OUR LOCALISM: PART I—THE STRUCTURE OF LOCAL GOVERNMENT LAW

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INTRODUCTION

Two themes dominate the jurisprudence of American local government law: the descriptive assertion that American localities lack power and the normative call for greater local autonomy. The positive claim of local legal powerlessness dates back to the middle of the nineteenth century and continues to be affirmed by treatises and commentators as a central element of state-local relations. The argument for local self-determination has a comparably historic pedigree and broad contemporary support. The scholarly proponents of greater local power—what I will call “localism”—make their case in terms of economic efficiency, education for public life and popular political empowerment—a striking harmonization of the otherwise divergent values of the free market, civic republicanism and critical legal studies.

The law of state-local relations, however, is more complex than the dominant account suggests. The insistence on local legal powerlessness reflects a lack of understanding of the scope of local legal authority. Most local governments in this country are far from legally powerless. Many enjoy considerable autonomy over matters of local concern. State legislatures, often criticized for excessive interference in local matters, have frequently conferred significant political, economic and regulatory authority on many localities. State courts, usually characterized as hostile to localities and condemned for failing to vindicate local rights against the states, have repeatedly embraced the concept of strong local government and have affirmed local regulatory power and local control of basic services. Localism as a value is deeply embedded in the American legal and political culture.

Much as the extent of local legal power is usually understated, the virtues of enhancing local autonomy tend to be greatly exaggerated. Localism reflects territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to a minority of affluent localities, to the detriment of other communities and to the system of local government as a whole. Moreover, localism is primarily centered on the affirmation of private values. Localist ideology and local political action tend not to build up public life, but rather

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contribute to the pervasive privatism that is the hallmark of contemporary American politics. Localism may be more of an obstacle to achieving social justice and the development of public life than a prescription for their attainment.

The flaws in the dominant positive and normative critiques of American local government law are interconnected and proceed from a common methodology. Local governments and their powers are considered in relatively abstract, ideal terms. Legal analysis tends to focus on the formal legal category of local government. As a result, the enormous variety of local governments—their differences in size, wealth and function; the degree to which economic considerations enable them to benefit fully from the legal powers they enjoy; the intense political and economic conflicts among them—is often missed. So, too, the issue of local power is usually conceived of as the abstract question of who wins—state or locality—in a head-to-head conflict. Such an approach commonly fails to consider how infrequently such conflicts actually occur, where the balance of power lies in the absence of conflict and the importance of interlocal, as distinguished from state-local, conflicts. The values of local autonomy are ascribed to a thinly described set of idealized local units, while the policies and programs of actual local governments and the impacts localities have on each other are seldom examined. Localism in practice is significantly different from localism in theory.

This Article presents a study of “Our Localism”¹—of the legal powers of contemporary American local governments, the practical social and political ramifications of local legal power in a system characterized by wide divergences in local fiscal capabilities and needs and the ideological commitment to localism that sustains and legitimates local autonomy. It does so by pursuing a middle path, attempting neither a ground-level account of the law or politics of individual states or local governments nor a high theory examination of local autonomy as a matter of general political philosophy. Instead, it seeks, through a focus on a handful of selected legal issues, to provide a general treatment of the law of state-local relations with particular attention to the question of local power, and to make an argument concerning the proper scope of local autonomy within the specific setting of contemporary metropolitan America.

Part I presents a critical reading of the law of state-local relations. After a review of the traditional account of local legal powerlessness, it turns to two major local government law reform initiatives pursued

1. The reference to “Our Federalism” is intended. See, e.g., *Younger v. Harris*, 401 U.S. 37, 44 (1971). Federalism and localism are both a part of the American constitutional order. “Our Localism,” like “Our Federalism,” emphasizes that local autonomy is not simply a question of the structure of intergovernmental relations but also includes the ideology that structure has generated—an ideology which continues to provide support for the devolution of power to local governments.

during the last two decades: the challenges to the local property tax-based system of funding public elementary and secondary education and to exclusionary land use regulation. These cases and their legislative settings are important for several reasons.

First, education and zoning are the principal operations of local governments. School finance affects both the primary source of local revenue and the leading object of local expenditure. Land use control is the most important local regulatory power. Understanding the school finance and exclusionary zoning cases and the legislative framework out of which they arose is thus essential to an informed appraisal of local power.²

Second, school finance and exclusionary zoning illustrate deep-seated ambiguities in the concept of local power. In these two areas, state-delegated power, supported by judicial attitudes sympathetic to local control, has resulted in real local legal authority, notwithstanding the nominal rules of state supremacy. But local power is not just a matter of formal legal authority. State legislation and case law may create the legal structure for substantial local autonomy, but without local wealth adequate to local needs, formal authority is of limited usefulness, and the structure of local power may prove to be an empty shell.

Third, although the standard critique gives the impression that the principal conflict in local government law is that between states and localities, the school finance and exclusionary zoning cases demonstrate the salience of interlocal conflict in appraising the scope of local power. When, as in these cases and the accompanying legislative battles, the central issues concern state and local resources and the external effects of local actions, local governments are often at war with one another rather than with the states.

Fourth, the school finance and exclusionary zoning debates underscore the close connection between local legal and political autonomy and issues of distributive justice. The delegation of fiscal responsibility for schools and of zoning power to local governments serves to heighten the significance of interlocal wealth differences and to perpetuate inequalities in education, housing and employment opportunities. State legislatures and state courts are often reluctant to displace localities in just those situations that have the greatest implications for the class composition of localities and for the distribution of goods and

2. Although school finance and exclusionary zoning have been the subjects of extensive commentary, much of that discussion has focused on whether and how to reform these practices. See, e.g., J. Coons, W. Clune & S. Sugarman, *Private Wealth, Public Schools* (1970); Inman & Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 *Harv. L. Rev.* 1662 (1979); Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 *Harv. L. Rev.* 1373 (1978); *Future Directions for School Finance Reform*, 38 *Law & Contemp. Probs.* 293 (1974). My concern is with the light school finance and exclusionary zoning shed on the legal structure of state-local relations.

services among economic and social groups. The allocation of power and responsibility between states and localities has direct consequences for public policy, and in these cases local power tends to be associated with the preservation and reinforcement of existing economic inequalities.

Two further analyses are necessary to delineate the scope of local legal power. A pervasive theme of this Article is the importance of interlocal differences in evaluating, both descriptively and normatively, the scope of that power. These differences in local size, wealth, demographic composition and function cannot be assessed fully without some understanding of how they came into existence; this understanding requires an analysis of the laws governing municipal incorporation and annexation. The changing laws of local government formation and expansion serve to illustrate that the very idea of "local" is contestable and contingent, with the legal definition of local units often the result of political, economic and social conflicts among differing local interests. In addition, recent developments in federal constitutional law addressing local legal power and the relationship among states and localities must be considered. Federal constitutional law, like the black-letter law of state-local relations, is generally assumed to be committed to traditional notions of plenary state power and local powerlessness. But a powerful current in federal doctrine reflects the localism in our political culture. Thus, the Supreme Court has tended to validate the states' delegation of regulatory power and fiscal responsibility to local governments despite the inequalities and externalities localism creates.

Part II³ builds on the critical description of the structure of local government law in Part I to elaborate two central and interrelated issues: interlocal differences and the normative account of local power.

At the heart of our localism are the differences among local governments, which I organize around the models of cities and suburbs. The role of the suburbs is central to contemporary local government jurisprudence. Failure to appreciate the importance of the suburbs and how city-suburb differences affect the meaning of local power has obscured our awareness of the extent of local power, contributed to the ready assumption of local powerlessness that characterizes much of the legal commentary and enhanced our susceptibility to arguments advocating greater local power.

The first half of Part II addresses city-suburb differences and examines the role of local government law in the rise of the suburb as a distinctive and increasingly dominant form of urban community. Much of the localism that informs contemporary local government law is attributable to the tendency of courts and legislators to conceptualize local governments in terms of small size, relatively homogenous populations and residential nature—features characteristic of the sub-

3. Part II will appear in the March 1990 issue of the *Columbia Law Review*.

urbs but atypical of big cities. Questions of local power often are resolved by an implicit reliance on the suburb, and its association with the values of home and family, as the paradigmatic locality. This “suburbanization” of the law contributes to the deference to local control found in the school finance and exclusionary zoning litigation surveyed in Part I and to the effects of local school finance and zoning on the political economy of metropolitan areas.

The second half of Part II takes a more normative approach. It reviews the case for localism and the scholarly models of local government that case entails. It then considers the social costs of local autonomy and how well the values of localism are advanced by localism in practice. Contemporary normative advocacy of localism proceeds from two different models, one linking local autonomy with the greater opportunities for popular participation in public life said to exist in smaller units of government, the other claiming that decentralization of power, by enabling large numbers of government units in the same region to make decisions concerning spending, taxing and regulation, increases efficiency in the provision of public sector goods and services. Although these associations of local autonomy with participation and efficiency are persuasive in theory, both models ignore central attributes of existing localities, the effects of local actions on people outside local boundaries or on a region as a whole, and the implications of significant interpersonal and interlocal wealth inequalities for the distribution of power between higher and lower units of governments. Today, most local governments do not govern discrete communities as the models of localism presuppose. Rather, most local governments are fragments of larger, economically interdependent regions.

Moreover, race, class and income tend to go together in local settlement patterns as they do in so much of American life. The fragmentation of heterogeneous metropolitan areas into a multiplicity of independent residential localities converts social and economic segregation into political separation. Given the nature of local fiscal autonomy, this promotes the separation of taxable wealth from public service needs and constrains the potential range of local public sectors in less affluent localities. Indeed, as the school finance and exclusionary zoning cases illustrate, local fiscal autonomy may fuel further class segregation, as residents of more affluent communities seek to escape sharing in the tax burdens of the poor and utilize their local government formation and land use regulatory powers to do so. In a setting of interlocal and interpersonal wealth inequalities, not only does the value of local autonomy turn on the wealth of the locality, but such autonomy often tends to exacerbate the disparities between rich and poor.

Indeed, the rise of fragmentary suburban localities—the separation of residence and commerce and of ethnic and income groups into separate municipalities—calls into question basic assumptions about the “public” nature of local political activity. The political economy of

metropolitan areas effects a structural narrowing of the scope of local politics, leading it to focus tightly, and often defensively, on the private economic and social concerns of local residents. Local residents seek to use local powers to insulate their parochial interests from broader regional concerns. Given the private focus of local politics, local autonomy may erode rather than enhance the possibility of creating a vigorous public life.

Rather than join in the general call for greater local self-determination, I urge scholars to give greater attention to the state as a political and legal focal point in the system of local governments. New legal doctrines and governmental structures are needed to encourage state governments to take a state-wide perspective on local problems, to strengthen the states' role in overseeing local power and overriding parochial actions and to increase state accountability for local functions and for ameliorating interlocal wealth differences. Integrating a state focus, state regulation and state financial support with a proper attention to local particularities and with the opportunities for popular political participation that local governments provide are far more desirable than any undifferentiated ideological affirmation of localism.

I. THE STRUCTURE OF LOCAL GOVERNMENT LAW

A. *The Black Letter Principles and Traditional Assumptions*

The most emphatic recent presentation of the claim that local governments lack legal power is Gerald Frug's *The City as a Legal Concept*.⁴ Professor Frug's assertion that the law of state-local relations renders

4. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057 (1980) [hereinafter "City as Legal Concept"]. Frug subsequently elaborated on the theme of "city powerlessness" in Frug, *Empowering Cities in a Federal System*, 19 Urb. Law. 553 (1987) [hereinafter "Empowering Cities"]; Frug, *Property and Power: Hartog on the Legal History of New York City*, 1984 Am. B. Found. Res. J. 673, 678-91 [hereinafter "Property and Power"].

Frug's work has been repeatedly cited by courts and commentators as authoritative on the limited scope of local government authority and on the role of changes in legal doctrine in effectuating the powerlessness of cities. See, e.g., *Fisher v. City of Berkeley*, 37 Cal. 3d 644, 664, 693 P.2d 261, 278 (1984), *aff'd*, 475 U.S. 260 (1986); *Matter of Marcus v. Baron*, 84 A.D.2d 118, 134, 445 N.Y.S.2d 587, 598 (1981), *rev'd*, 57 N.Y.2d 862, 442 N.E.2d 437, 456 N.Y.S.2d 39 (1982) (Hopkins, J., dissenting) (opinion adopted by majority of the Court of Appeals on appeal); *State v. Hutchinson*, 624 P.2d 1116, 1120 (Utah 1980); H. Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870*, at 3 n.4 (1983); Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. Rev. 1030, 1058 n.105 (1983); Payne, *Intergovernmental Condemnation as a Problem in Public Finance*, 61 Tex. L. Rev. 949, 954-55 & n.22 (1983); Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Calif. L. Rev. 837, 853 n.54 (1983); Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 Stan. L. Rev. 509, 510 n.4 (1984); Zacharias, *Local Power and Local Knowledge*, 30 Am. J. Legal Hist. 122 (1986). Joan Williams has been far more critical, although she, too, notes that Frug's article has

cities powerless is not unique, however; the claim is widely reflected in the literature.⁵ According to Professor Frug, the limited nature of local power derives from, first, the principles of nineteenth-century legal theory that established cities as decidedly inferior political institutions and, second, the failure of state constitutional reforms, most notably home rule, to change that.⁶ Although this critique captures some of the black-letter principles of local government law, it ignores much of the formal legal power local governments possess as well as all of their legally significant informal authority.

As a matter of conventional legal theory, the states enjoy complete hegemony over local governments. Under both federal and state constitutional law, local governments have no rights against their states. Localities may not assert the contracts clause, the equal protection clause or the privileges and immunities clause against their state governments.⁷ Nor do the residents of local governments have any inherent right to local self-government:⁸ local residents may not assert a constitutional claim to belong to a particular local government or to have any local government at all.⁹

The formal legal status of a local government in relation to its state is summarized by the three concepts of "creature," "delegate" and "agent." The local government is a creature of the state. It exists only by an act of the state, and the state, as creator, has plenary power to alter, expand, contract or abolish at will any or all local units. The local government is a delegate of the state, possessing only those powers the state has chosen to confer upon it. Absent any specific limitation in the state constitution, the state can amend, abridge or retract any power it has delegated, much as it can impose new duties or take away old privileges. The local government is an agent of the state, exercising limited

been "extremely influential." Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. Rev. 429, 477-79 (1987).

5. See, e.g., 1 C. Antieau, *Municipal Corporation Law* § 2.00 (1985); G. Clark, *Judges and the Cities: Interpreting Local Autonomy* 70 (1985); H. Hartog, *supra* note 4, at 2; 2 E. McQuillin, *The Law of Municipal Corporations* §§ 4.03, 4.05 (3d ed. 1988); C. Sands & M. Libonati, *Local Government Law* § 3.01 (1981); W. Sayre & H. Kaufman, *Governing New York City: Politics in the Metropolis* 559 (1960); Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 Am. U.L. Rev. 369, 370 (1985).

6. Frug, *City as Legal Concept*, *supra* note 4, at 1062-63, 1105-13, 1116-17.

7. *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933) (privileges and immunities); *City of Trenton v. New Jersey*, 262 U.S. 182, 188 (1923) (contracts clause); *City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923) (equal protection).

8. See *City of Trenton*, 262 U.S. at 187; 1 C. Antieau, *supra* note 5, §§ 2.00, 2.06; 1 E. McQuillin, *The Law of Municipal Corporations* § 1.19 (3d ed. 1987); C. Sands & M. Libonati, *supra* note 5, §§ 3.01, 4.01.

9. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68-70 (1978); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907). But cf. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding unconstitutional Alabama statute that redrew boundaries of city of Tuskegee to remove most black residents).

powers at the local level on behalf of the state. A local government is like a state administrative agency, serving the state in its narrow area of expertise, but instead of being functional specialists, localities are given jurisdictions primarily by territory, although certain local units are specialized by function as well as territory.

The scope of local power is further affected by Dillon's Rule, the traditional measure for determining the scope of local power under state enabling legislation. Under Dillon's Rule, local governments may exercise only those powers "granted in *express words*," or "those *necessarily or fairly implied* in or *incident* to, the powers expressly granted," or "those *essential* to the declared objects and purpose of the [municipal] corporation—not simply convenient, but indispensable."¹⁰ Dillon's Rule operates as a standard of delegation, a canon of construction and a rule of limited power. It reflects the view of local governments as agents of the state by requiring that all local powers be traced back to a specific delegation: whenever it is uncertain whether a locality possesses a particular power, a court should assume that the locality *lacks* that power. By denying localities broad authority, Dillon's Rule limits the number of entities that may regulate private activity. Only through a clear and express state delegation may a locality obtain power to govern.¹¹ Generally followed from the late nineteenth century through the middle of this century,¹² the Rule has been formally abandoned by many states.¹³ However, Professor Frug and others contend that the Dillon's Rule tradition still leads state courts to construe local government powers narrowly.¹⁴

10. D. Mandelker, D. Netsch & P. Salsich, *State and Local Government in a Federal System: Cases and Materials* 83 (2d ed. 1983).

11. Dillon's Rule also serves to hold down local spending and, thus, to control the costs of government for local taxpayers. See Williams, *supra* note 5, at 437. According to one study, Dillon's "strict construction doctrine . . . sends local governments to State legislatures seeking grants of additional power; it causes local officials to doubt their power, and it stops local governmental programs from developing fully." Advisory Comm'n on Intergovernmental Relations, *State Constitutional and Statutory Restrictions Upon the Structural, Functional, and Personnel Powers of Local Government* 24 (1962).

12. See F. Michelman & T. Sandalow, *Materials on Government in Urban Areas* 252–55 (1970); D. Mandelker, D. Netsch & P. Salsich, *supra* note 10, at 83–85.

13. See, e.g., *Liberati v. Bristol Bay Borough*, 584 P.2d 1115 (Alaska 1978); *State v. Hutchinson*, 624 P.2d 1116, 1126–27 (Utah 1980); W. Valente, *Local Government Law* 66–67 (3d ed. 1987). As early as 1918, Professor McBain found that "important inroads" had been made "upon the rigidity with which the rule of strict construction" was applied. H. McBain, *American City Progress and the Law* 57 (1918).

14. See Frug, *City as Legal Concept*, *supra* note 4, at 1112–13. According to Gere, "the courts continue to construe the fundamental state-local relationship in the narrow, inflexible fashion in which it was defined by John Dillon more than one hundred years ago." Gere, *Dillon's Rule and the Cooley Doctrine: Reflections of the Political Culture*, 8 J. Urb. Hist. 271, 296 (1982). Indeed, Clark asserts that Dillon's Rule is still "the major judicial model of local government powers and dominates American debates of the proper role of localities with respect to state governments." G. Clark, *supra* note 5,

Dillon's Rule and the notion of plenary state power are the formal background norms for state-local relationships.¹⁵ But even as these doctrines crystallized in the nineteenth century, states were amending their constitutions in order to strengthen local self-government.¹⁶ After the Civil War a wave of state constitutional revision took place. State constitutions were amended to prohibit legislatures from delegating the performance of municipal functions to "special commissions"¹⁷ and to bar the enactment of "special or local acts" applicable to particular localities.¹⁸ The special commission ban was intended to protect the structural integrity of municipalities by barring the transfer of municipal services or activities to agencies not a part of the local govern-

at 77; see also Elkin, *State and Market in City Politics: Or, The "Real" Dallas*, in *The Politics of Urban Development* 25, 26 (C. Stone & H. Sanders eds. 1987) (arguing that Dillon's Rule, with its surrounding legal-constitutional interpretation, continues to give meaning to the relationship between cities and states).

15. See, e.g., H. Hartog, *supra* note 4, at 2; Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 *Wis. L. Rev.* 83, 99.

16. As early as 1850, some states began to adopt constitutional provisions providing for local selection of local officers and prohibiting state interference with local control of city streets and roads. See H. McBain, *The Law and the Practice of Municipal Home Rule* 29-45, 59-63 (1916).

17. See, e.g., Utah Const. art. VI, § 29. For instances of the types of state laws that gave rise to the ban on special commissions, see *People v. Hurlbut*, 24 Mich. 44 (1871) (state law transferring control over Detroit's water works and sewers from city to state board); *People ex rel. Wood v. Draper*, 15 N.Y. 532 (1857) (state law transferring control over New York City and Brooklyn police forces to metropolitan police district run by commissioners appointed by governor). See generally H. McBain, *supra* note 16, at 45-48 (reviewing late nineteenth century amendments to state constitutions prohibiting the appointments of special commissions with authority over municipal affairs).

18. See H. McBain, *supra* note 16, at 64-106. McBain points out that since the initial adoptions of bans on special legislation predated the Civil War and occurred in states like Ohio, Iowa and Kansas that had no large cities, they probably were not responses to state antilocal abuses. *Id.* at 68, 81, 85, 91-92. These measures appear to have been modeled upon contemporary general corporation laws for business corporations and were not directed at state-local relationships. According to Hartog, Dillon's Rule also grew out of the traditional rule of construction for corporate charters. H. Hartog, *supra* note 4, at 183-84 n.14. Starting with Illinois' ban on special acts in 1870, the prohibitions on special legislation appear to have been aimed at restricting state power over localities.

Special act bans take three main forms: the proscription of special legislation with respect to certain specified subjects; a declaration that all general laws shall have uniform application throughout the state and that no special law shall be passed where a general law could be made applicable; and a requirement that special legislation undergo a more exacting procedure, perhaps requiring a supermajority vote, before it may be adopted. Some states have two or all three of these restrictions in their state constitutions. See O. Reynolds, *Handbook of Local Government Law* 86-88 (1982). For examples of each category of special act restriction, see Ill. Const. art. 4, § 13 (prohibition of special law where general law may be made applicable); N.Y. Const. art. 9, § 2(b)(2) (special procedure); Pa. Const. art. 3, § 32 (restricting special acts concerning specified areas).

ment, while the special act prohibition was intended to prevent the singling out of specific localities for state interference.

The special commission and special act restrictions, which did not in themselves contain any affirmative grants of local power, were followed by a second wave of pro-local state constitutional revision, which did: home rule. Starting with Missouri in 1875¹⁹ and California in 1879²⁰ and accelerating in the Progressive Era,²¹ states adopted constitutional amendments giving localities the power to adopt their own charters and to legislate with respect to local matters. The home rule movement had two goals: to undo Dillon's Rule by giving localities broad lawmaking authority and to provide local governments freedom from state interference in areas of local concern.

State home rule provisions generally follow two models. The original form of home rule amendment treated the home rule municipality as an *imperium in imperio*, a state within a state, possessed of the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference.²² When courts encountered difficulties distinguishing "municipal affairs" from matters of state concern, a second model was developed that sought simply to broaden local lawmaking authority without attempting to erect a wall against state laws on local matters.²³ This form of home rule grants affected local governments all the powers the legislature could grant, subject to the legislature's authority to restrict or deny localities a particular power or function. In a sense, it reverses Dillon's Rule—all powers are granted until retracted. Most of the states that have adopted home rule since World War II use some version of this more modest "legislative" model.²⁴ Today, forty-one states provide

19. Mo. Const. of 1875, art. IX, §§ 20–25. The 1875 Missouri home rule provision applied only to a single named city, St. Louis. See H. McBain, *supra* note 16, at 118–20. For an interesting recent discussion, see Libonati, *Home Rule: An Essay on Pluralism*, 64 Wash. L. Rev. 51, 65–67 (1989).

20. Calif. Const. of 1879, art. XI, § 8. As in Missouri, the power to frame a charter of local self-government was initially limited to the largest city in the state, San Francisco. In 1887, the home rule provision was amended to apply to all cities with a population of 10,000 or more, and in 1892 home rule was further extended to cities of more than 3,500 inhabitants. Additional Progressive Era amendments to the home rule provision were adopted in 1902, 1906, 1911 and 1914. See H. McBain, *supra* note 16, at 200–03, 223–28.

21. See H. McBain, *supra* note 16, at 223–28.

22. A good example of an *imperio* provision is Cal. Const. art. XI, § 6. See generally Vanlandingham, *Municipal Home Rule in the United States*, 10 Wm. & Mary L. Rev. 269, 284–90 (1968) (reviewing state constitution *imperio* home rule provisions).

23. See, e.g., Mont. Const. art XI, § 6; Vanlandingham, *Constitutional Home Rule Since the AMA (NLC) Model*, 17 Wm. & Mary L. Rev. 1, 2–5 (1975).

24. See J. Fordham, *Local Government Law* 86 (2d rev. ed. 1986); Macchiarola, *Local Government Home Rule and the Judiciary*, 48 U. Det. J. Urb. L. 335, 339–40 (1971) (citing New York in 1963; Alaska in 1959; Massachusetts in 1966; Iowa in 1968; Pennsylvania in 1969); Vanlandingham, *supra* note 22, at 289. Other commentators often refer to this as home rule on the National League of Cities (formerly the American

some form of home rule to at least some of their local governments.²⁵

According to Professor Frug and other scholars, these state constitutional measures have failed to protect or empower localities. These commentators assert that state legislatures have continued to legislate concerning local matters, often displacing local decision makers in the process. State courts, they say, have failed to vindicate local autonomy and, instead, have generally upheld legislative interventions in local areas. Professor Libonati contends that home rule has failed to provide a shield against state raids on local power because of the state courts' "progressively constricted view of what is a purely local matter."²⁶ Another commentator has argued that the "narrow and restrictive judicial interpretation" given to local autonomy has stunted local initiative and discouraged local governments from utilizing the powers that home rule gives them.²⁷ The shift to "legislative" home rule has been treated as indicative of the failure of local autonomy to take root in state jurisprudence, since legislative home rule provides localities with no immunity from state legislation, and the scope it affords local initiative turns entirely on the willingness of the legislature to exercise self-restraint. As one scholar has commented, "[t]he experience in some states makes this condition perhaps too much to expect."²⁸

Professor Frug concludes that "[r]estrictions on special legislation, then, have become merely weak equal protection clauses. . . . They are ineffective because there is nothing 'suspect' about state restrictions

Municipal Association) model, see *supra* note 23, and reserve the term "legislative" home rule for home rule that is the product of state legislation, in contrast to "constitutional" home rule, which is the result of state constitutional amendment. In this Article I shall not be concerned with the textual source—legislative or constitutional—of local home rule and will use the term "legislative" home rule to refer to the form of home rule that grants localities all the powers of the state legislature, subject to legislative restriction.

25. M. Hill, *State Laws Governing Local Government Structure and Administration* 43 (1978) (home rule authority granted to cities in 41 states and to counties in 27 states). Many state constitutions combine both *imperio* and "legislative" grants. See, e.g., N.Y. Const. art. IX, § 2(b)–(c).

26. M. Libonati, *Reconstructing Local Government*, 19 Urb. Law. 645, 646 (1987); see G. Clark, *supra* note 5, at 113 ("[T]he class of problems considered *local* has become progressively narrower over time . . .").

27. Vanlandingham, *supra* note 23, at 30. According to Elkin, "it may, in fact, be the case that cities, in effect, already have expansive powers. But it would be more accurate to say that, because of the ongoing judicial interpretation, no one really knows." S. Elkin, *City and Regime in the American Republic* 176 (1987); see also C. Antieau, *supra* note 5, § 3.08 (criticizing judicial failure to provide a "clear and workable test separating 'local' from 'general' concerns"); Richland, *Constitutional City Home Rule in New York*, 54 Colum. L. Rev. 311, 313, 315 (1954) (contending that in New York, "as almost universally throughout the country, the results of judicial interpretation of constitutional provisions in regard to home rule have been a source of bitter frustration to the sponsors of these measures").

28. Vanlandingham, *supra* note 23, at 21. According to Professor Libonati, legislative home rule "firmly establishes local subordination to the center." Libonati, *supra* note 19, at 51, 67.

and nothing 'fundamental' about the invasion of local autonomy."²⁹ He adds that home rule "has not successfully created an area of local autonomy protected from state control."³⁰ As a result, "state control of cities has not been affected significantly by state constitutional protection for home rule."³¹ According to Professor Clark, "[e]verywhere, local autonomy is compromised by centralized authority. . . . Practically, the rhetoric of local autonomy is difficult to take seriously given overwhelming evidence of the fiscal, political, and judicial domination of local governments by the higher tiers of the state."³²

This wholesale dismissal of the state constitutional protections of local government is unwarranted. State-local relations do not consist simply of "unremitting"³³ raids by hostile antiurban or centralizing state legislatures on vulnerable local governments. Moreover, treating state court decisions upholding state laws affecting local governments as manifestations of an obdurate hostility to localism³⁴ ignores the serious conceptual difficulties state courts have faced in defining and enforcing the notion of local autonomy.

The power of state legislatures to make laws with respect to local matters cannot be treated simply as an ongoing affront to local autonomy. Many state laws dealing with local matters are not antilocal, but respond to requests advanced by local interests or address matters affecting more than one locality.³⁵ Nineteenth-century special legislation, usually presented as the epitome of antagonistic state interference with localities, often served to confer necessary powers requested by local governments in the absence of a general extension of home rule.

29. Frug, *City as Legal Concept*, *supra* note 4, at 1116.

30. *Id.* at 1117.

31. *Id.*

32. G. Clark, *supra* note 5, at 113-14.

33. W. Munro, *The Government of American Cities* 60 (1912).

34. See, e.g., Bruff, *Judicial Review in Local Government Law: A Reappraisal*, 60 *Minn. L. Rev.* 669, 671 (1976); Note, *City Government in the State Courts*, 78 *Harv. L. Rev.* 1596 (1965).

35. State action displacing local authority often involves the siting of public utilities that serve large regions. A locality may adopt zoning requirements that would exclude the utility, but the cost of the reduced power-generation capacity would be felt regionally or state-wide. Thus, states often pass statutes that preempt local authority to affect the siting of such utilities. See, e.g., *Public Serv. Co. v. Town of Hampton*, 120 N.H. 68, 71, 411 A.2d 164, 166 (1980); *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 105, 456 N.E.2d 487, 490, 468 N.Y.S.2d 596, 599 (1983); see also *Long Island Lighting Co. v. County of Suffolk*, 119 A.D.2d 128, 132-33, 505 N.Y.S.2d 956, 959 (1986) (state enactment creating a power authority to acquire lighting company preempted similar county resolution).

As will become clear in the discussions of land use regulation and school finance, see *infra* notes 255-304 and accompanying text, states are far more likely to act with respect to infrastructure issues and other matters affecting economic development and growth of the state generally, or affecting all localities equally, than they are to act on matters entailing redistribution from affluent localities to poorer ones or on issues affecting the economic and social composition of localities.

Contemporary critics of special legislation like Lord Bryce condemned such measures not because they were centralizing or reflected external interferences with local matters, but because they were pervaded by “the spirit of localism.”³⁶ Special laws were usually drafted by local interests, handled at the state level by legislators from the locality affected and enacted by the legislature unamended.³⁷ Deference to local opinion was basic to the process—a part of the etiquette of state legislatures. If a state legislature interfered with the decisions of city governments, it was usually in response to the requests of other local officials or groups, not a product of rural antagonism or centralizing tendencies.³⁸ So, too, in the twentieth century, “special commissions” and state laws concerning localities have provided localities with new revenues and authority,³⁹ dealt with problems spanning the boundaries of multiple localities⁴⁰ and regulated the interactions of localities.⁴¹

As for the attitudes of state courts, some of the factors explaining state legislation concerning localities are also at work when the courts sustain measures that interfere with local autonomy. The bans on spe-

36. 1 Bryce, *The American Commonwealth* 549–50 (rev. ed. 1911).

37. See J. Teaford, *The Unheralded Triumph: City Government in America, 1870–1900*, at 84–85 (1984).

38. *Id.*; Teaford, *Special Legislation and the Cities, 1865–1900*, 23 *Am. J. Legal Hist.* 189, 207 (1979). A twentieth century example of this phenomenon is the Illinois statute requiring the city of Chicago to indemnify its police officers for tort judgments obtained against them for actions taken in the course of employment, *Ill. Rev. Stat.*, ch. 24, ¶ 1-15 (1949) (current version at *Ill. Ann. Stat.* ch. 24, ¶ 1-4-5 (Smith-Hurd 1961)), sustained by the Illinois Supreme Court in *Gaca v. City of Chicago*, 411 *Ill.* 146, 148, 103 *N.E.2d* 617, 619 (1952). The statute was, of course, a direct and costly mandate on the city, but it did not entail a transfer of power to a central state bureaucracy, the exploitation of Chicago’s resources for the state’s purposes or the imposition of alien and hostile downstate values on Chicago residents. Rather, the principal beneficiaries appear to have been the Chicago police, who, as a result of the statute, were protected from personal tort liability in all cases except willful misconduct, and their tort victims, who were guaranteed a deep pocket payor in lieu of a potentially judgment-proof police officer. The Chicago police and their tort victims often, though certainly not always, will be Chicagoans.

39. See, e.g., *Atlantic City Parking Auth. v. Board of Chosen Freeholders*, 180 *N.J. Super.* 282, 287, 434 *A.2d* 676, 679 (Law Div. 1981) (authorizing parking authority to handle transportation problems created by legalization of casino gambling); *Hotel Dorset Co. v. Trust for Cultural Resources*, 46 *N.Y.2d* 358, 364–65, 385 *N.E.2d* 1284, 1286, 413 *N.Y.S.2d* 357, 359 (1978) (authorizing New York City to create trust to finance improvements to Museum of Modern Art); *Tribe v. Salt Lake City Corp.*, 540 *P.2d* 499, 502 (Utah 1975) (authorizing urban renewal program); *N.Y. Gen. City Law* § 25-m (McKinney 1989) (authorizing New York City to impose income tax on commuters).

40. See, e.g., *Four-County Metro. Capital Improvement Dist. v. Board of County Comm’rs*, 149 *Colo.* 284, 296–97, 369 *P.2d* 67, 73 (1962) (invalidating metropolitan district); *City of West Allis v. County of Milwaukee*, 39 *Wis.* 2d 356, 362–64, 159 *N.W.2d* 36, 39–40 (1968) (solid waste disposal facility), cert. denied, 393 *U.S.* 1064 (1969).

41. For a discussion of state land-use law requiring local zoning decisions approving developments with regional impacts to undergo some form of state or regional review, see *infra* text accompanying notes 275–304.

cial commissions and special laws, and *imperio* home rule's protection of local control over local matters require a sharp demarcation between local matters and matters of state concern—a line that is inherently difficult to draw. Local spillovers are endemic to metropolitan areas containing hundreds of local governments; the resulting interlocal conflicts may require state action. Some problems may arise in many localities concurrently. Even if these do not have cross-border effects, state-wide treatment of a problem that exists state-wide may be appropriate.⁴² But the heart of the problem derives from the conundrum of a multitier government system in which a higher level government and its concerns subsume the lower and its concerns. Every locality is a part of a state, and all local residents are state residents. State measures displacing local government actions are often taken on behalf of interests within that locality.⁴³ The ability of losers in local politics to reflight their battles by taking an appeal to the state legislature, or even to Congress, may be endemic to our multilevel system of government, but that hardly seems evidence of a pervasive judicial commitment to centralization.⁴⁴ That localism, like federalism, needs political safeguards does not mean it is without powerful legal significance.

42. See, e.g., *Tribe*, 540 P.2d at 502 (urban blight treated as state-wide problem even though particular blighted areas may be within individual localities with no spillover effects).

43. This is particularly true of state laws dealing with the municipal government-municipal employee relationship. State laws may require more generous compensation packages, restrict residency requirements or impose binding arbitration mechanisms that result in increases in employee salaries. See, e.g., *Uniformed Firefighters Ass'n v. City of New York*, 50 N.Y.2d 85, 90, 405 N.E.2d 679, 680, 428 N.Y.S.2d 197, 198–99 (1980); *City of Rocky River v. State Employment Relations Bd.*, 39 Ohio St. 3d 196, 200–01, 530 N.E.2d 1, 5 (1988); *City of La Grande v. Public Employees Retirement Bd.*, 281 Or. 137, 149–53, 576 P.2d 1204, 1212–13 (1978). Despite the burden on local taxpayers, the beneficiaries are also a local interest group, although municipal employees will not always be residents of the locality in which they are employed.

44. The multiarena nature of a multitiered system of governments works in both directions. National losers can reflight their battles at the state level, and state-level losers can bring their concerns to the local level. Certainly, in the 1980s advocates for a broad range of economic, social and environmental initiatives that were rejected at the national level brought their concerns to the states and were often more successful. See, e.g., R. Nathan, F. Doolittle & Associates, *Reagan and the States* 355–57 (1987); D. Osborne, *Laboratories of Democracy* 283–87 (1988).

One example of a state-local shift in the locus of battle is the public financing of election campaigns. In New York State, advocates tried unsuccessfully for years to get the state legislature to enact a public financing program. In 1987, they turned their attention to New York City, which in 1988 adopted a public campaign finance law for city elections. *New York City, N.Y., Admin. Code* §§ 3-701 to -714 (1989).

State courts facilitate reflighting state issues at the local level through doctrines that limit the preemptive effect of state laws on local action. See *infra* notes 54–55 and accompanying text. For an analysis of how state preemption doctrines attentive to local autonomy concerns apply to the New York City campaign finance law, see Briffault, *Taking Home Rule Seriously: The Case of Campaign Finance Reform*, 37 *Proc. Acad. Pol. Sci.* 35 (1989).

Certainly, whatever the technically limited status of local units and their formal subservience to the state, local governments have wielded substantial lawmaking power and undertaken important public initiatives. Even during the late nineteenth and early twentieth centuries—the heyday of Dillon’s Rule, the era of plenary state power and the unsteady beginnings of home rule—American city governments pioneered in public health, education, parks, libraries, water supply, sanitation and sewage removal, street paving and lighting and mass transit, building the infrastructure that still serves modern urban centers.⁴⁵ City governments owned and operated public utilities, regulated private utilities, professionalized their administrations and employment structures and experimented with a broad range of political and governmental innovations, including the council-manager and commission forms of government, competitive bidding on public works, planning and zoning, and nonpartisan elections.⁴⁶ This could not have been accomplished without significant legal power.

Despite the standard contention that a crabbed judicial interpretation of the “municipal affairs” language in home rule provisions has limited local power to initiate measures, the most comprehensive study of the first decades of home rule found that the courts generally permitted “a fairly wide latitude of action on the part of the city in its so-called capacity as an organization for the satisfaction of local needs,” and that under home rule the courts “extended the concept of the city’s local capacity far beyond its limits” under Dillon’s Rule.⁴⁷ A more recent analysis agrees, finding that “[j]udicially imposed limitations on the initiative power . . . in the absence of conflicting state legislations have been relatively infrequent and of minor importance in undermining local autonomy.”⁴⁸ Indeed, the postwar era has witnessed a steady broadening of the discretionary authority of local governments.⁴⁹ To-

45. By 1900 American city governments provided the most extensive, most technologically advanced public services in the world. J. Teaford, *supra* note 37, at 217; see also M. Edel, E. Sclar & D. Luria, *Shaky Palaces: Homeownership and Social Mobility in Boston’s Suburbanization* 295–96 (1984) (greater percentage of United States gross national product devoted to building transportation lines, housing and other structures between 1890 and 1910 than at any other time in United States history; most of this work was done by city governments).

46. See E. Griffith, *A History of American City Government: The Progressive Years and Their Aftermath, 1900–1920*, at 34–99 (1974); H. McBain, *American City Progress and the Law* 30–173 (1918); W. Munro, *supra* note 33, at 80–101.

47. H. McBain, *supra* note 16, at 671; see H. McBain, *supra* note 46, at 30–123 (noting willingness of state courts to sustain municipal power to own and operate public utilities, and to sanction wide discretion to regulate height and bulk of buildings under police power before states authorized zoning).

48. Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 *Minn. L. Rev.* 643, 652 (1964).

