

# LOCAL EVIDENCE IN CONSTITUTIONAL INTERPRETATION

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*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 to local law. Although it has gone largely unnoticed, there is a robust practice of acknowledging and accounting for local law in the course of constitutional interpretation. Local evidence may inform the decision whether to recognize a constitutional right, it may inform the interpretation of the right, and it may inform the remedies for a constitutional violation. For example, the Supreme Court has examined local enforcement patterns to decide whether a constitutional right is violated in death penalty jurisprudence. In substantive due process rulings, a lack of local enforcement has provided support for recognizing constitutional rights. Judges seek to minimize remedies for constitutional violations that might disrupt local law and practice. As is done with respect to states, judges consider 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 practice, but as evidence in constitutional interpretation. Using local evidence in constitutional law is particularly important at a time in which empirical research on local-level data is providing 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.<sup>1</sup> The Justices may look to state law for a range of purposes: surveying state laws to assess a “national consensus”;<sup>2</sup> to minimize disruption of existing state practices;<sup>3</sup> to enforce the Constitution against outlier states;<sup>4</sup> to consider whether a constitutional rule raises general 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 Supreme Court and other federal courts also look to local law. In this Article, I argue that local law and practice provides important evidence in constitutional interpretation.

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<sup>1</sup> Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365, 368–70 (2009); Note, *State Law as “Other Law”: Our Fifty Sovereigns in the Federal Constitutional Canon*, 120 HARV. L. REV. 1670, 1671 (2007).

<sup>2</sup> *Roper v. Simmons*, 543 U.S. 551, 562–64 (2005).

<sup>3</sup> *Emp’t Div. v. Smith*, 494 U.S. 872, 890 (1990) (noting that “a number of [s]tates” had laws with exceptions for the type of peyote use at issue).

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

When should local evidence matter for constitutional purposes? Counties and cities are not sovereigns in the same way that states are. For some purposes, federal courts treat local law as subordinate to state law. However, just as state practices can matter when assessing federal constitutional questions, so can local practices, notwithstanding local governments' lack of independent sovereignty. For example, courts may seek to interpret constitutional provisions in a way that will minimize disruption of local practices, courts may consider whether local government practices under review are outlying or common, or courts may review local rules or practices in developing new norms. I do not argue here for a version of localism—that the local practice deserves deference. I do argue that local practice is undervalued 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.<sup>5</sup>

One area in which the courts have 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*, highlighting how “[g]eography also plays an important role in determining who is sentenced to death.”<sup>6</sup> Justice Breyer noted

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<sup>5</sup> See, e.g., Brandon L. Garrett, Alexander Jakubow & Ankur Desai, *The American Death Penalty Decline*, 107 J. CRIM. L. & CRIMINOLOGY 561, 575–615 (2017) (analyzing twenty-five years of death sentencing data at local level and describing relevance for constitutional doctrine). I do not argue that local practices necessarily deserve deference or that 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 *infra* Part III (discussing why local practices and rules are important evidence in constitutional interpretation and what methods should be used to assess them). For prominent arguments that local constitutional norms deserve deference, see, e.g., David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 561–63 (1999) (arguing that local political institutions are critical to substantive constitutional enforcement); Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85 (2013) (arguing that local governments should have fewer constitutional restrictions on regulating firearms in urban areas); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1636 (2005) (arguing that local governments should be held to different constitutional standards than state or federal authorities in some circumstances); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 153–67 (2005) (arguing that local governments have different, and under some circumstances greater, powers than state governments in protecting constitutional rights); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1815 (2004) (arguing that local governments are a “robust structural component” of the constitutional guarantee of religious liberty).

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

that from 2004 to 2009, “just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide.”<sup>7</sup> Justice Breyer discussed a body of empirical research examining the changing local geography of the death penalty and called for full briefing on whether the death penalty is now a cruel and unusual punishment under the Eighth Amendment.<sup>8</sup> Citing to empirical studies of local factors such as the preferences of local prosecutors, adequacy of local defense resources, and racial distribution within counties, Justice Breyer argued that focusing on local government shows how “unusual” the death penalty has become and how arbitrary its imposition is.<sup>9</sup> Justice Breyer repeated those concerns in a subsequent dissent from denial of certiorari.<sup>10</sup> While that type of empirical analysis has not informed a majority opinion in the Supreme Court, it has informed majority opinions in state courts, including a recent unanimous decision by the Washington Supreme Court applying state constitutional law to find the death penalty unconstitutional and a Connecticut Supreme Court decision.<sup>11</sup>

This analysis demonstrates how local government practices can provide valuable evidence in constitutional construction. In the Eighth Amendment context, in which the focus has been on the “evolving standards of decency” in our country, the Supreme Court has at times insisted that the “clearest and

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 2761–62.

<sup>9</sup> *Id.* at 2759–61 (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”).

<sup>10</sup> *Sireci v. Florida*, 137 S. Ct. 470, 470 (2016) (Breyer, J., 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 INFO. CTR., *Facts about the Death Penalty*, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> [https://perma.cc/R768-2Q58] (updated Dec. 7, 2016); TRACY L. SNELL, DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT, 2013—STATISTICAL TABLES 14 tbl.10 (Dec. 19, 2014); DEATH, PENALTY INFO CTR., *Execution List 2016*, <https://www.deathpenaltyinfo.org/execution-list-2016> [https://perma.cc/S74B-CUUZ])).

<sup>11</sup> *State v. Gregory*, 427 P.3d 621, 630, 642 (Wash. 2018) (describing findings of statistical study of Washington death sentences, finding significant county-by-county variation in decisions to impose the death penalty, as well as strong race-based variations; while the analysis did not rely on county-level disparities, it more broadly found evidence of “arbitrary and racially biased” sentencing); *State v. Santiago*, 122 A.3d 1, 49 (Conn. 2015) (noting that Connecticut “has imposed sustained death sentences at a rate . . . that is among the lowest in the nation,” and citing to detailed empirical analysis of those death sentences by Professor John Donohue).

most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."<sup>12</sup> Such judicial assessment of "national consensus" and "evolving standards of decency" has its critics, who argue that state law is not instructive because capital punishment is linked to the preferences of local prosecutors, jurors, and judges.<sup>13</sup> In part for that reason, scholars have assembled a large body of empirical research examining local-level death sentencing practices.<sup>14</sup>

In general, relying on state law when interpreting the federal Constitution may not always be the most appropriate way to capture the question of 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.<sup>15</sup> However, critics have long been concerned that nose-counting of state laws can be a strained or artificial exercise,<sup>16</sup> that doing so undervalues federal constitutional norms, or that it can overvalue state government norms that do not fit federal constitutional values well.<sup>17</sup> There is not just one way in which the Supreme Court and lower federal courts rely on patterns in state law. In *Atkins v.*

<sup>12</sup> *Penry v. Lynaugh*, 492 U.S. 302, 331, 334 (1989); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) ("'[F]irst' among the 'objective indicia that reflect the public attitude toward a given 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. See *Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005).

