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Kevin J. Worthen

The Role of Local Governments in Striking the Proper Balance Between Individualism and Communitarianism: Lessons for and from Americans

Kevin J Worthen[*]

The title of this conference[1] recognizes the almost adversarial relationship between the concepts of individualism and communitarianism. At the extreme of each ideology, the other begins to lose all meaning. At the extreme of individualism, where personal autonomy reigns as the supreme virtue, one encounters anarchy—a system that embraces no community values. At the extreme of communitarianism, where community values are the only determinant of acceptable behavior, one encounters totalitarianism—a system that rejects individual differences. Neither extreme is attractive. Yet, properly balanced, the two ideologies can produce a consistently shifting, but ultimately enriching, social milieu.[2] If individualism were placed at one end of a spectrum and communitarianism at the other, the ideal mix might, in an overly simplistic sense, be located in the middle—perhaps reminiscent of Aristotle's golden mean. The problem is discovering where that Aristotelian mean is located.[3]

Drawing on the articles by Professors Wyrzykowski and Inoue,[4] this comment begins by presenting a few of the lessons

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* Professor of Law, J. Reuben Clark Law School, Brigham Young University.

1. Conference, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations*, 1993 B.Y.U. L. REV. 1.

2. *See* Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 4 (noting the "natural and usually desirable tension" between individual and community interests).

3. "[T]he necessity for resurrecting community without at the same time burying the individual in some new collectivist idolatry is rapidly becoming, after survival itself, *the* political problem of our time." Dante L. Germino, *The Crisis in Community: Challenge to Political Theory*, *in* 2 NOMOS: COMMUNITY 80, 81-82 (Carl Friedrich ed., 1959).

4. Miroslaw Wyrzykowski, *Individualism and Communitarianism in a Contemporary Polish Legal System: Tensions and Accommodations*, 1993 B.Y.U. L.

that can be learned from the Polish and Japanese experiences with communitarianism. These experiences are then used as a backdrop to show why and how local governments can strike the proper balance between individualism and communitarianism, especially in the American system.[5] If American local governments are granted the necessary flexibility, they can properly accommodate these two legitimate interests. Finally, this comment offers some tentative thoughts about what lessons the American experience might provide for Japan and Poland and the role that local governments might play in their systems.

I. LESSONS *FOR* AMERICANS

Turning to the lessons Americans can learn from the Polish and Japanese experiences, the first common insight presented by Professors Inoue and Wyrzykowski is that "communitarianism" has a "dark side"—a point that those interested in reviving the communitarian concept in America need to keep in mind. Professor Wyrzykowski points out that the communist system, in which individuals were totally subordinated to the community interests under the slogan "the masses are all, the individual is nothing," has failed in Poland and other Eastern European countries.[6] Similarly, using *karoshi* or "death from work" as a paradigm, Professor Inoue

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REV. 577; Tatsuo Inoue, *The Poverty of Rights-Blind Communality: Looking Through the Window of Japan*, 1993 B.Y.U. L. REV. 517.

5. The hierarchy of American governments is as follows: The federal or national government is supreme in the areas in which it has been given authority to act. U.S. CONST. art. VI. The governments of the 50 states are next in line, possessing inherent police power to govern in areas not in conflict with federal law. *See License Cases*, 46 U.S. (5 How.) 504, 582 (1847). Local governments are political subdivisions of the state, created by state law. They have no inherent authority to govern, but must always point to some enabling legislation (either a state statute or the state constitution) to justify any of their actions. *See, e.g.*, City of Tacoma v. Taxpayers of Tacoma, 743 P.2d 793, 796 (Wash. 1987); West Point Island Civic Ass'n v. Township Comm. of Dover, 255 A.2d 237, 239 (N.J. 1969). The prototypical American local government is the city, which, under most state laws, has considerable authority to regulate its citizens on matters such as land use, traffic control, and nonfelonious criminal activities. There are other kinds of local governments that perform more limited functions, such as water districts and school districts. This comment focuses mainly on cities and school districts.

6. Wyrzykowski, *supra* note 4, at 577.

illustrates how overemphasis of group goals can destroy individuals.[7]

Nevertheless, both articles underscore that those who have seen this "dark side" of communitarianism are still unwilling to completely reject the concept in favor of unfettered individualism because communitarianism also has its redeeming features. Thus, Professor Wyrzykowski informs us that, despite the rejection of communism, socialism retains "an attractive set of promises, at least for major sections of society."[8] Professor Inoue likewise observes that the economic growth resulting from Japan's "communal character" has in turn "caused Japan to reproduce or even reinforce [this] character."[9] Clearly, both nations have found something attractive in their communitarian heritage.

These two common observations underscore the tension between individualism and communitarianism, as well as what I believe is a consensus that neither value should be completely excluded from the social equation. At the same time, the two articles provide different examples of what the two nations view as the desirable results of communitarianism. Professor Inoue focuses on the contribution of Japan's communal character to its "tremendous economic growth."[10] Professor Wyrzykowski, by contrast, notes that the "homo sovieticus"[11] mindset views "enterprises" with favor not necessarily because they are more efficient or productive, but because they give their members a "feeling of dignity."[12] These benefits differ widely from one another and may reflect differences in the societies themselves.

The point for Americans, however, is that there are many communitarian benefits that, as a society, we may overlook when considering the manner in which we accommodate communitarian and individual interests. For example, even though Professor Wyrzykowski concludes that the feelings of dignity and liberty generated by membership in Polish enterprises were largely illusory,[13] under proper circum-

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7. Inoue, *supra* note 4, at 532-38.
8. Wyrzykowski, *supra* note 4, at 577.
9. Inoue, *supra* note 4, at 531.
10. *Id.*
11. Wyrzykowski, *supra* note 4, at 578 (quoting J. Tischner, *Homo sovieticus*, GAZETA WYBORCZA, Jan. 15, 1991).
12. *Id.*
13. *Id.* at 579. Professor Wyrzykowski asserts that the feelings of dignity were

stances membership in a group can contribute to *genuine feelings* of liberty, a concept many modern Americans overlook. For many contemporary Americans, groups are entities that only *suppress* liberty. In the minds of many Americans, when a person joins a group or enterprise, that person surrenders a portion of her liberty in order to enjoy *other* non-liberty related benefits of membership. Yet, an individual's liberty increases in some ways when she joins a group.

