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BOOK REVIEW

LEVIATHAN: THE FEDERAL REPUBLIC AND THE CHALLENGE TO FREEDOM

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In an age of transparency, let me make clear at the outset of this review of Clint Bolick's latest book, *Leviathan*,¹ that the author and I have co-labored in the legal vineyards, including most recently in the closely watched wine litigation.² The issue that specific case presents is whether states may, by virtue of the Twenty-first Amendment, discriminate against out-of-state wineries wishing to ship directly to consumers.³ The broader issue, which unifies Clint Bolick's wide-ranging work, is freedom—freedom of trade in the national economic union. Prior to that intriguing (and still unfolding) episode, he and I were (and still are) colleagues over the course of many years in the school choice battle, culminating in the Supreme Court's milestone decision in *Zelman v. Simmons-Harris*,⁴ and in Bolick's book, *Voucher Wars*.⁵ The underlying issue, again, is freedom—freedom to choose the right school for one's children.

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¹ CLINT BOLICK, *LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY* (2004).

² The litigation culminated in *Granholm v. Heald*, 544 U.S. ____, ____, 125 S. Ct. 1885 (2005), which the Supreme Court decided this term. *Granholm* is a consolidation of three conflicting lower court decisions concerning the constitutionality of laws that restrict interstate shipment of wine to consumers. See *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004) (upholding the constitutionality of New York's regulatory scheme under the Twenty-first Amendment), *cert. granted in part*, 124 S. Ct. 2391 (2004); *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) (holding that Michigan's regulations were discriminatory and violated the Commerce Clause), *cert. granted in part sub nom.*, *Granholm v. Heald*, 541 U.S. 1063 (2004), *and cert. granted in part sub nom.*, *Michigan Beer & Wine Wholesalers Ass'n v. Heald*, 541 U.S. 1062 (2004).

³ See *Granholm*, 544 U.S. at ____, 125 S. Ct. at 1895. The case interestingly pits two parts of the Constitution against each other. See *id.* The Twenty-first Amendment purports to grant states broad authority over the sale, importation, and distribution of alcohol within their borders. See U.S. CONST. amend. XXI, § 2. On the other hand, the Dormant Commerce Clause acts as a safeguard against protectionist laws that discriminate against out-of-state businesses in order to favor local industry. See, e.g., *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984) (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 329 (1977)).

⁴ 536 U.S. 639 (2002).

⁵ CLINT BOLICK, *VOUCHER WARS: WAGING THE LEGAL BATTLE OVER SCHOOL CHOICE* (2003). Again, in the spirit of transparency, in this book, Bolick was kind enough to compliment this reviewer.

With that brief excursion into full-disclosure land, let me say that Clint Bolick has stood firmly and consistently on the side of liberty in the face of governmental intrusions and compulsions. His is a strong presence in American law and culture, and one need not guess where he will take his stand. He is grittily determined to enlarge the sphere of individual freedom and contract the liberty-draining sphere of compulsion and coercion. He is the champion of the little person suffering from constraints—and coercive institutions—that stifle opportunity and initiative. Bolick, in short, is a committed libertarian. Not surprisingly, he finds himself in issue-by-issue, ad hoc coalitions—of which he is a master builder—with individuals and organizations that might not otherwise find common ground. Not all of Bolick's allies on school choice will join him, say, in his property-rights initiatives, and vice versa.⁶ The coalitions rise and fall, ebb and flow, but Bolick's polestar remains the same. *Leviathan* is a variation on the Bolickian theme of liberty—the threat to human freedom can come from close to home, from state and local governments.

I

A foundational principle of the American experiment, one emphasized throughout the 1990s in Rehnquist Court jurisprudence,⁷ is that ours is a federal republic.⁸ What happens in Albany and Sacramento (or other state capitals) is vitally important to the well-being of the people in the several states. It counts who is Governor, or Attorney General, and who enjoys control of the state legislature. Who these people are counts for so much because of the Founders' determination that the central government would be, as every civics student knows, one of enumerated powers.⁹ It will not do for Congress, for example, simply to take over the education system, or the police func-

⁶ To give one example, the NAACP filed an amicus brief opposing Bolick on school vouchers in *Zelman*, see Brief of the NAACP Legal Def. & Educ. Fund, Inc. & the NAACP as Amici Curiae in Support of Respondents, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Nos. 00-1751, 00-1777, 00-1779), but filed a brief supporting Bolick's colleagues, who represented private property owners in the recent eminent domain case, *Kelo v. New London*, 843 A.2d 500 (Conn. 2004), *aff'd*, No. 04-108, 2005 WL 1469529 (U.S. June 23, 2005), see Brief of Amici Curiae NAACP et al., *Kelo v. New London*, No. 04-108 (U.S. granted cert. Sept. 28, 2004).

