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THE PROMISE OF COOLEY'S CITY: TRACES OF LOCAL CONSTITUTIONALISM

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INTRODUCTION

We do not think of local governments, such as towns and cities, as important components of the federal constitutional structure. The text of the Constitution does not mention local governments, and black-letter constitutional law formally deems them to be the mere administrative appendages of the states that "create" them.[1] This doctrinal depiction accords with a deep-

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[1] *See* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978) (upholding a state statute giving extraterritorial force to a municipal ordinance on the grounds that political

seated intuition that local governments are islands of private parochialism which are likely to frustrate the effective enforcement of federal constitutional rights. Indeed, the Supreme Court's recent defense of what has sardonically been termed "our localism,"[2] in cases such as *Milliken v. Bradley*[3] and *San Antonio Independent School District v. Rodriguez*,[4] has been the

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subdivisions such as cities and counties are created by the state and that states have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them"); Williams v. Mayor & City Council, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal Constitution which it may invoke in opposition to the will of its creator."); City of Newark v. New Jersey, 262 U.S. 192, 196 (1923) ("The regulation of municipalities is a matter peculiarly within the domain of the State."); City of Trenton v. New Jersey, 262 U.S. 182, 187 (1923) (maintaining that "[a] municipality is merely a department of the State, and the State may withold, grant or withdraw powers and privileges as it sees fit"); Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (stating that "[m]unicipal corporations are political subdivisions 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"); New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 89-90 (1891) (holding that a municipality may not invoke the Fourteenth Amendment in a suit alleging that a state statute impaired the obligation of a contract); Commissioners of Laramie County v. Commissioners of Albany County, 92 U.S. 307, 312 (1875) (affirming the state's power to diminish or enlarge the area of a county). The Supreme Court has recognized that local governments are important political institutions in the course of recognizing individual rights of participation in the local governmental political process. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 335-60 (1972) (striking down a durational residence requirement for voting); Hunter v. Erickson, 393 U.S. 385, 392-93 (1969) (striking down a city charter amendment making it more difficult to enact an anti-race discrimination ordinance by limiting the authority of the city council); Avery v. Midland County, 390 U.S. 474, 476 (1968) (extending the "one person, one vote" principle to local governments). These cases, however, did not recognize rights of local governments against states, or even rights of local governments to protect individuals from states. *See generally* Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 488-89 (1989) (noting that the Supreme Court has embraced only a right to political participation on an equal basis with other citizens in one's jurisdiction, not a "fundamental" right to political self-government at the local level).

[2] Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) [hereinafter Briffault, *Our Localism Part I*] (arguing that local governments possess considerable power, despite widely held suppositions to the contrary); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 346 (1990) [hereinafter Briffault, *Our Localism Part II*] (offering a critical analysis of the political and economic arguments for local governmental autonomy).

[3] 418 U.S. 717 (1974) (striking down a federal district court decree requiring interdistrict busing to remedy school segregation).

[4] 411 U.S. 1 (1973) (upholding a state school financing system against an equal protection challenge); *see also* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268-71 (1977) (upholding a municipality's denial of a rezoning application against an equal protection challenge); City of Eastlake v. Forest City Enters., 426 U.S. 668, 672-79 (1976) (upholding a local zoning referendum); Rizzo v. Goode, 423 U.S. 362, 373-81 (1976) (striking down a federal district court decree requiring a local police department to develop guidelines for handling citizen complaints of police misconduct); Warth v. Seldin, 422 U.S. 490, 498-517 (1975) (denying standing in a challenge to a local zoning policy); Village of

subject of substantial scholarly criticism precisely because it has appeared to insulate homogeneous suburbs from judicially enforceable constitutional obligations.[5]

If the arguments against the constitutional recognition of local governmental independence are familiar, the arguments in favor of such recognition have not been fully explored.[6] This Article offers a different view of the role that local governments play in the federal constitutional framework.[7] It rejects the conception of local governments as either administra-

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Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974) (upholding a local decision to prohibit group homes); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-97 (1926) (upholding local zoning power).

[5] *See* Briffault, *Our Localism Part I*, *supra* note 2, at 85-111 (discussing local autonomy and federal constitutional law); Briffault, *Our Localism Part II*, *supra* note 2, at 382-92 (arguing that a "suburban model" has contributed to the Court's deference to local autonomy); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843, 1860-85 (1994) (arguing that the Supreme Court's local government decisions have perpetuated racial segregation); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 263-73 (1993) [hereinafter Frug, *Decentering*] (criticizing the Court's preference for suburban interests); Lawrence Gene Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enters., Inc., 91 HARV. L. REV. 1373, 1418-23 (1978) (arguing that the Court's reluctance to review local zoning decisions jeopardizes "substantial constitutional values"); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 105-11 (noting the Court's use of Jeffersonian rhetoric favoring local sovereignty in *San Antonio School District* and *Milliken*); *see also* Joseph P. Viteritti & Gerald J. Russello, *Community and American Federalism: Images Romantic and Real*, 4 VA. J. SOC. POL'Y & L. 683, 687 (1997) (questioning the assumption that "refocusing politics down to the community level will lead to a form of governance that is more public-spirited and less susceptible to the forces of self-interest").

[6] Those scholars who have focused on the state/local relationship, and who have argued for increased local power, have not rooted their arguments in constitutional law. They have based their pleas for greater local autonomy on more general contentions about legal and political theory as well as notions of democratic self-government generally. *See, e.g.*, Ford, *supra* note 5, at 1908-09 (arguing that local autonomy sustains participatory democracy and fosters diverse communities); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067-73 (1980) [hereinafter Frug, *The City as a Legal Concept*] (arguing that "city powerlessness" undermines freedom); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1107 (1996) [hereinafter Frug, *The Geography of Community*] (advocating the "allocat[ion of] local entitlements through an inter-local negotiation rather than through state law"). To the extent that these scholars have considered how localism operates within constitutional law, they, too, are quite hostile to the Court's defense of localism and therefore show a surprising solicitude for reforms that would make existing local governmental institutions less central than they presently are. *See* Ford, *supra* note 5, at 1909 ("I propose semi-autonomous local governments with permeable boundaries."); Frug, *Decentering*, *supra* note 5, at 323 ("[W]e have to stop building local governmental law on residency and on the importance of local jurisdictional boundaries."). They therefore pay relatively little attention to how local governments might perform an affirmative, structural role in protecting individual constitutional rights at the more mundane level of constitutional doctrine.

[7] Some scholars have begun to examine the connection between liberty and localism. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1201

tive agents of the states that "create" them or as insular forums for registering the private preferences of the persons who inhabit them. It proceeds from the contrary premise that our towns and cities are what we know them to be: important political institutions that are directly responsible for shaping the contours of "ordinary civic life in a free society."[8]

(1991) ("[P]opulism and federalism—liberty and localism—work together."); H. Jefferson Powell, *The Principles of '98: An Essay in Historical Retrieval*, 80 VA. L. REV. 689, 690-92 (1994) (noting the centrality of states' rights in Jeffersonian Republicanism, as embodied in the Virginia and Kentucky Resolutions). The main focus, however, has been on the relationship between the federal government and the states, and thus these defenses tend to be defenses of federalism rather than defenses of localism as such. *See, e.g.*, Amar, *supra*, at 1199-200, (discussing popular sovereignty in terms of federalism's protection of state power); Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 964-80 (1985) (discussing the possibility of restoring federalism in terms of federal policy concerning federal grants to states); *see also* Frank I. Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in* National League of Cities v. Usery, 86 YALE L.J. 1165, 1183 (1977) [hereinafter Michelman, *States' Rights and States' Roles*] ("States are said to have rights to their 'integrity' including, most particularly, rights to 'structure' their internal governmental affairs as seems to them best.... These rights are compendiously called the states' 'sovereignty.'"); Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1103-04 (1977) (conflating state and local governments in concluding that the Tenth Amendment may protect an individual right to governmental services). *But see* Michelman, *supra*, at 1191-92 & n.86 (recognizing the distinction between states and their political subdivisions). To the extent that scholars root the practice of constitutionalism in "local" institutions other than states, they generally ignore local governments in favor of "local" institutions such as the jury, the militia, the church, and private associations. *See, e.g.*, Amar, *supra*, at 1137-201 (discussing the jury, the militia, and the church); Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339, 357 (1992) [hereinafter Michelman, *Universities, Racist Speech and Democracy*] (discussing private associations). *But see* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 730 (1992) (noting that the protection of local public schools from central interference serves important First Amendment values); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 316-23 (1998) (discussing the important role that localism should play in the constitutional framework); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation*, 56 TENN. L. REV. 291, 303-19 (1989) [hereinafter Michelman, *The Case of Pornography Regulation*] (explaining that judicial deference to local antipornography ordinances may promote a positive conception of the First Amendment by creating a public space for speech for those silenced by pornography); Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 445-58 (1997) (arguing that the Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996), suggests the importance of political participation at a local level). To be sure, the constitutional text does not mention local governments—while it does mention the jury, the militia, and the church—but the scholarly omission is curious nonetheless given the obviously central role that local governments play in organizing our daily lives at the substate level. As these scholars suggest, to the extent that the constitutional Framers intended to connect localism and constitutionalism, it would be surprising if they did not intend for local governments to play some role in translating that intended connection into reality.

[8] Romer v. Evans, 517 U.S. 620, 631 (1996).

The unique public function that local governments perform in fashioning communal political life calls into question their current treatment as institutions that are no different from state environmental agencies on the one hand, or private homeowner associations on the other. Towns and cities are often the institutions that are most directly responsible for structuring political struggles over the most contentious of public questions, whether they concern the proper means of overcoming racial stratification, securing quality public education, or protecting disfavored groups from private discrimination.[9] For that reason, local governments are often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of such public questions—better positioned in some instances, that is, than either federal or state institutions.

It is necessary to inquire, therefore, whether the Federal Constitution may be understood to protect local governments from state attempts to prevent local governments from bringing their special institutional capacities to bear in these constitutional contexts. Such an understanding would not relieve local governments of their obligations to enforce the Constitution. It would instead free local governments from state law constraints that preclude them from exercising their discretion in fulfilling those constitutional obligations.

To pursue the connection between localism and constitutionalism, the first half of this Article reviews the nineteenth-century debate over the constitutional status of local governments. It shows that Thomas Cooley, the prominent nineteenth-century treatise writer and State of Michigan Supreme Court justice, offered an important, but long-neglected response to the still dominant view that local governments are the passive creatures of their states. The now-forgotten defense of localism that Cooley put forth is worth reconsideration for two reasons. First, Cooley's subtle analysis of the role that local governments could play in the constitutional framework deserves attention simply by virtue of the care with which it was offered. Second, Cooley was a key participant in the important late nineteenth-century debate over the role of local governments in our constitutional system, a debate that has renewed relevance in an era in which localism is increasingly a key component of the national governmental framework.

Cooley's unique contribution to the debate was to link a structural defense of local governmental independence to substantive constitutional en-

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[9] *See generally* BUZZ BISSINGER, A PRAYER FOR THE CITY (1997) (providing a detailed account of how the city of Philadelphia confronted and structured public questions in the 1990s); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 35-45 (1998) (arguing for the potential of the city to promote "community building"); Frug, *The Geography of Community*, *supra* note 6, at 1077-81.

forcement. He subscribed to a substantive constitutional vision that was hostile to public attempts to lend aid to powerful private associations, but he believed that this substantive constitutional vision could not be given life without the assistance of local political institutions. Cooley argued that local communities, by virtue of their familiarity with local needs, would play a critical extrajudicial role in securing what he termed "constitutional freedom" by forestalling state legislative efforts to favor private interests.[10] Local governments would, if provided a measure of protection from state control, give particularized meaning to the substantive constitutional value of public impartiality that Cooley believed judges were often poorly positioned to enforce. In this way, Cooley embraced localism to give life to substantive constitutional values, even as his substantive constitutional commitments defined the scope of the local governmental autonomy that he recognized.[11]

The second half of this Article turns to modern doctrine to show that it may be understood to incorporate a structural connection between substantive constitutional enforcement and local governmental independence that harkens back to the connection that Cooley drew more than a century before. In doing so, this Article reveals that, just as Cooley's defense of local constitutionalism represented something more than a crude effort to protect private-propertied interests from public politics, the modern defense of localism represents something more than a bare attempt to insulate private homeowners from constitutional obligations. By demonstrating that there is "something more" to localism than privatism, this Article argues against the

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[10] *See* People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 106 (1871) (Cooley, J., concurring).

[11] There is a growing body of recent scholarly literature examining Cooley's constitutional philosophy. *See, e.g.*, ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY 122-65 (Harold Hyman & Stuart Bruchey eds., 1987) (discussing Cooley's due process philosophy); PAUL W. KAHN, LEGITIMACY IN HISTORY 73-77 (1992) (describing Cooley's philosophy as "combin[ing] history and science by identifying constitutional law with the common law"); PHILLIP S. PALUDAN, A COVENANT WITH DEATH 249-73 (1975) (documenting the connection between Cooley's Jacksonian roots and his constitutional jurisprudence); Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 STAN. L. REV. 495, 504-32 (1997) (discussing the origins of Cooley's constitutional jurisprudence and comparing his philosophies to those of Langdell and Holmes); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593, 1618-23 (1988) (summarizing Cooley's position on the Contract Clause and its relationship to his position on substantive due process); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431, 1502-15 (analyzing Cooley's philosophy through an examination of historism, "a network of assumptions and aspirations that undergirded and significantly influenced most branches of nineteenth-century social thought"). Only Joan Williams, however, has devoted sustained attention to Cooley's constitutional defense of local governmental independence. *See* Williams, *supra* note 5, at 88-90 (explaining Cooley's concept of inherent local government sovereignty).

tendency of modern critics of localism to embrace the state creature metaphor and thereby to confine our towns and cities to a wholly passive role in the construction of constitutional law.

To be sure, cases such as *San Antonio School District* and *Milliken* have been legitimately criticized for defending localism in order to protect a privatized conception of local political life from federal judicial intervention. Considered alone, however, these cases provide only a partial picture of the role that localism plays in current constitutional case law. This Article demonstrates that they should be read in conjunction with *Washington v. Seattle School District No. 1*,[12] *Papasan v. Allain*,[13] and *Romer v. Evans*,[14] in which the Supreme Court enforced public constitutional values by striking down state attempts to control the political discretion of towns and cities.

Strikingly, in each of the modern cases considered, the Court has confronted constitutional claims for positive public action: sweeping remedies to desegregate the public schools in *Milliken* and *Seattle School District*; equitable financing of public education in *San Antonio School District* and *Papasan*; and protection from private discrimination in *Romer*. Such claims to enforce positive constitutional rights seek intrusive judicial remedies that threaten to overwhelm political processes and to obliterate distinctions between private choices and public actions.[15] Rather than simply concluding

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[12] 458 U.S. 457 (1982) (holding that a State of Washington initiative terminating local school assignment plans that was intended to promote racial integration violated the Equal Protection Clause of the Fourteenth Amendment).

[13] 478 U.S. 265 (1986) (holding that a breach of trust claim for school land grants was not immune to equal protection challenges).

[14] 517 U.S. 620 (1996) (holding that a State of Colorado constitutional amendment prohibiting local ordinances against discrimination based on sexual orientation violated the Equal Protection Clause of the Fourteenth Amendment).

[15] There are a number of important discussions of positive constitutional rights to compel affirmative governmental action in order to correct for private inequities or discrimination, and how these positive constitutional rights differ from the classically negative constitutional right against governmental interference into private affairs. *See generally* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2308-26 (1990) (reviewing the theory of the Constitution as a charter of negative liberties and tracing this theory through common law thought); Charles L. Black, *The Supreme Court, 1966 Term, Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 85-91 (1967) (addressing the development of the state action doctrine in the field of racial discrimination); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 872-86 (1986) (questioning the theory that the Constitution contains only negative rights by demonstrating the existence of positive rights in civil rights and equal protection cases); Kenneth L. Karst & Harold W. Horowitz, Reitman v. Mulkey: *A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 55-58 (proposing that the Supreme Court, in *Reitman v. Mulkey*, established an affirmative duty to prohibit private discrimination); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1324-26 (1984) (questioning the desirability of

that such claims would impermissibly extend the scope of federal judicial power,[16] however, the Court may be understood to employ localism in these cases as a structural means of giving life to positive constitutional values through the practice of local politics. By recognizing the important institutional role that local governments play in shaping community life, and by enforcing limits on the power of more central institutions to control them, the Court may be understood to have secured a means by which positive constitutional rights may be enforced.

An examination of the traces of local constitutionalism that span more than a century of constitutional thought reveals the limits of the current conception of local governments as either passive state creatures or protected private zones. Each of the standard depictions ignores the important role that the political institutions that most directly shape our public lives may play in shaping the constitutional principles that define our national identity. As a result, each depiction reflects a constricted conception of the very

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dichotomizing constitutional rights into positive and negative rights); Frank I. Michelman, *The Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 33-40 (1969) (describing the various ways in which the Fourteenth Amendment can be used to protect the poor); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767, 767-93 (1969) (exploring the application of the Fourteenth Amendment to "exclusionary zoning"); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1006-59 (1987) [hereinafter Seidman, *Public Principle*] (examining constitutional rights in a post-*Lochner* world); Louis Michael Seidman, Romer*'s Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 SUP. CT. REV. 67, 86-96 [hereinafter Seidman, Romer*'s Radicalism*] (discussing the Court's approach in *Romer* as resting on a positive conception of constitutional rights); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 886-88 (1987) (examining negative and positive rights through an analysis of state action and private discrimination); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 335-43 (1985) (reexamining the interaction of individual, inalienable, and negative rights through the example of abortion funding); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 8-17 (1989) [hereinafter Tribe, *The Curvature of Constitutional Space*] (examining the role of government inaction in child abuse and abortion cases through the concept of "curved space").

[16] *See, e.g.*, William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1777-80 (1994) (explaining the problems with the judicial enforcement of positive constitutional rights); *see also* Bandes, *supra* note 15, at 2326, 2326-42 (stating that "by recognizing only the negative governmental duty to avoid direct harm, courts avoid the need for difficult decisions about motivation, causation, duty, allocation of governmental resources, allocation of judicial resources and a host of other thorny issues"); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L REV. 1212, 1217-20 (1978) (discussing judicial restraint in equal protection cases); Alan Effron, Note, *Federalism and Federal Consent Decrees Against State Governmental Entities*, 88 COLUM. L. REV. 1796, 1797-808 (1988) (examining the constraints federalism places on the scope of federal equitable remedial power).

meaning of what Thomas Cooley termed "constitutional freedom."[17] For in the end, as Cooley argued, constitutional freedom cannot be secured simply through the judicial enforcement of limitations upon the political process or the enactment into law of the prevailing preferences of a reigning majority. Constitutional freedom can be secured only if diverse communities, organized in various towns and cities across the Nation, are encouraged (and permitted) to govern themselves in accordance with a set of common principles that they know to be more enduring than the preferences of any temporary majority.[18]

That is not to deny that there is an important substantive divergence between the defense of local constitutionalism that Cooley offered in the nineteenth century and the defense of local constitutionalism that is offered here—there clearly is. Cooley defended local governmental independence to promote a substantive constitutional vision that sought to constrain the power of government to intervene in the private market. The defense of local governmental independence that is offered here is intended to promote a substantive constitutional vision that is far more sanguine about the virtues of governmental intervention.

This divergence reflects the substantive shift in post-*Lochner* constitutional theory, which has rightly called into question the merits of the nineteenth-century distinction that Cooley defended between the public realm of governmental power and the private realm of the market. This substantive divergence should not, however, obscure the deeper structural point. There is an important and often overlooked connection between localism and constitutionalism that may be discerned once we are willing to cast aside familiar, but incomplete, images of local governments as passive administrative agents or autonomous private associations. The emphasis here, therefore, is on structural affinities rather than substantive discontinuities. Through Cooley's pre-*Lochner* structural defense of localism, we may uncover a localist vocabulary that will permit us to comprehend the important role that our towns and cities may play in giving life to the quite different

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[17] *See supra* note 10 and accompanying text (discussing constitutional freedom).

[18] Joan Williams covered somewhat similar terrain in her path-breaking article comparing Cooley's nineteenth-century conceptions of the state/local relationship with those of the Burger Court. *See* Williams, *supra* note 5, at 101-15 (discussing the conservative posture of the Burger Court in formulating a definition of city status). Williams concluded, however, that the underlying affinity between defenses of localism across the centuries is a fear of governmental power, and that localism (or antilocalism) merely serves as the empty vessel into which such fears are poured. *See id.* at 149-53 (summarizing Dillon's, Cooley's, Burger's, and Brennan's theories of city status and its relationship to government power). This Article suggests, by contrast, that the underlying affinity is that public political power provides an important affirmative means of giving life to constitutionalism, and, thus, that local governments are critical components of the federal constitutional structure.

substantive constitutional norms that define the post-New Deal legal world that we now inhabit.

Part I examines the basis for the still influential nineteenth-century doctrinal rule—crafted first by Chief Justice Marshall and later modified by Cooley's contemporary, John Dillon—that local governments possess only those legal rights that their state legislatures grant them. It shows that the seemingly identical defenses of state supremacy that Marshall and Dillon offered in the nineteenth century flowed from strikingly different substantive constitutional visions and dramatically divergent conceptions of the connection between political engagement and constitutional development.

Parts II and III show that Thomas Cooley constructed his constitutional defense of local governmental independence by synthesizing the competing substantive (as well as structural) constitutional visions that underlie the defenses of state power that Marshall and Dillon advanced. Part IV shows that Cooley remained committed to his structural constitutional defense of local independence despite the emergence of the great cities of the late nineteenth century, which appeared to pose a significant threat to his substantive constitutional vision.

Parts V and VI draw upon the nineteenth-century debate over the constitutional status of local governments to show how modern doctrine may bear important traces of the structural connection that Cooley drew between localism and constitutionalism. These Parts read modern case law to incorporate structural premises that are similar to those that guided Cooley, even as they are employed to vindicate substantive constitutional rights that would no doubt have been unimaginable to him. Part VII concludes the inquiry by offering some general principles concerning when, and to what extent, federal constitutional recognition should be accorded to local governmental institutions.

I. MARSHALL AND DILLON: LOCAL GOVERNMENTS AS CREATURES OF THEIR STATES

A. *Introduction*

A critical debate in nineteenth-century jurisprudence concerned the proper understanding of the constitutional relationship between states and their local governments. This debate centered in large part on the degree to which a positivist conception of localism, making state law the sole determinant of local governmental power, was warranted or whether a more social conception of localism should be adopted in its stead. The debate featured a now little-remembered defense of the social conception of local governments that Thomas Cooley offered, in which he sought to connect

local governmental independence with substantive constitutional freedom. Cooley's argument on behalf of localism, an argument that met with only limited success in its own time, illuminates the manner in which modern doctrine may be understood to have drawn a connection between local governmental independence and extrajudicial, substantive constitutional enforcement.

Before turning directly to the connection that Thomas Cooley drew between localism and constitutionalism, however, it is important to set forth the competing nineteenth-century understanding that Chief Justice Marshall first advanced, and that Cooley's contemporary, John Dillon, later modified. Both Marshall and Dillon crafted a rule of state supremacy to constrain the ability of local majorities to interfere with the private realm. Marshall's conclusion in *Trustees of Dartmouth College v. Woodward*[19] that local governments were the creatures of their states differed in important respects, however, from Dillon's seemingly identical determination more than a half century later. A consideration of the points of divergence between Marshall and Dillon sets the stage for an examination of the challenge to the state creature metaphor that Cooley lodged at the close of the century, as well as for the connection between localism and extra-judicial constitutional enforcement that he would draw.

B. Trustees of Dartmouth College v. Woodward

Chief Justice Marshall's decision in *Dartmouth College* set forth the basic contours of the constitutional doctrine that Cooley would later question. The case concerned a Contract Clause challenge to the New Hampshire legislature's attempt to restructure Dartmouth College's governing board. The trustees of Dartmouth College claimed a contractual right in their corporate charter. The state defended on the ground that such a public charter did not give rise to a constitutionally protected contract. Chief Justice Marshall ruled for the trustees.[20]

Dartmouth College required the Court to determine whether corporate charters constituted constitutionally protected contracts. In broad terms, the dispute raised the same question that had been first addressed in *Fletcher v. Peck*:[21] whether any public governmental action, a legislatively conferred

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[19] 17 U.S. 250, 4 Wheat. 518 (1819) (holding that a state attempt to alter the charter of a private college violates the Contract Clause).

[20] *See id.* at 311-12, 4 Wheat. 652-54.

[21] 10 U.S. (6 Cranch) 87 (1810). Marshall held that the Contract Clause prohibited the Georgia legislature from repudiating a land grant that had vested in a subsequent purchaser even though the initial grant had apparently been secured through corrupt legislative dealing. *See id.* at 139. In reaching his conclusion, Marshall rejected the argument that the Contract

grant of land or charter of incorporation, could be deemed a contract for purposes of the Contract Clause. At the same time, because the case concerned the legal status of a state-conferred corporate charter, it implicated a constitutional issue that had not arisen in *Fletcher*—the constitutional relationship between states and their local governments.

At the time the *Dartmouth College* case came to the Court, no settled legal distinction had yet emerged between municipal corporations, such as towns and cities, and private business or eleemosynary corporations.[22] A judicial decision regarding the constitutional protection to be afforded private corporate charters therefore arguably constituted a judicial decision regarding the protection to be afforded municipal charters. As a result, both parties framed their constitutional arguments concerning the scope of constitutional protection for corporate charters with the state/local relationship very much in mind. The state defendants attempted to link Dartmouth College to public corporations such as towns, cities, and villages. They hoped to show that the trustees were attempting to use the Constitution to separate the government from the people as a whole by immunizing corporate charters from legislative alteration.[23] The state's argument in *Dartmouth College* drew upon the powerful post-Revolutionary sentiment that all corporations, whether commercial or municipal, constituted unwarranted, antidemocratic exceptions to a norm of popular control.[24] That generalized

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Clause could not provide protection for a legal grant from the government—the land grant—and that the Contract Clause was intended solely to protect contracts between private parties from public interference. *See id.* at 137.

[22] *See generally* GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 319-20 (1991) (discussing the practice of granting corporate charters in early America and the lack of distinction between public and private entities); Frug, *The City as a Legal Concept*, *supra* note 6, at 1076 (discussing how cities were conceived of "partly as creations of the state, yet . . . partly as creations of the individuals who lived within them"); Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225 (1985) (discussing the status of corporation law in early American history); Joan Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 392-400 (1985) (same); Jon C. Teaford, *The Birth of a Public Corporation*, 83 MICH. L. REV. 690 (1985) (reviewing HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW (1983)).

[23] As the state attorney general explained, in arguing that Dartmouth College was a public entity, "[c]harters to public corporations, for purposes of public policy, are necessarily subject to legislative discretion, which may revoke or modify them, as the continually fluctuating exigencies of the society may require." *Dartmouth College*, 17 U.S. at 291, 4 Wheat. at 609.

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> It was heatedly contended in the press and in the legislature in the sort of argument that carried well into the next century that all corporate grants, even when their public purpose was obvious, like those for the College of Philadelphia, the Bank of America, or the city of Philadelphia, were repugnant to the spirit of the American

sentiment was applied with particular force to municipal corporations. Notwithstanding the continuing resonance of the idealized New England town and the deep attachment to local community life that persisted throughout the early nineteenth century, there was a pervasive hostility toward so-called municipal corporations. If the state's grant of public power to certain privileged incorporators was, as a general matter, thought to be incompatible with revolutionary notions of egalitarianism, such a grant was thought to be particularly offensive when the incorporators were given charge of an entire community rather than simply a single business.

To many, it seemed fundamentally undemocratic to entrust public power to a closed class of select persons and to authorize such persons to determine the degree to which public participation in local political affairs would be tolerated. Moreover, the legal conception of the idealized town as a closed corporation rather than as a public commons seemed to make a mockery of the very notion of community. Early efforts to increase state power over municipal corporations, therefore, were commonly pressed on behalf of those seeking to expand local suffrage and to diminish the power of local oligarchies.[25] Thus, municipal corporations bore the brunt of the republican argument against corporate privilege, and "by 1790 many Americans were urging either radical reform or total abandonment of the municipal corporation as an instrument of urban law."[26]

Where the state's defenders sought to bolster their contention by linking Dartmouth College's charter to those granted to towns and cities, Daniel Webster, arguing for the College's trustees, skillfully sought to bolster his competing claim by carefully drawing a distinction between these types of charters.[27] He responded to the generalized democratic argument against the conferral of constitutional protection on corporate charters by exploiting his opponents' implicit concession that the provision of legal protection to

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republics, "which does not admit of granting peculiar privileges to any body of men."

GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 401 (1969) (quoting PHILA. PA. GAZETTE, Mar. 31, 1779).

[25] *See* Jon Teaford, *City Versus State: The Struggle for Legal Ascendancy*, 17 AM. J. LEGAL HIST. 51, 60-63 (1973) (discussing attacks on city charters as establishing local oligarchies and describing the consequent state intervention that followed).

[26] *Id.* at 54. Teaford notes that "men of the post-revolutionary era repeatedly linked despotism and aristocracy with the institution of the municipal corporation." *Id.* As Gerald Frug has further explained:

> This attack on the privileged control of city corporations and the concomitant expansion of participation in corporate governance made it increasingly difficult to separate the city corporation from the people as a whole, that is, to view city corporate rights as distinct from the rights of the public at large.

Frug, *The City as a Legal Concept*, *supra* note 6, at 1101.

[27] *See Dartmouth College*, 17 U.S. at 270, 4 Wheat. at 561.

municipal charters would be uniquely offensive to a constitutional system intended to facilitate the practice of self-government. If such protection were particularly offensive to such a constitutional system, then, necessarily, there would be room for a constitutional rule that distinguished between types of corporate charters.

Webster construed the Contract Clause in a manner that would ensure that states would maintain control of their municipal corporations even as it constricted the scope of their control over private business corporations. He argued that only those institutions that needed protection from the vagaries of public politics should be deemed private entities entitled to the protection afforded by the Contract Clause. Colleges, Webster contended, were such institutions.

> It will be a dangerous, a most dangerous experiment, to hold those institutions subject to the rise and fall of popular parties, and the fluctuation of political opinions. If the franchise may be, at any time, taken away or impaired, the property also may be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their officers. Colleges and halls will be deserted by all better spirits, and become a theatre for the contention of politics, party and faction will be cherished in the places consecrated to piety and learning.[28]

Webster argued that the Contract Clause served to confine "the contention of politics" to the public realm of government, and to secure zones of private freedom from political "theatre."[29] He saw no need to explain why corporations "for government and political argument; such for example, as cities, counties, and towns in New England," could "be changed and modified, as public convenience may require, due regard being always had to the rights of property."[30] The Framers of the Contract Clause did not intend to rid politics from the necessarily political realm of governmental administration. They intended only to ensure that private mediating institutions, free from legislative control, would develop to advance civic goals. Municipal corporations constituted public entities, and thus they lacked constitutional protection from legislative control.[31]

Moreover, for a federalist such as Webster, once the distinction between public and private corporations had been drawn, no legal basis remained for the contention that the Constitution protected local political institutions

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[28] *Id.* at 287, 4 Wheat. at 599.

[29] *Id.*

[30] *Id.* at 270, 4 Wheat. at 562.

[31] *See id.* at 288, 4 Wheat. at 601 ("The convention who framed the [C]onstitution, did not intend to interfere in the exercise of the political powers reserved to the state governments. That was left to be regulated by their own local laws and constitutions . . . .").

from state control. Madison's essay in *The Federalist No. 10* revealed the flaw in any argument that the Constitution protected local political majorities from central ones. The Constitution had been designed to constrain the power of local majorities, not to protect it.[32]

By distinguishing public contracts with "private" corporations from public contracts with "public" corporations, Webster cleverly blunted the force of the threshold contention that the Contract Clause had no application to public grants of incorporation rights. Against the view that the Contract Clause only served to protect contracts between private parties from public interference, he had drawn a public/private line that seemed to cabin the novel expansion of the Contract Clause for which he argued. His new line would distinguish contracts that the public effected with private parties from contracts that it had essentially effected with itself. In so doing, he could call for a dramatic expansion of the Contract Clause while professing obeisance to the public/private distinction on which the argument for a narrower construction of the Contract Clause had initially hinged.

Chief Justice Marshall adopted much of Webster's argument in ruling for the trustees.[33] He rejected a construction of the Constitution that would "convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government."[34] As Marshall explained in a private letter, "'I consider the interference of the legislature in the management of our private affairs, whether those affairs are committed to a company or remain under individual direction, as equally dangerous and unwise.'"[35]

By adopting Webster's logic, Chief Justice Marshall easily distinguished private colleges from local governments. He explained that it would be formalistic to equate local governments with other corporations

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> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.

THE FEDERALIST NO. 10, at 63-64 (James Madison) (Jacob E. Cooke ed., 1961).

> [A] rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.

Id. at 65.

33 *See Dartmouth College*, 17 U.S. at 301, 4 Wheat. at 630.

34 *Id.* at 311, 4 Wheat. at 653.