Group membership can enhance liberty interests in at least two ways. First, being part of a group in a democratic system enhances a person's liberty by increasing the impact he can have on the political process. To use the current American vernacular—group membership gives greater "voice" to individuals.[14] In a representative democracy like America, where campaigns and legislation are greatly influenced by organized groups such as political action committees, the ability of an individual to actually influence the outcome of political debates is increased considerably by membership in a group.

Second, group membership may be essential to the achievement of individual fulfillment, the ultimate goal of those who wish to protect liberty. Although many modern Americans are so imbued with the notion of the presocial self that they would find such an assertion somewhat novel, western political philosophers have long maintained that community membership is an element of happiness, not just a means to that end. Aristotle postulated, "It is . . . surely paradoxical to represent the man of perfect happiness as a solitary; for . . . man is a social creature . . . naturally constituted to live in company."[15] He concluded that this "natural impulse . . . to live a social life"[16] is so strong "that man is by nature an animal intended to live in a polis"—to be a member of the

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just that—feelings—an ephemeral feeling resulting largely from an overestimation by the working class of their actual power in the political process. *Id.*

14. As Alexis de Tocqueville observed: "The right of associating with [the view of promoting the spread of certain doctrines] is very analogous to the *liberty* of unlicensed writing; but societies thus formed possess more authority than the press. When an opinion is represented by a society, it necessarily assumes a more exact and explicit form." 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 217 (Henry Reeve trans., 1961) (emphasis added).

15. ARISTOTLE, NICOMACHEAN ETHICS 304 (1170a) (J.A.K. Thomson trans., Penguin Books 1976) (1953).

16. ARISTOTLE, POLITICS 128 (1278b) (Ernest Barker trans., 1948) (emphasis deleted).

highest form of community.[17] Similar observations by other western philosophers,[18] modern theorists,[19] and the author of Genesis[20] provide powerful support for the position that communities are essential to human happiness. Consequently, group membership not only facilitates liberty, it is ultimately essential to it. The continuing communal nature of both Poland and Japan would seem to lend some support to this conclusion. Despite the recent recognition in these societies that overemphasis of community values can be destructive, members of both societies appear to be extremely hesitant to eliminate communitarianism.

The third common observation in the Inoue and Wyrzykowski articles is that the proper balance between communitarianism and individualism can be achieved only if one understands the past and current thinking in a particular society with regard to those two concepts. Both articles show that for historical and other reasons their societies are currently much more communal than American society.[21] Professor Wyrzykowski keenly observes that this different starting point is of critical importance in determining the direction the respective societies should take today.[22]

With that observation in mind, let me briefly set forth what I believe is the current mindset of the "homo Americanus." Perhaps the best summation of the mindset is found in Justice Harry Blackmun's dissenting opinion in *Bowers v. Hardwick*: "the 'moral fact [is] that a person belongs

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17. *Id.* at 6 (1253a).

18. Thomas Aquinas, for example, asserted that the human being "is naturally a social and political animal, destined more than all other animals to live in community." THOMAS AQUINAS, DE REGIMINE PRINCIPUM, I.1, (J.G. Dawson trans.), *quoted in* Germino, *supra* note 3, at 85. Similarly, Cicero observed that a "social instinct natural to man" is the "original cause" of humans forming commonwealths, for "the human kind is not solitary, nor do its members live lives of isolated roving; but it is so constituted that, even if it possessed the greatest plenty of material comforts [it would nevertheless be impelled by its nature to live in social groups]." CICERO, DE REPUBLICA I.25 (G.H. Sabine & Stanley B. Smith trans.), *quoted in* Germino, *supra* note 3, at 85.

For a more detailed description of the rise and fall in western political thought of the concept that man by nature seeks to belong to a community, see Germino, *supra* note 3, at 83-89.

19. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179 (1982) (arguing that there can be no moral conception of self without taking into account allegiances and commitments to others).

20. *See Genesis* 2:18 ("It is not good that the man should be alone . . . .").

21. *See, e.g.*, Inoue, *supra* note 4; Wyrzykowski, *supra* note 4.

22. Wyrzykowski, *supra* note 4, at 598.

to himself and not others nor to society as a whole.' "[23] In other words, most Americans today consider themselves autonomous individuals over whom the community has little, if any, moral command.

In contrast, Professor Inoue describes the more communitarian Japanese mindset in which loyalty to a particular group is the primary factor influencing both individual choice and identity.[24] Professor Inoue also describes Japan's "weak commitment to such universal principles as human rights, justice, and fairness" which has been produced by this mindset.[25] To emphasize the "dark side" caused by this communitarian mindset, Professor Inoue paints a disturbing picture of the *kigyo senshi*—corporate warriors so dedicated to their corporation that they are willing to sacrifice all other aspects of their life on its behalf.[26]

An equally disturbing picture is revealed in an examination of the statistical profile of what I believe is an American group that is, at least in part, a product of the individualistic American mindset—young African-American males. One in four African-American males ages 15-24 is either in prison, paroled, or on some form of probation.[27] Homicide is the leading cause of death for African-American male teenagers and young adults.[28] African-American males ages 15-24 are more than three times as likely to die from homicide or suicide as are their white counterparts.[29] Over thirty-five percent of all African-American males are drug and alcohol abusers.[30]

While the problems represented by these statistics cannot *all* be charged to the individualistic bent of the current

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23. Bowers v. Hardwick, 478 U.S. 186, 204 (1986) (Blackmun, J., dissenting) (quoting Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFFAIRS 288-89 (1977))).

24. Inoue, *supra* note 4, at 527.

25. *Id.*

26. *Id.* at 528.