<sup>13</sup> See Lain, *supra* note 1, at 367–68 n.7–8 (citing critics); Robert J. Smith, Bidish J. Sarma & Sophie Cull, *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2423–28 (2014); Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: "Still in Search of A Unifying Principle"?*, 73 U. PITT. L. REV. 107, 160 (2011).

<sup>14</sup> See Garrett, Jakubow & Desai, *supra* note 5, at 592–95; see also BRANDON L. GARRETT, *END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE* 107–31 (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, 265–85 (2016) (examining county-level concentration of death sentences).

<sup>15</sup> AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 112 (2012); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 453 (2004); JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 4 (2006).

<sup>16</sup> For critiques, 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. POLY 17, 18–26 (2009); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1159–68 (1993); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 142–46 (2006).

<sup>17</sup> See Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 89 (2006).

Virginia, the majority emphasized: "It is not so much the number of these States that is significant, but the consistency of the direction of change."<sup>18</sup> Sometimes a more forgiving minority practice is selected because it is less disruptive as a constitutional floor than the approach adopted by the majority of states.<sup>19</sup> Justice Harlan famously defended such rulings as "born of the need to cope with national diversity under the constraints of the incorporation doctrine."<sup>20</sup> 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.<sup>21</sup> 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*.<sup>22</sup> 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.'"<sup>23</sup>

As I will describe in Part II of this Article, there are important examples of robust use of local evidence in constitutional law. That evidence may be relevant to (1) define the constitutional right itself, by using local information to influence constitutional norms; (2) assess whether the right is violated by using local evidence to inform the analysis; and (3) decide what the appropriate remedy is for a constitutional violation. In addition, local evidence may be looked at in different ways. I describe 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 patterns of county-level enforcement to assess whether a state law is an outlier that is rarely enforced at the local level; (3) assess best practices at the local level to influence the appropriate consti-

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<sup>18</sup> 536 U.S. 304, 315 (2002).

<sup>19</sup> See, e.g., *Williams v. Florida*, 399 U.S. 78, 136 (1970) (Harlan, J., concurring) (noting that the Court adopted the "lowest common denominator" in various standards followed in this country "to avoid causing disruption").

<sup>20</sup> *Id.*

<sup>21</sup> David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 878-79 (2009).

<sup>22</sup> 463 U.S. 1032, 1039 (1983).

<sup>23</sup> *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199 n.9 (2008); *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring).

tutional floor, including in the Fourth Amendment area; and (4) use local remedies and needs to inform constitutional norm development. 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.<sup>24</sup> The ruling has been strongly criticized and its precedential value is unclear from the text of the ruling itself.<sup>25</sup> However, the concern with arbitrary and discriminatory practices and patterns is far from unique to the election law context.<sup>26</sup> 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 decision making is more focused at the local level.<sup>27</sup>

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 should itself be evidence-based. For example, the frequent lack of good data about county practices is often a significant obstacle to using such evidence to inform constitutional interpretation. Judicial reliance on local law and practice should not be, but 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

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<sup>24</sup> 531 U.S. 98, 106 (2000).

<sup>25</sup> See 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.” *Bush*, 531 U.S. at 109. 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) (discussing the confusion of lower courts in interpreting *Bush v. Gore*).

<sup>26</sup> 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, 802–03 (2007).

<sup>27</sup> There is another advantage of relying on local government, which 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.

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 regarding 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 precedent from state law. The Justices often 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 status of states as sovereigns, and such reasoning does not translate to support similar treatment of local law. However, when one closely examines the supporting arguments, many of the reasons for focusing solely on state-level lawmaking are not sovereignty-related. As sovereignty-based justifications 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 turns to the normative rationales for that usage before turning to the sources for law at the local level.

#### A. Uses of State Law in Constitutional Interpretation

The Supreme Court has looked to state law in several 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, none of which 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.”<sup>28</sup> Whether state law is a good or bad marker for the standards of decency in society is a difficult question.

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<sup>28</sup> Trop v. Dulles, 356 U.S. 86, 101 (1958).



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

In *Washington v. Glucksberg*, the Court noted how few states permitted assisted suicide in finding the asserted due process right was not “fundamental.”<sup>29</sup> A “fundamental” right might demand quite a bit of consensus, 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.<sup>30</sup> In Sixth Amendment cases, the Court has cited to state practices regarding size of juries and whether factfinding is by a judge or a jury.<sup>31</sup> In *Ring v. Arizona*, a Sixth Amendment ruling on state statutes permitting judicial imposition of the death penalty, 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.”<sup>32</sup>

*What if the law in the states is in flux?*

To take a prominent example, in *Bowers v. Hardwick*, the Supreme Court noted that about half the states at that time criminalized homosexual sodomy.<sup>33</sup> 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 book and not on how often such laws were actually enforced.<sup>34</sup> 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

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<sup>29</sup> 521 U.S. 702 (1997).

<sup>30</sup> *E.g.*, *Payton v. New York*, 445 U.S. 573, 600 (1980) (considering trends in state legislation on warrantless entries into private homes); *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (considering trends in state evidentiary rules requiring exclusion of unconstitutionally seized evidence).

<sup>31</sup> *Ring v. Arizona*, 536 U.S. 584, 607–08 (2002); *Williams v. Florida*, 399 U.S. 78, 98 (1970).

<sup>32</sup> *Ring*, 536 U.S. at 607–08.

<sup>33</sup> 478 U.S. 186, 192–93 (1986).

<sup>34</sup> 539 U.S. 558, 571 (2003).

of a type of measure. For example, the Court has noted that there would be little need for states in which 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.<sup>35</sup>

*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 a “nose-count.” The Justices sometimes also ask whether those statutes are enforced and how many sentences are actually imposed under those statutes (if they are criminal statutes).<sup>36</sup> The Justices have also considered whether to count a state with a statute on the books, but which has been found unconstitutional by the state supreme court.<sup>37</sup> Timing can also matter, such as when the Justices have asked how recently state statutes were adopted, 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.<sup>38</sup>

*What level of state law adoption matters?*

The underlying constitutional right at issue may demand more or less strength of state law support. In the Eighth Amendment cases concerning the death penalty, for example, the Supreme Court refers to “national consensus” as the standard. That standard calls 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. In *Kennedy v. Louisiana*, the Court emphasized:

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<sup>35</sup> See *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

<sup>36</sup> *Lawrence*, 539 U.S. at 572–73; *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967); *Enmund v. Florida*, 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).

<sup>37</sup> See *Kennedy v. Louisiana*, 554 U.S. 407, 423–25 (2008) (not counting Florida, where although the state death penalty statute includes child rape as death eligible, “the Supreme Court of Florida held the death penalty for child sexual assault to be unconstitutional”).

