

Washington Law Review

Volume 64
Number 1 *Dedication to Professor Charles E.
Corker; Symposium on State Constitutional Law*

1-1-1989

Home Rule: An Essay on Pluralism

Michael Libonati

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>

Digital Part of the State and Local Government Law Commons
Commons

Network Recommended Citation

Michael Libonati, *Home Rule: An Essay on Pluralism*, 64 Wash. L. Rev. 51 (1989).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol64/iss1/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

HOME RULE: AN ESSAY ON PLURALISM

Michael Libonati*

Abstract: Home rule can be viewed as a metaphor for the policies of decentralization and diffusion of power. This Essay aims to rediscover some of the deep historical roots of the policy and practice of local self-government. The Essay also explores some of the ways in which local autonomy can be reimagined in contemporary contexts.

This Essay is the product of a tradition devoted to discourse about politics,¹ a tradition whose basic commitment is to expanding the participation of individuals in the process and substance of decisions affecting their lives.² From the perspective of this tradition, home rule is concerned with the decentralization of decision-making to give a forum to those whose lives are focused on the parochial—home, family, and neighborhood—and thus to bring government down to where the goats can get at it.³ Home rule also is concerned with the role that collectivities, local government entities, play as agents and protagonists of concerns labeled parochial.

This Essay will discuss how we can reconceptualize the crucial relationship between centralized decision-making and the peripheral local government. According to the conventional synthesis, modern political society consists of the subordination of the periphery to the dominant center,⁴ but this Essay seeks to persuade that the political process is a dialectic of claims, an endless power struggle between center and periphery, so that political society can be understood as “a more or less successful aggregate of the little societies that constitute it which enjoy a life of their own and a fair degree of autonomy.”⁵

* Professor of Law, Temple University; LL.B. 1967, LL.M. 1969, Yale University.

1. See, e.g., H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950); Long, *Aristotle and the Study of Local Government*, 24 *SOC. RES.* 287 (1957).

2. H. LASSWELL & A. KAPLAN, *supra* note 1, at XXIV; see, e.g., H. LASSWELL & R. RUBENSTEIN, *THE SHARING OF POWER IN A PSYCHIATRIC HOSPITAL* (1966).

3. The acute reader will recognize this paraphrase of George Wallace's pungent advice to Jesse Jackson concerning how to formulate issues to appeal to the broadest spectrum of the electorate.

4. See, e.g., Shils' romantic Hegelian essay *Center and Periphery* in E. SHILS, *CENTER AND PERIPHERY* 3-16 (1975). For an anguished jeremiad against the modernist synthesis and the role played by jurists in deconstructing traditional communities, see Cover, *Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983).

5. Springborg, *Politics, Primordialism, and Orientalism: Marx, Aristotle, and the Myth of the Gemeinschaft*, 80 *AM. POL. SCI. REV.* 185, 187 (1986).

The importance of the periphery in the political process is illustrated by the following table from the 1982 Census of Governments, which demonstrates a political structure shaped by localism.⁶

Table A. Governmental Units: 1972 to 1982

Type of government	1982	1977	1972
Total	82,341	79,913	78,269
U.S. Government	1	1	1
State Governments	50	50	50
Local Governments	82,290	79,862	78,218
County	3,041	3,042	3,044
Municipal	19,076	18,862	18,517
Township	16,734	16,822	16,991
School district	14,851	15,174	15,781
Special district	28,588	25,962	23,885

The question remains how to understand the relationship between center and periphery. This Essay will use political and historical examples to point out that home rule can be located within a wider cultural context, the dialectic between center and periphery, so that home rule can be seen as a deep and abiding artifact of our social and political system. This Essay also will comment, sometimes polemically, on the tradition of analytic positivism by illustrating that tradition's inability to appreciate or legitimate the practical wisdom embedded in the values and institutions of localism.

I. TWO CONVENTIONAL PERSPECTIVES ON HOME RULE

Before placing home rule within a historical and political context, it is helpful to review two perspectives on home rule: Traditional legal analysis and a recent effort by a social scientist to broaden and revitalize the analytic tradition.

A. *Traditional Legal Analysis*

First, by viewing the periphery as essential to the dialectic between center and periphery, we must break with traditional legal analysis, which views the periphery as subordinate to the central government⁷ and as part of a rigid hierarchical system whose "ability to handle com-

6. 1 UNITED STATES BUREAU OF THE CENSUS, 1982 CENSUS OF GOVERNMENTS VI (1983).

7. See *supra* note 4 and accompanying text.

plex situations depends upon a simple message and upon growth through uniform replication."⁸ The analytic tradition also is primarily concerned with how home rule fits in with previously established legal doctrine. Thus, legal commentators traditionally have viewed local government as a peripheral and subordinate part of a static political system.

The analytic tradition's inflexible synthesis also is shown by its normatively tinged vocabulary of paired opposites— universal/particular, dominant/subordinate, superior/inferior, and unity/fragmentation—that legitimizes the claims of the central government and delegitimizes those of the periphery.⁹ The style of discourse associated with traditional legal analysis, analytic positivism, also serves to maintain the mystique of the sovereign, centralized state.¹⁰ Positivism's hallmarks are clarity and orderly statement. Its aim is to winnow through ambiguous and loose terminology by searching and discriminating analysis in order, in the words of its greatest practitioner, to "aid in the understanding and in the solution of practical, every-day problems of the law."¹¹

Home rule, however, does not lend itself to a static, positivist analysis. The concerns of local government entities are parochial and imprecise, and as such are neither coherent nor consistent.¹² Thus, as this Essay will discuss, home rule is better viewed as an essential part of a flexible dialectic of autonomy, interdependence, and reciprocity between center and periphery.¹³ Because the analytic tradition is unable to recognize the flexible and essential role that local government plays in the political process, it is not surprising that home rule has been tried and found wanting by nearly every legal commentator who has subjected it to the solvent of traditional legal analysis.¹⁴

8. D. SCHON, *BEYOND THE STABLE STATE* 187 (1971).

9. See generally Libonati, *Intergovernmental Relations in State Constitutional Law: A Historical Overview*, 496 ANNALS 107 (1988).

