

OVERRULED BY HOME RULE: THE PROBLEMS WITH NEW JERSEY’S LATEST EFFORT TO CONSOLIDATE MUNICIPALITIES

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I. INTRODUCTION

In the spring of 1997, the national press descended on the rural hamlet of Pahaquarry Township, New Jersey. Photographers and reporters packed into an abandoned one-room schoolhouse to watch Pahaquarry's two elected officials debate the future of their community.¹ It was the town's most noteworthy event in thirty years—the biggest since the federal government evicted most of its residents in the 1960s to make room for a proposed dam project on the Delaware River.² Since then, Pahaquarry's population had plummeted from several hundred to six, and now the half dozen remaining townspeople were considering whether they should disband the municipality and merge with neighboring Hardwick.³

The media marveled at the novelty of a tiny township facing its demise.⁴ But the more remarkable aspect of the story was how long the Pahaquarry residents held out. Every indication suggested that the community could no longer support itself. Pahaquarry's existence actually violated state law—New Jersey requires each municipality to elect at least three councilpersons, but only two residents in the township met the eligibility criteria⁵—and yet the town proudly continued on.⁶ If home rule is “New Jersey's religion,” as former Governor Brendan Byrne once said, then Pahaquarry's struggle for existence bordered on fanaticism.⁷

It took five years for the Township Committeepersons to negotiate a consolidation agreement with their Hardwick

¹ Mike Frassinelli, *Pahaquarry's End*, STAR-LEDGER, Feb. 15, 2006, at 17.

² Judy Peet, *Bitterness Runs Through It*, STAR-LEDGER, Nov. 23, 2003, at 19.

³ Keith Ryzewicz, *Towns' Merger Faces Obstacles*, COURIER NEWS, Jan. 23, 1999, at 1A.

⁴ *Id.*; Art Charlton, *Tiny Pahaquarry Township Loses 30-Year Struggle to Survive*, STAR-LEDGER, July 3, 1997, at 36.

⁵ Of the six residents, two were children under 18, and another two were their parents, who worked for the Federal Park Service and thus were barred from serving on municipal boards. This left only Jean Zipser, who served as mayor, and Harold Van Campen, who served as councilman. Art Charlton, *Pahaquarry No More: A Town of 7 Gives Up Its All to Neighbor Hardwick*, STAR-LEDGER, June 29, 1997, at 19.

⁶ Mike Frassinelli, *With Zipser's Death, the Ghost of Pahaquarry Must Also Fade*, STAR-LEDGER, Feb. 15, 2006, at 20.

⁷ BARBARA SALMORE & STEPHEN SALMORE, *NEW JERSEY POLITICS AND GOVERNMENT: SUBURBAN POLITICS COMES OF AGE* 201 (2d ed. 1998).

counterparts.⁸ Each side broke off talks more than once, with officials quarreling over who would take responsibility for road maintenance and the costs of educating the two teenage children living in Pahaquarry.⁹ The proposed merger eventually required federal legislation to streamline the process, as well as over \$27,000 in state subsidies to cover administrative costs.¹⁰ Ten years later, Leonard Lance, the state senator who facilitated the merger, still remembered the headaches. “It was like pulling teeth,” he explained.¹¹

* * *

A century’s worth of policy experts, government commissions, and reform-minded politicians have concluded that New Jersey has too many towns. They have filled the state’s archives with reports documenting the costs of fragmentation in the Garden State: the inability to address regional problems; the inefficiency of redundant municipal services; and the inequalities created by residential segregation.¹² But while New Jersey has 566 municipalities—the most per capita of any state¹³—only nine sets of towns have considered merging since 1952 and only one pair, Pahaquarry and Hardwick, has actually consolidated into a single

⁸ David W. Chen, *A New Jersey Town Votes Itself Nonexistent*, N.Y. TIMES, Apr. 28, 1997, at B4.

⁹ Art Charlton, *Pahaquarry Entering Into Its Final Days*, STAR-LEDGER, Apr. 24, 1997, at 33; Mary Jane Fine, *A Township Fades from the Map; It’s the End For Us, Mayor Laments Pahaquarry’s Forced Merger*, BERGEN REC., Apr. 23, 1997, at A03; Art Charlton, *Hardwick Tries to Sell Merger to Residents*, STAR-LEDGER, Mar. 7, 1997, at 35.

¹⁰ Charlton, *supra* note 4, at 36.

¹¹ Jeremy Peters, *Lips Move, but No Mergers Result*, N.Y. TIMES, Nov. 18, 2007, at NJ2.

¹² See, e.g., N.J. DEP’T OF CMTY. AFFAIRS, LOCAL GOVERNMENT SHARED SERVICES AND MUNICIPAL CONSOLIDATION: A REPORT AND AN AGENDA (1995) [hereinafter LOCAL GOVERNMENT SHARED SERVICES AND MUNICIPAL CONSOLIDATION]; N.J. COUNTY AND MUN. GOV’T STUDY COMM’N, CONSOLIDATION: PROSPECTS AND PROBLEMS (1972) [hereinafter CONSOLIDATION: PROSPECTS AND PROBLEMS]; N.J. COUNTY AND MUN. GOV’T STUDY COMM’N, CREATIVE LOCALISM (1968) [hereinafter CREATIVE LOCALISM]; N.J. STATE PLANNING BD., FIRST ANNUAL REPORT OF PROGRESS (1935).

¹³ Jon Shure, *End New Jersey’s Fragmentation*, CITY BELT, Feb. 13, 2007.

unit.¹⁴ These experts have learned it is far easier to create new towns than it is to eliminate them.¹⁵

In the summer of 2006, Governor Jon Corzine launched the latest effort to tackle this dilemma. Addressing a joint special legislative session, the governor called on New Jersey's elected officials to streamline the state's Byzantine municipal structure.¹⁶ He did not want another commission report for the archives; he wanted "action, action, action—now."¹⁷ He called for the creation of a "Reengineering Fund" to provide financial incentives "so powerful" that local governments would have "little economic choice but to share services and reduce costs."¹⁸ He urged the legislature to enact reforms that would facilitate municipal consolidation.¹⁹

State Senators Joseph Kyrillos and Bob Smith took up the challenge. Their idea was based on the federal government's procedure for closing military bases²⁰—they proposed creating an independent, ten-member commission to review the state's 566

¹⁴ Tom Hester, *Tax-cut Panel Focuses on Consolidation*, STAR-LEDGER, Aug. 9, 2006, at 17; John McAlpin, *Tax Panel Cites Need to Merge Services; Lawmakers Take Aim at Home Rule Tradition*, BERGEN REC., Aug. 9 2006, at A01.

¹⁵ Tom Hester, *How New Jersey Became the Land of So Many Towns - and Taxes*, STAR-LEDGER, July 26, 2006, at 1.

¹⁶ Dunstan McNichol & Tom Hester, *Tax Reformers Pursue the Urge to Merge*, STAR-LEDGER, Nov. 15, 2006, at 15.

¹⁷ Corzine did not mince words. He likened the state's municipal fragmentation to one of "the four horsemen of the apocalypse." Jon Corzine, Governor of N.J., Address to Joint Special Legislative Session as Prepared for Delivery (July 28, 2006), available at http://www.nj.us/governor/news/speeches/legislature_20060728.html.

¹⁸ *Id.*

¹⁹ Jonathan Tamari, *Assembly Leader Vows to Implement Government Reforms*, DAILY REC. (Parsippany, N.J.), Oct. 12, 2006, at NEWS02, available at <http://www.app.com/apps/pbcs.dll/article?AID=/20080409/NEWS0301/804090306/1008/news0301>.

²⁰ At the end of the Cold War, most military experts agreed that the United States needed to contract the size of its armed forces, but any effort to downsize was blocked by the hundreds of Congressmen with bases in their districts. DAVID LOCKWOOD, CONG. RES. SERV., CRS REPORT FOR CONGRESS: MILITARY BASE CLOSURES: TIME FOR ANOTHER ROUND? 13 (2001). Representative Dick Armey first proposed the Base Realignment and Closure commissions to, in essence, save Congress from itself—to remove politics from the closure process, and to create a non-partisan panel that would take the blame when angry constituents learned that a base in their community was shutting down. Richard Armey, *Base Maneuvers*, 43 POL. REV. 70 (1988); Richard Armey & Barry Goldwater, *Close the Obsolete Military Bases*, WASH. POST, May 7, 1987.

municipalities and recommend which ones should consolidate or share services. The panel, to be called the Local Unit Alignment, Reorganization, and Consolidation (LUARC) Commission, would prepare an annual report recommending a slate of municipal mergers, which the state legislature would be required to either approve or reject on an up-or-down vote. If legislators approved the package, or if they failed to act within forty-five days, the reforms would go into effect automatically.

Proponents such as Kyrillos and Smith explained that the goal was to remove politics from what had always been highly political debates about municipal consolidation. The proposal vested much of the decision-making power in an entity insulated from electoral pressures, providing legislators with political cover for unpopular recommendations. In theory, technocrats would make the difficult decisions, not politicians, and so the Commission's policy proposals would reflect the best interests of the state rather than the parochial demands of local officials.²¹ Just as the federal Base Realignment and Closure (BRAC) commissions had succeeded in closing over 100 military bases between 1989 and 2005,²² supporters hoped that this bill would allow experienced policymakers to implement much-needed reforms with minimal interference from special interests.²³

But the idea, as it was initially proposed, never became law. Before passage, rival legislators modified Kyrillos and Smith's bill, adding a provision that required voter approval before consolidation plans went into effect. Under the new proposal, voters in each municipality targeted for consolidation now had final say over any proposed mergers.²⁴ Given New Jersey residents'

²¹ Joseph M. Kyrillos, Jr., *Shared Services, Consolidation Can Bring Tax Relief*, ASBURY PARK PRESS, Oct. 1, 2006, at 3C (stating that final recommendations should be presented to the legislatures to "compel and enforce mergers").

²² 2005 DEF. BASE CLOSURE AND REALIGNMENT COMM'N, FINAL REPORT 316 (2005); see also LILLY J. GOREN, *THE POLITICS OF MILITARY BASE CLOSINGS: NOT IN MY DISTRICT* 68-69 (2003).

²³ Kyrillos, *supra* note 21.

²⁴ Residents in each of the municipalities considering consolidation must pass the law by referendum. N.J. STAT. ANN. § 52:27D-508 (Supp. 2008) ("Upon the taking effect of a consolidation or shared services proposal . . . each recommendation included therein shall be put before the affected voters at the next general election and shall become effective only upon its adoption by a majority of the voters of each affected municipality.") This procedure is no different than the one created by the

long-standing antipathy to such measures, the new provision alone heavily undermined the LUARC Commission's ability to overcome the core obstacle to consolidation. Senator Kyrillos derided the amendment as a poison pill designed to deter municipal mergers, and withdrew his sponsorship of the bill before its final vote.²⁵ Both houses of the state legislature eventually passed the modified plan by overwhelming majorities.²⁶

The debate over the LUARC Commission was a classic case of what some political scientists called a "collective dilemma."²⁷ To New Jersey's legislators, the perceived costs of municipal consolidation were direct, immediate, and visceral, while the perceived benefits were broad and diffuse. Opponents of consolidation were thus far more likely to rally against sweeping reforms than proponents were likely to advocate for it.²⁸ As a result, parochial politicians concerned with protecting home rule for themselves and their constituents triumphed over those who sought a bold solution to one of the state's oldest and most systemic problems.²⁹

Municipal Consolidation Act of 1977, which still governs consolidations in New Jersey today.

²⁵ Kyrillos introduced his own bill on December 11, 2006 that would have withdrawn funding from any municipality which rejected consolidation after being recommended to do so by the Local Unit Commission. It never came up for a vote. S. 1, 212th Legis. (N.J. 2006); Joseph M. Kyrillos, Jr., *Corzine's Budget Fails to Fix State's Financial Woes*, ASBURY PARK PRESS, Op-Ed., Mar. 22, 2007 (referring to the final version of the law as a "watered-down version of my original proposal"); GREGORY FEHRENBACH, N.J. STATE LEAGUE OF MUNICIPALITIES, A LAW TO SUGGEST AND ENCOURAGE LOCAL GOVERNMENT CONSOLIDATION (2007), http://www.njslom.org/mag1107_article_pg110.html. Previously, Sen. Kyrillos suggested that the state legislature should have final say over consolidations, with the authority to vote up-or-down on the Local Unit Commission's recommendations without referenda in the affected communities. Kyrillos, *supra* note 21.

²⁶ A. 15, 212 Legis. (N.J. 2006) (enacted); *see also* Valerie L. Brown & D. Todd Sidor, *New Laws*, N.J. LAWYER, Apr. 9, 2007, at 14; Deborah Howlett, *Corzine Enacts Key Parts of Tax Reform*, STAR-LEDGER, Mar. 16, 2007, at 19; Ronald Smothers, *Trenton Assembly Votes to Ease State's Property Tax Burden*, N.Y. TIMES, Jan. 30, 2007, at B5.

²⁷ Kenneth R. Mayer, *Closing Military Bases (Finally): Solving Collective Dilemmas Through Delegation*, 20 LEGIS. STUD. Q. 393, 396 (1995).

²⁸ *Id.*

²⁹ Tamari, *supra* note 19.

To be fair, the new LUARC Commission serves a valuable purpose, even in its weakened form.³⁰ Although it is still in the early stages of hiring staff and beginning research, the Commission will have opportunities to influence the discussion on municipal reform in coming years. In particular, the Commission's annual reports will identify specific municipalities that would benefit from consolidation or shared services—these reports alone will help to focus the discussion on tangible policy proposals and force some of New Jersey's tiniest communities to finally engage in a serious discussion of an issue they have long ignored.³¹ Depending on the Commission's leadership, the entity can also serve as a clearinghouse for policymakers and citizens seeking information about streamlining municipal government. Over time, these measures can help build popular support for broader measures, especially if the Commission's activities are coordinated with Governor Corzine's on-again, off-again efforts to cut state aid for municipalities with fewer than 10,000 residents.³²

But, despite these possibilities, it is clear that legislators nonetheless missed an opportunity for genuine reform. By allowing municipalities to veto the Commission's recommendations, the state legislature failed to create a truly

³⁰ The new procedure for consolidating municipalities is also a slight improvement over the old one. The Municipal Consolidation Act of 1977 involved a four-step process. First, two or more neighboring towns had to agree to consider the possibility of consolidation. Second, each municipality then held a referendum on whether to create a "study commission," and if the measure passed, five residents would serve on the panel. Alternatively, each municipality could adopt an ordinance or resolution expressly creating the consolidation commission. Third, the ad hoc commission had ten months from the date of its formation to study the costs and benefits of a merger and file a final report. If a majority of the commissioners from each participating municipality voted in favor of proceeding, only then would the measure return to the voters. Finally, the residents of each town held a second referendum to decide whether they actually wished to merge with their neighbor. 1977 N.J. Laws Ch. 435 (C.40:43-66.35).

The LUARC Act essentially bypasses the first part of this process: rather than waiting for pairs of towns to create their own ad hoc panels to study the matter, the permanent Commission identifies the municipalities that would most benefit from merger and puts the question up for a direct vote. In theory, the Local Unit Commission can force towns to begin a conversation about consolidation even where they have been reluctant to do so in the past. 2007 N.J. Laws Ch. 54.

³¹ See, e.g., *First Wave of Tax Reforms Has Pros - And Cons*, COURIER NEWS, Mar. 19, 2007, at Op01.

³² Tom Hester, *Corzine Proposes Cuts in Municipal Aid*, STAR-LEDGER, Feb. 26, 2008.

effective solution. As this Article notes, there are numerous obstacles to reforming New Jersey's archaic municipal structure, and state leaders will only succeed at creating a more efficient system of local government if they can overcome the entrenched interests that oppose consolidation.³³

This Article proceeds in five parts. It begins by asking why municipal consolidation is necessary, and explains how the costs of operating so many local governments have hurt the state's residents.³⁴ It then considers the historical causes of New Jersey's fragmentation, reviewing events from the state's settlement in the 1700s and continuing to the middle of the twentieth century. It next analyzes the modern political history of consolidation and considers why opposition to consolidation remains so strong.

The Article turns then to other examples of "collective dilemmas."³⁵ It studies cases where other governments have overcome similar obstacles, including the recent fights to close military bases in the United States and to consolidate municipal units in Scandinavia.³⁶ Finally, the Article considers what New Jersey must do in order to fix its broken system of local government. It closes by discussing the weaknesses of the LUARC Commission and arguing why the state should enact a more muscular municipal consolidation act.

II. MUNICIPAL CONSOLIDATION: WHY DOES IT MATTER?

Alan Karcher, former speaker of the state assembly and a strong proponent of consolidation, spent years chronicling what he called New Jersey's "multiple municipal madness." His examples of the state's fragmented municipal structure demonstrate the absurdity of New Jersey's system of local

³³ Suzanna M. Leland & Gary A. Johnson, *Consolidation as a Local Government Reform: Why City-County Consolidation Is an Enduring Issue*, in CITY-COUNTY CONSOLIDATION AND ITS ALTERNATIVES: RESHAPING LOCAL GOVERNMENT LANDSCAPE 25–50 (Jered B. Carr & Richard C. Feiock eds. 2004).

³⁴ See *id.*

³⁵ Mayer, *supra* note 27.