35 4 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 479-80 (1919) (quoting Letter from John Marshall to Greenhow (Oct. 17, 1809)).

merely because both were "corporations" in a technical sense. "The right to change [local governments] is not founded on their being incorporated, but on their being instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature."[36]

The "of course" reflected Marshall's view that, although the Constitution protected certain institutions from the "influence of legislative bodies," it did not protect political bodies from themselves.[37] Private decision making was sufficiently neutral to be free from legal constraints. The protection that the Contract Clause provided private business corporations from political interference would not extend to local governments. The latter were governed by politics by their very nature.[38] The rhetoric of democracy thus could be employed to provide political institutions less constitutional protection than private ones, and it could be reconciled with the federal judicial review of "contracts" that the public itself had forged through the exercise of legislative powers.

The "of course" also reflected Marshall's federalist assumption that the Constitution served to centralize, rather than devolve, political power. Given the hostility towards state and local majorities that Marshall expressed in his Contract Clause decisions and the deference that he afforded national majorities in his Commerce Clause decisions, it is not surprising that Marshall fashioned a constitutional rule that preserved central political control.[39] If the public realm of government needed constitutional protec-

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[36] *Dartmouth College*, 17 U.S. at 304, 4 Wheat. at 638.

[37] *Id.* at 308, 4 Wheat. at 648.

[38] Marshall already had made clear that he did not believe that the Constitution protected political institutions from themselves in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), in which he first articulated the proper scope of the Contract Clause. There, he declined to permit the legislature to revoke a land grant on the ground that the initial grant was the product of corruption. Unwise grants could not be revoked at the legislature's will; the people would have to protect themselves through politics from such imprudent grants initially. Courts were simply incapable of distinguishing the wise from the unwise grant. "If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned." *Id.* at 130.

[39] *See* G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 485-594, *in* 3-4 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund & Stanley N. Katz eds., 1988) (proposing that Marshall's Contract Clause and Commerce Clause decisions were animated by his belief that the Constitution embodied the American people's resolve to create a general government with sovereign powers to serve as a "bulwark against the evils . . . [and] chaos of the preframing period").

tion, it was generally to be provided by placing constitutional restraints on the power of local majorities and not the other way around.

There was more to Marshall's decision, however, than a simplistic, federalist defense of private over public, and central over local, power. Notwithstanding Marshall's rhetoric about the dangers of "embarrass[ing]" state legislative interference in the private realm, there was an important public constitutional dimension to his decision.[40] Marshall acknowledged that, at bottom, his construction of the Contract Clause stemmed from his belief that the public political realm must intervene to promote private institutions, as such institutions were needed to give life to the broader constitutional vision to which he was committed. Marshall explained that it would often prove impossible for "[c]haritable or public-spirited individuals" to undertake their charitable and public-spirited missions unless they were permitted by law to incorporate.[41] Private mediating institutions would not simply spring up through the efforts of industrious individuals. They would need the public's support, as well as the grant of legal rights to incorporate that the government alone could confer.

The public's compensation for the grant of incorporation would stem from the "benefit to the public" to be derived from the corporation's fulfillment of its public-sponsored mission.[42] There was therefore no need to exact further compensation through a right of future interference.[43] Indeed, Marshall argued that if private persons could obtain the right to incorporate only on pain of future governmental interference in their public mission, then their incentive to seek incorporation in the first instance would be diminished. The public's ability to obtain the benefits of public-spirited institutions would be frustrated by recognizing the public's right to revise its corporate grants.

> It is probable, that no man ever was, and no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps, delusive hope, that the charity will flow for ever in the channel which the givers have marked for it.[44]

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[40] *See Dartmouth College*, 17 U.S. at 299, 4 Wheat. at 627 (discussing potentially "unprofitable and vexatious interference with the internal concerns of a state" if the Contract Clause were construed in its broadest latitude).

[41] *Id.* at 304, 4 Wheat. at 637.

[42] *Id.*, 4 Wheat. at 638.

[43] *See id.*

[44] *Id.* at 308, 4 Wheat. at 647.

For Marshall, then, the *Dartmouth College* case concerned more than the rights of private parties. His decision depended on a constitutional vision that conceived of constitutional limitations as something more than checks on political institutions that would protect private freedom. It was a vision that conceived of constitutional limitations as legal rules that would facilitate the public's capacity to promote the growth of important civic institutions, such as those private colleges that would foster education. "These eleemosynary institutions," the Chief Justice explained, "do not fill the place, which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations, which any government must be disposed rather to encourage than to discountenance."[45] The constitutional protection that he accorded the "private" corporate charter in this way became a means of facilitating the public's capacity to promote those civic institutions on which constitutional governance depended.

Given its undeniably public focus, Marshall's defense of constitutionalism also paradoxically pointed in the direction of expanding local power to facilitate the creation of private corporations, while attempting to constrain the power of local majorities to revise corporate charters. It suggested, on the one hand, that local political interference might undermine constitutionalism by interfering with private rights. It reflected, on the other, a belief that the promotion of constitutionalism might depend upon the intervention of public politics through the grant of legal rights to participants within the private market.

Marshall's conclusion—that the Contract Clause did not provide municipal corporations with the same constitutional right against retrospective legislative interference that it provided to private corporations—did not necessarily imply a need to constrict the scope of local governmental power as a general matter. If Marshall's decision suggested that local governments possessed only that authority granted by their states, it provided no basis for inferring that Marshall would have taken a narrow view of the scope of those powers that states had granted local governments in municipal charters. He defended state power to rebuff arguments that local political bodies should not be considered the functional equivalents of private business corporations, not because he believed that there were no instances in which the sober exercise of local political power might serve to promote a public constitutionalism.

If Marshall embraced the state creature metaphor in *Dartmouth College*, then he did so in the context of a particular constitutional claim and for rea-

[45] *Id.*

sons that are far more compatible with a defense of localism than is commonly supposed. While his federalist commitments made him sympathetic to centralized forms of political control, the opinion was more than a resounding defense of state political supremacy. Indeed, Marshall's belief that public political intervention was necessary to promote the establishment of vital private institutions such as Dartmouth College could even be read to support a liberal construction of local governmental charters. Such a construction would promote public facilitation of the private market. This contention had particular force in a young republic in which there was only a skeletal federal bureaucracy and local governmental institutions played a critical role in building the new nation.[46]

That Marshall's decision was less than the sweeping defense of state power than is sometimes suggested may be further discerned from the subsequent Supreme Court doctrine that it generated. In the century that followed *Dartmouth College*, the Supreme Court did not subscribe to the view that Marshall had intended to circumscribe the power of local governments to promote private industry. In a series of municipal bonding cases inspired by *Dartmouth College*'s broad construction of the Contract Clause, the Court repeatedly stretched the boundaries of federal court deference to state law to *affirm* local governmental efforts to promote private industry. Even in cases in which it appeared undisputed that local governmental efforts to facilitate private corporate enterprise exceeded their state-conferred powers, the Court readily concluded that locally granted subsidies to private corporations were immune from "retrospective" repudiation by the state legislature.[47]

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[46] *See* HARTOG, *supra* note 22, at 78 ("Several studies have demonstrated the ways that public agencies were used as entrepreneurs and as central economic actors in the life of the new republic.").

[47] *See* CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88: PART ONE, 918-1116, *in* 6 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES (Paul A. Freund ed., 1971) (focusing on the Court's treatment of municipal bonds during the Reconstruction period). Fairman explains, for example, that the Court went so far in *Gelpcke v. City of Dubuque*, 68 U.S. (1 Wall) 175, 190 (1863), as to treat a state court's overruling of a prior state court decision "on which investors might have relied" as "impairing the obligation of a contract." *Id.* at 1010; *see also* Charles A. Heckman, *Establishing the Basis for Local Financing of American Railroad Construction in the Nineteenth Century: From* City of Bridgeport v. The Housatonic Railroad Company *to* Gelpcke v. City of Dubuque, 32 AM. J. LEGAL HIST. 236, 256 (1988) ("However we may regard the late case in Iowa as affecting the future, it can have no effect upon the past.") (citing Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) at 190).

C. *Dillon's Rule*

If *Dartmouth College* reflected a complex understanding of the proper constitutional relationship between state and local governments, John Dillon, the most famous nineteenth-century scholar of municipal governance, had reformulated that understanding by the end of the century to constrict local power far more than Marshall's opinion required.[48] Dillon's logic was simple. Corporations in general were aligned with the private realm. Municipal corporations in particular were aligned with the public realm. The private realm had to be protected from the passion of public politics, and thus local governments, being by their nature public, deserved no constitutional protection from state political interference, at least with respect to their governmental powers.[49]

On the surface, Dillon's defense of state power seemed to follow naturally from Marshall's earlier determination that local governments were public entities established solely to carry out governmental duties. As Judge Dillon explained in language that the Court would later adopt in the early twentieth-century case of *Hunter v. City of Pittsburgh*:[50]

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation . . . the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no

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[48] *See* 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS (2d rev. ed. New York, James Cockroft & Co. 1873). There are a number of examinations of Dillon's legal philosophy. *See generally* FAIRMAN, *supra* note 47, at 1102-04 (analyzing Judge Dillon's holding in *Commercial Nat'l Bank v. Iola*, 6 F. Cas. 221 (C.C.D. Kan. 1873) (No. 3061), and noting that Dillon felt that taxation "could be only for a *public* purpose"); Frug, *The City as a Legal Concept*, *supra* note 6, at 1109-13 (discussing Dillon's commitment to the public/private distinction); Edwin A. Gere, Jr., *Dillon's Rule and the Cooley Doctrine: Reflections of the Political Culture*, 8 J. URB. HIST. 271, 277 (1982) (indicating that Dillon limited the scope of power available to local governments); Hovenkamp, *supra* note 11, at 1638-40 (comparing Dillon to Cooley and noting Dillon's opinions regarding the relationship between the public purpose doctrine and general incorporation); Williams, *supra* note 5, at 84 (discussing Dillon's concerns about limiting governmental power).

[49] *See* Gere, *supra* note 48, at 277 (citing a portion of Dillon's opinion in *City of Clinton v. Cedar Rapids & Missouri R.R.*, 24 Iowa 455 (1868), in which the judge stated that courts, when presented with "substantial doubt" as to the existence of a corporation's governmental power, should decide against the corporation and deny the power).

[50] 207 U.S. 161, 178 (1907).

> limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at will of the legislature.[51]

Dillon's approach also appeared to be consistent with the federalist premise underlying *Dartmouth College*'s affirmation of the state's power to control its political subdivisions—that the Constitution was intended to centralize, rather than to devolve majoritarian power. Dillon explained, echoing Madison's *The Federalist No. 10*, that a legal regime that subjected local governments to the strict supervision of state judges and central legislatures ensured that public power would be exercised by the men "*best fitted* by their intelligence."[52]

Despite the apparent similarity between the constitutional conception of the state/local relationship that Dillon offered and the one that Marshall had set forth, there was an important shift in emphasis. Marshall's vision did not preclude the public from playing an important role. Marshall's constitutional vision expressly sought to ensure that the public sphere would take an active role in facilitating the private market's ability to establish mediating institutions like Dartmouth College. Dillon, by contrast, subscribed to a more classically liberal economic vision of constitutionalism. He viewed public interventions to promote the creation of private, civic institutions as dangerous breaches of the public/private line. His defense of central power, therefore, not only precluded local majorities from unwisely deterring private persons from seeking public assistance in the future, but also precluded the local public from providing assistance to the private sphere in the first instance.[53]

Working from these contrary substantive constitutional premises, Dillon elaborated upon Marshall's conclusions in *Dartmouth College* to constrain further the proper scope of local governmental power and to extend the state creature metaphor. In a passage that soon became known as "Dillon's Rule," he concluded that "[a]ny fair, reasonable, doubt concerning the existence of power is resolved by the courts against the [municipal] corporation,

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[51] City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (1868) (Dillon, C.J.). The Supreme Court adopted similar language in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

[52] 1 DILLON, *supra* note 48, at 85; *see also* Frug, *The City as a Legal Concept*, *supra* note 6, at 1110 (noting that in Dillon's judgment "it was the role of the best people to assume responsibility by recognizing and fulfilling their communal obligations").

[53] *See* Hovenkamp, *supra* note 11, at 1601-27 (examining Marshall's, Dillon's, and Cooley's differing constitutional visions); *see also* Frug, *The City as a Legal Concept*, *supra* note 6, at 1109-13 (noting that Dillon believed that the common good could be served best by placing the cities under the control of the states and under judicial supervision); Williams, *supra* note 5, at 84 (discussing Dillon's aversion to public intervention in the private market).

and the power is denied."[54] Dillon's Rule severed *Dartmouth College*'s rule of state supremacy from its more public-regarding underpinnings and thereby elaborated upon Marshall's defense of state power to serve a dramatically different substantive end. Dillon's new rule precluded local governments from exercising any powers that had not been expressly granted by the legislature, and thus, it thwarted the very kinds of public intervention that Marshall had sought to encourage as a necessary incident of his more public constitutional vision.

Under the new approach, the public's sole constitutional obligation was to avoid interfering with private market orderings. For example, in *Hanson v. Vernon*,[55] Dillon struck down a state statute that authorized municipalities to levy taxes to aid the railroads. He concluded that such a statute violated constitutional due process because it lacked a permissible "public" purpose.[56] The statute in question benefited a particular private party and thus distorted the neutral market. Though Dillon claimed to desire upholding the statute, he explained that he could not see a way to do so without creating "a dangerous breach in those barriers which the Constitution has erected to protect private property from legislative invasion."[57]

In Dillon's hands, Marshall's rule of state supremacy reinforced a bleak view of the relationship between constitutionalism and public political life. It retained all of Marshall's pessimism about the relationship between public politics and constitutionalism but showed none of the relationship's optimism. It reflected a seemingly unwavering constitutional faith in the private market that Marshall had been unwilling to accept. To the extent that Dillon looked to the public sphere to promote constitutionalism, he looked solely to central institutions, where the "men *best fitted* by their intelligence"[58] and culled from the state at large might keep popular politics from intruding on the private sphere. Because central legislatures might fail to live up to their responsibilities to respect the market's ways, Dillon ultimately placed his

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[54] 1 DILLON, *supra* note 48, at 173.

[55] 27 Iowa 28 (1869).

[56] *See id.* at 47-48.

[57] *Id.* at 34-35. There are several useful discussions of Dillon's decision in *Hanson*. *See, e.g.*, FAIRMAN, *supra* note 47, at 978-79 (examining the facts out of which *Hanson* arose and commenting on the judges involved in that case); Williams, *supra* note 5, at 95-96 ("Dillon set forth in *Hanson* the framework of laissez-faire jurisprudence which most American lawyers know as the constitutionalism of the *Lochner* Court .... [B]y focusing the issue around the central metaphor of a clash between government and property, [Dillon] introduced the central framework of laissez-faire constitutionalism.").

[58] 1 DILLON, *supra* note 48, at 85; *see* Frug, *The City as a Legal Concept*, *supra* note 6, at 1110 ("[I]t was the role of the best people to assume responsibility by recognizing and fulfilling their communal obligations.").

faith in the prospect that enlightened state judges would enforce the private boundary that public politics would likely breach.

II. THOMAS COOLEY'S DEFENSE OF LOCAL CONSTITUTIONALISM

A. *Introduction*

Dillon's work has become such an established part of modern legal culture that, if there is one rule concerning local governments about which most persons are aware, it is his assertion that state law alone defines the scope of local governmental independence. This now seemingly settled doctrinal position, however, was the subject of almost immediate attack by Thomas Cooley, who was perhaps the leading constitutional theorist of his age.

That these two men should have diverged on the question of localism becomes understandable only through a careful examination of their competing legal visions. In many respects, Thomas Cooley and John Dillon shared a similar substantive constitutional philosophy. Not so many years ago, progressive legal historians portrayed both Cooley and Dillon as the originators of laissez-faire constitutionalism and the leading intellectual forerunners of Lochnerism.[59] In recent years, however, revisionist historians have offered a somewhat different portrait of men such as Cooley and Dillon, one that points the way to an understanding of their differing attitudes towards local governmental autonomy.

The revisionists have shown that the progressive legal historians misunderstood the import of the laissez-faire inclinations of the leading constitutional theorists of the late nineteenth century. They have persuasively demonstrated that if Cooley and Dillon were conservatives, they were old

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[59] *See* CLYDE E. JACOBS, LAW WRITERS AND THE COURTS 112-14, 116-19 (1954) (noting the impact of Dillon and Cooley's laissez-faire ideas on their holdings as well as the impact of Dillon's ideas on the Constitution of Iowa); ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895, at 12-13, 78 (1969) (describing Cooley's contributions to laissez-faire constitutionalism as "path-breaking," and noting that "Judge Dillon was never a laissez-faire extremist.... But now, under the impact of advancing social radicalism, Dillon was to urge a philosophy of constitutional conservatism... that would align him not too far from the most outspoken advocates of *laissez faire*"); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ-FAIRE CAME TO THE SUPREME COURT 18-41 (1942) (describing Cooley's background and ideology). The progressive legal historians particularly reviled Cooley's enormously influential 1868 treatise on state constitutional law, *see* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Da Capo Press 1972) (1868), which one described as the means by which laissez-faire capitalism "was supplied with a legal ideology." TWISS, *supra*, at 18. Cooley's work was even described as "a direct counter to the appearance a year earlier of Karl Marx's *Das Kapital*." *Id.*

conservatives who sought to protect private individuals from the dangerous combination of corporate and governmental power. These "old conservatives believed that decentralized economic and political institutions—a 'self-regulating, competitive market economy presided over by a neutral, impartial, and decentralized "night-watchman" state'—were the fundamental conditions of American freedom."[60]

The revisionists' reconsideration of Cooley has been particularly illuminating, however, because it has shown that Cooley was far less fearful of the public realm of politics than old conservatives such as Dillon typically were. The progressive legal historians emphasized Cooley's defense of individual autonomy and his willingness to substitute judicial predilection for democratic will. The revisionists, by contrast, have focused on Cooley's Jacksonian faith in the people. The result has been a portrait of Cooley as a "common law Jacksonian" who sought at once to embrace and to tame popular rule.[61]

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[60] Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1037 (1993) (reviewing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 (1993) [hereinafter HORWITZ, TRANSFORMATION II]) (quoting HORWITZ, TRANSFORMATION II, *supra*, at 4). There are many important discussions of the "old conservative" constitutional vision in addition to the one offered by Ernst. *See, e.g.*, HORWITZ, TRANSFORMATION II, *supra*, at 65-74 (tracing the development of corporate theory through the late nineteenth century); Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1350 (1990) (examining Tiedeman's jurisprudence along with his views regarding government and economics); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 987 (1975) (discussing late-nineteenth-century judicial concern with the "reconciliation of private rights and governmental powers"); Stephen A. Siegel, *Understanding the* Lochner *Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 188 (1984) (arguing that the "legal controversies of the *Lochner* period" were a "dual struggle"—both methodological and substantive, and using the controversies surrounding railroad utility rate regulation to illustrate the argument); Stephen A. Siegel, *Let Us Now Praise Infamous Men*, 73 TEX. L. REV. 661, 672-86 (1995) (reviewing OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910 (1993)) (describing the influences of Justices Brewer and Peckham on the Fuller Court).

[61] *See* PALUDAN, *supra* note 11, at 259 ("Cooley's common law respected Jacksonian goals when it emphasized the idea that constitutional government was limited government, and that under just law all men's rights were equal."); *see also* JONES, *supra* note 11, at 25 ("Contact with Strong [Cooley's legal mentor in 1842] . . . placed Cooley in the Jacksonian pattern of New York politics . . . ."); KAHN, *supra* note 11, at 73-74 (discussing Cooley's study of the history of common law and constitutional case law and linking them to the common law aspects of constitutional government); Carrington, *supra* note 11, at 527 (discussing Cooley's ideas and identifying them as Jacksonian in nature); Siegel, *supra* note 11, at 1489-515 (discussing Cooley's theories of constitutional interpretation, thoughts on the common law, and thoughts on the role of the American legislatures in private enterprise). The revisionist transformation of Cooley's constitutional legacy has been remarkable. Paul Carrington's recent praise for Cooley's ideas as a preferably populist alternative to the elitist

It is important to emphasize that the revisionist portrait of Cooley as a misunderstood Jacksonian has, at times, overreached.[62] He was most assuredly something less than a fiery populist. Indeed, the very description of Cooley as a "common law Jacksonian" implicitly acknowledges the complicated nature of Cooley's Jacksonian legal philosophy. A pure Jacksonian faith in the people would tend towards defenses of codification, celebrations of majoritarianism, and attacks on the common law.[63] Cooley's more tempered, protoprogressive Jacksonianism led him in a different direction. He embraced a common law conception of legal development,[64] and he emphasized the need for constitutional limitations on popular rule. He then sought to demonstrate how such a seemingly antidemocratic vision of the law could be reconciled with a commitment to popular sovereignty. As we shall see, Cooley's constitutional defense of local governmental independence stemmed from this unique, common law Jacksonian vision.

It is important to note at the outset that, as a formal matter, Cooley rooted his legal defense of local independence in an interpretation of the state constitution. His defense did not rest, however, on the specific textual provisions of the Michigan Constitution, but rather on a more general assertion of basic, unwritten constitutional norms that were not tethered to a particular body of state law. This organic approach to constitutionalism was typical of his time. During the latter half of the nineteenth century, the legal interpretation of state laws and state constitutions was thought to provide a model for, even as it was reflective of, federal constitutional interpretation

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tendencies of *Lochner*'s great dissenter, Justice Holmes, provides particularly powerful confirmation that Cooley at last has escaped the clutches of the progressive historians. *See* Carrington, *supra* note 11, at 527 (noting, however, that "Holmes and Cooley came to their similar positions on judicial self-restraint from very different premises"); *see also* Paul D. Carrington, *Law and Economics in the Creation of Federal Administrative Law: Thomas Cooley, Elder to the Republic*, 83 IOWA L. REV. 363, 364 (1998) (describing Cooley's acceptance of the Jacksonian equal rights doctrine and the Jacksonian belief "that any more ambitious scheme of government regulation would almost surely be captured and used for the selfish advantage of those whom it purported to regulate").

[62] For example, Cooley has been allied with populism. *See* Carrington, *supra* note 11, at 498 ("[T]he populist traditions and values represented by Cooley will attract more adherence in the century to come than they have in the eleven decades that have passed since 1886.").

[63] *See, e.g.*, HORWITZ, TRANSFORMATION II, *supra* note 60, at 117-21 (discussing codification of the common law as a perennial issue in American legal history and, for example, tracing the codification of the New York and California civil codes).

[64] In particular, Cooley rejected arguments in favor of codification. *See* COOLEY, *supra* note 58, at 22 ("It was the peculiar excellence of the common law that it recognized the worth, and sought specifically to protect the rights and the privileges of the individual man.... The system was the opposite of servile; its features implied boldness and independent self-reliance on the part of the people....").

in a way that our present legal context should not obscure.[65] As a result, Cooley's defense of local governmental independence, although formally based in state law norms, was rooted in a larger constitutional vision that he believed to be capable of generalization.

Cooley offered a constitutional vision that sought to secure a norm of public neutrality through the popular practice of local self-government, rather than simply through the judicial imposition of restraints on democratic politics. In doing so, Cooley sought less to protect the private sphere from public intrusion than to protect the public sphere from private influence. Cooley's defense of local independence, therefore, broke from both Dillon's pessimistic view of the public's capacity to foster constitutionalism and Marshall's assumption that constitutionalism required public intervention in the private sphere. He instead offered a vision of local constitutionalism in which public municipal corporations—such as towns and cities—would be responsible for imparting important values to the public in much the same manner that Marshall had previously imagined private civic corporations such as Dartmouth College would be.

B. *Cooley's Break with Marshall's Decision in* Dartmouth College

For Cooley, the Constitution was not a privatizing charter that protected individuals from government. It was a publicizing document that protected the community from self-interested public officials, corrupted by powerful private interests. This conception of constitutionalism reoriented the traditional understanding of the constitutional boundary line between the public and the private spheres.[66] The Constitution should be understood to provide protection against both political intrusions into the private market and private corruption of the public sphere.[67]

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[65] *See, e.g.*, G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION 109-10 ("Since Congress had tacitly allowed the states to take the lead in regulating entrepreneurial activity, the pattern of regulation tolerated by state courts came to serve as a pattern for the nation.").

[66] *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 255-56 (1977) (discussing the traditional nineteenth-century distinction between the public and the private spheres); HORWITZ, TRANSFORMATION II, *supra* note 60, at 11 ("All of these conceptualizations [of the public/private distinction] sought to establish a separate, 'natural' realm of non-coercive and non-political transactions free from the dangers of state interference and redistribution."); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 234 (1979) ("The liberal argument was that the exercise of state power was legitimate only to . . . facilitate[] intercourse between individuals in . . . civil society by promoting their rights against one another; or . . . [to] protect[] those same individual rights against attempts by the state . . . to establish itself as a private power center.").

[67] In this respect, Cooley's constitutional vision accorded with the more general nineteenth-century defense of what have been termed "public rights." *See* Harry N. Scheiber,

Cooley rejected *Dartmouth College*'s application of the public/private distinction precisely because he believed that it would neither ensure that individual reason would trump popular passion nor prevent private interests from capturing public power. The broad construction of the Contract Clause that Chief Justice Marshall adopted would simply accord legal recognition to the corrupt deals that powerful private interests might strike with public officials.[68]

The unique conception of the constitutional distinction that Cooley drew between the public and the private spheres stemmed from the commitment to constitutional equality that animated it. Cooley, like Jacksonian constitutional theorists generally, believed in "equality of freedom" and not "equality in the sense of achieving distributive justice."[69] For Cooley, the preservation of equality "affirm[ed] the autonomy and liberty of persons to order their own affairs, subject to general laws which do not create favored or disfavored classes of citizens."[70]

Cooley's commitment to a constitutional norm of equality led him to distrust public attempts to empower the private realm. Such public efforts threatened to deprive the people of a government administered pursuant to neutral rules and tended to steer the law away from the general interest and towards the particular. The private sphere's success in capturing public power would result in the passage of class legislation that would confer special privileges on powerful, favored persons. Cooley therefore premised his commitment to the public/private distinction less on a faith in the private market than in a belief that, as Cooley put it in his 1868 treatise on state constitutional law, "every one has a right to . . . be governed by general rules."[71]

Public Rights and the Rule of Law in American Legal History, 72 CAL. L. REV. 217, 219 (1984) (arguing that "American judges and legal commentators have not given sustained, explicit, and systematic attention to the notion that the public, and not only private parties, have 'rights' that must be recognized and honored if there is to be true rule of law").

[68] *See* JONES, *supra* note 11, at 132-33 (discussing Cooley's ideology regarding the power of corporations); *see also* HORWITZ, TRANSFORMATION II, *supra* note 60, at 65-74 (discussing the hostility of the legal elite in the late nineteenth century to the *Dartmouth College* decision).

[69] Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1372 (1990) (reviewing WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988)); *see also* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 251-68 (1997) (discussing the Jacksonian conception of equality and Cooley's conception of equality in particular).

[70] Yudof, *supra* note 69, at 1372.

[71] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 459 (3d ed. Boston, Little, Brown & Co. 1874); *see also* Yudof, *supra* note 69, at 1374 (discussing this quotation).

More than speculation underlie Cooley's fear that private interests would corrupt the public realm. By the middle part of the nineteenth century, many had come to see the state legislature as "'a counter over which private groups could acquire legal rights and privileges, without undue squeamishness about the methods employed by lobbyist or legislator.'"[72] There was a "widespread folk mood which identified legislation with special privilege."[73] A similar mood had inspired Chief Justice Taney, President Jackson's chosen successor to Chief Justice Marshall, to set forth the basic premises of the constitutional vision that Cooley would come to embrace. Taney's vision broke sharply from Marshall's conception of the public/private distinction:

> "It would be against the spirit of our free institutions, by which equal rights are intended to be secured to all, to grant peculiar franchises and privileges to a body of individuals merely for the purpose of enabling them more conveniently and effectually to advance their own private interests. . . . The consideration upon which alone, such peculiar privileges can be granted is the expectation and prospect of promoting thereby some public interest . . . ."[74]

By embracing Taney's antagonism towards federalist constitutional theory's tendency to favor private power, Cooley severely limited the permissible scope of public legislation. Public laws could be deemed constitutional only if they served some intelligible public purpose. At the same time, Cooley, like Taney before him, understood his constitutional vision to be far more respectful of public power than Marshall's. Taney explained in the *Charles River Bridge* case, in which he severely curtailed Marshall's decision in *Dartmouth College*, that

> the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed, that the government intended to diminish its power of accomplishing the end for which it was created. . . . The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations.[75]

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[72] Heckman, *supra* note 47, at 247-48 (quoting ROBERT S. HUNT, LAW AND LOCOMOTIVES: THE IMPACT OF THE RAILROAD ON WISCONSIN LAW IN THE NINETEENTH CENTURY 33-34 (1958)).

[73] JONES, *supra* note 11, at 41.

[74] CARL BRENT SWISHER, ROGER B. TANEY 366-67 (1935) (quoting Memorandum from Chief Justice Roger Taney to President Andrew Jackson (June 20, 1836)).

[75] Charles River Bridge v. Warren Bridge, 36 U.S. 420, 547-48, 1 Pet. 341, 430-31 (1837).

Cooley agreed with Taney's assessment. The strong defense of private power that Marshall advanced threatened to "diminish" the public's power to serve the ends for which government had been created. It permitted private parties to wrest control of the public power, and then to give legal sanction to their claims of a right to continue to exercise that publicly conferred power even in the face of a popular conclusion to the contrary. As Cooley explained in a footnote appended to the 1874 edition of his treatise on state constitutional law:

> It is under the protection of the decision in [*Dartmouth College*] that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually having greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence. Every privilege granted or right conferred—no matter by what means or on what pretence—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.[76]

C. *Cooley's Break with Dillon's Rule*

Cooley's substantive constitutional vision gave rise to a paradox. He broke from Marshall's defense of private power in order to defend the rights of the public. Cooley's substantive desire to keep public institutions free from private control appeared to depend, however, upon the antidemocratic judicial assessment of the "public" nature of duly enacted legislation. His substantive constitutional vision, though ostensibly rooted in a defense of popular political power, threatened to make the judiciary, rather than the people, supreme.

Cooley resolved the paradox by arguing that the contours of substantive constitutional principles may be fully defined only through judicial attentiveness to, and respect for, popular democratic practices. He became a leading proponent of the turn towards an organic or historical conception of constitutional development that emerged in late-nineteenth-century constitutional theory. He argued that constitutional principles could not be divined solely from the written text. Their meanings and scopes acquired their shapes through the habits and customs of the people as they developed over time.[77] Constitutional development occurred in much the same way

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[76] COOLEY, supra note 70, at 315-16 n.2.

[77] *See* JONES, *supra* note 11, at 231-46 (explaining that Cooley's approach to law "combined the idea of law as a changing response to common sentiments and needs and the idea of law as a reservoir of right reason and valued prescription"); KAHN, *supra* note 11, at

that common law development occurred. Constitutional principles flowed from the "'common thoughts of men'"[78] and the daily experiences of people living together in particular communities just as

> "[t]he noble Common Law of England is the code enacted by the common people of England, carefully elaborated and perfected through long centuries, at their firesides, and in their shops, and only declared in Parliament and in the courts. Its peculiar excellence is that it is forever adapted to the people, and expands to accommodate new circumstances and new and higher conditions of society."[79]

Because Cooley understood constitutionalism as a public practice that the people experienced through politics, and because, as we have seen, he believed himself to be enforcing public rights against private power, he did not share Dillon's attraction to a regime of constitutional enforcement that depended solely upon judicial review.[80] Cooley broke from Dillon's de-

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76 (explaining Cooley's belief that "constitutionalism must be an expression of reasonableness" and that Cooley linked "reason to popular government through a model of growth .... [T]he pattern of growth is the development of reason in an institutional form that receives support from the contemporary community"); Siegel, *supra* note 11, at 1514 (explaining that "Cooley's historism allows him to see principles in the Constitution's text that modern scholars see as nontextual; it allows him to find determinate law where modern scholars see discretionary value choices"); *see also* Carrington, *supra* note 11, at 525-33 (contrasting Holmes's positivism with Cooley's historism). It is important to note, however, that the initial version of Cooley's treatise on state constitutional law contained a lengthy introductory section that purported to defend a more conventionally strict construction of the constitutional text. *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 3-4 (photo. reprint 1972) (Boston, Little, Brown & Co. 1868); *see also* Thomas H. Peebles, *A Call to High Debate: The Organic Constitution in Its Formative Era, 1890-1920*, 52 U. COLO. L. REV. 49, 71 n.92 (1980) (finding Cooley to be more enamored of a fixed view of constitutionalism than other late-nineteenth-century constitutional theorists). Cooley's organic conception of constitutionalism became quite pronounced, however, by the last decades of the century. *See, e.g.*, Thomas M. Cooley, *Comparative Merits of Written and Prescriptive Constitutions*, 2 HARV. L. REV. 341, 349 (1889) ("A good constitution must be of gradual formation; it must result from the history and experiences of the people, and be the natural and deliberate expression of their thoughts, wishes, and aspirations in government."); Thomas M. Cooley, *The Federal Supreme Court—Its Place in the American Constitutional System, in* CONSTITUTIONAL HISTORY OF THE UNITED STATES 29 (G.P. Putnam's Sons, 1890) (providing a general survey of the origins of federal judicial authority).

78 Carrington, *supra* note 11, at 499 (quoting Thomas M. Cooley, Address at Harvard Univ. (Nov. 1886), *in* HARVARD UNIVERSITY, A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE (1887)).

