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## *ARTICLES*

### THE NEW LOCAL

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## INTRODUCTION

ON November 6, 2012, with millions of their compatriots, citizens in the North River area of Chicago headed to the ballots.<sup>1</sup> Like other voters throughout the city, the state, and the nation, North River citizens were asked whether they wanted to see their President, their Congressional Representative, and a slew of state officials return to office. But they were asked an additional question other voters in the United States, in Illinois, and in Chicago, did not face. Citizens of North River had to decide whether they desired that their community provide free mental health services for residents—independently from their city.<sup>2</sup> The measure a majority of those citizens approved that day expanded public health services for early intervention and prevention of mental disorders solely for North River residents, through additional property taxes levied there but not elsewhere in Chicago. Traditionally, the local government provided the pertinent mental services, but once the City of Chicago discontinued them because of budget cuts, the neighborhood was authorized by the Illinois legislature to go at it alone.<sup>3</sup>

At around the same time, a New York appeals court ruled that two resident groups from the Park Slope section of Brooklyn could proceed with their lawsuit against New York City.<sup>4</sup> The residents were challenging the city’s decision to dedicate parts of their street to a bike lane. They contended that the lane would jeopardize safety and, even more

<sup>1</sup> North River, not to be confused with Chicago’s River North neighborhood, consists of the Chicago neighborhoods commonly known as Albany Park, Irving Park, Hollywood/North Park, Horner Park West, Mayfair, North Mayfair, Peterson Park, Ravenswood Manor, and Sauganash.

<sup>2</sup> Bd. of Election Comm’rs for the City of Chi., Offices, Candidates, Retention Judges, Constitutional Questions, Referenda and Local Options November 6, 2012 General Election (Oct. 12, 2012), [http://www.chicagoelections.com/dm/general/document\\_3680.pdf](http://www.chicagoelections.com/dm/general/document_3680.pdf).

<sup>3</sup> 405 Ill. Comp. Stat. 22/10, 15 (2013) (empowering a “geographically contiguous area with a population of 75,000 to 250,000” wholly contained within a municipality with more than 1,000,000 inhabitants to create an “Expanded Mental Health Services Program”).

<sup>4</sup> *Seniors for Safety v. N.Y.C. Dep’t of Transp.*, 101 A.D.3d 1029, 1032 (N.Y. App. Div. 2012) (overruling the lower court’s finding that the claim was time-barred). At the time of writing, the proceedings were ongoing. Christopher Robbins, *Data: Prospect Park West Bike Lane Doesn’t Impede Traffic Flow*, *Gothamist* (Apr. 13, 2014, 3:15 PM), [http://gothamist.com/2014/04/13/data\\_prospect\\_park\\_west\\_bike\\_lane\\_d.php#](http://gothamist.com/2014/04/13/data_prospect_park_west_bike_lane_d.php#) (reporting on a court hearing scheduled for late April 2014).

distressingly, increase traffic near their homes. Traditionally, such determinations were left to the sole discretion of the city's department of transportation.<sup>5</sup> Since the legislation empowering the city department to make these determinations subjected it to no duty to protect area residents' interests, there was, under traditional rules,<sup>6</sup> no basis for recognizing those residents' standing to intervene.<sup>7</sup> Nonetheless, the Park Slope residents were able to rely on a clause in the state's civil procedure code facilitating administrative challenges to question the decision.<sup>8</sup>

Legally, these two events appear to share very little, if anything, in common. They relate to two separate fields of law: health and welfare law in Chicago, civil procedure in New York City. They involve two distinct forms of governmental decision making: legislation and direct

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<sup>5</sup> N.Y.C., N.Y., Charter § 2903 (2004).

<sup>6</sup> Even when statutes do not award residents formal standing, courts often grant standing to individual residents challenging a governmental decision that interferes with a public interest in a space adjacent to their property when that interest is protected in a statute or the common law and the interest benefits them in a particular way. See, e.g., *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411–13 (1971) (allowing citizens to challenge the construction of a highway through a local park in violation of a statutory requirement that the government demonstrate no “feasible and prudent” alternatives to building through public lands); Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 Nw. U. L. Rev. 1417, 1419–20 (2011) (exploring standing rules applicable to adjacent owners under the public trust and public dedication doctrines, both “designed to preserve spaces dedicated to public uses”). Specifically, under New York law, a challenge for review of an administrative determination under N.Y. C.P.L.R. § 7803(3) (Consol. 2012) may only be made by “aggrieved” persons. *O’Neill v. Schechter*, 159 N.E.2d 146, 148 (N.Y. 1959) (“It is axiomatic that Administrative procedure will be reviewed only at the instance of a person allegedly aggrieved thereby.” (citation omitted) (internal quotation marks omitted)). Aggrieved persons are those who stand to sustain a particular damage, different in kind and degree from the community generally. This normally requires the owner’s land to be in proximity to the land directly affected by the decision, *Emmett v. Town of Edmeston*, 771 N.Y.S.2d 568, 570 (App. Div. 2004), *aff’d*, 814 N.E.2d 430, 431 (N.Y. 2004), and also that the “interest asserted [by the neighbor] is arguably within the zone of interest to be protected by the statute.” *Dairylea Coop. v. Walkley*, 339 N.E.2d 865, 867 (N.Y. 1975); see also *Sun-Brite Car Wash v. Bd. of Zoning and Appeals*, 508 N.E.2d 130, 133–35 (N.Y. 1987) (applying this test to deny a neighbor’s challenge of a zoning decision).

<sup>7</sup> The proceedings in New York differ in this regard from another case involving a challenge to a city’s plan to dedicate a lane to bikes, since that case was based on a clear and explicit statutory requirement that the city allegedly ignored. In *Coalition for Adequate Review v. City and County of San Francisco*, No. 505509, 2007 WL 5368710, at \*2 (Cal. Super. Ct. June 18, 2007), a superior court in California granted an injunction barring San Francisco from proceeding with its bike lane plan prior to conducting an environmental review to assess its potential impacts as required by the California Environmental Quality Act.

<sup>8</sup> N.Y. C.P.L.R. § 7803(3).

democracy in Chicago, judicial review in New York City. Yet in fact, the two occurrences are symptoms of one legal phenomenon. In both, a new level of government, more local than the current local government, was established or empowered. The city used to be the most local, or lowest, level of government responsible for welfare and health; it also used to be the most local, or lowest, level of government responsible for planning. Yet now that the Illinois legislature empowered residents to separately expand health care by referendum, the resident voters of North River were added to the ranks of decision makers in health and welfare law; now that the New York appeals court permitted residents to dispute the choice of location for a bike lane, the resident claimants in Park Slope were added to the ranks of decision makers in planning law.

This recent trend of further localizing the local reaches far beyond North River and Park Slope.<sup>9</sup> Without legal commentators noticing it, localism in contemporary American law is more local than ever before. This new, further localized form of localism is on the minds of all actors generating law in America and has permeated all fields of local government law. The local is further localized by a variety of acts hailing from disparate legal sources: U.S. Supreme Court decisions,<sup>10</sup> federal statutes,<sup>11</sup> state statutes,<sup>12</sup> city ordinances,<sup>13</sup> state court decisions,<sup>14</sup> and one of the most eminent stages for legal commentary.<sup>15</sup> The local is further localized across myriad legal disciplines: in policing law—Arizona now empowers a majority of residents to petition for a curfew for minors in

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<sup>9</sup> Indeed, even the specific example of further localized government in bike lane planning is not confined to Park Slope. As already mentioned, community challengers obtained an injunction forcing the city of San Francisco to conduct an environmental impact review before proceeding with its bike lanes plan. *Supra* note 7. The injunction was only lifted after the review was completed, three years later. Order Overruling Petitioners' Objections at 30, *Coal. for Adequate Review v. City and Cnty. of S.F.*, available at <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=615>. In Seattle, a legal challenge by local residents to one of the city's planned bike lanes resulted in a settlement whereby in exchange for withdrawal of the lawsuit the city agreed to the formation of a neighborhood committee to advise the city's project team. Paige Cornwell, *Westlake Ave. Group Drops Challenge to City Bicycle Plan*, *Seattle Times* (Feb. 20, 2014, 8:11 PM), [http://seattletimes.com/html/localnews/2022957828\\_cycletrackxml.html?syndication=rss](http://seattletimes.com/html/localnews/2022957828_cycletrackxml.html?syndication=rss).

<sup>10</sup> See *infra* Subsection I.B.1.

<sup>11</sup> See *infra* Subsection I.B.2.a.

<sup>12</sup> See, e.g., *infra* Subsection I.B.2.b.

<sup>13</sup> See, e.g., *infra* Subsection I.C.2.

<sup>14</sup> See *infra* Subsection I.B.2.c.

<sup>15</sup> See *infra* Subsection II.B.1.

their neighborhood,<sup>16</sup> and the Chicago Police Department mandates that every “beat” hold regular community meetings so that priorities and strategies are jointly developed by officers and residents;<sup>17</sup> in licensing law—Hawaii empowers a majority of residents living 500 feet from a business to force the denial of an alcohol license,<sup>18</sup> and Rhode Island empowers owners of a majority of the land within 200 feet of a suggested site for a junkyard or some other business dealing in second-hand articles to block the grant of a license to operate it;<sup>19</sup> in housing law—the U.S. Court of Appeals for the Fifth Circuit accorded Dallas homeowners standing to oppose a desegregation order placing a public housing project in their midst,<sup>20</sup> and Boston’s Redevelopment Authority signed a contract with a neighborhood’s city councilor, state representative, and state senator in which the Authority promised to spend within that neighborhood housing and job linkage fees a developer had been required to pay the city;<sup>21</sup> in the law respecting public space—San Francisco had “stakeholders,” consisting mainly of “Community Representatives,” evaluate the effects of a street closure before its permanent conversion to an open-space plaza,<sup>22</sup> and the Chicago Park District accepts applications from community groups to designate the uses and de-

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<sup>16</sup> Ariz. Rev. Stat. Ann. § 11-251 (2012).

<sup>17</sup> The Chicago Police Department requires at least one such meeting per quarter. Most beats hold monthly meetings. Chicago Police, What Are Beat Meetings . . . And Why Are They Important?, <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Get%20Involved/How%20CAPS%20works/Beat%20Meetings> (last visited Aug. 9, 2014). For more on Chicago’s Alternative Policing Strategy, adopted in 1995, see Chicago Police, How CAPS Works, <https://portal.chicagopolice.org/portal/page/portal/ClearPath/Get%20Involved/How%20CAPS%20works> (last visited Mar. 10, 2014).

<sup>18</sup> Haw. Rev. Stat. Ann. §§ 281-58 to -59 (LexisNexis 2011).

<sup>19</sup> R.I. Gen. Laws § 5-21-2(b) (2009).

<sup>20</sup> Walker v. City of Mesquite, 169 F.3d 973, 979–81 (5th Cir. 1999).

<sup>21</sup> S. Bos. Betterment Trust Corp. v. Bos. Redev. Auth., 777 N.E.2d 812, 814 (Mass. 2002).

<sup>22</sup> Jane Warner Plaza, also known as Castro Commons and 17th Street Plaza, was first established as a pilot project that was to be micro-locally assessed in light of the principles set forth in Memorandum from San Francisco Planning Department on Proposed Evaluation Method - 17th Street Plaza, available at [http://www.castrocdbd.org/images/archive/Evaluation\\_Memo.pdf](http://www.castrocdbd.org/images/archive/Evaluation_Memo.pdf). Following this assessment it was transformed into a permanent plaza in 2010. Jane Warner Plaza, Castro/Upper Market Community Benefit District, <http://www.castrocdbd.org/index.php/visit-the-castro/jane-warner-plaza> (last visited Aug. 9, 2014).

signs for, fund the development of, and independently maintain spaces the District owns.<sup>23</sup>

The new local founded in these and many other similar instances is not merely quantitatively new and more local—that is, smaller than existing levels of local government (the city, county, or school district)—it is also qualitatively new and more local. These examples reflect a new mode of governing: government with no distinct, unitary, and stable decision-making body. Other local (or state) governments are steered by an entity responsible for day-to-day decision making: the city council,<sup>24</sup> the school board,<sup>25</sup> the zoning or planning commission,<sup>26</sup> etc. An equivalent body is absent in the cases highlighted here. North River’s initiative was not adopted or promoted by a political neighborhood board or by an electorate whose geographical definition predated that specific vote. In Park Slope, the novelty of the new local government is magnified still further. The New York appeals court’s decision produced not merely government with no unitary and lasting decision-making body, but a government with no identifiable decision-making entity at all. In essence, it empowered government by whichever neighbors opt to band together and head to court.