49. J. Zimmerman, *State-Local Relations: A Partnership Approach* 160 (1983); see, e.g., *State ex rel. Swart v. Molitor*, 621 P.2d 1100, 1102 (Mont. 1981) (Montana’s 1972 constitution, by allowing localities to adopt self-government charters, “opened to local

day, most home rule governments possess broad regulatory and spending powers.⁵⁰

The heart of the case for the failure of home rule remains the judicial resolution of state-local conflicts. In cases of conflict between state statutes and local ordinances even a home rule government will usually lose. That, by definition, must be the result in "legislative" home rule states. Moreover, even in *imperio* states, where local ordinances are supposed to govern in municipal matters, the difficulties state courts experience in defining exclusive areas of local interest erode the legal protection of local autonomy.⁵¹ According to Dean Sandalow, "It is the doctrines developed in resolving this problem which have caused home rule to be a disappointment to advocates of substantial local autonomy."⁵²

The significance of cases of head-to-head conflict in the overall picture of state-local relations and in determining the scope of local autonomy is overestimated. Localities do not always lose,⁵³ and although

governmental units new vistas of shared sovereignty with the state"). For an important case in a state whose constitution does not provide for home rule, see *Inganamort v. Borough of Fort Lee*, 62 N.J. 521, 536-38, 303 A.2d 298, 306-07 (1973) (sustaining municipal rent control as matter of local power even though state had repealed statute authorizing municipal rent control).

50. The public purpose doctrine has ceased to be much of a restriction on either state or local spending or regulatory authority. See, e.g., *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 69-73, 646 P.2d 835, 840-43, 183 Cal. Rptr. 673, 678-81 (1982); *Wilson v. Connecticut Prod. Dev. Corp.*, 167 Conn. 111, 114-19, 355 A.2d 72, 75-77 (1974); *Common Cause v. State*, 455 A.2d 1, 23-26 (Me. 1983); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 629-35, 304 N.W.2d 455, 457-60 (1981); *City of Pipestone v. Madsen*, 287 Minn. 357, 365-73, 178 N.W.2d 594, 599-604 (1970); *Hotel Dorset Co. v. Trust for Cultural Resources*, 46 N.Y.2d 358, 368-72, 385 N.E.2d 1284, 1288-91, 413 N.Y.S.2d 357, 361-64 (1978).

51. See *supra* note 27 and accompanying text.

52. Sandalow, *supra* note 48, at 652.

53. The core of home rule is the creation and preservation of governmental structures for independent local decision making and political participation. In many states that core is protected. See, e.g., *Sonoma County Org. Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 314-18, 591 P.2d 1, 11-13, 152 Cal. Rptr. 903, 913-16 (1979) (local control over wages of municipal employees); *Smith v. City of Riverside*, 34 Cal. App. 3d 529, 535-38, 110 Cal. Rptr. 67, 71-73 (1973) (local control over employment on public works projects); *Resnick v. County of Ulster*, 44 N.Y.2d 279, 285-89, 376 N.E.2d 1271, 1273-75, 405 N.Y.S.2d 625, 627-29 (1978) (local power to choose means of selecting local officials); *Bareham v. City of Rochester*, 246 N.Y. 140, 158 N.E. 51 (1927) (same); *Baranello v. Suffolk County Legislature*, 126 A.D.2d 296, 300-04, 513 N.Y.S.2d 444, 446-49 (1987) (same); *City of Rocky River v. State Employment Relations Bd.*, 39 Ohio St. 3d 196, 200-08, 530 N.E.2d 1, 5-11 (1988) (local control over municipal public employee labor relations); *United States Elevator Corp. v. City of Tulsa*, 619 P.2d 791 (Okla. 1980) (local control over terms of bidding on local public works); see also *Macchiarola*, *supra* note 24, at 350-59 (New York state cases show that Court of Appeals has allowed powers of local government to expand under home rule).

The problem in the law of state-local relations of the power of local governments to control the local public sector and repel state laws affecting the operations of local government is analogous to the problem presented in federal constitutional law by the ap-

localities usually do lose, surprisingly few head-to-head legal battles with the states occur. First, state courts may preserve local autonomy by avoiding the finding of a state-local conflict. These courts may determine that differing state and local regulations of the same subject are not inconsistent or that the state did not intend to preempt local law-making.⁵⁴ Courts may treat the adoption of home rule as grounds for either narrowing the field occupied by a state law or creating a presumption against preemption.⁵⁵ Some courts have relied on other provisions of state constitutions to invalidate state laws that intrude on local autonomy, particularly in areas of traditional local control such as land use.⁵⁶ Second, and far more important, state legislatures avoid

plication to the states of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1982). As the *Maryland v. Wirtz*, 392 U.S. 183 (1968); *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) line of cases—and especially the narrow 5-4 divisions that marked the latter two cases—indicates, the United States Supreme Court has not yet developed a stable analysis that avoids excessive judicial intrusion in the political process while protecting the interests of lower-level governments from higher-level intervention. This tension between confining the judicial role and defending lower-level government rights also marks state court decisions addressing the power of state legislatures to regulate municipal labor relations, and state courts, also by narrow margins, have embraced both a *National League*- and a *Garcia*-style of analysis. Compare *City of Rocky River v. State Employment Relations Bd.*, supra, 39 Ohio St. 3d at 200-01, 530 N.E.2d at 4-5 (invalidating state law mandating binding arbitration for collective bargaining disputes between municipalities and employees as unconstitutional violation of power of local self-government) with *City of La Grande v. Public Employees Retirement Bd.*, 281 Or. 137, 147-57, 576 P.2d 1204, 1210-15 (1978) (sustaining state legislation concerning municipal employee retirement and insurance on analysis foreshadowing *Garcia*).

54. See, e.g., *Peters v. City of Springfield*, 57 Ill. 2d 142, 145-49, 311 N.E.2d 107, 109-11 (1974) (upholding local ordinance setting lower mandatory retirement age for municipal firefighters and police than state municipal code); *Miller v. Fabius Township Bd.*, 366 Mich. 250, 257-58, 114 N.W.2d 205, 208-09 (1962) (township's ban on powerboat racing and waterskiing after four p.m. not inconsistent with state law prohibiting such activities starting one hour after sunset); *State ex rel. Swart v. Molitor*, 621 P.2d 1100, 1104 (Mont. 1981) (state planning and zoning code did not preclude local government from assessing fee for review of certificates of survey); *New York State Club Ass'n v. City of New York*, 69 N.Y.2d 211, 217-22, 505 N.E.2d 915, 917-20, 513 N.Y.S.2d 349, 351-54 (1987) (city's application of antidiscrimination ordinance to private clubs not in conflict with state human rights law's exemption for "distinctly private" clubs).

55. See, e.g., *People v. Judiz*, 38 N.Y.2d 529, 531-32, 344 N.E.2d 399, 401, 381 N.Y.S.2d 467, 469 (1976) ("The mere fact that a local law may deal with some of the same matters touched upon by State law does not render the local law invalid . . .") (quoting *People v. Webb*, 78 Misc. 2d 253, 256, 356 N.Y.S.2d 494, 498 (N.Y. Crim. Ct. 1974)); *People v. Cook*, 34 N.Y.2d 100, 109, 312 N.E.2d 452, 457, 356 N.Y.S.2d 259, 266 (1974) (regulations modifying State Cigarette Tax Law permissible absent express preemption by legislature).

56. See, e.g., *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1063-64 (Fla. Dist. Ct. App. 1977) (delegation of regulatory authority over land development to state administrative agency held unconstitutional due to inadequate standards governing agency exercise of power), aff'd, 372 So. 2d 913 (Fla. 1978); *Garcia v. Siffrin Residential Ass'n*, 63 Ohio St. 2d 259, 270-74, 407 N.E.2d 1369, 1377-79 (1980) (state statute overriding

conflicts by devolving broad authority to localities and then declining to pass laws displacing the operations or policies of their local governments in critical areas of local decision making.⁵⁷ The scope and significance of the state delegation of power to local governments will be elaborated more fully in the next section.

B. School Finance and Exclusionary Zoning: Local Autonomy Challenged and Sustained

The scope of local authority is inherently indeterminate, reflecting an ever-shifting mix of state delegation and oversight, the vagaries of judicial interpretation, fluctuations in the local capacity to initiate measures, the strains of interlocal conflict and the changing economic, social and technological dimensions of the problems local governments are called upon to address. Yet a useful understanding of the dimensions of local legal power and of the legal structure of state-local relations may be obtained through close attention to the outcomes of the school finance and exclusionary zoning litigations of the last two decades. These cases highlight the intersection of local government law with local political economy and underscore the general pattern of state delegation of substantial fiscal responsibility and administrative and regulatory authority to local governments. Moreover, school finance reform and anti-exclusionary zoning movements have been pursued primarily in state courts and have turned primarily on the state judicial construction of state constitutions and statutes.⁵⁸ Thus, the inquiry here appropriately focuses on state jurisprudence, which is the principal source of the law of state-local relations.

Most importantly, these litigations have addressed two of the weak links in the state-local system of decentralized power and responsibility: the pronounced interlocal inequalities in public service spending that result from interlocal differences in wealth and the external costs that result from parochial local land use regulation. These cases involve

local zoning ordinance invalid as a violation of State constitutional provision requiring laws of a general nature to have a uniform operation throughout the state).

57. See *infra* text accompanying notes 255–304.

58. During the early 1970s the United States Supreme Court essentially rejected all federal constitutional challenges to local school finance and exclusionary zoning. See, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973) (sustaining traditional school finance system in Texas); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8–9 (1974) (holding that local governments' broad zoning authority includes power to zone to maintain a community's character); *Warth v. Seldin*, 422 U.S. 490 (1975) (nonresidents seeking to challenge local exclusionary zoning generally lack standing to do so); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 263–71 (1977) (upholding village's power to prohibit multifamily housing); see also Sager, *supra* note 2, at 1375 (“*Warth* and *Eastlake* seem to constitute a tacit but broad disavowal of federal judicial qualification for review of local land use practices.”). The Court's resolution of the federal claims in the school finance and exclusionary zoning cases, together with other recent Supreme Court decisions addressing the constitutional status of local autonomy, are discussed more fully at *infra* text accompanying notes 426–83.

areas in which equity and efficiency concerns counsel a greater role for the states and greater state supervision of and accountability for local government performances. Under the standard interpretation of state-local legal relationships, local autonomy should have been of little moment to the state courts that considered the quality of the local performance of these delegated education and land use functions. In fact, these litigations have had only a limited effect in displacing the structure of decentralized responsibility for education finance and unfettered local control over land use. Indeed, they demonstrate the extent of the state commitment to preserving a strong local role in these areas.

1. *The Setting.* — The patterns of local school finance and local zoning autonomy, and the litigative and legislative challenges to them, grow out of the basic structure of state-local and interlocal relations.

Central to state-local relations is the broad delegation of power and responsibility by the states to localities with relatively little state oversight of or accountability for local actions. States generally have entrusted to local governments the authority to provide basic public services.⁵⁹ To fund these services and carry on the functions of local government, the states have authorized localities to raise their own revenues through a tax on real property situated inside local boundaries.⁶⁰ Similarly, state governments, through general enabling legislation, have authorized localities to regulate the use of land, including the power to zone.⁶¹

Central to interlocal relations are the significant differences in property wealth and public service needs among localities—with a particular locality's wealth having little or no connection to the extent of its financial needs. These differences arise out of the uneven distribution of industrial and commercial facilities and of rich and poor people, and out of the freedom of investors, businesses and people to migrate between localities.

Interlocal differences in wealth are often enormous. Within a par-

59. See, e.g., R. Lineberry, *Equality and Urban Policy: The Distribution of Municipal Public Services* 10 (1977) ("The services performed by municipalities are those most vital to the preservation of life (police, fire, sanitation, public health), liberty (police, courts, prosecutors), property (zoning, planning, taxing), and public enlightenment (schools, libraries).").

60. See J. Aronson & J. Hilley, *Financing State and Local Governments* 120–23 (4th ed. 1986) ("Not only has the general property tax become local [as opposed to state-based], but in terms of revenue productivity it is the dominant local tax.").

61. See Inman & Rubinfeld, *supra* note 2; see also 1A C. Antieau, *Municipal Corporation Law* § 7.01 (1987); J. Fordham, *supra* note 24, at 719. The major exception to the general pattern of state devolution of power and responsibility to local governments is the state of Hawaii. In Hawaii, more than 90% of the funds for public schools in the 1984–1985 school year came from the state, with almost all of the rest coming from federal sources. Advisory Comm'n on Intergovernmental Relations, *Significant Features of Fiscal Federalism* 1987 Edition 36 [hereinafter "Fiscal Federalism"]. Similarly, most land use regulation in Hawaii occurs at the state level. See D. Callies, *Regulating Paradise: Land Use Controls in Hawaii* 6–12 app. II, at 13–14, 16 (1984).

ticular state the disparity in assessed valuation per capita between the wealthiest and poorest school district may be on the order of 100 to 1; even if the extremes are ignored, and the school districts at the 90th and 10th percentiles of taxable wealth per capita are compared, the differences are still often as much as 3 or 4 to 1. These wealth differences regularly occur in districts located only a few miles apart in the same metropolitan area.⁶² Moreover, differences in local service needs are substantial. Some localities, especially larger cities, have far higher crime rates, much greater congestion and housing decay and other public safety, public health and public assistance needs that require them to spend a much higher fraction of their budgets on noneducational expenditures, leaving them significantly less for schools.⁶³ Typi-

62. In 1986, in New York's Suffolk County, the average school district property wealth per pupil was \$285,000. However, in three school districts the tax base was greater than \$1.5 million per child, while in eight other school districts the tax base was less than \$50,000 per child. In Westchester County, the county average was \$221,000 per pupil; three districts had less than \$100,000 per pupil, while four districts had more than \$300,000 per child, including Pocantico Hills, which had \$979,000 per pupil. See New York State School Bds. Ass'n, Overview of 1986 Legislative Action on State Aid to Schools (1986) [hereinafter "Overview of N.Y. State Aid"].

In 1985-86, the wealthiest school district in Texas had over \$14 million of property wealth per student, while the poorest district had approximately \$20,000 of property wealth per student. *Kirby v. Edgewood Indep. School Dist.*, 761 S.W.2d 859, 867-68 (Tex. Ct. App. 1988) (Gammage, J., dissenting), rev'd, 777 S.W.2d 391 (Tex. 1989).

The one million students in school districts at the upper range of property wealth have more than two and one-half times as much taxable property wealth to support their schools than do the one million students in the poorer districts. The 300,000 students in the lowest-wealth schools have less than three percent of State property wealth to support their education, while the 300,000 students in the highest wealth schools have over twenty-five percent of State property wealth to support their education.

Id. at 867-68.

See also *Serrano v. Priest*, 5 Cal. 3d 584, 500 n.15, 487 P.2d 1241, 1252 n.15, 96 Cal. Rptr. 601, 612 n.15 (1971) [hereinafter *Serrano I*] (in metropolitan Los Angeles assessed valuation per pupil in 1968-69 ranged from \$50,885 in Beverly Hills to \$3,706 in Baldwin Park); Hain, *Milliken v. Green*: Breaking the Legislative Deadlock, 38 Law & Contemp. Probs. 350, 350-51 (1974) (in Michigan in 1971, assessed valuation per pupil ranged from \$405,747 to \$2,165); Johnson, State Court Intervention in School Finance Reform, 28 Clev. St. L. Rev. 325, 365 (1979) (in Ohio in 1975-76, wealth per pupil ranged from approximately \$283,000 to approximately \$4,300); Schwartz, Illinois School Finance—A Primer, 56 Chi.-Kent L. Rev. 831, 835 n.24 (1980) (in Illinois in 1971, local assessed valuation per pupil ranged from \$355,386 to \$4,917 for elementary school districts and from \$231,331 to \$24,219 for secondary school districts); Comment, A "Uniform" Education: Reform of Local Property Tax School Finance Systems Through State Constitutions, 62 Marq. L. Rev. 565, 567 (1979) (in 1977-78 school district tax bases in metropolitan Milwaukee ranged from \$361,812 per pupil to \$51,042 per pupil); Note, Equality in Public School Financing: Missouri's Need for Reform, 19 Urb. L. Ann. 133, 134 n.6 (1980) (in school districts of metropolitan St. Louis in 1977-78, assessed valuation per pupil ranged from \$90,119 to \$6,728).

63. See, e.g., *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 613-14, 458 A.2d 758, 767 (1983) (Baltimore City imposed property tax rate nearly twice as high as surrounding Baltimore County, but 69.5% of city revenues went for noneducation

cally, the magnitude of local needs is totally unrelated to the extent of local resources.⁶⁴

These interlocal wealth differences have obvious implications for the relative abilities of different localities to finance public education—the principal state-delegated and locally funded service. Although all states provide some fiscal assistance to their school districts, this aid is often insufficient to offset the differences in tax bases. Wealthier districts remain able to spend far more on schools and provide better services and more extensive programs than can poorer districts,⁶⁵ and usually they may do so while imposing much lower tax rates than their poorer neighbors.⁶⁶ The local property tax system of school finance thus leads to interlocal inequalities in both the quality of local schools and property taxation.

Interlocal wealth differences may be reinforced and extended by local power over zoning. Because, for any given level of service, tax rates will be lowest when per capita property values are highest, local governments have “natural economic interests”⁶⁷ in excluding potential new residents who would bring down the local wealth average. Thus, the preservation of local wealth differences provides the motive for exclusionary actions; local zoning power provides the means. Ordi-

purposes while only 47% of suburban revenues went for purposes other than schools so that, despite tax rate disparity, suburbs had almost twice as much in revenues available per pupil for educational purposes). This is one element of the problem of municipal overburden. Similarly, due to their greater numbers of poor, non-English speaking and handicapped children, the central cities usually need to spend more per pupil to bring their children up to the same level of educational attainment as in suburban districts. See, e.g., *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 494–505, 408 N.Y.S.2d 606, 619–26 (Sup. Ct. 1978) (discussing municipal overburden and the higher costs associated with urban educational programs); W. Colman, *Cities, Suburbs, and States: Governing and Financing Urban America* 51–52, 129 (1975).

64. See, e.g., *Robinson v. Cahill*, 62 N.J. 473, 501, 303 A.2d 273, 287 (1973) [hereinafter *Robinson I*] (“Statewide there is no correlation between the local tax base and the number of pupils to be educated, or the number of the poor to be housed and clothed and fed, or the incidence of crime and juvenile delinquency, or the cost of police or fire protection, or the demands of the judicial process.”).

65. For example, in 1986 in Suffolk County the Fishers Island district spent \$17,141 per pupil and three other school districts spent more than \$8,000 per pupil while six districts spent less than \$4,000 per pupil; in Westchester County, four districts spent less than \$5,000 per pupil while Pocantico Hills spent \$15,355 per pupil and three other districts spent more than \$7,000 per pupil. Overview of New York State Aid, *supra* note 62; cf. *Kirby*, 761 S.W.2d at 868 (Gammage, J., dissenting) (“In the 1985–86 school year . . . spending per student varied between districts from \$2,112 to \$19,333.”).

66. See, e.g., Note, *supra* note 62, at 134 n.6 (in metropolitan St. Louis in 1977–78, Clayton taxed at a rate of 3.97% and produced \$3,441 per pupil while Normandy taxed at a rate of 5.19% and produced \$1,475 and University City taxed at 6.47% and produced \$1,666); *Serrano I*, 5 Cal. 3d at 600 n.15, 487 P.2d at 1252 n.15, 96 Cal. Rptr. at 612 n.15 (in 1968–69, Beverly Hills taxed at 2.38% and produced \$1,232 per pupil while Baldwin Park taxed at 5.48% but produced only \$577).

67. Hirsch & Hirsch, *Exclusionary Zoning: Local Property Taxation and the Unique-Ubiquitous Resource Distinction*, 52 S. Cal. L. Rev. 1671, 1724 (1979).

nances requiring that homes be of large size or built on large lots are widespread.⁶⁸ Many localities exclude multi-family housing,⁶⁹ mobile homes⁷⁰ and all forms of subsidized housing.⁷¹ These devices tend to assure that newcomers have wealth as great or greater than current residents. Moreover, by enabling localities to maintain and expand high quality education programs while keeping down tax rates and protecting property values, exclusionary zoning may provide an inducement to upper income families to settle in these communities.

The effects of exclusionary zoning go beyond these pervasive inequalities in the quality and availability of local public services. People who cannot afford more expensive suburban homes are effectively denied access to suburban jobs at a time when the suburbs are the principal area of job growth.⁷² Would-be emigrants from the central cities are forced to search farther afield for homes, thereby lengthening commutes and contributing to urban sprawl.⁷³ There may be an increase in the cost of housing and in the general economic segmentation of the metropolitan area.⁷⁴

68. See M. Danielson, *The Politics of Exclusion* 59–62 (1976).

69. See *id.* at 52–59; see also C. Perin, *Everything In Its Place: Social Order and Land Use in America* 32–80 (1977) (linking hostility to apartments to reluctance to permit renters into community of home owners).

70. See M. Danielson, *supra* note 68, at 62–64.

71. See *id.* at 79–106.

72. See, e.g., *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 172–73, 336 A.2d 713, 724 (1975).

73. M. Danielson & J. Doig, *New York: The Politics of Urban Regional Development* 96–98 (1982).

74. See, e.g., *id.* at 100–05; D. Harvey, *Social Justice and the City* 136 (1973). Several scholars have argued that exclusionary zoning has no external effects since a particular suburb provides a “ubiquitous resource” and that, given the large number of suburbs in metropolitan areas, there is likely to be “perfect competition among uncongested suburbs.” Hirsch & Hirsch, *supra* note 67, at 1679; see Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 425–30 (1977). But see Burnell & Burnell, *Community Interaction and Suburban Zoning Policies*, 24 Urb. Aff. Q. 470 (1989) (hypothesizing that one locality’s decision to exclude multifamily housing may lead neighboring localities to adopt the same exclusionary measures in order to prevent an influx of residents from the initial excluding community).

Studies have shown that in some areas many suburbs adopt exclusionary ordinances, especially large lot requirements and the exclusion of multifamily housing, so that the aggregate effect of local exclusionary zoning is often county-wide or region-wide. See, e.g., R. Babcock & F. Bosselman, *Exclusionary Zoning* 10–11 (1973) (detailing widespread adoption of density controls and minimum floor area requirements throughout selected metropolitan areas around the country); C. Perin, *supra* note 69, at 181–82 (only one-half of one percent of developable land in northeast New Jersey is zoned for multifamily housing; even within that category many apartments are limited to one or two bedrooms); M. Danielson, *supra* note 68, at 50–78 (reviewing county-wide restrictions on small buildings and lots, multifamily housing and mobile homes in various states including New Jersey, New York, Minnesota, Virginia and California); *id.* at 77 (estimating that for the New York metropolitan area 80% of households whose heads are 30–34 years old are priced out of new housing market); *id.* at 79–106 (noting general suburban practice of excluding subsidized housing); McDougal, *Contemporary Author-*

Starting in the late 1960s, serious legal challenges to the local property tax system of funding public education and to local exclusionary zoning practices were mounted. These two reform campaigns were pursued in the name of equality and their goals were interrelated. School finance reform would sever the link between local wealth and the quality of local education by having the states assume a greater degree of financial responsibility for public schools. Reducing the local role in school financing would ease local tax burdens and reduce the fiscal incentive to zone out lower-income residents. The attack on exclusionary zoning was aimed at opening the suburbs to less expensive housing and thus to less affluent people. The economic integration of the suburbs would mitigate interlocal disparities in taxable wealth and public services.

These cases posed significant questions about local autonomy and the balance of state-local power. To promote interlocal and interpersonal equality, the reform movements relied upon the continuing validity of the traditional notion of a state-centered local government system, with states responsible for interlocal differences and local governments accountable to the states for the uses of their power. Interlocal wealth and spending disparities are more vulnerable to legal attack if the state is considered the basic unit of government, with local governments treated as creatures of the states and local public service responsibilities traced back to state delegations. Similarly, local exclusionary zoning and the injuries it imposes on state residents outside a locality are problematic only if local governments are viewed as agents of the state, required to serve state interests rather than parochial local interests. Thus, in the school finance and exclusionary zoning litigation, a progressive late twentieth-century concern for economic and social equality was joined to the nineteenth-century notion of local governments as state creatures, delegates and agents.

By the same token, the value of local autonomy was central to the defense against the demand for greater equality. State and local governments justified the existing school finance system and local land use decision making as essential to local autonomy. For the defendants, local governments, not the states, were the pivots of the local government system. Local governments were seen not merely as creatures of the state, but as representatives of local residents, making local public policy on behalf of local constituents. Local control, including fiscal responsibility for local schools and regulation of local land use, was treated as a vital local interest that state legislatures could legitimately

itative Conceptions of Federalism and Exclusionary Land Use Planning: A Critique, 21 B.C.L. Rev. 301, 319-23 (1980) (detailing extent of exclusionary local regulation in Connecticut, Georgia and Illinois). In *Mahaley v. Cuyahoga Metro. Housing Auth.*, 500 F.2d 1087, 1089 n.2 (6th Cir. 1974), the court found that only 4 of 56 municipalities in metropolitan Cleveland had established agreements with the metropolitan housing authority to accept subsidized housing.

promote and that the courts ought to preserve. Interlocal inequality and local exclusion were not justified per se, but were excused as inevitable costs of a strong local government system—the price that must be paid to protect local autonomy.⁷⁵

The principal forum for the school finance reform and exclusionary zoning cases has been the state courts, and the cases have turned on state constitutional provisions and state law doctrines. If the conventional assumptions about state power and local powerlessness were correct, this combination of powerful equality claims and the formal legal status of local governments as little more than administrative arms of their states would have boded well for the two law reform efforts. Plaintiffs, in fact, have scored some notable successes in state courts, and those cases quickly have become a part of the contemporary canon that won praise as representative of a renewed state judicial activism and state constitutional law in an era of more conservative federal courts.⁷⁶ But these victories were not typical. Despite the evidence of profound interlocal inequalities and the asserted tradition of legal powerlessness, state judges were often moved to vindicate local autonomy and were frequently unwilling to disturb the education funding and zoning responsibilities of local governments.⁷⁷

The next two subsections analyze the case law that emerged out of nearly two decades of school finance and exclusionary zoning litigation in the state courts. A third subsection provides a brief critical consideration of state legislative developments in these areas. Although the general evolution of the legal structure has been in the direction of greater state power and responsibility, with some restrictions on local autonomy, the pace of change has been slow, the effects limited and the systemic commitment to localism only modestly modified and on occasion reaffirmed. Taken together, the litigation and legislative records demonstrate the continuing grip of localism on the legal system's approach to state-local and interlocal relations.

2. *The School Finance Cases in the State Courts: Local Autonomy and Interlocal Inequality.* — Courts in twenty-four states have considered state constitutional challenges to the local property tax system of financing public schools. The school finance reform plaintiffs⁷⁸ usually based

75. See Carrington, *Financing the American Dream: Equality and School Taxes*, 73 *Colum. L. Rev.* 1227, 1248–50 (1973); Carrington, *On Egalitarian Overzeal: A Polemic Against the Local School Property Tax Cases*, 1972 *U. Ill. L.F.* 232.

76. See, e.g., *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 *Harv. L. Rev.* 1324, 1444–49 (1982).

77. The only way to preserve local fiscal autonomy and local zoning while eliminating interlocal fiscal differences and reducing the incentive to zone out lower-income residents would be to redraw local boundaries to create local governments of comparable size and wealth. Interestingly, there has not been any litigation effort to redraw local boundary lines, perhaps because such a challenge would have been too great an attack on the independent existence of localities. See *infra* text accompanying notes 305–57.

78. Plaintiffs were either poorer school districts or the residents of such districts.

their claims on two state constitutional provisions—state equal protection clauses, and state constitutional articles directing legislatures to provide for free public school systems.⁷⁹ In fourteen states, the courts sustained the traditional school financing system, rejecting both state equal protection and education article claims.⁸⁰ In six states, the courts found the existing school finance systems invalid under the state education articles, although they rejected or declined to reach equal protection claims.⁸¹ In four states, the courts determined that the traditional finance system violates state equal protection clauses.⁸² An underlying concern in most of the school finance cases was the impact on local

See, e.g., *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 607–12, 458 A.2d 758, 764–67 (1983); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 36–37, 439 N.E.2d 359, 362, 453 N.Y.S.2d 643, 646–47 (1982); *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 368–69, 390 N.E.2d 813, 815 (1979), cert. denied, 444 U.S. 1015 (1980).

79. Thirty-five state constitutions contain an express provision guaranteeing a free public education. See Levin, *Reform Through the State Courts: Strategies for Reform in Selected States*, 38 Law & Contemp. Probs. 309, 310–11 (1974). Seven of these states mandate a “thorough and efficient” system of free public schools; another nine use either “thorough” or “efficient,” nine mandate a “general and uniform” public school system and another ten guarantee either a “general” or a “uniform” system. *Id.* at 310. The state educational articles performed two functions for the plaintiffs. One of the reasons the United States Supreme Court, in *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), had rejected a challenge to a traditional school finance system under the federal equal protection clause was that education could not be determined to be a fundamental interest for equal protection purposes—and, therefore, school finance systems would be subject only to rational basis review—because education is not afforded explicit or implicit protection by the federal constitution. *Id.* at 33–35. A state constitution’s education article arguably supplied the textual reference sufficient to require state courts to treat education as a fundamental interest. Moreover, the education article could be said to provide the basis for the imposition of a separate duty on the state to guarantee the quality of the education provided in all local school districts.

80. *Shofstall v. Hollins*, 110 Ariz. 88, 515 P.2d 590 (1973); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 248 Ga. 632, 285 S.E.2d 156 (1981); *Thompson v. Engelking*, 96 Idaho 793, 537 P.2d 635 (1975); *People ex rel. Jones v. Adams*, 40 Ill. App. 3d 189, 350 N.E.2d 767 (1976); *Hornbeck*, 295 Md. 597, 458 A.2d 758; *Milliken v. Green*, 390 Mich. 389, 212 N.W.2d 711 (1973); *Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643; *Walter*, 58 Ohio St. 2d 368, 390 N.E.2d 813; *Fair School Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 276 Or. 9, 554 P.2d 139 (1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland County v. Campbell*, 294 S.C. 346, 364 S.E.2d 470 (1988); *Kukor v. Grover*, 148 Wis. 2d 469, 436 N.W.2d 568 (1989); *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976).

81. *Rose v. Council for Better Educ., Inc.*, 1989 Ky. Lexis 55, 1989 W.L. 60207 (Ky.); *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Robinson I*, 62 N.J. 473, 303 A.2d 273 (1973); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978); *Pauley v. Kelly*, 162 W. Va. 672, 255 S.E.2d 859 (1979).

82. *DuPree v. Alma School Dist.* No. 30, 279 Ark. 340, 651 S.W.2d 90 (1983); *Serrano II*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); *Horton v. Meskill*, 172 Conn. 615, 376 A.2d 359 (1977); *Washakie County School Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

autonomy of a legal requirement that would force interlocal equalization of school spending. Even in the decisions invalidating the traditional school finance systems local control was an important concern, as courts troubled by the consequences of limited local tax bases for educational quality in poorer districts sought to reconcile a greater fiscal role for the state with the preservation of local school autonomy.

For many of the state courts upholding the existing local property tax-based system of financing public schools,⁸³ their decisions reflected a background assumption of local self-government which implicitly requires local control of the funding and provision of basic government services.⁸⁴ They treated local control of education, in particular, as essential to the existence of effective local self-government. The local public school was proclaimed "the center of community life, and a pillar in the American conception of freedom in education and in local control of institutions of local concern."⁸⁵ Schools were seen as the focal points of local communities, and local control of education deemed critical to local autonomy. The state constitutional provisions directing the state legislatures to provide for the "maintenance and

83. These states are Arizona, Colorado, Georgia, Idaho, Illinois, Maryland, Michigan, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina and Wisconsin. See *supra* note 80.

84. As a matter of constitutional doctrine, the courts in these states usually denied that the textual reference to education in their state constitutions made education "fundamental" for state equal protection purposes. As a result, interdistrict spending disparities remained subject to the rational basis test. The value of local control supplied the rational basis. See, e.g., *Lujan*, 649 P.2d at 1014-24; *McDaniel v. Thomas*, 248 Ga. 632, 644, 285 S.E.2d 156, 165 (1981); *Hornbeck*, 295 Md. at 645-57, 458 A.2d at 784-90; *Nyquist*, 57 N.Y.2d 27, 42-47, 439 N.E.2d 359, 365-68, 453 N.Y.S.2d 643, 650-52 (1982); *Walter*, 58 Ohio St. 2d at 373-82, 390 N.E.2d at 817-22; *Fair School Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135, 1149 (Okla. 1987); *Olsen v. State*, 276 Or. 9, 12, 19-21, 554 P.2d 139, 141, 144-45 (1976).

The Wisconsin Supreme Court held that education is a "fundamental right" for purposes of state equal protection analysis, but found that fundamental right status did not require equal expenditures per pupil, so that strict scrutiny would apply to state legislation effecting a complete denial of educational opportunity but not to spending disparities. *Kukor v. Grover*, 148 Wis. 2d at 495-99, 436 N.W.2d at 579-80; accord, *Shofstall*, 110 Ariz. at 90, 515 P.2d at 592. The Wisconsin court also indicated that even if strict scrutiny were the appropriate standard to be applied, "[t]he requirement that local control of schools be retained is of constitutional magnitude and necessarily compelling." *Kukor*, 148 Wis. 2d at 504 n.13, 436 N.W.2d at 582 n.13.

The courts rejecting school finance reform claims also determined that the mandates of the education articles of the state constitutions did not require interdistrict equality, but could be satisfied by the provision of a minimally adequate education in each district. They found as a factual matter that a basic education was generally provided. See, e.g., *Lujan*, 649 P.2d at 1024-25; *Hornbeck*, 295 Md. at 619-39, 458 A.2d at 770-80; *Nyquist*, 57 N.Y.2d at 47-49, 439 N.E.2d at 368-69, 453 N.Y.S.2d at 652-53; *Walter*, 58 Ohio St. 2d at 382-88, 390 N.E.2d at 822-26; see also *Richland County v. Campbell*, 294 S.C. 346, 349, 364 S.E.2d 470, 471-72 (1988) (South Carolina education article leaves "legislature free to choose the means of funding the schools of this state to meet modern needs").

85. *Thompson v. Engelking*, 96 Idaho 793, 803, 537 P.2d 635, 645 (1975).

support” of public schools did not bar the delegation of the administration and funding of education to localities. Rather, many courts read their constitutional traditions to mandate the preservation of local control.⁸⁶

Most of these courts candidly acknowledged the existence of substantial spending differences among school districts, which they recognized were largely attributable to differences in local taxable wealth.⁸⁷ But they held that interlocal wealth and spending differences did not undermine the legitimacy of the state delegation of responsibility for the provision and funding of basic public services to local governments. Instead, unequal levels of local services and taxation were deemed characteristic of the American system of local government. “We are all aware,” observed the Arizona Supreme Court, “that the citizens of one county shoulder a different tax burden than the citizens of another and also receive varying degrees of governmental service.”⁸⁸ Differences in the cost and quality of services were seen as inherent in the structure of the local government system.⁸⁹

Plaintiffs did not challenge the value of local control, but rather contended that true local control for all districts required reformation of the finance system and a greater fiscal role for the state, since poorer districts lacked the taxable wealth to support the educational programs their residents desired. They asserted that local administrative authority could be preserved even if fiscal responsibility were shifted to the state. Typically, plaintiffs did not call for full state funding of education, centralized state determination of educational needs and allocation of resources or the interdistrict equalization of spending. Instead, plaintiffs usually sought only to equalize local fiscal capacity.

To combine the benefits of local administrative authority with state fiscal support for poorer districts, school finance reformers advanced the “district power equalization” concept.⁹⁰ Under district power equalization, local school districts would continue to set the local tax

86. See, e.g., *Lujan*, 649 P.2d at 1021–24 (“[T]he historical development of public education in Colorado has been centered on the philosophy of local control.”); *Hornbeck*, 295 Md. at 621–31, 654–56, 458 A.2d at 771–76, 788–89; *Buse v. Smith*, 74 Wis. 2d 550, 570–72, 247 N.W.2d 141, 150–52 (1976).

87. See, e.g., *Lujan*, 649 P.2d at 1023 (poorer districts have “less fiscal control than wealthier districts”); *Hornbeck*, 295 Md. at 658, 458 A.2d at 790 (“[T]here are great disparities in educational opportunities among the State’s school districts . . .”); *Nyquist*, 57 N.Y.2d at 38, 439 N.E.2d at 363, 453 N.Y.S.2d at 647 (noting “significant inequalities in the availability of financial support for local school districts”); *Olsen*, 276 Or. at 24, 554 P.2d at 147 (“[S]ome districts have less local control than others because of the disparity in the value of the property in the district . . .”).

88. *Shofstall*, 110 Ariz. at 91, 515 P.2d at 593.

89. Notwithstanding the disparity in cost and quality, “this tradition of local government providing services paid for by local taxes,” the Oregon Supreme Court wrote, “continues to be a basic accepted principle of Oregon government.” *Olsen*, 276 Or. at 25, 554 P.2d at 147.

90. See generally J. Coons, W. Clune & S. Sugarman, *supra* note 2, at 200–43.

rate, determine the portion of local revenues allocated to education and, within the school budget, fix local spending priorities. However, the states would have to guarantee all districts an equal fiscal capacity for school programs. Spending differences could still result, but they would be due to local decisions concerning the level of taxation and the share of local budgets to be devoted to schools, not to differences in tax base.⁹¹

The state courts that sustained the traditional school finance system generally rejected the idea that local control could be separated from local fiscal responsibility. The New York Court of Appeals, for example, concluded that there was "a direct correlation" between the implementation of local interests and local control of school budgets.⁹² Only through control of the school budget could local residents "exercise a substantial control over the educational opportunities made available in their districts."⁹³ Local fiscal responsibility was an incentive to community involvement, and it enabled district residents to decide the size of the school budget and the allocation of funds among school programs. Thus, local fiscal control was deemed essential for local administrative control.⁹⁴

91. One problem with district power equalization is that it assumes the same measure of local taxable wealth will buy the same measure of education in all districts in the state. Representatives of large city school districts have contended that the usual measure of district power—assessable property per pupil—unfairly overstates their power to commit resources to schools. These districts argue that the presence of commercial and industrial property in the cities means that, under most legislative measures of local property wealth, they will appear relatively affluent, but that due to municipal overburden, see *supra* note 63, they actually need to spend more per pupil to bring their children up to the same level of educational attainment as in nonurban districts. Thus, the large cities have argued that mere district power equalization without some special attention to urban problems will not provide true equalization for them. See, e.g., *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 494–519, 408 N.Y.S.2d 606, 619–40 (Sup. Ct. 1978). Indeed, there is some evidence that equalization without a municipal overburden factor will actually reduce the revenues available for schools in large cities. See, e.g., *Serrano v. Priest*, 226 Cal. Rptr. 584, 618–19 (Cal. Ct. App. 1986).

The municipal overburden argument has fared even less well in court than school finance reform generally. See, e.g., *Kukor v. Grover*, 148 Wis. 2d 469, 481–84, 436 N.W.2d 568, 573–74 (1989); *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 41–42, 439 N.E.2d 359, 365, 453 N.Y.S.2d 643, 649–50 (1982); *Robinson v. Cahill*, 69 N.J. 449, 466–67, 355 A.2d 129, 138 (1976) [hereinafter *Robinson V*] (sustaining New Jersey's Public School Education Act of 1975 notwithstanding the Act's failure to make provision for municipal overburden). J. Coons, W. Clune and S. Sugarman have contended that school finance reform need not deal with municipal overburden. J. Coons, W. Clune & S. Sugarman, *supra* note 2, at 232–38.

92. *Nyquist*, 57 N.Y.2d at 46, 439 N.E.2d at 367, 453 N.Y.S.2d at 652.

93. *Nyquist*, *id.* at 45, 439 N.E.2d at 367, 453 N.Y.S.2d at 651.