27. Daniel Goleman, *Black Scientists Study the "Pose" of the Inner City*, N.Y. TIMES, Apr. 21, 1992, at C1.

28. Jewelle T. Gibbs, *Young Black Males in America: Endangered, Embittered, and Embattled*, *in* YOUNG, BLACK AND MALE IN AMERICA: AN ENDANGERED SPECIES 1, 15 (Jewelle T. Gibbs et al. eds., 1988).

29. U.S. DEP'T OF HEALTH & HUMAN SERV., HEALTH, UNITED STATES, 1991, at 155 (1992).

30. Robert Staples, *Black Male Genocide: A Final Solution to the Race Problem in America*, *in* BLACK MALE ADOLESCENTS: PARENTING AND EDUCATION IN COMMUNITY CONTEXT 39, 41 (Benjamin P. Bowser ed., 1991).

American mindset, in many respects, these statistics represent the natural course of a society that appears to have adopted the motto: "Every man for himself."[31] If nothing else, the dissatisfaction expressed in the 1992 riots in south central Los Angeles reflects a culture that has abandoned the "good of the whole" as the primary societal value. Thus, as both Professors Inoue and Wyrzykowski observe, the American system is more individualistic than communitarian, and this should make a difference in how current American law is shaped to maintain the proper tension between the two competing interests.

A fourth insight that can be drawn from the two articles is that while there are differences between private communities and public or governmental communities, the differences are not as great as the American legal system makes them appear. Under the current American legal system, private communities, such as churches, families, fraternal organizations, etc., are entitled to constitutional protection from undue governmental interference with their internal affairs. On the other hand, whenever a government entity engages in similar activities, the constitutional scales tip dramatically in the opposite direction, emphasizing protection of individual rights above community interests.[32] The Japanese and Polish experiences illustrate, however, that a legal system based on a firm dichotomy between private associations and government-sponsored associations may not accurately respond to real life situations.

Professor Inoue uses the *kaisha* or business corporation as a prototype of the kind of community that can, without proper control, inflict great damage on individual interests.[33] Under the American system, there is little doubt that a business corporation would be a private association not subject to the constitutional limitations imposed on government communities by federal and state constitutions.[34] Yet, Professor Inoue

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31. The exact manner in which I draw the connection between the current plight of inner-city African-American males and the lack of a more concerted communitarian focus in contemporary American society is beyond the scope of this brief comment, but a cursory explanation is given in the text accompanying notes 68-70, *infra*. A more complete explanation is given in Kevin J Worthen, *One Small Step for Courts, One Giant Leap for Group Rights: Accommodating the Associational Role of "Intimate" Government Entities*, 71 N.C. L. REV. 595 (1993).

32. *See* Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1715 (1988).

33. *See* Inoue, *supra* note 4, at 527-28.

34. *See, e.g.*, Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 501 (1st Cir. 1950) (holding that the First Amendment to the U.S.

clearly illustrates that such private associations can seriously threaten individual liberty under some circumstances, something the current American legal approach to the problem does not seem equipped to address.[35]

Constitution "limits only the action of Congress or of federal agencies and not private corporations").

35. Current American federal constitutional jurisprudence recognizes a "dichotomy between state action, which is subject to scrutiny under [the provisions of the constitution protecting individual rights from state interference] and private conduct, against which the [constitution] affords no shield no matter how unfair that conduct may be." NCAA v. Tarkanian, 488 U.S. 179, 191 (1988). The practical impact of that firm dichotomy on those whose individual rights are affected by action the court determines to be private is illustrated by *Tarkanian*.

The NCAA is an unincorporated association composed of "virtually all public and private universities and four-year colleges conducting major athletic programs in the United States." *Id.* at 183. It regulates each of its member institution's participation in intercollegiate athletics, through rules adopted by its members. Upon receiving allegations that the University of Nevada Las Vegas (UNLV), an NCAA member institution operated by the State of Nevada, had violated NCAA rules, the NCAA initiated an investigation in conformity with NCAA procedures. The NCAA concluded that Jerry Tarkanian, the men's basketball coach at UNLV, had committed a number of violations of the NCAA rules. The NCAA imposed certain penalties on UNLV and threatened additional penalties if the university did not remove Tarkanian from UNLV's program for a 2-year period. UNLV's president announced his intention to remove Tarkanian "though tenured and without adequate notice [of the charges the NCAA made against him]—even while believing that the NCAA was wrong." *Id.* at 187.

In the litigation that ensued, the trial court and the Nevada Supreme Court concluded that Tarkanian's constitutional right of due process was violated, and that the NCAA was largely responsible for that violation. The U.S. Supreme Court by a narrow 5-4 vote eventually ruled that the NCAA was not a state actor and that it was not subject to the constraints of the Constitution when it investigated Tarkanian and threatened to sanction the university unless the university removed Tarkanian. *Id.* at 195-99.

The ruling that the NCAA's actions were private conduct not only effectively overturned earlier lower court rulings that the NCAA was a state actor subject to the limitations of the constitution, *see, e.g.*, Regents of University of Minnesota v. NCAA, 560 F.2d 352, 364-65 (8th Cir.), *cert. dismissed*, 434 U.S. 978 (1977); Howard University v. NCAA, 510 F.2d 213, 220 (D.C. Cir. 1975); Parish v. NCAA, 506 F.2d 1028, 1032-33 (5th Cir. 1975); Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1254 (9th Cir. 1974), it opened the way for the NCAA to claim constitutional protection when the State of Nevada subsequently attempted to require by legislation that the NCAA comply with minimum due process requirements before it imposed sanctions. *See* NCAA v. Miller, 795 F. Supp. 1476, 1479 (D. Nev. 1992) (NCAA challenges state law on the ground that it violates members' "right to freely associate with each other to maintain their intercollegiate athletics programs").