The new local governments are not miniature versions of traditional local governments. They represent a new understanding of local governance in American law—a notion of the “local” that is closer to the resident not solely physically but also conceptually. As a form of local government it is both more “local” in the traditional sense of the term “local” and less “government” in the traditional sense of the term “government.” This fact has consistently been overlooked by prior efforts to analyze governments operating on a level smaller than the local. Existing works assume that such governments must replicate the governmental structure of traditional local governments, simply on a smaller

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<sup>23</sup> Chicago Park District, *Community Gardens in the Parks: Manual for Development*, [http://www.chicagoparkdistrict.com/assets/1/23/CG\\_NewGardenManual\\_20131.pdf](http://www.chicagoparkdistrict.com/assets/1/23/CG_NewGardenManual_20131.pdf) (last visited Aug. 24, 2014). The process is normally used to create community gardens, but more recently it was employed to establish a large dog-friendly park. See Kimberly Pool, *Logan Square’s Dog Park Gets the Green Light*, LoganSquarist (May 15, 2014), <http://logansquarist.com/2014/05/15/logan-square-dog-park/>. The overall plan for the original park was suggested in *Logan Square Open Square Plan*, City of Chi., [http://www.cityofchicago.org/city/en/depts/dcd/supp\\_info/logan\\_square\\_openspaceplan.html](http://www.cityofchicago.org/city/en/depts/dcd/supp_info/logan_square_openspaceplan.html) (last visited Sept. 13, 2014).

<sup>24</sup> E.g., N.Y.C., N.Y., Charter § 21 (2004).

<sup>25</sup> E.g., N.Y. Educ. Law §§ 2(12), 2(14), 1501-b (Consol. 2012).

<sup>26</sup> E.g., N.Y. Gen. Mun. Law § 236 (Consol. 2012).

scale.<sup>27</sup> As a result, the most prevalent and significant forms of further localized decision-making processes are yet to be addressed. This Article fills that void, by identifying and analyzing this new form of local government, which I dub “micro-local.” The Article thereby forms part of the burgeoning literature tackling the diverse forms that local government or local power can assume in American law. Spurred by the realization that local governments are the public units playing the most significant role in citizens’ lives, this scholarly effort first focused on the quintessential local entity, the city;<sup>28</sup> more recently, writers turned readers’ attention to less archetypical, and hence previously under-explored, formats of local governance, such as counties,<sup>29</sup> unincorporated urban areas,<sup>30</sup> extraterritorial zones,<sup>31</sup> special districts,<sup>32</sup> regional bodies,<sup>33</sup> and school districts.<sup>34</sup> This Article will subject the new, micro-local form of local power to similar legal scrutiny.

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<sup>27</sup> See, e.g., Ellen P. Aprill, *Caution: Enterprise Zones*, 66 S. Cal. L. Rev. 1341, 1341 (1993) (exploring “enterprise zones” within cities, which have clear and fixed boundaries); Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 Colum. L. Rev. 365, 368–69 (1999) (exploring the “business improvement district,” which has clear and fixed boundaries as well as a managing board); Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 Minn. L. Rev. 503, 504–05 (1997) [hereinafter Briffault, *The Rise of Sublocal Structures*] (exploring governments that operate in pre-determined areas within a city); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 Duke L.J. 75, 90 (1998) (exploring neighborhood-level government structures); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 Urb. Law. 335, 336 (1993) (same); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 Geo. Mason L. Rev. 827, 831 (1999) (same). For a full discussion of ways in which these works fail to cover the full range of the micro-local, see *infra* Section I.A.

<sup>28</sup> See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 10–18 (1990); Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1059 (1980).

<sup>29</sup> Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 Stan. L. Rev. 931, 980–81 (2010).

<sup>30</sup> Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. Rev. 1095, 1101–02 (2008).

<sup>31</sup> Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 1115, 1130–31 (1996).

<sup>32</sup> Nadav Shoked, *Quasi-Cities*, 93 B.U. L. Rev. 1971, 1991–92 (2013).

<sup>33</sup> E.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 Geo. L.J. 1985, 1988–90 (2000); Gerald E. Frug, *Beyond Regional Government*, 115 Harv. L. Rev. 1763, 1766–68 (2002).

<sup>34</sup> William A. Fischel, *Neither “Creatures of the State” nor “Accidents of Geography”: The Creation of American Public School Districts in the Twentieth Century*, 77 U. Chi. L. Rev. 177, 177–78 (2010).



The new local must finally be engaged in this fashion not solely since existing research, adhering to a traditional framework, fails to provide an accurate description of current patterns of further localized government, such as those unfolding in North River and Park Slope. More importantly, these works, ignoring the novel nature of the new local government, cannot supply policymakers and commentators with the theoretical tools required to assess the desirability of new and further localized local governments. Since further localized local government is also transformed local government, it requires a fresh theory to enable law to evaluate all its different manifestations. How are we to decide whether North River should, as a normative matter, be allowed to provide mental services separately from the rest of the City of Chicago? And how are we to decide whether Park Slope neighbors should, as a normative matter, be allowed to question traffic decisions adopted to benefit the wider City of New York?

My normative contention in this Article is that we cannot seriously approach these questions without a new and comprehensive theory of government, without a new theory of the micro-local. In the absence of serious scholarly and critical appreciation, the moves to create and embrace the new local have been completed without much thought. Relying on little more than the utopian tenet “small is beautiful,”<sup>35</sup> the march toward the new local—a local government that is more “local” and less “government”—has been proceeding unobstructed. Ever smaller and more localized forms of government have always appealed to American values.<sup>36</sup> Over the past few decades they became practically irresistible as collective ideas and purposes fragmented,<sup>37</sup> faith in objective planning dissipated,<sup>38</sup> and organic growth from below emerged as the preferred alternative to the central bureaucracies rejected by both the laissez-faire right and the counter-culture left.<sup>39</sup> Accordingly, conventional wisdom

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<sup>35</sup> See generally E.F. Schumacher, *Small is Beautiful* (1973).

<sup>36</sup> Thomas Jefferson is famously associated with identifying small governments run by small independent farmers (yeomen) as democracy’s bulwark. E.g., Sean Wilentz, *The Rise of American Democracy* 47–48 (2005). The idea has proven immensely influential, guiding, for example, the Jacksonian drive against special interests and consolidation, see Arthur M. Schlesinger, Jr., *The Age of Jackson* 334–41 (1953), and much of the Progressive agenda in the early twentieth century as well. See Louis D. Brandeis, *The Curse of Bigness* 38–39 (Osmond K. Fraenkel ed., 1934).

<sup>37</sup> Daniel T. Rodgers, *Age of Fracture* 5 (2011).

<sup>38</sup> Jane Jacobs, *The Death and Life of Great American Cities* 3–5 (1961).

<sup>39</sup> See Samuel Bowles & Herbert Gintis, *Social Capital and Community Governance*, 112 *Econ. J.* 419, 419–20 (2002) (noting that, and explaining why, the concepts of social capital

deems the new local governments to be good because they embrace smallness and empower real “people.”<sup>40</sup> Any decision by a micro-local government *has* to be more efficient and more democratic than a local or state decision. Yet the relationship between the new local governments and these vaunted values of economic efficiency and democratic participation is more complicated. Sometimes, micro-local government promotes these values; sometimes, it defeats them. The task of the law is to tell these cases apart. This Article’s theory of micro-localism provides lawmakers and commentators with useful tools—precise questions to contemplate when an issue arises—to do so.

The challenge engaged by this Article is thus two-faceted. I aim to expose reforms putting the new local in place and to provide the tools for evaluating such reforms normatively. These twin goals inform the Article’s organization. Part I will set the stage by bringing to light the intensity of the legal movement toward the new local. It will first explain that there are two distinct ways—direct and indirect—whereby law establishes the micro-local, and that since the indirect form has not been appreciated before, the current prevalence of micro-localism is grossly underestimated. Part I will then present actual, and dramatic, examples of micro-local government in education and land use. With regard to the former, it will highlight the different ways by which, without legal commentators realizing it, the individual school—as distinct from the traditional local government, the school district—became a legal concept; as to land use, it will focus on neighborhood involvement in the establishment and management of historic preservation districts.

Part II, forming the Article’s core, will develop the normative framework to assess these and all other micro-local reforms. Micro-localism, like localism in general, is promoted since lawmakers and commentators argue that it serves economic efficiency and democratic participation.

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and community governance became attractive during the closing decades of the twentieth century to those on both the left and right of the political center).

<sup>40</sup> Richard C. Schragger, *The Limits of Localism*, 100 Mich. L. Rev. 371, 403 (2001) (noting, sardonically, that “[n]o one can be against community”). In a recent and highly influential book, sociologist Robert Sampson argues that American social policies should focus on “*community-level intervention*,” for example, community policing or the U.S. Department of Housing and Urban Development’s “Choice Neighborhoods” program, in light of the importance of neighborhoods’ internal dynamics to residents’ lives. Robert J. Sampson, *Great American City: Chicago and the Enduring Neighborhood Effect* 420–24 (2012); see also Jens Ludwig, *Great American City: Chicago and the Enduring Neighborhood Effect*, 118 Am. J. Soc. 1447, 1448 (2013) (book review) (arguing that “at some level the book’s war has already been won”).

Part II will show that law must adopt a more nuanced stance since often micro-localism cannot achieve either of these twin goals, and might even compromise them. I advance two rigorous theoretical frameworks—one guided by economic efficiency, the other by democratic participation—to be used in evaluating whether a given micro-local reform will promote the relevant normative value. To demonstrate how the frameworks should be used and why they are indispensable, the discussion of each will end with an application of its operative tests to the two examples of micro-localism presented in Part I. Through this exercise, I will conclude that most micro-local reforms in the education field fail to further, and in fact undermine, normative goals, and that some schemes involving neighborhood residents in the historic districting process are preferable to others.

For its in-depth analysis and policy recommendations the Article will rely specifically on these examples from the legal fields of education and land use, rather than on any of the other examples mentioned earlier in this Introduction. The scope of any single article must be limited, and I opt to focus on reforms pertaining to the two most important functions of local government in American law.<sup>41</sup> Nonetheless, the normative frameworks the Article develops can, and should, be employed to evaluate all other instances of micro-localism in disparate legal fields. I will do so myself in the Conclusion where the legal developments in North River and Park Slope will be revisited and appraised.

## I. THE NEW LOCAL IN AMERICAN LAW

### *A. Different Legal Techniques of Further Localizing Local Government*

In American law, local governments are created, defined, and empowered by explicit action of the state legislature.<sup>42</sup> Accordingly, it is rather easy to name the different forms of local government currently recognized: for example, cities, counties, special districts, and school districts.<sup>43</sup> The task of identifying further localized local governments is

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<sup>41</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”); Briffault, *supra* note 28, at 3 (“Land use control is the most important local regulatory power.”).

<sup>42</sup> *City of Trenton v. New Jersey*, 262 U.S. 182, 189–90 (1923) (“A municipal corporation . . . exists by virtue of the exercise of the power of the State through its legislative department.”).

<sup>43</sup> See Lynn A. Baker & Clayton P. Gillette, *Local Government Law* 46–51 (4th ed. 2010) (listing the types of local governments).

much more challenging. As a result, scholars have grossly underappreciated the pervasiveness of further localized local governments. They mistakenly assume that, like regular-scaled local governments, smaller-scaled local governments are created in only one fixed and legislatively prescribed manner. This Section explains that there are actually two manners by which law further localizes local government. Previous commentators have noticed only the first—which I dub “direct”—and not the second—which I term “indirect.” This second manner of further localizing local government is the more prevalent of the two, and thus only once it is recognized can the widespread presence of new, further localized local governments in American law be faithfully acknowledged. For this reason, the Article introduces the term micro-localism, which encompasses both forms of further localizing local governments—direct and indirect.

The only further localized local governments—micro-local governments, in the Article’s new phrasing—that scholars have recognized so far are formal, institutionalized, and well-defined neighborhood entities legally generated in a direct manner. Examples of these directly created micro-local governments are business improvement districts,<sup>44</sup> enterprise zones,<sup>45</sup> neighborhood councils,<sup>46</sup> and proposals for more powerful neighborhood bodies replicating the model of the homeowners association.<sup>47</sup> As these examples illustrate, micro-localities created in a direct fashion resemble local governments. On the local level, state law defines the municipality and then consistently relies on that unit for the delegation of state powers. Now the same is done on the micro-local level: State statutes intentionally and directly establish and empower new entities smaller than traditional local governments. As with municipal bodies, the boundaries of such smaller jurisdictions do not intersect. They are stable for a long time and their existences and roles are products of system-wide planning and institutional choice. Once such direct and purposeful legal architecture is consummated, a resident is located in a Russian doll-like set of nested jurisdictions, where each layer consists of one relevant jurisdiction ruled by its own governing body: the federal,

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<sup>44</sup> Briffault, *The Rise of Sublocal Structures*, *supra* note 27, at 508.

<sup>45</sup> Aprill, *supra* note 27, at 1343–44.

<sup>46</sup> E.g., L.A., Cal., Charter art. ix, §§ 900, 908 (2011); N.Y.C., N.Y., Charter ch. 70, § 2800(a), (d)(2) (2004).