³⁶ Robert Morlan, *Territorial Reorganization and Administrative Reform in Denmark*, in LOCAL GOVERNMENT REFORM AND REORGANIZATION 31–41 (Arthur B. Gunlicks ed. 1981).

government.³⁷ He noted, for instance, that Bergen County contains *seventy* municipalities, each with an average size of less than four square miles.³⁸ Shrewsbury Township, once one of the largest municipalities in the state, has subdivided over a dozen times in its history, splintering into seventy-five separate towns and shrinking from its original 400,000 acres to less than a tenth of a square mile.³⁹ Teterboro, in Bergen County, is nothing more than eighteen residents and a regional airport, while Tavistock, in Camden County, houses an exclusive golf course and twenty-eight residents.⁴⁰ The former uses an airplane hangar as its “city hall” and the latter uses a shed behind the green on the eighth hole.⁴¹ Today, the state has more towns than Rhode Island, Delaware, Maryland, Nevada, Wyoming, New Mexico, Arizona, and Hawaii combined.⁴²

Karcher argued that this tendency towards smaller and smaller units is a central part of New Jersey’s political tradition. If home rule is a religion, then the right to preserve one’s hometown, no matter how small, is at the core of its theology.⁴³ But, as Karcher discussed at length, this subdividing has hurt New Jersey immeasurably. Before considering the benefits and drawbacks of municipal consolidation, it is worth considering the many problems created by municipal fragmentation.

The most commonly discussed costs are economic. Towns are expensive to operate. Each municipality is a government unit with certain obligations to its residents. Such obligations include the

³⁷ This also serves as the title of Karcher’s book on the history of municipal incorporation in New Jersey. Written after he retired from politics and shortly before his death in 1999, it is generally considered the authoritative source on this aspect of state history. See generally ALAN KARCHER, *NEW JERSEY’S MULTIPLE MUNICIPAL MADNESS* (1998). See also Richard Trenner, *One Lawmaker’s Ideas on Peeling Away Layers of Redundant Services*, N.Y. TIMES, Sept. 27, 1998, at NJ1.

³⁸ KARCHER, *supra* note 37, at 87.

³⁹ *Id.* at 33–34.

⁴⁰ New Jersey—Place and County Subdivision, 2007 Population Estimates, U.S. Census Bureau, available at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US34&-_box_head_nbr=GCT-T1-R&-ds_name=PEP_2007_EST&-_lang=en&-format=ST-9S&-mt_name=PEP_2007_EST_GCTT1_ST9&-sse=on.

⁴¹ KARCHER, *supra* note 37, at 94–95, 115–17.

⁴² Eleanor Barrett & Cathy Bugman, *Merger Bandwagon Is Gaining Speed*, STAR-LEDGER, Feb. 11, 1999, at 23.

⁴³ SALMORE & SALMORE, *supra* note 7.

duty to assess property, maintain local roads, provide policing and fire protection, dispose of solid waste, and to provide a variety of basic services. If towns cannot offer these services on their own, they must contract with another municipality, a regional authority, or a private agency that can. These services require varying amounts of manpower, equipment, and capital financing, and each one achieves a point of maximum efficiency when serving populations of different sizes. The smaller the town, the less likely it is that the municipality can deliver its services in an efficient, cost-effective manner.⁴⁴

Consider, for example, local fire departments. There is usually a base requirement of equipment and personnel that each fire department must possess in order to operate adequately; anything above that level is unnecessary.⁴⁵ This is not an issue in large cities where fire departments have the resources to buy basic necessities and serve the entire community. However, when the region is highly fragmented, as it is in New Jersey, each town winds up with its own fire department and the basic capital expenses required to fund the department. Thus, hundreds of tiny municipalities must buy their own fire trucks, hazmat suits, and whatever else their firemen need, even though these materials could be used to serve a much larger geographic area. In New Jersey, the redundancies are remarkable: Wildwood Island, a 4.5 square mile resort community with four municipalities, has nine

⁴⁴ This discussion of municipal “efficiency” may be of *constitutional* significance when applied specifically to a town’s educational system. Under the state constitution, the Legislature must provide for a “thorough and efficient” system of free public schools. N.J. CONST. Art. VIII, § IV(1). Historically, the justices of New Jersey Supreme Court—as well as education advocates—have devoted considerable effort interpreting the word “thorough” while mostly ignoring its counterpart, “efficient.” But this latter word holds substantial meaning. See, e.g., Paul Trachtenberg, *Beyond Educational Adequacy: Looking Backward and Forward Through the Lens of New Jersey*, 4 STAN. J. C.R.C.L. (forthcoming 2008); Harriet L. Sepinwall, *The New Jersey Constitution and the 1875 “Thorough and Efficient” Education Amendment*, 59 J. RUTGERS U. LIBR. 57 (2001), available at <http://ejbe.libraries.rutgers.edu/index.php/jrul/article/view/13/38>. One could theoretically argue that the existence of 616 school districts statewide is constitutionally “inefficient,” and that this inefficiency must be remedied by the Legislature through some sort of consolidation process.

⁴⁵ *Uniform Shared Services and Consolidation Act: Hearing on A. 51 Before the J. Legis. Comm. on Gov’t Consolidation and Shared Serv.*, 212th Leg. 16 (2006) (statement of Robert Giorgio, Chief, Cherry Hill Fire Dep’t).

firehouses and more fire trucks than Trenton. Similarly, the seventy towns in Bergen County own more equipment than all of New York City, despite having one-tenth the population.⁴⁶

In an effort to achieve greater efficiencies, municipalities have increasingly turned to shared service agreements—where they contract with a neighboring town or a regional authority to provide the service on a wide scale.⁴⁷ But these shared service agreements do not always solve the towns' problems. If, for example, Caldwell agrees to pick up West Caldwell's garbage, then the residents of the latter become dependent on the former. Residents of West Caldwell can no longer hold their municipal officials accountable for the adequacy of the garbage collection, except insofar as the officials can enforce or renegotiate the contract with Caldwell. If neither town possesses the capacity to collect garbage, then they must join some regional authority to provide the service. But these authorities create an additional layer of bureaucracy with little direct accountability. Oftentimes, the state must provide substantial aid to small municipalities to fund these programs.

There is almost no data on how much these inefficiencies cost New Jersey residents, partly because the state only recently started collecting specific information on municipal services.⁴⁸ A 1970

⁴⁶ Hester, *supra* note 14.

⁴⁷ Part of the problem has been that the state has never provided municipalities with benchmarks on appropriate or efficient levels of spending on various local services. Until recently, most towns have no way of determining how much they spent on services as compared with their neighbors. One of the less controversial aspects of the Local Unit Realignment Act is the provision authorizing the state's Local Finance Board to collect information about municipal service expenses and prepare a "municipal report card" indicating a town's performance relative to efficiency standards, and how its efficiency changes over time. 2007 N.J. Laws, *supra* note 30, § 9a-d. This increased transparency will almost certainly help communities recognize their strengths and weaknesses in providing efficient services. *See also* Keith Ruscitti, *Local Mayors Discuss Shared Municipal Services*, OCEAN CO. OBSERVER, Mar. 23, 2007.

⁴⁸ *See* Hester, *supra* note 14. One of the few redeeming aspects of the new Local Unit Alignment, Reorganization, and Consolidation Act is that it directs the Department of Community Affairs to collect better statewide data about municipal expenses. The state's Local Finance Board will use this data to establish "efficiency benchmarks," which will allow towns to compare their spending with other New Jersey municipalities. 2007 N.J. Laws, *supra* note 30, at § 9a (C.52:27D-18.2). The law also directs the Commission of Community Affairs to issue municipal "report card[s]" that indicate how towns fare on efficiency metrics. *Id.* at § 9d. This type of "grading" system has proved useful in other sectors as a way of encouraging

report provides anecdotal evidence on some of these expenses. At the time, several north Jersey towns formed the Rahway Valley Sewage Authority to handle their sewage treatment. By pooling their resources, these communities paid approximately twenty-three dollars for every million gallons of sewage treated. On the other hand, several Monmouth County towns decided to build their own sewage treatment plants. Matawan, Keyport, and Long Branch, each with their own treatment program, paid over six times more, spending 140 dollars for every million gallons of sewage. The reason was clear: the Rahway Authority achieved economy by running an average of thirty million gallons through its system every day, while the Monmouth County individual town plants averaged less than a million gallons a day.⁴⁹

David Grubb, former mayor of the tiny Park Ridge, identified that most towns employ 1.1 street repairers for every 1,000 residents, although some hire three to four times that number.⁵⁰ Similarly, one community might employ 1.5 police officers for every 1,000 residents, while a neighboring town pays for twice as many.⁵¹ He notes, however, that the state has failed to study these differences or provide local communities with any information about such redundancies.⁵²

Most local planning experts agree that there is a ideal population size—an “optimum service standard”—where a municipality can provide a service at the lowest cost.⁵³ Without

individual actors to improve their performance relative to their peers. See, e.g., Elissa Gootman & Jennifer Medina, *50 New York Schools Fail Under Rating System*, N.Y. TIMES, Nov. 6, 2007; Adam Liptak, *In Students' Eyes, Look-Alike Lawyers Don't Make the Grade*, N.Y. TIMES, Oct. 29, 2007.

⁴⁹ N.J. COUNTY AND MUN. GOV'T COMM'N, JOINT SERVICES: A LOCAL RESPONSE TO AREA WIDE PROBLEMS 3 (1970) [hereinafter JOINT SERVICES, A LOCAL RESPONSE].

⁵⁰ David Grubb, *Bringing a Little Rationality to Public Finances*, BERGEN REC., Dec. 8, 2006, at L15.

⁵¹ *Id.* The town of Paterson, for example, has 2.7 police officers for every 1000 residents. Its neighbor, West Paterson, has only 1.8.

⁵² *Id.*; McAlpin, *supra* note 14, at A01. See also *Law & Order*, STAR-LEDGER, July 11, 2007, at 21 (quoting Somerset County Freeholder Thomas Ciattarelli that, with property taxes continuing to rise, “it’s not clear than [sic] having 19 different police departments in a county of 300,000 people is the way to get the most business-like service.”); Bonnie Delaney, *Central Ocean Towns Mull Pooling Cops*, ASBURY PARK PRESS, Mar. 22, 2007.

⁵³ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 10; CREATIVE LOCALISM, *supra* note 12, at 89.

attempting to determine that figure, it is obvious that many of New Jersey's towns fall well below that number. Tavistock, population twenty-four, and Teterboro, population eighteen, clearly could not exist without numerous shared service agreements and substantial state aid. The same is true for the twenty-six municipalities with fewer than 1000 residents, and most likely for the seventy-four towns with populations below 2000. In fact, the state is so fragmented that less than one-fifth of New Jersey's municipalities have more than 20,000 inhabitants.⁵⁴

All of the costs of operating these towns are passed, directly or indirectly, onto residents. The state's property tax crisis is well documented. As of early 2007, New Jersey property taxes were some of the highest in the nation, with the average New Jersey homeowner paying \$6331 per year.⁵⁵ While many factors contribute to the high property taxes, the expense of operating inefficient municipal resources undoubtedly exacerbates the problem. These rising costs affect every aspect of the state. Urban communities often must cut essential services simply to remain solvent, while rural regions face strong pressure to develop any remaining open space as a way of expanding the tax base.⁵⁶ As conditions worsen, residents and businesses alike abandon the state, leaving only higher taxes for those who stay behind.⁵⁷ The problem shows little sign of improvement.

There are also other, less obvious economic costs. It takes 400,000 employees to staff New Jersey's local governments, costing the towns more than \$16 billion a year.⁵⁸ With so many positions to fill, municipalities often find it difficult to attract qualified

⁵⁴ Places in New Jersey Listed Alphabetically, Population Estimates, U.S. Census Bureau [hereinafter Population Estimates], available at http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_PL_U_GCTPL_ST7format=ST-7&_box_head_nbr=GCT-PL&ds_name=DEC_2000_PL_U&geo_id=04000US34.

⁵⁵ Jonathan Tamari, *Tax-Reform Bills Signed*, HOME NEWS TRIB., Apr. 4, 2007; *Want Tax Reform? Consider Mergers*, JERSEY J., Oct. 19, 2006; Heather Haddon, *Relief For Big Burden Awaited; Lawmakers Debate Ways to Save*, HERALD NEWS, Oct. 5, 2006, at A01.

⁵⁶ JOINT SERVICES: A LOCAL RESPONSE, *supra* note 49, at 13.

⁵⁷ The rate of departure more than tripled between 2002 and 2007. See Ken Belson, *Departures for Other States Erode New Jersey's Economy*, N.Y. TIMES, Oct. 10, 2007, at B4.

⁵⁸ 3 U.S. CENSUS BUREAU, COMPENDIUM OF PUBLIC EMPLOYMENT, NO. 2, at 13, 16 (2002).

applicants. Many communities rely on local volunteers to govern their towns on a part-time basis, even though these volunteers lack experience in public finance and administration.⁵⁹ It is also common for politicians to dole out government jobs to friends and political allies without regard to their qualifications.⁶⁰ This patronage—which is as much a part of New Jersey’s “religion” as is a devotion to home rule—breeds corruption.⁶¹ Former Governor Byrne agreed with Rutgers professor George Sternly’s estimation that one-half of New Jersey’s municipalities were corrupt in some way.⁶² With so many towns and regional authorities, it is easy for officials to steal from the public coffers unnoticed. This culture of incompetence and cronyism makes towns all the more expensive to operate and creates a less hospitable environment for businesses and residents.⁶³

The effects of fragmentation are not simply economic, however. The state’s municipal structure reinforces residential segregation, which in turn creates substantial inequalities for residents. Over the past century, New Jersey’s political boundaries have become proxies for race and socioeconomic status, as small towns use their zoning powers to maintain their exclusivity. Some of these practices, including racially restrictive covenants and redlining, were designed to keep out ethnic minorities, particularly African-Americans.⁶⁴ Other ordinances, such as

⁵⁹ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 25.

⁶⁰ See, e.g., Damien Cave, *For First Time in 20 Years, Newark Looks to a Future Without Sharpe James as Mayor*, N.Y. TIMES, Mar. 26, 2006, at B1; Lisa Brennan, *New Jersey Law Journal’s Lawyer of the Year: Christopher Christie; U.S. Attorney’s Tactics Draw Critics but Get Results*, 186 N.J.L.J. 1141 (2006); Jeffrey Gettleman, *Corruption? Voters Say They Know It When They See It*, N.Y. TIMES, Oct. 17, 2005, at B1.

⁶¹ David Kocieniewski, *Report Finds Patronage Rife at a University*, N.Y. TIMES, Apr. 4, 2006, at B1.

⁶² Tom Moran, *Four Experts Talk About how to Deal with N.J.’s Ethically Challenged Politicians*, STAR-LEDGER, Nov. 10, 2002, at 1; LELAND & JOHNSON, *supra* note 33, at 30; Suzanne M. Leland & Kurt Thurmaier, *Metropolitan Consolidation Success: Returning to the Roots of Local Government Reform*, 24 PUB. ADMIN. Q. 202 (2000); I. Rubin, *Early Budget Reformers: Democracy, Efficiency and Budget Reforms*, 24 AM. REV. OF PUB. ADMIN. 229 (1994).

⁶³ For more on the costs of corruption and cronyism, see SUSAN ROSE-ACKERMAN, *CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM* (1999).

⁶⁴ See generally MICHAEL DANIELSON, *THE POLITICS OF EXCLUSION* (1976). Many factors contributed to this racial segregation. Several of New Jersey’s bedroom communities incorporated specifically to keep racial minorities out of their towns. See *infra* Part III, § 3. Other towns enforced racially restrictive covenants as a way of

requirements that developers could not subdivide property into plots smaller than five acres, were race-neutral but implemented to keep out poorer residents who could not add favorably to the town's tax base.⁶⁵ Either way, these land-use regulations have transformed a heterogeneous state into smaller, less diverse entities with widely varying levels of municipal services.⁶⁶ The wealthiest—and, often, the whitest—towns can afford high quality public services, while the poorest communities, housing the highest percentages of African-Americans and Hispanics, lack the tax base to support even the most basic services.⁶⁷

In turn, potential homeowners choose where to live—and what level of public services they wish to receive—based on their ability to pay.⁶⁸ The more fragmented a region, the greater the opportunity for this socioeconomic residential sorting.⁶⁹ In New Jersey, poor neighborhoods have transformed into racial ghettos as the richest residents increasingly flock to affluent enclaves. In East Orange, a traditionally black neighborhood, only four of its schools' 10,000 students were white.⁷⁰ Next door, in the far-

excluding unwanted residents from their towns, at least until the practice was ruled unconstitutional in 1948. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). In addition, realtors, mortgage agencies, and the Federal Housing Administration often refused to provide loans to lower-income families, especially those who were African-American, which limited the families' ability to purchase homes in suburban neighborhoods. See John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African Americans*, 32 LAW & SOC. INQUIRY 399, 406–07 (2007). This “redlining” continued until Congress banned the practice in the Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619.

⁶⁵ Joseph F. Sullivan, *Jersey Ruling Aids Housing for Poor*, N.Y. TIMES, Jan. 21, 1983, at A1.

⁶⁶ In the wealthiest towns, the homes are so large and the property is so highly valued that officials can provide excellent services while taxing their residents at a comparatively low rate. Officials in the poorest towns lack this luxury, and are often forced to raise already high property taxes to provide the most basic services. See *S. Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713, 723–25 (N.J. 1975).

⁶⁷ Shure, *supra* note 13.

⁶⁸ See DANIELSON, *supra* note 64; Thomas C. Schelling, MICROMOTIVES AND MACROBEHAVIOR 155 (1978); Richard Hill, *Separate and Unequal: Governmental Inequality in the Metropolis*, 68 AM. POL. SCI. REV. 1557 (1974).