94. See, e.g., *Lujan*, 649 P.2d at 1021–24; *Hornbeck*, 295 Md. at 654–57, 458 A.2d at 788–90; *Nyquist*, 57 N.Y.2d at 45–46, 439 N.E.2d at 367, 453 N.Y.S.2d at 651–52; *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 377–80, 390 N.E.2d 813, 820–21 (1979); *Fair School Fin. Council v. State*, 746 P.2d 1135, 1146–47 (Okla. 1987); *Olsen v. State*, 276 Or. 9, 23, 554 P.2d 139, 146–47 (1976).

These courts considered district power equalization to be inconsistent with local control. Given the enormous interlocal wealth differences, guaranteeing the poorest school district the same fiscal capacity as the richest would be prohibitively expensive for the states. The only way to make district power equalizing fiscally feasible would be to limit spending by the richer districts.⁹⁵ The richer districts strenuously opposed any such limitation on the use of their tax bases for their schools.⁹⁶ Many state courts agreed. The New York Court of Appeals indicated that a basic element of local autonomy was the right of individual school districts to spend more than the state requires or more than their neighbors can afford: "Any legislative attempt to make uniform and undeviating the educational opportunities offered by the several hundred local school districts . . . would inevitably work the demise of the local control of education available to students in the individual districts."⁹⁷

Indeed, judicial commitment to local control led the Wisconsin Supreme Court in *Buse v. Smith*⁹⁸ to invalidate state legislation that would have equalized interdistrict spending in part by limiting the power of wealthier communities to outspend poorer ones.⁹⁹ The Wisconsin plan provided a guaranteed tax base for poorer districts and required that districts with spending or assessed valuation per capita above a certain level make payments, euphemistically styled "negative aid," into a state fund.¹⁰⁰ The "negative aid" payments would supple-

95. A bare half-dozen states have sought to limit the funds available to more affluent districts by providing for the "recapture" of revenues raised above some ceiling and the transfer of the excess moneys to poorer districts. In one state, Wisconsin, the state supreme court invalidated recapture as inconsistent with the local autonomy of the more affluent districts. See *Buse v. Smith*, 74 Wis. 2d 550, 247 N.W.2d 141 (1976). The provision in Maine was repealed soon after adoption, and the recapture provision in Minnesota was really little more than a reduction in state aid. The recapture measures in Montana and Wyoming were largely limited to the redistribution of revenues derived from state-mandated taxes. See Education Commission of the States, *School Finance Reform in the States: 1981* (discussing recapture provisions in Utah, Montana and Minnesota); Meyer & Young, *School Finance Reform in Wyoming*, 19 Land & Water L. Rev. 135, 152-56 (1984) (describing three methods of implementing recapture and the system adopted by Wyoming in 1983); Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 Law & Contemp. Probs. 459, 467, 481 (1974) (describing Maine's state aid program as the only one providing for full recapture of excess revenue); Comment, *supra* note 62, at 582-83 (Wisconsin and Maine).

96. See, e.g., *Buse*, 74 Wis. 2d at 557, 247 N.W.2d at 144; Brief for 85 Public School Districts as Amici Curiae, *Board of Educ. v. Nyquist*, 57 N.Y.2d 27, 32-33, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982) (brief filed by affluent suburban school districts in appeal of lower court determination that New York school financing system was unconstitutional).

97. *Nyquist*, 57 N.Y.2d at 45-46, 439 N.E.2d at 367, 453 N.Y.S.2d at 652; accord *Lujan*, 649 P.2d at 1023; *Walter*, 58 Ohio St. 2d at 377-81, 390 N.E.2d at 820-22; *Danson v. Casey*, 484 Pa. 415, 427-28, 399 A.2d 360, 367 (1979).

98. 74 Wis. 2d 550, 554-62, 247 N.W.2d 141, 143-46 (1976).

99. *Id.* at 579, 247 N.W.2d at 155.

100. *Id.* at 557, 247 N.W.2d at 144.

ment the state's revenues for "positive aid" to poorer districts while restricting the capacity of rich districts to outspend the poor.¹⁰¹ The Wisconsin Supreme Court declared "negative aid" an unconstitutional infringement upon the autonomy of the richer districts.¹⁰²

The *Buse* court invoked the traditional doctrine that school districts, like all other political subdivisions, are "but arms of the state, carrying out state duties."¹⁰³ Nonetheless, the court treated the districts as autonomous entities and placed local rights on a par with state power. Although the Wisconsin Constitution obligated the state legislature to provide for free public schools "which shall be as nearly uniform as practicable," the text of the constitution referred to "*district schools*."¹⁰⁴ Based on that language, the Wisconsin Supreme Court held the local interest in administering and funding schools to be of constitutional magnitude.¹⁰⁵ Rather than giving the state plenary power over local districts, the court found a "state-local control dichotomy" to be "part and parcel of the constitution."¹⁰⁶ Thus, the court concluded, "[l]ocal districts retain the control to provide educational opportunities over and above those required by the state and they retain the power to raise and spend revenue ' . . . for the support of common schools therein.' "¹⁰⁷ Local autonomy meant that the state could neither limit district spending in the name of interlocal equality nor require one school district to contribute to the support of a poorer neighbor.

Judicial resistance to the interdistrict equalization of school resources is commonly linked to judicial deference to the legislative policy choice to fund education out of local revenues. In *Buse*, the one school finance case in which the values of deference to the legislature and support for local autonomy dictated different outcomes, the court opted for localism. Though not typical, *Buse* is exemplary of the judicial concern for local autonomy characteristic of many of the school finance cases. Despite the formal legal inferiority of local districts, the nominal status of localities as mere delegates of the state and the indisputable evidence that local autonomy led to interlocal educational inequality, the *Buse* court, like many of the state courts that rejected school finance reform claims, saw local control of education as desirable, and sought to affirm it.

Even some of the courts that held their states' school finance sys-

101. *Id.* at 557–58, 247 N.W.2d at 144–45.

102. *Id.* at 570–72, 247 N.W.2d at 150–51. *Buse's* approach to "the fundamental concept of the state-locality relationship in school financing" was recently reaffirmed in *Kukor v. Grover*, 148 Wis. 2d 469, 486–90, 436 N.W.2d 568, 575–76 (1989).

103. *Buse*, 74 Wis. 2d at 572, 247 N.W.2d at 151.

104. Wis. Const. art. X, § 3.

105. 74 Wis. 2d at 572, 247 N.W.2d at 151–52.

106. *Id.*

107. *Id.* (emphasis omitted).

tems unconstitutional placed a high value on local autonomy and limited the impact of their decisions on the basic structure of state-local relations. The six state courts that based their judgments on the state education articles necessarily limited the interlocal equalizing effect of their decisions to education finance;¹⁰⁸ broader implications for the interlocal differences in ability to spend on other basic public services or for inequalities in local taxation were usually disclaimed.¹⁰⁹

Moreover, although these education articles courts stressed the states' obligations to improve educational opportunities for children in poorer districts, they did not require their states to fund education fully or to eradicate all interlocal wealth or spending differences. Indeed, like the courts upholding the school finance systems, some of these courts have indicated that locally raised revenues can still be used in school budgets, thus allowing more affluent districts to spend above state requirements and to outspend their neighbors.¹¹⁰ Where they parted company with the other courts was in finding that their states had failed to show that an adequate education was being provided in all districts.

The opinions of the New Jersey Supreme Court in *Robinson v. Cahill*¹¹¹ are most striking, particularly given the case's status as a landmark progressive school finance reform case and an exemplar of contemporary state judicial activism. *Robinson I* rejected an equal protection challenge to the interlocal differences in fiscal capacity and spending, finding that such inequalities are inherent in local self-gov-

108. The Washington Supreme Court, for example, laid heavy emphasis on the "unique" provision of that state's constitution that made it "the paramount duty of the state to make ample provision" for education. *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 498, 585 P.2d 71, 84 (1978) (construing Wash. Const. art. 9, § 1). Similarly, the Texas Supreme Court recognized "that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed." *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 398 (Tex. 1989). Similarly, the four state courts that found the traditional school financing system violative of state equal protection clauses also implied that any inter-local equalization was unique to education, either because of education's textual reference in their state constitutions or because of education's fundamental importance. See *infra* note 128.

109. See, e.g., *Robinson I*, 62 N.J. 473, 501-04, 303 A.2d 273, 287-89 (1973); *Seattle School Dist. No. 1*, 90 Wash. 2d at 526, 585 P.2d at 99; *Pauley v. Kelly*, 162 W. Va. 672, 709, 255 S.E.2d 859, 879 (1979).

110. See, e.g., *Kirby*, 777 S.W.2d at 398; *Rose v. Council for Better Educ., Inc.*, 1989 Ky. Lexis 55 at *74, 1989 W.L. 60207 (Ky.); *Robinson I*, 62 N.J. at 520, 303 A.2d at 294, 298; *Seattle School Dist. No. 1*, 90 Wash. 2d at 526, 585 P.2d at 99; *Pauley*, 162 W. Va. at 710-12, 255 S.E.2d at 880.

111. Significant opinions in the *Robinson* litigation may be found at 70 N.J. 155, 358 A.2d 457 (1976); *Robinson V*, 69 N.J. 449, 355 A.2d 129 (1976); 67 N.J. 333, 339 A.2d 193 (1975); and *Robinson I*, 62 N.J. 473, 303 A.2d 273, cert. denied 414 U.S. 976 (1973). See generally R. Lehne, *The Quest for Justice: The Politics of School Finance Reform* (1978) (describing New Jersey's efforts to reform school finance in the wake of the *Robinson* decisions).

ernment. For that very reason such differences could not be unconstitutional:

A signal feature of home rule as we know it is that the residents of a political subdivision are permitted within substantial limits to decide how much to raise for [local] services. . . . How much will be done by local government may, of course, depend upon the size of its tax base. . . . It is inevitable that expenditures per resident will vary among municipalities, resulting in differences as to benefits and tax burden.¹¹²

The *Robinson I* court recognized the enormous discrepancies between local service needs and local fiscal capacities, and acknowledged that “[s]tatewide there is no correlation between the local tax base and the number of pupils to be educated, or the number of the poor to be housed and clothed and fed, or the incidence of crime and juvenile delinquency, or the cost of police or fire protection, or the demands of the judicial process.”¹¹³ Nevertheless, these local government functions or services were funded primarily out of local revenues. To direct the state to equalize local fiscal capacities or to assure local governments the resources to satisfy local needs, the court said, would have “convulsive implications” for home rule¹¹⁴ and require that “our political structure . . . be fundamentally changed.”¹¹⁵ The court was not willing to countenance such a profound restructuring of state-local relations.¹¹⁶ Thus, after giving a full accounting of the costs of local fiscal responsibility in terms of the lack of fit between local funds and local needs, and the inequality in resources and spending, *Robinson* indicated a willingness to pay those costs in order to preserve the system of local self-government.¹¹⁷ In short, home rule—warts and all.

112. *Robinson I*, 62 N.J. at 493–94, 303 A.2d at 283.

113. *Id.* at 501, 303 A.2d at 287. The court suggested that perhaps in the idyllic past there may have been “a rough correlation between the needs of an area and the local resources to meet them so that there was no conspicuous unfairness in assigning State obligations to the local units of government. Surely that is not true today in our State.” *Id.* at 500, 303 A.2d at 287.

114. *Id.* at 501, 303 A.2d at 287.

115. *Id.* at 494, 303 A.2d at 283.

116. Despite the state constitution’s textual commitment to education, the court declined to treat education as “fundamental” for state equal protection purposes. *Id.* at 491–99, 303 A.2d at 282–87. Local services such as police, fire protection or public health could not be said to be any less essential than public schools. *Id.* at 489, 303 A.2d at 281. The inequalities in the funding of all local services would stand or fall together; the court determined that they would stand.

The *Robinson* court also rejected the contention that local control could be satisfied by local administrative authority without local fiscal responsibility. The “basic tenet of local government” was “local authority with concomitant fiscal responsibility.” *Id.* at 499–500, 303 A.2d at 286–87. Providing that costs be borne locally served to guarantee that local residents would be “given some voice as to the amount of services and expenditures therefor” and “to stimulate citizen concern for performance.” *Id.* at 499, 303 A.2d at 286.

117. Indeed, the New Jersey Supreme Court rejected in a subsequent case an equal

Robinson I did, of course, invalidate the state's school financing system. The court construed the state constitution's education article to require the state to define the content of a "thorough and efficient" education and to take the necessary steps to ensure that such an education is provided in all districts.¹¹⁸ Although the state could delegate that function and the financial responsibility for its performance to localities, the state was obligated to oversee local school districts to ensure that the "thorough and efficient" commitment was met.¹¹⁹ The court found that the state had never specified the content of a "thorough and efficient" education, nor had it properly monitored local district performance.¹²⁰ The court interpreted the low levels of spending in poorer districts as indicating that children in those communities were not receiving the education to which they were entitled under the constitution. Interdistrict inequality per se was not unlawful, but the lower levels of spending in poorer districts put the burden on the state of proving that the promise of the constitution had been kept.¹²¹

The *Robinson* court did not mandate equalization and contemplated that richer districts could spend beyond the constitutional mandate. The New Jersey Supreme Court subsequently withdrew from the school finance controversy by upholding New Jersey's Public School Education Act of 1975, which was enacted as a result of the *Robinson* decision.¹²² Although the Act increased the state's role in defining educational quality, oversight of local schools and its financial assistance to localities, the Act still required local taxes to provide the bulk of financial support for education.¹²³ Much of the state aid provided under the Act was not equalizing, but went to rich districts as well as poor ones, and was contingent on levels of local spending, not measures of local need.¹²⁴ Although the Act raised the revenues available to poorer districts, it did not reduce interlocal spending disparities.¹²⁵ Nevertheless, the New Jersey Supreme Court held the Act constitutional on its face and responsive to the *Robinson* mandate.¹²⁶ More recently, the state's board

protection challenge to the state's requirement that counties pay for local welfare and judicial administration costs out of the local property tax, notwithstanding the disparities in local ability to pay. *Bonnet v. State*, 78 N.J. 325, 395 A.2d 194, aff'g 155 N.J. Super. 520, 382 A.2d 1175 (App. Div. 1978); accord *Colorado Dep't of Social Serv. v. Board of County Comm'rs*, 697 P.2d 1, 13-15 (Colo. 1985).

118. *Robinson I*, 62 N.J. at 519, 303 A.2d at 297.

119. *Id.* at 513, 303 A.2d at 294.

120. *Id.* at 515-18, 303 A.2d at 295-96.

121. *Id.* at 519-20, 303 A.2d at 297-98.

122. *Robinson V*, 69 N.J. at 467-68, 355 A.2d at 139.

123. *Id.* at 486-87, 355 A.2d at 149 (Conford, J., concurring and dissenting).

124. *Abbott v. Burke*, 100 N.J. 269, 285-87, 495 A.2d 376, 384-85 (1985).

125. *Id.* at 285-87 & n.2, 495 A.2d at 385 & n.2.

126. *Robinson V*, 69 N.J. at 467-68, 355 A.2d at 138-39. The court's approval was contingent on the legislature fully funding the measure. The Washington and West Virginia courts also held that their school financing systems violated their state constitutions only because those states had failed to guarantee that local school districts had the

of education, relying in part on local autonomy concerns, rejected a claim that the continuing substantial disparities in local fiscal capacities and school spending under the Public School Education Act rendered the current school finance system unconstitutional.¹²⁷ Thus, even in a state whose supreme court has pushed the state legislature hard to as-

funds necessary to meet constitutionally mandated minimum levels of service. Neither required the equalization of resources or spending or sought to limit the ability of more affluent districts to use their local resources. See, e.g., *Seattle School Dist. No. 1 v. State*, 90 Wash. 2d 476, 524–25, 585 P.2d 71, 97–99 (1978); *Pauley v. Kelly*, 162 W. Va. 672, 709, 255 S.E.2d 859, 879–80 (1979).

More recently, however, the West Virginia Supreme Court has treated the state constitution's "thorough and efficient system of free schools" clause as making education a fundamental right for purposes of state equal protection clause review. See *State ex rel. Bd. of Educ. v. Manchin*, 366 S.E.2d 743, 748–49 (W. Va. 1988). The recent education article decisions in Kentucky, Montana and Texas also tend to blur the distinction between the "adequacy" concerns that were the focus of the prior education article decisions in New Jersey, Washington and West Virginia, and "equality" concerns. The supreme courts in Kentucky and Texas treated their state constitutional provisions requiring the legislature to provide for an "efficient system" of public schools, Ky. Const. § 183, Tex. Const. art. VII, § 1, as also entailing a requirement of substantial equality of educational opportunities throughout their states. *Rose v. Council For Better Educ., Inc.*, 1989 Ky. Lexis 55, at *76, 1989 W.L. 60207 (Ky.); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391, 397 (Tex. 1989). The Montana Constitution of 1972, which was interpreted in *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684, 689–90 (Mont. 1989), includes an equalization component in its education article. Mont. Const. art. X, § 1(1) ("[E]quality of educational opportunity is guaranteed.").

127. Recent developments in school finance in New Jersey highlight the paradox of *Robinson*. In 1981, plaintiffs representing children attending public schools in Camden, East Orange, Irvington and Jersey City brought suit contending that the state's Public School Education Act of 1975 ("the Act"), which had been upheld against a facial attack in *Robinson V*, 69 N.J. at 467, 355 A.2d at 139, failed to satisfy the "thorough and efficient" requirement of the state constitution in their property-poor urban school districts. *Abbott v. Burke*, 100 N.J. 269, 302–03, 495 A.2d 376, 393–94 (1985). The state supreme court remanded the case with instructions for transfer to the state Office of Administrative Law to conduct an administrative hearing and produce a record. *Id.* at 301–03, 495 A.2d at 393–94. Three years later the administrative law judge issued a 607-page "initial decision" which found, *inter alia*, that interdistrict disparities in the capacity to finance schools had widened substantially since the enactment of the Act; that the Act had failed to remedy these disparities; that, as a result, there were substantial differences in the school programs and facilities of poor urban and affluent suburban districts; and that due to these disparities New Jersey was systemically failing to assure students in urban property-poor districts a thorough and efficient education. *Abbott v. Burke*, OAL Dkt. No. EDU 5581-85, Agency Dkt. No. 307-8/85 (Aug. 21, 1988).

The Commissioner of Education, however, rejected the administrative law judge's findings and found that the Act satisfied the "thorough and efficient" requirement. *Abbott v. Burke*, OAL Dkt. No. EDU 5581-85, C. 37-89 (Comm'r of Educ. Decision, Feb. 22, 1989). The principal point of difference between the administrative law judge and the Commissioner was the significance of continuing interlocal spending and program differences. The Commissioner agreed that such differences exist but he found them consistent with the "home rule and local fiscal management [that] are the hallmarks of local school districts." *Id.* The Commissioner found that the administrative law judge had erred in focusing on the spending and program differences. The "thorough and efficient" education requirement was satisfied as long as each district was providing the

sume a greater role in funding and monitoring local public schools, the state has continued to support local school autonomy.

Only four state supreme courts, out of the two dozen that heard these cases, invalidated the traditional school finance system because the central role of interlocal wealth differences violated state equal protection clauses.¹²⁸ These courts agreed with the other state courts that the relationship between local school finance and local control was significant. They parted company with the others, however, in determining that local authority over the scope and content of local education programs did not require local fiscal responsibility. Instead, these courts found that for poorer districts true local control required substantial state fiscal support, not just nominal administrative authority, and that an enhanced state role would not necessarily result in any reduction in local autonomy.¹²⁹ As the California Supreme Court put it:

only a district with a large tax base will be truly able to decide how much it really cares about education. The poor district cannot freely choose to tax itself into an excellence which its tax rolls cannot provide. Far from being necessary to promote local fiscal choice, the present financing system actually de-

education required by the Act and the state education department was actively monitoring the performance of local districts to assure compliance with the statutory criteria.

The State Board of Education concurred in the Commissioner of Education's analysis. Although it, too, acknowledged that plaintiffs had demonstrated significant disparities in per pupil expenditures and program offerings between their districts and selected suburban districts, that did not amount to "a systemic failure of our education system to provide a thorough and efficient education." *Abbott v. Burke*, SB # 12-89 (April 13, 1989) at 4. The Board agreed with the Commissioner that "thorough and efficient education" was largely whatever the legislature defined it to mean and that the constitutional requirement was satisfied by the state's monitoring efforts. Although individual school districts did fall short of the statutory requirements, those were seen as individual, not systemic failures, capable of remediation within the existing statutory structure. Continuing interlocal spending and program differences were justified in part by "the State's interest in giving local residents throughout the State a voice as to the amount of educational services and expenditures, and providing that some of the cost is borne locally to stimulate citizen concern for performance." *Id.* at 49. The case is currently pending before the New Jersey Supreme Court.

128. Three courts—in California, Connecticut and Wyoming—concluded that education was a fundamental interest for equal protection purposes, thus triggering strict judicial scrutiny, and that the existing system was unsupported by a compelling interest. See *Serrano II*, 18 Cal. 3d 728, 764–75, 557 P.2d 929, 951–57, 135 Cal. Rptr. 345, 367–73 (1976); *Horton v. Meskill*, 172 Conn. 615, 647–51, 376 A.2d 359, 373–76 (1977); *Washakie County School Dist. Number One v. Herschler*, 606 P.2d 310, 333–37 (Wyo. 1980). The Arkansas court found no need to decide whether education was "fundamental" since it determined that the state's reliance on the local property tax base to fund schools served no rational purpose. The court noted that the provision of the state constitution directing the state to provide "a general, suitable and efficient system" of free public education "reinforce[d]" the court's equal protection analysis. *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340, 345–46, 651 S.W.2d 90, 93 (1983).

129. See, e.g., *Horton*, 172 Conn. at 651–62, 376 A.2d at 376.

prives the less wealthy districts of that option.¹³⁰

These courts were unclear about what role local wealth differences constitutionally could play under a reformed system. Despite the equal protection predicate for their rulings, these courts did not require full state funding, a centralized matching of state resources to local needs, full equalization of district tax bases or equal spending.¹³¹ Later cases from some of these states suggest that, despite the strong language about equalization, these courts might be satisfied with a remedy comparable to New Jersey's solution, that is, increasing the resources available to the poorest districts without either capping the richest districts or compelling full equalization of district tax bases. The Connecticut Supreme Court, for example, sustained a reformed system that left local governments responsible for half the funding and continued to result in substantial spending inequalities.¹³² A decade after finding the state's school financing system unconstitutional, the court upheld remedial legislation that "retained a salutary role for local choice by guaranteeing minimum funds without imposing a ceiling on what a town might elect to spend for public education."¹³³ On the other hand, the California Court has imposed tight limits on interdistrict school spending differences that derive from wealth-related disparities.¹³⁴

As the school finance cases continue to unfold, it has become more difficult to categorize the decisions or to characterize their overall tenor. After a period of intensive activity in the 1970s and early 1980s and a lull in the middle 1980s, the end of the decade witnessed a flurry of new decisions: three state supreme courts rejected school finance reform claims;¹³⁵ three state supreme courts held their state systems invalid;¹³⁶ and, as indicated, the New Jersey Commissioner of Education denied, subject to further judicial appeal, a claim that continuing

130. *Serrano I*, 5 Cal. 3d 584, 611, 487 P.2d 1241, 1260, 96 Cal. Rptr. 601, 620 (1971).

131. See, e.g., *Serrano v. Priest*, 226 Cal. Rptr. 584, 615-20 (Cal. Ct. App. 1986); *Horton*, 172 Conn. at 652, 376 A.2d at 376; *Herschler*, 606 P.2d at 336. Arkansas's *DuPree* decision did not address the requirements of a reformed school finance system. 279 Ark. at 349-50, 651 S.W.2d at 95.

132. *Horton v. Meskill*, 195 Conn. 24, 39, 486 A.2d 1099, 1107 (1985).

133. *Id.*

134. *Serrano*, 226 Cal. Rptr. at 593-95. The state share of school spending has greatly increased and interdistrict spending differences have been sharply reduced in California. *Id.* at 615. However, this may be as much a result of Proposition 13's drastic restriction on local tax bases, Cal. Const. amend. XIII A, as of the *Serrano* decision. See Henke, *Financing Public Schools in California: The Aftermath of Serrano v. Priest and Proposition 13*, 21 U.S.F. L. Rev. 1, 1-2, 22-23, 39 (1986).

135. *Kukor v. Grover*, 148 Wis. 2d 469, 436 N.W. 2d 568 (1989); *Fair School Fin. Council v. State*, 746 P.2d 1135 (Okla. 1987); *Richland County v. Campbell*, 364 S.E. 2d 470 (S.C. 1988).

136. *Helena Elementary School Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Rose v. Council for Better Educ., Inc.*, 1989 Ky. Lexis 55, 1989 W.L. 60207 (Ky.); *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

interlocal fiscal disparities under the state's "reformed" school finance system violate the state's constitution, as interpreted in *Robinson*.¹³⁷ The three most recent school finance reform victories—decisions handed down by the supreme courts of Kentucky, Montana and Texas in 1989—though based solely on state education articles, had a stronger equalization thrust than earlier education article decisions in other states. Instead of following *Robinson* and treating the education articles as simply requiring the states to assure that basic adequate education is provided in all districts, the courts in these states interpreted the education articles as mandating "substantial equality" of educational opportunities throughout their states—although the concept of "substantial equality" has not been given judicial definition and these courts have continued to authorize local governments to raise and spend funds above the levels deemed necessary to assure basic adequacy.¹³⁸ The Kentucky and Texas decisions, in particular, are noteworthy for their calls for systemic reform to improve the quality of education provided in the poorest districts.¹³⁹ Since both courts have given their state legislatures until mid-1990 to propose new school finance systems,¹⁴⁰ it is too soon to tell what the long-term consequences for these states will be. However, *Robinson* and its aftermath suggest that a school finance reform decision may be only a first step in a prolonged politico-legal conflict in which true interlocal equalization remains an elusive goal.

As a result of these recent decisions, school finance reform arguments have prevailed in a greater percentage of state courts than was the case just two years ago. The new focus on education in public debates—as perhaps evidenced by the election of a self-proclaimed "education President"—and the belief that the quality of American public education has suffered a decline that has long-term deleterious implications for American economic competitiveness in world markets,¹⁴¹ may be providing a new impetus to school finance reform. Although the equality concern that engendered the school finance reform movement in the 1960s and 1970s was not sufficient to offset the localism built into the school finance system, it may be that fear of declining economic competitiveness will do so.¹⁴²

Despite these recent decisions, after two decades of litigation a ma-

137. *Abbott v. Burke*, OAL Dkt. No. EDU 5581-85 (April 14, 1989) (state board of education decision).

138. *Rose*, 1989 Ky. Lexis 55, at *73-74; *Helena*, 769 P.2d at 689-90; *Kirby*, 777 S.W.2d at 397-98.

139. *Rose*, 1989 Ky. Lexis 55, at *84-85 ("Kentucky's entire system of common schools is unconstitutional."); *Kirby*, 777 S.W.2d at 397 ("A band-aid will not suffice; the system itself must be changed."). *Kirby*, however, still preserves the right of local communities to "supplement[] an efficient system established by the legislature." *Id.* at 398.

140. *Rose*, 1989 Ky. Lexis 55, at *88; *Kirby*, 777 S.W.2d at 399.

141. See *infra* note 267.

142. The Kentucky court in *Rose* was clearly concerned by the low level of educa-

jority of the state courts that heard school finance reform claims rejected them because of a concern that mandating greater interlocal equalization of fiscal capacity would threaten local autonomy. More important than the scorecard of school finance reform victories and defeats is what the school finance reform cases demonstrate about the problematic nature of local autonomy. The basic structure of school finance—the state delegation of authority—is predicated on the desirability of local power. Yet formal legal and administrative authority does not by itself necessarily lead to real local power in practice. Fiscal autonomy is necessary too; but many localities lack the resources for the effective exercise of their formal legal powers. For these localities, the state is not an enemy but, rather, a potential source of vital financial assistance. The uncertain relationship of legal power and fiscal resources has been a consistent theme in many of the school finance cases. A majority of the state courts acknowledged the limits on local wealth in poorer communities, but nevertheless determined that increasing the state's share of local school funding would ineluctably erode local operational control. Moreover, they saw interlocal equality achieved through a cap on spending by richer districts as an inappropriate infringement on local freedom. The other state courts concluded that, unless districts with limited tax bases were provided with substantial financial assistance, those poorer districts would be unable to enjoy the blessings of local control.

Neither position is unreasonable on its face. On the one hand, intergovernmental grants often come with strings attached, and decision-making authority may be tied to the primary revenue source whatever the formal organization charts provide.¹⁴³ Compelling the state to take over the school funding field may permanently jeopardize local autonomy. Professor Frug has been critical of state court activism in the area of school finance since it interferes with the ability of localities “to work out these problems themselves.”¹⁴⁴ On the other hand, for a substantial number of localities fiscal incapacity makes a mockery of local con-

tion spending in the state generally and by the state's low status in the various national rankings of educational performance. *Rose*, 1989 Ky. Lexis 55, at *25–32.

143.

State aid . . . often diminishes home rule and increases the centralization of control at higher levels of government, for there is a tendency for those who control financing to try also to control policy. Money without strings attached is rare. Spending priorities are eventually decided in state rather than in local political arenas.

Pfiffner, *Inflexible Budgets, Fiscal Stress and the Tax Revolt*, in *The Municipal Money Chase: The Politics of Local Government Finance* 37, 57 (A. Sbragia ed. 1983) (footnote omitted). But see T. Clark & L. Ferguson, *City Money: Political Processes, Fiscal Strain and Retrenchment* 223–32 (1983) (local governments preserve autonomy “by adapting outside funds to local preferences” so that there are “[r]emarkably few” policy differences between cities receiving substantial intergovernmental aid and those receiving less).

144. Frug, *Empowering Cities*, *supra* note 4, at 566.

trol. Formal local autonomy for all, at the price of effective self-determination for some and fiscal burdens and impoverished public services for others, is hardly a stirring ideal. As the school finance cases illustrate, local autonomy in a setting of limited local fiscal capacity—remediable only through greater state financing at the risk of state control—is a central dilemma of our localism.

3. *The Exclusionary Zoning Cases in the State Courts: Local Autonomy and the Definition of Community Character.* — Local government efforts to use zoning to determine the social and economic composition of the locality may be traced back to the introduction of zoning as a land use regulatory tool, but exclusionary zoning as a significant form of local legislation did not become significant until the postwar suburban boom. These local efforts originally received the imprimatur of state courts. Ironically, given its current position as the leading opponent of exclusionary zoning, the court most identified with the affirmation of local power to use zoning to determine the demographic make-up of a community was the New Jersey Supreme Court.

Deeply concerned by the “tide of suburban development”¹⁴⁵ spreading out from New York City, Newark and Philadelphia during the postwar period, the court endorsed the efforts of New Jersey’s localities to protect themselves from urbanization. In a series of decisions between 1949 and 1962, the court upheld efforts by New Jersey communities to zone out industry, multifamily residences and mobile homes, and to impose costly minimum floor space, building frontage and large lot acreage requirements.¹⁴⁶ The court adopted an expansive interpretation of the state’s power to regulate land use under the police power and an equally sweeping construction of the scope of the state’s delegation of power over land use to localities. Dillon’s Rule played no part in the court’s analysis of local zoning authority; instead, the court construed zoning power “liberally in favor of the municipalities.”¹⁴⁷ Lower courts were directed to “allow fullest flexibility to the range of well-informed local judgment as to the precise way in which local zoning can best serve the welfare of the particular community.”¹⁴⁸

Moreover, not only did local governments enjoy broad powers over land use, localities also could use their powers for the exclusive benefit of local residents. Localities were not agents of the state, as the black-letter law principles would have it, but of the local community.

145. *Vickers v. Township Comm.*, 37 N.J. 232, 245, 181 A.2d 129, 136 (1962).

146. See *id.* at 249–52, 181 A.2d at 138–40 (ban on mobile homes); *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 327–28, 139 A.2d 749, 753 (1958) (prohibition of multiple-family dwellings); *Fischer v. Township of Bedminster*, 11 N.J. 194, 205–06, 93 A.2d 378, 384 (1952) (minimum five-acre lots); *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 171–75, 89 A.2d 693, 695–98 (1952) (minimum floor space requirements for residential dwellings); *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 1 N.J. 509, 514–15, 64 A.2d 347, 350–51 (1949) (exclusion of industry).

147. *Lionshead Lake*, 10 N.J. at 172, 89 A.2d at 696.

148. *Clary v. Borough of Eatontown*, 41 N.J. Super. 47, 70, 124 A.2d 54, 66 (1956).

The court's standard of review for a zoning ordinance was whether the measure was "reasonably calculated to advance the community as a social, economic and political unit."¹⁴⁹ Exclusionary practices were treated as a legitimate form of local self-advancement. Suburban residents could pursue in their communities "more land, more living room, indoors and out, and more freedom in their scale of living than is generally possible in the city."¹⁵⁰

New Jersey was not alone in affirming local authority to enact such exclusionary zoning measures.¹⁵¹ Other state courts found these local actions justified by a mix of interrelated concerns—the protection of private property values, the control of public service costs and the local tax rate, and the preservation of the "quiet and beauty" of communities undergoing the rapid transition from small town to suburb.¹⁵² Although courts occasionally warned that localities could not zone for the sole purpose of economic segregation, they were reluctant to find such a motivation. Indeed, courts were willing to countenance the increased housing costs caused by exclusionary measures as a necessary incident to the defense of property values and the maintenance of attractive communities.¹⁵³

The courts in the postwar decades did not see these exclusionary measures as raising issues of interlocal or regional significance. The interests of prospective residents, excluded by these measures from membership in the community, were largely ignored. Rather, the courts usually saw only a conflict between the private property rights of landowners and the public interest of the local community;¹⁵⁴ they generally deferred to the authority of local decision makers to define and enforce the local public interest.¹⁵⁵ Regional concerns were advanced,

149. *Vickers*, 37 N.J. at 247, 181 A.2d at 137.

150. *Lionshead Lake*, 10 N.J. at 174, 89 A.2d at 697.

151. See, e.g., *Zygmunt v. Planning & Zoning Comm'n*, 152 Conn. 550, 556, 210 A.2d 172, 175 (1965); *Honeck v. County of Cook*, 12 Ill. 2d 257, 260, 146 N.E.2d 35, 37 (1957); *Simon v. Town of Needham*, 311 Mass. 560, 567, 42 N.E.2d 516, 520 (1942); *Flora Realty & Inv. Co. v. City of Ladue*, 362 Mo. 1025, 1041–42, 246 S.W.2d 771, 779–80 (1952), appeal dismissed, 344 U.S. 802 (1952); *Bilbar Constr. Co. v. Board of Adjustment*, 393 Pa. 62, 69, 141 A.2d 851, 855 (1958); see also *Valley View Village, Inc. v. Proffett*, 221 F.2d 412, 417–18 (6th Cir. 1955) (upholding ban on all industrial uses); 8 E. McQuillin, *Law of Municipal Corporations* § 25.127 (3d ed. 1983) (citing cases in fifteen states upholding municipal ordinances precluding multiple-family dwellings). But see *Board of County Supervisors v. Carper*, 200 Va. 653, 661–62, 107 S.E.2d 390, 396–97 (1959) (invalidating two acre requirement).

152. E.g., *Simon*, 311 Mass. at 563, 42 N.E.2d at 518; *Flora Realty*, 362 Mo. at 1034–36, 246 S.W.2d at 775.

153. See, e.g., *Simon*, 311 Mass. at 565–66, 42 N.E.2d at 519; *Flora Realty*, 362 Mo. at 1034–41, 246 S.W.2d at 774–79; *Bilbar Constr.*, 393 Pa. at 76, 141 A.2d at 858.

154. See, e.g., *R. Babcock & F. Bosselman*, *supra* note 74, at 29 ("The most striking feature of the large-lot decisions is the absence of serious judicial examination of their exclusionary consequences. With the exception of scattered dicta the issue has not even been posed in these cases.").

155. See, e.g., *Clary v. Borough of Eatontown*, 41 N.J. Super. 47, 70, 124 A.2d 54,

if at all, to defend exclusion; in a metropolitan area, it was thought, a person or land use denied a place in the zoning locality could relocate elsewhere in the region.¹⁵⁶

In fact, in many metropolitan areas exclusionary ordinances had region-wide effects. By 1970, more than 99% of the vacant and developable land in northeastern New Jersey was zoned to exclude multifamily housing.¹⁵⁷ The minimum floor space required of new homes in that part of the state was one-third greater than that set by United States construction standards.¹⁵⁸ In Bergen County, 27,000 acres of developable land were zoned for single-family housing and 131 acres for apartments.¹⁵⁹ In Connecticut's Fairfield County, 89% of the vacant land was subject to minimum lot requirements of one acre or more.¹⁶⁰ Between 1952 and 1968, the average size of a legally developable lot in New York's Westchester County rose from 0.3 acres to 1.5 acres. As a result, the county, which had been zoned for a projected maximum population of approximately 3 million in 1952, had been downzoned to a population maximum of approximately 1.75 million in 1969—a 40% drop during a period of rapid population growth.¹⁶¹ Studies have found similar widespread uses of exclusionary measures in states with rapidly expanding metropolitan areas.¹⁶² One locality's exclusionary measure, when followed by other communities in the region, could have broad extralocal consequences. And in all areas suburban localities sought to exclude public or publicly subsidized housing.¹⁶³

During the last two decades, courts in several states have rejected the view that the validity of local zoning is to be assessed solely in terms of its effect on the "welfare of the particular community" and have re-

66 (1956); *Bilbar Constr.*, 393 Pa. at 72, 141 A.2d at 856 ("[W]hat serves the public interest is primarily a question for the appropriate legislative body in a given situation to ponder and decide.").

Often the principal legal issue was whether "aesthetic" or "community character" considerations were a legitimate goal of local public action—and an appropriate basis for abridging private property rights—and usually the answer was in the affirmative. See, e.g., *Fischer v. Township of Bedminster*, 11 N.J. 194, 203, 93 A.2d 378, 384 (1952); *Bilbar Constr.*, 393 Pa. at 72–74, 141 A.2d at 856–57; *State ex rel. Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 271–72, 69 N.W.2d 217, 222 (1955).

156. See, e.g., *Valley View Village, Inc. v. Proffett*, 221 F.2d 412, 418 (6th Cir. 1955); *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 1 N.J. 509, 513–14, 64 A.2d 347, 349–50 (1949).

157. C. Perin, *supra* note 69, at 181 (discussing the four New Jersey counties that form the outer ring of the New York Metropolitan Area).

158. *Id.* at 61. The United States requirement was the standard for determining the eligibility of single-family dwellings for federal mortgage insurance.

159. M. Danielson, *supra* note 68, at 53.

160. R. Babcock & F. Bosselman, *supra* note 74, at 10.

161. R. Babcock, *Billboards, Glass Houses and the Law: And Other Land Use Fables* 106 (1977).

162. See, e.g., M. Danielson, *supra* note 68, at 60 (metropolitan St. Louis); McDougal, *supra* note 74, at 319–23 (Connecticut, Georgia, Illinois).

163. See, e.g., M. Danielson, *supra* note 68, at 79–106.

quired municipalities to take the regional implications of their actions into account.¹⁶⁴ As zoning has been the major regulatory activity of local governments these decisions have been the subjects of considerable scholarly attention.¹⁶⁵ These cases have been seen as a part of the "quiet revolution in land use control"¹⁶⁶ in which state-level institutions—legislatures and administrative agencies as well as courts—are asserting greater oversight and operational responsibilities in an area traditionally delegated to local governments.

