

INTRODUCTION

Pop quiz. Name the president of the United States.

Got it? That was easy.

How about your two United States senators? Your member of the House of Representatives? Bravo if you're still scoring 100 percent.

Now they get trickier. Name your mayor. Name a member of the school board. Not all of them—just one.

Give up yet? How about a member of the county governing board? The local planning commission? The local zoning board? The special authority that delivers your water?

Anyone picking up this book is probably better informed than the average person. Yet can even the most sophisticated

reader answer all of those questions? (I'm the author, and I was stumped after the fourth question.) We all know who our national elected officials are, but as they get closer to home, the image gets a bit fuzzier. It is a sad commentary on the state of our representative democracy that a majority of Americans probably don't know who their two U.S. senators are. When it comes to local officials like county board members and planning commissioners, the vast majority of people probably don't even know they exist, much less their identities.

And yet, it is not as if those individuals are unimportant. To the contrary, on essential matters of vital importance to every American—the quality of our children's schools; the capabilities of police and fire departments; the provision of water, electricity, and sewage services; the amount of sales and property taxes—those local officials whose names and faces we don't even know are far more consequential to the intimate aspects of our everyday lives than the president.

Indeed, our nation was designed that it be so. Initially, we were a confederation of state governments that bound together for common but limited national purposes. From that initial experiment, we created a constitution intended to create a national government of limited and defined powers while keeping most government close to home where we could keep an eye on it.

Things haven't worked out exactly as planned with regard to the first of those two constitutional objectives. We have a huge national government whose power is largely unchecked. Indeed, when most Americans think of "big government," surely the image they conjure is our massive, remote, avaricious national capital.

In reality, the national government has downsized somewhat since the Reagan era. But President Bill Clinton had it

wrong when he declared that the era of big government was over.

It just moved to the suburbs.

In a perverse sense, Americans have achieved their objective of primarily local government: The combined bulk of state and local government now exceeds that of the entire federal government—even including the military—in both size and spending. Furthermore, even as the national government shrinks or stays relatively stable in size, state and local governments are growing—in size, number, wealth, and power. And while they may be close to home, most Americans are decidedly *not* keeping an eye on them. Though we care deeply about who our president is, most of us could not care less about the nameless, faceless officials who run our local governments.

That is a big mistake. While the national government has the power to infringe upon the rights of Americans—and does so frequently, and often with impunity—state and local governments often pose an even greater threat, both because their actions touch more intimately the everyday lives of ordinary Americans, and because of their very invisibility. If the president starts an unpopular war or raises taxes, people know who to blame and they direct their energy accordingly. But if your kid gets a lousy education in public school, or your local government decides to exercise eminent domain to take your home or business, it is often impossible even to find out who is responsible, much less how to fight it. Someone figured all that out long ago when coining the adage, “You can’t fight city hall.”

Fortunately, you can—but it’s rarely easy, and never painless. Supposedly, in our federalist system we revere local government because we can better control it. But too often the rules are rigged in favor of government—and particularly

local government. Ordinary Americans are usually no match for special-interest groups whose sole purpose is to manipulate the power of government for their own benefit. Courts are reluctant to disturb local government prerogatives except in the most extraordinary circumstances—even if the government officials involved are democratically unaccountable. Fighting local government can be like banging your head against a wall.

My colleagues and I at the Institute for Justice sue bureaucrats for a living. Representing David against the governmental Goliath, we provide the legal slingshot. We find that when someone's rights are infringed by government, it usually takes place at the hands of some state or local government official. One of the purposes of this book is to share our experiences, both to illustrate the grave threat that state and local governments pose to liberty, and to demonstrate that it is possible to fight back.

My own interest in what I have come to call grassroots tyranny stems from two episodes earlier in my life. The first occurred when I was a teenager in Linden, New Jersey, a suburb of New York City. Linden was (and decades later, still is) dominated by a corrupt, venal Democratic political machine that controlled every facet of political life in the city, from taxes to contracts to abundant patronage. At its helm was the autocratic mayor, John T. Gregorio.

Growing up with an interest in politics, and displaying an affinity for the underdog that continues to this day, I aligned myself with the sole Republican on the 11-member city council, a retired insurance executive named Joseph P. Locascio. The avuncular Locascio became not only my political mentor but almost a surrogate dad, vowing to me with a grin, "I'll make a Sicilian out of you yet." He taught me to value principle and integrity above partisanship and political power,

quipping, “if you vote for the donkey or the elephant, that’s what you get.”

Well ahead of his time in the 1970s, Locascio championed such populist reforms as an elected board of education and term limits for elected officials. The machine did not pay much heed to Locascio’s often quixotic efforts—until he succeeded in enacting, through a voter initiative, an elected school board, thereby depriving the machine of a huge source of patronage.

As it always does, the empire struck back, engaging in a savage personal smear campaign that nearly ruined Locascio’s reputation in Linden. I watched in horror as a man I respected beyond any other was laid low by vicious bullies for whom the ends justified the means. Valuing his good name and family over his political career, Locascio resigned and moved out of town, removing the only political thorn from the side of the machine.

Subsequently, Mayor Gregorio was convicted of various acts of corruption, stripped of his political offices (he also served as a state senator), and sentenced to jail. But politics in New Jersey transcends partisan lines, and a Republican governor, Thomas Kean, pardoned Gregorio, who was once again elected mayor of Linden, where he presides to this day.*

While in law school at the University of California at Davis, I encountered grassroots tyranny of a different sort. The city of Davis, like many other college towns, leans politically to the fringe left. In the early 1980s, left-wing activists led by Jane Fonda and Tom Hayden created an organization called the Campaign for Economic Democracy (CED), whose mission was to effectuate a redistribution of society’s wealth.

