

COOPERATIVE LOCALISM: FEDERAL-LOCAL  
COLLABORATION IN AN ERA OF STATE SOVEREIGNTY

*Nestor M. Davidson\**

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\* Associate Professor, University of Colorado Law School. J.D., Columbia Law School. The author wishes to thank Richard Collins, Heather Elliott, Mark Fenster, Audrey McFarlane, Clare Huntington, Laurie Reynolds, Peter Salsich, Pierre Schlag, Richard Schragger, and Philip Weiser for their insights, and Keely Ambrose and Matthew Lasek for their excellent research assistance. An earlier version of this Article was presented at the 2006 Annual Meeting of the Law and Society Association.

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#### INTRODUCTION

CONTEMPORARY debates about federalism and localism often proceed with, at best, a glancing reference to each other.<sup>1</sup> Commentators portray parallel, largely disconnected worlds in which the federal government relates only to the states, and the states, in turn, hermetically encompass local governments. In practice, however, numerous federal regulatory, spending, and enforcement policies actively rely on the participation of local governments independent from the states. Indeed, direct relations between the federal government and local governments—what this Article calls “cooperative localism”—play a significant role in areas of contemporary policy as disparate as homeland security, law enforcement, disaster response, economic development, social services, immigration, and environmental protection, among other areas of vital national concern.

Despite the importance of this facet of intergovernmental relations, cooperative localism exists in an increasingly tenuous legal

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<sup>1</sup> Courts and commentators tend to focus on federal-state relations and state-local relations, but rarely on federal-local relations. See, e.g., Daniel J. Elazar, *Cooperative Federalism, in Competition among States and Local Governments: Efficiency and Equity in American Federalism* 65, 66 (Daphne A. Kenyon & John Kincaid eds., 1991).

landscape. Direct federal-local cooperation invokes two competing jurisprudential traditions. The prevailing view of local government identity in federal law is one of fundamental powerlessness, with localities at the whim of states' plenary authority. In a lesser-recognized tradition, however, courts have allowed local governments to invoke federal authority to resist assertions of state power. This judicial space for federal empowerment has granted local governments both a measure of autonomy to act in the absence of state authority and an ability to check state control.

The Supreme Court's contemporary revival of state sovereignty as the cornerstone of its federalism jurisprudence is now bringing these doctrinal traditions into direct confrontation. The Court is increasingly suggesting that state control over local governments is a fundamental aspect of state sovereignty triggering judicial limits on federal power.<sup>2</sup> A clash is thus looming between plenary authority over local government as a facet of resurgent state sovereignty and the protection that has been afforded to federal-local cooperation.

When this confrontation comes to a head, limiting federal authority to empower local governments would be a mistake with potentially far-reaching consequences. Reflexively protecting state supremacy over the alignment of local and federal interests would interject the judiciary into questions of intergovernmental relations that are best left to the political process.

This Article proposes a new framework for conceptualizing federal empowerment of local governments that is not only consistent with the Court's contemporary view of federal structure, but in fact advances the normative and pragmatic goals the Court is seeking to achieve. The Court in its modern federalism jurisprudence has built a largely instrumental case for devolving and decentralizing governmental power. This vision of federal structure privileges state sovereignty in order to promote efficiency and intergovernmental competition, check governmental tyranny, draw on pluralism and the experimental values of decentralized governance, and reinforce community and democratic participation. These core instrumental concerns are served even more forcefully by enhancing the autonomy of local governments. Thus, the very values of feder-

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<sup>2</sup> See *infra* Section II.B.

alism that the Court invokes to enhance state sovereignty provide a compelling case for the particular exercise of federal authority represented by cooperative localism—in essence, a localist grounding for national power.

Cooperative localism carries risks as well as potential. For every instrumental argument in favor of bolstering local autonomy, there is a counterargument. Local governments often give life to the Madisonian fear of the tyranny of local majorities: they sometimes reinforce racial, ethnic, and economic segregation; exclude outsiders; and generate significant externalities for neighboring communities. In other contexts, scholars have argued for regionalist solutions to these problems of local parochialism. A regionalist perspective, I argue, can be incorporated into the jurisprudence of federal-local cooperation, tempering the scope of federal power and local autonomy to ensure that federal interests are not undermined by local parochialism.

This proposed conception of cooperative localism sheds new light on contemporary debates in both localism and federalism.<sup>3</sup> First, it re-conceives the legal status of local governments when operating in federal-local regimes, challenging the prevailing view of local governments as powerless instrumentalities of the states. In the cooperative localism context, local governments act neither as subservient departments of state government nor as islands of independent authority. Rather, local governments act under an alternative and underappreciated source of autonomy, one bounded

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<sup>3</sup> The jurisprudence of federal-local relations has been an area of relative silence in the legal literature. One notable exception is the work of Roderick Hills. Hills has argued for a rule of interpretation that would read ambiguous federal and state law to preserve the institutional autonomy of the states while recognizing some scope of federal interest in fostering intrastate competition for federal resources. See Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 *Mich. L. Rev.* 1201, 1230–52 (1999) [hereinafter Hills, *Dissecting the State*]; see also Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 *Harv. J.L. & Pub. Pol'y* 181, 181–93 (1998) (discussing state and local governments as administrative arms of the federal government). Likewise, Deborah Jones Merritt has argued for Guarantee Clause limitations on federal interference with state ordering of local governments. See Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 *Colum. L. Rev.* 1, 40–41 (1988). For further discussion of these approaches to federal-local relations, see *infra* text accompanying notes 190–202.

by federal involvement rather than plenary state control.<sup>4</sup> Conceptualizing local autonomy through a lens of cooperative localism more firmly grounds the actual exercise of local power while providing a rationale for cabining that power in precisely those areas where local autonomy is most problematic.<sup>5</sup>

This understanding of cooperative localism likewise reveals a significant conceptual gap in the increasingly reflexive judicial protection of state sovereignty in contemporary federalism. Despite an enormous outpouring of academic, judicial, and popular attention to federalism in recent years, both the normative premises that shape the place of local governments in our federal system and the practical realities concerning the independent role that localities play remain submerged. Local government autonomy to participate in national policymaking, however, bolsters the very arguments that inform the Court's current attempts to devolve and decentralize power in our federal structure.

Direct federal-local relations merit continued judicial respect. A pragmatic judicial approach to intergovernmental relations that

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<sup>4</sup> Some scholars have argued for a constitutionally grounded doctrine of local autonomy, harkening back to conceptions of inherent local sovereignty championed by the nineteenth-century treatise writer and Michigan Supreme Court Justice Thomas M. Cooley. See David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 491–93 (1999) (drawing on Cooley's theory of local constitutionalism to argue for a connection in modern jurisprudence between the enforcement of substantive constitutional rights and local government independence); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 88–90 (discussing Cooley's theory of inherent local sovereignty). See generally Gerald E. Frug, *City Making: Building Communities Without Building Walls* 48–51 (1999). These scholars have not focused, however, on the structure of federal-local interaction and on the broader implications of federal-local cooperation for conceptions of local autonomy and contemporary federalism.

<sup>5</sup> David Barron has noted that local autonomy is more complicated than standard accounts suggest in that autonomy can only be evaluated in light of a normatively contested baseline. See David J. Barron, *A Localist Critique of the New Federalism*, 51 Duke L.J. 377, 378–79 (2001) (“The ability of each locality to make effective decisions on its own is inevitably shaped by its relation to other cities and states, by its relation to broader, private market forces, and, most importantly, by the way the central power structures these relations, even when central governmental power appears to be dormant.”); cf. Richard C. Schragger, *The Limits of Localism*, 100 Mich. L. Rev. 371, 375 (2001) (“Local norms cannot be understood outside the context of a dynamic between localities, between neighborhoods within a city, and between city and suburb.”); *id.* at 459, 463–64. Intergovernmental relations, particularly in cooperative regimes, are another example of the deeply situated nature of local autonomy.

does not give priority to any particular alignment of governmental collaboration allows the political branches at *all* levels of government to craft approaches most appropriate to modern exigencies. Given the critical importance and ubiquitous practice of local government involvement in national policies, it is well past time for a firmly grounded jurisprudence of cooperative localism.

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This Article proceeds as follows: Part I provides background on direct federal-local cooperation. Part II describes the prevailing view of local governments as powerless instrumentalities of the state and the Court's increasing incorporation of that view in its revival of state sovereignty. Part III contrasts this prevailing view with the tradition of federal empowerment of local governments implementing national policy. Part IV then argues that when this federal empowerment directly confronts resurgent state sovereignty, the Court should not reflexively limit the ability of local governments to collaborate independently with the federal government. The Article argues that the very same instrumental goals driving the Court's contemporary federalism jurisprudence provide a foundation for preserving federal empowerment of localities. Finally, Part V identifies a limitation inherent in this cooperative localism posed by the risk of local parochialism and a potential regionalist response to this risk. The Article concludes by placing the jurisprudence of cooperative localism in a pragmatic context.

#### I. BACKGROUND: FEDERAL-LOCAL COOPERATION AND CONSTITUTIONAL STRUCTURE

The concept of "dual federalism" has long been the common starting point in legal debates about federal structure.<sup>6</sup> As the Supreme Court has stated, "Ours is a 'dual system of government,'" and "[t]here exist within the broad domain of sovereignty but [the

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<sup>6</sup> See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 *Iowa L. Rev.* 243, 246 (2005) (noting that dual federalism "continues to haunt contemporary discussions of federalism"); *id.* at 251–52. The Court frequently invokes "dual sovereignty" as the foundation of its federalism jurisprudence. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.").

states and the federal government].”<sup>7</sup> This conception of constitutional structure, often described as a layer cake, posits the federal government and state governments operating in separate, clearly demarcated spheres, with no independent role for local governments. Despite repeated declarations of the death of dual federalism,<sup>8</sup> this vision of constitutional structure continues to hold a strong grip over the modern jurisprudence.<sup>9</sup>

Dual federalism, however, masks two important aspects of constitutional structure. First, as a description of actual intergovernmental relations, dual federalism ignores the ubiquity of policies that involve cooperation rather than conflict. These regimes of “cooperative federalism” involve ongoing collaboration rather than clear and separate spheres of competing authority. Second, in contemplating two, and only two, sovereigns,<sup>10</sup> the reigning iconography of our federal scheme too often ignores local governments entirely in conceptualizing federalism or subsumes local governments into a general category of subnational polities controlled by the state.<sup>11</sup> Taken together, these gaps in the prevailing dual-

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<sup>7</sup> *Cnty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 53 (1982) (emphases omitted) (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1942) and *United States v. Kagama*, 118 U.S. 375, 379 (1886)).

<sup>8</sup> See, e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 *Va. L. Rev.* 1 (1950). See generally Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, *Publius: J. Federalism*, Spring 2001, at 15.

<sup>9</sup> See Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 *Md. L. Rev.* 503, 507–11, 537–65 (2007) (analyzing the current Court’s “strict separationist” approach to federalism); see also Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 *Mich. L. Rev.* 813, 822–56 (1998); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 *Ind. L. Rev.* 27 (1998) (discussing dual federalism in the modern context).

<sup>10</sup> Although this Article focuses on the role that local governments play in federalism, the nature and jurisprudence of American Indian tribal sovereignty raises similar questions about the fracturing of sovereignty in our federal system. See, e.g., Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 *Or. L. Rev.* 1109 (2004).

<sup>11</sup> Indeed, advocates of local power have conflated local governments with the states in debates about federalism to argue for protections that a jurisprudence of devolutionary federalism can grant to the states. See Gerald E. Frug, *Empowering Cities in a Federal System*, 19 *Urb. Law.* 553, 553 (1987). But cf. Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 *Va. L. Rev.* 1347, 1351–52 (1997) (discussing the general absence in the literature of clear distinctions between federal, state, and local governments for purposes of debates over decentralization); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Feder-*

federalist vision of constitutional structure intersect to relegate the significant practice of direct federal-local interaction to irrelevancy.

The practice of “cooperative localism” raises jurisprudential questions similar to the puzzles posed by better-recognized regimes of cooperative federalism involving the states, particularly with regard to questions of statutory interpretation and preemption. Unlike regimes of federal-state cooperation, however, regimes of federal-local cooperation must account for the traditional power that state governments exercise over local governments. How that power is moderated when federal and local interests align directly challenges prevailing conceptions of local autonomy and identity.

This Part canvasses the history and contemporary importance of direct federal-local cooperation. It then outlines the challenges posed by the intermediary of the states.

#### *A. The Importance of Direct Federal-Local Cooperation*

Although the dual-sovereignty model predominates in judicial accounts of federalism, in practice Congress has long chosen to approach regulation, spending, and enforcement through regimes that blur the boundary between national and state authority.<sup>12</sup> Co-

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alism in Congress and the Court, 14 *Yale L. & Pol’y Rev.* 187, 208–09, 218–21 (1996) (arguing for disaggregating localities from the states in federalism).

<sup>12</sup> See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *Yale L.J.* 619, 624 (2001) (“The contemporary debate about whether to prefer, a priori, the states or the federal government for certain forms of lawmaking misses dynamic interaction across levels of governance. In practice, federalism is a web of connections formed by transborder responses (such as interstate agreements and compacts) and through shared efforts by national organizations of state officials, localities, and private interests.”); see also Ryan, *supra* note 9, at 565–70 (canvassing “inter-jurisdictional” approaches in the contemporary regulatory state).

In addition to cooperative federalism as a primary alternative to dual sovereignty, contemporary accounts in the legal literature emphasize a variety of other theoretical frames for understanding the federal-state relationship. Process federalism, for example, emphasizes procedural and political protections, rather than strict judicial enforcement, to manage the federal-state balance. See, e.g., Ernest A. Young, *Two Cheers for Process Federalism*, 46 *Vill. L. Rev.* 1349, 1350, 1390–91 (2001). Empowerment federalism, by contrast, seeks to magnify state and federal power without limiting either. See, e.g., Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 *U. Kan. L. Rev.* 1219, 1221, 1234 (1997); Deborah J. Merritt, *Federalism as Empowerment*, 47 *U. Fla. L. Rev.* 541, 541–42 (1995). Robert Schapiro proposes yet another alternative, which he labels interactive or “polyphonic” federalism, emphasizing intergovernmental dialogue as a hallmark over cooperation or confrontation. See

operative federalism, the “marble cake” to dual federalism’s “layer cake,”<sup>13</sup> involves forms of collaboration between the federal government and the states.<sup>14</sup> These regimes involve varying shades of preemption, collaboration, and incentives that reflect interactive intergovernmental relations.<sup>15</sup>

Cooperative federalism seeks to capture the benefits of decentralization, particularly by fostering experimentalism and pluralism in governance, as well as the efficiency gains promised by the administration of regulatory regimes by multiple agents outside of the core federal structure.<sup>16</sup> At the same time, cooperative federalism seeks to preserve the primacy of the federal government to set national priorities and prescribe standards through which to advance those priorities.<sup>17</sup> Cooperative federalism thus seeks a functional middle ground between competing concerns: local variation versus uniformity, the balance of local autonomy and the national inter-

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Schapiro, *supra* note 6, at 285–88. For a similar account, see David L. Shapiro, *Federalism: A Dialogue* 137–40 (1995).

<sup>13</sup> In the literature on federalism, metaphors of layer and marble cakes compete with metaphors of picket and bamboo fences—imagery that focuses on the functional congruence between policy specialists at all three levels of government. See David C. Nice & Patricia Fredericksen, *The Politics of Intergovernmental Relations* 11–15 (2d ed. 1995). In practice, dual federalism, cooperative federalism, and other approaches to intergovernmental relations coexist to some extent in contemporary policy.

<sup>14</sup> See Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 *Yale L.J.* 1344 (1983); Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 *Ariz. L. Rev.* 205 (1997); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 *N.Y.U. L. Rev.* 1692 (2001) [hereinafter Weiser, *Cooperative Federalism*]; Philip J. Weiser, *Towards a Constitutional Architecture For Cooperative Federalism*, 79 *N.C. L. Rev.* 663 (2001) [hereinafter Weiser, *Constitutional Architecture*]. For historical perspectives on the jurisprudence of cooperative federalism, see, for example, Samuel Mermin, “Cooperative Federalism” Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements (pts. 1 & 2), 57 *Yale L.J.* 1, 201 (1947); Foreword *to* Symposium on Cooperative Federalism, 23 *Iowa L. Rev.* 455, 455–56 (1938).

<sup>15</sup> See Elazar, *supra* note 1, at 67–69; Deil S. Wright, *Understanding Intergovernmental Relations* 49 (3d ed. 1988) (discussing overlapping authority as the predominant mode of intergovernmental relations in practice). Congress has broad latitude to choose regimes of preemption, whether total or partial; of collaboration, involving shared responsibility for regulation or market intervention; or of absence, leaving the states to act without federal involvement.

<sup>16</sup> See Weiser, *Cooperative Federalism*, *supra* note 14, at 1696–98.

<sup>17</sup> See *id.* at 1697–98.

est, and jurisdictional competition as a check on governmental power given limits to meaningful exit from national regimes.<sup>18</sup>

Cooperative intergovernmental regimes have long involved not only federal-state interaction but also direct federal-local relations. This is hardly surprising, as localities are the primary site for many areas of public policy at the center of modern life. Local governments are intimately involved in questions that implicate such central concerns as where and how people live, public safety, work conditions, and education. As David Barron put it, local governments are “the political institutions that most directly shape our public lives.”<sup>19</sup>

The federal government casts a ubiquitous shadow over local governance,<sup>20</sup> although perhaps not playing as immediate a role as the states. Federal policies, for example, set the context in which the exercise of local power unfolds. Federal tax and subsidy policies create an incentive structure and the conditions for patterns of local development.<sup>21</sup> Federal environmental law intertwines intimately with local land-use regulation.<sup>22</sup> In many regions of the country, federal land holdings exert a significant and often conten-

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<sup>18</sup> See *id.* at 1698–703.

<sup>19</sup> Barron, *supra* note 4, at 494.

<sup>20</sup> See, e.g., Neal R. Peirce, *Citistates: How Urban America Can Prosper in a Competitive World* 22 (1993) (discussing the influence of federal policies at the local level).

<sup>21</sup> The federal mortgage interest deduction and property tax deductions for owner-occupied housing, for example, directly impact the type, location, and pace of local development, fundamentally influencing a core traditional aspect of local power—the regulation of land use. See Nice & Fredericksen, *supra* note 13, at 175. Likewise, federal transportation subsidies literally shape the connections between local communities and the extent to which dispersion of population can occur. See Bruce Babbitt, *Cities in the Wilderness: A New Vision of Land Use in America* 4–5 (2005); cf. U.S. Gen. Accounting Office, *GAO/RCED-99-87, Community Development: Extent of Federal Influence on “Urban Sprawl” Is Unclear* 2–4 (1999), available at <http://www.gao.gov/archive/1999/rc99087.pdf> (recognizing the federal role in patterns of local growth, but noting empirical uncertainties attendant to isolating that role).

<sup>22</sup> Cf. *Rapanos v. United States*, 126 S. Ct. 2208, 2215–16 (2006) (discussing the wetland permitting process for local development). Although the federal government has never adopted a national land-use policy, see Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 *Wash. U. J.L. & Pol’y* 445, 448 (2000) (discussing Senator Henry Jackson’s failed attempt to pass the National Land Use Policy Act of 1970); Todd A. Wildermuth, *National Land Use Planning in America, Briefly*, 26 *J. Land Resources & Envtl. L.* 73, 77–79 (2005) (same), federal influence on local land-use policy is ubiquitous. See Babbitt, *supra* note 21, at 143–73 (discussing federal-local interaction in land-use policy).

tious influence on local land-use, tax, and other policies.<sup>23</sup> The structure of local finance and the capacity of local governments to fund infrastructure is likewise heavily influenced by federal tax, regulatory, and spending policies.<sup>24</sup> And federal law—constitutional and statutory—provides baseline standards of fairness and equality that bind local government actors.

The federal-local relationship runs both ways, as local communities influence the national political and social landscape.<sup>25</sup> A critical aspect of the local role in national affairs is direct cooperation between local governments and the federal government. Modest through much of the nineteenth century—reflecting the limited scope of intergovernmental relations in general—federal-local interaction increased in the twentieth century, parallel to the rise of the modern regulatory state.<sup>26</sup> The New Deal in particular marked

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<sup>23</sup> See, e.g., Robert D. Comer, *Cooperative Conservation: The Federalism Underpinnings to Public Involvement in the Management of Public Lands*, 75 U. Colo. L. Rev. 1133, 1133 (2004) (discussing efforts to include local entities in federal land management decisions); Sandra K. Davis, *Fighting over Public Lands: Interest Groups, States, and the Federal Government*, in *Western Public Lands and Environmental Politics* 25 (Charles Davis ed., 1997) (discussing conflicts between county governments and federal agencies over federal public land policy).

<sup>24</sup> Local governments finance much of their infrastructure and related needs through the bond markets, which operate within the constraints of federal tax law. See Clayton P. Gillette, *Fiscal Federalism and the Use of Municipal Bond Proceeds*, 58 N.Y.U. L. Rev. 1030, 1042 (1983). Moreover, local government finance often implicates the federal bankruptcy regime. See Christopher Smith, *Provisions for Access to Chapter 9 Bankruptcy: Their Flaws and the Inadequacy of Past Reforms*, 14 Bankr. Dev. J. 497 (1998).

<sup>25</sup> Local governments, as a practical matter, are hardly passive recipients of federal assistance (and mandates). An extensive body of political science research has documented the practice not only of local adaptation of federal resources but also of the initiative that local governments take in shaping federal policy. See generally Robert Agranoff, *Managing Within the Matrix: Do Collaborative Intergovernmental Relations Exist?*, *Publius: J. Federalism*, Spring 2001, at 31.

