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## Rightsizing Local Legislatures

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# RIGHTSIZING LOCAL LEGISLATURES

Brenner M. Fissell\*

## *Abstract*

*Local councils, boards, and commissions have all the lawmaking powers of a legislature—including the power to criminalize conduct—but they are far too small to deserve them. With an average size of only four members, local legislatures depart from the norm observable at all other levels of government. Only in the past few years have legal scholars turned their attention to the institutional design of these bodies, but this developing literature has yet to address their most striking feature—their small size.*

*This Article takes up this project. It claims that local micro-legislatures are comparatively unrepresentative and undemocratic, and that their size can affect the content of local law and the way that it is perceived. The fundamental problem with a micro-legislature is that it is not inclusive of the diversity of interests in a modern society. Too few seats results in a deficit of descriptive representation—meaning the legislature will not “look” like its community—and also of democratic deliberation, since all voices will not be a part of political debate. This works to silence or muffle minority viewpoints, resulting in more extreme legislation. Moreover, minorities will perceive this exclusion, and may view local law as less legitimate because of it.*

*Rather than being models of democratic involvement, localities—at least as they are currently structured—are sites of exclusion, not inclusion. The path forward is uncertain and depends on one’s appetite for reform.*

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## INTRODUCTION

In the United States, as in most countries, it is axiomatic that legislatures are the primary lawmaking institutions. This is of course true federally<sup>1</sup> but also in the states, which all have legislatures of their own. The same paradigm of legislation-by-legislature is found at the level of local government, with councils, boards, and commissions proliferating.<sup>2</sup> But beyond sharing this basic power, the similarities between local legislatures and their state and federal “superiors” are few. Only very recently has the legal academy turned its attention to the institutional design of local councils and boards, with a nascent body of literature emerging regarding features such as their unicamerality,<sup>3</sup> professionalism,<sup>4</sup> and compensation models.<sup>5</sup> This endeavor has yet to describe and assess what is, I believe, the most striking dissimilarity between local and state or federal legislatures: their size. Specifically, local legislatures are extremely small in membership, with an average size of four members, while state legislatures are large, with an average size of approximately 150 members.<sup>6</sup> Local government in the United States, then, presents a phenomenon of *micro-legislatures* that deviates from the norm at higher levels of government.

<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 999 (2019) [hereinafter Zale, *Part-Time Government*] (describing various categories of local government).

<sup>3</sup> See generally Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. 1147 (2018) [hereinafter *American Unicameralism*].

<sup>4</sup> Zale, *Part-Time Government*, *supra* note 2, at 1000.

<sup>5</sup> Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839 (2018) [hereinafter Zale, *Compensating City Councils*].

<sup>6</sup> CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 1992 CENSUS OF GOVERNMENTS: POPULARLY ELECTED OFFICIALS 1 (1995), <https://www2.census.gov/programs-surveys/gus>

This is highly significant. While the optimal size of a legislature is surely a contested question of institutional design that admits of no easy answers, at some point membership numerosity becomes so small or so large that this feature, on its own, renders the legislature an entirely different type of institution. Put another way, one can view legislative membership size as a constitutive feature of the concept of a legislature. Given this, localities' use of the micro-legislative model is worthy of sustained inquiry. That is the goal of this Article. Overall, I argue that micro-legislatures are deficient with respect to both their representative and democratic qualities, and that these theoretical deficiencies can have practical implications. Unrepresentative and undemocratic legislatures fail to include the diversity of interests that exist in a modern, pluralistic community. This can create local law that ignores or muffles minority viewpoints and can damage the sociological legitimacy of that law by utilizing decision-making processes that create perceptions of exclusion.

But when tens of thousands of local governments all coalesce on a given model of legislature, one should criticize this choice only after first considering whether it might somehow be defensible. This Article addresses three potential defenses;<sup>7</sup> each is unavailing. First, one might claim that local political communities are insufficiently populous (and therefore insufficiently diverse) to justify the larger legislature that a state-level community has and needs. But unless one relies on a very reductive understanding of diversity, one should accept that in any community of reasonable size there are a multitude of divergent opinions and interests about communal life. Second, one might say that localities depart from standard models of legislative size because local government's primary purpose in the trifecta of government levels is to be a direct service provider (e.g., garbage and fire trucks) and that this function is better suited to a smaller, quasi-executive board. But attention to a primary purpose cannot come at the expense of greatly undermining a secondary purpose, which is legislation. Micro-legislatures' size does precisely that. Finally, micro-legislatures might be justified on pragmatic grounds: there may be insufficient citizen interest to populate a normal sized legislature in a smaller

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/tables/1995/gc92-1-2.pdf [https://perma.cc/F5MC-JRMM] [hereinafter 1992 GOVERNMENT CENSUS]. Examples of very small legislatures representing very large populations include Los Angeles County and Maricopa County, where five legislators in each jurisdiction represent populations of 9.8 million and 4.5 million people, respectively. See *About the Board*, BD. OF SUPERVISORS CNTY. OF LOS ANGELES, <https://bos.lacounty.gov/> [https://perma.cc/2WYU-8V89] (last visited Nov. 20, 2022); *QuickFacts: Lost Angeles County, California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/losangelescountycalifornia,CA/PST045221> [https://perma.cc/K5KH-WSET] (last visited Nov. 20, 2022); *Board of Supervisors*, MARICOPA CNTY., <https://www.maricopa.gov/224/Board-of-Supervisors> [https://perma.cc/Y8P5-FCEV] (last visited Nov. 20, 2022); *QuickFacts: Maricopa County, Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/maricopacountyarizona/PST045221> [https://perma.cc/JT3N-NFNB] (last visited Nov. 20, 2022).

<sup>7</sup> See *infra* Part II.

locality. This pessimistic assumption is mere speculation and should not be a basis for deficient institutional design.

With potential defenses of local micro-legislatures rejected for the above reasons, the path is clear for their critique. This Article will begin with a thorough assessment of these institutions through the lens of contemporary political theory.<sup>8</sup> Given that this phenomenon has never been considered by legal scholars or political theorists, this foundation is a necessary predicate to more practical inquiries, which will follow. The applicability of theories of representation will be discussed first, followed by the applicability of theories of democracy.

A central purpose of a legislature is to function as a representative institution, but I will argue that local micro-legislatures' small size renders them *unrepresentative*. Theories of representation abound in political theory and are contested, but this literature helps to identify most precisely the deficit that minimal numerosity of membership creates. This is a deficit of so-called "descriptive representation"—a lack of representatives who reflect the diversity of interests, beliefs, and opinions present in the larger community. Legislatures in the states, the federal government, and in all modern democracies are large assemblies, and a major reason for this is to facilitate descriptive representation. Modern pluralistic societies will possess a great diversity of views among individuals, and these will regularly conflict with one another. Given this reality, the legitimacy of legislation—which will always involve choices and tradeoffs between competing interests—depends on a legislative institution that includes all relevant interests. Legislatures that are very small, like those in local governments, simply cannot approximate the complexity of a modern, pluralistic society in even a small population locality.<sup>9</sup> Micro-legislatures fail spectacularly with respect to descriptive representation.

Legislatures also must be democratic, though, and local micro-legislatures fail on this count. Perhaps no other concept has received more attention in political theory than that of democracy. Despite considerable disagreement on specifics, most contemporary theorists agree that what makes a democracy valuable and legitimate is its facilitation of deliberation.<sup>10</sup> Unlike older theories that equated democracy merely with the aggregating of majority preferences by voting, so-called "deliberative democracy" claims that the process leading up to the voting—when reasons are communicated reciprocally and considered—is the essence of a democracy.<sup>11</sup> Some deliberative democrats ground this idea in the epistemic benefits of deliberation; better decisions can be expected when a larger and more diverse group of people discuss and debate the way forward.<sup>12</sup> Others ground the claim in fairness.<sup>13</sup> Even when one's choice is not the choice taken by the community, the inclusion of that voice in a deliberative process leading up to the vote allows one to accept the result as legitimate. Both versions of deliberative democracy depend on

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<sup>8</sup> See *infra* Part III.

<sup>9</sup> See *infra* Part III.A.

<sup>10</sup> See *infra* Part III.B.

<sup>11</sup> See *infra* Part III.B.

<sup>12</sup> See *infra* Part III.B.

<sup>13</sup> See *infra* Part III.B.

an assumption of an inclusive process—that the diverse interests, opinions, and beliefs in a political community will be part of the deliberation. Exclusion vitiates epistemic benefits and fairness. When a group has no meaningful voice in the deliberative process, its knowledge and perspective cannot work to enhance the outcome, nor will that group recognize the outcome as fair. Local micro-legislatures, through their small size, stack the deck in favor of the exclusion of diverse interests and voices. In this way, they are *undemocratic*.

To make these claims about micro-legislatures is not to make a claim that normally sized legislatures perfectly satisfy the criteria of representation and democracy. Rather, it is to claim that micro-legislatures are *comparatively* far less representative and democratic.

After laying the theoretical foundation of the critique from the standpoint of political theory, this Article will proceed to a discussion of practical implications. In so doing, case studies and examples from recent history will help to illustrate the problem. I will focus especially on examples of local legislation that criminalizes conduct or creates civil offenses, for it is in these exertions of legislative power that the stakes are the highest.

The first implication to consider is that when a local micro-legislature fails to include the diversity of interests in a community, the groups most likely to have their voices silenced or muffled are those in the minority. This can have concrete effects on the policies adopted by local law—it can result in *noninclusive legislation*.<sup>14</sup> Without a dissenting voice or voices demanding compromise or moderation, majority groups are free to pursue more extreme legislation reflecting their unvarnished preferences. The Article will present three case studies of minorities silenced or muffled by a micro-legislature that enacts policies detrimental to the group: (1) LGBT individuals in two suburban counties (one in Maryland and another in Georgia) and (2) student populations in various university towns. To preview just one example, consider the case of the student population in Ann Arbor, Michigan (home of the University of Michigan). In 2010, Ann Arbor’s 11-person micro-legislature—none of whom were students—passed an ordinance prohibiting the placement of couches on porches.<sup>15</sup> This was clearly targeted at the student

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<sup>14</sup> See *infra* Part IV.A. While this Article will limit its consideration of various interests to the case studies below, recent work by political scientist Sarah Anzia provides a more comprehensive look at what groups are most active in local politics given localities’ current institutional structures. See SARAH F. ANZIA, LOCAL INTERESTS: POLITICS, POLICY, AND INTEREST GROUPS IN U.S. CITY GOVERNMENTS (2022).

<sup>15</sup> *City Council: Council Members*, CITY OF ANN ARBOR MICH., <https://www.a2gov.org/departments/city-council/Pages/Home.aspx> [<https://perma.cc/5VSJ-48CW>] (last visited Aug. 28, 2022); Ryan J. Stanton, *Ann Arbor City Council Passes Ordinance Banning Couches on Porches*, ANN ARBOR NEWS (Sept. 20, 2010, 9:42 PM), <http://www.annarbor.com/news/ann-arbor-city-council-passes-ordinance-banning-couches-on-porches/> [<https://perma.cc/X2GZ-82VU>].

community, but that population (comprising about 40% of Ann Arbor)<sup>16</sup> had no meaningful voice in the legislative process and could only protest this exclusion through their Student Assembly.<sup>17</sup>

A second implication of a legislature that is non-inclusive of diverse societal interests is that the unrepresented interests will *perceive exclusion*.<sup>18</sup> The expressive effects of micro-legislatures are worth considering alongside any concrete effects that their size has on enacted law. The literature on sociological legitimacy and procedural justice suggests that these effects will be harmful to civic bonds.<sup>19</sup> Minorities that are either totally excluded from micro-legislatures, or who are not meaningfully represented, will begin to feel as if their local government is no longer their own.<sup>20</sup> It is not just that they do not “win” in a given policy debate, but that they feel as if they have no seat at the table when the debate is happening.<sup>21</sup> This Article will discuss two case studies on this point: (1) Black communities’ perceptions regarding their control over policing, and (2) partisan minorities in deep red and deep blue localities. For example, in 2021 the city of Lebanon, Ohio’s six-person, all-Republican legislature voted unanimously to “outlaw[] abortion” within city limits.<sup>22</sup> The substantial minority of Democrats in Lebanon (at least one quarter of the population)<sup>23</sup> who presumably would have opposed such a law had no voice after the sole Democrat legislator (and sole woman) resigned in protest, stating that the council had been “hijacked.”<sup>24</sup> This purely symbolic flex of majority partisan power communicated to Lebanon’s Democrats that the local government was akin to an occupying force, and that it was totally unconcerned with their viewpoints.

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<sup>16</sup> Ann Arbor’s population is around 120,000, with about 48,000 of that population, or about 40%, being University of Michigan students. See *QuickFacts, Ann Arbor City, Michigan*, U.S. CENSUS BUREAU (2021), <https://www.census.gov/quickfacts/fact/table/ann-arbor-city-michigan#> [<https://perma.cc/4L96-ULVP?view-mode=client-side>]; *Facts & Figures*, UNIV. MICH., <https://umich.edu/facts-figures/> [<https://perma.cc/PSM2-5WSN>] (last updated May 2022).

<sup>17</sup> Ryan J. Stanton, *Ann Arbor’s New Ban on Porch Couches Doesn’t Sit Well with University of Michigan Students*, ANN ARBOR NEWS (Sept. 23, 2010, 6:03 AM), <http://www.annarbor.com/news/ann-arbors-new-ban-on-porch-couches-doesnt-sit-well-with-university-of-michigan-students/> [<https://perma.cc/2UYM-XMDP>].

<sup>18</sup> See *infra* Part IV.B.

<sup>19</sup> See *infra* Part IV.B.

<sup>20</sup> See *infra* Part IV.B.

<sup>21</sup> See *infra* Part IV.B.

<sup>22</sup> LEBANON, OHIO, ORDINANCE NO. 2021-053 (2021), <https://www.scribd.com/document/509488876/ORDINANCE-2021-053-of-Lebanon> [<https://perma.cc/P6PC-6EDK>]; *Minutes for the Lebanon City Council Meeting*, LEBANON CITY COUNCIL (May 25, 2021), <https://cms8.revize.com/revize/lebanonoh/05-25-2021.pdf> [<https://perma.cc/5W4F-83XJ>].

<sup>23</sup> See Alice Park, Charlie Smart, Rumsey Taylor & Miles Watkins, *An Extremely Detailed Map of the 2020 Election*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/upshot/2020-election-map.html> [<https://perma.cc/WHJ9-2Y7V>] (last visited Sept. 3, 2022).

<sup>24</sup> Audra Jane Heidrichs, *How Anti-Abortion Advocates Are Pushing Local Bans, City by City*, THE GUARDIAN (Nov. 23, 2021, 2:00 PM), <https://www.theguardian.com/world/2021/nov/23/anti-abortion-local-bans-ohio> [<https://perma.cc/M3EK-XJJN>].

All these observations have implications for the lens through which legal scholars should view local government. Specifically, these claims are a blow to proponents of the school of participatory localism—those who argue that the value of local government is its small scale, which facilitates both accessibility to officials and participation as officials.<sup>25</sup> If the primary lawmaking institutions in localities are unrepresentative and undemocratic, thus enabling the exclusion of minority voices in diverse communities, then localism takes on a more sinister aspect. The extremely small size of local legislatures is yet another<sup>26</sup> strike against them—another reason to believe that participatory localism “substitute[s] romance for reality.”<sup>27</sup>

While the solution to the problem identified here goes beyond the scope of the present Article, I conclude by briefly considering paths forward. Remedies will depend on one’s appetite for reform and can range from the extreme to the mild. One might simply decide that since local legislatures fail to function as true legislatures, they should be deprived of the power to legislate. Alternatively, one might allow for local legislatures to retain their powers but require that they gradually expand in size. In between these two paths lies a middle ground, with greater judicial scrutiny of

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<sup>25</sup> See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1399 (2020) (“Local governments, it is argued, foster political awareness and, in turn, participation both formal and informal. . . . Because the scale is small, advocates of localism assert, local government officials are more accessible than their state or federal counterparts. This availability encourages greater involvement by constituents in a variety of matters that directly affect day-to-day life. The availability of multiple avenues for meaningful political participation at the local level has the attendant benefit of building community, which further promotes democratic deliberation.”); see also Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2009 (2000) (“According to this tradition, participation in local politics is not only a good way to control government, but also a useful way to transform citizens, imbuing them with civic spirit, a taste for public affairs, and political skills.”).

<sup>26</sup> One might say that the first strike is their unicamerality. Kazis, *American Unicameralism*, *supra* note 3, at 1156 (“Within local government law, local unicameralism cuts against established theories of participatory localism, which praise local government as a site for civic engagement. Local legislatures are designed for efficiency and instrumentalism, not participation. Those seeking consensus and deliberation in their local governments would do well to look outside the legislative branch.”). A second problem, at least for very large cities, is the lack of partisan competition in council elections. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 426 (2007) (“The lack of parties makes city government both unrepresentative and uncreative . . . . [D]etermining that local governments are not particularly democratic problematizes much recent work in local government law aimed at enhancing local power and reforming local government structures.”). Schleicher’s claims regarding representation and democracy deficits are limited to very large city councils, and are predicated on different aspects of those concepts than are the claims made here. See *id.* at 426 (deploying aggregative concept of democracy and responsive concept of representation). He suggests that in smaller cities the opportunity to exit or vote-with-one’s-foot compels the councils to be more responsive to citizen policy preferences. *Id.* at 432 n.49.

<sup>27</sup> Hills, *supra* note 25, at 2012.



local legislation via intrastate preemption doctrines. Such scrutiny would be “representation reinforcing” in that it would further stack the deck in favor of state policies over local ones, and thus in favor of standard-sized legislatures over micro-legislatures.<sup>28</sup>

This Article proceeds as follows. Part I describes the general features of a local legislature and introduces census data, yet unrecognized by legal scholars, that demonstrates that the average legislative size is extremely small. Part II surveys some possible defenses of local “micro-legislatures” and rejects them all. Part III moves to a critique of the phenomenon and uses the tools of contemporary normative political theory to make two claims: micro-legislatures are comparatively (1) *unrepresentative* and (2) *undemocratic*. Part IV assesses the practical implications of these theoretical claims, using case studies and examples to show how micro-legislatures’ size can impact both the content of local law and the perceptions of its legitimacy. Special attention will be paid to legislative actions that criminalize conduct or create civil offenses. The Conclusion briefly considers paths forward.

## I. THE FEATURES OF A LOCAL LEGISLATURE

It is notoriously difficult to make general claims about local governments. The last U.S. Census counted 38,779 general-purpose localities (this does not include special districts, like school boards),<sup>29</sup> with populations ranging from the smallest town to the largest city. While New York City is a local government with a population of more than eight million, over 18,000 of the general-purpose localities have a population of less than 1,000.<sup>30</sup> With respect to sub-county level governments (the vast majority), census data reveals that more than 99% of these localities have populations of fewer than 100,000 (35,397 of 35,748), and that this class of localities contains about 62% of the population of the U.S. (266,421,114 of 368,288,999).<sup>31</sup> Most of the phenomenon of local government, then, is a story of the small city, town, and village.