79 JONES, *supra* note 11, at 115-16 (quoting ADDRESS BY HON. THOMAS M. COOLEY ON THE DEDICATION OF THE LAW LECTURE HALL OF MICHIGAN UNIVERSITY 5-6 (Ann Arbor 1863)).

80 *See* JONES, *supra* note 11, at 150 (explaining that Cooley "did not overvalue the role of the judiciary in setting its own arbitrary standards of what was arbitrary, and his influence

fense of state judicial and legislative power by subscribing to a social rather than a positivist conception of constitutional meaning. Popular institutional practices, not simply legal texts, would give life to constitutional principles.

This more democratic conception of constitutionalism led Cooley to connect his substantive constitutional commitment with equality and to connect neutral public governance to a structural defense of the practice of local self-government.[81] Local political institutions provided the fora through which people could engage in the practice of constitutionalism for themselves. The practice of local self-government would directly inculcate constitutional values in the public sphere by affording the local citizenry an opportunity to practice democracy within constitutional limitations. Through the practice of public politics at the local level, citizens would be forced in a direct and immediate way to determine for themselves which decisions would serve the "public" interests of their own communities and which would not. That experience would provide citizens with a greater understanding of what it meant to govern themselves in accord with constitutional limitations than would be possible under a regime of either centralized state legislative control or judicial supremacy.

Like Dillon, Cooley feared that public politics would intrude on the private market. Unlike Dillon, however, he demanded that local political institutions assume responsibility for enforcing the constitutional imperative that the public sphere should not intrude upon the private realm. He argued that constitutionalism could not achieve a "living and breathing spirit"[82] unless local political entities possessed a measure of freedom to give content to the substantive constitutional limitations on untoward public interventions that judges were often poorly positioned to enforce.

Cooley neatly summarized his beliefs in his great treatise on constitutional limitations. The American constitutional framework was intended to ensure "that the powers of government are not concentrated in any one body of men, but are carefully distributed, with a view to being easily, cheaply, and intelligently exercised, and as far as possible by the persons more im-

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emphatically lay in the direction of judicial self-restraint rather than in the direction of judicial usurpation" (footnote omitted)).

[81] Local self-government having always been a part of the English and American system, we shall look for its recognition in any such instrument. And even if not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view.

COOLEY, *supra* note 77, at 35; *see also* PALUDAN, *supra* note 11, at 258 (explaining that "Cooley came more and more to believe that an institutional framework, such as that provided by the common law, was imperative for liberty"); Carrington, *supra* note 11, at 535-39 (linking Cooley's defense of local self-government to his Jacksonian constitutional vision).

[82] People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 107-08 (1871) (Cooley, J., concurring).

mediately interested."[83] As a result, Cooley later argued, the judicial protection of local governmental independence would not undermine, as Dillon seemed to contend, basic constitutional values. Instead, Cooley explained, such protection would be necessary in certain circumstances in order to secure what he termed "constitutional freedom."[84]

Cooley noted that constitutional freedom demanded more than the enforcement of negative rights against the public. "Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell and enjoy property, and generally to seek happiness in his own way."[85] Such a constricted conception of freedom "might be permitted by the most arbitrary rule, even though [the ruler] allowed his subjects no degree of political liberty."[86] Cooley sought to prove that there was a public dimension to constitutional freedom by appealing to the intuitions of his readers.

> The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other; but if it were sought to establish such a government over our cities by law it would hardly do to call upon a protesting people to show where in the constitution the power to establish it was prohibited . . . .[87]

Cooley's defense of local governmental independence, therefore, rested upon a partial rejection of a purely privatized conception of the purpose of constitutional protection. To be sure, Cooley conceded, there was no express constitutional protection for the rights of the local public. This textual omission only served, however, to reinforce his belief in the merits of an organic conception of constitutional meaning. "Some things," Cooley explained, "are too plain to be written."[88]

Given its localist dimension, Cooley's substantive hostility toward private-interested legislation should not be mistaken for an embrace of a nine-

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[83] COOLEY, *supra* note 77, at 190-91. The passage echoes de Tocqueville's earlier statement that

> [a] nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty. The transient passions and the interests of an hour, or the chance of circumstances, may have created the external forms of independence; but the despotic tendency which has been repelled will, sooner or later, inevitably reappear on the surface.

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 60 (Henry Reeve trans., Colonial Press rev. ed. 1900) (1835).

[84] *Hurlbut*, 24 Mich. at 106 (Cooley, J., concurring).

[85] *Id.*

[86] *Id.* at 106-07.

[87] *Id.* at 107.

[88] *Id.*

teenth-century version of public choice theory.[89] He agreed with Marshall, and broke with Dillon, in arguing that the practice of public politics could serve public interests, and he elaborated upon that intuition in arguing that only a strong system of local self-governance would protect "constitutional freedom."[90] The "public" realm was not to be divined from the aggregate preferences of the largest territorial majority that spoke on a given legal question. It was to be culled from the

> usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally far and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.[91]

Here, Cooley relied on (and indeed, cited to) the insights of Francis Lieber, the German legal philosopher who had become an influential professor of law at the University of South Carolina. Lieber argued that local political institutions served as the primary means by which it was possible to "unite *self*-government and self-*government*."[92] Local institutions constituted the "political embodiment of self-reliance and mutual acknowledgement of self-rule. It is in this view the political realization of equal-

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> Like all good Jacksonians, [Cooley] fully appreciated the core of truth in public choice theory—that the legislatures and courts are easily deflected from pursuing the common good by their own self-interests—but he maintained a base of optimism (disturbingly absent in public choice theory) that professionals committed to serving the common good can enjoy some success.

Carrington, *supra* note 11, at 527 (footnote omitted).

90 *Hurlbut*, 24 Mich. at 108-09 (Cooley, J., concurring).

91 *Id.* at 107.

92 FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT 320 (Theodore D. Woolsey ed., 3d rev. ed. J.B. Lippincott & Co. 1859). Cooley's defense of local governmental independence in *Hurlbut* relied on Lieber's work. *See Hurlbut*, 24 Mich. at 99 (Cooley, J., concurring) (relying on Lieber in expressing concerns about a centralized government).

ity."[93] The "absence of a love of institutions leads to a remarkable tendency to worship one man, to centralization, or, in some cases, to the very opposite—a desire to abolish all government, and establish the 'sovereignty of the individual.' All extremes in politics meet."[94]

The exercise of self-government through local governmental institutions, Lieber contended, ensured the preservation of liberty in a way that the practice of self-government through more centralized political mechanisms could not.

> Yet the self-government of our country or of England would be considered by us little more than oil floating on the surface of the water, did it consist only in a congress and state legislatures with us, and in a parliament in England. Self-government, to be of a penetrative character, requires the institutional self-government of the county or district; it requires that everything which, without general inconvenience, can be left to the circle to which it belongs, be thus left to its own management; it consists in the presenting grand jury, in the petty jury, in the fact that much which is called on the European continent the administrative branch be left to the people. It requires, in one word, all the local appliances of government which are termed local self-government; and Niebuhr says that British liberty depends at least as much on these as on parliament, and in contradistinction to them he calls the governments of the continent Staats-Regierungen, (state governments, meaning governments in which all detail is directed by the general and supreme power).[95]

Cooley added content to Lieber's abstract, structural argument in favor of local governmental independence by linking it to Cooley's substantive, common law Jacksonian commitment to constitutional equality. Cooley did not believe that local governments were entitled to complete freedom of action. He acknowledged that, at some level, local governments were creatures of their states, subject to a substantial degree of state supervision.[96] Indeed, he believed that a contrary conclusion would simply authorize local governments to become arbitrary sovereigns in their own right. He did not concur, however, in Dillon's contention that the essentially subordinate status of local governments deprived them of constitutional protection from state interference or precluded them from assuming an affirmative role in protecting constitutional liberty. Local governments were critical institutions for checking the arbitrary tendencies of public power and for infusing the public realm with those substantive constitutional principles that made the practice of self-government worthy of judicial respect.

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[93] LIEBER, *supra* note 92, at 320.

[94] *Id.* at 286.

[95] *Id.* at 321 (footnotes omitted).

[96] *See* COOLEY, *supra* note 77, at 191-93 (explaining some of the restrictions on local governmental power and describing some of the powers of the states over municipalities).

Thus, where Dillon feared the tendency of local majorities to ignore substantive constitutional limitations, Cooley believed that local governments were often the fora in which the "mutual acknowledgement of self-rule"[97] would take root. Local political institutions might be well positioned—indeed, better positioned than judges or state legislatures—to determine whether governmental action served a "public" rather than a "private" purpose. They might be the institutions best situated to ensure that a constitutional norm of equal protection would be respected. Or, at least, to the extent that this empirical prediction proved incorrect, Cooley argued that a meaningful constitutionalism depended upon local political institutions striving towards, and being encouraged to strive towards, this ideal.

State attempts to preclude local governments from ensuring respect for the public/private boundary, therefore, were constitutionally suspect. Such attempts directly interfered with the institutional means by which the substantive boundary line that separated the public from the private could be fully secured. For Cooley, a defense of local independence could be justified as a structural means by which the substantive constitutional principle of public equality could be defended. In this way, the judicial protection of the local community from state interference served as a means by which the individual right to equal administration of the laws could be protected.

D. *Conclusion*

Cooley believed that a substantive conception of constitutional principles, rather than an abstract, a priori commitment to local autonomy, defined the limits of local independence from state control. Judges should intervene to protect local independence only when the state's interference threatened the locality's capacity to act in accord with a substantive constitutional requirement of neutral, public governance. Moreover, Cooley argued that constitutionalism required more than the conscientious enforcement of judicially imposed substantive restraints on public intrusions into the neutral, private realm. It required an institutional framework that would, on the one hand, preclude powerful private interests from dominating the public political realm, and, on the other, provide a space for the practice of local self-government in accord with substantive constitutional limitations.

The maintenance of such a framework would sometimes require judicial deference to a state judgment that local governments were in need of supervision—but only sometimes. Judges could ensure that the people would use their lawmaking powers to serve public rather than private ends

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[97] *See supra* note 94 and accompanying text (explaining Lieber's view that institutional, local self-government was distinct from government by majority rule).

by sensitively employing constitutional limitations to allocate institutional power between state and local governments. The difficulty, of course, lay in distinguishing the types of state intrusions on local affairs that merited skeptical judicial inquiry from those that did not. We now turn to Cooley's attempt to draw such distinctions.

III. COOLEY'S LOCAL CONSTITUTIONALISM APPLIED

A. *Introduction*

To see how Cooley employed his unique vision of local constitutionalism in order to enforce substantive constitutional constraints on state legislative action and in order to infuse the local political realm with substantive constitutional principles, the next two Subparts examine two particular doctrinal areas that Cooley examined through his unique, localist lens. Each area concerns a pressing problem that faced local governments in the late nineteenth century. The first concerns the increasing power of large corporations in the supply of public services. The second concerns the increasing power of political parties in the control of popular political life.

Each of these potentially menacing private forces—private corporations and private political parties—threatened to overwhelm the local public sphere. Both forces, particularly when joined with the power of state government, threatened to undermine the constitutional principle of equal administration of the law that Cooley held so dear. Thus, in each doctrinal area, Cooley employed a defense of local governmental independence to secure a public space within which the people could conduct themselves in accord with substantive constitutional limitations on governmental power. In each area, Cooley employed that defense to extend a constitutional norm of public neutrality that served to protect an individual right to equality, as he conceived it, that would otherwise lie beyond judicial competence to enforce. The examination that follows, therefore, reveals how Cooley conceived of local governments as extrajudicial agents of constitutional freedom rather than either passive agents of state will or protected zones of private freedom.

B. *The Private Supply of Public Services*

A key issue in the late nineteenth century concerned the authority of local governments to raise capital for proposed railroad construction projects. Municipalities, eager to take advantage of a growing national transportation market, often assumed huge debts through publicly issued securities to ensure that a proposed rail would pass through their borders. When towns

proved reluctant to assume such debts, state legislatures, under heavy pressure from railroad interests, would often command them to do so.[98]

Cooley found offensive the mad scramble to fund the new rails and found unseemly the attempts by the railroads to claim a vested right in the locally issued securities that, if honored, would often bankrupt the community. He believed that the resulting municipal bankruptcies were less the consequence of public imprudence than private selfishness. The railroad companies maneuvered themselves to lay claim to public funds by exerting political pressure to secure the bond issues and then seeking to immunize their ill-gotten gains from public correction by relying on the constitutional protection afforded private contracts. The legal claims of the railroads—claims made legitimate by Marshall's opinion in *Trustees of Dartmouth College v. Woodward*[99]—constituted little more than private efforts to capture the public realm.[100]

Cooley addressed the crisis occasioned by the disputes over such bond issues in his famous decision for the Michigan Supreme Court in *People ex rel. Detroit & Howell Railroad v. Township Board of Salem*[101] and in his earlier treatise on state constitutional limitations.[102] In each instance, Cooley conceived of the problem as one that implicated both substantive constitutional limitations on the capacity of public majorities to lend capital in aid of private business ventures and structural constitutional limitations on the authority of state majorities to intervene in local affairs. In his most trenchant response to the problem, set forth in his treatise discussion, Cooley conjoined his substantive and structural analyses to enforce a substantive constitutional limitation on the influence of private power through the institutional mechanism of enhanced local governmental independence.[103]

In *Township Board of Salem*, Cooley considered the constitutionality of an 1864 state law that permitted several Michigan townships to pledge their credit to aid in the construction of a privately owned railroad running from Detroit to the village of Howell. By writ of mandamus, the private railroad

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[98] *See generally* FAIRMAN, *supra* note 47, at 918-1116 (describing the legal debates over states commanding localities to issue municipal bonds); Heckman, *supra* note 47, at 241-69 (showing the importance of, and some legal arguments concerning, municipality-organized railroad financing).

[99] 17 U.S. 250, 4 Wheat. 518 (1819).

[100] *See* JONES, *supra* note 11, at 131-38 (describing, inter alia, Cooley's distaste for the new powers of railroads and other corporations, and his fears of their exercising "more influence over the state legislatures than both political parties").

[101] 20 Mich. 452, 494 (1870) (holding that a state cannot compel a locality to issue bonds for the benefit of a private corporation).

[102] *See infra* text accompanying note 125.

[103] *See infra* text accompanying notes 125-27.

sued to enforce the bonds issued, pursuant to the state statute, against municipalities that had refused to pay them. The towns defended the suit on the ground that the securities were void. They argued that the taxing power conferred by the state constitution contained inherent limits that precluded the government from raising money for private purposes.[104] The railroad countered that the state constitution protected its rights in the securities from retrospective repudiation.[105]

Cooley approached the constitutional question at issue in *Township Board of Salem* deeply suspicious of the railroad's claim. Cooley's belief that the traditional application of the public/private distinction had diminished public power informed his analysis in *Salem*. The court had instructed the parties to address whether the towns had entered into an enforceable contract with the railroad,[106] but Cooley concentrated on a prior question. He asked whether private persons could compel the exercise of the public taxing power by asserting a constitutional right to specific performance of a contractual agreement with a public entity.[107]

For Cooley, it would not do to follow Marshall in *Dartmouth College* and to check a public attempt to renege on a contract with a private party. Such an approach would only facilitate an irrevocable blending of the public and private spheres. It would tend to diminish the public's ability to ensure the impartial administration of the law by conferring upon a private industry the power to compel the exercise of public power. Thus, for Cooley, resolution would turn on whether the state constitution protected the public sphere from private influence, not on whether it protected the private market from political incursion.

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[104] *See Township Bd. of Salem*, 20 Mich. at 453-60 ("A construction of [specific segments of the state constitution], which shall leave it in the power of the Legislature to authorize or compel each city and township . . . to grant or loan its credit to, or subscribe to the stock of railroad companies . . . would render these sections nugatory.").

[105] *See id.* at 460-69 (arguing that railroads are public improvements and "to encourage and aid their construction would seem to be directly within the powers usually conferred upon municipal corporations").

[106]

> Did the proceedings which were had create a contract, or any relation or obligation in the nature of a contract, between the township and the railroad company? What was its precise character? If not, what is the specific ground upon which the company is entitled to the *mandamus* prayed for?

Id. at 469.

[107] *See id.* at 472 ("The railroad company therefore apply [sic] for a writ of mandamus to compel the delivery of the securities, and an issue of law having been joined upon that application, we are required to consider the important constitutional question which the objection of the township board presents.").

Cooley began by stating that the state taxing power

> must be imposed for a public, and not for a mere private purpose. Taxation is a mode of raising revenue for public purposes only, and, as is said in some of the cases, when it is prostituted to objects in no way connected with the public interests or welfare, it ceases to be taxation and becomes plunder.[108]

Cooley conceded that the legislature must not be prevented from "taking broad views of State interest, necessity or policy, or from giving those views effect by means of the public revenues."[109] He argued, however, that "[i]n the present case it appears that the object of the burden is not to raise money for a purpose of general State interest."[110] The railroads were "not, when in private hands, *the people's highways*; but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages, over their own land, for such pecuniary compensation as may be stipulated."[111] Private parties were attempting to "prostitute" the public realm under the guise of enforcing constitutional property rights.[112]

The requirement that state taxation further a public purpose served to "*distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality.*"[113] This "line of distinction"[114] made it immediately clear that the present case fell outside the scope of the public purpose requirement. Public actors did not oversee the provision of railroad service; private actors did. The "public may reap many and large benefits from them, and indeed are expected to do so."[115] They would reap them, however, "only incidentally, and only as they might reap similar benefits from other modes of investing private capital."[116] Such public efforts to privilege private parties offended Cooley's "old conservative" conception of constitutional equality.

Where Marshall emphasized the need to protect the private sphere from public control so that important civic institutions could serve the public's interests, Cooley emphasized the need to protect the public sphere from the corrupting influence of the private market. Where Marshall deemed corporate charters useful private contracts, Cooley concluded that they were

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[108] *Id.* at 474.
[109] *Id.* at 475.
[110] *Id.* at 476.
[111] *Id.* at 478-79.
[112] *See id.* at 474.
[113] *Id.* at 485.
[114] *Id.*
[115] *Id.*
[116] *Id.*

problematic private subsidies. As Cooley explained, "when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger."[117]

To this point, Cooley's approach in *Township Board of Salem* appeared to be substantially similar to the approach that John Dillon had employed in *Hanson v. Vernon*.[118] There, as we have seen, Dillon concluded that a state statute that authorized municipalities to raise railroad bonds trenched on the constitutional line separating the public from the private sphere. Dillon unapologetically asserted the importance of judicial review in voiding that state law. In justifying his decision to do so, Dillon relied on the judicial capacity to enforce a formal line that would distinguish between public and private legislation. Cooley's decision in *Township Board of Salem* did not, however, betray a similar confidence in the judicial power or a similar skepticism about the role that public politics might play in fostering constitutionalism.

The dissent in *Township Board of Salem* noted that Cooley had conceded that the state possessed the authority to exercise the power of eminent domain on behalf of railroads, even though such a power could only be exercised for a "public" purpose.[119] How, then, could Cooley legitimately contend that the state's exercise of its taxing power was not similarly "public"? Was Cooley not relying on his own unmoored assumptions about the impurity of legislative motives in striking down the state law? How could a Jacksonian jurist reject a popular determination of what constituted a public purpose?[120]

To blunt the force of the dissent's objection, Cooley turned to a defense of localism that departed dramatically from Dillon's more privatized constitutional vision. Cooley noted that the towns responsible for exercising the state-delegated taxing power perceived (no doubt somewhat self-servingly) the state law authorization to serve private rather than public purposes. Judges should not ignore the local community's democratic determination that such legislation failed to serve constitutionally permissible public ends. Cooley explained that the scope of the state's power to determine

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[117] *Id.* at 487.

[118] 27 Iowa 28 (1869); *see supra* notes 55-57 and accompanying text (discussing the *Hanson* opinion).

[119] *See Township Bd. of Salem*, 20 Mich. at 510 (Graves, J., dissenting).

[120] Indeed, Justice Graves's dissent opened with a blistering assault on what he perceived to be a majority opinion rooted in an unjustified assumption of judicial supremacy. *See id.* at 502-08 (Graves, J., dissenting).

municipal tax policy must be construed in light of the prevailing system of municipal governance.

> The power of coercion and control is nevertheless to be exercised in view of and in subordination to those maxims of local self-government which pervade our whole system, and which preclude arbitrary and unaccustomed impositions, however desirable, in the opinion of the Legislature, the object to be attained may appear to be.[121]

Cooley elaborated on the point by noting that, as a general matter, government should "leave with the local communities, in managing the public affairs which concern them, the largest possible liberty of action which is consistent with the general public order and good government."[122] Here, the state claimed to be acting consistently with that principle by permitting a locality to raise taxes to "encourage a local enterprise."[123] By so framing the state's interest in enacting the law, however, Cooley could easily rejoin that the state law did not serve the state's interest. A single local community would be raising money—not for a public purpose that would directly serve that community—but rather, for a private enterprise that would serve the needs of the community that would bear the financial burden of supporting it.[124]

Thus, if the result in *Township Board of Salem* did not differ from the one that Dillon had reached in *Hanson*, the mode of argumentation did. Cooley portrayed his decision as a structural defense of local governmental prerogatives, rather than simply as a defense of an objectified distinction between the public and the private realms. He conceded that there were limits on the scope of judicial power, but he believed that these limitations did not preclude the judicial imposition of structural limitations on state authority. Cooley therefore accorded the local political realm a primary role in enforcing the very constitutional line that Dillon assumed local governmental institutions would be particularly likely to breach.

In addition, through his defense of a measured form of local governmental independence, Cooley recast the judicial role in more democratic terms than Dillon thought necessary. The court, in striking down the state law authorizing local bond issues, was not second-guessing the legislature's motives. It was defending a long-standing tradition of local self-government and protecting a valuable institution—the government itself—from unseemly, state-sponsored private corruption. To be effective, Cooley

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[121] *Id.* at 488.

[122] *Id.* at 476.

[123] *Id.* at 476-77.

[124] *See id.* at 477 (stating that although the project would benefit the public, that benefit would be secondary to the benefit to the private corporation).

suggested that any challenge to the court's decision would have to explain why the communities most directly affected by the consequences of the decision to issue securities should not be entitled to resist their strict enforcement.

The state's error in concluding that municipalities could issue these bonds, and then be held accountable for their payment, did not lay simply in a substantive misconception of the judiciary's interpretation of the line that separated the public from the private spheres. It lay in the structural assumption that the communities most immediately affected by the tax levies would not have a complete right to determine for themselves if the constitutional line between public and private legislation had been crossed in the issuance of the public bonds. Cooley contended that the state's unwillingness to defer to that local determination of the proper demarcation of the public/private boundary betrayed the state's unwillingness to respect that boundary. The Jacksonian suspicion of private legislation that underlay Cooley's substantive constitutional hostility to public taxation in aid of private business therefore gave rise to a structural defense of local governmental independence from state control.

To be sure, Cooley's defense of localism in *Township Board of Salem* is less than fully convincing. The state law at issue had merely *authorized* the local governments to issue bonds. In the absence of direct state commandeering of the municipal taxing power, the argument for local independence was more than a little strained. Perhaps Cooley meant to suggest that, in light of the power of the railroads to influence the political process, even an authorization by the state constituted an imposition on local power. But if that were so, then what of Cooley's apparent presumption that local governments were better suited than states to resist private corruption? Moreover, the consequence of Cooley's holding was to preclude the state from authorizing local governmental innovation, a curious consequence for one truly committed to a structural defense of local prerogatives. Of course, this paradox may simply show that Cooley's substantive constitutional commitments predominated, but then why did he bother with the express structural constitutional appeals to local governmental autonomy?

There are no obvious answers to these questions. Cooley clearly struggled to make a case that, at least on its face, did not directly implicate questions of local governmental autonomy into a case that did implicate such questions. If the effort to do so is less than persuasive, the impulse to do so is nonetheless instructive. Cooley's opinion clearly reflected his structural belief that, by defending the practice of local self-government from state interference, courts could enforce a constitutional limitation on the private

use of governmental power that might go unheeded if judges alone were left to enforce that limitation on the democratic process generally.

Two years before *Township Board of Salem*, and unburdened by the inconvenient facts of a particular legal dispute, Cooley had applied his theory of local constitutionalism more coherently in addressing the same subject. In the initial edition of his treatise on state constitutional law, Cooley considered the propriety of a state law that purported to define the rights of municipalities to levy taxes on behalf of railroads. Unlike his decision in *Township Board of Salem*, however, his treatise discussion hewed to the distinction between state laws that *authorized* municipalities to effect such tax levies, and those that *compelled* them to do so. The former laws were far less constitutionally troublesome to Cooley than the latter.[125]

Cooley's treatise explained that many courts upheld state legislation that *authorized* municipalities to exercise a taxing power on behalf of railroads as permissible exercises of public power.[126] Even if those decisions were correct, Cooley argued, structural constitutional principles of local governmental independence demonstrated that a state's *compulsion* of such a municipal taxing power would surely cross the public/private line.

> [T]hose cases which hold it competent for the legislature to give its consent to a municipal corporation engaging in works of public improvement outside its territorial limits, and becoming a stockholder in a private corporation, have certainly, as we think, gone to the very limits of constitutional power in this direction; and to hold that the legislature may go even further, and, under its power to control the taxation of the political divisions and organizations of the State, may *compel* them, against the will of their citizens, to raise money for such purposes, and invest their funds in these exterior undertakings, seems to us to be introducing new principles into our system of local self-government, and to be sanctioning a centralization of power not within the contemplation of the makers of the American constitutions. We think if any such forced taxation is resisted by the municipal organization, it will be very difficult to defend it as a proper exercise of legislative authority in a government where power is distributed on the principles which prevail here.[127]

The treatise discussion laid bare the critical distinction between Cooley's local constitutionalist vision and the conventionally statist approach that Dillon employed in *Hanson*, even though both Cooley and Dillon ultimately sought similar substantive constitutional outcomes. The distinction

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[125] *See* COOLEY, *supra* note 77, at 235 (concluding that a state law compelling a municipality to raise taxes for these purposes crosses the constitutional line).

[126] *See id.* at 214 ("We have . . . collected the cases in which it has been held that the legislature may . . . authorize cities, townships, and counties to subscribe to the stock of railroad companies . . . and to tax their citizens to pay these subscriptions . . . .").

[127] *Id.* at 235.

between a state authorization and a state mandate would have been of no constitutional relevance to Dillon. For Cooley, however, it was critical. Constitutional limitations on the exercise of political power did not simply prohibit public taxation to aid private parties. They also placed structural limits on the scope of the state's authority to intrude upon the prevailing system of local governmental independence. After all, was it not the towns, rather than the state, in *Township Board of Salem*, that had, in the end, resisted the private railroads' attempt to capture public power?

Cooley's approach to the municipal taxation question in both *Township Board of Salem* and his treatise discussion transformed the constitutional doctrine that Marshall had set forth in *Dartmouth College*. Private business corporations would receive less constitutional protection from the intrusion of politics than their public municipal counterparts. The public realm of government needed protection from the corrupting influence of the market at least as much as the market needed to be cleansed of politics. And local communities, not state legislatures or state judges, constituted the institutions that would resist such corruption. Where Marshall would have ruled against the towns in *Township Board of Salem* because they had violated their constitutional obligation to honor their contracts, Cooley ruled for them because they had acted as institutional defenders of a public/private boundary that the state had appeared willing to transgress.

Cooley's decision also transformed Dillon's statist solution to the constitutional problem posed by private legislation. He declined to join Dillon in defending a broad judicial power to review whether duly enacted laws served a "public" purpose. Cooley's Jacksonian instincts led him to connect his substantive constitutional defense of the public/private boundary to the practice of public politics. The possibility that the line separating the public from the private would not always be susceptible to direct judicial enforcement was simply the price of a structural constitutional vision that charged local political institutions with the responsibility for enforcing controversial and difficult to discern substantive constitutional limitations on public power. The benefits of a more deferential judicial stance would be reaped through the practice of local self-government. Popular participation in the process of constitutional enforcement would imbue constitutionalism with a penetrative character that it would otherwise lack. Cooley therefore placed his constitutional faith in the local public sphere in a way that Dillon had not.

C. *The Private Control of Public Politics*

In *Township Board of Salem*, as in his treatise discussion of local bonding authority, Cooley employed principles of localism to place state

constitutional constraints on the power of large-scale corporations to capture the public realm. He employed those principles in *People ex rel. Le Roy v. Hurlbut*[128] to place state constitutional limitations on the power of political parties to do the same. The case concerned an attempt by the State of Michigan to establish and appoint a board of public works for the city of Detroit. Detroit residents, in a public action on behalf of the city, objected that the State lacked the power under the Michigan Constitution to appoint the board members. The court invalidated the state-appointed board, with Cooley providing an important concurring opinion.[129]

The plaintiffs contended that the appointments impermissibly intruded upon their underlying right to local self-government, although it was evident that the text of the Michigan Constitution provided no clear support for the existence of such a general right.[130] The state defended the act by relying on the general rule that a state possessed the complete power to structure its political subdivisions as it wished, a conclusion that, at least on first glance, appeared to be more consistent with conventional legal assumptions.

In his separate concurrence, Cooley declined to resolve the dispute by asserting general principles of local sovereignty or by invoking a direct constitutional right to local self-government.[131] As in *Township Board of Salem* and his earlier treatise discussion, Cooley recognized local governmental independence only insofar as it served as a structural limitation on a state legislature's constitutionally suspect attempt to serve private interests at the public's expense. He argued that a proper resolution of the case therefore turned on the following determination: whether the state's assertion of the local appointing power constituted a legitimate effort to reorganize a municipality in distress or constituted an illegitimate attempt by state officials to secure partisan spoils for a favored class of private persons who possessed little local support.

Cooley was particularly vexed by overt political partisanship, particularly when it resulted in central intrusions on local political processes. Such

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[128] 24 Mich. 44 (1871).

[129] *See id.* at 92-112 (Cooley, J., concurring).

[130] The court stated:

> [I]t is . . . insisted . . . that the intention of this provision of the constitution was . . . that judicial officers of cities and villages shall be elected by the *electors of such cities and villages* . . . [a]nd such, I confess, is the inference . . . which I draw. . . . It is, however, true that it is but an inference.

Id. at 64.

[131] Cooley stated at one point in his concurrence that the right to local self-government was "absolute." *Id.* at 108 (Cooley, J., concurring). That statement should not, however, obscure the far narrower manner in which he actually framed the constitutional question at issue.

politically motivated lawmaking served to preclude the local community from controlling its own destiny by substituting the will of local residents with that of powerful private political parties working in tandem with distant state officials. By posing the constitutional question as one that turned on an evaluation of the substantive nature of the state law, Cooley implicitly acknowledged that the right to local governmental independence was far from absolute. The scope of local governmental independence was confined by an underlying substantive constitutional principle of neutrality—a principle that was directly violated by the spoils system, through which victorious state officials handed out local sinecures to party supporters. Only if the state's interference in local affairs transgressed the underlying substantive constitutional line, by unduly enhancing the influence of powerful private political parties, would there be a basis for the recognition of a structural constitutional limitation on the state's power to supervise its political subdivisions.

Cooley began his concurrence by noting that the state statute at issue provided that "the appointees under it shall be members of two certain political parties."[132] That provision was "simply nugatory, because the legislature, on general principles, have [sic] no power to make party affiliation a qualification for office."[133] Basic notions of constitutional equality made that much clear. Cooley readily conceded, however, that judges could not enforce fully the constitutional principle that precluded the people from imposing a party affiliation requirement on public officeholders. A judge had no authority to look behind each election to determine whether a particular official had been elected for constitutionally impermissible partisan, rather than constitutionally permissible neutral, reasons. It was therefore inevitable that, unless the people honored their own constitutional obligations to elect their officials without regard to party affiliation, the substantive constitutional norm of equality that he discerned could not be fully enforced.[134]

The restrictions on a judge's power to investigate the motives of the electorate did not, however, preclude the judicial enforcement of institutional limitations on state power that would guard against the unconstitutional, partisan political capture of the local electoral process. A regime of state-mandated local appointment would likely result in the effective imposition of an illegal requirement of partisan affiliation for public office. Without some limitation on the state's appointing power, "[officials] can

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[132] *Id.* at 94 (Cooley, J., concurring).

[133] *Id.*

[134] *See id.* (explaining that "[i]t is the duty of every person who has a voice in the selection of a public officer to choose with single eye to the public good; but we know very well that it is impossible to exclude other motives").

and may be sent in from abroad, and it is not a remote possibility that self-government of towns may make way for . . . such influences as can force themselves upon the legislative notice of [the state capital]."[135] Localism therefore served as a structural means of securing a substantive constitutional prohibition on party affiliation requirements for public officeholders.[136]

Under a system of state appointment, Cooley explained,

> it is inevitable that parties, from mere personal considerations, shall seek the offices, and endeavor to secure from the appointing body, whose members in general are not to feel the burden, a compensation such as would not be awarded by the people, who must bear it, though the chief tie binding them to the interests of the people governed might be the salaries paid on one side and drawn on the other.[137]

As the legislature

> could not be compelled to regard the local political sentiment in their choice, and would, in fact, be most likely to interfere when that sentiment was adverse to their own, the government of cities might be taken to itself by the party for the time being in power, and municipal governments might . . . become the spoils of party, as state and national offices unfortunately are now.[138]

The attention to the substantive constitutional problem occasioned by partisan appointments revealed that Cooley was careful in his concurrence not to defend local governmental autonomy as such. He sought to enforce a substantive constitutional principle that protected against private legislation through the recognition of a structural constitutional defense of local governmental independence. The protection of local political control served merely as a prophylactic check against state attempts to make public offices party spoils. As Cooley would later explain:

> When therefore an appeal is made to the majority at the state capital, it is made to ears prepared by political association and kinship in prejudices to listen willingly in the complaint. But in every case the appeal to the state is in part if not wholly a fraud. The pretence is that it is made in the interest of good order and good government when in fact the purpose, either wholly or in part, is to

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[135] *Id.* at 106 (Cooley, J., concurring).