<sup>26</sup> Federal influence at the local level can be traced to the earliest days of the Republic. See Mark I. Gelfand, *A Nation of Cities: The Federal Government and Urban America, 1933–1965*, at 12 (1975). Direct federal-local cooperation is equally venerable, with local communities involved in early federal infrastructure projects such as canal building, as well as in the provision of federally financed local social services. See *id.* at 13 (discussing federal aid for local infrastructure in early America); Roscoe C. Martin, *The Cities and the Federal System* 39 (1965) (discussing the role of cities in “cooperative activities” with the federal government); Daniel J. Elazar, *Urban Problems and the Federal Government: A Historical Inquiry*, 82 *Pol. Sci. Q.* 505, 511–18 (1967). As Mark Gelfand notes, federal involvement in local affairs ebbed after the Civil War, in line with the general *laissez-faire* approach of the national government

a turning point for the nation's cities.<sup>27</sup> A central aspect of the New Deal reaction to the Great Depression focused on direct municipal relief, and, after some initial wariness at the federal level, mayors managed to secure unprecedented access to the Roosevelt White House.<sup>28</sup> In bypassing the states, federal urban policy began to fracture the traditional hierarchy of intergovernmental relations.<sup>29</sup>

Direct federal-local relations accelerated during the post-war period. Hallmarks of this era included urban renewal under Title I of the National Housing Act of 1949,<sup>30</sup> as well as significant federal involvement in transportation through national highways<sup>31</sup> and the development of a national system of local public airports.<sup>32</sup> The involvement of the federal government at the local level reached its apex during the Johnson administration's urban-oriented "creative

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at the time and reflecting the surge in state assertiveness over municipal affairs. See Gelfand, *supra*, at 15–16. For a general discussion of the rise of federal-local interaction in the twentieth century, see Martin, *supra*, at 111–14.

<sup>27</sup> See Martin, *supra* note 26, at 111.

<sup>28</sup> During the Depression, cities banded together for the first time to lobby in a concerted way for federal assistance. This lobbying was in reaction to President Hoover's rebuff of the cities and the first wave of Roosevelt-era programs that block-granted relief to the states, which tended to favor rural over urban interests. As the New Deal progressed, programs like the Works Progress Administration cut out the intermediary of the states. See Gelfand, *supra* note 26, at 37–38, 41–44. In addition to direct municipal relief, New Deal programs included the first significant federal involvement in housing through the creation of the Federal Housing Administration in 1934 and the United States Housing Act of 1937, as well as the use of federal funds for early urban renewal efforts through the National Industrial Recovery Act of 1933. See *id.* at 59–65; see also John J. Gunther, *Federal-City Relations in the United States: The Role of the Mayors in Federal Aid to Cities* 68–132 (1990) (describing federal-city relations during the New Deal).

<sup>29</sup> Perceiving the states as dominated by rural interests and insufficiently sensitive to the effects of the Depression on the cities, many municipal leaders successfully pressed for direct federal relations during the New Deal. See Gelfand, *supra* note 26, at 66; see also Martin, *supra* note 26, at 109.

<sup>30</sup> Title I of the National Housing Act of 1949, ch. 338, 63 Stat. 413 (1949) (codified as amended in scattered sections of 42 U.S.C. §§ 1441–1453a (2000)).

<sup>31</sup> The Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374, represented a massive federal investment in local transportation funding. See Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 248–51 (1985).

<sup>32</sup> Starting in the early 1930s, and particularly in the wake of the Federal Airport Act of 1946, Pub. L. No. 79-377, 60 Stat. 170, the federal government took a significant role in developing civil airports, bypassing the states and fostering a direct relationship with local governments. See Martin, *supra* note 26, at 83–108.

federalism” era.<sup>33</sup> The Nixon administration created new administrative structures to manage intergovernmental relations and moved to a system of general revenue sharing for much of the federal funding flowing to local governments, in some sense increasing the intensity of the direct federal-local relationship.<sup>34</sup> The Reagan administration moved in the direction of privileging the states,<sup>35</sup> but the Clinton administration swung back toward emphasizing direct partnership with local governments.<sup>36</sup>

Federal-local cooperation is accelerating again in the post-9/11 policy landscape, although disarray and miscommunications at all levels of government in the wake of Hurricane Katrina may have shown that the renewed emphasis on federal bolstering of local government capacity can at times be more rhetorical than real.<sup>37</sup> It is undeniable, however, that the capacity of local governments to address national concerns is important to current policy in areas as varied as homeland security,<sup>38</sup>

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<sup>33</sup> See Joseph F. Zimmerman, *Contemporary American Federalism: The Growth of National Power* 9 (1992); see also Gelfand, *supra* note 26, at 348–79.

<sup>34</sup> See David R. Berman, *Local Government and the States: Autonomy, Politics, and Policy* 25–26 (2003); Timothy Conlan, *From New Federalism to Devolution: Twenty-Five Years of Intergovernmental Reform* 19–35 (1998).

<sup>35</sup> See Conlan, *supra* note 34, at 95–97; George E. Peterson & Carol W. Lewis, *Introduction to Reagan and the Cities* 1, 8–9 (George E. Peterson & Carol W. Lewis eds., 1985) (summarizing shifts in federal-state-local relations during the Reagan administration).

<sup>36</sup> See William A. Galston & Geoffrey L. Tibbetts, *Reinventing Federalism: The Clinton/Gore Program for a New Partnership Among the Federal, State, Local, and Tribal Governments*, *Publius: J. Federalism*, Summer 1994, at 23 (1994).

<sup>37</sup> See, e.g., Pamela Winston et al., *After Katrina: Federalism after Hurricane Katrina* (2006), available at [http://www.urban.org/UploadedPDF/311344\\_after\\_katrina.pdf](http://www.urban.org/UploadedPDF/311344_after_katrina.pdf) (assessing the breakdown in intergovernmental relations in several key policy areas in the aftermath of Hurricane Katrina); Ryan, *supra* note 9, at 521–35; Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina* (Tulane Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Research Paper No. 06-04, 2006), available at <http://ssrn.com/abstract=894470>.

<sup>38</sup> See Susan N. Herman, *Introduction to David G. Trager Public Policy Symposium: Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 *Brook. L. Rev.* 1201, 1204 (2004) (discussing the structural constitutional dimensions of the involvement of local and state governments in combating terrorism); Jason Mazzone, *The Security Constitution*, 53 *UCLA L. Rev.* 29, 137–40 (2005) (discussing the constitutional allocation of responsibility for homeland security and arguing for a more vigorous federal role in supporting state and local efforts based on the Protection Clause of Article IV, § 4 of the U.S. Constitution); see also Susan E. Clarke & Erica Chenoweth, *The Politics of Vulnerability: Constructing Local Per-*

criminal justice,<sup>39</sup> immigration,<sup>40</sup> education,<sup>41</sup> employment,<sup>42</sup> housing,<sup>43</sup> economic development,<sup>44</sup> telecommunications,<sup>45</sup>

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formance Regimes for Homeland Security, 23 *Rev. of Pol'y Res.* 95 (2006) (discussing the local role in federal homeland security policies).

<sup>39</sup> Because of federal attention to drug trafficking and related crimes, federal-local cooperation has become a significant aspect of law enforcement. See Malcolm Russell-Einhorn et al., *Federal-Local Law Enforcement Collaboration in Investigating and Prosecuting Urban Crime, 1982–1999: Drugs, Weapons, and Gangs* (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/201782.pdf>.

<sup>40</sup> See, e.g., Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 *B.C. Third World L.J.* 81, 91–93 (2005) (discussing the potential institutionalization of cooperation between state, federal, and local law enforcement through federal legislation); Jeff Sessions & Cynthia Hayden, *The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 *Stan. L. & Pol'y Rev.* 323, 345–46 (2005); see also Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Law Enforcement of Immigration Laws Violates the Constitution*, 31 *Fla. St. U. L. Rev.* 965, 970–76 (2004) (discussing Justice Department efforts to engage local law enforcement in immigration enforcement).

<sup>41</sup> See, e.g., Michael Heise, *The Political Economy of Education Federalism*, 56 *Emory L.J.* 125, 133–35 (2007).

<sup>42</sup> Federal policies to respond to employment dislocations often involve local governments. See, e.g., *Workforce Investment Act of 1998*, 29 U.S.C. § 2864 (2000) (providing federal funding at the local level to mitigate employment effects of disasters, mass layoffs, and similar events).

<sup>43</sup> See, e.g., Jamie Zembruski, *Block Granting the Housing Choice Voucher Program: A Perilous Choice for Recipients, Market Participants, and State Governments*, 13 *J. Affordable Housing & Community Dev. L.* 463, 470–71 (2004) (discussing arguments about shifting housing voucher funds to state control versus control by local entities).

<sup>44</sup> A raft of federal programs directly support economic development at the local level, including Community Development Block Grants and the Renewal Communities/Enterprise Zones program. See Scott L. Cummings & Benjamin S. Beach, *The Federal Role in Community Economic Development*, 40 *Clearinghouse Rev.* 89, 91–92 (2006); see also Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 *N.Y.U. L. Rev.* 513, 560–96 (2005) (discussing the impacts of current federal attempts to increase economic investment in low- and middle-income communities). The federal government also provides significant direct funding for local social services through programs such as the Community Services Block Grant.

<sup>45</sup> The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, while generally empowering states in areas of local land-use regulation and threatening local capacity to tax telecommunications, strengthened the capacity of local governments to provide telecommunications services directly. See Berman, *supra* note 34, at 20–21. The current federal telecommunications regime involves a mix of local control and federal oversight of cell-tower siting decisions, for example. Cf. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128–29 (2005) (Breyer, J., concurring) (describing the “cooperative federalism” structure of federal procedural and substantive minima imposed on local zoning boards). See generally Robert B. Foster &

transportation,<sup>46</sup> and environmental protection.<sup>47</sup>

A key aspect of federal-local cooperation involves fiscal federalism. Direct federal assistance to local governments grew in the 1960s and 1970s, through infrastructure, housing, and education programs, as well as unrestricted General Revenue Sharing.<sup>48</sup> Although direct federal aid to local governments has declined in the intervening three decades,<sup>49</sup> federal support remains an important

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Mitchell A. Carrel, *Patchwork Quilts, Bumblebees, and Scales: Cellular Networks and Land Use Under the Telecommunications Act of 1996*, 36 *Urb. Law.* 399 (2004).

<sup>46</sup> The Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914, reauthorized as the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) (itself reauthorized as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1145 (2005)), requires state governments to increase local involvement in transportation policy. See Berman, *supra* note 34, at 21.

<sup>47</sup> Well-known examples in the environmental arena include local governments operating in the interstices of federal regulation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (2000), see *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 600–02 (1991), watershed management, see generally A. Dan Tarlock, *The Potential Role of Local Governments in Watershed Management*, 20 *Pace Envtl. L. Rev.* 149 (2002), and federal-local collaboration on brownfield redevelopment, see Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 *Val. U. L. Rev.* 381, 392 (2002); Larry Schnapf, *Financing Development of Contaminated Properties*, 13 *Nat. Resources & Env't* 465 (1999); cf. Matthew D. Fortney, *Comment, Devolving Control Over Mildly Contaminated Property: The Local Cleanup Program*, 100 *Nw. U. L. Rev.* 1863, 1875–76 (2006) (discussing the local role in federal-state brownfield remediation programs). Also, given the prevalence of nonpoint source pollution regulation in modern environmental protection, environmental protection is increasingly a local government issue. See John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 *Harv. Envtl. L. Rev.* 365, 372–77 (2002); A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 *U. Chi. L. Rev.* 555, 581–82 (1993). See generally Daniel Rodriguez, *The Role of Legal Innovation in Ecosystem Management: Perspectives from American Local Government Law*, 24 *Ecology L.Q.* 745 (1997).

<sup>48</sup> Bruce A. Wallin, *Brookings Inst. Metro. Policy Program, Budgeting for Basics: The Changing Landscape of City Finances 4* (2005), available at [http://www.brookings.edu/metro/pubs/20050823\\_BudgetingBasics.pdf](http://www.brookings.edu/metro/pubs/20050823_BudgetingBasics.pdf).

<sup>49</sup> In 1977, at its high-water mark, direct federal aid to local governments represented approximately 17.5% of general local government revenues, at least with respect to cities. See *id.* That figure has declined to approximately 4.66% for local governments in the most recent figures. See U.S. Census Bureau, *State and Local Government Finances by Level of Government and by State: 2003–04* (2004), [http://www.census.gov/govs/estimate/0400ussl\\_1.html](http://www.census.gov/govs/estimate/0400ussl_1.html). See generally Robert Tannenwald, *Nat'l League of Cities & Brookings Inst. Metro. Policy Program, Are State and Local Revenue Systems Becoming Obsolete?* (2004), available at [http://www.brookings.edu/metro/pubs/20041022\\_tannenwald.pdf](http://www.brookings.edu/metro/pubs/20041022_tannenwald.pdf).

part of the landscape of local government finance. Moreover, a portion of the state aid that flows to local governments includes pass-through federal funds.<sup>50</sup>

Contemporary federal-local interaction involves regulatory policy as well. Congress has created a number of regulatory regimes that explicitly incorporate or facilitate regulation by local governments,<sup>51</sup> and the federal government is increasingly calling upon local government to enforce federal law. The local government role in homeland security and in the traditionally federal domain of immigration has sparked controversy, but not widespread resis-

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<sup>50</sup> In 2003–2004, local governments received approximately one-third (34.63%) of their general revenues from the states. See U.S. Census Bureau, *supra* note 49. In housing, transportation, education, and other areas, however, federal funds nominally flowing to the states are often passed through to the local government level. See, e.g., U.S. Gen. Accounting Office, GAO/HGHS-95-3, *Education Finance: Extent of Federal Funding in State Education Agencies* 2, 11–12 (1994), available at <http://archive.gao.gov/f0902a/152626.pdf>; Robert Jay Dilger, *TEA-21: Transportation Policy, Pork Barrel Politics, and American Federalism*, *Publius: J. Federalism*, Winter 1998, at 49, 51 (1998).

<sup>51</sup> Many instances of federal-local interaction involve both fiscal and regulatory federalism. Consider the example of primary and secondary education, a quintessential aspect of local governance. The federal government has long played a role in financing local education. Indeed, grants-in-aid from the central government to local governments for education predate the Constitution. See Bernard J. Frieden, *Advisory Comm'n on Intergovernmental Relations, Metropolitan America: Challenge to Federalism* 120 (1966) (discussing the Ordinance of 1785, by which the Congress of the Confederation authorized land grants to local governments for schools). While local education continues to be funded at least in part through federal land grants, the Elementary and Secondary Education Act provides approximately twenty-four billion dollars per year to local school districts. See U.S. Dep't of Educ., *Fiscal Year 2007 Budget Summary and Background Information* 3 (2006), <http://www.ed.gov/about/overview/budget/budget07/summary/07summary.pdf>. Other federal assistance includes programs such as Head Start and school lunches. Federal influence on local education, however, is hardly limited to fiscal federalism. See generally Richard W. Riley, *The Role of the Federal Government in Education—Supporting a National Desire for Support for State and Local Education*, 17 *St. Louis U. Pub. L. Rev.* 29, 36–42 (1997). Federal standards provide a national floor to govern civil rights for local school systems. See, e.g., Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000) (prohibiting race, color, and national origin discrimination); Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2000) (prohibiting sex discrimination); Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794 (2000) (prohibiting disability discrimination); Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2000) (same). Also note that the leading educational focus of the current administration—the controversial No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2001)—sets national standards for core educational competencies backed by a regime of mandatory testing largely implemented at the local level.

tance.<sup>52</sup> In short, cooperative regimes involving direct local-federal interaction have a long history and form a critical aspect of contemporary intergovernmental relations.

*B. Local Autonomy and the Intermediary of the States*

Direct federal-local cooperation implicates the federal-state relationship but even more directly affects the nature of local autonomy. Local government autonomy encompasses both *empowerment*—the ability to initiate policy—and *immunity*—the ability to resist encroachment from another governmental entity or from a private party.<sup>53</sup> Structurally, these elements involve questions of internal governmental organization and personnel, but more critically turn on questions of the permissible functions of local government and the ability of local governments to finance their operations and services.<sup>54</sup> Cooperative federal-local regimes implicate both aspects of local autonomy, as the federal government can serve as a source of empowerment as well as a source of immunity when states attempt to assert control.

Judicial management of direct federal-local cooperation raises challenges that to some extent parallel those posed by cooperative federal-state regimes,<sup>55</sup> particularly with respect to regulatory scope and interpretation.<sup>56</sup> At the state-federal level, cooperative regimes

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<sup>52</sup> See *supra* notes 38, 40.

<sup>53</sup> See Gordon L. Clark, *Judges and the Cities: Interpreting Local Autonomy 187–91* (1985).

<sup>54</sup> See U.S. Advisory Comm'n on Intergovernmental Relations, *Local Government Autonomy: Needs for State Constitutional Statutory, and Judicial Clarification 1* (1993), available at <http://www.library.unt.edu/gpo/ACIR/Reports/policy/a-127.pdf>.

<sup>55</sup> Cooperative intergovernmental regimes pose fundamental challenges for the judicial role in federalism. Much of the constitutional law of federalism focuses on regulating (or explicitly leaving to the political process) the proper boundary between theoretically independent sovereigns. Courts are temperamentally ill suited to mediate cooperative regimes and are accordingly drawn to the clean lines of the dual sovereignty tradition. Courts have struggled to find the appropriate balance between the uniformity of federal authority and the value of allowing state-level experimentation and specialization. Cooperative federalism regimes have thus often created gaps between prevailing constitutional rhetoric and actual practice. See Weiser, *Constitutional Architecture*, *supra* note 14, at 696–98.

<sup>56</sup> Questions, for example, of the preemptive effect of federal statutes and regulations at the local level regularly reach the Court. See, e.g., *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 249 (2004); *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 428 (2002); *City of N.Y. v. FCC*, 486 U.S. 57,

require a subtle meshing of the gears of two entities, each of which enjoy, within their respective realms, relatively loosely constrained power. In any regime involving federal-local cooperation, by contrast, the federal government potentially serves as a source of local autonomy. In other words, cooperative localism presents not simply a dichotomy between cooperation and preemption—the functional choice that the federal government presents to the states in inducing cooperation—but rather the opportunity for local empowerment and resistance to state intervention. Cooperative localism thus touches on the central debate in the contemporary discourse of local government, which is the extent of local powerlessness.<sup>57</sup>

Accordingly, any comprehensive legal theory of federal-local relations must account for the uncertain constitutional status of local government, the structural incommensurability between governments at the local and national level, the triangulation and conflicts of interest that states interject into the federal-local relationship, and the potential of states as intermediate actors to react to any judicial protection of federal empowerment of local governments.

To begin with, although the precise content of the structural and substantive role that the Constitution reserves for the states is subject to vigorous debate,<sup>58</sup> the Constitution clearly contemplates at least *some* form of state sovereignty.<sup>59</sup> Competing accounts of the

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59 (1988); *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 709 (1985). See generally Sandra M. Stevenson, 1 *Antieau on Local Government Law* § 12.01 (2d ed. Supp. 2006). As with cooperative federalism at the state level, federal-local cooperation involves direct collaboration as well as the kind of indirect coordination that arises from federal decisions to frame regulatory regimes with space for shared governance.

<sup>57</sup> The classic starting points for this debate remain Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057 (1980) (discussing the legal powerlessness of American cities), and Richard Briffault's two-part exploration of localism, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 *Colum. L. Rev.* 1 (1990) [hereinafter Briffault, *Our Localism Part I*]; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *Colum. L. Rev.* 346 (1990) [hereinafter Briffault, *Our Localism Part II*] (both discussing elements of practical local power).

<sup>58</sup> See generally Shapiro, *supra* note 12.

<sup>59</sup> *Id.* at 61–62. As Richard Briffault has noted:

The states have fixed boundaries; their borders cannot be changed without their consent. They have territorial integrity; no state or other subnational government overlaps the boundary of any other state. The states serve as constituent

federal-state relationship begin with this basic fact, and the separate legal identity of either sovereign is not at issue under any normative conception of federalism.<sup>60</sup> When states assert a measure of regulatory or fiscal independence from the federal government, they do so with a constitutionally recognized core of authority.<sup>61</sup>

The same cannot be said for local governments. Localities occupy a quasi-constitutional nether realm.<sup>62</sup> It may be true as a positive matter that local governments have gained some measure of power and formal autonomy in the state-local relationship,<sup>63</sup> but the constitutional role of local governments remains fundamentally contested.<sup>64</sup> Localities thus approach any intergovernmental relationship with the federal government from a much more tenuous position than the states.<sup>65</sup>

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elements in the structure of our national government. The states have inherent, autonomous law-making capacity: they can enact laws, regulate, and raise and spend money without having to secure authority from any other level of government.

Richard Briffault, "What about the 'Isms'?" Normative and Formal Concerns in Contemporary Federalism, 47 *Vand. L. Rev.* 1303, 1305–06 (1994).

<sup>60</sup> Some scholars have argued that it is implicit in the nature of the Federal Constitution as a compact not between the states and the federal government, but between "the People" and various governments to which the People have delegated their inherent sovereignty, that while the separate legal existence of the states merits recognition, the precise contours of any powers allocated to the states or to the federal government are delimited only by the doctrine of enumerated powers (and the Necessary and Proper Clause). See Shapiro, *supra* note 12, at 14–26; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *Yale L.J.* 1425, 1439–66 (1987).

