

## San Francisco and the Rising Culture of Engagement in Local Public Law Offices

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Imagine the following scenario. A nationally-renowned think-tank issues a report revealing that in dozens of American cities, two so-called “payday lending” companies are offering installment loans at more than four hundred percent annual interest, financially crippling thousands of working poor families. The report identifies City X as among those most plagued. The applicable state laws, which cap interest rates on installment loans at thirty-six percent, are not being enforced. The state attorney general has not acted, perhaps because he has limited resources and these lenders are concentrated in cities, not dispersed across the state. Class action and non-profit law firms have not filed suit on behalf of consumers, perhaps because they cannot recoup their attorneys’ fees. Assuming that City X has a typical local public law office, is it likely to sue to stop the lenders’ illegal and harmful practices? Legally, can it? Should it?

Local government officials, including city attorneys, typically operate within carefully circumscribed limits. Courts and scholars sometimes assume that constitutional or other legal structures dictate

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those limits.<sup>1</sup> But often it is institutional culture, not legal barriers, that bounds city and county law office activities.

Drawing on the example of San Francisco, this Essay examines plaintiff-side public policy cases filed by cities and counties. It explores the gap between the law and policy cases city attorneys typically bring and the authority they actually have. It introduces two basic ideas: First, cities are often culturally indifferent (or even resistant) to bringing affirmative cases even when they are not legally restrained from undertaking such work.<sup>2</sup> Second, some state laws, including California's, authorize city attorneys to sue not only on behalf of their cities ("City Cases") but also on behalf of constituents ("Constituent Cases"). I argue that City Cases and Constituent Cases represent equally legitimate and desirable exercises of local government power.

## **I. Responsive Culture Versus the Culture of Engagement**

### **A. Background on San Francisco**

San Francisco<sup>3</sup> is fairly described as a fifty-square-mile not-for-profit corporation with more than 800,000 constituents and an annual budget of nearly \$6 billion. It serves two different but equally important

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<sup>1</sup> See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980). But see Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986) (noting that the U.S. Supreme Court has developed contradictory lines of authority on the subject of local sovereignty). For related analyses of the Court's doctrine, see Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 417 (1990); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 995-1000 (2007); and Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 BUFF. L. REV. 393, 394, 407 (2002). See generally Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. (forthcoming 2010) (noting the legal community's increased focus on local government power rather than powerlessness).

<sup>2</sup> While the San Francisco City Attorney's Office is not the only public law office that has engaged in affirmative litigation over the years, it has moved most decisively to develop and institutionalize a culture of engagement.

<sup>3</sup> San Francisco is unusual in that it is both a city and a county. However, for ease of discussion, throughout this Essay I refer to local public entities as "cities" rather than "cities and counties," and to San Francisco as a "city" rather than a "city and county."

roles: it is a public management corporation, and it is a unit of representative democracy.

In its role as a public management corporation, San Francisco runs a port, an international airport, power and water systems, and two major hospitals. It maintains buildings, roads, bridges, sidewalks, and other infrastructure. It provides housing and mass transportation. It owns and manages several libraries and museums, acres of parks and gardens, and a zoo.

In its role as a unit of representative democracy, San Francisco is similarly busy. It organizes elections involving federal, state, and local candidates, and ballot measures. Its elected and appointed officials work to meet immediate needs and pursue the long-term common good. San Francisco's government employs a familiar division of labor: The Mayor executes and the Board of Supervisors legislates; the District Attorney prosecutes and the Public Defender defends the criminally accused.

For his or her part, the City Attorney—who is elected, and operates, independently of the Mayor and the Board of Supervisors—has the formidable job of advising and defending the more than 25,000 City officials and employees who perform the functions listed above. Dennis Herrera, City Attorney from 2002 through the present, oversees a public law office of approximately 180 deputy city attorneys and 140 staff.