<sup>47</sup> See Ellickson, *supra* note 27, at 90; Liebmann, *supra* note 27, at 336; Nelson, *supra* note 27, at 831–32.

the state, the local (for example, the county and then the city), and the micro-local (for example, the business improvement district or neighborhood council). When adhering to this first, direct form, micro-local governments differ from traditional local governments solely in scale; accordingly they have been famously termed “sublocal” by Professor Richard Briffault.<sup>48</sup>

The second form of further localizing local government—the indirect form—does not foster micro-local governments that are similar in design to governments at other levels, and consequently its many instances have previously escaped scholarly detection. Consider the lawsuit involving the Park Slope residents, noted in the Introduction. Micro-localism there was not realized through the establishment of a sublocal entity to manage transportation planning in the neighborhood, and the delegation of the relevant powers was not the product of an institutional design initiative adopted by the state or city legislature. Rather, micro-localism was the result of a judicial decision regarding individual residents’ standing to challenge local-level administrative acts. The embrace of the micro-local was the incidental and unintended outcome of a judicial act dealing with unrelated concerns from the field of civil procedure. As this case exemplifies, when adhering to the indirect form of micro-localism, legal policies recognize the smaller-scale government in a manner that is informal, fluid, task-specific, ad hoc, and geographically indeterminate. In this format the micro-local differs drastically from the local in its legal status and function. Thus the same resident may be the subject of more than one micro-locality, the boundaries of any of which may change over time. For example, a citizen whose residence is along the Park Slope bike lane may be subject to additional micro-localities not governing all other co-members of the bike lane micro-locality. She may also be located in a micro-locality providing mental health services as in Chicago;<sup>49</sup> perhaps she is served by a police station whose priorities are set in micro-local meetings as in Los Angeles;<sup>50</sup> maybe her residence is close enough to a business to be allowed by a court to join a micro-local challenge to the business’s city-issued liquor license, as in

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<sup>48</sup> See Briffault, *The Rise of Sublocal Structures*, supra note 27, at 503.

<sup>49</sup> See supra notes 1–3 and accompanying text.

<sup>50</sup> For an overview of the Los Angeles Police Department’s twenty-one “Community-Police Advisory Boards,” see The Los Angeles Police Department, Community Policing Unit, [http://www.lapdonline.org/support\\_lapd/content\\_basic\\_view/731](http://www.lapdonline.org/support_lapd/content_basic_view/731) (last visited Mar. 9, 2014).

Nebraska,<sup>51</sup> or be part of the micro-local community whose welfare the liquor department must consider before granting the license, as in Pennsylvania.<sup>52</sup> The fluctuating nature of the boundaries and membership of micro-local governments created indirectly is the product of their most prominent attribute and contrast to micro-local governments established through the direct route: the lack of a body managing the micro-locality's affairs. Micro-localities formed indirectly engage in local government without having a government.

Since law often establishes micro-local governments in this indirect fashion, the phenomenon that this Article titles micro-localism is much more widespread than previously assumed in works analyzing solely the "sublocal," that is, governments that are the result of direct micro-localism. The remainder of this Part will identify highly impactful, yet mostly unappreciated, cases of both indirect and direct micro-localism, drawn from the two major fields entrusted to American local governments: education and land use. This discussion will force legal observers to confront and consider side by side, often for the first time, seemingly disparate legal policies, which in fact embody the same legal pattern. Later, in Part II, I will develop the theoretical framework to normatively evaluate such micro-local policies.

### *B. Examples of Further Localized Local Government: Education*

Education law has undergone some of the most dramatic micro-local reforms. These reforms assumed diverse forms and originated in different quarters—some judicial, some legislative, some administrative, some federal, some state, still others local—and they have never before been considered together. The following description, even standing independently from the normative assessment to follow in Part II, performs an important task by shedding light on the absence of systematic thinking in the field.

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<sup>51</sup> *Orchard Hill Neighborhood Ass'n v. Orchard Hill Mercantile*, 738 N.W.2d 820, 830–31 (Neb. 2007) (internal quotation marks omitted) (holding that an informal neighborhood association had standing to challenge a local decision, and finding that it persuasively argued that neighborhood "public convenience and necessity" did not require the issuance of a liquor license).

<sup>52</sup> 47 Pa. Stat. Ann. § 4-404 (West 1997) ("[T]he board shall refuse any application for a new license . . . if . . . such new license . . . would be detrimental to the welfare, health, peace and morals of the inhabitants of the neighborhood within a radius of five hundred feet of the place proposed to be licensed . . .").

*1. The Traditional Legal Structure and Its Unsettling*

Education is a power reserved to the states. Almost all states leave the establishment, operation, and management of schools to entities they create: school boards.<sup>53</sup> School boards govern geographical subdivisions, often called school districts.<sup>54</sup> The 12,880 school districts that existed as of 2012<sup>55</sup> are the local level of government in the education field (that is, the equivalent of cities or counties).<sup>56</sup> A school district usually controls several individual schools. Traditionally, these individual schools had no legal significance in American jurisprudence. They were subunits wholly managed by, responsive to, and existing at the pleasure of the local government—the school district.<sup>57</sup> As dependent subunits directed from above, it was impossible to treat them as individually differentiated entities. The dissenting Justice Stephen Breyer explained in the Supreme Court’s seminal decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, “by design and in practice, [schools within one district] offer substantially equivalent academic programs.”<sup>58</sup> Hence, while state courts translated the right to education residents hold under their state constitutions into a property right to attend *a* school within the district of residence,<sup>59</sup> they held that “[t]here is no constitutionally protected interest to attend *the* school of one’s choice” within the district.<sup>60</sup> Courts reasoned that placement decisions between schools are “adminis-

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<sup>53</sup> Most states establish local school boards by legislation. A few have done so through constitutional provisions. See, e.g., Fla. Const. art. IX, § 4; Va. Const. art. VIII, § 7.

<sup>54</sup> 1 James A. Rapp, *Education Law* § 3.03(2) (2005).

<sup>55</sup> U.S. Census Bureau, U.S. Dep’t of Commerce, *Individual State Descriptions: 2012*, at x (2013).

<sup>56</sup> State legislatures have bestowed control over school districts on the mayors in several major cities. E.g., 105 Ill. Comp. Stat. 5/34-3 (2012) (Chicago); Act of July 5, 1991, ch. 108, §§ 1–10, 1991 Mass. Acts 222, 222–26 (Boston); N.Y. Educ. Law § 2590-b (Consol. 2007) (New York City). However, even in these cases, the city and the school board remain separate legal entities. See, e.g., *Lanza v. Wagner*, 183 N.E.2d 670, 674–75 (N.Y. 1962) (holding that although members of New York City’s Board of Education were appointed by the mayor, “they are officers of an independent corporation separate and distinct from the city”).

<sup>57</sup> E.g., Kan. Stat. Ann. § 72-8212 (2002); Va. Code Ann. § 22.1-28 (West 2010).

<sup>58</sup> 551 U.S. 701, 835 (2007) (Breyer, J., dissenting).

<sup>59</sup> See *Dunbar v. Hamden Bd. of Educ.*, 267 F. Supp. 2d 178, 182 (D. Conn. 2003).

<sup>60</sup> *Britt v. Rogers*, 485 N.Y.S.2d 358, 360 (App. Div. 1985) (emphasis added); see also *Helena F. v. W. Contra Costa Unified Sch. Dist.*, 57 Cal. Rptr. 2d 605, 609 (Ct. App. 1996) (“The obligation to provide free education does not encompass a duty to provide schools that are geographically convenient to the parent.”).

trative decisions,”<sup>61</sup> “a matter of educational policy, the responsibility for which lies within the professional judgment and discretion” of school districts.<sup>62</sup> In sum, in American law, school district boundaries traditionally matter and individual school boundaries do not.

Lately, however, the primacy of school districts—the relevant local governments—in education law has receded. Justice Breyer’s position noted in the preceding paragraph was rejected by the plurality opinion in *Parents Involved*. That decision bestowed legal meaning on boundaries within school districts. In its ruling that the school district’s student assignment decisions must be colorblind and refrain from aiming for racial integration,<sup>63</sup> the Court accepted the claim of the white plaintiffs that they had sustained an injury when they were denied entry into one school in the district and assigned to another within the same district.<sup>64</sup> For this conclusion to be coherent, the Court had to assume, as it did, that some schools in the school district were different from, and more specifically preferable to, others; the Court thereby moved past the traditional view of school districts as homogenous and unitary entities whose student assignment decisions are purely internal matters.<sup>65</sup> *Parents Involved* implied that individual school boundaries, not school district boundaries, are the smallest meaningful boundaries in education law.

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<sup>61</sup> *Johnpoll v. Elias*, 513 F. Supp. 430, 431–32 (E.D.N.Y. 1980); see also *Sch. Bd. of Broward Cnty. v. Constant*, 363 So. 2d 859, 860–61 (Fla. Dist. Ct. App. 1978) (holding that only administrative relief can be sought against a school board’s decision establishing boundary lines for schools).

<sup>62</sup> *Britt*, 485 N.Y.S.2d at 360.

<sup>63</sup> *Parents Involved*, 551 U.S. at 711.

<sup>64</sup> *Id.* at 718–20. The Court analyzed the case as if it were an affirmative action—rather than school integration—case. See Rachel F. Moran, *Let Freedom Ring: Making Grutter Matter in School Desegregation Cases*, 63 U. Miami L. Rev. 475, 483–84 (2009) (discussing the traditional distinction between diversity and desegregation and the Court’s decision to ignore it). In an affirmative action case there is an assumption of disparity between the position the plaintiff seeks—for example, admission to the flagship state university—and the one she must settle for due to her race—for example, admission to a formally inferior university. *Gratz v. Bollinger*, 539 U.S. 244, 251–52 (2003).

<sup>65</sup> In passing, Chief Justice Roberts and Justice Kennedy both explained that parents are competing for seats in schools, and that in arbitrating this competition the district is distributing burdens and benefits. *Parents Involved*, 551 U.S. at 719, 720 (Roberts, C.J., majority opinion); *id.* at 795 (Kennedy, J., concurring).



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*2. Micro-Local Reforms in Education Law*

The Supreme Court's contribution to micro-localism in education was late and mostly symbolic. Since education is a matter of state law, the moves imbuing micro-local school boundaries with concrete legal substance occurred elsewhere, on the state level. At least three reforms have transformed the individual school—the micro-local unit—into a legal entity: (1) the “right” to attend a specific—as opposed to any—school in the district; (2) individual school management; and (3) the power to dispute a district's decision to close a school. It is helpful to consider the reforms in this order since it is the sequence in which residents' relationship with education authorities unfolds: First their children are assigned to a school, then they may become involved in the independent management of that school, and finally, sometimes, they must deal with a district's decision to close that school.

*a. The Parent's “Right” to the Neighborhood School*

As explained, American law has traditionally vindicated districts' power to freely make student assignment decisions, that is to say, to send a resident's child to any school within the district. Local government law supposedly perceives residents as living in school districts, not school neighborhoods. That, however, is no longer the case. American education law has been shifting its emphasis away from local boundaries and toward micro-local ones—those marking off individual neighborhood schools—for quite some time. In the Equal Educational Opportunities Act of 1974, Congress declared “it to be the policy of the United States that . . . the neighborhood is the appropriate basis for determining public school assignments.”<sup>66</sup> In 1991 the Supreme Court held that after a desegregation order is lifted, a school district is free to adopt neighborhood-based assignments despite risks of re-segregation.<sup>67</sup> Thereafter, most states and districts picked this course. By 2007, seventy-three percent of American students attended the public schools to which they were assigned based on neighborhood residency.<sup>68</sup> Such assignment to

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<sup>66</sup> 20 U.S.C. § 1701(a)(2) (2012).

<sup>67</sup> Bd. of Educ. of Okla. City Pub. Sch. v. Dowell, 498 U.S. 237, 243–44, 248–51 (1991).

<sup>68</sup> Sarah Grady et al., U.S. Dep't of Educ., Trends in the Use of School Choice: 1993 to 2007, at 7 (2010).

the neighborhood school is either prescribed by state law<sup>69</sup> or entrenched through district policies.<sup>70</sup>

Only a small minority of school districts have been able to maintain the primacy of their external boundaries over internal ones in student assignment and to thus resist micro-localism. Less than fifteen percent of American students in 2007 were placed in schools through non-neighborhood-based assignment.<sup>71</sup> A mere ten states require intra-district open enrollment,<sup>72</sup> which allows parents to choose any school within the

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<sup>69</sup> E.g., Del. Code Ann. tit. 14, § 223 (2007) (providing assignment to neighborhood schools); Miss. Code Ann. § 37-15-13 (2013) (denying right to attend school other than assigned); N.Y. Educ. Law § 2590-b(2)(c) (Consol. 2007) (providing that the New York City School Board may shift micro-local community districts within it only once in ten years); N.C. Gen. Stat. § 115C-367 (2013) (relying on attendance zones, as long as not for the purpose of segregation); Va. Code Ann. § 22.1-264.1 (West 2010) (specifying that it is a misdemeanor to misrepresent residency to be served by an alternative attendance zone within the district); Va. Code Ann. § 22.1-269.1 (West 2010) (enabling the state board to permit districts, in specific situations, to adopt alternative attendance programs); W. Va. Code Ann. § 18-5-16(a) (LexisNexis 2012) (according parents a right to appeal a decision to assign their child to a school outside their attendance zone); see also N.J. Stat. Ann. §§ 18A:36B-14 to 24 (West 2013) (establishing potential inter-district, but not intra-district, choice program); *Hunn v. Loudoun Cnty. Sch. Bd.*, No. 71499, 2012 Va. Cir. LEXIS 63, at \*3 (Va. Cir. Ct. Aug. 20, 2012) (holding that parents have standing to sue the district for redrawing attendance zones).