<sup>61</sup> Constitutionally, moreover, states have general authority within their jurisdiction and a police power that is not, in theory, limited and enumerated in the manner of federal constitutional authority. States also have relatively free rein to raise funds, subject to practical and political constraints. Any interaction between the federal government and the states begins with this as a background premise and then proceeds to inquire about the extent to which that otherwise plenary authority is or should be limited by the potentially superior exercise of federal authority.

<sup>62</sup> See Frug, *supra* note 4, at 17; Williams, *supra* note 4, at 85. It would be possible to argue that localities have no constitutional status whatsoever, but this Article describes their status as "quasi-constitutional" in recognition of the independent role that the Court has, at times, accorded local governments in constitutional law. See *infra* text accompanying notes 133–160.

<sup>63</sup> See *infra* notes 161–163 and accompanying text.

<sup>64</sup> See *infra* Parts II–III.

<sup>65</sup> Similarly, regardless of the efficacy of the political safeguards of federalism, it is undeniable that states as such are guaranteed a direct role in the management of the federal government. Again, not so with local governments. Although local governments have long asserted their interests at the federal level, see generally Donald H.

A second critical distinction between federal-state and federal-local relations is that the former obviously implicates only two layers of government.<sup>66</sup> Federal-local relations, by contrast, inherently invoke the intermediary role of the states, with the federal-local relationship existing in the shadow of state law even when there is no conflict between federal and local priorities and those of the state. In many instances, state interests are either not involved or there is an alignment of interests between states and localities.<sup>67</sup> But in the more interesting case, local interests clash with state power, and the federal role is either to take local governments as controlled by the state or to empower local governments to act independently.

A key feature of this aspect of the federal-local dynamic is that states have the power to react to judicial and legislative developments that empower local governments at their expense. Although in a given instance a state may be blocked from overriding a federal mandate implemented by a local government, in the long run states can exercise their powers over local governments to change the baseline conditions under which future federal-local interaction would occur.<sup>68</sup>

Given the uncertain constitutional status of local governments and the critical role of the states in mediating any federal-local re-

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Haider, *When Governments Come to Washington: Governors, Mayors, and Intergovernmental Lobbying* 1–2 (1974), they are often treated as one more interest group among many.

<sup>66</sup> To be clear, one cannot properly speak of the federal-state relationship as bilateral, because many of the most significant aspects of federal-state relations involve interstate competition or cooperation mediated through the federal government. Cf. Barron, *supra* note 5, at 378–79 (discussing state and local autonomy as bounded by horizontal relationships and embedded in the context of the larger framework set at the federal level).

<sup>67</sup> Many areas of policy involve complex patterns of overlapping federal, state, and local authority. See Frug, *supra* note 11, at 556. Conceptual challenges are still posed when federal, state, and local interests are aligned, but this Article focuses on federal-local relations that are not channeled through the intermediary of the states.

<sup>68</sup> Theoretically, states can respond in a variety of ways to cooperation between local governments and the federal government. States can participate in intergovernmental regimes, can conversely seek to thwart the alignment of federal and local interests, or can take some other kind of intermediary supervisory role over local governments. There is also an iterative aspect to the state role in federal-local regimes. To the extent that a local government successfully invokes federal power to act or to resist state control, the locality must still exist in an ongoing and multifaceted relationship with the state. See *infra* text accompanying notes 324–27 (discussing the pragmatics of intergovernmental relations).

lationship, the central jurisprudential question of cooperative localism becomes the source and breadth of local authority in that relationship. Courts evaluating cooperative federal-state relations have grappled with the scope of authority granted to state agencies to advance federal priorities, whether in the regulatory arena or in spending. Congress often provides state agencies with a nominal choice to enter a regulatory field within the bounds set by federal law or face complete preemption.<sup>69</sup> Accepting the choice to participate, as agencies generally do, can have the effect of empowering such agencies to act in the absence of clear state authorization.<sup>70</sup> This dilemma, however, is magnified in the case of federal-local cooperation. Where the recipient of federal authority or federal funding is a local government, interpretation of the scope of local power must account for the traditional control that state governments have had over their localities.

At its core, then, cooperative localism challenges the traditional notion that the federal government must take local entities “as it finds them.” Cooperative localism instead asks whether the federal government is authorized to shape local government identity when necessary to advance federal aims, even in the face of state resistance. Understanding that the relevant legal landscape is largely contested when the federal government interacts with local governments provides space to construct a new jurisprudence of federal-local relations.

## II. LOCAL GOVERNMENT POWERLESSNESS AND STATE SOVEREIGNTY

In conceptualizing the legal framework under which federal-local cooperation occurs, courts are faced ultimately with a choice between federal and state supremacy.<sup>71</sup> Cooperative localism thus

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<sup>69</sup> See Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 *Colum. L. Rev.* 1911, 1935–39 (1995).

<sup>70</sup> See Weiser, *Constitutional Architecture*, *supra* note 14, at 677–81.

<sup>71</sup> Federal-state relations generally exist in the realm of federal law, and state-local relations have traditionally been the province of state law. Federal-local relations, however, operate under a dual focus, with state law foundations of local autonomy informing a federal jurisprudence of local government identity. For an overview of the jurisprudence of local identity in federal law, see Richard Briffault & Laurie Reynolds, *State and Local Government Law* 63–81 (6th ed. 2004).

implicates two distinct jurisprudential traditions. The prevailing view of local governments is one of formal legal powerlessness, subject to plenary state authority.<sup>72</sup> In the federalism context, this view takes the states as unitary entities within which local governments serve as merely convenient instrumentalities of the states, imbued with, at best, reflected sovereignty. Local governments, however, have successfully invoked federal law as a source of authority and a defense against state control.

To understand the looming conflict between these two traditions, this Part outlines the prevailing unitary state view and the role it plays in the contemporary revival of judicial protection of state sovereignty. Part III, below, considers the competing jurisprudence of federal empowerment of local governments.<sup>73</sup>

#### *A. Plenary State Control of Local Governments and the Unitary State*

The conventional view of local government identity that has developed in the interstices of constitutional law holds that local governments exist as creatures of the state, with questions of local structure, power, and immunity ultimately subject to plenary state control.<sup>74</sup> As put most starkly by the Court in *Hunter v. City of*

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<sup>72</sup> See Frug, *supra* note 4, at 5 (“A city is the only collective body in America that cannot do something simply because it decides to do it. Instead, under American law, cities have power only if state governments authorize them to act.”).

<sup>73</sup> It is important to consider the Court’s various approaches to local autonomy and status with a recognition that localism is often a trope employed by the Court to reach substantive outcomes largely removed from the nature of local governments. See, e.g., Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 *Buff. L. Rev.* 393, 397 (2002). Currents of local identity in federal law, as internally contradictory as they may be, can only be discerned from these interstitial approaches and with an appropriately skeptical eye. Cf. Ryan, *supra* note 9, at 594–97 (exploring “federalism opportunism”); Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 *Geo. Wash. L. Rev.* 906, 909 (2006) (arguing that the Rehnquist Court used its federalism decisions instrumentally to further policy preferences).

<sup>74</sup> See Frug, *supra* note 4, at 17–19; Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 *J.L. & Pol.* 187, 198 (2005) (“So far as the United States Constitution is concerned, the conventional wisdom is that the states are all unitary democracies, in that the state legislatures, if permitted by their state constitutions, can freely alter or abolish local governments.”). See generally Eugene McQuillin, 2 *The Law of Municipal Corporations* § 4:3 (3d ed. 2006); Stevenson, *supra* note 56, at § 13.01. This view is not limited to legal scholars. See, e.g.,

*Pittsburgh*, municipal corporations are “created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”<sup>75</sup> As a result, the Court famously concluded, the “number, nature and duration of the powers conferred upon [them] and the territory over which they shall be exercised rests in the absolute discretion of the State.”<sup>76</sup>

*Hunter* provides a federal analogue to the state law tradition of plenary control—generally shorthanded as Dillon’s Rule, after

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Berman, *supra* note 34, at 2 (“There is no doubt about the formal legal status of the approximately 87,000 units of government in this country: they are at the bottom of the hierarchy of government, at the mercy of the states.”).

The constitutional status of local governments is, as noted, uncertain. With the exception of its grant of authority over the national capital to Congress in Article I, § 8, the Federal Constitution mentions neither local governments nor the notion of state political subdivisions more generally. See Gelfand, *supra* note 26, at 4. Gelfand argues that this constitutional silence was a conscious reaction to the revolutionary generation’s experience with the abuse of English imperial control over municipalities. *Id.* As Gelfand notes, although the Constitution’s silence left matters of municipal law to the states, states generally left municipalities to their own devices until well into the nineteenth century. *Id.* at 6. It was only with the rapid urbanization of the United States in the mid-nineteenth century that state supremacy became a significant issue. *Id.*

<sup>75</sup> 207 U.S. 161, 178 (1907). *Hunter* involved Fourteenth Amendment Due Process and Contract Clause challenges to the consolidation of Pittsburgh and Allegheny, Pennsylvania. *Id.* at 176–77. Intimations of plenary state authority over local governments predate *Hunter*. See, e.g., *Missouri v. Lewis*, 101 U.S. 22, 30 (1879) (“Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government.”). A number of scholars trace the *Hunter* view back to *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), in which the Court held that private but not municipal corporations were protected by the Contract Clause. See Frug, *supra* note 4, at 41–42; Hills, *Dissecting the State*, *supra* note 3, at 1208; Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 *Am. U. L. Rev.* 369, 394–96 (1985).

<sup>76</sup> *Hunter*, 207 U.S. at 178. See also *id.* at 179 (“In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.”). The formal legal powerlessness that *Hunter* and subsequent decisions by the Court evince, see, for example, *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933), has been interpreted to deny municipalities the ability to challenge actions by the state on federal constitutional grounds, either as a matter of standing or as a substantive limitation on the reach of federal constitutional law. See Michael A. Lawrence, *Do “Creatures of the State” Have Constitutional Rights?: Standing for Municipalities to Assert Procedural Due Process Claims Against the State*, 47 *Vill. L. Rev.* 93 (2002); Carol F. Lee, *The Federal Courts and the Status of Municipalities: A Conceptual Challenge*, 62 *B.U. L. Rev.* 1, 13–17 (1982); Brian P. Keenan, Note, *Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law?*, 103 *Mich. L. Rev.* 1899, 1902–05 (2005).

Chief Justice John F. Dillon of the Iowa Supreme Court. In his *Commentaries on the Law of Municipal Corporations*, Chief Justice Dillon stated that municipal corporations “possess[] and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; [and] third, those essential to the accomplishment of the declared objects and purposes of the corporation,” with any doubt construed against the municipal corporation.<sup>77</sup> Dillon’s Rule and the *Hunter* view of the federal constitutional subordinacy of localities to the states form the twin pillars of the prevailing view of formal local government powerlessness.

The *Hunter* view infuses a number of areas of federal law where the Court subsumes local governments as instrumentalities indistinguishable from the states.<sup>78</sup> For example, the Court treats local governments as aspects of a unitary state in considering questions of “state action,” implicitly rejecting the view that there might be contexts in which local governments are not considered “states” for purposes of the Fourteenth Amendment.<sup>79</sup> The Court likewise treats local governments as an indistinguishable aspect of the states in evaluating double jeopardy claims.<sup>80</sup> And the Court treats states and local governments as unitary entities in its dormant Commerce Clause jurisprudence.<sup>81</sup>

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<sup>77</sup> 1 John F. Dillon, *Commentaries on the Law of Municipal Corporations* 449–50 (5th ed. 1911). See also Briffault & Reynolds, *supra* note 71, at 266–69.

<sup>78</sup> The unitary state view arises in the realm of federal statutory interpretation as well. For example, in *Wisconsin Public Intervenor v. Mortier*, the Court, in reviewing a federal preemption challenge, read a statutory exception for “States” in the Federal Insecticide, Fungicide, and Rodenticide Act to include local governments (thus finding local authority not preempted). 501 U.S. 597, 600, 607 (1991). The Court found the “more plausible reading” of the statute to leave “the allocation of regulatory authority to the ‘absolute discretion’ of the States themselves, including the option of leaving local regulation of pesticides in the hands of local authorities.” *Id.* at 608 (quoting *Hunter*, 207 U.S. at 178). See also *id.* at 612 (“The term ‘State’ is not self-limiting since political subdivisions are merely subordinate components of the whole.”). Thus, the Court invoked plenary state authority over local governments to construe a statutory reference to “States” to include local governments.

<sup>79</sup> See Alex E. Rogers, Note, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine, 92 *Colum. L. Rev.* 1243, 1246 (1992).

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

<sup>81</sup> See, e.g., *Nw. Airlines v. County of Kent*, 510 U.S. 355, 373–74 (1994); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443–44, 448 (1960).

Local government conflation with the states emerges as well in the Court's structural constitutional jurisprudence.<sup>82</sup> To some extent, the Court relied on local governments as proxies for the states for purposes of its federalism doctrine in *National League of Cities v. Usery*.<sup>83</sup> *National League of Cities* held that the federal Fair Labor Standards Act's application to state and local employees exceeded Congress's power under the Commerce Clause because of its interference with traditional state governmental functions.<sup>84</sup> The Court made no distinction between the Act's impact on the states and their political subdivisions, stating that federal interference with "integral governmental services provided by . . . subordinate arms of a state government is . . . beyond the reach of congressional power under the Commerce Clause just as if such services were provided by the State itself."<sup>85</sup> The Court again conflated states and local governments for structural constitutional purposes in the case that overruled *National League of Cities*, *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>86</sup> *Garcia*, of course, involved a suit by a metropolitan transit authority, and the Court again deployed the rhetoric of federal-state relations in evaluating the constitutionality of federal regulation of this local government entity.<sup>87</sup>

The practice of using local governments as proxies for the states returned most recently in *Printz v. United States*.<sup>88</sup> *Printz* involved a suit by a county sheriff to block provisions of the federal Brady

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<sup>82</sup> Cf. *Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 713 (1985) ("[F]or the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws."); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 625–26 (1973).

<sup>83</sup> 426 U.S. 833, 852 (1976).

<sup>84</sup> *Id.* at 840, 855–56.

<sup>85</sup> *Id.* at 856 n.20. Much of the instrumental rhetoric that underpinned the majority's approach in *National League of Cities* focused on local government functions like police and firefighting as examples of quintessential government functions at risk from federal wage and hour regulation. *Id.* at 849–51.

<sup>86</sup> 469 U.S. 528, 531 (1985).

<sup>87</sup> Indeed, although not generally discussed in these terms, *Garcia* involved a paradigm cooperative-localism program. *Id.* at 531–33. The San Antonio Transit System (SATS), as it was then known, was a metropolitan-wide transit authority that, at a time of fiscal crisis in 1970, turned to federal assistance under the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302 (1964) (codified as amended at 49 U.S.C. §§ 5301–5330, 5332–5338 (2000)).

<sup>88</sup> 521 U.S. 898 (1997).

Handgun Violence Prevention Act that required local officials to conduct background checks relating to the purchase of certain firearms.<sup>89</sup> The Court had previously held, in *New York v. United States*, that the Tenth Amendment bars the federal government from “conscripting” the states as its agents.<sup>90</sup> The Court applied this anti-commandeering principle to local law enforcement in *Printz* despite the *New York* Court’s grounding of the principle in conceptions of state sovereignty. Accordingly, much of the *Printz* Court’s rationale focused on the inherent value of state sovereignty and the Founders’ design with respect to the role of the states.<sup>91</sup> The *Printz* dissent pointed out the conceptual oddity of venerating state sovereignty in a case arising from a challenge by a local-government official.<sup>92</sup> The majority, however, dismissed the possibility that local governments were anything other than embodiments of the state in this instance.<sup>93</sup>

### *B. Modern Federalism, State Sovereignty, and Local Governments*

The Court is increasingly drawing the tradition of plenary state control over local governments into its modern revival of judicial protection of state sovereignty. After the Court overruled *National League of Cities* in *Garcia*, it briefly appeared that the Court had

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<sup>89</sup> See *id.* at 902–04.

<sup>90</sup> 505 U.S. 144, 166 (1992) (“[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.”); see also *id.* at 176–78. The *New York* Court struck down a provision of the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 that made states that failed to provide for the disposal of all internally-generated waste potentially liable for damages. To the Court, this was the functional equivalent of requiring the states to legislate, which “commandeered” the state legislative process. *Id.* at 175–76. (*New York* also involved a Guarantee Clause challenge, which the Court rejected with respect to those provisions of the Act that survived Tenth Amendment scrutiny. See *id.* at 183–86.)

<sup>91</sup> See 521 U.S. at 918–22.

<sup>92</sup> See *id.* at 955 n.16 (Stevens, J., dissenting) (“Even if the protections that the majority describes as rooted in the Tenth Amendment ought to benefit state officials, it is difficult to reconcile the decision to extend these principles to local officials with our refusal to do so in the Eleventh Amendment context. If the federal judicial power may be exercised over local government officials, it is hard to see why they are not subject to the legislative power as well.”); see also *id.* at 965.

<sup>93</sup> See *id.* at 931 n.15 (stating that “the distinction in our Eleventh Amendment jurisprudence between States and municipalities is of no relevance here” and is “peculiar” to sovereign immunity).

decided to leave the policing of federal-state relations to the political process. Shortly thereafter, however, the Court began to tack in the direction of a vigorous role for judicial oversight of the federal-state relationship. Over the past decade and a half, the Court (generally by narrow and contested majorities) has revived federalism-based limitations on federal power and venerated state power as a lodestar of federalism.<sup>94</sup> In addition to its commandeering jurisprudence,<sup>95</sup> the Court in a now-familiar line of cases has limited the scope of Congress's powers under the Commerce Clause<sup>96</sup> and Section Five of the Fourteenth Amendment,<sup>97</sup> and has carved out a broad new scope of state immunity.<sup>98</sup>

This federalism revival has placed great emphasis on state "sovereignty" as a ground for limiting federal authority.<sup>99</sup> At many turns where the Court has directly protected the states in a clash with national power, the Court has emphasized the "dignity" of the

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<sup>94</sup> The Court's march toward a renewed respect for state sovereignty has been uneven. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 9 (2005) (upholding congressional power to regulate local activities under the Commerce Clause); *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004) (holding that Title II of the Americans with Disabilities Act is a valid exercise of Congress's enforcement power under the Fourteenth Amendment). The Court has even backed away from *Printz* and *New York*, upholding a federal restriction on state disclosure of certain personal information. See *Reno v. Condon*, 528 U.S. 141, 151 (2000). Some scholars accordingly see the Court's fervor for protecting state sovereignty as diminishing. See, e.g., Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. Pa. L. Rev. 1331, 1340–42, 1363 (2006) (discussing the Rehnquist Court's later federalism decisions).

<sup>95</sup> See *supra* text accompanying notes 88–93 (discussing *New York* and *Printz*).

<sup>96</sup> See *United States v. Morrison*, 529 U.S. 598, 627 (2000) (holding that the civil remedy provision of the federal Violence Against Women Act violates the Commerce Clause); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (finding that Congress exceeded its Commerce Clause authority by passing the Gun-Free School Zones Act of 1990).

<sup>97</sup> See *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

<sup>98</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that Article I does not grant Congress the power to abrogate state sovereign immunity in private suits for damages); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (holding that the Indian Commerce Clause does not grant Congress the power to abrogate states' sovereign immunity).

<sup>99</sup> See, e.g., Amar, *supra* note 60, at 1492–95; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1074–77 (1995).

states as a formal imperative.<sup>100</sup> In particular, the Court is increasingly intimating that internal political ordering is a fundamental attribute of state sovereignty. At the outset of its current state-centered federalism turn, the Court in *Gregory v. Ashcroft* justified a plain-statement rule for the application of federal statutes to state officials in part by noting that “[t]hrough the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.”<sup>101</sup> In *Alden v. Maine*, the Court likewise found support for limiting congressional power to abrogate state sovereign immunity by invoking the importance of state ordering of its own internal structure.<sup>102</sup> “A power to press a State’s own courts into federal service to coerce the other branches of the State,” the Court argued, “is the power first to turn the State against itself and ultimately to commandeer the entire political machinery of the State against its will and at the behest of individuals.”<sup>103</sup>

These intimations of state control over local governments as fundamental to state sovereignty reached fullest expression in a 2004 decision, *Nixon v. Missouri Municipal League*.<sup>104</sup> *Nixon* involved a Missouri statute that prohibited “political subdivisions” from providing telecommunications services or facilities.<sup>105</sup> Several municipalities and public utilities challenged this prohibition before the Federal Communications Commission (“FCC”), claiming it was preempted by the Telecommunications Act of 1996’s provision that “[n]o State [law] may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>106</sup> The FCC upheld Missouri’s power to prevent political subdivisions from providing services,<sup>107</sup>

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<sup>100</sup> See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”).

<sup>101</sup> 501 U.S. 452, 460 (1991).

<sup>102</sup> 527 U.S. at 749.

<sup>103</sup> *Id.*

<sup>104</sup> 541 U.S. 125 (2004).

<sup>105</sup> *Id.* at 129.

<sup>106</sup> *Id.* (quoting 47 U.S.C. § 253(a) (2000)). The Telecommunications Act requires the FCC first to find a violation of § 253(a), at which point the Commission “shall preempt” such state law. *Id.* (quoting 47 U.S.C. § 253(d)).

<sup>107</sup> The FCC had interpreted the relevant provision of the Telecommunications Act not to apply to political subdivisions of a state, finding that Congress intended to pro-

but the Court of Appeals for the Eighth Circuit disagreed, finding the statutory phrase “any entity” sufficiently clear to include local governments.<sup>108</sup> The Supreme Court reversed.