⁶⁹ See Miguel Urquiola, *Does School Choice Lead to Sorting? Evidence From Tiebout Variation*, 95 AM. ECON. REV. 1310 (2005); Charles T. Clotfelder, *Public School Segregation in Metropolitan Areas*, 74 LAND ECON. 487 (1999).

⁷⁰ Rick Malwitz, *Segregation Still Exists in Districts*, HOME NEWS TRIB. (East Brunswick, N.J.), Feb. 18, 2007.

wealthier Livingston, the demographics reversed, with only a two percent African-American student population.⁷¹ The disparities increase along with property values. According to the 2000 Census, out of the 8828 residents in the state's five wealthiest municipalities, only eighty-one were black, accounting for less than one percent of the towns' combined population.⁷² New Jersey's high degree of fragmentation has created an array of self-governed homogeneous communities, where race is highly correlated with the quality of municipal services, particularly public schooling.⁷³

State officials face significant barriers to ending this inequality, particularly because the segregated communities exist as separate municipalities rather than as neighborhoods within a larger city. Each homogeneous town elects its own slate of representatives, who are free to pursue their constituents' parochial interests without strong internal opposition. Due to lack of state involvement, politicians in the wealthiest towns have few incentives to share services with poorer residents outside their districts.⁷⁴ Over time, the political boundaries between municipalities become psychological, as inhabitants feel some emotional, although possibly ill-founded, attachment to their community. Each town forms its own "in-group," making it all the more difficult to negotiate inter-municipal agreements with others.⁷⁵ Residents demand whatever funding scheme will guarantee them the highest level of service with the lowest

⁷¹ *Id.*

⁷² The five towns, Mantoloking, Saddle River, Far Hills, Essex Fells, and Alpine, average less than one percent African-American. Population Estimates, *supra* note 54; U.S. CENSUS BUREAU, FACT SHEET (2000); U.S. CENSUS BUREAU, SUMMARY FILE 3 2000 CENSUS OF POPULATION AND HOUSING (2000).

⁷³ Jonathan Kozol describes the extraordinary disparities between black and white students in America's public schools in his landmark book, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991). Although he discusses the gap between students in the South Bronx and Long Island, *id.* at 120–25, he might as well be describing the differences between Newark and the wealthier portions of Essex County. He also devotes a chapter to describing the horrors of the school system in Camden, New Jersey. *Id.* at 133–74; see also DAVID CARD & JESSE ROTHSTEIN, UNIV. OF MICH., *RACIAL SEGREGATION AND THE BLACK-WHITE TEST SCORE GAP* 20 n.26, Table 1a, (2005), available at <http://fordschool.umich.edu/ams/docs/DCardMarch05.pdf>.

⁷⁴ Jay Romano, *A New Battle on School Segregation*, N.Y. TIMES, Apr. 21, 1991, at 1.

⁷⁵ DAVID RUSK, *CITIES WITHOUT SUBURBS* 66–72 (1995).

possible tax rate.⁷⁶ For example, when officials proposed consolidating school districts in Gloucester County, a scheme which would have forced some wealthier residents to subsidize the education of poorer students, over 3000 protesters showed up at a county meeting to attack the plan.⁷⁷

Even courts, which are supposedly free from such political considerations, have proven unable to overcome these barriers. In 1974, the United States Supreme Court rejected a Michigan plan to merge school districts as a way to reduce the disparities between predominately black and predominately white schools, holding that the federal judiciary could not implement inter-municipal desegregation plans unless one of the districts was explicitly created with a racially discriminatory purpose.⁷⁸ The New Jersey Supreme Court has worked more aggressively to counter the effects of fragmentation, but has done little to address the core problem. The *Abbott* decisions, which ruled that the disparities between rich and poor schools violated the New Jersey Constitution, have upheld the legality of district boundaries.⁷⁹ The *Mt. Laurel* decisions, which most directly confronted the issue by ruling that towns could not use its zoning powers to exclude low and moderate-income housing, also provided major loopholes by allowing rich towns to pay their way out of housing requirements.⁸⁰

⁷⁶ One of the most controversial debates in this area has been whether municipalities should fund regional schools using a formula based on the overall value of the town's property, or on the number of students each town sends to the regional school. Typically, wealthier towns benefit when the formula involves a per-pupil calculation, while poorer towns fare better when the rate is based on property valuations. See Joseph Ax & Matthew Van Dusen, *Well-Off Can Get Socked on Taxes, But Less Affluent Say That's Only Fair*, HERALD NEWS, Mar. 12, 2007, at A01. Towns in the same school district often pay widely varying rates: one recent study showed that half of the regional districts in Bergen County included at least one town that paid at least \$5000 more per student than a neighboring municipality. Joseph Ax & Matthew Van Dusen, *Regionalized Schools Called Dens of Inequity; Richer Towns Foot Large Share of the Cost, Analysis Confirms*, BERGEN REC., Mar. 12, 2007, at A01.

⁷⁷ Malwitz, *supra* note 70.

⁷⁸ *Milliken v. Bradley*, 418 U.S. 717, 745 (1974); see also *U.S. v. Missouri*, 515 F.2d 1365, 1369-70 (8th Cir. 1975).

⁷⁹ *Abbott by Abbott v. Burke*, 643 A.2d 575 (N.J. 1994); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985).

⁸⁰ *S. Burlington County NAACP v. Mt. Laurel*, 456 A.2d 390 (N.J. 1983); *S. Burlington County NAACP v. Mt. Laurel*, 336 A.2d 713 (N.J. 1975). The loophole, known as regional contribution agreements, allows wealthy towns to pay urban areas to build additional low-income housing, thus relieving the richer municipalities of

The government's failure to address residential segregation harms all of the state's poor residents, but the costs fall particularly hard on New Jersey's minority students, who are forced to attend underfunded schools and lack the opportunities to escape urban poverty.⁸¹ This failure hurts the state long-term as much as any of the economic costs discussed earlier.

The great irony is that political fragmentation has weakened, rather than strengthened, New Jersey's tradition of home rule. So many areas have subdivided into miniscule municipalities that few currently possess the financial strength to operate as self-sufficient communities. Most of the towns that proudly cling to their political independence are, in fact, wholly dependent on regional or state-financed programs to remain solvent. At the same time, these communities are forced to compete against the hundreds of other tiny towns in New Jersey, each of which is eager to lure revenue-generating businesses or tax-paying residents to its borders. As they race to the bottom of this municipal marathon, most inhabitants must live with higher taxes, less efficient services, and highly segregated communities. Without the ability to develop regional solutions to problems, each town must face regional issues, including pollution, traffic, and sprawl, on its own. The argument that government operates best when it operates as close to its constituents as possible, loses force when those local government officials are corrupt, incompetent, or both. This is hardly the image that home rule advocates envisioned when they divided the state into such small municipalities.

III. NEW JERSEY'S EARLY HISTORY OF FRAGMENTATION

Several themes emerge by reviewing the history of New Jersey's municipalities. Many towns formed in response to one or

their constitutional housing obligations. This exception, along with other methods by which towns can reduce their fair housing obligations, has reduced the impact of the landmark *Mt. Laurel* decisions by allowing the residential segregation to persist. Warren Boroson, *Corzine Defends New Jersey*, DAILY REC. (Parsippany, N.J.), Mar. 6, 2007; David W. Chen, *Slouching Toward Mount Laurel*, N.Y. TIMES, Mar. 31, 1996, at NJ1.

⁸¹ It may be that the current educational system is constitutionally "inefficient" under the state's education clause, which would require the state legislature to remedy the fragmentation of school districts. No litigant has ever tested this argument, however. See *supra* text accompanying note 44.

more of five main issues: road maintenance, proximity to railroad stations, control of public schools, alcohol policy, and exclusionary zoning. Against the backdrop of a weak state government—the result of the state’s early religious heterogeneity and its status as a transportation corridor—these five issues triggered widespread fragmentation. In order to understand why these matters became controversial enough to divide communities, it is necessary to examine the state’s early history and its deep attachment to the concept of “home rule.”

New Jersey has long been defined by its neighbors. The British seized the land from the Dutch and the Swedes in 1664, not because it possessed value of its own, but because the territory was included in the surrender agreement for New York City.⁸² The territory was little more than a corridor for connecting more important colonies, and the British treated it as such.⁸³ The colonial government managed the state so poorly that it granted conflicting charters for the region: the Royal Governor in New York distributed land to Quakers and Puritans shortly after acquiring control, only to have James II, Duke of York, grant the area to two of his loyal friends, Sir George Carteret and Lord John Berkeley.⁸⁴ The mismanagement continued, and within twenty years the state was divided between West Jersey and East Jersey, with weak royal control of each.⁸⁵

The colony quickly became a destination for those who wanted little government interference in their lives. Religious settlers flocked to the state. The Dutch Reformed occupied the northernmost part of the state, the English Quakers embarked along the eastern shore of the Delaware River, and the Anglicans settled the Hudson River.⁸⁶ Over the next half century, Presbyterians founded present-day Princeton, Puritans founded Newark, Scots settled along the coast, Germans settled inland, and outcasts and non-conformists moved into the state’s forested Pine Barrens.⁸⁷ As these groups dispersed across the state, they

⁸² THOMAS J. FLEMING, *NEW JERSEY: A HISTORY* 6 (1985).

⁸³ THOMAS FLEMING, *NEW JERSEY: A BICENTENNIAL HISTORY* 11 (1977).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ SALMORE & SALMORE, *supra* note 7, at 12.

⁸⁷ KARCHER, *supra* note 37, at 76–77.

established self-sufficient agricultural communities, and their highest priority was to be left alone.⁸⁸ East and West Jersey reunited by royal order in 1702.⁸⁹ They remained together in future decades not for shared ideological reasons, but for their mutual safety: Separate, they each feared the possibility of domination by Philadelphia or New York City.⁹⁰

New Jersey maintained a complicated relationship with the powerful metropolises directly across its borders. New York and, to a lesser extent, Pennsylvania, sought to extend control over the region, frequently interfering in state affairs and exacting duties from Jersey merchants.⁹¹ Despite this abuse, New Jersey profited tremendously from its neighbors. Operating as the connection between the northern and southern colonies, and as the direct link between the two fastest-growing cities in North America, the state made much of its money by moving commerce from one end of the state to the other.⁹² By 1765, New Jersey had more roads than any other colony.⁹³

Colonists used these routes to explore and settle the state. In 1798, when the legislature first recognized the state's municipal boundaries, New Jersey's original 104 townships had claimed all 7000 square miles between the Delaware and Hudson Rivers.⁹⁴ Unlike other states, which often contained vast tracts of unincorporated land, New Jersey had no room for its towns to expand beyond their original borders. This kept any town from growing into a major metropolis, and reinforced the state's image as a community of tiny townships.⁹⁵

Road maintenance of New Jersey's many roads became the first of five issues that triggered fragmentation in the state. As the state grew in the early 1800s, farmers needed well-kept roads to bring their goods to markets. The state government lacked the

⁸⁸ See generally RALPH K. TURP, *WEST JERSEY: UNDER FOUR FLAGS* 99–140 (1975).

⁸⁹ SALMORE & SALMORE, *supra* note 7, at 12.

⁹⁰ FLEMING, *supra* note 83, at 13–17.

⁹¹ DENNIS E. GALE, *GREATER NEW JERSEY: LIVING IN THE SHADOW OF GOTHAM* 18–20 (2006); see also CHARLES A. STANSFIELD, JR., *NEW JERSEY: A GEOGRAPHY* 21 (1983).

⁹² Edmund Wilson, Jr., *New Jersey: The Slave of Two Cities*, *THESE UNITED STATES: A SYMPOSIUM* 56 (Ernest Gruening ed. 1971).

⁹³ SALMORE & SALMORE, *supra* note 7, at 13.

⁹⁴ KARCHER, *supra* note 37, at 134.

⁹⁵ *Id.*

funds to pay for necessary maintenance, largely because New Jersey's heterogeneous population had ratified a constitution which allowed almost no centralized power.⁹⁶ The responsibility fell to the counties, which in turn delegated the responsibility to the towns. Starting in 1818, the towns divided their territory into "road districts" and appointed residents to oversee individual districts.⁹⁷ These subdivisions often possessed conflicting agendas based on geographical locations. For example, a district in the western part of a township might want to invest in a new cart-path to a western neighbor while a district on the eastern side might want to widen a roadway heading the opposite direction.⁹⁸ Neither district wanted their tax revenues to subsidize road maintenance on the other side of town.

As conflicts increased, it was often easier to partition a township along district lines than it was to resolve whatever taxation issues divided its residents.⁹⁹ The distinctions between districts grew even more divisive in 1859, when the state allowed each region to elect its own road commissioner.¹⁰⁰ By politicizing the position, the legislature inadvertently encouraged additional incorporations. As commissioners focused on building constituencies and winning elections, they frequently used their status in the community to advocate for the creation of new towns, often becoming the municipalities' first mayors.¹⁰¹

The second issue that triggered fragmentation was the rise of railroad companies. In some ways, the railroads had the same kind of impact on the state's municipalities as did road maintenance. In 1831, industrialist Robert Stevens began laying rail connecting Philadelphia and New York.¹⁰² The route, which began in Camden in the south and ended at Perth Amboy, became an enormously profitable means of transporting people and goods.¹⁰³ Stevens

⁹⁶ SALMORE & SALMORE, *supra* note 7, at 11; FREDERICK HERMANN, *STRESS AND STRUCTURE: POLITICAL CHANGE IN ANTEBELLUM NEW JERSEY* 321-37 (1976).

⁹⁷ See *Ward v. Folly*, 5 N.J.L. 566 (N.J. 1819). See also KARCHER, *supra* note 37, at 49.

⁹⁸ KARCHER, *supra* note 37, at 54.

⁹⁹ *Id.* at 29.

¹⁰⁰ 1859 N.J. Laws 2841 § 177; see also *Allen v. Hiles*, 50 A. 440, 441 (N.J. 1901).

¹⁰¹ KARCHER, *supra* note 37, at 54.

¹⁰² WHEATON J. LANE, *FROM INDIAN TRAIL TO IRON HORSE* 286-87 (1939).

¹⁰³ SALMORE & SALMORE, *supra* note 7, at 15-16.

realized that the railroad could be used not only to transport goods, but also to carry commuters who wanted to work in a city but live in a residential neighborhood.¹⁰⁴ The Brick Church section of Orange, located approximately fifteen miles from Manhattan, became the nation's first commuter suburb.¹⁰⁵

Similar communities sprung up across the state. Often, the railroad company would buy up land in the middle of a large township and place a rail station at the center of its property. The company would sell off its land to developers—at a significant profit—and the area around the station would develop into a thriving community of commuters.¹⁰⁶ This practice generated conflict with the surrounding township. The commuters, who were used to the sophisticated lifestyle of the city, wanted additional amenities, including sidewalks, streetlights, clean water, and fire protection.¹⁰⁷ The farmers who lived in the township cared more about roads and school funding.¹⁰⁸ Again, neither constituency wanted their taxes to fund the other's needs. Rather than attempt to negotiate a balance between the two regions, it was easier for the commuters to incorporate their own boroughs, “doughnut holes,” as New Jerseyans call it, completely surrounded by other towns.¹⁰⁹

However, the impact of rail companies extended well beyond this. Stevens did not simply build a rail line between Camden and Perth Amboy—he also convinced the state to grant his company full monopoly powers over the route and to exempt the property from local taxes.¹¹⁰ Between 1833 and 1869, any item that passed from Philadelphia to New York by rail had to go via the Camden and Amboy line.¹¹¹ In exchange, Stevens guaranteed the state

¹⁰⁴ LANE, *supra* note 102, at 290.

¹⁰⁵ KARCHER, *supra* note 37, at 69.

¹⁰⁶ SALMORE & SALMORE, *supra* note 7, at 17.

¹⁰⁷ Kevin Wright, *Punkin Duster Finds the Woodchuck Borough: A Centennial Review of Bergen County Borough Fever 1894–95* (Bergen County Historical Soc., New Bridge Landing, N.J.), undated, available at <http://www.bergencountyhistory.org/Pages/part1.html>.

¹⁰⁸ *Id.*

¹⁰⁹ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 7.

¹¹⁰ LANE, *supra* note 102, at 285–86.

¹¹¹ *Id.*

government a portion of his annual revenues.¹¹² Stevens exploited his monopoly, becoming one of the wealthiest men in America, but the state profited as well, and the revenue from the railroad provided enough funding that the New Jersey government never had to tax its residents until the mid-twentieth century.¹¹³ To ensure that the state would not break his monopoly, Stevens threw the clout of his railroad behind a political machine that owned most of New Jersey's Democratic Party.¹¹⁴ This machine forced ratification of a new state constitution in 1844 which not only maintained New Jersey's weak central government, but also capped the state's total allowable debt at \$100,000.¹¹⁵ His machinations made it impossible for the legislature to ever raise large amounts of capital for public works purchases, thus guaranteeing that the state would be unable to buy out his railroad.¹¹⁶

The wealth generated by the Camden and Amboy line had two significant effects on the state's municipalities. First, by eviscerating the state government, the railroad further weakened any notion of centralized control of New Jersey's activities, which gave the townships even greater freedom to act as they wished.¹¹⁷ This made it all the easier for road districts and railroad commuter boroughs to incorporate as their own towns. Second, the wealth spoiled New Jersey's taxpayers, who became

¹¹² *Id.*

¹¹³ SALMORE & SALMORE, *supra* note 7, at 17–18. (Stevens charged exorbitant rates for passage between Philadelphia and New York, even though his rail service was notoriously awful. The state was not terribly concerned with Stevens' extortion, however, as most of the people riding the rails were out-of-staters. If anything, state officials were pleased to see New Yorkers and Pennsylvanians subjected to Stevens' financial abuse, viewing it as payback for years of living in the shadow of its neighbors.) See also KARCHER, *supra* note 37, at 65–66.

