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Beyond Congress: The Study of State and Local Legislatures

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BEYOND CONGRESS: THE STUDY OF STATE AND LOCAL LEGISLATURES

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I'd like to thank the *Journal of Legislation and Public Policy* for inviting me back to N.Y.U. I am particularly grateful to have the opportunity to sit between and learn from Bill Eskridge and Beth Garrett, who have once again demonstrated in their comments today why they are leaders in this field. I understand now what it must have been like to be a student in a class with Eskridge as the professor and Garrett as a fellow student—can you imagine what an experience that must have been?

I am going to focus my remarks on state and local legislatures, and on the legislative process at the subnational level. I think this is useful because the discussion of legislation often turns into a consideration of statutory interpretation, which typically is about courts. Of course, focusing on courts in a discussion of legislation is entirely appropriate, given the role the courts play in interpreting the products of legislation. But most legislation is never the subject of judicial consideration. The study of legislation needs to consider legislatures themselves and the processes of enacting legislation.

In his book, *Law and Disagreement*, my colleague Jeremy Waldron nicely put his finger on one of the key features of the legislature, which is its multiplicity of membership—its plurality of voices.[1] Judicial decisions represent the determinations of a single judge, or a three judge panel, or nine justices on the Supreme Court. But New York's City Council has fifty-one members, and the State Assembly has 150 members. Four hundred thirty-five men and women make up the House of Representatives. Indeed, at the federal level, you have 536 elected decision makers—Representatives, Senators, and the President—jointly engaged in making legislation.

The size of the legislature generates the collective action problems that are characteristic of any pluralistic society: How do you aggregate preferences? How do you build majorities? How do you stabilize decisions? How do you reconcile the competing values of

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1. JEREMY WALDRON, LAW AND DISAGREEMENT 10, 49–50 (1999).

representativeness, deliberation, expertise (which we may feel judges lack in substantive policy areas), and information-gathering (another area in which judges fall short and must depend on litigants), all of which characterize the legislature? Ultimately, how do the members of the legislature collaborate to produce effective governance?

One way to consider this is by studying Congress, which is something nearly all scholars of legislation do. But we should all recognize that we are a part of a federal system in which the vast majority of legislation is enacted at the subnational level. Indeed, the vast majority of governance—basically everything important except for foreign relations, economic security, and transfer payments—occurs at the subnational level. State and local governments are primarily responsible for criminal justice, public safety, education, land use regulation, and neighborhoods. The vast majority of the public's interactions with government involve local or state governments. State and local legislatures are, thus, intrinsically important to the study of American government. Moreover, the differences between the federal legislature and the subnational legislatures, and among the many state and local legislatures, provide an important perspective for considering such fundamental questions of the legislative process as the aggregation of preferences, the construction of majorities, and the stabilization of decisions.

A lot of what I do involves actually looking at how legislatures work. To be sure, I don't look at them all—with Congress, the fifty states, and thousands of county and municipal legislatures to consider, a comprehensive analysis is well beyond my individual capacity. But even a more limited consideration of the variations among state and local legislatures aids the analysis of legislatures and the legislative process.

One characteristic of legislatures at the state and local level is very strong partisan leadership—this is increasing in Congress as well, but it is still not as significant a factor in Congress as it is in some states and localities. In many state legislatures, most of the legislature is literally irrelevant. In New York, we talk about "three men in a room"—that is, the governor and the leaders of each of the two legislative houses—who make the legislative decisions; there often is no real legislative vote. The legislature uses something called the fast roll call, in which the clerk of the State Senate calls the senator listed first alphabetically, the majority leader, the minority leader, and the senator listed last alphabetically. The party leaders may cast votes for all the senators from their party unless the leader has been informed specifically that a member is absent or has chosen to break with the

party position, which is extremely rare. There was an interesting case in New York a few years ago in which the crucial vote was cast by a party leader on behalf of a senator who was in the hospital at the time the vote was taken—and who subsequently stated that he had informed his party leader that he had intended to oppose the party on the bill. The court, noting that in the legislative session in which the dispute arose 97.9% of Senate bills voted on passed on fast roll call votes, declined to disturb the outcome of the vote.[2]