To the Court, although sound policy might support allowing municipal entry into the telecommunications market and “any entity” was susceptible to a reading that included governmental entities, neither proposition resolved the statutory question.<sup>109</sup> Rather, the Court looked primarily to a pragmatic analysis of the state-local relationship to discern congressional intent.<sup>110</sup> For the Court, then, the interpretation question turned squarely on “the practical operation and effect”<sup>111</sup> of federal preemption on the state-local relationship.

The *Nixon* Court distinguished between federal preemption involving state regulation of the private sector and preemption “meant to unshackle local governments from entrepreneurial limi-

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hibit restrictions on market entry by “independent entities subject to state regulation.” Id. at 130 (quoting *In re Mo. Mun. League*, 16 F.C.C.R. 1157, 1162 (2001)). The FCC discerned a line between “political subdivision” and “independent entity” by reference to state law, finding that the order did not preempt the Missouri statute as applied to municipally owned utilities not chartered as independent corporations on the theory that, under Missouri law, the utilities were subdivisions of the state. Id. at 130 n.2. The FCC had implied that it might find state regulation of municipally owned entities that had been separately chartered preempted, but the Court declined to express a view as to the proper resolution of that view of preemption. Id.

<sup>108</sup> Id. at 131 (citing *Mo. Mun. League v. FCC*, 299 F.3d 949 (8th Cir. 2002)). The Eighth Circuit applied the *Gregory* plain-statement requirement, but found that “entity,” especially when modified by “any,” included political subdivisions. The D.C. Circuit had affirmed an earlier FCC decision arising from a similar conflict in Texas. See *City of Abilene v. FCC*, 164 F.3d 49, 54 (D.C. Cir. 1999). The Eighth Circuit’s ruling thus created a clear circuit split.

<sup>109</sup> Although the Court looked to the state-local relationship to inform its view of congressional intent and avoided directly resolving the underlying constitutional question, the parties engaged in a direct and spirited debate about the underlying constitutional status of local governments. See, e.g., Petitioner’s Brief at 12–15, *Nixon*, 541 U.S. 125 (Nos. 02-1238, 02-1386, 02-1405), 2003 WL 22118800; Brief for the Respondents at 32–33, *Nixon*, 541 U.S. 125 (Nos. 02-1238, 02-1386, 02-1405), 2003 WL 22466041; Petitioner’s Reply Brief at 3–5, *Nixon*, 541 U.S. 125 (Nos. 02-1238, 02-1386, 02-1405), 2003 WL 22873089.

<sup>110</sup> *Nixon*, 541 U.S. at 133 (“To get at Congress’s understanding, what is needed is a broader frame of reference, and in this litigation it helps if we ask how Congress could have envisioned the preemption clause actually working if the FCC applied it at the municipal respondents’ urging.”).

<sup>111</sup> Id. (quoting *N.J. Realty Title Ins. Co. v. Div. of Tax Appeals*, 338 U.S. 665, 673 (1950)).

tations.”<sup>112</sup> The “trouble,” according to the Court, was that “a local government’s capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of governments at the state or local level to support entry into the market.”<sup>113</sup> Federal preemption of a state ban on government utilities, then, “would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place.”<sup>114</sup> Thus, “when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated.”<sup>115</sup>

In parenthetically conflating the state with “the subdivision through which it acts,”<sup>116</sup> the Court dismissed the possibility—apparent in other areas of the federal law of local identity, as discussed below<sup>117</sup>—that there might be a conceptual distinction between the state and local governments or a source of local authority independent of the state. Instead, what the Court saw in federal preemption was a parade of horrors, marching off to “strange and indeterminate results.”<sup>118</sup>

Federal preemption, the Court noted, could free a local government from a specific state prohibition, “but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the telecommunications business.”<sup>119</sup> The Court entertained no argument “that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not.”<sup>120</sup> Further, if federal preemption only affected restrictions on

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 133–34.

<sup>114</sup> *Id.* at 134.

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

<sup>116</sup> *Id.* The Court similarly conflated local governments with the states when it concluded that “preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that we think it highly unlikely that Congress intended to set off on such uncertain adventures.” *Id.*

<sup>117</sup> See *infra* Subsection III.A.1 (discussing judicial disaggregation of local governments from the states).

<sup>118</sup> *Nixon*, 541 U.S. at 133.

<sup>119</sup> *Id.* at 135.

<sup>120</sup> *Id.*

the use of preexisting authority, then practical barriers (primarily fiscal) would render the preemption moot.<sup>121</sup>

The next concern the Court invoked was the risk that federal preemption of state control might lead to local variance. If, the Court supposed, a jurisdiction had authority to act (but for a preempted specific prohibition), managed to find a source of financing, and entered the telecommunications field, such action might put the locality at odds with a locality in the “State next door where municipalities lacked such general authority.”<sup>122</sup> The result, the Court concluded, would be “a national crazy quilt.”<sup>123</sup>

The final float in the parade of horrors was a federal “one-way ratchet.”<sup>124</sup> To the Court, the fact that a state might choose to allow a locality to provide telecommunications services, and then reconsider and be prevented from withdrawing that authority, would create a distinction between a state that had made such an initial decision and a neighboring state that had never acted to allow local governments to enter the field.<sup>125</sup> Both states would seek the same outcome—no local governments in telecommunications—but an initial decision to empower a local government would not be reversible.

In a coda, the *Nixon* Court articulated a “working assumption” that “federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power, in the absence of [a] plain statement.”<sup>126</sup> This canon, built on the *Gregory* plain-statement rule, had previously been applied to narrow the interpretation of federal statutes that might encroach on local regulatory authority.<sup>127</sup> *Nixon*, however, suggested that the canon applied di-

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<sup>121</sup> Id. at 136. Justice Stevens, in dissent, would have read the Telecommunications Act to prohibit *specific* restrictions on municipal provision of services but not to have otherwise affected state control of local government power. Id. at 146–47 (Stevens, J., dissenting).

<sup>122</sup> Id. at 136 (majority opinion).

<sup>123</sup> Id.

<sup>124</sup> Id. at 136–37.

<sup>125</sup> Id.

<sup>126</sup> Id. at 140.

<sup>127</sup> See *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 433 (2002); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991).

rectly to federal interference with state power over local governments.<sup>128</sup> Implicit in this canon of construction is the proposition that, if it acted through an “unmistakably clear” statement,<sup>129</sup> Congress *would* possess the power to interpose itself between a state and a local government where that local government asserted a federal statutory ground for resisting state restrictions on local power. But the Court still viewed the constitutional conflict between federal and state authority as sufficiently grave to invoke this tool of avoidance.<sup>130</sup>

*Nixon* represents the clearest articulation of a vision of the state-local relationship that for practical and formal reasons precludes federal empowerment of local governments in the face of state assertions of control.<sup>131</sup> *Nixon* presages a clash between the contemporary Court’s vision of state sovereignty and the legal protection for federal-local cooperation represented by the jurisprudence of federal empowerment of local governments. It is to that tradition that we now turn.

### III. THE TRADITION OF FEDERAL EMPOWERMENT OF LOCAL GOVERNMENTS

The unitary state view of local governments breaks down in a number of areas of federal constitutional and subconstitutional law. Courts regularly disaggregate local governments from the states. At times, courts draw sharp lines that belie formal kinship between the states and local governments; at other times, courts approach local identity through a functional balancing of state and federal (though rarely local) interests.<sup>132</sup> Most notably, the unitary state perspective has been weakest where courts have validated federal preemption of state control over local governments, freeing

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<sup>128</sup> See *Nixon*, 541 U.S. at 140–41.

<sup>129</sup> *Id.* at 141 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

<sup>130</sup> *Id.* at 140–41; see also *id.* at 141 (Scalia, J., concurring) (arguing that the case turned entirely on *Gregory*).

<sup>131</sup> *Nixon*’s affirmation of state control has had practical consequences as some states have moved to block local governments from providing wireless broadband services. See generally Sharon E. Gillett, *Municipal Wireless Broadband: Hype or Harbinger?*, 79 S. Cal. L. Rev. 561, 585–86 (2006).

<sup>132</sup> See Lee, *supra* note 76, at 42.

localities to act, and to resist commands of the state, in the name of federal power.

*A. Cracks in the Façade of the Unitary State*

*1. Local Disaggregation from the States*

In a number of areas of federal law, the Court treats local governments as independent entities with identities separate from the states, devoid of any reflected state sovereignty. As a constitutional matter, as the dissent noted in *Printz v. United States*,<sup>133</sup> this disaggregation is clearest in the area of sovereign immunity. The Court has declared repeatedly that municipalities are categorically not cloaked with state sovereignty for immunity purposes.<sup>134</sup> In its recent federalism jurisprudence, the Court has expanded significantly the concept of state immunity from suit, articulating a preconstitutional doctrine of immunity neither derived from, nor limited by, the Eleventh Amendment.<sup>135</sup> As the Court has carved out this expansive immunity doctrine, it has continued categorically to refuse to extend the same sovereignty-based protection to political subdivisions that are not arms of the state.<sup>136</sup>

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<sup>133</sup> See supra note 92 and accompanying text.

<sup>134</sup> See, e.g., *Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 609 n.10 (2001); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). But cf. *Tennessee v. Lane*, 541 U.S. 509, 527 n.16 (2004) (noting that lower courts have treated municipal courts as arms of the state for sovereign immunity purposes).

<sup>135</sup> See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (noting that state immunity from suit “is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments”).

<sup>136</sup> See *id.* at 756. The Court recently built on the categorical distinction it has drawn between states and political subdivisions for purposes of sovereign immunity in limiting the scope of Congress’s power under § 5 of the Fourteenth Amendment. In *Board of Trustees of the University of Alabama v. Garrett*, the Court analyzed whether Congress’s § 5 power could support enactment of the Americans with Disabilities Act (“ADA”). 531 U.S. 356, 364 (2001). In *City of Boerne v. Flores*, the Court had explained that Congress’s power under § 5 is limited to prophylactic measures that evince congruence and proportionality to the constitutional harms Congress seeks to remedy. 521 U.S. 507, 529–30 (1997). In evaluating whether Congress was justified in its findings with respect to a history of disability discrimination, the parties supporting the ADA cited instances of discrimination involving local governments. See *Garrett*, 531 U.S. at 368–69. The Court, however, drew a categorical line dividing acts of discrimination on the part of local governments from the evaluation of the actions of the

In its arm-of-the-state immunity jurisprudence, the Court has developed elaborate tests for evaluating entities that might be considered within the ambit of state sovereignty, seeking sufficient indicia that an entity is not really “local” for these purposes. The factors the Court has relied on include whether a suit against an entity will be satisfied out of the state treasury,<sup>137</sup> whether state law designates an entity as a political subdivision, the degree of state supervision, the level of state funding, and whether an entity is empowered by the state to raise its own revenue.<sup>138</sup> In all of this, however, the Court continues to rely on a vision of local governments as entities generally outside the ambit of the state, conceptually distinct from the vision suggested by the unitary state theory.<sup>139</sup>

This same categorical disaggregation of local governments from the states emerges in subconstitutional federal law. Under Section 1983,<sup>140</sup> for example, the Court has held that local governments are subject to liability as “persons” that Congress intended to reach.<sup>141</sup> The Court has distinguished local governments from the states, holding that states as such are immune from Section 1983 suits but local governments are not.<sup>142</sup>

Rather than completely disaggregate states and local governments, courts at times afford local governments identity independ-

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state for § 5 remedial purposes. See *id.* at 369 (“It would make no sense to consider constitutional violations on [the] part [of units of local governments], as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.”).

<sup>137</sup> See *Ford Motor Co. v. Dep’t of Treasury of Ind.*, 323 U.S. 459, 464 (1945).

<sup>138</sup> See *Mt. Healthy*, 429 U.S. at 280. This immunity jurisprudence does not focus generally on whether a political subdivision of a state is acting pursuant to a governmental purpose or pursuant to a specific grant of delegated authority. While the jurisprudence has been fairly categorical with respect to traditional local governments, it has fractured in confronting conceptual questions in the growing arena of special-purpose districts, regional authorities, and other novel instrumentalities. See Rogers, *supra* note 79, at 1246–47.

<sup>139</sup> See Lee, *supra* note 76, at 42 (discussing the extent to which the Court’s modern intergovernmental immunity cases have treated local governments at times as entities distinct from the states).

<sup>140</sup> 42 U.S.C. § 1983 (2000).

<sup>141</sup> See *Monell v. Dep’t of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 690–91 (1978).

<sup>142</sup> See *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 62 (1989); *Quern v. Jordan*, 440 U.S. 332, 339–40 (1979).

ent from the states through pragmatic inquiries.<sup>143</sup> In applying federal constitutional one-person/one-vote standards to local governments, for example, the Court has at times treated local governments as bodies representative of distinct local polities.<sup>144</sup> These cases essentially remove local governments from their conceptual moorings as instrumentalities of the state, although the Court has been hesitant to move too far in federalizing local election law.<sup>145</sup>

The Court, moreover, has groped its way toward a federal test of state empowerment of local governments in interpreting the scope of the Sherman Act and similar statutory schemes that are ambiguous with respect to the question of local identity.<sup>146</sup> Traditionally, the Court has interpreted federal antitrust law to exempt state governments acting in their sovereign capacity under *Parker v. Brown*.<sup>147</sup> Whether this *Parker* immunity extends to local governments has been a contentious issue.<sup>148</sup> Although shifting over the course of its development, the Court's *Parker* jurisprudence at the local level has focused on discerning indicia of the delegation of regulatory power from the state to local governments.<sup>149</sup> The Court

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<sup>143</sup> Cf. 47 Am. Jur. 2d Judgments §§ 624–625 (2006) (noting that state and local governments are sometimes viewed in privity for purposes of issue and claim preclusion and sometimes not); Garry G. Mathiason & Paula Champagne, Interrelationship of Administrative, Local, State, and Federal Claims and Procedures, Issue Preclusion and Statute of Limitations Problems, in *Employment Discrimination and Civil Rights Actions in Federal and State Courts* 981, 1003 (ALI-ABA Course of Study, 1993) (discussing cases).

<sup>144</sup> See Richard Briffault, Who Rules at Home?: One Person/One Vote and Local Governments, 60 U. Chi. L. Rev. 339, 345–59 (1993).

<sup>145</sup> *Id.* at 340.

<sup>146</sup> Other federal statutes contain language that leaves subject to interpretation questions about the relationship between states and local governments and the nature of local identity in federal law, see, e.g., National Labor Relations Act, 29 U.S.C. § 152(2) (2000); cf. *Crestline Mem'l Hosp. Ass'n v. NLRB*, 668 F.2d 243, 245 (6th Cir. 1982) (citing *NLRB v. Natural Gas Util. Dist.*, 402 U.S. 600, 604–05 (1971)) (discussing interpretations of the scope of the NLRA's carveout for political subdivisions), although the Court has not created quite as elaborate a jurisprudence of local identity in these areas as it has in the case of antitrust liability.

<sup>147</sup> 317 U.S. 341 (1943).

<sup>148</sup> The same statutory term at issue in § 1983 cases—the word “person”—provides the starting point for the analysis of liability and immunity questions under both the Sherman Act and the Clayton Act. See *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 394–96 (1978).

<sup>149</sup> *Id.* at 413 (plurality opinion) (“[*Parker*] exempts only anticompetitive conduct engaged in as an act of government . . . by [a state's] subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service.”); New

has required that any state policy relied upon by a local government to shield itself against antitrust liability must be “clearly articulated and affirmatively expressed.”<sup>150</sup> While home-rule powers are insufficient to satisfy this requirement,<sup>151</sup> a very general delegation of regulatory authority suffices.<sup>152</sup> These common-law-like tests of the scope of local power turn not on state law as such but on a federal reflection, under federal standards, of the Court’s view of the appropriate balance between the goals of the federal antitrust regime and state sovereignty.<sup>153</sup>

## 2. Shadow Constitutional Protection for Local Autonomy

The Court’s adherence to the *Hunter v. City of Pittsburgh* plenary power view of state-local relations in constitutional law is anything but uniform.<sup>154</sup> David Barron has elegantly argued, for example, that in a series of individual-rights cases,<sup>155</sup> the Supreme Court has recognized some scope of local autonomy to vindicate constitutional values at the local level.<sup>156</sup> For Barron, this “local constitu-

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Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978); see also Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, 445 U.S. 97, 105 (1980).

<sup>150</sup> See Cmty. Commc’ns Co. v. Boulder, 455 U.S. 40, 51 (1982) (quoting *City of Lafayette*, 435 U.S. at 410).

<sup>151</sup> See *id.* at 54–55.

<sup>152</sup> See *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 372–73 (1991).

<sup>153</sup> Gerald Frug has noted that the internally contradictory results the courts have reached in defining the nature of local governments reflect the distinction between the public and private roles that local governments play. See Frug, *supra* note 4, at 24–25. It is clear that the public-private distinction has played an important role in the jurisprudence of local government identity, particularly in areas such as antitrust liability, although the Court in *Garcia v. San Antonio Metropolitan Transit Authority* rejected the governmental-proprietary distinction as a meaningful basis for local government immunity from federal regulation. See 469 U.S. 528, 541–44 (1985). When filtered through the broader nature of the federal-state relationship, however, the public-private distinction can be seen as one among many other elements of local identity on which the courts have focused.

<sup>154</sup> Some lower courts have directly limited *Hunter* with respect to the question of local-government latitude to assert federal challenges against the states. See, e.g., *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986); *Rogers v. Brockette*, 588 F.2d 1057, 1068 (5th Cir. 1979); *Hayward v. Clay*, 573 F.2d 187, 190 (4th Cir. 1978). See also Lee, *supra* note 76, at 40.

<sup>155</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996); *Papasan v. Allain*, 478 U.S. 265 (1986); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

<sup>156</sup> See Barron, *supra* note 4, at 560–95; see also Lawrence Rosenthal, *Romer v. Evans* as the Transformation of Local Government Law, 31 *Urb. Law.* 257, 260–62, 269 (1999) (arguing that *Romer* represents a new paradigm in local government law ir-

tionalism” reflects a structural protection through which the Court allows local governments a role in shaping substantive constitutional norms.<sup>157</sup>

Other scholars have similarly highlighted the structural constitutional role that local autonomy can play in vindicating individual rights. For example, Richard Schragger has emphasized the vigorous potential that local diffusion of power holds for protecting religious liberty.<sup>158</sup> And Heather Gerken has recognized the role that local governments, among other institutions, can play in providing a local majority on a smaller scale for those who hold minority views within a larger polity. This inversion of the Madisonian fear of the tyranny of local majorities, Gerken argues, provides vital institutional protection for unpopular policies and expression.<sup>159</sup>

The doctrinal foundations for these instances of local constitutionalism offer some counterweight to the *Hunter* view. They are equally important, however, for the general recognition they grant to local governments as independent actors in the federal constitutional structure.<sup>160</sup>

### *B. Federal Empowerment of Local Governments*

As a practical matter, local governments are hardly powerless in the face of state authority.<sup>161</sup> The autonomy that local governments

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reconcilable with the *Hunter* plenary state-power view); Richard C. Schragger, *Cities As Constitutional Actors: The Case of Same-Sex Marriage*, 21 *J.L. & Pol.* 147, 173–74 (2005) (building on a “localist” reading of *Romer* to argue for a decentralized Equal Protection Clause jurisprudence).

<sup>157</sup> See Barron, *supra* note 4, at 610–11.

<sup>158</sup> See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 *Harv. L. Rev.* 1810 (2004).

<sup>159</sup> See Heather Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745, 1748 (2005).

<sup>160</sup> At times the Court has privileged local-government autonomy in federal constitutional law as a shield against private federal constitutional claims. This judicial protection for local autonomy in constitutional law developed primarily in the areas of desegregation and educational funding. See Briffault, *Our Localism Part I*, *supra* note 57, at 99–111; Williams, *supra* note 4, at 106–15.

<sup>161</sup> See Briffault, *Our Localism Part I*, *supra* note 57, at 111–15 (discussing the reality of local empowerment with respect to the states despite the jurisprudence of local powerlessness). In the state law of local governments, the practical scope of local autonomy remains hotly contested. As the Advisory Commission on Intergovernmental Relations noted, “[t]wo legal concepts of local government have contended for ascendancy in the American federal system: home rule and creatures of the state.” U.S. Advisory Comm’n on Intergovernmental Relations, *supra* note 54, at 1. On the limits

have managed to garner, however, generally has been obtained as a matter of state law, reflecting the influence that local governments have at the state level.<sup>162</sup> Although scholars have recognized the practical ways in which state authority over localities has yielded space for local autonomy, questions of local identity are still generally thought to devolve ultimately to plenary state power.<sup>163</sup>

There is a countertradition, however, of federal power subverting the *Hunter/Dillon's* Rule view of formal local powerlessness. If local autonomy encompasses both the ability to initiate action and the ability to resist the commands of other actors, the Court has recognized that the federal government can support both.<sup>164</sup>

### 1. *Autonomy and the Authority to Act*

A stark and direct conflict between federal supremacy and state power over local governments arose over the effort by the city of Tacoma to dam the Cowlitz River in southwest Washington.<sup>165</sup> In 1948, Tacoma filed an application with the Federal Power Com-

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of local autonomy, see Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 Minn. L. Rev. 643, 693–707 (1964).

<sup>162</sup> In other words, although the home-rule movement has subverted Dillon's Rule and has limited plenary state authority with respect to local matters, see Briffault & Reynolds, *supra* note 71, at 281, these gains for local autonomy are matters of state constitutional and statutory law. See generally David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255 (2003).

<sup>163</sup> The Court at times has signaled that federal preemption of local authority must be clear, a canon of statutory interpretation that arguably privileges local authority under federal law. See Lynn A. Baker & Clayton P. Gillette, *Local Government Law* 334–36 (3d ed. 2004) (discussing the principle that Congress must indicate its intent to preempt local authority in “clear and manifest” terms).