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<sup>28</sup> See *infra* Conclusion.

<sup>29</sup> Table 3. *General-Purpose Governments by State: Census Years 1942 to 2017*, in CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2017 CENSUS OF GOVERNMENTS – ORGANIZATION (2017), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [<https://perma.cc/5NCU-JMVG>] (last visited Aug. 28, 2022) (click “Table 3” to download and open the zip folder, then click the spreadsheet labeled “data”).

<sup>30</sup> Tables 5. *County Governments by Population-Size Group and State*, in CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2017 CENSUS OF GOVERNMENTS – ORGANIZATION (2017), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [<https://perma.cc/5NCU-JMVG>] [<https://perma.cc/5NCU-JMVG>] (last visited Aug. 28, 2022) (click “Table 5” to download and open the zip folder, then click the spreadsheet labeled “data”); Table 6. *Subcounty General-Purpose Governments by Population-Size Group and State: 2017*, CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2017 CENSUS OF GOVERNMENTS – ORGANIZATION (2017), <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [<https://perma.cc/5NCU-JMVG>] (last visited Aug. 28, 2022) (click “Table 6” to download and open the zip folder, then click the spreadsheet labeled “data”).

<sup>31</sup> See sources cited *supra* note 30.

This combination of high numerosity and small size makes generalizations difficult. The same is true of the legislatures of these localities, which vary greatly in powers and character. Scholars and commentators, however, have observed shared phenomena and patterns. First, we will consider the legal status of local legislatures and their legislation (ordinances). Second, we will consider a yet under-analyzed feature of local legislatures: the size of their membership.

### A. General Features

#### 1. Relationship to Executive Power

The most common way local legislatures are categorized is by their power in relation to executive power. Recent work by Kellen Zale ably describes the most common schemas.<sup>32</sup>

First is the “mayor-council” form of government. In this arrangement, a local legislature has legislative authority to pass ordinances and resolutions, and a mayor either chairs the council as a first-among-equals (a “weak” mayor-council)<sup>33</sup> or serves as a separate executive and administrative head (a “strong” mayor-council).<sup>34</sup> The strong form resembles traditional notions of a government with separation of powers that one observes at the state and federal level, while the weak form blends executive and legislative power in the council.

A second very common form of local government is the “council-manager” form.<sup>35</sup> This form is like the weak mayor-council in that executive and legislative

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<sup>32</sup> Zale, *Part-Time Government*, *supra* note 2, at 999.

<sup>33</sup> *Id.* at 1000–01 (“[T]he mayor may be independently elected or may be chosen from among city council members and largely serves a ceremonial role as the head of the city. The mayor may have full voting rights on city council or may only have power to break a tie; and the council, not the mayor, appoints department heads and has primary control over the city budget . . . [T]here is no traditional separation of powers: the mayor typically has minimal executive powers and may simply share legislative power with the council (if she is a voting member).”).

<sup>34</sup> *Id.* at 999–1000 (“[T]here is a separation of powers between the city council, which has legislative authority, and the mayor, who is separately elected and vested with executive and administrative powers. . . . [T]he mayor is an independently elected official who typically has authority to supervise city agencies and oversee personnel, as well as a significant amount of discretion over budgetary decisions and veto power over council legislation. . . . [S]eparation of powers most closely mirrors that of federal or state government: while the city council may disagree with how the mayor is administering (or failing to administer) policies enacted by the council, council has limited authority to interfere with the mayor’s decisions over personnel or the day-to-day administration of city departments.”).

<sup>35</sup> *Id.* at 999 (“The council-manager system . . . vests all governmental authority—legislative, executive, and administrative—in the city council. The council in this system delegates its administrative authority to an appointed city manager who is tasked with the day-to-day administration of city government and implementation of policies enacted by the council.”).

power are both possessed by the council, but with the addition of a professional, appointed manager to run the administration of the local government.<sup>36</sup>

Two other categories of local government that are much less prevalent are commissions and town meetings. A commission is an old form of government in which the legislature is composed of the elected heads of the various executive departments (e.g., the police commissioner, the fire commissioner).<sup>37</sup> Like in the council-manager and weak mayor-council forms, both executive and legislative power are combined in a multi-member institution. Finally, some local governments are organized as a town meeting government—direct democracies where citizens regularly vote on matters of policy without any delegation to a representative body or an executive.<sup>38</sup>

Most localities have a mayor-council or council-manager form of government. According to a 2008 study, about 49% of municipalities (not including townships) with a population greater than 2,500 utilized a council-manager government, and about 44% utilized a mayor-council form.<sup>39</sup> Only 5.6% used a town meeting, and only 2% used a commission.<sup>40</sup>

Thus, in almost all local governments—all but the town meeting—a representative institution exists and possesses what society thinks of as legislative power. Most significantly, this includes the power to make local laws—usually

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<sup>36</sup> Zale notes that managers may also be employed by systems that have either a strong or weak mayor. *Id.* at 1000.

<sup>37</sup> *Id.* at 999 n.51 (“In a commission form of government, the city is governed by an elected commission, which holds all legislative and executive authority and has no elected executive or appointed professional manager. Each member of the commission is responsible for a specific aspect of city governance (such as fire, police, or public works).”).

<sup>38</sup> *Id.* Zale notes two categories: a town meeting form, and a representative town meeting form. *Id.* In the former there is true direct democracy, while in the latter, the representative assembly is very large and more closely approximates the entirety of the community. *Id.* “In a town meeting form of government, all eligible voters make decisions about policy directly, and in a representative town meeting form of government, residents elect a large number of their fellow residents to serve as selectmen who vote at town meetings.” *Id.*

<sup>39</sup> JAMES H. SVARA & DOUGLAS J. WATSON, MORE THAN MAYOR OR MANAGER: CAMPAIGNS TO CHANGE FORM OF GOVERNMENT IN AMERICA’S LARGE CITIES 9 (2010). Note that this leaves out many thousands of small municipalities as well as townships. Still, it provides the best snapshot we have on the prevalence of the different governmental forms. On the difference between municipal and township government, see CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2017 CENSUS OF GOVERNMENTS: INDIVIDUAL STATE DESCRIPTIONS 4 (2019) <https://www.census.gov/content/dam/Census/library/publications/2017/econ/2017isd.pdf> [<https://perma.cc/996H-5TQ3>] (“There are two types of subcounty general-purpose governments, municipalities, and townships. The subcounty general-purpose governments enumerated in 2017 include municipal governments and town or township governments. These two types of governments are distinguished by both the historical circumstances surrounding their incorporation and geographic distinctions. That is, incorporated places are generally associated with municipalities, whereas townships are generally associated with minor civil divisions (MCDs).”).

<sup>40</sup> SVARA & WATSON, *supra* note 39, at 9.

called ordinances.<sup>41</sup> It should be obvious that ordinances constitute “legislation,” but explicating a few features drives home the point. First, ordinances are written down; like statutes, they possess what Jeremy Waldron calls the “textuality” of legislation.<sup>42</sup> They are not like the verbal commands of a police officer. Moreover, they are written in the same form as statutes, deploying obligatory language such as “shall,” and with sections and subsections (unlike, say, a judicial opinion). They are also usually organized in a code.<sup>43</sup> They create rules for citizens and for officials, and these rules have the force of law within the local jurisdiction. They are authoritative and binding (although subordinate to state and federal law).<sup>44</sup>

Consider the following ordinance from the Town of Hempstead, NY: “No person shall sell or permit the sale of age-restricted [smoking] products to any person under the age of 21.”<sup>45</sup> This ordinance looks much like any other statute, including the state analogue: “Sale of tobacco products . . . shall be made only to an individual who demonstrates . . . that the individual is at least twenty-one years of age.”<sup>46</sup> Local ordinances are a locality’s form of legislation.

Unsurprisingly, then, these features result in judicial treatment of ordinances indistinguishable from that of statutes. Take for example the famous case *Lambert v. California*, where the Supreme Court invalidated a Los Angeles felon registration ordinance.<sup>47</sup> That the law came from a locality and not from a state statute was immaterial; instead, the Court discussed the ordinance in the context of other felon “registration laws” more generally.<sup>48</sup> The local origin of legislation is irrelevant to its judicial interpretation or to its effect on individual rights and duties.

## 2. Other Features: Unicamerality, Professionalism, and Compensation

We have established that nearly all local governments have a council that possesses legislative power—the power to make written rules that are binding on citizens and on officials. But what do these councils themselves look like? How are they structured, and who are their members? A burgeoning new literature is emerging on this question.

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<sup>41</sup> Zale, *Part-Time Government*, *supra* note 2, at 1004 (noting that councils possess the following powers: “Enactment of local ordinances, resolutions, and/or motions in furtherance of public health, safety, welfare (i.e., legislative exercise of police powers)”).

<sup>42</sup> Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 653–54 (1995) [hereinafter Waldron, *The Dignity of Legislation*].

<sup>43</sup> See Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837, 838 (2020) (“[L]ocal governments—even the smallest village—possess vast powers to criminalize conduct and to punish violators with months in prison or probation.”).

<sup>44</sup> See, e.g., *City of Davenport v. Seymour*, 755 N.W.2d 533, 539 (Iowa 2008) (“In applying implied preemption analysis, we presume that the municipal ordinance is valid.”).

<sup>45</sup> TOWN OF HEMPSTEAD, N.Y. CODE § 121-3, <https://ecode360.com/32304837> [<https://perma.cc/Z585-Z2JA>].

<sup>46</sup> N.Y. PUB. HEALTH LAW § 1399-cc(3).

<sup>47</sup> *Lambert v. California*, 355 U.S. 225, 229–30 (1957).

<sup>48</sup> *Id.* at 229 (“Registration laws are common and their range is wide.”).

First, Noah Kazis recently discovered that all local legislatures, unlike nearly all state legislatures and the U.S. Congress, are unicameral.<sup>49</sup> Kazis’s research recounts a history, starting with the Progressive era in the early twentieth century, in which American localities—even those that started with bicameral legislatures—converged on unicameralism as the chosen model.<sup>50</sup> By championing the values of cost-savings and efficiency in government (by reducing barriers to consensus and action), “unicameralism could be deemed the Progressive Era’s most complete success in restructuring local government.”<sup>51</sup> Today, one cannot find a bicameral legislature in any locality.

Second, Zale has classified councils as full-time or part-time, and also as professional or nonprofessional.<sup>52</sup> While not comprehensive or randomized, a recent survey conducted by a non-profit reported that 92% of respondent localities maintained a part-time council.<sup>53</sup> “Professionalism” is a harder quality to pin down. Zale notes that some indicators include staff, other forms of support, length of session, turnover, and level of compensation.<sup>54</sup> Perhaps given the vagueness of the category, there appears to be no data regarding the prevalence of professional councils.

### *B. Legislative Size: The “Micro-Legislature”*

The focus of this Article is an under-recognized and never-theorized feature of local legislatures: that they are extremely small in size.<sup>55</sup> The most recent comprehensive data regarding the size of general-purpose local legislatures comes

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<sup>49</sup> Kazis, *American Unicameralism*, *supra* note 3, at 1147.

<sup>50</sup> *Id.* at 1159 (“Local unicameralism is the convergence of thousands of individual actors independently reaching the same conclusion across a period of more than a century. Local governments were not always unicameral. They have moved steadily in that direction over two centuries. In 1903, one-third of large cities still had bicameral councils. Bicameralism was a common, high-profile option for local legislatures at the turn of the 20th century.”).

<sup>51</sup> *Id.* at 1159–60, 1163.

<sup>52</sup> Zale, *Compensating City Councils*, *supra* note 5, at 855.

<sup>53</sup> INT’L CITY/CNTY. MGMT. ASS’N, 2018 MUNICIPAL FORM OF GOVERNMENT SURVEY: SUMMARY OF SURVEY RESULTS 11 (2019), <https://icma.org/sites/default/files/2018%20Municipal%20Form%20of%20Government%20Survey%20Report.pdf> [<https://perma.cc/V7JH-6YLM>].

<sup>54</sup> Zale, *Compensating City Councils*, *supra* note 5, at 855.

<sup>55</sup> I am aware of no scholarship addressing this point directly. Kazis alludes to it when he writes that “[l]ocal legislatures range in size from New York City’s fifty-one-person Council . . . to as few as three members . . . .” Noah M. Kazis, *Service Provision and the Study of Local Legislatures: A Response to Professor Zale*, 81 OHIO STATE L. J. ONLINE 1, 3 (2020) [hereinafter Kazis, *Service Provision*]. But to say that there is great variation is perhaps an overstatement: it is the very small form that predominates.

from the 1990 Census.<sup>56</sup> In a report published in 1992, the Bureau calculated that the average size of a local legislature was four members.<sup>57</sup> Since it seems unlikely that any local legislature would have as few as two members, this indicates that a very high number of localities opt for a three- or four-person board.

Less comprehensive studies similarly report small legislative size. The International City/County Management Association conducted a 2018 survey of the approximately 13,000 municipal governments in their database (almost all with populations greater than 2,500). With a 32% response rate, it reported that 90% of these legislatures have seven or fewer members.<sup>58</sup> A study of upstate New York localities conducted by the University of Buffalo in 2009 reports similar numbers.<sup>59</sup>

The juxtaposition of the average local legislative size reported by the Census Bureau (4) alongside the average state legislative size (149.2) is jarring.<sup>60</sup> Consider also that the average size of a lower house or unicameral legislature in Europe is 216 members, and that globally the average is 201.<sup>61</sup> These numbers are even higher

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<sup>56</sup> 1992 GOVERNMENT CENSUS, *supra* note 6, at 1. This appears to be the last time the Census Bureau conducted a “Census of Governments” that collected this data. Cf. Christopher R. Berry & Jacob E. Gersen, *Fiscal Consequences of Electoral Institutions*, 52 J. L. ECON. 469, 474 n.12 (2009) (citing the 1992 Census Bureau data as the most recent available).

<sup>57</sup> 1992 GOVERNMENT CENSUS, *supra* note 6, at 1 tbl. 1.

<sup>58</sup> See INT’L CITY/CNTY. MGMT. ASS’N, *supra* note 53, at 10.

<sup>59</sup> *Sizing Up Local Legislatures*, UNIV. BUFF. REG’L INST. (Sep. 2009), <https://regional-institute.buffalo.edu/wp-content/uploads/sites/155/2020/11/Sizing-Up-Local-Legislatures-Policy-Brief.pdf> [<https://perma.cc/7JAP-YJUQ>] (“A survey of towns and villages in five New York counties with large central cities—Eric, Albany, Monroe, Onondaga and Westchester—revealed all but one of the 87 towns and 69 villages with boards of either five or seven members. In this sample, board size was the same for communities with population below 2,000 (Towns of Brant, Spafford, Rensselaerville, for example) and over 90,000 (Towns of Greenburgh and Amherst). Only the Village of Marcellus in Onondaga County differed from this norm with a three-member village board of trustees. Residents of West Seneca and Evans voted in 2009 to become the first towns in this group to use the three-member structure, effective 2010.”).

<sup>60</sup> 1992 GOVERNMENT CENSUS, *supra* note 6, at 1.

<sup>61</sup> See *Compare Data on Parliaments*, INTER-PARLIAMENTARY UNION PARLINE, [https://data.ipu.org/compare?field=chamber%3A%3Afield\\_statutory\\_members\\_number&structure=any\\_lower\\_chamber#map](https://data.ipu.org/compare?field=chamber%3A%3Afield_statutory_members_number&structure=any_lower_chamber#map) [<https://perma.cc/9YMZ-UJ4R>] (last visited Aug. 28, 2022). I should note that I have not discovered comprehensive data regarding the average size of Europe’s local councils, and it is not clear whether most of these institutions possess legislative power like that of U.S. localities. A 2008 paper reports that “[a]verage council sizes vary—from relatively small local councils in France, Greece, Ireland, Italy, Sweden and Spain of between 8 and 14 elected representatives compared to 49 councilors in the UK and over a hundred in Sweden.” Kingsley Purdam, Peter John, Stephen Greasley & Paul Norman, *How Many Elected Representatives Does Local Government Need? A Review of the Evidence from Europe 4* (Cathie March Centre for Census & Survey Rsch Working Paper 2008), <https://hummedia.manchester.ac.uk/institutes/cmist/archive-publications/working-papers/2008/2008-06-how-many-elected-representatives.pdf> [<https://perma.cc/ET7G->

when taking upper houses into account. Local legislatures are, therefore, extreme deviations from standard conceptions of legislative design—so extreme that they deserve their own term: *micro-legislatures*. While deviant from the norm at the level of ideal institutional design, micro-legislatures are nevertheless ubiquitous within American local government. Such a combination of deviance and ubiquity would seem to call for a justification, yet there is no sustained defense of the micro-legislature. In the discussion that follows, I will assess potential defenses and explanations.

## II. LOCAL MICRO-LEGISLATURES: POTENTIAL DEFENSES

Local micro-legislatures diverge from standard institutional design, but to frame them as outliers is to ignore the fact that they vastly outnumber state legislatures. An enduring social practice chosen by tens of thousands of localities cannot be dismissed out of hand as aberrant. Some effort must be made to reconstruct<sup>62</sup> why non-assembly legislatures might be valuable in local government. I make this effort, but ultimately, I conclude that the surveyed defenses are unavailing.

Many localities may have micro-legislatures because they followed the lead of the influential National League of Cities' Model City Charter, which recommends that local governments utilize micro-legislatures.<sup>63</sup> The Charter's brief statement on the subject contains a number of arguments for micro-legislatures:

The Model does not specify the exact number of council members but recommends that the council be small—ranging from five to nine members . . . . In the largest cities, a greater number of council members may be necessary to assure equitable representation. However, smaller city councils are more effective instruments for the development of programs and conduct of municipal business than large local legislative bodies. In the United States, it has been an exceptional situation when a large municipal council, broken into many committees handling specific subjects, has been able to discharge its responsibilities promptly and

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JDBN]. A more recent study showed that of 35 major municipalities in western democracies, the average size of the council is 56. Jean-Philippe Meloche & Patrick Kilfoil, *A Sizeable Effect? Municipal Council Size and the Cost of Local Government in Canada*, 60 CAN. PUB. ADMIN. 241, 245 tbl.1 (2017); *id.* at 264 n. 1 (“The comparison of local governance in different countries is quite challenging and needs to account for major differences in municipal responsibilities.”).

<sup>62</sup> J. M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 122 (1993) (“[R]ational reconstruction is the attempt to see reason in legal materials—to view legal materials as a plausible and sensible scheme of human regulation.”).