[136] Although Cooley formally interpreted the state constitution, he did not suggest that the "general principles" to which he referred did not inhere in the Federal Constitution as well. Nor did he suggest that those "general principles" were somehow a special feature of Michigan's founding charter.

[137] *Hurlbut*, 24 Mich. at 106 (Cooley, J., concurring).

[138] *Id.*

> give the local minority certain local offices and local patronage which their numbers were not sufficient to enable them to secure.[139]

Because a substantive constitutional principle, rooted in a fear of special interests and a commitment to public neutrality, defined the scope of local sovereignty that *Hurlbut* recognized, Cooley did not actually vote to strike down the board that the State of Michigan had imposed upon the people of Detroit. He voted instead simply to limit the permissible terms of its members to a period consonant with the state's concededly significant interest in the exercise of its general supervisory authority.[140]

Cooley explained that he had "no doubt it was entirely competent for the legislature to abolish the old boards and provide for a new one to take the place of all."[141] Such an action "would be but the ordinary exercise of legislative supervision and control in matters of municipal regulation."[142] Because it was within the state legislature's power to make provisional appointments to the newly created board in order to put the new system in operation, Cooley explained that "we must suppose the object of the legislature, in making the first appointments was not to appropriate patronage to itself, but only to insure the organization of the new system without confusion."[143] To the extent that the state had attempted to supplant the local appointment power for all time, however, the partisan motives of the legislature stood revealed and thus this aspect of the legislation could not be given legal effect.

In *Hurlbut*, no less than in *Township Board of Salem*, Cooley inverted the logic of *Dartmouth College* to secure the independence of local governments. Local governments should not be left to become theaters for the play of contending factions any more than colleges. They, too, should be protected from untoward turns in their administration. Indeed, Cooley suggested, it would be an odd constitutional doctrine that would seek to keep everything pure but the government itself. Local governments, no less than colleges, had constitutionally protected interests in restraining the popular will. Judges could therefore preserve the constitutional requirement of neutral public governance by ensuring that distant majorities would not inject partisan considerations into local politics.

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[139] Thomas M. Cooley, Lecture III: Analogies in Local Government and when They Fail 26-27 (1879) (unpublished manuscript on file in the Cooley Collection, Bentley Library, University of Michigan) [hereinafter Lecture III].

[140] *See Hurlbut*, 24 Mich. at 111-13 (Cooley, J., concurring) (holding that it was within the power of the legislature to make provisional appointments, but permanent appointments could not be made without serious difficulty).

[141] *Id.* at 111 (Cooley, J., concurring).

[142] *Id.*

[143] *Id.* at 112 (Cooley, J., concurring).

Moreover, in *Hurlbut*, as in *Township Board of Salem*, Cooley broke from Dillon's statist defense of the constitutional separation of the public and private realms. His opinion revealed that Dillon's broad defense of state power was inadequate to ensure that the public realm would govern itself in accord with a substantive norm of constitutional neutrality. Dillon's approach would only encourage states to exercise their vast powers over the public realm in an arbitrary fashion, and it would sap the constitutional resolve of those local political institutions that Cooley believed were critical to the task of securing "constitutional freedom."

IV. COOLEY AND THE RISE OF THE CITIES

A. *Introduction*

The rise of the great cities severely tested Cooley's contention that the values of localism and constitutionalism could be harmonized. The archetype of local government by the end of the nineteenth century was no longer the simple village. It was the sprawling urban metropolis—a place of immigrants and strangers, thievery and corruption, poverty and fiscal irresponsibility. The evidence that the newly emergent cities rapidly were incurring seemingly insurmountable debts fueled a growing sense that local constitutional democracy was a thing of the past.[144]

Cooley confronted the problem that the new urbanism posed for his defense of local constitutionalism in a remarkable series of lectures he presented at Johns Hopkins University in 1879. The lectures, entitled *On the Evils of Local Government*, have received scant scholarly attention. They have not been published, and they are written in a sometimes difficult-to-decipher longhand over several hundred pages contained in a series of leather-bound volumes. They represent Cooley's most extended commentary on the legal role and status of cities, however, and therefore command attention.

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[144] *See* MARY P. RYAN, CIVIC WARS: DEMOCRACY AND PUBLIC LIFE IN THE AMERICAN CITY DURING THE NINETEENTH CENTURY 183-303 (1997) (discussing the change in the civic, social, and political structure in cities after the Civil War); ALAN TRACHTENBERG, THE INCORPORATION OF AMERICA: CULTURE AND SOCIETY IN THE GILDED AGE 101-39 (Eric Foner ed., 1982) (discussing the growth of cities during the nineteenth century and observing that they lacked "democratic planning"); ROBERT H. WIEBE, THE SEARCH FOR ORDER, 1877-1920, at 13, 30-31 (David Donald ed., 1967) (discussing the decrease of "civic spirit" in the cities due to lack of security and individuals' concerns about their own place in the changing economy). The fears were hardly new. Jefferson, for example, had predicted in a letter to Madison that "[w]hen we get piled upon one another in large cities, as in Europe, . . . we shall become corrupt as in Europe, and go to eating one another as they do there." Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), *in* 2 THE WRITINGS OF THOMAS JEFFERSON 230 (Paul Leicester ed., G.P. Putnam's Sons 1892).

The lectures are in many ways marked by a deep hostility towards the emergence of the great cities of the late nineteenth century. In them, one hears, at times, Cooley wistfully remembering the simpler localities of old that he clearly favored. One also hears the first strands of what was to be a Progressive Era crusade against the cities as well as a disturbingly cold-hearted skepticism towards popular sovereignty that the "crisis of the cities" occasioned. Nevertheless, what is striking is the degree to which the lectures reveal that Cooley remained committed to a defense of local governmental independence even though the modern cities no longer exhibited the fiscal prudence that he believed to be critical to constitutional governance.[145]

The lectures demonstrate that Cooley did not root his belief that local governmental institutions constituted critical components of constitutional structure in either a romanticized view of local political life or a defense of homogeneous communities, immune to urban conflicts. They show that he rooted his ideas, instead, in a structural belief that constitutionalism depended upon the efforts of local communities, struggling together to practice self-government in accord with constitutional limitations. Cooley remained committed to that belief, as the lectures show, without regard to whether local political institutions were the quaint towns of his youth or the unruly, ethnically diverse cities of the late nineteenth century.

Thus, while Cooley began his lectures by suggesting that one path to urban reform lay in the imposition of restrictions on the practice of politics *within* the city,[146] he concluded them on a far different note. He ultimately rejected the privatizing tendencies of modern corporate theory and the unrestrained majoritarianism of positivist conceptions of democracy. He lay claim instead to a revived vision of city life, in which local communities

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[145] *See* Thomas M. Cooley, Lecture I: The Sentiment of Equality in American Politics (1879) (unpublished manuscript on file in the Cooley Collection, Bentley Library, University of Michigan) [hereinafter Lecture I]; Thomas M. Cooley, Lecture II: The Growth of Local Institutions in America (unpublished manuscript on file in the Cooley Collection, Bentley Library, University of Michigan) [hereinafter Lecture II]; Cooley, Lecture III, *supra* note 139; Thomas M. Cooley, Lecture IV: Protections and Securities in City Government [hereinafter Lecture IV]; Thomas M. Cooley, Lecture V: The Evils of Municipal Indebtedness (unpublished manuscript on file in the Cooley Collection, Bentley Library, University of Michigan) [hereinafter Lecture V]; Thomas M. Cooley, Lecture VI: Remedies in the Hands of the Individual Citizen (unpublished manuscript on file in the Cooley Collection, Bentley Library, University of Michigan) [hereinafter Lecture VI].

[146] This aspect of Cooley's lectures reflected the late-nineteenth-century idealization of "[a] middle-class version of the city." TRACHTENBERG, *supra* note 144, at 107. Because the people had proven themselves incapable of self-government, "[r]edemption lay in a revived sense of responsible citizenship among middling property holders and city homesteaders, who in their good sense would turn to men of intelligence and specialized training, 'experts,' to reform city government and restore order and harmony to city streets." *Id.*

would once again assume their structural constitutional obligations to resist impermissible public attempts to lend aid to private power.

B. *Retreating to the Private City*

To make clear the magnitude of the challenge that the newly emergent cities posed for constitutionalism, Cooley used his second lecture to contrast Boston in the late eighteenth century with Chicago in the late nineteenth. The Boston of 1791, he began, had but 12,000 residents[147] and was built "almost entirely of wood."[148] A dozen constables, one for each of the city's twelve wards, constituted the entirety of its police force.[149] Cows grazed freely on city land,[150] and the establishment of a linen factory occasioned a public celebration.[151] Sobriety was so strictly adhered to that "a great tanning day might pass off in Boston without a single instance of public drunkenness or other disorder."[152] The people were "grave in deportment,"[153] and they listened intently to sermons on hardbacked wooden benches which delighted them as much as the dogmatic theology that they absorbed.[154] The picture had "something of Arcadian simplicity."[155] It revealed

> an overgrown country town thoroughly democratic in habits and tastes, economical in public and private expenditures, a little over boisterous at times no doubt, but in the main thoroughly deferential and subservient in all things lawful to the authority of their plain fellow citizens temporarily set over them, as well as to that of their elected ministers.[156]

By contrast, the Chicago of 1879 was an "ambitious city seated like a queen at the head of the great lakes."[157] Though "founded but yesterday,"[158] it boasted a population greater than London's.[159] It "gathered together men from every nationality and from all quarters of the globe and has handed over to them her municipal government."[160] Many were raised in monar-

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147 *See* Lecture II, *supra* note 145, at 33.
148 *Id.* at 41-42.
149 *See id.* at 42.
150 *See id.*
151 *See id.* at 43.
152 *Id.* at 44.
153 *Id.*
154 *See id.* at 44-45.
155 *Id.* at 45.
156 *Id.*
157 *Id.* at 45-46.
158 *Id.* at 46.
159 *See id.*
160 *Id.*

chies, still others did not speak English, and many more were trained from infancy "to look upon government as their natural and implacable enemy."[161] Yet another sizeable class of persons had "for [its] bond of union the principle that property in private hands is robbery."[162] Just one-third of Chicago's voters paid taxes, and "not one half would take active interest in an economical administration of public affairs."[163] More troubling still, political primaries were "held in the haunts of dissipation and vice where respectable people feel contaminated by the place and the surroundings if they venture to enter, which many never do."[164]

Having established the contrast, the question all but asked itself:

> Is this concentration of business and activity and risk; of pleasure and passion and crime; of arrogant wealth and crushing poverty and devilish hate; of social extremes wide apart as the poles and yet brought into immediate and hourly contact; Is this of the same family with the staid and sombre New England town; capable of being ruled by the same simple methods in the same economic ways and by the common consent of all the people harmonizing for the purpose?[165]

Cooley answered at first by proposing to restructure urban centers along lines similar to those soon to be proposed by Progressive Era reformers. He argued that too strong a commitment to democracy would preclude local governments from performing their critical temporizing function.[166] The cities could not be left to "bosses raised to power by an alliance of scheming speculators and ignorant immigrant voters, blindly loyal to political chieftains."[167] As Cooley explained in concluding his first lecture,

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[161] *Id.*

[162] *Id.*

[163] *Id.* at 49.

[164] *Id.*

[165] *Id.* at 49-50.

[166] By contrast, Cooley explained that the old town system of New England had taught the people "to apply in public affairs the same rules and maxims of policy and prudence which they applied in their own affairs." *Id.* at 14. Moreover, the system had "taught them to select the best men in the community for all public positions. Their chief officers were select men; so named because they were chosen for their merits and abilities." *Id.* at 15. Finally, Cooley explained that the town system had

> impressed upon every one the importance of prudence and economy in public affairs. The man who was not a taxpayer was a rare exception; and every taxpayer knew and never forgot that nature in this inhospitable region had imposed it as one of the conditions of reasonable prosperity, that prudence should be the constant counsellor, and the guide in all pecuniary transactions.

Id. at 16.

[167] TRACHTENBERG, *supra* note 144, at 107. Trachtenberg elaborates on the point. "Against the rule of bosses and ruthless speculators, of the forces of mystery, the Jeffersonian

> [w]e shall have gained something when we have fully come to understand that government . . . is useful in proportion as it imposes restraints on the passions of men for the common good and not as it subverts the common good to the impulses, desires, and passions of an uneducated and inexperienced community.[168]

Cooley drew upon his general critique of a sentimental attachment to democracy[169] in his third lecture, entitled *Analogies in Local Governments and when They Fail.* He argued that local governments were more like private corporations than public governments, such as states. The states had the power to pass general welfare legislation,[170] but cities "have no corresponding power to make general laws, and they are compelled to accept such as the state makes for them."[171] A city is interested in

> its property, its rights which are in the nature of property, or which can be converted into property by the sale or lease of franchises, and with questions as to how all these can be made to subserve the interests and increase the value of the estates of its citizens.[172]

Because the city concerned itself with the distribution of property among those who already possessed it,[173] "its analogies are all to private corporations, differing from them mainly in that the interests of citizens are not represented by stock."[174]

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ideal of cultivated intelligence in service to the Republic now implied the stewardship of a qualified elite." *Id.* at 112.

[168] Lecture I, *supra* note 145, at 56.

[169] Cooley had acknowledged in his first lecture that "civil government has its origin in the agreement of the people," *id.* at 8, and that the course of constitutional government was "in the direction of a transfer of power from one or from a few to the many." *Id.* at 11-11.5. He explained, however, that the principle of political equality had been qualified even in the Nation's first local governments. *See id.* at 8. The New England colonies "did not venture upon the experiment of universal suffrage; their government was by a select number, determined either by membership in the Church or by the choice of those previously admitted as freemen." *Id.* at 15. While one found "seeds of the doctrine of universal political equality striking root here and there and attaining for a time some little vitality," *id.*, Cooley argued, such seeds rested on "a creed of what are called natural rights," *id.* at 20. The belief in universal political equality depended upon the "sentimental" supposition that the creator has conferred "the right to take part" in government on individuals not because of their "natural or acquired fitness," but because human nature itself "determines" fitness. *Id.* Cooley went so far as to contend that arguments for universal suffrage shared a deep affinity with the discredited doctrine of a "divine, hereditary, or traditionary right to rule." *Id.* at 22. The American experiment with universal suffrage therefore constituted an incongruous application to "republics of the monarchical idea of a hereditary right." *Id.* at 25.5.

[170] *See* Lecture III, *supra* note 139, at 32.

[171] *Id.* at 33.

[172] *Id.* at 34.

[173] *See id.* (discussing how cities improve public property for the benefit of individual owners by paving streets, creating water works, and improving parks).

[174] *Id.* at 36.

The public/private division that Cooley drew *within* the city led him to propose a restriction on city suffrage. "Giving effect to this view it would become necessary that city powers of legislation should be apportioned between two houses, one of which might be limited in its action to matters relating to the control of city property, the levy of city taxes, and the contracting of city debts."[175] The new legislative body would be charged with administering "private" functions, and thus the suffrage should be provided in accord with principles governing private corporations.

Cooley all but conceded that his new proposal for urban reform was in severe tension with the deep expressions of faith in local self-government that underlay his decisions in *People ex rel. Detroit & Howell Railroad v. Township Board of Salem*[176] and *People ex rel. Le Roy v. Hurlbut*.[177] The proposal was, in substance, little more than a sketch for the establishment of an insulated, propertied bureaucracy, staffed by leading capitalists, immune from popular accountability. Indeed, in defending the proposal, Cooley even suggested that state legislatures might be better positioned than cities to ensure the proper separation between the public and private realms. Echoing Dillon, he noted that the representatives in the state legislatures, by reason of their distance from their constituents, might be less likely to succumb to the pressures of special interests at the local level.[178] The practice of constitutionalism would no longer be the obligation of citizens struggling in their local communities to discern their public responsibilities. It would be a means of protecting the private sphere from popular intrusion, and it would depend upon bureaucratic structures that sought to strip the city of its public character.

C. *Reclaiming the Public City*

As the lectures came to a close, Cooley cast aside his Dillonesque defense of a privatized city, controlled by state-appointed officials and super-

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[175] *Id.* at 42.

[176] 20 Mich. 452, 494 (1870) (holding that a state cannot compel a locality to issue bonds for the benefit of a private corporation).

[177] People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 92 (1871) (Cooley, J., concurring).

[178] *See* Lecture IV, *supra* note 145, at 17-18. Cooley stated:

> Legislatures are away from their constituents, and are usually exempt from any extraneous pressure resulting from passion, prejudice, or excitements of any sort arising subsequent to the time when the representatives were chosen. But the city constituency is forever at hand, in constant association with the representatives, so that the passion of the one immediately communicates itself to the other, or if the representative is not found to be responsive, the constituency assumes a threatening aspect which the representative will seldom venture to face.

Id.

vised by state judges. He returned to the basic premises of the local constitutionalist vision that he had long advocated, and he applied those premises to offer a dramatically different set of reforms for the newly emergent cities. Once again, Cooley constructed a defense of local governmental independence that portrayed the local public realm as an important institutional means by which people could discover how to govern themselves in accord with constitutional principles. Once again, state judges and legislatures appeared as potential obstacles to the constitutional governance of local communities.

Entitled *Remedies in the Hands of the Individual Citizen*, the final lecture began with the contention that a restriction on city suffrage, and a privatized conception of city life, was not likely to cure the city's ills. Cooley proceeded to argue that the cure would instead lay in individual residents committing themselves to practice urban self-governance. Cooley explained that

> much of the difficulty to be encountered in establishing proper municipal government comes from the presence in every city of a very considerable body of voters—usually a considerable majority of all—who have no such ties binding them to the city and attaching them to its interests, as are essential to make them feel that good city government is of personal importance to themselves.[179]

This diagnosis of the problem resonated with his long-held belief that constitutional limitations simply could not be imposed from on high. They could be given full expression only through the practices of an active local citizenry, focused on the needs of the local community. Cooley therefore devoted his final lecture to an explanation of how urban centers could become homes to a citizenry attentive to local needs.

Cooley identified three basic changes that would have to be made for the practice of local self-government to take root within the modern cities. First, the influence of state and national politics on local political life would have to be constrained. Second, the business class's withdrawal from active engagement in city affairs would have to cease. Third, the public as a whole would have to be educated in the practice of self-government. It was a reform program worthier of Cooley's Jacksonian heritage than the privatized city he had imagined in the preceding lectures. It imagined the restoration of the public realm within the city, rather than a retreat from the city into privatism and centralism. Local governments were neither state administrative bureaucracies that would be charged with supplying discrete state services nor protected enclaves of private power to be run by the owners of

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[179] *Id.* at 6.5-7.

capital. They were the critical political institutions through which the public would learn to practice constitutional self-governance.

Cooley's first suggestion for reform, the imposition of constraints on state and national political influence at the local level, tracked his concurrence in *Hurlbut*.[180] There, as we have seen, Cooley argued that state appointments precluded city residents from selecting officers on the basis of city needs rather than partisan interests. In his lectures, he contended that the dominance of state and national parties in local politics caused city elections to turn on issues that were not of direct concern to the city itself. "A local election when it is made improperly to turn upon general politics may have the effect to encourage the successful party and bring to its aid many of those collectively known as the floating vote . . . ."[181]

Cooley asserted that the critical determinants in a city election should be "the character, ability and purposes of the men to be voted for."[182] When a state or national political party was "allowed to select local candidates for the party without reference to any other considerations, the selection is a fraud upon the purposes for which caucuses nominally exist, and is almost of necessity mischievous."[183] Indeed, Cooley noted, oftentimes the party caucus represented less an election than a means by which party managers formally ratified their prior decisions.[184] Such a system severed the people from the public community. It vested legal authority in a distant political bureaucracy, untutored in the daily experiences of local life which made it possible to practice self-government in accord with constitutional limitations.

Cooley's second suggested reform, to end the disinterest of the business class in city affairs, supplemented his plea for constraints on state influence in the local political process. The fact that the "thrifty businessmen of the Country hold themselves aloof from politics might not be fatal to good government" if they were replaced by other persons whose "circumstances and means enabled them to devote their attention to the study of the problems of government, and who made choice of politics as a calling from patriotic motives."[185] Such was not the case, however. Those "who make politics a business in the cities are not of this sort; but they are men who cultivate

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[180] 24 Mich. at 92 (Cooley, J., concurring); *see supra* notes 111-22 and accompanying text (discussing this case).

[181] Lecture VI, *supra* note 145, at 10.

[182] *Id.*

[183] *Id.*

[184] *See id.* at 16.

[185] *Id.* at 24.

politics for its personal profits, as the merchant pursues his business for its rewards."[186]

By holding themselves aloof from politics, prominent citizens had ignored "the unpleasant fact that vigilance is as much the price of free institutions now as it ever was."[187] The "difficulty thus far has been to bring the businessmen of cities to an understanding of the fact that as business men it was their duty to take active part in politics."[188] Some "ha[d] busied themselves in making money while those holding public office have been equally busy in wasting it."[189] Others attempted to become politically engaged but withdrew after being discouraged by the current system of party control. Such retreats were unjustified, however, for there was no reason to assume that the educated and the propertied could not compete "with the Tweeds."[190]

Through the participation of the business class, the local political system would be transformed, all the way down. As Cooley explained:

> The Caucus System being an established institution it is for the time at least necessary to recognize it as such, and to turn it to useful service. To this end it is necessary that the best citizens attend it, take part in it, and whenever practicable control it. The mere fact of attendance will be a blessing to the city; the Caucus will immediately begin to put on a more decent appearance; it will seek better quarters; the manners of those accustomed to congregate there will begin to conform to those of decent society and to leave off the habits of barbarism. . . . It then becomes antecedently more probable that good men will be selected and good measures be advocated, and if they fail, the decencies of deliberation are at least likely to be preserved. All this, however, is on the assumption that attendance is habitual, and not on rare and extraordinary occasions only.[191]

Cooley's plea to the business class was of a piece with what one historian termed "the revolt of the capitalist class in late-nineteenth-century municipal life."[192] Cooley's final proposed reform, however, suggested that it was also part of a broader plea for the invigoration of city politics at all levels. Cooley concluded his final lecture by arguing for education of the citizenry as a whole in the art of self-government. He contended that such edu-

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[186] *Id.* at 25.
[187] *Id.* at 27.
[188] *Id.* at 28.
[189] *Id.* at 28-29.
[190] *Id.* at 29.
[191] *Id.* at 31-32.
[192] *See* RYAN, *supra* note 144, at 271-82.

cation could be promoted with the aid of general newspapers and through the system of free public education that already existed.[193]

Cooley explained that "of all the institutions whose teachings are now available to the people at large, the most useful is the press, controlled by independent men, who have intelligent opinions on political subjects, and who express them frankly, fearlessly, and candidly, for the instruction of the people."[194] Indeed, he noted, "[i]t is a deserved compliment to the ability of the independent political press that today its utterances are more read and more heeded than are the discussions in Congress."[195]

The press's role in educating the public was, however, only a partial one. "[A] sovereign cannot wisely be left to mere chance instruction."[196] Cooley explained that "only in the general instruction of the sovereign ruler—the people—can there be safety."[197] He concluded that a "general education of all the people in the existing schools will do something towards fitting them for their responsibilities as citizens."[198] Such general education "will increase self respect, and cannot fail to open the eyes to some of the most conspicuous evils in government."[199]

The image, then, was no longer of a city divided between private property owners and untutored masses, supervised from above by wise state officials. It was of an integrated city, bound together by a common destiny, freed from the powerful private interests and those unconcerned with the needs of the local public. As Cooley explained at the close of the final lecture,

> [t]he purpose of this discourse has been to show that the individual citizen has duties which he now habitually neglects to the detriment of the public interest, and of his own .... We must never forget that in America, employer and employed, rich and poor, educated and ignorant, are embarked with all their interests in a common vessel with common guidance, and that what endangers one class endangers all; what will wreck the interests of one class will involve all in a common ruin.[200]

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[193] *See* Lecture VI, *supra* note 145, at 41-42.
[194] *Id.* at 47.
[195] *Id.*
[196] *Id.*
[197] *Id.* at 41.
[198] *Id.* at 41-42.
[199] *Id.* at 42.
[200] *Id.* at 54-55.

D. *Conclusion*

The lectures that had at first set forth an extended argument for the privatization of city politics concluded with a call for the restoration of an active and inclusive public city life. They reveal that Cooley's defense of local political power emanated from a general conception of constitutional structure. The modern city appeared to embody a set of values that were inimical to Cooley's essentially conservative substantive constitutional vision. Nevertheless, Cooley was unwilling to abandon localism in the face of urbanism.

In the end, Cooley argued that constitutionalism could not survive without strong local political institutions. Such institutions were needed to check private power and to involve the public in the practice of governing in accord with constitutional limitations. The structural connection between localism and constitutionalism that he drew flowed from Jacksonian instincts which ultimately led to a plea for an urban revival. The rejection of the positivist conception of local governmental power, and the state creation metaphor that resulted from it, did not entail an embrace of a privatized conception of local life. One could strive, as Cooley strove, for a constitutional defense of local governmental power that rejected the extreme positions that the conventional understanding of the public/private boundary seemed to require.

At the same time, we may discern in the relatively diffuse and unconvincing nature of the reforms that Cooley proposed for the revival of city life evidence of a deep incompatibility between his structural constitutional commitment to localism and his substantive constitutional commitment to a "night-watchman" state. There was always a paradoxical character to Cooley's localism, for it sought to protect the private market from public power through the energetic efforts of an invigorated local public community. It seemingly demanded local communities to adopt an almost ascetic posture—eager to be involved so that they would be sure to do little. The inherent paradox became even more pronounced as the great metropolises emerged in the late nineteenth century. The new cities served a diverse populace with increasingly severe demands that could be accommodated only with an increased degree of governmental intervention. In this new urban world, one could no longer be confident that a revived public realm would ensure government inaction.

And so it is perhaps the case that the localism that Cooley defended in his lectures on the evils of the cities was even then more suited to a constitutional age that was yet to come. It may be that if Cooley's structural defense of localism was to survive, then it was to survive only after the demise of the long-standing, substantive constitutional hostility to an active public

government, willing to intervene to adjust relations in the private realm. His structural defense of localism might survive, in other words, only in an age in which substantive constitutional limitations took the form of more positive claims on the public sphere. For then, the structural constitutional defense of an energized public realm would coincide with a substantive constitutional vision that is more compatible with public action. As a result, it is toward the role that localism might play in modern constitutional law that we now turn, mindful that Cooley's far different defense of localism may, paradoxically, supply the critical vocabulary that will permit the explanation of that role.

V. THE LOCALIST TURN IN MODERN DOCTRINE AND ITS CRITICS

A. *Introduction*

We have seen that Thomas Cooley synthesized the seemingly contradictory premises of Marshall's and Dillon's prior constitutional visions—the former which pointed towards public intervention in the private realm, the latter which pointed away from such intervention—to celebrate the public city as an important extrajudicial agent of constitutional freedom. Cooley believed that constitutional freedom depended upon an active local citizenry, eager to govern itself in accord with a constitutional norm of impartiality. That norm would be given a living, breathing spirit through the daily institutional practice of local self-government, which judges would protect, from state interference, incident to the judges' enforcement of substantive constitutional principles.

We have also seen that, as a substantive matter, Cooley relied on localism to enforce a nineteenth-century constitutional distinction between the public and the private spheres that was intended to secure equality. He believed that local communities were well positioned to frustrate private capture because they would be likely to take only those actions that would serve the broader public interests of the particular local community in question. Thus, state attempts to mandate local intervention into the private market to boost certain industries, or to interfere with local efforts to resist partisan politics, were suspect, because (but only to the extent that) they tended to privilege the demands of powerful private interests over the needs of the local public.

The incorporation of Cooley's defense of local governmental independence in modern doctrine would appear, at first glance, to be problematic in light of the substantive constitutional premises on which it depended. The

advent of legal realism[201] and the Warren Court's challenge to the Nation's pervasive racial segregation[202] cast irrevocable doubt upon the kind of constitutional dichotomy between the public and the private spheres that animated Cooley's substantive constitutional vision. Modern constitutional doctrine is far more sympathetic than its nineteenth-century counterpart with respect to both public attempts to intrude on market affairs[203] and claims that the protection of individual constitutional rights depends upon the willingness of public institutions to undertake affirmative efforts to correct inequities in the private sphere.[204] It is tempting to conclude, therefore, that the modern doctrinal incorporation of Cooley's localist vision

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[201] *See* HORWITZ, TRANSFORMATION II, *supra* note 60, at 206-08 (describing the legal realist critique); *see also* Sunstein, *supra* note 15, at 876-83 (briefly chronicling the demise of Lochnerian assumptions in constitutional law).

[202] In several modern cases, the Court stretched the limits of the "state action" doctrine to strike down seemingly "private" acts of racial discrimination. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (holding that the exclusion of blacks from voting in elections held by the Jaybird Democratic Association was unconstitutional). *See generally* Black, *supra* note 15, at 84-85 (explaining that as of 1967, *Hodges v. United States*, 203 U.S. 1 (1906), was the last case in which "the Supreme Court . . . held that a claim under the equal protection clause, against racial discrimination, must fail because 'state action' is absent, or present in insufficient kind or amount to implicate the equal protection clause of the fourteenth amendment").

[203] *Compare* West Coast Hotel v. Parrish, 300 U.S. 379, 391-400 (1937) (upholding a state minimum wage law for women), *with* Lochner v. New York, 198 U.S. 45, 58-65 (1905) (striking down state minimum hours legislation).

[204] There are many discussions of how modern doctrine may be read to be consistent with an affirmative constitutional vision. *See* Bandes, *supra* note 15, at 2342-47 (proposing to discard the rhetoric of negative rights and instead focus on effectuating constitutional goals); Black, *supra* note 15, at 95-107 (discussing the state action doctrine and the initial barriers to ending racial discrimination); Karst & Horowitz, *supra* note 15, at 65-78 (examining the Supreme Court's decision in *Reitman v. Mielkey*, 387 U.S. 369 (1967), and its implications for state sanctioned discrimination); Michelman, *supra* note 15, at 9-19 (discussing the Court's treatment of social welfare concerns in the 1968 term and the paradox of requiring the government to treat everybody equally while requesting that it remedy certain social inequalities); Michelman, *States' Rights and States' Roles*, *supra* note 7, at 1190-91 (concluding that the Court's decision in *National League of Cities* may protect an individual's right to governmental services); Sager, *supra* note 15, at 785-98 (discussing the equal protection doctrine and its application to exclusionary zoning issues in residential areas); Tribe, *The Curvature of Constitutional Space*, *supra* note 15, at 23-38 (applying concepts of quantum physics to constitutional analysis and examining the effects of court decisions in the social realm under such a rubric); Tribe, *supra* note 7, at 1075-76 (concluding that the Court's decision in *National League of Cities* may protect an individual's right to governmental services). There are, of course, formidable obstacles to the recognition of such claims. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (explaining that "the [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security"); Currie, *supra* note 15, *passim* (contrasting decisions made by the former German Constitutional Court and the courts of the United States in their treatment of positive versus negative rights in interpretations of their respective constitutions).

would serve merely to reinscribe discredited Lochnerian premises into constitutional law.

The standard critique of the localist turn in modern case law has proceeded along precisely this line. In the view of many scholars, the Court's recent defense of localism, in cases such as *San Antonio Independent School District v. Rodriguez* and *Milliken v. Bradley*, reflects a distressing preference for private over public interests. According to this view, these cases employ the nostalgic rhetoric of localism to favor a vision of suburban quietude that entrenches inter-local inequalities and traps urban residents within discriminatorily constructed political boundary lines. Moreover, this view reads these cases to depict local governments as protected zones of private freedom and thus to constitute defenses of the private sphere from the positive demands of modern constitutionalism.[205] Indeed, it has been suggested that Cooley's own defense of localism in the nineteenth century reveals the laissez-faire assumptions that must underlie the re-emergence of localist rhetoric in modern constitutional doctrine.[206]

In tying the defense of localism in modern case law to a Lochnerian constitutional vision, the standard critique implicitly argues for a return to the conventional doctrinal assumption that local governments are merely creatures of their states, undeserving of special judicial respect. Such a return, it is suggested, would enable federal courts to break free from the remaining shackles of nineteenth-century constitutional theory that have led them to view with suspicion claims that suburbs have constitutional obligations to remedy private inequities.

