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Introduction to the Special Issue on State and Local Governance

Many are well-acquainted with Justice Brandeis's metaphor that states serve as laboratories of democracy. While dicta in the 1932 decision, *New State Ice Co. v. Liebmann*,¹ Brandeis's words have taken hold in legal scholarship and subsequent jurisprudence for nearly a century since. However, what is often left out of the retelling of Brandeis's famed dissent is the full quotation – and, in its fullness, an understanding of the active engagement required to sustain these laboratories. Brandeis wrote, cautioning the Supreme Court to proceed carefully so as not to stifle states: “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²

Justice Brandeis spoke not of states as laboratories in the abstract, but of democracy as an active commitment, one that requires courageous states and citizens in order to live up to its creed. Indeed, to preserve and encourage the prosperity of these laboratories, it is essential that we continue to examine them – that we enter the laboratory and put under the microscope the laws, systems, infrastructures, and very DNA of our state and local governments.

It is with this same spirit that the *Yale Law Journal* proudly presents the Special Issue on State and Local Governance. Dedicating Volume 133's eighth and final Issue to this area of law was motivated by a desire to shed light on topics that surround us and deserve greater attention. Despite its underrepresentation in discourse, state and local governance touches the lives of every individual in this country. This governance operates in vastly different ways and takes a

1. 285 U.S. 262 (1932).

2. *Id.* at 311.

variety of forms, including in community zoning, school administration, state and local budgeting, and utilities regulation. Moreover, while the number of states remains concrete at fifty, the very number and structure of local governments within those states is not only numerous but dynamic. Thus, we hope the Special Issue helps demystify the laws and units of governments that we interact with each and every day.

In addition, the Special Issue was motivated by a desire to turn attention to the power and toolkit that state and local governments have to effectuate change. Recent years have demonstrated that rights and legal frameworks at the federal level may be thrust into a state of uncertainty, leading citizens, scholars, and policymakers alike to turn to alternative avenues for vindicating rights. Moreover, states and localities have emerged as arenas for critical policy and legal challenges. In the past several years alone, courts have considered whether state law can preempt local law on matters related to gun control and abortion; taken up questions as to state-level capital gains taxes; and reviewed state constitution-based challenges to global issues like climate change, to name a few.³ Further, in an October Term 2022 decision, *Moore v. Harper*, the Supreme Court considered the bounds of state legislatures' authority on federal matters, including elections.⁴ In publishing this Special Issue, the *Journal* hopes to highlight not only the prospect of innovation and change that can arise within state and local laboratories, but also the many challenges these governments face.

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The Special Issue includes two Articles and two Features by leading scholars. The Special Issue Articles were anonymously selected by the Articles & Essays Committee from the *Journal's* call for papers on state and local governance. The Special Issue Features were selected by the Features & Book Reviews Committee, which solicits scholarship on proposed subject matters.

The first piece, *Suing Cities*, is an article by Professors Zachary Clopton and Nadav Shoked. Recognizing the many ways in which local governments are at the forefront of tackling pressing societal issues, from education to transportation to homelessness, this Article focuses on one headwind that cities will face in instituting change: lawsuits. While it is well-known that suing the state or federal government is difficult, this Article examines the distinct legal and functional ways in which cities are more susceptible and vulnerable to lawsuits. The ease of suing cities, in turn, halts progress cities are aiming to make. This Article

3. See, e.g., *Kirk v. City of Morgan Hill*, 299 Cal. Rptr. 3d 879 (2022) (gun control); *State v. City of Seaford*, 278 A.3d 1149 (Del. Ch. 2022) (abortion); *Quinn v. State*, No. 100769-8, 2023 WL 2620080 (Wash. Mar. 24, 2023) (capital gains taxes); *Held v. State*, No. 2020-307 (Mont. 1st Dist. Ct. Aug. 14, 2023) (climate change).

4. 600 U.S. 1 (2023).

first delves into the special standing that American law has accorded to private plaintiffs suing cities—including taxpayer, neighbor, and preemption standing—before discussing the ways in which the ease of suing cities has interfered with local governance. It concludes with recommendations to reset the balance between plaintiffs and local governments, namely by curbing litigation that aims to stagnate development while ensuring that socially beneficial litigation remains viable.

The second piece, *The Local Lawmaking Loophole*, is an article by Professor Daniel Rosenbaum. It explores an often-overlooked aspect of local governance: interlocal agreements (ILAs), which are binding agreements between two or more local governments. While ILAs provide opportunities to efficiently pool resources between various units of local government, this Article highlights issues that are at the very core of democracy: the lack of transparency and accountability around ILA use. It examines the sheer breadth of many ILAs despite these limitations, focusing on examples in policing and criminal justice to elucidate their expansiveness. This Article concludes with a discussion of the interaction between states and ILA authority as well as recommendations to lessen the gap between ILAs' expansive power and limited transparency and to recognize ILAs for the unique local government tool that they are.