#### B. The Traditional “Responsive Culture”

City attorneys' offices are generally invisible to the public and even to law students and lawyers. Their invisibility is due at least in part to what I call their responsive culture: for reasons yet unknown, most city attorneys see their role as primarily or exclusively responsive. They respond to client problems with legal (but rarely policy) advice. They respond to lawsuits by defending their cities in court. They respond to citizens complaining of city code violations with informal mediation or a court order. They may occasionally sue to enforce their cities' contract rights, but they do not behave as local agents of federal or state civil law enforcement.<sup>4</sup>

Indeed, most city attorneys appear to believe that the officials they advise and represent—not they—are responsible for tracking daily life in the city and diagnosing problems; and that attorneys general, non-profit legal organizations, and plaintiff's law firms—not they—are responsible for enforcing civil and constitutional laws. Their responsive orientation is similar to that of a typical in-house corporate counsel, but unlike that

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<sup>4</sup> For a glimpse of city attorney activities nationwide, see the International Municipal Lawyers Association, <http://www.imla.org> (last visited Apr. 1, 2009).

of a typical state attorney general, who provides advice and defense but also serves as a watchdog over, and champion of, the public interest.<sup>5</sup>

### C. The Rising “Culture of Engagement”

Over the past three decades, the San Francisco City Attorney’s Office has gradually moved away from a responsive cultural norm and toward what I call a culture of engagement: While continuing to provide critical responsive legal services to the City, the Office has added a robust federal and state civil law enforcement function, thus operating as if it were a local attorney general.

San Francisco took major strides toward developing a culture of engagement under former City Attorney Louise Renne, who served from 1986 to 2002. Although the City Attorney’s Office had filed a smattering of affirmative cases in the decades before she arrived, Renne revolutionized the concept of what a city, and its chief counsel, should do. Under Renne’s leadership, the City Attorney’s Office sued title insurance companies to reclaim funds misappropriated from the City and other insureds.<sup>6</sup> It sued tobacco companies to recover the additional health care costs San Francisco incurred as a result of their predatory business practices.<sup>7</sup> It sued lead paint manufacturers to force them to remove their product from every building within city limits.<sup>8</sup> Renne’s approach to developing a public policy litigation docket was informal and ad hoc: If a news item, constituent, public official, or city employee brought an issue to the Office’s attention, and Renne thought it was important and could be resolved through litigation, her office would bring a case.

Renne’s successor, Dennis Herrera, took a conceptual and institutional leap forward in 2006 by creating the Affirmative Litigation Task Force, an inter-office think tank composed of some twenty deputy city attorneys. Its mandate is threefold: to identify major problems affecting the City and its constituents; to conduct factual and legal investigations; and, where appropriate, to recommend affirmative

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<sup>5</sup> For a glimpse of attorney general activities nationwide, see the National Association for Attorneys General, <http://www.naag.org> (last visited Apr. 1, 2009).

<sup>6</sup> *State v. Old Republic Title Co.*, No. CGC-98-993507 (Cal. Super. Ct. Mar. 9, 1998).

<sup>7</sup> *City and County of San Francisco v. Philip Morris*, No. C-96-2090 DLJ, 1998 U.S. Dist. LEXIS 3071 (N.D. Cal. Mar. 3, 1998); *People v. Philip Morris*, No. CGC-96-980864 (Cal. Super. Ct. Sept. 5, 1996).

<sup>8</sup> *See County of Santa Clara v. Atl. Richfield Co.*, 40 Cal. Rptr. 3d 313 (Cal. Ct. App. 2006).

litigation to the City Attorney. The Office has continued to perform its traditional functions—all deputy city attorneys, including Task Force members, still advise and defend City clients—but the Task Force members institutionalized the City Attorney’s added role as champion of the local public interest.

The Task Force began its work by identifying general public policy issues of concern to San Franciscans, such as the environment, health care, reproductive rights, banking and credit practices, childhood nutrition, and workers’ rights. It then divided the issues among its members and started reaching out to city officials, community groups, non-profit and plaintiff’s law firms, think tanks, and the California Attorney General’s office, to learn whether and how the City could add value to existing efforts. Finally, and most important to its ultimate productivity, the Task Force established partnerships with Yale and Berkeley law schools. Those collaborations allowed deputy city attorneys to gain precious research assistance from talented law students, who in turn got the opportunity to be mentored by those deputies and work on innovative cases.<sup>9</sup>

By taking such a comprehensive and aggressive approach to affirmative litigation, Herrera sent two clear signals: first, that he intended to enforce the law, and second, that he intended to make the City and its constituents heard on the major public policy and legal issues of the day.