¹¹⁴ BARBARA SALMORE & STEPHEN SALMORE, *NEW JERSEY POLITICS AND GOVERNMENT: SUBURBAN POLITICS COMES OF AGE* 16 (3d ed. 2008).

¹¹⁵ FLEMING, *supra* note 83, at 105.

¹¹⁶ It was widely known at the time that many of the state's legislators were on the Camden-Amboy's payroll. Rather than hide their corrupt activities, most flaunted it. Reports from the 1850s indicate that, after legislative victories for the railroad, their allies in the statehouse would gather to celebrate with drink and song. One tune ended with the unabashed refrain: "We are all a bunch of robbers \ We are all a bunch of robbers \ From the Camden & Amboy State." FLEMING, *supra* note 83, at 107.

¹¹⁷ See, e.g., Lincoln Steffens, *New Jersey: A Traitor State*, in *THE STRUGGLE FOR SELF-GOVERNMENT* 214 (1906).

accustomed to free rides courtesy of John Stevens.¹¹⁸ Thereafter, whatever services the government offered to state residents were usually provided—and paid for—by the municipality.¹¹⁹ The majority of the tax revenue in New Jersey came through township property taxes, which varied substantially across communities and created tremendous inequities over the next 150 years.¹²⁰ This legacy of local levies continues today, and despite the state's efforts to equalize rates over the past half century, this system of taxation has contributed to many of the state's current budget problems.¹²¹

The Financial Panic of 1873 disrupted the Camden and Amboy's control of the state and ushered in a new era of instability.¹²² Many blamed the railroads for the panic, which in turn triggered a four-year economic depression.¹²³ New Jersey voters replaced the railroad-friendly Democrats with Republicans, who pushed an aggressive reform agenda.¹²⁴ The electorate cared for the Republicans even less, and power changed hands several times over the next fifteen years.¹²⁵ In that period, the state legislature passed a series of laws, as well as one significant constitutional amendment, that forever changed the state's landscape and doubled the number of municipalities.¹²⁶

In 1873 and 1884, the Republicans passed two Railroad Tax Acts, which reduced and eventually eliminated the Camden & Amboy's exemption from local property taxes.¹²⁷ In response, the railroad unloaded thousands of acres it had purchased over the past thirty years.¹²⁸ This property, typically near rail stations, quickly

¹¹⁸ SALMORE & SALMORE, *supra* note 7, at 14.

¹¹⁹ PROPERTY TAX COMM'N, REPORT OF RECOMMENDATIONS TO GOVERNOR CHRISTIE WHITMAN (1998) [hereinafter PROPERTY TAX COMM'N].

¹²⁰ *Id.*

¹²¹ Ron Marscio & Robert Schwaneberg, *Fewer Towns and Free Cash*, STAR LEDGER, Mar. 5, 1998, at 1.

¹²² SALMORE & SALMORE, *supra* note 7, at 20.

¹²³ KARCHER, *supra* note 37, at 79.

¹²⁴ SALMORE & SALMORE, *supra* note 7, at 21.

¹²⁵ SALMORE & SALMORE, *supra* note 7, at 20; *see also* WILLIAM EDGAR SACKETT, 1 MODERN BATTLES OF TRENTON 12–18 (1895).

¹²⁶ 1878 N.J. Laws Ch. CCIX; 1882 N.J. Laws Ch. XLVII; *see also* KARCHER, *supra* note 37, at 79–81.

¹²⁷ KARCHER, *supra* note 37, at 26.

¹²⁸ KARCHER, *supra* note 37, at 65–66.

developed into more “doughnut hole” communities that began appearing in the 1840s.¹²⁹ These new communities soon incorporated.

The Borough Acts of 1878 and 1882 hastened this trend. The Democrats hoped to create new urban areas sympathetic to their party’s agenda. They passed the Borough Acts to encourage incorporation of small, urban communities.¹³⁰ The 1878 Act allowed any area containing *less* than four square miles and five thousand people to seek a referendum for municipal incorporation.¹³¹ The threshold for putting the question on the ballot was also extraordinary low, permitting a referendum within ten days whenever residents owning “at least one-tenth of the taxable real estate” in the proposed borough petitioned for one.¹³² The 1882 Act allowed even smaller communities—those with less than two square miles—to create a “borough commission” within a township.¹³³ These commissions were semi-autonomous bodies that governed the provision of basic services in the borough region, including water, street lighting, and sidewalk maintenance.¹³⁴ Just as the creation of elected road commissioners in 1859 whet the appetite of small-town politicians eager to incorporate their own towns, so too did these borough commissions excite residents about forming their own municipalities. Once borough residents had control over water and lights, they soon craved the full powers of a municipality, including the ability to issue bonds, establish a police force, and collect fines.¹³⁵ The push towards incorporation grew so strong that candidates began running for office across the state on the “Incorporation Party” ticket.¹³⁶

This flurry of legislative activity later raised the third issue that triggered municipal fragmentation: school funding. The issue

¹²⁹ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 7; KARCHER, *supra* note 37, at 26–27, 65.

¹³⁰ 1878 N.J. Laws Ch. CCIX; 1882 N.J. Laws Ch. XLVII; KARCHER, *supra* note 37, at 80.

¹³¹ 1878 N.J. Laws Ch. CCIX; KARCHER, *supra* note 37, at 80.

¹³² 1878 N.J. Laws Ch. CCIX; *see also* KARCHER, *supra* note 37, at 81.

¹³³ 1882 N.J. Laws Ch. XLVII.

¹³⁴ KARCHER, *supra* note 37, at 71.

¹³⁵ *Id.* at 70–71.

¹³⁶ *Id.* at 71.

emerged almost accidentally, the result of a poorly written statute that would precipitate the most remarkable burst of incorporation in New Jersey's history.¹³⁷ In 1894, the Republicans again regained power.¹³⁸ They wanted to equalize some of the imbalance in education funding across the state, and their first target was intra-municipal disparities.¹³⁹ At the time, many townships contained more than one school district, each funded by the region's tax base.¹⁴⁰ Franklin Township, for example, had 774 students and eleven separate school districts, with the wealthier neighborhoods able to contribute more money to their district.¹⁴¹ The Republicans passed the Township School Law requiring townships to consolidate all school districts within their borders.¹⁴²

But the legislators inadvertently created a loophole. Section 24 stated that each city, borough, and town must contain its own distinct school district.¹⁴³ When wealthy township residents realized that they would have to share an enlarged school district with other parts of the municipality, they decided to take advantage of the Borough Acts and create new communities of their own. New boroughs emerged overnight, thus beginning what is known as Borough Fever or "Boroughitis."¹⁴⁴ By the end of the year, Bergen County alone added twenty-six new boroughs, each with an average population below 500.¹⁴⁵ These municipalities were overwhelmingly commuter suburbs and, though many were wealthy, they lacked the tax base to support a borough government.¹⁴⁶ It took until 1897 for the legislature to eventually realize its error and pass "emergency measures," prohibiting the incorporation of new boroughs except when specifically authorized by the legislature.¹⁴⁷

¹³⁷ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 7.

¹³⁸ KARCHER, *supra* note 37, at 82-83.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² 1894 N.J. Laws 506, 512.

¹⁴³ KARCHER, *supra* note 37, at 82.

¹⁴⁴ Wright, *supra* note 107.

¹⁴⁵ KARCHER, *supra* note 37, at 83.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

Around the same time, another trend swept over New Jersey residents: the temperance movement. This triggered another round of municipal fragmentation, as towns incorporated either to specifically prohibit alcohol or to provide a haven for those who wished to drink. Religious Protestants founded a series of dry towns in the late 1800s, first in the southern part of the state, and later along the shore, including Asbury Park and Ocean Grove.¹⁴⁸ In response to the state's blue laws and, eventually, to Prohibition, several communities incorporated specifically so that they could direct their police force to ignore bans on alcohol. Tavistock Borough is the most famous example, which was created when the owners of the exclusive Tavistock Golf Course split from dry Haddonfield so that they could serve liquor in the clubhouse on Sundays.¹⁴⁹ The club's members were among the state's most influential residents and one in particular tapped his connections with the governor to approve the tiny incorporation.¹⁵⁰ With the legislature still weak and riddled with corruption no one in state government exposed the inefficiencies and redundancies created by establishing towns like this fifteen-person municipality.

Zoning restrictions presented the fifth and final issue producing New Jersey's fragmentation. Throughout the nineteenth century, state courts held that land use zoning was an unconstitutional limitation on free association.¹⁵¹ As a result, if a neighborhood wanted to keep out vagrants, it was more efficient to create a new municipality and pass a general ordinance than remain a diverse township where the flow of residents could not be easily restricted. After the 1897 law limiting incorporation, communities could incorporate as boroughs only upon receiving special permission from the legislature.¹⁵² This measure benefited

¹⁴⁸ HELEN-CHANTAL PIKE, *ASBURY PARK'S GLORY DAYS: THE STORY OF AN AMERICAN RESORT* 110 (2007); BARBARA WESTERGAARD, *NEW JERSEY: A GUIDE TO THE STATE* 5 (2006).

¹⁴⁹ Robert Strauss, *Municipal Madness or 'Creative Localism?'*, N.Y. TIMES, Jan. 4, 2004, at NJ6; JOHN P. SNYDER, *THE STORY OF NEW JERSEY'S CIVIL BOUNDARIES: 1606-1968*, at 109 (1969).

¹⁵⁰ KARCHER, *supra* note 37, at 94-95.

¹⁵¹ Norman Williams & Thomas Norman, *Exclusionary Land Use Controls: The Case of Northeastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971). Not until New Jersey legislators amended the state constitution in 1927 were municipalities allowed to adopt zoning ordinances. N.J. CONST. of 1844, art. IV, § 6, ¶ 5 (1927).

¹⁵² KARCHER, *supra* note 37, at 87.

wealthy residents with political connections, and consequently, most of the municipalities created between World War I and the Great Depression were rich enclaves, including Franklin Lakes, Falls Hills, Hardin, and Mountain Lakes, which incorporated to ensure that African-Americans and immigrants did not move in.¹⁵³

During this period, the New Jersey legislature passed a law solidifying the supremacy of municipalities in the state's political culture. The 1917 Home Rule Act, which detailed the powers and rights of municipalities, gave local government broad powers to ensure the health, safety, and welfare of their residents.¹⁵⁴ Although New Jersey was not one of the twenty-one states that enshrined home-rule protections in its constitution, the 1917 statute simply formalized a three-century tradition of home rule in the Garden State.¹⁵⁵ Few places outside New England could match the level of power New Jersey delegated to its municipalities.¹⁵⁶

IV. NEW JERSEY IN THE TWENTIETH CENTURY: THE ARBITRARY BOUNDARIES FOSSILIZE

A. Pre-War Efforts to Expand New Jersey's Cities

By World War II, the number of municipalities stabilized. With the end of the temperance movement, the busting of the railroad monopolies, and the creation of new zoning laws, communities no longer had as many reasons to split from their neighbors. Other factors also slowed the rate of incorporation. In 1947, voters ratified New Jersey's third constitution, which substantially strengthened the state government and thereby limited the ability of new municipalities to incorporate.¹⁵⁷ In addition, the post-war period brought rapid development in New Jersey's suburbs. Highways and interstates soon linked hundreds of these municipalities and, as the population grew, the distinctions between communities began to disappear.¹⁵⁸

¹⁵³ KARCHER, *supra* note 37, at 110.

¹⁵⁴ 1917 N.J. Laws 319.

¹⁵⁵ CHARLES ADRIAN, *STATE AND LOCAL GOVERNMENTS* 123 (1960).

¹⁵⁶ *JOINT SERVICES: A LOCAL RESPONSE*, *supra* note 49.

¹⁵⁷ See 4 RICHARD J. CONNORS, *THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY* 145-154 (1970).

¹⁵⁸ See *JOINT SERVICES, A LOCAL RESPONSE*, *supra* note 49.

The rate of incorporation slowed, but New Jersey state officials were unable to actually reverse the trend and persuade towns to consolidate. As early as 1900, a handful of municipalities considered annexations and mergers to create larger, more efficient government units; however, these strategies never proved very successful nor gained widespread acceptance.¹⁵⁹ Although many of the forces that triggered the state's fragmentation had disappeared, the underlying principle that motivated so many of the incorporations—a faith in local control of government affairs—remained throughout the twentieth century. This unrelenting commitment to home rule stymied many proposals to create more regionalized governments.

Part of the problem was that New Jersey lacked a major metropolis. Any of the contenders—Jersey City, Newark, Trenton, or Camden—were hamstrung by tight municipal boundaries. The cities were too geographically compact to become regional powers. Newark and Jersey City combined were still smaller than the island of Manhattan, New York's smallest borough, and the combined acreage of the state's four big cities was still less than Boston's.¹⁶⁰ Unlike other parts of the country, there were no unincorporated areas adjacent to any of these cities, and so they had little room to grow as their populations surged.

The legislature did little to encourage urbanization. Ever since East and West Jersey reunited in 1702, the state apportioned legislative power by region, with each county getting an equal number of seats in the Assembly and Senate.¹⁶¹ This arrangement strongly favored rural interests, as agricultural, under populated counties in the south and west of the state had the same number of votes as industrialized counties like Camden, Essex, and Hudson.¹⁶² The rural legislators did not want to invest state money in developing metropolitan regions.¹⁶³ Without state aid, the major

¹⁵⁹ KARCHER, *supra* note 37, at 168–69.

¹⁶⁰ *Id.* at 134.

¹⁶¹ *Id.* at 135.

¹⁶² In 1870, a mere eleven state senators could control the flow of legislation. When legislators from the most rural parts of the state joined forces, politicians representing less than twenty percent of the state population could dominate New Jersey's politics. KARCHER, *supra* note 37, at 137.

¹⁶³ *Id.* at 138.

cities never received the funding they so badly needed to build sustainable urban infrastructure.¹⁶⁴

The growth of the railroads only made matters worse. John Stevens' 1830 charter exempted the Camden and Amboy railroad from local property taxes, leaving hundreds of New Jersey's communities without the ability to tax one of the largest landowners within their borders.¹⁶⁵ The deal hurt New Jersey's cities especially hard. The Camden and Amboy line bought vast swaths of land by their rail terminals, which were typically located along the waterfront in major cities. By 1860, for example, the railroad owned a quarter of all the land in Jersey City, including much of the property along the Hudson River, and did not pay a single dollar to the city in return.¹⁶⁶ The situation improved only slightly after 1873, when the state allowed municipalities to tax the railroads.¹⁶⁷ To offset the costs of these new taxes, rail companies began developing their property, but they built the kinds of structures—such as warehouses and cargo depots—that only made these cities less inhabitable.¹⁶⁸ In addition, the railroads often devised schemes to avoid paying localities for these new taxes. In Camden, for example, the railroad executives convinced the legislature to incorporate a whole new town near the waterfront so that they could develop new rail projects near the city without being subjected to its rising tax rates.¹⁶⁹

¹⁶⁴ Several scholars have hypothesized that the state might have developed differently if the legislature apportioned political power based on municipalities rather than counties, as Connecticut and Rhode Island do. If the legislature had to re-apportion seats with the addition of new municipalities, the scholars argue, then it probably would not have allowed so lenient an incorporation policy as it did in the 1800s. In New Jersey, politicians could divide up existing towns, providing them with hundreds of new government posts they could fill with patronage, without upsetting the partisan balance in Trenton. SALMORE & SALMORE, *supra* note 7, at 203; Stanley Friedelbaum, *Origins of New Jersey Municipal Government*, in GOVERNING NEW JERSEY MUNICIPALITIES 59–66 (Julius Mastro & J. Albert Mastro eds., 1979); JOHN E. BEBOUT & ROLAND J. GRELE, *WHERE CITIES MEET: THE URBANIZATION OF NEW JERSEY* 37 (1964). But while Connecticut and Rhode Island both have fewer municipalities per capita than New Jersey, neither of those states developed comparably sized metropolises either.

¹⁶⁵ LANE, *supra* 102, at 324.

¹⁶⁶ KARCHER, *supra* note 37, at 179.

¹⁶⁷ *Id.* at 26–27.

¹⁶⁸ *Id.* at 27.

¹⁶⁹ *Id.* at 156–157.

The state's largest cities did attempt to expand their borders, although with limited success. In 1869, 1871 and 1897, Newark re-annexed some of territory it lost during the state's incorporation craze.¹⁷⁰ The city felt all the more pressure to consolidate in 1898, when New York City consolidated its five boroughs into one metropolis.¹⁷¹ Newark might have continued, but a 1899 court decision, *Miller v. Greenwalt*, kept the city, as well as New Jersey's other large municipalities, from growing further.¹⁷²

In 1899, Camden annexed neighboring Stockton in a hostile takeover.¹⁷³ Camden sought and received authorization from state legislature to annex the municipality, but Stockton itself never had the opportunity to vote on its fate.¹⁷⁴ Officials unhappy with the merger promptly challenged the constitutionality of the legislature's approval power. Later that year, an intermediate appellate court approved the annexation, holding that "[t]he challenged statute is, we think, constitutional."¹⁷⁵ Although Stockton chose not to appeal the decision to the court of last resort—the Court of Errors and Appeals—the ruling nonetheless chilled future efforts by cities to annex property by legislative fiat. At least one commentator has hypothesized that Newark in particular worried about increased judicial scrutiny of its expansionist policy, fearful the Court of Errors and Appeals might retroactively rule that its 1869, 1871, and 1897 annexations were also unconstitutional.¹⁷⁶ Afterwards, cities only annexed communities that assented to the takeover, thus making it far more difficult for them to expand their boundaries during the twentieth century.

