

American Federalism and the American Civil Liberties Union

Norman Dorsen and Susan N. Herman***

The United States federalist system has a national government with defined and limited powers and fifty state governments with broad powers of their own, plus the District of Columbia and territories. Inevitably, these powers sometimes overlap or conflict. For more than two centuries, the challenge of federalism has been to develop mechanisms for distributing powers and responsibilities in an optimal manner.

The American Civil Liberties Union (ACLU), founded in January 1920, has a similar structure—a national organization (“National”) with fifty-one affiliates (“affiliates”) and a few nationally-run chapters¹—and has faced a similar set of issues.

If there were no national organization of the ACLU, each state civil liberties organization would presumably be free to litigate any issue that arose within its borders, subject only to self-restraint. Indeed, even though there has been a national ACLU from the beginning, a majority of lawsuits and legislative initiatives have been brought by the ACLU’s local affiliates. But for several reasons, allocating these responsibilities entirely to the affiliates could not work. The ACLU, like the United States, needs a national superstructure. In the first place, many civil liberties issues arise under statutes of the United States that apply throughout the country. Obviously, a single affiliate could bring an action challenging or supporting a federal statute. But which state? Should there be a dash to the courtroom to see who gets there first? Or should the affiliate with the best lawyer or most experience with an issue take the ball? Who would referee if several affiliates were interested and had competent lawyers?

Federal constitutional issues also demand coordination. The ACLU has initiated cases challenging the constitutionality of thousands of government actions, including restrictions on abortion, discrimination against racial and other minorities, and restrictive welfare or employment practices. Affiliate lawyers from many states could bring a

* Stokes Professor of Law and Counselor to the President, New York University; President, ACLU, 1976 – 1991.

** Centennial Professor of Law, Brooklyn Law School; President, ACLU, 2008 – present; former constitutional law student of Norman Dorsen.

¹ The ACLU generally has one affiliate per state, as well as in the “National Capital Area” (District of Columbia). Some states (California, Missouri, and Pennsylvania) have more than one affiliate; other states (North Dakota, South Dakota, and Wyoming) or territories (Puerto Rico) have ACLU chapters run by National.

lawsuit on these issues. But the question would arise, again, as to which affiliate would take precedence and how that would be decided.²

Looking back to the founding of the United States, we know that the colonies first decided to establish a weak national government under the Articles of Confederation, and then a stronger one under the Constitution. The ACLU's history is different. The national organization came first, and it created state affiliates over the ensuing decades, initially rather slowly—although from the beginning many local civil liberties “committees” were active—and more rapidly in the 1960s and 1970s.³

The ACLU's structure raises two broad questions related to federalism: First, in the work of defending and advancing civil liberties in the U.S., what are appropriate roles for the national and local organizations? Second, what is the appropriate allocation of decision-making about key issues such as a) litigation and other programs, b) distribution of money, and c) representation in governance?

These questions are of considerable moment because of the ACLU's primacy in protecting Americans' civil liberties. There are hundreds of other fine organizations doing similar work, but most of them are smaller, focus on only one or a few issues, and have fewer resources. Additionally, the fact that the ACLU is a membership organization with an affiliate structure enhances its effectiveness on a national scale. How the ACLU fares affects the rights of everyone who lives in this country.

I. Enforcing Rights

What are the “civil liberties” the ACLU defends? Almost everyone has a sense, intellectual or visceral or both, that liberties include rights to speech and religion, to fair procedures if charged with a crime, to a right of privacy, a right to property, and to non-discriminatory treatment, at least by the government. But how broad are these protections? What is “privacy” or “property,” and what limits are there on “free speech?” What other civil liberties are there and how are they identified? Unless the ACLU has a systematic and credible approach to defining its agenda, the public as well as the courts would lose confidence in the organization.