10. See Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429 (1987). See generally R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

11. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 20 (1913).

12. See *supra* text accompanying note 3; *infra* notes 25–27 and accompanying text (discussing these parochial concerns).

13. See *infra* notes 28–132 and accompanying text.

14. See F. GOODNOW, *MUNICIPAL HOME RULE* (1897); H. MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* (1916); J. MCGOLDRICK, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-1930* (1933); Fordham & Asher, *Home Rule Powers in Theory and Practice*, 9 OHIO ST. L.J. 18 (1948); Ruud, *Legislative Jurisdiction of Texas Home Rule Cities*, 37 TEX. L. REV. 682 (1959); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964); Sato, "Municipal Affairs" in California, 60

B. A Social Scientist's Perspective

Gordon Clark has proposed a highly sophisticated formulation¹⁵ to broaden the traditional analysis, but his perspective is insufficient because he fails to adequately account for the dynamic interaction between center and periphery. Seeking to extend traditional private law analytic categories proposed by Bentham and Hohfeld to public law questions, Clark focuses on the concept of "local autonomy."¹⁶ He extracts two "primary principles of local autonomy: The power of initiative and the power of immunity."¹⁷ By initiative, he means the power of local government to act in a "purposeful goal oriented" fashion.¹⁸ By immunity, he means "the power of localities to act without fear of the oversight authority of higher tiers of the state."¹⁹ Combining the principles of initiative and immunity, Clark arrives at the following typology:

- Type 1: initiative and immunity
- Type 2: initiative and no immunity
- Type 3: no initiative and immunity
- Type 4: no initiative and no immunity.²⁰

Clark then goes on to relate these ideal types to several concrete examples:²¹

- Type 1: the autonomous city-state (ancient and medieval)
- Type 2: decentralized liberalism
- Type 3: local discretionary implementation of centrally defined tasks
- Type 4: local government under Dillon's rule.²²

Clark's carefully articulated scheme consists of a set of dichotomized variables. As such, his static analysis fails to account for the

CALIF. L. REV. 1055 (1972); Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968); Westbrook, *Municipal Home Rule: An Evaluation of the Missouri Experience*, 33 MO. L. REV. 45 (1968).

15. Clark, *A Theory of Local Autonomy*, 74(2) ANNALS ASS'N AM. GEOGRAPHERS 195-208 (1984); see also G. CLARK, JUDGES AND THE CITIES 6-7 (1985).

16. Clark, *supra* note 15, at 196-97, 199.

17. *Id.* at 198. Professor Clark's categories seem to this observer to be functionally equivalent to the notions of "sword" and "shield" home rule suggested in S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 216-18 (1970) and applied in *Jefferson v. State*, 527 P.2d 37, 42 n.26 (Alaska 1974).

18. Clark, *supra* note 15, at 197.

19. *Id.* at 198.

20. *Id.* at 199.

21. *Id.* at 200-01, 203.

22. Dillon's rule holds that statutes delegating powers to local governments ought to be strictly construed and consist only of those powers expressly granted, necessarily implied, or indispensable. *Merriam v. Moody's Ex'rs*, 25 Iowa 163, 170 (1868) (per Dillon, C.J.); 1 J. DILLON, MUNICIPAL CORPORATIONS § 237, at 448-51 (5th ed. 1911).

dynamic dialectic of center and periphery and does not facilitate the central purpose of his inquiry, which he defines as the "ongoing choice of how we are to make and remake our institutions."²³ Nevertheless, Clark's work provides more insights into the role that local government plays in the political process than does traditional legal analysis. First, Clark understands that analytic categories point to, and are rooted in, historical and political context. Second, unlike conventional legal analysis, Clark's analysis recognizes that discourse about local government must be enriched to encompass local government's aims or functions, that is, those concerns labeled parochial.²⁴ In contrast, conventional legal discourse about home rule is deeply self-absorbed and is concerned primarily with how this new doctrine fits in with established doctrines or how it impacts on the judiciary as an institution. Finally, Clark recognizes that local self-government engages with vital issues of our time: The emergence of "not in my backyard" ("NIMBY") opposition to local siting of a variety of business, governmental, and government licensed facilities in the industrialized countries;²⁵ rediscovery of the values of decentralization of power and localism in socialist bloc countries led by Yugoslavia but now including the Soviet Union and the People's Republic of China;²⁶ and the pressures of urbanization and ethnic fragmentation on the governmental apparatus of less developed countries.²⁷ Thus, Clark, by recognizing that any discourse on home rule must be rooted in historical and political contexts, provides the starting point for this Essay.

II. HOME RULE: POLITICAL AND HISTORICAL CONTEXTS

This Essay now will explore, through political and historical examples, how our political system is a dynamic dialectic of autonomy, interdependence, and reciprocity between center and periphery²⁸ and how the periphery is integral to the political system and to the ancient

23. Clark, *supra* note 15, at 197.

24. See *supra* text accompanying note 3.

25. Glaberson, *Coping in the Age of "Nimby,"* N.Y. Times, June 19, 1988, § 3 (Business), at 1, 25.

26. Gorbachev, for example, has recognized that "the need has fully matured to reorganize the management of local affairs along the lines of self-government, self-financing, and self-sufficiency." Speech at the 19th Communist Party Conference (June 28, 1988), *excerpted in* N.Y. Times, June 29, 1988, § A, at 10, col. 4.

27. See P. MAWHOOD, LOCAL GOVERNMENT IN THE THIRD WORLD (1983).

28. J. LOPREATO, VILFREDO PARETO 7-12 (1965).

and modern task of coming to terms with the multiplicity and radical variousness of political life.²⁹

A. *Classical Roots: Polis and Urbs*

The term "autonomy" is as good a starting point as any from which to add political and historical context to the discourse about local government. Autonomy is thought to be associated with the notion of sovereignty and independence. Hence, a home rule entity is said to seek the status of an *imperium in imperio*, a state within a state.³⁰ As such, the project of local self-government can be lambasted by positivists as juridical nonsense because sovereignty is a hierarchical and indivisible concept.³¹

Current classical scholarship indicates that the term "autonomy" originated in Asia Minor, where it was coined to express the status granted Greek cities under Persian rule.³² Autonomy then developed as part of the dialectic of ancient Greek international law: claims made by weaker polities to constrain or inhibit the exercise of power by a stronger polity.³³ Autonomy is a status conceded by a central power to a peripheral one, "a declaration of its willingness to refrain from exercising [sic] the power it has, a willingness which is in control of the major power alone and depends on the historical circumstances in which it finds itself at any given time."³⁴ Present at the creation of the term autonomy are all the contemporary characteristics of the project of local self-government: Variable content, imprecise formulation, and contingent implementation.