The next two Parts show, however, that a structural defense of local independence should be understood to be consistent with, and a critical aspect of, the more affirmative constitutional vision that underlies the standard critique of the Supreme Court's localist turn. With the aid of Cooley's structural insights, the modern doctrinal recognition of localism need not be read to mark a return to a minimalist constitutional vision seeking to protect the private sphere from public intervention. Such recognition should be read, instead, to reflect a broader doctrinal framework affording local communities the freedom to give life to the positive constitutional rights of their residents that judges are often ill-positioned—and unwilling—to secure. If this framework accords local governments a measure of freedom from intrusive judicial remedies that would impose burdensome positive constitutional obligations upon them, it also accords them constitutional protection against

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[205] *See supra* note 5 (citing discussions of the Court's creation of the concept of "localism").

[206] *See* Williams, *supra* note 5 (comparing the views of Dillon, Cooley, the Burger Court, and Justice Brennan on the constitutional constraints upon municipal power).

state attempts to prevent them from assuming such obligations when they believe it necessary to do so.

This Part begins the inquiry by examining, in some detail, the conventional critique of those modern, localist cases that have constrained the scope of federal judicial power. It shows that, paradoxically, the standard critique of these cases actually applies with greater force against the structural constitutional vision that underlies Dillon's defense of state power than it does against the structural vision that underlies Cooley's defense of local independence. Part VI supplements the discussion by considering a series of modern cases that may be read to employ localism in order to preclude state attempts to stifle local constitutionalism.

B. *The Standard Critique*

Modern doctrine is often criticized for imbuing local power with a talismanic authority that threatens to undermine necessary constitutional enforcement and privilege suburban selfishness. As Richard Briffault has put it, the modern doctrinal attraction to localism "tend[s] not to build up public life, but rather contribute[s] to the pervasive privatism that is the hallmark of contemporary American politics."[207] Localist cases, such as *Milliken v. Bradley*,[208] *San Antonio Independent School District v. Rodriguez*,[209] and a series of decisions that have rejected constitutional challenges to local zoning cases,[210] are said to reflect the modern Court's distressing attraction to an impoverished conception of public politics.[211] They are also said to demonstrate that the modern defense of localism tends to insulate private inequalities from public interference.[212]

For example, in *Milliken*, the Court emphasized the importance of local educational control in striking down a district court decree that ordered more than fifty suburban school districts to assist in desegregating the Detroit public schools.[213] The Court's nostalgic appeal to localism appeared to

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[207] Briffault, *Our Localism Part I*, *supra* note 2, at 2.

[208] 418 U.S. 717 (1974).

[209] 411 U.S. 1 (1973).

[210] *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (upholding a local zoning plan); City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) (upholding a local zoning referendum); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding a local decision to prohibit a group home); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding a local zoning power).

[211] *See supra* note 5 (citing several commentators' views that these cases allow local communities to escape from constitutional obligations).

[212] *See supra* note 5.

[213] *Milliken*, 418 U.S. at 717.

protect a racially stratified private sphere from a judicial attempt to require local communities to take the affirmative actions necessary to enforce a constitutional right to equal protection. Moreover, it seemed to sanction a local political process that displayed little interest in fulfilling constitutional requirements in order to foster an integrated public educational system and relieve suburban communities of their obligation to help solve the problems of segregated cities.

As Richard Ford has explained, by emphasizing the importance of local autonomy, *Milliken* "ironically segregated the scope of the remedy to racial segregation, and thereby may have allowed the historical segregation to become entrenched rather than remedied."[214] Similarly, Laurence Tribe concluded that *Milliken* offered no explanation "for why it thought district boundaries were sacrosanct. . . . The plaintiffs were to be trapped within the city's boundaries, without even an opportunity to demand that those boundary lines be justified as either rational or innocently nonrational."[215] Joan Williams has joined in the general criticism, arguing that *Milliken* is part of a larger trend "in which the Burger Court extols local autonomy to constrict the scope of the fourteenth amendment."[216]

San Antonio School District, too, has been cited as evidence of the dangers that attend the modern Court's turn towards localism. There, the Supreme Court rejected an equal protection challenge to Texas's allegedly inequitable system of public school financing by invoking the virtues of local self-government.[217] The Court's defense of localism has been criticized for upholding a state system of funding public schools that benefited privileged, wealthy suburbs. As a result, severe wealth disparities between local communities were immunized from constitutional review.

Joan Williams has argued that the Court used localism in *San Antonio School District*, in part, to counter the Warren Court's successful attempts to subject state power to constitutional limitations. She therefore concludes that the Court's localist turn served to frustrate the more expansive, modern conception of the permissible scope of constitutional enforcement that emerged in the wake of *Lochner*, and thus served to protect private inequality.[218] Moreover, Richard Briffault has contended that *San Antonio School District* relieved public institutions of their constitutional obligations to cor-

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[214] Ford, *supra* note 5, at 1876.

[215] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1495 (2d ed. 1988).

[216] Williams, *supra* note 5, at 111.

[217] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 1 (1973) (upholding state school financing system against an equal protection challenge).

[218] Williams, *supra* note 5, at 100-20.

rect interlocal income inequalities.[219] Indeed, he has suggested that it inspired many state courts to use the mantra of "local control . . . as a shield, to ward off claims that the state has an obligation to revamp the existing school finance system."[220]

Finally, the Court's invocations of localism in a variety of exclusionary zoning cases have been cited as powerful confirmation that the modern defense of localism tends to privilege private power by protecting wealthy suburbs. Lawrence Sager advanced this argument with particular force more than twenty years ago in an article that criticized the Court's decisions in *Warth v. Seldin*[221] and *City of Eastlake v. Forest City Enterprises, Inc.*[222] for their deference to local institutions.[223]

In *Warth*, the Court concluded that the plaintiffs lacked standing to challenge a local zoning ordinance that they claimed unconstitutionally discriminated against poor and minority residents.[224] Sager argued that the Court manipulated modern standing doctrine in order to protect local communities from the demands of constitutional litigation.[225] Moreover, he noted that in *City of Eastlake* the Court rejected in cursory fashion a due process challenge to a city charter amendment that required a majority of city residents, by citywide referendum, to ratify any zoning change approved by the city council.[226] Taken together, Sager suggested, that

> *Warth* and *City of Eastlake* can be understood as consistent products of the view that the legislative facilitation of the aggregate will of the members of a community is to predominate over virtually all other possible concerns in the land use planning process. On this view, the cases reflect the equation of the local zoning process with the joint exercise of the prerogatives of private ownership; the municipality is a club, which enjoys the mandatory and exclusive membership of its residents and landowners. And majority will—however, insular, unjust, or irrational—prevails.[227]

Convinced that the modern turn towards localism entrenches private power, critics of these modern localist cases look to central institutions to promote their more affirmative, substantive constitutional vision. They suggest that a positive constitutional vision requires courts to return to the

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[219] Briffault, *Our Localism: Part II*, *supra* note 2, at 411-17, 441.

[220] Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 775 (1992).

[221] 422 U.S. 490 (1975).

[222] 426 U.S. 668 (1976).

[223] *See generally* Sager, *supra* note 5.

[224] 422 U.S. at 504-07.

[225] Sager, *supra* note 5, at 1376-1402.

[226] *Id.* at 1402-24.

[227] *Id.* at 1425.

traditional assumption that local governments are merely the administrative appendages of their states, and thus to avoid the tendency to conceive of these local institutions as protected private arenas deserving of special judicial solicitude.

Given that local political boundary lines are in some sense arbitrary, critics suggest that federal judicial intervention to correct for local inaction in cases such as *Milliken* and *San Antonio School District* is relatively costless.[228] Moreover, critics contend, local suburbs are unlikely to fulfill their constitutional obligations in the absence of judicial prodding.[229] Thus, to the extent that the federal judiciary, or perhaps even Congress, is unable to perform the task, critics of the modern turn towards localism argue that state courts should fill in for these national institutions.[230]

Similarly, critics contend that the Court's apparent embrace of unrestrained local majoritarianism in *Warth* and *City of Eastlake* reflects the constitutional need for central supervision of local communities. In response, Sager offers a variety of solutions to these cases that appear to be premised on the assumption that local political processes will in fact be marked by unrestrained majoritarianism. As he explains, "Contemporary urban zoning decisions are quite likely to involve circumstances in which the unrestrained self-interest of a community's residents will be drastically inconsistent with tenets of reasonableness and fairness . . . ."[231] State courts

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[228] *See, e.g.*, TRIBE, *supra* note 215, at 1495 (noting with disapproval that the Court's holding in *Milliken* is "especially puzzling in the wake of the Court's repeated rulings that neighborhood school assignments enjoy no such sacred status as emblems of local autonomy and community control of public schools"); Ford, *supra* note 5, at 1875 (noting with disapproval that the Court's decision in *Milliken* is "puzzling unless one views cities not as mere agents of state power, but as autonomous entities"); *id.* at 1877 (concluding with respect to the Court's decision in *San Antonio School District* that "[i]f respect for local government were as important as the Court claimed, it would seem strange that the Court should so casually dismiss the fact that the boundaries that define these governments are arbitrary"); Williams, *supra* note 5, at 109 (criticizing both *Milliken* and *San Antonio School District* for purporting to defend local autonomy given that "the Supreme Court has long since accepted Dillon's principle that cities are mere subdivisions of the states").

[229] *See* Briffault, *Our Localism: Part II*, *supra* note 2, at 355 ("Suburbs benefit from the localist values of courts and legislatures that discourage modification of the highly satisfactory status quo and protect them from outside interference.").

[230] *See, e.g.*, Briffault, *Our Localism: Part I*, *supra* note 2, at 18-39 (examining state court jurisprudence in school financing cases and finding that although these courts split on the appropriate degree of local autonomy required, the majority reject any calls for reform); Sager, *supra* note 5, at 1242-63 (arguing for state judicial authority to enforce the margins of underenforced federal constitutional norms).

[231] Sager, *supra* note 5, at 1420.

should therefore provide the judicial review that federal courts are unwilling to apply.[232]

Even those scholars who profess to break from the federalist assumption that localism and constitutionalism are antithetical values often, in the end, embrace the basic federalist assumption that central institutions must control local ones. For example, soon after the Court ruled in the subsequently reversed *National League of Cities v. Usery* case,[233] Laurence Tribe offered a sympathetic reading of the Court's decision in which he purported to connect localism to a more affirmative, substantive vision of constitutionalism. He explained in his article that although the Court's use of localism generally had tended to constrict the scope of constitutional rights, there was no necessary connection between decentralization and constitutional minimalism. "[E]ven a Court motivated to cut back on federal vindication of personal claims," he noted, "might structure such cutbacks in ways reflecting an inchoate recognition that those claims are propelled by a justice too insistent to be denied."[234]

Tribe proceeded to argue that *National League of Cities* implicitly recognized an affirmative constitutional right to the receipt of basic welfare services from the government. He suggested that its rule protecting integral state and local functions from congressional interference could be defended only if it were understood to rest on a desire to protect the underlying individual constitutional right to the receipt of certain public services from the adverse impact of federal regulation on the provision of such services.[235]

Tribe concluded his putatively localist argument, however, by suggesting a reading of *National League of Cities* that would actually expand federal power. "Congress could alter the result of that decision by reenacting minimum wage regulations for public employees," he explained, "as one possible vindication of the rights of those employees to equality, liberty, and property."[236] For, he continued, "[o]nce we have recognized affirmative rights against government, Congress may claim that it is just such rights that it is vindicating for public employees by ensuring that they receive a minimum wage."[237]

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[232] *See id.* at 1422 (advocating that state courts become more involved in "restraining gross excesses of suburban exclusion").

[233] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[234] Tribe, *supra* note 7, at 1104.

[235] *See id.* at 1067-78.

[236] *Id.* at 1103.

[237] *Id.*

Frank Michelman's defense of the decision in *National League of Cities* follows a similar pattern.[238] It, too, professes to draw a connection between localism and constitutionalism. It concludes, however, with the suggestion that *National League of Cities* may serve as a strong precedent for a federal court challenge to a locality's failure to provide sufficient services.[239] Indeed, Michelman's suggestion premises the viability of such a claim on the contention that "self-interested local voter majorities" cannot be trusted with determining the proper amount of services that the Federal Constitution requires them to provide.[240] Thus, for Michelman, no less than for Tribe, an argument that begins as a defense of local autonomy ultimately dissolves in a flight of federalist fancy.

C. *Critiquing the Critique*

The standard critique of modern localism, at first glance, appears consistent with the general defense of state power that Marshall and Dillon had advanced. Like their nineteenth-century predecessors, the modern critics suggest that constitutionalism depends upon sober, central institutions (the federal or state judiciary or, perhaps, the national or state legislature) constraining the baleful influences of local majoritarian politics. They presume that local majorities are unlikely to govern in accord with constitutional obligations, and thus they perceive an implicit rejection of constitutionalism in the deference accorded local majorities in cases such as *Milliken*[241] and *San Antonio School District*.[242]

Considered more closely, however, one detects an important disjunction between the nineteenth-century attack on local power and the modern critique of the Court's recent respect for it. Both Marshall and Dillon sought to constrain local power because of their fear that local majorities were peculiarly likely to breach the public/private boundary.[243] By contrast, the modern critics are hostile to the defense of localism because they believe

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[238] *See* Michelman, *States' Rights and States' Roles*, *supra* note 7, at 1172-73 (discussing the responsibility inherent in the decision of states and municipalities to provide social services).

[239] *See id.* at 1181-91 (discussing potential constitutional challenges based on *National League of Cities*).

[240] *See id.* at 1190 (suggesting that reliance on the local electorate "creates . . . an obvious risk that the general social obligation will not be fairly or adequately weighed in the decisions that result").

[241] 418 U.S. 717 (1974).

[242] 411 U.S. 1 (1973); *see supra* notes 208-20 and accompanying text (discussing the Court's use of concepts of localism in these two cases).

[243] *See supra* notes 19-58 and accompanying text (describing Marshall and Dillon's views on localism).

that it tends to protect the private sphere from public influence. *Milliken* is problematic because it appears to insulate the private housing decisions of suburban dwellers from constitutional reach. *San Antonio School District* is troublesome because it renders private wealth disparities irrelevant to constitutional analysis. *Warth*[244] and *City of Eastlake*[245] are wrongly decided because they transform public institutions, as Sager puts it, into private homeowner clubs, immune from constitutional review.[246] Thus, these critics suggest, modern doctrine, through its invocation of localism, tends to favor private over public interests.

The substantive disjunction between these past and present critiques of localism may be traced to the substantive shift in our understanding of the constitutional boundary line between the public and the private in the post-*Lochner*, post-Warren Court era. Much of modern constitutional law has challenged the pre-*Lochner*, pre-Warren Court conception of the public/private distinction. It has suggested that constitutional violations are as likely to result from governmental inaction in the face of private discrimination as from majoritarian intrusions into the private realm. Public deference to private choices may impinge on positive constitutional rights to public protection. It is just such positive rights to public intervention—interdistrict public school busing in *Milliken*, equitable public education financing in *San Antonio School District*—that modern scholars implicitly seek to vindicate when they criticize the modern Court's turn toward localism.

The standard critique of the modern turn toward localism, however, has largely failed to examine the degree to which the affirmative constitutional vision that animates localism may comport with the structural conception (though not the substantive premises) of constitutionalism that underlay Cooley's nineteenth-century defense of localism. The standard critique draws upon the fear of local majoritarianism that underlay the nineteenth-century defense of state power in order to embrace a positive constitutional vision of a revived public sphere, eager to resist private power. It is Cooley's nineteenth-century defense of localism, rather than Dillon's defense of statism, however, that may be understood to accord better with the modern critique's embrace of the public sphere.

Cooley contended that private interests were likely to dominate central political institutions, and he therefore suggested that local political institutions were likely to play a critical role in securing a neutral public sphere

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[244] Warth v. Seldin, 422 U.S. 490 (1975).

[245] City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976).

[246] *See* Sager, *supra* note 5, at 1425 (concluding that *Warth* and *City of Eastlake* support the view of municipalities as clubs with residents and landowners as the exclusive members).

that would govern in accord with a constitutional norm of equality.[247] He argued that many constitutional problems were so intertwined with localized facts and community concerns that no centralized solution was likely to succeed. Local governments, however, would be sufficiently close to the concerns of their communities to discern a public from a private purpose that might elude the judicial eye. State attempts to interfere with the capacity of local governments to make determinations that depended on knowledge of, and engagement with, localized circumstances therefore threatened to undermine substantive constitutional limitations on public power. A reflexive judicial deference to assertions of central power, in other words, would deprive the courts of an important institutional contributor to constitutional analysis—the local communities that were engaged most directly with the particular circumstances that had occasioned the constitutional dispute.

Moreover, Cooley believed that a regime of constitutional enforcement that depended on central institutions, such as the judiciary, to enforce highly contestable constitutional restrictions on private power, would fail to endure over time.[248] He contended that such a regime would not infuse constitutionalism with the "living and breathing spirit" that was needed to secure constitutional freedom, and thus, it would serve as a poor means by which to prevent the capture of public politics by powerful private interests.[249] The temporary imposition of constitutional principles from on high would fail to succeed because those charged with carrying constitutional principles into practice were ultimately the people who lived in the very communities that would be responsible for abiding the constitutional command. Without their internalization of the underlying constitutional principle, the principle itself could never fully take root as an element of self-government.

Cooley also suggested that local governments would serve as the institutional mechanism by which the contours of constitutional principles themselves would become knowable, for it was through communal interactions at the local level that legal principles were given their definition. Cooley's belief that the local public could serve as an institutional means by which substantive constitutional norms could be given full expression suggests that the local sphere could serve as the crucible through which individual private lives would interact to forge public constitutional values. In this way, he

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[247] *See supra* note 92 and accompanying text (discussing the role of local governments).

[248] *See* JONES, *supra* note 11, at 150 (discussing Cooley's recognition of the limits of the role of the judiciary).

[249] People *ex rel.* Le Roy v. Hurlburt, 24 Mich. 44, 107 (1871) (Cooley, J., concurring).

suggested, localism not only comports with constitutionalism, but also creates it.[250]

Finally, Cooley's nineteenth-century defense of local constitutionalism calls into question the view that a modern defense of localism amounts to a defense of privatized, suburban power. As Cooley's lectures show, a local constitutionalist vision need not be rooted in a naively romantic attraction to homogeneous communities. A structural commitment to local constitutional enforcement, which takes constitutionalism to depend upon the active involvement of local communities in the practice of constitutional enforcement, may be quite compatible with a defense of urbanism. For, as we have seen, Cooley remained faithful to his localist vision despite the ethnic and economic heterogeneity of the emerging cities of the late nineteenth century. Indeed, Cooley's structural constitutional commitment to localism led him to seek urban reforms that would build up public life in order to ensure that cities could be governed in accord with the Jacksonian principles of equality to which he subscribed.[251]

It would appear, then, that Cooley's structural insights about the important extrajudicial role that local governments may play in promoting constitutionalism are quite relevant to the more positive constitutional vision that the modern critics of localism seek to promote. Federal judicial intervention is, after all, a notably problematic means of resolving the difficult problems of proof and remedy presented in, for example, *Milliken* and *San Antonio School District*. The constitutional claims that are at issue in such cases call upon federal judges to assume responsibility for a host of determinations that are normally entrusted to local officials. A deferential stance by central institutions may be premised, therefore, on an appropriate respect for the local public sphere (and its capacity to govern itself in accord with constitutional limitations) rather than a blind faith in the virtues of private decision making.[252]

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[250] *See supra* notes 80-84 and accompanying text (noting local governments' place in realizing constitutional values).

[251] *See supra* notes 181-201 and accompanying text (discussing Cooley's proposed reforms).

[252] Even scholars who are sympathetic to a more positive conception of constitutionalism are aware of the limits of judicial competence, *see, e.g.*, Bandes, *supra* note 15, at 2326-42 (discussing objections, such as lack of judicial capacity, to the judicial enforcement of affirmative constitutional duties), and these scholars have therefore emphasized the need to distinguish between judicially enforceable positive constitutional obligations and positive constitutional obligations that should be enforced through the efforts of political institutions.

> It may be that the Constitution contains some duties to provide basic necessities and ensure bodily survival which are not "perfectly enforceable in courts of law." To deny the existence of these duties based on current judicial reluctance or inability to enforce them is to risk permanently sacrificing their implementation.

To be sure, Cooley believed that an energized local public would protect against untoward public interventions in the private market.[253] His insight that an energized local public is a critical aspect of robust constitutionalism, however, clearly resonates with the positive constitutional vision of the modern critics of localism. For in the modern constitutional context, it is clear that an energized local public is necessary if the more ambitious aims of positive constitutionalism are to endure. A federal judicial decree that imposes affirmative obligations upon a community may not, of its own force, convince the community that it has constitutional obligations to provide protection. An injunction against state attempts to preclude local efforts to assume those obligations, by contrast, can ensure that local communities that have begun the process of transforming abstract constitutional norms into reality may continue in that most public of endeavors. And, once a local community has been assured the space to undertake such efforts, the possibility that other communities will be influenced to follow suit will only increase. There is, then, in Cooley's work, the beginnings of a vocabulary that would permit us to conceive of localism—and even the modern uses of localism—as something other than a cloak for distressing privatism.

Indeed, the conventional reading of modern doctrine's localist caste does tend to obscure a discernible public constitutional dimension—akin to that advanced in the nineteenth century by Cooley (and even Marshall)—in cases such as *Milliken*, *San Antonio School District*, and *Warth*.[254] The critique portrays such cases as if they were merely attempts to defend governmental inaction against the judicial enforcement of positive individual constitutional rights to public assistance. It thus reads such cases as resting upon an embrace of a minimalist public sphere that merely aggregates private preferences. The cases themselves, however, often describe local communities in terms reminiscent of those that Chief Justice Marshall used in *Dartmouth College*[255] to describe the civic institutions that would give life to his constitutional vision, or that Cooley used to describe the public city he imagined could be revived.

The localist cases often depict the local community, as Cooley depicted the reformed city, as a public entity, free from the hurly-burly of partisan

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See id. at 2342 (footnotes omitted). *See generally* Sager, *supra* note 15, at 767 (providing the classic statement of this position).

[253] *See supra* notes 83-84 and accompanying text.

[254] *See supra* notes 221-32 and accompanying text (discussing a critical analysis that suggests that *Warth*'s localism is a defense of private power).

[255] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 4 Wheat. 250 (1819); *see supra* notes 19-47 and accompanying text (detailing the arguments and reasoning of the *Dartmouth College* decision).

political life, intent only on considering the practical, mundane, and therefore neutral interests of the public as a whole. They also often emphasize the degree to which the peculiar nature of affirmative constitutional obligations requires a heightening of local public involvement. This rhetorical depiction at least suggests a reading of modern doctrine that takes local governments to be, in the present constitutional context, the important civic institutions through which constitutional values may be extrajudicially imparted to the people.

For example, the seemingly majoritarian logic that underlies *Milliken* is tempered by the Court's description of local school boards as deliberative, participatory entities, concerned with public interests distinct from the aggregated private preferences of the majority. As the Court put it,

> local autonomy has long been thought essential to maintenance of community concern and support for public schools and to quality of the educational process.... [L]ocal control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."[256]

If the rhetoric is to be believed, the local sphere is worthy of deference less because an abstract respect for majoritarian will demands it, or a respect for private suburban interests compels it, than because public educational excellence depends, at least in part, upon local community control. *San Antonio School District* sounds a similar theme in invoking Justice Brandeis's description of the states as "laborator[ies]" of democracy in emphasizing the importance of local educational autonomy.[257]

Even *City of Eastlake*, as Professor Michelman has shown, may be understood to rest on an optimistic vision of public life and a corresponding fear of private power.[258] He explains that *City of Eastlake* pointedly distinguished *Eubank v. Richmond*,[259] which struck down a provision conferring zoning power to "two-thirds of the owners along any block."[260] It did so, Professor Michelman notes, by explaining that "'[a] referendum . . . is far more than an expression of ambiguously founded neighborhood preference. It is *the city itself* legislating through its voters—an exercise by the voters of

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[256] Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

[257] 411 U.S. at 50 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting)).

[258] *See supra* notes 224-32 and accompanying text (discussing the Court's apparent embrace of local private interest in this case and in *Warth*).

[259] 226 U.S. 137 (1912).

[260] Frank Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 164 (1978).

their traditional right to [determine] . . . what serves the *public interest.*'"[261] The Court's "derogation of mere 'neighborhood preference,' in favor of something called a 'public interest' found by something called the 'city itself,' should certainly suggest that the Court was not in direct touch with the divinities of economic and public choice while ruminating on the *Eastlake* case."[262]

D. *Conclusion*

The mere fact that Cooley relied upon a defense of local governmental independence to promote a constitutional vision that would build up public political life, and thereby promote substantive constitutional values, does not mean that the Court's recent use of localism serves a similar end. It does mean that the Court's reliance upon localism is not necessarily inconsistent with a strong defense of constitutionalism or a healthy skepticism towards both private power and unrestrained majoritarianism. For, as we have seen, localism has a deeper historical connection to the promotion of both constitutionalism and a vital public urbanism than is sometimes supposed.

In addition, the mere fact that many of the Court's recent decisions contain an encouraging description of the deliberative character of the local political realm does not mean that federal judicial deference to local prerogatives promotes constitutionalism. There is the inescapable fact that in each of the cases thus far considered, the Court's holding had the consequence of protecting suburban inaction from constitutional challenge. As the next Part shows, however, cases such as *Milliken*, *San Antonio School District*, *Warth*, and *City of Eastlake* do not exhaust the Court's deference to local power. There is another series of cases that may be read to constitute a critical component of the Court's localist turn, and this series of cases cannot be reconciled so easily with the standard critique of modern localism.

VI. TRACES OF THE PUBLIC CITY IN MODERN DOCTRINE

A. *Introduction*

This Part uses Cooley's structural insights to examine a series of cases that are not generally understood to rest on a defense of localism—namely, *Washington v. Seattle School District No. 1*,[263] *Papasan v.*

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[261] *Id.* at 182 (quoting City of Eastlake v. Forest City Enters., 426 U.S. 668, 678 (1976) (citation omitted) (emphasis in Michelman)).

[262] *Id.*

[263] 458 U.S. 457 (1982).

Allain,[264] and *Romer v. Evans*.[265] Indeed, these cases are not commonly thought to rest on much of anything. They are jurisprudential enigmas that seem to lack any coherent relationship to constitutional doctrine as a whole, let alone to one another. If none is clearly explicable within the confines of conventional doctrinal assumptions, however, they may, taken together, be read to share surprising affinities with Cooley's structural suggestion that state-created local governments may promote constitutionalism in much the same manner that Marshall believed that state-created private colleges could.[266] Cooley's localist vocabulary reveals more, however, than an immanent logic to cases that might otherwise appear inexplicable. By using that vocabulary to consider the cases discussed below in conjunction with those that have been discussed already, we can begin to see that the critique that has been commonly lodged against the modern doctrinal turn towards localism is wholly inadequate.

The cases considered below are not described fairly as examples of how the judicial recognition of localism serves to entrench suburban power or to insulate the private sphere from public influence. They are better understood as examples of how the federal judiciary's recognition of "our localism,"[267] and its rejection of an absolutist vision of state power, serve to expand the authority of towns and cities to correct private discrimination and inequity and to impart constitutional values to the public. So read, these cases cast a new light on the use of localism in cases such as *Milliken*[268] and *San Antonio School District*.[269]

Considered as a whole, then, the turn towards localism in modern doctrine may be understood to reflect a deeper point about constitutional structure—namely, that the enforcement of positive constitutional rights to public assistance depends in important respects upon the active political engagement of local political institutions. For that reason, the current assumption that local governments are either creatures of their states without independent constitutional interests or private associations that are immune from constitutional obligations fails to capture the potential role that local governments may play as important, extrajudicial components of the federal constitutional structure.

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[264] 478 U.S. 265 (1986).

[265] 517 U.S. 620 (1996).

[266] *See supra* notes 19-47 and accompanying text (discussing Chief Justice Marshall's decision in *Trustees of Dartmouth College v. Woodward*).

[267] *See supra* note 2 and accompanying text (identifying and defining the use of "our localism" in Supreme Court opinions).

[268] Milliken v. Bradley, 418 U.S. 717 (1974).

[269] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *see supra* notes 208-20 and accompanying text (analyzing the court's concepts of localism in these two cases).

Admittedly, the readings of *Seattle School District*, *Papasan*, and *Romer* that are offered below do not demonstrate that the Court, in some overt manner, has embraced a kind of local constitutionalism. The cases are not self-consciously framed as defenses of local governmental autonomy from state control, and they are suffused with traditional, individual rights rhetoric. With Cooley's defense of localism in mind, however, it becomes possible to understand such cases as instances in which the Court has protected localism in order to promote constitutionalism.

Before proceeding directly to an examination of *Seattle School District*, *Papasan*, and *Romer*, it is important to lay a bit of groundwork in order to dispose of a looming objection that will no doubt occur to many readers. To the extent that Supreme Court doctrine has addressed the federal constitutional status of local governments, it has often described them as mere creatures of the states that have created them. A federal constitutional claim for local governmental independence from state control would therefore appear to be in direct tension with settled doctrine that establishes state law to be the sole determinant of the permissible scope of local political power. As the next Subpart reveals, however, in several cases the Court has cast doubt directly upon the validity of the state creature metaphor that is so commonly thought to define the state/local relationship for constitutional purposes. A brief review of the cases that have rejected the strongest form of the positivist position is necessary in order to make plausible the more ambitious localist readings of *Seattle School District*, *Papsan*, and *Romer* that are then offered.

B. Hunter v. Pittsburgh *and the Limits of the "State Creature" Metaphor*

Although the cases are legion that assert that state law defines the scope of local governmental power, none has done so more forcefully, or more famously, than *Hunter v. City of Pittsburgh*.[270] There, the Court employed language that, if taken seriously, would appear to foreclose any serious contention that the Federal Constitution protects a measure of local governmental freedom from state control, or that anything so fundamental as securing constitutional freedom depends upon the independence of our towns and cities. As the Court explained:

> The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, 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, conditionally or unconditionally, with or without the consent

[270] 207 U.S. 161 (1907).

> 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.[271]

Hunter's seemingly unlimited holding is, however, more confined than it appears. The *Hunter* Court considered a particular type of federal constitutional claim to local governmental independence, one that invited the majority to speak more broadly in describing the subordinate legal status of towns and cities than the federal constitutional structure warranted.[272] The federal constitutional claim before the Court arose from an annexation dispute.[273] The plaintiffs asserted a vested contractual right in a municipal charter. They contended that a state annexation law violated the Contract Clause of the Federal Constitution because it purported to alter retrospectively the terms of the charter.[274] The contention threatened to make the Contract Clause a provision that would transform the several states into the powerless overseers of constitutionally inviolable mini-republics, each free to enjoin any state attempt at supervision that could be termed an alteration of the foundational local charter.

Faced with such a dangerous claim, the Court went to great lengths to make clear that the Federal Constitution did not apply to a state's regulation of its municipal charters in the same manner that the Constitution applied to a state's regulation of its contracts with private parties.[275] To that end, the Court seized upon the image of local governments as creatures of state law and emphasized that, implicit in the state's act of creation, was the reservation of the unlimited future power to alter or modify the creature.[276] The *Hunter* Court employed sweeping descriptions of local governmental subordination to state control, therefore, to refute a particular kind of federal constitutional claim for local governmental independence—one that rested on a notion of vested state law property rights that would have dramatically limited a state's basic supervisory authority.

As a result, while *Hunter*'s positivist description of local governmental power was necessary to reject the Contract Clause claim in question, it was also necessarily incomplete. It ignored the degree to which local communities may provide the vital institutional context within which people live their public lives in a constitutional democracy. A local community is not simply

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[271] *Id.* at 178-79.
[272] *See id.* at 178.
[273] *See id.* at 174.
[274] *See id.* at 176.
[275] *See id.* at 179.
[276] *See id.* at 178.

a type of state administrative agency to be shaped at will to serve the need of the central state. It is, in a fundamental sense, the locus for those human interactions that comprise what we conceive to be democratic life in a constitutional system committed to self-government. So understood, local governments are necessarily something more than the mere creatures of state law, a point that the *Hunter* Court did not acknowledge.

If *Hunter* ignored a more social conception of local government, the modern Court clearly embraced it in several Warren Court-era decisions. For as much as *Hunter*'s sweeping contentions retain a hold on the legal imagination, the limits of that extreme, positivist conception of localism are evident in a set of cases in which the Court has expressly declined to give broad sanction to the state creature metaphor. These cases, *Marsh v. Alabama*,[277] *Gomillion v. Lightfoot*,[278] and *Avery v. Midland County*,[279] do not address the scope of local governmental power to provide extrajudicial constitutional protection in derogation of state law. They clearly demonstrate, however, that notwithstanding *Hunter*, state law alone does not define the legal nature of local governments.