The only large-scale consolidation effort before World War II took place in Camden County. By 1910, Camden was the largest city in the state, its growth fueled by the large factories run by Campbell Soup, New York Shipyards, and Victor Talking Machine

¹⁷⁰ *Id.* at 168.

¹⁷¹ *Id.*

¹⁷² See *Miller v. Greenwalt*, 44 A. 880 (N.J. 1899).

¹⁷³ KARCHER, *supra* note 37, at 168.

¹⁷⁴ *Id.* at 168–69.

¹⁷⁵ *Miller*, 44 A. at 881.

¹⁷⁶ KARCHER, *supra* note 37, at 168–73.

Company.¹⁷⁷ The city's business leaders realized that the municipal fragmentation created a less efficient, and thus less favorable, business environment. The Camden Board of Trade joined forces with the Chamber of Commerce, the Masons, and the city's powerful Republican Party to form the "Greater Camden Movement."¹⁷⁸ They hoped to merge all of Camden County's municipalities into a single government unit. The businessmen developed elaborate plans to develop the region's infrastructure, with interconnecting parks, a coordinated school system, and a cohesive transportation plan, and then had New York's top public relations experts publicize the effort nationwide.¹⁷⁹

Despite their effort, their vision never materialized, largely because the leaders focused their attention on the wrong audience and the wrong issues. The organizers failed to target their efforts at county residents, who would have to approve the effort by referendum, and ignored the most important issue to voters: taxes.¹⁸⁰ Even though scores of municipalities would join into one unit, no one ever explained whether the residents would have to pay some equalized tax rate, and if so, how individuals living in towns with low tax rates would cope with the increase once the county-wide government took over. Without answers to these questions, the Greater Camden Movement never gained traction, and the project died once the Republicans lost power in 1922.¹⁸¹ The Movement's failure presaged many of the challenges that other consolidation efforts would face in the coming century.

These early efforts provide a backdrop for the post-war debates about New Jersey's local governance. By the 1960s, state officials realized that the municipal system was badly broken. The population had nearly doubled since World War II and the state's many tiny towns lacked the capacity to adequately serve their residents.¹⁸² On the state level, the government organized a series of commissions to study the problem, each of which published

¹⁷⁷ HOWARD GILLETTE, JR., *CAMDEN AFTER THE FALL: DECLINE AND RENEWAL IN A POST-INDUSTRIAL CITY* 15 (2006).

¹⁷⁸ ANN MARIE T. CAMMAROTA, *PAVEMENTS IN THE GARDEN: THE SUBURBANIZATION OF SOUTHERN NEW JERSEY* 150–151 (2001).

¹⁷⁹ KARCHER, *supra* note 37, at 160.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² SALMORE & SALMORE, *supra* note 7, at 47.

reports recommending reforms.¹⁸³ On the local level, a handful of towns actually attempted consolidation by referendum.¹⁸⁴ The efforts yielded much paperwork but few results.

B. Post-War Efforts: "Shared Services" Over Consolidation

In 1967, Governor Richard Hughes formed the County and Municipal Government Study Commission.¹⁸⁵ The Commission, which still exists today, studied the history, economics, and culture of New Jersey's municipalities and published a series of reports recommending changes to the existing system.¹⁸⁶ These publications were the first serious attempt to bring sanity to New Jersey's municipal madness.¹⁸⁷

One of the first questions posed by the Commission was a normative one: politics aside, what would be the ideal size for a New Jersey municipality? The group discussed two possible guidelines, the "optimum service standard" and the "minimum viability standard." The former indicated the population at which a town achieves economies of scale in delivering municipal services. It is the size where a town operates most efficiently and effectively. The latter indicated the lowest number of residents required for a municipality to operate. Below that threshold, a town cannot provide the most basic services required by state

¹⁸³ See *supra* note 12.

¹⁸⁴ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 14–15.

¹⁸⁵ SALMORE & SALMORE, *supra* note 7, at 363; see also *Creative Localism*, TIME (Jan. 20, 1967).

¹⁸⁶ See, e.g., CREATIVE LOCALISM, *supra* note 12; see also FRANK J. COPPA, COUNTY GOVERNMENT: A GUIDE TO EFFICIENT AND ACCOUNTABLE GOVERNMENT 74–76 (2000).

¹⁸⁷ As early as 1933, Governor A. Harry Moore argued that "advanced steps must be taken in the direction of consolidation of small governing areas," and two years later, the state's planning board suggested that the "excessive number" of local government unites were to blame for the state's administrative problems. Little came from these conclusions, however. A. Harry Moore, *First Annual Message* 52, Jan. 10, 1933, quoted in N.J. LEG., NOTES ON ASSEMBLY JOINT RESOLUTION NUMBER 23 OF 1955: ESTABLISHING A CONSOLIDATION OF MUNICIPALITIES STUDY COMMISSION 11 (1955). N.J. STATE PLANNING BD., *supra* note 12, at 118 (1935). In 1935, Princeton University president Harold Dodds convened a group of faculty members to study the problems inherent in the state's many municipalities. The group, known as the Princeton Local Government Survey, came to similar conclusions as Governor Moore and the State Planning Board, but again, there was no legislative follow-up. KARCHER, *supra* note 37, at 197–99.

law.¹⁸⁸ Both standards were imprecise, as they required researchers to subjectively value the extent and the quality of municipal services expected by state residents. The Commission suggested that a population of 50,000 was commonly accepted as an optimum service standard, but did not even attempt to articulate a minimum viability standard.¹⁸⁹ These standards provided a framework for evaluating the state's municipal system.

The Commission then looked at the present state of New Jersey's municipalities. Of the state's 567 towns, only nineteen met the 50,000-person optimum service standard.¹⁹⁰ 117 had fewer than 2000 inhabitants and 190 had a tax base of less than \$5,500 per capita.¹⁹¹ The Commission tied the inherent inefficiencies of these small towns to the state's surging property taxes, noting that the number of municipalities taxing its residents more than \$3.00 for every \$100 had jumped from 13% to over 75% in a decade.¹⁹² The reports indicated that the tax burden would increase rapidly in future years if municipalities did not reform their governance.

The Commission identified two possible solutions, one more ambitious than the other. The first and more controversial option was municipal consolidation.¹⁹³ The Commission did not suggest that all towns and boroughs should merge with their neighbors, but specifically targeted "communities of interest" where arbitrary boundaries had separated a locality that would better operate as one town.¹⁹⁴ The most obvious examples were the "hole and doughnut" municipalities that formed in the 1800s—communities such as Princeton, where Princeton Borough governed the downtown area and Princeton Township served the outlying parts of town.¹⁹⁵

¹⁸⁸ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 10; CREATIVE LOCALISM, *supra* note 12, at 89.

¹⁸⁹ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 10–11; *see also* COMM. FOR ECON. DEV., MODERNIZING LOCAL GOVERNMENT 33–37 (1966); *cf.* ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH 45–52 (1968) (suggesting that communities in the 25,000 to 250,000 population range do not achieve cost-saving economies of scale).

¹⁹⁰ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 11.

¹⁹¹ *Id.*

¹⁹² JOINT SERVICES: A LOCAL RESPONSE, *supra* note 49, at iii.

¹⁹³ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 26.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

The Commission recognized the political and personal opposition to consolidation. For communities that did not wish to merge, it recommended “shared services” between municipalities.¹⁹⁶ The Commission discussed the many services provided by local governments—public works and utilities, tax collection, law enforcement, fire safety, land-use planning, and public education—and suggested that cities could coordinate efforts in one or more of these efforts.¹⁹⁷ Some towns had already begun sharing services, although most inter-municipal projects were informal agreements that assist one another during emergencies. This option proved more popular, partly because it was simpler than consolidation, partly because it allowed towns to cherry-pick assistance on the services it needed most, and partly because it saved municipalities money without ceding power to other governments.¹⁹⁸

The state’s new interest in local governance helped to change perceptions about inter-municipal cooperation. Surveys of 400 New Jersey mayors in 1967 and 1970 suggest how quickly local officials recognized the benefits of working together.¹⁹⁹ In 1967, only 19% of mayors said they would consider coordinate solid waste disposal with another municipality.²⁰⁰ Three years later, 85.7% reported that they would be willing to share waste disposal services, a four-fold increase.²⁰¹ Their attitudes changed in other areas as well. The percentage of mayors willing to share increased 9.5% to 65.1% for public health issues, 7.1% to 41.3% for fire protections, and recreation from 4.2% to 34.9%.²⁰² Even the powers that municipalities guarded most jealously—education and zoning—saw increases as well, albeit by less dramatic rates.²⁰³ Seventy years after so many municipalities had asserted their

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 13–14; JOINT SERVICES: A LOCAL RESPONSE, *supra* note 49, at 18–26.

¹⁹⁹ JOINT SERVICES: A LOCAL RESPONSE, *supra* note 49, at 33.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Support for sharing education services jumped from 14.2% in 1967 to 49.2% in 1970. Zoning saw the smallest increase, moving from 9.5% support to 17.5%. JOINT SERVICES: A LOCAL RESPONSE, *supra* note 49, at 33.

independence, local officials were now realizing how much they needed the support of their neighbors.

The Commission's work also prompted a legislative response. In 1973, the state enacted the Interlocal Services Act, which streamlined the process for communities willing to share services, and the Interlocal Services Aid Act, which funded feasibility studies and other administrative costs associated with shared services agreements.²⁰⁴ Four years later, the legislature also passed the Municipal Consolidation Act, which lowered the number of signatures necessary to put a consolidation referendum on the ballot in the affected communities and generally streamlined the merger process.²⁰⁵ These reforms were supposed to be the first step towards overhauling local government in New Jersey.

But the overhaul never came. Few expressed interest in the kinds of broader reforms that would sacrifice their sovereignty to other government powers. By 1985, the legislature stopped funding feasibility studies through the Interlocal Services Aid Act.²⁰⁶ Municipal costs kept rising, and during the 1980s, county and municipal budgets doubled the rate of inflation.²⁰⁷ Elected officials had to choose between raising property taxes further or cutting the costs of local services.²⁰⁸ Shared service agreements became an increasingly attractive option that allowed municipalities to save costs without necessarily reducing the quality of the services provided. Regional associations developed organically, particularly in the areas with the highest rates of municipal fragmentation. The Pascack Valley Mayor's Association, in north-central Bergen County, and the Northwest Bergen County Mayors Association published manuals on sharing services

²⁰⁴ Interlocal Services Act, 1973 N.J. Laws 208 (codified as amended at N.J. STAT. ANN. § 40:8A-1 et seq.); Interlocal Services Aid Act, 1973 N.J. Laws 289. *See also* ASSEMB. REPUBLICAN TASK FORCE ON SHARING COUNTY AND MUN. SERV., SHARING SERVICES: A NEW APPROACH TO REGIONALIZATION 3 (1990) [hereinafter SHARING SERVICES].

²⁰⁵ Municipal Consolidation Act, 1977 N.J. Laws Ch. 435 (codified as amended at N.J. STAT. ANN. § 40:43-66.35 et seq.).

²⁰⁶ SHARING SERVICES, *supra* note 204, at 3-4.

²⁰⁷ N.J. GOVERNOR'S TASK FORCE ON LOCAL P'SHIPS, THE CHALLENGE OF LOCAL PARTNERSHIPS i-ii (1992) [hereinafter THE CHALLENGE OF LOCAL PARTNERSHIPS].

²⁰⁸ SHARING SERVICES, *supra* note 204, at 4.

and began purchasing equipment and goods jointly.²⁰⁹ Their shared programs were often mundane—entailing leaf-composting or legal work—but they helped demonstrate that communities could work together without each losing their sense of individual identity.

In 1991, the state's Department of Community Affairs published its *Directory of Interlocal Activity*, which catalogued shared service programs in New Jersey.²¹⁰ The directory noted that over 800 local authorities, including municipalities, school boards, and county agencies, participated in at least one of thirty-eight purchasing cooperatives.²¹¹ An overlapping 300 of these local authorities contributed to joint insurance pools.²¹² Other government reports in the early 1990s indicated that nearly 300 municipalities participated in a county library system, 120 belonged to a regional sewage authority, 20 supported county housing authorities, and 12 joined regional water commissions.²¹³ Although surveys suggested that municipal officials remained skeptical of the true cost-savings of shared services, as well as the danger of encroachments on home rule powers, more and more local leaders believed that cooperation could benefit their hometowns.²¹⁴ In 1995, sixty percent of local officials surveyed stated that "moderate to significant" potential for additional shared services existed in the state.²¹⁵

²⁰⁹ The Pascack Valley Mayors Association included the communities of Emerson, Hillsdale, Montvale, Old Tappan, Oradell, Park Ridge, Riverdale, Washington Township, Westwood, and Woodcliff Lake. The Northeast Bergen County Mayors Association includes the boroughs of Midland Park, Mahwah, Allendale, Saddle River, Ho-Ho-Kus, Ramsey, Oakland, Wycoff, Upper Saddle River, Franklin Lakes and Waldwick. SHARING SERVICES, *supra* note 204, at 5.

²¹⁰ N.J. DEP'T OF CMTY. AFFAIRS, A DIRECTORY OF INTERLOCAL ACTIVITY (1991) [hereinafter DIRECTORY OF INTERLOCAL ACTIVITY].

²¹¹ *Id.*

²¹² See generally DIRECTORY OF INTERLOCAL ACTIVITY, *supra* note 210; see also N.J. DEP'T OF CMTY. AFFAIRS, LOCAL GOVERNMENT SHARED SERVICES AND MUNICIPAL CONSOLIDATION: A REPORT AND AN AGENDA (1995) [hereinafter LOCAL GOVERNMENT SHARED SERVICES AND MUNICIPAL CONSOLIDATION].

²¹³ SHARING SERVICES, *supra* note 204, at 5.

²¹⁴ THE CHALLENGE OF LOCAL PARTNERSHIPS, *supra* note 207, at 27–28.

²¹⁵ GRAD. DEP'T OF PUB. ADMIN., NEWARK CAMPUS OF RUTGERS, OUTSOURCING AND SHARED SERVICES AMONG NEW JERSEY MUNICIPALITIES: A PRELIMINARY ASSESSMENT OF POTENTIAL (Marc Holzer & Raphael J. Caprio eds., 1995); see also LOCAL GOVERNMENT SHARED SERVICES AND MUNICIPAL CONSOLIDATION, *supra* note 212.

Despite this growing interest, state officials worried that municipalities were not moving quickly enough to offset skyrocketing property taxes. As early as 1992, legislators considered bills that would require municipalities to share services, although critics attacked the plans as heavy-handed, and the state shelved mandatory cooperative programs.²¹⁶ The Governor's office, as well as the state's Department of Community Affairs, published a series of how-to guides, which provided local officials with everything they needed to share services, including sample public notices and municipal resolutions.²¹⁷ In 1998, Governor Christie Whitman commissioned a panel to study the state's rising property taxes, which, among other proposals, recommended that the state renew its efforts to encourage municipal cooperation.²¹⁸ Later that year, the legislature enacted the Regional Efficiency Development Incentive Program and the Regional Efficiency Aid Program, which not only provided grants to support feasibility studies—as the de-funded Interlocal Services Aid Act of 1973 had done—but also provided state grants to municipalities that entered shared service agreements.²¹⁹

The support for shared services did not translate into support for municipal consolidation.²²⁰ If anything, shared services allowed

²¹⁶ THE CHALLENGE OF LOCAL PARTNERSHIPS, *supra* note 207, at 25. The threat of mandatory programs probably hastened some shared service agreements. A handful of local officials indicated in 1995 that they supported shared service programs simply as a way to keep to the state from interfering in local activities. *Id.* at 31.

²¹⁷ N.J. OFFICE OF THE GOVERNOR, ACHIEVING EXCELLENCE: A GUIDE FOR LOCAL OFFICIALS AND TAXPAYERS TO IDENTIFY COST SAVINGS AND IMPROVE LOCAL SERVICES (1996); N.J. DEP'T OF CMTY. AFFAIRS, INTERLOCAL SERVICES: WORKING TOGETHER: MUNICIPAL SCHOOL BOARD COOPERATION: AN OVERLOOKED OPPORTUNITY (1994); N.J. DEP'T OF CMTY. AFFAIRS, INTERLOCAL SERVICES: WORKING TOGETHER: A GUIDE TO JOINT SERVICE FEASIBILITY STUDIES AND INTERLOCAL AGREEMENTS (1994); N.J. DEP'T OF CMTY. AFFAIRS, INTERLOCAL SERVICES: WORKING TOGETHER: COUNTY-MUNICIPAL COOPERATION (undated).

²¹⁸ PROPERTY TAX COMM'N, *supra* note 119. See also George James, *Enough Power to the People?*, N.Y. TIMES, Sept. 27, 1998, at NJ1.

²¹⁹ Ernest C. Reock, Jr., Alma Joseph & Michele Collins, *New Jersey, in HOME RULE IN AMERICA: A FIFTY STATE HANDBOOK* 288 (Dale Krane et al. eds., 2001); Christine Todd Whitman & Jane M. Kenny, *State Incentives for Shared Services*, N.J. MUNICIPALITIES 24 (1999); 1973 N.J. Laws 289 (Interlocal Services Aid Act).