<sup>63</sup> See NAT'L CIVIC LEAGUE, MODEL CITY CHARTER 14 (9th ed. 2021), <http://www.nationalcivicleague.org/wp-content/uploads/2021/11/Model-City-Charter%E2%80%949th-Edition.pdf> [<https://perma.cc/8NXA-VM5J>].

effectively . . . . In determining the size of the council, charter drafters should consider the diversity of population elements to be represented and the size of the city.<sup>64</sup>

The NLC’s endorsement of micro-legislatures appears to be based on the (A) implication that there is insufficient diversity in most localities to justify a large legislature and (B) increased efficiency in government action provided by a micro-legislature.<sup>65</sup> I will address versions of these claims below, as well as (C) the idea that it would be practically impossible—either due to financial strain or lack of interest—to create a normal-sized legislature in a standard-sized locality.

*A. Lack of Necessity for Assembly-Type Legislature: Homogenous Communities*

One potential defense of micro-legislatures in most localities is that the small population of the locality (recall that 99% have fewer than 100,000 people)<sup>66</sup> reduces the diversity of the citizenry to the extent that even a board of four members is sufficient to be representative. This argument should be rejected as empirically implausible. One should question whether it is *ever* true that a paradigmatic locality of, say, tens of thousands of people, could be accurately described as homogenous.

When one thinks of the “diversity” in need of representation, or its inverse—homogeneity—one immediately thinks of racial or ethnic diversity. But the interests a legislature represents are innumerable. Moreover, racial groups are obviously not monolithic in their views about politics. When one considers an individual and the various aspects of that person’s life, the notion of their “interests” becomes quite complicated. In the words of economist George Stigler, “We should expect the number of . . . interest groups to be large relative to the population, and conceivably even to exceed the population. Jones may be a wheat grower, a protestant, a war veteran, a resident of county X, a consumer of many products subject to political influences, etc.”<sup>67</sup>

The presence of intra-racial diversity in need of representation is illustrated well by the community of Bozeman, Montana, population 53,293, legislature size of four (not including the mayor).<sup>68</sup> While this community is about 92% white and in a distinctive geographic location,<sup>69</sup> the latest mayoral race (2019) resulted in a split

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<sup>64</sup> *Id.* at 14–15.

<sup>65</sup> The NLC also stated the following in their Model Charter: “In large councils, members usually represent relatively small districts with the frequent result that parochialism and ‘log-rolling’—bargaining for and exchanging votes on a quid pro quo basis—distract attention from the problems of the whole city.” NAT’L CIVIC LEAGUE, *supra* note 63, at 14.

<sup>66</sup> *See supra* note 31 and accompanying text.

<sup>67</sup> George J. Stigler, *The Sizes of Legislatures*, 5 J. LEGAL STUD. 17, 17 (1976).

<sup>68</sup> *City Commission*, CITY OF BOZEMAN, <https://www.bozeman.net/government/city-commission> [<https://perma.cc/PS26-NFXZ>] (last visited Aug. 28, 2022); *QuickFacts: Bozeman City, Montana*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/bozemancitymontana> [<https://perma.cc/DB3Z-ZEWE>] (last visited Aug. 28, 2022).

<sup>69</sup> *QuickFacts: Bozeman City, Montana*, *supra* note 68.



vote of 62% to 37% for two candidates.<sup>70</sup> In the same election, two commission slots were up for grabs and three candidates received a vote breakdown of 33%, 10%, and 55%, respectively.<sup>71</sup> The point is this: in our imagination, an all-white “flyover city” of only 50,000 people may seem like a homogenous community, but even these similarly-situated human beings disagree greatly about local politics. Surface level homogeneity belies an invisible diversity of thought.

Consider also that even in a locality that is homogenous racially, religiously, and economically, there will always be diversity with respect to age cohorts. College-aged young people, parents with young children, empty nesters, and elderly widows all have different interests, even if they are all wealthy Anglo-Saxon Protestants.

The invisible diversity of thought becomes visible, moreover, when one considers political party demographics.<sup>72</sup> Consider Lea County, New Mexico, population approximately 75,000.<sup>73</sup> Lea County was the most pro-Trump county in New Mexico in the 2020 election, voting by a margin of +60 for the Republican candidate.<sup>74</sup> But this means that about 20% of those who voted chose the Democrat.<sup>75</sup> Lea County, though, has a five-member legislature that is all Republican.<sup>76</sup> Lea’s micro-legislature completely stifles the representation of the minority group of Democrats who have very different political viewpoints than the members of the legislature.

In sum, communities will always have a diversity of viewpoints—whether these viewpoints stem from race, class, gender, age, or political affiliation—and micro-legislatures cannot be justified by an unsupported claim of community homogeneity.

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<sup>70</sup> *Gallatin County Election Results*, MONT. RIGHT NOW (Nov. 6, 2019), [https://www.montanarightnow.com/gallatin-county-election-results/article\\_5889e20c-0002-11ea-8e16-932a6d2fb134.html](https://www.montanarightnow.com/gallatin-county-election-results/article_5889e20c-0002-11ea-8e16-932a6d2fb134.html) [https://perma.cc/Q4VW-KUA5].

<sup>71</sup> *Id.*

<sup>72</sup> The lack of partisan competition in local elections is not evidence of a lack of diversity of views about local policy. Schleicher, *supra* note 26, at 433 (“There are frequent debates about what public goods cities should provide and what policies work best at achieving these goods. They are just not the subject of partisan debates.”).

<sup>73</sup> *QuickFacts: Lea County, New Mexico*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/leacountynewmexico/PST045219> [https://perma.cc/V4XV-3Y2K] (last visited Aug. 28, 2022).

<sup>74</sup> Park et al., *supra* note 23.

<sup>75</sup> *Id.*

<sup>76</sup> *Lea County Board of County Commissioners*, LEA COUNTY, <https://www.leacounty.net/p/elected-officials/lea-county-commissioners> [https://perma.cc/AGD8-SA6L] (last visited Aug. 31, 2022).

*B. Legislation as Secondary Purpose of Local Legislatures:  
Service Provision and the Need for Efficiency*

The second potential defense to the phenomenon of local micro-legislatures is the most significant—it is the claim that local legislatures are very small because these institutions are not really legislatures in the proper sense. The paradigmatic feature of a “legislature” is to create “legislation,” after all, which is a source of law that is formally enacted in a text.<sup>77</sup> This is not the primary purpose of local boards and councils, one might say, and the small size of these bodies follows from their different purpose. The primary purpose of local councils, according to this view, is to efficiently direct the provision of services to the local populace. This reasoning should not placate our concerns regarding micro-legislatures.

First, we should be clear that this objection does not and cannot claim that local legislatures lack legislative power. The discussion above regarding the widespread existence of local ordinances—including criminal laws—demonstrates the opposite. Rather, this objection claims that the primary purpose of local legislatures is not to create legislation but instead is to provide services; thus, legislative power inheres in local legislatures, but it is ancillary. Support might be found in the observation that in the majority of local governments (all but those with a strong mayor-council form), the council possesses both legislative and executive power. This observation could be coupled with the observation that the actual activity of local councils is predominantly executive—relating mostly to the direction of service provision. Executive-type functions such as this are incompatible with large, inefficient assembly-type legislatures, and therefore localities have compromised by retaining a legislature, but making it micro-sized.<sup>78</sup>

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<sup>77</sup> See, e.g., Waldron, *The Dignity of Legislation*, *supra* note 42, at 642 (“Certainly, it is important to most modern positivist theories that there be legislatures and legislation. H.L.A. Hart thought, for example, that the mark of a modern legal system is the community’s capacity to deliberately change its rules through formalized procedures. Hans Kelsen believed that the dynamic role of the Grundnorm contained ‘nothing but . . . the authorization of a norm-creating authority’ and that in a modern legal order, ‘the creation . . . of general legal norms has the character of legislation.’ But even on this the positivists are not unanimous.”).

<sup>78</sup> I am channeling here, with some modifications, a version of Noah Kazis’s response to Kellen Zale’s work on city councils, as well as his rationalization of the choice made by localities to use a unicameral legislature. I refrain from quoting him above the line out of recognition that I am not attempting to address his precise views on micro-legislatures, since he has not himself addressed the issue. In his response to Zale, Kazis notes that while scholars should continue to evaluate the “constitutional design of local government,” they should do so without “los[ing] sight of one of local government law’s most traditional claims: that local government’s special (though hardly only) role in our federalist system is as a direct service provider.” Kazis, *Service Provision*, *supra* note 55, at 1. Kazis links this to a historic concern for efficiency that motivated the Progressive-era reforms of local government structure. Kazis, *American Unicameralism*, *supra* note 3, at 1159 (noting desire for local government to be “more efficient—not hampered by the need for consensus across two fractious

It makes sense to structure an institution so that it can best advance its primary purpose, but what if the features that best advance a primary purpose are inimical to the advancement of a secondary purpose? This, in my view, is the state of local micro-legislatures: a senseless identity crisis of institutional design. Local councils possess both executive and legislative power, but their micro-structure is solely aimed at advancing the efficiency values of executive-type action. These efficiency-related values, and the institutional structure they require, are incompatible with a healthy legislative process. Localities can't have it both ways. The solution for the efficiency deficits of a legislative body is not to shrink that body to the point that it becomes a quasi-executive council—it is to separate powers and to create an executive. Given that this has not happened in most local government forms, we should be concerned by the extreme efficiency of a local council. A council that can very easily address an emergent garbage problem (using its executive-type power) can also very easily create new crimes (using its legislative-type power).

We should pause to consider how important this secondary purpose is. Recent years have made it clearer that local governments often legislate around contentious political issues that have national salience, at times provoking sharp rebukes from state legislatures.<sup>79</sup> An excellent example of this is in the area of gun rights.<sup>80</sup> While localities' distinctive role may be service provision (in that no other layer of government is so service-oriented), this does not diminish their great power to alter the rights and duties of their citizens. As mentioned earlier, localities create codes of ordinances that prohibit conduct and impose licensure regimes.<sup>81</sup> These can be expansive. For example, the Department of Justice wrote in its "Ferguson Report" that "Ferguson's municipal code addresses nearly every aspect of civic life for those who live in Ferguson . . ."<sup>82</sup> Recent scholarship on the misdemeanor criminal justice system reveals that offenses with even light penalties can result in a web of

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bodies. . ."); *id.* at 1161 ("Efficiency formed the heart of the intellectual argument for charter reform in Philadelphia."). He is sympathetic to the consensus of history, I think. He argues that we have less to fear from an efficient local legislature with an ability to easily pass new ordinances because ordinances can only affect our lives in a comparatively minimal way. Additionally, this is even less worrisome when one considers the ability to "vote with one's feet" and the ability of a state to preempt an ordinance. "That said, constraints on local power, whether interlocal competition or state oversight, do provide a partial explanation of local unicameralism: The worst-case scenarios of unchecked power are somewhat less threatening." *Id.* at 1155.

<sup>79</sup> See Nestor M. Davidson & Laurie Reynolds, *The New State Preemption, The Future of Home Rule, and The Illinois Experience*, 4 ILL. MUN. POL'Y J. 19, 19–21 (2019).

<sup>80</sup> See *id.* at 22.

<sup>81</sup> See Fissell, *supra* note 43, at 838–44.

<sup>82</sup> U.S. DEP'T OF JUST., CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 7 (Mar. 4, 2015), [https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson\\_police\\_department\\_report.pdf](https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf) [<https://perma.cc/4JBK-9WY4>].

managerial social control,<sup>83</sup> facilitated by local police and local courts.<sup>84</sup> Local power is in the garbage truck rolling by, but also in the police officer arresting someone for an open container, and in the local court thereafter imposing fines, fees, and onerous procedural hurdles.

The primary purpose of local government may be service provision, but if its secondary purpose (and power) is to legislate, then one cannot dismiss critiques that identify aberrant features of the local legislature.

### *C. Practical Impossibility: Lack of Resources or Interest*

The last defense of micro-legislatures that we must consider is a defense borne of practical realities: that it would be impossible, either financially or due to lack of interest, to convene a normal-sized legislature in most normal-sized localities (think of our core case of the locality with fewer than 100,000 people).

Financial impossibility should be dismissed immediately because legislators can be unpaid. Zale discusses the financial concern exhaustively in her assessment of full versus part-time councils.<sup>85</sup> But she explicitly limits her analysis to “midsize and large cities,” noting that “membership on the city council in small cities may be considered a quasi-volunteer role: The position is often unpaid or provides a de minimis stipend, and members are expected to devote only a few hours a month to council responsibilities.”<sup>86</sup> Because most localities are small cities,<sup>87</sup> most legislatures are likely to be quasi-volunteer. Indeed, were quasi-volunteer micro-legislatures converted to regular-sized legislatures, they could also convert to entirely volunteer legislatures. The small workload already required would be reduced, as work would be shared with a larger group of representatives. Thus, resource constraints are not a valid reason to limit the size of a local legislature.

A more serious impediment that cannot be so easily dismissed is the lack of interest in legislative service. When a 2013 Massachusetts state audit recommended that the Town of Deerfield, population approximately 5,000, increase the size of its three-person legislature to five, the chair of the legislature expressed reservations

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<sup>83</sup> See Fissell, *supra* note 43, at 878 n.235 (“The three most significant characteristics of the managerial model [are]: (1) its aim of ‘marking’ defendants by putting arrests and convictions on their records so that they could be tracked and later controlled; (2) putting up ‘procedure hassles’ to test the ‘rule-abiding propensities’ of the marked individuals (e.g., appearing in court); and (3) ‘performance’ in place of a sentence, meaning ‘the set of activities the defendant is instructed by the court or prosecution to undertake,’ such as drug treatment (also aimed at testing rule-abidingness).” (quoting ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 21 (2018))); see also ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME (2018).

<sup>84</sup> See Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 964–73 (2021).

<sup>85</sup> Zale, *Compensating City Councils*, *supra* note 5 *passim*.

<sup>86</sup> *Id.* at 851.

<sup>87</sup> See *supra* note 30 and accompanying text.

that there would not be enough interested citizens to fill the roles: “I think it would be worthwhile, but we already don’t have anyone to run for a three-member board. I don’t know where you’d find people . . . .”<sup>88</sup> Another member shared the same concerns: “I can’t imagine trying to find five people to run. We already have a hard time filling any of our boards . . . .”<sup>89</sup> While it may be that the existing Deerfield legislators were motivated by a desire to preserve their aggrandized influence on a small board, their concerns seem to track an observed phenomenon in local elections. Many may see the position of local legislator as a thankless job with little power or prestige to justify the unpaid extra work.

This argument should be considered speculative. Arguments about lack of interest are presumably premised on the lack of candidates standing themselves up for the few seats that are currently available, and perhaps on the widespread phenomenon of uncontested elections.<sup>90</sup> But a large percentage of seats in state legislatures go uncontested.<sup>91</sup> In Massachusetts 73% of seats were uncontested in 2020.<sup>92</sup> This is also true federally: in Alabama almost 40% (3 of the 7) congressional seats were uncontested in 2020.<sup>93</sup> Surely it is not that more of the nearly seven million residents of Massachusetts are uninterested in being on the state legislature; nor is it that Alabama’s almost five million people cannot produce three candidates interested in being members of Congress. Interest in legislative participation may be a function of how easy it is for someone to get the job. In any event, we just do not know.

Institutional design must accommodate reality, but it should not pessimistically anticipate, without evidence, that a given aspiration is practically impossible. Defenders of micro-legislatures ought not ground their defenses in a speculative lack of interest in legislative service.

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<sup>88</sup> Kathleen McKiernan, *Deerfield Split on State’s Recommendations*, THE GREENFIELD RECORDER (Nov. 17, 2013), Westlaw 2013 WLNR 29007159.

<sup>89</sup> *Id.*

<sup>90</sup> “We don’t have the same data on local races, but we have every reason to believe that the percentage of local races—so school board races, city council races, etc[.]—that are uncontested is even higher.” Ann Marie Awad, *When Election Day Comes and There’s Only One Candidate on the Ballot*, NPR (Nov. 4, 2017, 5:00 AM), <https://www.npr.org/2017/11/04/561408611/when-election-day-comes-and-theres-only-one-candidate-on-the-ballot> [<https://perma.cc/9Z9W-C8QM>]. For a discussion of why there is not *partisan* competition in many “big city” local elections, see Schleicher, *supra* note 26, at 426 (rejecting “natural explanation” of lack of policy disagreement and instead positing explanation rooted in “unitary party rules” imposed by election law).

<sup>91</sup> *2020 Election Analysis: Uncontested Races by State*, BALLOTPEDIA (Dec. 16, 2020), [https://ballotpedia.org/2020\\_election\\_analysis:\\_Uncontested\\_races\\_by\\_state](https://ballotpedia.org/2020_election_analysis:_Uncontested_races_by_state) [<https://perma.cc/UED9-EQJN>].

<sup>92</sup> *Id.*

<sup>93</sup> Jaclyn Beran, *30% of Seats Nationwide Were Uncontested in the 2020 General Election*, BALLOTPEDIA NEWS (Dec. 18, 2020, 11:12 AM), <https://news.ballotpedia.org/2020/12/18/30-of-seats-nationwide-were-uncontested-in-the-2020-general-election/> [<https://perma.cc/E4GH-7WVQ>].

### III. LOCAL MICRO-LEGISLATURES: THE CRITIQUE

Part II addressed and rejected potential defenses of the micro-legislative model in American local government; it remains, then, to sharpen and illuminate the bases of the critique. I argue that the micro-legislatures prevalent in American localities are deficient in two respects: they are (A) unrepresentative and (B) undemocratic. In this Part, I will use the tools of normative political theory to advance these claims. I will not rely on fringe theories or on doctrinaire positions, but instead on mainstream, contemporary schools of thought.

#### *A. Unrepresentative*

Micro-legislatures are too small to be representative of the communities they govern. To understand this claim, we must understand both what representation is and why it deserves our normative commitments.

Representation is a central concept in democratic political thought. Because democracy presupposes free and equal citizens and therefore self-determination, legitimate authority and its attendant coercive power must reside in an institution that is representative of those citizens.<sup>94</sup> In the words of Dario Castiglione and Mark Warren: “[T]he basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions . . . [and] [i]n all but directly democratic venues (and even sometimes then), this norm of democratic inclusion is achieved through representation.”<sup>95</sup> Direct democracy—decision by all members of the community—passes the legitimacy test, but it is impractical and unwise in complex modern societies.<sup>96</sup> Representation is actually a refinement of direct

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<sup>94</sup> Nadia Urbinati & Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANN. REV. OF POL. SCI. 378, 395 (2008) (“Although there are important variations in the normative presuppositions embedded in this principle, most democratic theorists hold that (a) individuals are morally and legally equal and (b) individuals are equally capable of autonomy with respect to citizenship—that is, conscious self-determination—all other things begin equal. It follows that collective decisions affecting self-determination should include those affected. The advantage of such a norm—call it democratic autonomy or simply collective self-government—is that it enables us to avoid reduction of ‘democracy’ to any particular kind of institution or decision-making mechanism. It allows us to assess emerging institutions and imagine new ones by asking whether they fulfill the norm of democratic autonomy . . .”).