Recent scholarship even reconstructs our view of the Roman Empire, which is now characterized as a "federation of autonomous cities" by the distinguished historian Paul Veyne.³⁵ Veyne also has asserted that "the city was the ultimate frame of reference for social life just as the Empire was the ultimate framework for political life. For it was the center for decisions in matters concerning everyday life

29. In this connection, the most interesting work has been done by those trained in anthropology. See C. GEERTZ, LOCAL KNOWLEDGE 167-234 (1983); Pospisil, *Legal Levels and Multiplicity of Legal Systems in Human Societies*, 9 J. CONFLICT RESOLUTION 2-26 (1967), reprinted in L. POSPISIL, ANTHROPOLOGY OF LAW 97-126 (1971).

30. Vanlandingham, *supra* note 14, at 284-85. See generally *id.*

31. State *ex rel.* Mueller v. Thompson, 149 Wis. 488, 501-03, 137 N.W. 20, 25-26 (1912) (Timlin, J., concurring).

32. Bickerman, *Autonomia: Sur un Passage de Thucydide (I, 144, 2)*, 35 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITE 313-44 (1958).

33. See generally M. OSTWALD, AUTONOMIA: ITS GENESIS AND EARLY HISTORY (1982).

34. *Id.* at 9.

35. 1 A HISTORY OF PRIVATE LIFE 92 (P. Veyne ed. 1987).

. . . . Socially, psychologically, and, not least, administratively, the city was self-sufficient, it was autarchic in Aristotle's sense."³⁶

B. The Earthly Republic:³⁷ Italian Medieval Cities

The peculiar juridical status of the medieval Italian *civitas* after the reception of Roman law also manifests the dynamic and dialectic properties of local self-government. Medieval jurists like Bartolus and Baldus³⁸ confronted a Roman public law which seemed to require the consent of the center for the creation of local political institutions,³⁹ but nevertheless recognized the essential role played by local government. Bartolus, for example, held that a *civitas* could be formed by popular agreement without central sanction provided that it did not tend to the injury of the nominal sovereign.⁴⁰ He then proceeded to legitimate self-proclaimed local republics by recognizing their exercise of extensive rights and privileges, including the competence to legislate concerning their own internal concerns⁴¹ without an imperial "by your leave." Thus, in a political context in which the center was weak, Bartolus and Baldus incorporated a robust sense of localism into the analytic categories that they inherited from Roman public law to facilitate the evolution of the dependent *civitas* into an autarchic, autonomous city-state.⁴²

C. In English Ways

We turn next to England to add more historical context to the discussion on local government. At first blush, the relation between center and periphery in England seems to be captured in Selden's formulation circa 1650: "What makes A Citty . . . Resp[onse]: it is according to ye first Charter which made ym a corporacon; if they be

36. Springborg, *supra* note 5, at 191 (translating P. VEYNE, *LE PAIN ET LE CIRQUE: SOCIOLOGIE HISTORIQUE D'UNE PLURALISME POLITIQUE* 107 (1976)).

37. *THE EARTHLY REPUBLIC—ITALIAN HUMANISTS ON GOVERNMENT AND SOCIETY* 5–6 (B. Kohl & R. Witt ed. 1978) (term denotes a turning away from Augustine's City of God). See generally G. MAZZOTTA, *DANTE, POET OF THE DESERT* 107–46 (1979) (discusses extensively the notion of community in the 12th century).

38. C. WOOLF, *BARTOLUS OF SASSOFERRATO* (1913); J. CANNING, *THE POLITICAL THOUGHT OF BALDUS DE UBALDIS* (1987).

39. *DIG. JUST.* 3.4.1.

40. C. WOOLF, *supra* note 38, at 114–15.

41. *Id.* at 146–47.

42. J. CANNING, *supra* note 38, at 64–65, 67–68, 93–158, 185–208. It also is important to note that analytic categories have nothing to say about how type 4 polities are transformed into type 1 polities under Clark's analysis or about the role jurists play in blocking, fostering, or ratifying political innovations originating at the periphery. See *supra* notes 17–22 and accompanying text (discussing Clark's categories).

incorporated by ye name of (Civitas) then they are a City; if by ye name of (burgum) then they are A burrough."⁴³ This response is very close to pre-Bartolist Roman public law doctrine because it presupposes that a corporate entity can only be created by the sovereign center.⁴⁴ Local corporate powers are defined with reference to the authoritative words of the charters. Selden's remarks convey the picture of a strong center dominating a weak periphery. In fact, however, the House of Commons, at the time those words were uttered, was an institution in which municipal governing bodies and their corporate interests were directly represented. As Sacret noted, "[a]pproximately four-fifths of the personnel of the house of commons were city and borough members, who were generally elected by at most a small body of freemen, and very frequently by the governing body alone."⁴⁵ So, too, a number of boroughs were insulated from direct royal pressure on corporate charters because they had attained their status as a result of prescription.⁴⁶

Localism was a sufficiently pervasive value that members representing localities argued that they could not agree to amendments to the Corporation Act in 1661 "without Breach of Trust reposed in them by those Corporate towns they served for; as conceiving those Alterations tend to the destroying the Charters of all Corporations."⁴⁷ The penetration of center by periphery was so great that in the battle with Whig Parliamentarianism, a significant part of royal strategy was aimed at subordinating the localities to the center not only by displacing local Whig elites, but also by enlisting localities in the enforcement of centrally determined policies.⁴⁸ This experiment in central control was swept away by the Glorious Revolution of 1688 in such a way as to insulate English, but not colonial, local government from both central and popular control until the passage of the Municipal Corporations Act in 1835.⁴⁹

43. TABLE TALK OF JOHN SELDEN 30 (F. Pollock ed. 1927).

44. See *supra* notes 38-39 and accompanying text.

45. Sacret, *The Restoration Governments and Municipal Corporations*, 45 ENG. HIST. REV. 232, 234 (1930).

46. J. JONES, *THE REVOLUTION OF 1688 IN ENGLAND* 157 (1973).

47. Sacret, *supra* note 45, at 250 n.2.

48. *Id.* at 254; J. JONES, *supra* note 46, at 130-31.