<sup>70</sup> E.g., School Board of Miami-Dade County, Fla., Bylaws & Policies § 5120 (2014), available at <http://www.neola.com/miamidade-fl/>; Noblesville, Ind., School Bylaws & Policies § 5120 (2008), available at <http://www.neola.com/noblesville-in/>; Iowa City School Board, Iowa, Code No. 501.4 (2011) (requiring superintendent permission for a student to attend a school other than the school to which she is assigned based on attendance area); Austin, Tex., Independent School District LDU 2011.02 (2011) (providing that assignment is based on attendance areas, which must “be kept as stable as possible”); Seattle, Wash., Public Schools Student Assignment Plan 7 (2009) (“[S]tudents are assigned to a designated attendance area school based on where the student lives, as long as the school can meet the student’s needs.”); Wake County Public School System, N.C., Board Policy 6200 R&P (A)(2), available at <http://www.wcpss.net/policy-files/series/policies/6200-rp.html> (“Students [in Wake County, which covers the Raleigh area], other than those with special needs are assigned to their ‘base school’; that is the school assignment based on the parent’s or legal custodian’s domicile.”).

<sup>71</sup> The National Household Education Survey reports that sixteen percent of American students were placed based on some form of choice. Grady et al., *supra* note 68. This figure encompasses open district enrollment, but also several assignment schemes that are of no interest here since they do not preserve the primacy of the local governing entity. For example, it includes charter schools that operate outside the district framework and magnet schools that screen applicants. *Id.* at 4.

<sup>72</sup> See Ariz. Rev. Stat. Ann. § 15-816.01 (2014); Ark. Code Ann. § 6-18-227 (2013) (allowing a parent whose child is assigned to an academically distressed school to choose to send her to a different school); Cal. Educ. Code § 35160.5 (Deering 2013); Colo. Rev. Stat. § 22-36-101 (2013); Del. Code Ann. tit. 14, § 414 (2007); Idaho Code Ann. § 33-1402

district and does not assure them the right to use the neighborhood school, thereby bucking the marked trend elsewhere toward micro-local assignment.

The widespread policy restricting the ability to assign students to a school outside their neighborhood is an indirect promotion of micro-localism. It fortifies the school—the micro-local—without instituting an entity to govern it and without awarding the school any powers. It establishes the individual school as a meaningful unit merely as the incidental result of recognizing parents' interest in sending their children there.

*b. Individual School Management*

Unlike the fortification of the neighborhood school, the second of the three reforms further localizing local government in education is direct. It involves the passage of control—over educational and hiring policies—from the local government, that is, the school district to the micro-local, that is, an independent school-based council. During the past decades many reformers advocated such reshaping with checked success: As a general rule the school board is still central in the management of education in America,<sup>73</sup> but change has occurred.

While nineteen states mandate school management by micro-local school councils elected by parents and teachers,<sup>74</sup> the powers states grant to these councils are mostly advisory. Only in two states are school

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(2014); 105 Ill. Comp. Stat. 5/10-21.3a (2012); Ohio Rev. Code Ann. § 3313.978 (LexisNexis 2013); S.D. Codified Laws § 13-28-15 (2004) (requiring the school board to “take into consideration” the “wishes of the parents”); Utah Code Ann. § 53A-2-213 (LexisNexis 2013). Indiana mandated open enrollment for Indianapolis alone, Ind. Code Ann. § 20-3.1-4-1 (West 1995), but repealed this statute in 2005. See Ind. Code Ann. § 20-3.1-1-1 to 20-3.1-15-1 (LexisNexis 2005). Twelve other states follow the federal No Child Left Behind Act guidelines applying plans to students in low-performing schools. Massachusetts grants the right to choose a school only to non-white students attending a school suffering “racial imbalance.” Mass. Gen. Laws ch. 71, § 37D (2012). Given *Parents Involved*, this provision's constitutionality is questionable. The Alabama Constitution authorizes the state legislature to assure parents the right to choose to send their child to a segregated school. Ala. Const. art. XIV, § 256. The constitutionality of the clause is questionable (at best), and a trial court has indeed found it to violate the Equal Protection Clause of the Fourteenth Amendment. *Ala. Coal. for Equity, Inc. v. Hunt*, Nos. CV-90-883-R, CV-91-0117-R, 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993).

<sup>73</sup> See William G. Howell, Introduction to *Besieged: School Boards and the Future of Education Politics* 1, 5–6 (William G. Howell ed., 2005) [hereinafter *Besieged*].

<sup>74</sup> For more data on individual states, see Jennifer Dounay, *Educ. Comm'n of the States, Site-Based Decisionmaking: State-Level Policies* 1 (2005), available at [www.ecs.org/html/Document.asp?chouseid=6113](http://www.ecs.org/html/Document.asp?chouseid=6113).

councils awarded crucial powers: Illinois,<sup>75</sup> which limits the application of its statute to Chicago,<sup>76</sup> and Kentucky.<sup>77</sup> Chicago's school councils—that is, micro-local governments—select school principals<sup>78</sup> and approve “improvement plan[s]” addressing staffing and curriculum concerns for the school.<sup>79</sup> Kentucky's school councils not only appoint principals but also determine the number of positions in each job classification at the school and play a role in filling those positions. Furthermore, they set policies dictating curriculum and the assignment of students to classes.<sup>80</sup>

Chicago and Kentucky are still outliers, but laws and practices in other parts of the country are moving in their direction. A number of other states now require by statute non-advisory school councils, though with limited powers.<sup>81</sup> In addition, a Louisiana statute that took effect less than a year ago empowers a majority of parents to remove their school from the district's control.<sup>82</sup> Several years earlier, the Boston School District, in its collective bargaining agreement with the Teachers Union, committed itself to maintaining school-based management by teachers and parents who control hiring, school plans, and certain components of budgeting.<sup>83</sup> The subsequent collective agreement, currently in effect,

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<sup>75</sup> 105 Ill. Comp. Stat. 5/34-2.1(a) (2012).

<sup>76</sup> *Id.* 5/34-1.

<sup>77</sup> Ky. Rev. Stat. Ann. § 160.345 (2) (LexisNexis 2009).

<sup>78</sup> 105 Ill. Comp. Stat. 5/34-2.3(1)(B)–(C).

<sup>79</sup> *Id.* 5/34-2.3(7), 2.4.

<sup>80</sup> Ky. Rev. Stat. Ann. § 160.345.

<sup>81</sup> In Hawaii a school council whose decision was overruled by the school principal can appeal all the way up to the State Board of Education. Haw. Rev. Stat. § 302A-1124(g) (2013). North Carolina's school improvement teams adopt school improvement plans governing the allocation of certain funds; the district must then abide by these, to some extent. N.C. Gen. Stat. § 115C-105.30 (2013). Colorado amended its law to explicitly require that the school principal take into account the school accountability committee's decisions when forming the state mandated “school performance plan.” Colo. Rev. Stat. § 22-11-403(1)(b) (2013). Texas now mandates the campus-level committee's approval of portions of the campus plan addressing staff development needs. Tex. Educ. Code Ann. § 11.253(e) (West 2012).

<sup>82</sup> La. Rev. Stat. Ann. § 17:10.5(F)(1)(a) (2013) (enabling a majority of parents to petition the State Board of Education to transfer control over the school from the relevant school district to the hands of a recovery school district). A school district's challenge to the provision's constitutionality was rejected. *Orleans Parish Sch. Bd. v. Pastorek*, 122 So. 3d 1106, 1116–17 (La. Ct. App. 2013).

<sup>83</sup> *Bos. Teachers Union & Bos. Sch. Comm., Collective Bargaining Agreement 2006–2010*, at 14–31 (2006). The agreement led to the establishment of a “School Site Council” in each Boston school. These councils' powers are an extension of the advisory powers that school councils, whose creation is mandatory throughout the state, hold under Mass. Gen. Laws ch. 71, § 59C (2012).

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expands further the role of such school councils in hiring.<sup>84</sup> All these recent reforms, varied as they are, indicate a growing trend toward micro-localism in school management.

*c. Challenging the District's Power to Close an Individual School*

As already noted, law traditionally respected school districts and their boundaries, not individual schools and their boundaries. Thus the latter could be abolished by the school district at its discretion: As long as the district is the governing unit in the education field, its exclusive power to close a school is uncontestable.<sup>85</sup> This ability to unilaterally obliterate the boundaries of the school has lately been called into question, and its erosion presents the third micro-local shift in education. This final move to further localize local government has not been proceeding, in this Article's terms, directly. Even states that directly instituted powerful individual school councils have not entrusted these councils with a meaningful role in school closing decisions.<sup>86</sup> But many states have cleared various openings for individual parents to intervene in the process, thereby promoting indirect micro-localism.

Since parents traditionally held no right to send their child to a specific school, they lacked standing to attack a district's decision to close the school that their child attended.<sup>87</sup> In several places, however, individual parents have lately been granted standing to challenge a district's decision to close their school. Delaware's Neighborhood School Plans Act of 2000 explicitly created such a private parental right of action.<sup>88</sup> Elsewhere, courts recognized parents' standing to challenge the district's power to close their school even while statutes remained silent. A Florida court ascribed its willingness to act in this fashion to the fact that par-

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<sup>84</sup> Bos. Teachers Union & Bos. Sch. Comm., Collective Bargaining Agreement 2010–2016, at 9–15 (2010), available at [http://btu.org/sites/default/files/Final\\_BTU\\_Contract\\_No\\_Index.pdf](http://btu.org/sites/default/files/Final_BTU_Contract_No_Index.pdf).

<sup>85</sup> See, e.g., 105 Ill. Comp. Stat. 5/10-21.3 (2012); *Tyska v. Bd. of Educ.*, 453 N.E.2d 1344, 1353 (Ill. App. Ct. 1983) (finding the board need not even provide reasons for its decision); see also Me. Rev. Stat. tit. 20-A §§ 4102, 1512 (2013) (establishing requirements for school closure, including voter approval—but by all district residents, not the specific school); Austin, Tex., Independent School District LDU 2011.02, CT(LOCAL)-X (2011) (authorizing the Board to decide on school closures).

<sup>86</sup> For example, even after mandating the establishment of influential school councils, Kentucky's law still empowers the school board to act unilaterally on such issues. Ky. Rev. Stat. Ann. § 160.290(1) (LexisNexis 2013).

<sup>87</sup> *Sanders v. Seattle Sch. Dist. No. 1*, 144 Wash. App. 1043 (Ct. App. 2008).

<sup>88</sup> Del. Code Ann. tit. 14, § 223 (2013).

ents are parties whose substantial interests were affected and thus “[i]t is anathema to us to conclude that no avenue of judicial relief is available to them.”<sup>89</sup> In other states, courts granted standing based on the state constitution’s guarantee of adequate education,<sup>90</sup> the state civil procedure code’s provision for challenging administrative actions,<sup>91</sup> the state’s environmental laws,<sup>92</sup> or with no reasoning at all.<sup>93</sup>

Relying on disparate legal grounds, all these states have strengthened—or rather, created—the parent’s right to maintain her relationship with the individual school within the local district. Parents’ empowerment to question the district’s closing of their school, like the other two reforms reviewed of mandated assignment to the neighborhood school and of independent school management, forcefully weakens the prerogatives of the local government in education law and replaces the government with the micro-local.

### *C. Examples of Further Localized Local Government: Historic Districts*

Education law is one prominent locus of substantial reforms further localizing local government. Another legal area where micro-localism has been aggressively progressing at the expense of traditional local governments is the law of historic preservation. The exploration of the reforms in this field, and their normative assessment which will follow in Part II, is vital. These reforms are situated in the vanguard of a broader drift in land use law away from centralized top-down planning led by the local government.<sup>94</sup>

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<sup>89</sup> Cortese v. Sch. Bd. of Palm Beach Cnty., 425 So. 2d 554, 555 n.2 (Fla. Dist. Ct. App. 1982).

<sup>90</sup> Walker v. Ark. State Bd. of Educ., 365 S.W.3d 899, 908 (Ark. 2010).

<sup>91</sup> Ferrer v. Quinones, 522 N.Y.S.2d 547, 548 (App. Div. 1987) (concluding that the school closure decision is not justiciable). The statute has since changed, so justiciability is probably no longer a barrier. E.g., Avery Parents’ Ass’n v. N.Y.C. Dep’t of Educ., 910 N.Y.S.2d 760, 2010 WL 1856017, at \*2 (Sup. Ct. Apr. 12, 2010) (unpublished table decision); see also Mulgrew v. Bd. of Educ., 906 N.Y.S.2d 9, 11 (App. Div. 2010) (striking down a board’s decision to close schools).

<sup>92</sup> San Lorenzo Valley Cmty. Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist., 44 Cal. Rptr. 3d 128, 142–44, 156–57 (Ct. App. 2006) (finding school closure decisions may have environmental impacts and thus may be governed by statute).