<sup>95</sup> Dario Castiglione & Mark E. Warren, *Rethinking Democratic Representation: Eight Theoretical Issues and a Postscript*, in THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION 21, 24 (Lisa Disch, Mathijs van de Sande & Nadia Urbinati eds., 2019).

<sup>96</sup> These feasibility problems include the practicality of so many people being able to assemble at a single time, but also the lack of consistency of a plenary assembly’s edicts. See PHILIP PETTIT, ON THE PEOPLE’S TERMS 188 (2012) (“I begin with a model in which the citizens gather periodically in a plenary assembly, a committee-of-the-whole, to determine the laws of the community. This model, which is reminiscent of Rousseau’s assembly, offers a plausible, initial interpretation of what it might be for the people to enjoy equally accessible

democracy, and not just a regrettable compromise; it relieves the individual citizen from making decisions on every political matter and places that responsibility in the hands of a dedicated agent.<sup>97</sup>

But what is representation? Hanna Pitkin's seminal 1967 work *The Concept of Representation* helped to schematize centuries of disparate political thought on the subject.<sup>98</sup> In the face of numerous thinkers asserting conflicting ideas about representation, Pitkin's theory was a plea for conceptual clarity: "The most that we can hope to do when confronted by such a multiplicity [of theories] is to be clear on what view of representation a particular writer is using, and whether that view, its assumptions and implications, really fit the case to which he is trying to apply them."<sup>99</sup> Still, she extracted three aspects of representation, each advanced as central by prior theorists, which, when combined, embody a large part of what many people mean by "representation."<sup>100</sup> First, representatives must be authorized to act *ex ante*; second, representatives must be accountable for their actions *ex post*; finally, representatives must act in furtherance of the interests of the represented.<sup>101</sup> While

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influence over government. Whatever its other faults, however, I argue that the model is quite infeasible, even in an electronic age in which people might assemble virtually.").

<sup>97</sup> ERIC BEERBOHM, *IN OUR NAME: THE ETHICS OF DEMOCRACY* 193 (2012) ("Representation is more than a strategy for reducing decisional costs. Mediating agents can reduce the risks of empirical and moral error. They can guard against attempts to prey on our psychological vulnerabilities. If we design the agency relationship between citizens and lawmakers in the right way, we can guard against our vulnerability to framing effects, self-bias, and political priming."); *see also* Chiara Valentini, *The Legislative Assembly and Representative Deliberation*, 64 *AM. J. JURIS.* 105, 106 (2019) ("Representative democracy, then, is not a lesser alternative to direct democracy; rather, the former is an improvement on the latter, much as it is an improvement on rule by the prince.").

<sup>98</sup> *See generally* HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967).

<sup>99</sup> *Id.* at 228.

<sup>100</sup> Much of Pitkin's work is an unearthing of "partial truth[s]" about representation. *Id.* at 66. She does not attempt to advance a theory of the "whole truth." Martha L. Minow, *From Class Actions to Miss Saigon: The Concept of Representation in the Law*, 39 *CLEV. ST. L. REV.* 269, 280–81 (1991) ("Professor Pitkin demonstrates the inadequacy of any single definition for the concept.").

<sup>101</sup> "Nonetheless, Pitkin sketched out the generic features of political representation in constitutional democracy. For representatives to be 'democratic,' she argued, (a) they must be authorized to act; (b) they must act in a way that promotes the interests of the represented; and (c) people must have the means to hold their representatives accountable for their actions." Urbinati & Warren, *supra* note 94, at 393.

political theorists continue to debate these propositions,<sup>102</sup> Pitkin's schema, and its reception, has become the "standard account" of representation.<sup>103</sup>

Authorization and accountability are "formalistic" components of representation, and they give us no way to evaluate the quality of representation or the conduct of the representative. Either the representative was authorized and is now accountable, or she was not and is not.<sup>104</sup> The third component—promotion of interests—introduces a substantive aspect to representation, and a further conceptual division. Substantive representation can be "descriptive," "symbolic," or action-based.<sup>105</sup> Descriptive representation is when something "stands for" another, and thus "depends on the representative's characteristics, on what he is or is like, on being something rather than doing something . . . ."<sup>106</sup> Descriptive representation is maximized when "a representative body is distinguished by an accurate correspondence or resemblance to what it represents, by reflecting without distortion."<sup>107</sup> Symbolic representation, by contrast, is the representation one might see in a flag, and is based mostly on the emotional or affective response it provokes

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<sup>102</sup> The assessment of the standard account of representation in political theory, while fascinating and voluminous, is beyond the scope of this Article. For our purposes we will merely adopt it for the purposes of application to a new phenomenon—local legislative size—while also noting its criticisms. For deeper reading of its critics, see Castiglione & Warren, *supra* note 95, at 24–27 ("Recently, this 'standard view' has come under increasing pressure, and it has become increasingly evident that political representation in democracies is a rather more complex process. . . . Democratic theories tend to combine authorisation and accountability, but the way in which they combine is neither obvious nor necessarily fixed once and for all.").

<sup>103</sup> Andrew Rehfeld, *Towards a General Theory of Political Representation*, 68 J. POL. 1, 3 (2006) (noting the dominance of Pitkin's tripartite theory: accountability through deliberation, authorization through electoral reform, and pursuit of interests—calling it the "standard account"); Urbinati & Warren, *supra* note 94, at 393 ("Pitkin did not, however, inquire more broadly into the kind of political participation that representation brings about in a democratic society. Nor were her initial formulations further debated or developed. Instead, they stood as the last word on representation within democratic theory for three decades, until the appearance of Manin's *The Principles of Representative Government* (1997)."). The standard account is not limited to Pitkin, but also the account's reception. Castiglione & Warren, *supra* note 95, at 45 ("Overall, we think of the standard account as the consolidated view of a model of political representation institutionalised in the course of the twentieth century across a number of constitutional democracies, and not as the particular theoretical construct of a single author or even a group of authors. The work of Hanna Pitkin, for instance, is a theoretically sophisticated reflection about such a dominant view, but cannot be described as the 'standard account' itself, nor can some of the limits of the standard account be attributed to her own theorisation, which in a number of cases offers elements for a critique.").

<sup>104</sup> PITKIN, *supra* note 98, at 39 ("Representation is a kind of 'black box' shaped by the initial giving of authority, within which the representative can do whatever he pleases."); *id.* (explaining that there is "no such thing as representing well or badly" under this conception).

<sup>105</sup> *Id.* at 60, 92, 112.

<sup>106</sup> *Id.* at 61.

<sup>107</sup> *Id.* at 60–61.



in the viewer.<sup>108</sup> Finally, action-based representation involves “acting for” the represented, i.e., acting in their interests and “in a manner responsive to them.”<sup>109</sup>

Representative institutions transcend regime type (one might conceive of a polity in which only certain groups are represented), but our concern is with representative democracy. The primary manner in which a democracy implements authorization and accountability of representatives is through elections.<sup>110</sup> The manner in which a democracy legitimately implements descriptive and action-based representation is the creation of an assembly of elected representatives. As Philip Pettit argues, the alternative to a plenary assembly (direct democracy), is a non-plenary assembly “elected by the people to debate and enact laws on their behalf.”<sup>111</sup>

But how big should a non-plenary, electoral assembly be? This basic question of institutional design has received almost no theoretical attention.<sup>112</sup> The only sustained treatment is that undertaken by Jeremy Waldron. Rather than tackling the question *ex nihilo*, he begins with an empirical observation: legislatures in contemporary nation-states are made up of large numbers of members: “Everywhere in the modern world, legislatures are institutions which comprise hundreds of members, members who take their decisions collectively, and deal with one another formally as equals.”<sup>113</sup> Numerosity of membership is what makes a legislature an “assembly” of persons,<sup>114</sup> and the ubiquity of the numerosity phenomenon is explainable (and defensible) for normative reasons. The size of the legislative body “makes a difference to our understanding of the concept of law [and] our understanding of the authority of law.”<sup>115</sup>

The essential ingredient added by numerosity—by legislature-as-assembly—is not democratic authorization or accountability, but representativeness. Specifically, numerosity facilitates the descriptive representation described earlier—the aspect of representation in which a legislative body mirrors those it represents.<sup>116</sup> Consider the

<sup>108</sup> *Id.* at 92.

<sup>109</sup> *Id.* at 209.

<sup>110</sup> Urbinati & Warren, *supra* note 94, at 397–98 (“Electoral democracy is that subset of representative relationships in which representatives are authorized through election to represent the citizens of a constituency to act on behalf of their interests, and then are held accountable in subsequent elections.”).

<sup>111</sup> PETTIT, *supra* note 96, at 197.

<sup>112</sup> Despite the ubiquity of the legislature-as-assembly phenomenon, Waldron writes that legal theory had “systematically neglected” it as unworthy of further discussion. Waldron, *The Dignity of Legislation*, *supra* note 42, at 634–35.

<sup>113</sup> *Id.* at 635. Elsewhere he calls this a “constitutional instinct about legislation.” Jeremy Waldron, *Legislation by Assembly*, 46 *LOY. L. REV.* 507, 512 (2000) [hereinafter Waldron, *Legislation by Assembly*].

<sup>114</sup> The lawmaker—the legislator—as a single person had been a dominant theme in the history of political thought prior to modern democracy. Waldron, *Legislation by Assembly*, *supra* note 113, at 517.

<sup>115</sup> *Id.*

<sup>116</sup> Numerosity may also bear on action-based representation if it constrains inclusion of interests, but this connection is not conceptually required. Inclusion of an interest does not

following discussions of descriptive representation from prominent Framers John Adams and James Wilson. Adams wrote that a legislature “should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them.”<sup>117</sup> Wilson, similarly, argued that “[t]he Legislature ought to be the most exact transcript of the whole Society.”<sup>118</sup>

For Waldron, the justification for these claims, and for the ubiquity of large legislatures, begins with the recognition that we live in political communities in which people will often disagree sharply about the most important issues (including the meaning of life itself).<sup>119</sup> This fundamental disagreement is not some unusual aberration to be corrected, but a normal state of affairs that political and legal theory must account for; it is the “circumstances of politics.”<sup>120</sup> This is a standard presumption of liberal political theory<sup>121</sup> and a predicate for institutional design.

In a real-world community that must confront the “circumstances of politics,” and in which citizens are held to be free and equal, political decisions must not be made on the basis of the inherent correctness of chosen policy. Instead, they must be made on the basis of majority vote.<sup>122</sup> The institutional vehicle for such a process is an elected assembly—a body that is big enough that, when it votes, it can be seen as capturing the “diversity” of opinions, experiences, and interests in society confronting the circumstances of politics.<sup>123</sup> Given the reality of fundamental and

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necessarily entail that the legislator descriptively representing an interest also act responsively to that interest. One might imagine a milk farmer in upstate New York serving in the state assembly, but ignoring the demands of his or her farmer constituents.

<sup>117</sup> Letter from John Adams to John Penn (1776), in IV THE WORKS OF JOHN ADAMS 203, 205 (Charles C. Little & James Brown eds., 1851).

<sup>118</sup> 1 COLLECTED WORKS OF JAMES WILSON 90 (Mark David Hall & Kermit L. Hall eds., 2007).

<sup>119</sup> Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2198 (1996) (“We may say, along similar lines, that the felt need among members of a certain group for a common framework, decision, or course of action on some matter, even in the face of disagreement about what that framework, decision, or action should be, are *the circumstances of politics*.”).

<sup>120</sup> *Id.* at 2197–98.

<sup>121</sup> JOHN RAWLS, POLITICAL LIBERALISM 441 (2005) (“[A] basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions.”).

<sup>122</sup> This is a requirement of fairness. See JEREMY WALDRON, POLITICAL THEORY: ESSAYS ON INSTITUTIONS 264 (2016) [hereinafter WALDRON, POLITICAL THEORY] (“In democratic theory, the most powerful case that can be made for [Majority Decision] is that it is required as a matter of *fairness* to all those who participate in the social choice. . . . Informally, people may be persuaded that [Majority Decision] is fair because, although they are losers this time around, they may be winners in the next political cycle. . . . Formally, we may defend [Majority Decision] as a way of respecting political participants as equals.”).

<sup>123</sup> See Waldron, *The Dignity of Legislation*, *supra* note 42, at 635. Indeed, Waldron clarifies that this is not just “diversity” in the racial or demographic sense, but of “opinions”

intractable disagreement in a political community of free and co-equal citizens, a lawmaking institution that aims to be representative (and therefore legitimate)<sup>124</sup> must accommodate diversity in membership, which is in turn facilitated by numerosity.<sup>125</sup>

If representation is necessary for legitimate political authority, and if numerosity of the legislative assembly is necessary for fulsome descriptive representation, then one can view numerosity as necessary for political legitimacy. Waldron is right to make this connection. He points out that descriptive representation is not merely a desirable feature of a legislative institution—it is central to the authoritativeness of the rules it creates: “[L]aw may properly elicit allegiance only from those that the law respects, and you respect a person not just by taking their interests and views into account, but by taking *them* into account as active intelligences and consciences.”<sup>126</sup> A legislature claiming to consider the interests of those who are not represented in that legislature is insufficiently authoritative.<sup>127</sup> Thus, in a society with a diversity of interests the legislature must itself be diverse: “Laws must stake their claim to authority among not only a diversity of interests but also among a diversity of law-thinkers.”<sup>128</sup>

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“experiences” and “interests.” WALDRON, *POLITICAL THEORY*, *supra* note 122, at 132. Of these, the need for diversity of “interests” appears to be primary. *Id.* at 133 (claiming that in political disputes “*impact on interests is often the main issue*”).

<sup>124</sup> Recall the words of Castiglione and Warren: “[T]he basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions . . . [and] [i]n all but directly democratic venues (and even sometimes then), this norm of democratic inclusion is achieved through representation.” Castiglione & Warren, *supra* note 95, at 24.

<sup>125</sup> Waldron is not the only theorist to make these claims, but he is the only one to analyze them thoroughly. For related discussions, see RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 149 (2012) (“[T]he assembly is not just a group, as is any committee or council. It is a large group that is structured to represent the community . . . in the sense that it is drawn from the community . . . . The reason for the large size of the assembly is that with several hundred members it is practical for individual legislators to represent particular groups or districts.”); John M. Carey, *Legislative Organization*, in *THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS* 431, 432 (R.A.W. Rhodes, Sarah A. Binder, & Bert A. Rockman eds., 2008) (“Legislatures are plural bodies with larger membership than executives, and so offer the possibility both to represent more accurately the range of diversity in the polity . . . . The diversity represented in legislatures may be defined along collective lines . . . . The rules by which collective representatives are selected, in turn, must identify some set of principles defining interest, such as geographical location, partisanship, race, ethnicity, gender, language, religion, etc.”).

<sup>126</sup> Waldron, *Legislation by Assembly*, *supra* note 113, at 529.

<sup>127</sup> “It is not enough to have one person trying to represent diverse views in his own mind; they should be actively present, each arguing its case as forcefully as it can.” *Id.* at 530; “The point of a legislative assembly is to represent the main factions in the society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist.” JEREMY WALDRON, *LAW AND DISAGREEMENT* 27 (1999).

<sup>128</sup> Waldron, *Legislation by Assembly*, *supra* note 113, at 529.

When one applies this analytical framework to local micro-legislatures, the conclusion is readily apparent: their size makes the approximation of an adequate amount of descriptive representation impossible. A legislature with four seats, for example, cannot possibly account for the multiplicity of interests in a complex modern society—even in a small city of 100,000 people or fewer. Micro-legislatures are unrepresentative.

### B. Undemocratic

Just as legislative size bears on representativeness, so too does it bear on whether an institution can be said to be “democratic.” For the reasons explained below, local micro-legislatures do not deserve this label. Again, to criticize the democratic bona fides of local legislatures requires us to understand what “democracy” is and why it is desirable.

As with representativeness, one must tread carefully when claiming that something is or is not “democratic.” In the words of Dan Kahan: “[D]emocracy is an essentially contested concept: there is not just one, but rather a plurality of competing conceptions of democracy, each of which emphasizes a different good commonly associated with democratic political regimes.”<sup>129</sup> Democratic theory recognizes this complexity and approaches the subject by positing various “models of democracy,” with each model focusing on an “ideal typical feature of democracy.”<sup>130</sup> There are many “models,”<sup>131</sup> and a full consideration of the range of

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<sup>129</sup> Dan M. Kahan, *Democracy Schmocracy*, 20 CARDOZO L. REV. 795, 795 (1999). For a criticism of the use of “democracy” in assessment of contemporary American institutions, see Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 714 (2001) (“As soon as we invoke the term ‘democracy,’ therefore, we are smuggling outmoded values, that will inevitably conflict with the government we actually possess, into our political discourse. Consequently, this Article proposes that we simply set the term ‘democracy’ aside and cease using it in scholarly discussions of modern government.”); Rikki Dean, Jean-Paul Gagnon & Hans Asenbaum, *What Is Democratic Theory?*, 6 DEMOCRATIC THEORY v, v (2019) (“Robert Dahl . . . famously argued that ‘there is no democratic theory—there are only democratic theories.’”).

<sup>130</sup> Mark E. Warren, *A Problem-Based Approach to Democratic Theory*, 111 AM. POL. SCI. REV. 39, 39–40 (2017) (criticizing the model approach while recognizing that “democratic theorists usually think in [these] terms”).