<sup>38</sup> See, e.g., *Atkins*, 536 U.S. at 315–16 (“[T]he complete absence of States passing legislation reinstating the power to conduct . . . executions [of mentally retarded persons] provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”).

“44 States have not made child rape a capital offense.”<sup>39</sup> Yet that was an overstatement in the sense that many of those were states that no longer retained the death penalty for any criminal offenses. In *Graham v. Florida*, the Court identified only thirteen states that had banned life without parole for at least some juvenile offenses, but the Court found that the practice nevertheless violated the Eighth Amendment.<sup>40</sup> Strict nose-counting clearly does not explain 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, which therefore calls for some assessment of state law.<sup>41</sup> In *Glucksberg*, the Court asked how many states permitted assisted suicide when deciding whether a candidate for substantive due process protection was a “fundamental” right.<sup>42</sup> 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, though the courts find it valuable for other reasons. One reason courts may look to state law is 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 trials.<sup>43</sup> Justice Sotomayor

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<sup>39</sup> 554 U.S. at 423.

<sup>40</sup> 560 U.S. 48, 62 (2010).

<sup>41</sup> *Kennedy*, 554 U.S. at 423.

<sup>42</sup> 521 U.S. 702, 710 (1997).

<sup>43</sup> *Kansas v. Carr*, 136 S. Ct. 633, 647–48 (2016) (“We intervene in an intra-state 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

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.”<sup>44</sup> Similarly, Eric Posner and Cass Sunstein have argued that broadly held interpretations or views may not only deserve deference, they may be more likely to be correct.<sup>45</sup> The states may act as 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 widely-accepted state practice. However, 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.<sup>46</sup> Others more broadly argue that state constitutionalism should be robust and is an important source for informed law.<sup>47</sup> These debates, which remain unresolved 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.<sup>48</sup> When referring broadly to localities or counties in this Article, I include other types of local

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‘reasonable likelihood’ of jury confusion, an empirical question best answered with evidence from many state courts.”).

<sup>44</sup> *Id.* at 648.

<sup>45</sup> Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 *STAN. L. REV.* 131, 142–46 (2006).

<sup>46</sup> 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).

<sup>47</sup> For a defense, see Roderick M. Hills, Jr., *Counting States*, 32 *HARV. J.L. & PUB. POLY* 17, 18 (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, 1148 (1993).

<sup>48</sup> NATIONAL LEAGUE OF CITIES, NUMBER OF MUNICIPAL GOVERNMENTS AND POPULATION DISTRIBUTION, <http://www.nlc.org/number-of-municipal-governments-population-distribution> [<https://perma.cc/6VLS-7BQC>] (last visited Jan. 11, 2018).

administrative units, particularly incorporated municipalities or 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.<sup>49</sup> Local government can inform state law and state constitutional law to varying degrees, depending on the structure of lawmaking in the state and the practical reality of state politics.<sup>50</sup>

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.”<sup>51</sup> Local government entities are “political subdivisions such as cities and counties that are created by the State,” and they exist “as convenient agencies for exercising such of the government powers . . . as may be entrusted to them.”<sup>52</sup> Federal 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.<sup>53</sup> 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.”<sup>54</sup> If so, as I develop, looking at whether local practices are atypical should matter in the analysis, and similarly, whether local practices are common and representative should matter in the analysis. The decision whether to defer to local practices should be evidence-based.

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<sup>49</sup> See Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 218 (1996) (“Court decisions have recognized the key role of localities without explicitly saying so.”).

<sup>50</sup> Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 644–45 (2001).

<sup>51</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 475 (1982).

<sup>52</sup> *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).

<sup>53</sup> See, e.g., *Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 362–63 (2009) (holding that municipalities are creatures of the State, and thus state statute, rather than municipal ordinance, controls).

<sup>54</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637–38 (1943).

#### 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. But localism is not my subject in this Article. What is important to note 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 government necessarily, but nevertheless interprets the Constitution to defer to local interests.<sup>55</sup>

The Supreme Court and other federal courts should not make such rulings that defer to the local in a largely uncritical fashion. When turning from the national to the local, sometimes the Court has emphasized that a diversity of local practices is unproblematic or should even 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 in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State.”<sup>56</sup> The Court has approved funding laws that provide very different resource levels to public schools based on county districting.<sup>57</sup> Instead, I would argue, the Court should conduct a careful examination of that variation in resource levels and assess whether it is arbitrary.

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<sup>55</sup> Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. REV. 83, 85 (1986) (“Given that the [F]ourteenth [A]mendment 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 [F]ourteenth [A]mendment when states’ sovereignty cannot?”).

<sup>56</sup> 101 U.S. 22, 31 (1879); see also *Reinman v. City of Little Rock*, 237 U.S. 171, 177 (1915) (“While such regulations are subject to judicial scrutiny upon fundamental grounds, yet a considerable latitude of discretion must be accorded to the law-making 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 [Fourteenth] Amendment.”); *Hayes v. Missouri*, 120 U.S. 68, 72 (1887) (“[T]he state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government; and that, as respects the administration of justice, it may establish one system of courts for cities and another for rural districts. And we may add that the systems of procedure in them may be different, without violating any provision of the [F]ourteenth [A]mendment.”).

<sup>57</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 54–55 (1973).

In other areas, the Supreme Court has avoided discussing the local government implications or bases for its rulings. Such rulings raise the concern that local evidence is not even being considered. Scholars have argued that the Court discusses the local law when it is convenient and ignores the local law when it is troublesome; Joan Williams has called this a type of “forum-shifting,” not by litigants, but by “shift[ing] power among different levels of government.”<sup>58</sup> 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.”<sup>59</sup> Schragger criticizes the Supreme Court for not distinguishing between national and local regulation of religion, claiming that this invites more damaging centralized regulation as opposed to local municipal power.<sup>60</sup>

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. As Justice William J. Brennan famously asked in *San Diego Gas & Electric v. City of San Diego*, if “a policeman must know the Constitution, then why not a planner?”<sup>61</sup> 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.<sup>62</sup>

Then again, the Court’s direction is not fully consistent in the land use and takings area, either. Recent rulings have adopted less deferential standards in cases concerning the Takings Clause and so-called regulatory takings, in which local land use regulations affect property.<sup>63</sup> Such rulings may reflect an abiding concern with localism: that the local law does not deserve deference if localities are abusing the rights of individuals or of groups. Dissenting from the 2013 ruling in *Koontz v. St. Johns River Water Management District*, Justice Elena Kagan expressed a concern that the Court, by relaxing its traditional deference, “threatens to subject a vast array of land-use

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<sup>58</sup> Williams, *supra* note 55, at 87–88.

<sup>59</sup> Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1813 (2004).

<sup>60</sup> See *id.* at 1818.