At the ACLU, the National and affiliate boards of directors make careful determinations about how to define “civil liberties” as a predicate to staff action. While the ACLU consists of clearly defined National and affiliate offices, the ACLU's civil liberties work cannot be neatly divided into national and local spheres. National lawyers initiate chal-

² The same coordination issues can arise when the ACLU raises a constitutional claim on behalf of a defendant, as in *Gideon v. Wainwright*, 372 U.S. 335 (1963), or *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ Analogously, state affiliates have created their own subdivisions—chapters in cities or regions of their states to address local matters—with limited authority.

lenges to federal statutes and lobby Congress and federal agencies. Local issues often implicate the federal government, and thus affiliates will also be affected and will lobby their own members of Congress. And because people interact more frequently with local governmental actors, such as school and law enforcement officials, ACLU affiliates handle a large majority of civil liberties matters— including those of great federal constitutional significance. For example, the ACLU of Pennsylvania successfully argued that a program of teaching creationism in Dover, Pennsylvania, public schools was unconstitutional, establishing a precedent that other jurisdictions can follow.⁴ The ACLU affiliate in Southern California sued the state for failing to provide California public school students with the basic necessities of an education, raising arguments under the state constitution as well as under federal law.⁵

In many such cases National plays a back-up role, often deploying lawyers situated in National ACLU “projects” that have been created over the years in many areas such as reproductive freedom, national security, race discrimination, and sex discrimination.⁶ Project lawyers assist the affiliates in challenging state as well as federal laws and actions. Thus, a successful challenge to an anti-immigrant ordinance in Hazleton, Pennsylvania, was a collaboration between the Pennsylvania affiliate and the National Immigrants’ Rights Project.⁷ The Capital Punishment Project provides attorneys to litigate capital cases, as evidenced by a recent reversal of a death sentence in a Tennessee state appeals court.⁸ The National Prison Project also frequently collaborates with affiliates attacking the constitutionality of state prison conditions.⁹

⁴ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (D. Penn. 2005); see ACLU, *Kitzmiller et al v. Dover Area School District*, <http://www.aclupa.org/legal/legaldocket/intelligentdesigncase/> (last visited March 25, 2009).

⁵ See First Amended Complaint for Injunctive and Declaratory Relief, *Williams v. California*, No. 312236 (Cal. Super. Ct. Aug. 14, 2000), available at <http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf>. See generally *Decent Schools for California: Williams v. State of California*, <http://www.decentschools.org/> (last visited March 25, 2009).

⁶ State affiliates create projects, too. For example, the ACLU of Michigan created a Lesbian Gay Bisexual Transgender Project to defend LGBT people against discrimination in Michigan custody cases, and in its schools. See ACLU, *Lesbian Gay Bisexual & Transgender Project of the ACLU of Michigan*, <http://www.aclumich.org/courts/lgbt-project> (last visited March 25, 2009).

⁷ *Lozano v. City of Hazleton*, 496 F. Supp. 2d 477 (D. Penn. 2007).

⁸ *Tennessee v. Taylor*, 2008 Tenn. Crim. App. LEXIS 200 (Tenn. Crim. App. 2008); see ACLU, *State of Tennessee v. Taylor*, <http://www.aclu.org/capital/mentalillness/30356res20070717.html> (last visited March 25, 2009).

filiates attacking the constitutionality of state prison conditions.⁹ And the National legal department regularly works with affiliate lawyers to prepare appellate briefs when affiliate cases are appealed to the U.S. courts of appeals or the Supreme Court.¹⁰ Collaboration runs in both directions. While the affiliates get back-up, National looks to affiliates to identify local issues that are of national importance or that will probably arise in more than one state. National's Women's Rights Project, for example, has challenged sex-segregated schools in Georgia, Kentucky, and Louisiana, with the collaboration of the affiliates involved.¹¹

Collaboration is also horizontal. A success in one state can inspire action elsewhere, in the form of follow-up litigation or lobbying. After the successful litigation against Hazleton's anti-immigrant ordinance, for example, an ACLU affiliate in San Diego joined with the other two California affiliates and other organizations to persuade California to prohibit local anti-immigration ordinances as a matter of state statutory law.¹²

Because of its federalist structure, the ACLU simultaneously enjoys the advantages of local expertise and the ability to coordinate and sequence challenges around the country. And because of its collaborative model, the ACLU does not have to define the "local" and the "national" as separate categories of cases. Local cases have connotations for other jurisdictions, and national cases have local consequences. This does not mean that there are never jurisdictional issues. Occasionally conflicts arise, as we discuss below. But when it comes to the substantive work of defending civil rights and civil liberties, the ACLU's cooperative federalism model has proven effective.