49. *THE EIGHTEENTH CENTURY CONSTITUTION 1688-1815*, at 4 (E. Williams ed. 1960).

D. *Cities upon a Hill*:⁵⁰ *The American Colonies*

Whether the “full hearted localism”⁵¹ of the English polity was transplanted to its American colonies has generated substantial debate among colonial American historians.⁵² The task of contextualizing the project of local self-government in the American colonies is complicated by the fact that two separate kinds of claims must be disentangled: First, claims by the colonies (periphery) in relation to England (center),⁵³ and second, claims by constituent units (county, city, and town) in each colony in relation to the colony.

1. *Relationship of Colonies to England*

The Glorious Revolution did not change the Crown’s policy of seeking to limit colonial autonomy *without local consent* by securing permanent revenues, restricting the authority of colonial assemblies, eliminating private colonies by recalling their charters, and consolidating existing colonies into more general governments.⁵⁴ A most vexing question concerned the right to, and extent of, colonial legislative powers. Clauses in the royal commissions of colonial governors empowered them “to summon and call General Assemblies of the . . . Freeholders and Planters within their Government, according to the Laws and Usages of Our said Province” and to exercise, with colonial assemblies, “full Power and Authority to make, constitute, and ordain Laws, Statutes and Ordinances for the Public Peace, Welfare and good Government of Our said Province, and of the People and Inhabitants thereof”⁵⁵ subject to the qualification that colonial enactments could “not be repugnant” to the laws and statutes of Great Britain.⁵⁶ The center’s claim was that all legislative powers and privileges were from the Crown alone so that the sole basis for colonial legislative authority

50. “[F]or wee must Consider that wee shall be as a Citty vpon a Hill, the eies of all people are vpon us” Sermon by John Winthrop, Governnor of Massachusetts, to passengers aboard ship, on the voyage to New England, *A Modell of Christian Charity* (1630), in 1 *THE PURITANS* 199 (P. Miller & T. Johnson rev. ed. 1963).

51. Kishlansky, *Community and Continuity: A Review of Selected Works on English Local History*, 37 *WM. & MARY Q.* 3d Ser. 139 (1980).

52. The pertinent monographs are cited in B. DANIELS, *THE CONNECTICUT TOWN* 203 n.1 (1979). See generally D. ALLEN, *IN ENGLISH WAYS—THE MOVEMENT OF SOCIETIES AND THE TRANSFERRAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* (1981).

53. See generally J. GREENE, *PERIPHERIES AND CENTER* (1986). Much of the subsequent discussion of this topic summarizes Greene’s work.

54. *Id.* at 7–18. See generally *THE GLORIOUS REVOLUTION IN AMERICA* (M. Hall, L. Leder & M. Kammen ed. 1964).

55. J. GREENE, *supra* note 53, at 29.

56. *Id.* at 29–30.

was to be found in royal charters and commissions.⁵⁷ Thus, any tendency by the periphery to expansive construction of their derivative legislative powers was checked by the Privy Council because colonial laws either did not come into effect without the Council's approval or could be quashed by it upon appeal from colonial courts.⁵⁸ The colonial counterargument was founded on a liberal and latitudinarian construction of empowering documents coupled with an appeal to English birthright and immemorial custom.⁵⁹ Greene neatly summarizes the situation in the 1760's:

Notwithstanding this lack of theoretical resolution or agreement as to the actual and customary distribution of power within the empire, the empire continued to function in practice with a clear demarcation of authority, with virtually all internal matters being handled by the colonial governments and matters of general concern by the metropolitan government.⁶⁰

This practical, working accommodation satisfied neither the clamor of the periphery to entrenched rights founded on constitutional principle, charter, and custom nor of the center for absolute acceptance of its supremacy.⁶¹ But the practice of accommodation, as Greene brilliantly discerns, reveals much about the role that local government plays in the political process:

1) "sovereignty [lies] not in any institution or collection of institutions at the center . . . but in the separate constitutions of each of the many separate political entities that compose[] the empire,"⁶²

2) "political and constitutional arrangements within . . . extended polities [are] founded upon the consent of their many constituent components;"⁶³

3) "local sanction from the peripheries [is] essential to endow any position of the center with constitutional authority—and vice versa,"⁶⁴ and

4) "constitutional customs and doctrines [can] emanate from either the center or the peripheries but they [cannot] attain full consti-

57. *Id.* at 34.

58. *Id.* at 30. Under current Massachusetts law, the Commonwealth Attorney General has the power to disapprove local legislative enactments inconsistent with state law. *E.g.*, *Town of Amherst v. Attorney Gen.*, 398 Mass. 793, 502 N.E.2d 128 (1986).

59. J. GREENE, *supra* note 53, at 37-42, 175-76.

60. *Id.* at 76.

61. *Id.* at 82-85, 106-07.

62. *Id.* at 128.

63. *Id.* at XI.

64. *Id.*

tutional authority outside the area of emanation . . . until they [are] accepted by all parties to which they might apply.”⁶⁵

These points add support to this Essay’s goal of illuminating the significance of local government in the political process.⁶⁶

2. *Relationship Between Colony and Town*

The internal dynamics of colonial polities do not lend themselves to easy generalization. Variety and ambivalence then, as now, characterized the crosscutting relationship between central and local government. The most extensively investigated colony is Massachusetts. Reports from the scholarly battlefield resemble nothing so much as the tale of Rashomon. Some see a highly centralized oligarchy impressing itself on a passive, malleable local template.⁶⁷ Others glimpse the efflorescence of a decentralized, particularist political order in which the concerns of the periphery predominated.⁶⁸ Though these visions apparently conflict, they probably can be reconciled by one more learned than the writer by fitting them into a Hegelian or evolutionary periodization such that centralization is inevitably followed by decentralization, leading to a synthesis in which the national identity displaces more parochial systems of governance.⁶⁹ Thus, either perspective is part of the same uniformitarian, positivist impulse. This

65. *Id.*

66. In addition, these points provide the transformative grammar to replace the positivist vocabulary of traditional legal analysis. See *supra* notes 9–11 and accompanying text. The points also are maxims that teach us much that we need to know about designing decentralized institutions while minimizing recourse to force. We ought to deviate from these maxims of prudence and practical reason only when necessary to achieve overriding goals of public order.