<sup>164</sup> A related area of judicial protection for local autonomy in the face of assertions of state control bears mention. The arena of municipal bankruptcy has frequently engendered conflicts between states and localities over the effect of federal law. See Lee, *supra* note 76, at 34 n.157 (noting that in upholding federal legislation governing municipal bankruptcies in *United States v. Bekins*, 304 U.S. 27 (1938), the Court began a shift toward recognition of local autonomy under federal law); see also Hills, *Dissecting the State*, *supra* note 3, at 1280–85 (discussing a conflict between the state of Connecticut and the city of Bridgeport over Bridgeport's invocation of the provision of the federal bankruptcy code that allows for municipal bankruptcy where local governments are “generally authorized” by state law to file).

<sup>165</sup> This controversy raged in the courts and before the Federal Power Commission for more than a decade, producing a long series of judicial and administrative decisions. See Hills, *Dissecting the State*, *supra* note 3, at 1205 n.19 (listing decisions).

mission under Section 4(e) of the Federal Power Act.<sup>166</sup> The State of Washington objected, asserting that the proposed dam violated a state law requiring state permission for such construction.<sup>167</sup> The Commission issued the license over the state's objection.<sup>168</sup>

Washington appealed to the Ninth Circuit, arguing that Tacoma, as a creature of the state, could not act in opposition to state law. Rejecting the argument, the Ninth Circuit held that state laws could not prevent a federal licensee from acting under the license, notwithstanding a state's nominal plenary power over its subdivisions.<sup>169</sup>

In a later suit that followed the issuance of bonds for the dam project, the Washington Supreme Court ruled that Tacoma had not been empowered by the state to exercise the power of eminent domain over the fish hatcheries—owned by the state—that the dam would impact.<sup>170</sup> The Washington Supreme Court held that only state law, and not the federal license, could so empower the city of Tacoma.<sup>171</sup> The city sought review by the U.S. Supreme Court. In 1958, the Court reversed, ruling that the issue of municipal power had been settled by the Ninth Circuit's decision that “state laws cannot . . . bar the licensee from acting under [a federal license].”<sup>172</sup>

Although the Court technically only validated the Ninth Circuit's earlier recognition of the grant of federal authority to the city of Tacoma in the face of state resistance (and a state supreme court interpretation of state law that denied local authority), to some commentators the Court's *City of Tacoma v. Taxpayers of Tacoma* decision has come to stand for a more general recognition of a

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<sup>166</sup> 16 U.S.C. § 797(e) (2000).

<sup>167</sup> See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 325 (1958).

<sup>168</sup> See *id.* at 326.

<sup>169</sup> See *Wash. Dep't of Game v. Fed. Power Comm'n*, 207 F.2d 391, 396 (9th Cir. 1953).

<sup>170</sup> See *City of Tacoma v. Taxpayers of Tacoma*, 307 P.2d 567, 576 (Wash. 1957).

<sup>171</sup> *Id.* at 577 (“[Tacoma’s] inability so to act [in condemning certain state-owned property] can be remedied only by state legislation that expands [the city’s] capacity.”) (emphasis omitted).

<sup>172</sup> *City of Tacoma*, 357 U.S. at 340 (quoting *Wash. Dep't of Game*, 207 F.2d at 396) (emphasis omitted).

scope of federal delegation of regulatory authority beyond state control.<sup>173</sup>

## 2. Fiscal Federalism, Local Spending, and State Interference

While the Cowlitz River Project controversy centered on an attempt by a state to interfere with local ability to exercise federal authority, the Court has also been protective of local resistance to state fiscal control.<sup>174</sup> In *Lawrence County v. Lead-Deadwood School District No. 40-1*, the Court confronted an effort by South Dakota to regulate the distribution of funds provided to a county pursuant to a federal Payment In Lieu of Taxes (“PILOT”) program.<sup>175</sup> The state passed a statute requiring local governments to distribute PILOT payments in the same way as general tax revenues.<sup>176</sup>

The Supreme Court found the state statute preempted by language in the federal PILOT Act that provided that a unit of local government “may” use the funds for “any” governmental purpose.<sup>177</sup> In dissent, then-Justice Rehnquist invoked *Hunter* to argue that in “light of the long history of treatment of counties as being by law totally subordinate to the States which have created them,”<sup>178</sup> the PILOT statute should not be read to prohibit the state from regulating the manner in which the county might spend the PILOT funds.<sup>179</sup> The Court did not respond to the *Hunter* point directly, but it did reject the general proposition that federalism con-

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<sup>173</sup> See, e.g., Stevenson, *supra* note 56, at § 12.07 (citing *City of Tacoma* for the proposition that the federal government “can confer powers directly on . . . local governments,” which grants “cannot be set aside or negated by the states”); 1 Eugene McQuillin, *The Law of Municipal Corporations* § 1.58 (3d ed. 1999) (citing *City of Tacoma* for the proposition that municipal corporations “have achieved a status—nebulous as yet—on the national scene distinctly different from their original status as merely creatures of the state legislature with only the powers granted by that body”).

<sup>174</sup> Carol Lee has noted that local governments in the late 1960s found success in striking down state school funding schemes that undermined the benefits of federal impact aid funds. Lee, *supra* note 76, at 39–40. These cases rested on Supremacy Clause grounds in reaffirming local government rights.

<sup>175</sup> 469 U.S. 256 (1985). PILOT payments compensate local governments for the loss of tax revenues resulting from public lands’ federal tax immunity and for the cost of providing services in connection with certain federal public lands. *Id.* at 258–59.

<sup>176</sup> See *id.* at 259.

<sup>177</sup> *Id.* at 260–61.

<sup>178</sup> *Id.* at 273 (Rehnquist, J., dissenting).

<sup>179</sup> See *id.* at 270–71.

cerns undermined Congress's ability to empower local governments to spend federal funds "without substantial interference."<sup>180</sup> The Court thus clearly endorsed the ability of the federal government to interpose itself between the states and local governments as a matter of federal supremacy.<sup>181</sup>

### 3. Other Federal Intervention in State Ordering

It bears noting, in any discussion of federal empowerment, that the Court in other contexts has upheld fairly direct federal interference with a state's ordering of its internal affairs. As Justice Scalia has noted, "it should not be thought that the States' power to control the relationship between themselves and their political subdivisions—their 'traditional prerogative . . . to delegate' (or to refuse to delegate) 'their authority to their constituent parts,' . . . has hitherto been regarded as sacrosanct. To the contrary."<sup>182</sup>

Acting, for example, pursuant to its power to enforce the Fourteenth and Fifteenth Amendments,<sup>183</sup> Congress has interfered directly with state political ordering in the voting-rights context.<sup>184</sup> Congress likewise regularly invokes its other powers—under the

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<sup>180</sup> Id. at 269–70 (majority opinion). For a similar suggestion, see *Wheeler v. Barrera*, 417 U.S. 402, 416–17, 417 nn.12–13 (1974) (discussing congressional power to preempt state constitutional restrictions on local use of federal funds).

<sup>181</sup> *Lawrence County* has had a mixed reception in the lower courts. For examples of lower courts that distinguish it, see *Indian Oasis-Baboquivari Unified School District No. 40 of Pima County v. Kirk*, 91 F.3d 1240, 1243 (9th Cir. 1996) (distinguishing *Lawrence County* and holding that school districts had no standing against the state); see also *City of N.Y. v. State*, 655 N.E.2d 649, 651 (N.Y. 1995) (holding that the city and school board could not maintain suit against the state on federal constitutional or statutory grounds); id. at 658 (Ciparick, J., dissenting) (citing *Lawrence County*).

<sup>182</sup> *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 448 (2002) (Scalia, J., dissenting) (citing federal statutory regimes that interfere with the relationship between the states and their political subdivisions); see also id. at 448–49 (citing *Hills, Dissecting the State*, supra note 3).

<sup>183</sup> See, e.g., *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970); *Katzenbach v. Morgan*, 384 U.S. 641, 651–52 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301, 341, 348 (1966).

<sup>184</sup> See, e.g., *Johnson v. De Grandy*, 512 U.S. 997 (1994) (reviewing a suit under § 2 of the Voting Rights Act of 1965 challenging Florida's state legislative districting plan). The Court has constricted Congress's power under the Civil War amendments in recent decisions. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82–84 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999); *City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997). But see *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 735 (2003).

Commerce and Spending Clauses in particular—in ways that significantly impact the internal structure of state governments.<sup>185</sup> As *Garcia v. San Antonio Metropolitan Transit Authority* made clear, for example, Congress regulates the wages and hours of state employees.<sup>186</sup> The Court has likewise validated the application of the federal Family and Medical Leave Act to the states.<sup>187</sup> These cases do not involve direct invocation of federal authority by local governments, but each example, however contested, underscores the contingent nature of the state plenary control view.

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Taken together, the independence from states reflected in the immunity cases, the Court's struggles to define the relationship between the states and local governments in some areas of federal statutory interpretation, and the flashes of local empowerment against the states in the individual rights context all give shape to a federal jurisprudence of local government identity as distinct from the states. Likewise, the federal empowerment jurisprudence and other instances of federal intervention in state internal political ordering undermine any robust view of the constitutional necessity of state control over local governments. In short, these cracks in the unitary state belie any reductionist view of local governments as undifferentiated instrumentalities of the state.

#### IV. A LOCALIST VIEW OF FEDERAL EMPOWERMENT IN AN ERA OF DEVOLUTION AND DECENTRALIZATION

The relevant law that might define the arena for federal-local cooperation stands at a crossroads. The tradition of federal empowerment is increasingly at odds with the Court's revival of state sovereignty as the lodestar of its federalism jurisprudence. Given the ubiquity of direct federal-local relations, a clash between fed-

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<sup>185</sup> Many statutes of general applicability that the Court has upheld in applying to the states have an impact, if at times indirect, on how the states choose to order their structure. See, e.g., *New York v. United States*, 505 U.S. 144, 203–05 (1992) (White, J., dissenting in part) (discussing the effect on state sovereignty of federal regulations like the wage and hour requirements at issue in *Garcia v. San Antonio Metropolitan Transit Authority*).

<sup>186</sup> 469 U.S. 528 (1985).

<sup>187</sup> See *Hibbs*, 538 U.S. at 734–35.

eral empowerment and the Court's revival of state sovereignty is inevitable.<sup>188</sup>

This Part argues that federal empowerment is not only consistent with the Court's contemporary federalism revival, but actually can be seen to advance the core instrumental concerns that have driven recent changes in the law of federal-state relations. The revival of judicial protection for the states, while nominally grounded in formal conceptions of sovereignty, has largely followed instrumental arguments for devolution and the preservation of the states as separate polities. These devolutionary and decentralization arguments, however, can serve as a *localist* justification for federal empowerment of local governments. Thus the very values on which the Court has relied to limit federal power in the face of state resistance support preserving federal power when engaged through local governments.

This Part begins with a review of theoretical perspectives on the state supremacy view before articulating the localist account of federal empowerment of local governments.

#### *A. The State Supremacy View in Theoretical Perspective*

Before turning to the localist view of federal empowerment, it is important to consider alternative approaches to reconciling the increasing tension between resurgent state sovereignty and judicial protection for federal-local cooperation. One might begin with two opposite propositions. According to one approach, the Supremacy Clause simply ends the debate. Any exercise of federal authority within the recognized scope of a national power would necessarily trump state control. This approach, however, must confront the increasing solicitude for state autonomy evident in modern federal-

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<sup>188</sup> The lower courts have been confronted much more directly than the Supreme Court with opportunities to expound on the Supremacy Clause implications of federalism-based protections for state control over local governments. See, e.g., *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364–65 (9th Cir. 1998) (Kozinski, J., concurring) (arguing that the Supremacy Clause protects the interests of the federal government against encroachment by the states and that localities, then, should not have the right to assert the federal interest against the states); *id.* at 1365 (posing the question as a conscription issue: “can [Congress] conscript state instrumentalities to aid in destruction of the state’s laws?”).

ism jurisprudence, a solicitude that has in some instances placed explicit limitations on federal power.<sup>189</sup>

The opposite approach, of course, would be to reject the federal interest outright. Deborah Jones Merritt has provided a subtle argument for a version of this approach grounded in a respect for republican government that Merritt reads as implicit in the Guarantee Clause.<sup>190</sup> As noted above, the Court's intimations that state control over local government is a core aspect of state sovereignty suggest a structural constitutional basis for vindicating the same state power to trump federal empowerment of local governments.

One could argue, moreover, that the state power to create and, ultimately, to destroy local governments recognized in *Hunter* negates federal authority in this context. But this theoretically "greater" power does not have to logically include the "lesser" power to interfere with any delegation of federal authority and resources. The two powers are conceptually distinct. And for practical reasons, it is implausible to assume that a state government would punish a local government's desire to access federal resources or authority by abolishing it.

Roderick Hills has offered an alternative analysis of what he describes as federal "dissecting" of the state.<sup>191</sup> Hills notes that precedent provides no clear answer to the clash of state and federal supremacy over local governments.<sup>192</sup> Considerations of policy, however, suggest a reconciliation that places emphasis on state supremacy, while preserving some scope for federal delegation to local governments in order to enhance intergovernmental competition. For Hills, state supremacy promotes the cost-effective delivery of public goods in a politically accountable manner on the theory that state legislatures are better suited than Congress to craft and monitor appropriate institutional structures to accomplish

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<sup>189</sup> See *supra* Section II.B.

<sup>190</sup> See Merritt, *supra* note 3, at 40–41. Merritt acknowledges that the Fourteenth and Fifteenth Amendments and the Spending Clause give the federal government authority to intervene in state internal political ordering and that states are generally barred from violating constitutional strictures. But beyond those express limitations, Merritt argues that the Guarantee Clause prohibits federal interference with state-level ordering of local governments, among other structural aspects of state government. *Id.* at 50.

<sup>191</sup> Hills, *Dissecting the State*, *supra* note 3; see also Hills, *supra* note 9.

<sup>192</sup> See Hills, *Dissecting the State*, *supra* note 3, at 1207–16.

those goals.<sup>193</sup> Yet the fact that state supremacy tends to centralize power in the hands of state legislatures increases the likelihood that state governments will engage in strategic behavior in competing for federal resources.<sup>194</sup>

From this framework, Hills proposes a functional balance. Rejecting unfettered congressional power to “liberate” local officials from the commands of state law,<sup>195</sup> Hills advocates a canon of construction that he calls a “presumption of institutional autonomy.”<sup>196</sup> Under this presumption, courts would construe ambiguous federal grants and ambiguous state law to “maximize the ability of nonfederal institutions to compete with each other for federal money.”<sup>197</sup> With respect to spending, this presumption would allow courts to enjoin state conditions on federal funds flowing to local governments on the theory that the state would rather waive its control than have its political subdivisions not receive federal funds.<sup>198</sup> For regulatory delegations, states would be required to object clearly to federal empowerment. The theory ultimately preserves state su-

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<sup>193</sup> See *id.* at 1218–25. Hills acknowledges that this view of the benefits of state control assumes the primacy of a goal of local self-governance, a goal that can clash with the kinds of policies that federal intervention at the local level tend to involve, such as income redistribution and the facilitation of regional policymaking. See *id.* at 1222–23.

<sup>194</sup> See *id.* at 1225–30. For Hills, state and local entities competing for federal resources are less likely to engage in strategic behavior if the federal government has alternative agents to whom it can delegate authority and on whom it can bestow funding.

<sup>195</sup> *Id.* at 1231; see also *id.* at 1225 n.79 (rejecting the proposition that “the federal government can somehow preserve the structure of local governments while delegating duties to them that are inconsistent with state law”); Hills, *supra* note 9, at 878 n.217 (arguing that any federal “commandeering” of local governments effectively commandeers the state government).

<sup>196</sup> See Hills, *Dissecting the State*, *supra* note 3, at 1232.

<sup>197</sup> See *id.* Hills describes this canon as inverting the presumption the Court articulated in *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991), that federal statutes should be construed to preserve state autonomy. See Hills, *Dissecting the State*, *supra* note 3, at 1232.

<sup>198</sup> See Hills, *Dissecting the State*, *supra* note 3, at 1245. Hills argues that these “revenue enhancing” provisions are least likely to implicate the efficient oversight by the state of local governments. *Id.* at 1243. Moreover, state law that only targets local ability to use federal funds signals state desire to control the funding and not to supervise local institutions. Accordingly, to Hills, federal law should prevail in that situation. *Id.* at 1244.

premac y by vesting state legislatures with the authority to override federal interests.<sup>199</sup>

Although Hills's approach is compelling in many respects, and acknowledges the potential of federal oversight in some circumstances, it ultimately takes an overly jaundiced view of local autonomy. For Hills, state supremacy must ultimately trump federal authority for institutional concerns similar to those the Court noted in *Nixon v. Missouri Municipal League*.<sup>200</sup> But there is, as this Article argues, an alternative perspective on the alignment of federal and local interests that takes a more sanguine view of the ability of the federal government to weigh the costs and benefits of local action, and also accords greater weight to the independent interests of localities to operate in national policymaking. Indeed, state supervision can, at times, privilege the ability of local governments to block action by other localities that might have significant benefits beyond the interlocal dispute. What may look like local aggrandizement through one lens may, through another, more appropriately reflect regional or similarly broad interests.<sup>201</sup>

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<sup>199</sup> See *id.* at 1249, 1271. Hills views the Tacoma-Cowlitz River dam controversy as involving not state objection to the exercise of local authority, but rather the question of how to construe Tacoma's action in light of the absence of state legislative guidance. *Id.* at 1273. This places primacy at the state level on *legislative* assertions of control over local government; the Tacoma controversy seems to demonstrate, however, that a state can seek to assert control over its localities through a variety of means. Legislative silence does not necessarily equate to state acquiescence.

<sup>200</sup> See *supra* text accompanying notes 109–125. Hills's view of the distinction between spending and empowerment stands in tension with the basic Supremacy Clause underpinnings of any federal dissecting of the state. Certainly, for institutional reasons, as Hills discusses, it might make sense to approach ambiguity with respect to spending differently than with respect to regulatory authority, but the source of federal power to interfere with state authority over local governments still derives from the Supremacy Clause, and whatever limitations *South Dakota v. Dole*, 483 U.S. 203 (1987), imposes have been virtually ignored by the Supreme Court and the lower courts. See Heise, *supra* note 41, at 136–37. The proposition, moreover, that a state might be assumed to acquiesce to revenue enhancement given the supposedly voluntary nature of Spending Clause restrictions underplays the fact of state objection to local desire to obtain federal resources. In other words, when the state interferes with federal grants to local governments, the state is, by definition, at odds with the element of local autonomy represented by the local decision to seek federal resources.

<sup>201</sup> Hills argues, for example, that the Second Circuit's decision in *United States v. City of New Haven*, 447 F.2d 972 (2d Cir. 1971), was "wrong as a matter of law and policy." Hills, *Dissecting the State*, *supra* note 3, at 1247. In *New Haven*, the Second Circuit upheld a preliminary injunction against the State of Connecticut. 447 F.2d at 972. The injunction had been predicated on authority from a Federal Aviation Ad-

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Hills's concern for the values of intergovernmental competition and respect for state sovereignty underplays the value of local-government autonomy when local governments act as independent polities in securing federal authority and resources. Hills appropriately focuses on the risk of local negative externalities<sup>202</sup> but places relatively little faith in local government or the potential for federal-local collaboration.

*B. A Tale of Two Subsidiarities: A Localist View of Federal Empowerment*

*1. Decentralization and Devolution in Contemporary Federalism*

The various limitations on federal power that the Court has articulated in its recent federalism jurisprudence have, at best, a tenuous grounding in history, text, and constitutional structure.<sup>203</sup> It is possible to view the resurgence of state sovereignty as a formalist

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ministration grant that allowed New Haven to extend an airport "clear zone" into a neighboring town even though Connecticut law required the latter jurisdiction's consent. *Id.* at 973–74. To Hills, the Supremacy Clause should not allow a local government to override state control because the risk of local aggrandizement at the expense of neighbors is too great. See Hills, *Dissecting the State*, supra note 3, at 1246–47. However, one can view the *New Haven* controversy as a situation where state control risks subverting the benefits of federal-local cooperation. Airports may cause local negative externalities, but, conversely, they might generate significant regional positive externalities. By allowing Connecticut to block the ability of the federal government to cooperate with New Haven to provide that regional benefit (presumably some portion of which benefits nearby states like New York and Rhode Island), a restrictive view of the Supremacy Clause places faith in state control that is no more inherently likely to calibrate costs and benefits than the combination of local and federal incentives and information.

<sup>202</sup> See Hills, *Dissecting the State*, supra note 3, at 1246–47. This is an important concern, as discussed *infra* Subsection V.A.1. It does not, however, necessarily lead to the balance in favor of state supremacy over local governments that Hills outlines.