In addition to echoing the United States's federalist structure in its allocation of responsibilities, the ACLU has learned to use that structure advantageously in its work. When the U.S. Supreme Court has rejected a civil liberties claim or is likely to do so, National and affiliates

⁹ See, e.g., *Graves v. Arpaio*, 2008 U.S. Dist. LEXIS 85935 (D. Ariz. 2008); see also Press Release, ACLU, ACLU In Court Today Challenging Conditions At Maricopa County Jail (Aug. 12, 2008), available at <http://www.aclu.org/prison/conditions/36387prs20080812.html>.

¹⁰ Lead counsel in an ACLU Supreme Court case sometimes will be from the affiliate where the case arose and sometimes from the National legal department or a National project.

¹¹ See *Sex Segregated Schools: Separate and Unequal*, <http://www.aclu.org/womensrights/edu/30129res20070614.html> (last visited March 25, 2009).

¹² Assem. 976, 2007–2008 Leg., Reg. Sess. (Cal. 2007) (codified at CAL. GOV'T CODE § 12955 (Deering 2008)); see also Press Release, ACLU, California First State to Prohibit Anti-Immigrant Ordinances (Oct. 11, 2007), available at <http://www.aclu.org/immigrants/discrim/32203prs20071011.html>.

petition state courts and legislatures to provide protection through state law. Thus, in the California case on education adequacy, the ACLU invoked state constitutional law to ensure rights for schoolchildren that would have been difficult and perhaps impossible to obtain under federal law.¹³ And in a notable instance of coordination, after the U.S. Supreme Court decided that it was acceptable for states to fund childbirth but not abortions,¹⁴ National campaigned to support women's right to choose to terminate a pregnancy through state law and, working with affiliates, was successful in litigation or lobbying efforts in ten states.¹⁵

Using the structures of federalism and its own resources creatively, the ACLU has developed its own "laboratory" approach, in the language of Justice Brandeis's well-known reference to the "happy" fact that a single state may, if its citizens choose, "try novel social and economic experiments without risk to the rest of the country."¹⁶ Or invoking James Madison, the ACLU takes advantage of the "dual security" that the U.S. federalist system creates for liberty by encouraging states and the federal government to enunciate individual rights.¹⁷ Liberty may find an oasis in particular places, as when women in some states can exercise their right to choose to terminate a pregnancy regardless of their income, in spite of the Supreme Court's failure to protect that right. Liberty may also spread from the laboratory of one state to others.

II. Constitutional Federalism

The Tenth Amendment to the U.S. Constitution provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁸ This amendment is the cornerstone of state sovereignty and an important basis of judicial claims of authority to invalidate congressional action as inconsistent with the federal structure.

¹³ See *Decent Schools for California*, *supra* note 5.

¹⁴ *Williams v. Zbaraz*, 448 U.S. 358 (1980).

¹⁵ See *The ACLU's Role in Securing Public Funding for Abortion*, <http://www.aclu.org/reproductiverights/lowincome/26926res20060928.html> (last visited March 25, 2009). The coalition of which the ACLU was a part also succeeded in three additional states.

¹⁶ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

¹⁷ THE FEDERALIST NO. 51 (James Madison). See generally Norman Dorsen, *Separation of Powers and Federalism: Two Doctrines with a Single Goal—Confining Arbitrary Authority*, 41 ALBANY L. REV. 53 (1976-1977).

¹⁸ U.S. CONST. amend. X.