Indeed, under Herrera’s leadership, the City Attorney’s Office has filed cases that ask such nationally resonant questions as whether the State may exclude same-sex couples from civil marriage,<sup>10</sup> whether a state may terminate the Medicaid-funded benefits of juveniles in detention centers,<sup>11</sup> whether the State may sanction gender rating in the health insurance industry,<sup>12</sup> whether major bond insurance companies

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<sup>9</sup> For a description of the partnership, see Press Release, Yale Law School, YLS Partners with San Francisco City Attorney and Boalt Law School in Affirmative Litigation Working Group (Dec. 19, 2006), *available at* <http://www.law.yale.edu/news/4016.htm>.

<sup>10</sup> *City and County of San Francisco v. State*, No. CGC-04-429539 (Cal. Super. Ct. Mar. 11, 2004). Upon appeal to the California Supreme Court, this case was consolidated with five others to form *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (hereinafter *In re Marriage Cases*).

<sup>11</sup> *City and County of San Francisco v. State*, No. CGC-07-468241 (Cal. Super. Ct. Oct. 16, 2007) (hereinafter *Medi-Cal*).

<sup>12</sup> *City and County of San Francisco v. Poizner*, No. CGC-09-484410 (Cal. Super. Ct. Jan. 27, 2009).

are knowingly selling worthless insurance to cities,<sup>13</sup> and whether a national credit card company and its designated arbitration forum have colluded to create an illegal judgment mill.<sup>14</sup>

The San Francisco City Attorney's Office is not alone: the culture of engagement is rising among local public law offices. A number of localities, including New York, Washington, D.C., Los Angeles, Seattle, Newark, Chicago, and Santa Clara County, have undertaken or shown interest in civil law enforcement. And in some ways, the timing is right: on the heels of the economic collapse, the electorate is more aware than ever of the critical need for robust law enforcement; and on the heels of the Obama campaign, the nation is teeming with energetic, idealistic young law students and lawyers seeking opportunities to serve the public good.

## II. Legal Questions

### A. City Cases Versus Constituent Cases

The basic legal question this Essay poses is whether a city attorney's office, at least in California, may engage so aggressively in civil law and policy litigation.

Scholars of city power often place lawsuits by cities into two categories: (1) suits against their own states; and (2) all other suits.<sup>15</sup> I find it more analytically useful to categorize city suits not according to who has been sued in a particular case, but rather, whose interests the case seeks to vindicate. Viewed this way, city suits fall into two different categories: (1) those brought primarily to vindicate the city's direct institutional interests as a market participant or a public corporation ("City Cases"); and (2) those brought primarily to vindicate the interests of some or all of the city's constituents ("Constituent Cases").<sup>16</sup>

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<sup>13</sup> *City and County of San Francisco v. AMBAC Fin. Group*, No. CGC-08-480708 (Cal. Super. Ct. Oct. 8, 2008).

<sup>14</sup> *People v. Nat'l Arbitration Forum*, No. CGC-08-473569 (Cal. Super. Ct. Mar. 24, 2008) (hereinafter *NAF*); see also Robert Berner & Brian Grow, *Banks vs. Consumers (Guess Who Wins)*, BUS. WK., June 15, 2008, at 72, available at [http://www.businessweek.com/magazine/content/08\\_24/b4088072611398.htm](http://www.businessweek.com/magazine/content/08_24/b4088072611398.htm).

<sup>15</sup> See David J. Barron, *Why (And When) Cities Have A Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006); Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147 (2005).

<sup>16</sup> The City Case versus Constituent Case distinction echoes the proprietary actor versus governmental actor distinction that runs through the law. See, e.g.,

City Cases, even those brought against the state, are relatively non-controversial; cities don't seem to scare people when they sue to protect their direct interests, even when they invoke constitutional norms. But Constituent Cases are an entirely different matter. Whether filed against private entities, the state, or the federal government, Constituent Cases are more likely to be criticized as exceeding the City's legal or political authority.