This apparent state judicial activism with respect to zoning is cited by Professor Clark as a prime example of the narrowing of "the class of problems considered *local*."¹⁶⁷ Professor Frug also has treated state court decisions curbing exclusionary zoning as another aspect of the disempowerment of localities—as a denial to localities of "the ability to decide their future by themselves."¹⁶⁸ Professor Steinberger regards zoning, "the last apparent vestige of local control," as "slowly but surely being eroded under the weight of judicial opinion."¹⁶⁹

A review of the leading state exclusionary zoning cases, however, demonstrates that the extent of state judicial intrusion on local zoning autonomy has been wildly exaggerated. The vast majority of state courts have left local land use authority untouched. Only four state supreme courts—California, New Jersey, New York and Pennsylvania—have undertaken any significant review of local exclusionary practices. Yet, with the exception of New Jersey, each court left the structure of local control over land use largely intact and did not require effective oversight by the states. Even in New Jersey, the state supreme court,

164. See, e.g., Pearson, *State Court Reactions to Exclusionary Zoning*, 1984 Ann. Surv. of Am. L. 865. There have been some noteworthy decisions in other jurisdictions. See, e.g., *Robinson Township v. Knoll*, 410 Mich. 293, 321, 302 N.W.2d 146, 154 (1981) (invalidating arbitrary exclusion of mobile homes; they may be excluded only for failure to satisfy reasonable standards designed to assure favorable comparison of mobile and site-built structures); *Save a Valuable Environment v. City of Bothell*, 89 Wash. 2d 862, 869, 576 P.2d 401, 405 (1978) (requiring local government to take regional impacts into account when considering approval of a major shopping center); *Builders Serv. Corp. v. Planning and Zoning Comm'n*, 545 A.2d 530, 532, 550–51 (Conn. 1988) (invalidating minimum floor area requirement of 1300 square feet). The significance of the *Builders Service* decision is unclear since the court took pains to explain that the floor area of the homes plaintiffs proposed to construct in East Hampton was 1026 square feet, or significantly greater than the minimum sustained in *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952); the homes were priced at or above prevailing prices in the neighborhood; the East Hampton requirement was one of the highest in the state; and the town had imposed varying minimum floor area requirements without justifying the differences. 545 A.2d at 540–41, 543–44.

165. See, e.g., C. Sands & M. Libonati, *supra* note 5, § 16.62; McQuillin, *supra* note 5, §§ 25.120a–25.120b; W. Valente, *supra* note 13, at 521–34.

166. F. Bosselman & D. Callies, *The Quiet Revolution in Land Use Control* 3 (1971).

167. G. Clark, *supra* note 5, at 113–14.

168. Frug, *Empowering Cities*, *supra* note 4, at 566.

169. P. Steinberger, *Ideology and the Urban Crisis* 148 (1985).

after prodding its state legislature into action, ultimately acquiesced in legislation that provided for the reduction, if not the rollback, of the judiciary's antiexclusionary efforts. The discussion here will focus on the state courts that have criticized the exclusionary consequences of local power over land use and will show just how limited judicial activity in those states has been. However, one should at all times remember that more than forty other states have witnessed *no* judicial activism with respect to local exclusionary zoning.

In Pennsylvania, California and New York, the courts acknowledged the regional consequences of local zoning actions, condemned municipal parochialism and required local governments to take regional needs and requirements into account when they regulate land use.¹⁷⁰ These courts ordered local governments to serve the general welfare of the state or region when they zone, not just the interests of the locality,¹⁷¹ and directed the lower state courts to look to the extralocal effects of local actions when they review local land use decisions.¹⁷² In addition, these courts appealed to their states to take a greater role in land use planning and in overseeing local zoning.¹⁷³ In implementing these principles, these courts invalidated certain large lot requirements and restrictions on multifamily housing.¹⁷⁴

170. See, e.g., *Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 607-09, 557 P.2d 473, 487-88, 135 Cal. Rptr. 41, 55-56 (1976); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 110-11, 341 N.E.2d 236, 242-43, 378 N.Y.S.2d 672, 681-82 (1975); *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 192, 382 A.2d 105, 110 (1977); *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 449, 341 A.2d 466 (1975).

171. As the California Supreme Court noted in *Livermore*, the traditional standard of state judicial review of local land use controls was whether the measure served the "general welfare." Although previously the "general welfare" had been interpreted to refer to only the zoning community, now a local land use measure with implications for "the supply and distribution of housing for an entire metropolitan region" would be judicially evaluated "by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." 18 Cal. 3d at 601-07, 557 P.2d at 483-87, 135 Cal. Rptr. at 51-55.

172. See, e.g., *Berenson*, 38 N.Y.2d at 111, 341 N.E.2d at 242, 378 N.Y.S.2d at 681 (directing lower courts to "consider the effect of the ordinance on the neighboring communities" when they consider challenges to local zoning).

173. See, e.g., *id.* at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682; *Golden v. Planning Bd.*, 30 N.Y.2d 359, 374-75, 285 N.E.2d 291, 299-300, 334 N.Y.S.2d 138, 149, appeal dismissed sub nom. *Rockland County Builders Ass'n, Inc. v. McAlevy*, 409 U.S. 1003 (1972); *Appeal of Kit-Mar Builders, Inc. (Concord Township Appeal)*, 439 Pa. 466, 474-76, 268 A.2d 765, 768-69 (1970); *Girsh Appeal*, 437 Pa. 237, 245 n.4, 263 A.2d 395, 399 n.4 (1970).

174. In *Berenson*, the New York Court of Appeals established standards for evaluating exclusionary zoning. 38 N.Y.2d at 106, 341 N.E.2d at 239, 378 N.Y.S.2d at 677. After affirming a denial of summary judgment, the court remanded for trial a challenge to a local ordinance that excluded multifamily housing. The ordinance was subsequently invalidated. 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979). In Pennsylvania, the supreme court has invalidated large lot requirements, *Kit-Mar Builders*, 439 Pa. at 478, 268 A.2d at 770; *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 533, 215 A.2d 597, 613

However, these assertions of a commitment to a regional perspective and of a concern for the parochial tendencies of local zoning were accompanied by determinations that preserved local zoning autonomy. The local desire to exclude new residents was not treated as illegitimate per se, nor was the local power to regulate land use displaced. Rather, these courts affirmed the legitimacy of the "local desire to maintain the status quo within the community."¹⁷⁵ The residents' interest in maintaining the local status quo through restrictions against newcomers was to be considered and balanced against the "countervailing interest" of nonresidents that desired to come into the community and "share in the perceived benefits of suburban life."¹⁷⁶ Primary responsibility for reconciling competing local and regional interests would remain with local zoning boards—the very bodies that had been found to be acting from local self-interest and that were directly accountable only to local electorates. In the absence of any state or regional legislative or administrative oversight the courts have continued to affirm local zoning authority and to disclaim a judicial role in regional planning.¹⁷⁷

Similarly, although lower courts were directed to take regional considerations into account in reviewing local zoning ordinances, they were also required to continue to assess local zoning measures, in the words of the California Supreme Court, "by the more liberal standards that have traditionally tested the validity of land use restrictions enacted under the municipal zoning power."¹⁷⁸ Judicial suspicion of local parochialism was married to the traditional judicial deference to the local government role in land use planning. As a result, when the zoning municipality has been able to demonstrate that it has given some

(1965), and restrictions on multifamily housing, *Fernley v. Board of Supervisors*, 509 Pa. 413, 420, 502 A.2d 585, 588 (1985); *Chesterdale Farms*, 462 Pa. at 450, 341 A.2d at 468; *Girsh*, 437 Pa. at 243, 263 A.2d at 398. *Livermore*, the leading California case, involved not an exclusionary zoning measure but a local ordinance that imposed a complete moratorium on local growth through a ban on the issuance of new housing construction permits. 18 Cal. 3d at 588, 557 P.2d at 475, 135 Cal. Rptr. at 43. Although the California Supreme Court used the case to announce the standard of "regional welfare" for reviewing local land use restrictions, the court sustained the moratorium. 18 Cal. 3d at 610, 557 P.2d at 489, 135 Cal. Rptr. at 57.

175. *Berenson*, 38 N.Y.2d at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681. As the California Supreme Court put it, "[s]uburban residents . . . may assert a vital interest in limiting immigration to their community." *Livermore*, 18 Cal. 3d at 608–09, 557 P.2d at 488, 135 Cal. Rptr. at 56.

176. *Livermore*, 18 Cal. 3d at 609, 557 P.2d at 488, 135 Cal. Rptr. at 56.

177. See, e.g., *Suffolk Hous. Servs. v. Town of Brookhaven*, 70 N.Y.2d 122, 130, 511 N.E.2d 67, 70, 517 N.Y.S.2d 924, 926 (1987) ("[I]t is . . . anomalous that courts should be required to perform the tasks of a regional planner.").

178. *Livermore*, 18 Cal. 3d at 603–04, 609, 557 P.2d at 485, 488–89, 135 Cal. Rptr. at 53, 56–57 (directing lower courts to defer to the municipality, but that "judicial deference is not judicial abdication"). For an instance of judicial deference to a local zoning decision in a case with a clear spillover effect, see *Town of Bedford v. Village of Mount Kisco*, 33 N.Y.2d 178, 186–89, 306 N.E.2d 155, 158–60, 351 N.Y.S.2d 129, 134–37 (1973).

attention to external concerns, courts have assumed the municipality balanced local and regional interests in good faith and have sustained local exclusionary measures.¹⁷⁹

The New York, California and Pennsylvania courts have been unwilling to consider local ordinances imposing large lot requirements or excluding multifamily housing unlawful per se.¹⁸⁰ Instead, these courts test the reasonableness of local land use measures only as they apply to particular sites. As a result, the legal issue is often not the propriety of a locality's general exclusion of multifamily housing, but whether a particular site ought to be rezoned.¹⁸¹ The commitment to case-by-case review allows localities to initiate exclusionary zoning and puts the onus on prospective developers to plead and prove their cases—a time-consuming and costly process that few housing proposals survive.¹⁸²

179. See, e.g., *Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville*, 51 N.Y.2d 338, 342, 347, 414 N.E.2d 680, 681, 685, 434 N.Y.S.2d 180, 181, 184–85 (1980) (sustaining five acre minimum lot requirement), cert. denied, 450 U.S. 1042 (1981); *Suffolk Hous. Servs.*, 70 N.Y.2d at 128, 130–32, 511 N.E.2d at 69–71, 517 N.Y.S.2d at 925–27 (sustaining local zoning that made no provision for multifamily housing). In New York, the lower courts have not been especially vigorous in challenging local exclusionary practices. See, e.g., *Blitz v. Town of New Castle*, 94 A.D.2d 92, 99–100, 463 N.Y.S.2d 832, 836–37 (1983); *North Shore Unitarian Universalist Soc'y, Inc. v. Incorporated Village of Upper Brookville*, 110 A.D.2d 123, 124, 128–29, 493 N.Y.S.2d 564, 565, 567 (1985). It may be that the only effect the *Berenson* decision has had on exclusionary practices in New York was in the *Berenson* case itself. See Rice, *Exclusionary Zoning: Mount Laurel in New York?*, 6 Pace L. Rev. 135, 190 (1986); see also *Appeal of Elocin, Inc.*, 501 Pa. 348, 350, 354, 461 A.2d 771, 772, 774 (1983) (upholding exclusion of town houses in a community 12% of whose housing units were multifamily dwellings); *Appeal of M.A. Kravitz Co.*, 501 Pa. 200, 203, 214–16, 460 A.2d 1075, 1077, 1082–83 (1983) (upholding exclusion of town houses by a town that is not a growth area).

180. See, e.g., *Suffolk Hous. Servs.*, 70 N.Y.2d at 131, 511 N.E.2d at 70, 517 N.Y.S.2d at 927; *Robert E. Kurzius*, 51 N.Y.2d at 346, 414 N.E.2d at 684, 434 N.Y.S.2d at 184; *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 194, 382 A.2d 105, 111 (1977).

181. See, e.g., *Suffolk Hous. Servs.*, 70 N.Y.2d at 131, 511 N.E.2d at 70, 517 N.Y.S.2d at 927.

182. As one critic of New York's exclusionary zoning doctrine has noted, the "case-by-case approach . . . places a heavy burden on plaintiff's experts to marshal evidence regarding regional needs and local responsibilities. There has been no judicial guidance as to how a region is to be defined, making it difficult to know where to collect data." Nolon, 1987: *Year for Decision in Exclusionary Zoning*, N.Y.L.J., Dec. 22, 1986, at 1, 26. Two other land use experts have pointed out that "[e]xclusionary zoning litigation is expensive and complex and players who are not ready, willing and able to spend substantial sums of money and wait an indefinite length of time for a resolution of their dispute should not play." R. Babcock & C. Siemon, *The Zoning Game Revisited* 221 (1985) (quoting Henry Hill, a Princeton, N.J. attorney who represents developers in zoning litigation).

The story of developer Joseph Girsh, the protagonist in one of the leading Pennsylvania exclusionary zoning cases, is instructive. It took Girsh six years to obtain a ruling from the Pennsylvania Supreme Court that the Township of Nether Providence had to make some land in the community available for multifamily dwellings. *Appeal of Girsh*, 437 Pa. 237, 244–46, 263 A.2d 395, 398–99 (1970). In response, the township zoned land in a quarry for apartment development rather than rezone the property that

This combination of deference to local zoning authority and protracted case-by-case litigation has meant that, despite the antiexclusionary tenor of the leading cases in these three states, there has been little significant expansion in the range of suburban housing opportunities.¹⁸³ Localities retain substantial authority to regulate and control growth.¹⁸⁴

Indeed, even as they condemned exclusionary zoning, the courts in New York and California actually facilitated the local adoption of land use regulatory measures with regional consequences. In *Golden v. Planning Board of Ramapo*,¹⁸⁵ the New York Court of Appeals sustained a local growth control ordinance that curtailed the subdivision or development of land in the township for up to eighteen years, until the town or developers made certain capital improvements, such as sewers, parks and roads, necessitated by population growth. Timed growth controls are not aimed directly at the would-be occupants of smaller homes or apartments, and a growth control program can provide for a variety of housing at different costs. *Golden* relied upon this distinction between "assimilation" and exclusion in upholding the growth control measure.¹⁸⁶ Yet growth controls, like exclusionary devices, may raise housing costs, reduce housing availability and ultimately exclude lower income people.¹⁸⁷ Moreover, local growth controls, like exclusionary devices, can have a regional impact, either by displacing population onto other communities or by inspiring other suburbs in the region to emulate the growth control program, thereby reducing housing availability generally and displacing population still further.¹⁸⁸

The *Golden* court was aware of and concerned about the regional implications of the Ramapo program¹⁸⁹ and it urged the state to con-

Girsh owned. Girsh returned to court and eventually obtained an order directing township officials to issue a building permit for a site suitable for his apartment project. By that time, however, Girsh had died. See M. Danielson, *supra* note 68, at 165.

183. See, e.g., M. Danielson, *supra* note 68, at 190.

184. See, e.g., *Robert E. Kurzius*, 51 N.Y.2d at 344, 414 N.E.2d at 682-83, 434 N.Y.S.2d at 182 (1980); *Blitz v. Town of New Castle*, 94 A.D.2d 92, 98, 463 N.Y.S.2d 832, 835 (1983); *Appeal of Elocin, Inc.*, 501 Pa. 348, 353, 461 A.2d 771, 773 (1983); *Appeal of M.A. Kravitz Co.*, 501 Pa. 200, 211, 460 A.2d 1075, 1081 (1983).

185. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972).

186. *Id.* at 376, 285 N.E.2d at 300-01, 334 N.Y.S.2d at 150.

187. The principal goal of most supporters of growth controls is the exclusion of apartment houses and high-rise housing. See M. Baldassare, *Trouble in Paradise: The Suburban Transformation in America 93-94* (1986).

188. See, e.g., Frieden, *The Exclusionary Effects of Growth Controls*, 465 *Annals* 123, 131-32 (1983); Zumbrun & Hookano, *No-Growth and Related Land Use Legal Problems: An Overview*, in *The Land Use Awakening: Zoning Law in the Seventies* 161, 181-82 (R. Freilich & E. Stuhler eds. 1981).

Growth controls are an understandable response to the concern that population growth burdens public facilities and ordinarily will require additional or expanded improvements; but underlying many large lot requirements were similar concerns about the fiscal impact of population growth.

189. The court agonized at length about "communal and regional interdepen-

sider state or regional planning.¹⁹⁰ But in the absence of any state or regional planning measures, the court's residual localism—its commitment to a broad reading of local control over land use and local power to shape community development—prevailed over its doubts about the ordinance's extralocal effects. Notwithstanding that the town was "not in an absolute sense statutorily authorized to deny the right to subdivide,"¹⁹¹ the court determined that the cumulative effect of various state laws delegating power over land use to localities was to place "the primary responsibility for formulating and implementing zoning policy . . . in the hands of local government."¹⁹² Planning was a "legislative prerogative," and the court treated the Planning Board of Ramapo as a full-fledged legislature, deserving "the usual presumption of validity attending the exercise of the police power."¹⁹³ *Golden* illustrates just how much the Dillon's Rule mentality has faded, how easily the new regionalism and the old localism can coexist and a residual localism may prevail even with a court attentive to and troubled by the regional implications of a local action.

In California, in the very case in which it first articulated a commitment to a regional perspective in the review of local zoning, the state supreme court held that voter-initiated zoning ordinances need not comply with state statutes imposing certain restrictive procedural requirements for local zoning.¹⁹⁴ Subsequently, the court held that the voter initiative could be used for the spot rezoning of a specific parcel of land to block its development¹⁹⁵ and that state legislation requiring municipalities to consider and balance the effect of local zoning on regional housing needs and to make findings justifying the resulting possible reduction in housing opportunities could not be applied to voter-

dence"; local "insularism and its correlative role in producing distortions in metropolitan growth patterns;" the tendency of growing localities "to try their hand at an array of exclusionary devices" to avoid the burdens of growth; and the inability of "Ramapo or any single municipality" to solve the problems of growth. 30 N.Y.2d at 374-76, 285 N.E.2d at 299-300, 334 N.Y.S.2d at 149-50.

190. *Id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150.

191. *Id.* at 373, 285 N.E.2d at 298, 334 N.Y.S.2d at 147.

192. *Id.* at 375 n.8, 285 N.E.2d at 300 n.8, 334 N.Y.S.2d at 149 n.8. The growth control program fell "well within the ambit of existing enabling legislation," *id.* at 376, 285 N.E.2d at 300, 334 N.Y.S.2d at 150, which, the court determined, gave the locality broad power to shape community development.

193. *Id.* at 377, 285 N.E.2d at 301, 334 N.Y.S.2d at 151. As Professor Ellickson has observed, judicial adherence to a Dillon's Rule approach to the scope of local lawmaking would have doomed the Ramapo ordinance. Ellickson, *supra* note 74, at 473-74.

194. *Associated Home Builders v. City of Livermore*, 18 Cal. 3d 582, 589-96, 557 P.2d 473, 476-81, 135 Cal. Rptr. 41, 44-49 (1976). California first upheld the constitutionality of zoning by initiative in *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), appeal dismissed, 427 U.S. 901 (1976).

195. *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980).

initiated ordinances.¹⁹⁶ As the court noted, there would be no way of proving that the electorate-as-legislature had undertaken the requisite analysis and come to the appropriate findings.¹⁹⁷

Local electorates appear to be even less likely than local legislatures to take a regional perspective on zoning restrictions. As a result, the judicial validation of local initiative-zoning has facilitated the enactment of restrictive measures.¹⁹⁸ The California Supreme Court's affirmation of initiative zoning may have offset the antiexclusionary effect of the court's commitment to a regional approach to local zoning.¹⁹⁹

The most thoughtful and protracted judicial confrontation with local exclusionary ordinances has been in New Jersey. Unlike the more modest efforts in New York, Pennsylvania²⁰⁰ and California, the New

196. *Building Indus. Ass'n v. City of Camarillo*, 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986).

197. *Id.* at 823–24, 718 P.2d at 76, 226 Cal. Rptr. at 89. The court did, however, uphold the applicability to voter-initiated land use controls of a provision of the California Evidence Code which establishes the presumption that growth limitation ordinances adversely affect regional housing needs and places the burden of proof on the locality to show that the ordinance is necessary to promote public health, safety and welfare. *Id.* at 817–23, 718 P.2d at 72–75, 226 Cal. Rptr. at 84–88 (construing Cal. Evid. Code § 669.5).

198. One study found that, during the 1970s and early 1980s, California communities considered 108 land use ballot propositions; 93 of those were antigrowth; and 58 of those passed. By contrast, only four of the fifteen progrowth ballot propositions passed. See Note, *Instant Planning—Land Use Regulation by Initiative in California*, 61 S. Cal. L. Rev. 497, 514 & n.96 (1988). Zoning via initiative and referendum, and the propensity of California ballot proposition voters to take an antigrowth stance, has become even more common in the 1980s. See, e.g., Goetz, *Direct Democracy in Land Use Planning: The State Response to Eastlake*, 19 Pac. L.J. 793, 795 (1987); Peterson, *Land Use Decisions Via the Ballot Box*, N.Y. Times, May 22, 1988, § 10, at 1, col. 2.

199. California decisions upholding the local imposition of large subdivision and development fees and local requirements that developers pay for community capital improvements also reflect a broad deference to local autonomy. See, e.g., *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 643, 484 P.2d 606, 614, 94 Cal. Rptr. 630, 638, appeal dismissed, 404 U.S. 878 (1971); *J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3d 745, 756, 203 Cal. Rptr. 580, 588 (1984). Although these measures were often based on state enabling legislation—itsself an interesting commentary on the state's commitment to local autonomy in land use and community development—many exactions go far beyond the traditional power of local governments to assess the costs of government services against beneficiaries. The California courts have indulged their communities by taking a broad interpretation of local authority to impose charges on developers. See Ellickson, *supra* note 74, at 477–89, 511 & n.421.

These fees and exactions contribute to the costs of housing and to the exclusion of lower income residents from growing suburbs, Frieden, *supra* note 188, at 126–35, but the courts have not invoked the regional perspective or any of the conventional notions about the limited regulatory powers of local governments, in passing on their validity.

200. The Pennsylvania Supreme Court was a pioneer in the judicial attack on exclusionary zoning, and the first court to look beyond the zoning town and the affected developer to the interests of other communities and of persons seeking housing in the region in evaluating local zoning measures. See *Appeal of Kit-Mar Builders, Inc.*, 439 Pa. 466, 268 A.2d 765 (1970); *Appeal of Girsh*, 437 Pa. 237, 263 A.2d 395 (1970); *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965). In implementing

Jersey Supreme Court attempted to change both the basic legal structure of state-local relations in zoning and the demographics of the state's developing communities. The resulting litigation and legislative and administrative activity over a period of fifteen years demonstrate with particular clarity the intensity of local exclusionary desires, the tension between local zoning autonomy and the state-wide perspective, and the stubborn strength of localism in state law.

In the celebrated *Mount Laurel*²⁰¹ case ("*Mount Laurel I*"), the New Jersey Supreme Court recanted its prior approval of suburban exclusionary zoning and instead sought to undo local exclusionary practices. *Mount Laurel I* is an unusual combination of contemporary political economy concerns and the shade of Dillon's Rule. The court situated local exclusionary practices in the fiscal structure of the local government system. In the court's view, local responsibility for the funding of basic services led to the practice of fiscal zoning: localities using their zoning ordinances to restrict local land to users that would enhance the local tax base.²⁰²

The zoning policy employed by the town of Mount Laurel was a textbook case of exclusionary devices: large lot zoning; high minimum floor space requirements for homes; the reservation of most residential sites for single-family detached houses; and requirements of costly amenities in the handful of multifamily units.²⁰³ To reduce the strain of growth on the local tax base, the few multifamily housing units were subject to tight limits on the number of bedrooms and school-age chil-

these principles, the court has on several occasions invalidated large lot requirements, *Kit-Mar*, 437 Pa. at 237, 268 A.2d at 765; *National Land*, 437 Pa. at 237, 215 A.2d 597, and restrictions of multifamily housing, see, e.g., *Fernley v. Board of Supervisors*, 509 Pa. 413, 502 A.2d 585 (1985); *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975).

The Pennsylvania court, however, has declined to find large lot requirements or the exclusion of multifamily housing unlawful per se. See, e.g., *Appeal of Elocin, Inc.*, 501 Pa. 348, 461 A.2d 771 (1983); *Appeal of M.A. Kravitz Co.*, 501 Pa. 200, 460 A.2d 1075 (1983). Like the New York court, it has urged the state to adopt state-wide or regional planning, while simultaneously sustaining local measures in the absence of any new state or regional legislative or administrative oversight. *Id.* In suburbs which have made token allowances for some multifamily residences, the burden is on the plaintiff to demonstrate that the locality is "in the path of growth"—neither fully developed nor outside the area of imminent metropolitan population expansion—and that the locality has not accepted its fair share of regional housing development. *Surrick v. Zoning Hearing Bd.*, 476 Pa. 182, 382 A.2d 105, 108, 110 (1977). The court has proceeded on a case by case basis, assessing the quality of local consideration of regional needs rather than developing judicial measures of region, need or fair share. See Note, *The Pennsylvania Supreme Court and the Exclusionary Zoning Dilemma*, 29 Vill. L. Rev. 477 (1984).

201. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 170–71, 185, 336 A.2d 713, 723, 730–31, cert. denied, 423 U.S. 808 (1975). The court's fiscal perspective may not be surprising considering the contemporaneous *Robinson* school finance litigation.

202. See *id.* at 162–69, 336 A.2d at 718–22.

203. *Id.* at 163–64, 168, 336 A.2d at 719, 722.

dren. Moreover, most of the vacant land had been zoned for light industry so that the community of 11,000 residents was planning for industries providing 43,000 jobs.²⁰⁴ There would be substantial tax base growth but no place to house the workers of the new industries.

Mount Laurel was not so much antigrowth as concerned about the type of growth that occurred. The town was open to development and new residents provided they did not detract from the average wealth of the community. Nor was Mount Laurel unusual. The court found that zoning had become a primary weapon in the interlocal struggle for "good ratables" and against the immigration of residents who could increase local public service costs.²⁰⁵ Lower-income residents, denied access to suburban homes, jobs and public services, were the casualties of these restrictive local land use practices.²⁰⁶

Remedying the state's emergent economic segregation required curtailing local zoning autonomy. To accomplish this, the court summoned up the traditional notions of local government as agent and delegate of the state: "[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as is the state."²⁰⁷ The court determined to take a "non-local approach to the meaning of 'general welfare' " in zoning cases, so that when a local ordinance has "a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served."²⁰⁸ As the state could have no interest in an individual locality either preserving its own special character or keeping up its tax base at the price of limiting housing and public service opportunities for other citizens of the state, the *Mount Laurel I* court ruled that localities could not zone for such purposes.²⁰⁹

The court's underlying concern with the state's growing interlocal economic segmentation and the implications for the separation of rich and poor in terms of both the quality of local public services and access to housing and employment opportunities led it beyond the other active state courts in defining the zoning community's obligation to the rest of the state. The mere elimination of exclusionary devices would not suffice. Instead, the court articulated its vision of a state composed of integrated, mixed-income communities and held that local zoning

204. Id. at 161, 163, 336 A.2d at 718-19.

205. Id. at 170-71, 336 A.2d at 723.

206. Id. at 172-73, 336 A.2d at 724.

207. Id. at 177, 336 A.2d at 726.

208. Id. at 177-78, 336 A.2d at 726-27.

209. Id. at 186, 336 A.2d at 731. The court did indicate that local zoning ordinances could restrict housing for ecological or environmental reasons, but warned that it would not accept an environmental defense of a restrictive local ordinance which is "simply a makeweight to support exclusionary housing measures or preclude growth." Id. at 187, 336 A.2d at 731.

ordinances must further that goal. Thus, *Mount Laurel I* obliges a locality “affirmatively to plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing, to meet the needs, desires and resources of all categories of people who may desire to live within its boundaries.”²¹⁰

The court acknowledged that, due to differences in the availability of vacant land, employment opportunities and access to transportation, new housing might be more appropriate in one community than another.²¹¹ Regional planning, rather than judicial intervention in local zoning, might be a better way to accomplish its affirmative goals. But rather than join the other state courts in bemoaning the lack of state planning while accepting continued local autonomy, the New Jersey court held that until the state acted to provide some form of regional planning, every developing community “must bear its fair share of the regional [housing] burden.”²¹²

Despite *Mount Laurel I*’s bold doctrine, the court was initially cautious and preserved a substantial measure of local autonomy over zoning. The basic elements of the *Mount Laurel I* doctrine—“region,” “fair share,” “present and prospective low and moderate income housing needs”²¹³—were left undefined. In the absence of state-wide or regional planning, the court indicated that local governments—not the courts—were to be accorded the first opportunity to give meaning to these open concepts. Notwithstanding the historical record of, and structural incentives for, local avoidance of sharing regional housing needs, zoning remained a “local function and responsibility.”²¹⁴

In subsequent cases, the court exempted certain municipalities from the “*Mount Laurel* obligation”²¹⁵ and held that those localities subject to *Mount Laurel I* need not come up with a precise formula to

210. Id. at 179, 336 A.2d at 728.

211. Id. at 189, 336 A.2d at 732.

212. Id. at 189, 336 A.2d at 733. The court did urge the legislature to consider regional zoning “or at least regulation of land uses having a substantial external impact by some agency beyond the local municipality.” Id. at 189 n.22, 336 A.2d at 732–33 n.22.

213. Id. at 189, 336 A.2d at 733.

214. Id. at 191–92, 336 A.2d at 734 (vacating portion of the lower court order nullifying local zoning ordinance *in toto* and ordering township to present plan of affirmative public action designed to satisfy need for low and moderate income housing).

215. In *Pascack Ass’n v. Mayor of Washington*, 74 N.J. 470, 483–84, 379 A.2d 6, 13 (1977), the New Jersey Supreme Court held that fully developed, single-family residential communities did not have any *Mount Laurel* obligation. This holding was reaffirmed in *Fobe Assocs. v. Mayor of Demarest*, 74 N.J. 519, 524–27, 379 A.2d 31, 34–35 (1977), in which the court upheld the decision of the Demarest Board of Adjustment denying a variance for multifamily housing since a “developed” municipality like Demarest did not have a *Mount Laurel* obligation.

determine their "fair share" of regional housing needs.²¹⁶ Reviewing courts were to look simply to the "substance" of a challenged zoning ordinance and the "bona fide efforts" of a municipality to remove exclusionary barriers in order to determine whether the municipality had met its *Mount Laurel* obligation.²¹⁷ Most importantly, lower courts were cautioned against issuing remedial orders that would permit developers to build new housing.²¹⁸ The court eschewed direct affirmative judicial intervention in local zoning. As a result, in the first eight years after *Mount Laurel I* little new low- or moderate-income housing was built in New Jersey's suburbs. Local governments dug in their heels,²¹⁹ the courts temporized²²⁰ and the state government remained inactive.²²¹

Only in 1983 did the court conclude that it would no longer defer to local decision making or wait for the state to come up with comprehensive regional plans. In *Mount Laurel II*,²²² the New Jersey Supreme Court moved decisively beyond both the other state courts and the New Jersey legislature to effectuate its vision of economically integrated communities. The court put the burden on New Jersey's suburbs to demonstrate that they were providing for their fair share of regional present and prospective housing needs. Localities would be required

216. *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 498–99, 371 A.2d 1192, 1200 (1977).

217. *Id.* at 499, 371 A.2d at 1200.

218. Although a builder's remedy was granted in *Oakwood at Madison*, the court emphasized that the plaintiff, after six years and through two trials and an extended appeal, had "borne the stress and expense of this public-interest litigation, albeit for private purposes." *Id.* at 550, 371 A.2d at 1226. The court warned that its "determination is not to be taken as a precedent for an automatic right to a permit on the part of any builder-plaintiff who is successful in having a zoning ordinance declared unconstitutional. Such relief will ordinarily be rare" *Id.* at 551–52 n.50, 371 A.2d at 1227 n.50.

219. The Township of Mount Laurel, for example, responded to the New Jersey Supreme Court's requirement that it make a place for its fair share of the regional low and moderate income housing needs by rezoning for new housing a swamp, a flood plain and land in the path of a high-speed commuter rail line. The town understated its fair share; provided for costly planned unit development housing; and required developers to undertake expensive studies of the transit impact, the environmental impact, the municipal services cost and the economic costs and benefits of new housing. See McDougal, *supra* note 74, at 337.

220. See *Pascack Ass'n v. Mayor of Washington*, 74 N.J. 470, 483–84, 379 A.2d 6, 13 (1977); *Fobe Assocs. v. Mayor of Demarest*, 74 N.J. 519, 524–27, 379 A.2d 31, 34–35 (1977); *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 498–99, 371 A.2d 1192, 1200 (1977); *Castroll v. Township of Franklin*, 161 N.J. Super. 190, 391 A.2d 544 (App. Div. 1978) (sustaining denial of a variance for multifamily dwelling); *Nigito v. Borough of Closter*, 142 N.J. Super. 1, 359 A.2d 521 (App. Div. 1976), cert. denied, 74 N.J. 265, 377 A.2d 670 (1977) (upholding municipality's denial of use variance for garden apartment complex).

221. For a discussion of the inactivity of the state legislature between *Mount Laurel I* and *Mount Laurel II*, see R. Babcock & C. Siemon, *supra* note 182, at 218–19.

222. *Southern Burlington County NAACP v. Township of Mount Laurel*, 92 N.J. 158, 456 A.2d 390 (1983).

to make determinate calculations; the courts would no longer rely on local good faith.²²³ Localities would be required to remove all excessive restrictions and exactions and to provide appropriate incentives for the construction of low and moderate cost housing.²²⁴ Further, although it acknowledged a lack of professional expertise, the court resolved to render amenable to judicial resolution the issues of determining the proper areas for future housing growth, defining "region," predicting future needs and making interlocal allocations. To accomplish this it borrowed from the planning studies of state administrative agencies and improved the capacity of the lower courts to deal with technical planning matters.²²⁵

Most importantly, trial courts were authorized to enter remedial orders permitting successful developer-plaintiffs to build.²²⁶ The builder's remedy proved crucial to subsequent developments in the *Mount Laurel* litigation. Challenges to local exclusionary zoning were slow, costly and complex. Few public interest organizations had the resources for a sustained assault on local exclusionary practices, but developers did. *Mount Laurel II* was followed by a dramatic increase in *Mount Laurel* litigation, and all of the new cases were brought by developers.²²⁷ Even though the remedy was conditioned on the developer's setting aside a portion of the new housing for low- or moderate-income inhabitants, developers still were willing to litigate. The developer became a kind of private attorney general for the economic and social integration of New Jersey's suburbs; in the three years following *Mount Laurel II*, a considerable amount of new housing was built as a result of the builder's remedy.²²⁸

The threat to local zoning autonomy engendered by *Mount Laurel II*, and the builder's remedy in particular, aroused a storm of controversy. Governor Kean denounced "the wholesale revision of local zoning ordinances by the judiciary [as] an undesirable intrusion on the home rule principal [sic]" and rescinded the state planning documents upon which the court had relied in determining the communities subject to the *Mount Laurel* obligation.²²⁹ *Mount Laurel* became a focal

223. *Id.* at 215–16, 220–23, 456 A.2d at 418–19, 421–22.

224. *Id.* at 258–74, 456 A.2d at 441–50. In addition, the court overruled its prior decision in *Vickers v. Gloucester*, 37 N.J. 232, 181 A.2d 129 (1962), which had permitted townships to ban mobile homes. 92 N.J. at 275, 456 A.2d at 450.

225. *Mount Laurel II*, 92 N.J. at 223–58, 456 A.2d at 422–41.

226. *Id.* at 278–81, 456 A.2d at 452–53.

227. See *J.W. Field Co. v. Township of Franklin*, 204 N.J. Super. 445, 452, 499 A.2d 251, 255 (1985) ("*Mount Laurel* litigation has increased dramatically since *Mount Laurel II* and every suit has been brought by a builder rather than a nonprofit or public agency."); Rice, *supra* note 179, at 167 (1986).

228. By January 1986, twenty-two *Mount Laurel* lawsuits had been settled, and the affected communities had agreed to the construction of 14,000 low and moderate income units. See McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 Harv. C.R.-C.L. L. Rev. 623, 623 n.4 (1987).

229. See R. Babcock & C. Siemon, *supra* note 182.

point in many local elections, and in a nonbinding referendum the state electorate voted to abolish the decision.²³⁰ The legislature was finally galvanized into action.

In the Fair Housing Act of 1985 (the "Act"),²³¹ the legislature accepted *Mount Laurel* in principle but moderated it in effect. The Act codified *Mount Laurel's* determination that developing communities have a "constitutional obligation" to use their land use regulations to provide "a realistic opportunity" for a fair share of regional present and prospective need for housing for low and moderate income families.²³² It also provided for greater state administrative oversight of local zoning than ever before.

However, the legislature preserved a substantial measure of local autonomy in zoning and rejected *Mount Laurel's* goal of promoting mixed income communities through affirmative state action. Formally, the Act provided for a state-local sharing of power with respect to local compliance with the *Mount Laurel* obligation. The initial determination of a municipality's "fair share" and the preparation of implementation plans would remain at the local level, but a new state Council on Affordable Housing would set criteria and guidelines, monitor municipal actions and, through its power to immunize municipalities that had submitted acceptable plans from *Mount Laurel*-style lawsuits, affect the content of municipal zoning and housing programs.²³³ The Act's standards for municipal zoning were more protective of the local interest in controlling growth and maintaining community character than the court's had been. The Act acknowledged the need for more low and moderate income housing, but directed the new council in developing local housing plans to respect "the established pattern of development in the community" and to consider the costs of improving public facilities and adding new infrastructure capacity.²³⁴ In addition, the legislature firmly disclaimed any intention to "require a municipality to raise and expend municipal revenues in order to provide low and moderate income housing."²³⁵

The Act signalled a shift away from the goal of integrated communities that had animated *Mount Laurel*. The state agreed to fund low and moderate income housing, but only in low and moderate income areas, not in more affluent suburbs. Localities subject to the *Mount Laurel* obligation were permitted to transfer half their "fair share" hous-

230. See Hanley, *Housing the Poor in Suburbia: A Vision Lags in Jersey*, N.Y. Times, June 1, 1987, at B1, col. 2. According to one observer, "There is not an election in New Jersey nowadays in which Mount Laurel does not play a part . . ." DePalma, *Mount Laurel: Slow, Painful Progress*, N.Y. Times, May 1, 1988, § 10, at 1, col. 2.

231. 1985 N.J. Laws 222 (codified at N.J. Stat. Ann. § 52:27D-301 to -329 (West 1986)).

232. N.J. Stat. Ann. § 52:27D-302(a) (West 1986).

233. Id. § 52:27D-303 to -319.

234. Id. § 52:27D-307(c)(2)(b), (g).

235. Id. § 52:27D-311(d).

ing duty through payments to other, presumably less exclusive, localities to fund the construction or rehabilitation of low and moderate income housing in the latter.²³⁶ Like the additional state housing monies, these regional contribution agreements would tap into the resources of wealthier localities for transfer payments to poorer localities, but they would preserve the existing spatial and political separation of social and economic groups. Finally, the Act imposed a moratorium on builders' remedies and provided for the transfer of all *Mount Laurel* litigation from the courts to a new administrative process.²³⁷

The New Jersey Supreme Court upheld the Act.²³⁸ As with *Robinson V* and the Public School Education Act,²³⁹ the court's figurative sigh of relief that the state was finally willing to accept some responsibility for local practices was almost audible.²⁴⁰ The court interpreted the Act as a ratification of *Mount Laurel* and of the state's obligation to oversee local zoning and held that the governor and the legislature could dispense with the judicial standards and enforcement mechanisms developed during the course of the *Mount Laurel* litigation. Thus, the court acquiesced in the transfer of pending *Mount Laurel* cases from the lower courts to the new Council on Affordable Housing,²⁴¹ the elimination of the builder's remedy²⁴² and the provision allowing communities to buy their way out of part of their *Mount Laurel* obligation.²⁴³ As in school finance, the New Jersey Supreme Court, under enormous political pressure, found that it had achieved success in principle, declared victory and readily decamped from the field of battle.

Since the court sustained the Act, the effects of *Mount Laurel* on exclusionary practices by New Jersey's suburbs have been attenuated, although the doctrine remains a flashpoint of controversy. The Council on Affordable Housing halved the judicial projections of low and moderate income housing needs and reduced even more drastically the share to be allotted to the state's developing suburbs. Now, more than half of the housing is to be satisfied by units in central city areas, including rehabilitated older units, and not by the construction of new subur-

236. Id. § 52:27D-312(a).

237. Id. § 52:27D-315, -316, -328.

238. *Hills Dev. Co. v. Township of Bernards*, 103 N.J. 1, 40-47, 510 A.2d 621, 642-46 (1986).

