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# In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law

Clayton P. Gillette

# IN PARTIAL PRAISE OF DILLON'S RULE, OR, CAN PUBLIC CHOICE THEORY JUSTIFY LOCAL GOVERNMENT LAW?

CLAYTON P. GILLETTE*

## I. INTRODUCTION

Contemporary scholarship in local government law faces the difficult task of defining a role for individual municipalities in a world of increasing local interdependence. For some, this regionalism has the unfortunate by-product of reducing opportunities for individuals to participate in political affairs or to share in the benefits of community identity.[1] Others take a contrary tack, arguing that desirable advances in regional coordination are frustrated by a legal regime that sanctions parochial local goals.[2] Each side of the debate, however, agrees on this much: the current state of local government law, particularly those doctrines that define the scope of local autonomy, are inadequate to the desired task. For those who consider the locality as a focal point for public life within which individuals can participate meaningfully in politics, legal doctrine insufficiently promotes municipal initiative.[3] On this view, localities can

* Perre Bowen Professor of Law, University of Virginia School of Law. Thanks for careful readings and helpful comments are due to participants in faculty workshops at Boston University School of Law and George Mason University Law School. Special thanks are due to Kathy Abrams, Lynn Baker, Vicki Been, Jack Beermann, Richard Briffault, Joe Brodley, Ronald Cass, Douglas Leslie, Larry Sager, Gary Schwartz, Ken Simons and Avi Soifer.

1. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Ronald R. Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983); Frank Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

2. The best statement of this position can be found in Richard Briffault, *Our Localism* (pts. 1&2), 90 COLUM. L. REV. 1, 346 (1990).

3. The possibility of the locality becoming a place for public debate has caused some to bemoan the failure of the founders to find a place for localities in the constitutional firmament. *See* HANNAH ARENDT, ON REVOLUTION 235 (Penguin ed. 1977); James E. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999 (1976). On the Jeffersonian admonition to "turn the counties into wards," see Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 931 n.7 (1988).

Although some assume that local units will foster a spirit of communitarianism, that view is not necessarily coextensive with the celebration of localism. A desire to provide a public place for deliberation is also consistent with a liberal individualism that seeks to provide opportunities for dispute and exchange of ideas without any expectation or hope that a consensus will emerge, or even to ensure the existence of private space, free from government or group intervention. *See* Amy Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308 (1985); George Kateb, *Democratic Individuality and the Meaning of Rights*, in LIBERALISM AND THE MORAL LIFE 183-206 (Nancy Rosenblum ed., 1989).

achieve their desired purpose only when empowered to engage in activities that permit pursuit of residents' interests. For those who fear the capacity of localities to act parochially, however, those interests too readily ignore or offend the interests of nonresidents. For them, local governments should be constrained in their ability to do much more than serve as administrative units for the implementation of policy decisions made at a more centralized level of government. Hence, even the current scope of local authority is threatening.[4]

My concern in this article is with the underpinnings of current doctrine concerning local autonomy. Debates over issues such as home rule and the proper interpretation of municipal authority cannot rationally be resolved unless we have some view of the reasons for exercising or withholding those powers. Compatible with all sides of the debate over the proper scope of local autonomy, however, is the view that municipalities, at a minimum, should provide those local public goods and services preferred by their constituents. This objective certainly incorporates the view that local governments are administrative economic units; indeed, those who hold this view may consider provision of public goods to be the only task suitable to localities.[5] But satisfaction of local preferences is equally compatible with the conception of local government as a focal point for public discourse. If individuals were unable to realize the objectives that emerge from public debate (to attain the type of community that emanates from discussion), the content of that debate would soon become purely academic and would be unlikely to sustain the robustness that advocates claim for it. At the same time, the focus on local public goods, by definition, avoids the problem of externalities that lead some to call for constraints on local autonomy.

In this Article, I suggest that one particular doctrine of local government law that initially appears inconsistent with liberal conceptions of local autonomy may actually increase the likelihood that a given locality will supply those goods and services preferred by its residents. I argue that the doctrine at issue, Dillon's Rule, can best be understood and justified as a judicial check on local tendencies to cater to special interests at the expense of other groups within the locality. For those who consider local autonomy to be unnecessarily constrained, Dillon's Rule is anath-

4. The excellent attack on "localism" by Richard Briffault focuses primarily on the capacity of localities to engage in activities that generate adverse effects outside the jurisdiction. *See* Briffault, *supra* note 2.

5. *See* GEORGE J. STIGLER, THE TENABLE RANGE OF FUNCTIONS OF LOCAL GOVERNMENT, *in* JOINT ECONOMIC COMMITTEE, FEDERAL EXPENDITURE POLICY FOR ECONOMIC GROWTH AND STABILITY, 85th Cong., 1st Sess. 213 (Joint Comm. Print 1957).

ema. If my view of the Rule is correct, however, then Dillon's Rule may be vital in ensuring that localities satisfy the objectives of their residents. Typically, special interests will constitute a minority of the locality, so that satisfaction of their demands is likely to deviate from the aggregate preferences of the community. If Dillon's Rule creates an obstacle for these interests, therefore, it may enhance the ability of a majority of municipal residents to achieve their preferences.[6] Nor is there anything implicit in Dillon's Rule that requires that those preferences be taken as given; the Rule does nothing to frustrate and perhaps provides some mechanism to achieve informed preferences that presumably evolve from robust public debate. Indeed, my strongest claim is that, given the current structure of local decision-making, informed residents would *prefer* the doctrine that has emerged.

I propose to reinforce my thesis with learning from the literature of public choice. Nevertheless, I cannot claim that public choice theory leads inexorably to my conclusion. Public choice theory makes two related predictions that can explain the propriety of Dillon's Rule. The first is that political officials and their constituents will tend to make decisions that advance their own personal welfare, even when doing so comes at the expense of the community's general welfare.[7] This is not to say that either public officials or their constituents are devoid of personal ideology, or are oblivious to any conception of the public interest.[8] It is to say that personal interests are an important variable in the positions taken by local officials and constituents regarding the allocation of municipal resources. The second prediction is that localities are particularly susceptible to the political alliances that form as a result of economic

6. Although I have stated in the text that the primary justification of Dillon's Rule is to constrain the capacities of minority interests, it is important to recognize that "special interests" may occasionally coincide with the interests of the majority. In this case, it is difficult to separate majoritarian interests from the aggregate preferences of the community, a point made effectively by Richard Briffault in his comments at the Conference at which this paper was presented. This situation may give rise to fear that the majority will run roughshod over the minority, a concern for "raw majoritarianism." Although my immediate concern with Dillon's Rule lies in its ability to prevent capture of the local legislative process by minority interests, I will argue, particularly with respect to impact fees, that Dillon's Rule and related doctrines of local government law also serve to counter raw majoritarianism by requiring a process in which adversely affected minorities are permitted to express their views. *See* text accompanying notes 110-33, *infra*. This process may frustrate majority will in some sense, but does so only by requiring that the majority consider alternative interests before making an ultimate decision, not by replacing majority rule with some other decision-making process.

7. I recognize the difficulty of providing any concrete meaning to the concept of "general welfare" or "public interest." I do not propose to define these phrases, but to suggest that action in the name of the general welfare takes into account the interests of diverse groups, considers long-term as well as short-term effects, and is not necessarily coextensive with majority views.

8. *See, e.g.*, Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990).

interests, as local governance heightens both opportunities for the formation of some groups and opportunities for free riding among those not easily organized. The result of these predictions is that rent-seeking behavior is possible and that Dillon's Rule is a potential remedy.

At the same time, my thesis is inconsistent with other predictions from public choice. Public choice theory, at least in its strongest form, suggests that law is a tool of special interests able to capture the attentions (and votes) of lawmakers, who themselves engage in efforts to collect rents from those most willing and able to pay for government largesse. This view of legal process has led to the complaint that public choice theory is antidemocratic, or at least produces an unattractive picture of government through democratic representation.[9] Thus, if Dillon's Rule were embodied in a statute, one might explain it as a legislative attempt to exact rents from localities that seek to exercise authority. But public choice theory need not be so negative. By delineating the conditions in which special interests are most likely to succeed, it may also predict the circumstances in which legal intervention to prevent domination by a particular interest group is most essential. The strongest forms of public choice, of course, would deny the possibility of such publicly interested intervention. Indeed, acceptance of the premises of public choice requires some explanation of how and why a publicly interested coalition would arise to create legal obstacles for the favored interest group. Dillon's Rule may less readily be classified in this manner. First, it is a judicial rule, and the rents that judges can obtain through its implementation are less obvious. Second, few would suggest that no legal doctrines serve the public interest. It must be the case, then, that some mechanism motivates the occasional legal doctrines inhibiting the type of laws that the public choice literature finds so prevalent and unpalatable. In this Article, I suggest that the desire to create barriers to rent-seeking behavior best explains the existence and application of Dillon's Rule. At the end of the Article, I suggest that the desire to impede government behavior that would be predicted by public choice also explains some related doctrines that affect the scope of municipal autonomy.[10]

9. *See, e.g.*, Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989).

10. Since I am concerned with the use of public choice to predict failures of the democratic process, it may be useful to determine whether the legal responses to those failures I discuss fit with those conditions in which public choice theorists speculate public interest might be served. At first glance, it may appear that no such fit exists. Jonathan Macey, for instance, has suggested that public interest may be vindicated during a constitutional moment. *See* Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987). If this is true, then one

## II. DILLON'S RULE AND THE SCOPE OF LOCAL AUTONOMY

Dillon's Rule is perhaps the best known doctrine of local government law. As formulated by its author—judge and treatise writer John F. Dillon—the doctrine[11] limits localities to exercise of those powers expressly delegated to them by the state legislature or necessary to implement or necessarily implied from express legislative grants.[12] Any doubts about the validity of the local initiative are to be resolved *against* exercise of the power. The Rule therefore embodies a vision of localities as creatures of the legislature that are entitled to no rights greater than or independent of those of the state. Notwithstanding some subsequent liberalization by its author,[13] most judicial statements of the rule remain true to its original expression.

Dillon dedicated precious little space to justifying his view of local subservience. The relationship between locality and state implicit in the Rule assumes an immutable and incontestable principle of positive law that reflects the state's position as "creator" of its political subdivisions and for which justification would be superfluous. Confirmation of the Rule's propriety lay in the circumstances out of which it arose. In the absence of legal constraints, municipalities had incurred substantial debts for the questionable public function of financing railroad companies and other public improvements that subsequently failed, leaving taxpayers in fiscal straits.[14] Dillon, as judge and commentator, had railed (pun in-

might look to see whether state constitutions embody the rule of law that I argue herein serves public interest. Even a cursory examination of state constitutions reveals that they tend to embody home rule, a doctrine contrary to Dillon's Rule. Nevertheless, this proves little in the current context. These provisions were added as state constitutions were revised, a process quite different from the creation of a nation and initial constitution with which Macey is concerned. Indeed, one may argue that home rule was inserted into state constitutions at the behest of special interest groups (large cities), and thus illustrates the type of legislation with which public choice theory is most concerned. Additionally, Macey seems concerned with the federal constitutional process, rather than with the more frequent and less definitional process of drafting, amending, or revising a state constitution.

11. The doctrine is perhaps better cast as a rule of statutory construction. *See* FRANK MICHELMAN & TERRANCE SANDALOW, GOVERNMENT IN URBAN AREAS 254-55 (1970).

12. That part of Dillon's Rule most frequently cited reads:

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable.

1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-49 (5th ed. 1911).

13. Compare 1 JOHN F. DILLON, THE LAW OF MUNICIPAL CORPORATIONS § 55 (1st ed. 1873) with 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237-39 (5th ed. 1911).

14. *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 92-97 [hereinafter Williams, *Constitutional Vulnerability*]; Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in*

tended) against these developments.[15] Dillon's Rule, therefore, became a weapon in the battle against fiscal overextension and its more vicious counterpart, municipal corruption.[16] Fiscal impropriety did not result simply from banal overconfidence in the capacity of entrepreneurs to enhance the commercial attractiveness of a city; it was also the stepchild of immorality in local government, evidenced by outright bribery; the creation of machine politics; and, for Dillon, local government's disregard for private property that would otherwise have created a barrier against government intervention.[17]

The oft-told story of scholarly reactions that sought a right of self-government for localities and ultimately generated the home rule movement need not be repeated here.[18] It is sufficient to note that, notwithstanding some recent doubt expressed about its continuing vitality,[19] Dillon's Rule remains a significant doctrine in decisions about the exercise of local power. Within the decade, courts have invoked the doctrine of limited municipal powers to achieve results as widespread as invalidation of municipal contracts to purchase energy capacity in a decision that led to the largest default of municipal bonds in history,[20] nullification of an ordinance requiring bottle deposits,[21] and invalidation of municipal

*Legal Change*, 34 AM. U. L. REV. 369, 437 (1985). The claim that follows from this history is that decisions concerning local fiscal stability had to be made at a more centralized level of government, *i.e.*, by the state. This traditional account from Dillon's laissez-faire era ignores the fact that during the first half of the eighteenth century, states had assumed similar obligations with similar results when the Panic of 1837 forced default on borrowings for internal improvements. *See* ALBERT M. HILLHOUSE, MUNICIPAL BONDS: A CENTURY OF EXPERIENCE 34 (1936). *See generally*, WILLIAM A. SCOTT, THE REPUDIATION OF STATE DEBTS (1893).

15. *See, e.g.*, Hanson v. Vernon, 27 Iowa 28 (1869); John F. Dillon, *The Law of Municipal Bonds*, 2 (N.S.) S. L. Rev. 437, 444 (1876).

16. *See* Frug, *supra* note 1, at 1110-11; Williams, *Constitutional Vulnerability*, *supra* note 14, at 100.

17. HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870 222-23, 261-62 (1983). The view of private property as a bulwark against government excess is not limited to those who would constrain the reach of local government. Hannah Arendt's celebration of the American Constitution recognizes "respect for private property" as the traditional remedy against "the tendency of public power to expand and to trespass upon private interests." *See* ARENDT, *supra* note 3, at 252. Arendt is not advocating a libertarian policy, however. She simultaneously feared the possibility that pursuit of private interests could reduce individual concern with the public realm. Her remedy was the elevation of the public realm at the local level, the only level in which individuals could have the opportunity "of *being* republicans and of *acting* as citizens." *Id.* at 253.

18. *See* Howard L. McBain, *The Doctrine of an Inherent Right of Local Self-Government* (pts.1 & 2), 16 COLUM. L. REV. 190, 299 (1916).

19. Carol Rose has suggested, for instance, that zoning powers granted to localities after *Euclid* effectively eviscerated the doctrine of narrow construction of municipal power. *See* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 99 (1989).

20. Chemical Bank v. Washington Public Power Supply Sys., 666 P.2d 329 (Wash. 1983), *cert. denied*, 471 U.S. 1065, 1075 (1985).