Initially, one may be tempted to hypothesize that such criticisms are rooted in the controversial nature of some Constituent Cases (for example, San Francisco's constitutional challenges to the federal Partial-Birth Abortion Ban Act<sup>17</sup> and California's marriage statutes<sup>18</sup> and Proposition 8<sup>19</sup>). But, in fact, only a few of San Francisco's Constituent Cases center on hot-button social issues. Most deal with important but relatively uncontroversial topics such as lender abuse,<sup>20</sup> unlawful arbitration practices,<sup>21</sup> public funding of juvenile health care,<sup>22</sup> and unfair pharmaceutical industry practices.<sup>23</sup> One must therefore assume that critics are uncomfortable with Constituent Cases in general, and address their concerns.

## B. Standing

The U.S. Constitution, the California Constitution, and the San Francisco Charter do not expressly limit a city's ability to sue in a representative capacity. Federal case law raises questions—the U.S. Supreme Court, for example, has described cities as “political subdivisions . . . created by the States ‘as convenient agencies for

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Puget Sound Power & Light Co. v. City of Seattle, 291 U.S. 619, 629–631 (1934), County of Inyo v. Pub. Utils. Comm'n, 604 P.2d 566, 570 (1980).

<sup>17</sup> Planned Parenthood Fed'n of Am. v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff'd sub nom.* Planned Parenthood Fed'n of Am. v. Gonzales, 435 F.3d 1163 (9th Cir. 2006), *rev'd sub nom.* Gonzales v. Carhart, 550 U.S. 124 (2007) (hereinafter *Planned Parenthood*) (challenging 117 Stat. 1201 (codified at 18 U.S.C. § 1531 (2000))).

<sup>18</sup> *In re Marriage Cases*, *supra* note 10.

<sup>19</sup> *Strauss v. Horton*, 2009 Cal. LEXIS 5416 (June 17, 2009) (hereinafter *Horton*).

<sup>20</sup> *People v. Check 'n Go*, No. CGC-07-462779 (Cal. Super. Ct. Apr. 26, 2007) (hereinafter *Check 'n Go*).

<sup>21</sup> *NAF*, *supra* note 14.

<sup>22</sup> *Medi-Cal*, *supra* note 11.

<sup>23</sup> *San Francisco Health Plan v. McKesson Corp.*, No. 1:08-CV-10843-PBS (D. Mass. May 20, 2008) (hereinafter *McKesson*).

exercising such of the governmental powers of the State as may be entrusted to them,”<sup>24</sup> suggesting that cities are mere component parts of their states, and thus can never sue them—but this view cannot be squared with the vertical power distribution in many state constitutions, including California’s.<sup>25</sup> The U.S. Constitution does not grant the federal courts, or any other branch of the federal government, plenary authority to distribute power within the states. Such authority lies with the people, who distribute state and local power, horizontally and vertically, via their state constitutions. Accordingly, the U.S. Supreme Court’s view of what a city “is,” or what powers localities do or do not have, is relevant only for purposes of federal law.

With no express constitutional or charter limitations on the City’s power to sue, we turn to generally applicable standing requirements. In federal court, two independent constitutional rules place limits on Constituent Cases. First, federal courts may only hear cases that satisfy the so-called “case or controversy” requirement embedded in Article III of the U.S. Constitution. Accordingly, the City may only pursue federal cases on behalf of its constituents when it satisfies the requirements of Article III.<sup>26</sup> Second, even when cities satisfy Article III, federalism principles limit their ability to bring *federal* constitutional challenges against their own states in either state or federal court.<sup>27</sup>

Turning to California law, the California Constitution does not contain a “case or controversy” requirement, and California law does not prohibit localities from suing the State. Accordingly, a California city may bring a Constituent Case to enforce state law in state court, against any defendant, as long as it has statutory or common law standing to sue. To cite a few examples, the San Francisco City Attorney can sue in the name of the People of the State of California to abate a public nuisance,<sup>28</sup> or to enjoin any business practice that is illegal or contrary to public policy.<sup>29</sup> He or she may also challenge State acts under statutory or constitutional law as long as the City either has a “beneficial

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<sup>24</sup> *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (quoting *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907)). *But see supra* note 1 (listing articles that discuss the Court’s competing doctrines on local government sovereignty).

<sup>25</sup> See CAL. CONST. art. XI, §§ 3(a), 4(g), 7, 11(a).

<sup>26</sup> See *Int’l Union v. Brock*, 477 U.S. 274, 281-282 (1986).