⁷ See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (limiting scope of federal power under Commerce Clause); *United States v. Lopez*, 514 U.S. 549 (1995) (same); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (narrowing definition of Fourteenth Amendment congressional enforcement power over states); *Printz v. United States*, 521 U.S. 898 (1997) (strengthening states' Tenth Amendment protections against federal intrusion upon their sovereignty); *New York v. United States*, 505 U.S. 144 (1992) (same).

⁸ See THE FEDERALIST No. 51, at 338–41 (James Madison) (Random House 1941).

⁹ See THE FEDERALIST No. 45, at 303 (James Madison) (Random House 1941) (“The powers delegated by the proposed Constitution to the federal government are few and defined.”).

tion, or the law of domestic relations. Drawing the lines separating the appropriate exercise of national power from an assault on state prerogatives is a painstaking, enduring issue in constitutional law. But what undergirds all this is a sense that securing power close to the people is presumptively good.

Justice Louis Brandeis famously praised the virtues of decentralized control in his much-cited *New State Ice* dissent:

There must be power in the States . . . to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs Denial of the right to experiment may be fraught with serious consequences to the Nation. 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.¹⁰

To Justice Brandeis, one of the chief benefits of a federal republic was state and local governments' ability to respond to specific needs in innovative ways.¹¹ And, as originally drafted, the Bill of Rights was consistent with this view.¹² Both the Ninth and Tenth Amendments set forth explicitly what was already implied in the doctrine of enumerated powers: Sovereignty rests with the people, the people delegate specific powers to the federal government, and the remaining powers default to the states.¹³ Under this historic arrangement, the states were to be the primary guardians of individual liberty.¹⁴

At the close of the Civil War, however, it was utterly untenable to entrust the states with unsupervised responsibility for individual rights. Slavery had made it appallingly evident that the states must be held accountable to a federal standard.¹⁵ The Fourteenth Amendment, in combination with the nationalizing events of the twentieth century (particularly the Great Depression), worked a major shift in power away from the states and toward the federal government.¹⁶ At the same time, Congress exercised its commerce power to foster a national economic union and protect it against balkanizing tenden-

¹⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹¹ *See id.*

¹² *See* BOLICK, *supra* note 1, at 34.

¹³ *See* U.S. CONST. amends. IX, X; BOLICK, *supra* note 1, at 34–37.

¹⁴ *See* BOLICK, *supra* note 1, at 34–37.

¹⁵ *See id.* at 37–42.

¹⁶ *See id.* at 41 (noting that new power to “curb state abuses of rights” the Fourteenth Amendment granted the federal government); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 43 (2004) (discussing the choice in power from the states to the federal government resulting from the New Deal).

cies.¹⁷ These developments severely curtailed the states' ability to conduct "social experimentation."

There were those who called for even greater centralization. Most obviously, President Franklin D. Roosevelt, through the New Deal, sought to provide security to the American people through myriad federal programs.¹⁸ The Works Projects Administration, Social Security Administration, and the National Labor Relations Board are only a few familiar examples.¹⁹ Yet Roosevelt envisioned even more federal hegemony, as explained by Cass R. Sunstein in his recent book, *The Second Bill of Rights*.²⁰ Professor Sunstein focuses on Roosevelt's State of the Union Address in 1944, in which the President called for further expansion of fundamental economic rights.²¹ Included in Roosevelt's vision were rights to meaningful employment, adequate wages, satisfactory medical care, and a good education.²² Though Congress never officially adopted these rights, Professor Sunstein points out that many Americans still look to the federal government for the creation and maintenance of these sorts of centralized privileges.²³