21. Tabler v. Board of Supervisors, 269 S.E.2d 358 (Va. 1980).

restrictions on the sale of condominium units.[22] Thus, even if the Rule had its birth in local attempts to interfere with private property, it has matured in areas that include traditional local functions.[23]

Against this historical background, contemporary legal scholarship has had little patience for Dillon's Rule or the costs it imposes on localities before they can legislate in a novel area. Instead, the doctrine is usually presented as a cause of mischief whereby judicial bias is substituted for principled decision about the scope of the local initiative.[24] Questions about the desirability of the Rule begin with comparison to analogous legal doctrines employed to interpret the powers of private corporations. Like municipal corporations, private corporations are creatures of legislative charter. The by-laws that directors enact pursuant to legislative enabling acts are the functional equivalent of municipal ordinances enacted by officials pursuant to municipal charter or statute. Nevertheless, the standard principle of statutory construction with respect to private corporations is one of broad interpretation, so that findings of ultra vires actions by these entities are infrequent.[25] Moreover, black letter law dictates that any ambiguity concerning corporate powers is to be resolved in favor of the exercise of power. How, then, can one justify the opposite rule for municipal corporations? The simple answer

22. Steinbergh v. Rent Control Bd. of Cambridge, 546 N.E.2d 169 (Mass. 1989).

23. *See also* Brooks v. City of Benton, 826 S.W.2d 259 (Ark. 1992). Frug argues that the Rule had its source in the concern to insulate private property from government interference. *See* Frug, *supra* note 1, at 1109-13. One might argue that the Rule should have continued vitality where localities are involved in proprietary activities that are more likely to implicate private property, but less effect where traditional government activities are involved. Given the ability of courts to differ over whether a particular function is proprietary or governmental, *see id.* at 1140 n.359, the continuing demise of the distinction is fortunate and should not be disrupted. *See* Janice C. Griffith, *Local Government Contracts: Escaping From the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990). Furthermore, there is little reason to believe that governments are more likely to act arbitrarily or improperly when their conduct concerns a "private" rather than a "public" function. Indeed, just the opposite may be the case. When government adversely affects private property, at least one person, the property owner, will generally have a sufficiently intense interest to object. Where public property is at issue, interests may be sufficiently diffuse that it is not worth any one party's while to intervene, notwithstanding the aggregate loss to the community.

24. *See* Note, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693 (1982). Even Professor Briffault, who presumably would prefer to constrain municipal authority, does not explicitly endorse Dillon's Rule as a means to that end.

25. The general rule for interpretation of the authority of private corporations provides:

> In determining the powers of a corporation, a fair and reasonable construction should be given to the laws or charter provisions under which such powers are claimed . . . [and] where the power exercised is not wholly inconsistent with the powers granted or with the object or purpose of the corporation, and the power has been exercised for a long period of time, any doubt as to the construction of a grant of power should be resolved in favor of the corporation.

WILLIAM M. FLETCHER, CYCLOPAEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2483 (Perm. Ed. 1989 Rev. Vol.). It may be, or course, that both should be subject to the doctrines currently applicable to localities. Later in this Article, however, I will suggest a justification for the distinction.

that municipal corporations must be restrained because of the inherent power of government simply cannot pass muster in a period when private corporations take on responsibilities as important as those of governments in the delivery of essential services. That an investor-owned electric utility or water company should be subject to less rigorous constraints than a municipally owned electric light plant can be explained formalistically, but not justified, on the basis of the governmental nature of the provider. The capacity of a private telephone company or automobile manufacturer to affect the quality of life through corporate decision making is not apparently less than that of a government. In a time of increasing privatization of government functions, the distinction increasingly rings hollow.[26]

Questions about Dillon's Rule become more pronounced on the understanding that its primary effect is to shift the decision about the scope of local authority from political institutions, the city council or state legislature, to the courts.[27] *Judges* determine whether an express grant of power includes the activity at issue in a particular case. *Judges* decide whether a legislative grant of power "necessarily" implies the authority that the locality seeks to exercise. The consequence is subordination of local decision making to other institutions and a correlative decline in municipal autonomy, political participation, and self-determination by residents. The inherent vagueness of the standard provides courts with the ability to modify or retard the local agenda, or to require localities to seek specific enabling acts from the state. A rule that limits local initiative, therefore, implies that local constituents cannot be trusted to sort out those policies that are and are not detrimental to the locality, while shareholders of private corporations can best evaluate what serves their financial welfare. Unlike the corporate context, the political process by which local choices might be made is subordinated to a non-market selection mechanism, *i.e.*, a judicial arbiter.

Greater tolerance for the Rule might exist if there were a sense that, once placed in judicial hands, interpretation of the standard had evolved into a coherent, predictable view of local powers. Were this the case, local officials and residents might at least pursue political activity in areas clearly within local jurisdiction. Alternatively, residents might come to

26. *See* Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449 (1988). On the public/private distinction, see Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

27. Williams, *Constitutional Vulnerability*, *supra* note 14, at 99-100; HARTOG, *supra* note 17, at 224. This, of course, was the intended consequence of the Rule, as judges saw themselves as the barrier between local misuse of authority and the protection of individual rights. *See id.* at 222-23.

believe that judges were acting properly, if paternalistically, in their (the residents') interests. But commentators on local government purport to discern just the opposite of a sustained, lucid view of the Rule's application.[28] The uncertainty the Rule is thought to engender is evident in the textbook staple used to introduce students to it, *Early Estates v. Housing Board of Review of Providence*.[29] That case illustrates the nuisance that judicial intervention can work. In *Early Estates*, the Supreme Court of Rhode Island was asked to consider whether the city council of Providence had the authority to include two requirements in a minimum standards housing ordinance. The ordinance had been passed pursuant to a state statute authorizing the city to establish minimum standards for housing "essential to the protection of the public health, safety, morals and general welfare," and to enact minimum standards deemed necessary to make dwellings "safe, sanitary and fit for human habitation." One of the challenged provisions of the ordinance required multi-family dwellings to have lighting in public spaces; the other required the same dwellings to be connected to hot water lines. In an opinion as conclusory as it is mystifying, a majority of the court held that the quoted language in the statute "clearly intended to vest the council with power to require hallway lights."[30] The majority interpreted the same statute, however, to contain no authority for a municipality to enact hot water requirements. In each case, the court reached its decision on an application of Dillon's Rule.

The popular pedagogical use of this contradictory set of conclusions suggests that the case stands as evidence of such pervasive judicial mischief as to render the Rule congenitally inappropriate. My objective is to demonstrate instead that Dillon's Rule plays an important function in ensuring appropriate decision making at the local level. What makes the doctrine inappropriate in the Rhode Island case, I contend, is not simply

28. *See* MICHELMAN & SANDALOW, *supra* note 11, at 254.

29. 174 A.2d 117 (R.I. 1961). Apparently no set of materials in local government law can be considered complete without *Early Estates*. *See* MICHELMAN & SANDALOW, *supra* note 11, at 277; GERALD FRUG, LOCAL GOVERNMENT LAW 64 (1988); DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 93 (3d ed. 1980).

30. 174 A.2d at 118. The full sentence reads: "The use of such language [by the legislature] makes it abundantly clear that the legislature clearly intended to vest the council with power to require hallway lights as a safety measure." I submit that when a court uses a form of the term "clear" to describe legislative intent, there is a rebuttable presumption that the court has no support for its position; but that when a court uses a form of the term "clear" twice in one sentence to describe legislative intent, there is an irrebuttable presumption that the court has no support for its position.

The Rhode Island legislature effectively overturned the decision in *Early Estates* the following year. 1962 R.I. Pub. Laws 122 expressly permitted minimum standards under local housing code ordinances to require the installation of facilities to heat hot water.

inconsistency in application (a judicial trait hardly unique to this rule of statutory construction[31]), but the absence of those factors that otherwise render local decision-making suspect.

## III. THE CONDITIONS FOR LOCAL AUTONOMY

In the face of these criticisms—inconsistency with analogous legal principles, shifting authority away from autonomous localities, and inherent ambiguity—what justifications could exist for narrow construction of municipal initiative power?[32] In this part, I wish to elaborate a justification based on an argument that residents of a locality would prefer Dillon's Rule under a discrete set of circumstances where its application increases the probability of receiving a mutually agreeable package of local goods and services. I begin with an attempt to indicate the circumstances under which restrictions on local autonomy are superfluous. Given the assumption that the primary function of localities is to provide local goods and services for constituents, those ideal circumstances would obtain when the package of local public goods and services provided in each locality satisfies the preferences of local residents.[33] When that condition exists, there seems to be little reason to limit the authority of local governments, as they are acting in the desired manner, even without legal intervention.

31. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

32. One rationale for the Rule seems implicit in Mill's observation that local officials are of "lower average of capacities," "almost certain to be of a much lower grade of intelligence and knowledge" than officials of the central government, and "accountable to, an inferior public opinion." JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 222-24 (Currin V. Shields ed., 1958). If our quest is for sophisticated, intelligent decision making, then the assumption that local officials are generally inadequate to the task augurs for restricting the scope of their authority. Dennis Thompson refers to this attitude as evidence of Mill's concern for the competence of government officials. *See* DENNIS F. THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT 126-35 (1976). But even Mill is ambivalent in his analysis of the "comparative position of the central and the local authorities, as to capacity for the work, and security against negligence or abuse." MILL, *supra*, at 224. Thus, Mill notes that, even as local residents have an inferior knowledge of "the principles of administration," they have "a far more direct interest in the result" and thus are likely to be more watchful of their officials. *Id.* Mill seems to imply that residents at the local level are more likely to overcome the free rider problem due to their comparatively small numbers. If we understand Mill to be seeking allocation of government power in a manner that permits both competent administration and opportunities for personal development where the adverse effects of learning slowly are not imposed externally, local activity seems appropriate within a range where the intense interests of constituents will induce and enable them to monitor the implementation of centrally designed programs. Hence, Thompson suggests that Mill believed that localities were capable of achieving an appropriate balance of competence and participation and thus avoided unqualified endorsement of centralization. *See* THOMPSON, *supra*, at 130-31.

33. As indicated above, this objective may be intended either as an end unto itself or as a means to achieving some further end (such as allowing citizens to engage in discourse about the selection and allocation of goods provided, or having sufficient goods provided to contemplate the good life).

Once these ideal conditions are recognized, they can be compared to the more realistic state of affairs under which localities actually operate. Should absence of the ideal conditions bring about a situation in which the package of local public goods fails to satisfy constituent preferences, some legal constraints on local autonomy may be appropriate to reduce or eliminate the diversion from the ideal. Given the contractarian nature of the argument, the clearest case of a desirable constraint on local autonomy exists where all residents would agree to it. My argument, therefore, ultimately seeks to demonstrate that rational residents would prefer a legal principle such as Dillon's Rule.[34]

The polar case for untrammelled local autonomy seems subsumed in Charles Tiebout's exploration of the allocation of local goods and services.[35] In Tiebout's idealized model, each locality provides a package of local public goods consistent with the preferences of its residents (consumer-voters).[36] Residents whose preferences remain unsatisfied by a particular locality's package of goods and services would (costlessly) move. (I address later the possibility that disgruntled residents might also seek to convince their neighbors or officials to adjust the package to one consistent with their own preferences.) Escape from undesirable packages of goods and services is feasible as a result of two explicit characteristics of the Tiebout model: absence of externalities and mobility of residents.

The assumption that externalities do not exist in the Tiebout world is consistent with Mill's limitation of the proper arena of local autonomy to matters "purely local."[37] The willingness of localities to impose burdens on neighbors who have no representation in the decision has generated the most bitter attacks on local exercises of power.[38] The capacity of localities to engage in exclusionary zoning, to draw boundaries, and to pollute all illustrate that localities can exercise their considerable authority to achieve narrow parochial objectives at the expense of nonconstituents. By definition, intramural delivery of goods and services neither confers substantial benefits nor imposes substantial costs on nonresidents. Hence, in the Tiebout world of no externalities, nonresidents need

34. On contractarian arguments generally, see GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES 19-33 (1985). For a view that arguments resting on hypothetical consent must ultimately rely on the justification of the goods that parties are said to desire in the hypothetical contract, see DAVID SCHMIDTZ, THE LIMITS OF GOVERNMENT 7-10 (1991).

35. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

36. I have previously elaborated this view in Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946 (1987) (book review).

37. *See* MILL, *supra* note 32, at 222.

38. *See* Briffault, *supra* note 2.

no protection from offensive local activity and individuals within a locality can avoid all costs of unwanted services through emigration.

In such a world, legal restrictions on municipal autonomy would be superfluous. Localities that sought to exercise broad initiative power to perform novel functions would presumably attract residents partial to those functions without adversely affecting those who wished to eschew them.[39] Performance of a function that imposed substantial costs on residents without returning offsetting benefits would presumably be corrected either through electoral reform or by migration as exiting residents signalled their displeasure without governmental intervention. Indeed, this argument meets even the occasional argument that Dillon's Rule was articulated as an effort to forestall local government interference with private property.[40] A more autonomous local government structure would permit localities so inclined to condemn or regulate private property and to invite those parties least receptive to such intervention to emigrate. What is important is that the combination of "markets" for residents and "deliberation" within any particular locality about the desired service package can produce an optimal allocation of resources within localities of optimal size without government intervention (except in the creation of the institutions necessary for decision making by consumer-voters).[41]

Within the Tiebout model, any justification for Dillon's Rule that is itself based on externalities also evaporates. Because local functions generate no external effects, no restriction on the local initiative is necessary to protect nonresidents. Nor would legal constraints or incentives be necessary to accomplish greater levels of participation or more powerful localities. Instead, residents who sought additional opportunities for participation would migrate to those localities that offered them. Town meeting forms of governance would freely compete with more bureaucratic or hierarchical forms.[42]

39. Tiebout also assumes a sufficient number of localities to accommodate disgruntled emigrants. *See* Tiebout, *supra* note 35, at 419.

40. *See* Williams, *Constitutional Vulnerability, supra* note 14, at 97.

41. The capacity of individuals to migrate may also interfere with optimal allocation of resources, as individuals will decide whether or not to move based on a consideration of personal costs and benefits rather than social ones. The result may be that it is worthwhile for an individual to move from jurisdiction A to jurisdiction B, even though it produces congestion in the latter. This problem requires redress at a centralized level. *See* DENNIS C. MUELLER, PUBLIC CHOICE II 157-63 (1989); James Buchanan & Charles Goetz, *Efficiency Limits of Fiscal Mobility: An Assessment of the Tiebout Model*, 1 J. PUB. ECON. 25 (1972).

42. One might imagine that this choice would not satisfy the objectives of those who view localities as an appropriate forum for political activity because individuals who had not previously participated could fail to appreciate the benefits of participation and ignorantly choose a hierarchical form of local government when, if informed, they would prefer a participatory one.