239. See *supra* text accompanying notes 122-26.

240. See *Hills Dev. Co.*, 103 N.J. at 21-26, 510 A.2d at 632-34.

241. Id. at 47-56, 510 A.2d at 646-50. One provision of the Act authorized parties in pending cases to move for transfer to the Council and directed the trial court in reviewing such a motion to "consider whether or not the transfer would result in a manifest injustice." N.J. Stat. Ann. § 52:27D-316 (West 1986). Although the trial judges read the "manifest injustice" standard to require "a balancing of all relevant factors," the supreme court read the Act as mandating the transfer of "every pending *Mount Laurel* action to the Council." Id. at 47-53, 510 A.2d at 646-49.

242. 103 N.J. at 42-46, 60, 510 A.2d at 643-45, 652.

243. Id. at 37-38, 510 A.2d at 640-41.

ban homes.²⁴⁴

The legislative repudiation of the builder's remedy also eliminated the principal incentive to local cooperation. As of August 1989, only one-third of New Jersey's municipalities had submitted housing plans to the Council, and only one-eighth of the state's municipalities have been certified as having completed plans that comply with *Mount Laurel*.²⁴⁵ About 2,000 low and moderate income units have been built, compared with 14,000 during the three years between *Mount Laurel II* and the court's validation of the Fair Housing Act.²⁴⁶

In Mount Laurel Township itself, "little has changed."²⁴⁷ Although it has nearly tripled in population since the original New Jersey Supreme Court decision, the only openings to low and moderate income families are a dozen mobile homes in a marginal area of town and plans for twenty subsidized units to be limited to older adults.²⁴⁸ The town's mayor was quoted as saying, "We'd just like to see our town develop in a nice way. We should have the right to run our town."²⁴⁹ After more than a dozen years of litigation and political ferment, it does not appear that the state is seriously interested in challenging that "right."²⁵⁰

244. See, e.g., Hanley, *supra* note 230; DePalma, *supra* note 230; Mondics, N.J. Easing Mt. Laurel Obligations, *The Bergen Record*, May 6, 1986, at A1, col. 1.

245. Of New Jersey's 567 municipalities, just 187 had submitted plans as of August 7, 1989, and only 71 of the municipal plans had been substantively certified by the Council on Affordable Housing as in compliance with the *Mount Laurel* requirement. N.J. Council on Affordable Hous., Press Release (Aug. 7, 1989). These plans provided for the construction or rehabilitation of 13,504 low and moderate income housing units out of a total of 145,000 units which the Council has estimated as the statewide need. *Id.* In addition, as of January 9, 1989, the Council on Affordable Housing had approved 19 regional cooperation agreements pursuant to which affluent communities agreed to pay \$37 million to poorer localities for the rehabilitation of 1,579 old units and the construction of 341 new affordable units. 3 Council on Affordable Housing Newsletter, no. 4 (Winter 1989).

246. See DePalma, *supra* note 230 (although state supreme court had estimated that New Jersey needed 277,000 moderately priced houses and apartments, fewer than 2,000 had been built, and those were located in just 14 of the state's 567 municipalities); McDougall, *supra* note 228.

247. DePalma, *supra* note 230.

248. *Id.*

249. Hanley, *After Seven Years, Town Remains Under Fire for Its Zoning Code*, N.Y. Times, Jan. 22, 1983, at 31, col. 1. The residents of other New Jersey communities are equally emphatic in their opposition to *Mount Laurel*. Morris Township, a town of 18,000 people, settled its *Mount Laurel* suit prior to the passage of the Fair Housing Act, and agreed to accept 300 low-income units and 1,200 market-priced units—which subsidized the low-income units—to be built on ten sites dispersed throughout the community. See Winerip, *Taking Control In the Wake of Mount Laurel*, N.Y. Times, March 31, 1989, at B1, col. 1. Thereafter, the local voters ousted the mayor and all the incumbents on the town's governing bodies. The new mayor promptly fired the town planning consultant, the town engineer and the town's law firm and is leading efforts to resist implementation of the settlement.

250. Currently, the focus of *Mount Laurel* litigation in New Jersey has been the re-

As with school finance, the handful of exclusionary zoning cases and the lack of comparable litigation in most states underscore the fundamental misconception of the idea of local legal powerlessness and illustrate the problematic nature of our localism. Whatever the formal legal superiority of the state, power over land use has been delegated to localities with minimal constraints on its use. Exclusionary zoning, intended to protect the local fisc and preserve the class and social homogeneity of local communities regardless of the harm to other state residents, frequently has been the result. Courts have been ready to extend the idea of local self-determination to include exclusionary zoning and slow to realize that such local actions impose burdens on other localities. Even the New Jersey Supreme Court, with its rigorous post-*Mount Laurel* hostility to exclusionary zoning ran into difficulty when it sought to graft its anti-exclusionary principle onto a politico-legal system that continues to assure substantial local power over land use.

Local exclusionary zoning is both a consequence and a cause of interlocal fiscal inequality. Local responsibility for funding local services provides a structural incentive to exclude the poor and compete for the affluent; the local zoning response furthers the disparities in taxable wealth among localities. But the impetus for exclusionary zoning is more than fiscal. Some land uses are discouraged even though they may contribute to the local tax base or impose little fiscal burden.²⁵¹

Like school finance, local land use regulation illustrates a basic ambiguity in the concept of local power. Local autonomy is intended to give people an important degree of participation in, and control over, decisions affecting their lives. Few actions affect local life more than changes in land use. Local zoning enables local residents to affect the character of the local community—to determine “the look of the place”²⁵²—and to decide who their neighbors will be. It gives residents political control over the physical environment surrounding their homes, and thereby allows them to protect their investment in their houses and their neighborhoods.²⁵³ Local zoning authority is a critical element of community self-determination that allows local people to mediate the pace and pattern of residential change and manage the economic and social dislocations attendant on local development. The state judicial and legislative affirmation of broad local zoning autonomy

gional contribution agreement provision of the Fair Housing Act. The State Department of Public Advocacy has challenged the Council on Affordable Housing's review of regional contribution agreements, contending that the Council's regulations do not allow analysis of the exclusionary zoning implications and in some instances “have the effect of reinforcing racial stratification.” Hanley, *Open Housing Is Mired in Lawsuits Again*, N.Y. Times, Jan. 2, 1990, at B1, Col. 2.

251. See, e.g., Richards, *Zoning for Direct Social Control*, 1982 Duke L.J. 761, 762–67 (controlling land use as means of excluding certain classes of land users).

252. Rose, *supra* note 4, at 911 (noting that strong preference for localized land use decision making cannot be wholly explained by economic arguments).

253. See generally C. Perin, *supra* note 69, at 129–209.

is a core component of contemporary legal localism. Even courts troubled by exclusionary zoning have affirmed the right of localities to shape the local physical and social landscape and have sought only to infuse local zoning autonomy with a greater attention to regional needs.

But, as with local control of public schools, not all localities benefit from zoning autonomy equally. Only communities with resources sufficient to meet their needs and content with the character of local development can use local zoning to greatest effect. The power to exclude, like the right to spend on public schools, is no boon to communities short on local resources. To build their tax bases, these localities may feel compelled to seek development, even at the cost of upsetting traditional neighborhoods and introducing unsettling changes. Moreover, local zoning power is far less effective in enabling poorer communities to capture new investment than it is in enabling affluent communities to protect local social values and community character.

More generally, local zoning autonomy often results in the promotion of local parochialism and a commitment to the preservation of community status regardless of the cost to other localities and to the balanced development of a region. "Community character" is often a code phrase for the local preference for expensive homes and the affluent people who can afford to own them. Inexpensive houses, apartments, rentals, public or publicly subsidized housing and mobile homes, and the people who would reside in these sorts of dwellings, are often considered inconsistent with the character of the community or the character to which the community aspires.²⁵⁴ Local zoning will have external effects as these unwanted residents, and many industrial and commercial uses as well, are displaced onto neighboring communities, or, in areas where exclusionary zoning is the norm, driven from the region.

By enabling some localities to insulate themselves from the economic and social costs of growth and from poorer people and their problems, local land use authority may reinforce the class and cultural differences that drive communities apart and breed interlocal suspicion, tension and conflict. Local zoning authority may encourage the localities that benefit from it to believe in the legitimacy of local autonomy and to resist state intervention, on behalf of poorer communities or poorer people, in land use and other matters that are assumed to be "local." The danger that local autonomy will degenerate into local parochialism and lead to an ideological predisposition to local solutions for problems that only some localities have the resources to solve is a dilemma of our localism.

4. *The Patterns of State Legislative Change: New State Activity and Continued Local Autonomy.* — Litigation is not the only avenue of legal

254. *Id.* at 32–80.

change, and the courtroom is not the only forum for addressing issues of state-local relations. State legislatures are the primary state institutions concerned with financing public services and regulating land use, and they have been increasingly active in recent decades. The conventional stress on local legal helplessness and plenary state power, the alleged centralizing tendencies of the states and the lack of protection for local authority would suggest that state legislatures are likely to shift the balance of power in these areas toward the states at the expense of local autonomy. That, however, has not been the case. Although the state role in both school finances and land use has grown, recent state legislative activity continues to assume substantial local responsibility in both areas. Indeed, the patterns of state legislative change reveal a deep commitment to strong decision-making roles for local governments, protection of local communities from outside interference, reluctance to displace local choices and unwillingness to address the social and economic differences among localities. Localism remains an important factor in state legislative decisions.

a. *School Finance*. — State legislatures have been busy in the area of education. Many states have revised their school finance laws and have given new attention to the content and quality of the education provided by local districts.²⁵⁵ Overall, the states have expanded their financial and administrative roles, but significant interlocal spending and program differences tied to local wealth differences remain.

The states have greatly increased their spending on local public education. The states are now the source of the largest share of school revenues—50%, compared to the 44% provided by local governments.²⁵⁶ Twenty years ago the state portion was 41% and the local share 52%.²⁵⁷ Since state revenues are collected on a state-wide basis

255. See Education Comm'n of the States, *Education Finance in the States: 1984; Augenblick, The Current Status of School Financing Reform in the States*, in *The Fiscal, Legal and Political Aspects of State Reform of Elementary and Secondary Education* 3–20 (V. Mueller & M. McKeown eds. 1986) [hereinafter *Fiscal, Legal and Political Aspects*].

256. *Fiscal Federalism*, supra note 61, at 37, table 28.

257. *Id.* The remainder of local education expenditures is funded by federal aid. The figures in this report conceal significant interstate and interregional variation. In some states, the state provides nearly all of the funds for public education, and in others the state provides very little. The overall pattern has been a shift towards state financial responsibility, with the state government being the predominant revenue source in most states, although in most states a substantial portion of school funds continues to originate locally. In the Northeast, the Midwest and the Rocky Mountain states, local governments still provide more than 50% of the expenditures for public schools. Only in the South and the Far West does a majority of school funds come from the state.

Interestingly, in three of the seven states in which the state supreme courts held in the 1970s or early 1980s that the traditional school finance systems were unconstitutional, more than half of school revenues in 1984–85 still came from local sources. In Connecticut, local governments were the source of 55.5% of school expenditures, in New Jersey, 52.7%, and in Wyoming 60.3%. The most “reformed” states were Arkansas, where the state provided 60.8% of school revenues; West Virginia, where the

and state aid is ordinarily paid out according to criteria other than the source of the tax receipts, wealthier districts cannot restrict their resources for the exclusive use of their own schools, while poorer districts are not entirely dependent on local resources. Thus, the shift in the balance of funding responsibility has the potential for promoting interlocal equality by reducing the significance of local wealth in determining local spending.

But there has been much less equalization than the numerous state school finance legislative reforms and the shift in financial responsibility might suggest. The limited equalization effect of the enhanced state financial role is attributable to two factors: a significant portion of state school aid is not designed to equalize, and state equalization programs are not intended to be fully equalizing.

Most state school aid programs include components based on neither poverty nor educational needs nor local tax effort. Most states have some form of flat grant, which provides a set amount per child to every district, and some form of "save harmless" program, which prevents reductions in aid from the previous year.²⁵⁸ Flat grant and save harmless moneys are provided to affluent districts as well as to poor ones.²⁵⁹ In addition, many state educational assistance programs contain "categorical" elements, which defray specific types of expenses: transportation, construction, special education or teacher pensions.²⁶⁰ This aid may be based not on local poverty but on the level of local spending on the categorical programs. Therefore, high wealth, high expenditure districts may receive more categorical aid than poorer districts.²⁶¹

state share was 64.9%; California, where the state share was 68.3%; and Washington, where the state share was 74.5%. These figures may overstate the significance of court-ordered reforms since in Arkansas, Washington and West Virginia the states were providing a significant proportion of school funds as early as 1959-60. The only really dramatic shift was in California, and there Proposition 13 has been a major factor in holding down local spending. See *infra* note 265.

258. M. Yudof, D. Kirp, T. van Geel & B. Levin, *Educational Policy and the Law* 568-69 (2d ed. 1982).

259. See, e.g., Johnson, *supra* note 62, at 325, 365 (in Ohio, 15 of the 20 wealthiest districts received save harmless aid); *Robinson V*, 69 N.J. 449, 472, 355 A.2d 129, 141 (1976) (Hughes, C.J., concurring) (minimum aid compensating "rich" districts at expense of "poor" districts is "clearly regressive and antithetical to the constitutional goal"); *id.* at 477-78, 493-94, 355 A.2d at 144, 152-53 (Cornford, J., concurring and dissenting) (minimum aid unconstitutional as long as equalization aid is inadequately funded).

260. D. Mandelker, D. Netsch & P. Salsich, *supra* note 10, at 676; see, e.g., *Board of Educ. v. Nyquist*, 94 Misc. 2d 466, 485, 608 N.Y.S.2d 606, 614 (Sup. Ct. 1978) (summarizing New York's categorical grant programs); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 763 (Md. 1983) (summarizing Maryland's categorical aid programs); *Fair School Finance Council of Oklahoma, Inc. v. State*, 746 P.2d 1135, 1140 (Okla. 1987) (summarizing Oklahoma's categorical aid program).

261. See, e.g., *Robinson V*, 69 N.J. at 473, 355 A.2d at 141 (Hughes, C.J., concurring) (categorical aids "regressive in the constitutional sense"); *id.* at 547-49, 355 A.2d

Flat grants, save harmless and categorical aid programs are tributes to legislative localism. Localism entails concern for the fiscal stability of every locality, regardless of local wealth. In order for a needy locality to obtain state aid, every locality, regardless of need, must also receive a state grant. Legislative localism means that state aid will be a general support for all school districts rather than a purely redistributive measure.²⁶²

Equalization programs are also limited by localism. With the exception of Hawaii, no state provides full state funding of local schools, a central determination of local spending needs or a central allocation of education resources.²⁶³ Even with equalization aid, local wealth continues to play a major role in school spending.²⁶⁴ Limited state fiscal capacities and resistance to increased state taxes constrain the scope of equalization programs, so that most equalization assistance serves not to equalize but to raise the level of spending in poorer districts to some target amount—usually at or below the median spending level in the state, and certainly not up to the spending of the more affluent districts. The “levelling up” component of state school aid thus tends to level to the middle. At the same time, judicial and legislative localism precludes limits on the spending autonomy of more affluent districts. Efforts to “level down” the spending of affluent districts to the level of

at 181–82 (Pashman, J., dissenting) (categorical aids for transportation and special education disbursed without regard to need); Board of Educ., *Levittown Union Free School Dist. v. Nyquist*, 83 A.D.2d 217, 226, 443 N.Y.S.2d 843, 849 (1981) (“[T]he formulas employed in computing transportation and [Boards of Cooperative Educational Services] aid are more beneficial to property rich districts than to those of low wealth.”).

262. In New York, state aid to local school districts rose by more than one billion dollars between 1983–84 and 1986–87, and the state share of school funding rose from 42% to 44%, but in the process every district in the state received an increase in unrestricted aid. Of the state’s more than 700 school districts, 239 received save harmless aid and all districts received a \$360 per pupil flat grant. N.Y. State School Bds. Ass’n, *supra* note 62, at i, 6. Pocantico Hills, a wealthy district with assessed valuation per pupil of \$979,000, received a half million dollars from the state. The Fisher’s Island school district, with \$1,567,000 assessed valuation per pupil, received a 2% state aid increase, and the Quogue district, with assessed valuation per pupil of \$1,798,000, received a 7.5% aid increase. Overview of N.Y. State Aid, *supra* note 62, app. II, at 14–16; see also J. Berke, M. Goertz & J. Coley, *Politicians, Judges and City Schools: Reforming School Finance in New York* 74 (1984) (“[T]he legislative design for the distribution of state aid to education continues to mirror the distribution of power in the legislature rather than the education needs of the state or the implications of equity in the raising and distribution of revenues for education.”).

263. 2 W. Valente, *Education Law: Public and Private* 283 (1985).

264. The most radical approach to school aid considered by the states has been the district power equalization concept, see *supra* notes 90–97 and accompanying text. Yet even district power equalization assumes local authority to determine the level of local support for education and to set priorities among education and other local spending programs. Indeed, the principal proponents of district power equalization have emphasized the degree to which such a program would maintain local autonomy. See J. Coons, W. Clune & S. Sugarman, *supra* note 2, at 200–43.

poorer districts are very rare.²⁶⁵

During most of the 1980s, the interest of state legislatures in equalization of school finance abated,²⁶⁶ and state concern in education shifted to the promotion of "excellence."²⁶⁷ In pursuit of "excellence," the states have become more actively involved in setting and monitoring curricula, skills requirements, teacher qualifications and compensation, standards for promotion and graduation, and overall district performance.²⁶⁸

There is no necessary tension between equity and excellence. The

265. See *supra* note 95. Yet, as school finance analysts have recognized, the widening gap in fiscal capacities that separates wealthy districts from poorer ones can only be closed by either some form of recapture or a massive infusion of new state aid to poorer districts. See J. Aronson & J. Hilley, *supra* note 60, at 217.

One of the few states to advance significantly toward interlocal spending equality and the reduction of differences based on local wealth has been California. Although the impetus for school finance equalization in California was undoubtedly the *Serrano* decision, the real cause for the substantial reduction of interlocal spending differences was the local property tax limits enacted through Proposition 13, now article XIII A of the California Constitution. Although Proposition 13 was intended as a property tax reduction measure, "a major side effect was to force fully centralized state funding of the California schools." Henke, *supra* note 134, at 23. Proposition 13 has been particularly important in limiting the ability of high wealth districts to outspend their neighbors. Indeed, much of the equalization in California is a "consequence[] of years of effective levelling down" for high spending districts. *Serrano v. Priest*, 226 Cal. Rptr. 584, 619 (Cal. Ct. App. 1986).

266. The greatest period of legislative reform was in the 1970s, when the threat of serious judicial intervention in the name of equality seemed greatest. Many state legislatures increased both the commitment of state resources and the equalization component of state aid to local schools. There is some evidence that the state share of school revenues peaked in 1979 and receded slightly in the early 1980s. See Augenblick, *supra* note 255, at 4, 9-10. For most of the 1980s, as state courts rejected most challenges to school financing systems, the spectre of court-mandated equality appeared to recede in all but a handful of states. The recent successful challenges to the constitutionality of the Kentucky, Montana and Texas school systems, see *supra* text accompanying notes 138-40, may usher in a new period of legislative efforts to promote interdistrict equality.

267. Stirred by studies such as *A Nation at Risk* and the reports of the Twentieth Century Fund, the Carnegie Foundation and others, which were released in the early and middle 1980s and portrayed many American school districts as mired in mediocrity and incapable of meeting the needs of today's students and tomorrow's economy, state legislatures during the last several years have adopted numerous measures designed to improve educational quality. See, e.g., Education Comm'n of the States, *supra* note 255, at vi ("[T]he issue in 1984 is excellence and not the equity and access issues that have been on the agenda for the last 15 years. The fiscal issue is not school finance reform, but raising money to finance education excellence.").

268. Most states have lengthened the school day and the school year, raised course work standards for high school graduates, imposed or raised standards for the hiring of teachers and required students to take more, or more difficult, skills assessment tests as a condition for promotion or graduation. See M. Goertz, *State Educational Standards: A 50-State Survey* (1986); McDonnell & Fuhrman, *The Political Context of School Reform*, in *Fiscal, Legal and Political Aspects*, *supra* note 255, at 43; Steller, *Implications for Programmatic Excellence and Equity*, in *Fiscal, Legal and Political Aspects*, *supra* note 255, at 79-82.

states' expanded administrative role, the setting of state-wide standards and requirements and the general concern for work force skills and American international economic competitiveness, which provides much of the impetus for the educational excellence movement, could apply to poorer districts as well as richer ones. These educational reforms assume that the states bear responsibility for local educational quality; that responsibility could be the basis for requiring states to commit the resources necessary to ensure that all students receive quality educations. Since poorer districts will need to spend more money and to receive additional state assistance to meet state standards of quality, the educational excellence movement could imply a greater obligation of state support for poorer districts and thus reduce interlocal inequality.²⁶⁹

In practice, however, the concern for excellence has thus far not led to greater fiscal equity. Despite the numerous state measures designed to require greater academic achievement and increase local accountability for educational failures, "very few states have provided extra funding to implement these additional requirements,"²⁷⁰ and there has been "little or no attempt by states to link new standards to school finance."²⁷¹ The pattern of state legislative activity has been one of mandates without money. Where new facilities or courses have been required, supplemental state financial assistance has not usually been provided; one commentator has remarked, "Apparently, policy makers assume that such courses should be funded out of new local revenues or that trades should be made between these courses and others now viewed as marginal."²⁷² Similarly, when districts have been required to adopt self-improvement plans, new state money has not been forthcoming to finance the costs of local self-improvement.²⁷³

269. My colleague James Liebman has argued that these state-set standards of quality can generate an administratively and judicially enforceable obligation on the states to provide the funds necessary to assure that students in poorer jurisdictions receive a quality education as the state has defined it. See J. Liebman and the Right to a Minimally Adequate Education Group, Columbia University School of Law, Political Reconstruction, Liberal Recollection, and Legislative Reform: New Strategies for Implementing *Brown*, 76 Va. L. Rev. (forthcoming 1990).

270. McGuire, Implications for Future Reform: A State Perspective, in *Fiscal, Legal and Political Aspects*, supra note 255, at 314.

271. Id. at 321.

272. Id. at 314.

273. See, e.g., New York State Educ. Dept., New York State Board of Regents Action Plan to Improve Elementary and Secondary Education Results in New York (1984). The Regents Action Plan provides an elaborate mechanism for assessing the performance of local school districts.

For identified low performing schools, a self-improvement plan will be required. If sufficient progress has not been made in correcting the deficiencies identified by the CAR [Comprehensive Assessment Report], the [State Education] Department will require corrective measures targeted at the specific deficiency. Corrective measures may include required use of the State syllabi, time on task for certain subjects, State-approved approaches to remedial work, com-

Indeed, the excellence standards may be widening the disparities among school districts. State requirements for expanded curricula, advanced facilities, additional credentials for teachers and enhanced teacher compensation are a greater fiscal burden on poorer districts than affluent ones. State incentives for the adoption of new instructional technologies may be taken advantage of more often by rich districts than by poorer ones. New programs, without new resources, may increase differential access to educational quality according to the wealth of the school district.²⁷⁴

b. *Land Use*. — The much-vaunted “quiet revolution in land use control” has failed to transform state-local relations in land use. The “quiet revolution” phrase was coined in the early 1970s to describe legislation in Hawaii, Vermont and other states that increased state involvement in land use planning and regulation, often by superseding local regulation.²⁷⁵ Scholars predicted that an increased awareness of interlocal interdependence, the extralocal implications of local land use actions and the economic and social segmentation resulting from uncontrolled local zoning autonomy would result in the spread of the “revolution” and a general shift in land use responsibility from localities to the states.²⁷⁶ Although the last two decades have witnessed nu-

prehensive planning, and the use of the State-supported in-service education days to address deficiencies identified by the CAR.

Id. at 68. Conspicuous by its absence from the list of “corrective measures” to remedy local deficiencies is additional state money.

Where new money has been provided it is often categorical and not equalizing. See Education Comm’n of the States, *supra* note 255, at 22.

274. See Long, *An Equity Perspective on Educational Reform*, in *Fiscal, Legal and Political Aspects*, *supra* note 255.

275. See F. Bosselman & D. Callies, *supra* note 166. For a critical appraisal of the record of state-based land use regulation in Hawaii, see D. Callies, *supra* note 61.

276.

This country is in the midst of a revolution in the way we regulate the use of our land. . . .

The *ancien regime* being overthrown is the feudal system under which the entire pattern of land development has been controlled by thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less what happens to all the others.

The tools of the revolution are new laws taking a wide variety of forms but each sharing a common theme—the need to provide some degree of state or regional participation in the major decisions that affect the use of our increasingly limited supply of land.

F. Bosselman & D. Callies, *supra* note 166, at 1; see R. Babcock & F. Bosselman, *supra* note 74, at 151 (resurgence of state role in land use planning is “one of the most significant events in shaping the growth of the United States since the homestead laws”); R. Healy & J. Rosenberg, *Land Use and the States* 1 (2d ed. 1979) (in early 1970s “it was considered only a matter of time before some form of state involvement in land use regulation was universally adopted”); see also W. Colman, *supra* note 63, at 98–108 (states asserting authority over a field long ago left entirely to local government”); Comment, *State Land Use Statutes: A Comparative Analysis*, 45 *Fordham L. Rev.* 1154 (1977) (trend toward some measure of state control); *Developments in the Law—Zon-*

merous state enactments on land use, in most states these new measures have left intact the structures of local control and the traditional commitment to local land use autonomy.²⁷⁷

State land use legislation has focused primarily on protecting environmentally fragile "critical areas" and in controlling "developments of regional impact" ("DRIs"). Critical areas laws protect coastal zones, shorelands, wetlands, scenic areas, historic sites and wildernesses from overdevelopment.²⁷⁸ These are areas where the benefits of development, in terms of new jobs or an expanded tax base, will be enjoyed by local residents, while the environmental losses will be felt statewide. Developments of regional impact are industrial, commercial or residential projects, such as industrial parks, shopping malls or tract homes, that cover large sites or provide for occupation or use by large numbers of people.²⁷⁹ Because of their scale, these projects often will have impacts on water supply, sewage facilities, transportation networks and other infrastructure services that extend far beyond the locality in which the project is to be sited. As with the critical areas, there is concern that the host locality will receive the fiscal benefits of a substantial addition to the local tax base, while the costs of congestion, pollution and strained services may be spread over a number of neighboring localities.

Laws protecting critical areas and regulating DRIs are important in two respects. First, they constitute a state displacement of local authority, either through the creation of new state or regional agencies that regulate the affected areas directly or through the enactment of state standards that bind local decision makers and render local actions subject to state judicial or administrative review.²⁸⁰ Second, they demonstrate a legislative acknowledgement that local actions have extralocal

ing, 91 Harv. L. Rev. 1427, 1590-1624 (1977) (state control over limited land-use issues).

277. See, e.g., Callies, *The Quiet Revolution Revisited*, 46 J. Am. Plan. A. 135, 142 (1980) ("[I]t is a local, and not a state or regional, law which seems to have moved the country along the land use control continuum . . ."). See generally R. Healy & J. Rosenberg, *supra* note 276, at 1 (traditional role of local land use); T. Pelham, *State Land-Use Planning and Regulation* (1979) (selective areas of regulation by state).

278. See, e.g., F. Bosselman & D. Callies, *supra* note 166, at 205-61; P. Florestano & V. Marando, *The States and the Metropolis* 129-30 (1981); R. Healy & J. Rosenberg, *supra* note 276, at 80-125, 135-44, 177-80; T. Pelham, *supra* note 277, at 75-143.

279. See, e.g., F. Bosselman & D. Callies, *supra* note 166, at 54-107 (Vermont); *id.* at 187-204 (Maine site location law); R. Healy & J. Rosenberg, *supra* note 276, at 40-79 (Vermont's Environmental Control Act); *id.* at 144-64 (Florida's regulation of developments of regional impact); T. Pelham, *supra* note 277, at 15-74; Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. Fla. L. Rev. 789 (1977).

280. Judicial review of critical areas laws has occasioned affirmations of plenary state power over land use and over local governments. See, e.g., *CEED v. California Coastal Zone Conserv. Comm'n*, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974); *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 362 N.E.2d 581, 393 N.Y.S.2d 949 (1977); *J.M. Mills, Inc. v. Murphy*, 116 R.I. 54, 352 A.2d 661 (1976).

effects, that people outside a locality have interests affected by local actions and that, when those interests are not adequately represented in the traditional institutions of local control, some state intervention on behalf of nonlocal residents may be necessary.

Yet these laws are only a limited intrusion on local autonomy. The process for designating an area as critical is often long and difficult, reflecting the concern that the usual rule of local control of land use requires a strong justification for state intervention.²⁸¹ Critical areas are by definition atypical; their essential characteristic is their environmental fragility. They are different from most other parts of their states.²⁸² Indeed, critical areas legislation, by highlighting the special nature of the areas affected and assuming an unusual predicate for state regulation, may serve to underscore the tradition of local control. It is the exception that proves the rule and may legitimate a generally localist approach to other land use questions.

The DRI concept is potentially more radical since DRIs are not limited to unique areas of a state or keyed to fragile environments. DRI laws indicate a broader acceptance of the notion that the extralocal effects of local actions merit some state or regional review of local decisions. They imply some recognition that politically independent localities are parts of interdependent economic regions and that traditional local land use regulation is unable to cope with regional problems or protect regional interests. In its strongest versions, DRI legislation enables state or regional bodies to block local development or condition approval on modifications intended to mitigate the negative regional effects.²⁸³ Weaker versions simply require the host locality to advise a regional body of the planned DRI and to consider the regional body's objections or conditions before proceeding. Even the weaker versions may permit a regional appeal to a state-wide body of a local decision authorizing an objectionable development.²⁸⁴ DRI laws could be a step toward metropolitan area regional planning.

In fact, DRI legislation has not significantly displaced local land use autonomy. There are very few strong DRI states; regional bodies with purely advisory or recommendatory roles are far more common

281. See, e.g., *Cross Key Waterways v. Askew*, 351 So. 2d 1062 (Fla. Dist. Ct. App. 1977), *aff'd*, 372 So. 2d 913 (Fla. 1978). For a general discussion of the process of designating critical areas in Florida, see R. Healy & J. Rosenberg, *supra* note 276, at 135-43; T. Pelham, *supra* note 277, at 110-26.

282. Indeed, Florida's Environmental Land and Water Management Act of 1972, Fla. Stat. Ann. §§ 380.012-380.10 (West 1988), provided that only five percent of the land in the state could be designated as "critical areas." *Id.* § 380.05(20); see R. Healy & J. Rosenberg, *supra* note 276, at 135.

283. See, e.g., Comment, *supra* note 276, at 1166-70 (discussing Vermont's system of direct state control over local development).

284. See, e.g., R. Healy & J. Rosenberg, *supra* note 276, at 144-48 (discussing procedure under Florida's DRI law).

than those with the power actually to block local action.²⁸⁵ These reviewing bodies are rarely either arms of the state or independent regional planning institutions. They do not impose external notions of regional development on localities or create general regional development plans. Rather, they are typically part-time councils created and controlled by local governments and are often composed of local interests.²⁸⁶ Instead of framing and pursuing guidelines for the best interests of a region, they serve as forums for interlocal negotiations and have a "tendency . . . to degenerate into 'reciprocal back-scratching.'" ²⁸⁷ As one critical study of Florida's DRI program found, "collections of local government officials in regional guise but ultimately accountable politically only to their local constituencies cannot be expected to produce effective advocacy for state and regional interests."²⁸⁸

Moreover, DRI laws are premised on a one-sided concern about local land use regulation. Under DRI statutes, regional review is triggered only when a locality approves a development proposal. DRI laws do not supersede initial local power to review or regulate local land uses. Typically, the locality retains all prior controls over development. Nor does regional oversight occur if the locality rejects a proposed development. Usually DRI laws merely provide a second layer of review of development plans. It is, as commentators have described it, a "double-veto system"²⁸⁹ that requires potential developers to surmount two layers of review.

In its bias against change, DRI legislation is consistent with the land use policies of many local governments.²⁹⁰ DRI laws check local zoning autonomy by requiring certain large-scale developments to proceed only with some external review, but that restriction serves the general local interest in being able to exclude unwanted development. In many areas, local zoning autonomy by itself is inadequate to provide for effective community control of development: individual localities

285. See, e.g., *id.* at 191–96; Morgan & Shonkweiler, *Urban Development and Statewide Planning: Challenge of the 1980s*, 61 *Or. L. Rev.* 351, 385–86 (1982).

286. See, e.g., R. Healy & J. Rosenberg, *supra* note 276, at 110–13, 158; T. Pelham, *supra* note 277, at 41–43.

287. T. Pelham, *supra* note 277, at 40.

288. *Id.* at 42.

289. R. Healy & J. Rosenberg, *supra* note 276, at 189.

290.

[T]he selected activities and critical-areas approaches have been utilized primarily to deal with physical environmental problems in undeveloped areas rather than with urban problems.

...

With the exception of isolated selected-activities legislation . . . these two techniques have not been utilized to combat such peculiarly urban problems as exclusionary zoning, urbanization of agricultural lands, preservation of open space and growth control.

T. Pelham, *supra* note 277, at 202–03.

cannot exclude the consequences of land use decisions by their neighbors. DRI laws enable localities to object to development proposals in nearby localities, thereby projecting local growth control policies beyond local boundaries. The double-veto system exhausts the developer, while regional review provides local residents with a second opportunity to block projects that may disturb the physical and social setting of their community.

This localist interpretation of DRI legislation is reinforced by a comparison of DRI laws and critical areas legislation with states' treatment of proposals to restrict local power to exclude facilities, such as low and moderate income housing, which serve regional needs but are usually considered undesirable by the host locality. Such a "development of regional benefit" ("DRB") is the inverse of a DRI, which may provide fiscal benefits to the host locality but have an adverse impact on the region. A local decision to block a DRB, like a local decision to permit a DRI, imposes costs on the region for the sake of the regulating locality.

In the American Law Institute's Model Land Development Code,²⁹¹ DRBs were linked to DRIs and critical areas in one comprehensive package of land use subjects meriting state regulation. Critical areas and DRI laws restrict local autonomy but do not force new development; DRI laws also protect the interests of localities in preventing unwanted development nearby. DRB legislation, by contrast, could impose an unwanted land use on a community. State or regional review of local rejections of DRBs would constitute a far more serious intrusion on the tradition of local autonomy. Although many states have passed critical areas or DRI laws, none has enacted general DRB legislation. The lack of DRB legislation is powerful evidence of the localist orientation of the land use control system.²⁹²

The reluctance of state legislatures to limit local authority to exclude is well-illustrated by the paucity of state laws concerning exclusionary zoning and the siting of low and moderate income housing. Only New York and Massachusetts ever provided for a direct state over-

291. Model Land Dev. Code (1975). The Model Code generally sought to preserve local land use autonomy but determined that, with respect to critical areas, DRIs and DRBs, there were significant state or regional interests at variance with the interests of the regulating localities that were likely to go unprotected without affirmative state or regional intervention. See *id.* §§ 7-201, -301.

292. See, e.g., Bosselman, Raymond & Persico, Some Observations on the American Law Institute's Model Land Development Code, in *The Land Use Awakening*, *supra* note 188, at 105-06 (remarks of G. Raymond); R. Healy & J. Rosenberg, *supra* note 276, at 162, 182-83; Pelham, *supra* note 279, at 801; Note, *supra* note 276, at 1603. Although the states have not enacted general DRB laws or, with rare exceptions, laws displacing local power to exclude low and moderate income housing, many states have preempted local governments with respect to the siting of undesirable infrastructure facilities, such as power plants. See, e.g., P. Florestano & V. Marando, *supra* note 278, at 130; T. Pelham, *supra* note 277, at 13-14.

ride of local exclusionary measures, and New York quickly abandoned that effort. In 1968, the New York Legislature created the Urban Development Corporation ("UDC") to build low and moderate income housing and authorized it to overrule local zoning that precluded such construction. At first, the UDC moved cautiously, undertaking projects primarily in central city areas. When it announced plans for subsidized housing units in small projects in a number of Westchester County towns, the state's suburbs rallied under the banner of home rule. The legislature promptly revoked the UDC's power to override local zoning and authorized localities to veto UDC residential projects even if the projects at issue conformed to local zoning.²⁹³

In Massachusetts, the legislature in 1969 authorized the Housing Appeals Committee of the Department of Community Affairs to overrule decisions of local zoning boards that deny permission to build low or moderate income housing where the local action is not "consistent with local needs."²⁹⁴ The legislation defines consistency with local needs to include a determination whether the local action was "reasonable in view of the regional need for low and moderate income housing" ²⁹⁵

Despite this commitment to a regional approach, the Massachusetts law is sharply limited in scope. Only public agencies or not-for-profit organizations can take advantage of the state override; private builders willing to accept housing subsidies or provide subsidized units have no right of appeal under the law. The measure imposes no limit on local power to enact large lot or large floor area requirements for single-family homes,²⁹⁶ to restrict the size of apartments²⁹⁷ or to reduce the number of apartments in the community.²⁹⁸ Moreover, the law provides that a local permit denial is consistent *per se* with local needs if ten percent of the housing in the locality is low or moderate income, regardless of regional low or moderate income housing needs.²⁹⁹ The act does not provide for the financing of any low or

293. See 1973 N.Y. Laws 446 (Codified in N.Y. Unconsol. Law §§ 6253(16), 6265(5) (McKinney 1979)). For a general discussion of the rise and fall of the Urban Development Corporation's power to supersede local zoning, see M. Danielson, *supra* note 68, at 313.

294. Mass. Ann. Laws ch. 40B, § 23 (Law. Co-op 1983).

295. *Id.* § 20; see also *Board of Appeals of Hanover v. Housing Appeals Comm.*, 363 Mass. 339, 346, 294 N.E.2d 393, 402 (1973).

296. See, e.g., Note, *The Massachusetts Zoning Appeals Law: First Breach in the Exclusionary Wall*, 54 B.U.L. Rev. 37, 70 n.225 (1975) ("One primary reason for not setting statutory maximums for lot sizes was that it would be too great an erosion of local land use control.").

297. See *Hallenborg v. Town Clerk*, 360 Mass. 513, 521, 275 N.E.2d 525, 531 (1971).

298. *Bellows Farms, Inc. v. Building Inspector of Acton*, 364 Mass. 253, 260, 303 N.E.2d 728, 733 (1973); Reed, *Tilting at Windmills: The Massachusetts Low and Moderate Income Housing Act*, 4 W. New Eng. L. Rev. 105, 120 (1981).

299. Mass. Ann. Laws ch. 40B, § 20 (Law. Co-op. 1983).

moderate income housing or require that any community do so.

Notwithstanding these limitations, the Massachusetts statute is an affirmative state legislative displacement of local power in the name of regional concern for low and moderate income housing. Although its effect on interlocal economic segregation in Massachusetts is uncertain,³⁰⁰ it is an important legal statement. It is also unique; it took two decades for another state—Connecticut—to pass a comparable law, and the Connecticut law has not yet gone into effect.³⁰¹

Aside from critical areas and DRIs, the state's role in land use regulation is relatively limited. Several states have adopted general land use planning laws, but these almost always follow the traditional pattern of state-local relations by delegating the responsibility for planning, implementation and enforcement to local governments, albeit subject to greater state oversight than previously. Those states that require localities to conform to professional standards and procedures probably have improved the local capacity to regulate, without supplanting local control by state administrators.³⁰² Nor do state laws typically intrude on the local authority to shape the local social setting. Rather, they usually require local plans to give detailed attention to the physical and fiscal consequences of growth—the burdens on natural resources, air and water quality, infrastructure and government services.³⁰³ These state planning requirements are likely to slow down

300. See, e.g., Reed, *supra* note 298, at 131 (zoning appeals law has had “negligible effect”).

301. See, e.g., McDougall, *supra* note 228, at 645; Note, *supra* note 296, at 73 n.243 (in the 1970s Connecticut and Wisconsin legislatures considered and rejected laws based on Massachusetts model).