<sup>61</sup> 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

<sup>62</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

<sup>63</sup> *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 841 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

regulations, applied daily in States and localities throughout the country, to heightened constitutional scrutiny.”<sup>64</sup>

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, content, and 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 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 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.’”<sup>65</sup> 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 interpretation 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 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

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<sup>64</sup> *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 620 (2013) (Kagan, J., dissenting).

<sup>65</sup> *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 199 n.9 (2008); *Kansas v. Marsh*, 548 U.S. 163, 185 (2006) (Scalia, J., concurring).



Supreme Court's largely inconsistent approach towards the problem.

In this Part, I describe how local evidence may be relevant to (1) define the constitutional right itself by using local information to influence constitutional norms; (2) assess whether the right is violated by using local evidence to inform the analysis; and (3) decide what the appropriate remedy is for a constitutional violation. In constitutional interpretation, each of those three decisions may be linked. I also 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; and (4) use local remedies and needs to inform constitutional norm-development, including in Fourteenth Amendment cases. These uses are related, and they broadly focus on patterns of local law and practice, but also sometimes the quality of local law and practice.

Before turning to examples of this consideration of local evidence, 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*.<sup>66</sup> That rule ensures that local government actors are not direct 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

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<sup>66</sup> 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, 5 (2012). 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.”); David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2232 (2006) (arguing that the “distinctive legal status of cities might justify affording them an important degree of latitude to challenge the constitutionality of state statutes”); Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (arguing that individuals with a minority view within a polity as a whole may enjoy a local majority on a decision making body, and can thus dissent to the majority via a state decision); 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) (noting the dual status of local governments as “creatures of the state with no independent . . . constitutional role,” and as “sovereign political entities entitled to constitutional protection”).

immunity, under the Supreme Court's doctrine in *Monell v. Department of Social Services*.<sup>67</sup> As a result of 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 a number of constitutional rulings that involve challenges to municipal ordinances or local government actors but do not dwell on the subject. And 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 decision making. 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 traditionally seen as federal, like immigration enforcement, are all heavily impacted by local decisions.<sup>68</sup> As I will describe in this Part, a careful analysis of local practices can improve decision making 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, 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, and defense offices are all usually governed almost entirely locally. County priorities and

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<sup>67</sup> *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663 (1978).

<sup>68</sup> 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, 1222 (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) (describing the merged system of criminal law and immigration enforcement).

policies matter enormously 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 local practices in interpretation. As the sections that follow will describe, several areas provide important examples of use of local evidence in constitutional interpretation.

### 1. *Local Enforcement Patterns and the Eighth Amendment*

The death penalty is governed by a complex body of constitutional regulation under the Eighth Amendment. 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 second type of use of local evidence that I set out in this Part: assessing whether a right is violated by using local evidence to inform the analysis, and examining patterns of local law and practice to do so.

In the past, the Supreme Court looked to states and not localities. The Justices highlighted how, for Eighth Amendment purposes, “[f]irst among the ‘objective indicia that reflect the public attitude toward a given sanction’ are statutes passed by society’s elected representatives.”<sup>69</sup> Rulings therefore asked how many states adopted death penalty statutes of a given type to assess contemporary attitudes. The Court’s concern that the death penalty may be imposed arbitrarily, in a manner that “smacks of little more than a lottery system”<sup>70</sup> or that is “so wantonly and so freakishly imposed,”<sup>71</sup> dates back to its ruling in *Furman v. Georgia*. There, the Court found 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.<sup>72</sup> Focusing on state death penalty statutes, the Court has not often cited to county-

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<sup>69</sup> *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (quoting *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987)).

<sup>70</sup> *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring).

<sup>71</sup> *Id.* at 310 (Stewart, J., concurring).

<sup>72</sup> *Gregg v. Georgia*, 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”).

level death sentencing practices in its Eighth Amendment cases.

This largely state-level focus has changed over time to focus more on the local level. The Supreme Court has increasingly cited to the practices of sentencing juries and charging practices by prosecutors as relevant in addition to state-level statutes. 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.”<sup>73</sup> This concern with the practical reality of jury decision making dates back to the *Furman v. Georgia* ruling itself. Justice Byron White, in his opinion, 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.”<sup>74</sup> In other rulings, the Justices have more strongly emphasized the presence or absence of state statutes as the best evidence for current death penalty practices.

The Eighth Amendment relevance of counties is changing as 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.<sup>75</sup>

Justice Breyer added that where, “[t]he 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.”<sup>76</sup> Justice Breyer called for full briefing on the question of whether the death penalty is now cruel and unusual under the Eighth Amendment, and when that briefing occurs,

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<sup>73</sup> 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (quoting *Gregg*, 428 U.S. at 181).

<sup>74</sup> *Furman v. Georgia*, 408 U.S. 238, 314 (1972) (White, J., concurring).

<sup>75</sup> 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting).

<sup>76</sup> *Id.* at 2772 (Breyer, J., dissenting) (emphasis omitted).

“data-driven arbitrariness review” may take on a more prominent role, with the availability of detailed county-level data.<sup>77</sup>

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 using data that was not available when the federal government only reported 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 sentencing from 1977 through 1995 and found a concentration of death sentences in a small minority of counties.<sup>78</sup> The researchers noted that “[e]ven in Texas, nearly 60% of its counties did not impose a single death sentence in the period.”<sup>79</sup> A more recent report analyzing executions in 1976, from data collected by Professor Frank Baumgartner, found that only 2% of counties in the U.S. were responsible for a majority of capital cases, and 85% of the counties in the U.S. had not had a single execution in over 45 years.<sup>80</sup>

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.”<sup>81</sup> Thus, Smith noted, Los Angeles County, California sentenced

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<sup>77</sup> Robert J. Smith, *The Geography of the Death Penalty and Its Ramifications*, 92 B.U. L. REV. 227, 254 (2012). Professor Smith also called for collection of 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. See *id.* at 256.

<sup>78</sup> James S. Liebman & Peter Clarke, *Minority Practice, Majority's Burden: The Death Penalty Today*, 9 OHIO STATE J. CRIM. L. 255, 312 (2011).

<sup>79</sup> *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-town jurisdictions. See 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).

<sup>80</sup> DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/views-executions> [<https://perma.cc/2UMD-P5NF>] (last visited Oct. 21, 2018); Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFO. CTR. (October 2013), <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf> [<https://perma.cc/87DS-WGQ9>].

<sup>81</sup> Smith, *supra* note 77, at 228.

the same number of people to death in 2009 as the entire state of Texas, and Maricopa County, Arizona sentenced more than the entire state of Alabama.<sup>82</sup> 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.<sup>83</sup> In Texas, Harris County accounts for the vast bulk of the state's death row, far out of proportion to its population or to the number of murders occurring there.<sup>84</sup> A "small set of counties" are imposing death sentences, which 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."<sup>85</sup> What explains which counties are the most prone to impose death sentences?