Outside the Tiebout world of no externalities, however, some constraints on local power are necessary to prevent strategic local behavior. One locality may affect others by direct regulation[43] or by engaging in activities, such as polluting, that significantly limit the choices of nonresidents. The desire to control externalities, therefore, may explain a great deal of otherwise incoherent doctrine about local government law.[44] Nevertheless, the failure to eliminate external effects does not explain—and certainly does not justify—Dillon's Rule. First, the Rule does not ensure that localities will be unable to impose substantial burdens on nonresidents. The Rule does not prohibit the exercise of municipal power; it only requires that localities first seek permission from the state legislature. Where benefits will be concentrated within the proposing locality, and burdens will be distributed diffusely throughout much of the state, the intense interests of the locality may be sufficient to overcome any resistance from those burdened. While representatives of even minutely burdened areas might be expected to oppose the proposal from which they receive no benefit, the possibility of logrolling suggests that even these representatives could be persuaded to vote in favor of the proposal if they can trade for a bill that favors their constituents, as long as those benefits outweigh perceived losses from support of the first locality's proposal.[45] Thus, to the extent that Dillon's Rule requires localities

43. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978).

44. Take, for example, the issue of the scope of judicial review of incorporation decisions. In virtually all jurisdictions, municipalities become incorporated by following statutory standards. The relevant standards, however, vary widely from state to state. In some jurisdictions, the requirements for incorporation create ephemeral standards such as the existence of a "community." *See, e.g.*, ALA. CODE § 11-41-1 (1989), which allows incorporation by "a body of citizens whose residences are contiguous to and all of which form a homogeneous settlement or community." Elsewhere, statutes dictate a relatively specific litany of factors that must be considered before incorporation can occur. *See, e.g.*, MINN. STAT. ANN. § 414.02 (West 1987 & 1991 Supp.). In each case, the ultimate question remains who is to decide whether the legislative standard has been satisfied. Absent concern about external effects, however, that inquiry seems unnecessary; petitioners presumably sought incorporation because they believed that incorporation meets their needs. Typically, the reason that courts use to express concern about proposed incorporations has to do with the fear that incorporation will impose substantial externalities on those areas outside the proposed municipality. These externalities might take the form of a reduced tax base for surrounding unincorporated areas, *see* Cottonwood City Electors v. Salt Lake County Bd. of Comm'rs, 499 P.2d 270 (Utah 1972); of physical isolation as new boundary lines divide neighborhoods, *see In re* Incorporation of the Borough of Glen Mills, 558 A.2d 592 (Pa. Commw. Ct.), *appeal denied*, 567 A. 2d 655 (Pa. 1989); or of the omission of areas equally in need of services as those included in the incorporated municipality, *see* Daniel R. Mandelker, *Standards for Municipal Incorporations on the Urban Fringe*, 36 TEX. L. REV. 271, 292-94 (1958). It is unlikely that the decision of incorporators will consider the costs that incorporation will impose on those who remain outside. Delegation of the decision to the broader body, *e.g.*, a court, is more likely to generate a process that encompasses both costs and benefits of the proposed incorporation.

45. Logrolling may enable representatives of one locality to obtain support for legislation particularly favorable to it by agreeing to vote for legislation favored by representatives of other localities, even though each such enactment would generate aggregate costs in excess of social gains. I

to appeal to the state legislature, the effect may be to foster trading external burdens at the state level rather than a net diminution of negative spillovers.[46]

More importantly, however, the presence of externalities can neither explain nor justify Dillon's Rule, because activities that generate significant spillovers do not fall within the domain covered by the Rule in the first place. Dillon's Rule does not attempt to define those activities that are or are not within the scope of local competence. Rather, it requires that, even for activities deemed properly within the local realm under some independent metric, the locality must additionally secure legislative authorization. What takes them outside the realm of local concern, however, is the very fact that they produce substantial spillovers. Thus, no formulation of Dillon's Rule is necessary to bar one locality from imposing taxes on another or from zoning or condemning property within another jurisdiction.[47] Of course, it is likely that an exercise of local authority that imposed substantial externalities would properly be addressed at a more centralized level, such as the legislative. Thus, the search for a proper decision maker in such a case could well lead to results consistent with Dillon's Rule. Nevertheless, impositions of external burdens do not constitute the cases that have given rise to judicial invocation of the Rule.[48] Indeed, even in home rule jurisdictions that grant localities substantial initiative power within a particular realm of "municipal affairs," we might be willing to preclude local decision making that adversely affected neighboring jurisdictions.[49] Finally, at the very

have suggested elsewhere that the concern for logrolling may be viewed as a justification for state constitutional restrictions on "special legislation," i.e., legislation that affects only a limited number of localities. *See* Gillette, *supra* note 3, at 970-71.

46. This form of the Tragedy of the Commons may support a general skepticism about logrolling. *See* MUELLER, *supra* note 41, at 82-86.

47. This is not to say that a legislature might not delegate such powers to a locality. *See, e.g.*, John M. Payne, *Intergovernmental Condemnation as a Problem in Public Finance*, 61 TEX. L. REV. 949 (1983). It is only to say that the requirement for such extraordinary delegation is not dependent on Dillon's Rule, but on recognition that regional issues are sometimes best addressed by having one locality serve as regional decision maker.

48. *See, e.g.*, Jachimek v. Superior Court in and for County of Maricopa, 819 P.2d 487 (Ariz. 1991) (invalidating local requirement for use permit in areas otherwise zoned in conformity with state law); State v. City of Orlando, 576 So. 2d 1315 (Fla. 1991) (invalidating municipal revenue bond issue); City of Richmond v. Confrere Club, 387 S.E.2d 471 (Va. 1990) (city could not enact ordinance delegating authority to suspend bingo and raffle permits); Resource Conservation Management, Inc. v. Board of Supervisors of Prince William County, 380 S.E.2d 879 (Va. 1989) (upholding ordinance to prohibit debris landfill). One recent invocation of Dillon's Rule precluded the imposition of external benefits. *See* Watauga County Bd. of Educ. v. Town of Boone, 416 S.E. 2d 411 (N.C. Ct. App. 1992). Courts, however, have expressed a Dillon's-Rule unwillingness to permit extraterritorial zoning without explicit legislative authority. *See, e.g.*, Dougherty County v. Burt, 308 S.E.2d 395 (Ga. Ct. App. 1983).

49. This is a relatively simplified view of a complex topic, *i.e.*, the scope of home rule. *See, e.g.*, De Fazio v. Washington Pub. Power Supply Sys., 679 P.2d 1316 (Or. 1984). Home rule jurisdictions

most, an externalities explanation for Dillon's Rule would justify restrictions only on those exercises of power that generated substantial negative spillovers. For cases of "business purely local" that constitute the great majority of Dillon's Rule issues,[50] there would be little reason for state or judicial intervention. In the absence of externalities, the only negative effects that local officials could produce would affect their own constituents. Should that occur, the political process should be a sufficient source of remedy.

*Unless*, of course, the local political process is subject to its own failures that impede—within the locality—the capacity of individuals to obtain their preferred goods and services. Tiebout defines away this possibility with his second assumption—that his actors are perfectly mobile.[51] Tiebout's residents live on dividend income and thus are not tied to localities by employment or other fiscal and physical constraints (although social and psychic ties are not explicitly addressed in the model). The result, again, is that they can vote with their feet should local officials be insufficiently attentive to constituent preferences.

Where mobility is complete, politics are unnecessary to resolve issues of allocation.[52] Thus, the capacity to gravitate to more congenial jurisdictions reinforces the impropriety of placing legal limits on local authority. But, as in the case of externalities, once we move outside the Tiebout world, the need for restrictions on local autonomy potentially arises, this time to compensate for the lack of perfect mobility.[53] I say "potentially" because, even in the absence of the ability to exit, there may

may figure more prominently in the debate about local autonomy today because major cities tend to enjoy home rule rather than be subject to Dillon's Rule. At the same time, the larger size of home rule localities tends to reduce the problems of forming multiple interest groups that I argue below undergirds the justification for Dillon's Rule. Non-home rule localities tend to be relatively small and hence the jurisdictions in which the concerns I express about reputation, repeat play, and collective action are likely to have greatest force.

50. That intramural disputes constitute the majority of cases is important if the objective is to create a default rule for municipal authority in order to avoid judicial investigation into the degree of externalities in any given case. The desire to ignore ad hoc investigation is appropriate to reduce administrative costs or judicial error. But the default rule would presumably reflect the situation that arises in the majority of cases likely to be in dispute. If the majority of cases involve minimal externalities, then, even if it otherwise might be appropriate to limit local authority where externalities do exist, a default rule that permitted local autonomy would be proper.

51. Tiebout also assumes a sufficient number of localities to make the possibility of migration to one more consonant with personal preferences a viable option.

52. *See* Robert Inman & Daniel Rubinfeld, *A Federalist Fiscal Constitution for an Imperfect World: Lessons from the United States*, *in* FEDERALISM: STUDIES IN HISTORY, LAW AND POLICY (Harry Scheiber ed., 1988).

53. Even if opportunities for exit from the locality are limited, they will likely exceed opportunities for interstate or international movement. Thus, one would expect to see substitutes for exit used increasingly as the level of government against which residents have complaints becomes more centralized.

be more effective remedies than legal intervention to the problem of unsatisfied preferences. Indeed, once we relax the assumption that mobility is costless, exit may be disfavored even by those who are relatively mobile if some less costly alternative for achieving preferences is available. It is to this end that Albert Hirschman suggested that voice might be an alternative to exit.[54] Where mobility is costly, the introduction of politics to change the status quo, or to resist change advocated by others, would seem appropriate. Were all those interested in a particular outcome willing to express their views in a manner that revealed their true intensity, we would expect a signalling process, deliberation and compromise, and hence an ultimate outcome that approximates (if not duplicates) results that could be obtained through perfect mobility.[55] The two processes would deviate substantially only where those who lost the debate on an issue would have exited, but fail to do so because the costs of mobility are too high.[56] As long as the voice option remains a substantial, if imperfect, substitute for full mobility, however, lack of mobility alone cannot serve as a justification for Dillon's Rule in intramural affairs. (Indeed, under the communitarian view of local government, perfect mobility—far from providing the benefits inherent in the Tiebout world—is less desirable than the participation-fostering effects of relative immobility, since loyally remaining in the locality and attempting to convince others to change or reaching common ground is superior to individualistic retreat.[57]) If the participatory option worked as well outside the Tiebout world as exit works within, Dillon's Rule would again be superfluous.

But participatory alternatives to exit may have their own limitations. Dillon's Rule can be justified, therefore, if it addresses the conditions that place limits on exercise of the voice option and if those limits are sufficiently significant that the mix of exit and voice cannot provide

54. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). *See* Rose, *supra* note 19; Gillette, *supra* note 3, at 944-45.

55. *See* Rose, *supra* note 19, at 96-97. Thus Briffault writes, "The idea of local governments as governments as centers of collective decision making rather than as firms that supply goods to the municipal marketplace is certainly the underpinning of the legal authority of local governments." Briffault, *supra* note 2, at 416. My own view is that the choice between participation and supply is less binary than Briffault suggests. The focus of participation at the local level is quite often about what goods the "municipal firm" should supply to its constituents. That point notwithstanding, his position that localities provide a forum for the debate is certainly correct.

56. On strict enforcement of the Tiebout criteria, this would encompass every case in which a resident lost a vote, since Tiebout assumes that there is available a range of communities that fills the full range of public goods possibilities. Thus, each loser would migrate to a community that provided the preferred basket of public goods.

57. This may overstate the case. If perfect mobility existed, those who favored communitarian localities would be perfectly free to gravitate to them. If, however, one views communitarianism as good for everyone, even for those who would not select it, then the sentence in the text stands.

residents with something approximating their preferred package of goods and services. If constituents could avoid these defects by constraining local authority, that would provide the consensual basis for limiting municipal autonomy necessary to rescue Dillon's Rule. It is to the possibility that these conditions are met that I now turn.

## IV. A CONSENSUAL THEORY FOR DILLON'S RULE

Begin by recalling that the initial argument for local government is as a supplier of public goods and services. These are goods that would presumably be undersupplied (from a social perspective) without government because any resident who engages in their production will be unable to exclude others from benefiting, will be unable to collect contributions from other beneficiaries, or will be unable to coordinate with others willing to contribute in order to ensure optimal supply. Note that undersupply of these goods is possible even if failure to participate in producing them is not a dominant strategy. In short, the possibility of free riding on the efforts of others does not inexorably lead to a Prisoner's Dilemma in which no public goods are provided. It does, however, indicate that we may be in the more precarious situation (a Chicken Game) where public goods are likely to be underprovided because of uncertainty over the conduct of other parties. An individual may benefit from supplying public goods, but would benefit even more if someone else performed the same task and could not compel contributions from other beneficiaries. Even in this situation, some people may step forward to supply the popularly desired public goods, even though they know that others will free ride on their efforts. One reason may be that the others have successfully communicated an unwillingness to act, so that unless the remainder themselves act, the desired good will not be produced. Thus, a common solution to the Chicken Game dilemma is to precommit not to cooperate before others can do so.[58] The result is that those others must cooperate if the public good is to be produced at all. As long as personal benefits from acting exceed personal costs and these individuals do not suffer too much envy, the failure of others to cooperate will not necessarily prevent these individuals from acting. A second solution to the Chicken Game lies in the possibility that some altruists may exist, indifferent to personal costs and benefits. A third possibility is the appearance of a discrete subgroup that gets sufficient benefit from providing

58. *See* Jean Hampton, *Free-Rider Problems in the Production of Collective Goods*, 3 ECON. & PHIL. 245, 262 (1987); Michael Taylor & Hugh Ward, *Chickens, Whales, and Lumpy Goods: Alternative Models of Public-Goods Provision*, 30 POL. STUD. 350 (1982).

the good to others (as opposed to providing it for personal consumption as in the case of the first group) that it is worthwhile to them to incur the related costs, regardless of what others do.

The problem is that, in each of these cases, it is unlikely that the producers will provide the exact good in the exact form that the public at large would prefer. The first group may not produce at all. Precommitment by defectors may successfully signal others that they must produce the good or forgo its production entirely. But effective precommitment requires communication to all other players, a strategy that becomes costly once the number of players increases, and is likely to be impossible where their numbers approach those of even small localities.[59] Even if some are willing to produce, they will only produce the quantity and quality of the good necessary to satisfy personal, rather than social preferences, and personal preferences may require more or less of the good than is socially desirable.[60] Altruists (the second group), although seeking to satisfy social preferences, may misunderstand the public desire or be incompetent and thus provide too much or too little, notwithstanding their best efforts to satisfy the public interest.[61] The third group, political entrepreneurs, may produce quantities and qualities of goods sufficient to capture the gains of entrepreneurship, but this point may also deviate substantially from the social optimum.[62]

The possibility of these results leads to the received view that, left to their own devices, rational, self-interested, utility maximizing individuals would, perversely, undersupply public goods that all desire.[63] The standard solution to the problem lies in the creation of government, an entity authorized to provide the preferred goods and exact from constituents the contributions they are willing to make in the first place, as long as they are paying only their fair share and for a good they in fact desire.[64]

59. *See* DAVID HUME, A TREATISE OF HUMAN NATURE 538-39 (L.A. Selby-Bigge ed., 1978). Jean Hampton has noted that there may be situations in which more than one, but not all persons affected by the public good are necessary for its production. In that situation, some selection mechanism is needed to determine which of the affected parties should participate in production. *See* JEAN HAMPTON, HOBBES AND THE SOCIAL CONTRACT TRADITION 262 (1986).