²²⁰ The final report of the New Jersey Regionalization Advisory Panel, which the state commissioned to evaluate merging school districts, discussed the failures of this incentive-based system. It noted that state aid had not stimulated mergers as

municipal officials to reap many of the benefits of more comprehensive mergers without being forced to cede political power.²²¹ Ever since Vineland Borough and Landis Township joined in 1954,²²² only nine pairs of towns have seriously considered consolidation, and only one pair—Pahaquarry and Hardwick in 1997—have actually merged.²²³ There are numerous reasons why towns have shunned mergers. Two failed efforts in the 1990s—to join Franklin Borough with Hardyston Township and to join Princeton Borough with Princeton Township—offer insight into why the process has been so unpopular.

In November 1996, “the voters of Franklin Borough and Hardyston Township approved the creation of a [consolidation] commission . . . [to study] whether the two municipalities should [merge] into [one town] or remain separate.”²²⁴ Prior to the 2007 LUARC Act, the Municipal Consolidation Act of 1977 governed the merger process, which involved several steps.²²⁵ First, each municipality considering consolidation would hold a referendum on whether to create a “study commission.”²²⁶ If the measure passed, they next determined which five residents from each town would serve on the panel.²²⁷ The ad hoc commission would then have one year to study the costs and benefits of a merger.²²⁸ If a majority of the commissioners from each participating municipality voted in favor of proceeding, the measure would return to the voters for a second referendum on whether the towns should merge.²²⁹ Despite the availability of this procedure,

expected, and that the state might eventually consider “legislatively required regionalization.” N.J. REGIONALIZATION ADVISORY PANEL, FINAL REPORT 4, 7 (1998).

²²¹ See THE CHALLENGE OF LOCAL PARTNERSHIPS, *supra* note 207, at 31.

²²² *New City Set in New Jersey: 2 Communities Vote to Merge as Vineland on July 1*, N.Y. TIMES, Feb. 6, 1952, at 24.

²²³ Hester, *supra* note 15, at 1.

²²⁴ The voters of neighboring Hamburg Borough also had the option of joining the consolidation commission. They elected not to participate. FRANKLIN BOROUGH-HARDYSTON TOWNSHIP JOINT MUNICIPAL CONSOLIDATION STUDY COMM., FINAL REPORT 1 (1997) [hereinafter FRANKLIN-HARDYSTON FINAL REPORT].

²²⁵ Municipal Consolidation Act, 1977 N.J. Laws Ch. 435 (codified as amended at N.J. STAT. ANN. § 40:43-66.35 et seq.).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

Franklin and Hardyston only got past the first step, because eight months after the towns' residents voted to create a study commission, the ten-member panel unanimously recommended against consolidation, causing the matter to die before it could return to the voters.²³⁰

The commission provided four reasons for its decision that the towns remain independent.²³¹ First and foremost, the towns had great disagreements regarding public education.²³² Each community would lose some degree of control over a merged school district. Hardyston employed more teachers than Franklin, but paid them at a lower pay scale, and the consolidation would have required that the merged town either raise the salaries of the Hardyston teachers to match those of their Franklin counterparts, lower the Franklin salaries, or lay off some of the teachers.²³³ None of these options were politically palatable. In addition, the new town would have faced logistical issues, such as coordinating school curriculums and busing, and the commissions argued that these matters would eliminate any cost savings from school consolidation.²³⁴

Second, the commission argued that the merger would increase taxes in Hardyston.²³⁵ The relationship between Franklin and Hardyston is a classic example of a "doughnut-and-hole" community, where Franklin Borough governs a downtown region and Hardyston Township manages the outlying areas.²³⁶ Like so many other doughnut pairs, the borough "hole" is more geographically compact and, as a result of its small tax base, traditionally taxes residents at a higher rate.²³⁷ By consolidating, the new community would have set an equalized rate, with a heavier burden falling on the residents of the township

²³⁰ FRANKLIN BOROUGH-HARDYSTON TOWNSHIP JOINT MUNICIPAL CONSOLIDATION STUDY COMMISSION, PRELIMINARY REPORT 7 (1997) [hereinafter FRANKLIN-HARDYSTON PRELIMINARY REPORT].

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Patty Paugh, *Three Towns That Once Were One Considering 'Reuniting,'* STAR-LEDGER, Oct. 27, 1996.

²³⁷ CONSOLIDATION: PROSPECTS AND PROBLEMS, *supra* note 12, at 15–17.

“doughnut.” One commissioner noted that he “could not in good conscience saddle Hardyston with increased taxes.”²³⁸

The third and fourth arguments against consolidation were less economic and more political. The commission noted that Hardyston was growing faster than Franklin, and as its population grew, the outlying parts of town would gain increased political power.²³⁹ The townships gain would be Franklin’s loss, and the commission argued that, over time, the community would pay less attention to the former borough’s needs and concerns.²⁴⁰ In addition, state law would require that the county superintendent to pick members of the new consolidated school board, putatively leaving both communities without a voice in the initial board meetings.²⁴¹ Finally, the commission recommended against consolidation because public opinion was so strongly against the plan.²⁴² It noted that public support for the merger seemed to drop the more residents learned the details of the scheme.²⁴³

Princeton Township and Princeton Borough, another set of doughnut-and-hole municipalities, also considered consolidation in the late 1990s.²⁴⁴ The proponents of the Princeton consolidation advanced further, but ultimately failed for similar reasons. In November 1996, each municipality elected five residents to serve on a Consolidation Study Commission.²⁴⁵ The panel voted 8-2 in favor of merger, putting the question to the voters.²⁴⁶ The following year, a majority of Princeton Township residents voted in favor of consolidation, while a majority of Borough residents voted against it, and the town remained split.²⁴⁷ The referendum marked the sixth time that borough voters had defeated a Princeton consolidation proposal since 1952.²⁴⁸

²³⁸ FRANKLIN-HARDYSTON PRELIMINARY REPORT, *supra* note 230.

²³⁹ *Id.*

²⁴⁰ *Id.* at 8.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See *Battle of the Princetons*, N.Y. TIMES, Nov. 1, 1996, at B1.

²⁴⁵ Terry Pristin, *Princeton Will Stay Split*, N.Y. TIMES, Nov. 6, 1996, at B17.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

The Princeton commission painted a far rosier image of the benefits of consolidation than its Hardyston/Franklin counterparts. The commission argued that merging towns would allow the new community to provide common facilities for police, town administration, and public works projects, saving residents nearly \$700,000 each year.²⁴⁹ The two towns already shared a number of services, the commission noted, but argued that some joint efforts, such as community policing, were impossible unless the towns merged.²⁵⁰ It also highlighted the cultural and historical connections between the two towns, encouraging residents to think of Princeton as one community that past officials had split into two along arbitrary lines.²⁵¹ The commission argued that suburbanization and development had long since blurred whatever distinctions once existed.²⁵²

Many Borough residents disagreed. Opponents of the merger formed a community called "Preserve Our Historic Borough," which argued that, in a unified Princeton, the interests of township residents would outweigh those of downtown borough dwellers.²⁵³ The new municipal government would not attend to borough affairs, the opponents argued, and the historic, architecturally diverse heart of Princeton would eventually transform into the strip malls and housing developments that dotted the township's perimeter.²⁵⁴ The treasurer of Preserve Our Historic Borough argued that a unified Princeton would suffer the fate of New Haven, where the inner regions of the city turned into a "slum."²⁵⁵ Consolidation advocates formed their own group, "One Princeton," to counter these arguments.²⁵⁶ Supporters of the merger argued that all Princeton residents benefited from the historic downtown region, and that even suburban commuters living in the township recognized that the borough's unique

²⁴⁹ Melody Petersen, *2 Princetons Consider a Merger, Once Again*, N.Y. TIMES, Nov. 5, 1996, at B5.

²⁵⁰ PRINCETON CONSOLIDATION STUDY COMM'N, THINKING AS ONE TOWN 8 (1997).

²⁵¹ *Id.*

²⁵² *Id.* at 9.

²⁵³ Terry Pristin, *Anti-Merger Group Persists*, N.Y. TIMES, Dec. 26, 1996, at B1.

²⁵⁴ *Id.*

²⁵⁵ Petersen, *supra* note 249.

²⁵⁶ Pristin, *supra* note 253.

charm increased the overall value of the community.²⁵⁷ Ultimately, the measure passed by a 3-to-1 margin in the township and lost in the borough by 400 votes. In total, 5700 voted for consolidation and 3400 against it, but since state law required a majority in each municipality, the communities remained divided.²⁵⁸

V. **BARRIERS TO CONSOLIDATION IN THE TWENTY-FIRST CENTURY**

A. *Searching For Analogies*

The efforts in Hardyston/Franklin and Princeton demonstrate the difficulty of merging towns in New Jersey. But how much of the opposition to consolidation is based on legitimate concerns about the political and economic costs of such mergers, and how much is based on residents' emotional attachment to their hometowns? If the concerns are legitimate, can they be assuaged, or is consolidation simply not worth the costs? To answer these questions, it is helpful to examine consolidation as a tool of urban policymaking and to apply some general lessons to this particular case.

New Jersey is hardly the only state to struggle with inefficient governance. During the 1800s, leaders in both Philadelphia and New York worried that their metropolitan regions were too fractured to operate effectively, and both cities merged with adjacent municipalities to increase their size and achieve economies of scale. In 1854, Philadelphia consolidated all twenty-nine of the towns in its county into a single unit, and in 1898, New York merged five boroughs into a single entity.²⁵⁹ Consolidation allowed these two cities to coordinate land-use planning and provide municipal services far more easily than before.

During the twentieth century, several American cities sought to consolidate government powers into a single entity, although

²⁵⁷ Petersen, *supra* note 249.

²⁵⁸ Pristin, *supra* note 253.

²⁵⁹ Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1766 (2002).

none attempted to merge multiple municipalities into one.²⁶⁰ Virtually all consolidation efforts involved creating an “upper-tier” metropolitan government to oversee regional issues, such as land-use, pollution, water treatment, mass transit, and environmental protection.²⁶¹ Several Southern and Midwestern cities, including Nashville, Jacksonville, and Indianapolis, merged their metropolitan government with their county government, although these city-county consolidations did not involve dissolving any municipalities.²⁶² Similarly, Portland and Minneapolis-St. Paul each established metropolitan planning organizations that spanned several counties, but these entities only handled regional issues and neither challenged the fundamental autonomy of the participating municipalities.²⁶³ In North America, only Toronto has attempted a large-scale consolidation of municipal governments. In 1997, the Ontario legislature amalgamated Toronto and seven suburban municipalities into a single city.²⁶⁴ Experts have criticized the new unified government for doing exactly what it sought to avoid—creating additional bureaucracy and increasing the cost of municipal services.²⁶⁵

Unfortunately, large-scale consolidations provide little guidance for New Jersey policymakers. All of these past efforts involved a major city consolidating power to better serve an entire metropolitan region. Each of these plans affected hundreds of thousands of residents. New Jersey’s efforts are far smaller in scope. Officials in the Garden State have focused not on regional planning commissions that merge large townships, but rather on consolidating the many tiny communities that wreak havoc on local property taxes.²⁶⁶ To borrow the language of New Jersey’s

²⁶⁰ Douglas Henton, John Melville, & John Parr, *Governing Complexity: The Emergence of Regional Compacts*, in *URBAN SPRAWL: A COMPREHENSIVE REFERENCE GUIDE* 366–67 (David C. Soule ed., 2006).

²⁶¹ ANDREW SANCTON, *MERGER MANIA: THE ASSAULT ON LOCAL GOVERNMENT* 70–71 (2000).

²⁶² *Id.* at 43.

²⁶³ *Id.* at 70–71.

²⁶⁴ *The Big Apple Marks Century of Unification*, *TORONTO STAR*, Dec. 30, 1997, at A2.

²⁶⁵ SANCTON, *supra* note 261, at 46–51; see ALBERT ROSE, *GOVERNING METROPOLITAN TORONTO: A SOCIAL AND POLITICAL ANALYSIS 1953–1971* (Univ. of Cal. Press) (1972).

²⁶⁶ Even if New Jersey wanted to address larger scale problems through regional planning, it would face more serious obstacles. Most notably, the state shares its metropolitan regions (New York and Philadelphia) with three other states, making it

County and Municipal Government Study Commission, the state is more concerned with raising communities to the “minimum viability standard” than they are with reaching the “optimum service standard.”²⁶⁷ They can therefore draw only limited conclusions from the empirical research documenting the successes and failures of these previous consolidations.

New Jersey’s extreme fragmentation makes it difficult for policymakers to identify helpful case studies. The Garden State has more municipalities per capita than any other region in the country, forcing it to confront a problem that no other state has faced so directly. Ironically, the nations of northern Europe—home to so many of New Jersey’s first settlers—provide the most analogous examples of municipal consolidation. Over the past half-century, several European countries have reduced the number of townships by merging local units of government. In 1952, England contained 1356 districts and boroughs; by 1974, the number dropped by seventy-five percent to 333.²⁶⁸ West Germany similarly shrunk its number of local municipalities, dropping from 24,512 towns in 1959 to 8514 in 1978.²⁶⁹ Scandinavia has cut the most, with Denmark moving from 1097 municipalities in 1970 to 282 a decade later,²⁷⁰ and Sweden reducing its number ten-fold, from 2500 in 1952 to a mere 282 today.²⁷¹

These nations were not settled in an organized way. As in New Jersey, most of northern Europe’s small towns formed organically, over the course of centuries, often for odd or arbitrary reasons. These municipalities cherished their autonomy, as many of them predated the nations that governed them. These factors produced thousands of tiny hamlets across the European countryside, too

far more difficult to consolidate authority and implement comprehensive solutions to area-wide problems.

²⁶⁷ CREATIVE LOCALISM, *supra* note 12, at 89.

²⁶⁸ Jack Brand, *Reforming Local Government: Sweden and England Compared*, in THE DYNAMICS OF PUBLIC POLICY: A COMPARATIVE ANALYSIS 36 (Richard Rose ed., 1976).

²⁶⁹ L.J. Sharpe, *Local Government Reorganization: General Theory and UK Practice*, in THE DYNAMICS OF INSTITUTIONAL CHANGE: LOCAL GOVERNMENT REORGANIZATION 99 (Bruno Dente & Francesco Kjellberg eds., 1988); ALAN NORTON, INTERNATIONAL HANDBOOK OF LOCAL AND REGIONAL GOVERNMENT: A COMPARATIVE ANALYSIS OF ADVANCED DEMOCRACIES 254 (1994).

²⁷⁰ MORLAN, *supra* note 36, at 31.

²⁷¹ Brand, *supra* note 268, at 36; Michael A. Nelson, *Municipal Amalgamation and the Growth of the Local Public Sector in Sweden*, 31 J. OF REG. SCI. 39, 40–43 (1992).

small to provide municipal services in an efficient way but too proud to join with their neighbors. Thus, while New Jersey's degree of fragmentation is high by American standards, it is about average for European states.²⁷² The efforts in these nations to restructure local government offer useful insight into the merger process.

The most radical, and best documented, consolidation efforts occurred in Sweden and Denmark. Both nations imposed strict standards on the minimum size of their municipalities, forcing small communities to join with their neighbors to create townships of the appropriate size. Sweden introduced the reforms piecemeal. In the 1950s, the national government realized that its municipalities were too small to operate effectively and stated that all towns (or "communes") should have populations greater than 3000 people.²⁷³ At first, Sweden offered incentives to encourage consolidation. Many towns did merge, although a sizeable minority was still not large enough to meet the 3000-person threshold.²⁷⁴ In 1962, the government raised the minimum population to 8000, and stated that new communes were to be clustered around some town or populous place, creating a series of coherent economic and geographical units held together by some central community.²⁷⁵ This rule was much more strictly applied. In eight years, the number of municipalities dropped from 816 to 464, and then to 274 four years later.²⁷⁶ Although Swedish locals felt threatened at first by relinquishing control over their townships, the amalgamation process moved quickly and

²⁷² Using 2000 census data, the average population of a New Jersey municipality is 14,866. Forty-six towns, or about two percent of the state's municipalities, have less than 1000 residents. The state is still considerably less fragmented than Norway (which averages 9000 residents per municipality with four percent of towns containing less than 1000), Spain (averages 5000, with 56% below 1000), and France (averages 1300, with 77% below 1000). See Pawel Swianiewicz, *Size of Local Government, Local Democracy and Efficiency in Delivery of Local Services—International Context and Theoretical Framework*, in CONSOLIDATION OR FRAGMENTATION? THE SIZE OF LOCAL GOVERNMENTS IN CENTRAL AND EASTERN EUROPE 7 (Pawel Swianiewicz ed., 2002); Council of Europe, *The Size of Municipalities, Efficiency, and Citizen Participation, Local and Reg. Authorities*, in EUROPE 56 (1995); U.S. CENSUS BUREAU, NEW JERSEY QUICK FACTS (2007), available at <http://quickfacts.census.gov/qfd/states/34000.html>.

²⁷³ Brand, *supra* note 268, at 40.

²⁷⁴ *Id.*

²⁷⁵ NORTON, *supra* note 269, at 298.

²⁷⁶ Brand, *supra* note 268, at 41.

smoothly.²⁷⁷ Empirical research suggests that the new, larger governments are more efficient than their predecessors and the intensity of local political life actually increases²⁷⁸ after the consolidations.

