual "orientation, conduct, practices or relationships."¹⁰⁵ The Court noted that some of the largest urban centers in Colorado, such as "the cities of Aspen and Boulder and the city and County of Denver each had enacted ordinances which banned discrimination in many transactions and activities, including housing, employment, education, public accommodations, and health and welfare services."¹⁰⁶ The statewide amendment was designed to strike down at those local anti-discrimination laws. The Justices emphasized not just the general far-reaching effects of the statutes, but they surveyed Colorado's state but also municipal laws. The majority noted such laws "follow a consistent pattern" in enumerating persons or entities that may not discriminate and enumerating a range of groups or persons that are protected, extending beyond the Supreme Court's caselaw on groups subject to strict scrutiny.¹⁰⁷ Thus, these statutes and ordinances typically included an "extensive catalog of traits which cannot be the basis for discrimination," including sexual orientation.¹⁰⁸ The Court went on to explain the unique disabilities imposed by the legislation, its breadth, and why it violated rational basis scrutiny in violation of the Equal Protection Clause.

The *Romer* opinion did somewhat more than the other substantive due process rulings to analyze patterns in local government practices. However, what is useful to highlight for these purposes is that the Justices conducted this brief survey of local ordinances in Colorado and the content of that local law mattered to the decisionmaking, while in other areas, the rarity of local government enforcement mattered to the ultimate decision. In each of these cases, local government practices constituted important evidence used to support a constitutional decision.

C. Local Practices and the Fourteenth Amendment

Much of the body of law that established race discrimination in the United States post-Reconstruction was enacted at the local level, in the form of ordinances regulating public accommodations, education, employment, and housing; they were supplemented by state laws and constitutional provisions

¹⁰⁴ Id. at 581 (O'Connor, J.) (quoting See *State v. Morales*, 869 S.W.2d 941, 943 (Tex.1994) (noting that the provision "has not been, and in all probability will not be, enforced against private consensual conduct between adults").

¹⁰⁵ *Romer v. Evans*, 517 U.S. 620, 624 (1996).

¹⁰⁶ Id. at 623-24.

¹⁰⁷ Id. at 628.

¹⁰⁸ Id. at 628.

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but they enacted racial preferences and segregation locally.¹⁰⁹ Following *Brown v. Board of Education*, the Supreme Court remanded in *Brown II* the question of developing remedies to district courts, due to their “proximity to local conditions and the possible need for further hearings.”¹¹⁰ Over time, the Supreme Court focused more on the unit of local government, in this case the school district (which might or might not correspond with municipal or county lines) and increasingly limited inter-district remedies.¹¹¹ As a result, the caselaw did not account for practices as between counties or patterns across a state; the caselaw focused on practices within individual local entities. In that way, the cases were a strong example of the fourth category set out in this Part, in which the courts used local remedies and needs to inform constitutional norm-development.

The Supreme Court’s ruling in *Bush v. Gore*, finding that there was an Equal Protection violation in conducting Florida recounts in the 2000 Presidential election, did emphasize patterns across counties. That ruling emphasized the inconsistencies in practices for conducting the Presidential vote recount from county to county, as well as among recount teams within single counties.¹¹² The ruling has been strongly criticized, and the ruling itself makes its precedential value quite unclear.¹¹³ As a result, it is hard to say whether the *Bush v. Gore* decision sets out anything like a model for looking more carefully at patterns and disparities in local practices. That ruling, though, provides an example of category one, in which the court examines patterns of local law and practice.

D. State Cases that are Local

One area in which local government matters, but only sub silentio, are cases in which localities are not examined, but instead, the state interests examined are in fact largely the work of local government decisionmakers. The Supreme Court’s Tenth Amendment commandeering cases provide an example of this different phenomenon, where the constitutional problem is

¹⁰⁹ Note, *The Matter of Racial Differences and Local Police Legislation*, 5 LOY.L.REV. 73 (1949).