Yet the ghost of Justice Brandeis still walks. Amid the centralization movement are heard countervailing calls for greater respect of state prerogatives and the inviolability of state structures. More recently, the 1990s witnessed the apparent triumph of structural federalism in an impressive (and deeply controversial) march of Supreme Court cases. In divided rulings such as *United States v. Lopez*²⁴ and *United States v. Morrison*,²⁵ the majority forcefully pushed the pendulum back in favor of state power, limiting Congress's authority under the Commerce Clause. This victory for state autonomy, however, has not gone unchallenged. To the contrary, mighty arguments have been advanced that the *Morrison* decision, and others like it (such as *Lopez*), are major steps backward for individual liberties. Martin Garbus, in his book *Courting Disaster*,²⁶ suggests that it was the states' failure to protect battered women that prompted the federal legisla-

¹⁷ See SUNSTEIN, *supra* note 16, at 55 (discussing the conflict between the Supreme Court and the Roosevelt Administration over New Deal legislation and the eventual expansion of the Court's interpretation of Congress's power under the Commerce Clause).

¹⁸ See *id.* at 44–53.

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.* at 9–16.

²² *Id.* at 13.

²³ See, e.g., *id.* at 62–64.

²⁴ 514 U.S. 549 (1995).

²⁵ 529 U.S. 598 (2000).

²⁶ MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* (2002).

tion at issue in *Morrison*.²⁷ Faced with the manifest, undeniable problem of violence against women, the Supreme Court nonetheless refused to uphold the obvious default option: federal enforcement.²⁸ Garbus viewed *Morrison* as a stirring victory for “states’ rights” at the expense of individual liberty, relegating battered women to seek protection from the same states that had already failed them.²⁹

II

In *Leviathan*, Bolick approaches the issue of federalism from a different angle. Not only do state and local governments fail to protect individual liberties, but often those same governments engage in active abuse of individual rights.³⁰ Pointing out the relative ease with which small majorities gain control of local government, Bolick echoes James Madison’s warning in *Federalist 10*: Popular government is too easily guided “not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.”³¹ The danger that specialized interests will work to the abuse of individual liberties is nowhere more apparent, Bolick posits, than in local government.³² Few Americans know the individuals who serve in their local government, how they got there, or what exactly they do.³³

Leviathan is presented in three parts. Bolick begins with a discussion of federalism in general: its design, evolution, and application to protect individual liberties.³⁴ From there, Bolick relates a number of his personal experiences with the Institute for Justice³⁵—examples of how he has fought for individual rights against the “grassroots tyranny” of local government.³⁶ Bolick concludes with a brief discussion of what can and, in his view, must be done to rein in local govern-

²⁷ *Id.* at 139–46.

²⁸ *See id.* at 143–46.

²⁹ *See id.*

³⁰ *See* BOLICK, *supra* note 1, at xiv–xix.

³¹ THE FEDERALIST No. 10, at 54 (James Madison) (Random House 1941); *see* BOLICK, *supra* note 1, at xiv–xix (discussing Bolick’s concept of “grassroots tyranny”).

³² *See* BOLICK, *supra* note 1, at xi–xiii.

³³ *Id.*

³⁴ *See id.* at 3–65.

³⁵ The Institute for Justice is a libertarian public-interest organization that Bolick co-founded in 1991. *See* Inst. for Justice, Staff Biographies: Clint Bolick, at <http://www.ij.org/staff/bolick.html> (last visited Apr. 24, 2005). In 2004, Bolick became president and general counsel of the Alliance for School Choice, but he has remained affiliated with the Institute for Justice as counsel for strategic litigation. *Id.* In that capacity, he argued the *Granholtm* case before the Supreme Court this term. *See* *Granholtm v. Heald*, 544 U.S. ____, 125 S. Ct. 1885 (2005).

³⁶ BOLICK, *supra* note 1, at 67–154.

ment.³⁷ The courts serve as the Bolickian-preferred avenue of recourse.³⁸

A. Local Government and the Purpose of Federalism

Bolick begins his work with a general description of local governments nationwide: growing in number, virtually invisible, and intimately involved in our daily lives.³⁹ State and local governments spend more money and employ more workers than the federal government.⁴⁰ Positions on influential local bodies such as school boards, water districts, and zoning commissions are often filled by executive appointment or low-turnout elections.⁴¹ As a result, the entities responsible for setting property taxes, regulating local business, and overseeing public education are largely unknown, unaccountable, and particularly susceptible to control by organized interests.⁴² In Bolick's pessimistic vision, the unobserved, pervasive power of local government poses a significant threat to individual liberty.⁴³

Having signaled the danger that local governments pose to individual freedom, Bolick sets forth a useful reminder of the history and purpose of federalism.⁴⁴ Federalism, he explains, is primarily concerned with *individual liberty*.⁴⁵ The federal and state governments are set against one another, not to protect their own respective powers, but to defend the rights of individuals.⁴⁶ When one level of government oversteps its bounds, the other acts as a counterbalance.⁴⁷ Early on, federalism expressed a preference for decentralized decisionmaking, as evidenced by the Ninth and Tenth Amendments.⁴⁸ Under that early model, as we have seen, the states constituted "natural guardians" of individual liberty.⁴⁹ But, as our national experience tragically demonstrated, this trust proved profoundly ill-founded.⁵⁰ As a rem-

³⁷ See *id.* at 157-73.