Organizations such as the NCAA undoubtedly do perform valuable functions for universities, public and private. Furthermore, imposition of a constitutional requirement that it provide a full-blown hearing to those it is investigating may greatly impede its ability to perform this socially desirable function. But, it would not seem to follow that the NCAA's practical ability to order the removal of

Similarly, Professor Wyrzykowski discusses the problems created by the Polish government's surrender of law-making authority to self-managing associations of certain professions, such as the medical and veterinary professions.[36] When a group like the Country Assembly of Physicians is given authority to set standards that all physicians must comply with in order to maintain their ability to practice, the potential conflict between individual conscience and group norms is just as real as if the national government were imposing the standards.[37]

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someone from his employment following an investigation to which he had no access should be completely unrestrained. Unfortunately, the current law presents American courts with the choice of either imposing all the constitutional limits on the NCAA in disregard of its needs as a large voluntary association or providing absolutely no protection to those individuals whose lives may be profoundly impacted by its actions. There is no room for a middle ground under which the court could impose special rules tailored to minimize interference with the essential function of the organization, while still providing some protection to the individuals affected by it.

36. Wyrzykowski, *supra* note 4, at 592-98.

37. The Polish Country Assembly of Physicians seems to operate much like integrated state bar associations in American society. As with lawyers practicing in a state with an integrated bar association, Polish physicians must belong to the association in order to practice the profession. *Compare* Keller v. State Bar, 496 U.S. 1, 6 (1990) (describing integrated bar as "an association of attorneys in which membership . . . [is] required as a condition of practicing law in a State") *with* Wyrzykowski, *supra* note 4, at 593 (noting that "[m]embership in the appropriate self-managing association is a precondition for practicing a profession"). Like many state bar associations, the Polish Country Assembly of Physicians has promulgated and enforces a set of ethical rules with which members must comply. *Compare Keller*, 496 U.S. at 6 (noting that the bar association engaged in a variety of functions, including "formulating rules of professional conduct [and] disciplining members for misconduct") *with* Wyrzykowski, *supra* note 4, at 594 (noting that "the organs of the self-management group may adopt certain norms regarding principles of professional ethics, regulate the activities of different branches, or regulate the professional tribunals which may decide on the right to be admitted into the profession."). Those rules seem to have generated as much controversy and litigation among Polish physicians and members of the general public as have the rules of many state bar associations. *Compare* Wyrzykowski, *supra* note 4, at 594-98 (discussing conflicts between Medical Ethical Code and various legislative enactments) *with* Hoover v. Ronwin, 466 U.S. 558 (1984) (antitrust challenge to practices of state bar committee in grading bar examinations); Bates v. State Bar, 433 U.S. 350 (1977) (antitrust and First Amendment challenge to state bar rule prohibiting lawyer advertising). The two entities may not be completely similar, however, because in most states, the ultimate authority to adopt ethical codes and admit or remove members from the profession resides in the state supreme court and not the bar association itself. *See Keller*, 496 U.S. at 11 ("The State Bar does not admit anyone to the practice of law, it does not finally disbar or suspend anyone, nor does it ultimately establish ethical codes of conduct. All of those functions are reserved by California law to the State Supreme Court"); *Hoover*, 466 U.S. at 572 (Arizona Supreme Court, not Bar Examination Committee makes final decision to grant or deny admission to practice); *Bates*, 433 U.S. at 362 n.14

At the same time, however, the conflicts in the Polish system between individual conscience and group norms may not be as pronounced when nongovernment organizations are involved because the jurisdictional scope of such organizations is limited, and a judicial mechanism exists for eliminating abuses that clearly violate national policy expressed in the parliamentary statutes.[38] Moreover, benefits accrue to the profession from having self-regulation rather than regulation by parliamentary enactment. The rule-making body of a self-regulating profession is likely to be more sensitive than is parliament to the sometimes subtle pressures that the profession's members face. Such organizations can also respond with more flexibility to the issues presented because, unlike parliament, they are concerned with only one segment of society and are, therefore, under no compulsion to set forth uniform or consistent rules for all professions.

Thus, professional self-management associations would seem to require a unique set of legal rules to adequately limit their potential for abusing individual rights without unduly infringing on their ability to engender the benefits of self-regulation. Again, the American legal system's either/or, private/public method of dealing with the problem would seem to be inadequate.[39] A more functional approach would be more

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(Arizona Supreme Court has final authority to adopt or reject proposed rules of conduct, and to promulgate its own).

38. Wyrzykowski, *supra* note 4, at 585-98.

39. Whether American constitutional law would treat the actions of an organization like the Polish Country Assembly of Physicians as governmental action, subject to the limitations imposed on the government by the Bill of Rights and the Fourteenth Amendment to the U.S. Constitution, or as conduct of a private association not subject to any constitutional restraints is not entirely clear. As noted above, a close but not complete analogy can be drawn between the Country Assembly of Physicians and an integrated state bar association. *See supra* note 37. The public/private status of integrated bar associations is far from clear in American law. While possessing substantial authority over their members, state bar associations are "a good deal different from most other entities that would be regarded in common parlance as 'governmental agencies.' " *Keller*, 496 U.S. at 11. Thus, although the actions of state bar associations have been treated as governmental action when the state itself retains ultimate control over the activities, *see, e.g.*, *Hoover*, 466 U.S. at 570-73 (holding that actions of state bar committee constitute state action immune from antitrust liability because the state supreme court retained sole authority to determine who should practice law in the state); *Bates*, 433 U.S. at 361 (holding that actions of state bar in enforcing the bar rules was state action immune from antitrust liability because "its role is completely defined by the court; the [bar] acts as the agent of the court under its continuous supervision"), when a state bar association acts without approval of the state court or legislature, its acts have been held not to be state action under

beneficial—one that examines the potential of a particular group to harm individual interests and promote communitarian interests before deciding on the legal rules to be applied.[40]

Finally, both articles indirectly point out that the abuses produced by an overemphasis on communitarianism occurred at a time when local governments were losing power. Professor Wyrzykowski notes that local governments in Poland were "liquidated in 1950" and replaced with a system in which local self-rule had "no power to decide matters affecting the local community."[41] Similarly, while noting that neighborhood communities still possess at least informal power to shape the lives of their residents, Professor Inoue observes that the "[n]eighborhood communities, which once prospered as the lower reaches of government in prewar and wartime Japan, have generally become less pervasive in terms of their influence on everyday life."[42] Thus, while overemphasis of communitarian values seems to have caused problems in both Poland and Japan in the last 40 years, the fault cannot fairly be imposed on local governments. The Polish experience demonstrates that communitarianism at the behest of a national government can easily be abused, while the Japanese experience illustrates that communitarianism at the private level can likewise become excessive. An adequate balance may be achieved by placing the focus of the communitarian interest at another level.