<sup>27</sup> See *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933); *Star-Kist Foods v. County of Los Angeles*, 719 P.2d 987, 989-990 (Cal. 1986).

<sup>28</sup> See CAL. CIV. PROC. CODE § 731 (West 2008); CAL. GOV’T CODE § 36900 (West 2008).

<sup>29</sup> See CAL. BUS. & PROF. CODE § 17204 (West 2008).



interest” in the case’s outcome<sup>30</sup> or has brought the case to vindicate the general public interest rather than its own.<sup>31</sup> These examples make clear that, at least in California, cities have broad legal authority to pursue a wide range of Constituent Cases, against a wide range of defendants including the State, in state court.

### III. Normative Questions

Even if cities have standing, *should* they pursue Constituent Cases? What is a locality’s proper role vis-à-vis its constituents, other units of representative democracy, and private entities, and how do localities’ law offices fit into that picture?

#### A. Arguments in Favor of the Culture of Engagement

(1) *The culture of engagement is good for local constituents.* When city attorneys look out for local interests, local residents win. San Franciscans are direct beneficiaries of the City Attorney’s efforts to force payday lenders and arbitration sponsors, for example, to comply with California laws. In suing Check ‘n Go and Money Mart,<sup>32</sup> the City Attorney’s Office addressed illegal activity—installment loans with annual interest rates ten times those allowed under California law—that constitutes a well-documented, national problem,<sup>33</sup> but one with severe local impact: San Francisco has the unfortunate distinction of being the California city most highly saturated with fringe financial establishments. Similarly, the City Attorney’s case against the nation’s largest credit card issuer and the National Arbitration Forum<sup>34</sup> tackles a national issue that has local ramifications.

Moreover, compared to the entities typically relied on to pursue affirmative litigation, local public law offices are uniquely accessible and accountable.<sup>35</sup> They are more likely to respond to citizen petitions than

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<sup>30</sup> See CAL. CIV. PROC. CODE § 1085 (West 2008) (California’s general writ of mandate statute).

<sup>31</sup> This standing arises under California’s general common law “public right / public duty” doctrine. See *Green v. Obledo*, 624 P.2d 256, 266-267 (Cal. 1981).

<sup>32</sup> See *Check ‘n Go*, *supra* note 20.

<sup>33</sup> See Editorial, *391 Percent Payday Loan*, N.Y. TIMES, Apr. 13, 2009, at A20, available at <http://www.nytimes.com/2009/04/13/opinion/13mon2.html>.

<sup>34</sup> See *National Arbitration Forum*, *supra* note 14.

<sup>35</sup> See Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2577

are faraway federal and state attorneys general. Their focus is broader than those of non-profits and plaintiff's contingency counsel, and unlike such offices, they are democratically accountable. The culture of engagement empowers city constituents by placing within easy reach a public interest law firm whose mandate is to attend to law and policy priorities. Adding local government law offices to the nation's informal structure for affirmative litigation ensures a more transparent and democratic regime.

Finally, the culture of engagement is good for local constituents because it provides a collective counterweight to federal and state majorities and corporate power. In San Francisco, it has made deputy city attorneys unafraid to question, and where necessary, to take on powerful public and private interests. Local constituents win when localities have the confidence and practical ability to protect them from overreach by other, often more powerful, forces.

(2) *The culture of engagement strengthens local governance.* As public law offices engage more vigorously and consistently in law and policy debates, they bond more powerfully with their clients and constituents. A proactive city attorney inspires city departments and residents to remain sensitive to possible legal violations and stay in closer touch with their public law office. Engaged public law offices, in turn, form new alliances and find new ways to collaborate with neighborhood groups, federal and state attorneys general, non-profit organizations, think tanks, and plaintiff's lawyers.

A city attorney office's commitment to robust law enforcement also may, over time, draw dissenters into local government, enriching internal debate. Dissenters are drawn to intellectually energetic environments. And as Heather Gerken has observed, when "dissenters" become "deciders," they "no longer enjoy the luxury of the critic: inaction. They must figure out how to put their ideas into practice, negotiate a compromise, and, most importantly, live with the consequences of their critique."<sup>36</sup> And for their part, city employees are forced to confront dissenting views in deciding to pursue or not pursue particular cases. By drawing dissenters into the public fold, the culture of engagement infuses local public law offices with better information and more intellectual diversity, energy, and focus.