60. *See* Christopher Bliss & Barry Nalebuff, *Dragon-Slaying and Ballroom Dancing: The Private Supply of a Public Good*, 25 J. PUB. ECON. 1 (1984); Clayton P. Gillette, *Who Puts the Public in the Public Good?: A Comment on Cass*, 71 MARQ. L. REV. 534, 541-43 (1988).

61. William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

62. *See, e.g.*, RUSSELL HARDIN, COLLECTIVE ACTION 35-37 (1982); Bruce A. Ackerman et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985).

63. Conceivably, the provider would oversupply, from a social perspective, the amount of public goods. A defense contractor, for instance, has incentives to sell the government more than the optimal number of weapons necessary to ensure the public good of national defense.

64. Numerous scholars have indicated that government is not necessary to bring about this

Agreement to local government effectively transforms the non-cooperative Chicken Game into an Assurance Game, in which all parties are inexorably driven to cooperate because government makes possible enforcement of the implicit agreement. What remains to be demonstrated is that individuals who seek to avoid undersupply of local public goods by agreeing to the formation of local government would also agree to have that government constrained by Dillon's Rule.

Within a locality, some decision must be made about which public goods among the variety available should be provided. Given that no local budget is without constraints, some trade-off is inevitable among eligible activities, such as schools, police protection, road paving, and tax collection. If the "public" nature of these goods creates the need for government (what I will call the first-order problem), however, then we should recognize that decisions by government about which goods to provide and about their allocation raise the same kind of problem that government was intended to cure. Government (at least legitimate government) will govern by reacting to the signals of constituents about their preferences. At least, that is what we expect of government and the predicate for believing that both exit and voice will generate changes in government policy. If numerous people share a preference for the same allocation, however, any can free ride on the efforts of the others to govern, or to secure the agreement of other governors to make the favored allocation. Given majoritarian rule, the probability of obtaining a favored allocation might be thought to increase with the number of advocates for that allocation. Nevertheless, participating in the advocacy process is itself costly. Thus, potential supporters may believe that their personal contributions produce diminishing marginal returns and are unnecessary to effect the desired result. Hence, government itself must be viewed as a public good. Once we recognize that fact, however, it follows that government is subject to the same misallocation as other public goods, in what we might call a second-order public goods problem.[65] The implication of conceiving of government as a public good is that those who step forward to govern or to secure the benefits of government

result, that cooperation will evolve among repeat players. *See, e.g.*, ANTHONY DEJASAY, SOCIAL CONTRACT, FREE RIDE 12 (1989); MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION (1987); Hampton, *supra* note 58; GREGORY KAVKA, HOBBESIAN MORAL AND POLITICAL THEORY (1986). I believe that each of these contributions demonstrates that some public goods will be provided through cooperation in the absence of government; but none demonstrates that the same level of public goods will be so provided.

65. *See, e.g.*, Clayton P. Gillette & James E. Krier, *Risk, Courts & Agencies*, 138 U. PA. L. REV. 1027, 1064-70 (1990); DEJASAY, *supra* note 64, at 12 (sanctions necessary to enforce co-ordination problems themselves raise second-order co-ordination problems).

may do so not because their preferences coincide with those of the public at large, but because they have a peculiar preference that makes it worthwhile to secure those benefits in a manner that coincides with their own interest. In short, the same motivations of self-interest that create the public goods problem in the first place also infect its solution.

The result is that government is unlikely to allocate resources within its control (first-order public goods) strictly in accordance with the preferences of all, or even a majority of, its constituents. In itself, this result is neither surprising nor nefarious. Outside the Tiebout world, one would expect that preferences among constituents of any locality will diverge. Under these circumstances, and assuming limited municipal resources, some model of fair division among competing groups would be appropriate. What constitutes a fair division under these circumstances is open to debate. For some, taking intensity of preferences or personal utility into account would be appropriate;[66] for others ensuring an equal share of municipal resources to each constituent would be appropriate;[67] for some an equal share of each resource is appropriate;[68] and for some allocation by lottery may be appropriate.[69] There is not necessarily a single standard by which to judge the propriety of the rule of fair division. Indeed, one strength of municipal autonomy is its capacity to permit different localities to attract those residents who share a particular vision of the optimal allocation rule. Further, it may be appropriate within a single locality to allocate different resources by use of different standards (e.g., it would make no sense to allocate welfare services on a willingness-to-pay standard that purports to measure intensity of preference, but it might make sense to allocate access to a municipal golf course in that manner). Even if a wide variety of acceptable rules of fair allocation exists, however, it is likely that, with respect to any particular good, the allocation selected by government will coincide with none of them. Instead, the second-order public goods problem suggests that, for numerous goods, government will select a rule of allocation that most (those who received a suboptimal supply) would agree is outside the permissible range, i.e., by supplying any good to those with the greatest capacity to make their preferences heard where that metric does not necessarily coincide with public interest.

66. RICHARD BRAITHWAITE, THEORY OF GAMES AS A TOOL FOR THE MORAL PHILOSOPHER (1955); John Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950).

67. BRIAN BARRY, THEORIES OF JUSTICE 85-95 (1989); Ronald Dworkin, *What is Equality—Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981).

68. DANIEL W. FESSLER & CHARLES M. HAAR, THE WRONG SIDE OF THE TRACKS (1986).

69. *See* Lewis Kornhauser & Lawrence Sager, *Just Lotteries*, 27 SOC. SCI. INFO. 483 (1988).

The likelihood of this result may become evident by examining a single local government decision. Assume that a city council is deciding whether to allow development of a conservation area within the municipality. Developers obviously anticipate substantial financial benefits from an affirmative vote, while preservationists would prefer a negative vote. Because the number of developers will likely be small, one might imagine that their preferences will be ignored if a large number of preservationists exists. This same numerical disparity, however, means that any single developer will likely be unable to secure benefits without direct participation in the political process of lobbying the city council. In addition, the benefits of participation by developers are likely to be substantial (high profits), so that expected gains of involvement will likely outweigh even the certain costs of participation. Preservationists, however, face a very different payoff schedule from participation. Since they are numerically superior, the need for any one of them to become involved declines, as similar (if not identical) benefits can be obtained if other preservationists lobby.[70] Additionally, the benefit of involvement may also be small, depending on matters such as how much other conservation land exists in the vicinity or how far the preservationist lives from the threatened area.[71] The result is that any given developer is likely to participate in the lobbying effort while any given preservationist is not, thus sending a skewed signal to the city council.

Note that there is nothing insidious in the conduct described above. Although it leads to a decision favored by a minority of current residents,[72] the result occurs through the very political process that advocates of localism seek to foster. The only problem is that numerous residents have decided not to participate (a result that may diminish if participation were more of a social norm), because the personal costs of participation outweigh personal benefits. But the same result could be obtained through a more perverse process. Assume, for instance, a classic example of public goods, police protection. Assume that A and B live in a neighborhood affected by crime. A may suggest that patrolling the

70. The result may not be identical because greater numbers will translate into a greater showing of support for the preservationist position, which is likely to help persuade the city council. Nevertheless, the marginal benefit generated by the involvement of any one preservationist is likely to be small.

71. A variety of reasons exist why preservationists may band together to form a lobbying group. *See* Robert C. Mitchell, *National Environmental Lobbies and the Apparent Illogic of Collective Action*, *in* CLIFFORD S. RUSSELL, COLLECTIVE DECISION MAKING 87-121 (1979). Thus, the argument in the text should be read as a statement of relative tendencies, rather than absolute prediction.

72. It may be favored by a larger number of non-residents, i.e., those who would immigrate to the locality in order to live in the new development.

neighborhood is likely to reduce the incidence of crime. B may openly disagree in the hope that if A is sufficiently convinced of B's unwillingness to contribute, A will bear the entire costs of patrolling, notwithstanding that cooperation will reduce a substantially greater amount of crime. If A takes the bait, A will be unable to exclude B from the benefits, notwithstanding B's non-contribution. If we assume a similar level of self-interestedness throughout the relevant community, however, then A is likely to be engaged in the same concealment of preferences as B. Neither will provide what each desires.

Both A and B would prefer that the other supply the public good of patrol, but if the other fails to do so, each would prefer to act rather than have neither act. Thus, assume that patrolling the neighborhood costs a total of 100. This cost could be incurred by A or B alone, or evenly divided (50 each) between them. (Obviously, other apportionments are possible, but for the sake of simplicity we will limit ourselves to equal division.) Patrolling, whether done by A *or* B or by A *and* B, creates a gain of 125 to each (a social total of 250) from avoided theft losses. Thus, it is worthwhile for each to incur the full cost of patrolling, but each comes out better if the other incurs the entire cost. The worst case obtains if neither patrols; in that situation each actor can anticipate no gain over the status quo, where each suffers losses through theft in excess of avoidance costs. These choices can be summarized in the following matrix, each box of which represents the payoffs (the sum of benefits (avoided theft losses) less payments) to each player who is preparing to choose whether to patrol or hold out.[73]

| | | B | |
|---|---|---|---|
| | | Patrol | Hold Out |
| A | Patrol | 75,75 | 25,125 |
| | Hold Out | 125,25 | 0,0 |

It is quite unclear what the parties will do in such a case. Each has an incentive to hold out. But if neither patrols, they will bring about catastrophic results that could have been avoided had they been willing to coordinate at the outset or had the cooperative solution imposed on them. In the absence of coordination, it is possible that neither will pro-

73. In accordance with game theory convention, the payoff for the party represented by rows (here, A) is shown first in each box, and the party represented by columns (here, B) is shown second.

vide the service that each wants. Again, the traditional solution to this Chicken Game is to create a government that can provide police protection to both A and B and extract from each of them the relevant cost.

Once we posit the introduction of government, however, our second-order public goods problem arises. A and B are each better off by up to 50 if they can shift all the costs of patrol onto the other. Thus, each has an incentive to make a side payment to government of up to 50 in return for shifting policing costs onto the other.[74] Given the monopoly status of local government as an enforcer of these deals, one would anticipate that each government would attempt to extract these payments from the competing parties, increasing the deviation from the socially optimal solution. If we are truly in a universe consisting of only two residents, the likelihood that either will have success is somewhat reduced, as each is willing to make the bid and each is capable of monitoring the conduct of the other. But outside this universe, we may face a problem identical to the development problem above, i.e., one group may have a distinct advantage over any competing group in its capacity to form a coalition and thereby better be able to convince government to impose on those others a greater than pro rata share of the costs.

Note that the nature of the political process here is quite different from the ideal participatory model that makes the voice option a meaningful alternative to exit as a means for obtaining a package of public goods compatible with local preferences. These situations do not entail robust debate by matched sides that have competing preferences. Rather, the consequence is one-sided domination of a debate in which adversely affected interests are not represented. Indeed, given the relative capacity of small groups to coalesce and to monitor members' behavior, it is likely that privileged minorities will pose a greater threat to social welfare than the more traditionally suspect raw majorities.

Now how does all this relate to Dillon's Rule? To begin, notice that local issues have characteristics that tend to exacerbate both formation of privileged groups and free riding by latent groups. The possibility that interest groups are particularly likely to form at the local level stems from that body of collective action theory that suggests the possibility of collective action is directly related to size of the affected group.[75] This possibility arises from a variety of incentives that are not easily replicated among large groups. First, within a small group, reputation may be important, so that disfavoring of free riding can be directed at particular

74. DEJASAY, *supra* note 64, at 67-68.

75. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 36 (1971).

individuals. Second, and related, among small groups there remains the possibility of monitoring the performance of actors and imposing sanctions, reputational or otherwise. Each of these elements is more likely to materialize at the local level, where small-group members are likely to have personal relationships, which makes reputation important, and to be repeat players, which facilitates monitoring and organization.

At the same time, those who do not join interest groups at the local level are likely to have increased tendencies to free ride on the efforts of others. Recall that the structure of the Chicken Game is such that each player finds it worthwhile to cooperate in production of the collective good, but each player also does better by defecting as long as someone else produces the good. Thus, whether one is willing to act depends on the probability with which one believes someone else will act. The result is somewhat paradoxical. If I believe that someone else shares my preferences for the collective good, I might expect that other is more likely to prefer that it be produced. Thus I have less incentive to act in the expectation that the other person will. The probability that there exists an alternative actor with preferences similar to mine increases at the local level because residents already have some affinity of preferences, as evidenced by the fact that they all live in the same locality. That is to say, even if—outside the Tiebout world—a perfect alignment of interests is not achieved among all residents, it may nevertheless be the case that a tendency exists for like-minded people to gravitate to the same general area. Indeed, even those who live in a municipality out of lack of mobility might take on the ethos of that area. At the same time, if all like-minded people do a similar calculus, then the preferences of all are less likely to be satisfied.

This increased asymmetry of enhanced political activity by those in privileged groups and of free riding by others, however, will not exist only with respect to a single good. General purpose municipalities must supply a basket of public goods and services. To the extent that residents of a locality outside the Tiebout world have disparate (if similar) preferences, different groups are likely to favor different contents for the basket or different priorities among the contents. Developers will want more development than the community as a whole, parents will want more educational facilities, the elderly will want more parks and police protection, the poor will want more social services. The result is that each of these groups has incentives to form an effective interest group with respect to its favored good. Each group similarly has incentives to make contributions necessary to achieve the interests of the group, at least up to an amount that the expected benefit from passage of preferred legisla-

tion exceeds the amount of the contribution. Further, local governors have incentives to seek these contributions from readily identifiable interests. If each group seeks to accomplish its own ends at the expense of others, substantial deadweight losses will occur as resources of each group are spent lobbying government.[76] As each group incurs and imposes these losses in attempts to gain more than its "fair" share of the local budget, the tragic result is less for all than any fair division of social resources within the acceptable range would provide. Further losses will be incurred by groups that invest unsuccessfully in winning the favor of government.[77]

The result is that, even if all citizens belong to interest groups that occasionally obtain gains on issues salient to them and at the expense of others, those occasional gains are likely to be outweighed by the combination of rent payments and exactions that all other groups impose when they are successful. The city council, in effect, becomes a commons on which the battles over allocation of municipal resources generate tragic results. If all groups involved in this game ultimately lose, then one would imagine that each group would rationally be willing to forgo engaging in the game at all, as long as all other groups were similarly bound. Initially, one might believe that the best way to attain this result would be through mutual agreement against rent-payments. Any such agreement, however, is impossible to achieve (the relevant groups being continuously changing in number and membership) or to enforce (each group having an incentive to break the deal, which itself takes the form of a Prisoner's Dilemma). Indeed, it is not clear that such an agreement would be desirable even if achievable and enforceable. The reason is that the agreement would essentially bar participation in local affairs, which is desirable as long as all sides of an issue have meaningful access to the decision maker. The best way to achieve what all would prefer, therefore, is to disempower rent-seeking decision makers under circumstances that are most susceptible to one-sided factional pressure, either because the issue holds interest for a limited number of constituents or because only one side of the issue has a sufficiently intense interest to overcome obstacles to collective action. In either event, the result is what I will call one-sided lobbying. This does not mean that government bodies are not entitled to make allocational decisions. Rather it means that the govern-

76. *See* Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 No.3 AM. ECON. REV. 291 (1974); Fred McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987); Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

77. *See* Posner, *supra* note 76, at 812.

ment body selected to make the decision should be one likely to make it in an environment that minimizes one-sided lobbying. That this result would be favored by all seems implicit in acceptance of the role of local government as a response to the first-order public goods problem. Certainly it would be odd to address that problem by creating an institution that is itself subject to the same distortions. Thus, if one believed that one-sided lobbying was more likely to materialize at the local than at the state level, and if one could identify those discrete sets of cases in which such lobbying was likely to occur, it would be appropriate to restrict the capacity of localities to make decisions in those cases.