*In college, I wrote my political science honors thesis about Linden’s political machine. I attended Drew University, whose current president is none other than the same Tom Kean who pardoned Gregorio.

The method they chose to achieve that goal was not national politics, but *local* politics, a strategy built upon two critical insights: (1) that it is easier to dominate local rather than national politics; and (2) that local government has the greatest control over society's wealth.

CED set out to seize power in local governments, and they did just that in cities such as Berkeley, Santa Monica, and Davis. Then came the agenda: rent control, regulations on the use of property, campaign contribution and spending limits, minimum-wage increases, antispeculation ordinances, and the like. College towns in California became little socialist utopias, and so they largely remain to this day.

Fortunately, while in law school I also took a course in local government, and learned that there are two powerful weapons for combating grassroots tyranny. The first is the 14th Amendment to the U.S. Constitution, which guarantees the privileges or immunities of citizenship, equal protection, and due process. The second is a wonderful federal statute that ought to have a respectful name but only has a number: 42 U.S.C. § 1983. This law allows private individuals to sue state or local government officials who violate federal constitutional rights while acting “under color of state law.” (Happily, under another provision, successful litigants can collect attorney fees, too.) As I studied all of this, the lightbulbs started switching on. In § 1983, I saw the path to a very rewarding (if not particularly remunerative) legal career.

“Wait a minute,” you might ask, “how can a self-professed libertarian champion the invocation of national power against innocent and defenseless local governments? Doesn't that violate the basic precepts of federalism?”

Good question, and one that vexed me for a long time, until I began investigating what federalism was all about. Like most people, I reflexively thought of federalism as synony-

mous with “states’ rights.” So to use national power in a way that trenched upon state sovereignty must conflict with federalism.

Not exactly, it turns out. The framers were deeply concerned about the expansion of national power, and they created a number of mechanisms (among them federalism) to prevent this expansion. But they also keenly understood the tendency of local governments to abuse individual rights. Indeed, the propensity of states to enact protectionist trade barriers was one of the greatest motivations for replacing the Articles of Confederation and creating a stronger national government in the first place. A fundamental purpose of the Constitution was to provide a check against state governments that indulged parochial interests above individual liberty and the general welfare.

Still, the framers believed that between the two governments, the states would be the more reliable guardians of individual liberty. Federalism was seen not as a means of protecting state sovereignty as an end in itself, but as a means of achieving the greater end of safeguarding individual liberty. As a result, the original constitution narrowly defined the powers of the national government, while the Tenth Amendment reserved to the states all residual governmental powers.

Over time, however, the premise underlying that system — that states were the more reliable guardians of liberty — proved incorrect, particularly when, acting under the mantle of states’ rights, they sought to preserve the greatest nullification of individual liberty, the institution of human slavery. Following the Civil War, the tapestry of federalism was reworked through the enactment of the 14th Amendment, which guaranteed against state abuse the privileges or immunities of citizens, equal protection under the law, and due process of law. The 14th Amendment, when conjoined with

other provisions of the Constitution that preserved state autonomy, created a mutual balance of power between the states and the national government, aimed at protecting individual liberty.

Ultimately, a balanced and comprehensive examination of the American concept of federalism yields an important insight: that the notion of states' rights is an oxymoron. States do not have rights. States have powers. People have rights. And the purpose of federalism is to ensure that government at every level abides those rights.

I first wrote about this topic a decade ago in a book published by the Cato Institute called *Grassroots Tyranny: The Limits of Federalism*.¹ By that time, I had been practicing law at the Institute for Justice for two years, and had already witnessed (and challenged) a number of abuses of state and local government power. Over the years, I have heard from a number of people who have read *Grassroots Tyranny*. The common thread binding all of these readers together is that each one, whether liberal or conservative, has found within it at least *some* example of grassroots tyranny that strikes personally close to home. It is from that convergence of experience that I hope will flow greater concern, among both liberals and conservatives, about the scope and abuse of government power in our own backyards.

In this book, I revisit *Grassroots Tyranny* from the vantage point of two decades in the litigation trenches.* If anything, my initial concerns have grown. Local government is at once more voracious, far-reaching, and recklessly deployed than I ever realized. And increasingly it is wielded by officials and

*Prior to cofounding the Institute for Justice in 1991, I challenged abuses of local government power at the Mountain States Legal Foundation; the U.S. Department of Justice, Civil Rights Division; and the Landmark Legal Foundation Center for Civil Rights.

entities that are virtually invisible to most of the public. It is the experiences of ordinary Americans locked in combat with their local governments—and the insights that my colleagues and I have gained from those experiences—that provide the bulk of this book.

My colleagues and I have litigated most of the cases discussed in chapters 4–6, mostly successfully, sometimes not. Some that we lost in court, we won in the court of public opinion. Local government often commits its misdeeds under cover of public darkness; but like the demons of folklore, it doesn't stand up well to the light of day.

I think I can make one prediction safely: Almost everyone reading this book will find that some of the stories of grassroots tyranny infuriate them, while others make them want to stand up and cheer. To counter that instinct, I use the first two chapters to set the stage by discussing the principles underlying our constitutional system of federalism, and by making a plea for consistent application of those principles. Grassroots tyranny finds fertile soil in the uneven application of the rules designed to protect our freedom. Even if we sometimes are offended by the way some people exercise their freedom, we must scrupulously protect their freedom if we are to have any prospect of protecting it for ourselves.

Since writing *Grassroots Tyranny*, I have developed a greater appreciation for the tools that are available to combat infringements of liberty by state and local governments. So in addition to raising an alarm, I hope to provide a fairly optimistic assessment of the prospects for retethering local governments to their proper bounds of power. I hope that you will find the pages to follow illuminating and useful—and worth doing something about.