The recently enacted Connecticut law establishes an “affordable housing land use appeals procedure” for the judicial review of local zoning commission decisions concerning affordable housing developments. Act of June 29, 1989, Pub. Act No. 89-311, 1989 Conn. Legis. Serv. 706 (West). An “affordable housing development” is defined as either government-assisted housing, or housing in which twenty percent of the dwelling units are restricted to low or moderate income persons and families. *Id.* § 311.1(a). A developer whose application is either denied outright or approved with restrictions “which have a substantial adverse impact on the viability of the affordable housing development or the degree of affordability” may appeal to a designated state superior court. *Id.* § 311.1(b).

Under the law, the burden will be on the locality to prove:

(1) the decision from which such appeal is taken and the reasons cited for such decision are supported by sufficient evidence in the record; (2) the decision is necessary to protect substantial public interests in health, safety or other matters which the [municipality] may legally consider; (3) such public interests clearly outweigh the need for affordable housing; and (4) such public interests cannot be protected by reasonable changes to the affordable housing development.

Id. § 311.1(c).

The new appeals procedure takes effect July 1, 1990. *Id.* § 311.4.

302. See, e.g., R. Healy & J. Rosenberg, *supra* note 276, at 11–13, 162–65, 191; T. Pelham, *supra* note 277, at 16–23, 42–44, 145–46, 192.

303. See, e.g., P. Florestano & V. Marando, *supra* note 278, at 129–30; R. Healy &

development and provide new bases for exclusion, rather than encourage social or economic change. Thus, many state planning requirements are consonant with the growth control concerns of most local governments.

Only a few states require localities to plan for mixed-income levels of housing. New Jersey is one of the rare states that has legislation formally imposing on localities a duty to plan for a "fair share" of low and moderate income housing. As we have seen, that state's Fair Housing Act was adopted under intense pressure from the state courts, and its effect has been to moderate the more vigorous integrative efforts of the state judiciary under *Mount Laurel*.³⁰⁴

Aside from a few states and a few regulatory issues, then, state legislatures have been no more aggressive than state courts in disturbing local land use autonomy or curtailing local power to shape local social and economic development. Although the states have been increasingly active in the land use area, recent state legislation, like state case law, generally fits in with the localist tradition.

Thus, in land use, as in school finance, recent state legislative initiatives generally have been consistent with the deep structure of the local government system. Greater state administrative involvement, new state standard-setting, oversight mechanisms and substantive requirements are compatible with the preservation of considerable local decision making. Although in both areas there has been a movement of power toward the states, the pattern of state activity has not entailed a general retraction of the traditional broad delegations of power to local governments in education or land use. Nor have the states assumed a significantly greater responsibility to remedy interlocal inequalities or

J. Rosenberg, *supra* note 276, at 40–46, 60, 80–120, 126, 177–79; T. Pelham, *supra* note 277, at 16, 75, 192; Bosselman, Raymond & Persico, *supra* note 292, at 115; Comment, *supra* note 276, at 1158–59.

304. See *infra* notes 229–37 and accompanying text. California and Oregon planning laws also require localities to include "housing elements" in their plans. See Cal. Gov't Code §§ 65302(c), 65583(a), 65584(a), (b) (West 1983 & Supp. 1989); Or. Rev. Stat. Ann. § 197.307(1) (Butterworth 1985) (declaring "the availability of affordable, decent, safe and sanitary housing opportunities for persons of lower, middle, and fixed income is a matter of state-wide concern"); *id.* § 197.312 (prohibiting cities and counties from including in their charters provisions barring from all residential zones specified types of housing). But cf. Cal. Gov't Code § 65584(d), (e) (local governments still have power to limit building permits and impose moratoria on residential construction and the state's authority to review and revise a local government's share of regional housing need "shall not constitute authority to revise, approve or disapprove the manner in which the local government's share of the regional housing need is implemented through the housing program"). As the previous discussion of California law suggests, however, the widespread use of the voter initiative to regulate land use has limited the effectiveness of the housing element requirement.

Although Oregon's law requires localities to plan to accept a share of regional housing needs, the general purpose of Oregon's law has been the preservation of agricultural lands and the limitation of urban growth. See Morgan & Shonkweiler, *supra* note 285, at 247, 264–79 & n.144.

rein in local parochialism. Instead, local autonomy remains the legal norm. Local actions continue to rely on local resources and to be the outcomes of local political processes. For the most part, neither state courts nor state legislatures have questioned the structure of localism; instead, their actions have tended to assume it.

C. *The Law of Local Government Formation*

An unstated premise of both the school finance and exclusionary zoning cases is the existence of fixed local boundaries that give political and fiscal significance to local wealth differences. The law of local government formation is, in a sense, the third leg of the legal triangle that structures the relationship of local regulatory authority, interlocal wealth inequalities, and local government actions. Indeed, local land use regulation and local responsibility for funding basic public services would not be so problematic if local governments were either relatively equal in taxable wealth or populated by similar mixes of high, middle, and low income residents. Neither *Mount Laurel*'s effort to promote the economic integration of local units by facilitating the settlement of low and moderate income people in more affluent areas nor the school finance reform program of making local wealth irrelevant to the provision of public education by requiring state equalization aid would be necessary if local boundary lines were drawn in order to combine more and less affluent areas into common political and fiscal units. Such a standard for boundary-setting would eliminate fiscal inequality and much of the incentive for exclusionary regulation.

One may object that even if localities could be formed on such a basis, the system of equalized interlocal wealth or economic integration would break down rapidly. The constitutional guarantees of the free movement of people, goods and capital across local borders³⁰⁵ would assure the re-emergence of interlocal differences. Interlocal wealth equality and economic integration could be preserved, however, if local boundaries were periodically reconfigured with equality of wealth or economic integration as the lodestar. Local governments could be treated like congressional or state legislative districts, which have their boundaries redrawn every ten years in order to conform to the constitutional command of one person, one vote.³⁰⁶ But, of course, this is not the case, nor is it conceivable that it will ever occur. The difficulty of according local boundaries the plasticity we readily associate with congressional districts indicates that local governments enjoy a far more protected place in our system than do other subdivisions of the states.

305. See U.S. Const. art. IV, § 2, cl. 1 & art. I, § 8, cl. 3 (commerce clause); *Edwards v. California*, 314 U.S. 160 (1941) (right of people to travel).

306. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

This Section examines the state law principles governing local incorporation, annexation and consolidation, as well as state legislation that attempts to infuse local formation and expansion decisions with greater attention to regional concerns. As in all matters local, there is considerable state-to-state and regional variation, but, notwithstanding the plenary power of the states, the law of local formation, local boundaries and the preservation of local political existence is generally dominated by local concerns. Unlike congressional and legislative districts, which must satisfy stringent standards of population equality and which have no claim to legal existence beyond the next census, local governments are formed largely in response to local desires. Once created, they are rarely abolished, and their boundaries are only infrequently modified.³⁰⁷ Such boundary changes as do occur are often a result of local decisions. If the rules of local government formation and continuation are the nucleus of the system of local governments, then local government law is localist at the core.

1. *Incorporation*. — The law of local government formation is primarily about municipal incorporation. Municipal corporations—variously known as cities, boroughs, towns or villages—are general purpose governments, providing a broad array of public services and authorized to exercise general police powers and impose general taxes on residents within the territorial limits.³⁰⁸ Within the category of general purpose governments, municipalities have conventionally been the units most associated with urbanness, and the additional, more extensive services and regulations that greater density of population is thought to require.³⁰⁹ Although most land lies within unincorporated

307. See, e.g., P. Florestano & V. Marando, *supra* note 278, at 56–57.

308. General purpose governments differ from special districts, which possess only limited authority to provide one or a handful of services and whose regulatory and revenue powers, if any, are focused on the provision of that particular service. Although special districts are a significant feature of the American local government system, most general discussions of local government law focus on general purpose governments.

309. The other type of general purpose government—the county—has differed historically from the municipal corporation in the nature and scope of the government provided and the relationship to the state. Counties are more truly administrative divisions of the state, performing the traditional law enforcement and welfare functions of the minimal state—such as registering deeds, probating wills, operating roads, providing relief and running elections—at a substate level. As befits an administrative subdivision, nearly every state is entirely divided up into counties, so that every bit of territory of the state falls within a county. The county division usually occurred when the state was formally organized, and the number of counties in the United States and the location of county lines has remained virtually unchanged for decades. During the quarter century between 1957 and 1982, the total number of counties in the entire United States changed by six, dropping from 3,047 to 3,041. That is a percentage change of two-tenths of one percent. See J. Aronson & J. Hilley, *supra* note 60, at 76. There is, in effect, no law of county formation or boundary alteration, because counties are no longer being formed or having their boundaries altered.

Although the operational distinction between municipal and county governments has been somewhat blurred with the rise of the “urban county” and the assumption by

territory, most people live inside municipal boundaries.³¹⁰

In most states, general enabling legislation places municipal incorporation in the hands of local residents or landowners. State laws provide for the initiation of the process by petitions signed by some number or percentage of local residents or landowners. Thereafter, an election is held in which local residents or landowners participate, and if a requisite percentage of the local electorate approves the incorporation goes forward.³¹¹ Neighboring localities, regional entities and residents outside of the boundaries of the territory proposed to be incorporated generally have no role.³¹² Judicial or administrative review is usually ministerial and limited to a determination of whether the signature, voting and other formal requirements have been met.³¹³

The principal criterion for deciding whether a municipality will be incorporated is whether the local people want it. There are few limits on local discretion. In many states, the principal requirement is that the incorporators provide a map describing an area of contiguous, unincorporated land containing a population greater than the statutorily prescribed minimum. The statutory minima are often quite small: in some states as few as seventy-five people may suffice for an incorporation.³¹⁴ Thus, if a relatively small number of people living on unincor-

counties in metropolitan areas of some of the functions traditionally associated with municipal governments, the conceptual difference remains.

310. The legal issues surrounding municipal incorporation are of pressing importance since new municipalities continue to be created in large numbers every year and nearly 2,000 municipalities have been incorporated in the last three decades. See *id.* (number of municipalities increased from 17,183 in 1957 to 19,076 in 1982); Miller, *Municipal Annexation and Boundary Changes*, in *International City Management Association, The Municipal Year Book 1986*, at 73 [hereinafter *Municipal Year Book 1986*] (in an approximately one-and-one-half year period in 1984 and 1985, 86 municipalities were incorporated and 23 disincorporated or merged, for a net increase of 63).

311. See 1 C. Antieau, *supra* note 5, §§ 1.09–14; 1 E. McQuillin, *supra* note 8, §§ 3.24–35g; 1 C. Sands & M. Libonati, *supra* note 5, §§ 8.11–16. Many states limit the right to petition for an incorporation or an annexation to landowners in the area proposed to be incorporated or annexed. In *re Char*, 59 Ohio App. 2d 146, 149–50, 392 N.E.2d 1312, 1314–15 (1978) (construing Ohio law making “good of territory” principal criterion for annexation approval to mean best interests of area landowners since statute limits right to petition for annexation to owners of real estate). It is generally assumed that such a limitation raises no constitutional question since the petition is not itself an election triggering the one person, one vote principle. See, e.g., *Berry v. Bourne*, 588 F.2d 422, 425 (4th Cir. 1978); *Township of Jefferson v. City of West Carrollton*, 517 F. Supp. 417, 420–21 (S.D. Ohio 1981), *aff’d mem.*, 718 F.2d 1099 (6th Cir. 1983); see also *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259 (1977) (“one-shot” local formation decisions not subject to one person, one vote rule for organization of ongoing local legislatures).

312. 1 C. Antieau, *supra* note 5, § 1.27; C. Sands & M. Libonati, *supra* note 5, §§ 8.03–17.

313. C. Sands & M. Libonati, *supra* note 5, §§ 8.16, .21.

314. According to the 1982 Census of Governments, the minimum population for the incorporation of a municipality was 75 in Alabama; 100 in Nebraska; 150 in New Mexico, Oregon and Wisconsin; 200 in Tennessee; and 250 in Nevada. See Bureau of

porated land want to create their own municipality, and they can persuade a majority of their neighbors to agree, then they are likely to be able to form that government.

Some states go further and require that the local population be concentrated; that the land be "urban" or suitable for urban development; that the proposed municipality have the need and ability to pay for governmental services; or that the people share a "community of interest."³¹⁵ These standards appear to go beyond the subjective local desire for incorporation and suggest an inquiry into whether there is an objective need for a new government. They also indicate a concern for the burden of government on local residents, especially landowners.³¹⁶ These requirements, however, do not address the effect of the formation of a new government on the surrounding area, the region or the state.

These additional criteria often prove to be without bite. Courts have treated the local desire for municipal government, as revealed by the incorporation request, as dispositive of the question of local benefit from incorporation.³¹⁷ Similarly, the courts have been disinclined to use the "community of interest" requirement as a substantive standard. Courts have sustained proposed incorporations of areas lacking common stores, businesses, schools or social and cultural amenities, in the face of contentions that the lack of such common facilities negated the

the Census, U.S. Dep't of Commerce, 1982 Census of Governments 105, 237, 254, 281, 333, 303, 241 (1983) [hereinafter *Census of Governments*].

In those states that classify their municipalities according to population, it may take as little as 1,000 (Oklahoma), 2,000 (Colorado, Mississippi) or 2,500 people (Illinois) to be incorporated as a city. See *id.* at 277, 132, 223, 166.

315. See, e.g., 1 C. Antieau, *supra* note 5, at §§ 1.20–.22; D. Mandelker, D. Netsch & P. Salsich, *supra* note 10, at 52–54; 1 E. McQuillin, *supra* note 8, at § 3.15c; C. Sands & M. Libonati, *supra* note 5, at § 8.06.

316. A new government may be seen as portending a reduction in liberty through additional regulation and taxation. The requirements of population concentration, projected development or urban service needs are intended to assure that there is a real need for a new government to justify the potential imposition of new regulations and taxes. Moreover, local wealth is unevenly distributed and an area may be composed of different economic interests. In such a setting, incorporation could provide a means for local electoral majorities to seize political power and, through redistributive and tax and spending programs, exploit wealthier minorities. Proposals by neighbors of an oil field, a shopping mall or a factory to incorporate the neighborhood so as to be able to tax and regulate the industrial or commercial facility in their vicinity illustrate some of the possibilities. See, e.g., *Cottonwood City Electors v. Salt Lake County Bd. of Comm'rs*, 28 Utah 2d 121, 499 P.2d 270 (1972); cf. *Superior Oil Co. v. City of Port Arthur*, 628 S.W.2d 94 (Tex. Ct. App. 1981) (similar considerations in an annexation case), appeal dismissed, 459 U.S. 802 (1982). The "community of interest" requirement may pose some check on redistribution by requiring that the proposed municipality function as a social community, with bonds uniting the members, thereby allaying the concern that incorporation may result in exploitation.

317. See Mandelker, *Standards for Municipal Incorporations on the Urban Fringe*, 36 Tex. L. Rev. 271, 276–89 (1958).

presence of a "community of interest."³¹⁸ In these cases, "community" was often supplied by the common demand for municipal services, as evidenced by the petition for incorporation.³¹⁹

Similarly, courts have found a "community of interest" even when the area proposed for incorporation was only a small piece of a larger area that arguably comprised a true "community" of common economic and social interactions.³²⁰ There is nothing in the incorporation criteria in most states to preclude incorporators from drawing lines that bring in high-tax or elite residential properties and fence out tax-exempt lands or poor or black people.³²¹ As a general rule, the impact of the incorporation on the well-being and development of the broader "community" outside the proposed municipal borders is not a factor in judicial review of the incorporation or the proposed boundaries.³²²

Local incorporations may be based on the desires of ethnic or economic groups to separate themselves politically from their neighbors, to wield planning and zoning authority, to control the pace of growth and to restrict local taxable wealth for their immediate uses. Local governments may be created, and usually are, without any regard to differences in wealth among localities or to the fact that incorporation may aggravate those differences or interfere with regional approaches to

318. See *State ex rel. Stephens v. Odell*, 61 Wash. 2d 476, 378 P.2d 932 (1963).

319. See *State ex rel. Pickrell v. Downey*, 102 Ariz. 360, 366, 430 P.2d 122, 128 (1967); *In re Incorporation of Eden Park*, 158 Pa. Super. 40, 43, 43 A.2d 529, 530 (1945); *In re Incorporation of Churchill*, 111 Pa. Super. 380, 383, 170 A. 319, 320 (1934); *In re Incorporation of Oconomowoc Lake*, 7 Wis. 2d 400, 403-04, 97 N.W.2d 189, 191 (1959).

320. See *Rose v. Barraud*, 61 Misc. 2d 377, 379, 305 N.Y.S.2d 721, 723-24 (Sup. Ct. 1969), *aff'd mem.*, 36 A.D.2d 1025, 322 N.Y.S.2d 1000 (1971); *State ex rel. Cole v. City of Hendersonville*, 223 Tenn. 365, 445 S.W.2d 652 (1969); *In re Incorporation of Elm Grove*, 267 Wis. 157, 162-64, 64 N.W.2d 874, 877-78 (1954).

321. See, e.g., *Taylor v. Township of Dearborn*, 370 Mich. 47, 56, 120 N.W.2d 737, 742-43 (1963) (racially motivated incorporation); *Village of Inkster v. Wayne County Supervisors*, 363 Mich. 165, 170-71, 108 N.W.2d 822, 825 (1961) (same); *Rose v. Barraud*, 61 Misc. 2d at 379, 305 N.Y.S.2d at 723 (fiscal factors); *In re Incorporation of Bridgewater*, 87 Pa. Commw. 599, 604-05, 488 A.2d 374, 376-77 (1985) (racially motivated incorporation); NAACP v. Town of Hilton Head, 287 S.C. 254, 335 S.E.2d 806 (1985) (same). Race may also be a factor in other forms of local government boundary change. See, e.g., *City of Pleasant Grove v. United States*, 479 U.S. 462, 465-67 (1987) (all-white city annexing parcels that were either all white or unpopulated and refusing annexation of black area); *Marshall v. Mayor of McComb City*, 251 Miss. 750, 756-58, 171 So. 2d 347, 349-50 (white majority town detaching a black district), *cert. denied*, 382 U.S. 836 (1965); Symposium, *The White Curtain: Racially Disadvantaging Local Government Boundary Practices*, 54 J. Urb. L. 679-1073 (1977).

322. See, e.g., *Marcus v. Baron*, 57 N.Y.2d 862, 863, 442 N.E.2d 437, 456 N.Y.S.2d 39 (1982) (invalidating town law conditioning village incorporation on "overall public interest," including that of remainder of town); *McManus v. Skoko*, 255 Or. 374, 376, 467 P.2d 426, 427 (1970) (county may not deny incorporation on grounds of good government, general welfare or the public interest); cf. *City of Town & Country v. St. Louis County*, 657 S.W.2d 598, 606 (Mo. 1983) (*en banc*) (overruling precedent requiring best interests of county perspective in an annexation).

economic and social problems. Incorporation subtracts land and revenues from the surrounding jurisdiction and denies it to other localities in the area. Incorporation on the urban fringe precludes the extension of central city boundaries to recapture middle-class residents who have moved to outlying areas. In most states, none of this provides a legal basis for challenging or denying an incorporation. Instead, these factors often constitute practical incentives to incorporate.

Despite the lack of a right to local self-government, courts often treat the formation of a local government as a healthy development, reflecting an area's growth and the democratic desires of its residents.³²³ This combination of liberal incorporation laws and indulgent judicial attitudes has resulted in a multitude of municipalities—more than 19,000 of them.³²⁴ Many of these municipalities are quite small. More than three-quarters of all municipalities have fewer than 5,000 inhabitants, and fewer than 500 municipalities have populations greater than 50,000.³²⁵ In most metropolitan areas, there are dozens of independent municipalities. To paraphrase the old saw about God and the poor: the states must love local governments, since they have made so many of them.

Of course, the pattern of large numbers of small municipalities is not entirely attributable to ease of incorporation. If municipalities were easily created but just as easily destroyed, there might be far fewer municipal governments. But that is not the case. Under the law of annexation and consolidation, municipalities are significantly protected from reorganization or elimination from outside.

2. *Annexation and Consolidation.* — Municipal expansion through annexation and consolidation³²⁶ has been of great significance for the development of American urban centers. As historian Kenneth Jackson observes, "Without exception, the adjustment of local boundaries has been the dominant method of population growth in every American city of consequence."³²⁷ There is greater state-to-state variation in the laws governing annexation and consolidation than in those governing

323. See, e.g., *State ex rel. Northern Pump Co. v. So-Called Village of Fridley*, 233 Minn. 442, 451, 47 N.W.2d 204, 210 (1951); *State ex rel. Burnquist v. Village of St. Anthony*, 223 Minn. 149, 26 N.W.2d 193 (1947); *Town & Country*, 657 S.W.2d at 605; *Oconomowoc Lake*, 7 Wis. 2d at 402–04, 97 N.W.2d at 191; *Elm Grove*, 267 Wis. at 162, 64 N.W.2d at 877 ("[T]he size of the village and the location of its boundaries are matters within the choice of the electors of the territory proposed to be incorporated and not within the discretion of the court.").

324. 1982 Census of Governments, *supra* note 314, at v (19,076 municipalities).

325. *Id.* at 8 (table 6).

326. Annexation is the territorial expansion of a municipal corporation through the addition of new land. Consolidation is the merger of one or more local governments, either municipal corporations or municipal corporations and the county in which they are located.

327. K. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 140 (1985).

incorporation. Some states do not authorize annexation at all,³²⁸ while others make it extremely easy, at least for some cities.³²⁹ Most states fall somewhere in between. But, as with incorporation, state laws concerning annexation and consolidation are quite localist.

The states have devolved the decisions concerning annexation and consolidation to local actors. As one commentator has noted, the relevant state laws commit "to the people and communities directly concerned the final determination of territorial and boundary questions."³³⁰ As a general rule, the states no longer provide for annexation or consolidation by special legislative act. Indeed, some state courts have interpreted the constitutional proscription against special acts concerning local governments to operate as a ban on annexation by state law.³³¹ Instead, the states have delegated territorial and boundary decisions to the annexing city, the territory to be annexed or the localities to be merged.³³²

Municipalities are generally protected from forcible annexation or consolidation. It is a nearly universal rule that an incorporated area may not be annexed without its consent and that a consolidation requires the separate consent of each unit proposed for merger.³³³ The

328. The Rhode Island Code flatly states: "The extent and boundaries of the several cities and towns shall remain as now established by law." R.I. Gen. L. § 45-1-1 (1988). Other states that appear to make no provision for annexation include Maine, New Hampshire, Massachusetts, Connecticut and Hawaii. See F. Sengstock, *Annexation: A Solution to the Metropolitan Area Problem* 11 (1960); Note, *Stumbling Giants—A Path to Progress Through Metropolitan Annexation*, 39 *Notre Dame Law* 56, 63 (1963).

329. Texas and Missouri permit home rule cities to engage in unilateral annexation. See F. Sengstock, *supra* note 328, at 19–23. North Carolina and Oklahoma also permit municipalities to annex contiguous urbanized territory by unilateral action in some cases. See J. Bollens & H. Schmandt, *The Metropolis: Its People, Politics and Economic Life* 287–88 (2d ed. 1970); Note, *The Coulwood Horror—North Carolina's Unilateral Annexation Statutes*, 19 *Wake Forest L. Rev.* 215 (1983).

330. 2 E. McQuillin, *supra* note 5, § 7.15.

331. See, e.g., *Jamison v. City of Atlanta*, 255 Ga. 51, 165 S.E.2d 647 (1969).

332. F. Sengstock, *supra* note 328, at 13–41 (1960); Thomas & Marando, *Local Governmental Reform and Territorial Democracy: The Case of Florida*, 11 *Publius* 49, 62 (1981) (with respect to local government reorganization state operates as facilitator and supervisor, but does not mandate changes in basic territorial structures and operations of local units); Comment, *Annexation by Municipal Corporations*, 37 *Wash. L. Rev.* 404 (1962).

333. See, e.g., *Chastain v. City of Little Rock*, 208 Ark. 142, 185 S.W.2d 95 (1945); *Rogers v. Board of Directors*, 218 Cal. 221, 22 P.2d 509 (1933); *Taliaferro v. Board of Supervisors*, 354 Mich. 49, 92 N.W.2d 319 (1958); *Appeal of Snyder*, 302 Pa. 259, 153 A. 436 (1931); 1 C. Sands & M. Libonati, *supra* note 5, § 8.30; 2 E. McQuillin, *supra* note 5, §§ 7.16, 7.22; M. Hill, *supra* note 25, at 43–44, F. Sengstock, *supra* note 328, at 13–19.

With the exception of the partial consolidation of Indianapolis with Marion County, Indiana in 1969, in the twentieth century no state legislature has ordered a major consolidation of local governments without also making provision for a local referendum. See J. Zimmerman, *supra* note 49, at 96. Because of suburban resistance, voter approval

rules vary for unincorporated territory, but in some states the annexation of even unincorporated land requires the consent of the voters in the area to be annexed.³³⁴ Most Northeastern and Midwestern states discourage annexation in this way. As a result, the large cities in these states are unable to add new land. They have experienced little or no territorial or population growth since World War II, although their surrounding metropolitan areas have swelled.³³⁵ A metropolitan area may function as one economic market, but, characteristically, it is broken up into a multiplicity of political units. Thus, in 1982 there were 121 municipalities in Cook County, Illinois; 89 in St. Louis County, Missouri; 56 in Cuyahoga County (Cleveland), Ohio; and 123 in the three New York counties of Nassau, Suffolk and Westchester combined.³³⁶

The requirement of local consent is a classic example of localism. It treats all local areas—large cities and outlying areas alike—as equally deserving of respect as political units, and it protects the right of every incorporated residential grouping to retain its local independence. Areas with tax bases adequate for their needs may prefer to control their own services and their own development. If there are race, class, or income differences between the annexing city and the area proposed for annexation, or between the entities considering consolidation, then the annexation or consolidation is unlikely to win local approval.³³⁷ Local consent is a staunch protector of local autonomy and a major “stumbling block” to annexation or consolidation.³³⁸

Some states, particularly in the South and West, favor urban ex-

requirements are generally fatal to consolidation proposals. See, e.g., F. Sengstock, P. Fellin, L. Nicholson & C. Mondale, *Consolidation: Building a Bridge Between City and Suburb* (1964) (case study of unsuccessful consolidation efforts in St. Louis); Filer & Kenny, *Voter Reaction to City-County Consolidation Referenda*, 23 *J.L. & Econ.* 179 (1980); Lineberry, *Reforming Metropolitan Governance: Requiem or Reality*, 58 *Geo. L.J.* 675, 690–97, 715 (1970).

334. Of the 41 states that authorize municipal annexation by general law, 23 require a referendum and the approval of a majority of the voters in the area to be annexed. M. Hill, *supra* note 25, at 44–45.

335. Chicago and Cleveland have registered very little territorial growth and Detroit and Pittsburgh have registered virtually no territorial growth since 1930. Baltimore, Boston and Cincinnati have been virtually confined within the same boundaries since 1920. New York City has added only minimal territory since 1900. St. Louis has not expanded since 1880, and Philadelphia has added fewer than seven square miles since the Civil War. *Municipal Year Book* 1986, *supra* note 310, at 78–79.

336. Bureau of the Census, U.S. Dep’t of Commerce, *Local Government in Metropolitan Areas* 37–74 (table 3) (1985).

337. See, e.g., J. Bollens & H. Schmandt, *supra* note 329, at 292; F. Sengstock, P. Fellin, L. Nicholson & C. Mondale, *supra* note 333, at 135 (“fear of racial integration inspired a great deal of opposition to consolidation” among residents of suburban St. Louis); Dye, *Urban Political Integration: Conditions Associated with Annexation in American Cities*, 8 *Midwest J. Pol. Sci.* 430, 439–42 (1964); Filer & Kenny, *supra* note 333, at 183–84 (poor areas more likely to support consolidation and above median income areas more likely to oppose).

338. F. Sengstock, *supra* note 328, at 16.

pansion, permit certain cities to annex unincorporated territory unilaterally and restrict new incorporations in the vicinity of cities with broad annexation authority.³³⁹ Indeed, much of the population growth of the large cities of the Sunbelt in recent decades is a result of substantial territorial expansion attributable to the liberal annexation laws of those states.³⁴⁰ State laws that facilitate municipal annexation may also be termed localist because the annexation decision remains a local one: it is a decision of the annexing city and not of a state or regional entity. Promoting big city growth may be state policy, but the decisions concerning annexation—what areas to annex? when? which city will do the annexing?—generally remain within the discretion of local govern-

339. See N.C. Gen. Stat. §§ 160A-24 to -30 (1982); Tex. Rev. Civ. Stat. Ann. art. 970(a) (Vernon 1963). In the postwar period, Texas has led all states in population and land area annexed. In the 1970s, 16.8% of all the territory annexed by cities in the United States, and 14.4% of the people annexed, were in Texas. See Ashcroft & Balfour, *Home Rule Cities and Municipal Annexation in Texas: Recent Trends and Future Prospects*, 15 St. Mary's L.J. 519, 546 (1984). Among the major Texas cities, Dallas was 40 square miles in 1940 and 331 square miles in 1984; Houston was 73 square miles in 1940 and 565 square miles in 1984; and San Antonio was 36 square miles in 1940 and 278 in 1984. *Municipal Year Book* 1986, *supra* note 310, at 78-79. See generally Note, *supra* note 329, at 215 (overview of state's unilateral annexation process and compilation of major appellate court decisions concerning it).

340. For example, Texas and North Carolina. See, e.g., C. Abbott, *The New Urban America: Growth and Politics in Sunbelt Cities* 49-51 (1981); J. Bollens & H. Schmandt, *supra* note 329, at 242-45; K. Jackson, *supra* note 327, at 154-55 (population growth of Memphis, Houston, Phoenix and Indianapolis since 1940 based entirely on annexation).

In the 1970s, American cities annexed territories containing 3.2 million people—1.8 million in the South, and 0.7 million in the West. Forty percent of all annexations occurred in four states: California, Florida, Illinois and Texas. Miller & Forstall, *Annexations and Corporate Changes: 1970-79 and 1980-83 in Int'l City Mgmt. Ass'n, The Municipal Year Book: 1984*, at 96-99. In the first half of the 1980s, seven states—California, Texas, North Carolina, Florida, Alabama, Louisiana and Nebraska—accounted for the bulk of annexations measured according to population. See Miller, *Municipal Annexation and Boundary Changes*, in *The Municipal Yearbook* 1986, *supra* note 310, at 74. Of the 85 voter referenda on city-county consolidations that occurred between 1921 and 1978, 80 occurred in the South and the West, and of these 59 occurred in the South. Indeed, the four Southern states of Florida, Georgia, Tennessee and Virginia accounted for 49 of the referenda, or more than half of the votes that occurred in the whole country over a 67 year period. See Glendening & Atkins, *City-County Consolidations: New Views for the Eighties*, in *Int'l City Mgmt. Ass'n, The Municipal Year Book: 1980*, at 68-69.

More recently, Southern and Western state legislatures have begun to move away from easy annexation. In Texas, increasing suburban growth and the class and ethnic differentiation of outlying areas from central cities have led to statutory changes designed to slow down annexation and require the consent of annexed areas. See Ashcroft & Balfour, *supra* note 339, at 530-42. In California, a court declared: "It is the strong public policy of this state, in respect of municipal annexation proceedings, that the inhabitants and the owners of land proposed to be annexed have the ultimate decision therein." *Schaeffer v. County of Santa Clara*, 202 Cal. Rptr. 515, 516, 155 Cal. App. 3d 901, 904 (1984) (affirming trial court's invalidation of annexation without sole landowner's consent). See Cal. Govt. Code § 57000 (West 1983 & Supp. 1989); see also C. Abbott, *supra*, at 189-93 (resistance to annexation in suburbs of Denver and Atlanta).

ments. One local interest—that of the area to be annexed—may not be heard, but the relevant decision makers are still local ones.

Finally, not only are local governments and local residents the primary decision makers, but local desires are the ruling criteria. An affluent jurisdiction has no obligation to annex a fringe area that would benefit from the extension of municipal services. A well-to-do suburb has no obligation to consent to annexation by the adjacent central city with a declining tax base. Two communities of differing ethnic composition or social status need not merge. Each jurisdiction may decide based on its own perception of its self-interest, without considering the interest of the region as a whole.³⁴¹

These rules assure the continued autonomy of localities that want autonomy. Indeed, the law of annexation is an incentive to incorporation. Since an incorporated entity may not be annexed or consolidated without its consent, the best way to avoid an undesirable political connection is to incorporate.³⁴² Such “defensive incorporation” is widespread in metropolitan areas.³⁴³

Ease of incorporation and the requirement of consent to annexation together provide the legal basis for the multiplicity of autonomous, economically and socially differentiated local governments in most metropolitan areas. The main criterion for the creation and preservation of a local government is whether local people—with the definition of local supplied by the people themselves—want it. For people with resources adequate to their local public service needs or desiring to regulate local land use, the answer is usually in the affirmative. The interests of other localities or of the region as a whole usually need not be taken into account.

3. *Recent State Boundary Review Legislation.* — As with school finance and exclusionary zoning, there has been some movement toward state

341. See, e.g., *City of Town & Country v. St. Louis County*, 657 S.W.2d 598, 606 (Mo. 1983).

342. Southern and Western metropolitan areas generally have fewer municipalities than their Northern and Eastern counterparts, but because of the universal rule permitting incorporated areas to escape forcible annexation, even the metropolitan areas in Sunbelt states with liberal annexation laws are politically fragmented into multiple municipalities. Thus, even though San Diego, California, has grown by annexation from 99 square miles in 1950 to 322 square miles in 1984, and Phoenix, Arizona, grew from 10 square miles in 1940 to 386 square miles in 1984, see Miller, *supra* note 340, at 78, by 1967 there were already 14 separate municipalities in the San Diego area and 18 in greater Phoenix, see J. Bollens & H. Schmandt, *supra* note 329, at 289.

343. See, e.g., *City of Olivette v. Graeler*, 338 S.W.2d 827, 837 (Mo. 1960) (many of the 99 incorporated cities in St. Louis County incorporated as “defensive measure” against annexation); W. Colman, *supra* note 63, at 18–19, 23–24 (discussing instances of defensive incorporation); S. Sato & A. Van Alstyne, *State and Local Government* 48 (2d. ed 1977) (discussing examples in Missouri and Minnesota); Note, *supra* note 328, at 79–80; Note, *Promoting Rational Land Use Planning: The Municipal Incorporation Statute as a Comprehensive Plan Implementation Device*, 57 *St. John’s L. Rev.* 127, 142–43 (1982).

or regional oversight of decisions to incorporate, annex or consolidate, and toward legislative standards that require greater attention to state or regional concerns. Again, as with schools and zoning, only a small fraction of state legislatures have acted to provide a state or regional review of local boundary decisions. A focus on this minority of states may give the misleading impression of state activism. Nevertheless, some attention to the handful of states with boundary review laws is appropriate, if only to indicate the limited nature of the control on local autonomy in even these activist states.

In the 1950s and 1960s, several states, primarily in the Middle and Far West, passed laws providing for some administrative review of incorporations and boundary changes.³⁴⁴ These laws, and the review they authorize, vary in structure and scope, but they have two common features. Procedurally, some external administrative agency passes on the wisdom of the proposed local organizational action and may reject it. Substantively, the reviewing body is authorized to decide whether the local action is in the best interests of the region as a whole, and not just of the areas seeking annexation, incorporation or consolidation.³⁴⁵

In some states, the reviewing body is a state agency; in others it is composed of both state and local officials, or just local officers.³⁴⁶ Some states review all local government formations or boundary alterations, while others limit oversight to major metropolitan areas or designated types of localities.³⁴⁷ Review may entail consideration of the

344. See, e.g., Wis. Stat. Ann. §§ 66.014-.016 (West 1973 & Supp. 1989); Minn. Stat. Ann. § 414.02 (West 1987 & Supp. 1989); Cal. Gov't Code § 56250 (repealed by Stats. 1985, c. 541, § 4) See, now, Cal Gov't Code § 56826 (West Supp. 1989) (West 1983 & Supp. 1989).

345. See J. Zimmerman, *supra* note 49, at 110-20; P. Florestano & V. Marando, *supra* note 278, at 79-80; see also Goldbach, *Local Formation Commissions: California's Struggle Over Municipal Incorporations*, 25 Pub. Admin. Rev. 213 (1965) (describing aims of California's law governing agency review and outlining standards of and viewpoints regarding make-up of agency itself); Johnson, *The Wisconsin Experience with State-Level Review of Municipal Incorporations, Consolidations, and Annexations*, 1965 Wis. L. Rev. 462 (administrator's account of early years of agency in Wisconsin); Note, *The Minnesota Municipal Commission—Statewide Administrative Review of Municipal Annexations and Incorporations*, 50 Minn. L. Rev. 911 (1966) (overview of the establishment of agency review of municipal boundary activities); Note, *1969 Amendments to Minnesota's Incorporation, Consolidation, Annexation and Detachment Statute*, 54 Minn. L. Rev. 1052 (1970) (discussion of procedural and substantive changes in agency review).

346. See J. Zimmerman, *State Responses to Urban/Rural Problems* 12 (Aug. 30-Sept. 2, 1984) (unpublished paper presented at Am. Political Science Ass'n 1984 annual meeting).

347. See generally 1 C. Antieau, *supra* note 5, § 1.16 (summarizing general state administrative supervision of local government incorporation); P. Florestano & V. Marando, *supra* note 278, at 79-80 (listing the substantive powers generally given to state agencies); J. Zimmerman, *supra* note 49, at 110-19; Woodroof, *Systems and Standards of Municipal Annexation Review: A Comparative Analysis*, 58 Geo. L.J. 743, 754-65 (1970) (outlining the discretionary aspects of state agency review standards).

impact of the formation or boundary change on the revenues, service capacity, regulatory authority and growth of the jurisdiction from which the area in question is being subtracted, on other local governments in the area and on the structure of the area as a whole.³⁴⁸

These laws have reduced the proliferation of small local governments.³⁴⁹ In 1959, Minnesota was one of the first states to provide for state review of local government formation. In the nine years preceding the creation of the state boundary review commission, sixty-two local governments were incorporated—thirty-six in the Twin Cities area alone.³⁵⁰ In the nine years after the commission's creation, only five new municipalities were created, and these were, on average, four times as large as the municipalities incorporated in the 1950s.³⁵¹ In Wisconsin, which also enacted its administrative review in 1959, new incorporations were sharply reduced, and in the first six years of the state agency's existence approximately one-third of all proposed incorporations were rejected.³⁵²

But these laws do not empower the boundary review agencies to eliminate local governments that already exist, nor do they authorize the forcible merger of localities that prefer to maintain separate political existences. A boundary commission can block a local incorporation or annexation proposal it deems not in the best interest of the region, but a commission cannot initiate or compel a boundary change that it determines would be of regional benefit. Annexations and consolidations in these states continue to require local consent,³⁵³ and the local consent requirement is still a significant barrier to annexations and consolidations.³⁵⁴

In the states providing some region-oriented oversight of local organizational decisions, the departure from localism is thus only partial. Local government formation is no longer a purely local matter, but lo-

348. See Cal. Gov't Code § 5479b (West 1983); Minn. Stat. Ann. § 414.031 subd. 4 (West 1987); Wash. Rev. Code § 35.13.173 (West 1965 & Supp. 1989); Wis. Stat. Ann. § 66.016 (West 1965 & Supp. 1988). For example, the reviewing agency may decide that annexation by an existing municipality would better serve the interests of the region than would formation of a new local government. See Wis. Stat. Ann. §§ 66.016(2)(b), 66.021(11)(c) (West 1965 & Supp. 1988); Johnson, *supra* note 345, at 467–69.

