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Constitutionalizing Local Politics

Kathleen Morris has written a bold and exciting article on an issue that deserves more attention than it has received: local governments' role in constitutional enforcement. Rather than engage the merits of the article's central doctrinal argument—that *Erie Railroad v. Tompkins* effectively overruled *Hunter v. Pittsburgh*—this short response makes a brief foray into what Morris calls the "normative debate over local constitutional enforcement." Specifically, it offers a few thoughts on how increased local involvement in constitutional enforcement might change the political and constitutional landscape.

Such a changed role would, by definition, raise new challenges as well as new opportunities for local government, and the former may be more significant than Morris's article suggests. For example, she argues that perhaps localities are "uniquely *competent*, rather than uniquely *in*competent, to interpret the Constitution,"[1] because they are in effect the places where the constitutional rubber meets the real-life road. But local governments' responsibility for applying laws that might raise constitutional problems—Morris points to the announcement of time, place, and manner restrictions on speech and the creation of strip-search policies[2]—simply highlights the stakes of constitutional issues at the local level, not necessarily the desirability of local government officials' role in resolving them.

This potential shortcoming is only reinforced by the fact that—holding aside extraordinary counter-examples such as San Francisco's role in the same-sex marriage debate—voters generally seem to elect municipal leaders precisely because they have expertise in issues like . . . well, like real-life roads (not to mention schools, law enforcement, zoning, and the like). Since few city council members, selectmen, or aldermen are elected on the basis of any particular constitutional vision, it is unclear how "welcoming localities into constitutional cases as plaintiffs would democratize constitutional litigation."[3] Moreover, the most important actors in a post-*Hunter* world of local government constitutional enforcement would presumably be city attorneys and corporation counsel—roughly the municipal equivalent of state attorneys general—only some of whom are directly accountable to voters. How, then, are any of these officials well-positioned to democratize constitutional litigation?

Of course, all of that could change. Local government officials undoubtedly *could* articulate constitutional visions, and one implication of Morris's argument is that overruling *Hunter* would

incentivize them to do just that. Perhaps if local government were allowed to engage in constitutional enforcement, more local government officials would be subject to election. And more city attorneys might start taking public positions on substantive constitutional issues like prayer in local schools or free speech in municipal parks.

But there are reasons to doubt that the constitutionalization of local politics would be a good thing. It could lead to significant mission creep, distracting local government officials from traditional and vital functions like the nitty-gritty operations of schools and parks themselves. Moreover, it's not entirely clear that a politically savvy city attorney would always argue in favor of the interests of the city *qua* city. There are undoubtedly many situations in which an ambitious attorney's political career could be advanced by arguing a politically popular constitutional claim that would *limit* city power and autonomy—against municipal authority to regulate guns, for example, or for prayer in local schools.

Perhaps the political process would prevent that, too. Maybe voters simply wouldn't support candidates who prioritize constitutional claims over roadwork, or who sacrifice the city's interests for some other legal or political goal. But the story would be complicated at the very least. Overruling *Hunter* could radically alter the role of the city attorney, and that transformation's implications for the internal structure of the city are unclear. Presumably a higher proportion of city attorneys would be chosen by election than by appointment, in order to give voice to the people's constitutional vision; many city attorneys would use their positions as stepping stones to higher office, as state attorneys general occasionally do now; and conflicts might well arise between bold city attorneys, mayors, and city councils, as occasionally happens between attorneys general and Governors.[4] The internal structure of local government, in other words, would need to shift to accommodate this new weight.

Over time, increased local constitutional enforcement could also prompt an unexpected shift in cities' civic character. A municipality's vigorous litigation in support of, say, school prayer, could act as a signaling device—a local constitutional flag—to prospective residents. Even as the city's advocacy of its constitutional vision attracted likeminded citizens, it could drive out those more comfortable with the status quo. Rather than enriching public discourse, increased local engagement with polarizing constitutional issues might contribute to urban spaces' homogenization and the accompanying erosion of cities' capacity to nurture diverse communities.[5]

To be clear, these are musings on the implications of Morris's article, not an effort to evaluate its powerful and provocative central argument. As local governments shoulder tremendous burdens with diminished resources, serious reflection is needed on their place in our constitutional landscape. That the article facilitates such engagement is, hopefully, evidence of the influence it will have on discussions about the proper role of local government in political and constitutional life.

1 Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, at 47 (Draft, Aug. 2011) (forthcoming in 47 Harv. C.R.-C.L. L. Rev.).

2 *Id.*

3 *Id.* at 44

4 See William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General & Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2453-55 (2006).

5 See Gerald Frug, City Making: Building Communities without Building Walls 138-42 (1999).