<sup>203</sup> Ernest Young has ably set out the limits of using constitutional text, history, and early practice to yield a clear jurisprudence of federalism. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 *Wm. & Mary L. Rev.* 1733, 1735–36 (2005). For Young, this absence of clear organic signals is not to be decried. Rather, he argues, there is no reason that this area of constitutional law should not develop through the kind of constitutional common law evolution that has guided the Court in other areas. See *id.* at 1755–56. Young's recognition of the essentially pragmatic, common-law-like evolution of the Court's federalism jurisprudence supports this Article's instrumental case for federal empowerment of local governments.

move, but, as the Court's dissenters have repeatedly argued, the Court is engaged in a fundamentally functionalist enterprise.<sup>204</sup>

In that enterprise, pragmatic and normative concerns about the appropriate allocation of power in a federal system have largely driven the jurisprudence. The Court and commentators elaborating on the Court's turn toward devolutionary federalism have focused on a now-familiar core of arguments for limiting federal power and promoting state authority.<sup>205</sup> These often interrelated instrumental concerns venerate decentralization as well as the checking power of diffused authority.<sup>206</sup>

One set of concerns driving the Court's devolutionary federalism is the potential for increased efficiency and effectiveness that may flow from intergovernmental competition for residents and other resources.<sup>207</sup> Reflecting Charles Tiebout's argument that local governments can be analogized to private firms competing for citizens

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<sup>204</sup> The consistent dissenters from the march of revived judicial protection for the states have made a convincing argument that the formalism of state sovereignty is an empty source of limitation on federal power. See, e.g., *United States v. Morrison*, 529 U.S. 598, 649–54 (2000) (Souter, J., dissenting); *Printz v. United States*, 521 U.S. 898, 952–53 (1997) (Stevens, J., dissenting). In making the claim that the Court is engaged in an essentially functionalist exercise in privileging state sovereignty, I acknowledge that formalism clearly plays a role for some Justices who have supported the revival of a vigorous judicial role for policing the boundaries of federal and state authority. Discussions of the dignity of the states in decisions such as *Alden v. Maine*, 527 U.S. 760 (1999), carry strong formalist overtones and the proposition that the Court invokes instrumental concerns in order to bolster a formalist view of federal-state relations is nontrivial. It is possible, however, to acknowledge this ambiguity and nonetheless insist that the Court is interposing itself between the federal government and the states primarily to serve instrumental goals inherent in a decentralizing and devolutionary view of constitutional structure.

<sup>205</sup> See generally *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (discussing the benefits of dividing federal and state authority); *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (citing *Gregory*'s catalogue of the “benefits of the federal design”).

<sup>206</sup> The basic instrumental debate about federalism involves weighing the advantages of devolving power to territorially circumscribed states responsive to local electorates which, the standard account holds, allows groups smaller than a national majority to satisfy preferences for public goods, increases opportunities for political participation, and diffuses power to promote electoral competition against the risk of harming equally important values like a free national market or the protection of fundamental rights. See *Hills*, supra note 9, at 856.

<sup>207</sup> As Justice O'Connor put it in *Gregory*, state authority “makes government more responsive by putting the States in competition for a mobile citizenry.” 501 U.S. at 458. See *Briffault*, supra note 59, at 1312.

rather than profits,<sup>208</sup> decentralization is seen as a critical way to preserve the ability of subnational governments to tailor policies to local preferences and achieve efficiency through the discipline of exit.<sup>209</sup>

A related set of devolutionary arguments focuses on capturing the value of pluralism and experimentalism in public policy—the classic “laboratories of democracy” perspective.<sup>210</sup> Having more diverse governmental entities, the argument goes, enables innovation and lowers the costs of trying new policies.

A third, classic set of instrumental arguments for limiting federal power focuses on federal structure as a protection against tyranny. These arguments center on the view that empowering the states serves as a check on the potential abuse of federal power.<sup>211</sup> A related value is the potential for decentralization to multiply platforms for dissenting voices in political debates.<sup>212</sup> Additionally, a subtext in a number of cases where the Court has privileged state sovereignty is that preserving clear lines of authority prevents abuse of power by reinforcing political accountability.<sup>213</sup>

Finally, Civic Republican arguments promote devolution as a means of enhancing democratic engagement and civic participa-

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<sup>208</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. Pol. Econ.* 416, 419 (1956). For a fascinating discussion of the intellectual history of Tiebout’s hypothesis, see William A. Fischel, *Footloose at Fifty: An Introduction to the Tiebout Anniversary Essays*, in *The Tiebout Model at Fifty 1* (W.A. Fischel ed., 2006).

<sup>209</sup> For the classic discussion of exit as a means of discipline, see Albert O. Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (1970); see also Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 *N.Y.U. L. Rev.* 190, 200–02 (2001).

<sup>210</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting). See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *Colum. L. Rev.* 267 (1998).

<sup>211</sup> See *New York v. United States*, 505 U.S. 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.” (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))); *Gregory*, 501 U.S. at 458 (“Perhaps the principal benefit of the federalist system is a check on abuses of government power.”); Amar, *supra* note 60, at 1492–95.

<sup>212</sup> See Gerken, *supra* note 159, at 1748 (discussing the capacity of local governments, among other institutions, to serve as alternative channels for dissent within a democratic process characterized by the diffusion of decisionmaking power).

<sup>213</sup> See, e.g., *New York*, 505 U.S. at 169 (“Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”).

tion.<sup>214</sup> Moving the exercise of political power closer to those affected by that power, the argument goes, increases the likelihood of political involvement and awareness.<sup>215</sup> This is also said to have the benefit of fostering community.<sup>216</sup> Reinforcing local community, in turn, can have the effect of allowing local tailoring, more from the information-feedback perspective than from the perspective of Tieboutian competition. As power is devolved, the range of interests to be reflected in policy can be narrowed.<sup>217</sup>

The Court has focused on these instrumental benefits in bolstering the independence and authority of the states.<sup>218</sup> As the Court has done so, it has either ignored local governments or quite explicitly subsumed local governments into the states.<sup>219</sup> But the same instrumental concerns can highlight the interests of local governments as entities distinct from the states.

## *2. The Localist View of Federal Empowerment*

If the tradition of federal empowerment of local governments is to have a place in the Court's current federalism jurisprudence, the practice has to be grounded in more than the preemptive effect of

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<sup>214</sup> See *Gregory*, 501 U.S. at 458 (“[Dual sovereignty] increases opportunity for citizen involvement in democratic processes . . .”). Tocqueville crystallized this argument in his commentaries on early nineteenth-century America, venerating the potential of local governments to foster citizen participation. See Alexis de Tocqueville, *1 Democracy in America* 61–98 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835).

<sup>215</sup> See Shapiro, *supra* note 12, at 91–92, 139.

<sup>216</sup> See, e.g., Erwin Chemerinsky, *The Values of Federalism*, 47 *Fla. L. Rev.* 499, 536–37 (1995).

<sup>217</sup> See *Gregory*, 501 U.S. at 458 (preserving state authority “assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society”).

<sup>218</sup> Some scholars have argued that subsidiarity—the principle that decisionmaking and political power should be devolved to the lowest practicable level of society, including private organizations and individuals, see Hills, *supra* note 74, at 190—can be supported on deontological grounds. On this view, regardless of the instrumental benefits or lack thereof of decentralization, the principle of subsidiarity serves individual rights by situating decisions about individuals at the level of government closest to the self. *Id.* at 191–92; see also Ryan, *supra* note 9, at 615–19 (discussing subsidiarity). The localist grounding that this Section outlines brackets arguments like these from first principles primarily because the contemporary jurisprudence of federalism is predicated largely on judicial calibration of a constitutional design primarily on instrumental grounds.

<sup>219</sup> See *supra* text accompanying notes 82–103.

the Supremacy Clause standing alone. Although it has not squarely resolved the issue, the Court has intimated that some combination of instrumental and formal concerns likely limits federal supremacy over the internal operations of the states.

In the contemporary jurisprudence of federalism, formalism provides little guidance and few fixed principles. Because constitutional text, history, and structure are all indeterminate, there is latitude to consider functional arguments in evaluating the exercise of federal power that steps beyond the narrow confines of strict dual federalism. Indeed, much of the contemporary jurisprudence of state sovereignty is based quite explicitly on quasi- or preconstitutional traditions, or structural inferences that are little more than rhetorical devices to justify the Court's view of the appropriate balance between federal and state authority. The majority's discussion in *Alden v. Maine* of the preconstitutional nature of state immunity demonstrates how abstracted the jurisprudence has become.<sup>220</sup> The Court has likewise situated the limitations it has placed on federal authority in the commandeering cases in the realm of constitutional structure derived from conceptions of federalism that transcend any specific constitutional text.<sup>221</sup> Once it is recognized that the jurisprudence is operating untethered from constitutional text, with a historical grounding that is ambiguous at best and doctrinal shifts that belie any singular evolution of the case law, the kind of functionalist grounding for federal empowerment that this Article articulates can hardly be seen as anomalous.

As noted, the Constitution is largely silent on local governments.<sup>222</sup> Implicit in this silence about local governments is the proposition that the Constitution takes no position on the internal structure of state instrumentalities.<sup>223</sup> That the Court has developed

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<sup>220</sup> See 527 U.S. 706, 713 (1999); see also *supra* note 135 and accompanying text.

<sup>221</sup> See *New York v. United States*, 505 U.S. 144, 156–57 (1992) (“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.”).

<sup>222</sup> See *supra* note 74 and accompanying text.

<sup>223</sup> In contrast to the Constitution's silence with respect to substate institutions, the Constitution has much to say about the specific attributes of state government. See

an elaborate body of law connecting state control over local governments as an inherent element of state sovereignty can thus be seen for what it properly is—a quasi-constitutional, instrumental view of the nature of the state-local relationship.<sup>224</sup>

In the Court's contemporary concern for state sovereignty, however, lie the seeds of a localist view of federal empowerment. Although the formal legal features of the states do not apply to local governments as such, what Richard Briffault has called "federalism's values" can build a normative case for devolution to the local level.<sup>225</sup> These values in large measure parallel the instrumental benefits that proponents of local empowerment have articulated.<sup>226</sup> The instrumental case for decentralization and devolution thus provides a new grounding for protecting local autonomy in order to advance national goals.<sup>227</sup> In short, the normative case for devo-

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Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2246 (1998) (noting that the Constitution explicitly recognizes the existence of state governments; that they exist in the form of legislatures, "executive authority," and courts; and that they have affirmative obligations to participate in certain federal functions).

<sup>224</sup> Vicki Jackson has noted the difficulty in discerning what Deborah Jones Merritt suggests are core state functions, a definitional enterprise explicitly abandoned by the Court in *Garcia v. San Antonio Metropolitan Transit Authority*. See *id.* at 2254–55 (discussing Merritt, *supra* note 3, at 53). Jackson does not discuss state control over local governments as an example of aspects of state sovereignty that might yield to a contextual, functionalist judicial approach, but there is no reason why this particularly contested aspect of state regulation should be approached from a purely formal perspective.

<sup>225</sup> See Briffault, *supra* note 59, at 1306–07 (arguing for distinguishing between the formal legal features of the federal structure and the normative case for devolution). Briffault is skeptical of the jurisprudential value of the normative case for devolution, citing the inherent tension that arises from the existence of counter-values for each value of federalism. *Id.* at 1350. As Briffault notes, however, there is an inevitable choice to be made when courts confront federal empowerment of local governments in conflicts with the states, *id.* at 1305, and the Court in recent years has repeatedly invoked instrumental questions in evaluating federalism conflicts.

<sup>226</sup> *Id.* at 1305. As Mark Gordon has argued, "when one considers the federalist values of local decisionmaking, citizen participation, and responsiveness to diverse community needs," all "occur far better on the municipal than on the state level." Gordon, *supra* note 11, at 218. See also Barron, *supra* note 5, at 377–78.

<sup>227</sup> Some scholars have argued that federalism actually undermines localism. See Frank B. Cross, *The Folly of Federalism*, 24 Cardozo L. Rev. 1, 1–2 (2002) (arguing that current federalism jurisprudence undermines the instrumental goals which it invokes by reducing local autonomy); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 914–15 (1994).

lutionary federalism leads to a defense of federal authority to empower local governments.<sup>228</sup>

To begin with the Tieboutian argument for efficiency in the delivery of government services, local governments provide far more sources of particularized targeting than the states. Tiebout himself focused on local governments as the unit of competition,<sup>229</sup> and state-level targeting is inherently more general than that available at the local level.

The ability to compete and tailor local services, however, requires first and foremost resources at the local level.<sup>230</sup> A well-founded critique of the Tieboutian vision is that interjurisdictional competition is only meaningful given a baseline of adequate resources.<sup>231</sup> In reality, local resources often fail to match the preference of local citizens.<sup>232</sup> Federal empowerment certainly does not solve the problem, but it does mitigate resource inequalities where communities can access federal resources to fund priorities that otherwise would not be served. Local governments are perennially authority constrained as well as resource constrained,<sup>233</sup> and federal

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<sup>228</sup> See Briffault, *supra* note 59, at 1315 (arguing that the normative case for federalism “tends to approach” the case for localism); see also Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 *U. Chi. L. Rev.* 429, 441 (2002) (noting that “in functional analysis of the values that federalism serves, the significance of local governments is enormous”). In discussing instrumental arguments relating to efficiency, participation, promotion of liberty, experimentalism, and the like, I do not mean to suggest that each element of the localist case necessarily coheres with each other element. The arguments that support decentralization can be quite internally self-contradictory. See Briffault, *Our Localism Part I*, *supra* note 57, at 1–2. The point is rather that there is a core set of moves that have defined the argument for devolutionary federalism, and this set of moves has an analogue at the local level that can support localities over the states as easily as supporting the states over the federal government.

<sup>229</sup> Tiebout, *supra* note 208, at 418.

<sup>230</sup> Indeed, one of the quaintest assumptions in Tiebout’s “A Pure Theory” is his counterfactual limitation that his model does not consider “[r]estrictions due to employment opportunities.” Tiebout, *supra* note 208, at 419. “It may be assumed,” Tiebout dryly added, “that all persons are living on dividend income.” *Id.*

<sup>231</sup> See, e.g., Briffault, *Our Localism Part II*, *supra* note 57, at 350–51; see also Richard Briffault, *Localism and Regionalism*, 48 *Buff. L. Rev.* 1, 19–20 (2000).

<sup>232</sup> See Briffault, *Our Localism Part II*, *supra* note 57, at 350–51. But cf. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 *U. Pa. L. Rev.* 607, 613–16 (1997) (defending the practical application of the Tiebout hypothesis at the level of city-suburb residential choice).

<sup>233</sup> See David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 *J.L. & Pol.* 261, 261–62 (2005).

resources are arguably most meaningful for those local governments that tend to be losers in the interlocal resource competition.<sup>234</sup> Indeed, federal resources can be distributed with the express purpose of remedying inequities between localities. Though the federal government's execution of this goal has been inconsistent, several programs have attempted to do just that.<sup>235</sup>

Federal engagement at the local level also has the potential to enhance both tailoring and the Civic Republican potential of decentralization. Intergovernmental regimes involving local governments are a form of delegation that parallels, but has clear differences from, delegation at the national level to expert administrative agencies.<sup>236</sup> Enlisting local government in implementing federal policy represents a choice to engage the local political process.<sup>237</sup> This can allow federal priorities to be tailored to local conditions in a way that would be difficult for federal field-office representatives to achieve.<sup>238</sup>

Local engagement at the federal level can not only make local participation more meaningful but also increase such participation. Devolving power to the local level is more meaningful if the "stakes" are higher and if the range of possible engagement by the local political process is broader. One disincentive to participation at the local level is that the types of issues local governments can be relegated to addressing may often seem prosaic.<sup>239</sup> When local governments engage with the federal government in cooperative regimes, however, the range of policy choices available at the local

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<sup>234</sup> The Tieboutian case for local autonomy also supports metropolitan fragmentation for the theoretically increased choice it offers to mobile consumer-voters. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *Stan. L. Rev.* 1115, 1124–25 (1996).

<sup>235</sup> Community Development Block Grants represent one example. Of course, transportation subsidies and federal income tax deductions for mortgage interest and property taxes may have the opposite effect. See *supra* note 21.

<sup>236</sup> Cf. Hills, *supra* note 74, at 206–10 (discussing the choice to delegate to state and local policy generalists or to federal-level policy specialists).

<sup>237</sup> Local autonomy has long guided systems of federal-local interaction. As Daniel Elazar has stated, "the cultural bias toward local self-government has survived by adapting itself as a bias for local control of activities in the locality regardless of who stimulates or finances them." Daniel J. Elazar, *Exploring Federalism* 189 (1987).

<sup>238</sup> On the potential efficiency advantages of the local political process, see William A. Fischel, *The Homevoter Hypothesis* 1–18 (2001).

<sup>239</sup> Cf. Paul E. Peterson, *City Limits* 69–71 (1981) (contrasting issues typically handled by local and national governments).

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level expands to include many more issues of national importance.<sup>240</sup>

Federal empowerment of local government has the potential to enhance local community identity as well. A tension in discussions of federalism at the federal-state level is what Robert Schapiro calls “distinctiveness”: the extent to which states are unique entities that deserve protection from federal intrusion to preserve local identity.<sup>241</sup> For scholars like Rubin and Feeley, the relevant “community” for assessing competing claims of federal or state priority is the national one.<sup>242</sup> The same question can play out at the local level, and given the scale of local communities, it is often possible to make an even more fine-grained articulation of a community’s distinctiveness when compared to the states. Federal empowerment—again, often seen as destructive to local identity—can in fact provide a means for local communities to retain, sharpen, and bolster that identity.

Federal-local cooperation also implicates the argument from experimentalism. Far from imposing uniform federal policies, cooperative localism enables experimentation no less so than cooperative federalism regimes at the state level.<sup>243</sup> Enlisting local governments to assist in federal programs can relay information back to the central government that is qualitatively different than information available to field-office officials.<sup>244</sup>

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<sup>240</sup> See Daniel Rich, Foreword *to* Gunther, *supra* note 28, at 9 (the direct federal-local relationship has empowered localities “as units of government by granting them political recognition in national policy and by functionally acknowledging their right to make claims on national priorities and resources”).

<sup>241</sup> See Schapiro, *supra* note 6, at 275–76.

<sup>242</sup> See Rubin & Feeley, *supra* note 227. On one level, this is obviously a false choice. Most people experience loyalties to multiple communities and have no difficulty self-identifying as, say, a “Bostonian” or “Los Angeleno,” as a resident of Massachusetts or California, and as an American. Indeed, one’s most distinctive sense of community and belonging may have nothing to do with geography, but may have much more to do with aspects of identity tied to family, to race, to sexual preference, and the like. Cf. Schapiro, *supra* note 6, at 276 n.121 (citing Thomas W. Merrill, *A New Age of Federalism?*, 1 *Green Bag* 2d 153, 161 (1998), for the increasing disconnect between communities of interest and geography).

<sup>243</sup> See *supra* text accompanying notes 16–18 (discussing the benefits of cooperative federalism in allowing state-level variation within the context of broad federal parameters).

<sup>244</sup> Much of this information may come only in proxy form, by the decision of local governments to participate in programs over which they have little functional control.

Indeed, cooperative regimes have the potential to temper the extremes of devolution and decentralization. There is a limitation to the value of experimentalism and pluralism at the margins, given the risk of local majorities, of whatever stripe, overriding the preferences (or rights) of local minorities or producing spillover effects that harm the citizens of other states.<sup>245</sup> The bounded choice offered by cooperative intergovernmental relations can appropriately balance the ability to experiment with broad parameters set to protect overriding national interests.

The ground on which a localist view of federal empowerment may be most tenuous is the argument from the anti-tyrannical potential of decentralization.<sup>246</sup> For local governments to serve as effective political counterweights in the way that the states are thought to do, protecting individual liberties through Madison's "double security,"<sup>247</sup> autonomy in the sense of independence is certainly required.<sup>248</sup>

It is important not to minimize the risk that any collaboration involving the federal government carries for local governments, with capitulation to national demands an ever-present concern.<sup>249</sup>

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In most cooperative regimes, though, there is an active dialogue on many issues between agency officials and local government agencies.

<sup>245</sup> See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 *UCLA L. Rev.* 1353, 1355, 1370–72 (2006).

<sup>246</sup> Tocqueville's argument for the liberty-enhancing potential of local institutions had less to do with localities operating as a counterweight to other governmental institutions and more to do with local institutions instilling the practice of democracy. See Tocqueville, *supra* note 214, at 62–63 ("[T]he strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science . . .").

<sup>247</sup> See *The Federalist* No. 51, at 253–54 (James Madison) (Terence Ball ed., 2003); see also *The Federalist* No. 28 (Alexander Hamilton), *supra*, at 130.

<sup>248</sup> See Briffault, *supra* note 59, at 1322 ("[A]lthough most of the other values of federalism can be obtained by decentralization in which the local units are legally subordinate to the central government, the local units have to be legally autonomous in order to be able to protect the people against central government tyranny.").

<sup>249</sup> The federal government certainly has a mixed record in promoting the autonomy of those local jurisdictions under direct federal supervision. Congress, for example, has plenary authority over the District of Columbia under Article I, § 8, Clause 17. See, e.g., *Palmore v. United States*, 411 U.S. 389, 397–98 (1973). Congress has used this power, at times, to make of the District a laboratory of federal priorities, micro-managing District policies and at times overturning District laws. See Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 *Cath. U. L. Rev.* 311, 314–15 (1990) (detailing examples of federal legislation preventing the District from allowing meters in taxicabs, prohibiting the use of a local high school swimming pool after 9

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But there are offsetting aspects to this form of decentralization that bear emphasis. First, there is the general value in diffusing power. If devolutionary federalism helps to divide power and thus secure liberty, there is no reason why power should not be further divided, at least to recognize the independence of local polities—a tripartite vertical separation of powers to parallel the tripartite horizontal separation. In cooperative regimes, moreover, there is a measure of accountability at the local level that tempers the implementation of national policies.<sup>250</sup>

Federal involvement at the local level certainly reflects federal priorities and federal standards to some extent, but local governments have been quite adept at utilizing the resources granted to reinforce local power.<sup>251</sup> And the fact that most regimes of federal-local cooperation are voluntary—indeed, are predicated on local governments competing for federal resources—means that the federal government is practically constrained in the extent to which it can dictate priorities to unwilling partners.<sup>252</sup>

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p.m., and mandating that the District establish a free telephone hotline for residents near a local prison, among others, as well as numerous instances of regulating the District's social policies); see also Note, Democracy or Distrust? Restoring Home Rule for the District of Columbia in the Post-Control Board Era, 111 Harv. L. Rev. 2045 (1998) (discussing the history of the governance of the District).