Marsh reveals the Supreme Court's recognition that *Hunter*'s state creature metaphor is a partial one. *Marsh* concerned a federal constitutional challenge to the application of a state trespass law to unauthorized leafleting on the property of a private company town.[280] The State contended that the federal constitutional right to free expression did not entail a right to trespass on private property. The State contended that, as a private company, the "town" had no federal constitutional obligation to provide its residents with a free and open forum for the exchange of ideas, even though public towns and cities plainly would have been obliged by the Constitution to do so.[281] Thus, the State argued, a state law that in application criminalized the breach of a private company's rule against leafleting could not infringe upon the federal constitutional rights of company town residents.[282]

The Court rejected the State's contention. Justice Black suggested in his majority opinion that, embedded within the federal constitutional structure, lay a conception of what it means to be a "town" or a "city." Justice Black explained that

> [m]any people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and

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[277] 326 U.S. 501 (1946).
[278] 364 U.S. 339 (1960).
[279] 390 U.S. 474 (1968).
[280] *See* 326 U.S. at 502-05.
[281] *See id.* at 505.
[282] *See id.*

> country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[283]

Justice Frankfurter offered a separate concurrence that elaborated on the intuitions that underlay Justice Black's majority opinion.[284] He emphasized that state law alone could not determine whether a place should be conceptualized as a community responsible for the practice of constitutional self-government, or rather as private property immune from constitutional obligations. A determination of such fundamental constitutional importance could be answered only by consulting the substantive federal constitutional principles that underlay the First Amendment. Those principles, Justice Frankfurter argued, implicitly embraced a conception of local community life independent of state law.

> A company-owned town gives rise to a net-work of property relations. As to these, the judicial organ of a State has the final say. But a company-owned town is a town. In its community aspects it does not differ from other towns. These community aspects are decisive in adjusting the relations now before us .... Title to property as defined by State law controls property relations; it cannot control issues of civil liberties which arise precisely because a company town is a town as well as a congeries of property relations.[285]

Marsh reveals that, for purposes of federal constitutional law, towns and cities perform a role that, in a deep sense, operates independent of state law. The entity before the Court in *Marsh* was not a town or a city for purposes of state law—the State of Alabama had not created the company town in the way that it had created the cities of Birmingham or Mobile. The seemingly private company town nevertheless was considered a public town for purposes of the federal constitutional right to freedom of speech.[286] The Federal Constitution invested the community in question with duties independent of, indeed inconsistent with, the state law rules that purported to define the nature of the place in question. The substantive federal constitutional right in question—the right to the free exchange of ideas within a community—presupposed the existence of a local community within which such free exchanges could take place. State law lacked the power to alter

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[283] *Id.* at 508-09 (footnotes omitted).

[284] *See id.* at 510-11 (Frankfurter, J., concurring) (discussing the importance of community aspects of the town in finding that state law controls property relations, but not issues of civil liberties).

[285] *Id.*

[286] *See id.* at 508.

that prior constitutional presupposition through its own definition of what constituted a "town."[287]

The doctrinal rejection of the extreme positivist conception of local governmental power is also plain in the two post-*Marsh* cases: *Gomillion v. Lightfoot*[288] and *Avery v. Midland County*.[289] The Court decided *Gomillion* more than a half century after *Hunter v. City of Pittsburgh*,[290] at a time when, as a consequence of the civil rights movement, judicial concern about the arbitrary exercise of state power was at its zenith. *Gomillion* concerned Alabama's attempt to manipulate the boundaries of a municipality in a manner that effectively divested a town's black residents of their citizenship in that community. Faced with an argument that a state possessed the plenary power to define municipal boundaries—an argument that *Hunter* appeared to support—the Court limited the "unconfined dicta" that *Hunter* had espoused.[291]

Gomillion explained that the Court's seemingly broad prior holdings on the state/local relationship had merely established two relatively limited legal propositions. First, as cases such as *Hunter* made clear, "no constitutionally protected contractual obligation arises between a State and its subordinate governmental entities solely as a result of their relationship."[292] Second, although a state's restructuring of its internal organization might visit economic burdens upon some local communities, "the Due Process Clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a State's exercise of its political powers."[293]

Having narrowed *Hunter*'s rule, *Gomillion* explained that "the Court has never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences."[294] The Court concluded that the claim for state supremacy was particularly weak in the present context given the Fifteenth Amendment right to vote possessed by the ousted town residents. For although it was true that a state was "insulated from federal judicial review" when it exercised "power wholly within the domain of state interest,"[295] the Court hastened to add that "such insulation

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[287] *See id.* at 509.
[288] 364 U.S. 339 (1960).
[289] 390 U.S. 474 (1968).
[290] 207 U.S. 161 (1907).
[291] *See Gomillion*, 364 U.S. at 344.
[292] *Id.* at 343.
[293] *Id.*
[294] *Id.* at 344.
[295] *Id.* at 347.

is not carried over when state power is used as an instrument for circumventing a federally protected right."[296] Accordingly, the *Gomillion* Court invoked the Fifteenth Amendment to invalidate the racial gerrymandering that had resulted in the disenfranchisement of black town residents.[297]

In *Avery*, the Court built upon the antipositivist conception of localism apparent in *Marsh* and *Gomillion* in applying the one-person, one-vote rule of *Reynolds v. Sims*[298] to local governmental elections.[299] The Court first rejected the claim that local governments were somehow insulated from judicial review on the question presented.[300] Notwithstanding the decision of the Texas Supreme Court that had upheld the county's apportionment, the Court concluded that the internal electoral methods of local governments in Texas plainly implicated a protected federal constitutional right—the right to equal protection of the laws in voting.[301] The Court then explained that the failure of local governments to apportion their own internal political districts in accord with the *Reynolds* rule could not be excused by the constitutional apportionment of the state legislature.[302] In doing so, the Court emphasized the unique role that local governments play in facilitating the practice of self-government. In a passage that recalled Justice Black's statement in *Marsh*, the Court stated:

> 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 decisionmaking 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.[303]

Marsh, *Gomillion*, and *Avery* demonstrate that there are well-established constitutional limits to the "state creature" metaphor that *Hunter*

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[296] *Id.*

[297] *See id.* at 346 ("When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment.").

[298] 377 U.S. 533 (1964).

[299] *See* Avery v. Midland County, 390 U.S. 474, 476 (1968) (holding that the petitioner had a right to a vote of "substantially equal weight to the vote of every other resident").

[300] *See id.* at 480.

[301] *See id.* at 478-81 (finding that the Fourteenth Amendment prohibits local elections with voters in districts of disparate populations).

[302] *See id.* at 481.

[303] *Id.*

embraced. They establish that such basic individual constitutional rights as the right to free expression, equal protection of the laws, and the right to vote, may presuppose active engagement in local political life. As a result, the cases demonstrate the Court's unwillingness to insulate from judicial review state laws respecting local affairs when such laws trench on the federal constitutional rights of local residents.

These cases do not, however, support the further proposition that local governments are entitled to a degree of constitutional protection from an exercise of state power that would not interfere with a judicially enforceable individual constitutional right. Rather, the cases show that a state may not justify the infringement of an otherwise judicially enforceable individual constitutional right simply by asserting its power to control its local governments. They do not show that local governments themselves may justify a disregard of direct state law commands by claiming an interest in protecting individual constitutional rights that concededly could not be enforced by the federal judiciary directly against the locality itself.

Yet it is precisely this latter class of constitutional claims—claims by local governments against their states for the authority to provide extrajudicial constitutional protection to their residents—for which the cases considered in the next three Subparts may be read to provide support. Cases such as *Seattle School District*, *Papasan*, and *Romer* suggest that local governments do have an affirmative role to play in securing federal constitutional norms that lie beyond judicial protection. The cases may further suggest that judges should protect that affirmative role by limiting state attempts to interfere with local affairs in certain constitutional contexts. Thus, as we shall see, such cases may be understood as legitimate extensions of the same constitutional conception of local governments that led the Court in *Marsh*, *Gomillion*, and *Avery* to confine the more extreme statements in *Hunter* concerning the state creature metaphor.

C. Milliken v. Bradley *and* Seattle School District No. 1 v. Washington

As we have seen, in *Milliken v. Bradley*, the Supreme Court invoked localist principles to reverse a federal district court decree that had been designed to remedy racially segregative policies in the Detroit school system.[304] The decree required interdistrict busing and compelled the participation of numerous surrounding suburbs. The Court explained that, in providing interdistrict relief for an intradistrict violation, the district court

[304] Milliken v. Bradley, 418 U.S. 717, 741 (1974); *see also supra* text accompanying note 213 (noting that the Court's appeal to local educational control protected the racially stratified private sphere from court imposed remedial action).

erred in assuming that "school district lines are no more than arbitrary lines on a map drawn for political convenience."[305] In fact, the Court explained, "No single tradition in public education is more deeply rooted than local control over the operation of schools . . . ."[306]

Because Michigan provided "for a large measure of local control,"[307] the Court concluded that the district court's remedy would "alter the structure of public education in Michigan."[308] Critical questions regarding financing, school assignment, the political authority of local boards, and the authority to impose taxes, all of which the state had left to its local school districts, would suddenly be removed from local control.[309]

> [T]he District Court will become first, a *de facto* "legislative authority" to resolve these complex questions, and then the "school superintendent" for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.[310]

The Court therefore held that an interdistrict school desegregation remedy could be ordered only if there had been a "constitutional violation within one district that produces a significant segregative effect in another district."[311]

There would be reason to question whether *Milliken*'s professed respect for local control contained a public constitutional dimension if it served merely to constrict the power of federal courts to remedy constitutional wrongs. If *Milliken* is read in conjunction with the Court's subsequent decision in *Washington v. Seattle School District No. 1*,[312] however, the localist notes that *Milliken* sounded may be read to have a constitutionally generative force. For if the Court's recognition of localism in *Milliken* served to sanction suburban segregation, then the Court's recognition of localism in *Seattle School District* served to constrain a state's attempt to preclude urban efforts to foster integration. Taken together, *Milliken* and *Seattle School District* may be read to share important structural ties to Cooley's earlier constitutional vision that conceived of local governments as important, extrajudicial institutions for the promotion of constitutionalism.

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[305] *Milliken*, 418 U.S. at 741 (internal quotation omitted).

[306] *Id.*

[307] *Id.* at 742.

[308] *Id.* at 742-43.

[309] *See id.* at 743 (proposing questions that would arise in consolidating the 54 independent school districts historically administered as separate units).

[310] *Id.* at 743-44.

[311] *Id.* at 744-45.

[312] 458 U.S. 457 (1982).

In *Seattle School District*, several State of Washington school districts challenged Initiative 350, a statewide measure that precluded local school districts from effecting race-based school assignment plans intended to achieve racial balance. The school districts claimed that the state law violated the Equal Protection Clause, even though they acknowledged that the plans they wished to adopt were designed to remedy de facto, as opposed to de jure, segregation and thus could not have been ordered by a federal court.[313] The Court upheld the school districts' challenge principally by relying upon its earlier decision in *Hunter v. Erickson*.[314] In *Hunter*, the Court invalidated a local charter amendment that would have required a super majority, voting by referendum, to approve any antiracial discrimination ordinance before it could be enacted into law. The Court concluded that the alteration of the ordinary political process for such ordinances amounted to a racial classification that impermissibly burdened the ability of racial minorities to participate in the political process.[315] By parity of reasoning, the Court in *Seattle School District* explained that, in enacting Initiative 350, Washington had effectively made it more difficult for minority citizens than for all others to achieve legislation that inured to their benefit and that, under *Hunter*, such a restructuring constituted an impermissible racial classification.[316]

The Court's reliance on *Hunter*, however, is less than persuasive. *Hunter* concerned a restriction on the adoption of conventional antidiscrimination laws.[317] *Seattle School District* concerned a restriction on race-based busing, which, as the Court implicitly acknowledged, by the early 1980s had attracted many proponents and opponents on both sides of the racial divide.[318] For that reason alone, the analogy to *Hunter* was strained.

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[313] *See id.* at 459-65 (describing the history of Initiative 350).

[314] *See id.* at 470 (finding that the *Hunter* analysis is dispositive of the issue and that "Initiative 350 must fall because it does 'not attempt[] to allocate governmental power on the basis of any general principle.'" (alteration in original) (quoting Hunter v. Erickson, 393 U.S. 385, 395 (1969))).

[315] *See Hunter*, 393 U.S. at 391-93 (striking down a city charter amendment making it more difficult to enact an anti-race discrimination ordinance by limiting the authority of the city council).

[316] *See Seattle Sch. Dist.*, 458 U.S. at 470-75 (finding that "the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*" and stating that the initiative's "impact falls on the minority").

[317] *See Hunter*, 393 U.S. at 386 (deciding the constitutionality of an amendment to a city charter that prevented the city council from implementing any ordinance dealing with discrimination in housing without the consent of a majority of the city's voters).

[318] As the Court explained:

> It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy that does the sort of fair housing ordinance debated in *Hunter*.... But in the absence of a constitutional

Seattle School District also expressly avoided affirming the lower court's decision on the ground that Initiative 350's passage had been motivated by a racially discriminatory purpose.[319] As a result, the decision appeared to be without any clear foundation in prior case law. It could neither be easily assimilated to the political-process theory advanced in *Hunter*, nor could it be rooted in those cases that had struck down state laws passed with a racially discriminatory intent.[320]

Considered in light of Cooley's structural defense of local constitutionalism, and read in conjunction with the localist turn that *Milliken* took, *Seattle School District* may be understood to rest on a defense of local constitutionalism. The case suggests that, as a matter of federal constitutional structure, states may not preclude their local political institutions from promoting a norm of constitutional equality that lies beyond direct judicial enforcement. Such a reading takes *Milliken*'s respect for localism seriously. It reads that respect to rest on the premise that broad, local remedial discretion is a precondition for federal judicial restraint in the area of school desegregation.

Such a reading finds support in the school desegregation cases that preceded *Milliken* and *Seattle School District*. In *Cooper v. Aaron*,[321] for example, a case commonly thought to represent the high-water mark of modern notions of judicial supremacy, the Court was careful to cast its holding as a defense of a local attempt to give life to the Court's decision in *Brown v. Board of Education*.[322] The Court explained that the Little Rock School Board had voted for a remedial plan and had begun to adopt it. It was only when Governor Faubus prevented the school board from carrying out its own constitutional obligations that the school board sought relief from the

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violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest."

Seattle Sch. Dist., 458 U.S. at 473-74 (Harlan, J., concurring) (quoting *Hunter*, 393 U.S. at 395). The Court's obvious hedge as to whether even the minority community supported busing for integration further undermined the attempted analogy to *Hunter*.

[319] *See id.* at 486 n.30 ("We . . . note that singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation.").

[320] *See id.* at 484-87 (citing *Washington v. Davis*, 426 U.S. 229 (1976), for the proposition that the racially discriminatory impact of a law did not itself give rise to a constitutional violation, but explaining that *Washington* did not render *Hunter* a less relevant precedent).

[321] 358 U.S. 1 (1958).

[322] 347 U.S. 483 (1954).

legal responsibility to craft a detailed remedy.[323] It was a responsibility previously assumed by the school board, because the school board was in a better position than courts or other institutions to define its terms. The Court in *Cooper* recognized this state of affairs: "While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment."[324]

In his separate concurrence in *Cooper*, Justice Frankfurter elaborated on the localist underpinnings of the Court's holding.[325] He explained that the Court's decision demonstrated the vital role that local communities must play in transforming an abstract constitutional principle regarding the right to a desegregated public education into a felt reality. His description of the events in Little Rock makes *Cooper* a surprising case study in local constitutionalism. It identifies the critical role that local communities must play if constitutional principles are to have a penetrative character, and it suggests the importance of local commitment if constitutional rights to the equitable receipt of publicly provided services are to be realized.

> By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences. This process was under way in Little Rock.... The Little Rock School Board had embarked on an educational effort "to obtain public acceptance" of its plan. Thus the process of the community's accommodation to new demands of law upon it, the development of habits of acceptance of the right of colored children to the equal protection of the laws guaranteed by the Constitution, [amend. XIV,] had peacefully and promisingly begun.... All this was disrupted by the introduction of the state militia and by other obstructive measures taken by the State.... The State of Arkansas is thus responsible for disabling one of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty.[326]

The localist tilt to the Court's school desegregation jurisprudence extended beyond foundational cases like *Cooper*. In more direct precedents for the decisions in *Milliken* and *Seattle School District*, the Court had struggled to resolve how federal courts could enforce *Brown* against north-

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[323] *See Cooper*, 358 U.S. at 5-13 (describing the facts and circumstances underlying the school board's actions).

[324] *Id.* at 8.

[325] *See id.* at 20 (Frankfurter, J., concurring) (detailing the community efforts to support the local school board's desegregation plan).

[326] *Id.* at 20-22 (Frankfurter, J., concurring).

ern school districts without unduly intruding upon "the process of the community's accommodation to new demands of law upon it."[327] Northern school districts, like those that brought suit in *Seattle School District*, were often highly segregated. They usually had not, however, been subject to state laws that mandated segregation. Substantial questions therefore arose as to how federal courts could parse those segregative effects traceable to direct governmental action from those effects that were the result of numerous, seemingly private choices. Additional questions arose as to how remedies could be constructed for school segregation that appeared to be, in part, the consequence of "private" residential patterns.[328] These questions could not be elided by pointing to the discrimination that resulted from state-mandated racial segregation because northern school districts, unlike their southern counterparts, often did not operate under such laws.

The dilemma the Court faced was a serious one. Adopting too broad a view of the *Brown* mandate threatened to place federal courts in the position not only of running northern school boards but also of issuing decrees that would place entire northern communities under federal judicial supervision. Such a view threatened to enlist local school boards as the means through which federal judges would attempt to effect a major transformation of American society. At the same time, adopting too narrow a view of *Brown*'s mandate threatened to permit discredited distinctions between public action and "private" choices to immunize racial segregation in the North from constitutional review. These concerns about "judicial role"—concerns that flowed from the "positive" character of the underlying constitutional right to a desegregated public education—led the Court to adopt the distinction between judicially unremediable "de facto" segregation and judicially remediable "de jure" segregation that framed the constitutional question in *Seattle School District*.[329]

The Court did not easily arrive at the distinction between de jure and de facto segregation that has become the defining mark of its post-*Brown* desegregation jurisprudence. A critical early test of the eventual compromise that led to the adoption of this distinction came in *Keyes v. School District No. 1, Denver, Colorado*,[330] the first northern school desegregation case to reach the Court. Significantly, in a lengthy separate concurrence in *Keyes*,

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[327] *Id.* at 20 (Frankfurter, J., concurring).

[328] *See generally* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL JR. 289-331 (1994) (summarizing these cases and the legal dilemmas presented); TRIBE, *supra* note 215, at 1493-501 (surveying the relevant cases).

[329] *See generally* JEFFRIES, *supra* note 328, at 289-331; TRIBE, *supra* note 215, at 1493-501.

[330] 413 U.S. 189, 213 (1973).

Justice Powell, who later dissented in *Seattle School District*, argued that notwithstanding the vexing problems of proof and remedy that would surely arise, *Brown* and its progeny applied with full force to cases that involved northern school districts.[331] He rejected the Court's distinction between de facto and de jure segregation because he believed that no clear line could be drawn between the two. Moreover, he contended, drawing such a line would subject southern school districts alone to federal judicial supervision.[332]

Justice Powell further concluded, however, that fundamentally similar evidentiary and remedial difficulties arose in school desegregation litigation in both the South and the North.[333] He therefore counseled federal courts to be wary of substituting their own authority for that of local school boards, even when issuing decrees to correct de jure segregation in the South.[334] On this view, the problem that the Court faced in giving life to *Brown* stemmed ultimately from the federal judiciary's institutional limitations, limitations that hindered its remedial capacities in all desegregation cases. Thus, the seemingly unique problem posed by segregation in the North could not be legitimately resolved by drawing a formal constitutional distinction between public and private segregative action.

Justice Powell did not conceive of his plea for federal judicial restraint as an abandonment of constitutionalism. He assumed that local school boards would be responsible for correcting those constitutional violations that courts could not themselves discern. His plea therefore implicitly assumed that local school boards that attempted to cure de facto segregation were fulfilling a constitutional obligation and not simply carrying out a "discretionary" policy. Indeed, Justice Powell explained in *Keyes* that,

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[331] *See id.* at 219-23 (Powell, J., concurring in part and dissenting in part) (arguing that the Court should "formulate constitutional principles of national rather than merely regional application" with respect to desegregation).

[332] *See id.* at 218-36 (Powell, J., concurring in part and dissenting in part) (suggesting in lieu of the de facto/de jure distinction that "where segregated public schools exist . . . to a substantial degree, there is a prima facie case that the . . . public authorities . . . are sufficiently responsible to warrant imposing upon them a . . . burden to demonstrate they nevertheless are operating a genuinely integrated school system").

[333] *See id.* at 252-53 (Powell, J., concurring in part and dissenting in part) (noting that there is . . . not a school district in the United States, with any significant minority school population, in which the school authorities—in one way or the other—have not contributed in some measure to the degree of segregation which still prevails").

[334] *See id.* at 246 (Powell, J., concurring in part and dissenting in part) ("I do believe that this Court should be wary of compelling in the name of constitutional law what may seem to many a dissolution in the traditional, more personal fabric of their public schools."); *see also id.* at 253 ("Communities deserve the freedom and the incentive to turn their attention and energies to this goal of quality education, free from protracted and debilitating battles over court-ordered student transportation.").

while the constitutional right to a desegregated education could not be vindicated by federal judicial decree alone, "[n]othing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience."[335] The use of the word "minimal" suggests that he believed that there was a constitutional dimension to extrajudicial local efforts to desegregate. Even if federal courts might be ill-suited to mandate certain desegregation policies, he explained, "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation."[336]

By the time *Seattle School District* came to the Court, Justice Powell had abandoned his earlier suggestion that no meaningful constitutional distinction could be drawn between de facto and de jure racial segregation in public schooling. He cast his lot with Chief Justice Rehnquist, who had from the beginning perceived that adherence to a line that distinguished between de facto and de jure segregation would serve as a powerful means to circumscribe the federal judiciary's power to assume supervisory authority over local school boards.[337] Nevertheless, *Seattle School District* may paradoxically be read to draw upon the earlier analysis that the decision's chief dissenter, Justice Powell, had supplied in his concurrence in *Keyes*.

Justice Powell had advocated in *Keyes*, and the Court had later adopted in *Milliken*, a posture of judicial restraint that arguably had been premised on the precondition that local school boards "would be free" to resolve the de facto/de jure conundrum that courts were ill equipped to untangle.[338] In *Seattle School District*, however, the State of Washington had intervened to ensure that local school boards would not be free to effect remedies that they thought proper for the de facto segregation that persisted within their communities.[339] The state's intervention could be understood, therefore, to have posed a severe constitutional concern. For even if the "remedies" at issue were not ones that federal courts could have imposed themselves, the state's intervention had restricted the remedial power of the very political institutions to which *Milliken* had instructed the federal courts to defer. The state had, in other words, arguably cut short the process by which the only

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[335] *Id.* at 242 (Powell, J., concurring in part and dissenting in part).

[336] *Id.*

[337] *See* JEFFRIES, *supra* note 328, at 289-331 (detailing Chief Justice Rehnquist's view that the de facto/de jure line would check federal judicial power).

[338] *See Keyes*, 413 U.S. at 242 (Powell, J., concurring in part and dissenting in part).

[339] *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 461-63 (1982) (discussing WASH. REV. CODE § 28A.26.010 (1981), which was "designed to terminate the use of mandatory busing for purposes of racial integration"); *see also supra* note 12 and accompanying text.

institutions capable of the task—local school boards—would implement a constitutional, albeit judicially unenforceable, principle of equality.

The Court's opinion in *Seattle School District* contains language that is consistent with the local constitutionalist reading that is suggested here. At the outset of the opinion, the Court explained that it had been called upon to decide whether "an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State."[340] It then expressly acknowledged the important role that school boards might play in enforcing constitutional rights by awarding them attorney's fees.

> [N]o matter what the source of their funds, school boards have limited budgets, and allowing them fees encourage[s] compliance with and enforcement of the civil rights laws. While appellants suggest that it is incongruous for a state to pay attorney's fees to one of its school boards, it seems no less incongruous that a local school board would feel the need to sue the State for a violation of the Fourteenth Amendment.[341]

The conclusion is difficult to accept if *Seattle School District* is read purely as an individual rights case. It is hard to see how the school boards would have standing to assert the individual rights to participation of minority citizens. Minority citizens, after all, did not possess rights to receive a desegregated public school education. The Court's award is easily explained, however, if the case is understood to recognize a local community's right to desegregate its schools in accord with a judicially noncognizable, but constitutionally rooted obligation. Such a "right," would, of course, be intelligible only if one granted the connection between localism and constitutionalism.

Moreover, the Court suggested that the vice of the state law inhered not simply in the burdens it placed on minority voters, but also in the damage done to local communities. The student-assignment plans had been carefully crafted to unite diverse populations within local communities, and "ha[d] functioned for years without creating undue controversy."[342] As in *Cooper*, the plans inspired public opposition only when the state intervened and subjected those plans to statewide scrutiny.[343] State intervention could not be justified as an antidote to faction; instead, state intervention had increased faction.

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[340] *Seattle Sch. Dist.*, 458 U.S. at 459.

[341] *Id.* at 487-88 n.31 (citation and internal quotations omitted).

[342] *Id.* at 484 n.27.

[343] *See id.* at 461-64 (discussing the statewide initiative placed on Washington's ballot for the 1978 general election).

Nor could it be argued that the State had intervened to enforce a constitutional interest of its own—namely, to bar race-based busing. Although Justice Powell suggested that such an interest might justify the State's action,[344] the Court noted that the State of Washington had not proffered such an interest.[345] It had simply advanced a desire to promote neighborhood schooling.[346] It was an ironic interest for the State to assert, however, in light of the local school boards' conclusions that in their communities, neighborhood schooling would tend only to entrench segregation. Indeed, the Court noted, local school boards in Washington had long possessed the general "power to determine what programs would most appropriately fill a school district's educational needs."[347] The determination "whether to provide an integrated learning environment rather than a system of neighborhood schools" was precisely the type of question that a local school board, close to the needs of its community, was well positioned to resolve in a neutral manner.[348]

The Court also noted that the fact that Initiative 350 exempted "most nonracial reasons for assigning students away from their neighborhood schools"[349] belied the State's asserted general interest in neighborhood schools. The citizens of Washington had not chosen to "reserve[] to state officials the right to make all decisions in the areas of education and student assignment."[350] They had instead invested their local political institutions with the general authority to make the various determinations, and weigh the competing concerns, that would underlie any decision to use race in making school assignment decisions. In this respect, the opinion may be read to suggest that the State was in a position akin to the federal district court in *Milliken*—removed from the practical and necessarily specific concerns of the local communities, whose authority to effect a remedy would be supplanted by the State's or the court's intervention.

Finally, *Seattle School District* noted that *Milliken* had constricted federal court remedial power out of respect for a long-standing tradition of lo-

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[344] *See id.* at 491 n.6 (Powell, J., dissenting) ("'Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. . . . [W]ith no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.'" (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 28 (1971))).

[345] *See id.* at 472 n.15 ("Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation.").

[346] *See id.* at 479-80 (discussing the motivation and effect of Initiative 350).

[347] *Id.* at 479.

[348] *Id.* at 480.

[349] *Id.* at 474.

[350] *Id.* at 487.

cal governmental control over public education. The logic of *Milliken*, the Court explained, strongly supported the school boards' claims. "If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they make segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's *desegregative* policy is at issue."[351] School boards, the Court implied, must have at least as much authority to fulfill *Brown*'s mandate as they did to resist it. By interpreting *Milliken* in this manner, the Court may be read to suggest that there is a distinction of constitutional significance between states and their local governments.

The local constitutionalist reading of *Seattle School District* finds further support in the Court's decision of the same day in *Crawford v. Board of Education*,[352] which rejected an equal protection challenge to a seemingly similar California initiative. The California measure amended the state constitution to prevent state courts from issuing decrees to remedy de facto school segregation. The plaintiffs, relying on *Hunter*, claimed that the California law, like the initiative at issue in *Seattle School District*, constituted an impermissible racial classification because it singled out, on a racial basis, one type of judicial remedy for adverse treatment.[353] The Court, in an opinion authored by Justice Powell, rejected the plaintiffs' claim.[354]

The *Crawford* opinion distinguished *Seattle School District* on the ground that the California initiative amounted to a "mere repeal"[355] of an earlier judicial interpretation of the California Constitution. That earlier interpretation had authorized state courts to provide broader desegregation remedies than the Federal Constitution required; the state was now simply "repealing" that prior extension of a constitutional principle.[356] The distinction was weak. The measure at issue in *Seattle School District* could also have been described as a "mere repeal." The initiative had arguably "repealed" the prior authority that the State had granted to its political sub-

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[351] *Id.* at 482.

[352] 458 U.S. 527, 545 (1982) (holding that an amendment to a state constitution that barred state courts from ordering pupil assignment or transportation to remedy social segregation except where a federal court would be permitted to do so under federal law did not violate the Equal Protection Clause of the Fourteenth Amendment).

[353] *See id.* at 536 ("[The plaintiffs] argue that Proposition I [the state constitutional amendment] employs an 'explicit racial classification' and imposes a 'race-specific' burden on minorities seeking to vindicate state-created rights.").

[354] *See id.* at 535 ("We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment.").

[355] *Id.* at 539.

[356] *See id.* at 536-42 ("In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.").

divisions to provide remedies for de facto desegregation.[357] *Crawford* did not explain why the Federal Constitution should permit a state to "repeal" the remedial discretion of state courts, but not of local school boards.

If *Seattle School District* is read as an exemplar of local constitutionalism, however, the distinction that *Crawford* offered acquires force. The *Crawford* court was in no position to question a state's determination that expansive state court remedial power would have ill effects on local democracy. *Milliken* had been predicated on the similar concern that expansive *federal court* remedial power would infringe upon an important tradition of local educational autonomy.[358] The measure at issue in *Seattle School District* was therefore consistent with the decision in *Milliken* because *Milliken* pointed in favor of the protection of local school board discretion, not against it. By contrast, a decision striking down a state's determination that such central judicial interference with local educational processes was intolerable would appear to depart from both *Milliken* and *Seattle School District*. *Crawford*, then, simply followed both *Milliken* and *Seattle School District* in preserving local discretion to remedy segregation.

Not surprisingly, Justice Blackmun, the author of *Seattle School District*, concurred in *Crawford* but wrote separately to highlight the distinction between the *political* institutions that had been disabled by the state in *Seattle School District* and the *judicial* institution that had been disabled in *Crawford*. "I cannot conclude that the repeal of a state-created right—or, analogously, the removal of the judiciary's ability to enforce that right—'curtail[s] the operation of *those political processes ordinarily to be relied upon to protect minorities*.'"[359]

It is interesting to note that in the only school desegregation case since *Seattle School District* where the Court has ruled for a plaintiff, the Court used localism to supplement, rather than to constrain, federal judicial power. That case, *Missouri v. Jenkins I*,[360] concerned the propriety of a district court's decision to levy a tax in order to fund its desegregation decree.

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[357] *See* Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 477-80 (1982) (describing how the State had given decision-making authority in most educational matters to local school boards, before removing part of that authority with the measure at issue).

[358] *See* Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) (observing that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," and concluding that the "remedy approved by the [district and circuit] courts could disrupt and alter the structure of public education in Michigan").

[359] *Crawford*, 458 U.S. at 547 (Blackmun, J., concurring) (emphasis added) (additional citation and internal quotations omitted) (quoting *Seattle Sch. Dist.*, 458 U.S. at 486).

[360] 495 U.S. 33 (1990) (striking down a district court's order that imposed a tax to fund a court-ordered desegregation plan and enjoining the operation of a state law that would limit the taxing authority of a locality in frustration of remedying a constitutional wrong).

Though nominally a defendant, the local school board had joined with the plaintiffs in seeking the tax in order to fund a remedial desegregation plan to which it had agreed.[361]

The Court concluded that Article III prevented a federal court from imposing such a tax in its own right.[362] It went on to hold, however, that a federal court possessed the power to remedy a constitutional wrong by enjoining a state law that would have precluded a municipality from imposing a tax.[363] The Court emphasized that its constitutional holding was rooted in a respect for local discretion.

> [O]ne of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions. Especially is this true where, as here, those institutions are ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves.[364]

Indeed, the Court noted that there was a substantial distinction between a court exercising a taxing power on its own, and a court authorizing a local government to levy such a tax in derogation of state law. "Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."[365]

The point is not that the Court "intended" to embrace local constitutionalism in deciding *Seattle School District.* Rather, the decision may be read to suggest that the criticisms that have been applied to *Milliken* are less sali-

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[361] *See* Missouri v. Jenkins II, 515 U.S. 70, 74-80 (1995) (reviewing the history of the litigation).

[362] *See Jenkins I,* 495 U.S. at 50 ("[W]e agree with the State that the tax increase contravened the principles of comity that must govern the exercise of the District Court's equitable discretion in this area.").

[363] *See id.* at 52-58 ("It is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation."). Interestingly, for this holding the Court relied on the series of nineteenth-century municipal bond cases that had drawn on Marshall's decision in *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518, 710, 4 Wheat. 250, 336 (1819), to expand the scope of local power beyond state law limits. *See infra* note 47 and accompanying text. Cooley, of course, objected to these decisions on substantive grounds because of the protection they afforded private corporate interests. Clearly, however, the appearance of these nineteenth-century bonding cases in a modern decision regarding school desegregation demonstrates the potential for a structural connection between localism and constitutionalism that, paradoxically, owes its origins to the laissez-faire constitutional context in which Cooley operated and yet may facilitate the development of a positive constitutionalism within current doctrine.

[364] *Jenkins I,* 495 U.S. at 51.