This, I suggest, is the moving force behind (or at least an ex post justification of) Dillon's Rule. Where interaction among players leads to decreasing social returns, and devastating returns for those who do not win, the superior strategy for all is often not to play the game.[78] In the absence of an ability to bind each other contractually, the Rule serves as a mechanism by which all players precommit not to pay rents to local officials where the result is likely to be a limited set of benefits at general public expense.[79] The function of judges asked to determine whether a local act falls within the scope of local authority, according to this interpretation of the Rule, is to neutralize the downward spiral of strategic behavior by prohibiting local initiative in those situations where any local subgroup has an organizational advantage for registering its members' preferences and thus misstating popular preferences to decision makers or colluding with public officials.

Identification of those cases on an ad hoc basis would be a difficult proposition, and would itself be subject to the kinds of free riding issues that the identification is attempting to solve. Who would come forward to challenge a particular group as dominant? Doesn't the mere assertion of one group's dominance indicate the presence of a resistance group? Hence, some generic description of cases likely to fall within the category may be appropriate, even if imperfect. Dillon's Rule provides an opportunity for this process insofar as municipal entrance into a novel activity, not expressly within the realm of activities considered by the legislature,

78. Norms of retribution may have this characteristic. If each injury requires a vengeful response of a higher degree of injury, then escalation ultimately is destructive to all parties. In this way social norms that encourage vengeance may be contrary both to self-interest and to efficient social production. *See* JON ELSTER, THE CEMENT OF SOCIETY 118-21 (1989). Similarly, *see* ROBERT ELLICKSON, ORDER WITHOUT LAW (1991); DOUGLAS HOFSTADTER, METAMAGICAL THEMAS 733-34 (1985).

79. *See* RUSSELL HARDIN, MORALITY WITHIN THE LIMITS OF REASON 92-93 (1988) ("In all these cases, the members of a relevant class are potentially pitted against each other to their collective harm, and the only way to secure them against that collective harm is to deny them singly the right to free-ride on the abstinence of other members of the class.").

may signal that a discrete group has prevailed on city officials to grant an idiosyncratic benefit. This is not to say that novel activities are undesirable or to refute the laboratory model of local government. It is only to suggest that involvement in such activities may warrant examination to ensure that they are indeed experiments intended to further the locality's interest rather than to provide a windfall to a particular group.

To the extent that this argument is contingent on the avoidance of deadweight losses, one point should be clear. The concept of deadweight losses in this situation is somewhat more complex than in the typical case of rent-seeking. That is true, at least, if one assumes that participation may be of positive value, for instance, as a consumption good. If deadweight losses include all costs incurred to influence lawmakers, then there is no reason to believe that they will be less where there exist numerous well-matched groups to compete for slices of the local budget pie rather than a single dominant interest group. Indeed, the presence of myriad interest groups, as the pluralist model of democracy envisions, may increase the total resources invested in political activity, even though the probability of success for any particular group diminishes.[80] It is unclear, however, that the costs incurred in the multiple interest group scenario should be considered deadweight losses. Local issues generate interest among residents (grass roots movements) rather than only "professional" lobbyists, i.e., those who are repeat players before the city council such as zoning lawyers and developers.[81] This may have a variety of positive effects. If participation is considered a consumption good to the individuals who become involved, then their participation may be value-enhancing.[82] If their participation improves the quality of decision making, i.e., makes decision makers more attentive to arguments that otherwise would not have been considered, then again it is difficult to

80. For this reason, local officials might be encouraged to subsidize the creation of competing interest groups in order to maximize collectible rents. That effort, however, presumably will not be undertaken where the obstacles to organization are too great or where privileged groups can make sufficient payments to the local officials not to create subsidies.

81. *See, e.g.*, JAMES E. KRIER & EDMUND URSIN, POLLUTION AND POLICY (1977).

82. *See* ALBERT O. HIRSCHMAN, SHIFTING INVOLVEMENTS (1982); Gillette, *supra* note 3, at 951-52. Fred McChesney has recently suggested that consumers suffer a disadvantage relative to producers for purposes of organizing because the latter obtain both private and political benefits from organization, while the former obtain only political. His definition of political seems, quite narrowly, to include only the ability to pay regulatory rents. The private benefits available to producers include exchange of information, joint advertising, and development of industry standards. But if participation constitutes a consumption good for consumers (or consumer-voters), then there is no reason to deny their capacity to enjoy private benefits that augment the rental payments that McChesney designates as public. *See* Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 J. LEGAL STUD. 73, 77-79 (1991).

consider the process to be one that produces deadweight losses.[83]

Nevertheless, these results are unlikely to exist where lobbying is heavily one-sided. One would expect from the discussion about the formation of groups capable of overcoming collective action obstacles that grass roots movements are not typically the first lobbying group to appear; rather they tend to materialize in response to the successes of previously organized groups.[84] Thus, it is possible to constrain government activity where one-sided lobbying exists without necessarily diminishing the value of political participation. Where there is a single dominant interest group, that group is unlikely to comprise unseasoned, non-professional civic participants. Instead, that group is likely to comprise professional lobbyists most readily identified with "deadweight" losses that accompany rent-seeking.[85]

This rationale for Dillon's Rule as a means by which residents would mutually agree to deprive localities of rent-seeking activities provides an analytical basis for the intuitive negative reaction to *Early Estates*. One can criticize that decision by speaking of the imperial or unreasoned nature of the majority in the face of the judgment of elected city councillors. But I think that the best defense of the ordinance, and hence the best attack on the decision, lies in the implicit assumptions about the nature of the city council's decision making process. Begin by asking who is helped and who hurt by the challenged provisions. One would imagine that landlords would be opposed to such an ordinance, in part because of uncertainty about the extent to which they could pass costs of improvements on to their tenants.[86] In the absence of perfect markets, landlords would likely be required to incur some of the ultimate costs of improvements. That they feared this result is implicit in the very existence of the suit challenging the ordinance. The type of improvements required suggest that the tenants affected by the new requirements were likely to be of relatively low income, and thus to have limited discretionary funds to spend on improvements in housing.

The effect of the ordinance on the class of tenants is somewhat ambiguous.[87] Current tenants would presumably be assisted by the require-

83. It is noteworthy, however, that this model does not prevent rent seeking where political competition is available. Control of that phenomenon must await other legal doctrines.

84. *See, e.g.*, KRIER & URSIN, *supra* note 81.

85. *See* MUELLER, *supra* note 41, at 213 n.1; Roger D. Congleton, *Evaluating Rent-Seeking Losses: Do the Welfare Gains of Lobbyists Count?*, 56 PUB. CHOICE 181 (1988).

86. *See* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1991).

87. One may argue that tenants could have simply bargained for the improvements if they were truly desirable. The public good nature of hallway lighting and hot water pipes, however, diminish the likelihood that the bargain solution would occur. In a multi-family apartment house, however,

ments, but might believe that subsequent rent increases would render their apartments unaffordable. The consequences of the requirements for the last affected group, potential tenants, are similarly ambiguous. If rents increase in response to improvements, some may be unable to afford the improved units. Those who can afford to move in, however, may be better off insofar as they are willing to pay their pro rata share of the improvements, but would have been unable to bargain with landlords for the improvements had they not been required by ordinance.[88] On the interpretation of Dillon's Rule that I have offered, judicial interpretation of the human habitation standard to reject the ordinance would be warranted if, but only if, one or more of these groups had been excluded from the city's decision making process and the city's decision was inimical to the interests of the excluded group. This combination would serve as substantial evidence that the decision neither was motivated by a conception of public interest nor reflected a fair division of municipal resources.[89]

The problem with *Early Estates* is that no such bias in the decision making process is apparent. Two of the affected groups, present and potential tenants, are not necessarily of a single mind about the issue. In addition, to the extent that they would prefer the ordinance, neither of these groups was likely, in the early 1960's, to have substantial voice within the city council. This is not necessarily the result of any invidious discrimination against the poor or any ethnic group within the poor. Rather, it results again from recognition that effectively attaining the city council's ear is not a costless proposition. Certainly future tenants would face serious obstacles to overcoming the problems of lobbying costs and free riding on the efforts of other future tenants. They are unlikely to be able to identify each other, and maybe not themselves, as either positively or negatively affected by the ordinance. In the case of future residents, they may not yet have any particular basis for seeking the attention of the council.

Current tenants will similarly face substantial obstacles to collective action, even if they are of a single mind about the consequences of the

the repeated interactions of residents might be considered sufficient to overcome the collective action problem. Nevertheless, the failure of tenants to achieve this solution could be attributable to numerous factors. See text following note 89 *infra*.

88. As I discuss below, within the multifamily apartment these improvements would have constituted public goods susceptible to all the strategies that go with that status. Thus, it would have been unlikely that any one tenant would have bargained with the landlord for, say, installation of hot water pipes only to that tenant's apartment in return for higher rent.

89. Collective action, that is, may evolve, but the evolutionary period may be substantial.

ordinance.[90] First, tenants may have been relatively transient, thus rendering organization difficult. Second, fear of retributive eviction or nonrenewal of leases could deter anti-landlord movements. (Recall that the law barring retributive eviction had not developed.) Third, an ethos of collective action, e.g., tenants' unions, was unlikely as evident in 1960 as it is today.

If there is an interested group that seems particularly capable of overcoming the collective action obstacle and influencing the council, it appears to be the landlords. While likely small in number, and possibly including non-residents, the financial interests of the landlords, or a critical mass of them,[91] in avoiding mandated expenditures may be sufficiently great to justify their undertaking the costs associated with lobbying city officials to oppose the ordinance and appearing at hearings on the issue. Their relatively small number may have reduced opportunities of any one of them for free riding on the efforts of others, while facilitating efforts to monitor and organize the participation and allocate costs among those willing to cooperate. Similarly, as potential repeat players before city officials (imagine the occasional need for zoning variances, new construction permits, etc.) and as individuals more likely than tenants to have financial resources that could be helpful to those officials, they were more likely to have access to avenues that influence decision making. True, their smaller numbers make them less likely to deliver votes directly; but if low-income tenants were unlikely to vote in large numbers and the financial contributions of landlords enabled city officials to run campaigns that persuaded others to vote for them, that would seem substantially to compensate for the small number of votes landlords actually cast.

On this analysis, one would anticipate that landlords would be well positioned to control the legislative outcome in a manner that might raise suspicions about a city council ordinance favoring the landlords' position. Thus, if the city council had passed legislation that limited the obligations of landlords to make housing habitable, judicial intervention in the form of narrowly construing local authority to pass such legislation

90. Again they will not be, since some current tenants will fear that subsequent increases in rent will make their current homes unaffordable.

91. In his useful comments on this paper, Professor Gary Schwartz notes that the number of landlords in a city may be sizeable. Gary T. Schwartz, *Reviewing and Revising Dillon's Rule*, 67 CHI.-KENT L. REV. 1025, 1031 (1991). While that is true, the number of landlords who own several properties or who rent numerous dwellings is likely to be smaller. Some landlords are only renting a room in their own primary residence. If "commercial" landlords are small in number, and able to coalesce, they may find it worthwhile to represent all landlords, even though "occasional" landlords can free ride on the efforts of this subgroup.

might be considered as a positive check on the relative abilities of competing interests to attain the legislative ear. But just the opposite occurred in *Early Estates*. What makes that case unpalatable is narrow judicial construction where the city council acted in a manner *contrary* to the perceived dominant interest. Where, as here, local legislation appears inconsistent with a privileged group's preferences, it is more difficult to justify judicial intervention as a remedy for interest group capture.

One could imagine that some other privileged group would have favored the ordinance. Electricians and plumbers, for instance, might obtain additional employment by enactment of lighting and hot water requirements. If they are already formed into unions, and thus had overcome obstacles to organization, they would serve as an effective counterweight to the interests of landlords. But the presence of these groups does not alter the ultimate analysis. At the most, it demonstrates that the city council had been open to interest group bargaining conducive to productive debate and consideration of the public interest. Hence, there would seem to be diminished need for judicial intervention.

*Early Estates* deserves criticism, therefore, because it reflects judicial intervention in the absence of any breakdown of the political process.[92] The negative implication, however, is that judicial limitations on local authority would be appropriate where we can identify local legislation that serves particular interests at the expense of those un- or underrepresented in the political process. This principle does not constitute a hunting license for the judiciary; nor should it, given the possibility that judges, too, are susceptible to capture (from prestigious law firms, for instance). But where local legislation reflects the idiosyncratic interests of certain residents and of the city officials who vote on programs that may serve those interests, the judiciary is more justified in playing the role that Farber and Frickey describe as "mandating legislative delibera-

92. Avi Soifer has suggested to me a danger of too strict an application of this position. The point has to do with the argument that falls under the general heading of "baselines." Assume that a previously dominant interest group has fallen into disarray, e.g., landlords once able to coalesce have become sufficiently dispersed in an age of real estate investment trusts and absentee ownership that they currently lack local political clout. In the interim, tenants' rights groups have gained power, so they now attain the status of a dominant interest group. If the tenants now push through the city council a novel pro-tenant ordinance not expressly authorized by state legislation, a court employing the above scheme will be justified in invoking Dillon's Rule to require legislative approval. The result, however, will be to leave in place a scheme enacted through an equally skewed process, but that has become entrenched. I cannot deny such a possibility but am not sure that, even where demonstrable, it informs a court how to deal with the case currently before it. At the very least, the possibility of such a "baseline" problem should constitute an argument before the legislature by the group that currently seeks to have its interest satisfied.

tion,"[93] but that I understand to mean policing the political process. Any ad hoc investigation by the judiciary is likely to create the very displacement of legislative consideration by judicial prejudices that cause Farber and Frickey to eschew more substantive judicial review.[94] A general principle of strict construction of local government power, however, may be perfectly sensible where courts have reason to believe that something has gone awry with the model of local government as a place for robust debate among competing interest groups.[95] The most likely situation in which debate will reveal one-sided lobbying arises when a locality is asked to invest in a relatively novel enterprise. At that time, interests partial to the proposal will have had an opportunity to organize and plan a strategy. Competing interests, however, may have had insufficient opportunities to coalesce, even if they are otherwise able to do so. Thus, a doctrine such as Dillon's Rule, which is directed at relatively novel local activities, appears appropriate to curtail the most likely instances of one-sided lobbying.