Putting these somewhat disjointed points into summary form, together with what seems to be the logical conclusion to be drawn from each point, sets the background for a very brief explanation of why and how local governments can play a critical role in achieving the proper balance between individualism and communitarianism. While these observations are particularly relevant for contemporary American society, they may apply to Japanese and Polish society as well. The

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antitrust laws, even though the association is considered a "state agency by law." Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975). Although these rulings all concern state action immunity under antitrust law, rather than constitutional limitations on state action, the two inquiries are related. *Tarkanian*, 488 U.S. at 195 n.14 (noting that "analysis of the existence of state action justifying immunity from antitrust liability is somewhat similar to state action inquiry conducted pursuant to § 1983 and the Fourteenth Amendment").

40. For a more detailed elaboration of how such a functional approach might work, see Worthen, *supra* note 31, at 605-09, 611-22, 630-43.

41. Wyrzykowski, *supra* note 4, at 586.

42. Inoue, *supra* note 4, at 542.

points and conclusions are as follows.

1) Communitarianism taken to an extreme can ruin both societies and individuals. Any time social norms are enforced without regard to individual rights, there exists the potential that the dark side of communitarianism will prevail.[43] Accordingly, any entity possessing the power to enforce social norms should be subject to some limiting legal authority to check the excesses of communitarian power.

2) The benefits from a communitarian orientation are great enough that even those societies that have experienced some of the excesses of communitarianism are hesitant to reject the concept completely. Those benefits may extend as far as individual happiness, which cannot be fully enjoyed in isolation from other individuals. Accordingly, any entity that can produce some of these benefits contributes positively to both society and the individual and, therefore, should be entitled to some legal leeway when performing that role.

3) The adjustments that must be made in order to achieve a proper balance between individualism and communitarianism will vary from society to society depending on its past and current thinking with regard to those two concepts. The current American mindset seems to focus almost exclusively on individualism. Accordingly, changes in the American legal system should be focused on facilitating the realization of communitarian interests and, therefore, on entities that can create communitarian benefits.

4) A legal approach that treats private communities as entirely benign to individual rights and needing no legal scrutiny, while at the same time viewing all communities with any state authority as identical to one another, ignores the diverse nature of communities in contemporary society. Because the proper accommodation of communitarian and individual interests requires delicate balancing, a legal scheme that recognizes only two kinds of communities (private and governmental) and that invariably imposes one set of rules on one group and an opposite set on the other will find it difficult to achieve the proper balance. Accordingly, a functional approach is preferable—one that first examines the relative

43. Professors Wyrzykowski's and Inoue's articles demonstrate that social norms can be enforced either with formal state authority, as in the case of Poland, or informally through social pressure with which the state refuses to interfere, as in the case of Japan.

capacity of the organization to infringe on individual rights and further communitarian interests when making the challenged decision and then applies a rule which will allow maximum leeway to do the latter without risking the former.

5) Communitarianism enforced by the national government produced the excesses rejected by the Polish people. Communitarianism enforced by private businesses is producing the excesses currently being questioned by the Japanese people. Both excesses occurred at a time when local governments were decreasing in power. Accordingly, communitarianism focused at the local government level may be proper.

Using the five conclusions set forth above as criteria, a strong case can be made that local governments can play a key role in achieving the proper balance between communitarianism and individualism in contemporary American society.

First, under the current American legal system, there are ample layers of legal protections prohibiting local governments from engaging in the excesses of communitarianism. In the contemporary American legal scheme, local governments are subject to the complete control of their parent state.[44] Generally speaking, the state legislature can contract, alter, or even eliminate a local government's powers at any time.[45] Moreover, to the extent that there is any limitation on this authority, they are found in the state constitution[46]—a

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44. *See generally* Kevin J Worthen, *Two Sides of the Same Coin: The Potential Normative Power of American Cities and Indian Tribes*, 44 VAND. L. REV. 1273, 1276-77 (1991) ("city . . . governments exist at the will of a superior sovereign which could eliminate completely their right to govern").

45. John Dillon, the author of the first published treatise on local governments, observed that state power over municipal corporations "is supreme and transcendent: it may erect, change, divide, and even abolish them, at pleasure, as it deems the public good to require." 1 JOHN DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 54, at 75 (3d ed. 1881).

46. In one seminal case, the U.S. Supreme Court observed that "[t]he number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State," 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." Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907). The "*Hunter* Rule" has been modified somewhat to permit federal courts to ensure that the state does not invidiously discriminate against individuals when it draws municipal boundaries. *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960). However, the Court has made clear that *Hunter* "continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that States have in creating various types of political subdivisions and conferring authority upon them."

document that can generally be amended quite easily if the majority of the state population is upset about what a local government is doing. In addition, local governments are bound by federal statutes protecting individual rights, as well as by the guarantees of individual rights contained in both the federal and state constitutions. While these guarantees ought to be interpreted so as to favor local governments in some instances,[47] these limitations provide greater checks on the authority of local governments to suppress individual rights than those to which either the national or state governments in America are subject.