For many decades beginning in the late nineteenth century, the Supreme Court regularly struck down socially progressive statutes, usually enacted by Congress under its Commerce power in Article I of the Constitution, as exceeding that power by infringing state sovereignty. Well-known examples include cases invalidating statutes that regulated child labor, in 1918,¹⁹ and that governed the maximum hours and minimum wages of workers in the coal industry, in 1936.²⁰ In 1937, the New Deal Supreme Court adopted a new Commerce Clause jurisprudence and began overruling its prior decisions.²¹ Then, after a lapse of almost sixty years, the Court resurrected the old approach when it held in 1995 that Congress lacked power to declare a gun-free zone near schools,²² and again in 2000 when it held that Congress lacked power to offer a federal court forum to victims of gender-motivated violence.²³ More recently, and arguably somewhat inconsistently, in 2005 the Supreme Court upheld a federal statute criminalizing the use of locally grown marijuana as a valid exercise of the Commerce power and as trumping California's law permitting the use of marijuana for medicinal purposes.²⁴

The ACLU did not take a position on the federalism issues in these cases because there were perceived civil liberties risks in championing any general theory of federalism-based limits on Congress's powers. For example, if the ACLU were to argue that Congress has adequate power to enact gun control legislation, it might then be difficult for the organization to maintain, despite differences in the constitutionally relevant facts, that Congress cannot preempt California's medical marijuana law or ban particular methods of performing abortions.²⁵ Recognizing that federalism-based limits do not have a consistent civil liberties valence²⁶ permits the ACLU to focus on the rights and liberties that are at issue in a given controversy. Thus, in a case addressing whether the U.S. Attorney General could constitutionally invoke federal drug

¹⁹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

²⁰ *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

²¹ *See, e.g., NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

²² *United States v. Lopez*, 514 U.S. 549 (1995).

²³ *United States v. Morrison*, 529 U.S. 598 (2000).

²⁴ *Gonzales v. Raich*, 545 U.S. 1 (2005).

²⁵ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

²⁶ *See Ernest A. Young, Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, in *TERRORISM, GOVERNMENT, AND LAW: NATIONAL AUTHORITY AND LOCAL AUTONOMY IN THE WAR ON TERROR* 48, 61 (Susan N. Herman & Paul Finkelman, eds., 2008) (*hereinafter* Herman & Finkelman).

laws to regulate doctors acting under Oregon's Death with Dignity Act,²⁷ the ACLU brief did not discuss federalism. Rather, the ACLU argued that the Attorney General had exceeded his authority under the Controlled Substances Act,²⁸ a claim ultimately accepted by the Supreme Court.²⁹

A related federalism issue is whether states and localities can resist federal enforcement within their own jurisdictions. The Supreme Court said in the medical marijuana case that since Congress has sufficient Commerce power to prohibit marijuana, federal agents can enter the state to enforce the federal law over state objections. Because in the past the ACLU had vigorously resisted the argument that local segregationists should be empowered to resist federal attempts to end racial segregation or enforce voting rights, arguing against federal authority to enforce drug laws was unattractive even though the result in the marijuana case would have been consistent with ACLU policies. Here again the ACLU did not present a general theory under the Tenth Amendment.

The Bush Administration's anti-terrorism efforts raised new questions regarding the ACLU's skepticism about states' rights arguments. While the organization supported federal preemption of discriminatory state laws during the civil rights era, the federal government's enforcement activities after 9/11 were, in the view of the ACLU, abusive and contemptuous of civil liberties. In the fall of 2001, for example, the Administration detained hundreds of Muslim men, some of whom had been arrested for minor immigration violations, others of whom were being detained as "material witnesses." The Administration resisted the ACLU's Freedom of Information Act request for information about how many people had been detained and where they were being held, and the ACLU achieved only limited success in challenging that position in court.³⁰ When it then appeared that the federal government had contracted with New Jersey county jails for detention space, the ACLU of New Jersey invoked a local law that required wardens to reveal the identities of those being held.³¹ A state court ordered the warden to

²⁷ *Gonzales v. Oregon*, 546 U.S. 243 (2006).