349. See, e.g., Martin & Wagner, *The Institutional Framework for Municipal Incorporation: An Economic Analysis of Local Agency Formation Commissions in California*, 21 J.L. Econ. 409, 422–25 (1978).

350. Note, *The Minnesota Municipal Commission*, *supra* note 345, at 911.

351. See J. Zimmerman, *supra* note 49, at 111–13; Note, *supra* note 345.

352. See Johnson, *supra* note 345, at 471.

The Wisconsin Supreme Court has treated the state's municipal incorporation review scheme as intended to "place substantial obstacles in the path of the incorporation of a city or village which falls within the metropolitan area" and has sustained that legislative purpose. *Town of Pleasant Prairie v. Department of Local Affairs*, 113 Wis. 2d 327, 339, 334 N.W.2d 893, 900 (1983).

353. See, e.g., Woodroof, *supra* note 347, at 758–59.

354. See *id.* at 748–49.

cal governments that were already formed, and those that win approval as new incorporations, retain their autonomy. Even Wisconsin and Minnesota, which have had the longest experiences with regional review, declined to eliminate the referendum requirement for those annexations or consolidations that won administrative approval.³⁵⁵

More importantly, these administrative review commissions have not become national models. Most state review procedures were adopted between 1959 and 1967, when the effects of the postwar proliferation of local governments in metropolitan areas had become manifest. Since then, relatively few states have followed suit. Today, four-fifths of the states have no such regional administrative review mechanism.³⁵⁶

Thus, despite some recent gestures in the direction of greater state oversight, the law of local government formation and preservation remains essentially localist in character. Local inhabitants are the primary actors, local concerns are their criteria, and the continued existence of local governments is generally protected. These rules have been largely unquestioned in court and largely unaffected by legislative change. This is consistent with, and indicative of, the general structure of our localism in the states.³⁵⁷ Moreover, the law in this area gives little attention to the proper size of local units or to the standards for marking off the territory of one local government from that of another. Local governments are often self-defined; their boundaries are the product of history, the self-interested actions of local decision makers, and the legal system's deference to the result. Local governments are frequently created and defended not to strengthen local interests against the state but to insulate one set of local people or interests from the regulatory authority and population of another local government. As with school finance and land use regulation, the law of local government formation and preservation indicates that not all local governments benefit from state delegations of power and that often local

355. See Note, 1969 Amendments, *supra* note 345, at 1064-65 & n.61 (state legislature retained referendum requirement over objections of Minnesota Municipal Commission); Note, *The Rule of Reason in Wisconsin Annexations*, 1972 Wis. L. Rev. 1125, 1129, 1131 (Wisconsin Assembly defeated bill that would have permitted annexation of unincorporated contiguous territory upon approval of boundary review board without consent of residents of area to be annexed).

356. See J. Zimmerman, *supra* note 346, at 12.

357. State commitment to local territorial integrity is also illustrated by other state laws governing local government reorganization. Florida, for example, permits metropolitan areas to address urban problems through either the consolidation of city and county governments or county adoption of a charter enabling it to exercise powers comparable to those of home rule cities. Thomas & Marando, *supra* note 332, at 50-53. Both forms of reorganization, however, require local voter approval, *id.* at 53-54, and noncity voters are often opposed to greater county responsibility for urban problems, *id.* at 60. Thus, one recent study found that 10 out of 10 proposed city-county consolidations were rejected, as were 11 out of 14 proposed county charters. *Id.* at 56.

power is wielded against the interests and concerns of other localities. In such a setting, the very idea of local power becomes ambiguous.

D. *Local Autonomy and Federal Constitutional Law*

Although the law of local autonomy and state-local relations is primarily a product of state law, no critical description of the place of local governments in the American legal landscape would be useful without some attention to federal constitutional law. The traditional view is that the Supreme Court has predicated the constitutional status of local governments entirely on the theory that a local government is merely an administrative arm of the state, utterly lacking in autonomy or in constitutional rights against the state that created it.³⁵⁸ The Supreme Court's 1907 decision in *Hunter v. City of Pittsburgh*, which sustained the merger of the city of Allegheny into the city of Pittsburgh over the objections of Allegheny's residents, is usually treated as the purest statement of the black-letter position:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers . . . constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers . . . expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done . . . with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.³⁵⁹

Hunter remains fundamental to the federal constitutional status of local governments.³⁶⁰ Yet the Supreme Court has gone beyond *Hunter* in recent years. Without according local governments formal constitutional rights against their states, the Court has affirmed the importance of localism in our political culture. The Court has treated localities as active, locally responsive governments, not just administrative arms of the states. The Court has endorsed the appropriateness of local deci-

358. See, e.g., 1 C. Antieau, *supra* note 5, §§ 2.00–.05; 2 E. McQuillin, *supra* note 5, §§ 4.17–.19; C. Sands & M. Libonati, *supra* note 5, §§ 1.05, 3.06.

359. 207 U.S. 161, 178–79 (1907).

360. See, e.g., *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978); *Reynolds v. Sims*, 377 U.S. 533, 575 (1964).

sion-making and has frequently promoted localism and protected the considerable autonomy local governments enjoy under state law.

This Section explores the changing place of local governments in federal constitutional law. It is not a comprehensive survey³⁶¹ but a thematic study of the concern for local autonomy evinced in recent Supreme Court decisions. The first subsection examines the general status of local governments, exploring a number of cases in which the Court emphasized the interest of local people in self-government and the authority of localities, distinct from their states, to initiate actions and to respond to their residents' interests. The second subsection analyzes how the Court has sustained localist values in the critical areas of education finance, land use and local government formation.

1. *The Constitutional Status of Local Governments.*

a. *Local Governments and Local Self-Government.* — The Supreme Court's recognition of and support for the widespread practice of local autonomy is illustrated most clearly by the application of the one person, one vote doctrine to local governments. In *Avery v. Midland County*,³⁶² the Court articulated a view of local government that emphasized not the traditional authority of states to structure local arrangements, but the constitutional implications of the local inhabitants' stake in local self-government.³⁶³

361. For a general survey, see M. Gelfand, *Federal Constitutional Law and American Local Government* (1984); see also Gelfand, *The Constitutional Position of American Local Government: Retrospect for the Burger Court and Prospect for the Rehnquist Court*, 14 *Hastings Const. L.Q.* 635 (1987); Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 *B.U.L. Rev.* 1 (1982); Williams, *supra* note 15, at 83.

362. 390 U.S. 474 (1968).

363. *Id.* at 481. As a local voting rights case with implications for local autonomy and state-local relations, *Avery* was presaged by *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), the celebrated Alabama racial gerrymandering case in which the Supreme Court gave some indication of the contemporary limits of *Hunter*. *Gomillion* held that *Hunter* did not provide that "the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained by the particular prohibitions of the Constitution considered in those cases," that is, the contracts, due process, and privileges and immunities clauses. *Id.* at 344. The fifteenth amendment was not constrained by the *Hunter* rule and precluded the state from redrawing municipal boundaries if the state's purpose was to deny blacks the right to vote in municipal elections. *Id.* at 345.

Although nominally a voting rights case, *Gomillion's* fifteenth amendment analysis may have broader significance for the notion of local self-government and the right to be a member of a particular community. The Court has always considered residency in a jurisdiction a constitutionally valid prerequisite for the exercise of the franchise in that jurisdiction. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972); *Evans v. Cornman*, 398 U.S. 419, 422 (1970); *Kramer v. Union Free School District*, 395 U.S. 621, 625 (1969). The plaintiffs in *Gomillion* did not allege the loss of the right to vote in federal, state or county elections, or even the denial of the right to vote in any new community they might choose to incorporate outside the borders of the new Tuskegee. Their only claim was a disenfranchisement from Tuskegee elections. 364 U.S. at 341. But only residents of Tuskegee have a right to vote in Tuskegee elections, and the state,

Avery considered a challenge to the apportionment of the Midland County Commissioners Court—the county legislature—which gave a tiny rural minority a majority of the seats.³⁶⁴ The Midland apportionment had been adopted pursuant to a provision of the Texas Constitution that, the Texas Supreme Court held, did not require districts of equal population.³⁶⁵

The Court began its analysis by invoking the *Hunter* notion that local governments are arms of the state; indeed, the county's status as a political subdivision of the state was the predicate for application of the equal protection clause to the commissioners court, since the equal protection clause reaches only the exercise of state power.³⁶⁶ But the county's status as an extension of the state was not alone sufficient to require that the commissioners court be subject to one person, one vote.³⁶⁷ If, as *Hunter's* theory of state-local relations suggests, the state

by redrawing Tuskegee's borders, had made them nonresidents. Traditional doctrine was that the state had the unlimited authority to determine municipal boundaries, including the alteration of pre-existing boundaries. The finding of a fifteenth amendment violation suggests not only that the plaintiffs had the right to vote in Tuskegee elections, but, more importantly, that they had a right to be members of the territorial and political community known as Tuskegee. To that extent, *Gomillion* implies that a state does not have the unlimited power to decide who are the residents of a municipality or to draw municipal boundaries.

Of course, *Gomillion* is first and foremost a race discrimination case. Even if the black plaintiffs had a constitutionally protected interest in preventing race-conscious line-drawing that would exclude them from the political community of Tuskegee, cf. *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding state enforced residential segregation unconstitutional), *Gomillion* provides only modest support for a more comprehensive argument that local residents generally have a constitutionally protected interest in municipal boundary lines and local government arrangements. Cf. *Holt Civic Club*, 439 U.S. at 68–70 (holding state legislature may provide city with police jurisdiction over residents immediately outside city boundaries without giving those noncity residents a vote in city elections).

364. *Avery*, 390 U.S. at 476.

365. The Texas Constitution required a division of the counties of Texas “into four commissioner precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner” Tex. Const. of 1854, art. V, § 18. The trial court had found that the challenged apportionment of the Midland County Commissioners Court had been adopted “‘for political expediency, to maintain the status quo’” and reflected a “‘gross abuse of . . . discretion’” by the Commissioners Court, and the trial court invalidated the apportionment. *Avery v. Midland County*, 406 S.W.2d 422, 424–25 (Tex. 1966) (quoting trial court findings). The Texas Supreme Court sustained the trial court's finding of “obvious arbitrariness in the current districting order,” id. at 428, but rejected the claim that either the “convenience of the people” provision or the equal protection clauses of the state or federal constitutions required precincts of equal population. See id. at 426 & n.1 (under *Hunter* county governments not subject to “one man, one vote” principle); id. at 428 (population is a factor under Tex. Const. art. V, § 18, but “the convenience of the people in the particular circumstances of a county may require—and constitutionally justify—a rational variance from equality in population”).

366. *Avery*, 390 U.S. at 479–80.

367. Special districts, which are the most numerous of the political subdivisions of the state, are generally not subject to the one person, one vote requirement. See *Ball v.*

legislature is the only true legislative body in the state, then the principle, embraced in *Reynolds v. Sims*,³⁶⁸ that representative government requires legislative apportionment to be based on one person, one vote³⁶⁹ could have been fully satisfied by the proper apportionment of the state legislature without further application to local governments since, under *Hunter*, localities are subordinate administrative bodies and not real units of government.³⁷⁰ Moreover, the *Hunter* view of local governments as creatures of the states suggests that local government structure is a matter for either state legislatures, which by the time of *Avery* were subject to proper apportionment rules under *Reynolds*, or state constitutions.³⁷¹ The particular problem in *Avery*—rural domination of the county government—should not have been a problem since the county primarily attended to rural matters.³⁷² If the county government were simply a state agency, and the state saw the county's function as the protection of rural interests, the state reasonably could have sought a rural-oriented county structure.³⁷³

James, 451 U.S. 355, 368–69 (1981); *Salzer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973). But cf. *Hadley v. Junior College Dist.*, 397 U.S. 50, 53–54 (1970) (junior college district subject to one person, one vote rule); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632 (1969) (school district subject to one person, one vote rule).

368. 377 U.S. 533 (1964).

369. *Id.* at 561–68.

370. Indeed, *Reynolds* relied on just this distinction in rejecting the so-called “federal analogy” as a defense for malapportioned state legislatures. 377 U.S. at 575. Proponents of the federal analogy argued that when states utilize the county as the basic unit of representation in the legislature—creating state senates based on a one county, one vote rule and state lower houses with a minimum of one representative per county and the remaining representatives apportioned among the counties according to population—they are simply following the model set forth in the United States Constitution for the structure of Congress. See *id.* at 571–72. The Supreme Court dismissed the federal analogy, and any argument that local governments are polities comparable to the states. Whereas the states are “separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government,” *id.* at 574, “[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.” *Id.* at 575 (citing *Hunter*).

371. See *Avery*, 390 U.S. at 489 (Harlan, J., dissenting).

372. *Id.* at 483–84.

373. The rural focus of county government and the concomitant need to give rural voters disproportionate strength in elections to the Commissioners Court played a role in the Texas Supreme Court's decision. As the court explained, “The voice of the rural areas will be lost for all practical purposes if the commissioners precincts of counties are apportioned solely on a population basis except, perhaps, in those few sparsely settled counties without a concentration of urban centers. Yet, important affairs of the county administered by the Commissioners Court—such as roads, bridges, taxable values of large land areas—disproportionately concern the rural areas.” *Avery*, 406 S.W.2d at 428. The dissenting justices on the United States Supreme Court expressed similar views. See *Avery*, 390 U.S. at 491–92 (Harlan, J., dissenting), 507 (Fortas, J., dissenting).

The Court rejected this reasoning and held that the requirement of equal representation applies at the local level, and not just to the states, because local governments are *governments*, possessed of autonomous decision-making authority on behalf of local residents. Even a properly apportioned state legislature could not authorize a departure from one person, one vote at the local level. The Court relied on the practice of local autonomy in the states, the states' extension of home rule and the value of local self-government:

While state legislatures exercise power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision-making at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.³⁷⁴

The contrast in perspective between *Hunter* and *Avery* is clear. *Hunter's* view is top-down: local governments are creatures of the state, subject solely to state control and performing state functions in a state-specified local area. Juridically, a local government is little more than the Department of Motor Vehicles, with a geographically specific territory that the state can alter at will. *Avery's* view is bottom-up: a local government belongs to local people, and local citizens have a stake in its "responsible and responsive operation." Moreover, a local government is a government. It makes authoritative policies, laws and decisions in response to the demands of local residents.

Avery is not in formal conflict with *Hunter*. It does not hold that people have a right to local government or require states to respect local wishes concerning the delegation of local power or the configuration of local boundaries. The Court merely recognizes the "universal" existence of local governments possessing considerable autonomy and providing an important representational function and reasons from there. But the normative implications are unmistakable. *Avery* treats counties and municipalities as political institutions that initiate their own actions on behalf of local citizens rather than just implement state actions locally. The Court applied one person, one vote to the county

374. 390 U.S. at 481.

commissioners court—and to all city and county governments—because one person, one vote is the one constitutional “ground rule”³⁷⁵ of American representative institutions.³⁷⁶ Local legislatures are representative institutions; therefore, they must be structured in accordance with the equal population principle even though state administrative agencies need not be.³⁷⁷

According to the Court, local self-government is a basic value in the American political system, “of increasing importance to the quality of life of more and more of our citizens.”³⁷⁸ Notwithstanding *Hunter*’s broad disclaimer of a federal constitutional interest in state-local relations and its view of localities as mere arms of the state, *Avery* recognizes the representative nature of local governments and assumes a significant measure of local political self-determination. By raising localities to the status of governments, *Avery* also raises the standing of the principle of local self-government.³⁷⁹

Avery’s localism fits nicely with the localist pattern of state law

375. *Id.* at 485.

376. The Court continues to model its approach to one person, one vote at the local level on *Avery*. The rule for determining whether to apply one person, one vote to a particular local unit is whether the unit is governmental “with general responsibility and power for local affairs.” 390 U.S. at 483. *Avery* held that cities, counties and all general purpose governments are subject to one person, one vote. Subsequently, the Court also extended one person, one vote to school districts and special purpose districts involved in education. *Hadley v. Junior College Dist.*, 397 U.S. 50, 52 (1970); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969). Thereafter, the Court declined to extend one person, one vote further and held that the doctrine did not apply to water storage districts. *Ball v. James*, 451 U.S. 355, 362 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973). Even here, the Court did not retreat from *Avery*’s treatment of general purpose local governments such as cities and counties as entities distinct from the state. One person, one vote was held inapplicable in the water storage district cases not because those entities were considered appendages of the state, but because their narrow grants of authority and their limited functions led the Court to treat them more like business enterprises than governments. See, e.g., *Ball*, 451 U.S. at 366–68; *Salyer Land Co.*, 410 U.S. at 728–29; see also *Ball*, 451 U.S. at 372 n.1 (Powell, J., concurring) (distinguishing the application of the one person, one vote rule to the school boards in *Hadley* and *Kramer* as “reflect[ing] the Court’s judgment as to the unique importance of education among the functions of modern local government”).

377. The Court recently and unanimously restated this principle: “Both state and local elections are subject to the general rule of population equality between electoral districts. No distinction between authority exercised by state assemblies, and the general governmental powers delegated by these assemblies to local elected officials, suffices to insulate the latter from the standard of substantial voter equality.” *Board of Estimate v. Morris*, 109 S. Ct. 1433, 1437 (1989).

378. *Avery*, 390 U.S. at 481.

379. Indeed, by sustaining the representative nature of local governments, *Avery* may have strengthened local political development since general purpose local governments are now required to be fully representative of all local residents. Rural domination of county government, in particular, would be difficult to maintain after *Avery*. But see *Ellickson, Cities and Homeowners Associations*, 130 U. Pa. L. Rev. 1519, 1559 (1982) (contending that *Avery* inhibits local experimentation and local recalculation of

where, as we have seen, local autonomy is largely a product of institutional arrangements and political values rather than formal local legal rights.

Avery in a sense complements *Hunter*, providing doctrinal recognition of the fact that, in practice, local governments are agents of both the state and of local constituents, carrying out state functions locally and acting on behalf of local residents and local interests.³⁸⁰ These two ways of conceiving of local legal status are not entirely inconsistent but there is a tension between them. The strain of reconciling de facto local autonomy with formal plenary state power over localities may be seen in a range of cases concerning local government inclusion in state immunities, state liability for local government misconduct and local ability to assert federal claims against a state.

b. *Local Governments and State Immunities*. — Local governments may not always enjoy the immunities from federal regulation available to the states, as they would if localities were merely state agencies. This is the lesson of *Community Communications Co. v. City of Boulder*,³⁸¹ in which the Supreme Court held that the exemption from federal antitrust laws the

“the competing interests of allocative efficiency, administrative efficiency, progressive redistribution, and participation”).

380. A later local voting rights case, *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), marked a partial return to *Hunter*, but even here the Court continued to link local government with local political control. *Holt* involved an Alabama law which gave certain cities—in this case Tuscaloosa—limited “police jurisdiction” over unincorporated areas within a three-mile radius of the city limits but did not provide a concomitant extension of the right to vote in municipal elections to residents of the police jurisdiction. Relying on *Hunter*, which, the Court asserted, “continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them,” id. at 71, the Court upheld the Alabama law, id. at 70.

In *Holt Civic Club* as in *Hunter*, the Court saw the role of local government as providing basic services on behalf of the state at the local level. The function of Tuscaloosa in exercising its extraterritorial authority was to satisfy the needs of urban fringe residents for basic municipal services such as police, fire and public health. Id. at 74. It was not the policy-making or representational role emphasized in *Avery*. The state had discretion to decide how these needs would be met, whether by the state government directly, by the county, by a new municipality, or by vesting extraterritorial authority in a neighboring municipality. Under *Hunter*, “[a]uthority to make those judgments lies in the state legislature.” Id.

But *Holt Civic Club* was not pure *Hunter* and the nature of the Court’s departure from the traditional *Hunter* stance reflects the significance of *Avery*. The Court emphasized the limited scope of the extraterritorial authority granted to Tuscaloosa. “[A]mong the powers not included” in the municipal police jurisdiction were general taxation and land use regulation—“the vital and traditional authorities of cities and towns.” Id. at 73 n.8. If Tuscaloosa had been granted these hallmarks of local government power in the extraterritorial ring, it in effect would have been the municipal government for the urban fringe residents. Arguably, these residents therefore would have had the right to vote in municipal elections and to participate in municipal politics.

381. 455 U.S. 40 (1982).

states receive under *Parker v. Brown*³⁸² does not automatically extend to local governments, and that the state's grant of broad home rule powers to its municipalities is not by itself sufficient to immunize those municipalities from federal antitrust liability.³⁸³ Because *Boulder* exposed local governments to liabilities from which the states are shielded, the case may seem difficult to square with a claim that it gives support to localism. But *Boulder* reflects the Supreme Court's treatment of localities as legally autonomous governments. The gist of *Boulder* is that local governments are not simply administrative subdivisions or extensions of their states. Localities are independent entities, even though their autonomy may cost them some of the protections states enjoy. Local governments must take the bitter with the sweet.³⁸⁴

Boulder's rejection of home rule as sufficient authorization for local anticompetitive activity further underscores the Court's recognition of a home rule municipality's independence from direct state control.³⁸⁵

382. 317 U.S. 341 (1943). The state action exemption was created by the Supreme Court in *Parker* as a matter of statutory interpretation. Relying on principles of federalism and state sovereignty, the Court found that Congress had not intended the Sherman Act "to restrain state action or official action directed by a state," *id.* at 351, and therefore that states and state officials could not be subject to antitrust liability for anticompetitive actions. Subsequently, the Court recognized that *Parker's* federalism rationale, and its intention to permit states to pursue anticompetitive programs, must also shield private parties engaged in anticompetitive arrangements pursuant to state authorization. *Patrick v. Burget*, 108 S. Ct. 1658, 1662 (1988). Private parties may enjoy *Parker* immunity, but only if their anticompetitive actions are predicated on "'clearly articulated and affirmatively expressed [s]tate policy'" and are "'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). Thus, although *Boulder* and its progeny are cases of statutory interpretation, the *Parker* doctrine's grounding in principles of federalism indicates that the local government antitrust cases provide some insight concerning the constitutional status of local governments.

383. 455 U.S. at 50–57. Prior to *Boulder*, a fragmented Supreme Court had held that a local government could be sued under the antitrust laws in *Lafayette*. There was no majority opinion in *Lafayette*, which involved a suit by the private competitor of a municipal utility. See 435 U.S. at 391–92. *Lafayette* thus constituted an uncertain precedent for antitrust liability for local regulatory action. *Boulder*, which involved anticompetitive municipal regulation of cable television franchises, squarely presented the broader issue of municipal immunity. 455 U.S. at 44.

384. *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974).

385. The city of Boulder made two arguments that its home rule status under the Colorado Constitution entitled it to antitrust immunity. First, the city argued that since the Colorado home rule amendment vested plenary legislative power in the city, Boulder should be treated like the state of Colorado for purposes of the antitrust exemption. Second, even if home rule did not turn Boulder into Colorado, the broad home rule grant assertedly constituted sufficient state authorization of local anticompetitive action to satisfy the requirements for *Parker* immunity for entities other than states.

The Supreme Court rejected both assertions. 455 U.S. at 52–56. With respect to Boulder's first point, the Court explained, "[t]he *Parker* state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this

The *Parker* state action exemption extends only to those measures that pass the two-pronged test of being both the result of a "clearly articulated and affirmatively expressed state policy" and "actively supervised by the State itself."³⁸⁶ The "clear articulation" requirement generally means that the anticompetitive restraint must be either compelled by state law or explicitly authorized by state legislation.³⁸⁷ The *Boulder* Court properly treated home rule as a statement of the municipality's relative autonomy from state supervision and of the state's neutrality concerning municipal decision making, rather than as an affirmative authorization of local anticompetitive actions. Under home rule, municipal decisions are not decisions of the state. *Boulder's* denial of the *Parker* immunity to home rule municipalities is therefore consistent with the theory of home rule.

But while *Boulder* supported local autonomy in theory, it jeopardized it in practice. The Court left local governments in a bind: either localities could enjoy broad discretion as a matter of state law but be subject to antitrust suit, or they could immunize themselves from antitrust claims at the price of greater state oversight and control. However, the potentially antilocal thrust of *Boulder* was substantially ameliorated by the Local Government Antitrust Act of 1984,³⁸⁸ which eliminated money damages in antitrust suits against local governments,³⁸⁹ and by the subsequent decision in *Town of Hallie v. City of Eau Claire*,³⁹⁰ which liberalized the criteria for *Parker* immunity for localities.

Hallie was a suit against a Wisconsin city that was the sole provider of sewage treatment services in a two-county region and refused to treat the sewage of towns in the area unless they accepted the city's sewage collection and transportation services as well.³⁹¹ The Court in-

principle contains its own limitation: Ours is a 'dual system of government' . . . which has no place for sovereign cities." *Id.* at 53 (quoting *Parker*, 317 U.S. at 351).

Boulder's refusal to set local governments on a par with the states is not surprising. The fifty states are unique in our system. The states enjoy textual protection under the Constitution and function as fundamental components of the structure of the national government. American federalism has consistently been framed in the context of nation-state and state-state relations. Local governments lack the political status and historic role of the states, and have no claim to the states' special relationship with the national government. In the absence of a specific congressional grant of immunity, the most local governments can aspire to is autonomy, not sovereignty.

386. *Patrick v. Burget*, 108 S. Ct. 1658, 1662-63 (1988).

387. See, e.g., *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

388. Pub. L. No. 98-544, 98 Stat. 2750 (1984) (codified at 15 U.S.C. §§ 34-36 (Supp. V 1987)).

389. The act continues to permit suits for injunctive relief against local governments.

390. 471 U.S. 34 (1985).

391. The towns contended that the city used its monopoly over sewage treatment to gain an unlawful monopoly over sewage collection and transportation services, in violation of the Sherman Act. They also contended that the city's actions constituted an illegal tying arrangement and an unlawful refusal to deal with the towns. *Id.* at 37.

interpreted Wisconsin's general authorization to municipalities to provide extraterritorial sewage treatment services and to determine the areas to be served to "clearly contemplate that a city may engage in anticompetitive conduct."³⁹² The city could obtain the *Parker* immunity as long as its action was "a foreseeable result" of the state legislation authorizing local regulation or service provision.³⁹³ Immunity would lie even if the state law neither mandated nor mentioned anticompetitive local conduct.³⁹⁴ The governmental status of municipalities entitled them to broader protection of their anticompetitive behavior than would be available to private firms, the Court reasoned: "We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf."³⁹⁵

Further, *Hallie* completely released local governments from the obligation to prove that their actions were subject to active state supervision.³⁹⁶ Again, the Court relied on the fundamental difference between local governmental and private conduct. Local government activity, the Court reasoned, raised "little or no danger" of private self-interest.³⁹⁷ Therefore, there was no need for close state review.³⁹⁸ In effect, the two-pronged test for *Parker* immunity for private parties was pruned down to half of one prong for local governments. Together, then, *Hallie* and the Local Government Antitrust Act took some of the sting out of *Boulder* and restored a measure of local antitrust immunity. As *Boulder* affirmed local autonomy in theory, *Hallie* supported it in practice.

c. *Local Action and State Responsibility*. — Much as localities do not automatically enjoy state immunities, states are not automatically liable for the constitutional violations of their local governments. The lack of state derivative liability for local misconduct was underscored dramatically by *Milliken v. Bradley*,³⁹⁹ in which the Supreme Court relied on the formal legal disjuncture of a state from its localities to reject interdistrict busing as a remedy for unconstitutional segregation in the Detroit school system. The lower court in *Milliken* found that racial segregation within the Detroit public schools was irremediable unless suburban school districts were included in the busing program.⁴⁰⁰ The lower court also took seriously the Michigan Constitution's statement that public education is a state responsibility and Michigan law's treatment

392. *Id.* at 42.

393. *Id.*

394. *Id.* at 43–44.

395. *Id.* at 45.

396. *Id.* at 46.

397. *Id.* at 47.

398. *Id.*

399. 418 U.S. 717 (1974).

400. *Id.* at 732–33 (lower court opinion).

of state districts as creatures and agents of the state.⁴⁰¹ In the lower court's view, Detroit and the suburban districts were merely different components of the Michigan school system, and cross-district busing was analogous to busing students from one school to another within a single school district.⁴⁰²

The Supreme Court disagreed. The Court would not approve an interdistrict remedy unless either the state or the suburban school districts were also legally liable for interdistrict segregation.⁴⁰³ The Detroit school district was, in theory, a creature of the state: its boundaries had been drawn by the state and it was carrying out the state's education function at the local level. But, as in *Avery*, the Court turned from the state's theoretical supremacy to the practice of local autonomy, particularly in education: "No single tradition in public education is more deeply rooted than local control over the operations of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and the quality of the educational process."⁴⁰⁴ Despite the state's formal legal responsibility and its uncontested authority to redistribute power and restructure the school system, Michigan, "in common with most states, provide[d] for a large measure of local control."⁴⁰⁵ That local control deserved respect and operated as a brake on the lower court's remedial authority.

The Court held that the state and its school districts stood on independent legal footings. The state was not legally obligated to restructure public school administration in the greater Detroit area to remedy the segregation in Detroit.⁴⁰⁶ In the absence of separate evidence of direct state or suburban involvement in Detroit's segregation, an area-wide remedy that impaired local control in the suburban districts would not be sustained.⁴⁰⁷

By combining dozens of school districts into a single metropolitan area-wide system, the interdistrict remedy threatened the suburban districts' control of their own schools. But why were the suburban districts, and their particular boundaries, the proper reference point for local control? The metropolitan remedy did not necessitate central state operation of local schools. Metropolitan desegregation could

401. Id. at 726 & n.5.

402. Id. at 741.

403. Id. at 745.

404. Id. at 741-42.

405. Id. at 742.

406. Id. at 745.

407. Id. at 748-52. The Court was willing to assume *arguendo* that the state was responsible for segregated conditions in Detroit "on the theory that actions of Detroit as a political subdivision of the State were attributable to the State." Id. at 748. But in the absence of a showing that any local school district boundaries were drawn for racially invidious reasons there was no basis for requiring an interdistrict remedy. Id. at 748-49.

have been reconciled with local control through the creation of a metropolitan district composed of and controlled by area residents. However, a metropolitan remedy threatened local control by the *existing* local school districts—and for the *Milliken* Court, that was the local control that mattered. The district court in *Milliken* erred not only in ignoring the significance of local autonomy, but in treating the school district boundaries as “no more than arbitrary lines on a map drawn for political convenience.”⁴⁰⁸ Both the general principle of local control and the particular configuration of school districts deserved respect. The suburban school districts were “separate and autonomous” not only from the state, but from Detroit.⁴⁰⁹ The state’s formal legal authority to consolidate school districts was irrelevant. Unless and until a state consolidation occurred, the suburban school districts could rely on their independent political existence to insulate themselves from Detroit’s problems. The federal courts had to respect existing local boundary lines, even if that made an effective remedy for school segregation in the metropolitan area impossible.

d. *State-Local Conflicts*. — The autonomy of localities and the occasional willingness of the Supreme Court to vindicate local decision making are also revealed in two recent cases involving local assertions, in federal court, of federal claims against the states that created them. In *Washington v. Seattle School District No. 1*,⁴¹⁰ the Court permitted the school district to assert the fourteenth amendment to invalidate a state measure that would have banned a local program of busing for school integration. In *Lawrence County v. Lead-Deadwood School District No. 40-1*,⁴¹¹ the Court permitted a South Dakota county to assert the supremacy clause to pre-empt a state law that would have limited the county’s discretion to use federal funds.

In *Washington*, as in *Avery* and *Milliken*, the practice of local autonomy was as important as the state’s theoretical legal superiority. The state had endowed the locality with the powers it was attempting to retract.⁴¹² Contending that it “necessarily retains plenary authority over Washington’s system of education,”⁴¹³ the state sought to withdraw authority from local school districts and to make school busing policy a matter for state determination.⁴¹⁴ The Supreme Court acknowledged the state’s underlying authority over local school districts, but found it significant that the state had “generally delegated to a lo-

408. *Id.* at 741.

409. *Id.* at 744.

410. 458 U.S. 457 (1982).

411. 469 U.S. 256 (1985). For a third instance of a locality asserting a constitutional claim against its state, see *City of Boston v. Anderson*, 439 U.S. 951 (1978) (sustaining Boston’s argument that state restriction on city spending in election campaign violates first amendment).

412. 458 U.S. at 475-78.

413. *Id.* at 475.

414. *Id.* at 477.

cal, and locally accountable, board final responsibility in most matters.”⁴¹⁵ Local control was the operational baseline of education governance. The state’s ban on local busing was not equivalent to state adoption and repeal of its own voluntary busing law;⁴¹⁶ rather, the state’s intervention in the traditionally local area of education “worked a major reordering of the State’s education decisionmaking process.”⁴¹⁷ The Court viewed the state’s action not as a mere “internal” redistribution of decision-making authority from a line agency to the main office, but as an unusual interference with local school boards’ status as “separate entities for purposes of constitutional adjudication.”⁴¹⁸ The state’s reallocation of authority with respect to desegregative busing effected a highly suspicious structural change in state-local relations.⁴¹⁹ In departing from the widespread and traditional pattern of local school autonomy, the state’s action made local adoption of a measure that would benefit minorities difficult and thus created an unconstitutional burden on minority interests.⁴²⁰

415. *Id.*

416. *Id.* at 483.

417. *Id.* at 479.

418. *Id.* at 482.

419. As the Court pointed out, “It is the State’s race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle [busing] plan.” *Id.* at 485–86 n.29. The Court determined that the restructuring was race-conscious because the state measure “was carefully tailored to interfere only with desegregative busing.” *Id.* at 471. But the unusual nature of the state’s departure from the traditional pattern of local control further confirmed the race-conscious nature of the state’s action, *id.* at 474–82. *Washington* may be compared to *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), discussed more fully in note 363 *supra*. In both cases a state action with respect to a local government was invalidated because the state’s action was racially motivated. The formal effect on the doctrine of plenary state power over state-local relations is the relatively limited one that *Hunter* must give way to the anti-discrimination principle of the fourteenth and fifteenth amendments. Yet in both cases the Court’s view of local government has elements not caught even by a *Hunter* doctrine with a race discrimination exception. In *Washington*, part of the proof of discrimination may have been the departure from normal state-local arrangements. Moreover, part of the harm to Seattle’s minority residents was the loss of the opportunity to pursue a particular policy at the local level—a loss not offset by the comparable opportunity to pursue the same policy at the state level. That a restriction on the scope of permissible local policy making is an injury to local people reflects some of *Avery*’s localist concern about the value of local government and local political activity to local residents, as well as of the institutional separation of state and local governments.

420. 458 U.S. at 483–84. Noting that the Seattle busing plan was not constitutionally mandated, Justice Powell’s dissent sharply criticized the Court for “cut[ting] deeply into the heretofore unquestioned right of a State to structure the decision-making authority of its government”—assuming, of course, that a local school district is a part of the state’s government. *Id.* at 493 (Powell, J., dissenting). Chief Justice Burger and Justices Rehnquist and O’Connor joined Justice Powell’s dissent.

Washington serves as a useful reminder that local autonomy is consistent with a range of policy outcomes—racial separation in *Milliken* and desegregation in *Washington*—and that one should be careful before equating a commitment to localism with any other substantive vision. Cities, as many advocates of local power insist, can be more progres-

Lawrence County displayed *Avery's* localist spirit in its interpretation of the federal Payment in Lieu of Taxes Act. The act provides localities with funds to replace tax revenues lost because of tax-exempt federal lands, and it authorizes the recipients to "use the payment for any governmental purpose."⁴²¹ South Dakota sought to require the county to allocate the federal funds in the same manner as the state mandated county spending of locally raised revenues. The state contended, in classic *Hunter* top-down fashion that, as the county's creator, it had sole authority to determine the county's "governmental purpose."⁴²² But the Supreme Court read "any governmental purpose" in *Avery's* bottom-up style. County expenditures were the result of *local* decisions, responding to local needs and emerging from the local political representation process. Thus, the Court determined that Congress intended to "ensur[e] local governments the freedom and flexibility to spend the federal money as they saw fit."⁴²³ Local self-determination, not state control, better suited the Court's view of the source of local governmental purposes.⁴²⁴

These cases suggest that the Supreme Court's treatment of local governments is not fully captured by *Hunter* and traditional notions of plenary state power. The institutional arrangements of local autonomy, and the accompanying support for local self-government as a political value, have affected federal constitutional and statutory interpretation.⁴²⁵ Although there is no constitutional localism that formally pro-

sive than their states. Nevertheless, the factual setting in *Milliken* is more indicative of our local government system than the one in *Washington*. Most metropolitan areas look more like Detroit, where blacks and whites tend to live in separate localities, than Seattle, which had an adequate racial mix within the city for internal busing to have an effect.

421. 31 U.S.C. § 6902(a) (1982).

422. 469 U.S. 256, 259-60 (1985).

423. *Id.* at 263.

424. Justice Rehnquist would have continued "the long history of treatment of counties as being by law totally subordinate to the States which have created them." *Id.* at 273 (Rehnquist, J., dissenting). At least one court of appeals has reiterated the Supreme Court's view. See *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir. 1979) (holding that school district had standing under supremacy clause to sue state of Texas over conditions of participation in federal school breakfast program, but finding for state on merits).

425. Indeed, localism as a political doctrine that influences federal constitutional and statutory interpretation in ways that assume or advance local autonomy without providing local governments constitutional protection against their states may not be much less substantial in our constitutional order than federalism, notwithstanding federalism's superior formal status as a legal doctrine. As my colleague Henry Monaghan has pointed out, "The radical transformation that has occurred in the structure of 'Our Federalism' in the nearly two centuries of our existence has emptied the concept of legal content and replaced it with a frank recognition of the legal hegemony of the national government." Monaghan, *The Burger Court and "Our Federalism,"* 43 *Law & Contemp. Prob.* 39, 39 (1980). "In major part at least 'Our Federalism' is a political, rather than a legal, doctrine." *Id.* at 42.

fects local units against higher level governments, the Court's belief that locally accountable governmental units are significant in practice and desirable in theory has led it to affirm the representative nature of local governments, the operational independence of local governments from their states, and the important role local governments play in making law and policy in critical areas. Localities do not enjoy the status of states; they remain formally subordinate to the states; and local autonomy entails liability as well as power. But under the outer shell of plenary state power, a hardy inner skin of local control over local political institutions, and local articulation of local laws and policies, has grown.

2. *The Supreme Court's Affirmation of Our Localism.* — The Court's protection of local autonomy is particularly evident in the areas that constitute the basic fabric of state-local and inter-local relations: education finance, land use regulation and local government formation. In each area, the Court's concern for localist values contributed to its adoption of an expansive notion of the proper scope of local decision making or to its ratification of the distribution of power that has resulted from state legislative and judicial action.

a. *Education Finance.* — The Supreme Court's principal school finance case, *San Antonio Independent School District v. Rodriguez*,⁴²⁶ set the pattern in this area. In *Rodriguez*, the Court accepted plaintiffs' contentions that significant spending, taxing and educational quality differences resulted from the state's delegation of responsibility for funding public schools to localities of unequal wealth, and that the state had failed to provide revenues adequate to compensate for interlocal wealth differences. These profound differences, however, were not a sufficient basis for invalidating the school finance system.

Like many state courts, the Supreme Court acknowledged that local fiscal responsibility meant that there was "less freedom of choice with respect to expenditures for some districts than for others."⁴²⁷ But that was offset by the "freedom to devote more money to the education of one's children"⁴²⁸ that local control provides for those districts fiscally capable of spending. Decentralization was worth the price of interlocal inequality because it protected that freedom to spend.⁴²⁹ The Court emphasized the constitutionality of fiscal decentralization in general, noting that most states rely on the local property tax to fund schools as well as most other basic public services.⁴³⁰ Plaintiffs' conten-

426. 411 U.S. 1 (1973)

427. *Id.* at 50.