Brandon Garrett, Alexander Jakubow, and Ankur Desai 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 article and in a recent book, *End of its Rope: How Killing the Death Penalty Can Revive Criminal Justice*.<sup>86</sup> The researchers describe a dramatic decline in death sentencing wherein only thirty-nine people were sentenced to death in 2017 and only thirty-one in 2016, record lows compared with over 300 sentenced to death in the 1990s.<sup>87</sup> Only twenty-eight counties sentenced people to death in 2016, as compared with over 200 counties per year in the 1990s.<sup>88</sup> The figure below displays the number of counties that imposed death sentences from 1990 through 2016.<sup>89</sup>

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<sup>82</sup> See *id.* at 233.

<sup>83</sup> 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).

<sup>84</sup> Dieter, *supra* note 80, at 13–14.

<sup>85</sup> Liebman & Clarke, *supra* note 78, at 262; see also *id.* at 265 n.40 (reporting "from 1973 to 1995, sixty-six counties imposed 2569 of the 5131 total death sentences").

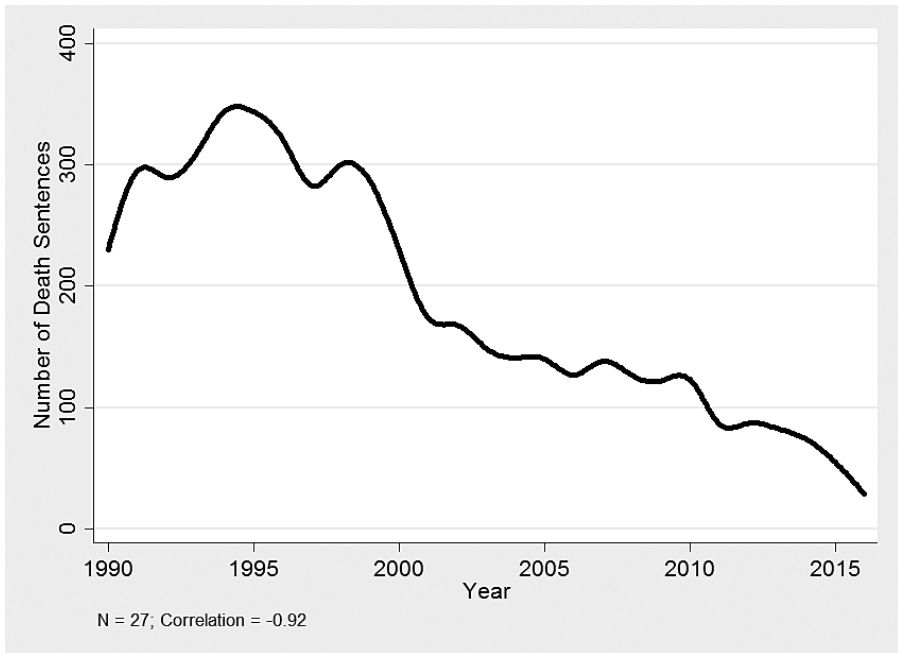
<sup>86</sup> Garrett, Jakubow & Desai, *supra* note 5, at 561; GARRETT, *supra* note 14, at 138–51.

<sup>87</sup> DEATH PENALTY INFO. CTR. *Facts About the Death Penalty*, (Sept. 28, 2018), <https://deathpenaltyinfo.org/news/past/58/2017> [<https://perma.cc/TR7A-MT2V>]; Garrett, Jakubow & Desai, *supra* note 5, at 561.

<sup>88</sup> Garrett, Jakubow & Desai, *supra* note 5, at 561.

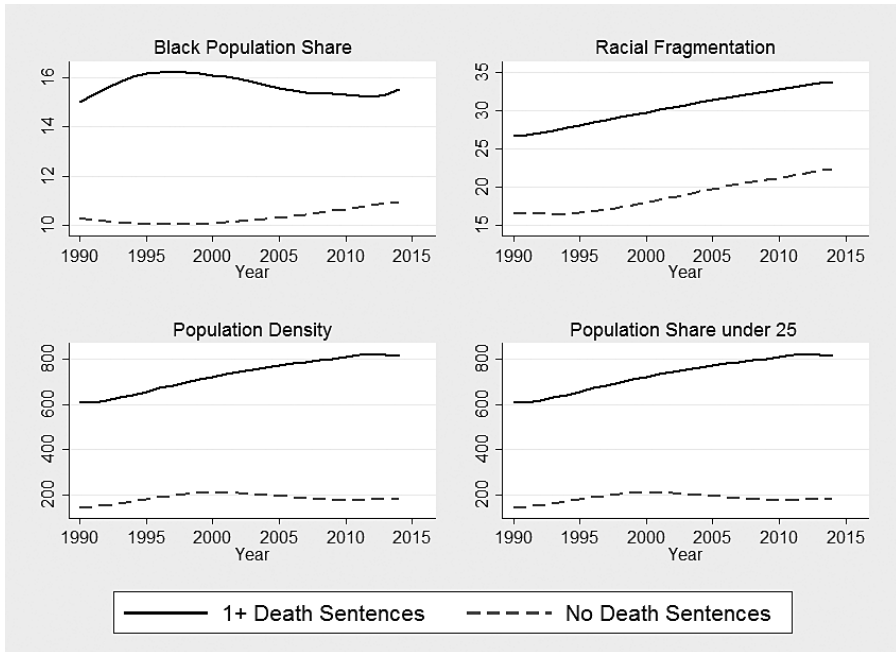
<sup>89</sup> *Id.* at 585.

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 limited to a scattered group of larger, more populous and urban counties.<sup>90</sup> The figure below illustrates the growing population density among the shrinking group of counties that impose death sentences. These counties are also increasingly racially fragmented and have relatively large black populations.

<sup>90</sup> See *id.* at subpart II.A.

FIG. 2. DEMOGRAPHIC TRENDS BY SENTENCING STATUS<sup>91</sup>

Death sentencing occurs in counties with higher murder rates, but it is generally counties with more white murder victims that engage in death sentencing, while black homicide victimization is not correlated with death sentencing.<sup>92</sup> Finally, counties that impose death sentences exhibit a powerful inertia effect such that death sentencing rates are strongly associated with rates in prior periods.<sup>93</sup>

These results have implications for constitutional regulation of the death penalty. They also raise the question of whether the death penalty has become arbitrary under the Eighth Amendment.<sup>94</sup> To date, such arguments have largely not been considered in federal courts, while state courts have only recently begun to engage with them. 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, county-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

<sup>91</sup> See *id.* at 131.

<sup>92</sup> See *id.* at subpart II.C.

<sup>93</sup> See *id.* at subpart II.E.

<sup>94</sup> See *id.* at subpart III.D.



patterns.<sup>95</sup> 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 revealed the same race disparity. Fulton County, Georgia, in which Warren McCleskey 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.<sup>96</sup> The Justices, however, were more broadly skeptical of such empirical data, particularly where there is so much discretion built into a range of decision makers including 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.