The New York legislature may be an extreme case, but it is not unique in the central role that partisanship plays. Although few states give party leaders the authority to cast votes for their members, in many states the party leaders strongly dominate the legislative agenda. So, too, in most state legislatures the committee system is quite weak. Some, like New York, do not have conference committees for resolving intercameral differences; that job is left to the party leaders themselves. Most local legislatures have very weak committee systems; indeed, many have no committee systems at all. Consistent with strong party leadership and weak committees, many state legislatures employ significant centralized research staffs. California is famous for its legislative service. While in some states the research arms are relatively independent, in others they work closely with and for the leadership and don't provide services to other members of the legislature.

Another difference between Congress and subnational legislatures involves the role of legislative history in statutory interpretation. In recent years, much ink has been spilled concerning the propriety of resorting to legislative history in interpreting statutes, but that debate is largely irrelevant to state and local legislation since most states and localities have no legislative histories. There are no committee reports—particularly when there are no committees. There are few floor debates and few reports concerning floor debates. At most, legislatures may retain general statements by a bill's sponsors, newspaper accounts of the politics surrounding enactment, and perhaps a signing statement by the governor. This necessarily requires a different approach to statutory interpretation at the subnational level.

State legislative rules and practices can also affect how we think about some of the norms central to the study of legislature, such as deliberation and expertise. Many states by their constitutions limit the duration of legislative sessions to a certain number of months. In some states, for example, the legislature may be in session for just two

2. Heimbach v. State, 454 N.Y.S.2d 993 (App. Div. 1982).

months out of every two years. Limits on state legislative sessions have been liberalized in recent years, but there still are a number of states where legislative sessions are just 60 days—that's it. They've got to get their lawmaking business done in a very short time.

The combination of strong party leadership, the absence of committees, and temporally limited sessions can result in very fast action. One of the themes that looms large in the literature about legislatures and legislative processes is deliberation, but there isn't a lot of deliberation in state and local legislatures. There may be a negotiation session with the three men in a room, but there is not a great deal of public deliberation in legislative committees or the legislature itself.

The possibilities for deliberation at the local level may also be limited by the absence of bicameralism. Legislative scholars struggling to make sense of bicameralism in the era of one person, one vote, where both houses of a state legislature are elected by the same electorate to represent the same electorate, have focused on the role that bicameralism can play in promoting deliberation. By requiring a bill to pass two legislative houses, the bicameral structure increases the opportunity for dialogue, debate, and the discovery and correction of whatever flaws may exist in a legislative proposal. But all local legislatures are unicameral; whatever deliberation occurs has to occur in a single chamber. I am not aware of any studies of how this affects the quality of legislative outputs, but it does change the dynamic of the legislative process.

Legislative expertise is increasingly shaped and constrained at the subnational level by legislative term limits. There are no term limits on members of Congress, but many state and local legislatures are subject to term limits. In the 2001 election, two-thirds of the membership of the New York City Council—as well as the office of Mayor—turned over because of term limits.[3] Suddenly, New York City's legislative process was in the hands of freshmen. The new speaker of the City Council was in just his sixth year on the Council, but, as a result of term limits, he was also one of the Council's most senior members.

Another distinctive feature of local legislatures is their frequent focus on very narrow, specialized matters. One of the goals of legislative reform has been to get legislatures to think broadly about policy questions rather than to write laws for specific individuals. In an effort to promote public interest-oriented lawmaking, most state consti-

3. Scott Shifrel, *Council Gets a Makeover: New Faces to Fill 38 Seats*, DAILY NEWS (New York), Nov. 7, 2001, at 29.

tutions ban what is called special legislation. At both the state and national levels, legislatures have generally gotten out of the business of issuing pensions to individuals, granting divorces, or resolving individual immigration disputes. Local legislatures are engaged with narrowly focused matters all the time—they are busy renaming streets, rezoning individual plots of land, and handling other very minor matters. They are legislatures, but they are frequently concerned with a very different type of legislation.