*Early Estates*, therefore, does not represent any malevolent strain inherent in Dillon's Rule other than its potential misuse in the hands of bad judging. In this respect, it is difficult to distinguish Dillon's Rule from any other maxim of statutory construction. What this interpretation of the Rule does suggest is that the basis on which we want to critique its use is one that may very well be consistent with Judge Dillon's underlying strategy: reducing municipal power where it is likely to be used counter to majoritarian interests. Notice, however, that this requires no adherence to a fictitious public/private distinction and no intrinsic attachment to the priority of private property.[96]

93. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 914 (1987).

94. *Id.* at 908-11.

95. None of this is to say that the city council in Providence was necessarily motivated by public interest. The city council may have been captured by some ideological interest, no less powerful than an economically interested one, e.g., a nascent tenants' rights movement. Nevertheless ideological groups would seem less susceptible to differential collective action obstacles than economic groups. Thus, different ideological groups would seem to have access to the city council relatively equal to their numbers and relatively equal in power to vote in sympathetic officials proportional to group strength.

96. My explanation of Dillon's Rule as an effort to prevent one-sided lobbying of city officials is intended more as an *ex post* justification than as a description of the motives of Judge Dillon. Nevertheless, I believe that this view is entirely consistent with his stated reasons for the Rule. The source of Dillon's concerns was not the exercise of governmental power generally, but the capacity of one set of constituents to impose burdens on another, unrepresented class. This reading is implicit in Dillon's rigid separation of municipal debt for public and private purposes. He fought a losing battle against the use of municipal debt to finance private railroads, the failure of which led to debt repudiation or fiscal distress throughout the midwest during the period that he was formulating his theories. Even after railroad aid bonds were validated in most jurisdictions, Dillon took some solace from the fact that courts upholding them had done so on the theory that they satisfied a public

## V. OBJECTIONS

### A. *Alternatives to Dillon's Rule to constrain one-sided lobbying*

One may still suggest that Dillon's Rule is unnecessary to constrain one-sided lobbying and continues to do mischief where applied outside the area of collective action failures. After all, *Early Estates* itself remains a testament to the judicial capacity for unjustified intervention. On this view, alternative means of avoiding capture of the local decision maker might be superior. In rejecting the Dillon's Rule tradition, the Utah Supreme Court pointed to three mechanisms for avoiding local abuse of the initiative power, by which we might understand the court to mean catering to special interests.[97] The court indicated that appropriate checks on local excesses may be found in electoral review of officials, legislative supervision, and judicial oversight.

The problem is that each of the alternatives suggested by the court depends on a viable political market that the collective action problem renders improbable. Elections are unlikely to serve as a useful monitoring mechanism because voters are faced with a binary choice in which they can only register occasional approval or disapproval of an official's overall performance. No one act of favoritism or misfeasance is likely to be pivotal for a majority of voters, and many voters may be persuaded to re-elect an official who has delivered on a matter of salient importance to

purpose; thus, these courts did not violate the theoretical distinction that barred municipal aid for "certain individuals or classes, or in aid of the *manufacturing enterprise* of individuals or private corporations," a use of the public treasury that would serve a purely private purpose. Dillon, *supra* note 15, at 444. While this distinction can be accounted for by a claim that Dillon wanted to minimize the reach of government generally, it is equally consistent (especially given the stated antipathy for legislation in assistance of "certain individuals or classes") with the concern that interested groups with disproportionately high access to municipal decision makers (railroad promoters) could accrue substantial rents by obtaining public resources that would return private gain. Indeed, it is just that concern that arguably led Dillon to prefer a narrow scope for government activity. What I think resolves the issue in favor of that reading is Dillon's explicit attention to the fact that, in the case of municipal bonds, what separated the represented from the unrepresented was not a geographical boundary, but a temporal one. The issuance of bonds allowed current residents to capture the benefits of a project, while deferring a substantial part of the cost to future residents who may or may not find the project worthwhile:

> One of these is the stimulus which the long credit commonly provide for effectually supplies, to over-indebtedness. The bonds usually fix a time, twenty or thirty years distant, for payment of the principal. Those who vote the debt, and the councils or bodies which create it and issue the bonds, do so without much hesitation, as the burden is expected to fall principally on *posterity*. A learned justice of the Supreme Court of the United States has very fitly described the effect witnessed as a *mania* for running in debt for public improvements.

*Id.* at 441. Dillon's concerns, in short, have less to do with the exercise of power generally than with the possibility that, given their relative geographical limits and susceptibility to the enticements of railroad entrepreneurs, local decision makers would be more likely to take action that imposed costs on the unrepresented.

97. Utah v. Hutchinson, 624 P.2d 1116 (Utah 1980).

them, even if the same official has granted favors to other groups. As long as the latter favors, although costly in the aggregate, individually impose only small costs and confer benefits that are not salient to those not benefited, there is likely to be little complaint from the general electorate. Again, the result is downward spiraling net social resources.

Legislative intervention to override the local decision is unlikely to work for the very same reason that it became necessary. Just as the dominated interests were unable to coalesce at the local level to avoid passage of the challenged program, so will they be unable to organize and monitor members to tackle the more difficult process of convincing state legislators to intervene. (As we shall see, if the presumption is reversed, as in Dillon's Rule, so that proponents of local initiative must secure legislative approval, the costs of organization for proponents and opponents may become more equal.)

Similarly, judicial supervision is unlikely to permit appropriate levels of monitoring. Judicial process is not self-executing; judicial intervention occurs only when a local act is challenged. But, given the difficulty of organizing a group to oppose the interests that passed the local legislation, there is little reason to believe that, once it is passed, a particular litigant would invest the time, effort, and money necessary to initiate and prosecute litigation.[98] Thus, the very problem that makes the judicial solution necessary also renders it insufficient. Two counterarguments must be mentioned, as they indicate the possibility of judicial supervision. The first is that litigation does occasionally materialize. Cases like *Hutchinson* in Utah and *Early Estates* demonstrate the periodic willingness of litigants to come forward. It is true that, as in all collective action problems, a subgroup with a sufficiently intense interest may overcome the tendency for inertia. In the Utah case, the issue was whether a candidate for public office had committed a criminal offense by violating a local campaign expenditure ordinance. Obviously, the personal benefit of initiating the lawsuit to avoid criminal conviction was sufficiently high to justify the costs of opposing the ordinance, notwithstanding the public goods effects of the litigation. But this occasional willingness may be too pathological to use as a benchmark for the appropriate legal rule. One cannot expect a similarly willing creator of public goods to arise in more mundane situations. Further, even when the interests of the litigant are sufficient to justify production of the public good (the lawsuit challenging local excess), there is no assurance that the

98. On the difficulties of initiating litigation where prospective plaintiffs are numerous, see Gillette & Krier, *supra* note 65, at 1048-49.

litigant will represent the interests of the populace. Indeed, it is likely that the reason a particular litigant does take measures is that his interest is sufficiently idiosyncratic to make litigation worthwhile, even though that is not the case for other members of the group, and those interests are likely to dominate any litigation or settlement that ensues.

As a second counterargument, one may claim that the same difficulty with judicial supervision of the legislative process arises under Dillon's Rule itself: once the ordinance is passed, someone must still appear to challenge it in court. The assertion, of course, is true. But the presumption created by Dillon's Rule both lowers the costs and raises the expected benefits of litigation and thus increases the likelihood that affected groups will find the challenge worthwhile.

### *B. The costs of Dillon's Rule*

All that I have done to this point has been to identify some benefits that Dillon's Rule might generate. That leaves open, however, the possibility that the Rule generates costs sufficient to offset those benefits. Most obvious are the increased transaction costs that the Rule engenders for municipalities insofar as it requires them to invest resources in seeking explicit legislative authority to engage in a particular activity.[99] The costs associated with lobbying the legislature, engaging in logrolling in order to secure sufficient support for the measure, and forgoing alternative uses of the resources necessary to accomplish these tasks will typically be significant and may occasionally be sufficient to frustrate otherwise appropriate attempts to seek legislative authority. Any attempt by the locality to avoid these costs by simply initiating the proposed program without prior legislative approval threatens the possibility of increased attorney's fees should the program be challenged plus the loss of any costs sunk in the enterprise should the lawsuit be lost.[100]

While it is in the nature of transaction costs to deter otherwise efficient agreements, the problem may be particularly problematic in a case such as Dillon's Rule, where the need to appeal to the state legislature engenders another collective action problem—the public goods nature of

99. Similarly, Jonathan Macey has suggested a transaction costs argument to explain why certain interest groups might prefer federal to state regulation. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271 (1990).

100. Of course, a lawsuit could be initiated against a proposed program even if Dillon's Rule were reversed. Suits against initiatives proposed by home rule municipalities are not rare. *See, e.g.*, City and County of Denver v. Colorado, 788 P.2d 764 (Colo. 1990). But the presumption of invalidity created by Dillon's Rule increases the likelihood that a challenge will be successful and thus increases the probability that the challenge will be brought.

state legislation. Localities that incur the costs necessary to secure legislative approval obtain the subsequent benefits not only for themselves, but for all localities similarly situated.[101] The consequence is that localities that contribute nothing to the legislative effort can nevertheless obtain the benefits of approval, as long as another locality or group of localities is willing to incur the necessary costs. Each locality, therefore, is driven to await action by others, with the effect that socially useful programs are not implemented.

If the transaction costs or free riding problem (or both together) were sufficiently significant, the case for Dillon's Rule would be weaker. Thus, the affirmative case for the Rule depends on a showing that these costs are not too great. I believe that showing can be made, at least in two sets of cases. In the first, localities positively affected by a proposal are sufficiently small in number and sufficiently capable of monitoring each other to overcome the free riding problem and engage in cost-sharing. This is likely to happen where the localities are geographically close and seek to address a problem on a regional scale. Their attempt to induce the legislature to permit joint action suggests that cooperation (including sharing costs of obtaining the legislation) is advantageous.[102]

The second set of cases involves situations where a local decision maker is willing to impose transaction costs on the locality in order to obtain personal benefits, notwithstanding that the locality might obtain greater net benefits if some other locality acted first. In short, the local official may believe there exist sufficient entrepreneurial benefits in being in the forefront of a movement to overcome the incentive to save the local budget by free riding on the efforts of others. Assume, for instance, a local official in one of several urban areas in a state is considering whether to lobby the legislature for a program that would permit tax increment financing to redevelop a business district. This popular financing mechanism typically involves issuance of bonds secured by increased property taxes that are assessed against properties improved with bond proceeds.[103] If several urban areas within the state could benefit from the new power to issue bonds for this purpose, and the costs of lobbying for

101. Theoretically, a locality could request legislative authority to engage in a particular only for itself. But most state constitutions contain prohibitions on the passage of "special legislation" that refers only to a single municipality or to less than all of a reasonable classification of municipalities. *See* John M. Winters, *Classification of Municipalities*, 57 NW. U. L. REV. 279 (1962).

102. Numerous states have passed legislation permitting localities to act jointly in a manner that would otherwise be prohibited to them under Dillon's Rule. *See, e.g.*, MINN. STAT. ANN. § 453.53 (permitting cities to form a municipal power agency to meet the energy needs of its members).

103. *See* John E. Anderson, *Tax Increment Financing: Municipal Adoption and Growth*, 43 NAT'L TAX J. 155 (1990); Tax Increment Fin. Comm'n of Kansas City v. J.E. Dunn Constr., 781 S.W.2d 70 (Mo. 1989).

and implementing the program are immediately visited on the municipal treasury, the traditional free riding problem arises. This same program, however, may promise to return substantial benefits to local officials in the short term (i.e., before the next election) in the form of redevelopment of distressed areas. Those benefits, of course, are not translatable from one locality to another. At the same time, costs of implementing a financing program are deferred to the long term through the bonding mechanism.[104] The result is that a local official can overcome the free riding problem where the personal payoff of the enabling legislation is sufficiently high; counterintuitively, the fear is that the private benefits available to local officials will mean that appeals to the legislature are likely to be over-, not underutilized.[105] What one would like to know is if these efforts are likely to correspond more closely to situations in which local officials are acting in a manner consistent with residents' preferences or more closely to situations in which local officials are acting at the behest of particular groups.

Finally, increased transaction costs (or the activities that generate them) are not without their own benefits. If we look at representative government as a classic monitoring problem, Dillon's Rule reduces monitoring costs of local residents (the principals of government officials) by limiting the scope of what agents (local officials) can do.[106] When the agents attempt to expand the scope of their activity, the fact that they need to petition the legislature may signal residents that something out of the ordinary is being considered, thus requiring enhanced monitoring. Expenditures made to lobby the legislature may be the event that triggers the signal to the populace, as these amounts are likely to be salient to monitors (the press, citizen's "watchdogs," potential candidates for offices held by current agents).

### *C. The state legislature as a more pluralistic forum*

Given my concern with one-sided lobbying and the capacity of dominant interest groups to provide unopposed rents to municipal officials, the propriety of Dillon's Rule ultimately depends on whether the state legislature is more likely than the locality to make decisions that are attentive to local residents' preferences. That conclusion, in turn, depends on whether diverse views are likely to be made known to state legislators

104. *See* Ann Gellis, *Mandatory Disclosure for Municipal Securities: A Reevaluation*, 36 BUFF. L. REV. 15, 45-46 (1988); Clayton P. Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. REV. 1030, 1063 (1983).

105. Gellis, *supra* note 104, at 45-46.

106. This argument was suggested to me by Joe Brodley.

and whether those legislators are more or less likely than their local counterparts to engage in rent-seeking from privileged groups. These concerns cut in opposite directions. The more that decision making at the state level is susceptible to inputs from various perspectives, the greater the likelihood that decisions will be made after consideration of all relevant interests. On the other hand, the more interests that are represented, the greater the ability of legislators to seek rents from high bidders. Certainly, even legislators who believe that the proposed activity will benefit the locality without generating offsetting external costs have reasons to withhold their votes in the expectation of receiving rents from local interests, local officials, and other legislators who seek favorable votes. The energies devoted to this process will increase the social waste created by the Rule. Indeed, if Dillon's Rule were embodied in statute rather than a rule of statutory construction, one might be tempted to consider it as a prime example of legislative rent-seeking. That the judiciary has seen fit to confer this authority on the legislature need not detract from an investigation into whether it has generated the identical effects. Thus, in this section I consider the relative opportunities of interest groups to influence state legislators and the opportunities of those legislators to exact payment from the groups that form.