<sup>93</sup> McComas v. Bd. of Educ., 475 S.E.2d 280 (W. Va. 1996).

<sup>94</sup> For other examples of this retreat, see Vicki Been, Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?, 77 U. Chi. L. Rev. 5, 5–16 (2010); Daniel P. Selmi, The Contract Transformation in Land Use Regulation, 63 Stan. L. Rev. 591, 591–97 (2011).

*1. From Landmark Preservation to District Preservation*

Historic preservation ordinances are land use controls allowing for detailed regulation of the aesthetic environment. Following the adoption of such an ordinance, properties designated as historic landmarks or located in a historic district may not be demolished or even altered without the consent of the preservation commission.<sup>95</sup> Since the term “alter” is often construed liberally, owners’ ability to perform even trivial changes to such properties is strictly curtailed. For example, Boston’s Beacon Hill Architectural Commission not only disallows opening new windows or modifying existing ones in buildings located within that historic district, but also mandates the sole use of clear-paned, non-tinted glass; bans window blinds; prohibits the painting of masonry reveals in window openings; and requires that window grilles have pierced horizontal rails.<sup>96</sup>

The Beacon Hill historic district was established in 1955, a time when the entire nation boasted only ten or so other local preservation ordinances.<sup>97</sup> Preservation efforts originally did not protect districts, but rather targeted individual landmarks. The first major federal preservation legislation reflected this approach, as its title “The Historic Sites, Buildings, and Antiquities Act of 1935” indicates.<sup>98</sup> Four years earlier, the first historic district in America had already been established in Charleston, South Carolina.<sup>99</sup> Though a few cities emulated Charleston, for decades the emphasis of preservation law remained firmly placed on individual buildings. The shift to district protection occurred only during the past half-century. The National Historic Preservation Act of 1966 allowed listing historic districts, not just individual structures, on the Na-

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<sup>95</sup> See generally Sherry Hutt et al., *Heritage Resources Law: Protecting the Archaeological and Cultural Environment* 25 (1999) (describing how historic preservation ordinances function).

<sup>96</sup> Architectural Guidelines, Historic Beacon Hill Dist., [http://www.cityofboston.gov/environment/pdfs/beaconhill\\_guidelines.pdf](http://www.cityofboston.gov/environment/pdfs/beaconhill_guidelines.pdf) (last visited May 13, 2014); see also *Globe Newspaper Co. v. Beacon Hill Architectural Comm’n*, 659 N.E.2d 710, 712 (Mass. 1996) (approving Beacon Hill Architectural Commission’s decision to regulate news racks as an “exterior architectural feature” of a “structure” in the historic district (citation omitted) (internal quotation marks omitted)).

<sup>97</sup> Richard J. Roddewig, *Preparing a Historic Preservation Ordinance* 1–2 (1983).

<sup>98</sup> 16 U.S.C. §§ 461–467 (2012).

<sup>99</sup> Diane Lea, *America’s Preservation Ethos: A Tribute to Enduring Ideals*, Introduction to *A Richer Heritage: Historic Preservation in the Twenty-First Century* 1, 7 (Robert E. Stipe ed., 2003).

tional Register of Historic Places.<sup>100</sup> This move did not affect owners since National Register status is mostly symbolic.<sup>101</sup> However, the federal reform blazed a trail for states and localities, which soon thereafter commenced adopting ordinances recognizing historic districts. Today there are more than 2300 local historic preservation ordinances.<sup>102</sup>

## 2. *Different Models for Micro-Localism in Historic Districting*

Once preservation's focus shifts from individual buildings to entire districts, the question of whether and how to involve the particular district in the decision-making process arises. Zoning powers—which encompass the preservation authority—are normally delegated by the state to local governments.<sup>103</sup> Yet some local preservation ordinances now invite input from the micro-local district that can thereby supplement, or even replace, the local government as a key participant in the field. The decision-making processes employed throughout the nation can be situated along a continuum of models, reflecting varying degrees of micro-localism.

New York City represents the extreme pole of traditional local centralization. The city's Landmarks Preservation Commission designates areas as historic districts and determines applicable limitations.<sup>104</sup> The city's preservation ordinance does not empower individual residents or community groups to initiate, or interfere in, the process. The Commission does voluntarily solicit resident recommendations for designation,

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<sup>100</sup> 16 U.S.C. §§ 470, 470a(a)(1)(A).

<sup>101</sup> The actual legal effect of inclusion in the National Register is very limited. The sole requirement is that when federal, or federally funded, undertakings are adopted, their impact on the structure or district be taken into consideration. *Id.* § 470f.

<sup>102</sup> Local Preservation Laws, Nat'l Trust for Historic Pres., <http://www.preservationnation.org/information-center/law-and-policy/legal-resources/preservation-law-101/local-law/#.U3JAjyOZG> (last visited May 13, 2014).

<sup>103</sup> See, e.g., U.S. Dep't of Commerce, A Standard State Zoning Enabling Act 4–7 (rev. ed. 1926) (adopted by most states).

<sup>104</sup> N.Y.C., N.Y., Admin. Code § 25-303(a)(4) (2014). The City Council has the right to overturn commission regulations. *Id.* § 25-303(g)(2). Not all cities using this model award the council the right to overturn commission designation decisions. See, e.g., Phila., Pa., Code § 14-1000(2)(a) (2014). Elsewhere, designation decisions lie solely with the city council, and the commission only makes recommendations. E.g., Denver, Colo., Rev. Mun. Code § 30-4(10) (2014).



but the “request for evaluation” form it provides is unmistakably geared toward the candidacy of individual landmarks, not whole districts.<sup>105</sup>

Minimal micro-localism is found in Boston. As in New York, in the Boston model the historic district is created with no input from the district itself. In fact, Beacon Hill, mentioned above, was designated a historic district by the state, not even the city.<sup>106</sup> Other Boston historic districts were created by local city ordinance.<sup>107</sup> Unlike in New York, however, the local, citywide commission in Boston does not manage historic districts after they are designated. Instead, each of the nine historic districts is assigned its own Historic District Commission.<sup>108</sup> These micro-local governments adopt guidelines for alterations and must approve any exterior changes to structures located in their respective districts. Commissioners are volunteers nominated by neighborhood groups, professional organizations, or the Boston Landmarks Commission.

More radical micro-localism and weakening of traditional local governments occurred in cities that, contrary to New York and Boston, now involve residents in the historic designation process itself. Austin, Texas permits citizens to initiate the process by submitting a petition signed by the owners of fifty-one percent of the proposed district’s land.<sup>109</sup> Once the application is filed, the city’s Land Use Commission presents a recommendation to the City Council.<sup>110</sup> Despite their city’s relative embrace of micro-localism, Austin landowners are never entitled to have their district approved as a historic district: That decision is left to the Council’s sole discretion.<sup>111</sup> Furthermore, both the City Council and the Land Use Commission can initiate historic districting proposals independently.<sup>112</sup> In such cases district residents have no way of intervening

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<sup>105</sup> Request for Evaluation, N.Y.C. Landmarks Pres. Comm’n, [http://www.nyc.gov/html/lpc/downloads/pdf/forms/request\\_for\\_evaluation.pdf](http://www.nyc.gov/html/lpc/downloads/pdf/forms/request_for_evaluation.pdf) (last visited Mar. 9, 2014).

<sup>106</sup> 1955 Mass. Acts 513, 513–17; see also 1966 Mass. Acts 594, 594–600 (establishing the Back Bay District).

<sup>107</sup> E.g., Bos., Mass., Mun. Code § 7-3.1 (2013) (establishing the Bay Village Historic District).

<sup>108</sup> E.g., id. § 7-3.3 (establishing the Bay Village Historic District Commission).

<sup>109</sup> Austin, Tex., Code of Ordinances § 25-2-242(5) (2013).

<sup>110</sup> Id. § 25-2-282.

<sup>111</sup> Id. § 25-2-283.

<sup>112</sup> Id. § 25-2-242(1), (2). While the two most recent of Austin’s three historic preservation districts—Hyde Park and Castle Hill—were declared following local residents’ petitions, the first one—Harthan Street—was not. Hyde Park was designated by Ordinance No. 020131-20 (2002). On the resident initiative to designate Hyde Park, see Sarah Coppola, Effort Aims To Preserve Hyde Park’s Character, *Austin Statesman* (Nov. 14, 2010, 8:49 PM),

and blocking the designation. Thus micro-localism in Austin is not complete; nonetheless the Austin model represents a major move toward the micro-local since the scheme empowers district residents to launch the historic-districting process.

Some cities embrace micro-localism more wholeheartedly and actually divest the local government of traditional powers by granting residents those same intervention rights withheld from residents in the Austin model. Houston's process differs from Austin's in this one major respect. After the residents' application for recognition as a historic district is initiated, all owners in the designated district are sent letters along with cards to send back to the city's Archaeological and Historical Commission. Owners of sixty-seven percent of all tracts in the proposed district must express their support of the application for it to proceed.<sup>113</sup> Only if such a majority is found can the Commission decide to create the historic district.<sup>114</sup>

In the Houston model, the micro-local positive vote is a necessary condition for creating a historic district, but it is not a sufficient condition—the local level must approve the move. We can imagine schemes maximizing micro-localism by dispensing with this final requirement. Residents can inch closer to this result in cities that allow citizen ballot initiatives. For example, when the Seattle mayor supported replacing the Pike Place Market with new structures, citizens wrote a ballot initiative that was approved by voters in 1971, establishing a historic preservation zone in the area.<sup>115</sup> Residents thereby overrode the decision of the traditional local government. But the voters who made this call were not all Pike Place Market area residents: The initiative process in Seattle and elsewhere is almost always citywide.<sup>116</sup> Thus this course of action does

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<http://www.statesman.com/news/local/effort-aims-to-preserve-hyde-parks-character/nRS5r/>. A few months earlier, Castle Hill was designated by Ordinance No. 20100930-038. On the resident initiative to designate it, see Sarah Coppola, *Should Castle Hill Neighborhood Be Deemed a Historic District?*, *Austin Statesman* (June 8, 2010, 12:49 AM), <http://www.statesman.com/news/news/local/should-castle-hill-neighborhood-be-deemed-a-hist-1/nRtRc/>. For more on the Harthan Street designation, see Jean Kwon, *City Ready to Designate Some Neighborhoods Historic Districts*, *Austin Bus. J.* (Dec. 16, 2007, 11:00 PM), <http://www.bizjournals.com/austin/stories/2007/12/17/story9.html?page=all>.

<sup>113</sup> Hous., Tex., Code of Ordinances § 33-222.1(e)–(f) (2014).

<sup>114</sup> *Id.* § 33-225.

<sup>115</sup> Seattle, Wash., Ordinance No. 100475 (Dec. 1, 1971).

<sup>116</sup> For data on the availability of the initiative mechanism in cities, see M. Dane Waters, *Initiative and Referendum Almanac* 36 (2003). In order to allow a sub-city initiative in North

not embody the utmost form of micro-localism, which would leave the designation decision to the historic district's residents alone.

Although states and cities have yet to go to this extreme, many of them have, as seen in this Section, espoused some degree of micro-localism in historic districting. They have done so either directly or indirectly. Direct micro-localization occurs when the local citywide preservation commission is replaced with a neighborhood council. Indirect micro-localization occurs when neighborhood residents are invited to individually participate through a one-time vote in the designation process. Such voter participation varies in its potency from an initiation right to a veto power.

## II. THE MERITS AND DEMERITS OF THE NEW LOCAL

Part I identified instances where micro-local units were empowered at the expense of traditional local governments in American law. Significantly, it illustrated that, due to the two diverse methods—direct and indirect—of nurturing micro-localism, the phenomenon is much more widespread than previously recognized. This unchecked expansion of the micro-local is attributable to the reigning normative presumption among legislatures, judges, and scholars that further localized local government is inherently better—that is to say, more efficient and more democratic—government. This presumption is often guided by little more than an instinctive belief that smaller is more beautiful.<sup>117</sup>

Yet the legal system must assess the transformative legal reforms wrought by micro-localism in a more sophisticated manner. Accordingly, this Part, forming the Article's core, will provide a comprehensive theory of micro-localism to determine whether specific reforms further localizing local government actually promote economic efficiency and democratic participation. These two frameworks—efficiency and participation—will be treated separately. The discussion of each will unfold as follows. First, I will briefly present scholars' conclusion that the relevant normative value can almost always justify micro-local reforms and explain why this reflexive conclusion is wrong. Second, I will develop a rigorous mode of analysis to discern whether a given micro-local reform actually promotes that normative value: I will isolate the theoretical

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River, Chicago to expand mental health services, as described in the Introduction, a special act of the state legislature was needed. 405 Ill. Comp. Stat. 22/15 (2013).

<sup>117</sup> See supra notes 33–38 and accompanying text.

framework's true requirements for beneficial further localized local government. Third, in order to illustrate the utility of the theoretical framework thus developed, I will employ it to evaluate the two examples of micro-localism presented in Part I.