³⁸ See *id.* at 159-60.

³⁹ See *id.* at xi-xiii.

⁴⁰ See *id.* at 7, 11.

⁴¹ See *id.* at 17-18 (discussing "special districts," governmental entities designed to provide specific services such as schooling, electricity, or transportation).

⁴² See *id.* at 20-22 (discussing the ways in which special districts are prone to being captured by business interests); see also *id.* at 148 (noting that urban public school systems are "especially sensitive to special-interest manipulation").

⁴³ See *id.* at 24 ("The propensity of local governments toward grassroots tyranny has been recognized since the earliest days of our republic, but never have the implications for individual liberty been more profound than they are today. Fighting city hall has become a Daniel versus Goliath struggle.").

⁴⁴ See *id.* at 25-65.

⁴⁵ *Id.* at 28-30.

⁴⁶ See *id.* at 29.

⁴⁷ See *id.* at 33-34.

⁴⁸ See *id.* at 36.

⁴⁹ See *id.*

⁵⁰ See *id.* at 36-39.

edy, the Fourteenth Amendment conferred unprecedented powers on the federal government to check state violations of individual liberties.⁵¹

Shortly after its adoption, however, the Fourteenth Amendment was seriously constrained in the *Slaughter-House Cases*,⁵² which, in Bolick's words, "gutted" the Privileges and Immunities Clause.⁵³ Bolick suggests that had *Slaughter-House* been decided differently, the Privileges and Immunities Clause would have served to protect fundamental rights, such as economic liberty, that are currently subject to abuse by state and local governments.⁵⁴ As it is, the Supreme Court is still free to apply the principles of federalism in defense of individual liberties, but does so in what Bolick discerns to be a frustratingly ad hoc manner.⁵⁵ Bolick expresses concern that liberal and conservative Justices alike resort to the doctrine when it comports with their personal preferences.⁵⁶ As examples, Bolick cites *Romer v. Evans*⁵⁷ and *Bush v. Gore*.⁵⁸ *Romer* had the liberal members of the Court standing up for the individual rights of homosexuals against the voting majority, while the conservative members of the Court objected on federalism grounds.⁵⁹ Yet in *Bush*, the tables were turned. There, the conservative members of the Court advocated the rights of individual voters against the state supreme court, while the more liberal Justices waved the flag of federalism.⁶⁰ On the whole, Bolick argues, this inconsistency undermines the power of federalism and erodes individual liberty.⁶¹

B. The Ground Battle for Individual Liberties

Having described federalism's purpose and design (and how it is often misapplied), Bolick then relates several stories from his personal experience.⁶² These examples are organized according to the differ-

51 *See id.* at 39-41.

52 83 U.S. 36 (1872).

53 BOLICK, *supra* note 1, at 44.

54 *Id.* at 45-46.

55 *See id.* at 54-64.

56 *See id.* Bolick terms the liberal Justices' approach to federalism "situational federalism," claiming "its proponents essentially defer to state prerogatives except when they don't." *Id.* at 50. Similarly, Bolick labels the conservative Justices' approach "the Jurisprudence of Selective Intent" because, in Bolick's view, conservatives apply principles of original intent only to "constru[e] government powers and the powers of the majority broadly and individual rights narrowly." *Id.* (quoting STEPHEN MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 25 (1987)).

57 517 U.S. 620 (1996).

58 531 U.S. 98 (2000).

59 *See* BOLICK, *supra* note 1, at 61-62.

60 *See id.* at 62-63.

61 *Id.* at 64-65.

62 *See id.* at 69-154.

ent liberties that Bolick has defended against perceived government abuse: freedom of commerce, property rights, free speech, and the like.