67. E.g., G. HASKINS, *LAW AND AUTHORITY IN EARLIER MASSACHUSETTS 77–78* (1960); 1 H. OSGOOD, *AMERICAN COLONIES IN THE SEVENTEENTH CENTURY 432* (1904).

68. E.g., M. ZUCKERMAN, *PEACEABLE KINGDOMS* (1970); Breen, *Persistent Localism: English Social Change and the Shaping of New England Institutions*, 32 *WM. & MARY Q.* 3d Ser. 3 (1975). By way of contrast, early scholarly work on local government in the United States sought to root these institutions in the primordial practices of the Anglo-Saxon race. G. HOWARD, *AN INTRODUCTION TO THE LOCAL CONSTITUTIONAL HISTORY OF THE UNITED STATES 10–18, 50–56* (1889). See generally Demophilus, *The Genuine Principles of the Ancient Saxon or English Constitution*, in 1 *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805*, at 340–63 (C. Hyneman & D. Lutz ed. 1983) (recommends that the Pennsylvania Constitution be formulated in accordance with Saxon political institutions).

69. Consider Chief Justice Parker’s rejection of the contention that the town of Fairhaven was with authority to expend funds to defend itself when threatened with invasion by British troops during the war of 1812.

By the Constitution of the United States, this duty [to defend against an enemy in the time of war] is devolved upon the national government, and although it may be impracticable, in so extensive a territory, to furnish competent security to every section or point, yet it does not follow that corporations of limited powers, like towns, can take upon themselves the duty, and exact money of their citizens for the execution of it.

Stetson v. Kempton, 13 *Mass.* 271, 279–80 (1816).

impulse, whether oriented toward claims of the center or the periphery, makes us forget that governmental form and function is a largely accidental and temporary hodgepodge and is not, as positivism seeks to establish, a coherent and consistent body of eternal truths.⁷⁰

E. Early State Constitutions

Key issues between center and periphery prior to the American Revolution include the following: The basis of representation in the colonial legislature, the scope of local legislative jurisdiction, the definition and control of the local franchise, and the creation and control of local offices. No discernible pattern emerges, although in the first flush of state constitution-making, some of these issues were entrenched in the constitutions of the several states.

A significant guarantor of local autonomy in Massachusetts, as in England, was the practice of affording each town the corporate right of electing a representative to the General Court.⁷¹ This right was entrenched in the Constitution of 1780⁷² as was the more curious, to modern eyes, local prerogative of giving binding instructions to their representatives.⁷³

The phenomenon of self-created, self-defined local government may be found in Connecticut,⁷⁴ but it was temporary and irregular. The general pattern was for the central legislature to pass more enabling legislation delegating greater discretionary powers to town officials.⁷⁵ One should not, however, forget that the colony or province was sometimes so weak that it was possible for dissenting counties to secede and form separate polities as did Delaware (from Pennsylvania) and Vermont (from New York and New Hampshire).⁷⁶ But the city-state form is absent.

70. See R. RORTY, CONSEQUENCES OF PRAGMATISM 26, 30-31 (1982). Professor Perry Sentell is a vigorous and articulate exponent of this viewpoint. See generally P. SENTELL, GEORGIA MUNICIPAL LAW: CURRENT TRENDS AND PROBLEMS (1971); P. SENTELL, STUDIES IN GEORGIA LOCAL GOVERNMENT LAW (1973).

71. J. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 52-54 (1966).

72. MASS. CONST. of 1780, pt. II, ch. 1, § 3, art. II, reprinted in 3 F. THORPE, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1898 (1909).

73. MASS. CONST. of 1780 pt. I, art. XIX, reprinted in 3 F. THORPE, *supra* note 72, at 1892. See generally D. LUTZ, POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS (1980).

74. B. DANIELS, *supra* note 52, at 13.

75. *Id.* at 90-91.

76. P. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC 126-45 (1983).

Connecticut furnishes an instructive lesson in the vagaries of participatory localism. Far from simple consolidated local polities, by 1733 all towns in Connecticut held 1) proprietors' meetings which had jurisdiction over the use of town land and unreviewable discretion as to whether to confer the status of proprietor on newcomers; 2) freemen's meetings at which deputies to the General Assembly and statewide officers were elected (the town selectmen possessed formal power to admit to the status of freemen); 3) militia meetings mandating all men between sixteen and sixty to bear arms, to take part in regular training exercises, and to elect their own officers, subject to confirmation by the state; and 4) town meetings in which inhabitants who were neither freeman nor proprietors also had a vote.⁷⁷ In addition, local congregational societies were separately established in a defined territory often coextensive with the town and empowered to levy and collect taxes for the support of the minister, the meetinghouse, and schooling.⁷⁸ Because these societies were the political arm of the parish, eligibility for participation in society's affairs depended on whether one had been admitted to the status of communicant in the church.

As for local offices, arrangements ran the gamut from centralization to localism. In New Jersey, many local officials were appointed by the governor or the legislature well into the nineteenth century.⁷⁹ In Virginia, members of the county court "held in its hands all the reins of local government" and were formally appointed by Governor and Council, but in practice "county magistrates filled vacancies among themselves virtually by co-optation."⁸⁰ In New York, the Constitution of 1777 guaranteed that town clerks, supervisors, constables, and collectors were subject to local popular election whereas sheriffs and coroners were appointed by the center.⁸¹ In Pennsylvania, however, sheriffs and coroners were subject to direct annual election in each city and county.⁸²

The first state constitutions were not devoid of provisions pertinent to the project of local self-government. A twentieth century scholar,

77. See B. DANIELS, *supra* note 52, at 119-39.

78. *Id.* at 94-118. See generally *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292 (1815) (describes rights of parish in Vermont).