*A. Efficiency*

*1. The Belief that Micro-Localism Inevitably Promotes Efficiency: Its Basis and Flaw*

Small-scale government's appeal to economic-minded commentators and policymakers is grounded in the function of government in the provision of public goods. Individuals are mostly unable to buy particular public goods—such as policing or street lighting—the way they purchase particular private goods—such as cars or clothing. But they *can* shop for municipalities—by moving between them—as famously argued by the economist Charles Tiebout.<sup>118</sup> Municipalities offer individuals a package of public goods—such as policing and street lighting—in exchange for a price embodied in local taxation. To draw individuals into their spheres and to keep them there, localities, very much like private providers of cars or clothing, proffer the product that best corresponds to individuals' preferences regarding quality, quantity, and price. Consequently, the market for public goods comes to be efficient in the same manner—that is, through competition—as the market for private goods, despite the inherent difference between public and private goods.<sup>119</sup>

From this observation that regular market dynamics operate in the market for public goods, an inference ensues that the larger the number of independent local units providing these goods—that is, the larger the number of competitors—the greater the efficiency gains. Just as individuals are likelier to find the car to their liking if a larger number of car manufacturers are present, they are likelier to find the locality that best fits their preferences for public services if there are more localities available.<sup>120</sup> Accordingly, it is common to argue that to promote efficiency, powers over public services' provision should be delegated to a burgeoning number of local governments and even further localized lo-

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<sup>118</sup> Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 418 (1956).

<sup>119</sup> Id. at 422–24.

<sup>120</sup> Id. at 418.

cal governments.<sup>121</sup> If instead of one city providing one package of public services, residents encounter plenty of micro-localities offering diverse packages, the likelihood that residents find the package best fitting their preferences grows. This insight animates the slew of scholarly calls for further localized local government.<sup>122</sup>

These scholars, however, are often acting upon superficial and misleading premises. They mistakenly treat as a hypothesis the prediction that residents' ability to join or leave a governing unit in the pursuit of satisfying their public service preferences (that is, residents' "exit" option) will generate efficiency gains. But Tiebout, who first developed this insight, was not putting forward a hypothesis. Rather, his argument was "pure theory": an economic model "shorn of all 'real-life' complicating factors in order to highlight a particular causal or potentially causal element."<sup>123</sup> For this purpose, Tiebout detailed very restrictive assumptions in whose presence—and only in whose presence—the model's prediction of efficiency gains through government fragmentation can hold.

Therefore, the task for an efficiency-minded analyst approaching a specific local governance problem is to ask to what extent the assumptions of the Tiebout model are present in that case.<sup>124</sup> If a lawmaker finds reason to believe that in the particular circumstances the model's assumptions are expected to exist, she can suppose that empowerment of a

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<sup>121</sup> E.g., Alex Anas, *The Costs and Benefits of Fragmented Metropolitan Governance and the New Regionalist Policies*, 2 *Plan. & Markets* 6, 6–7 (1999), available at <http://www-pam.usc.edu/volume2/v2i1a2s1.html>; Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 *Mich. L. Rev.* 277, 297 (2007); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 *Nw. U. L. Rev.* 1057, 1072 (2007); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. Chi. L. Rev.* 1484, 1493 (1987) (book review) (detailing the advantages of decentralized decision making).

<sup>122</sup> See, e.g., William A. Fischel, *The Homevoter Hypothesis* 285–87 (2001); Allison Dunham, *Property, City Planning, and Liberty*, in *Law and Land: Anglo-American Planning Practice* 28, 42–43 (Charles M. Haar ed., 1964); Ellickson, *supra* note 27, at 77–89; Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 *N.Y.U. L. Rev.* 190, 200 (2001); Nelson, *supra* note 27, at 828–29; Roger B. Parks & Ronald J. Oakerson, *Comparative Metropolitan Organization: Service Production and Governance Structures in St. Louis (MO) and Allegheny County (PA)*, 23 *Publius* 19, 28–29 (1993); Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 *U. Pa. L. Rev.* 607, 649–50 (1997).

<sup>123</sup> Keith Dowding et al., *Tiebout: A Survey of the Empirical Literature*, 31 *Urb. Stud.* 767, 767 (1994).

<sup>124</sup> For a similar claim, see Clayton P. Gillette, *The Tendency to Exceed Optimal Jurisdictional Boundaries*, in *The Tiebout Model at Fifty* 264, 265 (William A. Fischel ed., 2006).

smaller-scale unit will lead to efficient results in the provision of the specific public good. If, on the other hand, she thinks that the model's assumptions are improbable in the particular case, she should have no cause to surmise that smaller-scale government will promote efficiency; indeed, she should fear that it would decrease efficiency.

Writers embracing micro-localism in its different forms have so far failed to engage this indispensable analysis. They ignore the assumptions of Tiebout's model and simply state that the proliferation of ever-smaller governments promotes efficient results.<sup>125</sup> This position is plainly wrong. In the ensuing pages I will advance legal discourse past this simplistic stance by explaining how lawmakers should ascertain whether micro-localism is capable of actually promoting efficiency in any specific case. Since the test must be whether in the case at hand the model's assumptions are probable, I will examine each of Tiebout's assumptions—mobility, knowledge, no externalities, and efficient production—and identify the necessary inquiries to determine its presence in a given instance where micro-localism is contemplated.

## *2. An Efficiency Theory for Appraising Micro-Localism: The Conditions Efficiency Requires*

### *a. Mobility and Employment*

The model foreseeing efficient results thanks to small-scale government—the “Tiebout model”—relies on the moves individuals make between small governments in pursuit of the public services they desire. It assumes that “[c]onsumer-voters are fully mobile” and that there are no “[r]estrictions due to employment opportunities.”<sup>126</sup> These assumptions enable the model to predict that individuals will freely pick a residence based solely on the quality, quantity, and price of the public goods the local governing entity supplies, and that the locality will therefore adjust its public services in accordance with individuals' preferences. But needless to say, absolute freedom to move in search of a desired public service—uninhibited by transaction costs or job considerations—never exists. Hence it is always necessary to compare the intensity of the barriers to residential moves with the potency of the desire to consume the specific public service necessitating a move. The quality, quantity, and price of public services are factors an individual ponders, in addition to

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<sup>125</sup> See sources cited *supra* notes 121–22.

<sup>126</sup> Tiebout, *supra* note 118, at 419.

job considerations and relocation costs, when choosing a locality. The Tiebout model's predictive power is stronger when job and relocation impediments to moving are minor and the lure of a public service is major. For our purposes, therefore, we seek to determine whether entrusting the provision of a service to a micro-local unit, rather than a local one, dilutes the effects of mobility costs and job constraints on individuals' residential choices while bolstering the effects of tastes for that public service. In spite of common—and understandable—beliefs, more often than not micro-localism does not produce this desired result.

Naturally, the costs of, and job barriers to, switching governmental providers are lowered when the relevant government is smaller. Once a service is provided micro-locally, the resident is no longer required to move between local entities in order to swap the quantity, quality, and price of the public good. If she is unhappy with their current levels, she need only move within the local entity. Such a move is cheaper by definition, a fact which probably accounts for the otherwise unsubstantiated predictions reported earlier that further localized government will inevitably generate better regulation of public goods providers through residential moves.<sup>127</sup>

Still, the uncontestable fact that movement between providers is facilitated when local government is further localized cannot salvage these simplistic predictions. A decrease in the costs of moving between suppliers of a public good does not inescapably lead to increased residential moves in pursuit of satisfying preferences regarding that public good. The decrease in moving costs might be accompanied by a decrease in the fervor of preferences for the public good, negating, and even outweighing, the effect of diminished moving costs. Further localizing local government generates this result. That is to say, a micro-local reform may indeed lower the barriers to moves between public service providers, but it often also lessens the incentive to embark on such moves, and consequently micro-local governments are unlikely to receive accurate market signals through residential moves.

The reason is the special nature of such moves, which sets them apart from most other “shopping” excursions. The house a resident picks

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<sup>127</sup> Studies do show that shorter moves are more likely to be affected by fiscal considerations. See, e.g., Keith Dowding & Thanos Mergoupis, Fragmentation, Fiscal Mobility, and Efficiency, 65 *J. Pol.* 1190, 1197–98 (2003) (researching fragmented metropolitan areas and finding that moves within the metropolitan area are more likely to be affected by levels of public services and taxes than moves outside the metropolitan area).

whenever she moves, as well as the government (local or micro-local) she thereby joins, is a bundled product. A house has many attributes: size, appearance, immediately surrounding area, neighbors, transportation options, nearby commercial facilities, police and firefighting services, available schools, etc. Regardless of the ease with which she can move in search of a house, the resident cannot choose one house that fits perfectly her preferences regarding each and every attribute: The options will never be numerous enough. Thus even the fully mobile resident must compromise when shopping for a residence, and focus solely on certain salient attributes of the house.<sup>128</sup>

Services provided micro-locally might lack this salience required to entice the resident to move. The efficiency promise of further localized governments, as seen in Subsection II.A.1, is the added choices made possible through subtler differentiation between governments. But subtlety is, unfortunately, the opposite of salience. If differences between various micro-local service providers center around one service, they might not suffice to induce a move—the move's cheapness notwithstanding. Furthermore, the same factors rendering inter-micro-local moves cheap may also render them unnecessary. Thanks to decreasing transportation costs, services historically consumed only at the residence's vicinity can now be sought elsewhere within the city at little cost. Thus individuals do not assign much import to the quality of these services as provided within the specific micro-locality when picking a residence.<sup>129</sup> The result is that many micro-local services are of limited salience for residents shopping for a house.

In most cases, therefore, individuals are unlikely to transmit their preferences with respect to public services' provision by choosing a residence served by a particular micro-local provider. Such signaling, as required for micro-localism to be efficient, will occur only in a minority of cases where the enjoyment of the relevant public service remains, even nowadays, both important and dependent on the residence's specific location within the metropolitan area—for example, transportation or maybe playgrounds—and accordingly salient for a resident picking a

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<sup>128</sup> See Lee Anne Fennel, *The Unbounded Home: Property Values Beyond Property Lines* 38 (2009).

<sup>129</sup> This view was promoted by an important postwar study of families' reasons for moving from Philadelphia neighborhoods, showing that the major concerns related solely to housing, especially living space and structural conditions. Peter H. Rossi, *Why Families Move* 175 (1955).



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home.<sup>130</sup> Then, and only then, can the relocating resident be genuinely said to have chosen the government because of the particular public service it provides.

Accordingly, in light of the Tiebout model's first assumption, to discern in a given case whether micro-local government is likely to generate efficiency gains, an empirical question must be asked. The policymaker must inquire whether the service undergoing a micro-local reform falls within the category of public services whose provision is salient enough, and tied closely enough to the house's location, to generate residential moves.

*b. Knowledge*

For residents to efficiently sort themselves into localized units supplying public services in accordance with their preferences, it is not enough that they freely move between units in pursuit of these preferences. For those moves to reflect preferences regarding public services the residents must be informed about public services' variation in quantity and quality between units. Tiebout's assumption to this effect is much scrutinized.<sup>131</sup> For our purposes the relevant inquiry is whether residents gain better knowledge of a public service once the government providing it is further localized. Usually, they do not.

Micro-localism tends to overburden residents' ability to consume and process information regarding public services, for two reasons. First, most mainstream sources of information on local public services—such

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<sup>130</sup> In response to the claim that in modern urban agglomerations the local environment—that is, the neighborhood—no longer holds any importance to residents, many researchers have argued that the neighborhood is a “community of limited liability”: not vital for all interests and attachments, but still important for realizing certain interests that are tied to a specific territory. Jerald R. Herting & Avery M. Guest, *Components of Satisfaction with Local Areas in the Metropolis*, 26 *Soc. Q.* 99, 101 (1985); see also W.A.V. Clark, *Human Migration* 38–51 (1986) (describing how sociologists agree that a house's immediate vicinity is today determinative for realizing some, albeit not most, of the resident's preferences); Morris Janowitz, *The Community Press in an Urban Setting* 7 (2d ed. 1967) (reviewing the postwar literature about the place of the neighborhood in the growing modern metropolis and concluding that “[t]he large city involves an intricate balance between the relative use of local and non-local facilities, and a complex of social institutions for integrating the individual into his ‘residential’ community as well as his ‘employment’ community”); Robert J. Chaskin, *Perspectives on Neighborhood and Community: A Review of the Literature*, 71 *Soc. Serv. Rev.* 521, 527–28 (1997).