¹¹⁰ *Brown v. Board of Educ.*, 349 U.S. 294, 299 (1955).

¹¹¹ For decisions affirming broad remedial powers, see *Keyes v. School Dist.*, 413 U.S. 189, 198-203 (1973) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16-18 (1970); for decisions limiting those powers, see, e.g. *Milliken v. Bradley*, 418 U.S. 717 (1974); See *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Freeman v. Pitts*, 503 U.S. 467 (1992). For an overview, see James E. Ryan, *Schools, Race, Money*, 109 Yale L. J. 249, 283 (1999).

¹¹² *Bush v. Gore*, 531 U.S. at 106.

¹¹³ Markenzky Lapointe, *Bush v. Gore: Equal Protection Turned on its Head, Perhaps for a Good Though Unintended Reason*, 2 WYO. L. REV. 435, 479 (2002); David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1427, 1452-74 (2006). The Court stated that its ruling was “limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities. 531 U.S. at 109. See also Flanders, *supra* note xxx.

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characterized as about questions of state sovereignty, but where evidence concerning the preferences and policies of distinctly local actors could have played an important role had it been considered.

Take the case of *Printz v. United States*, striking down provisions of the Brady Handgun Violence Prevention Act under the Tenth Amendment as unconstitutionally requiring “state officers” to take action “in the implementation of federal law.”¹¹⁴ Although it was local sheriffs in Arizona and Montana who brought the lawsuit challenging the provisions under the Act, throughout the opinion, Justice Antonin Scalia writing for the Court referred to “state officers” being commanded to enforce by the federal statute, which did refer to state officers in its text. Were those officers “the police officers of the 50 states,” as the majority of the Supreme Court pointed out? Are those chiefly “state officers”? Of course not: very few police in any state report to state officials of any kind (aside from state troopers and the like); for the most part, police are locally governed and constituted at the city and county level. Only about eight percent of non-federal law enforcement officers work for a state agency; the vast bulk work for local police agencies or sheriff’s offices.¹¹⁵ The *Printz* case was not a case of a state being required to “enact or administer a federal regulatory program,” but rather local government agencies. The Court barely touched on the fact that this statute was actually requiring “state or local officers” to provide enforcement assistance.¹¹⁶ It was left to Justice John Paul Stevens in dissent to note, although without much development of the point, that the relevant question is whether Congress may “require local law enforcement officers to perform certain duties during the interim needed for the development of a federal gun control program.”¹¹⁷ Justice Stevens was the Justice to recognize something not adequately appreciated: the Tenth Amendment cases are localism cases in disguise as federalism cases. If so, I would argue that evidence about local government practices, resources, or willingness to participate in the federal scheme in question should have mattered.

Why does the Supreme Court so often label as federalism what is in fact localism? One reason may be due to the complexity of the relationship between state and local government. I would argue that “dual sovereignty” does not adequately capture the distinctions between state and local government and as a result, it does not adequately explain what burdens a federal scheme may or may not impose on local government actors. The Court could make its rulings both more practically relevant and careful if it did attend to those complexities in an evidence-informed manner. In some areas, the Court does so, as described in this Part. The next Part turns to the

¹¹⁴ 521 U.S. 898, 912 (1996).

¹¹⁵ Bryan Reaves, *Census of State and Local Law Enforcement, 2008*, Bureau of Justice Statistics, 2 (2008), at <https://www.bjs.gov/content/pub/pdf/csllea08.pdf>.

¹¹⁶ *Id.* at 926.

¹¹⁷ *Id.* at 939 (Stevens, J., dissenting).

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methodological issues raised by using local evidence in constitutional interpretation.