²⁸ See Brief of the American Civil Liberties Union and the ACLU of Oregon as Amici Curiae in Support of Respondents, *Gonzales v. Raich*, 545 U.S. 1 (2005) (No. 04-623), available at http://www.aclu.org/images/asset_upload_file516_21277.pdf.

²⁹ *Gonzales v. Oregon*, 546 U.S. at 274-275 (2006).

³⁰ See *Center for Nat'l Sec. Studies v. U.S. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004).

³¹ See Ronald K. Chen, *State Incarceration of Federal Prisoners After September 11: Whose Jail Is It Anyway*, in Herman & Finkelman, *supra* note 26, at 102, 104-105.

comply with the state law.³² While an appeal of this decision was pending, the federal immigration commissioner issued an interim regulation prohibiting such disclosure on the ground that it would compromise national security. An appellate court found that this federal regulation preempted the New Jersey law.³³ The ACLU did not make a general federalism-based claim in favor of the New Jersey law, but rather argued (unsuccessfully) only that the federal regulation was procedurally defective and therefore should not preempt.

The so-called “War on Terror” also led the ACLU to explore political avenues under our federal system as an alternative to judicial challenges or as a response to unfavorable judicial decisions. For instance, when the ACLU found it difficult to litigate problematic surveillance provisions of the Patriot Act and even more difficult to win the few lawsuits that courts would consider, it helped to organize opposition to the Patriot Act at the local level. Over 400 cities, towns, and villages as well as eight states adopted resolutions as a result of this campaign.³⁴ The resolutions did not make the radical federalism-based claim that state or local law enforcement officials had the power to resist federal surveillance. Instead, among other things, the resolutions urged each jurisdiction’s senators and representatives to reconsider the Patriot Act. The resolutions also declared certain forms of surveillance to be contrary to local understandings of constitutional principles, and urged that legal representation be provided for librarians who were asked for information by federal officials.³⁵ The resolutions did not encourage outright defiance of federal anti-terrorism efforts, or take the position of the eighteenth century Virginia and Kentucky Resolutions that the states should have the final word about what violates the federal Constitution. Instead, they promoted a grassroots challenge to the federal surveillance program by declaring that the localities would not actively collaborate with federal enforcement of its provisions. Arcata, California, went so far as to mandate a fine of \$57 for any Arcata employee who assisted in federal surveillance efforts.³⁶ While states have no authority to resist

³² *Id.* at 122 n.20.

³³ *Id.* at 124 n.35.

³⁴ See Bill of Rights Defense Committee: Resolutions Passed, <http://borcdc.org/resolutions.php> (last visited March 25, 2009). The resolutions issue from jurisdictions comprising some eighty-five million people. BILL OF RIGHTS DEFENSE COMMITTEE, GRASSROOTS OPPOSITION TO THE USA PATRIOT ACT (2007), available at <http://www.borcdc.org/resources/alphalist.pdf>.

³⁵ For a sample resolution, see Bill of Rights Defense Committee: Sample Resolution, <http://www.borcdc.org/involved/sample-res.php> (last visited March 26, 2009).

³⁶ See Arcata, Calif., An Ordinance of the City Council of the City of Arcata Amending the Arcata Municipal Code to Defend the Bill of Rights and

federal officials entering their territory to enforce federal laws, it is equally clear that under the Tenth Amendment federal authorities may not “commandeer” state or local officials to assist in the enforcement process.³⁷

In another instance of lawful resistance to federal overreaching, the ACLU of Oregon engaged in a successful political campaign against Portland’s participation in a joint federal/local anti-terrorism task force. The ACLU argued that Portland’s elected officials would be unable to prevent city employees who participated in the task force from violating state law that was more protective of certain associational and privacy rights than federal law. After considerable public discussion, Portland withdrew from the task force.³⁸ Similarly, although it has proved impossible so far to litigate the constitutionality of intrusive surveillance by the National Security Agency,³⁹ the ACLU asked state public utilities commissions to investigate whether telecommunications companies licensed in their states had failed to comply with local law by agreeing to spy on their customers.⁴⁰ In each of these instances, when no branch of the federal government was willing and able to restrain anti-terrorism activities that infringed civil liberties, the ACLU sought to employ federalism as a “dual security” by asking state and local governments to resist federal encroachment and to campaign for new federal policies.