[365] *Id.*

ent than they appear. There *is* an important constitutional value in permitting local political institutions to operate free from strict central enforcement. If respect for such a value appears costly in a case such as *Milliken*, the constitutional recognition of localism may inspire local public action that will give constitutional enforcement a depth that it would otherwise lack. It may also justify judicial intervention to preclude state efforts to block such local remedial efforts, even though the efforts are not themselves constitutionally required.

Cooley had suggested that a constitutional norm of equality could only be fully protected if local communities were freed from state interference in their attempts to govern impartially.[366] The norm could take shape, he suggested, only through the institutional process of local governmental decision making. Such was the case in *Seattle School District*. Chief Justice Marshall had held in *Dartmouth College* that the Contract Clause forbade the state from retroactively intruding upon the educational decisions of the private institutions that it had authorized to provide "public" education.[367] So, too, *Seattle School District* may be read to have employed the Equal Protection Clause to hold Washington to the "elaborate" institutional structure that authorized local governments to make critical educational decisions, when those decisions bore on the right to a desegregated public educational experience.

D. San Antonio Independent School District v. Rodriguez *and* Papasan v. Allain

The affirmative role that localism may play in the promotion of a positive constitutionalism may be discerned outside the unique context of the Court's school desegregation jurisprudence. It may be discerned as well in the Court's decisions concerning constitutional challenges to inequities in school financing.

Under the school financing system at issue in *San Antonio Independent School District v. Rodriguez*,[368] Texas made a substantial financial contribution to a general public school fund. Local school districts were then permitted to supplement that state contribution through the imposition of a tax on property within their jurisdictions. Due to inequalities among local

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[366] *See supra* notes 81-84 and accompanying text (discussing Cooley's belief that the protection of local governmental independence would further constitutional equality and freedom).

[367] *See* 17 U.S. at 652-54, 4 Wheat. at 310-12; *supra* note 20 and accompanying text.

[368] 411 U.S. 1 (1973) (reversing the decision of the district court, and finding that Texas's system of funding public education, which resulted in inequitable per pupil expenditures, did not violate the Equal Protection Clause).

tax bases, however, a poor district would have to tax property at a far steeper rate to supplement the state contribution at a level commensurate with a wealthy district.[369] In *San Antonio School District*, a group of schoolchildren residing in districts with low property bases challenged the state system on constitutional grounds. They argued that the state system had resulted in impermissibly wide disparities in per pupil expenditures and thus inequitably burdened their fundamental constitutional right to a minimally adequate public education.[370]

The Court was not impressed with the contention that the state system unlawfully burdened whatever right to public education the Federal Constitution might secure. It explained that the disparities were the consequence of a state program of public education that depended upon local decision making, and that the State had appropriately attempted to provide for local educational control in order to ensure that "[e]ach locality is free to tailor local programs to local needs."[371] Moreover, the Court explained, "[p]luralism . . . affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence."[372] Indeed, the Court concluded, the State had a substantial interest in preserving local decision-making autonomy in light of the centralizing tendencies of modern life.[373]

As Lawrence Sager has explained, it is difficult to understand the concerns identified by the Court in *San Antonio School District* "as speaking even indirectly to the scope or content of the concept of equal protection."[374] He contends that instead "they are claims which address the question of to what limits the federal judiciary should reach in interpreting and enforcing that concept. They are, in other words, arguments which support the underenforcement of the equal protection clause by the federal courts."[375] Given that the Court premised its holding on a "frankly institutional explanation[] for setting particular limits to a federal judicial construct,"[376] it is fair to consider whether *San Antonio School District* might be read to support the protection of local efforts to enforce that norm of equality from state interference. For when a state seeks to preclude such local

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[369] *See id.* at 12-13 (contrasting the tax rates for two San Antonio school districts).

[370] *See id.* at 18. The local school board whose name the case bears was originally sued as a defendant. It subsequently joined the schoolchildren as a plaintiff in the case and filed an amicus curiae brief in the Supreme Court in support of their position. *See id.* at 4 n.2 (noting the San Antonio Independent School District's support for the plaintiffs' complaint).

[371] *Id.* at 50.

[372] *Id.*

[373] *See id.* at 49 (describing the "merit of local control").

[374] Sager, *supra* note 16, at 1218.

[375] *Id.*

[376] *Id.* at 1219.

efforts, the institutional concerns that the Court relied upon in *San Antonio School District* as a basis for federal judicial restraint are arguably much diminished.

Significantly, the *San Antonio School District* dissent challenged the majority on localist grounds. It attempted to recast the case as one in which the State had acted to preclude local efforts to provide poor schoolchildren with equal protection. It contended that the majority's defense of localism was deeply ironic given the plaintiffs' contention that the state system effectively precluded poor school districts from demonstrating the intensity of their commitment to public education in financial terms.[377] State law alone determined the amount of money that local communities could spend on education, because state law required local communities to use only property taxes to finance public education. The dissenters pointed out that if the state system were understood to have precluded local communities from providing the full support they wished to provide, then the plaintiffs' claims appeared much stronger than the Court had allowed.

The majority was not insensitive to the possibility that principles of local autonomy actually undermined the state's justification for the school financing system. Accordingly, the Court devoted much of its opinion to a demonstration that judicial deference to localism served to protect the very right to an adequate public education that the plaintiffs claimed. The Court emphasized, for example, that the state system for financing public education permitted local school districts to supplement the state fund.[378] No one had argued that the state's contribution was itself so minimal as to be substantively unconstitutional if not augmented by local entities. Moreover, no school district had complained that the state law constraints placed on its taxing authority had prohibited the district from adequately serving its students.[379] Thus, the Court contended, the state financing system should be understood as a state effort to facilitate, rather than to limit, local efforts to enhance the educational interests of their residents because it authorized lo-

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[377] *See San Antonio Sch. Dist.*, 411 U.S. at 68 (White, J., dissenting).

> If the State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues.

Id.

[378] *See id.* at 49 (explaining that the state system "assur[es] a basic education for every child in the State" and "permits and encourages a large measure of participation in and control of each district's schools at the local level").

[379] *See id.* at 50 n.107 ("Appellees do not claim that the ceiling presently bars desired tax increases in Edgewood or in any other Texas district.").

cal school districts to make additional financial contributions to supplement the state's funds.

The Court's apparent embrace in *San Antonio School District* of the connection between localism and constitutionalism posited by Cooley is further evidenced by the analogy that the Court drew to *Katzenbach v. Morgan*.[380] In *Katzenbach*, the Court rejected the claim that Congress had violated the Equal Protection Clause by extending voter protection rights to non-English speaking people who completed the sixth grade in Puerto Rico and not to those educated in schools beyond the territorial limits of the United States.[381] The Court explained in *Katzenbach* that the challenge had to be rejected because it was "presented only as a limitation on a reform measure aimed at eliminating an existing barrier to the exercise of the franchise."[382] Similarly, in *San Antonio School District*, the Court concluded that the claimed violation inhered only in Texas's failure to extend a measure—a provision that authorized local governments to supplement the state fund—that was designed to protect individual rights.[383] In this way, the Court suggested, a local government's action in supplementing the state fund was like Congress's action in *Katzenbach*—a reformative effort to expand legal rights.[384]

In sum, although *San Antonio School District*'s invocation of localism served to limit federal court power, the Court did not rely on a simple defense of local majoritarianism or a privatized depiction of the local public realm. It depicted the practice of local self-government less as a barrier to educational opportunity than as a means through which the constitutional (though, perhaps, judicially unenforceable) right to an adequate education could be obtained. Through the operation of local political processes, communities would devise their own solutions to the difficult constitutional task of ensuring equal protection. Indeed, the Court explained that its decision should not

> be viewed as placing [a] judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax.... But the ultimate solutions must come

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[380] 384 U.S. 641 (1966).

[381] *See id.* at 656.

[382] *Id.* at 657.

[383] *See San Antonio Sch. Dist.*, 411 U.S. at 38 (distinguishing "prior cases involv[ing] legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty").

[384] *See id.* at 39 ("The Texas system of school financing is not unlike the federal legislation involved in *Katzenbach* in this regard.").

> from the lawmakers and from the democratic pressures of those who elect them.[385]

Given the justification *San Antonio School District* supplied for its holding, the decision may be read to suggest that a challenge to a state's direct attempt to inequitably burden a local government's ability to educate its citizens might fare differently. Such a challenge would not require federal courts to define some federally mandated level of public funding. Furthermore, it would not be subject to the localist defense that had been lodged against the challenge to the method that Texas had selected for permitting local communities to supplement state educational funding. A challenge of this type would only require the Court to impose a negative constraint upon state power in order to free local communities to devise solutions of their own that would promote equity in public education.

In *Papasan v. Allain*,[386] Justice White, who had dissented in *San Antonio School District*, authored an opinion for the Court that exploited the opening created by the localist strains in *San Antonio School District*.[387] The specific dispute in *Papasan* concerned the distribution of public school lands that the United States had granted Mississippi in the mid-nineteenth century. Pursuant to state law, Mississippi held the lands in trust for the benefit of public schools. In distributing the proceeds from the sale of these lands, the State provided substantially greater sums to certain districts. The disadvantaged school districts brought suit, claiming that the resulting funding disparities deprived their schoolchildren of an equal right to a minimally adequate education.[388]

Given the nature of the claim at issue in *Papasan*, the case could not be framed, in the fashion of *San Antonio School District*, as simply a dispute between individuals and their government. Moreover, because the school districts brought the constitutional challenge, principles of local autonomy could not easily be advanced on behalf of the state's distribution scheme. Drawing on the localist character of the school districts' constitutional claim, Justice White contended that *Papasan* differed critically from *San Antonio School District*. In *San Antonio School District*, "the differential financing available to school districts was traceable to school district funds available from local real estate taxation, not to a state decision to divide

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[385] *Id.* at 58-59.

[386] 478 U.S. 265 (1986).

[387] *See id.* at 287 (arguing that *San Antonio School District* was not controlling because in that case state resources were not divided unequally among school districts).

[388] *See id.* at 274 (stating the petitioners' central argument that "the disparity between the financial support available to Chickasaw Cession schools and other schools in the State" deprives Chickasaw Cession schoolchildren of equal protection of the laws).

state resources unequally among school districts."[389] For that reason, he explained, *San Antonio School District*, "which rested on the fact that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding," did not suffice to "settle the constitutionality of the disparities alleged in this case."[390] Thus, although Justice White followed *San Antonio School District* in declining to apply strict scrutiny, he upheld the school districts' constitutional challenge and remanded it for an assessment of the rationale for the State's concededly inequitable distribution to local school districts.[391]

Papasan demonstrates that the defense of localism relied upon in *San Antonio School District* was potentially both a shield and a sword. If a commitment to local self-government served to justify the State's financing plan in Texas, it cast suspicion on the inequitable distribution scheme in Mississippi. Moreover, *San Antonio School District*'s deference to local autonomy may be understood to be rooted less in an acceptance of private inequity than in a faith in the positive role that local school boards could play in giving life to a constitutional right to equitable public educational opportunities. Indeed, just as Cooley suggested that judges could enforce substantive constitutional limitations by protecting local communities from state interference,[392] Justice White suggested in *Papasan* that the Constitution placed limits on a state's authority to burden a local community's effort to provide for the education of its residents.

E. Romer v. Evans

The Supreme Court's recent decision in *Romer v. Evans*[393] reveals that the connection between localism and an affirmative constitutionalism is not a relic of a bygone era in constitutional law. The decision concerned an equal protection challenge to Amendment 2, a Colorado constitutional referendum that prevented the State's municipalities (and the state legislature) from enacting measures designed to protect gays and lesbians from private discrimination.[394] *Romer* is a notably obscure opinion, and it is therefore

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[389] *Id.* at 288.

[390] *Id.*

[391] *Id.* at 289-92.

[392] *See supra* Parts III.B-C (discussing the *Township Board of Salem* and *Hurlbut* decisions).

[393] 517 U.S. 620 (1996).

[394] The referendum, known as Amendment 2, did not stop with a ban on the enactment of antidiscrimination ordinances. As the Court explained, "[i]t prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall refer to as homosexual persons or gays and lesbians." *Id.* at 624.

difficult to attribute a single rationale to it.[395] *Romer* may be understood, however, to rest upon the same structural connection between localism and constitutionalism that Cooley drew in a different constitutional context more than a century ago.[396]

The Court began its brief opinion by noting that Amendment 2 was passed in response to the decision by several municipalities to enact ordinances that barred private discrimination on the basis of sexual orientation.[397] It further noted that the plaintiffs were not limited to "homosexual persons"[398] who contended that Amendment 2 "would subject them to immediate and substantial risk of discrimination on the basis of their sexual orientation."[399] They also consisted of "three municipalities whose ordinances we have cited and certain other governmental entities which had acted earlier to protect homosexuals from discrimination but would be prevented by Amendment 2 from continuing to do so."[400]

By expressly mentioning the municipalities, the Court suggested that the case did not pose a traditional contest between the rights of private individuals and the rights of the public. Here, too, as in *Seattle School Dis-*

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[395] *See, e.g.*, Akhil Reed Amar, *Attainder and Amendment 2:* Romer*'s Rightness*, 95 MICH. L. REV. 203, 203 (1996) (rooting the decision in the prohibition against bills of attainder); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2313 (1997) (rooting the decision in a broader principle of the social structure and hierarchy); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 258 (1996) (rooting the decision in a broader anticaste principle); Roderick M. Hills, Jr., *Is Amendment 2* Really *a Bill of Attainder?: Some Questions About Professor Amar's Analysis of* Romer, 95 MICH. L. REV. 236, 252-53 (1996) (rooting the decision in a prohibition against irrational legislation); Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 456 (1997) (rooting the decision in a constitutional principle of "equal worth"); Jane S. Schacter, Romer v. Evans *and Democracy's Domain*, 50 VAND. L. REV. 361, 362 (1997) (rooting the decision in a particular conception of constitutional democracy); Seidman, Romer*'s Radicalism*, *supra* note 15, at 72 (rooting the decision in a positive conception of constitutionalism).

[396] A few analyses of *Romer* have emphasized its localist aspects. *See, e.g.*, Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1410-11 (1997) (discussing *Romer* in connection with localities' "exit options" and rights of secession); Pamela Karlan, *Just Politics?: Five Not So Easy Pieces of the 1995 Term*, 34 HOUS. L. REV. 289, 293-304 (1997) (tying the motivation of Amendment 2 to the expression of an illegitimate animus against the political participation of gays and lesbians); Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 447-55 (1997) (addressing *Romer* in connection with a discussion of the conflict between "democratic" outcomes at two levels of government).

[397] *See Romer*, 517 U.S. at 623-24 (explaining that antidiscrimination ordinances passed by the cities of Aspen, Boulder and Denver were the impetus of the action).

[398] *Id.* at 625.

[399] *Id.*

[400] *Id.*

trict[401] and *Papasan*,[402] local communities sought the freedom from state power that would enable them to protect the rights of their residents. Just as the local governments were the true parties to the cause in *Township Board of Salem*[403] and *Hurlbut*[404]—to say nothing of *Seattle School District* and *Papasan*—the cities of Denver, Aspen, and Boulder may have been the appropriate plaintiffs in *Romer*.

Moreover, at its heart, *Romer*'s underlying constitutional claim sought to free the local public sphere to check private discrimination, rather than to constrain public interference with private rights. It was rooted in a characteristically modern belief that constitutionalism requires more than the imposition of constraints upon public power. The Court was receptive to the claim. As Louis Seidman explained, "*Romer* used equal protection doctrine to attack constitutional law's traditional conservative bias in favor of negative rights."[405]

It is important to emphasize, however, that the Court embraced positive constitutionalism in a tempered fashion. The Court did not hold that there was "substantive inequality inherent in denying gay people the protection of antidiscrimination laws when so many other groups are protected."[406] It did not purport to require local communities to enact antidiscrimination measures for gays and lesbians consonant with those that had been provided for racial minorities and women, or to preclude local communities from repealing such ordinances once they had been enacted. It concluded only that equal protection had been denied by the State's decision to disable its local communities from choosing whether to enact such measures.[407]

Indeed, Justice Scalia made this very point in his dissent from the Court's decision that same term to grant certiorari, vacate, and remand the

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[401] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *see supra* notes 312-21 and accompanying text (discussing *Seattle School District* as a practical exemplar of the connection between localism and constitutionalism).

[402] Papasan v. Allain, 478 U.S. 265 (1986); *see supra* notes 386-91 and accompanying text (discussing the Court's focus on placing limits on a state's authority over local community functions in *Papasan*).

[403] People *ex rel.* Detroit Howell R.R. v. Township Bd. of Salem, 20 Mich. 452 (1870); *see supra* notes 121-26 and accompanying text (explaining the concepts of localism embodied in *Township Board of Salem*).

[404] People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44 (1871); *see supra* notes 128-43 and accompanying text (providing an analysis of *Hurlbut* and the State's attempt to appoint a public works board for the city).

[405] Seidman, Romer*'s Radicalism*, *supra* note 15, at 70.

[406] *Id.* at 80.

[407] *See* Romer v. Evans, 517 U.S. 620, 633 (1996) ("A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

petition in *Equality Foundation, Inc. v. City of Cincinnati.*[408] There, a challenge had been brought to a citywide referendum that precluded the city council from adopting ordinances protecting gays and lesbians from private discrimination.[409] Justice Scalia explained that *Equality Foundation* involved "a determination by what appears to be the lowest electoral subunit that it does not wish to accord" gays and lesbians the protection of antidiscrimination ordinances.[410] By contrast, he explained, *Romer* had involved a state constitutional amendment that prohibited local communities from expressing their own "democratic preference."[411] Thus, the *Equality Foundation* case involved a direct challenge to local democratic rule in a way that *Romer* simply did not.

Romer may be read to suggest, then, that there is a deep connection between localism and positive constitutional enforcement. Federal courts are necessarily poorly positioned to assess the degree of affirmative "protection" that citizens are owed from private power. Federal courts could directly enforce a broad constitutional norm that prohibited private discrimination only by intruding deeply into the practices and functions of local self-government, and thereby calling their own legitimacy into substantial doubt. Such a declaration would obliterate the line between the public and private and threaten to make any private action subject to constitutional challenge.

Moreover, as the Court noted at the outset of its opinion in *Romer*, there were limits as well to the scope of congressional power to provide constitutional protection from private discrimination. "[I]t was settled early that the Fourteenth Amendment did not give Congress a general power to prohibit discrimination in public accommodations . . . ."[412] The constitutional obligation to provide public protection from private harms, therefore, was left, as a matter of federal constitutional structure, to the states and their local governments. Indeed, the Court noted, "[i]n consequence"[413] of its early holding limiting congressional power under Section 5 of the Fourteenth Amendment, most states "have chosen to counter discrimination by enacting

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[408] 518 U.S. 1001 (1996).

[409] *See* Equality Found., Inc. v. City of Cincinnati, 860 F. Supp. 417, 421 (S.D. Ohio 1994), *rev'd and vacated*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *on remand to* 128 F.3d 289 (6th Cir. 1997), *and cert. denied*, 119 S. Ct. 365 (1998). The Court subsequently denied certiorari after the Sixth Circuit distinguished *Romer* in part on localist grounds. *See* 119 S. Ct. 365 (1998).

[410] 518 U.S. at 1001 (Scalia, J., dissenting).

[411] *Id.*

[412] 517 U.S. at 628. The Court cited to the *Civil Rights Cases*, 109 U.S. 3, 25 (1883), for this proposition.

[413] *Romer*, 517 U.S. at 628.

detailed statutory schemes."[414] In this way, the Court implicitly linked the provision of such state and local statutory protection against private discrimination to the guarantee of equal protection of the laws set forth in the Fourteenth Amendment of the Federal Constitution.

Given this background, Colorado's blanket action to bar all of its local political institutions from determining that a certain class of persons needed statutory protection appeared to upset the careful structure of the federal constitutional framework. Such state action, as Justice Blackmun had noted in *Crawford v. Board of Education*, "'curtail[s] the operation of *those political processes ordinarily to be relied upon to protect minorities.*'"[415] As the *Romer* Court explained, "[t]he change Amendment 2 works in the legal status of gays and lesbians in the private sphere is far reaching, both on its own terms and when considered in light of the structure and operation of modern antidiscrimination laws."[416] The State had chosen to reserve to itself the power to determine the statutory protection that should be afforded homosexuals. "This is so no matter how local or discrete the harm, no matter how public and widespread the injury."[417] Precisely because the State had purported to preclude *all* localities from providing protection against private discrimination against gays and lesbians, there was "nothing special in the protections Amendment 2 withholds."[418]

The breadth of the state's prohibition ensured that it would preclude the adoption of those "protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and en-

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[414] *Id.* As Professor Michelman has explained:

> [The *Civil Rights Cases*] reasoning proceeds from the premise that the right to nondiscriminatory service may well be one that states are affirmatively obligated to protect by law (or rather, to speak more finely, it may well be a right that "law" simply does protect and that the states as engines of law are, accordingly, affirmatively obligated to vindicate through their remedial institutions). The holding is that federal authorities (an Act of Congress was in question, but the analysis presumably applies as well to the federal judiciary) are not authorized by the fourteenth amendment to provide remedies for privately wrought violations of rights that the state is affirmatively obligated to vindicate, unless and until it appears that the state itself is failing to perform this obligation.

Michelman, *The Case of Pornography Regulation, supra* note 7, at 307 n.54 (citation omitted).

[415] 458 U.S. 527, 547 (1982) (Blackmun, J., concurring) (emphasis added) (additional citation and internal quotations omitted) (quoting Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982)).

[416] *Romer*, 517 U.S. at 627.

[417] *Id.* at 631.

[418] *Id.*

deavors that constitute ordinary civic life in a free society."[419] It ensured, in other words, that private discrimination would persist no matter how "public" the resulting injuries. Such a broad-based state prohibition against the excesses of local action to provide protection for a group of residents is itself a "denial of equal protection of the laws in the most literal sense."[420]

One hears in the passages quoted above echoes of Cooley's own appeal to constitutional freedom. Cooley, too, believed that equal protection could not be won solely through the private realm.[421] His substantive conception of equality was rooted, of course, in a far different age, and one that was much less solicitous of public intervention in the private market. His structural insight, however, that local political institutions must play a role in giving life to constitutional norms of equality shares an affinity with the logic of *Romer*. Cooley argued that only through the active efforts of local communities, attentive to their obligations to enforce a norm of impartial governance, could such freedom be secured.[422] Colorado, however, had sought to prohibit its local communities from governing in accordance with that ideal.[423] As the Court explained:

> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.[424]

Thus, the Court may be understood to have recognized a positive right to governmental assistance by framing it as a traditionally negative right against state power and on behalf of local discretion.

In this respect, *Romer* comports with the Court's earlier decision in *Reitman v. Mulkey*,[425] which struck down a California voter initiative that precluded all levels of state government from enacting fair housing legislation.[426] The case was controversial in its day because it appeared to press the boundaries of the state action doctrine. The state had, after all, merely

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[419] *Id.*

[420] *Id.* at 633.

[421] *See supra* notes 71-76, 103-13, and accompanying text (presenting Cooley's view on whether private entities could compel a constitutional right).

[422] *See supra* notes 10-11 and accompanying text (providing Cooley's belief in the importance of local involvement in "constitutional freedom").

[423] *See Romer*, 517 U.S. at 623 ("The impetus for the amendment and the contentious campaign that preceded its adoption came in large part from ordinances that had been passed in various Colorado municipalities.").

[424] *Id.*

[425] 387 U.S. 369 (1967).

[426] *See id.* at 378-79 (holding that the initiative "would involve the State in private racial discriminations to an unconstitutional degree").

removed a public protection against private discrimination. It had not commanded the private discrimination at issue. Professor Black, however, has offered a powerful defense of *Reitman* that may illuminate the possible meaning of *Romer*.[427]

Professor Black argued that *Reitman* properly rejected a simple dichotomy between the public and the private realms of social life in holding that the state law constituted something more than a passive pronouncement that permitted the private market to do its work. As he explained, "[t]he state has not commanded discrimination against Negroes, but it has assured the discriminator, exactly with respect to the discrimination, of a special immunity—as complete an immunity as the state can within its constitutional forms grant—from any political assault on his practice of discrimination."[428]

He explained further that, at least with respect to racial discrimination, the public/private distinction codified by the state action doctrine was overdrawn. As he put it:

> If one race is, identifiably as such, substantially worse off than others with respect to anything which the law commonly deals, then "equal protection of the laws," is not being extended to that race unless and until every prudent affirmative use of law is being made toward remedying the inequality.[429]

Given the effect of the California law, Professor Black dismissed the argument that the Court had violated basic principles of federalism by denying the state the power to control the lawmaking functions of its political subdivisions. Such complaints were simply tired defenses of official discrimination dressed up in the (only slightly) more respectable clothes of federalism.

> When and where has respect for "localism" or "federalism" (which is too often, in this context, but old states' rights writ large) done any good in the racial sphere—any good, that is to say, worthy of being mentioned alongside the massive grinding racial oppression which has stayed unwhipped of justice precisely because of that "respect"?[430]

In conflating "federalism" and "localism," however, Professor Black did not explore the possibility that the very case he purported to defend supplied the answer to his question. For if ever there were a case in which respect for "localism" had done some good, surely it was *Reitman*. The case turned in large part upon the constitutional authority of California to protect private discriminators from "political assault" by local governments. And

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[427] *See generally* Black, *supra* note 15.

[428] *Id.* at 79.

[429] *Id.* at 73.

[430] *Id.* at 106-07.

the Court held that the Federal Constitution required that those local governments be insulated from state control so they could lead that assault. Indeed, the Court was arguably able to perceive that the State had not simply announced a neutral rule precisely because California had acted in an unprecedented fashion to constrict the authority of its local governments to combat private discrimination. The difficult "state action" doctrine questions apparently posed by the case dissolved once one understood that the State had acted to prevent local communities from providing public protection for private harms. So, too, *Romer* could be understood to have turned on a recognition that the State had acted to prevent local communities from undertaking constitutionally important protective actions on behalf of the residents.

As if to acknowledge the formidable connection between localism and constitutionalism that appeared to serve as the foundation of the majority's opinion in *Romer*, Justice Scalia invoked federalist constitutional theory to bolster his dissent. He portrayed Amendment 2 as a legitimate state attempt "to counter both the geographic concentration and the disproportionate political power of homosexuals."[431] In this way, he drew upon the federalist assumption that the genius of the Constitution inheres in the checks it provides against the unreasoned factionalism that localism breeds. As Madison explained in *The Federalist No. 10*, "[a]mong the numerous advantages promised by a well constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction."[432] The establishment of a central government, he contended, would ensure the containment of local passions.

Moreover, Justice Scalia implicitly drew upon Dillon's defense of state power to counter the Court's seemingly localist logic. Scalia suggested that state intervention had been designed to enforce a separation of the public and the private realms. The state sought to prevent local majorities from conferring "special" rights on certain favored classes of persons.[433] Respect for impartiality in governmental administration, Justice Scalia suggested, led to the conclusion that Amendment 2 should be upheld.

The Court implicitly countered Justice Scalia's centralist attack with a rejoinder reminiscent of Cooley. It offered the image of strong municipalities attempting to comply with an "emerging tradition of statutory protection,"[434] and to act consistent with "the principle that government and each

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[431] *Romer v. Evans*, 517 U.S. 620, 647 (1996) (Scalia, J., dissenting).

[432] THE FEDERALIST NO. 10, at 56 (James Madison) (Jacob E. Cooke ed., 1961).

[433] *See Romer*, 517 U.S. at 646 (Scalia, J., dissenting).

[434] *Id.* at 628.

of its parts remain open on impartial terms to all who seek its assistance."[435] For the majority, the State constituted the antirepublican villain, the governmental actor so infused with excitement that it had lost sight of basic constitutional limitations. Colorado had enacted "class legislation"[436] in direct violation of the Constitution; it had been swayed by passionate "animus";[437] and it had therefore declined to act consistent with "the rule of law."[438] Employing a Jacksonian indignation worthy of Cooley, the Court concluded that "[a] State cannot so deem a class of persons a stranger to its laws."[439] In this way, localism was placed on the side of constitutionalism to protect a public norm of equality from a state majority.[440]

The essentially unifying rhetoric of *Romer*, the integrationist impulse that lay at its heart, and the communitarian essence of its constitutional rule, all seem consistent with understanding the case as something other than a *judicial* attempt to protect a particular class of persons from governmental power. In a deep sense, it resonates with the Jacksonian conception of equality that underlay Cooley's own defense, presented more than a century before, of local independence from state control. Moreover, the decision reveals the limits of reading the modern Court's turn towards localism as a means of insulating private power from public influence. For *Romer* stands as an important indication of the degree to which localism may be understood to advance a positive constitutionalism. Finally, it reveals that localism need not be a proxy for suburban homogeneity. It may be the means by which diverse communities, often as plaintiffs, unite to promote constitutional values that their states have ignored.

F. *Conclusion*

The readings offered above do not show that the Court "intended" to draw a connection between localism and constitutionalism in cases such as *Seattle School District*,[441] *Papasan*,[442] and *Romer*.[443] Indeed, in none of the

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[435] *Id.* at 633.

[436] *Id.* at 635 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ." (quoting The Civil Rights Cases, 109 U.S. 3, 24 (1883))).

[437] *Id.* at 632 ("[T]he amendment seems inexplicable by anything but animus toward the class it affects . . . .").

[438] *Id.* at 633 ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

[439] *Id.* at 635.

[440] *See id.* at 633.

[441] *See supra* notes 313-20 and accompanying text.

[442] *See supra* notes 386-91 and accompanying text.

[443] *See supra* notes 393-440 and accompanying text.

cases thus far considered, other than *Cooper v. Aaron*[444] and *Missouri v. Jenkins I*,[445] did the Court state that it was protecting a local governmental effort to vindicate a constitutional right. The readings do suggest, however, the continuing relevance of Cooley's nineteenth-century belief that local governments are critical institutional components of the constitutional framework.

No doubt the substantive constitutional claims at issue in these modern cases would have been unimaginable to Cooley. They directly challenged the substantive divide between the public and private realms that he sought to enforce through the application of local constitutionalism in his time. Cooley's substantive understanding of equality differed in important, and historically contingent, respects from the one that animates the decisions discussed above. At the level of constitutional structure, however, the cases resonate with Cooley's belief that general legal maxims about the subordinate status of local governments proved a poor substitute for a deep understanding of constitutionalism. These cases suggest, therefore, as Cooley's own localist writings suggested more than a century ago, that there is a surprisingly public constitutional dimension to the conferral of judicial respect for local prerogatives against broad claims of state power.

VII. TOWARDS LOCAL CONSTITUTIONALISM

A. *Introduction*

While important traces of the connection between localism and constitutionalism may be discerned within modern case law, it remains to be considered how a local constitutionalist doctrine might actually be understood to work. There are benefits to such an inquiry. The frank recognition of local constitutionalism may free the Court from squeezing difficult cases into ill-suited doctrinal boxes—as appears to be the case in *Seattle School District*.[446] It may clarify otherwise obscure reasoning that is not tethered to any clear conception of constitutionalism—as arguably is the case in *Romer*.[447] It may focus the Court's attention on whether the constitutional right recognized is intended to protect the free working of local political processes, or, whether it is instead intended to constrain governments at both the state and local level. *Romer* again comes to mind. Finally, the ex-

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[444] *See supra* notes 321-26 and accompanying text.

[445] *See supra* notes 360-65 and accompanying text.

[446] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *see supra* notes 313-21 and accompanying text.

[447] Romer v. Evans, 517 U.S. 620 (1996); *see supra* notes 393-440 and accompanying text.

press recognition of local constitutionalism may engage local communities more directly in the public practice of constitutional interpretation and accord constitutional recognition to the diverse conceptions of constitutionalism that local communities embrace.

The frank recognition of local constitutionalism in modern doctrine would, of course, give rise to myriad difficult questions regarding when, and to what extent, federal judges should accord constitutional recognition to local prerogatives. There are no simple answers to such questions. A few general principles may be divined, however, from what thus far has been considered and from the general literature that addresses the institutional dimension to substantive constitutional enforcement.

B. *Local Constitutionalism as a Limitation on Central Institutional Power*

As an initial matter, the recognition of local constitutionalism would require courts to distinguish between constitutional rights that are susceptible to direct judicial enforcement against a locality and those that may be enforced only indirectly through the imposition of constraints upon a state's authority to control its political subdivisions. The recognition of local constitutionalism would not, therefore, expand federal court power *directly* to protect positive constitutional rights to public assistance. If one accepts a *localist* dimension to federal constitutional enforcement, then one must also accept that, as a matter of federal constitutional structure, central institutions (the national legislature, the federal judiciary) may be dependent upon local action in some constitutional contexts.

Cooley's decisions in *People ex rel. Detroit & Howell Railroad v. Township Board of Salem*[448] and *People ex rel. Le Roy v. Hurlbut*[449] show that the substantive constitutional right a court enforces when it frees a local government from state law constraints is inseparable from the local community's own judgment as to the scope, but not the existence, of that right. A doctrine of local constitutionalism may thus be understood as a particular subset of the more general doctrine of structural due process.[450] In such

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[448] 20 Mich. 452 (1870); *see supra* notes 101-17 and accompanying text.

[449] 24 Mich. 44 (1871); *see supra* notes 128-41 and accompanying text.