Denmark's mergers proved equally successful. Before the parliament acted in 1970, Denmark faced many of the same problems confronted by other developing regions. Urbanization and demographic shifts had rendered existing local authorities obsolete, municipal boundaries no longer matched population centers, and wealthier citizens moved out of the central cities towards the countryside. The small municipalities were unable to provide the services residents expected.²⁷⁹ Starting in 1962, the Danish government commissioned a panel of policy experts and local representatives to study the nation's municipal boundaries. They published the report in 1970, suggesting that towns contain at least five to six thousand residents and that their boundaries fully integrate a geographic region.²⁸⁰ In a surprisingly quick and nearly unanimous vote, the Danish parliament approved their recommendations.²⁸¹ Proponents successfully convinced the nation that these reforms were necessary not simply to create more efficient local governments, but to create more effective ones. By creating larger government units, the municipalities were better able to serve their constituents by taking on greater responsibilities, thus reaffirming the centrality of local government in Danish life.²⁸² The reforms were so well-received that Denmark chose to consolidate towns in 2005, further reducing the number of municipalities from 278 to 98 communities with at least 20,000 residents.²⁸³

Obviously, the Scandinavian political culture is quite different from the one that dominates New Jersey's local governments. It is highly unlikely that the Garden State could replicate the relatively painless consolidations in these countries. A quick comparison of

²⁷⁷ *Id.* at 44, 51–53.

²⁷⁸ Swianiewicz, *supra* note 272, at 15.

²⁷⁹ MORLAN, *supra* note 36, at 31–32.

²⁸⁰ NORTON, *supra* note 269, at 327–29.

²⁸¹ MORLAN, *supra* note 36, at 33.

²⁸² *Id.* at 38.

²⁸³ DANISH MINISTRY OF THE INTERIOR AND HEALTH, DEP'T OF ECON., THE LOCAL GOVERNMENT REFORM—IN BRIEF 13 (2007).

Denmark's 1970 parliamentary debate and Pahaquarry's 1997 town hall meetings reveals how little the two communities share. Nonetheless, the European case studies demonstrate that small-town amalgamation is possible and that, once a consensus forms in favor of such mergers, these policies can improve the quality of local government.

B. Five Barriers In New Jersey

After examining the general history of municipal consolidations, it is now possible to specifically address political barriers to their use in New Jersey. There are five types of barriers: procedural, philosophical, political, psychological, and practical. These obstacles affect different constituencies in different ways but, combined, they have prevented New Jersey from merging communities into more regional governments.

The first barrier involves the procedural challenges of getting a consolidation measure on a local ballot. There are now two ways to bring a consolidation proposal to a vote: under the process established by the 1977 Municipal Consolidation Act,²⁸⁴ or under the simplified process created by the 2007 reforms. The 1977 procedure contained numerous problems—towns often had trouble finding qualified residents to serve on their consolidation study commissions, for example—and the bureaucracy might have deterred towns from considering mergers.²⁸⁵ The new LUARC Act

²⁸⁴ Municipal Consolidation Act, 1977 N.J. Laws Ch. 435 (codified as amended at N.J. STAT. ANN. § 40:43-66.35 et seq.).

²⁸⁵ The Department of Community Affairs noted several shortcomings with the ad hoc consolidation study commissions required by the 1977 law. For example, in order to run for a position on the commission, candidates must collect nominating signatures equal to five percent of the total number of votes cast in the last general election for state legislature. This requirement is two-and-a-half times higher than the signature requirements for someone wishing to run for municipal office, and the Department of Community Affairs has argued that this higher threshold deters qualified candidates from participating in the study process. Even once the commission is formed, the Department has contended that the consolidation statute does not provide the members with enough time to do a thorough investigation. Moreover, by requiring that each of the participating municipalities elect five commission members, and that a majority of members from each town must support the consolidation plans in order for them to proceed, the approval process has become overly cumbersome and prevented towns from putting meritorious proposals before the voters. LOCAL GOVERNMENT SHARED SERVICES AND MUNICIPAL CONSOLIDATION, *supra* note 12.

should solve some of these problems. The law creates a permanent seven-person panel to study the state's municipalities, who will, in theory, have the expertise and the political independence to fairly determine which towns should be forced to vote on mergers. The Commission is several years away from its first slate of recommendations, however, so it is unknown how well this new process will work. Even if the Commission is successful, it might succeed in getting more towns like Hardyston and Franklin to vote on mergers, but it will be unable to stop communities like Princeton from voting against consolidation during the referendum process.

The second barrier is philosophical. Some voters believe, as a matter of principle, that government operates best when it remains close to the people. Decentralization not only allows municipal officials to customize their public services based on local needs, but also allows political leaders to personally know their constituents.²⁸⁶ When towns consolidate, these philosophical critics argue, the unit of government becomes less accessible, less accountable, and less responsive.²⁸⁷ This critique of consolidation is normative rather than empirical, and thus should be distinguished from public choice theory, which contends that fragmentation actually increases the quality of services provided by municipalities.²⁸⁸ The philosophical barrier to consolidation, on the other hand, involves a value judgment about the nature of republican government. This faith in democratic localism forms the core of the amorphous notion of "home rule."

The third barrier is political. Some elected officials fear that consolidation will put them out of work. When two towns merge, only one person remains as mayor. By consolidating municipalities, the communities are able to eliminate redundant positions, which, to most people, is a benefit of the policy. For politicians, a merger does not simply jeopardize their own offices, but it also reduces the number of patronage jobs they can

²⁸⁶ ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* 41-42 (1973).

²⁸⁷ Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 16-17 (2000).

²⁸⁸ See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. & ECON.* 416 (1956).

distribute to allies.²⁸⁹ In a state famous for its corruption and cronyism, this fear is both real and unspoken.²⁹⁰ The problem is exacerbated by New Jersey's long-standing tradition, only recently discontinued, of dual office-holding.²⁹¹ Thus, a mayor may also serve as a state legislator, and can double his effectiveness as he lobbies in two political arenas to stop the state from consolidating land in his district.

The fourth obstacle is psychological. Citizens often feel a strong attachment to their local communities. From an early age, the "home town" is a comforting and familiar symbol of one's heritage and group identity.²⁹² People live in localities; they attend church and host potlucks there. The object of one's attachment is often arbitrary, a happenstance of where one happened to be born.²⁹³ Citizens perceive consolidation programs not as an effort to improve the efficiency and efficacy of the local government, but as an assault on their way of life.²⁹⁴ To be targeted for consolidation is to be deemed somehow defective or unworthy of existence. These concerns loom large when residents perceive that consolidation will give them less control over their lives.²⁹⁵ In particular, communities feel threatened if they believe that the consolidation will reduce the quality of children's education, or if

²⁸⁹ See Ronald Smothers, *New Jersey Senate Passes Two Bills Meant to Cut Costs*, N.Y. TIMES, Jan. 23, 2007, at B5.

²⁹⁰ Ken Belson, *Long Island Officials Weigh Two Sides of Consolidation*, N.Y. TIMES, Mar. 22, 2007, at B5.

²⁹¹ Shure, *supra* note 13; see also Editorial, *Home Rule, High Taxes*, N.Y. TIMES, Jan. 28, 2007, at NJ17.

²⁹² See Ed O'Brien, *Don't Let 'Tax Reform' Destroy Towns*, STAR-LEDGER, Jan. 25, 2007, at 17; KENNETH HOOVER, *THE POWER OF IDENTITY: POLITICS IN A NEW KEY* 50-52 (1997); NICHOLAS K. BLOMLEY, *LAW, SPACE AND THE GEOGRAPHIES OF POWER* 193 (1994) (stating that localities are "valued not as temporary nodes in a continual migratory process, but as 'life spaces,' rich with personal and cultural meaning").

²⁹³ The state Department of Community Affairs hints at how arbitrary these attachments can be. Even in hole-and-doughnut towns that share the same name, such as the Princetons, the Mendhams, or the Chesters, residents report a connection to their particular municipality, which the Department describes as "perceptions of individuality." LOCAL GOVERNMENT SHARED SERVICES AND MUNICIPAL CONSOLIDATION, *supra* note 12.

²⁹⁴ MORLAN, *supra* note 36, at 33.

²⁹⁵ See Rebecca Lerner, *Merger Advocates Stressing Savings*, HOME NEWS TRIB. (New Brunswick, N.J.), Nov. 30, 2006, at 3A.

the merger will integrate the region racially or socio-economically.²⁹⁶

The final barrier involves practical concerns about consolidation. This is perhaps the largest obstacle to reform, as it encompasses all of the questions about whether consolidation will actually deliver the benefits its proponents promise. These inquiries are particularly difficult to answer, as any statement about future benefits will be speculative. Residents who demand certainty before committing to an overhaul of local government often find such statements unsatisfying.

Practical concerns typically fall into one of two categories. The first involves general questions about the economic benefits of fragmentation. Some public choice economists argue that local autonomy actually increases the efficient provision of services.²⁹⁷ In a market with a range of municipalities offering differing levels of service, these theorists argue, residents can choose to live in the community that best serves their needs. However, as the number of communities decrease, public choice theorists argue that residents are less able to “shop for cities” and thus must live in a neighborhood that provides either more or less services that inhabitants desire.²⁹⁸

Policymakers have attacked this theory for failing to account for the barriers that limit citizens’ ability to truly “shop” for hometowns. As the New Jersey Supreme Court has noted, many of New Jersey’s wealthier communities were zoned to intentionally prevent certain demographics from moving into neighboring communities.²⁹⁹ Opponents of consolidation continue to cite public choice theory to justify their position, however, and the argument remains a potent one in today’s debates.

The other kind of practical concerns are specific to communities considering consolidation. These barriers vary from situation to situation, although the Princeton and

²⁹⁶ KARCHER, *supra* note 37, at 198–205; Ax & Van Dusen, *supra* note 76.

²⁹⁷ See SANCTON, *supra* note 261, at 74–76; ROBERT BISH & VINCENT OSTROM, *UNDERSTANDING URBAN GOVERNMENT: METROPOLITAN REFORM RECONSIDERED* (1973); Tiebout, *supra* note 288.

²⁹⁸ Gerald Frug, *Against Centralization*, 48 *BUFF. L. REV.* 31, 35 (2000).

²⁹⁹ See *S. Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713, 723–25 (N.J. 1975).

Hardyston/Franklin consolidation movements reveal some of the most common problems.³⁰⁰ The biggest issue typically involves tax rate equalization.³⁰¹ In almost all cases, one town will have a higher tax rate than the other, and the gap can be particularly acute when one of the participating municipalities is a doughnut hole borough that lacks a significant property tax base. If the towns merge, they will move to a single, equalized rate, which means that the community that previously enjoyed the lower tax rate will have to pay more to the new municipality.³⁰²

A similar phenomenon occurs regarding services. It is not unusual for neighboring towns to offer different levels of municipal services. If, for example, one town offers weekly curbside garbage pick-up, and its neighbor offers the same service three times a week, the communities face a dilemma upon consolidation.³⁰³ If the merged town opts for the less-regular service, the result is that half of the community loses a service it had come to expect. If the town decides instead for the thrice-weekly service, then the cost of garbage collection will be higher than before the consolidation. As mentioned earlier, these concerns are often the most controversial when discussing public education, and communities turn hostile if they perceive that their children will receive an inferior education in the newly consolidated municipality. Over time, residents would most likely grow accustomed to the new service levels, but in the interim, the transition might prove quite jarring. The threat of such changes is often sufficient to solidify residents' opposition to consolidation.

VI. WHY IT IS HARD TO IMPOSE PAIN IN A DEMOCRACY

Consolidation will undoubtedly impose costs on New Jersey. Some residents will pay higher taxes, others will receive lower quality services, and many will lose their jobs in local government. The benefits will be diffuse and uneven, often rewarding those

³⁰⁰ David Grubb, *Bringing a Little Rationality to Public Finances*, BERGEN REC., Dec. 8, 2006, at L15.

³⁰¹ William Dressel, Jr., *Mayors Criticize Forced Municipal Consolidation*, OCEAN CO. OBSERVER, Dec. 19, 2006; William Dressel, Jr., *Consolidation Is One, Though not Best, Property Tax Answer*, DAILY J., Nov. 16, 2006, at 11a.

³⁰² See FRANKLIN-HARDYSTON PRELIMINARY REPORT, *supra* note 230, at 7.

³⁰³ KARCHER, *supra* note 37, at 200-02; Lerner, *supra* note 295, at 3A.

who live in poorer neighborhoods and others who do not benefit from the state's current municipal structure. The transition to larger towns could be quite painful. In the long-term, however, most experts agree that the benefits will outweigh the costs.³⁰⁴ Consolidation will avert an even greater budget crisis than the one the state currently faces, as well as help correct the state's history of severe socioeconomic segregation. The real question, then, is how to implement a policy with so many short-term costs.

The Framers created a representative democracy precisely to prevent the government from imposing unwanted burdens on its citizens.³⁰⁵ In order to enact a program that imposes losses on certain groups, policymakers must shield themselves from the political pressures seeking to maintain the status quo. These policies, which some political scientists call "de-distributive" because they force officials to de-distribute or take away some good from voters, are some of the most difficult to implement in a democracy.³⁰⁶

A government's ability to impose pain depends on many factors: who will be hurt by the policy; how badly they will be hurt; how much influence they possess in the political process; who will benefit from the policy; and how willing politicians are to stake out risky positions.³⁰⁷ To understand loss-imposition, one must begin with two common assumptions about the democratic process. First, elected officials are primarily concerned with retaining their positions, which requires them to take credit for popular policies and minimize blame for unpopular ones.³⁰⁸ Second, voters are influenced by a "negativity bias," by which individuals are more likely to remember government decisions that hurt them over those that benefited them.³⁰⁹ Politicians thus

³⁰⁴ See generally *supra* note 12.

³⁰⁵ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.").

³⁰⁶ Paul Light first coined the term "dedistributive" when describing Congressional efforts in 1983 to avert the bankruptcy of the Social Security Fund. PAUL LIGHT, *ARTFUL WORK, THE POLITICS OF SOCIAL SECURITY REFORM* 15 (1985).

³⁰⁷ R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371 (1986).

³⁰⁸ MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 50 (1977).

³⁰⁹ Howard S. Bloom & H. Douglas Price, *Voter Response to Short-Run Economic Conditions: The Asymmetric Effect of Prosperity and Recession*, 69 AM. POL. SCI. REV. 1240

possess strong incentives to avoid blame for unpopular policies whenever possible.³¹⁰ Given the strong power of incumbency in today's political environment, officials know that voters will keep re-electing them until provided with a reason not to.³¹¹

The more concentrated the harms of a particular policy, the more likely it is that the group of individuals affected by the policy will unite to fight its implementation.³¹² In some cases, these groups will be geographically dispersed but united around some common cause, such as gun owners opposed to the Brady Bill, factory owners opposed to environmental restrictions, or senior citizens opposed to pension cuts. In other cases, the government will try to impose an unpopular policy on a specific locality and the injured group will be geographically concentrated. Examples include most "NIMBY" laws, such as placement of garbage dumps, highway construction, nuclear waste disposal, and military base closures.³¹³ In these situations, the representative from the affected district will do whatever possible to protect his or her constituents.

This second group of cases—involving geographically concentrated losses—can further divide based on how far-reaching the policy is. In cases such as nuclear waste disposal, the government usually only needs to select a single site as a waste depository; once officials choose a location, every other community has a strong incentive to support the choice.³¹⁴ In other examples, if the government successfully imposes pain on one district, it will likely spread its redistributive policy to other regions. The BRAC commission's success in closing bases during the first round in 1989, for instance, only made it easier for Congress to enact more closures in 1994.³¹⁵ In these cases, the

(Dec. 1975); Richard R. Lau, *Two Explanations for Negativity Effects in Political Behavior*, 29 AM. J. POL. SCI. 119 (Feb. 1985).

³¹⁰ Weaver, *supra* note 307, at 374–76.

³¹¹ Michael Miller, *LoBiondo Wield Power of Incumbent*, PRESS ATLANTIC CITY, Jan. 28, 2008, available at http://www.pressofatlanticcity.com/top_three/story/7531319p-7433255c.html.

³¹² Leslie A. Pal & R. Kent Weaver, *The Politics of Pain*, in THE GOVERNMENT TAKETH AWAY: THE POLITICS OF PAIN IN THE UNITED STATES AND CANADA 4 (Leslie A. Pal & R. Kent Weaver eds. 2003).

³¹³ *Id.* at 13–16; KENT E. PORTNEY, SITING HAZARDOUS WASTE TREATMENT FACILITIES: THE NIMBY SYNDROME (1991).

³¹⁴ Pal & Weaver, *supra* note 312, at 17–18.

³¹⁵ GOREN, *supra* note 22, at 32.

policy ultimately affects a larger class of individuals, and thus all potential victims have a strong interest in blocking the policy before it gets off the ground.

Municipal consolidation proposals fall into this last group. As with base closures, if legislators succeed in merging a few towns, they will likely try to expand the policy and target other communities. As a result, the policy threatens all small municipalities, even those not originally slated for consolidation.

Another important factor that affects the government's loss-imposition abilities is the power of the affected parties. The more organized the potential victims are, the more they will use their power to oppose the proposal.³¹⁶ The geographic distribution of victims is again relevant: the more concentrated the individuals are, the easier it is for them to coordinate meetings, leaflet neighborhoods, and lobby specific legislators.³¹⁷ Legislators are especially likely to get involved if opponents of the proposal demonstrate that the issue will determine their vote in upcoming elections.

Similarly, politicians will intervene if it affects their personal self-interest. It is unsurprising, for example, that it took over two hundred years before the federal government ratified a constitutional amendment to prohibit Congressmen from raising their salaries for the current term.³¹⁸ Municipal consolidation thus presents unique challenges. Any successful merger will eliminate leadership positions in local government. Mayors and councilpersons can use their influence in the committee to campaign against consolidation referenda and can lobby assemblymen to veto state approval of the proposal. State legislators are reluctant to remove local allies from power, especially in communities where the political machinery is strongest.³¹⁹

³¹⁶ This pattern explains why governments often place garbage dumps and other undesirable public projects in poor neighborhoods: the lower-class residents lack the clout to lobby legislators to protect their communities.