III. METHODS FOR USING LOCAL EVIDENCE IN CONSTITUTIONAL INTERPRETATION

There is a family resemblance in each of the areas discussed in Part II in which local-level regulation and practice has been important in constitutional interpretation. In each of those areas, it is local government that makes critical decisions concerning the rights at stake, whether it is how election recounts are conducted, whether to seek the death penalty, or whether police officers should participate in a federal program. This Part turns to questions regarding what methods should be used to assess local law and practice, including how to decide which are the relevant types of localities. Next, this Part describes the different status of local government as laboratories of experimentation to develop new policies and potentially influence constitutional norms. Third, this Part asks how one should approach limiting the actions of outlier counties. Fourth, this Part asks what empirical data could better inform these questions and it sets out an empirical research agenda for further study of local-level law and practice.

A. Analyzing or Considering Local Law and Practice

Local constitutional law can provide different and perhaps better answers in a range of areas of constitutional interpretation. In this Article, I have not set out an overarching theory of constitutional law. I do not argue that local practices always deserve deference; they may in fact highlight greater conflict between what localities do and what the constitution demands. In areas in which courts are simply examining the application of constitutional text or structure, there may be no need to examine local practice. Nor, conversely, does it take an approach in which policy outcomes are crucial, to take local constitutional law seriously. Even if projected policy outcomes are not part of the constitutional analysis, some deference or consideration of local governments as important constitutional actors could still play an important role.

One reason do to so would be to permit local participation in developing norms and rules to inform constitutional questions. Some scholars have argued, for example, that constitutional criminal procedure rules should reflect some deference to community values and preferences.¹¹⁸ Others view local administrative rules as worthy of deference, in order to incentivize local administrative process, and to promote local democratic

¹¹⁸ Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L. J. 1153, 1184 (1998).

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engagement in decisions affecting constitutional rights.¹¹⁹ Critics of such approaches fear that “political pathologies” are known to affect local governance, particularly in areas like policing and criminal justice.¹²⁰ Without taking a view on an administrative law-informed approach, for a political process approach, focused on whether minorities are systematically excluded from decisionmaking, attending to power dynamics at the local level may be as important or more so than attending to such dynamics at the state level.¹²¹ Attending to local practices does not mean deference or ratification of those local practices.

Some answers to the questions posed about the use of state law would come out differently if the court is focused instead upon localities as the relevant unit of inquiry. When counting states, there are counting disputes, including as described, questions about which states should be counted, how they should be counted, and how many states adopting a position are sufficient to suggest that their approach should be given weight in constitutional analysis. The same and also different questions come up when examining counties. The same questions arise regarding how to count local government, including as between larger cities and more rural counties, and whether focusing on population, density, or other features should matter depending on what question one is asking.

New questions also arise, because while states are very different from each other, the Constitution does give them equal sovereignty. Counties are not sovereign and their status is very different and is not equal for all purposes under state law. If one turns to other local actors, such as local school boards, locally elected prosecutors, or Sheriff’s, still additional questions arise, regarding the scope of their authority and sovereignty. Scale should also matter. Richard Schragger points out that “obviously a city of 6 million persons is different from a city of 100,000 or a town of 400.”¹²² For some questions, large urban counties may be relevant unit, such as questions regarding what policies might be appropriately adopted for regulation of municipal subway systems or video surveillance. For other questions, like what policies are appropriate for police use of force, or what schools should do to assist disabled students, practices across a wide range of jurisdictions might be sensible subjects for careful evaluation.

B. Local Laboratories of Experimentation

¹¹⁹ See, e.g. Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91 (2016); Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827 (2015).

¹²⁰ Wayne Logan, *Fourth Amendment Localism*, INDIANA L. REV. (forthcoming 2018).

¹²¹ Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747-48, 772-82 (1991).

¹²² Schragger, *supra* note xxx, at 1818.