III. ACLU Governance in a Federalist Structure

Every large and complex organization has internal conflicts and tensions, and the ACLU is no exception. Many of these differences are unrelated to federalism. For example, over the years the ACLU Board of Directors has played an active role in setting civil liberties policy for the organization, distinguishing it from many other nonprofit boards which focus on governance, fundraising, and networking. It is not surprising—

Civil Liberties, No. 1339 (Apr. 2, 2003) (codified at ARCATA, CALIF., CODE §§ 2190–2195 (2009)), available at <http://www.bordc.org/detail.php?id=119>.

³⁷ See *Printz v. United States*, 521 U.S. 898 (1997).

³⁸ See Susan N. Herman, *Collapsing Spheres: Joint Terrorism Task Forces, Federalism, and the War on Terror*, in Herman & Finkelman, *supra* note 26, at 78.

³⁹ See, e.g., *ACLU v. NSA*, 493 F.3d 644 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 1334 (2008) (vacating favorable District Court order on the ground that plaintiffs did not have standing to raise a challenge to the surveillance program).

⁴⁰ See, e.g., Press Release, ACLU, MCLU and Maine Residents Call on State Officials to Investigate NSA Spying (June 12, 2006), available at <http://www.aclu.org/safefree/nsaspying/26042prs20060612.html>.

indeed it is healthy—that members of the ACLU staff, who are experts in their fields, sometimes question the Board’s formulation of civil liberties policy or claim that a policy enacted by the Board unduly confines the staff’s discretion in particular cases. Conversely, Board members have occasionally thought that the staff was too involved in matters within the Board’s province. These issues are worked out in the ACLU through clarification of policy and informal give and take.

The most important institutional tensions at the ACLU have arisen between National and affiliates. Over the years, and sometimes only after long debate, the organization has resolved many fundamental questions regarding representation on the Board, division of resources, and decision-making on litigation and other initiatives. In each case, carefully constructed procedures achieved what formal definition of “local” and “national” interests could not.

A. Representation on the Board of Directors⁴¹

At the beginning, the ACLU did not have a Board of Directors. The organization was run by a small staff headed by Roger Baldwin, the principal founder of the ACLU, who was called the “director.” There were eight officers, including a chairman, two vice chairmen, and a counsel. There was a large National Committee of prominent advisors, perhaps sixty people, almost all of whom were Easterners, most from New York. The Committee met semi-annually to review the work of the staff and officers, but it had little authority.

The ACLU’s 1933 annual report contains perhaps the first reference to a Board of Directors. There were twenty-four members and ten officers, both including Baldwin. Inspection of the names reveals that, as with the National Committee, a strong majority of Board members were from New York; a few were from other places on the East Coast, and one was from California. The division of authority between the Board and the staff is not made explicit.⁴² By the 1950s, the Board had grown to thirty-six members, and still had a strong New York, East Coast tilt.

In the meantime, ACLU affiliates and local committees were growing in size and importance, and there was increasing dissatisfaction with a system that concentrated authority in New York while more and more of the work was done elsewhere. Matters came to a boil at the 1964 Biennial Conference.⁴³ The unusual solution was the creation of two boards, the old “New York” Board that met frequently throughout the year, and a new plenary Board, comprised of the old Board plus affiliate

⁴¹ Internal documents relied on throughout Part III are on file with the authors.

⁴² Presently, staff and Board are strictly separate.