79. Attorney Gen. *ex rel.* Booth v. McGuinness, 78 N.J.L. 346, 355-56, 75 A. 455, 459-60 (1909).

80. J. POLE, *supra* note 71, at 156.

81. N.Y. CONST. of 1777, arts. XXIX & XXVI, reprinted in 5 F. THORPE, *supra* note 72, at 2634.

82. PA. CONST. of 1776, art. X, § 31, reprinted in 5 F. THORPE, *supra* note 72, at 3089.

who observes that local government powers were “missing”⁸³ from these texts, ignores the important and controversial entrenchment of local corporate representation in the state legislature and the extension of the franchise to the selection of local officials.

It was the Northwest Ordinance of 1787 which brought order and form to the eccentric legacy of institutions of local governance bequeathed to the thirteen original colonies.⁸⁴ To interpolate the Philosopher, our colonial inheritance “can be seen as an ancient city: a maze of little streets and squares, of old and new houses, and of houses with additions from various periods,” whereas the Congressional township created in advance of settlement with its grid contours may be aptly analogized to “a multitude of new boroughs with straight regular streets and uniform houses.”⁸⁵ The impact of the Northwest Ordinance on the project of local self-government is delineated in Merle Curti’s case study of democracy in a frontier county.⁸⁶ Curti makes the following salient observations about local government in Trempealeau County, Wisconsin:

Self-government did not have to be created or re-created on the Trempealeau frontier—because it existed there already. We are confronted with the semantic absurdity . . . of the frontier being self-governing before it was settled. We find that the apparatus of county and township government was readily available when the firstcomers arrived, and that the county fathers promptly made good use of it.

Wisconsin law regulating the kinds and duties of local officers, the collection of numerous taxes, and the expenditure of funds was (and still is) most specific. Trempealeau’s various officers spent nine-tenths of their time in meeting the requirements of a code emanating from Madison. . . . Trempealeau carefully conformed. One looks in vain in Trempealeau for a frontier effort to circumvent a law defining county or township government. . . . The people of Trempealeau seem to have governed themselves contentedly within a county “constitution” they had neither drafted nor ratified.⁸⁷

83. Herget, *The Missing Power of Local Government: A Divergency Between Text and Practice in Our Early State Constitutions*, 62 VA. L. REV. 999 (1976). I also have sinned in this regard. Libonati, *Reconstructing Local Government*, 19 URB. L. 645, 647 (1987).

84. The text of the Northwest Ordinance is now most readily accessible in 1 P. KURLAND & R. LERNER, *THE FOUNDERS’ CONSTITUTION* 27–29 (1987). For our purposes, there are two relevant provisions. Section 8 authorizes the governor “to lay out the parts of the district in which the Indian titles shall have been extinguished into counties and townships.” Section 9 sets forth the requirements of the franchise and for the right of legislative representation.

85. L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 18, at 8e (G. Anscombe trans. 1953).

86. M. CURTI, *THE MAKING OF AN AMERICAN COMMUNITY* (1959).

87. *Id.* at 261.

What Curti here describes is guided democracy in which a school-marm state taught “a civic grammar composed of state, county, township, and special purpose districts” and a “fiscal syntax” for the raising and dispersal of funds.⁸⁸

F. State Constitutions: The Missouri Innovation

It is interesting to note the concerns attending the entrenchment of what has come to be known as home rule in the Missouri Constitution of 1875. Corruption and favoritism by the state legislature in the management of the affairs of the city of St. Louis was as pervasive a theme in the debates as recourse to the principle of local self-government.⁸⁹ Indeed the principle did not carry very far since the proposed and adopted text applied only to a single named city, St. Louis.⁹⁰ The generalized remedy provided by the Convention for state legislative mischief consisted of a substantive prohibition of local or special laws changing the charters of cities, towns, or villages and a procedural provision requiring a three-month notice to the inhabitants of a county or city prior to the passage of local laws.⁹¹ These provisions were designed to curb the legislature’s manifest propensity “to make changes in the charter and organization of that city [St. Louis], which were not endorsed by the people of the city.”⁹² The innovative and specific part of the package was a provision delegating “to the people of St. Louis a power that has heretofore been possessed alone by the Legislature,” the power to make a charter.⁹³ The delegation was replete with procedural details prescribed as “conditions” to be met by the city in framing and adopting the charter and any subsequent amendments.⁹⁴ It also mandated what type of local government organization could be adopted in the home rule charter: “[A] chief

88. *Id.* at 270.

89. As Delegate Todd floridly observed:

What we are asking for a place in the Constitution is stability. It is for the purpose of establishing one local government upon a rock & not upon quicksand as it has been for the last twenty years, to be blown over by every wind & flood of bummersim, high fraud and rascally speculators.

12 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 470–71 (I. Loeb & F. Schoemaker eds. 1944) [hereinafter DEBATES]; see also *id.* at 445, 462, 468.

90. MO. CONST. of 1875, art. IX, §§ 20–25. These provisions were drafted, sponsored and debated largely on the initiative of the St. Louis delegation to the Convention. DEBATES, *supra* note 89, at 473, 476.

91. DEBATES, *supra* note 89, at 477 (remarks of Delegate Gottschalk).

92. *Id.* at 449–50 (remarks of Delegate Hale).

93. *Id.* at 467 (remarks of Delegate Taylor of St. Louis); see also *id.* at 459–60 (remarks of Delegate Gantt).

94. MO. CONST. of 1875, art. IX, §§ 20–22.

executive and two houses of legislation, one of which shall be elected by general ticket.”⁹⁵ That the tutelary state had not chosen to relax its grip on St. Louis is demonstrated by two clauses.