However, in recent years, state courts have engaged with empirical evidence concerning death sentencing practices. Most recently, the Washington Supreme Court, applying state constitutional law to find the death penalty unconstitutional, relied on a statistical analysis of death sentencing patterns chiefly focused on racial disparities in sentencing at the county level.<sup>97</sup> A concurring opinion focused on county-level disparities as well, detailing the findings of studies of death sentencing in the state, and emphasizing: "In the majority of our 39 counties, no death penalty has ever been sought. The current death row population arose from just 6 counties."<sup>98</sup> In a 2015 ruling, the Connecticut Supreme Court decision cited empirical analysis of death sentences to find its death penalty retroactively unconstitutional, chiefly focusing on the rarity of sentences.<sup>99</sup>

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 sen-

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<sup>95</sup> 481 U.S. 279, 287 (1987).

<sup>96</sup> David C. Baldus et al., *McCleskey v. Kemp (1987): Denial, Avoidance, and the Legitimization of Racial Discrimination in the Administration of the Death Penalty*, in *DEATH PENALTY STORIES* 232 n.6 (John H. Blume & Jordan M. Steiker eds., Foundation Press 2009).

<sup>97</sup> See *State v. Gregory*, 427 P.3d 621, 642 (Wash. 2018).

<sup>98</sup> *Id.* at 646 (Johnson, J., concurring).

<sup>99</sup> See *State v. Santiago*, 122 A.3d 1, 49 (Conn. 2015).

tencing through 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.<sup>100</sup> Should they matter under the Constitution? This is not an argument based on localism, or a notion that 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 rarer and more arbitrary than in the past. That outlier concern places the approach in the third sub-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 even 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 first category of analysis that I describe in this Part: examining local evidence to determine whether a constitutional right was violated. In this context, courts sometimes have examined best practices at the local level to influence the appropriate constitutional floor. In deciding whether to grant relief on a due process right in criminal procedure cases, the Court typically does not conduct a cost benefit analysis under *Mathews v. Eldridge*,<sup>101</sup> 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 to survey what is accepted local practice. The Fourth Amendment is a surprising example, but the manner in which the Court has looked at

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<sup>100</sup> See generally *Glossip v. Gross*, 135 S. Ct. 2726, 2761 (2015) (Breyer, J., dissenting) (“[W]ithin a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried.” (emphasis omitted)).

<sup>101</sup> See *Medina v. California*, 505 U.S. 437, 443–46 (1992) (holding that courts should exercise substantial deference to state legislative judgments because states have considerable expertise in matters of criminal procedure, thus significantly limiting the *Mathews* balancing test in criminal law cases).

local government practices has changed over time in a way that provides a troubling object lesson.

One prominent example of local constitutional interpretation occurs in *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.”<sup>102</sup> 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 did not simply rely on state statutes and carefully examined police department policies. The Court noted that “a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects.”<sup>103</sup> The Court mentioned examples of police policies, including policies of the New York City Police Department and forty-four other law enforcement agencies.<sup>104</sup> The Court also cited research on best practices by police organizations such as the International Association of Chiefs of Police (IACP) and the accreditation criteria of the Commission on Accreditation for Law Enforcement Agencies (CALEA).<sup>105</sup> Thus, the Court used local practices to inform best practices in the Fourth Amendment area before deciding the constitutional interpretation to adopt.

The ruling in *Garner* was something of a high-water mark in the attention that the Supreme Court paid to local police practices. In the decades since, the Justices have instead emphasized the discretion of individual officers rather than police department-level practices and supervision. In doing so, the Justices have disregarded evidence that a single 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, resulting in severe injuries to the driver.<sup>106</sup> The Justices did not discuss best practices in any way and suggested that what is justified may depend on

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<sup>102</sup> *Tennessee v. Garner*, 471 U.S. 1, 15–16 (1985).

<sup>103</sup> *Id.* at 10–11.

<sup>104</sup> *See id.* at 18–19.

<sup>105</sup> *See id.* at 18–19.

<sup>106</sup> 550 U.S. 372, 382 (2007).

what is reasonable in the circumstances.<sup>107</sup> 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.<sup>108</sup>

Had the Justices engaged with local practices in interpreting the Fourth Amendment standard, or in deciding whether the right had been violated, the opinion in *Scott v. Harris* might have looked very different. The International Association of the Chiefs of Police policy states 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.”<sup>109</sup> Moreover, as Seth Stoughton and I have discussed, the record was replete with evidence of poor local policy, supervision, and training.<sup>110</sup> 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, when engaging with mentally ill individuals.<sup>111</sup>

There are many structural features of modern civil rights litigation that draw attention away from questions of sound local government policy and practice other than the way the Justices interpret rights. Litigation often focuses on the conduct of individual officers and not on local government-level policy, supervision, and training.<sup>112</sup> However, as cases like *Garner* show, there is room in the doctrine to consider what sound local police practices are, and use them to inform the constitutional doctrine. The constitutional rule may be a floor, but it need not undermine local government efforts to run professional police departments.

## B. Local Outliers and Substantive Due Process

In rulings concerning substantive due process rights such as marriage, procreation, family relationships, education, sexual orientation, and other privacy and autonomy-related rights, the Supreme Court has sometimes looked to local prac-

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<sup>107</sup> See *id.*

<sup>108</sup> *Id.* at 396–97, 397 n.9 (Stevens, J., dissenting).

<sup>109</sup> Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 235 (2017).

<sup>110</sup> See *id.* at 234–36.

<sup>111</sup> *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777–78 (2015).

<sup>112</sup> Garrett & Stoughton, *supra* note 109, at 236–38.

tices and enforcement to get a broad sense of whether a type of practice is an outlier practice. These cases provide an example of the third subcategory that I develop in this Part: courts examining local-level enforcement to assess whether a state law is an outlier that is rarely enforced at the local level. The Court has done so when asking whether to recognize a fundamental substantive due process right in the first instance and when determining whether a right has been violated.

In *Bowers v. Hardwick*, the Court upheld state anti-sodomy laws and noted, using state nose-counting, that about half the states had criminalized sodomy.<sup>113</sup> In *Lawrence v. Texas*, the Court overruled *Bowers* and found that the *Bowers* court had “overstated” the practice by focusing on state law and that since the ruling, states had moved away from prohibiting same-sex conduct.<sup>114</sup> 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.”<sup>115</sup>

What Justice Anthony Kennedy could have highlighted was that it was local prosecutors who were declining to bring cases to enforce state laws; local decision makers had made anti-sodomy statutes moribund. Justice Kennedy wrote: “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.”<sup>116</sup> Again, that nonenforcement 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.”<sup>117</sup> In Texas, that nonenforcement was based on decisions chiefly by elected district attorneys. In a concurring opinion, Justice Sandra Day O’Connor similarly emphasized how rarely the law had been enforced.<sup>118</sup>

The Supreme Court’s ruling in *Romer v. Evans* finding an equal protection violation was based on the impact that a Colorado constitutional amendment had on disabling any local laws

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<sup>113</sup> *Bowers v. Hardwick*, 478 U.S. 186, 192–93 (1986).