(3) *The culture of engagement enriches the marketplace of ideas.* When a city attorney's office engages in affirmative litigation, it opens an additional forum—the courts—in which a city may speak its unique

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(2006) ("[T]he city is directly accountable and accessible to the citizenry in ways that other levels of government are not").

<sup>36</sup> Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1778 (2005).

collective truth. To provide just one example, as part of the City's marriage equality case,<sup>37</sup> the San Francisco Human Rights Commission provided a declaration describing its decades-long effort to maximize local legal and political equality regardless of sexual orientation. The City Controller detailed how marriage discrimination has reduced local taxes and diminished City coffers. None of the other parties to the case—not even the other localities—could have provided San Francisco's unique perspective on these issues (nor, for that matter, could San Francisco have provided theirs).

The nation would surely benefit from hearing its cities' perspectives, on an ongoing basis, on a wide range of public issues. The point is not that cities would always be right, but rather that the diversity of viewpoints that cities would bring to state and national tribunals would immeasurably enrich public debate.

#### B. Arguments Against the Culture of Engagement

(1) *The culture of engagement distorts local governance.* Some argue that the culture of engagement may lead a city to wrongly prioritize affirmative litigation over more essential services. But while there is no question that litigation is costly, a carefully-constructed affirmative litigation docket should pay for itself with recouped damages, costs, and civil penalties. Moreover, affirmative litigation is a good indirect investment because, over time, robust law enforcement deters activities that cause economic harm to businesses, constituents, and the city as a whole.

Others argue that the culture of engagement undermines good governance because city attorneys will abuse their authority and choose cases for political rather than policy reasons. But a politically shrewd city attorney will not pursue frivolous litigation simply to make news or help friends: wasting public funds creates bad publicity, to say the least, and leads to a decline in political support. In the end, the courts, the city budget process, the press, and the people (via elections)<sup>38</sup> serve as rigorous checks on the dangers of legal and political tomfoolery.

Still others argue that the culture of engagement is anti-localist because it encourages cities to seek statewide remedies, with the counterintuitive consequence of undermining local authority. David Barron has written that when a city seeks to enforce state law within its limits, it does not “expand the scope of its legal authority . . . to address

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<sup>37</sup> See *In re Marriage Cases*, *supra* note 10.

<sup>38</sup> If the city attorney is appointed rather than elected, then the political check applies to the appointing person or body (e.g., the mayor, city council, or board of supervisors) but still acts as a restraint.

local issues through the practice of local politics,” but rather, to the contrary, it “call[s] upon higher-level institutions to enforce norms that all localities then will be compelled to obey.”<sup>39</sup> Richard Schragger suggests that localities should set their own policies, free from state interference, which suggests they should not file lawsuits with extra-territorial consequences.<sup>40</sup> These versions of localism appear to prize local autonomy over access to federal and state law protections at the local level.

It is true that one city’s successful challenge to the constitutionality of a state statute takes *some* autonomy away from other cities. But what is wrong with a system of government that maximizes discretion at the local level while ensuring that federal and state law—the products of legitimate democratic processes that include local perspectives—remain as floors beneath which none may sink? Constituents should not have to choose between a governmental structure that respects local prerogatives and one that permits their local law office to vindicate their rights under state and federal law. The culture of engagement envisions a localism in which local civil law enforcement authority is maximized and serves the local populace.

(2) *The culture of engagement is an illegitimate exercise of local government power.* Others argue that cities lack the legitimacy to sue on behalf of their constituents and bind them to positions with which some may disagree. To them, when a city attorney’s office files a Constituent Case it is only truly “representing” the agreeing subset, not a majority or the entire constituency, because not everyone has had a chance to sign off on the docket.

To begin, the idea of a locally-elected official having full discretion to form an affirmative litigation docket and file cases on behalf of his or her constituents is not new. A generally accepted model where locally -elected and -funded officials file Constituent Cases and participate in law and policy debates exists in the criminal context in the form of district attorneys. It takes only a small leap to imagine a parallel cadre of city attorney’s offices that file Constituent Cases to enforce civil law.