First, charter provisions had to be “in harmony with and subject to the Constitution and laws” of Missouri.⁹⁶ That is, whatever principle of local self-government was embodied in the constitutional text had neither the scope nor the dignity routinely accorded other constitutional precepts. Structural arguments were precluded as was the balancing or harmonization of conflicting constitutional claims. The courts were invited not only to overturn local initiatives on constitutional grounds, but also on the ground that they were not in harmony with general laws. The charter clearly was subordinated not only to every other provision of the constitution but also to any general law, including those laws that classified cities by population. As one delegate remarked:

The General Assembly is the only law making power of the state & if they find that this scheme does not work well all they need to do is to pass a general law that in all cities or counties having over 100,000 inhabitants the law shall be so & so; & it will operate directly upon the city & county of St. Louis.⁹⁷

To remove any doubts about legislative hegemony, the Convention adopted a second saving clause: “Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis, that it has over other cities and counties of this State.”⁹⁸

In 1879, the California Constitutional Convention debated a proposal delegating charter making powers to the City and County of San Francisco which its drafter copied from the Constitution of Missouri.⁹⁹ Proponents of the provision argued that an express text was necessary to resolve “a very serious question with regard to the power of the Legislature to delegate its authority.”¹⁰⁰ Opponents, dubbed

95. *Id.* art. IX, § 20; *see also id.* § 22.

96. *Id.* art. IX, §§ 20, 22, 23.

97. DEBATES, *supra* note 89, at 476 (remarks of Delegate Fyan). The Missouri Supreme Court held in *Kansas City v. Stegmilller*, 151 Mo. 189, 52 S.W. 723 (1899), that home rule cities constitute a class concerning which the legislature is free to enact legislation without violating the constitutional prohibition against local or special legislation.

98. MO. CONST. of 1875, art. IX, § 25.

99. 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1059, 1060 (1881) (remarks of Delegate Hager); *see also id.* at 1063 (remarks of Delegates Brown and Reynolds).

100. *Id.* at 1060 (remarks of Delegate Barbour).

“sycophants of centralism” by their adversaries,¹⁰¹ invoked the spectres of “secession”¹⁰² and the flagrant corruption of big city government.¹⁰³ These charges widened the debate from the particular status of San Francisco to the principles of localism as expounded by de Tocqueville¹⁰⁴ and the theory and spirit of the principle that “local legislation ought to be left to the localities which it is intended to affect.”¹⁰⁵ Accordingly, the Convention adopted a provision which gave any city the option of framing a charter “consistent with and subject to the Constitution and laws of this state.”¹⁰⁶

Although subsequent state constitutional formulations have purported to commit to a more expansive notion of local autonomy,¹⁰⁷ recent state constitutions have rejected these models in favor of a version that firmly establishes local subordination to the center.¹⁰⁸

G. *Contemporary Notions of Home Rule*

We turn to a discussion of home rule in its contemporary context by discussing the scope of home rule in the Illinois Constitution, the role that courts have played in shaping the scope of home rule, and methods for implementing a dialogue between the center and the periphery.

1. *The Illinois Constitution*

The Illinois Constitution provides a particularly interesting example of how to create and implement a robust notion of home rule. Section six of the Local Government article of the Illinois Constitution addresses the most salient issues.

The first issue revolves around the self-reflective question, “How are decisionmakers to read the empowering text?” The blunt answer is that “[p]owers and functions of home rule units shall be construed liberally,”¹⁰⁹ thus extinguishing Dillon’s rule of narrow construction of grants of power to localities.¹¹⁰

101. *Id.* at 1063 (remarks of Delegate Howard of Los Angeles).

102. *Id.* at 1061 (remarks of Delegate Hale).

103. *Id.* at 1062 (remarks of Delegate Freeman).

104. *Id.* (remarks of Delegate Howard of Los Angeles).

105. *Id.* at 1063 (remarks of Delegate Winans).

106. *Id.* at 1064.

107. CAL. CONST. art. XI, § 5(a); COLO. CONST. art. XX, § 6; OHIO CONST. art. XVIII, §§ 3,

7. I am indebted to Professor Eugene Jacobs of Brigham Young University Law School for furnishing me with his compilation of State Constitutional Provisions Relating to the Basic Powers of Local Government as of October, 1985. See generally Callies, *Home Rule*, in 1 LOCAL GOVERNMENT LAW ch. 4 (C. Sands & M. Libonati eds. Supp. 1987).

108. *E.g.*, MONT. CONST. art. XI, § 6. See generally Vanlandingham, *supra* note 14.

109. ILL. CONST. art. VII, § 6 (m).

110. See *supra* note 22 (discussing Dillon’s rule).

The second issue has to do with the scope of home rule powers. Here, the results are mixed. We are told that "a home rule unit may exercise any power or perform any function" subject to the limiting, and potentially deconstructive¹¹¹ qualifications that the power or function be "pertaining to its government and affairs."¹¹² The grant of power, however, expressly includes the power to tax and to incur debt,¹¹³ which are the attributes of fiscal autonomy without which home rule would be meaningless in practice.¹¹⁴

The third issue is the problem of state legislative hegemony over home rule entities, which the Illinois Constitution addresses in detail. The following language drives the attenuated subtleties of the doctrine of implied preemption out of circulation: "Home rule units may exercise and perform concurrently with the State any power or function of a home rule unit to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive."¹¹⁵

2. *Judicial Influences*

Courts, aided and abetted by the academic bar,¹¹⁶ have not uncommonly regarded themselves as stewards of the center, quick to overrule local initiatives which directly or indirectly impede the "implementation of statutes which sought to further a specific statewide policy,"¹¹⁷ in order to assure the uniformity and supremacy of state law vis-a-vis local enactments. This stance ignores the state's interest in supporting effective local government, and in encouraging localities to develop their own decisionmaking mechanisms governing their own institutions.¹¹⁸ Courts also fail to pay attention to the "structures of normality"¹¹⁹ when wielding the doctrine of implied preemption of the field.

111. See *City of Miami Beach v. Fleetwood Hotel Inc.*, 261 So. 2d 801, 803 (Fla. 1972) (adopting a narrow construction of the term "municipal functions" in FLA. CONST. art. VIII, § 2(b)).

112. ILL. CONST. art. VII, § 6(a).

113. *Id.*

114. Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule*, 51 NW. U.L. REV. 27 (1957); Walker, *Toward a New Theory of Municipal Home Rule*, 50 NW. U.L. REV. 571 (1955).