Second, unlike the state and national governments in America, many local governments are small enough and homogenous enough that they can realistically provide the benefits of a true community. Even at the largest level of local government—the city—many American local governments could qualify as a true community. More than seventy-five percent of American cities have fewer than 5000 residents.[48] Approximately one-half have fewer than 1000.[49] Moreover, many of the potentially communitarian functions that local governments perform are accomplished with smaller groups. For example, the average American public school class contains fewer than eighteen students.[50] A true community feeling could easily be established among such small groups, even though they are government sponsored. The same is not true for either the national or state governments. Thus, if any American governmental unit is to provide communitarian benefits to its residents, the local government should be the unit of choice.

Local governments, especially smaller cities and school districts, can provide their residents with some communitarian benefits. Cities and towns have long been identified in the

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Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 71 (1978).

47. *See infra* text accompanying notes 54-56.

48. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982 CENSUS OF GOVERNMENTS 8-9 (table 6) (1983) [hereinafter 1982 CENSUS OF GOVERNMENTS]. Plato suggested that a true community could contain as many as 5040 members, although he apparently was relying more on cosmological speculations than on functional reality. Carl Friedrich, *The Concept of Community in the History of Political and Legal Philosophy*, *in* 2 NOMOS: COMMUNITY 3, 4 n.3 (Carl J. Friedrich ed., 1959).

49. 1982 CENSUS OF GOVERNMENTS, *supra* note 48, at 8-9.

50. U.S. DEP'T OF EDUCATION, STATE EDUCATION PERFORMANCE CHART, 1982 AND 1989.

American system as the governmental entities that can most meaningfully allow people to satisfy their innate need to associate with one another and, to a limited degree, subordinate their individual desires to that of the group.[51] The same could be said for public schools.[52] Because they are organized at a more intimate level than either the national or state governments, local governments can also contribute to the development of pluralism and tolerance by providing a meaningful voice to community members and to the values they share—values that might otherwise be ignored. Furthermore, the geographically compact nature of many local government units, especially public schools, enables them to more easily generate the participation and consensus necessary to decide on group values and to transmit those values to the next generation.[53] Because local governments can in some situations provide communitarian benefits to their residents, they should be entitled to some legal leeway when performing that role.

Third, if the American legal system should currently be focused on facilitating the realization of communitarian benefits and if local governments are the only government entities that can provide those benefits, the American legal system should consider more fully how these entities can be empowered to carry out this role. Government sponsored communities create grave risks because they are necessarily accompanied by coercive power which can infringe on critical individual rights. But at the same time, government sponsored communities can provide some benefits that a system entirely reliant on voluntary communities cannot provide. Most importantly, local governments can provide a *permanent* form of community that gives "everyone, even those [like many inner-city African-American males] who do not have opportunities to participate in more intimate forms of traditional communities such as religion or family, . . . a chance to experience the benefits that accompany community membership."[54] Government sponsorship also ensures that the

51. *See* TOCQUEVILLE, *supra* note 14, at 61-64; Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1067-73 (1980).

52. Worthen, *supra* note 31, at 611-14.

53. *See generally* Worthen, *supra* note 44, at 1300-01 ("[p]eople who live in the same geographic area can perpetuate their value system").

54. *Id.* at 1299.

community will have enough resources to implement community ideals.

Fourth, if a more functional approach focusing on the entity's interest in achieving the communitarian benefits and its potential to suppress individual rights is preferable, local governments should have more leeway than they currently do to promote communitarian benefits without unduly infringing on individual rights. For example, a city that wanted to establish and maintain a certain moral atmosphere might be granted greater leeway to regulate the kinds of movies and entertainment allowed in its limits than would a state as a whole.[55] Public schools wishing to provide a positive community to at-risk students like young African-American males might be allowed to offer all-male classes on a volunteer basis, even though state-mandated segregation would clearly be intolerable.[56] These two innovations would be permitted at the local level, but not the state level, both because local governments are more easily controlled than the state (as a result of additional layers and kinds of legal controls that can be imposed on local governments) and because local governments, unlike the states, can meaningfully provide some communitarian benefits to their residents.[57]

Finally, because they have historically developed as quasi-public/quasi-private entities,[58] local governments are not limited by a specific set of rigid expectations in the legal

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55. In Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981), the Supreme Court struck down a *municipal* (local) ordinance prohibiting nude dancing in the town. Ten years later in Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991), the Court upheld a *state* statute banning nude dancing. A court applying the approach I suggest would reach the opposite results. Worthen, *supra* note 44, at 1304-05.

56. In Garret v. Board of Education, 775 F. Supp. 1004 (E.D. Mich. 1991), a federal district court issued a preliminary injunction prohibiting the Detroit City School District from opening three voluntary all-male academies to deal with the specific problems of inner-city African-American males. Applying the rules normally applied when *state* action discriminates on the basis of gender, the court ruled in part that the plan would violate the equal protection clause of the 14th Amendment to the U.S. Constitution. *Id.* at 1006-08. Under the approach I suggest, the reasoning of the court, and possibly the result, would be altered. *See* Worthen, *supra* note 31, at 618-22.

57. *See* Worthen, *supra* note 44, at 1304-07.

58. For a more detailed discussion of the manner in which the historical development of cities enables them to retain greater flexibility in the American legal system, *see* Worthen, *supra* note 44, at 1281-91. For a similar discussion of how the same concept applies to public schools, see Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 670-95 (1987).

system. If the mindset of the American people turned too much to communitarian values at the expense of individual interests, local governments have the flexibility to shift the balancing process back to individualism by enforcing individual rights in a broader scope and with more immediate effect than either the state or federal government. Government at the local level permits diversity and, as a result, promotes the kind of flexibility necessary to maintain the proper delicate balance between individualism and communitarianism. Therefore, while keeping in mind the lessons learned from the experiences of Poland and Japan, the American legal system should focus more on the manner in which it can facilitate local governments' performance of that role.

II. LESSONS *FROM* AMERICANS

The American experience can also provide some lessons for Japan and Poland, societies that are dealing with communitarian excesses. The first two lessons are warnings that come from the experiences of vastly different segments of American society.