<sup>250</sup> It may be, as the Court has surmised, that implementation by one level of government of policies set at another level inherently undermines accountability. See *New York v. United States*, 505 U.S. 144, 168 (1992). That presupposes both a mandate from the higher level of government and the inability of the implementing government to disentangle that mandate from local policy. The first presumption is not present in cooperative regimes, and the second can be questioned in practice.

<sup>251</sup> It is true that federal authority and resources can (although, as *Lawrence County v. Lead-Deadwood School District No. 40-1* illustrates, not always) come with fairly specific constraints attached. Local governments, however, are rarely passive recipients of such authority and aid. Rather, local governments actively collaborate with the federal government and in no small measure either wrest local flexibility from federal directives or shape federal mandates to some extent. See Agranoff, *supra* note 25, at 47 (describing the “routine, program-oriented bargaining” that marks much of local-federal interaction); cf. Peter W. Salsich, Jr., *Saving Our Cities: What Role Should the Federal Government Play?*, 36 Urb. Law. 475, 487–89 (2004) (describing the pragmatic accommodation in federal rules and local flexibility that has evolved in the Community Development Block Grant program).

<sup>252</sup> This dynamic applies more clearly in the federal-local arena than in cooperative regimes involving the states. Given the number and variety of local governments, there is less of a risk than in regimes involving only fifty states that a federal source of resources may occupy the field, and there is more opportunity for “exit” as a mean-

Finally, there is the benefit to local autonomy, even if compromised by federal priorities, of mitigating state control as a source of potential “tyranny.” This requires recognizing a more subtle view of the threat of central-government tyranny, with state rather than federal authority at odds with local preference. In other words, viewed in terms of local discretion to initiate policy and immunity from control, any increase of federal involvement at the local level has the potential to threaten local autonomy.<sup>253</sup> Viewed from the perspective of the inherent tension between local and state governments, however, federal involvement at the local level can be a significant tool to bolster local autonomy against the more pervasive threat of state-level control.<sup>254</sup>

A localist view of federal empowerment, however, does require some distinction between substate institutions.<sup>255</sup> The localist view

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ingful constraint on co-optation. This can be contrasted to examples from jurisdictions like the District of Columbia that do not enjoy a similar right of exit.

<sup>253</sup> It might be argued that any federal engagement at the local level inherently undermines local autonomy. See, e.g., Frug, *supra* note 4, at 17 (arguing that state control over local governments is supplemented by federal restrictions on local power as hallmarks of local government powerlessness); cf. Pietro S. Nivola, *Tense Commandments: Federal Prescriptions and City Problems* (2002) (discussing the cumulative impact on local autonomy represented by federal mandates). In this view, it is impossible for local governments to receive federal regulatory authority or federal financial resources, or become involved in the enforcement of federal law, without fundamentally compromising local priorities and local independence. Scholars have focused, for example, on the potential for grants-in-aid and similar conditional support to override local preferences and the signals that internalizing taxing and spending provides. See Hills, *supra* note 74, at 194. If the local preference would be for low taxes and few services, any federal (or state) support for more public goods distorts local preferences. See *id.* at 194–95.

This argument makes a singular mistake about local government autonomy. This market vision of local government assumes that any local mix of taxes and services reflects the preferences of the local community and not the practical constraints imposed on that community. Cf. Briffault, *Our Localism Part II*, *supra* note 57, at 349–50, 399–402. As noted, greater access to resources, even with strings attached, can provide more range of choice at the local level. The greatest threat that most local governments face is not the diversion of resources but the lack of resources.

<sup>254</sup> Gerald Frug has argued that federalism-based arguments have not protected local governments “from the more traditional threat to their autonomy, state governments.” Frug, *supra* note 11, at 554. Federalism has been invoked, Frug notes, to protect local governments from the reach of federal constitutional law but not to protect localities from plenary control by the states. See *id.*

<sup>255</sup> Given that there are nearly 88,000 local government units of various stripes in the United States, see U.S. Census Bureau, *Governments Integrated Directory*, <http://www.census.gov/govs/www/gid2002.html> (last visited Apr. 13, 2007) (indicating

is most salient to local governments that represent some kind of organic community, however deeply (and appropriately) contested the concept of community is at the local level.<sup>256</sup> Although it is impossible to delineate sharp categories, the closer a local government comes to the independent polity end of the spectrum, the more applicable the instrumental claims that drive decentralization become.<sup>257</sup> It is difficult to think about a state department of the environment as an independent variable in considering questions of participation, community, experimentalism, and efficiency. A local government representing an independent local polity, by contrast, merits distinctive treatment on the grounds on which debates about federalism and localism play out.

### *3. Critiquing the Anxiety over Lawless Localities*

With this functional understanding of a localist view of federal empowerment, it is possible to return to the current high-water mark of state supremacy and to explore the limits of the *Nixon* Court's view of local autonomy. On the authority question, the Court acknowledged that home-rule jurisdictions—those granted general delegated state authority over local matters—stand on

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that according to the most recent census figures, as of 2002 there were 38,967 general-purpose governments, 35,052 special districts, and 13,506 school districts), it is difficult to speak in one breath about big-city governments that would in any other context constitute a major governmental entity and suburban water districts that exist solely to provide one service in one small area. See Peterson, *supra* note 239, at 10–11.

<sup>256</sup> See Schragger, *supra* note 5, at 403–59.

<sup>257</sup> Several characteristics stand out to define the relevant universe, although the boundaries that any such delineation must engender are inevitably fuzzy. First, relevant local governments must have some identification with a self-recognized community. This risks circularity, of course, and, as Richard Briffault has argued persuasively, local sense of community can be artificially maintained by legal fictions. See Briffault, *supra* note 234, at 1141–44. See generally Schragger, *supra* note 5. Even recognizing the tension raised by the boundary problem, distinctive communities undeniably do exist at the local level with their own identities, history, and culture. Second, there must be some mechanism of political accountability at the local level to distinguish local governments that exist as derivatives of politically accountable governments (local or state) or that operate within the narrow confines of special service delivery from local governments that are directly amenable to participatory norms. Finally, and this is perhaps the most challenging, one must distinguish between local governments that are conceptually independent (setting aside jurisprudential treatment of such governments) from other public bodies that truly function as administrative arms of state government.

fundamentally different ground than non-home-rule jurisdictions.<sup>258</sup> To the Court, however, the possibility that *some* local governments might already have the power to provide telecommunications services carried no significance in considering Congressional intent. The Court's view of local powerlessness, moreover, while obliquely recognizing the potential for a federal source of power, casually dismissed that potential in crafting a general view of state-local relations.

To take the Court's anxiety head on, then, the question becomes whether it is possible to defend the delegation of federal authority to local governments even in the face of direct state resistance. Even Justice Stevens, the lone dissenter in *Nixon*, found the possibility that federal preemption might block the ability of a state to withhold authority absurd. Such an interpretation, Justice Stevens concluded, would "leave covered entities in a kind of legal limbo, armed with a federal-law freedom to enter the market but lacking the state-law power to do so."<sup>259</sup> Such fear—shared by the majority and dissent—is overstated. Concerns presented by this "federal-law freedom" arise from a view of local governments not only as legally powerless instrumentalities, unable (as in the Tacoma controversy) to act independently in a federal scheme, but also as entities in need of constant supervision.<sup>260</sup>

It is true that states are generally the primary institution in our federal system charged with overseeing local governments.<sup>261</sup> The value of state supervision, however, should not be confused with its necessity or the possibility of alternative sources of oversight. It would be difficult, to say the least, to resolve empirically, but it cer-

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<sup>258</sup> See *Nixon v. Mo. Mun. League*, 541 U.S. 125, 135 n.3 (2004) (noting that the "hypothetical city" is a "general law" rather than "home rule" jurisdiction, the latter vested with "state constitutional authority to do whatever is not specifically prohibited by state legislation") (quoting *City of Lockhart v. United States*, 460 U.S. 125, 127 (1983)).

<sup>259</sup> *Id.* at 145 (Stevens, J., dissenting).

<sup>260</sup> Roderick Hills recently offered a telling analogy in criticizing efforts by federal courts to interpose federal law between states and local governments, a critique based on the likelihood that local governments would then "run amok." Hills, *supra* note 74, at 220. "Federal judges cannot liberate the municipal baby from the playpen," Hills argues, "unless they themselves are willing and able to act as babysitters." *Id.* This is an apt crystallization of the concerns that local-government empowerment raises.

<sup>261</sup> See Robert F. Nagel, On the Decline of Federalism, *Daedalus*, Winter 2006, at 127, 128 (discussing states as intermediate institutions in federalism).

tainly can be argued that federal supervision is no less likely to be effective in checking local excesses than state supervision.<sup>262</sup>

Roderick Hills has argued that state control of local governments is preferable to national-level supervision primarily because of what Hills sees as the democracy-enhancing potential of subnational legislatures that necessarily contain legislators sensitive to smaller constituencies.<sup>263</sup> Hills's argument, however, undervalues the potential benefits of involvement by the national government—involvement not tied as closely to the local political process as state involvement—if engaged through the mediation of local political institutions.

One advantage of a federal role in empowering local governments is the absence of the kind of embedded parochialism that state-level efforts may face. When the federal government approaches local governments, it has the capacity to do so from a national perspective—one not bound by the arbitrary lines that state law draws around and between communities.<sup>264</sup> Because state-level officials are particularly sensitive to local political communities,<sup>265</sup> and because states in the first instance create and empower localities, states may be bound too easily by the shortcomings of their own creations.

It is important to be clear about the unstated anxiety reflected in the local government lawlessness concern. I certainly acknowledge risks inherent in empowering local government and suggest one method within the framework of cooperative localism for temper-

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<sup>262</sup> In other words, if the Court were to protect federal empowerment of local governments, that would not eliminate federal discretion to withhold or condition federal authority at the local level, serving as a source of oversight. This limitation bears mentioning because the principle horror that freeing local governments from plenary state control evokes is not so much infringement on state prerogatives but rather local government freedom from any constraint. See Hills, *supra* note 74, at 220; see also *Nixon*, 541 U.S. at 133–40 (discussing the problems posed by freeing local governments from state control). Federal empowerment, however, involves a source of authority that is capable of fine-grained calibrations of its own delegated authority.

<sup>263</sup> See Hills, *supra* note 74, at 214–17.

<sup>264</sup> As Barron and Frug recently noted in their study of local-government attitudes toward regionalism in Massachusetts, “there seems to be little sense that the Boston metropolitan area as a whole is a shared community of interest.” Barron & Frug, *supra* note 233, at 289.

<sup>265</sup> See Hills, *supra* note 74, at 212–13 (discussing the deference state legislators pay to local polities).

ing those risks.<sup>266</sup> But the strongest argument for protecting state control over local governments assumes that local governments *should* be powerless to resist. Any argument for enhancing local autonomy requires a leap of faith that local political institutions are worthy of that autonomy.

As to the *Nixon* Court's arguments from disuniformity and one-way ratchets, the Court appears not to have considered the possibility that an entirely different (and presumably, to Congress, more pernicious) "crazy quilt" results from protecting *state* plenary authority. If, as the Eighth Circuit held and several FCC Commissioners endorsed as a matter of policy,<sup>267</sup> Congress meant for local governments to provide telecommunications services (as many local governments do), then the effect of the Court's validation of state authority is to make that uniform national decision turn on a state decision to block or withhold local authority.<sup>268</sup> The Court could just as easily have drawn the exact opposite conclusion from its hypothetical—that the cause of the disparity was not federal preemption but state control.<sup>269</sup> What is missing from *Nixon* is any recognition of the ability of local governments to advance a national regulatory scheme.<sup>270</sup>

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<sup>266</sup> See *infra* Section V.A.

<sup>267</sup> The *Nixon* opinion details how the Chairman of the FCC and another Commissioner had noted that although they did not read the Telecommunications Act to preempt the Missouri law at issue, "participation of municipally owned entities in the telecommunications business would 'further the goal of the 1996 Act to bring the benefits of competition to all Americans, particularly those who live in small or rural communities in which municipally-owned utilities have great competitive potential.'" *Nixon*, 541 U.S. at 131 (quoting *In re Mo. Mun. League*, 16 F.C.C.R. 1157, 1172 (2001)). A third Commissioner agreed. *Id.* (citing *In re Mo. Mun. League*, 16 F.C.C.R. at 1173).

<sup>268</sup> The Court found that the alternative "crazy quilt" that would arise from varying state decisions on the scope of municipal power would reflect "free political choices" rather than "the fortuitous interaction of a federal preemption law with the forms of municipal authorization law." *Nixon*, 541 U.S. at 136. This view again conflates political choice at the state level with political choice at the local level—the *Nixon* case itself, however, demonstrates the practical distance that can emerge between those two political spheres.

<sup>269</sup> See *id.* at 146 (Stevens, J., dissenting).

<sup>270</sup> Although a full exploration of the jurisprudence of federal preemption of local government authority is beyond the scope of this Article, it bears noting that a localist case for preserving federal empowerment of local governments would be consistent with the proposition that federal preemption of local government power is not to be lightly assumed. See *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424,

*Nixon's* vision of the imperatives of state control also ignores the myriad of ways in which Congress, at times with the Court's blessing, interferes directly with the internal structuring of state governments in a variety of contexts. *Lawrence County v. Lead-Deadwood School District No. 40-1* is a stark example,<sup>271</sup> but by no means the only one.<sup>272</sup> As discussed, the Court has upheld interference with state ordering of its own political subdivisions in voting rights, the structure of state employment, and in the general scope of state power.<sup>273</sup>

The proposition that state control of its political subdivisions is a core element of constitutional federalism, moreover, stands in contrast to the arguably more direct interference with state sovereignty represented by federal preemption of state regulatory power over private parties. But while the Court has articulated various protections for state sovereignty, it has at the same time continued to protect a vigorous role for federal preemption.<sup>274</sup>

From a theoretical perspective, finally, the formal boundaries of state and federal authority that the Court has recognized could be seen to be constrained by a larger constitutional principle, namely that power delegated to the federal government or retained by the states are both subsets of the residual sovereignty of the people.<sup>275</sup> This compact theory of inherent sovereignty finds textual support

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432–34 (2002); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 607–08 (1991). Although it might seem that federal preemption of local authority threatens state sovereignty on a view, as in *Nixon*, that equates state and local authority, treating local governments as independent entities in the federal structure carries with it a ground for preserving some local autonomy as an interpretive principle in construing ambiguous federal statutes.

<sup>271</sup> See supra text accompanying 174–181.

<sup>272</sup> See, e.g., Merritt, supra note 3, at 50 (discussing federal power to dictate the structure of state and local governments); cf. Briffault, supra note 144, at 345–59 (discussing the federalization of local election law).

<sup>273</sup> See supra text accompanying notes 182–187.

<sup>274</sup> Even as the Court has been protecting state sovereignty in areas like sovereign immunity and the scope of the Fourteenth Amendment's grant of power, individual Justices who have consistently voted to protect state sovereignty have tended to opt for broad interpretations of the preemptive effect of federal regulatory power. See Fallon, supra note 228, at 462; see also Allison H. Eid, Preemption and the Federalism Five, 37 Rutgers L.J. 1, 7–8 (2005).

<sup>275</sup> See Shapiro, supra note 12, at 14–26.

in the Constitution and has historical antecedents at least as plausible as the Court's current view of state sovereignty.<sup>276</sup>

Popular sovereignty dovetails with localism to produce something of a counternarrative in the history of federalism. It may be, as Carol Rose has noted, that the localist vision of republican government that infused Anti-Federalist opposition to the Constitution lost in the ratification debates.<sup>277</sup> Echoes of the Anti-Federalists' concern with local particularism, however, live on at the margins of those areas of constitutional doctrine that have protected local autonomy.<sup>278</sup> The tenacity in practice of Cooley's vision of local sovereignty,<sup>279</sup> and the decidedly mixed case law on the independence of local government under federal law,<sup>280</sup> both stand as reminders that the *Hunter/Nixon* view of local powerlessness and the unitary state is simply one path taken, and by no means an entirely solid one.

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At core, then, the alignment of federal and local interests in opposition to the states raises the same underlying interests that animate the localist critique of federalism. By disaggregating the relevant political interests into three, rather than two, governments—and recognizing the ever-present conflict between states and local governments—a vision of federalism can emerge that asks not whether power should rest with the states or at the federal level, but rather what combination of agents and interests is most appropriate. Indeed, as Justice Breyer noted in his *Printz v. United States* dissent, blending constitutional authority through local implementation of national policies can bolster local autonomy and reinforce the autonomy of the subsidiary government by protecting a role for the local in the national polity.<sup>281</sup>

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<sup>276</sup> See Amar, *supra* note 60, at 1466–92.

<sup>277</sup> See Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 *Nw. U. L. Rev.* 74, 94 (1989); see also Schragger, *supra* note 73, at 408–11 (discussing the constitutional tradition of endorsing local autonomy).

<sup>278</sup> Rose, *supra* note 277, at 98–99.

<sup>279</sup> *Id.* at 99. See generally Barron, *supra* note 4; Williams, *supra* note 4.

<sup>280</sup> See *supra* Parts II–III.

<sup>281</sup> 521 U.S. 898, 976–77 (1997) (Breyer, J., dissenting); see Richard Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Fed-*

Thus it is possible to recognize that the normative case for devolutionary federalism is often better realized at the local than at the state level.<sup>282</sup> This recognition provides a new grounding for the tradition of federal empowerment of local governments, a grounding not only consistent with, but actually reinforcing, the instrumental concerns driving the Court's current view of federal structure.

## V. LOCAL PAROCHIALISM AS A LIMIT ON FEDERAL EMPOWERMENT

A localist view of federal empowerment privileges the alignment of federal and local interests over state power. In so doing, federal-local cooperation poses a particular gamble inherent in the enterprise of bolstering local autonomy: cooperative localism risks subsuming federal interests to local parochialism. This Part notes, however, that the history of federal engagement with local governments on a regional basis may provide a response to this concern. The Part concludes by discussing the limits posed by practical and political realities to any jurisprudence of intergovernmental relations.

### *A. The Perils of Local Parochialism and the Regionalist Solution*

#### *1. Local Autonomy Revisited*

For every instrumental argument in favor of local autonomy, there is a well-recognized counterargument from the perils of local parochialism.<sup>283</sup> Any instrumental case for enhancing local autonomy must thus be tempered by the recognition that such autonomy in practice risks exacerbating economic, racial, ethnic, and cultural

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eral System, 115 Yale L.J. 2542, 2563 (2006). For an excellent discussion of arguments by dissenters on the Court in the contemporary federalism revival that invoke not nationalism but federalism, see David J. Barron, *Fighting Federalism with Federalism: If It's Not Just a Battle Between Federalists and Nationalists, What Is It?*, 74 Fordham L. Rev. 2081, 2102–13 (2006).

<sup>282</sup> Indeed, the same principles perhaps apply at the neighborhood or even more micro-level.

<sup>283</sup> In discussing parochialism, Sheryll Cashin has highlighted aspects of the critique of localism that center on racial and economic segregation. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 Geo. L.J. 1985, 2015–22 (2000). I use the concept of parochialism in a broader sense, to capture a more general critique of local autonomy.

divisions that local fragmentation engenders, can threaten individual liberties, and may generate significant externalities on neighboring communities.<sup>284</sup>

The critique of localism neatly counterpoints the instrumental case for devolution. To begin with the standard economic case, where devolution is said to increase the efficiency and effectiveness of government by strengthening interlocal competition, local autonomy can conversely generate significant externalities that are stubbornly difficult to internalize. Local government decisions in most areas of typical local authority, including land use, housing, transportation, and economic development, have external effects on neighboring communities, shaping regional economies without any imperative that the extraterritorial consequences of local decisionmaking be taken into account.<sup>285</sup>

Next, the anti-tyrannical potential of decentralization has as its counterpoint the argument that the more local the level of decisionmaking, the greater the risk that homogeneous local majorities will tend to act to oppress local minorities. James Madison famously highlighted this risk in *Federalist No. 10*. Speaking in the language of “faction,”<sup>286</sup> Madison argued that the potential tyranny of majority rule could be constrained by widening the area in which oppressive coalitions might operate.<sup>287</sup> In modern terms, this Madi-

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<sup>284</sup> Moreover, as a number of scholars have discussed, local autonomy takes on distinctly different valences when viewed through a spectrum that runs from central cities, through suburbs, to more recent exurban communities. Once short-handing this to a “city/suburb” dichotomy, with cities the source of urban problems and suburbs a monotonous haven for escape and privilege, scholars are increasingly recognizing that the clean boundaries the classic dichotomy suggests are attenuated at best in the modern context. Inner-ring suburbs share classic urban challenges with central cities, see generally Myron Orfield, *American Metropolitcs: The New Suburban Reality* (2002), while some central cities have experienced significant revitalization. Debates about local autonomy, however, remain complicated by the practical differences between types of local communities. See Barron & Frug, *supra* note 233, at 267–69. See generally Briffault, *Our Localism Part II*, *supra* note 57, at 382–92, 426–35.

<sup>285</sup> Jurisdictional rules about the relevant community affected by any decision raise not only normative questions but fundamental empirical challenges as well. As Roderick Hills has noted, “measuring the ‘external’ effects of any activity on non-actors . . . turns out to be a matter of intense controversy, difficult to resolve through social science.” Hills, *supra* note 74, at 193.