The third piece, *The Subdivided City*, is a feature by Professor Clayton Gillette. This Feature examines how cities are subdivided, from Business Improvement Districts to Community Land Trusts to Community Benefits Agreements, and hones in on the variance in subunit characteristics. Namely, it identifies two core categories of subunits—private-based and community-based subunits—and describes differences in how these subunits operate, with the former exhibiting high fidelity to their constituents' interests, while the latter hews more closely to fidelity to the city. This Feature concludes by making the stronger argument that when the interests of community-based subunits are in conflict with the city surrounding the provision of services, the community-based subunit's interests should prevail as justified by the equal services doctrine. In many ways, this Feature complements Professor Rosenbaum's Article as well, both exploring the importance of understanding local structures and the downstream implications for the provision of services for residents and democratic participation.

The fourth piece, *Public Utility's Potential*, is a feature by Professor Alison Gocke. It explores the power of state and local government to solve a global and nationwide challenge: climate change. This Feature highlights the ways in which state public utility commissions can be leaders in the clean-energy transition. However, these commissions have been slow to take on this role, often explained by a distinction between the focus of energy versus environmental law. This Feature challenges this assumed divide and encourages state public utility

commissions to step into their potential to facilitate transformative change for clean energy and the climate. To do so, this Feature looks to history, studying the role of New York's Public Service Commission in curbing pollution from coal-based fuel in the 1940s and 1950s. Inspired by New York's energy transition to natural gas through the tools of public utility regulation, this Feature argues for public utility commissions to play a more significant role within state and local governments to foster a transformation again.

Finally, much in this same spirit of highlighting the essential work that occurs at the state and local level, the *Journal* honors Justice Sandra Day O'Connor in this Special Issue. There is no shortage of remarkable traits to highlight about Justice O'Connor, who made history as the first woman on the U.S. Supreme Court. However, in including this tribute in the Special Issue, we hope to highlight two additional truly remarkable aspects of her life. First, Justice O'Connor began her pathbreaking career in various positions throughout her home state of Arizona. From the state legislature to her first position on the bench in Maricopa County Superior Court and eventually the Arizona Court of Appeals, Justice O'Connor's long-held commitment to the promise of state and local government roles is unmistakable. Additionally, Justice O'Connor retired from the bench, only to embark on another critical undertaking: fostering civic education nationwide. Her steadfast commitment to state and local governance as well as supporting democracy through civic education from the ground up is at the very heart of this Special Issue. Two of Justice O'Connor's clerks, Judge Michelle Friedland and Professor Justin Driver, honor her in writing about the many lessons we can learn from her, both on and off the bench.

In addition to this print publication, the *Journal's* online platform, *Forum*, dedicated a Collection to the Special Issue as well. The Essays in the Collection, *Revitalizing State Constitutions: A Turning Point for State and Federal Constitutional Rights*, discuss the power of turning to state constitutions and state courts, covering issues such as: the right to amend state constitutions (Professors Jessica Bulman-Pozen & Miriam Seifter); the de-judicialization of politics through state constitutions (Professors Mila Versteeg & Emily Zackin); the vindication of rights in state constitutions beyond the federal Constitution's floor (Justice Anita Earls); and the implications of the independent state legislature theory and federal-court review of state officers' interpretation of state election laws (Professors Leah Litman & Katherine Shaw). While not contained in the print Special Issue, we encourage readers to visit www.yalelawjournal.org/forum to read these important pieces.

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The Special Issue would not be possible without the hard work and dedication of editors across the Volume 133 masthead. First, thank you to the Volume 133 Officer Board, who have supported the idea for a Special Issue from its

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On behalf of the *Yale Law Journal*, it is our sincere hope that the Special Issue serves as another platform to spark invigorating conversation and add to ongoing debates on some of the most pressing issues facing our democracy. To commence the generative exchange of ideas on these topics, the *Journal* hosted a Special Issue Symposium on State and Local Governance from April 26-27, 2024 at Yale Law School. The Symposium gathered scholars, state supreme court justices, and state and local policymakers from across the United States to discuss the Special Issue's scholarship as well as myriad significant issues at the state and local level. Gathering a diverse cross-section of those who are passionate about these issues represents the very best of our democracy as well; ideas must be debated, exchanged, and enjoyed with one another if they are to motivate change.

As the *Journal* aims with all scholarship it publishes, we hope that the pages that follow represent merely the beginning and that we will all have the occasion to be the courageous citizens who engage in our respective laboratories of democracy, wherever that may find you.