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Scholars have begun to ask more questions about “who experiments” when state laboratories of experimentation consider and adopt new policy. The answer is often not state but rather local governments, whether it is climate change adaptation and resilience planning, immigration, drug enforcement, and oil and gas development.¹²³ Organizations of local government actors, such as the U.S. Conference of Mayors, are also highly influential in policy-making; Judith Resnik, Joshua Civin and Joseph Frueh have called these translocal organizations of government actors (TOGAs).¹²⁴

One often-neglected feature of localities as constitutional actors is that local government is potentially *more* accountable to federal constitutional norms than states. The sovereign immunity of states has a perverse and often unnoticed side effect. It renders states less accountable to constitutional values (although they may still be enjoined through actions under *Ex Parte Young* against individual state officials). But in contrast, municipal “pattern and practice” liability under Section 1983 to civil rights damages actions for their policies and practices, makes local government more directly and derivatively accountable for constitutional law violations.¹²⁵ This is a point not examined in the literature. States are treated as sovereign, responsible for creating and regulating local government, and are therefore treated as relevant for purposes of federalism in constitutional doctrine.

Yet in some respects, localities are far more active as constitutional actors (and accountable as constitutional actors). To be sure, state governments are liable for injunctions if they engage in unconstitutional executive actions, and state legislation can be constitutionally challenged.¹²⁶ As a result of *Monell* pattern and practice liability, however, there are reasons to think that cities and counties might be better exemplars of experimentation with, but adherence to, constitutional norms.

What if local government units adopt very different law and policy from each other? As Richard Briffault has developed, a defining feature of “our localism” has been conflict between localities, including as between cities and suburbs, over questions including school finance and zoning.¹²⁷ Should that conflict and the resulting diversity of approaches itself matter more on some questions than the diversity of approaches as between states, or the lack thereof? In my view, courts should both examine local practices but be attentive to conflict and diversity, as with state law and practice. In the

¹²³ Hannah J. Wiseman, *Regulatory Islands*, 89 NYU L. REV. 1661 (2014).

¹²⁴ Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereigntism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 711 (2008); Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN L. REV. 669 (2010).

¹²⁵ See *infra* Part I.B. for a discussion of *Monell* liability.

¹²⁶ *Ex parte Young*, 209 U.S. 123 (1908).

¹²⁷ Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).

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death penalty area, therefore, it is precisely that a small number of counties are outliers, and appear arbitrary as compared to how the death penalty is applied across the rest of the state, that lends support to Eighth Amendment arguments concerning the practice.

Should local governments matter as laboratories of experimentation?¹²⁸ In many ways, cities and counties are better situated to engage in experimentation than are states. Municipalities are more closely connected with communities and they are more diverse in their governing arrangements. One concern with experimentation is always that there could be a “race to the bottom” in which competition and outright conflict results in negative results.¹²⁹ That race to the bottom is generally examined at the state level and not at the local level. There are perhaps fewer reasons for that concern at the local or county level, given the greater local accountability in local government.

That said, if local government engages in abuses that affect persons that are not part of the political process, then there are special reasons to intervene and not defer to their practices. That is what the Department of Justices has done in the past with local policing agencies.¹³⁰ That is also what dormant commerce clause doctrine does; although it is often viewed as ensuring against state protectionism, in many cases it is local government that is at issue, and the dormant commerce clause serves to protect against discrimination in favor of local business.¹³¹

C. Outlier Localities

Constitutional rulings often seek to identify various types of “outliers,” or states that adopt measures that are infrequent. Attending to local practices does not mean that local preferences are necessarily deserving of deference. As Justin Driver has developed, “constitutional outliers” come in several varieties and the Supreme Court’s practice is complex; sometimes the problem is that a minority of states are “holdouts” that are the last to retain a practice; sometimes it is a new “upstart” that breaks the prior mold; sometimes it is a “backup” or an effort to do something novel to evade a constitutional rule; and sometimes, in Driver’s valuable taxonomy, it is a “throwback” effort to revive a largely abandoned approach.¹³² Each of those

¹²⁸ Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 267 (2011).

¹²⁹ Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking “The Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210-11 n.1 (1992).

¹³⁰ Rachel Harmon, *Promoting Civil Rights Through Proactive Police Reform*, 62 STAN. L. REV. (2009).