<sup>131</sup> See Andrew Sabl, *The Two Cultures of Democratic Theory: Responsiveness, Democratic Quality, and the Empirical-Normative Divide*, 13 PERSPS. ON POL. 345, 349 (2015) (“On a civic republican view, the test of democracy—or, better, of a ‘republic’ based on civic equality—is widespread devotion to the common good; on a more sober republican view, it is non-domination, the prevention of arbitrary power. On an ‘epistemic’ view . . . the purpose of democracy is to achieve through aggregation not the enactment of popular wishes but maximally accurate judgments regarding public problems that admit, more or less, of objectively better and worse answers. On an Emersonian view, democracy is valuable to the extent that it fosters independent and egalitarian mores, disinclined to docility. On a mitigated-elitist view, democracy allows for a salutary mix of democratic and aristocratic

these approaches goes well beyond our present concern. For our purposes it is sufficient to mark out what theorists have recognized to be the two major categories of models: aggregative theories and deliberative theories.<sup>132</sup>

Perhaps the most succinct description of this division is that given by Mark Warren: deliberative theories make as their touchstone “the giving and responding to reasons and coming to a collective decision,” while aggregative theories identify

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elements. . . . Conversely, on a radical view, full democracy would entail a universal ‘ability to use and develop . . . presently unusable or denied human capacities.’ On a different and more power-based radical view, democracies should be assessed by how well they ‘undermine and otherwise mitigate the corrosive effects of social hierarchies.’ On a social-democratic account of democracy . . . a key—perhaps the key—indicator of democratic quality is the level of economic equality.”); Warren, *supra* note 130, at 40 (“The consequence is that we now have a proliferation of adjectives that name and differentiate models: electoral democracy, competitive elite democracy, competitive multiparty democracy, pluralist democracy, corporatist democracy, developmental democracy, republican democracy, advocacy democracy, agonistic and adversarial democracy, pragmatic democracy, participatory democracy, progressive democracy, and—of course—deliberative democracy.”); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 43 (2004); DAVID HELD, *MODELS OF DEMOCRACY* (3rd ed. 2006); Dean et al., *supra* note 129, at xii (“Take, for instance, the ‘model wars’ that have characterized much democratic theory—a kind of ideological struggle to define a best form of democracy situated around a particular form of practice . . . The struggle is evident in battles over representative democracy vs. direct democracy, participatory democracy vs. elite democracy, and agonist democracy vs. deliberative democracy.”).

<sup>132</sup> Warren, *supra* note 130, at 40 (“Most of those who originated the model contrasted ‘deliberative’ to ‘aggregative’ models of democracy. In particular, deliberation (the giving and responding to reasons and coming to a collective decision) was contrasted with voting (making decisions by aggregating preferences).” (citations omitted)); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 18–26 (Will Kymlicka, David Miller, & Alan Ryan eds., 2000); JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* 165–170 (2018) (noting that aggregative democracy and deliberative democracy are the two main paradigms in contemporary democratic theory); Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 POL. THEORY 277, 278 (1994); Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 MINN. L. REV. 897, 910 (2010) (“Views of collective governance usually take one of two forms: an aggregative model or a deliberative model.”); James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 933 (2011) (“Although there are almost as many democratic theories as there are democratic theorists, for the most part contemporary accounts of democracy tend to fall into one of two categories often designated in consideration of their historical antecedents as liberal or republican, or in consideration of their most prominent conceptual features as aggregative or deliberative.”); Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 371, 436 (2012) (“Contemporary debates have largely focused on two rival sets of conceptions: aggregative conceptions and deliberative conceptions.”).

as key the feature of “voting (making decisions by aggregating preferences).”<sup>133</sup> Ian Shapiro’s survey of the state of the art in 2009 described the divide this way:

The aggregative tradition has bequeathed a view of democracy in which competing for the majority’s vote is the essence of the exercise, and the challenge for democratic theorists as they conceive it is to come up with the right rules to govern the contest. Deliberative theorists, by contrast, . . . tak[e] a transformative view of human beings. They concern themselves with the ways in which deliberation can be used to alter preferences so as to facilitate the search for a common good. For them the general will has to be manufactured, not just discovered.<sup>134</sup>

The aggregative account is undoubtedly the thinner of the two, and it was more popular in earlier years of democratic theory. Perhaps the most famous aggregative theorist, Joseph Schumpeter, emphasized that while elections occurred in democracies, the real power was wielded by the elite professional politicians who were elected—not the people.<sup>135</sup> So-called “pluralist” aggregative theorists, such as Robert Dahl, modified Schumpeter’s view of preference aggregation by highlighting the importance of interest groups politics in constraining elite action.<sup>136</sup> But aggregative accounts of democracy no longer predominate. Instead, many contemporary theorists now advance a deliberative version that focuses less on electoral procedures, and more on the value of the reciprocal communication that hopefully takes place during the democratic decision-making process.

Deliberative democracy is now the dominant contemporary theory of democracy.<sup>137</sup> As Shapiro noted earlier, the key shift from aggregative to

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<sup>133</sup> Warren, *supra* note 130, at 40.

<sup>134</sup> IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 3 (2003) (citations omitted).

<sup>135</sup> HELD, *supra* note 131, at 142 (“By democracy, Schumpeter meant a political *method*, that is, an institutional arrangement for arriving at political . . . decisions by vesting in certain individuals the power to decide on all matters as a consequence of their successful pursuit of the people’s vote.” (citations omitted)). Schumpeter himself wrote:

[D]emocracy is the rule of the politician. . . . If we wish to face facts squarely, we must recognize that, in modern democracies . . . politics will unavoidably be a career. This in turn spells recognition of a distinct professional interest in the individual politician and of a distinct group interest in the political profession as such.

JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM AND DEMOCRACY* 253 (2010).

<sup>136</sup> HELD, *supra* note 131, at 165 (“The account of interest group politics offered by classic pluralists was a significant corrective to the one-sided emphasis ‘elite politics’, [sic] and the overemphasis on the capacity of politicians to shape contemporary life, found in the writings of the competitive elitists.”).

<sup>137</sup> Warren, *supra* note 130, at 40 (calling deliberative model “now arguably the most productive research paradigm within democratic theory”); *see also* FRANK CUNNINGHAM,

deliberative democracy is a refusal to accept citizen viewpoints as givens, or to accept their tabulation as the litmus test of political legitimacy.<sup>138</sup> In the words of David Held: “At issue is enhancing the nature and form of political participation, not just increasing it for its own sake.”<sup>139</sup> Legitimacy, according to this theory, is instead conferred by democracy on the basis of the deliberation that democratic institutions facilitates—the public, mutual exchange of reason-giving for a specific political choice.<sup>140</sup> “[T]he source of legitimacy,” writes Bernard Manin, “is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself.”<sup>141</sup> For some deliberative theorists, legitimacy is bound up with the expectation that deliberation will produce better policy outcomes. The “epistemic goods” of deliberation “includ[e] revealing preferences and pooling information.”<sup>142</sup> But other deliberative theorists root democratic legitimacy in the inherent fairness of deliberation, regardless of its instrumental benefits. Deliberation makes political authority legitimate because it (ideally) requires rationality<sup>143</sup> and equal participation.<sup>144</sup> The opportunity to deliberate “increases chances that participants will recognize their preferences (their interests, values, and ethics) in collective wills or agendas, thus increasing the legitimacy of collective decisions.”<sup>145</sup>

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THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION 163 (2002) (calling deliberative democracy the “currently popular school of democratic theory”). This is not to say that it is without its critics. “Critics pounced, arguing that deliberative democracy failed to pay attention to power and interests; that it was insufficiently ‘political’ because it failed to attend to the deeply agonistic character of politics; that it overlooked inequalities of voice and power (there were many critics, including some working within the model, such as Young); that deliberation is subject to distortion and pathology when operating within political fields populated by strategic actors; and that deliberative models justify ideological domination because deliberation (in effect) alters individual consciousness under the coercive pressure of collective action.” Warren, *supra* note 130, at 40 (citations omitted).

<sup>138</sup> HELD, *supra* note 131, at 233 (“The major contention of deliberative democrats is to bid farewell to any notion of fixed preferences and to replace them with a learning process in and through which people come to terms with the range of issues they need to understand in order to hold a sound and reasonable political judgment.”).

<sup>139</sup> HELD, *supra* note 131, at 232.

<sup>140</sup> Gardner, *supra* note 132, at 935–36 (2011) (“Deliberation is thus doubly important in these theories: it is not only the forum in which citizens forge agreement on what to do, but also the very means by which they legitimately bind themselves to what they have collectively decided.”).

<sup>141</sup> Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 351–52 (1987).

<sup>142</sup> Warren, *supra* note 130, at 48. The major proponent of this version of deliberative democracy is David Estlund. See DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 12 (2008) (“[D]emocratic procedure involves many citizens thinking together, potentially reaping the epistemic benefits this can bring . . .”).

<sup>143</sup> Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* 67–94 (Seyla Benhabib ed., 1996).

<sup>144</sup> See Manin, *supra* note 141, at 351–52.

<sup>145</sup> Warren, *supra* note 130, at 48.

Having laid out this framework, we can now say that an institution is less democratically legitimate if it reduces deliberative opportunities. According to the epistemic-benefit version of deliberative democracy, this is true if features of the institution work against the epistemic payoffs that deliberation is intended to provide. According to the version of the theory that finds deliberation inherently legitimating (because it facilitates recognition of one's preferences in policies), this is true if features of the institution shut out citizen voices.

First, consider the epistemic-benefit theory of deliberative democracy. Two contemporary proponents of this argument are David Estlund and Hélène Landemore.<sup>146</sup> Estlund preceded Landemore in claiming that “[t]here is something about democracy other than its fairness that contributes to our sense that it can justify authority and legal coercion,” and this is because democratic laws “are produced by a procedure with a tendency to make correct decisions.”<sup>147</sup> Estlund’s theory of the “modest epistemic value” of democracy is grounded in the epistemic value of the deliberation that democracy facilitates.<sup>148</sup> Deliberation, under the right conditions (such as equal access to forum),<sup>149</sup> “is likely to have a significant tendency to make [better] decisions.”<sup>150</sup> Estlund’s theory appears to be predicated on the Hayekian concept of “dispersed knowledge”—if knowledge about the world is not held by an oligopoly of the few, then deliberation with more and more people will reintegrate the knowledge that was dispersed into a single decision-making body.<sup>151</sup> Under the right conditions, deliberation “brings together diverse perspectives, places a wide variety of reasons and arguments before the public, and prevents inequalities of power or status from skewing the results . . . .”<sup>152</sup>

Landemore’s work is a more robust elaboration of the epistemic-benefit theory.<sup>153</sup> According to her, the three “classic[]” arguments for the “known epistemic properties of deliberation” include (1) enlarging “pools of ideas and information,”

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<sup>146</sup> See generally ESTLUND, *supra* note 142; HÉLÈNE LANDEMORE, *DEMOCRATIC REASON: POLITICS, COLLECTIVE INTELLIGENCE, AND THE RULE OF THE MANY* (2013).

<sup>147</sup> ESTLUND, *supra* note 142, at 6–8. Note that Estlund does not claim that this results in epistemic perfection, but merely that it is superior to other forms of decisionmaking. “It is not an infallible procedure, and there might even be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires.” *Id.* at 8.

<sup>148</sup> See *id.* at 168; see also *id.* at 159 (proposing a “democratic theory that emphasizes the value of public deliberation.”).

<sup>149</sup> See *id.* at 175–76 for his list of ideal deliberative conditions.

<sup>150</sup> *Id.* at 176.

<sup>151</sup> See *id.* at 177.

<sup>152</sup> *Id.* at 185; see also Warren, *supra* note 130, at 48 (stating that the strengths of deliberation include “revealing preferences and pooling information”).

<sup>153</sup> See generally LANDEMORE, *supra* note 146. She sees the second mechanism of majority rule, the aggregative mechanism as also essential. *Id.* at 145 (“This chapter argues that simple majority rule is an essential component of democratic decision making with its own distinct epistemic properties and a certain task specificity, namely a predictive function: majority rule is ideally suited to predict which of two options identified in the deliberative phase is best.”).



(2) “weed[ing] out the good arguments from the bad,” and (3) working toward “consensus on the ‘better’ or more ‘reasonable’ solution.”<sup>154</sup> But Landemore finds these arguments to be “very general claims” in need of further explication and defense.<sup>155</sup> The missing sophistication, for her, is supplied by the social science concept of “cognitive diversity.”<sup>156</sup> “Cognitive diversity is the difference in the way people will approach a problem or a question,” she writes. “It denotes more specifically a diversity of perspectives (the way of representing situations and problems), diversity of interpretations (the way of categorizing or partitioning perspectives), diversity of heuristics (the way of generating solutions to problems), and diversity of predictive models (the way of inferring cause and effect).”<sup>157</sup> Social scientists have demonstrated that “in a problem-solving context, cognitive diversity actually matters more to the production of smart collective solutions than individual ability does.”<sup>158</sup> Thus, democracy’s benefits flow from its facilitation of deliberation, but more precisely, its expansion of cognitive diversity in decision-making. Landemore is explicit that deliberative bodies with more numerous memberships are therefore preferable:

[T]he advantage of involving large numbers is that it automatically ensures greater cognitive diversity. In that sense, more is smarter, at least up to the point of deliberative feasibility. I thus propose to generalize the Diversity Trumps Ability Theorem into a Numbers Trump Ability Theorem, according to which, under the right conditions and all things being equal otherwise, what matters most to the collective intelligence of a problem-solving group is not so much individual ability as the number of people in the group.<sup>159</sup>

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<sup>154</sup> *See id.* at 97.

<sup>155</sup> *See id.*

<sup>156</sup> *Id.* at 89.

<sup>157</sup> *Id.* at 102. Landemore, presumably confining her claim to the work of Hong and Page, excludes diversity of interests from her claim regarding the epistemic benefits of cognitive diversity. *Id.* “Cognitive diversity is not diversity of values or goals, which would actually harm the collective effort to solve a problem.” *Id.* She does not elaborate on this or cite to any further work. For our purposes, it is sufficient to note that this limitation is not essential to the theory of deliberative democracy. Landemore herself notes that many deliberative theorists, which she calls “type II deliberative democrats,” still see value in diversity of values. *See id.* at 94. She quotes Jane Mansbridge, who argues that “when interests and values conflict irreconcilably, deliberation ideally ends not in consensus but in a clarification of conflict and structuring of disagreement, which sets the stage for a decision by non-deliberative methods, such as aggregation or negotiation among cooperative organisms.” *Id.* (quoting Jane Mansbridge, James Bohman, Simone Chambers, David Estlund, Andreas Føllesdal, Archon Fung, Cristina Lafont, Bernard Manin, & José Luis Martí, *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 J. POL. PHIL. 64 (2010)).

<sup>158</sup> *Id.* at 90 (discussing the work of Lu Hong & Scott Page).

<sup>159</sup> *Id.* at 104.

Representative democracy, with its core organ of a representative assembly, most approximates this goal of “inclusive deliberation.”<sup>160</sup>

Still, many deliberative theorists see legitimacy flowing from deliberation not because of its expected policy benefits, but because it is fair. These theorists suggest that it allows for the recognition of one’s voice as having an equal part to play in the decision-making process.<sup>161</sup> A foundational assumption of these theorists is the reality of fundamental moral disagreements in a political community (what Waldron called the “circumstances of politics”).<sup>162</sup> Given this background presumption, which presents an obvious problem to harmonious political life and to the taking of political action, majority voting can be complemented by pre-voting deliberation to enhance the legitimacy of chosen policies. In the words of some of the most famous deliberative theorists, Amy Guttmann and Dennis Thompson, “[i]f we have to disagree morally about public policy, it is better to do so in a democracy that as far as possible respects the moral status of each of us.”<sup>163</sup> An institution works to respect equal moral status through deliberation, in that deliberation engenders

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<sup>160</sup> See *id.* at 106 (“Here, the function of representation is to reproduce the cognitive diversity present in the larger group on a scale at which simple deliberation remains feasible.”); see also *id.* at 89 (regarding need for inclusion).

<sup>161</sup> See, e.g., Manin, *supra* note 141, at 352 (“As political decisions are characteristically imposed on all, it seems reasonable to seek, as an essential condition for legitimacy, the deliberation of all or, more precisely, the right of all to participate in deliberation . . . . The deliberative principle is both individualistic and democratic. It implies that all participate in the deliberation, and in this sense the decision made can reasonably be considered as emanating from the people (democratic principle). The decision also proceeds from the liberty of individuals: those individuals deliberate together, form their opinions through deliberation, and at the close of the process each opts freely for one solution or another (individualistic and liberal principle). We must affirm, at the risk of contradicting a long tradition, that legitimate law is the result of general deliberation, and not the expression of the general will.”).

<sup>162</sup> Note that one school of deliberative theorists would not accept this. According to the so-called “impartialists,” the point of deliberation is to engage in communicative reasoning that *all* could accept—no matter their identities or interests. HELD, *supra* note 131, at 241. Deliberation should be “impartial,” in that deliberators should “be[] open to, reason[] from, and assess[] all points of view before deciding what is right or just; it does not mean simply following the precepts of self-interest, whether based on class, gender, ethnicity or nationality.” *Id.* at 239. Critics of impartialism, such as Iris Young, respond that this is practically fanciful but also normatively undesirable, in that it “represses difference” and presupposes only one correct form of reasoning. See IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 103 (reprt. 2011). Young argues alternatively for “a politics of inclusion” and an “ideal of a heterogeneous public.” See *id.* at 119. While it is impossible for me to weigh in on this debate here in a satisfactory way, I will note that the form of deliberative democracy that I invoke in this Article is one that does not require impartialism. The discussion in this section should clarify that I rely on the work of those deliberative theorists who accept the intractable reality of divergent interests and worldviews, and who nevertheless advance a normative argument for deliberation.

<sup>163</sup> AMY GUTTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 41–42 (1996).

“reciprocity”—the acknowledgement that a given reason for a policy is mutually acceptable even though one might oppose the conclusion that flows from it.<sup>164</sup> “Reciprocity aims at deliberative agreement,” Guttman and Thompson write, “whereby citizens are motivated to justify their claims to those with whom they must cooperate.”<sup>165</sup>

One might add that, along with fundamental moral disagreements, scarce resources will make most policy decisions result in winners and losers. But deliberation (and its reciprocity principle) can work to assuage the wounded feelings of even the losers:

Deliberation contributes to the legitimacy of decisions made under conditions of scarcity. . . . The hard choices that democratic governments make in these circumstances should be more acceptable even to those who receive less than they deserve if everyone’s claims have been considered on their merits rather than on the basis of wealth, status, or power. Even with regard to political decisions with which they disagree, citizens are likely to take a different attitude toward those that are adopted after careful consideration of the relevant conflicting moral claims and those that are adopted only after calculation of the relative strength of the competing political interests. Moral justifications [communicated during deliberation] . . . help sustain the political legitimacy that makes possible collective efforts . . . in the future, and to live with one another civilly in the meantime.<sup>166</sup>

Again, it is not just that a citizen had the chance to vote, but that he or she also had the chance to communicate his or her reasons for voting a certain way and to persuade others to change their votes. Moreover, one learns that the reasons for “the other side” voting a certain way are hopefully intelligible and satisfy the reciprocity principle. This pre-decisional deliberation therefore helps even the “losers” of the vote to live with the result.

An essential precondition to deliberation that satisfies the reciprocity principle and enhances legitimacy, then, is inclusive deliberation.<sup>167</sup> Significant groups of shared interests or viewpoints cannot be left out of the discussion and thereby made

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<sup>164</sup> *Id.* at 54. Reciprocity would preclude advancing a reason based on social status, for example.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 41–42.