<sup>131</sup> See, e.g., Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington, DC*, in *The Tiebout Model at Fifty*, supra note 124, at 101, 105–06.

as media outlets, chambers of commerce, and visitors' bureaus—operate on the city or metropolitan level and hence cannot be trusted to supply up-to-date and accurate information about each micro-locality in their domain. Second, any addition of a governing layer multiplies information costs. When all services are provided by one entity—say, the city—prospective residents only need to discern service variations between cities.<sup>132</sup> Once some services are provided by an added unit—say, a neighborhood—prospective residents must engage in additional and mentally taxing intra-city investigation. Residents, research shows, are prone to make errors when required to identify the roles of different governments to which they are subject.<sup>133</sup>

Only in very specific circumstances do individuals avoid these mistakes.<sup>134</sup> In instances where informal information sources can come to their assistance, residents may overcome the challenges of gathering and processing information regarding fragmented governments. When available, and accessible to outsiders, neighborhood sources such as gossip, newsletters, and micro-local websites are helpful. Often an even more effective informal indicator of the quality of services provided by a micro-locality is the identity of other residents. These residents' character aids a potential entrant in two ways. First, confronted with neighbors similar to herself, she may assume they share her preferences and will assure provision of services she seeks.<sup>135</sup> Second, if the prospective resident thinks current residents are “of high quality,” she may believe that the neighborhood is the locus of better services.<sup>136</sup>

Consequently, even though she may still lack concrete knowledge of the role played by a micro-locality in providing specific services, a resi-

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<sup>132</sup> Gillette, *supra* note 122, at 204–05 (applying this argument to the similar context of accountability when regional bodies are empowered).

<sup>133</sup> See, e.g., Stephen L. Percy et al., *Revisiting Tiebout: Moving Rationales and Interjurisdictional Relocation*, 25 *Publius* 1, 16 (1995) (finding that residents tend to overestimate the city's, as compared to other local governments', share of the property-tax burden).

<sup>134</sup> E.g., Dowding & Mergoupis, *supra* note 127, at 1198–99 (discovering a direct relationship between the coverage area of certain public service providers and the distance of moves within the metropolitan area encompassing them, indicating that residents may correctly identify the geographical reach of the public provider of a service they desire and pick their residence accordingly).

<sup>135</sup> For a similar idea regarding the role of the few “comparison shoppers” (consumers who research different providers) in the context of contract disclosure regimes, see Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 *U. Pa. L. Rev.* 630, 630–32, 649 (1979).

<sup>136</sup> See *infra* Subsection II.A.2.d, exploring the concept of “peer-effects.”

dent may pick the micro-locality that meets her service desires—when she can identify and follow peer residents. These dynamics, which satisfy the Tiebout model's knowledge assumption and are thus necessary for generating efficient outcomes through micro-localism, are probable only when the signals conveyed by peer residents or other informal sources are accurate. Therefore, with regard to each service whose provision is to be further localized, the policymaker must ask whether informal information generators are present and likely to be trustworthy.

*c. No Externalities*

If residents can freely move between localized units in pursuit of the public services they desire, and if they are informed of these diverse services' natures, they will join the government providing public services that meet their desires. This does not imply, however, that said government services would be provided in socially—as opposed to solely individually—desirable levels. If the government's provision of services generates effects felt outside that government's sphere of control, those effects do not influence residents' decisions to move into that sphere, and hence such effects will not be considered in the government's decision-making process. As a result, the services' production levels will not be efficient—even if they reflect the preferences of residents. For example, when aggressive policing in area *A* reduces crime in an independent area *B*, the added benefit to area *B* does not make area *A* more attractive to potential residents, and thus area *A* has no incentive to increase its investment in policing. In this case a service is socially underproduced since its positive external effects are not taken into account by the providing government. The counter scenario unfolds when the service generates negative external effects and is therefore overproduced. For example, when extensive use of area *A*'s water infrastructure damages the natural environment of an independent area *B*, area *A* is not less attractive to potential residents due to these effects, and hence it lacks the incentive to cut back on water use.<sup>137</sup>

Thus, for fragmentation to achieve efficient results as the Tiebout model predicts, goods' local production must not carry such positive or negative externalities.<sup>138</sup> As the area covered by the producing unit be-

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<sup>137</sup> See generally Paul A. Samuelson & William D. Nordhaus, *Economics* 751 (15th ed. 1995) (defining externalities).

<sup>138</sup> Tiebout, *supra* note 118, at 419.

comes smaller—that is, when local government is further localized—the likelihood of external effects naturally increases. Hence the Tiebout model’s no externalities assumption casts serious doubt on micro-localism’s ability to promote efficient public service provision.

Micro-localism can only promote efficiency when externalities are limited or can be internalized. Two inquiries must thus be made before advocating micro-localism: To what extent will the micro-locality’s decisions produce externalities, and to what extent might the governmental structure to which the micro-locality is appended facilitate negotiation to internalize such externalities.

The first investigation is easier to address. A policymaker must discern the scale of externalities—in terms of intensity and geographical scope—generated by the specific public good’s production. As noted, a smaller-scale government’s decisions are inherently likelier to induce effects outside its sphere. Still, public goods are not all of identical scale, and different services require differently sized governmental spheres to capture their full effects.<sup>139</sup> Thus, if the service creates only a few large-scale impacts, a micro-local government can provide it efficiently. On the other hand, a small-scale government cannot efficiently provide services portending broad effects, unless the micro-local reform can satisfy a second test.

This second investigation is harder to conduct. Even if the action of one government affects other governments, the acting unit may still incorporate those effects into its decision-making process because of bargaining with those other units. Thus, in the examples presented above, area *B* may pay area *A* to subsidize aggressive police services from which it benefits; area *A* may be forced to compensate area *B* for environmental degradation its water projects cause. Such bargaining between units leading to socially efficient goods provision despite externalities (“Coasian bargaining”) is often blocked by transaction costs, such as the difficulty and expense of negotiation between areas *A* and *B* or either area’s ability to evade negotiations.<sup>140</sup> Accordingly, the test for micro-localism ought to be whether institutional arrangements mitigate transac-

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<sup>139</sup> Vincent Ostrom et al., *The Organization of Government in Metropolitan Areas: A Theoretical Inquiry*, 55 *Am. Pol. Sci. Rev.* 831, 833 (1961).

<sup>140</sup> R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1, 15–19 (1960). For a recent review of the notion that transaction costs hinder efficient results, in accordance with Coase’s insight, see Lee Anne Fennell, *The Problem of Resource Access*, 126 *Harv. L. Rev.* 1471 (2013).

tion costs and facilitate bargaining between micro-local units. This test is satisfied when a larger traditional local government is maintained and granted powers to serve as a forum, and lay down rules, for bargaining between micro-localities.

The absence of externalities assumption tends to become less valid when local government is further localized. Therefore, before pursuing a micro-local reform in any service's provision, the policymaker must inquire whether, for that specific service, externalities are not pronounced or if they can be internalized through bargaining between micro-localities.

*d. Efficient Production*

This Section has shown that if residents freely move among localized providers of a public service of whose attributes they are fully informed and whose production does not generate externalities, levels of production will approximate socially desirable levels. Nonetheless, even in that scenario efficiency will still not be assured. It is possible that those desired levels of production are attained at a cost higher than necessary. In more formal terms, efficiency has two components: allocative efficiency and productive efficiency. Fragmentation's potentialities, presented in Tiebout's model and explored so far in this Section, focus on allocative efficiency: The larger the number of people receiving services they desire, the more efficient the allocation.<sup>141</sup> Productive efficiency deals with the relationship between inputs and outputs: The higher the output per unit of input (that is, the greater the amount of the public good produced by the investment of the same amount of money), the more efficient the production.<sup>142</sup> Tiebout's model assumes that its predicted gains in allocative efficiency will not be offset by losses in productive efficiency. This assumption is put in doubt whenever local government is further localized since micro-localism undermines two factors that contribute to efficient production: "economies of scale" and "peer-effects."<sup>143</sup>

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<sup>141</sup> Dowding & Mergoupis, *supra* note 127, at 1190.

<sup>142</sup> *Id.*

<sup>143</sup> On economies of scale, see generally Ronald J. Oakerson, *Governing Local Public Economies* 16 (1999) ("[P]rovision-side criteria lead to the establishment of provision units, both small and large, that are not well matched to economies of scale for particular services and service-components."). On peer-effects and consumers as co-producers, see, e.g., Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 *Tex. L. Rev.* 1, 12–23 (2001), and sources cited therein.

First, productive efficiency benefits from economies of scale. As the number of products or scope of the service expands, the cost per unit of product or service decreases since fixed costs are spread over a larger number of output units. For example, operating one forensic lab serving two cities' police forces is cheaper than operating two smaller labs, one for each police force. Micro-localism by definition undercuts production on a larger scale, and thus it is often ill-advised.

Often, but not always. The reason this is not always the case is that production on a larger scale does not always generate savings. Each service is optimally produced on a different scale. Some public services greatly exploit economies of scale; others do not stand to meaningfully benefit from them. For example, capital-intensive goods, such as forensic labs, are likelier to enjoy more substantial economies of scale than labor-intensive services, such as street policing.<sup>144</sup> While the former involve major infrastructure expenses prior to initial production and small marginal costs per added unit produced thereafter, the latter tend to exhibit the reverse and thus expanded service areas do not lower costs. Thus, in every case lawmakers must observe the particular service and ask whether further localized government represents the optimal size for its production; an affirmative finding is more probable if the service is labor-intensive.

Second, efficient production can profit from peer-effects. There is ample evidence that the characteristics of the residents themselves play a central role in public outputs. Thus the presence of a specific individual in a community affects the cost of providing local services, a phenomenon labeled peer-effects or "peer-group effects."<sup>145</sup> More specifically, research shows that individuals differ in their abilities to contribute to public services' production, in addition to their differences in tastes for those services' consumption.<sup>146</sup> There is also no reason to assume that the skills distribution is independent of the preferences distribution—that is to say, it would be a mistake to discount the possibility that people who share the same preferences are also identically skilled.<sup>147</sup> As a

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<sup>144</sup> See Oakerson, *supra* note 143, at 16.

<sup>145</sup> Robert M. Schwab & Wallace E. Oates, Community Composition and the Provision of Local Public Goods, 44 *J. Pub. Econ.* 217, 217–20 (1991).

<sup>146</sup> E.g., Wallace E. Oates, On Local Finance and the Tiebout Model, 71 *Am. Econ. Rev.* 93, 95–97 (1981).

<sup>147</sup> The earliest article examining the disparate ways in which different manners of interplay between the distribution of tastes and skills will affect the prediction of the Tiebout

result, micro-localities that are effective in satisfying residents' tastes for public services, thanks to their ability to attract only populations sharing a desire for those services, might be supplying the services at a higher cost, because the skills of those populations are homogeneous.

An illustration is useful. Imagine a population of 100 drivers, 50 of whom are prone to recklessness. The population must be divided into two equally sized communities, tasked with providing traffic safety (drivers do not cross community lines). Separating the two groups based on recklessness will entail low traffic safety production costs in the cautious drivers' community ( $X$ ), and high costs in the reckless community ( $Y$ ). Mingling the two populations, creating two heterogeneous communities, leads to traffic safety production costs in both ( $N, M$ ) higher than  $X$  but lower than  $Y$ . There is no assurance, however, that the aggregate costs for both heterogeneous communities ( $N+M$ ) equal the aggregate production costs in the homogeneous communities ( $X+Y$ ). It is possible that when residing next to, and driving alongside, cautious drivers, reckless drivers behave better; that is, peer-effects might be at play, lowering policing costs on the whole.

If so, the population's heterogeneity has led to productive efficiency gains. But what of allocative efficiency? It possibly decreased: Reckless and cautious drivers can entertain different safety preferences. The former may cherish safety less than the latter. But when forced to live together both groups must compromise and consume identical amounts of safety. Often enough, then, a trade-off between productive and allocative efficiency is inevitable: People of different types are needed for socially efficient production of public goods, but when people of different types consume public goods together, efficient consumption is impaired. The conflict is resolved in favor of mixed units if either the peer-effects advantage from mixing is sufficiently large or the allocative efficiency loss from mixing is sufficiently small.<sup>148</sup>

The comparison of these two values is complicated by the dynamics of their interaction. On the one hand, households with differing preferences may react in ways thwarting the productive efficiency gains promised by mixing. Those with "the strongest preferences for the public good will not contribute [to production] as much as *they* would like eve-

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model is Eitan Berglas, Distribution of Tastes and Skills and the Provision of Local Public Goods, 6 J. Pub. Econ. 409 (1976).

<sup>148</sup> Jan K. Brueckner & Kangoh Lee, Club Theory with a Peer-Group Effect, 19 Regional Sci. & Urb. Econ. 399, 403–04, 409–10 (1989).

ryone to contribute—because the others (quite justifiably) would not reciprocate.”<sup>149</sup> In our example, cautious drivers may choose to drive less cautiously. In an even more extreme reaction, the strong-preference households may withdraw from participating in public production and consumption, turning to private alternatives.<sup>150</sup> In our example, cautious drivers may band together to construct separate private roads.

On the other hand, the diverging preferences of households sharing a community may be reconciled over time, thereby diminishing the losses in allocative efficiency generated by mixing. Norms and culture mold preferences and sometimes force them to change.<sup>151</sup> As they live with cautious drivers and consume the same safety amounts, reckless drivers may end with a preference for safety higher than the one with which they entered the community (concurrently, cautious drivers’ appetite for safety may be dampened).<sup>152</sup>

When such temporal shifts are accounted for, the calculation of the relative costs and benefits in allocative and productive efficiency may paint the heterogeneous unit as socially desirable. In these cases, micro-localism will undermine efficiency. Conversely, when the calculation leads to the conclusion that peer-effects are limited, micro-localism’s promotion of allocative efficiency through fragmentation will translate into overall efficiency gains. The calculation of the relative role of peer-effects is thus requisite for an informed determination as to the efficiency of a micro-local reform. This calculation supplements the exploration into the operation of economies of scale in the specific case, which was similarly required by considerations of productive efficiency. To verify that a specific reform further localizing local government will buck micro-localism’s general tendency to threaten productive efficiency, the policymaker must be persuaded that economies of scale would not be upended and that the loss of beneficial peer-effects would be small.