For many local legislatures, and for some state legislatures, an important question is whether legislative membership is considered a full-time or a part-time activity. This affects the salaries members are paid, conflict of interest rules and other ethical norms, and other aspects of legislative behavior. A state or local legislature—where many members are engaged in an outside legal practice or in running an insurance or real estate agency—may be more closely connected to the public than a legislature composed solely of full-time legislators, but the members' outside business activities also complicate their ability to promote the public interest. In short, state and local governments raise interesting and difficult issues concerning legislative deliberation, expertise, interest issues about representativeness, and public-interest models of legislative decision making.

The study of subnational legislative bodies also gives us some perspective on separation of powers questions, particularly on the relationship between the executive and legislative branches. When legislation scholars talk about the separation of powers, they are often focused on the relationship between the political branches and the courts. But executive-legislative relations have important implications for legislation since the veto-wielding executive is a crucial member of the legislative decision-making process, even though he or she is not technically part of the legislature.

State and local governments have developed veto structures that can vary sharply from the federal veto structure. At the national level, the president's veto power is a fairly blunt instrument. The president can veto a bill or not, but has no opportunity to modify a bill once it has emerged from Congress. In the vast majority of states, however, the governor has an item veto for budgetary matters, which enables the executive to pick a bill apart by vetoing some sections, deleting portions of a bill while accepting the rest.[4] This presents an interesting challenge to theories about legislative bargaining and logrolling.

4. Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1175 (1993).

Some theorists view the legislative process as a form of multimember bargaining where certain provisions are included to gain the consent of legislators whose votes were required for a bill to pass. It is impossible to pick apart the elements of the bargain after a bill is enacted and conclude that the bill would still have become a law even if a certain provision were deleted. In the many item veto states, however, the governor can rewrite the legislative bargain, and unless two-thirds of each house of the legislature disagree, the governor's version becomes the law.[5]

This raises another interesting question. The legislature knows the governor has the power to rewrite a budget bill and delete key elements: Why do they let this happen? What is the point of putting something in a bill if the legislature cannot protect it from a gubernatorial veto? Why doesn't the legislature get the governor's agreement in advance, and condition their passage of what the governor wants on the governor's acceptance of the budget bill as they pass it? This may happen some times, but often the governor's item veto is a surprise that can undo deals made within the legislature.

Some states utilize other interesting permutations of the veto. Illinois and New Jersey, for example, have what is called the amendatory or suspensory veto.[6] The governor effectively says, "I won't accept the bill as it currently stands, but if you change it the following way, it's accepted." The governor actually submits the language to the legislature. If the legislature accepts the governor's changes, the bill becomes a law. In a sense, the governor becomes an initiator of legislative language with the legislature merely responding to the governor's proposal. It's an interesting flip of the traditional relationship between the executive and the legislature.

Indeed, in some areas the executive plays a key role in initiating the legislative process. In adopting budgets, for example, some states have constitutionalized a leading role for the governor. The governor is authorized to draft the state's budget and the legislature must react to the executive's budget before it can consider any budgetary actions of its own. The governor sets the budgetary agenda and the legislature must work with the governor's proposal. Moreover, given the central role of the budget in shaping a state's general legislative program, the executive budget may set the agenda for much of the legislative process. In many cities, the pattern is the same, with the Mayor setting

5. *Id.* at 1176, 1181.

6. Daniel S. Strouse, *The Structure of Appropriations Legislation and the Governor's Item Veto Power: The Arizona Experience*, 36 ARIZ. L. REV. 113, 119 n.25 (1994).

the budgetary and legislative agenda, and the City Council reacting to mayoral initiatives. In these states and cities, the usual assumptions about the roles of executive and legislature in the legislative process are reversed.