<sup>167</sup> It should be noted that some theorists argue that the concept of deliberation contains no inherent requirement of inclusion. In the words of Mark Warren, “[W]e should not expect deliberation to address problems of empowered inclusion. The key reason is that deliberation is not, in itself, a mode of empowerment, nor is it a mechanism for distributing empowerments according to entitlements for inclusion.” Warren, *supra* note 130, at 48. The version of deliberation that I invoke here, though, incorporates such a requirement. Warren’s claim, I think, is simply that this additional requirement is not one *necessitated* by deliberation.

unable to express the reasons for their preferred decision. Such a group would not recognize their viewpoints as having the potential to shape policy, and resentment would breed when the group's policy is "lost." As Bernard Manin argues: "A diversity of points of view and of arguments is an essential condition . . . for the rationality of the process (for the exchange of arguments and criticisms creates information and permits comparing the reasons presented to justify each position)."<sup>168</sup>

Applying all these insights to the case of local micro-legislatures, one should conclude that these institutions are insufficiently deliberative. The small size creates inclusion deficits that are insurmountable, preventing deliberation from producing either epistemic benefits or the recognition of fairness on the part of those affected by its decisions. With an average of four seats, local legislatures are not large enough to provide a platform for representation of the multiplicity of interests in a modern society. Thus, *descriptive representation* is inextricably connected with *deliberative democracy*, and the size of local legislatures renders them deficient with respect to both qualities.

#### IV. IMPLICATIONS

Much of the preceding discussion has been conceptual, establishing, through the use of normative political theory, that local micro-legislatures are unrepresentative and undemocratic. But there are practical implications for these theoretical claims. Lack of assembly-type legislatures, and the concomitant lack of diversity of interests in the legislative body, can have concrete social effects. In what follows, I will unpack two potential consequences: *non-inclusive legislation* and *perceptions of exclusion*. Along the way, I will attempt to illustrate these points with real world case studies. I will mostly focus on local laws that govern primary conduct by citizens—especially criminal and civil offenses. It is the possession of this power that makes local legislatures most resemble state legislatures, and what makes their comparatively small size most objectionable.

The first category of effects—(A) non-inclusive legislation—will focus on how the absence of minority interests in the legislative body actually affects the laws that it creates. The most significant problem is that, given the absence of any opposition group to critique or demand moderation, this can result in more extreme legislation. The second category of effects—(B) perceptions of exclusion—will focus not on the concrete policy outputs that legislative size can have, but instead on the perceptions of the legitimacy of those policies in the eyes of the community. An interest group may successfully obtain its legislative preferences in a manner that is nevertheless objectionable. And even when a group agrees with a law being enacted, it may view it as less legitimate if the group was not included in the decision-making.

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<sup>168</sup> Manin, *supra* note 141, at 355. Manin does not go on to claim that *all* viewpoints must be represented, as in the analogy of a "marketplace of ideas." *Id.* "[I]f the object of the conflict among varying points of view is the forming of the will," he writes, "then *some* degree of diversity and not an *extreme multiplicity* is necessary." *Id.* at 356 (emphasis added).

*A. Non-Inclusive Local Legislation: Silenced (or Muffled) Minorities*

Representation and democracy deficits due to legislative size can affect what policies are enacted by local ordinances and how these ordinances are written. This section considers a phenomenon that could come from a legislature that is too small to incorporate diverse community interests: it silences or muffles minorities, and thereby can result in more extreme legislation.

Legislatures with a small number of seats cannot account for all the interests in a pluralistic community. Therefore, many interests—especially minority group interests that cannot garner enough votes to win a seat—will have no place (or no meaningful place) at the table. They will be unrepresented (or underrepresented), and their voice will not be a part of the deliberative exchange. The result will be more extreme local legislation.<sup>169</sup>

Think of how this moderating function would work in a larger, more representative legislature. While a minority group in such a legislature would control only a minority of seats, the group's presence in the deliberative body would compel the majority to at least *consider* compromise solutions, or to modify extreme proposals in light of the minority's view.<sup>170</sup> For example, the Congressional Black Caucus has only 56 members in the 177th Congress—far short of a majority of votes in the House—yet the Caucus is influential in affecting legislation.<sup>171</sup> As one commentator notes:

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<sup>169</sup> A recent study by renowned deliberative theorist James Fishkin, along with Alice Siu, Larry Diamond, and Norman Bradburn, provides empirical support for the underlying claim that deliberation and polarization have an inverse relationship. “These results from a national field experiment offer proof of concept that deliberation, with an appropriate design, can dramatically narrow differences between Republicans and Democrats on issues where they are initially deeply polarized.” James Fishkin, Alice Siu, Larry Diamond, & Norman Bradburn, *Is Deliberation an Antidote to Extreme Partisan Polarization? Reflections on “America in One Room,”* 115 AM. POL. SCI. REV. 1464, 1477–79 (2021).

<sup>170</sup> There is political science research on state legislatures supporting the claim that a larger chamber allows for more “non-elite” members, and that this can correlate with policy proposals favoring “non-elite” groups. Scot Schraufnagel & Benjamin S. Bingle, *Legislature Size and Non-Elite Populations: Theory and Corroborating Evidence*, 8 J. POL. & L. 242, 242, 250–51 (2015) (“The theoretical assumption is that larger legislatures will be populated by a more diverse group of members, who will better represent and advocate for non-elites . . . . The research demonstrates that larger Lower Chambers are marginally associated with a lower percentage of adults without a high school diploma, easily associated with a larger percentage of the states’ poor receiving Medicaid, and also related to smaller state prison populations.”). For evidence of the effects of descriptive racial representation on state policies, see Robert R. Preuhs, *Descriptive Representation as a Mechanism to Mitigate Policy Backlash: Latino Incorporation and Welfare Policy in the American States*, 60 POL. RSCH. Q. 277 (2007); Robert R. Preuhs, *The Conditional Effects of Minority Descriptive Representation: Black Legislators and Policy Influence in the American States*, 68 J. POL. 585 (2006).

<sup>171</sup> *About*, CONGRESSIONAL BLACK CAUCUS, <https://cbc.house.gov/about/> [<https://perma.cc/3DEQ-9ZYZ>] (last visited Aug. 28, 2022).

The key to the CBC's success over time [is] its ability to leverage its bloc of votes within the Democratic House Caucus to further the shared policy concerns of its members. Due partly to increases in its size and its greater share of influence within the House leadership structure, the group has enhanced its role in the party's decision-making processes.<sup>172</sup>

With a very small legislature, representatives of the majority are free to pursue their chosen policy preferences without any pushback within the legislative body. The only routes for a minority group to voice its viewpoints are making comments at public meeting or protesting. The result can be that extreme positions, unmoderated by serious opposition, become law. This may be an explanation for the phenomenon of comparatively radical, one-sided policies enacted by localities (versus states and the federal government).

Having considered the concept of non-inclusive legislation in the abstract, we can now turn to specific case studies. The first will involve LGBT individuals in two counties; the second will involve student populations in various university towns.

### *1. Case Study: LGBT Individuals in Two Counties*

In most localities, LGBT-identifying persons are an extremely small minority of residents and voters. Polling data indicates that even in the metropolitan area with the highest percentage of these sexual minorities (San Francisco), the percentage is only 6.2%.<sup>173</sup> One interest that sexual minorities have, of course, is the freedom to engage in sexual behavior that the majority has no interest in engaging in, and which it may in fact find repugnant (for whatever reason). When one combines this minority group's lack of electoral power with the often-prevalent sentiments of the majority group, the outcome is predictable. It should be no surprise that local governments have been on the frontline of LGBT-oppressive policymaking.

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<sup>172</sup> Kareem Crayton, *The Changing Face of the Congressional Black Caucus*, 19 S. CAL. INTERDISC. L.J. 473, 476 (2010). While the CBC is often influential when the Democratic party is in power, Crayton cites an example of when, in the early years of the group, the CBC was able to make its voice heard to a Republican administration. *Id.* at 478 ("On repeated occasions, Nixon had abruptly denied individual requests from blacks in Congress to discuss a White House agenda described by its critics as 'benign neglect'—an indifference to racial discrimination and economic blight within the black community. After the membership staged a much publicized boycott of one of the President's State of the Union addresses, the Caucus soon received an invitation to visit the White House for an informal policy discussion.").

<sup>173</sup> Frank Newport & Gary J. Gates, *San Francisco Metro Area Ranks Highest in LGBT Percentage*, GALLUP (Mar. 20, 2015), [https://news.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx?utm\\_source=Social%20Issues&utm\\_medium=newsfeed&utm\\_campaign=tiles](https://news.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx?utm_source=Social%20Issues&utm_medium=newsfeed&utm_campaign=tiles) [<https://perma.cc/MKY9-LEQ5>].

Consider the case of Harford County, Maryland. Harford has a population of 260,924, with a seven-person legislature.<sup>174</sup> As of late 2021, all seven members were men, and six were married to women (the seventh appears to be single).<sup>175</sup> There is no indication that LGBT people are represented in this legislature, and they likely never have been.

Harford's code of ordinances has an article regulating the operation of adult bookstores.<sup>176</sup> The article punishes as misdemeanors (with up to six months of imprisonment),<sup>177</sup> among other things, “knowingly allow[ing] a sexual act on the premises”;<sup>178</sup> failing to “regularly check the parking lot to try to keep customers and members of the public from loitering or committing sexual acts there”;<sup>179</sup> and failing to “ensure that each viewing booth is separated from others by a solid wall . . . .”<sup>180</sup> According to the Fourth Circuit, the law was enacted in 1992 “to protect the health, safety and welfare of the County’s citizens by minimizing the undesirable secondary effects generally associated with sexually oriented businesses,” rooted in the Council’s finding that “such businesses frequently are used for unlawful sexual activities, may facilitate the transmission of sexual diseases, contribute generally to crime, decrease property values and adversely impact the quality of life in their surrounding areas.”<sup>181</sup> The likely unspoken subtext of this law was an attempt to crack down on gay men congregating for consensual sex with each other, for, as many scholars have observed, adult bookstores and theaters were focal points for gay life when gay sex was still criminal.<sup>182</sup>

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<sup>174</sup> U.S. CENSUS BUREAU, QUICKFACTS: HARFORD COUNTY, MARYLAND (2020), <https://www.census.gov/quickfacts/fact/table/harfordcountymaryland,US/POP010220> [<https://perma.cc/USL8-UB2D>] (last visited Aug. 28, 2022); *County Council*, HARFORDCOUNTYMD.GOV, <https://www.harfordcountymd.gov/155/County-Council> [<https://perma.cc/E46S-VH7N>] (last visited Aug. 28, 2022).

<sup>175</sup> *County Council*, *supra* note 174 (demonstrating marital status through biographies and showing that council member Giangiordano appears to be the single member).

<sup>176</sup> HARFORD CNTY. CODE §§ 58-1 to 58-13, <https://ecode360.com/9370163> [<https://perma.cc/PPP6-8TMS>].

<sup>177</sup> *Id.* § 58-13.

<sup>178</sup> *Id.* § 58-6(B)(3).

<sup>179</sup> *Id.* at § 58-7(A)(4).

<sup>180</sup> *Id.* § 58-8(A)(8).

<sup>181</sup> *Chesapeake B & M, Inc. v. Harford Cnty., Md.*, 58 F.3d 1005, 1007 (4th Cir. 1995).

<sup>182</sup> *See, e.g.,* William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, NOMOS, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 852 (1997) (“As applied in consensual situations, sodomy laws were used as the legal basis to monitor gay cruising areas (like public rest rooms) and to investigate or raid quasi-public forums—adult bookstores . . . , sex clubs, gay baths, and massage parlors . . . .”); Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 28 n.93 (2008) (“Public parks, department store restrooms, and highway rest stops do not offer the same amount of protection, and invite interference from unwanted spectators, from the police, and queer bashers.” (quoting William L. Leap, *Sex in “Private” Places: Gender, Erotics, and Detachment in Two Urban Locales*, in PUBLIC SEX/GAY SPACE

Today, the ordinance is actively enforced. News reports indicate that crackdowns took place regularly in 2012, and again in May 2021.<sup>183</sup> In a January 2012 raid, sheriffs noticed violations of the “solid wall” requirement, as well as a half-naked patron.<sup>184</sup> These raids stemmed from complaints raised by a local “community council”: “Most of the complaints about the bookstores are from parents, who have to drive past the three stores in their area and worry about what to tell their children about why, what is essentially a bookstore, has so many cars in front of it and so many people going in and out . . . .”<sup>185</sup> The more recent raid was also prompted by citizen complaints.<sup>186</sup> According to a journalistic account, a gay man arrested during the raid said: “[Y]ou know, I went inside and was hooking up with someone and the next thing I know, eight of us were against the wall with handcuffs with plastic zip ties on them . . . . And we all spent the night in jail . . . . I don’t know why people have a problem with this. We go there to meet people like us.”<sup>187</sup>

One cannot know for sure whether having LGBT people on the Harford County Council would lead to a repeal of the adult bookstore ordinance. But given the small size of that body and the small proportion of LGBT individuals in Harford, we can know that the interests and viewpoints of those affected by the ordinance was not represented in the deliberative process leading up to the ordinance’s enactment.

Going back further in time, one can find an even more extreme example of local anti-LGBT discrimination. In 1993, Cobb County, Georgia’s five-member Board of Commissioners cut all of its arts funding after someone issued a “complain[t] about

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135 (William L. Leap ed., 1999))). Paul Brest and Ann Vandenberg recount a debate about an ordinance in Minneapolis that took place at a city council meeting. Paul Brest & Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 629 (1987) (telling the story of one witness who “thought that the current ‘movement against pornographic bookstores has had a terrible effect on the gay community,’ leading to police brutality and the arrests of gay men. Still another [witness] emphasized the importance of adult bookstores as meeting places for gay men and as ‘a place to be sexual together.’ Gay men, he explained, ‘have had to develop signals in order to recognize each other and cultivate places where we can feel relatively safe. Adult bookstores have come to be part of that picture. So [sic] I do not take lightly that such places will be lost to the gay community when this ordinance comes to be successful.’”).

<sup>183</sup> Erika Butler, *Police Crack Down on Harford ‘Adult Bookstores,’* BALTIMORE SUN (Jan. 25, 2012, 11:56 AM), <https://www.baltimoresun.com/ph-ag-adult-bookstores-0125-20120124-story.html> [<https://perma.cc/4A62-TAG9>] (“Throughout the year, the sheriff’s office checks all the ‘adult bookstores.’”); Lou Chibbaro Jr., *Gay Men Arrested Under MD. Sodomy Law in Adult Bookstore Raid,* WASH. BLADE (July 21, 2021), <https://www.washingtonblade.com/2021/07/21/gay-men-arrested-under-md-sodomy-law-in-adult-bookstore-raid/> [<https://perma.cc/AY2W-K2D6>].

<sup>184</sup> Butler, *supra* note 183.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*; Chibbaro, *supra* note 183.

<sup>187</sup> Chibbaro, *supra* note 183. According to the Washington Blade, the 2021 raid resulted in only state law charges against the patrons, and it appears that no violations of the local ordinance (regarding the proprietors) were charged. *Id.*



references to homosexuality in a play” that was presumably supported in part by public money.<sup>188</sup> The same month the commissioners passed a resolution stating that “lifestyles advocated by the gay community should not be endorsed by government policy makers, because they are incompatible with the standards to which this community subscribes . . . .”<sup>189</sup> Later developments in the Cobb County incident illustrate the limits of public protest as a form of inclusion and representation in deliberation. As one scholar recalls, protests against the resolution were vigorous and organized (including the creation of a petition signed by many faculty and students at the local college), but they were immediately met by counter protests.<sup>190</sup> The result, according to him, was that “meetings between gay and human rights groups and the commissioners [showed] no progress toward rescinding the resolution.”<sup>191</sup> Petitions and protests are a weak substitute for the advocacy provided by voting members of a deliberative body.

## 2. Case Study: Student Populations in Various University Towns

Another minority interest group that has historically clashed with local governments—and has almost always lost—is college students in college towns. Universities are often in smaller localities where their residential student bodies comprise a recognizable minority of the population. The interests of students—due to age, occupation, transience, income level, etc.—often diverge sharply from those of older, longer-term residents of a college town.<sup>192</sup> Students are, in general, interested in living and socializing in closer proximity and at a standard that older, wealthier people would not accept for themselves. Moreover, long-term residents,

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<sup>188</sup> Peter Applebome, *County’s Anti-Gay Move Catches Few by Surprise*, N.Y. TIMES (Aug. 29, 1993), <https://www.nytimes.com/1993/08/29/us/county-s-anti-gay-move-catches-few-by-surprise.html> [<https://perma.cc/U3SB-ZHSF>]; Holly Selby, *Ga. Town Suffers Unwanted Fame for Anti-Gay Action*, BALTIMORE SUN (July 20, 1994, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1994-07-21-1994202112-story.html> [<https://perma.cc/ZBD4-HXAE>] (“The local Theatre in the Square last year presented a Terrance McNally play, ‘Lips Together, Teeth Apart,’ which infuriated some residents with references to homosexuality.”).

<sup>189</sup> John S. Gentile, “*That’s the Night that the Arts Went Out in Georgia*”: *The Passing of the Anti-Gay Resolution and Arts Defunding in Cobb County, Georgia, as Social Drama*, 19 STUD. POPULAR CULTURE 287, 292 (1996).

<sup>190</sup> *Id.* at 296.

<sup>191</sup> *Id.*

<sup>192</sup> See Blake Gumprecht, *The American College Town*, 93 GEOGRAPHICAL REV. 51, 61–62 (2003). For an excellent discussion of this phenomenon playing out in the community of Ithaca, New York, see Blake Gumprecht, *Fraternity Row, the Student Ghetto, and the Faculty Enclave*, 32 J. URB. HIST. 231, 232 (2006) (“College towns are highly segregated residentially. College faculty and other permanent residents seldom want to live near undergraduates because of the different lifestyles they often lead. For students, the college years represent their first chance to live relatively free from adult interference, so they, too, prefer to live among their own. Dissimilarities within the student body contribute still further to residential differences within college towns.”).

who are almost always in the majority, often have the traditional interest portfolio of a “homevoter.”<sup>193</sup> That is, they are interested in a quiet, more isolated family life in a house that is steadily increasing in value. The interests of a comparatively small student population can therefore clash with those of a dominant majority of homevoters,<sup>194</sup> and their minority status—as well as other factors such as transience and apathy—usually leave them politically powerless. The small size of local legislatures can play a role in this marginalization.

Local micro-legislatures have successfully waged war on student populations throughout the United States,<sup>195</sup> passing anti-student ordinances aimed at reducing or preventing altogether student rentals and the partying that takes place in them. The most famous such local ordinance,<sup>196</sup> a Belle Terre, New York restriction on

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<sup>193</sup> Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1824 (2003) (“The ‘homevoter hypothesis’ is deceptively straightforward: decentralized, local governments provide a desirable balance of taxes and government services because the homevoter seeks to maintain or increase the value of her single largest asset—the family home . . .”).