<sup>286</sup> The *Federalist No. 10* (James Madison), *supra* note 247, at 40–41.

<sup>287</sup> See *id.* at 45 (“[A] greater number of citizens and extent of territory [can] be brought within the compass of Republican, than of Democratic Government; and it is

sonian concern resonates in the critique of local empowerment that focuses on the exclusionary and homogenizing effects of local power to reinforce preferences that are only “majority” by virtue of the line drawn around the locus of decisionmaking.

In classic local policy areas such as zoning and education funding, local control has been a blunt tool to reinforce the will of particular segments of communities through reification of local boundaries that reinforce largely artificial majorities.<sup>288</sup> Indeed, some critics invert Tocqueville’s veneration of localities as protectors of liberty, arguing that local governments instead pose a special risk to individual rights.<sup>289</sup> If devolving authority may reinforce community, then the empowerment of artificially narrow communities has the potential to exacerbate local biases. In short, as Richard Briffault has argued, the confluence of the Civic Republican ideal of local participation and the Tieboutian rationale for inter-governmental competition combine in the realm of privileged local communities to foster exclusion and inequality.<sup>290</sup>

The perils of parochialism are particularly insidious for a localist view of federal empowerment. Federal power has at times been subverted at the local level or transmogrified into a further tool of exclusion. *James v. Valtierra*, for example, gave local governments relatively free rein not merely to decline participation in federal schemes, but to create special barriers to such participation.<sup>291</sup> This is not to argue that parochialism is unavoidable in local governance and hence an inescapable risk in federal empowerment of local governments. Rather, it is simply to note that conceiving of federal empowerment as grounded in the distinct, independent role that local governments can play in federal structure requires a mecha-

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this circumstance principally which renders factious combinations less to be dreaded in the former, than in the latter.”).

<sup>288</sup> See Briffault, *Our Localism Part II*, supra note 57, at 426–35; Schragger, supra note 5, at 403–59.

<sup>289</sup> See generally Clint Bolick, *Leviathan: The Growth of Local Government and the Erosion of Liberty* (2004).

<sup>290</sup> See Briffault, *Our Localism Part II*, supra note 57, at 403–25; see also Schragger, supra note 5, at 471.

<sup>291</sup> See 402 U.S. 137, 140–41 (1971). There is an argument to be made that *James* does not survive *Romer v. Evans*, 517 U.S. 620 (1996), entirely intact, given that *Romer* held that even under a rational-basis test, a policy that makes distinctions on no basis other than animus is constitutionally suspect.

nism for responding to the reality of parochialism that is likely to inform some instances of federal-local cooperation.

## *2. The Regionalist Solution and the Federal Role*

If the localist case for federal empowerment risks reinforcing local parochialism, a solution may lie in federal engagement with regionalism.<sup>292</sup> A number of legal scholars have advocated for forms of regional governance to overcome local parochialism.<sup>293</sup> Regionalism has taken on many casts over time, reflecting movements such as the annexations and consolidations that marked nineteenth-century urban expansion and modern attempts to form regional entities with some authority over local governments.<sup>294</sup> Regionalism, tracking the critique of localism, defines certain areas of policy (whether redistribution of economic, housing, education, or transportation resources, among others) as best approached by some combination of localities or on a metropolitan or regional basis.<sup>295</sup>

Local governments have a long history of resisting regionalization in many areas of policy where local autonomy is particularly

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<sup>292</sup> Cf. Rodriguez, *supra* note 47, at 760–61 (“Nothing in a prescriptive theory of localism—that is, of significant legal decentralization—commands local governments to act as autonomous, solitary units of government.”).

<sup>293</sup> See, e.g., Briffault, *supra* note 234, at 1165–66 (advocating a mixed strategy of limited regional governance to address regional issues); Cashin, *supra* note 283, at 2033–42; Gerald E. Frug, *Beyond Regional Government*, 115 *Harv. L. Rev.* 1763, 1788–92 (2002) (advocating a form of regional legislature that combines features of regional planning organizations and state legislatures); Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses*, 47 *Wash. U. J. Urb. & Contemp. L.* 3 (1995). For an overview of “New Regionalism,” see Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 *Wash. L. Rev.* 93, 111–19 (2003).

<sup>294</sup> See Frug, *supra* note 293, at 1766–81; Janice C. Griffith, *Regional Governance Reconsidered*, 21 *J.L. & Pol.* 505, 527–43 (2005) (surveying regional governance mechanisms in contemporary practice).

<sup>295</sup> Regionalism intersects with the strain of the literature on federalism that focuses on the appropriate scale of policy. See David A. Super, *Rethinking Fiscal Federalism*, 118 *Harv. L. Rev.* 2544, 2559–60 (2005); see also Ryan, *supra* note 9, at 619–23 (describing a “problem-solving value” in subsidiarity). This strain of the debate focuses on the most appropriate level of government at which any given policy should reside given the scale (local, regional, national) of the problem to which that policy is directed.

problematic.<sup>296</sup> Clayton Gillette has argued that resistance to inter-local policymaking results less from invidious self-interest than from transaction-cost barriers to effective bargaining.<sup>297</sup> Regardless, voluntary cooperation between local governments has largely proven impractical, and state-level incentives or mandates are noticeably lacking.

Federal efforts to encourage or mandate regional approaches have had some success in overcoming local resistance and general acquiescence at the state level.<sup>298</sup> While some advocates of regionalism have taken the federal government to task for its lack of a more sustained metropolitan focus,<sup>299</sup> the federal government does have some experience in providing incentives for regional cooperation by local governments.<sup>300</sup>

The federal government, for example, historically tied urban aid, housing assistance, and transportation subsidies to regional planning under Section 701 of the Housing Act of 1954,<sup>301</sup> the Federal-Aid Highway Act of 1962,<sup>302</sup> and the Housing and Urban Develop-

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<sup>296</sup> See Briffault, *supra* note 231, at 26–30; John Kincaid, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, 13 *Pace L. Rev.* 449, 476 (1993).

<sup>297</sup> Gillette, *supra* note 209, at 192–93, 201. Laurie Reynolds has argued further that intergovernmental cooperation can exacerbate regional inequality in light of the disparities of power and incentives between types of local governments. See Reynolds, *supra* note 293, at 148–49.

<sup>298</sup> Cf. Salsich, *supra* note 251, at 508–16 (arguing for a renewed federal role in urban policy, including a federal policy of encouraging state and local governments to rethink local government boundary decisions).

<sup>299</sup> See, e.g., David Rusk, *Cities without Suburbs* 114–15 (3d ed. 2003).

<sup>300</sup> See Charles M. Haar, *Metropolis and Washington: A New Federalism?*, 1970 *Utah L. Rev.* 511, 516–19; cf. Clement Dinsmore, Ctr. for Neighborhood Tech., *The Federal Role in Metropolitan Cooperation* (1997), <http://www.cnt.org/publications/federal-role-metro-co-op.html> (describing various programs through which the federal government is addressing the needs of metropolitan regional communities). But see Mark Alan Hughes, *Federal Roadblocks to Regional Cooperation: The Administrative Geography of Federal Programs in Larger Metropolitan Areas*, in *Urban-Suburban Interdependencies* 161, 161–80 (Rosalind Greenstein & Wim Wiewel eds., 2000).

<sup>301</sup> Housing Act of 1954, ch. 649, § 701, 68 Stat. 590, 640 (previously codified at 40 U.S.C. § 461; repealed by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 313(b), 95 Stat. 357, 398).

<sup>302</sup> Federal-Aid Highway Act of 1962, Pub. L. No. 87-866, § 134, 76 Stat. 1145, 1148 (codified as amended at 23 U.S.C. § 134 (2000)). Regional transportation planning is one of the few areas of federal regionalization that survived the Reagan Revolution. See generally U.S. Advisory Comm'n on Intergovernmental Relations, *MPO Capac-*

ment Act of 1965.<sup>303</sup> These experiments spurred the formation of regional councils of government and metropolitan transportation planning bodies.<sup>304</sup> Other federal-regional approaches at the local level can be found in the environmental arena, most notably in the planning requirement under the Clean Air Act. As the Court noted in *City of Columbus v. Ours Garage & Wrecker Service*, the Clean Air Act requires a planning process for air quality control regions “whose borders are defined by the Administrator of the Environmental Protection Agency based not upon local jurisdictional lines but upon criteria she ‘deems necessary or appropriate for the attainment . . . of [national] ambient air quality standards.’”<sup>305</sup> Accordingly, state implementation of the Clean Air Act has generally involved regional entities created pursuant to this federal mandate.<sup>306</sup>

While these federal efforts have often been half-hearted, and regional entities created under federal incentives have more often than not lacked genuine power,<sup>307</sup> these efforts nonetheless suggest a federal role in transcending local boundaries and balancing local autonomy against national priorities.<sup>308</sup> There is a distinct national interest in fostering regional policymaking for areas of policy best addressed below the state level and above the purely local, or those involving regional issues that transcend state-created local bounda-

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ity: Improving the Capacity of Metropolitan Planning Organizations to Help Implement National Transportation Policies (1995).

<sup>303</sup> Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451.

<sup>304</sup> See Peirce, *supra* note 20, at 32.

<sup>305</sup> 536 U.S. 424, 439 n.4 (2002) (quoting 42 U.S.C. § 7407(c)).

<sup>306</sup> See Griffith, *supra* note 294, at 539–40.

<sup>307</sup> See *id.* at 539. To pick perhaps the most prominent example, Frug dismisses the federal role in regional transportation planning, arguing that states dominate decisions about the allocation of federal transportation funds, notwithstanding the MPO mandates. See Frug, *supra* note 293, at 1813–17.

<sup>308</sup> If one accepts the premise that the primary explanation for the lack of regional cooperation is, as Gillette argues, transaction-cost barriers to interlocal cooperation, one response would certainly be to change the cost-benefit structure for local governments in evaluating regional policies. See Gillette, *supra* note 209, at 192–93, 201. But see Barron & Frug, *supra* note 233, at 281–86 (cataloguing local government cultural and state-level barriers to interlocal cooperation). The federal government can play a role—certainly one not currently vigorously pursued by the states in most parts of the country—in changing the incentive structure of local government with respect to regional issues.

ries. This national interest is particularly clear in cooperative localism.

### *3. A Federal Imperative?*

Institutionally and practically, it makes sense to encourage regionalist solutions to parochialism in federal-local cooperation. A regional focus, however, may also provide a way for courts to police the exercise of federal power to prevent federal empowerment from succumbing to local parochialism, at least in extreme cases.

There is a doctrinal thread in the jurisprudence of federal-local relations that can provide a template. This thread has recognized a basis for judicial imposition of a translocal obligation at the federal level. The primary example can be found in the Supreme Court's endorsement of an explicit regionalist mandate in *Hills v. Gautreaux*.<sup>309</sup> The sad history of the *Gautreaux* case reads as a roadmap of the worst that local subversion of national interests can represent. The Chicago Housing Authority ("CHA"), a local-government entity, received funds from the U.S. Department of Housing and Urban Development ("HUD") to build and operate public housing. A 1949 Illinois law granted the Chicago City Council approval rights over any public housing proposal, which led to a practice of "pre-clearing" housing siting decisions with ward aldermen.<sup>310</sup> With a few exceptions, all units built after 1950 were located in African-American wards.<sup>311</sup> In considering a remedy, Judge Richard Austin, a former loyalist of Mayor Richard Daley,<sup>312</sup> rejected the plaintiffs' calls for metropolitan-wide relief, finding that CHA and HUD's discrimination did not extend to the suburbs.<sup>313</sup> On this point, the Seventh Circuit reversed.<sup>314</sup>

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<sup>309</sup> 425 U.S. 284 (1976).

<sup>310</sup> See Richard F. Babcock & Charles L. Siemon, *The Zoning Game Revisited* 162 (1985).

<sup>311</sup> See *id.* The district court in the *Gautreaux* litigation found that four CHA projects were located in white neighborhoods and 99.5% of the remaining family units were located in black neighborhoods and were 99% occupied by black tenants. *Gautreaux*, 425 U.S. at 288.

<sup>312</sup> See Babcock & Siemon, *supra* note 310, at 160.

<sup>313</sup> *Gautreaux*, 425 U.S. at 290–91.

<sup>314</sup> See *id.* at 291.

The Supreme Court then faced the question whether *Milliken v. Bradley*<sup>315</sup> barred metropolitan relief.<sup>316</sup> The Court distinguished *Milliken* on the grounds that *Milliken* did not involve a finding of unconstitutional action on the part of the suburban school districts that were to have been brought into the remedy and that *Milliken* did not include a finding that “the operation of the Detroit school system had had any significant segregative effects in the suburbs.”<sup>317</sup> Finding that the relevant remedial area was the entire metropolitan region,<sup>318</sup> the *Gautreaux* Court framed the remedial question in terms of HUD’s wrongdoing, side-stepping the argument that a metropolitan-wide remedy would necessarily undermine “local autonomy and local political processes.”<sup>319</sup> The Court focused on HUD’s civil rights obligations, even though that did not directly answer the concerns regarding the proper respect owed to local boundaries that had been dispositive in *Milliken*.<sup>320</sup>

As the Court framed the question in *Gautreaux*, the relevant inquiry centered on judicial power to order HUD to take remedial action, an approach that allowed a court-ordered and supervised metropolitan-wide remedy involving CHA. When HUD was involved, in other words, local jurisdictional boundaries were not directly relevant in the same way they were in cases involving individual challenges to school district boundaries. This sleight of hand,

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<sup>315</sup> 418 U.S. 717 (1974).

<sup>316</sup> In *Milliken*, the Court had limited an education desegregation remedy to Detroit, reversing the district court’s regional solution, which included outlying suburbs. See *id.* at 728–30, 744–45. To the *Gautreaux* Court, however, the scope of remedy question in *Milliken* was one of “fundamental limitations on the remedial powers of the federal courts to restructure the operation of local and state governmental entities.” *Gautreaux*, 425 U.S. at 293. The Seventh Circuit had distinguished *Milliken* as limited to the practicalities and equities unique to school desegregation and thus distinguished housing as a policy area. See *id.* at 294.

<sup>317</sup> *Gautreaux*, 425 U.S. at 294.

<sup>318</sup> As the Court held, the geographic area relevant to the plaintiffs’ relief was “the Chicago housing market, not the Chicago city limits.” *Id.* at 299.

<sup>319</sup> *Id.* at 300 (quoting statements made at oral argument on behalf of HUD).

<sup>320</sup> The Court suggested in *Gautreaux* that federal statutes might give to the suburban jurisdictions likely to be on the receiving end of the district court’s eventual remedy some latitude to resist the siting of federally sponsored housing. See *id.* at 303. The Court did not acknowledge the logically obvious proposition that subsequent resistance by suburban jurisdictions would immediately and directly implicate those jurisdictions in the segregative effects that the Court was so reluctant to find in the first place.

however, required ignoring the extent to which HUD operated in Chicago through CHA. Ordering HUD to act on a metropolitan-wide basis was the functional equivalent of an order to the metropolitan jurisdictions involved, as HUD unsuccessfully argued to the Court.<sup>321</sup>

The regionalist mandate that *Gautreaux* endorsed was predicated on the clear constitutional violations found in the case but can serve as a model for judicial supervision of federal intervention at the local level.<sup>322</sup> Transcending its narrow constitutional holding, *Gautreaux* can be read to recognize an affirmative obligation that federal power look beyond local government boundaries where federal-local intergovernmental policies give rise to local parochialism. This federal obligation can be internalized into a judicial limitation on federal empowerment of local governments in cooperative regimes. Federal regionalization in conjunction with local entities would strike an appropriate balance between local autonomy and the pursuit of federal goals.<sup>323</sup> When the federal government sets a national priority, local autonomy must yield, but only to the extent that local parochialism threatens to subsume federal goals.

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<sup>321</sup> Id. at 297.

<sup>322</sup> The *Gautreaux* case itself has had a mixed history. *Gautreaux* did not lead to public housing in the suburbs of Chicago, in part because President Nixon stopped funding new construction of public housing and in part because the Court had adverted to the proposition that under replacement programs such as § 8 of the U.S. Housing Act of 1937, 42 U.S.C. § 1437f (2000), “local governmental units retain the right . . . to reject certain proposals that are inconsistent with their approved housing-assistance plans, and to require that zoning and other land-use restrictions be adhered to by builders.” Id. at 305; see Babcock & Siemon, *supra* note 310, at 167, 169. On remand, HUD entered into an agreement to fund the relocation of families to the suburbs, and from that agreement grew the *Gautreaux* Assisted Housing Program, under which more than 25,000 people eligible for public housing had moved to the suburbs through 1998. See generally Alexander Polikoff, *Waiting for Gautreaux: A Story of Segregation, Housing, and the Black Ghetto* (2006); Leonard S. Rubinowitz & James E. Rosenbaum, *Crossing the Class and Color Lines: From Public Housing to White Suburbia* (2000).

<sup>323</sup> A recent case illustrates how a mandate imposed at the federal level supersedes local jurisdictional boundaries in line with the *Gautreaux* approach. Citing HUD’s obligation to affirmatively further fair housing, see 42 U.S.C. § 3608(e)(5) (2000), a federal district court in *Thompson v. U.S. Department of Housing and Urban Development* recently held that HUD is not bound in implementing the public housing program, as it had taken itself to be, by the jurisdictional boundaries of the City of Baltimore, 348 F. Supp. 2d 398, 408–09 (D. Md. 2005).

*B. Beyond the Jurisprudence: The Pragmatics of Intergovernmental Cooperation*

This Article has articulated a grounding for continued judicial deference to federal-local collaboration in the face of state interference out of more than a sense of the inherent pragmatic value of such collaboration. It is entirely possible that the results of federal-local cooperation in any given instance will fail to achieve programmatic or policy outcomes superior to other alignments of interests or to an approach that does not involve intergovernmental cooperation.<sup>324</sup> There is, however, sufficient promise in the choice that Congress and federal agencies have frequently made to engage local governments in national policymaking and implementation that it is worth questioning any simplistic application of judicial deference to state sovereignty as represented by plenary state authority over local governments.

It is important to note that a focus on the jurisprudence of federal-local cooperation necessarily overemphasizes the judicial role in mediating federal, state, and local conflicts. As a practical matter, the vast majority of intergovernmental concerns rarely become fodder for judicial resolution.<sup>325</sup> On the ground, intergovernmental relations are fundamentally political, taking place largely outside of the stark conflicts that require judicial resolution. As a result, case law reflects only outlier instances of breakdowns in relations. And although the “political safeguards”<sup>326</sup> of federalism may carry little weight with the current Court, there is no denying the practical reality that states have significant influence at the federal level to shape federal policies toward local governments.

Nevertheless, in perennial conflicts between local governments and the states, the ability of local governments to call on federal resources and to invoke federal authority serves as a useful counter-

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<sup>324</sup> This is true of any alignment of federal, state, and local power in the aggregate. Scholars often ground arguments in some pragmatic vision of policies aligned with some level of government, but the decidedly mixed history—good and bad—of all levels of government should caution against broad generalizations.

<sup>325</sup> Cf. Briffault, *Our Localism Part I*, supra note 57, at 2 (discussing the infrequency of direct “head-to-head conflict” in state-local relations).

<sup>326</sup> See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543 (1954).

balance to state power. Parties necessarily interact in the shadow of the law and certainly do so in intergovernmental relations.<sup>327</sup>

#### CONCLUSION: THE ALCHEMY OF FEDERAL-LOCAL COOPERATION

Walter Lippman once said of cities that they are “places where the activities of the whole nation come to a head” and that “[t]here is no way to separate the cities from the nation.”<sup>328</sup> Today, the same can be said of local governments more generally and particularly of the metropolitan regions in which most Americans live and work. The federal government has chosen to pursue an array of policies through the intermediary of local government, raising challenging questions for any account of federalism that ignores intergovernmental cooperation and the vital local role in such regimes. At the heart of cooperative localism is the potential—which will not be realized in all instances—of an alchemical reaction that can be sparked when national goals are filtered through the instrumentality of local communities.

The present Court’s commitment to privileging states in the federal system threatens a tradition of judicial protection for cooperative localism. This Article has attempted to demonstrate that a counternarrative of federal-local interaction complicates the reflexive elision of local governments as instrumentalities critical to state sovereignty. That counternarrative begins with the significant—and continuing—ambiguities in the federal law of local identity. It then draws on the instrumental case for decentralization and devolution at the heart of the Court’s contemporary federalism jurisprudence to articulate a localist grounding for preserving the particular exercise of national power represented by federal-local cooperation.

A localist perspective, however, must confront the risk of local parochialism. An argument for preserving federal empowerment grounded in the unique role that local governments play in the federal structure must temper federal power when it reinforces what is most problematic about local autonomy—parochialism, economic and racial segregation, and the ever-present risk of negative externalities from local decisionmaking.

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<sup>327</sup> Cf. Agranoff, *supra* note 25, at 47 (discussing collaboration and bargaining between local governments and state and federal governments).

<sup>328</sup> *Quoted in* Gelfand, *supra* note 26, at 3.

Although it is true that “[c]o-operative—not dual—federalism has been the mode since the establishment of the Republic,”<sup>329</sup> federal-*local* relations are a vital aspect of contemporary policymaking. These regimes of cooperative localism have been given short shrift in contemporary legal scholarship. Clarifying the jurisprudential grounding for an active federal-local relationship, however, can bolster local autonomy while guarding against the threats that such autonomy can generate. More so than ever, an era of revived judicial protection of state sovereignty calls for a firmly grounded jurisprudence of cooperative localism.

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<sup>329</sup> Daniel J. Elazar, *The American Partnership: Intergovernmental Co-operation in the Nineteenth-Century United States* 305 (1962).