[450] *See* TRIBE, *supra* note 215, at 1673-87 (presenting a model of structural justice that unites individual rights and institutional design); Sager, *supra* note 5, at 1411-18 (arguing that elected bodies are charged with "the responsibility of mediating majority sentiment with judgments of reasonability and fairness"); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975) (suggesting a theory of constitutional limitation that focuses on the "structures through which policies are both formed and applied, and formed in the very process of being applied"); Laurence H. Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of*

cases, the Court has extended the sphere of substantive individual constitutional protection through the allocation of decisional power among existing governmental institutions, rather than by enforcing substantive individual rights against governmental institutions in general.[451] That the Constitution may authorize a local community to exceed state law constraints in order to protect the constitutional rights of its residents does not mean that federal courts would have the independent power to place limitations directly upon that local community. The nature of the underlying substantive constitutional right in such cases would take the form of a limited right to a local governmental decision-making structure for the resolution of how that right should be protected.[452]

It is important to remember in this regard that just as cases such as *Milliken v. Bradley*[453] and *San Antonio Independent School District v. Rodriguez*[454] should not be considered apart from cases such as *Washington v.*

Lawmaking, 10 CREIGHTON L. REV. 433 (1977) (same); Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973) [hereinafter Tribe, *Toward a Model of Roles*] (documenting the resurgence of structural due process rights in Supreme Court decisions); *see also* Cole, *supra* note 7, at 730 (discussing structural due process in public school administration); Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 95-96 (1990) ("[T]he chief judicial task is to ensure institutional policy is reached through decisional structures that promote widespread participation by treating participants with respect and prohibiting officials . . . from simply imposing their will.").

[451] *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 548 (1980) (Stevens, J., dissenting) (suggesting that the Fourteenth Amendment "does impose a special obligation to scrutinize any governmental decisionmaking process that draws nationwide distinctions between citizens on the basis of their race"), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976) (striking down a regulation that burdened a liberty interest because of the institutional limitations of the bureaucratic decision maker); *see also* TRIBE, *supra* note 215, at 1685-86 (explaining that the rule established in such cases not only "created a process which respected fairness at the time of the Court's decision, it also shaped a process which both 'incorporate[s] evolving visions of law and society into constitutional principle' and 'minimizes the justices' discretionary role in decreeing' the substance of the change" (quoting Tribe, *Structural Due Process*, *supra* note 450, at 293, 295-96)).

[452] *See* Sager, *supra* note 5, at 1414. Sager explains that there may be

> a right to procedural due process which requires that some legislative actions be undertaken only by a governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution.

Id.; *see also id.* at 1418 (explaining that the "claim for such a process requirement seems quite strong" in cases "where substantial Constitutional values are placed in jeopardy by the enactment at issue" and "where *substantive* review of the enactment by the judiciary is largely unavailable and hence cannot secure these constitutional values").

[453] 418 U.S. 717 (1974); *see supra* notes 305-12 and accompanying text.

[454] 411 U.S. 1 (1973); *see supra* notes 368-85 and accompanying text.

Seattle School District No. 1[455] and *Papasan v. Allain*,[456] the reverse is true as well. It would be a mistake, in light of *Seattle School District*, to read *Milliken* to mark an unconscionable federal judicial retreat from constitutionalism. It would be equally wrong, in light of *Milliken*, to read *Seattle School District* as evidence of the federal judiciary's obligation to remedy de facto desegregation directly. Similarly, it would be a mistake to read *Romer v. Evans*[457] to have recognized a judicially cognizable right to the passage of antidiscrimination legislation.

The recognition of local constitutionalism also would not, in and of itself, mean that Congress, exercising its powers under Section 5 of the Fourteenth Amendment, possessed expanded authority to right local wrongs. The recognition of localism in modern constitutional law results from a determination that the practice of local self-government serves an important public constitutional function and that local communities are peculiarly positioned to determine the scope of their positive constitutional obligations. The modern doctrinal connection between localism and constitutionalism, therefore, should not be understood, as was suggested by Professor Tribe's and Professor Michelman's readings of *National League of Cities v. Usery*,[458] to demonstrate that the scope of centrally enforceable positive constitutional rights to governmental action is broader than is often supposed.[459] Such a reading would ignore the degree to which constitutionalism and localism are mutually reinforcing values, neither clearly separable from the other.

Indeed, the Court's recent decision in *City of Boerne v. Flores*,[460] striking down the Religious Freedom Restoration Act, serves as an important cautionary reminder of the limits of the federal government's power to engage in extrajudicial constitutional enforcement. When considered in light of the cases just reviewed, *City of Boerne* may even support the connection between *localism* and extrajudicial constitutionalism that is offered here. In *City of Boerne*, the Court concluded that the unusual scope of the central authority's intrusion on local sovereignty revealed that the underlying leg-

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[455] 458 U.S. 457 (1982); *see supra* notes 313-21 and accompanying text.

[456] 478 U.S. 265 (1986); *see supra* notes 386-91 and accompanying text.

[457] 517 U.S. 260 (1996); *see supra* notes 393-440 and accompanying text.

[458] 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[459] *See* Michelman, *States' Rights and States' Roles*, *supra* note 7, at 1194 (interpreting the *National League of Cities* decision as vesting the states with an affirmative duty towards their citizens); Tribe, *supra* note 7, at 1102 (arguing that *National League of Cities* reflects an effort by the Court to allow state governments to provide their citizens with access to basic services guaranteed by the Constitution).

[460] 521 U.S. 507 (1997).

islation was not intended to *remedy* a constitutional wrong.[461] By contrast, in *Romer*, the Court may be understood to have concluded that the unusual scope of the central authority's intrusion on local sovereignty revealed that the underlying legislation was intended to *preclude the remedying* of a constitutional wrong.

Taken together, the Court's emphasis on the unusual breadth of the legislative preemption in both *Romer* and *City of Boerne*[462] might lead one to conclude that the Court continues to embrace extrajudicial constitutional enforcement, but that it perceives local, rather than national, political institutions to be better suited to the task. Indeed, *Romer* suggested that local governments must be free to step in to fill the constitutional gaps that limitations on Congress's Section 5 power inevitably leave.[463] Moreover, *San Antonio School District* specifically analogized the State's decision to enhance local discretion to supplement state public school funding to an exercise of the congressional power under Section 5.[464]

The notion that some measure of constitutional enforcement is dependent upon local political institutional action is hardly surprising when one considers that, in lieu of Section 5, Congress would lack the power to engage in such enforcement absent some other source of power. It is difficult to believe that, prior to the passage of Section 5, judges alone bore the responsibility for enforcing the Constitution. If we take seriously the conception of local governments as not simply creatures of state law, but also as creatures of the Constitution, then it follows that local governments have an important obligation to give life to federal constitutional principles. That obligation is no less an imperative for towns and cities than for the states that have "created" them.

C. *Local Constitutionalism as a Limit on Local Institutional Power*

At the other end of the spectrum, the recognition of local constitutionalism would not accord local governments an independent claim to consti-

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[461] *See id.* at 532 ("[The Religious Freedom Restoration Act] is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.").

[462] *Compare* Romer v. Evans, 517 U.S. 620, 631 (1996) (explaining that the state initiative bars the provision of "specific protection against discrimination" of gays and lesbians "no matter how local or discrete the harm, no matter how public and widespread the injury"), *with City of Boerne*, 521 U.S. at 532 (explaining that "[s]weeping coverage ensures [the Act's] intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter").

[463] *Romer*, 517 U.S. at 628 (showing, by example, that "most states have chosen to counter discrimination by enacting detailed statutory schemes").

[464] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 38-39 (1973).

tutional recognition akin to that of their states. As Cooley recognized, local governments are, in an important sense, creatures of their states, subject to state supervision, even though they are also important components of the federal constitutional structure.[465] Local constitutionalism would not call that general view into question, nor would it support a constitutional defense of localism qua localism. It would suggest only that local governmental sovereignty, understood as local freedom from state law constraints, merits federal constitutional protection when such recognition would serve some independent substantive constitutional value. Adherence to that proposition would work no change in the federal constitutional structure because basic principles of federal supremacy preclude states from structuring their internal governance in a manner that conflicts with federal constitutional rights.[466]

Nor would local constitutionalism afford local governments the right to disregard state law commands in the absence of some demonstration that such disregard would be supported by an independent federal constitutional limitation on state power. There is no general federal constitutional principle of localism that circumscribes traditional state power. There is only the possibility that the recognition of the importance of localism may expand the scope of already extant federal constitutional limitations on state power beyond those bounds that are necessitated by the institutional characteristics of the federal judiciary. For this reason, and because of federalism concerns, states' efforts to compel their local political subdivisions to assume positive, judicially (or congressionally) unenforceable constitutional obligations to correct for private discrimination, would not themselves raise federal constitutional concerns. They would represent merely an instance in

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[465] *See supra* notes 128-43 and accompanying text (discussing Cooley's use of localism principles in *People ex rel. Le Roy v. Hurlbut*).

[466] Justice Frankfurter stated the point most clearly in his opinion in *Gomillion v. Lightfoot*, which struck down a racial gerrymander. *See* 364 U.S. 339, 347 (1960) ("When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."). He further explained that the broad statements concerning the plenary nature of a state's power to control its political subdivisions contained in cases such as *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), should be considered with an awareness of the limited contexts in which they were offered:

> [I]t is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts. Thus, a correct reading of the seemingly unconfined dicta of *Hunter* and kindred cases is not 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.

Gomillion, 364 U.S. at 344.

which a state had undertaken to promote a constitutional norm on its own initiative.[467]

Moreover, the recognition of local constitutionalism would not confer independent interpretive authority over the Federal Constitution on local governments. Local governments would still be *governments* and thus their actions, no less than the actions of their state, would still have to accord with those constitutional norms that *are* judicially enforceable. Local governments could not, in the guise of extending federal constitutional protection, violate a federal constitutional norm prescribed by the Supreme Court.[468] Nor, at least as the doctrine is imagined here, could local governments purport to extend a constitutional norm that the federal courts had determined was not in fact rooted in the Federal Constitution. These essential limitations on the permissible scope of extrajudicial constitutional enforcement, though not commanded by the recent decision in *City of Boerne*, are certainly suggested by it.[469] For, even when Congress seeks to exercise its powers under Section 5, it must demonstrate that the right it claims to be enforcing is one legitimately within the scope of the Fourteenth Amendment. A similar limitation would apply to local governmental attempts to engage in extrajudicial constitutional enforcement.

It is, of course, no mean feat to divine a constitutional norm that, although not susceptible to direct judicial vindication, is nonetheless sufficiently related to an enforceable constitutional command as to justify the judicial invalidation of a state's attempt to preclude local action. As *City of Boerne* demonstrates, there are clearly limits to the kinds of extrajudicially implemented norms fairly deemed to be of "constitutional" stature. But what are the limits? What makes it plausible to describe the school desegregation plan at issue in *Seattle School District*[470] or the antidiscrimination ordinances at issue in *Romer*[471] and *Reitman*[472] as efforts to enforce a con-

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[467] *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975) (overhauling state zoning practices to correct for perceived racial and economic discrimination at the local level).

[468] *See* Sager, *supra* note 16, at 1240 (making a similar point with respect to the scope of Congress's power under Section 5 of the Fourteenth Amendment).

[469] They are not commanded by *City of Boerne* because that case involved separation of powers questions that are not presented by instances of state or local, extra-judicial constitutional enforcement. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2162 (1997) (discussing limitations resulting from the separation of powers doctrine).

[470] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *see supra* notes 312-20 and accompanying text.

[471] Romer v. Evans, 517 U.S. 620 (1996); *see supra* notes 393-440 and accompanying text.

[472] Reitman v. Mulkey, 387 U.S. 369 (1967); *see supra* notes 425-30 and accompanying text.

stitutional norm rather than simply a progressive political policy? Is it simply that the decisions themselves appear to have characterized the policy choices in question in quasi-constitutional terms, or is there something about the policies themselves that calls forth such characterizations? And what principles would distinguish such quasi-constitutional local actions from decisions to adopt rent control ordinances that intuitively seem less tethered to any underlying federal constitutional principle?

Professors Sager and Eisgruber have recently attempted, in connection with the *City of Boerne* decision, to give further content to the as yet ill-defined category of underenforced constitutional norms.[473] Further elaboration of the category would require a separate inquiry, however, that lies beyond the examination undertaken here and would require a detailed investigation of the individual substantive policies themselves. The important point, though, is that the category itself has been thought to have meaningful content (in other words, discernible limits) in the Section 5 context. There would seem to be no a priori reason why it could not have a similarly meaningful content in the localist context as well.

This last point is important because, unless some meaningful content can be given to the category of underenforced constitutional norms, local constitutionalism would in practice simply devolve into an unlimited defense of localism for its own sake. Local constitutionalism, at least as Cooley imagined it, however, commands attention precisely because it constitutes something other than an absolutist preference for local decision making.[474] It is intended to ensure that the practice of public politics will not devolve into mere majoritarianism. Cooley believed that his localist conception of constitutional structure would encourage local communities to practice self-government *in accord with substantive constitutional limitations*.[475] It would be a perversion of that conception if the connection between localism and constitutionalism were employed to invite local governments to extend the scope of their unchecked sovereignty through mere assertions of federal constitutional authority. Thus, the recognition of a doctrine of local constitutionalism should not be confused with a defense of a locality's right to engage in either constitutional nullification[476] or unlim-

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[473] *See* Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 83-84.

[474] *See supra* notes 59-97 and accompanying text.

[475] *See supra* notes 179-200 and accompanying text.

[476] *See* Powell, *supra* note 7, at 740-43 (contemplating state review of constitutional judgments by the federal judiciary).

ited constitutional expansionism. In this sense, a doctrine of local constitutionalism rests on what are, more conventionally, federalist premises.[477]

Finally, the defense of local governmental independence offered here differs markedly from the now-ascendant formalist defense of state independence from federal control. The defense offered here would not prohibit states from "commandeering" their local governments, even though the modern defense of federalism holds that Congress may not conscript a state.[478] Nor would a defense of local constitutionalism preclude states, as a general matter, from attempting to coerce their political subdivisions into complying with a statewide rule. This is true even though the principles of modern federalism may justify judicially enforceable constraints upon the federal government's exercise of coercive power over the states.[479] A defense of local constitutionalism also does not seek to define any category of traditionally local governmental functions—such as police protection—that, as the Supreme Court once suggested in its federalist doctrine, are immune from centralized control.[480]

The local constitutionalist defense offered here is simply not predicated on a formalist notion that there is some residual core of local governmental sovereignty, written silently into the Federal Constitution, that must be protected from central intrusion for its own sake. This defense proceeds instead from a structural conclusion that substantive constitutional rights sometimes presuppose the existence of a local decision-making process capable of ensuring the protection of those rights. That conclusion in turn supports the determination that it is appropriate for courts to protect the local decision-making process from state interference incident to the enforcement of the underlying substantive constitutional right even though that right would not be susceptible to more direct judicial protection. The defense proceeds, in other words, from a conception of individual constitutional rights as partially dependent upon local political action.

That does not mean, of course, that a theory of local constitutionalism is uncontroversial or susceptible to simple enforcement. There will remain contentious questions over whether a state attempt to control its political subdivisions in fact infringes upon a constitutional norm. And there is an undeniable danger in permitting courts broad reign to characterize some-

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[477] *See* Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 1005 (1997) (explaining that a radical federalism could require state review of constitutional holdings by the Supreme Court).

[478] *See* Printz v. United States, 521 U.S. 898 (1997).

[479] *See* New York v. United States, 505 U.S. 144 (1992).

[480] *See* National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

thing as a norm rather than a right, if only because such a power threatens to free the judiciary to clothe policy predilections in the garb of constitutional enforcement. That danger is particularly great when one considers that such judgments are in some respects relatively costless, as federal courts would not bear the burden of fashioning the decrees that must ordinarily be crafted when a judicially enforceable right is recognized.

D. *Local Rights and State Interests*

Within these broad parameters, complicated questions remain as to the circumstances under which the Federal Constitution may be understood to protect local governmental action from state interference. The literature regarding underenforced constitutional norms again sets forth the basic principles that may inform the inquiry.[481] In connection with his discussion of the scope of Congress's power under Section 5, Lawrence Sager has provided useful guidance. He explained: "Congress' section 5 power to prohibit state conduct which the Supreme Court would not find to violate the substantive norms of the fourteenth amendment is limited to those categories of conduct which the Court has condemned to analytical limbo because of its institutional concerns."[482]

Similarly, when the Court's institutional reasons for declining to enforce a credibly identifiable constitutional norm are expressly rooted in federal judicial deference to *local* political processes, then a state's attempt to interfere with those same processes may justify federal judicial intervention to protect those processes. This logic may explain the Court's reliance in *Seattle School District*[483] and *Papasan*[484] upon its earlier emphasis on the importance of local educational control in, respectively, *Milliken*[485] and *San Antonio School District.*[486] A similar logic also may explain the Court's

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[481] *See generally* Sager, *supra* note 16 (exploring the underenforcement of constitutional doctrine and the role of governments and the federal judiciary); Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959 (1985) (exploring when state judges should defer to the Supreme Court on constitutional issues).

[482] Sager, *supra* note 16, at 1239-40.

[483] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); *see supra* notes 313-20 and accompanying text.

[484] Papasan v. Allain, 478 U.S. 265 (1986); *see supra* notes 386-91 and accompanying text.

[485] Milliken v. Bradley, 418 U.S. 717 (1974); *see supra* notes 304-12 and accompanying text.

[486] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *see supra* notes 368-85 and accompanying text.

emphasis in *Romer*[487] on a long tradition of local governmental efforts to provide legal protections against private discrimination.

In light of this analysis, local constitutionalism is likely to have a particular role to play in connection with positive constitutional claims that seek public assistance from local institutions that have been assigned broad powers respecting such assistance. As we have seen, virtually all of the cases in which localism figures prominently involved instances in which the underlying claim differed dramatically from the conventional claim for a negative immunity from governmental power. Moreover, virtually all of these cases involved claims for assistance from local political institutions that states had vested with substantial regulatory authority. A state's decision to vest its local institutions with such broad regulatory authority suggests that the state may be no better positioned than a federal court to perform a constitutional calculus regarding the propriety of the locality's specific exercise of one of those powers.

At the same time, basic principles of federalism preclude local governments from insulating themselves from state control merely by demonstrating that there is a connection between their continued independence and the enforcement of an underlying federal constitutional norm. States have legitimate institutional interests of their own that may justify the preclusion of local constitutionalism, even when a local government's autonomy may credibly be identified with the enhanced protection of an underlying substantive constitutional norm. It is exceedingly difficult to determine which state interests are sufficient to trump a local community's attempt to extend an underenforced constitutional norm. No general answer is possible to the questions that arise.

As an initial matter, it appears clear that a state's determination that the continued exercise of local power itself would violate a competing and underenforced constitutional norm should command substantial federal judicial respect. The Court implicitly conceded this point in *Seattle School District.* It did not respond to Justice Powell's assertion that Initiative 350 could be defended as a permissible state attempt to restrict race-conscious busing.[488] The Court instead simply noted that the State had not advanced such an interest.[489]

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[487] Romer v. Evans, 517 U.S. 620 (1996); *see supra* notes 393-440 and accompanying text.

[488] *See Seattle Sch. Dist.*, 458 U.S. at 491-92 n.6 (Powell, J., dissenting) (arguing that "in the absence of a finding of segregation by the School District," mandatory busing on the basis of race is constitutionally impermissible).

[489] *See id.* at 472 n.15 ("[Washington] do[es] not challenge the propriety of race-conscious student assignments for the purpose of achieving integration . . . .").

The point is further demonstrated by the recent dispute over the constitutionality of California's Proposition 209, a statewide measure that dramatically constricts the authority of local governments to institute race- and gender-based affirmative action programs that comply with federal constitutional requirements.[490] Unlike the asserted state interests in *Seattle School District*, *Papasan*, *Romer*, and *Reitman*, California rooted its claimed interest in placing restrictions on local affirmative action efforts in an interpretation of the Federal Equal Protection Clause and, thus, in a concern about unconstitutional racial discrimination at the local level.[491] For that reason, as the Ninth Circuit concluded in upholding the measure, the State's intrusion on local prerogatives could not easily be characterized as an attempt to preclude necessary local remedial discretion.[492]

While states must be given a fair degree of latitude to engage in their own brand of local constitutionalism, federal courts should not simply defer to a state's contention that substantive federal constitutional principles would be furthered by the state's constriction of local authority. In *Reitman*, after all, the State argued that a constitutional norm of privacy justified its prohibition of local fair housing ordinances.[493] The Court declined, however, to grant that contention.[494] As Professor Black explains, the Court acted appropriately in doing so.

> I suppose we can save the state or local judgment from being one in aid of discrimination . . . if we make it a very abstract judgment in favor of "freedom of choice," rendered without care for the facts, without care for the sorts of choices likely to be made, or actually made. But why should anybody defer to such a judgment, or regard it as a respectable attempt to solve a problem? Is it not lacking in just that instructed regard for local conditions which is supposed to make respect for local judgments expedient?[495]

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[490] *See* Coalition for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997) (holding that Proposition 209 does not violate the Equal Protection Clause of the Constitution).

[491] *See id.* at 1446 ("Plaintiff's counsel . . . urged . . . that '[t]he people of the State of California are not entitled to make a judgment as to whether compelling state interests have been vindicated. That is for the courts.' *Au contraire*! That most certainly *is* for the people of California to decide, *not* the courts.").

[492] *See id.* ("To hold that a[n] . . . affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits.").

[493] *See* Reitman v. Mulkey, 387 U.S. 369, 377 (1967) ("[California] announced the constitutional right of any person to decline to sell or lease his real property to anyone to whom he did not desire to sell or lease.").

[494] *See id.* at 378-79 ("Here the California court . . . has determined that the provision would involve the State in private racial discriminations to an unconstitutional degree. We accept this holding of the California court.").

[495] Black, *supra* note 15, at 107.

It is this kind of criticism of the State's assertedly constitutional interest in *Reitman* that renders somewhat questionable the Ninth Circuit's sweeping vindication of Proposition 209's constitutionality. The Ninth Circuit engaged in no review of whether the state initiative would serve to check racially discriminatory local policies, as the State claimed, or whether it would instead impede constitutionally significant local efforts to remedy discrimination. States no doubt deserve substantial discretion in making such judgments, but deference to the judgments of a state differs from unquestioning acceptance of state assertions.

Moreover, the more significant the scope of central intrusion, the more reason there is to view the state's action with circumspection, even when it purports to vindicate an underenforced constitutional norm. For example, in *San Antonio School District*, the Court was relatively untroubled by the limits that the State had placed on the local taxing power, given the local school districts' authority to supplement the state's fund for financing public education.[496] By contrast, in *Romer*, the Court noted the unprecedented sweep of the State's intervention in the traditionally local process of providing protection against private discrimination.[497]

It may also be useful to recall Cooley's concurrence in *Hurlbut*.[498] He concluded that the State's assertion of a broad right to appoint local officials in perpetuity belied the State's asserted interest in providing necessary supervision over local affairs and suggested a partisan motivation.[499] He was willing, however, to uphold the state appointments on a temporary basis precisely because such a limited central intrusion appeared to be within a state's right to engage in neutral administrative oversight of its political subdivisions.[500]

In addition, state interests that appear only tenuously related to the actual restriction on local discretion should not be sufficient to justify state intrusion on local efforts to enforce the Constitution extrajudicially. Both the *Seattle School District* and *Romer* Courts ultimately rested on a similar determination about the adequacy of the State's interest, as did the *Papasan* Court, which remanded the case for an inquiry into the State's reasons for parceling out funds on an uneven basis.

The frank recognition of local constitutionalism would inevitably require federal courts to make difficult judgments about the "public" character of state laws that impede local efforts to extend a constitutional norm. That

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[496] *See supra* notes 378-79 and accompanying text.

[497] *See supra* note 405 and accompanying text.

[498] People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 92-112 (1871) (Cooley, J. concurring).

[499] *See id.* at 93.

[500] *See id.* at 96.

fact, however, should not in and of itself render a doctrine of local constitutionalism indefensible. As we have seen, such a "public purpose" review ultimately underlies decisions like *Seattle School District* and *Romer*, which the Court has already decided. The express recognition of local constitutionalism as the basis for decision in such cases might therefore serve the salutary function of explaining why the Court should engage in such "public purpose" review in the first instance. Additional scrutiny would be appropriate because of the underlying local attempt to extend a cognizable, albeit judicially unenforceable, constitutional norm.

Indeed, Cass Sunstein has suggested that "public purpose" review, at least with respect to modern equal protection doctrine, may be endemic to any effective regime of judicial enforcement.[501] He explains that modern equal protection doctrine rests on the premise that "[l]egislation may not be merely the adjustment of private interests or the transfer of wealth or opportunity from one person to another; it must be in some sense public-serving."[502] For that reason, he concludes that the doctrine requires judges to ensure that "differential treatment [is] justified by reference to some public value."[503] Indeed, he points to *Seattle School District* as an exemplar of this "public value" approach.[504]

Interestingly, Cooley also suggested that there was an important connection between localism and the enforcement of a constitutional norm of equality precisely because courts are appropriately reluctant to substitute their own judgment of "public values" for those that the people have themselves asserted. Present doctrine makes similar connections. State laws that do not facially discriminate on the basis of race or sex, are not motivated by invidious discrimination, and do not burden fundamental rights, are generally upheld so long as they reflect a rational connection to some public purpose. As we have seen, however, the Court has appeared to depart from (or at least to elaborate upon) this traditionally deferential approach in certain cases where local communities have asserted their own authority to protect their residents despite state-imposed obstacles. Thus, in both *Seattle School District* and *Romer*, the Court applied what appears to have been heightened scrutiny to the State's asserted interests even though the state laws at issue did not in any obvious respect burden a suspect class. Similarly, in *Pa-*

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[501] *See* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127 (discussing equal protection doctrine and its development by the Supreme Court).

[502] *Id.* at 134.

[503] *Id.* at 131.

[504] *Id.* at 150-64 (discussing *Seattle School District* and the Court's analysis of the Equal Protection Clause).

pasan, the Court appeared willing to apply heightened scrutiny to Mississippi's grant allocation process even though no underlying fundamental right to equal educational opportunity had been expressly recognized.

Finally, even more difficult questions arise when local governments themselves enact the kind of broad prohibitions against local governmental action that were at issue in *Seattle School District* and *Romer*. Such local precommitments to underenforce the Constitution might be defended as the consequence of local political choice and therefore distinguished from state preclusions of local constitutional enforcement. The Sixth Circuit recently adopted this view, concluding on remand in *Equality Foundation, Inc. v. City of Cincinnati*[505] that Cincinnati's enactment of its own version of Colorado's Amendment 2 did not violate *Romer*'s rule. The Sixth Circuit explained that the city's charter provision, unlike Colorado's state constitutional amendment, serves as a means of shifting decisional power from the city council to the people of the city as a whole. The Court concluded that such an internal shift in institutional power did not raise the same concerns presented by a state's attempt to deny local governments the authority to act through whatever institutional mechanism they might prefer.[506]

There is an undeniable force to this argument if *Romer* is rightly understood as a case that is rooted in localist concerns. A local community's own determination about how contentious questions of gay rights should be resolved stands on a different footing from a state's generalized distaste for antidiscrimination protection. In the former instance, one may fairly presume the local community has considered the difficult questions raised with sensitivity to the unique local circumstances. The application of such a presumption is more difficult to justify when a sweeping statewide prohibition is under review.

On the other hand, local precommitment may be problematic when it takes the form, as it did in Cincinnati, of a general proscription on local enforcement that is written into the locality's basic charter of governance. The measure at issue in Cincinnati did not, after all, purport to be simply a limitation on city council power. It instead proclaimed itself to be a general statement of the city's intent to ensure, through the only legally available mechanism, that ordinances outlawing private discrimination against homosexuals would not be enacted. A federal court might be wary, for reasons of institutional deference, of compelling local governmental action in the face of a locality's decision not to enact an ordinance, or of questioning a city's

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[505] 128 F.3d 289, 301 (6th Cir. 1997) (holding that a city charter amendment precluding protection according to sexual orientation does not violate the Constitution), *reh'g denied*, 1998 WL 101701, *cert. denied*, 1195 S. Ct. 365 (1998).

[506] *See id.* at 300-01 (contrasting Cincinnati's amendment with Colorado's in *Romer*).

preference for decision by referendum rather than by ordinance. These institutional considerations would not apply with the same force, however, in a case in which the locality declares a bare intent to preclude local protection through all of its institutional mechanisms. Indeed, the Cincinnati amendment is notably distinguishable from the provision upheld in *City of Eastlake v. Forest City Enterprises*,[507] which approved a provision requiring the approval of certain zoning decisions by referendum. The Cincinnati measure does not purport to enhance the people's power to decide matters by referenda. It purports only to ensure that local protection will not be provided.

Alternatively, cases of local precommitment may simply require the Court to confront directly the degree to which its constitutional rule is in fact rooted in localist concerns. There are strong indications that *Romer* rested on localist principles. As others have suggested, however, *Romer* may also rest on a more general anticaste principle that applies to constrain governmental power generally.[508] Cases that involve local precommitments to underenforce the Constitution, such as *Equality Foundation*, would therefore require courts to confront directly their own conceptions of constitutionalism and of constitutional structure.

E. *Reviving the Local Public Realm*

More broadly, the recognition of local constitutionalism would serve the useful function of framing state/local disputes as disputes between governments about the scope of governmental responsibility for constitutional enforcement. Indeed, in each of the cases thus far reviewed in which local governments received constitutional protection from state interference, either the local community in a public action or the relevant local governmental institution in a suit of its own brought the constitutional challenge. Such suits recast traditional private versus public contests as disputes that occur within the public sphere. In doing so, local constitutionalist challenges diminish the extent to which abstract appeals to majoritarian power, or democratic formalism, resolve more subtle questions of constitutional meaning.

The recognition of local constitutionalism would also afford local governments an important constitutional role in *enforcing* the Constitution—a role that all other levels of government, as the Equal Protection Clause implicitly recognizes, are charged with fulfilling. That is a welcome result in

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[507] 426 U.S. 668 (1976) (holding that a referendum to approve changes in land use is constitutional).

[508] *See supra* note 395.

light of current doctrine, which tends to make local governments uniquely liable for the commission of constitutional wrongs but otherwise formally depicts them as the passive administrative agents of their states,[509] with "no set place" in the federal constitutional structure.[510] Indeed, some lower federal courts have even read Supreme Court case law, often without attention to decisions such as *Seattle School District*, *Papasan*, and *Romer*, to preclude local governments from asserting standing to bring a constitutional challenge against their states.[511] Such a cramped understanding of the constitutional structure denies the important role local communities may play in enforcing constitutional norms on behalf of their residents.

Finally, the recent literature on the important role that local political institutions may play in reviving republican politics strongly supports a conception of constitutional structure in which local governments are critical components.[512] There is a tremendous diversity among and within local communities. The traditional city/suburb divide only begins to touch on the differing perspectives that communities in different regions, with different histories, and comprised of different groups would bring to constitutional interpretation. If local constitutionalism would protect those communities predisposed not to take a broad view of their constitutional obligations, then it might also free those communities more eager to extend constitutional protection from current state law constraints. By broadening the range of permissible constitutional interpreters, local constitutionalism might broaden the range of constitutional protections. It would, at the least, engage diverse local communities directly in the public practice of constitutionalism and force states to confront the substantive constitutional consequences of their assertions of control over the communities they claim to have created. Thus, regardless of the degree to which such a doctrine would in the end protect local governmental independence from state control, it would remind local governments in a direct way that they are ultimately

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[509] *Compare* Quern v. Jordan, 440 U.S. 332 (1979) (suggesting that civil rights plaintiffs cannot sue states under 42 U.S.C. § 1983 because states are not "persons" within the meaning of the statute), *with* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978) (holding that civil rights plaintiffs can sue cities under 42 U.S.C. § 1983 because cities are "persons" within the meaning of the statute).

[510] *See* Williams, *supra* note 5, at 83.

[511] *See, e.g., City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9th Cir.), *cert. denied*, 449 U.S. 1039 (1980) (holding that the City had no standing to challenge the validity of a state statute as a result of the Supremacy Clause).

[512] *See* Ford, *supra* note 5, at 1906-18 (arguing that a connection exists between desegregated local space and participatory democracy); Frug, *The City as a Legal Concept*, *supra* note 6 (discussing the connection between city power and public freedom); Frug, *City Services*, *supra* note 9, at 35-45 (discussing community building as a city function); Frug, *The Geography of Community*, *supra* note 6, at 1081 (same).

creatures of the Federal Constitution, and not simply creatures of their states.

CONCLUSION

Too much of our daily experience with self-government occurs at the local level for us to dismiss localism as an embarrassing feature of constitutional democracy. Local governments are too central to the lives of too many people to serve as passive administrative agents of state majorities without an independent interest in enforcing constitutional norms. Local governments are also too intimately involved in resolving the central public questions of our time to be protected arenas for the aggregation of private preferences, free from constitutional obligations to resist central or private power.

True, the constitutional text does not mention the special role that local governments play in giving life to constitutional principles. As Thomas Cooley concluded more than a century ago, however, "[s]ome things are too plain to be written."[513] Local governments, the political structures that govern our lives on a daily basis, may be the means through which we discover our constitutional rights. That, at least, is the promise of Cooley's City. It is a promise that constitutional doctrine would do well to fulfill.

[513] People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44, 107-08 (1871) (Cooley, J., concurring).