<sup>114</sup> 539 U.S. 558, 570–71 (2003).

<sup>115</sup> *Id.* at 572.

<sup>116</sup> *Id.* at 573.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 581 (O’Connor, J., concurring) (noting that the provision “has not been, and in all probability will not be, enforced against private consensual conduct between adults” (quoting *State v. Morales*, 869 S.W.2d 941, 943 (Tex. 1994))).

from providing anti-discrimination protection based on homosexual, lesbian, or bisexual “orientation, conduct, practices or relationships.”<sup>119</sup> 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.”<sup>120</sup> 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, they surveyed Colorado’s state and 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 beyond the Supreme Court’s caselaw on groups subject to strict scrutiny.<sup>121</sup> Thus, these statutes and ordinances typically included an “extensive catalog of traits which cannot be the basis for discrimination,” including sexual orientation.<sup>122</sup> 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 substantive due process rulings to analyze patterns in local government practices. What is useful to highlight for these purposes is that the Justices conducted a brief survey of local ordinances in Colorado and the content of that local law mattered to the decision making, 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, but they enacted racial preferences and segregation lo-

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<sup>119</sup> 517 U.S. 620, 624 (1996).

<sup>120</sup> *Id.* at 623–24.

<sup>121</sup> *Id.* at 628.

<sup>122</sup> *Id.* at 629.

cally.<sup>123</sup> The Supreme Court's first equal protection ruling, in *Yick Wo v. Hopkins*, found a San Francisco ordinance regulating laundries racially discriminatory and unconstitutional because of evidence that it was enforced by local officials who applied it only to Chinese-owned laundries. The ordinance was "applied and administered by public authority with an evil eye and an unequal hand."<sup>124</sup>

In other contexts, equal protection law has looked to local government enforcement patterns, but also sought guidance from local norms. 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."<sup>125</sup> Contemporary cases found unconstitutionally discriminatory, racially disparate patterns in local decision making regarding pupil assignment.<sup>126</sup>

Over time, the Supreme Court focused more on the reach of remedies for equal protection violations. In doing so, the Court focused on limiting remedies based 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.<sup>127</sup> As a result, the case law did not account for practices among counties or patterns across a state; the case law focused on practices within individual local entities. In that way, the cases were an example of use of local evidence to inform remedial questions, and of the fourth subcategory noted, in which the courts used local

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<sup>123</sup> Adrian G. Duplantier, *The Matter of Racial Differences and Local Police Legislation*, 5 *LOY. L. REV.* 73, 74–77, 81 (1949).

<sup>124</sup> 118 U.S. 356, 373–74 (1886).

<sup>125</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955).

<sup>126</sup> *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441 (1968) (describing pattern of persistent racially disparate student assignments under "freedom of choice" plan adopted by school district).

<sup>127</sup> For decisions affirming broad remedial powers, see *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198–203 (1973) and *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16–18 (1971); for decisions limiting those powers, see, e.g., *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (holding that it was improper to impose a multidistrict remedy for single-district de jure segregation); *Missouri v. Jenkins*, 515 U.S. 70, 89, 101 (1995) (explaining that the proper judicial inquiry is whether the district has remedied vestiges of de jure segregation "to the extent practicable," not to the "maximum potential"); and *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (holding that the district court may relinquish desegregation control in incremental stages, and stating that in the absence of a constitutional violation, the district court had no power to order "[r]acial balance . . . for its own sake"). For an overview, see James E. Ryan, *Schools, Race, Money*, 109 *YALE L.J.* 249, 283 (1999).

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.<sup>128</sup> The decision has been strongly criticized, and the ruling itself makes its precedential value quite unclear.<sup>129</sup> 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 analysis, 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 the state interests examined are in fact largely the work of local government decision makers. The Supreme Court's Tenth Amendment commandeering cases provide an example of this phenomenon where the constitutional problem is characterized as a question 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."<sup>130</sup> 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 the federal statute, which did refer to state officers in its text.<sup>131</sup> Were those officers "the police officers of the 50 states," as the majority of the Supreme Court pointed out? Are those

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<sup>128</sup> *Bush v. Gore*, 531 U.S. 98, 106 (2000).

<sup>129</sup> See Lapointe, *supra* note 25, at 479; Cole, *supra* note 25, at 1427, 1452-74. 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." *Bush*, 531 U.S. at 109. See also Flanders, *supra* note 25.

<sup>130</sup> 521 U.S. 898, 912 (1997).

<sup>131</sup> See *id.* at 903-05.



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 organized at the city and county level. Only about 8% of non-federal law enforcement officers work for a state agency; the vast majority work for local police agencies or sheriff’s offices.<sup>132</sup> 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.<sup>133</sup> 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.”<sup>134</sup> Justice Stevens was the only 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 methodological issues raised by using local evidence in constitutional interpretation.

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<sup>132</sup> Bryan Reaves, *Census of State and Local Law Enforcement, 2008*, BUREAU OF JUSTICE STATISTICS, 2 (2008), <https://www.bjs.gov/content/pub/pdf/cslllea08.pdf> [<https://perma.cc/7XVP-V6NK>].

<sup>133</sup> *Printz*, 521 U.S. at 926.

<sup>134</sup> *Id.* at 939 (Stevens, J., dissenting).

## 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 types of localities are relevant. Next, this Part describes the status of local governments 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 to do 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.<sup>135</sup> Others view local ad-

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<sup>135</sup> Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1184 (1998).

ministrative rules as worthy of deference, in order to incentivize local administrative process and to promote local democratic engagement in decisions affecting constitutional rights.<sup>136</sup> Critics of such approaches fear that “political pathologies” are known to affect local governance, particularly in areas like policing and criminal justice.<sup>137</sup> Without taking a view on an administrative law-informed approach, for a political process approach, focused on whether minorities are systematically excluded from decision making, attending to power dynamics at the local level may be as important or more so than attending to such dynamics at the state level.<sup>138</sup> Attending to local practices does not mean deference to 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 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 Sheriffs, 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.”<sup>139</sup> For some questions, large urban counties may be the relevant unit, such as questions

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<sup>136</sup> See, e.g., Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1879–81 (2015) (arguing that police agencies should be governed by the ordinary process of democratic government); Christopher Slobogin, *Policing as Administration*, 165 U. PA. L. REV. 91, 118 (2016) (arguing that police agencies should be governed by the principles of administrative law).

<sup>137</sup> Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 372 (2018).

<sup>138</sup> Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 747–48, 772–82 (1991).