Freedom of commerce is one liberty Bolick has seen recurrently abused by state and local governments. Local governments restrict entrepreneurship and start-up businesses by means of regulations, licensing requirements, and fees.⁶³ Often the boards and agencies that control access to a trade are governed by members of the established business community—who, unsurprisingly, are not eager for new competition.⁶⁴ As a result, would-be enterprises, such as African hair-braiding shops, commuter-van services, and local wineries are seriously restricted, sometimes into nonexistence, by protectionist, inflexible municipal governments—governments that easily fall prey to control by the established cosmetology, transportation, or liquor industries.⁶⁵ To make things worse, Bolick says, the Supreme Court's "rational basis" test provides precious little relief from grassroots tyranny.⁶⁶

Not only do local governments stifle competition and market choice, but they also violate private property rights as a matter of course. As Bolick persuasively illustrates, abuse of eminent domain power is on the rise.⁶⁷ Constitutionally, governments can condemn private land only for public use, but *Hawaii Housing Authority v. Midkiff*⁶⁸ effectively read the "public use" limitation out of the Constitution.⁶⁹ In that case, the Court held that condemnation proceedings to combat concentration of land ownership qualified as a "public use."⁷⁰ Now, local governments are quick to condemn privately owned property any time a so-called "higher use" is available—one that will result in higher tax revenues to the government.⁷¹ Bolick relates how advocates of private property rights have won scattered victories against eminent domain abuse in state courts and notes that incremental progress was made in *Lucas v. South Carolina Coastal Coun-*

⁶³ See, e.g., *id.* at 73–74 (discussing the wide variety of regulations affecting start-up businesses).

⁶⁴ See *id.* at 69–82. As one of several examples, Bolick relates the story of Garland Allen, an elderly African-American barber from Lebanon, Tennessee. *Id.* at 69–70. Because there were no Tennessee barber colleges that admitted African Americans when Allen was a young man, he learned the trade from his father. See *id.* at 69. He continued running his father's shop for decades, until 1996, when the Tennessee Board of Barbering Examiners had him arrested for "impersonating a professional." *Id.* Not surprisingly, a rival barber had turned Allen in for cutting hair without a barbering license. See *id.* at 70.

⁶⁵ See *id.* at 69–80.

⁶⁶ *Id.* at 74.

⁶⁷ See *id.* at 83–99.

⁶⁸ 467 U.S. 229 (1984).

⁶⁹ See BOLICK, *supra* note 1, at 88.

⁷⁰ See *Midkiff*, 467 U.S. at 241–42.

⁷¹ See BOLICK, *supra* note 1, at 84.

cil.⁷² As he describes it, though, the law remains woefully underdeveloped.⁷³

Bolick analyzes how other rights and “fundamental liberties” have suffered at the hands of overgrown local government. Free speech is often curtailed at the state and local level, due to the Supreme Court’s distinction between “commercial speech” and “political speech” and the limited protection the Court affords the former.⁷⁴ One example Bolick cites is *Kasky v. Nike*.⁷⁵ Under California law, Nike opponents spoke out publicly against the company’s overseas labor practices, all under the generous protections of “political speech.”⁷⁶ When Nike launched its own ad campaign to defend its practices, the California Supreme Court determined that this was “commercial speech” and subject to state restrictions on truth in advertising.⁷⁷ Caught in a public relations battle not of its own making, Nike found its right to engage in political speech seriously limited because of coexisting commercial ramifications.⁷⁸ Presented with the opportunity to extend greater protection to this “mixed speech,” the United States Supreme Court declined to get involved.⁷⁹

Bolick concludes with discussions of privacy rights, racial discrimination, and the grave issues relating to public schools and school choice. Privacy, Bolick asserts, is a right that too few are willing to honor when they find the practice in question to be offensive.⁸⁰ Many who supported the freedom *not* to associate with homosexuals in *Boy Scouts of America v. Dale*,⁸¹ Bolick emphasizes, took issue with the same liberty when it meant allowing homosexual sodomy in *Lawrence v. Texas*.⁸² And many of those who joined the majority in *Lawrence* were opposed to the rights upheld in *Dale*.⁸³ Likewise, Bolick views racial discrimination as a tool of convenience for local government—and the courts—citing to the landmark affirmative action decision in *Grutter v. Bollinger*.⁸⁴ Bolick’s final illustrations center on the problems

72 505 U.S. 1003 (1992); see BOLICK, *supra* note 1, at 91–92.