One-sided lobbying might be thought to be more prevalent at the state level because, to be successful, interest groups are likely to require financial resources beyond the reach of many local or ad hoc organizations. At the local level, a relatively small sum of money is likely to have greater influence than a similar sum at the state level. This is true not only because more state legislators than city councillors will have to be contacted, but because the financial demands of the former are likely to be much greater. A city councillor will need relatively few funds to sustain an effective election campaign, given the number and geographic scope of constituents. Thus, the number of groups who can make a "meaningful" contribution (sufficient to sustain the incumbent's attention) at the local level will be far greater than the number that can make "meaningful" contributions at the state level. The group that seeks state legislation may also have incurred substantial costs at the local level to induce local officials to press the case at the state level. This "double dip" increases the need for resources to wage a successful bid for or against legislation, and hence limits the number of groups able to engage in the process.

Nevertheless, there are competing reasons to believe that the state legislature will be far less susceptible than its local counterpart to one-sided lobbying. Simply as a geographical matter, the state is more likely

to contain a variety of perspectives that may be represented throughout the state but absent within any area within the state. Interests that are latent at the local level (for lack of numbers, organization, or funds) may be privileged at the state level or may attract an entrepreneurial leader who would not have been available at the local level. Additionally, the legislatures of most states are characterized by procedural safeguards against one-sided lobbying that are not available at the local level. At the state level, bills must survive a committee hearing, which may have no counterpart at the local level. Legislatures in all but one state are bicameral, so that investments made in lobbying must be directed at a larger and more geographically diffuse group of legislators. One effect of these safeguards is to increase the costs of capturing a large number of decision makers beyond the resources of groups that represent narrow interests. These safeguards increase the costs of obtaining legislation and hence serve to reduce the likelihood that any particular group will find pursuit of its interests worthwhile. Moreover, a bill that appears to favor a particular interest group may more readily find opposition from an alternative branch of government at the state level, i.e., a strong executive, that finds little analogue in any but the largest cities governed by mayors and city councillors.[107]

Moreover, the groups likely to be successful at the state level are not necessarily the same as those likely to be successful at the local level. A local developer or zoning attorney may have superior access to local officials because she is a repeat player with respect to those officials. But this does not translate into an advantage at the state level, governed by a different set of officials with whom the local partisan has little prior contact. Nor, if the developer or attorney anticipates continued concentration in local projects, is it worthwhile to develop the relationship necessary to cultivate the statewide relationship. Certainly statewide organizations will exist, be they state bar associations or developer associations. But they are likely to concentrate on matters of statewide concern beyond the ken of Dillon's Rule in the first place (as their statewide effects would render them inappropriate for local initiative), rather than on parochial concerns of a particular locality.

It is difficult to determine which of these tendencies (towards one-sided lobbying at the state or local level) dominates. The above consider-

107. These same procedures may, of course, be viewed as rent-seeking instruments rather than safeguards. Committee members, for instance, may specialize for purposes of extracting payments from those who seek approval of legislation. The increased costs that attend the process may eliminate from the debate some groups that could have participated in a less costly system and thus allow more access by the survivors, who may represent narrow, but wealthier interests.

ations, however, lead at least to the following conclusion. The higher costs that attend lobbying at the state level likely mean that fewer groups concerned with parochial issues will have a sufficient advantage to dominate at that level. Initially, this suggests that local issues will receive a less biased hearing at that level, a vindication of Dillon's Rule. But this same logic suggests that those groups with sufficient resources to sift through to the state level are likely to be even more influential as they will face less opposition than they would at the local level. What is unclear is whether the balance between quantity and ultimate effectiveness nets out in favor of forcing localities to seek express authority from the legislature for issues most susceptible to lobbying efforts.

### *D. The capacity of judges*

Even if judges play only a gatekeeper role in the administration of Dillon's Rule, endorsement of that role constitutes a vote of confidence in their ability to distinguish between cases in which salient interests are excluded from the political process and cases in which they are not. After all, *Early Estates* itself demonstrates that judicial error is possible, if not likely. Whether one opts for Dillon's Rule then, depends in part on how prevalent one believes error will be. Collective action failures are not necessarily so obvious that courts can be expected to recognize them. Judges hostile to a particular ordinance may too readily see its passage as the result of interest group pressures rather than the outcome of reasoned debate among competitors. These issues are exacerbated by the possibility that judges, too, are susceptible to deviations from public good. They may be captured by the mystique (as opposed to quality of legal argument) of particular law firms that appear before them. They may too readily identify their own perception of the good with that of the public at large. The issue, then, may become whether a false positive (deciding that appropriate collective action has occurred when it has not) is less important than false negatives (upholding ordinances passed in the face of collective action failures). It may be that the latter type of error is more serious because once it occurs (once the ordinance is passed), it is difficult to undo. Dillon's Rule has the effect of favoring the false negative by beginning with a presumption that the failure has occurred.

## VI. SUMMARY

The argument to this point suggests that, taking intramural considerations alone, all residents of a locality would desire to enter into some agreement to prevent any one of them from circumventing democratic

debate about the allocation of scarce municipal resources. Only in this manner could residents avoid competitive investment in rents to public officials and deadweight losses that ultimately diminished the fair division of resources for all. Dillon's Rule has the effect of such an agreement, insofar as it prevents local officials from extracting rents in those circumstances most susceptible to one-sided lobbying that circumvents the political process. Novel municipal activities, those not generally permitted to all localities, may signal the successful attempt of a discrete group within the municipality to capture the decision-making process. Thus, a rule that requires some other entity to pass on the propriety of the local decision serves as an effective means to distinguish those activities that are valuable experiments from those that cater to solitary bidders outside accepted channels of political debate. While any other level of decision making may also be susceptible (judges or legislators may be subject to their own biases and capacity for rent-seeking), the comparative costs are unclear. Thus, selection of a doctrine such as Dillon's Rule cannot be considered inconsistent with attempts to induce decision-making in the public interest, and there is much to be said for its consistency with that objective.

Regardless of how one resolves the tension about Dillon's Rule, attention to the capacity of local officials to circumvent constituent preferences makes some sense of the distinction between that Rule and the relevant rule for private corporations. I have maintained above that the relative power of public and private corporations cannot support the distinction in governing rules. I believe, however, that my analysis of Dillon's Rule suggests why the rules permitting private corporations greater leeway than their public counterparts are appropriate. Those adversely affected by the exercise of a new corporate power are likely to be shareholders who bought a stake in a particular venture at a particular level of risk.[108] If the corporation seeks to engage in a riskier activity with which the shareholder disagrees, investors have remedies not available to residents outside the Tiebout world. First, where shareholders are aware of the risky activities, they have an ability to sell their shares, even if they cannot effectively contest the activity. Exit costs, in short, are substantially below those available to municipal residents. Second, even where shareholders are numerous (so that free riding on the monitoring of others is possible), they are relatively (compared to residents) able to

108. Of course, corporate conduct may hurt nonowners, as where the corporation is engaged in pollution or price gauging. But that behavior is not reached by rules of corporate governance. Instead, that behavior is restricted by tort law or antitrust law that is applicable even where the behavior was authorized by the corporation's internal processes.

monitor the officials charged with administration of their investment. Corporations generally pursue a single objective (profit maximization) that is susceptible to measurement and analysis. Since public corporations (at least general purpose municipalities) serve multiple and interdependent functions, some of which are intrinsically immeasurable by a single metric (e.g., is the school system providing an "adequate" education), it is difficult to determine how well they are doing at any one of them.[109] Should it appear appropriate on the above arguments that Dillon's Rule is an appropriate doctrine for analyzing the exercise of authority by localities, therefore, the corporate analogy should not serve as an obstacle.

## VII. DILLON'S RULE AND POLITICAL MARKET FAILURES IN LOCAL GOVERNMENT LAW

### *A. The Impact Fee cases*

What I have tried to establish above is that there may be reasons to look askance at novel municipal activities, even when external effects of the proposed activity appear to be minimal and there is no evidence of official incompetence or corruption. Rather, the presumption embodied in Dillon's Rule may be explained primarily as a reaction to the predictable response by local officials to pressures of a subgroup with particular interests and access.[110] I am not claiming that courts have explicitly adopted Dillon's Rule on this reasoning, nor necessarily that Judge Dillon explicitly embraced this theory.[111] My somewhat weaker claim is that we can justify decisions in local government law on this basis, that courts have intuited to doctrines that protect groups that are members of the community but that are likely to be unrepresented in the local decision making process. Judicial intervention in these cases is appropriate not because of concern for local imposition of external costs, but because of intramural political process failures, sometimes generated by collective action problems and sometimes generated by the push of raw majorities.[112]

I want to examine two sets of recent cases that test this hypothesis.

109. *See* JOHN D. DONAHUE, THE PRIVATIZATION DECISION (1989); Cass, *supra* note 26.

110. *See* Gillette, *supra* note 104, at 1059.

111. *But see supra* note 96.

112. As Richard Briffault's remarks indicate, the problem of distinguishing appropriate majority activity from inappropriate raw majoritarianism is a difficult one. In what follows I mean only to suggest that courts have implicitly or explicitly attempted to address this conundrum in the context of local government law doctrine. I refer the reader to Briffault's comments in this issue for further elaboration. *See* Richard Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, 67 CHI.-KENT L. REV. 1011 (1991).

The first deals with a relatively novel mechanism for raising local revenues that has come under the name of impact fee or linkage fee. Municipalities have sought to impose these fees in order to exact payments from a subset of residents who seek some benefit from the municipality where that benefit is alleged to impose an identifiable cost on all residents. The function of the fee is to cause the beneficiary to pay the costs incurred as a result of allowing it to engage in the preferred activity. Examples include requiring office building developers to provide on-site parking or day-care facilities, or requiring developers of new residential areas to provide fees for road construction.[113] While this may be seen as a problem of imposing externalities on nonresidents or future residents, there are reasons to view the issue as one of intramural conflict. The fees are imposed directly on groups that frequently reside in or have some affiliation with the locality, so that even if the ultimate payors of the fees are not yet residents, the immediate payor may serve as a surrogate for their interests. Additionally, after the fee is imposed, the ultimate payors will constitute an identifiable group of residents, whether it be tenants on whom linkage fees are imposed or homeowners in areas subject to an additional road tax.

At first glance, such fees seem to satisfy both fairness and efficiency norms that underlie public finance. To the extent that burdens imposed are commensurate with benefits obtained, these fees do not offend elementary notions of fairness, particularly as the developments on which impact fees are imposed (office buildings or developments for single-family housing) generally do not cater to disadvantaged groups or otherwise raise issues of distributional equity.[114] Indeed, to the extent that burdens generated by these developments would otherwise be imposed on individuals who did not receive any benefit from the proposed activity, matching costs to the actual beneficiaries is consistent with nonredistributional rationales based on fairness.

As an efficiency matter, imposing on the beneficiaries the costs of their activity constitutes the traditional mechanism to internalize the adverse effects of conduct, thereby ensuring that the activity is limited to an amount that returns total benefits in excess of social costs.[115] Thus, if

113. *See, e.g.*, Russ Bldg. Partnership v. City & County of San Francisco, 234 Cal. Rptr. 1 (Cal. Ct. App.), *appeal dismissed*, 484 U.S. 909 (1987); New Jersey Builders Ass'n v. Mayor and Township Comm., 528 A.2d 555 (N.J. 1987); Note, *Municipal Development Exactions: The Rational Nexus Test and the Federal Constitution*, 102 HARV. L. REV. 992 (1989).

114. To the extent that the fees are disproportionate to the problem they purport to solve, they are arguably both unfair and inefficient. *See* Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980).

115. *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitu-*

development of a high rise office building will cause substantial parking problems in a downtown area, assessment of a fee on the developer, passed on through rental charges to tenants, that is then used to construct parking lots may ensure an optimal balance between office and parking facilities.

Given the capacity of impact fees to satisfy both fairness and efficiency concerns, it seems odd that a court would invalidate a fee imposed on an intramural activity. Assuming a reasonable relationship between the fee imposed and the cost that it is proposed to defray,[116] any judicial refusal to uphold such a fee would appear to constitute a mere substitution of judicial judgment about its propriety for a contrary legislative one. Yet that is exactly what might be said about the current trend of cases in which courts reject local efforts to impose such fees. While these fees have been attacked on a variety of fronts,[117] the issue that appears to have proven most troublesome to courts, and most successful for plaintiffs, is the authority of the municipality to impose them.

This issue of how broadly one can construe municipal power became the central issue in two recent cases on impact fees: *Kamhi v. Yorktown*[118] and *Albany Area Builders Association v. Town of Guilderland*.[119] In the *Kamhi* case, the town of Yorktown desired to impose an impact fee that would require developers either to set aside recreational land or to make a money payment to the town. The court held that this recreation fee was unauthorized by either statutory or home rule provisions. In a classic Dillon's Rule construction of implied powers, the court rejected the claim that authority to impose the fee was inherent in statutory zoning or planning power granted to the municipality. The court concluded, however, that the fee was permissible under the town's "supersession" authority—the authority for the municipality to supersede state legisla-

*tional Conditions Doctrine*, 91 COLUM. L. REV. 473, 486-90 (1991) (exploring whether the costs of exit provide a sufficient check on the capacity of localities to impose fees on developers); Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795, 805-13 (1987).

116. Several courts have required any impact fee to bear a rational relationship to the objectives of the assessing government in fixing the charge. *See, e.g.*, Downey v. Wells Sanitary Dist., 561 A.2d 174 (Me. 1989); Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980); John J. Delany et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions*, 50 LAW & CONTEMP. PROBS. 139 (1987).

117. *See, e.g*, Downey v. Wells Sanitary Dist., 561 A.2d 174 (Me. 1989) (equal protection); St. Johns County v. Northeast Fl. Builders Ass'n, 559 So. 2d 363 (Fla. Dist Ct. App. 1990) (state constitutional provision ensuring free public schools); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. Dist. Ct. App. 1989) (constitutional challenge); Hillis Homes, Inc. v. Snohomish County, 650 P. 2d 193 (1982) (impact fee invalidated as unauthorized tax under Dillon's Rule construction of county taxing power).

118. 547 N.E.2d 346 (N.Y. 1989).

119. 546 N.E.2d 920 (N.Y. 1989).

tion. Pursuant to this authority, the court said, the municipality had the theoretical power to enact this impact fee as long as a "sufficient nexus" existed between the property and the problem being redressed.[120] Certainly, the court concluded, the fee at issue was one of "uniquely local impact" and thus one to which the supersession authority applied. Furthermore, use of the supersession authority was appropriate to prevent developers from escaping proper impact fees where state restrictions on their use were inapposite. Nevertheless, the court found, the municipality had failed to jump through the procedural hoops necessary for the exercise of supersession power. The municipality, for instance, had not stated with sufficient "definiteness and explicitness" its intention to enact law pursuant to its supersession authority. For this heinous omission, the fee was invalidated in its entirety.