Turning more directly to the legitimacy question, Constituent Cases fall into two categories: law enforcement cases (such as the payday lending case<sup>41</sup>) and public policy or “impact” cases (such as the marriage equality case<sup>42</sup>). With respect to the former, it is hard to see why a city attorney enforcing civil laws would be any less legitimate a

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<sup>39</sup> See Barron, *supra* note 15, at 2247-2248.

<sup>40</sup> See Schragger, *supra* note 15, at 147-148, 185.

<sup>41</sup> See *Check ‘n Go*, *supra* note 20.

<sup>42</sup> See *In re Marriage Cases*, *supra* note 10.

representative than a district attorney, whose legitimacy in enforcing criminal laws is unquestioned. Political victories yield both city and district attorneys the privilege of prosecutorial discretion. In exercising that discretion, both represent the entire constituency, not just those who favor a particular decision. And in either case, if a majority of the local populace disagrees with that exercise of discretion, it can say so at the ballot box.

With respect to public policy cases, another analogy is instructive: why is a city attorney a less legitimate representative than, say, a private non-profit organization? City residents directly impacted by a particular Constituent Case are akin to people whose interests are pursued by nonprofits. In both examples, represented persons may well disagree with the organization's position on a particular issue or strategy, and while they can petition, they are ultimately subject to the organization's chosen legal strategy and bound by the result in court. If anything, the city residents who have a stake in the outcome in a given case are better positioned than are nonprofits' constituents: the former wield democratic power as they pressure the city attorney to prosecute the matter as they deem best.

(3) *The culture of engagement is bad for business.* Still others argue that increasing the number of market regulators is likely to create compliance headaches for businesses, lead to inconsistent application of the laws, and chill innovation. These claims ring true, but, on the other hand, consistent law enforcement would also likely create greater certainty in the marketplace and enable businesses to plan more efficiently. Moreover, the political checks on city attorney power might be sufficient to discourage them from engaging in excessively anti-business practices, ensuring that the benefits of local engagement outweigh any risks. In any event, corporate concerns about burdensome laws are probably best directed to the legislatures that craft them, not the lawyers who enforce them.

(4) *The culture of engagement only makes sense for "liberal" localities.* Finally, skeptics argue that the culture of engagement—an inherently progressive concept, they say—would only work in progressive cities or counties like San Francisco.

I disagree. The culture of engagement embraces no ideology other than a belief in robust good government, at all levels and at all times. Local politics and policy priorities would—indeed, should—shape each city's affirmative litigation docket. Atlanta's agenda will not resemble Chicago's, which will not resemble San Diego's, and so forth. Cities, after all, can be "laboratories," too.<sup>43</sup>

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<sup>43</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

Others claim that the culture of engagement cannot spread because most local public law offices cannot handle complicated cases.<sup>44</sup> But only some affirmative litigation is truly complex; a rational city attorney will gravitate toward cases within his or her office's particular competency. And to the extent the "local incompetence" point is valid, it argues for enhancing the quality of local public law offices, not hobbling them. As Richard Schragger has noted, parochialism is self-reinforcing;<sup>45</sup> the converse is equally true. At the San Francisco City Attorney's Office, meaningful, innovative work has attracted and retained some of the most sought-after legal talent in the country. If seeded nationally, the culture of engagement would draw outstanding, public-minded law students and lawyers into local public law offices, boosting the overall quality of those offices and improving public representation nationwide.

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Why are public law offices often marked by a responsive culture rather than a culture of engagement? It may be that city attorneys tend to view their clients primarily as public management corporations rather than units of representative democracy. More generally, perhaps they perceive their cities (rightly or wrongly) as lacking the legal, political, economic, and human resources to pursue affirmative litigation. But if localities could overcome these barriers, as San Francisco has over time, our nation would reap benefits in the form of more competent and vigorous local governance, a more energetic citizenry, and a richer marketplace of ideas.

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<sup>44</sup> See generally Schragger, *supra* note 1, at 393, 394, 404-405 (describing claims that cities and their officials are invidious and incompetent, and cannot be trusted with real power).

<sup>45</sup> See Schragger, *supra* note 35, at 2542, 2578.