<sup>194</sup> In one acrimonious case, a local mayor compared college students to “toxic waste,” prompting a state court judge to issue an eloquent description of the divergent interests of the two groups: “The Court cannot but be disheartened at a mental climate that classifies college students, presumably the brightest and best of our society, as less worthy than toxic waste. True, they may have peculiar lifestyles; true, they frequently exhibit a less respectful attitude toward their elders than those in present authority would prefer and they sometimes behave in such a manner as to drive their elders to distraction. Yet it cannot be forgotten not only that they are entitled to their lifestyle as a matter of constitutional right, but in a few fleeting years they will stand in the shoes of those they now offend—those whose present occupancy of power is but fleeting.” *Borough of Glassboro v. Vallorosi*, 535 A.2d 544, 549 (N.J. Super. Ct. Ch. Div. 1987).

<sup>195</sup> A good example of explicit anti-student sentiment expressed by a local legislature can be found in Christopher Washington, *Drinking Ban Remains in Limbo*, MIAMI STUDENT (Dec. 6, 2006, 7:00 PM), <https://www.miamistudent.net/article/2006/12/drinking-ban-remains-in-limbo> [<https://perma.cc/2CNL-ZAE7>] (“After an open discussion between Miami University (Ohio) students, Oxford, Ohio, residents and City Council, the ordinance that would ban all outdoor drinking games was tabled again Tuesday night so that dialogue between the city, students and residents can be continued. Respect surfaced as a theme of the evening when students encouraged City Council to reconsider the content of ordinance and to maintain the dialogue between Miami students and the Council. The motion to table the ordinance was presented when the Student Community Relations Committee (SCRC) asked City Council to postpone the vote until February, allowing additional student input and response. ‘(Additional student response will) be quite positive for those that like to be cooperative, good citizens whether they drink or not, and it’ll be quite negative for the nihilistic spoiled brats that give Miami students a bad name,’ said City Councilor Doug Ross, who voted against tabling the ordinance.”).

<sup>196</sup> Since I am not sure, and the case does not indicate, whether the ordinance discussed *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) was actually motivated by anti-student animus, I say here that the ordinance had anti-student “effects.” All of the subsequent ordinances discussed in this section, themselves implicitly blessed by *Village of Belle Terre*, are more clearly the product of anti-student animus.

renting to two or more people who were not part of the same “family,” was ostensibly an attempt at preventing rentals to students from a nearby university.<sup>197</sup> The Supreme Court upheld this restriction against a constitutional challenge, writing that “[i]t is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”<sup>198</sup> Since then, many localities have availed themselves of this option to the detriment of students.

Consider one iconic feature of college student neighborhoods: upholstered couches used as outdoor furniture on a porch. A number of micro-legislatures in localities with student populations have created ordinances prohibiting porch-couches, including Lincoln, Nebraska (7 members, home of University of Nebraska),<sup>199</sup> Chico, California (7 members, home of Chico State),<sup>200</sup> Boulder, Colorado (9 members, home of the University of Colorado),<sup>201</sup> Murfreesboro, Tennessee (7 members, home of Middle Tennessee State University),<sup>202</sup> and

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<sup>197</sup> *Id.* at 9.

<sup>198</sup> *Id.* It is interesting to note that currently the Village of Belle Terre, N.Y.—the locality that passed the ordinance—has a legislature of five people. *See The Village of Belle Terre: Mayors and Trustees*, BELLE TERRE (2022), <https://belletterre.us/village-people-2/mayors-and-trustees> [<https://perma.cc/TYZ4-ZUGL>]. One suspects that this number was not larger at the time that the ordinance was passed.

<sup>199</sup> *College Town Bans the Porch Couch*, 6ABC (Sept. 23, 2008), <https://6abc.com/archive/6408391/> [<https://perma.cc/2PKY-GNQ6>] (“Supporters of the ban say it’s a way to help revitalize older neighborhoods. It also likely targets college students who move in and out of rental homes. Lincoln is home to the campus of the University of Nebraska at Lincoln.”).

<sup>200</sup> *City Council*, CITY OF CHICO, <https://chico.ca.us/city-council> [<https://perma.cc/TY44-246E>] (last visited Aug. 28, 2022); *City Council Bans Furniture Outside Homes*, THE ORION (Dec. 18, 2015), <https://theorion.com/51278/news/city-council-bans-furniture-outside-homes/> [<https://perma.cc/2MDZ-DXB6>].

<sup>201</sup> *City Council*, CITY OF BOULDER COLO., <https://bouldercolorado.gov/government/city-council> [<https://perma.cc/F6B6-BK8A>] (last visited Aug. 28, 2022); Nick Madigan, *Peace Plan in Boulder Bans Sofas on Porches*, N.Y. TIMES (May 30, 2002), <https://www.nytimes.com/2002/05/30/us/peace-plan-in-boulder-bans-sofas-on-porches.html> [<https://perma.cc/Q3HU-5W8J>] (writing that, “[a]ppalled by several small but destructive disturbances near the University of Colorado in the last few years, events in which inebriated students invariably stole couches off porches and burned them, Boulder officials last week approved an ordinance that forbids keeping upholstered furniture outside. The measure, effective Aug. 1, applies only to University Hill, a residential area near the campus where the worst of the disturbances occurred. . . .” and explaining that the ordinance carries a penalty of up to 90 days incarceration).

<sup>202</sup> *City Council Members*, CITY OF MURFREESBORO, TENN., <https://www.murfreesborotn.gov/496/City-Council-Members> [<https://perma.cc/4268-XG99>] (last visited Aug. 28, 2022); Michelle Willard, *It’s Official: Indoor Couches Banned for Outdoor Use*, MURFREESBORO POST (Dec. 9, 2007), [https://www.murfreesboropost.com/news/it-s-official-indoor-couches-banned-for-outdoor-use/article\\_1544ddb4-3474-551a-a2d9-dd020a3dc780.html](https://www.murfreesboropost.com/news/it-s-official-indoor-couches-banned-for-outdoor-use/article_1544ddb4-3474-551a-a2d9-dd020a3dc780.html) [<https://perma.cc/Z4AL-6U7R>].

Columbus, Ohio (7 members, home of Ohio State University).<sup>203</sup> There is no evidence of student representation on these micro-legislatures.

The couch ban enacted by Ann Arbor, Michigan (home of the University of Michigan) in 2010 illustrates the issue well. Spurred by the advocacy of the mother of a student who died in a fire allegedly aggravated by the presence of a porch-couch, Ann Arbor's 11-person micro-legislature decided to act.<sup>204</sup> At the hearing in which the ban passed, only two people of the more than dozen people who spoke voiced opposition to the ban, and both were Michigan students.<sup>205</sup> The week following the ban, the Michigan Student Assembly's (MSA) executive board issued a statement condemning the ordinance and the Ann Arbor micro-legislature's lack of student inclusion in the deliberative process:

Only after MSA asked for a postponement did the City Council consult students on this issue . . . . However, a one-week delay allowed little time for students to express their concerns and sidestepped the much larger issue—the City Council acted unilaterally and offered no opportunities for students to review and discuss the proposal during the legislative process. With consideration largely during the summer months, the couch ban never had an opportunity to receive reasonable oversight and criticism from the student body.<sup>206</sup>

With no representation on the deliberative body, the students' interests in preserving an activity that some characterized as a "way of life" in a college residential community was not voiced, and no compromise or moderation was demanded.<sup>207</sup>

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<sup>203</sup> *City Council*, CITY OF COLUMBUS, OHIO, <https://www.columbus.gov/council/members/> [<https://perma.cc/V9KA-3X4F>] (last visited Aug. 28, 2022); Mark Ferenchik, *Law Largely Keeping Couches Off Porches*, COLUMBUS DISPATCH (Nov. 23, 2012, 10:27 AM), <https://www.dispatch.com/story/news/crime/2012/11/23/law-largely-keeping-couches-off/24014197007/> [<https://perma.cc/ZFU6-PWAW>].

<sup>204</sup> *City Council*, CITY OF ANN ARBOR, MICH., <https://www.a2gov.org/departments/city-council/Pages/Home.aspx> [<https://perma.cc/8GDD-X5G2>] (last visited Aug. 28, 2022); Ryan J. Stanton, *Ann Arbor City Council Passes Ordinance Banning Couches on Porches*, ANN ARBOR NEWS (Sept. 20, 2010, 09:42 PM), <http://www.annarbor.com/news/ann-arbor-city-council-passes-ordinance-banning-couches-on-porches/> [<https://perma.cc/MH4L-Y5X8>].

<sup>205</sup> Stanton, *supra* note 204.

<sup>206</sup> Ryan J. Stanton, *Ann Arbor's New Ban on Porch Couches Doesn't Sit Well with University of Michigan Students*, ANN ARBOR NEWS (Sept. 23, 2010, 6:03 AM), <http://www.annarbor.com/news/ann-arbors-new-ban-on-porch-couches-doesnt-sit-well-with-university-of-michigan-students/> [<https://perma.cc/JE6P-NV8K>].

<sup>207</sup> *Id.* In Bloomington, Indiana—home of Indiana University, with a local legislature of nine members—couches were banned in 2013. Jon Blau, *Bloomington Ban on Upholstered Furniture on Porches Leaves IU Students Wondering Why*, HERALD-TIMES (Jan. 12, 2013, 12:00 AM), <https://www.heraldtimesonline.com/story/news/2013/01/12/bloomington-ban-on-upholstered-furniture-on-porches-leaves-iu-students-wondering-why/4716>

*B. Perceptions of Exclusion*

While we considered above how micro-legislatures' size concretely impacts policy by silencing or muffling minority viewpoints, we must also consider how the lack of minority inclusion has expressive effects that go beyond the content of a chosen policy. The expressive function of inclusive legislative procedures creates a perception of legitimacy that can have concrete effects. "Sociological" legitimacy with respect to an institution, in the words of Richard Fallon, means that "the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."<sup>208</sup> It is an "active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest."<sup>209</sup> The possession, or not, of such legitimacy has significant impacts on whether a political institution can function in a healthy way. As Tom Tyler argues: "Considerable evidence suggests that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public."<sup>210</sup> So-called "legitimacy theory" or "procedural justice" theory has been applied to many areas of law,<sup>211</sup> and it has obvious relevance for the composition of a legislature. Thus, even when a non-inclusive micro-legislature makes law that the excluded minority group agrees with, it nevertheless communicates something to that group: they do not matter.

Kim Forde-Mazrui writes that "[t]he acceptability of legislatures, like juries, depends in part on the extent to which their membership represents the diverse constituencies within their jurisdictions."<sup>212</sup> The perception of a legislature's representational and deliberative legitimacy matters wholly apart from any effect

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7823/ [https://perma.cc/YKF3-FX53]. Student reactions to the ban indicated that the non-students on the council seemed unaware of the value the couch had to the students: "Where college-aged men and women see porch couches as comfy, city officials see damp and squishy. The heads of neighborhood associations cringe at yellow stuffing bursting from seats and armrests. . . . The student renters of Bloomington, who aren't necessarily tuned in to city politics, are puzzled by why anyone would legislate their furniture choices. . . . It is an understated part of the culture to these students — not sacred, but a worthwhile addition to their college experience. 'It will be a sad day,' said Devon McShane, a former IU student who took a moment to imagine Bloomington without porch couches. 'Ever since I moved in, it was the first thing: let's find some couches.'" *Id.*

<sup>208</sup> Richard H. Fallon Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).

<sup>209</sup> *Id.*

<sup>210</sup> Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283 (2003).

<sup>211</sup> See Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 265 n.213 (2004) (noting the "large literature on procedural justice").

<sup>212</sup> Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 351, 377 (1999).

representation or deliberation would have on the actual legislation.<sup>213</sup> “The public may find laws enacted by a representative legislature more acceptable because it understands (or assumes) that the content of the legislation reflects a real consensus among various interests.”<sup>214</sup> Describing this view,<sup>215</sup> Lani Guinier writes that many theorists view racial integration in legislative bodies as significant to their perceived legitimacy: “Once integrated, legislative bodies will deliberate more effectively and will be ‘legitimated’ as a result of their more inclusive character.”<sup>216</sup>

The small size of local legislatures inhibits fulsome inclusion of diverse interests, and therefore places constraints on the sociological legitimacy of the institution. Consider two case studies.

### *1. Case Study: Black Communities & Policing*

Nearly all policing is done by local departments, and these local departments are directly controlled by local legislatures.<sup>217</sup> The granularity of the legislature’s regulation is entirely dependent on legislative will. For example, the month after the killing of George Floyd, the Minneapolis City Council directly amended the Police Department Policy and Procedure Manual—a departmental document<sup>218</sup>—by legislative action to ban the use of chokeholds.<sup>219</sup> While there are limits on

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<sup>213</sup> See *id.* at 378 (“This legislative legitimacy gained through representativeness is distinct from the effect of representativeness on the content of legislation.”).

<sup>214</sup> *Id.* See also Solum, *supra* note 211, at 277 (“[U]ndemocratic legislation is illegitimate even if the legislation would have been approved by citizens had they been afforded an opportunity to do so. Rights of democratic participation are essential to the legitimacy of legislative processes.”).

<sup>215</sup> See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1513 (1991) (explaining that Guinier finds this to be insufficient, since descriptive representation of a minority group in a body with majority decision rules does not result in “effective legislative power” for that group); see also *id.* at 1434 (“Electing representatives from majority-black, single-member districts may simply transfer the ‘discrete and insular minority’ problem from the polling place to the local municipal or county legislative council.”). I need not take a position here on Guinier’s claim regarding the need for *more* than descriptive representation, since, in the case of local micro-legislatures even this has not been achieved. While she calls for a “third-generation strategy” of political equality, local micro-legislatures have not even attained a “second-generation model” of “access-based” legitimacy.

<sup>216</sup> *Id.* at 1415.

<sup>217</sup> Anthony O’Rourke, Rick Su, & Guyora Binder, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327 (2021) (including a notable exception in the case of sheriff’s offices that may have independent status under state constitutions).

<sup>218</sup> THE MINNEAPOLIS POLICE DEPARTMENT POLICY AND PROCEDURE MANUAL (Aug. 15, 2022), <https://www.minneapolismn.gov/media/-www-content-assets/documents/MPD-Policy-and-Procedure-Manual.pdf> [<https://perma.cc/XQ8J-WK9F>].

<sup>219</sup> See *Stipulation and Order, Lucero v. City of Minneapolis Police Dept.*, 27-CV-20-8182 at 4 (2020), <https://www.courthousenews.com/wp-content/uploads/2020/06/minneap>

disbanding or defunding police agencies,<sup>220</sup> it is not an exaggeration to say that local legislatures have near plenary authority over policing policy in their locality. Policing is also racially disparate—specifically, Black communities are overpoliced<sup>221</sup> with respect to petty crimes, and under-policed with respect to serious violent felonies.<sup>222</sup> In the words of Sarah Swan: “Like overpolicing, underpolicing expressively ‘devalues the lives’ of people of color, destabilizes families, erodes communities, and causes deep psychic harms.”<sup>223</sup> It is unsurprising, then, that the policing preferences of poorer communities of color elude easy description. Many scholars report that these communities fear police repression, and therefore hope to be less policed, but also fear criminal victimization, and therefore hope for protection. In the words of Tracey Meares and Dan Kahan:

The attitude of inner-city minorities toward the criminal law is suffused with ambivalence. They obviously resent their exposure to disproportionate criminal victimization, and expect relief. But unlike many whites who also strongly resent crime, they have *not* renounced their concern for the very individuals who are, or who are likely to become, criminal victimizers.<sup>224</sup>

The policy preferences of poor communities of color regarding policing are complicated and not monolithic. During the racial justice protests in the summer of 2020, a popular movement led by activists called for defunding or abolition of

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olis-tro.pdf [<https://perma.cc/PD4F-JL9T>]; *see also* Andy Monserud, *Minneapolis Bans Police Chokeholds in First Step of Reforms*, COURTHOUSE NEWS SERV. (June 5, 2020), <https://www.courthousenews.com/minneapolis-bans-police-chokeholds-in-first-step-of-reforms/> [<https://perma.cc/XC76-VG9A>].

<sup>220</sup> *See* O’Rourke et al., *supra* note 217, at 1334 (stating that “police agencies are harder to disband than many other governing institutions. They are entrenched, not only politically, but legally.”).

<sup>221</sup> Rick Trinkner, Jonathan Jackson, & Tom R. Tyler, *Bounded Authority: Expanding “Appropriate” Police Behavior Beyond Procedural Justice*, 42 L. & HUM. BEHAV. 280, 291 (2018) (stating that a “substantial amount of research has shown that racial and ethnic minorities, particularly young Black men, are especially likely to be overpoliced . . . .” (citing Rick Trinkner & Phillip Atiba Goff, *The Color of Safety: The Psychology of Race and Policing*, in *THE SAGE HANDBOOK OF GLOBAL POLICING* (Ben Bradford, Beatrice Jauregui, Ian Loader, & Jonny Steinberg eds., 2016))).

<sup>222</sup> Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 877–78 (2020); *see also* Christopher Lewis & Adaner Usmani, *The Injustice of Under-Policing in America*, 2022 AM. J.L. & EQUITY 85 (2022).

<sup>223</sup> *Id.*

<sup>224</sup> Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1165 (1998); *see also* RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997) (“[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.”).

police, while Gallup survey data indicated that a majority of Black people did not want police presence reduced in their communities.<sup>225</sup>

Plenary local authority over the police, combined with complex viewpoints about policing, would seem to indicate that local legislatures would be appropriate fora in which all residents—especially Black residents—could make their voices heard through representation, and make advancements in one of the most vexing issues concerning public life. But local legislatures often fail to live up to that ideal, and their small size may be part of the problem. Consider that at the time of the killing of Michael Brown, the six-member city council of Ferguson, Missouri had only one Black member, while the city’s population was two-thirds Black.<sup>226</sup> Similarly, a study by the think tank Demos, based on 2011 municipal survey data, reported that there were five respondent cities that were majority Black in population and had zero Black legislators.<sup>227</sup> These cities all had micro-legislatures of either five or six members.<sup>228</sup> These are the most extreme cases, where there was complete non-representation even in the case of a majority population group. But the phenomenon is generally observable. Demos summarized the data by concluding that Black residents of the respondent localities were underrepresented in their local legislatures eleven times more often than were white residents.<sup>229</sup> How can those

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<sup>225</sup> Lydia Saad, *Black Americans Want Police to Retain Local Presence*, GALLUP (Aug. 5, 2020), <https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx> [<https://perma.cc/V9FW-R9YW>] (“When asked whether they want the police to spend more time, the same amount of time or less time than they currently do in their area, most Black Americans -- 61% -- want the police presence to remain the same.”).