428. *Id.* at 49. The Court suggested that interlocal wealth differences are not "static": "Changes in the level of taxable wealth within any district may result from any number of events, some of which local residents can and do influence." *Id.* at 54. In other words, localities ought to engage in fiscal zoning in order to build up local tax bases.

429. *Id.* at 49–50.

430. *Id.* at 48 & n.102. Among the other public services usually funded by locally

tion that it was arbitrary to make educational quality turn on local wealth and "the fortuitous positioning of the boundary lines of political subdivisions"⁴³¹ was treated as a direct attack on the system of local government. It was, for that reason, rejected.⁴³² Neither interlocal wealth differences nor the alleged arbitrariness of local boundaries troubled the Court: "[T]he very existence of identifiable local governmental units . . . requires the establishment of jurisdictional boundaries that are inevitably arbitrary. It is equally inevitable that some localities are going to be blessed with more taxable assets than others."⁴³³ Interlocal inequality was not sufficient reason for upsetting the American system of decentralized fiscal responsibility for public services, especially education.⁴³⁴

Rodriguez, especially in light of *Milliken* and *Washington*, illustrates the Court's belief that the proper locus of educational decision-making authority is the local level.⁴³⁵ Local control of education is the federal

raised property tax revenues were "local police and fire protection, public health and hospitals, and public utility facilities of various kinds." *Id.* at 54.

431. *Id.* at 53.

432. Like many state courts, the Supreme Court also justified fiscal decentralization as essential to assuring effective local administrative decentralization. Requiring the equalization of school finance would, by increasing the state's control of "the purse strings," erode local school autonomy. *Id.* at 51-53 & n.109. Administrative decentralization, in turn, was lauded because it gave local people an opportunity to participate in and control local schools. *Id.* at 49-50. Local control was considered both an operative fact and a normative strength of the public school system. As indicated in the text, the Court was not persuaded by the argument, embraced by the California Supreme Court in *Serrano v. Priest*, that for school districts without sufficient funds "local control" is illusory and that true local control required the state to assure that all school districts have adequate resources. See *Serrano I*, 5 Cal. 3d 584, 611, 487 P.2d 1241, 1260, 96 Cal. Rptr. 601, 620 (1970); see also *Horton v. Meskill*, 172 Conn. 615, 651-52, 376 A.2d 359, 376 (1977) (state equalization aid necessary to "permit all towns to exercise a meaningful choice as to educational services"). The California and Connecticut decisions, of course, reflect a distinctly minority view among the state courts. See *supra* text accompanying notes 128-133 & 265.

433. 411 U.S. at 54.

434. The Court's subsequent decision in *Papasan v. Allain*, 478 U.S. 265 (1986), underscores its commitment to local spending differences based on local wealth disparities, as well as its acceptance of the naturalness of arguably arbitrary district lines. *Papasan* involved a challenge to a state school aid program that gave certain districts far less aid than others, for reasons unrelated to either fiscal or educational needs. The Court treated the statute in *Papasan* as "very different" from the system sustained in *Rodriguez*. *Id.* at 287. In *Rodriguez*, the variations in local spending "resulted from allowing local control over local property tax funding." *Id.* The disparities caused by differences in local wealth "were a necessary adjunct of allowing meaningful local control over school funding." *Id.* at 288. *Rodriguez*, however, would not justify an unequal distribution of state funds to local districts. The Court treated the state aid statute in *Papasan* not as fiscal decentralization but as "a state decision to divide state resources unequally among school districts." *Id.* The same description could have been given to the state's action in dividing the state into districts of unequal taxable wealth.

435. Obviously, these cases present only a partial picture. In other decisions, the Court has affirmed that local school boards, like the federal government, states and

constitutional norm much as it is for most state courts. It is not a result of local right, but is the outcome of a process of political delegation, combined with a judicial belief that local control is a value deserving of protection.

b. *Land Use Regulation*. — The Supreme Court has relied on the value of local autonomy to validate the local use of zoning authority to shape the economic and social character of local communities. The Court has treated as unproblematic local practices with economically restrictive effects; it has endorsed, within limits, the right of localities to promote socially homogeneous communities; and it has raised procedural hurdles that make it difficult to test in federal court those local practices that may run afoul of constitutional limitations.

The centerpiece of the Court's affirmation of local zoning power, and of the local right to exclude potential residents whose presence would be inconsistent with the local vision of proper community character, is *Village of Belle Terre v. Boraas*.⁴³⁶ Belle Terre, a small Long Island community, restricted all land uses to family residences. It defined family to include only those persons related by blood, adoption or marriage.⁴³⁷ As a result, a group of unrelated college students were unable to live in a house they had leased in Belle Terre.⁴³⁸

The dispositive issue in *Belle Terre* was the standard of review to apply to the local ordinance; the resolution of that issue required a determination of the constitutional status of the rights at stake. If the individual's interest in moving into a community or choosing a particular residential arrangement was held to be a fundamental right for purposes of equal protection review, then the ordinance would be subjected to strict scrutiny. Moreover, treating the right to choose one's place or form of residence as a fundamental right in *Belle Terre* could, by implication, also subject to strict scrutiny all other local restrictions on the rights of people to move into a locality or local regulations confining people to a particular type of residence. Thus, a fundamental rights approach would have thrown into question the presumptive legitimacy of local zoning for community character.

The application of strict scrutiny in *Belle Terre* would have compelled the village to demonstrate that the ordinance was necessary to secure a compelling local interest and that no less restrictive alternative would suffice. While the village's asserted goals of controlling noise, congestion and traffic were legitimate, all could have been achieved

other public bodies, are fully subject to constitutional constraints. See, e.g., *Frisby v. Schultz*, 108 S. Ct. 2495 (1988); *Board of Educ. v. Pico*, 457 U.S. 853, 864 (1982). These cases do not challenge the *locus* of decision-making authority, although they do limit the range of local government discretion.

436. 416 U.S. 1 (1974).

437. The ordinance contained an exception permitting two unrelated people living and cooking together in a single housekeeping unit to constitute a family. *Id.* at 2.

438. *Id.*

without this restriction on the character of the residential use.⁴³⁹ However, the village's basic goal—to maintain its character as a family community—required the “families only” provision. Full protection of the right to create a community of traditional families would have been inconsistent with protection of the right of outsiders to move into Belle Terre and establish their own living arrangements there. In short, finding that the local ordinance infringed upon a fundamental right would have required the Court to weigh the conflicting local and individual interests in self-determination.⁴⁴⁰

The Court avoided the need for close constitutional review by determining that the Belle Terre ordinance had no impact on fundamental rights. An outsider has no constitutionally protected right to make a home in a locality; the right to travel does not encompass the freedom to move into the community, and the right of association does not extend to residential arrangements.⁴⁴¹ Notwithstanding its exclusionary effect, the Belle Terre zoning ordinance was mere economic and social legislation, reviewable solely according to the rational basis test.⁴⁴²

Nor did the Court simply sustain the Belle Terre ordinance with a brief statement that the ordinance was rational. Instead, the Court gave a ringing endorsement of the right of Belle Terre to maintain itself as a traditional family community through restrictions on growth and controls on development.⁴⁴³ In exercising its zoning power, a local government may seek to preserve itself as “a quiet place where yards are wide [and] people few.”⁴⁴⁴ Although the Court's opinion referred to local power to “lay out zones” for “family values” and “quiet seclusion,”⁴⁴⁵ there was no implication that the locality also had to lay out zones for other uses or greater population, since the entire village was zoned family residential. The zoning power was developed to permit the separation of inconsistent uses; in *Belle Terre*, the Court sustained local use of zoning to exclude entirely residents not wanted by the community.

Belle Terre does not provide a blanket immunity for all local exclusionary practices. The Court has limited local zoning autonomy when the restrictions violated clearly protected constitutional rights⁴⁴⁶ or

439. *Id.* at 18–19 (Marshall, J., dissenting).

440. See Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *Ind. L.J.* 145, 196–98 (1977).

441. 416 U.S. at 7–8.

442. *Id.* at 8.

443. *Id.* at 9; see also *Construction Indus. Ass'n of Sonoma County v. City of Petaluma*, 522 F.2d 897, 906–08 (9th Cir. 1975), cert. denied, 424 U.S. 934 (1976).

444. *Belle Terre*, 416 U.S. at 9.

445. *Id.*

446. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion).

Moore is illustrative of both the limitations on *Belle Terre* and *Belle Terre's* underlying

were based on race⁴⁴⁷ or plainly arbitrary or irrational concerns.⁴⁴⁸ But even these cases reflect respect for the presumptive right of localities to control local land uses and exclude undesired users, and the ordinary use of zoning to serve the economic and social interests of a community through the exclusion of unwanted outsiders has not been seen as arbitrary or irrational.⁴⁴⁹ The Court treats local zoning ordinances with the deference normally accorded state laws and has broadly sustained local authority to wield the zoning power to shape the economic and social features of local communities.

The exclusionary measure affirmed in *Belle Terre* differed from the typical zoning restriction in its focus on individual life style rather than the cost of a home.⁴⁵⁰ In other cases, however, the Court's support of local zoning autonomy included more typical economically exclusionary measures. Thus, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁴⁵¹ *James v. Valtierra*,⁴⁵² and *City of Eastlake v. Forest City Enterprises*,⁴⁵³ the Court sustained local exclusions of public housing,

force. In *Moore*, the Court invalidated a local zoning restriction aimed at the exclusion of extended families. The ordinance was held to infringe the fundamental right of family privacy, which protected the right of persons related by blood, marriage or adoption to live together. *Id.* at 498–500. The *Moore* plurality reconciled its treatment of the East Cleveland ordinance with the one in *Belle Terre* around the shared theme of “family needs” and “family values”: *Belle Terre*'s action had been consistent with the constitution's protection of the traditional family, since it did not exclude persons related by blood, marriage or adoption, while East Cleveland's attempt to exclude blood relatives interfered with family rights. *Id.* at 498. Consequently, *Moore* constitutes little or no restriction on the authority of localities to adopt socially exclusionary ordinances, as long as there is no formal interference with the right of family members to live together.

447. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

448. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). The restriction on group homes for the mentally retarded in *Cleburne* fell because the local action had been prompted by “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding.” *Id.* at 448. The Court did not indicate what factors *are* properly cognizable by local regulators, but did nothing to suggest that economic and fiscal concerns were not proper factors for local zoning. Indeed, *Cleburne* gave implicit support to certain typical local exclusionary measures. The Court found the restriction on group homes arbitrary because the area in which the home sought to operate had been zoned residential without any other restriction on the type of structure or use. *Id.* at 447–48. Negative attitudes and fear were not “permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings and the like,” which were allowed in the neighborhood. *Id.* The city's authority to exclude would have been stronger if it had consistently zoned to exclude all nontraditional single family uses.

449. See *Ybarra v. City of Los Altos Hills*, 503 F.2d 250, 253–54 (9th Cir. 1974) (no duty of zoning community to make provision for needs of nonresidents).

450. *Belle Terre*'s ordinance did not differ, however, from other zoning ordinances seeking to determine the character of community residents. See Richards, *Zoning for Direct Social Control*, 1982 Duke L.J. 761, 776–81 (discussing ordinances excluding nontraditional families and children).

451. 429 U.S. 252, 268–71 (1977).

452. 402 U.S. 137 (1971).

453. 426 U.S. 668 (1976).

subsidized housing and all forms of multifamily housing.

Arlington Heights involved an application by a not-for-profit developer of low-cost housing to a Chicago suburb to rezone a parcel of land from single-family to multifamily so that the developer could build 190 subsidized units. Public hearings on the developer's application occasioned large and vocal demonstrations in opposition by local residents concerned about the "social issue" and the threat to property values posed by the introduction of low and moderate income people into an affluent community.⁴⁵⁴ The local planning commission and the village board voted against the rezoning.

Before the Supreme Court, the issue was framed as one of racial discrimination. Arlington Heights had twenty-seven black people out of a population of 64,000, while 40% of the Chicago area residents eligible for the subsidized units were black.⁴⁵⁵ Local zoning decisions, like all other government actions, may not be based on racially invidious motives. However, the Court found no evidence that the village was motivated by anything other than the desire to preserve itself as a middle-class, single-family home community.⁴⁵⁶

Arlington Heights treated as unproblematic a community's decision to zone itself entirely for single-family uses; to refuse to rezone to accommodate a small subsidized housing project; and to provide no alternative site for lower-cost multifamily housing. The very consistency of the village's zoning policy—the site the developer sought to build on and the surrounding area had long been zoned for single-family use—was taken as a rebuttal of racial motivation.⁴⁵⁷ In the absence of racial motivation, there was no basis for challenging the local land use policy. The village had an unquestioned right to pursue a policy of economic segregation.

In *James* and *Eastlake*, the restrictions on public or multifamily housing were procedural rather than substantive: state or local provisions required the approval of the local electorate as a precondition to certain land use changes.⁴⁵⁸ In *James*, a referendum requirement—

454. 429 U.S. at 257.

455. According to one commentator, Arlington Heights was the most segregated municipality with a population greater than 50,000 in the Chicago area. McGee, *Illusion and Contradiction in the Quest for a Desegregated Metropolis*, 1976 U. Ill. L.F. 948, 979.

456. The contested site had been zoned single-family since 1959 when Arlington Heights first adopted a zoning ordinance, and it was entirely surrounded by single-family homes. The village "[was] undeniably committed to single-family homes as its dominant residential land use." 429 U.S. at 269.

457. *Id.* at 270. See Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 Tex. L. Rev. 1217, 1239–40 (1977).

458. *James* involved Article XXXIV of the California Constitution, which provides that no low-rent housing project may be developed, constructed or acquired by a state public body, such as a housing authority, unless the project had been approved by a majority of those voting in a local referendum. 402 U.S. at 139. *Eastlake* involved a provision added to the charter of a Cleveland suburb which required that any changes in

aimed at public housing exclusively—had resulted in the rejection of several projects.⁴⁵⁹ In *Eastlake*, a referendum requirement had been added to the charter of a Cleveland suburb by voter initiative while the plaintiff developer's application for rezoning to permit construction of a multifamily project was pending before local zoning officials.⁴⁶⁰ A justice of the Ohio Supreme Court, which had invalidated *Eastlake's* referendum requirement, had "little doubt of the true purpose of *Eastlake's* charter provision—it is to obstruct changes in land use by rendering such change so burdensome as to be prohibitive."⁴⁶¹

Nevertheless, the United States Supreme Court had little difficulty sustaining either measure. In *James*, Justice Black echoed the concerns of public housing opponents when he noted that public housing "may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues."⁴⁶² It was entirely proper to give "all the people of a community . . . a voice in decisions that will affect the future development of their own community."⁴⁶³ The potential impact on the locality thus justified special procedures designed to assure that the community as a whole gave its assent. The impact on the availability and affordability of housing in the region was not considered.

In *Eastlake*, the Court continued to equate local zoning referenda with local devotion to democracy. The Court found no need to address the antimultifamily housing motivation or the impact on regional housing opportunities of the *Eastlake* ordinance and similar restrictions in other Cleveland area communities.⁴⁶⁴

Procedurally, *James* and *Eastlake* clear the way for local use of the referendum in zoning and for the current widespread use of voter initiative and voter approval requirements to establish growth controls and to enact and enforce exclusionary restrictions.⁴⁶⁵ Substantively, *James*

land use agreed to by the city council would also have to be approved by 55% of the voters in a local referendum. *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 670 (1976).

459. The case involved low-cost housing that had been rejected by the voters in referenda in San Jose and in San Mateo County. 402 U.S. at 139.

460. A dozen other Cleveland suburbs had imposed similar referendum requirements for zoning changes, usually in response to multifamily or low-income housing proposals. See *Forest City Enters. v. City of Eastlake*, 41 Ohio St. 2d 187, 200–01, 324 N.E.2d 740, 748 (1975) (Stern, J., concurring).

461. *Id.* at 199, 324 N.E.2d at 748.

462. 402 U.S. at 143.

463. *Id.*

464. These issues are addressed briefly in Justice Stevens's dissent. 426 U.S. at 689–90 (Stevens, J., dissenting) (quoting Justice Stern's concurring opinion in the Ohio Supreme Court decision). The only issue that detained the Court was the landowner's right to have his application for rezoning considered in a manner comporting with due process, and the Court held that the referendum requirement raised no due process issue. *Id.* at 675–80.

465. One study conducted prior to the *Eastlake* decision found that eight states—

and *Eastlake* are of a piece with *Belle Terre* and *Arlington Heights* in the approval of local authority to control economic and social development, to set a community life style and to exclude lower income residents.

Two more cases complete the picture: *Hills v. Gautreaux*⁴⁶⁶ and *Warth v. Seldin*.⁴⁶⁷ In *Hills*, the Supreme Court upheld a lower court's order requiring the federal Department of Housing and Urban Development (HUD), which had practiced racial discrimination in its siting of public housing projects in Chicago, to site future housing in the suburbs.⁴⁶⁸ In distinguishing its affirmance of metropolitan area relief in *Hills* from its contemporaneous rejection of area-wide school integration in *Milliken*, the Court managed to use *Hills* to renew its commitment to local zoning autonomy, including the right to exclude subsidized housing.⁴⁶⁹ *Hills* differed from *Milliken*, the Court reasoned, because HUD had authority to operate in the Chicago housing market, which extended beyond the Chicago city limits; thus, the larger boundaries of the housing market determined the territorial scope of the remedy.⁴⁷⁰ Moreover, the remedial order against HUD did not impair the zoning autonomy of Chicago's suburbs or interfere with their right to exclude HUD projects. HUD had no authority to build housing without a local application or approval. "An order directed solely to HUD

California, Colorado, Mississippi, Montana, Oklahoma, Texas, Vermont and Virginia—required local voter approval of low-rent housing projects. M. Danielson, *supra* note 68, at 99 n.68. But that study referred only to state-wide requirements and did not address the widespread practice of local adoption of referendum requirements, as in the village of *Eastlake* in Ohio.

The exclusionary effect of such referendum requirements is two-fold. First, the referendum constitutes an additional procedural obstacle that the new housing proposal has to overcome. Campaigning to win voter approval is costly, and the delay resulting from the referendum requirement adds to the cost of construction. The provision in *Eastlake* actually required the developer to defray the municipality's costs of conducting the referendum. *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 671 n.3 (1976). The Ohio lower court's decision invalidating the assessment of election costs against the developer was not appealed to the Ohio Supreme Court or to the United States Supreme Court.

Second, referenda on development tend to be one-sided in their results. See *supra* note 198.

Voters often reject public, subsidized or multifamily housing, which they fear will cause undesirable changes in local social status, physical environment or fiscal burdens. See, e.g., *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 292 (9th Cir. 1970) (referendum blocked subsidized multifamily housing); *Ranjel v. City of Lansing*, 417 F.2d 321 (6th Cir. 1969), cert. denied, 397 U.S. 980 (1970) (same); M. Danielson, *supra* note 68, at 99–101; Goetz, *Direct Democracy in Land Use Planning: The State Response to Eastlake*, 19 Pac. L.J. 793, 814–17 (1987).

466. 425 U.S. 284 (1976)

467. 422 U.S. 490 (1975).

468. 425 U.S. at 286–91.

469. *Id.* at 295–96.

470. Presumably, if the defendant in *Hills* had been the Chicago Housing Authority, *Milliken* would have precluded metropolitan relief.

would not force unwilling localities to apply” for housing assistance, but merely would limit HUD’s discretion in allocating federal funds among locally authorized projects.⁴⁷¹ The order would not preempt local power to decide not to accept federal housing funds or undercut the independent role of these localities in the federal housing assistance scheme.

Unlike the *Milliken* remedy, the *Hills* order “would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded local government entities under federal or state housing statutes or existing land-use laws.”⁴⁷² Since metropolitan relief would have no impact on the structure of local government, local land use autonomy or the suburbs’ authority to exclude subsidized housing, it could be affirmed.⁴⁷³

In *Warth v. Seldin*, the Supreme Court effectively precluded federal judicial review of most local exclusionary zoning practices. *Warth* involved an attack on the zoning actions of Penfield, a residential suburb of Rochester, New York. Ninety-eight percent of Penfield was zoned for single-family detached housing, with, plaintiffs alleged, lot size, setback and floor area requirements that placed housing in the town beyond the means of low or moderate income people.⁴⁷⁴ Moreover, Penfield had taken administrative actions to delay or bar low and moderate cost housing, including the refusal of variances, permits, tax abatements and support services.⁴⁷⁵

In *Warth*, the Court rejected the right of outsiders to challenge Penfield’s zoning, and refused to take a regional perspective on local zoning practices. Low and moderate income people in the region who wanted to live in Penfield, but could not afford to do so because of the cost of local homes, had no standing to attack Penfield’s zoning unless they could cite specific housing projects that Penfield had blocked in which they had been guaranteed homes.⁴⁷⁶ In the absence of such a “demonstrable, particularized injury,”⁴⁷⁷ these nonresident plaintiffs were merely victims of “the consequence of the economics of the area housing market, rather than of respondents’ assertedly illegal acts.”⁴⁷⁸ The effect of the decisions of Penfield in structuring the “economics of the area housing market” would not be considered.

Similarly, Rochester taxpayers who contended that Penfield’s ex-

471. 425 U.S. at 303.

472. *Id.* at 305–06.

473. For more critical commentary on *Hills*, see McGee, *supra* note 455, at 994.

474. 422 U.S. at 495.

475. *Id.*

476. *Id.* at 507.

477. *Id.* at 508.

478. 422 U.S. at 506.

clusionary practices forced Rochester to spend more on low and moderate income housing, thereby driving up Rochester's taxes, had no claim against Penfield. Regardless of the effects of Penfield's and other suburbs' zoning decisions on Rochester's tax base or its social service needs, Rochester's taxes were held to "result[] only from decisions made by the appropriate Rochester authorities."⁴⁷⁹

Warth sought to discourage federal judicial review of local zoning ordinances. The Court observed that "zoning laws and their provisions . . . are peculiarly within the province of state and local legislative authorities. . . . [C]itizens dissatisfied with provisions of such laws need not overlook the availability of the normal democratic process."⁴⁸⁰ Although the "normal democratic process" might protect the rights of residents of the zoning community,⁴⁸¹ the local democratic process is inadequate to protect the interests of nonresidents. As the review of state land use laws indicates,⁴⁸² state legislatures have not been eager to vindicate the interests of nonresidents affected by local exclusionary zoning.⁴⁸³

Warth is the perfect procedural complement to *Belle Terre, Arlington Heights* and the other substantive local zoning cases. Local land use regulations receive the deference normally accorded to government action, and the ordinary means of attacking local zoning will be the political process. Outsiders unable to participate in local politics will usually lack standing to challenge local zoning in court; even if they do have standing, they usually will have no substantive claim. In all but the most egregious cases involving clear racial discrimination or other invidious attacks on established constitutional rights, the locality can exclude. Each locality is treated as a distinct governmental unit; the cumulative effect of numerous localities in a region adopting such

479. *Id.* at 509. *Warth* also considered the standing of area organizations of builders and developers of not-for-profit housing to challenge Penfield's zoning. The builders and developers were found to have standing, but only to challenge the denial of a building permit or a variance for a specific project, not the totality of Penfield's zoning. *Id.* at 515-16. The majority did not address the fact that Penfield's ordinance, by requiring developers to pay for the time and money attendant on protracted administrative and court proceedings, discouraged most projects so that few developers were ever likely to contest the denial of a permit for a specific project. *Id.* at 530 (Brennan, J., dissenting) (White & Marshall, JJ., joined in the dissent).

480. *Id.* at 508 n.18.

481. See, e.g., Ellickson, *supra* note 74, at 405-07; Rose, *supra* note 4, at 863-64.

482. See *supra* notes 291-301 and accompanying text.

483. Lower federal courts have used *Warth* as a basis for denying standing in zoning litigation even in cases involving claims that *Warth* conceded might still be open, such as those based on federal housing statutes. See, e.g., *City of Hartford v. Town of Glastonbury*, 561 F.2d 1032, 1048 (2d Cir. 1976), cert. denied, 434 U.S. 1034 (1978); *Evans v. Lynn*, 537 F.2d 571, 589 (2d Cir. 1975), cert. denied, 429 U.S. 1066 (1977). See generally Sager, *supra* note 2, at 1392-1400 (1978) (describing broad construction lower federal courts have given *Warth* and the manner in which this construction has caught excluded residents and builders in "a three-legged Catch 22").

measures adds nothing to the case for standing or on the merits. Localities have the freedom to pursue local self-interest, without any duty to take into account the effects of local land use regulation on excluded nonresidents or the economy of the region as a whole. The Supreme Court's affirmation of localism in land use regulation could not be stronger.

c. *Local Government Formation and Preservation.* — The Supreme Court in recent years has not had cases requiring a constitutional examination of the state laws respecting local incorporation, annexation or consolidation,⁴⁸⁴ and the Court has not considered at all the criteria for the formation of local governments. Nevertheless, in *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*,⁴⁸⁵ the Court provided some doctrinal support for state laws protecting the continuation of local governments and the preservation of their borders.

Lockport involved a provision of the New York Constitution concerning the structure of county government. New York provides its counties the option of switching from a traditional "weak county" government to a "strong county" format, which gives the county a new administrative structure and additional regulatory capacity.⁴⁸⁶ Such a change requires the approval in a referendum of concurrent majorities

484. One line of Supreme Court decisions dealing with the voting rules in limited purpose governments has protected the independence of many local governments. In *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), the Supreme Court effectively held that most special purpose districts—such as water storage districts, irrigation districts and sewer districts—are not subject to the one person, one vote rule. By permitting the governance of these districts to be based on landownership or other criteria apart from population, as most of these districts have historically been governed, the Court assured the continued survival and proliferation of special purpose governments. Special purpose districts play an important role in maintaining local autonomy generally. This point is discussed more fully in Part II. Such districts can span a large geographical area but have authority solely for the limited purpose of funding one or a handful of specified services. Special districts enable a large number of small municipalities to pool their resources to satisfy their infrastructure needs without sacrificing their independence or merging into a metropolitan general government.

In addition, the Court has given some attention, in cases brought under the Voting Rights Act, 28 U.S.C. § 1973(c) (1982), to issues of racial discrimination incident to local government formation and expansion. See, e.g., *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987); *Perkins v. Matthews*, 400 U.S. 379 (1971).

485. 430 U.S. 259 (1977).

486. Under a traditional, "weak" or "noncharter" county organization, there is no provision for independent executive or administrative authority (although the county can provide itself with limited power). The county is governed by a legislative board of supervisors. "As long as the functions of county government were relatively few and simple, such arrangements assured the legislature of direct information about what was going on in day-to-day county operations." Department of State, State of New York, *Local Government Handbook* 71 (3d ed. 1982). To permit a county to provide and administer more complex programs and functions, the state authorizes counties to adopt "charters" or "stronger county" organizations, that provide the county with an executive independent of the legislature. In a strong county government, the county

of county voters who live in cities and of those who live outside the cities. A proposed strong county charter for Niagara County twice won the approval of city voters and of a majority of the total county voters, but both times was rejected by a majority of the noncity voters and thus failed to pass.⁴⁸⁷ The city voters contended that the concurrent majority requirement violated the equal protection clause.⁴⁸⁸ The Supreme Court, however, unanimously sustained the concurrent majority rule.⁴⁸⁹

The Court likened the county reorganization, which strengthened the county government and weakened other local units, to "the structural decision to annex or consolidate."⁴⁹⁰ A strong county, like an annexation or a consolidation, could have a differential impact on the "separate and potentially opposing interests" of city and noncity voters within the county.⁴⁹¹ The Court readily assumed the constitutionality of a concurrent majority requirement for annexations and consolidations, with separate veto authority for each of the "constituent units" of an annexation or consolidation, even though such a rule would permit a smaller group to outvote a larger one.⁴⁹²

Lockport's discussion of the separate consents of the constituent units in an annexation or consolidation is dictum. Nonetheless, *Lockport* is consistent with the localism of the law of annexation and consolidation in most states, which, as previously noted, generally provides that a municipality may not be annexed or consolidated to another without its separate consent.⁴⁹³

Lockport's protection of local governments, once created, from forcible annexation or consolidation fits nicely with the Court's general

executive has considerable authority over the budget and administration. See *id.* at 73-74.

487. 430 U.S. at 262-63.

488. *Id.* at 263.

489. *Id.* at 272-73.

490. *Id.* at 271.

491. *Id.*

492. *Id.* ("If that question were posed in the context of annexation proceedings, the fact that the residents of the annexing city and the residents of the area to be annexed formed sufficiently different constituencies with sufficiently different interests could be readily perceived. The fact of impending union alone would not so merge them into one community of interest as constitutionally to require that their votes be aggregated in any referendum to approve annexation.").

Although *Lockport* cited *Hunter v. City of Pittsburgh* on this point, *Hunter* had sustained a single majority requirement over the protests of the smaller city that it was being swallowed up without its consent. 207 U.S. 161, 174-79 (1907). *Lockport* and *Hunter* may be reconciled around the doctrine of plenary state power: in both cases the state won, once with a concurrent majorities rule and once without. But given the propensity of the states to require separate local consents to annexations and consolidations, plenary state power in this area usually results in the protection of local independence. See *supra* notes 333-338 and accompanying text.

493. See *supra* notes 326-343 and accompanying text. Although this rule preserves the political integrity of local units, especially smaller governments likely to be

approach to local government. As in *Milliken* and *Hills*, the Court in *Lockport* took seriously the separate existence of distinct local governments and the placement of local borders. Local boundaries are not "arbitrary lines on a map"⁴⁹⁴ but reflections of "separate and autonomous" political entities.⁴⁹⁵ More broadly, although the Court has never found a right to local government, once a state has created a system of local governments and delegated power to them—as all the states have—the Court has been supportive of the interests of local governments. The Court has treated local governments as locally representative political institutions; protected local autonomy against claims that the states must equalize interlocal differences or that the localities must assume a greater obligation to nonresidents; and vindicated local control over local taxable resources, public education and land development. The status of local governments in federal constitutional law is far less precarious than is often asserted. Contemporary federal doctrines of local government law and state-local relations are highly congruent with the localism that marks most state legal systems.

E. Conclusion: The Power of Local Governments

Are local governments legally powerless, as is often contended, or are they, in fact, fairly powerful? The answer turns on the meaning of power⁴⁹⁶ and on an assessment of the needs of local governments.

If power is defined as a legally enforceable right to existence and

outvoted in a single majority election, it poses a serious obstacle to governmental reorganization in most metropolitan areas.

At New York's 1967 Constitutional Convention, urban reformers had sought to facilitate the adoption of strong county charters by amending the state constitution to require a single county-wide referendum. Suburban municipalities, particularly on the north shore of Long Island and in Westchester County, mobilized in opposition to the proposal. These localities stressed the importance of decentralization, the need for local control over planning and zoning, and the fear of urbanization. Some upstate mayors, fearing an erosion of their powers, also opposed the measure. The proposal was defeated. According to one analyst, the defeat "stressed that the basic boundary system of New York local government was not likely to undergo any major changes in the foreseeable future." D. Shalala, *The City and the Constitution: The 1967 New York Convention's Response to the Urban Crisis* 81 (1972).

494. *Milliken*, 418 U.S. at 741.

495. *Id.* at 744.

496. Power, as Steven Lukes has observed, is an "essentially contested" concept; "its very definition and any given use of it, once defined, are inextricably tied to a given set of (probably unacknowledged) value-assumptions which predetermine the range of its empirical application." S. Lukes, *Power: A Radical View* 26 (1974). The very plasticity of the term is illustrated by the use of such very different concepts as coercion, influence, authority, force and manipulation as synonyms for power. See *id.* at 17. A rigorous definition of power is beyond the scope of this Article. For examples of differing scholarly views on the nature of power, see Lukes, *Introduction in Power* 1–17 (S. Lukes ed. 1986); Bachrach & Baratz, *Two Faces of Power*, 56 *Am. Pol. Sci. Rev.* 947, 947–48 (1962). All I seek to do in this section is indicate that local governments have power under an acceptable, common-sense meaning of the term.

continuation, to control local resources and regulate local territory and to prevail in conflicts with higher levels of government, then local governments generally lack power.⁴⁹⁷ There is no right to local self-government. There is no right of local control over local services, local schools or local land. States are the legal superiors of their local governments, with the power to invalidate local decisions. The formal theory of local governments as creatures, agents and delegates of the states still holds.

But if power refers to the actual arrangements for governance at the local level, then local governments possess considerable power. As Alvin Goldman has observed, "the central idea in the concept of power . . . is connected with *getting what one wants*."⁴⁹⁸ In our system, local governments often get what they want. Local governments exist in large numbers. They are easy to create and difficult to abolish, and the decision to create or abolish is usually up to local people who may act based on local self-interest. In most states, local governments operate in major policy areas without significant external legislative, administrative or judicial supervision. Local governments have considerable fiscal and policy-making responsibility and extensive regulatory authority.

Nor is local power simply a matter of easily revocable delegations of state power. Most state courts have treated the devolution of state power to local governments as more than a contingent political arrangement for the local discharge of state responsibilities. State and federal courts frequently adhere to a localist view of local power, holding local autonomy, particularly local control of the public schools and land use, to be a legal value potent enough to withstand challenges based on claims of equality, individual rights and local accountability for the external effects of local actions.

Local autonomy has taken on an air of permanence. State legislatures and state and federal courts have proven unwilling to limit local power or alter the structure of state-local relations, even after the effects of local autonomy in promoting interlocal inequality and local parochialism have been demonstrated. The mixed record of the school

497. A focus on the power to prevail in cases of observable conflict is consistent with the views of the pluralist school of political science studies of local government, exemplified by Robert Dahl and Nelson Polsby. See, e.g., R. Dahl, *Who Governs?* 66 (1961); Polsby, *How to Study Community Power: The Pluralist Alternative*, 22 *J. Pol.* 474, 483 (1960). Lukes refers to this as the "one-dimensional view" of power. Lukes, *supra* note 496, at 11-15.

498. Goldman, *Toward a Theory of Social Power*, *in* *Power*, *supra* note 496, at 156, 157. Of course, "getting what one wants" is not a sufficient description of power. A farmer may want rain, and a downpour may ensue, but that does not mean the farmer has the power to determine whether or not it will rain. Power exists with respect to an issue only if the powerholder can obtain one of a number of possible outcomes. See *id.* at 157-67. With respect to local governments, it is clear that local power in the areas of zoning, school finance and local government formation and preservation extends over a range of possible outcomes, thus satisfying Goldman's conditions for power.

finance reform movement and of the challenges to local exclusionary zoning, and the limited nature of efforts to regulate local boundary changes, exemplify the strength of the states' commitment to local autonomy and contribute to the legitimation of local power. In the school finance and zoning cases, the inequalities and externalities attendant on local autonomy, if joined to the traditional agency theory of local governments, could have led state courts to require state governments as principals in the state-local relationship to take responsibility for the fiscal weakness of some local governments and the exclusionary behavior of others. But only a minority of state courts have taken such a state-centered view. The inequalities and externalities imposed on nonresidents and other localities, which would be irrational in a state-centered system, were accepted by most courts as a part of the system of local autonomy. In the absence of direct attacks by state legislatures, state courts tend to rely on the principle of local autonomy to repel challenges to local power.⁴⁹⁹

Moreover, state legislatures make only limited use of their formal authority to pre-empt local lawmaking in areas of fundamental local concern. The states have been reluctant to supersede local land use regulations, redistribute local resources, redraw local boundaries or control local government formation decisions. In the areas of zoning and education, state legislative activism has been supportive of local autonomy. State school finance reforms have generally protected local spending autonomy. State land use laws have largely been consistent with the local exclusion of unwanted uses and users. The boundary review statutes do little to facilitate, let alone compel, the merger of separate local units.

The state's legal power to prevail in state-local conflicts is less significant than the fact that such conflicts are relatively infrequent. Indeed, it is the paucity of such conflicts that indicates the existence of considerable local power. As Bardach and Baratz have observed, power is often found in the institutional arrangements and "nondecisionmaking" practices that result in the avoidance of conflicts and in the exclusion of certain issues from political debate.⁵⁰⁰ State governments rarely consider, let alone adopt, measures that directly constrain local legal authority.

The extent of local power is, perhaps, even greater than these institutional arrangements suggest. Local autonomy is to a considerable extent the result of and reinforced by a systemic belief in the social and political value of local decision making. As the cases and statutes reviewed in Part I indicate, local control of issues central to local life has

499. See, e.g., *Cross Key Waterways v. Askew*, 351 So. 2d 1062 (Fla. Dist. Ct. App. 1977) (invalidating legislature's delegation to state commission, of power to establish government of local development superseding constituted local government), *aff'd*, 372 So. 2d 913 (Fla. 1978).

500. Bachrach & Baratz, *supra* note 496, at 949.

repeatedly been treated as desirable, as natural, indeed, as presumptive. State courts and legislatures appear to believe in the value of local control. It is the ideological strength of localism, its importance in shaping "perceptions, cognitions and preferences"⁵⁰¹ about the allocation of authority between state and local governments, that accounts for the success of local governments and indicates the magnitude of local power. In a political system in which so many participants support the legitimacy of local decision making, local autonomy is "the relatively firm institutionalization of the normative order itself."⁵⁰²

As a matter of state-local relations, then, there is considerable local autonomy emanating from the states' delegation of fiscal and regulatory authority with both the practice of state legislatures of leaving local governments alone and the tendency of state courts to elevate that practice to the level of a legally protected interest. Local power may be tacit or *de facto*, rather than a product of formal, constitutional arrangement, but it is nevertheless very real.⁵⁰³

Is this power adequate to meet local needs? That cannot be answered without some determination of what local government needs are; that, in turn, entails a closer assessment of the enormous variety of governmental units captured under the general rubric of "local government." Local governments differ significantly in population, area, wealth, function and fiscal capacity. Some have substantial resources and relatively few needs, while others have significant needs but are relatively poor. The same legal authorizations and restrictions may add up to real power for one set of local entities but provide only the illusion of power for the others. As the review of the school finance and exclusionary zoning cases and the state incorporation and annexation laws indicate, the differences in local needs and conflicts among local interests make the very concept of local power as a general matter, considered apart from the situations of particular local government and people, inherently ambiguous.

Part II of this Article opens up the formal legal category of "local government" and examines how different types of local governments fare under the general structure of local government law. By directing attention toward the characteristics of local governments as specific

501. S. Lukes, *supra* note 496, at 24.

502. Parsons, *Power and the Social System*, in *Power*, *supra* note 496, at 94, 113.

503. Local government law's general distribution of power between state and locality satisfies Gordon Clark's definition of local autonomy as "the capacity of local governments to act in terms of their interests without fear of having their every decision scrutinized, reviewed, and reversed by higher tiers of the state." G. Clark, *Judges and the Cities: Interpreting Local Autonomy* 6 (1985). Clark contends that the formal legal limits on local governments resulting from state constitutions, statutes and judicial decisions deny local autonomy. *Id.* at 77-81. Yet the preceding review of how state legislatures and courts actually deal with local governments indicates that local governments acting out of local self-interest have little reason to "fear" that their every decision will be scrutinized, let alone reversed, by higher levels of government.

places in the American political and legal landscape, Part II analyzes the relationship of local legal power to local needs. In addition, the discussion may illuminate factors that account for the differences in scholarly perceptions about the scope of local power and suggest how the pro-local development of local government law is linked to broader changes in the settlement and institutional patterns of metropolitan areas.

Further, an understanding of the social and economic differences among localities and the interaction of these differences with the formal legal powers local governments enjoy provides a basis for considering the normative issue raised at the outset of this Article. Local autonomy is too often promoted in the abstract, with advocates of localism implicitly relying on models of idealized local polities. The sharp differences among local governments and the concomitant differences in local needs and abilities render general claims about the value, as well as the extent, of local autonomy difficult to sustain. Much as local power in practice extends well beyond the nominal powerlessness of localities, so, too, once the political and economic setting in which contemporary local governments function is considered, the normative case for localism becomes considerably less compelling and theoretical generalizations about the appropriate distribution of power between states and local governments become more difficult to sustain.