At first glance, this reasoning seems unduly formalistic. Certainly, the court realized that they had invited the town simply to re-enact the fee with the proper procedures. Yet this demand for formalistic adherence to process seems entirely in keeping with the concerns that I have suggested underlie Dillon's Rule. A demand for attention to procedural niceties reveals a judicial concern that the fee legislation be passed only after appropriate signalling of the extraordinary nature of the proposal to groups that might be adversely affected but that might otherwise not seize opportunities to express their reservations. The case may vary from those discussed above, because the group that dominates the local officials may constitute majority rather than minority interests. Nevertheless, the principle of one-sided lobbying remains the same. Minorities may not be entitled to have their views adopted; they may, however, anticipate a process through which their views can be considered. The minority group (future residents) in *Kamhi*, however, may have been particularly difficult to galvanize into collective action, given the members' current inability to identify themselves or each other (since they do not yet reside in the affected area) or to monitor each other. By requiring local legislatures to send a clear signal about the exceptional nature of the activity they are about to undertake, the decision, consistent with the function that I have indicated properly grounds Dillon's Rule, reduces monitoring costs of groups potentially affected by eliminating the need to examine all proposed local legislation. This reduction is crucial for groups with weak links, since they are likely to be most susceptible to the costs of coalition building and the problem of free riding. The result of this forced signalling, therefore, is to reduce the probability that even a

120. 547 N.E.2d at 349.

majority will be able to introduce local legislation that never comes to the attention of a disadvantaged minority. This is not to say that the majority interests need to be rejected on that basis alone. It is only to suggest that decisions that require more explicit statements of local authority, consistent with Dillon's Rule, maximize opportunities for affected parties to participate in the debate.

The *Guilderland* case sends a very similar type of signal, but one that is even more exacting with respect to impact fees. The court in that case was faced with a municipality's attempt to impose an impact fee for transportation purposes. The fee at issue was to be paid by "applicants for building permits who seek to make a change in land use that will generate additional traffic," *i.e.*, builders of developments, and was to be used to fund off-site road improvements. The court held that the transportation fee was invalid because, even if authorized by statute or home rule authority or supersession authority, any attempt to impose a transportation fee was preempted by substantial state legislation in the same area. After recognizing that municipalities were entitled "to legislate in a wide range of matters relating to local concern," the court indicated that there was a compelling need for uniform, that is state-wide, applications of highway fees; municipalities cannot be allowed to impose their own highway fees and be unaccountable for the amounts collected in a manner not explicitly authorized by state law.

Even at first glance, this result appears quite odd. Why should it be that the Town of Guilderland must have a highway collection system for its town roads that is the same as the system of the City of Rochester? It is difficult to fathom how something would be amiss if that kind of uniformity were missing. The court's stretching to this degree to strike down the fee seems instead to reflect an ambivalence, if not outright animosity, to the very imposition of the impact fee. That animosity appears appropriate once one considers whether the requested fee—intended to defray costs for increased usage of town roads—was related to the prospective development. The municipal expenses of road maintenance and repair might, in fact, increase with population. Nevertheless, if those roads are to be used by all residents rather than (predominantly) by newcomers on whom the fee is to be imposed, can it truly be said that the residents of the development are imposing a greater pro rata cost on the town highway system than those who migrated to the town earlier and are using the same system? If that is not the case, then why ought the newcomers to be paying a disproportionately higher fee to maintain the roads? In the absence of a more compelling justification, one is tempted to read these exactions as an attempt to impose the costs of municipal

improvements that will be enjoyed by all on a group uniquely disqualified from opposing them: potential residents who are not yet capable of identifying or monitoring themselves, each other, or the extent of their interests. The absence, much less diffusion, of those adversely affected by the ordinance suggests that the impact fee cases present an ideal case for the type of capture that troubles public choice theorists.

This concern would be misplaced (or at least reduced) if absent future residents were represented by some other party currently before the city council. For instance, a decision to increase local parking taxes that fall disproportionately on commuters might pass the public choice test of propriety if resident parking lot owners and businesses dependent on commuter traffic had sufficient access to the city council considering the measure.[121] Developers and builders, however, do not necessarily provide good surrogates, especially in cases such as *Yorktown* and *Guilderland*. In towns with small numbers of development projects, the few developers will not necessarily have sufficient access to the local legislature to provide representation commensurate with the number of potential fee payers. Even where developers are more numerous, their interests may be more varied than that of landlords in *Early Estates*. Developers involved in new construction may oppose the plan, while those who have already completed developments and wish to maximize rents by keeping out competing developments may find attractive a financing scheme that places additional costs on new units.[122]

One can only take the argument about impact or linkage fees so far. Recent cases permit these fees to be imposed in circumstances not unlike those in *Kamhi* and *Guilderland*.[123] Thus, one cannot say that courts are uniformly intuiting to the results mandated by the interpretation of Dillon's Rule offered here. What I believe one can say is that this interpretation is a valid one for understanding those cases in which Dillon's Rule or some equivalent doctrine has been applied to prevent exercise of mu-

121. *See* City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974), which upheld just such a tax against a due process challenge. Although the Court did not articulate this rationale for its holding, the conclusion seems implicit in the Court's reasoning about the propriety of the taxation process.

122. Of course, one could make the same type of argument in *Early Estates* if some landlords who rented to low-income tenants had hot water already connected and others did not.

123. An impact fee was approved in Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990). But the court based much of its rationale on the need to finance affordable housing of the type involved in that case to fulfill its mandate from the Mount Laurel series of decisions. In a context outside the affordable housing debate, the same court rejected a development fee on authority grounds. *See* New Jersey Builders Ass'n v. Mayor and Township Comm., 528 A.2d 555 (N.J. 1987).

nicipal initiative where the decision making process is likely exclude systematically groups that are adversely affected by the decision.

### *B. The non-delegation doctrine cases*

Unlike its federal counterpart, the doctrine that a governmental entity may not delegate its public functions is alive and well at the state and local level. Thus, a township could not delegate to a city the right to approve plumbing services rendered within the township, even though the entities shared a sewage system and disposal plant.[124] Nor could a municipality enact a zoning ordinance that made intramural regulations subject to the approval of the state attorney general.[125]

On its face, the non-delegation doctrine seems peculiar, at least where the delegators are accountable to their constituents. A variety of economies could explain the propriety of delegation from one locality to another, or to private delegates. Economies of scale that justify substantial interlocal cooperation may be feasible only if one of the participating localities is delegated final authority over decision making. Any alternative permits decision making only by unanimous vote of the participants, a procedure that invites hold-out strategies and that can frustrate cooperation. Economies that result from experience may lead one locality to employ another, or a private entity, to operate a program that the latter has already successfully initiated. Economies in monitoring outputs rather than inputs may augur for a principal-agent relationship instead of an employer-employee one, and thus favor delegation of functions to an entity outside the locality.[126]

Given these economies, the non-delegation doctrine initially seems to frustrate municipal efforts to take advantage of the expertise or experience of outsiders. Typically, the doctrine is explained as preventing elected officials from abdicating responsibility in favor of parties with no direct accountability to the electorate.[127] Nevertheless, given the difficulty that directly accountable officials would have in performing all tasks necessary to perform municipal functions, some level of delegation

124. Smith v. Spring Garden Township, 34 Pa. D. & C. 2d 54 (C.P. York Cty. 1964).

125. Thompson v. Smith, 129 A.2d 638 (Vt. 1957). This case seems somewhat apart from non-delegation decisions in which the delegate is from another entity, since the attorney general presumably represents all state citizens and thus is in a position to strike a decision that considers statewide costs and benefits. Nevertheless, the court determined that the requirement of attorney general approval "would have the effect of redelegating power entrusted to the voters of the municipality to a third person who was a stranger to the town, disconnected in any official way with the municipality involved." *Id.* at 646.

126. *See* DONAHUE, *supra* note 109, Michael H. Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878, 883-87 (1990).

127. *See* MICHELMAN & SANDALOW, *supra* note 11, at 802-03.

is both necessary and appropriate.[128] The effect of the non-delegation doctrine, strictly construed, would be to prevent localities from obtaining assistance from those most qualified to assist in the performance of local tasks.

The more appropriate issue under the non-delegation doctrine, therefore, is the scope of impermissible delegation. Some hint of the proper parameters of the doctrine appear in *Vermont Department of Public Service v. Massachusetts Municipal Wholesale Electric Co.*,[129] where the Vermont Supreme Court incorporated an analysis reminiscent of Dillon's Rule to resolve a non-delegation issue. In that case, the Vermont court considered the validity of contracts for the supply of energy capacity between localities in that state and a public authority of the Commonwealth of Massachusetts. The authority ("MMWEC") was the part-owner of a nuclear power plant whose escalating costs required the contracting localities to increase their payments beyond initial expectations. The contract purported to obligate the Vermont municipalities to make payments to the authority in respect of construction costs, even if the power plant was never completed, operable, or operating. The Vermont localities, however, were given no role in decisions affecting the costs of construction or operation that served as the basis for the contractual payments. The Vermont participants could not even play an advisory committee role for registering discontent with the plans of the authority. The court concluded that the contractual arrangements surrendered to the Massachusetts authority

> the sole power to establish budgets, revise those budgets, and fix the amount of the participants' monthly payments. Further, the authority to issue bonds resides in MMWEC alone, whether the bonds be for the costs of plant construction, operation, termination, or of "renewals, extraordinary repairs, replacements, modifications, additions and betterments. . . ." In sum, MMWEC makes all decisions to incur, or to refrain from incurring, project debt. Hence, MMWEC is given exclusive control over the magnitude of the participants' monthly payments and over the duration of these payments.[130]

It is not remarkable, therefore, that the court found that the localities had delegated authority over the municipal spending power in excess of their authority.[131]

128. *See* Roehl v. Public Util. Dist. No. 1, 261 P.2d 92 (Wash. 1953).

129. 558 A.2d 215 (Vt. 1988), *cert. denied*, 493 U.S. 872 (1989).

130. *Id.* at 221.

131. Taken to its extreme, the court's statement of the non-delegation doctrine would preclude most effective means of joint action by multiple localities. If one accepts the strong language of the court ("[s]uch authority is in the nature of a public trust conferred upon the legislative body of the corporation for the public benefit, and it cannot be exercised by others," *id.* at 220), it would appear

Why would such a broad delegation have occurred? Once again, the potential explanation lies in the capacity of delegates to obtain benefits from local governments unopposed by adverse interests that have greater difficulty overcoming obstacles to collective action. In the *Vermont Public Service* case, MMWEC had been able to convince officials of Vermont municipalities to enter into contracts that—by virtue of the requirement to pay without receipt of energy—essentially constituted a gamble.[132] One can certainly understand MMWEC's incentives to enter into such contracts. The security of this "take or pay" obligation allowed that authority to sell its bonds at relatively low interest rates without committing its own faith or credit to repayment. In theory, any argument made to officials of the Vermont municipalities about the desirability or need for the contracts (or for the underlying energy) would be met with questions by residents who would pay the electric utility bills, potentially without receiving anything in return. Substantial obstacles, however, seem likely to frustrate the organizational efforts of residents. Even substantial increases in utility bills would likely not offset the costs that any individual would incur by lobbying local officials, investigating the probable costs of the project and probable increases in rates, or organizing opposition to the project. As with the Chicken Game examples above, individual efforts are even less warranted in this situation since similar efforts by others would reduce the need for any individual to participate without reducing the subsequent benefit to the nonparticipant. The nondelegation doctrine, therefore, imposes an offsetting obstacle on potential delegates who have opportunities to convince local officials of the efficiency of their services isolated from the pressures of competing interests.

There may be instances where competition among potential delegates causes them to act as surrogates for residents, so that the concerns that underlie the non-delegation doctrine are not triggered. Faced with competition, potential delegates may appeal to local officials on the basis

that joint action by municipalities necessarily entails improper delegation unless all action is taken by unanimous vote—a rule that would severely limit the possibility of cooperation among the participating localities. Unanimity would permit each locality to hold up the others in order to obtain additional domestic benefits in return for the necessary favorable vote. An alternative interpretation of the non-delegation doctrine would permit joint action to survive a non-delegation challenge so long as each locality was entitled to participate in the decision making process, even if it were required to acquiesce in action approved by the majority with which it disagreed. Under one reading of the Vermont court's rationale, however, municipalities in the minority would be considered to have delegated their authority just as much as if it had been unable to cast any vote at all. Thus, mere possession of a right to vote would arguably not satisfy the requirements of control and discretion that the Vermont Supreme Court considered essential to a finding of permissible delegation.

132. For a decision that a substantially similar contract was void on grounds of lack of authority, see Chemical Bank v. Washington Public Power Supply Sys., 666 P.2d 329 (Wash. 1983), *cert. denied*, 471 U.S. 1075 (1985).

of relative ability to represent the interests of others. Thus, delegation may be more appropriate where it takes the form of contracting with private firms that must compete for municipal business. A decision to let a contract for municipal waste disposal, for instance, may be made only after consideration of competing bids from private firms and hearing arguments from current municipal employees. In a case such as *Vermont Public Service*, however, providers of the service (electrical energy) are likely to be too small in number to generate the kind of competition that reflects residents' interests. Nor, since payments come from individual residents instead of the municipal budget, does the contract preclude local officials from using scarce municipal resources for other projects that they favor. Thus, delegation of authority to determine rates permits local officials to seek substantial rents from outside suppliers under conditions that neither interfere substantially with other favors that officials may wish to provide nor generate objection from any discrete body of constituents. For the same reasons, that decision is likely to be made by the officials based on unopposed representations from the delegate and its representatives. The effect of the non-delegation doctrine is to bar such assignments of authority without intervention by state legislators who, in this context, may have less ability to obtain rents or avoid fuller hearings that invite the formation of competing interest groups.[133]

## VIII. CONCLUSION

I am reluctant to suggest any grand unifying theme that connects all, or even much of an area as disparate as local government law. The desire to prevent local governments from acting in areas uniquely susceptible to rent-seeking behavior, however, seems to be an appropriate objective for lawmaking and attempted entries by localities into novel areas may indicate that rent-seeking opportunities have been seized. This interpretation is consistent with related doctrines that can be explained as efforts to compensate for collective action failures. The case law suggests that, in some groups of cases, courts may be intuiting to results consistent with that principle. Whether judicial direction of those cases to the state legislature minimizes rent-seeking or simply increases it at a differ-

133. It may be noteworthy that, in the course of the MMWEC opinion, the court intimated that delegation would have been permissible had it been legislatively authorized. *See* Vermont Public Service, 558 A.2d at 220, 220 n.2, 223 n.3. This suggests that the court believed that a state forum would be more receptive to expression of competing views, a belief that might have been particularly appropriate where financing a nuclear power plant, distant from the contracting localities, was at issue. Opponents of the plant might have had greater incentives to raise the contract issues before a single forum, the state legislature, in hearings concerning the delegation power than they had to intervene in multiple proceedings in localities of which they were not residents.

ent level appears to vary with the type of program involved and its susceptibility to interest group formation at the state level. Notwithstanding the difficulty of discerning the presence or absence of dominant interest groups in any given situation, making that principle more explicit may be a first step towards its refinement and application with greater certainty.