<sup>226</sup> Karen Shanton, *The Problem of African American Underrepresentation in City Councils*, DEMOS (Oct. 30, 2014), [https://www.demos.org/research/problem-african-american-underrepresentation-city-councils#footnoteref2\\_nuipnfq](https://www.demos.org/research/problem-african-american-underrepresentation-city-councils#footnoteref2_nuipnfq) [<https://perma.cc/K9RD-CTBP>].

<sup>227</sup> *Id.* at fig.3.

<sup>228</sup> See, e.g., *Elected Officials*, CITY OF VIENNA, <https://www.cityofvienna.org/ElectedOfficials.aspx> [<https://perma.cc/GN2L-T72B>] (last visited Aug. 28, 2022) (five-member board in Vienna, Georgia); *Board Meeting Minutes Held by the Board of Trustees of the Village of Riverview* (Jan. 28, 2021), <http://www.riverviewmo.org/uploads/Administration/Minutes/2021/BM1-21.pdf> [<https://perma.cc/8QKN-HRWY>] (five-member board in Village of Riverview, Missouri); *About the City Council*, CITY OF CLARKSTON, <https://www.clarkstonga.gov/about-city-council> [<https://perma.cc/U59G-G6X7>] (last visited Aug. 28, 2022) (six-member board in Clarkston, Georgia); *Mayor & Commissioners*, TOWN OF LAKE PARK, FLA., <https://www.lakeparkflorida.gov/government/departments/mayor-commissioners> [<https://perma.cc/T7FX-RLWT>] (last visited Aug. 28, 2022) (six-member board in Lake Park, Florida); *City Commission*, N. LAUDERDALE, [https://www.nlauderdale.org/quick\\_links/city\\_commission/index.php](https://www.nlauderdale.org/quick_links/city_commission/index.php) [<https://perma.cc/A85N-LYD6>] (last visited Aug. 28, 2022) (five-member board in North Lauderdale, Florida).

<sup>229</sup> See Shanton, *supra* note 226 (“And, though the gap between the absolute numbers of underrepresented whites and African Americans is striking, it doesn’t capture the full scope of the disparity. Whites outnumber African Americans 5-to-1 in the communities examined for this report so their smaller absolute numbers are also a smaller share of a larger total population. Just 1.5 percent of whites in the municipalities in the International



who are most affected by policing influence policing if they do not have seats at the table when policing policy is made? And how can such exclusion go unnoticed?

Monica Bell has theorized that, with respect to policing, communities of color suffer from something greater than a legitimacy-perception problem. They suffer, Bell writes, from “legal estrangement” in which there is “symbolic community exclusion” from the group of those who consider themselves to be protected by the law.<sup>230</sup> This sentiment is best explained by Bell in her recounting of the views of a Baltimore high schooler named Shawna:

Although Shawna sees the law and its enforcers as worthy of obedience as a theoretical matter, she does not believe that law enforcement officials see her, and people like her, as a true part of the polity. She is nothing more than a “thug.” This understanding of her group’s place in the world does not lead to lawbreaking or noncooperation, as a legitimacy perspective might predict. Yet her words nonetheless reveal a cleavage, or estrangement, from the enforcers of the law. Her story reveals that the empirical outcome that legitimacy theory is best used to explain is the wrong outcome: Shawna’s problem is not noncompliance, but symbolic community exclusion.<sup>231</sup>

Bell’s response to this phenomenon is a call for “structural reform” with “attention to group societal membership . . . .”<sup>232</sup> While she was not thinking of legislative size directly, one can see how a larger, more inclusive legislature at the local level—where policing is controlled—would help to “dismantle legal estrangement.”<sup>233</sup> One cannot be sure what communities of color want with respect to police presence and policy, but one *can* be sure that these communities want to have a seat at the table when the decision is made.

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City/County Management Association’s (ICMA) sample have local councils that don’t represent them. By contrast, 16.5 percent of African Americans in these municipalities are underrepresented. So, approximately one in every six African Americans lacks full representation on his or her local council, compared to just one in 66 whites.”).

<sup>230</sup> Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2099 (2017); *id.* at 2066–67 (“I introduce the concept of *legal estrangement* to capture both legal cynicism—the subjective ‘cultural orientation’ among groups ‘in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety’—and the objective structural conditions (including officer behaviors and the substantive criminal law) that give birth to this subjective orientation.” (quoting David S. Kirk & Andrew V. Papachristos, *Cultural Mechanisms and the Persistence of Neighborhood Violence*, 116 AM. J. SOC. 1190, 1191 (2011))).

<sup>231</sup> *Id.* at 2099.

<sup>232</sup> *Id.* at 2131.

<sup>233</sup> *Id.* at 2126.

## 2. Case Study: Partisan Minorities in Deep-Red and Deep-Blue Localities

The small size of local legislatures also inhibits representation of political parties that exist as a substantial minority in a local population. In “solid Blue” or “solid Red” localities, the opposing party may have no representation on a local legislature despite the party’s presence in the citizenry, resulting in a sense of alienation from the local political institutions on the part of the excluded group. According to an International City/County Management Association survey, most (approximately 70%) of local legislative elections are nonpartisan.<sup>234</sup> But in the approximately 30% where political parties play a role, micro-legislatures can work to exclude minority parties from having a meaningful voice—and in extreme cases, from having any voice at all. For example, the Los Angeles City Council has 15 seats, with 14 held by Democrats and one by an independent; 20% of the population of Los Angeles, though, is registered as Republicans.<sup>235</sup> The same exclusion of a minority party can be true in small communities. In the borough of Smethport, Pennsylvania (population about 1,400),<sup>236</sup> the eight-person council is all Republican even though 30% of the borough voted Democratic in the 2020 election.<sup>237</sup> This

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<sup>234</sup> INT’L CITY/CNTY. MGMT. ASS’N, 2018 MUNICIPAL FORM OF GOVERNMENT SURVEY – SUMMARY OF SURVEY RESULTS 10 (July 2019), <https://icma.org/sites/default/files/2018%20Municipal%20Form%20of%20Government%20Survey%20Report.pdf> [<https://perma.cc/3DPE-T5YT>] (noting that 69.9% of local general elections do not show the political party affiliation of council candidates on the ballot).

<sup>235</sup> See *Meet Your Government: City Council*, CITY OF L.A., <https://lacity.gov/government/elected-officials/city-council> [<https://perma.cc/3DB6-KFTL>] (last visited Aug. 28, 2022) (providing information about each council member); REPORT OF REGISTRATION AS OF FEBRUARY 10, 2013 – REGISTRATION BY POLITICAL SUBDIVISION BY COUNTY, CAL. SEC’Y STATE 29 (2013), <https://web.archive.org/web/20131103114419/http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-2013/political-sub.pdf> [<https://perma.cc/X67X-AE34>] (last visited Aug. 28, 2022) (providing data that out of 1,817,111 total registered voters in Los Angeles, 289,553 are registered Republican).

<sup>236</sup> *Annual Estimates of the Resident Population for Incorporated Places in Pennsylvania: April 1, 2020 to July 1, 2021*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/popest/2020s-total-cities-and-towns.html> [<https://perma.cc/86G2-DBNV>] (last visited Aug. 28, 2022) (click “Pennsylvania” to access and download the spreadsheet).

<sup>237</sup> Park et al., *supra* note 23; see also Matthew Bloch, Larry Buchanan, Josh Katz, & Kevin Quealy, *An Extremely Detailed Map of the 2016 Election*, N.Y. TIMES (July 25, 2018), <https://www.nytimes.com/interactive/2018/upshot/election-2016-voting-precinct-maps.html#9.00/41.809/-78.446> [<https://perma.cc/2BZM-TW3J>] (noting that 23% of Smethport voted for Hillary Clinton in 2016). Despite the shortcomings of this proxy, I use county level data for party membership since Pennsylvania appears to not keep sub-county level data on political party registration. The county that Smethport is in—McKean—has a Democratic population of approximately 24%. See *Voting & Election Statistics: Current Registration Statistics*, PA. DEP’T STATE, <https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx> [<https://perma.cc/XM7V-C8GR>] (last visited Aug. 28, 2022) (providing data that 5,959 out of 24,937 registered voters

underrepresentation and, in some cases, non-representation, communicates to the excluded party's members that their local government does not speak for them.

Partisan underrepresentation or non-representation becomes especially problematic when local legislatures enact ordinances that are designed to signal fealty to a plank of a national party's platform. One could find many examples of this signaling phenomenon,<sup>238</sup> and I will mention only one here: the movement for "sanctuary cities for the unborn."<sup>239</sup> Spurred on by the advocacy of a nonprofit leader in Texas, a number of small towns in Red states have adopted ordinances flagging strong opposition to abortion via various measures.<sup>240</sup> In November 2021, the seven-person micro-legislature of the city of Lebanon, Ohio (population approximately

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are Democrats) (click "voter registration statistics by county" to access and download the spreadsheet); *Borough Council*, SMETHPORT PA., <https://smethportpa.org/boro/borough-council-members/> [<https://perma.cc/HV9A-83FC>] (last visited Aug. 28, 2022) (providing names of all eight current council members in 2022); see also Nathan Muller, *High Voter Turnout in Smethport*, SMETHPORT PA. (May 20, 2015), <https://smethportpa.org/high-voter-turnout-in-smethport/> [<https://perma.cc/99KH-NS56>] (indicating Yingling as republican); Marcie Schellhammer, *Busy Primary Season in McKean Co.*, THE BRADFORD ERA (Mar. 14, 2019), [https://www.bradfordera.com/news/busy-primary-season-in-mckean-co/article\\_c7ff5032-45fd-11e9-8735-87aaf5e65a17.html](https://www.bradfordera.com/news/busy-primary-season-in-mckean-co/article_c7ff5032-45fd-11e9-8735-87aaf5e65a17.html) [<https://perma.cc/DB6J-R37P>] (indicating Ognen as republican); Official Absentee Ballot, Smethport Borough, County of McKean, Commonwealth of Pennsylvania, Municipal Election Held on the 2nd Day of November, 2021, [https://cms6.revize.com/revize/mckeanpa/departments/voter\\_registration\\_and\\_elections/docs/Smethport%20Boro.pdf](https://cms6.revize.com/revize/mckeanpa/departments/voter_registration_and_elections/docs/Smethport%20Boro.pdf) [<https://perma.cc/2VB3-E45N>] (indicating Hill as Republican).

<sup>238</sup> An example includes the movement to create Second Amendment "Sanctuary Cities" by passing ordinances granting gun rights that are clearly preempted by state law. See John M. Glionna, *In Needles, a 'Sanctuary' for Gun Owners — And 'A Little Jab in the Eyes' for California*, CAL. MATTERS (July 16, 2019), <https://calmatters.org/politics/2019/07/needles-sanctuary-guns-california-2nd-amendment-arizona-nevada-law/> [<https://perma.cc/6SRT-CA9H>] ("[Councilman] Terral fought back. He spearheaded a resolution, passed last week by the council, that declared Needles a 'Second Amendment Sanctuary,' a place where both California gun owners and those visiting from out-of-state can expect lenient enforcement on Golden State's rules governing, for example, ammunition and concealed carry permits. Terral even chose wording to take a swipe at Democratic legislators in Sacramento, and in cities such as San Francisco and Los Angeles, who have declared 'sanctuary' policies limiting the involvement of state and local law enforcement in the pursuit of undocumented immigrants targeted by the Trump Administration. 'With the gun resolution, I purposely chose the word 'sanctuary' to take a stab at all the liberals,' said Terral. 'It was a little jab in the eyes.'").

<sup>239</sup> Jessica Glenza, *The Tiny American Towns Passing Anti-Abortion Rules*, THE GUARDIAN (Apr. 27, 2021, 2:00 AM), <https://www.theguardian.com/world/2021/apr/27/ustiny-towns-anti-abortion-ordinances> [<https://perma.cc/3DZ3-SU4Y>].

<sup>240</sup> See *id.* (noting first ordinance passed in Waskom, Texas, that "approved a measure to punish doctors and anyone who 'aids and abets' an abortion with a \$2,000 fine.").

21,000)<sup>241</sup> voted unanimously to “outlaw[] abortion” within city limits.<sup>242</sup> Violations are punishable as misdemeanors with up to six months imprisonment, and they appear to target only doctors performing the operation (not the women undertaking it).<sup>243</sup> This clearly unconstitutional ordinance (when enacted)<sup>244</sup> was symbolic in nature—a flexing of Republican political muscles on the local level.

While the city council in Lebanon is technically nonpartisan, the partisan nature of the ordinance was immediately apparent to observers. The only Democrat among the seven members (and the only woman)—Krista Wyatt—resigned in protest before the vote was taken—leaving Lebanon’s substantial minority of Democrats (likely at least one quarter of the population)<sup>245</sup> without representation.<sup>246</sup> Her resignation statement illustrates well the alienation a minority party can feel when a micro-legislature impacts representation in a locality: “There is a core group of people who have hijacked the council to force their personal, political and religious views on the entire citizenship of Lebanon. It is not fair to the citizens and is not the role of a City Council member to be a moral compass.”<sup>247</sup> A local activist noted that the nonprofit leader from Texas is “looking for [towns] with an extreme Republican city council and Trump supporters.”<sup>248</sup> She recounted that one of the council members at the adoption meeting responded to a citizen who opposed the ordinance by saying, “[T]his is a conservative town and you should have done your research before you moved here.”<sup>249</sup> The activist concluded: “If all I’m going to get is resistance from a now completely white male extremist rightwing council—because that’s what this city elected—I’m not wasting my time on Lebanon.”<sup>250</sup>

Micro-legislatures can result in the non-inclusion or extreme under-inclusion of minority interests on the legislative body, and the result is a feeling of alienation from the institution and a corresponding reduction in sociological legitimacy. This

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<sup>241</sup> Heidrichs, *supra* note 24.

<sup>242</sup> LEBANON, OHIO, ORDINANCE NO. 2021-053 (2021), <https://www.scribd.com/document/509488876/ORDINANCE-2021-053-of-Lebanonl> [<https://perma.cc/P6PC-6EDK>]; *Minutes for the Lebanon City Council Meeting*, LEBANON CITY COUNCIL (May 25, 2021), <https://cms8.revize.com/revize/lebanonoh/05-25-2021.pdf> [<https://perma.cc/5W4F-83XJ>].

<sup>243</sup> Brook Endale & Rachel Smith, ‘Sanctuary City for the Unborn’: Lebanon Is First City in Ohio to Ban Abortions, CIN. ENQUIRER (May 26, 2021, 2:01 PM), <https://www.cincinnati.com/story/news/2021/05/25/lebanon-city-council-vote-abortion-ban/7434551002/> [<https://perma.cc/LX57-HCXR>].

<sup>244</sup> See *id.* (noting the ACLU’s comment and analysis contained therein).

<sup>245</sup> Ohio does not publicize sub-county voter registration data, so the precise number of Democrats in the locality is not known. However, consider the following proxy: in the 2020 presidential election, even in the reddest of Lebanon’s precincts, the Democratic vote was 27%. Park et. al., *supra* note 23.

<sup>246</sup> Ed Richter, *Lebanon Council Fills Vacant Seat*, J. NEWS (June 23, 2021), <https://www.journal-news.com/local/lebanon-council-fills-vacant-seat/P62R6IKSUJAGXDKWD4VPFVXW5E/> [<https://perma.cc/LQ3X-K72L>]; Heidrichs, *supra* note 24.

<sup>247</sup> Heidrichs, *supra* note 24.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

is in addition to the observations made earlier regarding the concrete impacts that non-inclusion of these interests can have on the laws that are actually passed.

#### CONCLUSION: THE WAY FORWARD

Local governments in the United States have the power to legislate, but the institutions that create local law are micro-legislatures with an average size of four members. A legislature of this size is unheard of at any other level of American government or in any other nation. Legislatures are almost always large assemblies, usually with over one hundred members, and for good reason. Only an assembly can satisfy two requirements of a properly designed legislature: that it be representative and democratic. Mainstream normative political theory, when applied to a micro-legislature, reveals defects on both counts. Micro-legislatures cannot be descriptively representative of the diverse political communities that characterize modern societies, and lack of descriptive representation results in a failure of inclusion that is fatal to true deliberation—a touchstone of democratic legitimacy.

If one accepts these conclusions, the path forward for local government depends on the appetite one has for reform. A full discussion of the solutions to this problem goes beyond the scope of the present Article. However, it is worth briefly mentioning three possible options.

At the most extreme end of the spectrum, reformers might decide that local micro-legislatures should lose the power to make law. Given their origins and primary purpose as service-providing boards, one might conclude that they should be confined to these powers. But this would be extreme indeed—it would be the end of local government and home rule as we know it.<sup>251</sup>

At the other end of the spectrum, and also extreme, is to radically increase the size of local legislatures until they conform to the standard size. Were a four-person legislature to begin doubling itself every two years, it would achieve this within ten years (reaching 128 members). But perhaps this too would result in a dramatic unsettling of institutional structure and it might have unintended consequences.

Between these extremes lies a middle ground: one could change the scrutiny that the judiciary gives to the legislation that comes out of them. The primary analytical lens through which local ordinances are reviewed by state judges is the doctrine of preemption—whether the local ordinance can survive when viewed in the context of state law (which never yields), and given the powers the state has granted to the locality.<sup>252</sup> Preemption doctrines flow from a recognition of the inherently subordinate status of local governments as creatures of state law,<sup>253</sup> and

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<sup>251</sup> While I hesitate to take a position on the issue of remedies, I will tentatively note that I am mostly opposed to this option. It is not local legislation *as such* that we have identified as a problem, but instead the institution that is creating it.

<sup>252</sup> See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114–16 (2007) (explaining how “a city’s authority in a particular area [can be] supplanted by state law”).

<sup>253</sup> “Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.” *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

gives teeth to a background skepticism of exercises of local power. If local legislation, unlike state law, emanates from an unrepresentative and undemocratic micro-legislature, one might demand greater judicial scrutiny of these ordinances and more preemption.<sup>254</sup>

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<sup>254</sup> Those who oppose the judicial invalidation of legislation normally do so because of its “countermajoritarian” effects. Indeed the standard case against judicial invalidation of statutes is called the “countermajoritarian difficulty.” See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334–35 (1998). But this idea is premised on the comparative democratic legitimacy of the legislature that is being thwarted. Micro-legislatures undercut this presumption. Moreover, in the context of preemption, this judicial invalidation works to protect and advance a state law policy that was enacted by a normal-sized legislature. Here, therefore, judicial “activism” through preemption—often criticized by localists, see, e.g., Davidson & Reynolds, *supra* note 79, at 20, is in service to democracy. One of the most important responses to the so-called “counter-majoritarian difficulty,” after all, is the theory of “representation reinforcement” crafted by John Hart Ely. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87 (1980); John Hart Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 453 (1978). Non-representative local micro-legislatures seem like excellent targets for representation reinforcement. See generally *id.*