73 See BOLICK, *supra* note 1, at 92–99.

74 See *id.* at 102–10.

75 45 P.3d 243 (Cal. 2002), *cert. granted*, 537 U.S. 1099, and *cert. dismissed as improvidently granted*, 539 U.S. 654 (2003); see BOLICK, *supra* note 1, at 107–10.

76 See BOLICK, *supra* note 1, at 107–08.

77 See *Kasky*, 45 P.3d at 964.

78 See BOLICK, *supra* note 1, at 107–09.

79 See *id.* at 109; *supra* note 75.

80 BOLICK, *supra* note 1, at 115.

81 530 U.S. 640 (2000).

82 539 U.S. 558 (2003); see BOLICK, *supra* note 1, at 115–23.

83 See BOLICK, *supra* note 1, at 115–24.

84 539 U.S. 306 (2003); see BOLICK, *supra* note 1, at 135–37. Bolick notes, “Many conservatives will decry racial preferences in college admissions while finding racial profiling entirely permissible; while many liberals see it exactly the reverse. That is one reason why

with public schools, particularly in large, poor urban districts.⁸⁵ In these districts, bloated school administrations are impenetrable and unresponsive to the concerns of parents, who generally lack the resources to move to the suburbs or place their children in private school.⁸⁶ In order to protect the individual liberties of these parents and their children, Bolick argues, parents need greater school choice (i.e., voucher programs) and schools need more transparent control.⁸⁷

C. A Call for Action

The final part of *Leviathan* is relatively brief. Here, Bolick argues that to curb local governments' abuse of individual liberty our primary recourse must be the courts: federal, state, and the informal court of public opinion.⁸⁸ First, Bolick challenges, friends of liberty must fight in the federal courts to expand protection of individual liberty and contract the tyrannical power of government.⁸⁹ Bolick cites the campaign to restore economic liberty to the status of a fundamental right as an example of effective litigation against "grassroots tyranny."⁹⁰ Slowly, through carefully selected cases involving particularly harsh abuse of sympathetic plaintiffs, the federal courts can be used to counteract local restrictions on economic freedom.⁹¹ Second, Bolick proposes that sincere advocates of federalism make better use of the state courts, something the political left has been effectively doing for years.⁹² Though the federal constitution sets the "floor" for individual liberties, state constitutions often can be used to create higher "ceilings,"⁹³ which may, in turn, influence other states.⁹⁴ Finally, Bolick tells of several cases lost in the courthouse, but won in the court of

the promise of equality is eroding: Too few of us honor the principle across the board . . ." *Id.* at 129.

⁸⁵ See BOLICK, *supra* note 1, at 143-48.

⁸⁶ See *id.* at 148.

⁸⁷ See *id.* at 149-54.

⁸⁸ See *id.* at 160-61.

⁸⁹ See *id.*

⁹⁰ *Id.* at 161.

⁹¹ See *id.* at 163-64. Bolick relates the story of Ego Brown, a bureaucrat-turned-entrepreneur who worked with members of the homeless community in the District of Columbia to operate a sidewalk shoeshine business. *Id.* at 162-63. When the District stepped in to enforce a Jim Crow-era law prohibiting shoeshine stands on public streets, Brown answered with an equal protection challenge. *Id.* The federal district court struck down the law—initially designed to keep African Americans from achieving economic independence—as a violation of equal protection. *Id.* This decision, Bolick notes, served as an important building block in other economic liberty cases. *Id.* at 163.

⁹² *Id.* at 164-69. Bolick cites liberal activists' success in suing for the right to gay marriage under state constitutions as one example. *Id.* at 164-65.

⁹³ See *id.* at 164.

⁹⁴ See *id.* at 166.

public opinion.⁹⁵ Media attention and public sentiment, he shows, can be used to expose restrictive practices to “the light of day, which exerts the same withering effect on government abuse as sunshine does on a vampire.”⁹⁶

III

Leviathan gives the reader a thought-provoking glimpse of Bolick’s rich experience on the front lines of litigation on behalf of the Institute for Justice. His stories of victory against abusive local government are powerful, yet Bolick himself acknowledges that these illustrations are not necessarily representative.⁹⁷ For most Americans, the adage “you can’t fight city hall” still holds true.⁹⁸ In that sense, Bolick’s book serves as a call to arms, demonstrating that you can fight city hall—if you have the right tools. In Bolick’s vision, the intelligent and persistent use of the courts to fight “grassroots tyranny” will, given time, restore fundamental individual liberties such as economic freedom, school choice, and rights to privacy.⁹⁹