The first of these is derived from the American experience with its indigenous population—the Native Americans. The warning is this: Some kinds of communities cannot be eliminated despite the legal system's best efforts to do so, and such efforts may serve only to make the life of the individual members of the community worse. For large portions of American history, the federal government's formal policy with respect to Native Americans was directed at the destruction of the key community group—the tribe. Several key pieces of federal legislation were expressly designed to "break up the tribal mass."[59] Single-minded efforts to this end were made from the 1880s to the 1930s[60] and again in the 1950s and

59. President Theodore Roosevelt compared a key 1887 act to "a mighty pulverizing engine to break up the tribal mass." Theodore Roosevelt, *First Annual Message*, *in* 14-15 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1914, at 6641, 6674 (James D. Richardson ed., 1917).

60. The main thrust of federal policy toward Native Americans during this period was typified by the Allotment Act of 1887, ch. 119, 24 Stat. 388 (codified as amended in scattered sections of 25 U.S.C.). Under the original act, the government was to allot parcels of land to individual tribal members—160 acres to each head of household and 40 acres to each minor. Surplus lands were then to be made available to non-Native Americans. *See* CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 19-20 (1987). As noted earlier, for some the avowed

early 60s.[61] Nevertheless, Indian tribes remain vibrant today. In fact, they provide a prime example of the communitarian role that local governments can play in American society.[62] Indeed, many of the tribes that completely lost their legal status retained a form of tribalism that the federal government was eventually forced to recognize.[63] Accordingly, the main effect of government efforts to destroy Indian tribes was not to destroy the communal tribal entity, but to injure individual tribal members.[64] The impact on both the tribe and the

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purpose of the policy was to destroy tribal culture so that Native Americans would be forced to assimilate into mainstream American society without any tribal ties. *See supra* note 59 and accompanying text.

61. In the 1950s the official federal policy toward Native Americans was typified by the Termination Acts under which tribal governments were "terminated." Termination generally involved "termination of federal trusteeship over certain Indian tribes, accompanied by mandatory distribution of tribal assets to tribal members and, in some cases, disbandment of the tribe." Robert N. Clinton, *Isolated in Their Own Country: A Defense of Federal Protection of Indian Autonomy and Self-Government*, 33 STAN. L. REV. 979, 1025 (1981). Over 100 tribes were terminated during the "Termination Era." Again, the pronounced goal of the policy was assimilation of Native Americans into mainstream society. S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 166 (1973). Or, as put more bluntly by one Montana Supreme Court justice: "The policy was to have declared an Indian no longer an Indian . . . ." R.V. Bottomly, Speech to National Congress of American Indians (1956), *reprinted in* S. LYMAN TYLER, INDIAN AFFAIRS: A STUDY OF CHANGES IN POLICY OF THE UNITED STATES TOWARD INDIANS 138-39 (1964).

62. *See generally* Worthen, *supra* note 44, at 1278-96, 1301-11.

63. Formal tribal status has been restored to a number of terminated tribes. *See, e.g.*, Menominee Restoration Act, 25 U.S.C. §§ 903-903f (1988).

64. The impact on many individual Native Americans of assimilationist policies, such as the General Allotment Act which eliminated the communal land ownership pattern of many tribes, was summed up by one historian:

> No longer did many tribal Indians feel pride in the tribal possession of hundreds of square miles of territory which they could use as a member of the tribe. Now they were forced to limit their life and their vision to an incomprehensible individual plot of 160 or so acres in a checkerboard of neighbors, hostile and friendly, rich and poor, white and red.
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> The blow was less economic than psychological and even spiritual. A way of life had been smashed; a value system destroyed . . . . The admired order and the sense of community often observed in early Indian communities were replaced by the easily caricatured features of rootless, shiftless, drunken outcasts, so familiar to the reader of early twentieth-century newspapers.

WILCOMB E. WASHBURN, RED MAN'S LAND/WHITE MAN'S LAW: A STUDY OF THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN 75-76 (1971).

Although the full current impact of these policies on individual Native Americans cannot be completely described in this short comment, a few statistics provide some representative illustrations. Forty-eight percent of the adult Native American population living on or near reservations nationwide are unemployed, with the percentage reaching as high as 80% in some states. BUREAU OF INDIAN AFFAIRS, INDIAN SERVICE POPULATION AND LABOR FORCE ESTIMATES 1 (table 1)

individual Native American was summed up by two scholars, who in 1980 observed:

> The entire history of the federal relationship with tribes is a history of attempts to subvert [tribal] consciousness and replace it with the naked, alienated individualism and formal equality of contemporary American society. Indian people have resisted and endured, but the poverty and hate which follow upon failure to assimilate obligingly into the American "melting pot" are the high price they have paid for it. Indeed, poverty is ample evidence that mere communal property interests are not the glue that binds the tribal fabric . . . .[65]

The American experience with Native Americans indicates that there may be groups in which communitarianism is so deep-seated that it cannot be eliminated. Despite the concerted efforts of the American legal system, tribalism remains "the heart and spirit of the [American] Indian people."[66] The efforts of the legal system failed because for many Native Americans, "[t]ribalism is not an association of interest but a form of consciousness which faithfully reflects the experience of Indians."[67] For these Native Americans, life without the tribal community is almost inconceivable.[68] When the communitarian consciousness is that deeply rooted, society should be careful how stridently it seeks to eliminate communitarianism

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(1989). The alcoholism mortality rate for Native American males ages 25-34 is nearly seven times that of other Americans. U.S. INDIAN HEALTH SERV., U.S. DEPT. OF HEALTH & HUMAN SERV., TRENDS IN INDIAN HEALTH 1991, at 50 (table 4.24) (1991). The suicide rate among Native American youth ages 15-19 is more than double that of other American youth. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, INDIAN ADOLESCENT MENTAL HEALTH 16 (1990).

65. RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY at viii (1980).

66. *Id.*

67. *Id.*

68. The significance of the tribal community to some Native Americans was summed up in the words of the Oglala Sioux Holy Man, Black Elk, who lamented his inability to use his sacred powers to help the group, even though he could help individuals:

> I wonder why [the vision giving me sacred power] came to me, a pitiful old man who can do nothing. Men and women and children I have cured of sickness with the power the vision gave me; but my nation I could not help. *If a man or woman or child dies, it does not matter long, for the nation lives on. It was the nation that was dying, and the vision was for the nation;* but I have done nothing with it.

JOHN G. NEIHARDT, BLACK ELK SPEAKS 180 (Univ. Neb. Press 1989) (1932) (emphasis added).

because such efforts may be largely unavailing with respect to the community itself and unintentionally destructive with respect to members of that community.

The second warning comes from the more recent American experience with young African-American males. A partial statistical profile of this group has already been presented.[69] The lesson to be learned from these depressing statistics, and the history behind them is this: If society destroys some forms of communities, it should be prepared to replace them with other positive forms of communities because a lack of positive communities can lead to devastating results.

A large part of the current problems faced by young African-American males stems from their lack of connection with, and access to, traditional intimate communities like family and religion. Although society did not consciously choose to destroy these communities among inner-city minorities, it allowed their degeneration and did little to prevent the resulting sense of alienation felt by inner-city youth. In the words of sociologist Jewelle Taylor Gibbs:

> With the breakdown or weakening of . . . traditional institutions within inner-city communities, there has been a parallel breakdown of the traditional black community values of the importance of family, religion, education, self-improvement, and social cohesion through extensive social support networks. Many blacks in inner cities no longer seem to feel connected to each other, responsible for each other, or concerned about each other. Rather than a sense of shared community and a common purpose, which once characterized black neighborhoods, these inner cities now reflect a sense of hopelessness, alienation, and frustration.[70]

As bad as this alienation and frustration is, it is only part of the story. Impelled perhaps by the innate desire to be part of some community, and finding no others readily available, increasing numbers of inner-city African-American males (and other minorities) are forming communities commonly know as "gangs," communities which are characterized by destructive violence to those not in the "community." If, as I believe, humans possess an inner need to belong to some meaningful

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69. *See supra* notes 27-30 and accompanying text.

70. Gibbs, *supra* note 28, at 19. Gibbs noted that "[i]t is exactly this kind of frustration that exploded in the urban riots of the 1960s." *Id.* I believe it also largely explains the more recent outbreak of violence in south central Los Angeles.

community, destruction of a community that is on the whole positive may exact unexpected costs that most societies would not willingly want to bear. While communities must be controlled and directed, those who are combating the excesses of communitarianism might do well to keep in mind that some kinds of associations "have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs."[71] Destruction of those communities might well undermine society itself.

Finally, given the primary focus of this comment, it seems appropriate to provide a few thoughts about the potential role of local governments in striking the proper balance between individualism and communitarianism in Japan and Poland. The thoughts are necessarily tentative and limited because of lack of familiarity with the two systems. However, in light of the suggestions presented in the two articles, there appears to be some potential for positive contributions by local governments in both Japan and Poland.

For example, Professor Inoue calls for an open communality in which multiple communities would be able to command a portion of each individual's allegiance and individual rights would be given greater respect.[72] Properly empowered and limited, local governments could play a role in developing this kind of communality. They could serve as alternative or counterbalancing communities to the business community, focusing on environmental, educational, or other concerns of the local citizens that individual businesses are not in a position to control. By providing a setting in which workers from all companies in the area could associate to achieve goals not fulfilled by the companies themselves, the local governments could become one of several communities that would limit the informal authority of the business community without destroying it.

In addition, by adopting laws that protect individual rights, local governments could help their citizens attain the proper moral sense of balance between allegiance to self and to the community. Such laws would not only directly limit the excesses of communitarianism, they would also indirectly curb them by providing an example of how individuals ought to be treated by communities.[73] Thus, a revitalization of local

71. Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984).
72. Inoue, *supra* note 4, at 545-50.
73. As Tocqueville observed: Local institutions "are to liberty what primary

governments in Japan could contribute to the solution proposed by Professor Inoue.

Similarly, local governments in Poland might serve as a necessary stepping stone to enable Polish citizens to safely make the transition from an authoritarian nation-state, in which the national government controls everything, to a more pluralistic polycentric society, in which private interests have a larger share of power. Professor Wyrzykowski warns that the transition may result in the preservation of the worst of both worlds.[74] However, by shifting power down to those government entities on the lower end of the vertical separation of power chain and retaining the right to direct fundamental policies, the Polish government may enable its citizens to retain the sense of control over their lives that was such an attractive aspect of the prior system and still limit the excesses of the statist authoritarianism of the past. Indeed, the Poles have apparently attempted just that through their efforts to rejuvenate local governments under the 1990 Local Community Law.[75]

In conclusion, because they lack the power to control all aspects of a person's life in a society where travel and relocation is possible and because they are often small enough to provide some sense of community to their residents, modern local governments can play a pivotal role in achieving the proper balance between individualism and communitarianism. The differing needs of the society in which they are located will determine whether local governments should increase the strength of either communitarian or individual interests. In either case, policy makers in all democratic societies would do well to use these unique local entities to achieve desired results.

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schools are to science; they bring it within the people's reach, they teach [people] how to use and enjoy it." TOCQUEVILLE, *supra* note 14, at 75.

74. Wyrzykowski, *supra* note 4, at 603.

75. *Id.* at 585-88. The Polish Local Community Law seems similar to legislative home rule provisions in American state constitutions under which states grant local governments authority to exercise any power not denied by the state constitution or state legislature. *See, e.g.*, PA. CONST. art 9, § 2; ILL. CONST. art. VII § 6(*l*). Like American courts and legislatures, *see, e.g.*, Sonoma County Org. of Pub. Employees v. County of Sonoma, 591 P.2d 1 (Cal. 1979), Polish lawmakers are struggling to determine what issues truly are matters of purely local concern. *See generally* Wyrzykowski, *supra* note 4.