¹³¹ See, e.g. *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383 (1994) (striking down municipal waste regulation that required waste to be processed at local transfer facility).

¹³² Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929 (2014).

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types of outlier treatments is be relevant as to localities. A locality could be a “holdout,” retaining a practice that the vast majority have abandoned. A locality might be a “throwback” reviving a constitutionally suspect practice.

If there is some consensus on the goal of a constitutional right, then there may also be consensus that some level of departure from constitutional norms is an outlier approach and unconstitutional. In the substantive due process area, that is in effect what the Supreme Court did in *Lawrence*, when it concluded that it was vanishingly rare for any locality to enforce anti-sodomy laws. Indeed, some have questioned whether *Lawrence* should be seen as a ruling suppressing state outliers; as Justin Driver has argued, the case involved “invalidation of thirteen state law.”¹³³ However, if the problem is seen as one that should be understood as not with state law on the books, but a practice that was in fact highly aberrational at the local level, then the opinion can properly be seen as an effort to enforce the constitution as against outlier localities. Driver views this as a problem of “nonenforcement” and that non-enforcement should not necessarily render a practice an outlier, or as a fallback, that if it is to be considered, it would raise too many complications to be useful, since one could have a measure that was adopted in all fifty states but not enforced.¹³⁴ I view the problem very differently. Courts must look at the right unit of government when conducting constitutional interpretation. Looking merely at the law on the (state) books and not how it is operationalized at the relevant (local) level can entirely miss the constitutional problem.

As I have described, it is not unduly complex but is in fact an accepted approach in a range of constitutional areas to focus on local enforcement and non-enforcement. I would counter that if a measure was in fact adopted in all fifty states, but arbitrarily and locally enforced only in a few scattered localities, that it should properly be scrutinized as a potential “outlier” practice. To be sure, non-enforcement alone is not necessarily enough to raise red flags. As David Strauss points out, “some restrictions may be unenforced because they are so universally accepted that they are hardly ever violated, such as laws forbidding slavery or cannibalism.”¹³⁵

However, lack of enforcement, together with a trend away from the use of a practice, and selective or rare use of a practice, can all contribute to suspicion that the practice does not deserve the same deference when facing a constitutional challenge.¹³⁶ In the death penalty area, that is what the Court did, without quite stating as much, in abolishing the juvenile death penalty, which similarly few localities had imposed in recent decades, although a quite a bit larger number of states retained the practice. I have argued that the entire death penalty is now a phenomenon of a few outlier localities, and

¹³³ Id. at 990.

¹³⁴ Id. at 992.

¹³⁵ Strauss, *supra* note xxx, at 877.

¹³⁶ Id. at 878.

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for that reason it raises substantial arbitrariness concerns. More research should be done regarding geographic variation in other areas of criminal punishment. For example, there is evidence that life without parole sentences are highly concentrated; in Texas, the bulk of such sentences come from Harris County, for example.¹³⁷

This discussion suggests that the consequences of attending to local constitutional law is to punish outlier counties, but we should also think about the converse: how to reward local government that adopts successful practices. Courts may reward localities that do address the policy question and attempt to protect constitutional norms, but suppress approaches that are poorly designed to do so. One way to reward localities is through dismissing constitutional claims against them and citing to their rules and practices as an example. That does provide some incentive to localities.

However, a better way to reward such localities might be for state or federal actors to actually reward them in the form of resources and grant support. The only way to even conduct such analysis is to produce adequate data on what local-level practices are and then evaluate them. In few areas, have the courts insisted on any such thing. However, research institutes or granting agencies could insist on such data and provide seed funding and grant support for localities that do adopt evidence-based approaches.