<sup>139</sup> Schragger, *supra* note 59, at 1818.

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

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, or oil and gas development.<sup>140</sup> 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 groups translocal organizations of government actors (TOGAs).<sup>141</sup>

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 § 1983 to civil rights damages actions for their policies and practices makes local government more directly and derivatively accountable for constitutional law violations.<sup>142</sup> 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 legisla-

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<sup>140</sup> Hannah J. Wiseman, *Regulatory Islands*, 89 N.Y.U. L. REV. 1661, 1677 (2014).

<sup>141</sup> Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, 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, 675–76 (2010).

<sup>142</sup> See *supra* subpart I.B for a discussion of *Monell* liability.

tion can be constitutionally challenged.<sup>143</sup> 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, and perhaps also 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.<sup>144</sup> 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 death penalty area, therefore, it is precisely the fact 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?<sup>145</sup> 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.<sup>146</sup> 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 Justice has done in the past

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<sup>143</sup> See *Ex parte Young*, 209 U.S. 123, 159–60 (1908).

<sup>144</sup> Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 18–24 (1990).

<sup>145</sup> See Hari M. Osofsky, *Diagonal Federalism and Climate Change Implications for the Obama Administration*, 62 ALA. L. REV. 237, 267 (2011).

<sup>146</sup> 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).

with local policing agencies.<sup>147</sup> 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.<sup>148</sup>

### 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.<sup>149</sup> Each of those types of outlier treatments is 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 laws.”<sup>150</sup> 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.

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<sup>147</sup> Rachel A. Harmon, *Promoting Civil Rights Through Proactive Police Reform*, 62 STAN. L. REV. 1, 13–19 (2009).

<sup>148</sup> See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 394 (1994) (striking down municipal waste regulation that required waste to be processed at local transfer facility).

<sup>149</sup> Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 933 (2014).

<sup>150</sup> *Id.* at 990.

Driver views this as a problem of “nonenforcement” and that nonenforcement 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.<sup>151</sup> 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 nonenforcement. 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, nonenforcement 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.”<sup>152</sup>

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.<sup>153</sup> 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 for that reason 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 (LWOP) sentences are highly concentrated; in Texas, the bulk come from Harris County, for example.<sup>154</sup>

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<sup>151</sup> See *id.* at 992.

<sup>152</sup> Strauss, *supra* note 21, at 877.

<sup>153</sup> *Id.* at 878.

<sup>154</sup> Keri Blakinger, *Harris County Leads Texas in Life Without Parole Sentences as Death Penalty Recedes*, HOUS. CHRON., <https://www.chron.com/news/houston-texas/houston/article/Harris-County-leads-Texas-in-life-without-parole-12491890.php> [<https://perma.cc/37XA-VHBQ>] (last updated Jan. 14, 2018, 9:24 PM).

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 governments that adopt 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 citing to their rules and practices as evidence in favor of or not in favor of their constitutionality.

However, a better way to reward such localities might be for state or federal actors to 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 suggested 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. Non-profits have already done so,<sup>155</sup> and the National Association of Counties has also supported such efforts, including through a recent “data-driven justice” initiative aimed at reducing reliance on jails.<sup>156</sup>

One 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.<sup>157</sup> In response to the Court’s decision in *Miranda*, Dorf and Sabel note: “there has been almost no actual experimentation.”<sup>158</sup> 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 in *Miranda*, and much of it occurring at the local level and not at the state level. That

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<sup>155</sup> For a description of evidence-based grant-making to counties, see Fact Sheet, *How Counties Approach Evidence-Based Policymaking*, PEW-MACARTHUR, July 11, 2018, at <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2018/07/how-counties-approach-evidence-based-policymaking> [<https://perma.cc/ES94-ZPPH>].

<sup>156</sup> National Association of Counties, *Data-Driven Justice: Disrupting the Cycle of Incarceration*, at <https://www.naco.org/resources/signature-projects/data-driven-justice> [<https://perma.cc/D6CG-M6QJ>].

<sup>157</sup> Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 453 (1998).

<sup>158</sup> *Id.* at 462.



experience provides a lesson in 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.<sup>159</sup> 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 exonerations involving false confessions.<sup>160</sup> 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 decision makers and changing research and technology, and not constitutional law, has informed policy and practice. Nor was *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.”<sup>161</sup> Local government may be a far more capable and flexible laboratory for experimentation than state government.

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<sup>159</sup> For an overview of these efforts, see Brandon L. Garrett, *Contaminated Confessions Revisited*, 101 VA. L. REV. 395, 416–17 (2015).

<sup>160</sup> See *id.*

<sup>161</sup> Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 155 (2009).

#### 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.<sup>162</sup> 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 income, and education, at the county level.<sup>163</sup> The Department of Commerce collects county-level economic data on employment, business patterns, and building permits.<sup>164</sup> 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.<sup>165</sup> 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.<sup>166</sup> 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.<sup>167</sup> The DOJ Bureau of Justice Statistics conducts census studies of local criminal justice actors, including public defender offices, pub-

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<sup>162</sup> See generally, Brandon L. Garrett, *Evidence-Informed Criminal Justice*, 86 GEO. WASH. L. REV. 101, 126–33 (2018) (exploring the opportunities and concerns of more empirical evidence on the criminal justice system).

<sup>163</sup> Dep't of Agric., *County-level Data Sets*, at <https://www.ers.usda.gov/data-products/county-level-data-sets/> [<https://perma.cc/KHX3-TAP3>].

<sup>164</sup> U.S. Census Bureau, *Local Economic Data for Counties*, at <https://www.census.gov/econ/geo-county.html> [<https://perma.cc/22QL-VZYB>].

<sup>165</sup> CDC, *County Data*, at <https://www.cdc.gov/DataStatistics/> [<https://perma.cc/YHB5-A53J>] and <https://www.cdc.gov/diabetes/data/county.html> [<https://perma.cc/6CEX-J2QR>].

<sup>166</sup> *Uniform Crime Reporting Program Data: County-Level Detailed Arrest and Offense Data*, 2012, at <http://www.icpsr.umich.edu/icpsrweb/NACJD/studies/35019> [<https://perma.cc/8ZNL-BX28>].

<sup>167</sup> U.S. *Presidential Elections*, at <https://libguides.princeton.edu/elections> [<https://perma.cc/G4H7-3RZA>].

licly funded crime laboratories, local law enforcement agencies, and problem-solving courts.<sup>168</sup>

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 decision making. 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 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 be far more evidence-based. Courts can and do attend to patterns in local decision making, 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 could be a mistake. 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

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<sup>168</sup> Bureau of Justice Assistance, All Data Collections, at <https://www.bjs.gov/index.cfm?ty=dca> [<https://perma.cc/UT8B-98CB>].

data can inform important questions of policy 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 decision makers 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. 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 adequate analysis 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 U.S. Constitution. In making local constitutional law more evidence-informed, judges should 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.