In emphasizing the importance of the courts, however, Bolick chooses not to discuss other, more democratic, avenues of relief. Conspicuously absent from his call to action against “grassroots tyranny” is any “grassroots” response (other than getting the media involved in a public relations war). Apparently, the solution to the low voter turnout and constituent ignorance described in Chapter One is not to get out the vote or learn who sits on the school board, but to ask the courts to intervene. While Bolick provides various examples of local governments insulated from local accountability, this is certainly not the case with many of the governments described in Chapter One.

Another possibility Bolick chooses not to address is federal legislation. At its best, Congress is the people’s body and has tools for controlling local government that goes astray.¹⁰⁰ A much-debated example is the No Child Left Behind Act,¹⁰¹ in which Congress itself pressured local school boards to be more accountable to the children

⁹⁵ *Id.* at 169–73.

⁹⁶ *Id.* at 173.

⁹⁷ *See id.* at 172.

⁹⁸ *Id.* at xiii–xiv (noting the challenges individuals face when litigating against local government).

⁹⁹ *See id.* at 157–73.

¹⁰⁰ Though, at times, Congress’s reach may exceed its grasp, as demonstrated by its recent involvement in the Terri Schiavo matter. Congress passed legislation allowing Schiavo’s parents to bring their case in federal court, but could not ultimately compel the federal court to overturn an earlier state court ruling. *See Abby Goodnough, U.S. Judge Hears Tense Testimony in Schiavo’s Case*, N.Y. TIMES, Mar. 22, 2005, at A1. As explained below, Congress has had greater success influencing the political branches of local governments by means of its Spending Power.

¹⁰¹ No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-7941 (Supp. II 2002).

and parents they serve.¹⁰² Another example is the 1984 Equal Access Act,¹⁰³ upheld by the Supreme Court in the *Mergens*¹⁰⁴ case. There, Congress required all federally funded schools to provide equal access to facilities for both religious and secular extracurricular student organizations.¹⁰⁵ This change was effected not only under the Fourteenth Amendment, but also under the authority of the Spending Clause.¹⁰⁶ "He who pays the piper calls the tune," as it were, and Congress's control of the purse allows it tremendous influence over public schools and other levels of state and local government.

On the whole, however, Bolick offers an important insight into the centrality of the courts in the protection of individual liberties. As Archibald Cox wrote in *The Court and the Constitution*, "Today the major function of the Court . . . centers on the protection of individual rights against governmental aggression."¹⁰⁷ Writing in 1987, Professor Cox pointed out that modern trends were certain to raise additional conflicts between the individual and organized society: "right to die" arguments, forced medication of "dangerous" offenders, and the then-unrealized spread of terrorism into the United States.¹⁰⁸ As state and federal governments attempt to manage these knotty issues, the courts will continue to serve as the natural arbiter between the two levels of government.

Having made (and thoroughly illustrated) his point about the importance of the courts to the protection of individual liberty, Bolick's *Leviathan* does leave even the sympathetic reader with a vague sense of disconnection. Many of the "evils" of local government described in the opening chapter never play out in the remainder of the text. Water districts, zoning commissions, and tax assessors are initially described as affecting our lives in "intimate" ways,¹⁰⁹ but these particular bogies fail to enter an appearance in Part Two. Likewise, the proverbial and omnipresent local school board appears from the first page of the book as an ominous, unknown entity, doing who-knows-what with and to your children. Yet, when Bolick comes to discuss public education in Chapter Nine, he ultimately admits that most rural and suburban school districts really are not that bad; it's only the large, urban districts that are particularly unaccountable to parents.¹¹⁰

102 See *id.* § 6301.

103 Equal Access Act, 20 U.S.C. §§ 4071-4074 (2000).

104 *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 253 (1990).

105 20 U.S.C. § 4071(a).

106 See *id.* § 4071.

107 ARCHIBALD COX, *THE COURT AND THE CONSTITUTION* 347 (1987).

108 *Id.* at 347-48.

109 See BOLICK, *supra* note 1, at xii.

110 See *id.* at 147-49.

Whatever its flaws, however, *Leviathan* stands as an important expression of the Bolickian commitment to a culture of liberty and as an enthusiastic libertarian embrace of a robust judicial power.