One general approach towards promoting experimentation in constitutional law is known as democratic experimentalism, which as Michael Dorf and Charles Sabel explain, involves setting constitutional floors but encouraging and empirically assessing progress above that floor. Certain Supreme Court decisions that are expressed in prophylactic terms, like *Miranda v. Arizona*, can be seen as setting a constitutional floor above which jurisdictions are free to experiment.¹³⁸ In response to the Court's decision in *Miranda*, Dorf and Sabel note: "there has been almost no actual experimentation."¹³⁹ In fact, since they wrote their Article, there has been a great deal of experimentation, but little of it that has been in any identifiable way in response to the Supreme Court's ruling *Miranda*, and much of it occurring at the local level and not at the state level. That experience provides a lesson how local constitutional law can develop.

The area of custodial interrogations has undergone a real revolution in the past decade. Many local governments and some entire states have adopted videotaping of interrogations.¹⁴⁰ They have done so because videotaping has become fairly inexpensive, but also because of a large body of research on what cases false confessions, together with examples of

¹³⁷ Keri Blakinger, *Harris County Leads Texas in Life Without Parole Sentences as Death Penalty Recedes*, Houston Chron., Jan. 11, 2018.

¹³⁸ Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 453 (1998).

¹³⁹ *Id.* at 462.

¹⁴⁰ For an overview of these efforts, see Brandon L. Garrett, *Confession Contamination Revisited*, 101 VA. L. REV. 395 (2015).

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exonerations involving false confessions.¹⁴¹ That said, constitutional law could have facilitated this change in local practices. As a matter of constitutional law, courts could have prioritized accurate evidence from interrogations and encouraged local police to document and record interrogations to ward off false confessions. Instead, the practical challenges faced by government decisionmakers and changing research and technology, and not constitutional law, has informed policy and practice. Nor was the *Miranda* well suited towards providing guidance to agencies seeking to improve interrogation practices; the ruling did not engage with local government practices. Yet, almost in spite of the Supreme Court's Fifth Amendment regulation, which is highly complex, but not informative of best practices, there has been an enormous amount of experimentation that actually has improved interrogation practices. Constitutional law has little influence over interrogation practice and policy—but it could if it attended to the right local practices.

There are some advantages to preferring localism in constitutional law that does try to reward experimentation. Local government may have substantial leeway in how it sets its policy, making local government far more able to experiment broadly in policy and in law. As Wayne Logan explains, “Although the substance of local laws must comport with state and federal constitutional expectations, local governments typically are limited only to the extent that their laws are preempted by or conflict with extant state law.”¹⁴² Local government may be a far more capable and flexible laboratory for experimentation than state government.

D. A Local Empirical Research Agenda

One challenge in many of the areas developed in this Article is a lack of data concerning local law and practice. Even on high-profile topics like the death penalty, scholars (like this author) had to painstakingly hand-collect county-level data because it did not already exist. In some areas, including in criminal law and procedure, there has been an endemic lack of adequate data to study important questions, including constitutional questions.¹⁴³ Courts may defer, in the name of localism, to local practices without realizing that they are in fact outlier practices.

Some federal agencies conduct surveys of counties that can provide valuable information. For example, the Department of Agriculture tracks socioeconomic indicators like poverty, unemployment, median household

¹⁴¹ Id.

¹⁴² Wayne Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 155 (2009).

¹⁴³ See generally, Brandon L. Garrett, *Evidence-Informed Criminal Justice*, GEO. W. L. REV. (forthcoming 2018).

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income and education, at the county level.¹⁴⁴ The Department of Commerce collects county-level economic data on employment, business patterns, and building permits.¹⁴⁵ The Centers for Disease Control and Prevention (CDC) collects county-level data on a wide range of health issues, including alcohol use, births, cancer, chronic diseases, deaths and mortality, immunizations, obesity, physical activity, and other data.¹⁴⁶ In criminal justice, the Department of Justice (DOJ) and the Federal Bureau of Investigations maintains data on county-level arrests and offenses in its Uniform Crime Reporting Program.¹⁴⁷ County-level data on voting patterns in federal elections is available and many states make election results available online, with voting district-level results as well.¹⁴⁸ The DOJ Bureau of Justice Statistics conducts census studies of local criminal justice actors, including public defender offices, publicly funded crime laboratories, local law enforcement agencies, and problem-solving courts.¹⁴⁹