⁴³ For many years, this biennial conference, now defunct, brought together a large, reasonably representative group of ACLU leaders from across the country, and had the authority to reverse decisions of the Board of Directors.

representatives, that met in plenary session semi-annually. The National Committee remained in place, as it does presently under the title of the National Advisory Council, but it has become mainly a way for the ACLU to publicize the names of prominent supporters.

The dual-board system was a cumbersome arrangement and it came undone during a bitter dispute in 1968 over whether the ACLU should represent leaders of the opposition to the Vietnam War, including Dr. Benjamin Spock and Rev. William Sloane Coffin, who had been charged with criminal conspiracy. The old, “New York” Board considered the matter and voted against directly representing the defendants, choosing instead to file an amicus brief. After strong protests from ACLU members around the country who believed that the case could be handled better by ACLU lawyers, a special plenary meeting of the larger Board was held, and the decision of the smaller board was overturned. This sensational event soon led to an amendment to the ACLU constitution that abolished the smaller Board and provided for a single Board composed of at-large members elected by the national ACLU constituency and one additional Board member elected by each ACLU state affiliate.

As the number of state affiliates increased over time, the Board’s size eventually grew to 83 members—a largely unforeseen and, some might argue, unfortunate consequence of the enduring single board structure. But like Congress, the ACLU Board is both large and representative of national and local constituencies. Having some members elected at-large by a national constituency and others elected by individual affiliates assures that the Board will be aware of both national and local consequences of its actions and can credibly resolve national-local disagreements.

B. Division of Funds

If a person in Indiana sends fifty dollars to the National office in New York in order to join the ACLU, should the Indiana affiliate have a right to any of the money? Conversely, if the check is sent to the headquarters of the Indiana affiliate, should National receive a share? Where should the money go if a foundation in California makes a grant to the ACLU for work on immigration issues? Questions like these troubled the organization for many decades. In the late 1950s or early 1960s a system of “primary membership responsibility” was instituted in which the entity that brought in the money through a mailing or personal contact would retain a larger share of the funds. While providing a sort of rough justice, this system was counterproductive because it led the two entities to compete rather than cooperate, and it sometimes left the smallest affiliates with meager resources to respond to major threats to civil liberties in some of the most hostile parts of the country. Recognizing this problem, and in the wake of a financial crisis that escalated after the ACLU advocated Nazi Party members’ right to march in Skokie, Illinois,

a committee and then the Board worked in the late 1970s to negotiate a comprehensive scheme to share donations.

As the policy eventually adopted by the Board explained, the financial rules were designed “to eliminate, to the fullest extent possible, disincentives to sound fundraising practices” and “to maximize overall net income by eliminating rules that tended to encourage competitive fundraising between the National Office and affiliates.” Among the prominent features of this elaborate set of rules are the following: All ACLU members are considered members of both National and the relevant affiliate. Affiliates agree to share income with National and National agrees to share with affiliates according to a complex but clearly defined formula. And the revised policy provides a methodology for resolving affiliate-National and affiliate-affiliate disputes.

The product of difficult and long negotiations, these rules resulted in a financially unified organization no longer plagued by continual competition over contributions and able to support the neediest affiliates. A monitoring process resulting in periodic updates to the rules, along with cooperative fundraising, has helped not only to deter disputes, but to raise more income and to share it more equitably throughout the nation.

C. Policymaking

Like the U.S. states, ACLU affiliates enjoy a great deal of autonomy to develop their own substantive civil liberties policies and interpretations, and to apply them within their own jurisdictions even when they diverge from policies adopted by the National Board. The ACLU of Southern California, for example, regards “civil liberties” as encompassing a greater range of socioeconomic rights than does National; the New York Civil Liberties Union’s double jeopardy policy differs from that of National. The ACLU may open itself to charges of inconsistency, but the fact that affiliates are autonomous means that they, again like states, can tailor their policies to accommodate local conditions. Affiliates generally agree about the components of civil rights and civil liberties, but not always. The ACLU Constitution characterizes this federalist philosophy as “general unity rather than absolute uniformity.”