³¹⁷ See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

³¹⁸ U.S. CONST. amend. XXVII (proposed 1789, ratified 1992) ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.")

³¹⁹ Dual-office holding adds a twist to this problem: in New Jersey, it is likely that state legislators actually hold some of the local government offices that consolidation

The power of interest groups or politicians to block loss-imposing policies will also depend on the type of the political institutions involved. In the United States, the separation of powers between a bicameral legislature and the executive creates numerous opportunities to oppose government proposals.³²⁰ Opponents have access to multiple “veto points”: they can weaken or defeat a proposal in a legislative subcommittee; on the floor of the lower or upper houses; as the two houses work out a compromise bill; or with the executive’s veto.³²¹ In addition, opponents can threaten to target specific legislators in future district elections. As a result, the frequency of elections plays a role: the more often politicians must answer to voters, the more they will be responsive to constituent concerns.³²²

Many of these veto points do not exist in Westminster parliamentary systems. In England and Canada, for example, where executive and legislative powers are consolidated into a single branch, and where party discipline is much stronger, opponents have fewer opportunities to block proposals.³²³ The prime minister and his deputies set the agenda, while the whip of the party in power ensures enough votes for passage.³²⁴ These institutional arrangements make it far easier for Westminster governments to impose losses, not simply because it prevents opponents from interfering, but also because the strong centralization of power insulates individual legislators from blame for an unpopular policy.³²⁵ Part of the reason that Danish and Swedish governments were able to consolidate so many

would eliminate. See Letter from William G. Dressel, Executive Director, New Jersey League of Municipalities, to New Jersey Mayors, Regarding Dual Elective Office Holding Prohibition (Jan. 25, 2008), available at <http://www.njslom.org/ml012508c.html>.

³²⁰ Pal & Weaver, *supra* note 312, at 6–7.

³²¹ Andre Kaiser, *Types of Democracy: From Classical to New Institutionalism*, 9 J. THEORETICAL POL. 419, 436 (1997); George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRITISH J. POL. SCI. 289 (1995).

³²² It is for the same reason that legislators will tend to propose redistributive or other types of loss-imposing policies early in a legislative session; they are hopeful that voters will forget about the negative effects by the time of the next election. LIGHT, *supra* note 306, at 15.

³²³ Pal & Weaver, *supra* note 312, at 7–9.

³²⁴ *Id.*

³²⁵ *Id.*

municipalities in such a short period of time was that the political parties in power supported the policy and could push it through their legislatures without much opposition.³²⁶

Finally, the ability to obstruct a dedistributive policy depends on the extent and the distribution of the proposal's benefits. The more concentrated the payoffs, the stronger the incentives for the beneficiaries to lobby for the change. When an issue creates equal numbers of highly concentrated supporters and opponents, gridlock ensues. Abortion and same-sex marriage generate such controversy because each side possesses a core of highly motivated activists seeking benefits or trying to block harms.³²⁷ The most intractable problems, however, arise when the harms are highly concentrated while the benefits are broadly distributed, as occurs with environmental protection, base closures and, of course, municipal consolidation. Only the most talented policymakers can find ways to overcome the barriers to implementing such policies.³²⁸

Political scientists have identified several strategies that politicians employ to shield dedistributive proposals from attack. The most common is delegation, or "passing the buck."³²⁹ For over a century, Congress has empowered independent regulatory agencies to make the kind of decisions its members could not or would not make. The Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, and the National Labor Relations Board are among the most famous examples of such bodies.³³⁰ These agencies insulate Congress from the actual legislative decisions, just as automated cost-of-living-adjustments (COLA) in Social Security payouts allow politicians to increase benefits for seniors each year

³²⁶ MORLAN, *supra* note 36, at 33; Brand, *supra* note 268, at 40–44; SANCTION, *supra* note 261, at 44.

³²⁷ As these examples suggests, the harms need not be "real" in a purely economic sense, but can also involve moral, ethical, or religious questions, where the harms are either symbolic or impose some psychic damage on those affected by the policy.

³²⁸ James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 372–74 (James Q. Wilson ed. 1980); Pal & Weaver, *supra* note 312, at 13.

³²⁹ Weaver, *supra* note 307, at 386.

³³⁰ GOREN, *supra* note 22, at 7; ROBERT CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 760–61 (1941).

without becoming subject to attacks for increasing budget deficits.³³¹

Other strategies involve lowering the profile of the issue, either by holding policy meetings in secret or by obfuscating the matter in the media. If that proves impossible, then officials will try to “redefine the issue,” or cast the proposal in terms of some other, previously overlooked benefit. Politicians will also try to avoid blame either by scapegoating (blaming another body for the decision) or by “circling the wagons” (sharing blame equally amongst all involved parties). Finally, if necessary, officials will pay off the victims, either by directly compensating them for their losses or by exempting some of the more influential victims from the harms as a way of winning their support. These kinds of maneuvering show politics at its most raw. Elected representatives must remain deeply committed to their goals in order to steer a dedistributive policy from proposal to reality.

Paul Light coined the term “dedistribute” when writing about his involvement in the 1983 Social Security reforms.³³² Early during Ronald Reagan’s presidency, the Social Security trust fund was on the verge of running dry. According to experts, the only way to rescue the fund was by raising taxes and cutting benefits. The White House pressed for the reforms, but Congressional Democrats, recognizing a political opportunity, attacked the plan.³³³ Only at the last minute, just before Social Security went bankrupt, did President Reagan and Speaker of the House Thomas O’Neill engineer a solution to keep the program solvent. Negotiated in secret, the plan was only revealed to the public once both parties had worked out its final terms and agreed to push it through Congress as quickly as possible.³³⁴ As a result, the rescue bill passed before the media or interest groups had the chance to attack its dedistributive policies.³³⁵

The backroom deal was so successful that it inspired other Congressmen to find creative ways to introduce other, much-needed austerity measures. In 1985 and 1987, U.S. Senators Phil

³³¹ Weaver, *supra* note 307, at 385.

³³² LIGHT, *supra* note 306, at 4.

³³³ *Id.* at 3.

³³⁴ *Id.* at 180, 196.

³³⁵ *Id.* at 226–28.

Gramm, Warren Rudman, and Ernest Hollings sponsored bills, known as the Gramm-Rudman Acts, that imposed binding constraints on federal spending.³³⁶ These automatic spending cuts, called “sequesters,” were popular with politicians, who wanted to balance the budget but needed a justification for returning less pork-barrel spending to their districts. The sequesters provided a useful scapegoat.

In 1988, Congress sought to tackle another intractable problem: military base closures. For over thirty years, legislators had blocked any efforts to shutter military sites. The reason was obvious: a Congressman was committing political suicide if he allowed a military base in his home district. By the end of the Cold War, the problem had reached its breaking point.³³⁷ The media publicized absurd examples of wasteful military bases—including Fort Douglas, an army post established in 1862 to protect the Pony Express but which, by 1988, had become entirely encircled by the campus of the University of Utah. Military experts universally agreed that dozens of bases had become obsolete.³³⁸

As stated earlier, Congress created the first BRAC commission in 1989 to address the issue. Representative Dick Armey, the bill’s sponsor, pointed directly to the 1983 Social Security Compromise as his inspiration.³³⁹ The proposal proved popular with politicians who recognized the need to close bases but demanded insulation from angry voters. BRAC was so successful in 1989 that Congress authorized four more rounds of closures in 1991, 1993, 1995, and 2005.³⁴⁰ The commissions, in turn, inspired New Jersey’s LUARC Commission. When the state legislature passed the LUARC Act in 2007, it cited the BRAC results, noting in the bill’s preamble that “tough political decisions are often most expeditiously made through the use of bipartisan commissions, as demonstrated by

³³⁶ Gramm-Rudman-Hollings Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038 (codified as amended in 2 U.S.C. § 900); Budget Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. 100-119, 101 Stat. 754 (codified as amended in 2 U.S.C. § 900).

³³⁷ GOREN, *supra* note 22, 48–49.

³³⁸ Mayer, *supra* note 27, at 397.

³³⁹ GOREN, *supra* note 22, at 50; Armey, *supra* note 20.

³⁴⁰ 2005 DEF. BASE CLOSURE AND REALIGNMENT COMM’N, *supra* note 22, at 311–17.

the success of the federal base realignment and closure (BRAC) procedure.”³⁴¹

These examples of successful redistributive policies share a common theme: in each case, all of the involved parties recognized the need to act. The actors understood the severity of the impending crises—an entitlement program going bankrupt, a massive federal deficit, or a redundant and mismanaged armed forces—if they failed to find a solution. These threats created the political will necessary for elected officials to put aside the dangers of backlash at the ballot box and work together for a bipartisan, loss-imposing solution. However, even then, politicians acted only after they had established procedures to avoid blame for their decisions.

What will it take for New Jersey’s legislators to act similarly with regards to municipal government reform? Political scientists and sociologists who study local government issues have tried to develop a theoretical framework to explain when and why communities decide to merge. In the United States, these experts have focused on city-county consolidations, as these remain the most common type of municipal merges in the country, but the arguments likely hold for situations, as in New Jersey, where two or more towns would seek to merge with each other.³⁴² The experts report that merger proposals rarely succeed and, when they do, they are often the result of a major crisis that suddenly shifts public opinion in favor of larger government.³⁴³ This would suggest that something major has to occur before New Jersey adequately responded to the current problem.

Most consolidation efforts follow a similar pattern. Borrowing from a 1966 treatise Chalmers Johnson’s *REVOLUTIONARY CHANGE*, scholars of local government reform argue that a successful consolidation effort goes through four stages: (1) crisis climate; (2) power deflation; (3) accelerator; and (4) professional

³⁴¹ N.J. STAT. ANN. § 52:27D-501 (West 2001 & Supp. 2008).

³⁴² For more on city-county consolidations, see *infra* Part IV, especially SANCTON, *supra* note 261, as well as *CASE STUDIES IN CITY-COUNTY CONSOLIDATION: RESHAPING THE LOCAL GOVERNMENT LANDSCAPE* (Suzanne Leland & Kurt Thurmaier eds., 2004).

³⁴³ Linda S. Johnson, *Revolutionary Local Constitutional Change: A Theory of the Consolidation Process*, in *CITY-COUNTY CONSOLIDATION AND ITS ALTERNATIVES: RESHAPING THE LOCAL GOVERNMENT LANDSCAPE* 157 (Jered B. Carr & Richard C. Feiock eds., 2004).

campaign.³⁴⁴ The first stage, crisis climate, involves three phases. The pressure for consolidation begins when residents begin to recognize a problem with the current municipal structure, either because of rising taxes, lowering quality of services, or growing environmental problems. In turn, these citizens demand some sort of change from elected officials. The local government responds in one of two ways: either it provides some adequate solution that resolves the problem, thus ending the need for consolidation; or it provides an inadequate solution, which only increases the demand for change.³⁴⁵

If the problem persists, then the movement proceeds to the second stage: power deflation. At this point, citizens come to see their local officials as intransigent or impotent to solve the community's growing problem. They demand sweeping changes to the government structure. Civic elites and the media increase their criticism of the status quo and begin supporting candidates who promise reform. Local organizations create ad hoc groups or formal commissions to study the problem to examine whether consolidation would be a viable solution.

The third stage involves some accelerator, or crisis event, that shocks the community and exposes the weakness of the government. This event could be anything from a high-profile scandal or death of a major local figure to a weather catastrophe mismanaged by local officials.³⁴⁶ The public demands immediate and broad-reaching change.

The final stage is the actual process of switching from one municipal structure to another in a professionally managed campaign. Even after the accelerating event, residents still need to

³⁴⁴ The first three stages comprise Chalmer's theory of how revolutionary changes generally occur. CHALMERS JOHNSON, *REVOLUTIONARY CHANGE* (1966). Walter Rosenbaum and Gladys M. Kammerer applied the theory to city-county consolidation efforts. WALTER A. ROSENBAUM AND GLADYS M. KAMMERER, *AGAINST LONG ODDS: THE THEORY AND PRACTICE OF SUCCESSFUL GOVERNMENTAL CONSOLIDATION* (1974). Boyd Messinger, Linda Johnson and Richard Feiock included a fourth stage, involving a professionally-run political campaign in favor of consolidation, to better reflect the consolidation process. BOYD R. MESSINGER, *LOCAL GOVERNMENT RESTRUCTURING: A TEST OF THE ROSENBAUM-KAMMERER THEORY* (1989); Linda S. Johnson & Richard C. Feiock, *Revolutionary Change in Local Governance: Revisiting the Rosenbaum and Kammerer Theory of Successful City-County Consolidation*, 27 J. POL. SCI., 1-29 (1999).

³⁴⁵ Johnson, *supra* note 343, at 158.

³⁴⁶ ROSENBAUM & KAMMERER, *supra* note 344, at 29.

decide whether consolidation is the right solution. Well-organized, trained activists must provide them with arguments in favor of a merger. The better informed the residents are about the benefits of consolidation, the more likely they are to support it.³⁴⁷

New Jersey's current situation falls somewhere between the first and second phases ("crisis climate" and "power deflation"). Residents recognize the many negative effects of fragmentation: redundant services, high property taxes, unequal distribution of resources, and political corruption. Civic elites have started calling for municipal reform.³⁴⁸ The Garden State seems poised for change. However, under this theoretical framework, New Jersey is still far from implementing a broad-reaching consolidation policy. It seems unlikely that the state's current fiscal crisis, which has caused property taxes to spike throughout the past few years, is enough to push consolidation to the very front of the state's political agenda. The creation of the 2007 LUARC Commission perhaps demonstrates that state officials recognize the importance of municipal government reform, but the problem has yet to become a salient issue for most of the state's voters.

In this context, the LUARC Commission appears to be one of the "government responses" that experts predict will occur towards the end of the first stage of the revolutionary process. The legislature created the Commission as part of a reform package to reduce property taxes. However, it remains to be seen whether these efforts were adequate to diffuse the state's fiscal crisis. If these reforms successfully help lower property taxes, then the crisis is diffused and the need for sweeping change lessens. If, however, the reforms are unsuccessful, the state may move deeper into the second stage of "power deflation," where citizens lose confidence in their leaders to resolve the crises.

Yet, even if the LUARC Commission proves inadequate, the state is unlikely to implement broad municipal reforms unless some destabilizing event occurs and accelerates the need for

³⁴⁷ MESSINGER, *supra* note 344.

³⁴⁸ As New Jersey Senator Bob Smith explained, the recent discussion of municipal consolidation has "raise[d] the flag to the proposition that we have too much government in New Jersey" and that the state is "finally addressing the 800-pound gorilla in the property tax debate," Deborah Howlett, *Corzine Enacts Key Parts of Tax Reform*, STAR-LEDGER, Mar. 16, 2007, at 19; *see also* Corzine, *supra* note 17; Kyrillos, *supra* note 21.

change. Moreover, even if a major crisis befalls New Jersey, it is unclear whether proponents of consolidation could mount a professional campaign to convince voters and legislators of the need for more municipal mergers. There are few interest groups in New Jersey that strongly advocate consolidation and, even if more were to emerge in response to a major crisis, these activists would still have to face the powerful political forces which seek to preserve the status quo.³⁴⁹ It may take a long time before the demands for wide-scale consolidation in New Jersey can overcome the many barriers in its path.

VII. Conclusion

This theoretical framework may explain past consolidation efforts, but it does not and cannot predict what will happen in the Garden State. At the same time, it is unlikely that the New Jersey Legislature will enact a more robust consolidation policy than the one embodied in the LUARC Commission, regardless of its weaknesses. In a state with a bureaucracy as sprawling as its suburbs, reform comes slowly, if ever.

This Article exposes one of the great failings of representative democracy. In a government that is highly responsive to the demands of its constituents, there will always be difficulties in addressing problems that involve concentrated harms and diffuse benefits. And yet, municipal fragmentation poses unique challenges. When a region divides itself into small government units, residents tend to develop an attachment to their tiny communities, even if the only thing that distinguishes them from neighboring towns is an arbitrary political boundary. More importantly, however, municipal fragmentation creates a class of actors—local government officials—who are crucial for reform efforts but have strong personal incentives to maintain the status quo. Add to this mix the thorny issues of racial and socioeconomic segregation, and the situation is ripe for political gridlock.

³⁴⁹ The New Jersey State League of Municipalities is the most vocal opponent of consolidation. The interest group represents the state's local officials, which as mentioned earlier have the most to lose from mergers. To read the organization's official position on consolidation and shared services, see N.J. STATE LEAGUE OF MUNICIPALITIES, POSITION STATEMENT ON CONSOLIDATED SERVICES, *available at* <http://www.njslom.org/documents/ConsolShareServPosition.pdf>.

It may take some unforeseeable crisis—the threat of state bankruptcy, perhaps—before efforts for municipal reform take root. Absent such a watershed moment, it is doubtful that local voters will opt for consolidation or that the state legislature will strengthen the LUARC Commission to coerce towns into mergers. Either way, New Jersey will never implement wide-scale consolidation unless citizens and activists continue to raise awareness about the need for reform. Those who wish to cut waste, fight corruption, limit sprawl, and reduce inequality must talk to the public about the foolishness of operating 566 municipalities in the nation's tenth-smallest state. This is the only way other residents will come to recognize the costs of political fragmentation.