Researchers are receptive to interest by the judiciary. If courts express interest in taking account of patterns of local practices, then researchers will do more work to measure and evaluate those local practices. That has occurred in the death penalty area, where two generations of academic researchers have conducted state-level and national studies of death sentencing patterns. There will also be more pressure for localities to make data and practices public and available to researchers, if they are relevant to judicial decisionmaking. Research grants and non-profits interested in funding salient academic research will similarly provide resources to conduct local government research if it could inform constitutional doctrine.

CONCLUSION

The local matters in constitutional interpretation. I have described how local governments are commonly actors in constitutional litigation. For that reason, their interests can receive some deference and they can shape the litigation. When local government practices inform doctrine, however, it does so as a type of evidence. I classify and discuss examples of four types of use of local evidence in constitutional law, in which courts: (1) examine patterns of local law and practice; (2) examine best practices at the local level to influence the appropriate constitutional floor; (3) examine county-level

¹⁴⁴ Department of Agriculture, County-level Data Sets, at <https://www.ers.usda.gov/data-products/county-level-data-sets/>.

¹⁴⁵ U.S. Census Bureau, Local Economic Data For Counties, at <https://www.census.gov/econ/geo-county.html>.

¹⁴⁶ CDC, County Data, at <https://www.cdc.gov/DataStatistics/> and <https://www.cdc.gov/diabetes/data/county.html>.

¹⁴⁷ Uniform Crime Reporting Program Data: County-Level Detailed Arrest and Offense Data, 2012, at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/35019>.

¹⁴⁸ U.S. Presidential Elections, at <https://libguides.princeton.edu/elections>.

¹⁴⁹ Bureau of Justice Assistance, All Data Collections, at <https://www.bjs.gov/index.cfm?ty=dca>.

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enforcement to assess whether a state law is an outlier that is rarely enforced at the local level; (4) use local remedies and needs to inform constitutional norm-development.

The use of local evidence in constitutional interpretation can itself be far more evidence-based. Courts can and do attend to patterns in local decisionmaking, but they often neglect to do so in areas in which the local could meaningfully inform the analysis. In doing so, there are important methodological limitations and challenges. In many areas, there is a genuine lack of data concerning local rules and practices. To set a constitutional floor without such information can be mistaken. However, if courts demand data, then there will be pressure to collect it and the resources and incentives to analyze it. Whether courts then make good use of data is another question. The death penalty context provides a case study in how better local-level data can inform important questions of police and constitutional rights; whether these data will inform constitutional analysis remains to be seen.

We learn important things about constitutional rights by disaggregating state and local interests. Local governments are often the relevant decisionmakers and their incentives and structures matter to ensure compliance with constitutional values. However, it is not enough to preserve the role of local government by relying on local actors as defense litigants in constitutional cases. We need to know whether the rules or practices of a litigant are representative before crediting them. We can obtain a better sense of how constitutional rights are implemented on the ground by paying attention to local patterns of enforcement or practice. Nor should we neglect, however, the role that state-level resources and law plays in setting practices. We can neglect the way in which there is a great deal of heterogeneity among local governments, ranging from rural counties to urban cities. Improved data collection should attend to all of those questions.

The local matters in constitutional law, but it does not consistently matter, and local governments sometimes receive deference without good evidence of the state of local law and practice. Local evidence can be used, not just to defer to localities, but to reach better results in constitutional law. Local evidence can be used more accurately and effectively. Judges, lawyers, and researchers should take more account of evidence from the local, even when interpreting the Constitution. In making local constitutional law more evidence-informed, judges can avoid the selective use of the local in constitutional law. That alone would be an enormous improvement in the use of local evidence in constitutional interpretation.