States and localities depart from the federal model of separation of powers in many other ways. Some states allow the legislature to participate in the executive process by providing for legislative appointments or joint executive-legislative appointments to administrative agencies, or by enabling legislators or their designees to sit on certain administrative agencies. Many important policy matters are resolved at state and local levels by executive order. At the local level there is often a complete blurring of the distinction between executive and legislature. Many localities do not even have a chief executive. They may be governed by a multimember commission or council rather than a single executive. In these settings, lawmaking and administration, and legislation and regulation, are fused.

Finally, our understanding of the legislative process at the subnational level is complicated by the existence of various institutions that provide for broader popular participation in lawmaking, and thus create alternatives to the legislature. These alternatives include direct democracy, elected judiciaries, and relatively easy procedures for amending state constitutions.

One of the hallmarks of governance at the state and local level is direct democracy. Nearly all states provide for voter referenda for at least some measures, particularly for certain fiscal matters such as bond issues. With a referendum requirement, a bill passed by the legislature and signed by the governor will not become law unless also approved by the people. Many states also provide for optional referenda. Even if a bill has been enacted into law its effect can be suspended if opponents secure enough signatures to force a popular referendum on the new law; at the referendum, a popular majority against the law can nullify it. Even more dramatically, about half of the states provide for voter-initiated legislation. If supported by enough petition signatures, a proposal for new legislation or a constitutional amendment can be placed on the ballot. If the voters approve the measure, it becomes law even though it has never been considered, let alone approved, by the legislature. This can have a powerful impact on legislation. For more than twenty-five years, government and politics in California, our largest state, have been strongly shaped by voter initiatives, which have curbed taxes, changed the procedures for adopting new taxes, mandated new expenses, imposed term limits, and addressed campaign finance laws. Voter initiatives give the voters, or

perhaps those interest groups who are able to mobilize large groups of voters, a direct say in the making of law.

State and local legislation is also subject to implementation and interpretation by elected judges. The vast majority of state judges are elected—mostly for long terms, but usually for much shorter terms than the life tenure enjoyed by federal judges. Moreover, judicial elections are increasingly politicized; judges and judicial candidates raise significant funds and campaign for votes, and other organizations engage in substantial independent spending efforts to support or oppose the election of particular judges. Additionally, state judges may participate in legislation not only by interpreting legislative end-products but also by issuing advisory opinions about the constitutionality of pending legislative proposals. The United States Supreme Court has stated that federal courts may not issue advisory opinions,[7] but advisory opinions are available to state supreme courts in many states, and legislatures in those states may ask courts for comments on legislative proposals—which can include approval, disapproval, and approval in part and disapproval in part—prior to enactment.

Finally, legislation at the state level may be affected by the very detailed nature of most state constitutions. This relates to my earlier point about direct democracy, because many state constitutions can be amended by voter initiative, and such measures certainly contribute to the length and substantive detail of state constitutions. But detailed constitutions are not limited to states with the initiative; nearly all state constitutions are far longer and contain far more provisions mandating or constraining substantive policies in crucial areas such as taxation, finance, law enforcement, and the delivery of public services. California, for example, mandates that a substantial portion of the state budget go to education.[8] This can directly affect the substance of state lawmaking and state budgets. Many state constitutions also impose special procedural rules, such as supermajority rules for new taxes or tax increases, that affect legislative process as well as substance.

I hope these comments provide a sense of the richness and complexity of lawmaking and governance at the state and local level. We are a federal system, but most scholarly analysis is focused on the national government. Greater study of legislative structures and procedures outside the federal government can give us a far better sense of the many alternative ways of designing and reforming legislative processes and making legislation.

7. United States Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446 (1993) (citing Preiser v. Newkirk, 422 U.S. 395, 401 (1975)).

8. *See* CAL. CONST. art. XVI, § 8 (amended 1988).