115. ILL. CONST. art. VII, § 6(j).

116. E.g., Sandalow, *supra* note 14. *Contra* 1 C. ANTIEAU, *MUNICIPAL CORPORATION LAW* § 5.41, at 5-196 (1988).

117. *Jefferson v. State*, 527 P.2d 37, 44 (Alaska 1974).

118. See Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987).

119. A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 24-25 (1988). On normality as a social construct, see generally E. DURKHEIM, *THE RULES OF THE SOCIOLOGICAL METHOD* 47-75 (S. Solovay & J. Mueller trans. 8th ed. 1962).

For example, the California Supreme Court invalidated a local ordinance criminalizing “resorting” for the purposes of unlawful sexual conduct on the ground that the state’s Penal Code preemptively regulated criminal aspects of sexual activity.¹²⁰ But nearly every significant aspect of criminal law enforcement reflects a norm of decentralization. Typically, local residents summon local police, who are overwhelmingly recruited from local residents, to exercise discretion, informed by local customs and mores,¹²¹ in arresting suspects. Charges against suspects are screened by locally elected prosecutors or a grand jury drawn from a local venire and tried before a local petit jury and, in many states, a locally elected judge. Displacement of the investigatory jurisdiction of local police, the local prosecutor, or local courts are all extraordinary acts, sparingly invoked and less often granted. The California Supreme Court’s result is predicated on an unrealistic command/control model of the relationship between center and periphery. By salutary contrast, the Illinois approach requires that the displacement of home rule authority be a considered, deliberate act of the legislature,¹²² in some cases calling for a three-fifths supermajority.¹²³

3. *Implementing a Dialogue Between Center and Periphery*

Some significant guarantors of a mature dialogue between center and periphery would include the following: 1) recognition of a local government unit’s standing as a collective entity to challenge the constitutionality of a state statute under both the state and federal constitution,¹²⁴ 2) compelling the state to fund legislation mandating new or increased levels of activities or service by local government,¹²⁵ and 3) recognizing that a local government unit is privileged to expend funds to engage in a wide variety of lobbying activities with state and federal executive and legislative branches of government concerning the passage and implementation of legislation.¹²⁶

Entrenching such claims of the periphery in a constitutional text is attractive because of the Nietzschean tendency of central elites to despise the ordinary, the fallible, and the contingent. Entrenchment, however, can lead to attempts by a group of law trained specialists to

120. *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962).

121. See Black, *Common Sense in the Sociology of Law*, 44 AM. SOC. REV. 18 (1979).

122. ILL. CONST. art. VII, § 6(h) (“The General Assembly may provide specifically by law for the exclusive exercise by the State of any power or function of a home rule unit. . .”).

123. *Id.* art. VII, § 6(g).

124. Libonati, *supra* note 83, at 655–56.

125. MO. CONST. art. X, § 21.

126. See generally *Burt v. Blumenauer*, 299 Or. 55, 699 P.2d 168 (1985).

dominate discourse about governmental structure and function and to sentimentalize their monopoly of access to courts by elevating the judiciary's role in the policy making process. Thus, nonconstitutional methods of securing the claims of the periphery may be more workable.

It is therefore fitting to end this paper with a description of a New Jersey statute, which is a wholly nonconstitutional mechanism for implementing the dialogue of center and periphery.¹²⁷ The subject of the statute lies squarely athwart the intersection of NIMBY¹²⁸ and technological rationalism: the siting of hazardous waste facilities. The approach adopted by New Jersey mediates between "straight state pre-emption" of local regulatory authority and "straight preservation of local veto authority."¹²⁹ The statute calls for the state Department of Environmental Resources to adopt technical siting criteria.¹³⁰ The Department then prepares a plan designating sites based on these criteria and projected needs. Instead of relying solely on individuals affected by the site designation plan to participate in further administrative hearings on the proposed site designation, the statute recognizes that the affected municipality ought to be recognized as a responsible protagonist in the process. But the rhetoric of localism—not in my back yard—does not persuade in a universe of discourse created by a statute couched in the language of technical rationality and administered by professionals trained in that neutral and detached vocabulary. Hence the statute provides for state grants to enable affected municipalities to hire the expertise necessary to participate meaningfully in the adjudicatory hearing prior to the inclusion of the site on a list of recommended sites.¹³¹ The availability of state funding indicates that the state regards the locality as a responsible and responsive partner in the decision-making process, not a mere pawn to be mobilized to carry out the purposes of the center. Further, state funding assures that these hazardous waste facilities will not be dumped on poorer communities unable to mobilize the resources, both financial and scientific, of a municipality like, say, Princeton. And when an applicant seeks a state permit, the affected municipality has not only a right to review the application, but also to receive funds

127. Those interested in a fuller exposition of alternative center-local decision-making structures are urged to consult Tarlock, *State Versus Local Control of Hazardous Waste Facility Siting: Who Decides in Whose Backyard*, in *RESOLVING LOCATIONAL CONFLICT* 137-58 (R. Lake ed. 1987).

128. See *supra* note 25 and accompanying text.

129. Tarlock, *supra* note 127, at 142.

130. N.J. STAT. ANN. § 13:1E-57.a. (West 1988).

131. *Id.* § 13:1E-59.d.

from the applicant to finance that review.¹³² This elaborate structure is predicated on the simple, homely insight which informs the project of local self-government—whoever must wear the shoe knows best where it pinches.

III. CONCLUSION

By placing home rule in a political and historical context, this Essay has explored how home rule is part of the dialectic between center and periphery, and as such is an integral part of our social and political system. Along the way, this Essay also has engaged with the analytic positivism of traditional legal analysis to show how positivism is unable to conceptualize or appreciate the importance of localism in our political process. By showing how home rule is an integral part of our political system, this Essay provides the starting point for a systematic inquiry into the policies justifying local institutions. But it is only a matter of taste whether one's convictions are predicated on positivist grounds (the statute or constitutional provision says so), on communitarian or civic republican principles (participatory democracy), on the justification of efficiency (public choice theory), on vulgar pragmatism (centralization doesn't work), on Durkheimian grounds (local government is a by-product of the division of governmental labor), or on institutional grounds (don't waste the state legislature's time on local issues; keep judges out of policy making). All roads lead out of Rome as well as into it.

132. *Id.* § 13:1E-60c.(4).