Conflicting policies or interpretations of policies can come to a head in the Supreme Court. One such situation occurred in 1950, when the Maryland affiliate asked the Court to review a case involving the question of whether a radio station that had broadcast inflammatory information about a criminal defendant was protected by the First Amendment, or whether its rights were trumped by the defendant’s right to a fair trial; National filed on the opposing side. As it happened, the Supreme Court declined to hear the case.⁴⁴ More recently, the

⁴⁴ *Balt. Radio Show, Inc. v. State*, 67 A.2d 497 (Md. 1949), *cert. denied*, 338 U.S. 912 (1950).

Northern California affiliate, together with National, filed a Supreme Court amicus brief in *Nike v. Kasky*,⁴⁵ arguing that an application of California's unfair competition and false advertising laws to Nike's ads violated the First Amendment. The California affiliates split on whether this was the right position: Southern California wanted to argue that the application of California law should be regarded as constitutional. After a vigorous internal debate, National proceeded to file its brief.⁴⁶ Southern California, having failed to persuade National to change its position, did not sign on to the National/Northern California brief, and did not file a brief of its own.⁴⁷

To resolve such conflicts, the National Board adopted a policy granting the National Legal Director carefully delineated authority regarding action before the Supreme Court. If there is no National policy on a given issue, or if an affiliate wishes to act in conformity with a National policy, the affiliate may file a petition, brief, or amicus brief after "consulting" the Legal Director. If an affiliate wishes to file an amicus brief taking a position inconsistent with that of existing National policy, the affiliate must seek the "consent" of the Legal Director. There are multiple levels of checks and balances: the Legal Director must consult with the elected Board General Counsel in deciding whether to allow an affiliate to file an amicus brief; if the Legal Director denies an affiliate's request, the affiliate may appeal to the National Board or the Executive Committee according to a specified process and subject to an enunciated standard of review. Again, the ACLU has used collaboration and process

⁴⁵ 539 U.S. 654, 655 (2003) (dismissing writ of certiorari as "improvidently granted").

⁴⁶ Brief Amici Curiae of the American Civil Liberties Union and the ACLU of Northern California in Support of Petitioner, *Nike v. Kasky*, 539 U.S. 654 (2003) (No. 02-575), available at <http://www.aclu.org/FilesPDFs/nike.pdf>.

⁴⁷ Conflicts can also occur between affiliates and their local chapters. In 1976, for example, there was a conflict between the Southern California affiliate and its San Diego chapter over a racial incident at a Marine base. White Marines suspected of being members of the Ku Klux Klan were attacked by a group of African-American Marines. The black Marines were court-martialed, and the white Marines were transferred to a different base. The Southern California affiliate decided to represent the black Marines because their court-martial had due process problems, while the San Diego chapter decided, without consulting with the affiliate, to represent the white Marines because they were subjected to involuntary transfer for their political affiliations. In the end, the affiliate and chapter, after intense debate, decided to support both groups of Marines. See SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU* 332 (2d ed., S. Ill. Univ. Press 1999).

to address national-local tensions rather than trying to define circumscribed spheres of operations.⁴⁸

Conclusion

The U.S. government was born as a federalist system that encompassed the entire country. The ACLU, on the other hand, developed such a system incrementally. This paper focuses on the different ways in which federalist values and realities, both external and internal to the ACLU, increase the organization's ability to achieve its overarching goal of protecting and advancing Americans' civil liberties.

The ACLU has not adopted an explicit theory of federalism under the Tenth Amendment because any such theory could have negative as well as positive consequences for civil liberties. In its work, the ACLU has used the structures of federalism creatively, as a means rather than as an end. Internally, the ACLU has employed a collaborative model of federalism, relying on an intricate process that engages the National Board, affiliate boards, and National and affiliate staffs. The local matters to the ACLU, but so does the national.

⁴⁸ For a discussion of the President's role in ACLU policy-making, see Norman Dorsen, *Nadine Strossen and the ACLU*, 41 TULSA L. REV. 661, 668-73 (2006).