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<sup>149</sup> Robert Sugden, *Reciprocity: The Supply of Public Goods Through Voluntary Contributions*, 94 *Econ. J.* 772, 783 (1984).

<sup>150</sup> Charles T. Clotfelter, *The Private Life of Public Economics*, 59 *S. Econ. J.* 579, 584–88 (1993).

<sup>151</sup> See Gary S. Becker & Kevin M. Murphy, *Social Economics: Market Behavior in a Social Environment* 8–11 (2000).

<sup>152</sup> This would be an example of the phenomenon commonly known as rising expectations. George C. Galster, *Homeowners and Neighborhood Reinvestment* 96 (1987) (“Of course, if one consistently exceeds the aspiration/need level established earlier, this level might be subsequently revised upward: the phenomenon of rising expectations.”).



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*e. Conclusion: The Questions We Should Be Asking*

Further localized government is presented and championed as guaranteeing efficiency gains by virtue of expanded inter-governmental competition. Micro-localism can indeed provide efficiency gains in this manner—but *only if* certain criteria are met. Combining the insights of this Section's different segments, the conclusion is that the addition of (1) governmental options for the provision of a public good will promote efficiency if (2) residents freely move among the new micro-local providers in pursuit of the public good (3) of whose attributes they are informed and whose production (4) does not generate effects they do not experience or (5) become wasteful due to government's diminished scale. The analysis of each of these necessary assumptions isolates an inquiry (or several connected inquiries) that must be satisfied before a micro-local reform is declared efficient:

1. Does further localized local government create more service options for mobile residents to explore?
2. Is the public service whose provision will be further localized salient enough in a resident's choice of home to affect moves?
3. How likely are residents to accurately assess the service's quality and identify the responsible government? Can informal information sources help?
4. Will the micro-local activity generate externalities? Of what scale? Is there a structure for micro-localities to bargain and internalize those externalities?
5. To what extent is the public service's production subject to economies of scale and peer-effects?

*3. Examples*

The questions generated by the efficiency theory of micro-localism can be applied to any reform further localizing local government to appraise its advisability. As illustrations, I now return to the instances of micro-localism introduced in Part I—in education and historic districting—and see how they fare when faced with these questions.

*a. Applying the Efficiency Theory of Micro-Localism to Education Law Reforms*

As it is elsewhere, further localized local government in education law, surveyed in Section I.B, is justified by promises of efficiency gains accruing through the expanded competition that fragmentation enables. Supposedly, micro-local education provision will allow parents to more easily find the public education provider best fitting their preferences.<sup>153</sup> But, based on the preceding analysis, this prediction only holds if the micro-local reform creates more education options, among which residents freely move, in an informed manner, without thereby generating externalities, or threats to productive efficiency.<sup>154</sup> To see whether these conditions are met, the micro-local education reforms must be subjected to the five questions just synthesized. As I now proceed to show, the move toward micro-localism in education fails these criteria.

The major flaw afflicting current micro-localism in education is exposed by the very first efficiency inquiry. The introduction of new units providing education services can promote competition and resident sorting in accordance with residents' preferences when it presents residents with more options. Increasing the number of school districts—that is, traditional local units—in one geographic area furnishes this benefit.<sup>155</sup> Recognizing and fortifying units operating below the school district through the most popular of micro-local reforms in education does not, and hence it cannot promote efficiency. The culprit is the overall structure of American education law reviewed in Section I.B. In current law, the district board controls all district schools, which must adhere to the curriculum, hiring, and other policies it dictates.<sup>156</sup> Even if the micro-local boundaries between those schools are fortified—that is, even if the district can no longer assign students to schools outside their neighborhood—all the schools must still comply with the district's unitary policies. Only if the individual school is empowered to independently adopt policies can differentiation between small-scale education providers be

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<sup>153</sup> E.g., Dennis Epple & Richard Romano, *Neighborhood Schools, Choice, and the Distribution of Educational Benefits*, in *The Economics of School Choice* 227, 233–36 (Caroline M. Hoxby ed., 2003) (offering a model to show that neighborhood schools produce effective sorting).

<sup>154</sup> See *supra* Subsection II.A.2.

<sup>155</sup> See Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 *Am. Econ. Rev.* 1209, 1211 (2000).

<sup>156</sup> See *supra* notes 53–57, 73 and accompanying text.

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offered. Yet, as seen in Subsection I.B.2, such direct micro-local reforms in education remain relatively rare. Instead, currently prevalent reforms imbue the neighborhood school's boundaries with meaning indirectly, in assignment and closing decisions. Thereby, micro-localism establishes more units—protected neighborhood schools—without creating more options—schools differing in the services they offer.

In the absence of direct micro-local reforms, educational policies remain district dictated and thus uniform across individual, micro-local schools. In such an environment, the neighborhood school, although transformed into a protected legal entity through micro-local reforms in student assignment and school closure decisions, has no power to differentiate itself from other schools. Such micro-local schooling units, enjoying no freedom to distinguish their services, cannot engage in competition over residents, as the preliminary efficiency inquiry requires. Therefore, most current practices of further localizing local government in education cannot promote efficiency.

The analysis need only proceed with respect to those few instances where variation between schools is generated through direct micro-local reforms empowering individual school councils to independently set their school's course. In these cases—namely, as seen in Subsection I.B.2.b, Chicago and Kentucky—micro-localism passes the preliminary efficiency inquiry and efficiency gains are possible through inter-school competition. For these gains to materialize, however, all the Tiebout model's assumptions must be present: Residents must move between the newly differentiated micro-local schools, following informed preferences, without generating externalities, or undercutting efficient production of education. The answers to the four remaining questions of the efficiency framework illustrate that often these assumptions are implausible.

To discern the presence of the first Tiebout assumption, the framework asks whether variation in provision of the public service—education—impacts residents' mobility. In picking a house, a resident picks schools. But to what extent do preferences regarding the latter affect the former? Surveys show that among the considerations impacting residential moves, the quality of schools is a subordinate consideration, piling in comparison to the neighborhood's social and physical attrib-

utes, as well as to the quality of other local services.<sup>157</sup> These findings are not surprising. The house is a bundled product: Numerous attributes and goods are wrapped in a house.<sup>158</sup> Many attributes tend to be more salient for a potential resident than the school. For example, the house's design, the neighbors, the street, and the area's safety may be more salient since in comparative terms, education is a service that can easily be consumed outside the neighborhood. Potential residents may plan to rely on private schools or predict a successful transfer application to another public school in the district.<sup>159</sup>

Thus, when a resident picks a house in the neighborhood, she is not unequivocally stating her endorsement of the neighborhood school, as necessary for efficient micro-localism in light of the second efficiency inquiry. The resident may choose a house served by a school that is not her first choice since she finds the house's other, more salient, attributes appealing. Consequently, her residence choice does not transmit accurate signals regarding school preferences. To foster effective signaling of school preferences, the choice of a school must be unbundled from the choice of residence. This goal is achieved through open enrollment—the antithesis of micro-local reforms in student assignment. Open enrollment allows the parent to send her child to any school within the district, freeing her from the obligation to balance her school preference with other preferences implicated in the choice of a house. She chooses a school, not a house, and thus the choice will reflect preferences with regard to schools alone.<sup>160</sup> Therefore, micro-localism in school assignment is not only incapable, alone, of promoting efficiency, as clarified by the first efficiency inquiry; the second inquiry concludes that it actually undermines the potential of other micro-local reforms—in school management—to do so. These reforms can advance efficiency only if accompanied by school, rather than neighborhood, choice.

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<sup>157</sup> Herting & Guest, *supra* note 130, at 107–08; R.S. Oropesa, *Neighborhood Associations, Political Repertoires and Neighborhood Exits*, 32 *Soc. Persp.* 435, 442–47 (1989).

<sup>158</sup> See Lee Anne Fennell, *Contracting Communities*, 2004 *U. Ill. L. Rev.* 829, 873–75.

<sup>159</sup> E.g., Austin, Tex. Indep. Sch. Dist., Update 93, *Admissions: Intradistrict Transfers and Classroom Assignments* (2012) (detailing procedures for intra-district transfers).

<sup>160</sup> That choice remains constrained by transportation costs: Very few states mandating intra-district choice sponsor student transportation, and even then, funding is often only made available in certain cases. E.g., Cal. Educ. Code § 35160.5(b)(4) (Deering 2013) (explaining that funding is only available if required and financed by federal law); Ohio Rev. Code Ann. § 3314.09 (LexisNexis 2013).

Yet even if this condition is met, to serve efficiency, school choice must be informed—as mandated by the third efficiency inquiry. Splintering the unitary school district into micro-local units inevitably adds information costs that parents must endure: They must compare not only school districts, but also individual schools. One study found that processing information becomes very difficult once parents' choices go beyond the consolidated district.<sup>161</sup> Furthermore, recent empirical analysis suggests that parents who most actively shop for education are also the likeliest to incorrectly estimate school performance.<sup>162</sup> Active parents hence cannot be relied upon as information sources that will then steer less active, follower parents.<sup>163</sup> Thus informal information sources are insufficient, and the third efficiency inquiry engenders grave concerns regarding educational micro-localism. The only way to alleviate these concerns is to preserve the district's supervisory power and have it oversee the publication of comparative information about each school.<sup>164</sup>

Still, additional doubts regarding further localizing local government in education are raised by the fourth efficiency question—highlighting externalities. Education generates many externalities: The “full social rate of return to an additional year of schooling could be twice the private economic rates of return” (that is, benefits to the individual consumer of education).<sup>165</sup> Some of these public benefits are felt within the classroom and school: One student's better education facilitates her

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<sup>161</sup> See Pew Charitable Trusts, Philadelphia Research Initiative, Philadelphia's Changing Schools and What Parents Want from Them 1–3, 8 (2010) (indicating that when the options available to parents in the city were neighborhood, charter, magnet, and private schools, many of them found it hard to attain and process the information regarding the different options).

<sup>162</sup> Buckley & Schneider, *supra* note 131, at 102–03.

<sup>163</sup> For the prediction that such “marginal consumers” will regulate the market, particularly since they are likely to have high incomes and so communities desire to entice them to move in, see Paul Teske et al., Establishing the Micro Foundations of a Macro Theory: Information, Movers, and the Competitive Local Market for Public Goods, 87 *Am. Pol. Sci. Rev.* 702, 704, 707–10 (1993).

<sup>164</sup> For example, in Kentucky every school must submit to the state a report card, made public, focusing on its academic attainments. Schools also need to provide descriptions of their other attributes, including those pertaining to non-academic achievement, learning environment, and parental involvement. Ky. Rev. Stat. Ann. § 158.6453(20)(a) (LexisNexis 2009).

<sup>165</sup> Barbara L. Wolfe & Robert H. Haveman, Social and Nonmarket Benefits from Education in an Advanced Economy, *in* Education in the 21st Century 97, 118–19 (Yolanda K. Kodrzycki ed., 2002).

classmates' learning.<sup>166</sup> Others accrue to the neighborhood: Education inculcates "behavior norms" in neighbors' children.<sup>167</sup> Other benefits are felt locally: Education reduces crime<sup>168</sup> and promotes participation.<sup>169</sup> Still others impact the region: Education levels predict a metropolitan area's success.<sup>170</sup> Finally, education generates some externalities that are experienced by society as a whole: Schooling is associated with lower probabilities of receiving welfare benefits,<sup>171</sup> with technological development,<sup>172</sup> and with economic growth.<sup>173</sup> Perhaps most fundamentally, education promotes a "stable and democratic society."<sup>174</sup>

The more far-reaching among such externalities necessitate supervision by the largest-scale government legally permissible. For example, decisions to hire unqualified teachers, to not teach sciences, or to not admit children with weaker backgrounds carry major externalities felt by broader society.<sup>175</sup> Therefore, reforms cannot entrust such decisions to micro-local school councils. The power of larger-scale traditional governments to manage the externalities of such micro-local assignment and

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<sup>166</sup> See *infra* notes 181–83 and accompanying text.

<sup>167</sup> Burton A. Weisbrod, Education and Investment in Human Capital, 70 *J. Pol. Econ.* 106, 118 (1962).

<sup>168</sup> See Isaac Ehrlich, On the Relation Between Education and Crime, *in* Education, Income, and Human Behavior 313, 334–35 (F. Thomas Juster ed., 1975).

<sup>169</sup> E.g., Seth M. Hauser, Education, Ability and Civic Engagement in the Contemporary United States, 29 *Soc. Sci. Res.* 556, 579–81 (2000).

<sup>170</sup> Edward Glaeser, *Triumph of the City* 253 (2011).

<sup>171</sup> Chong-Bum An et al., Teen Out-of-Wedlock Births and Welfare Receipt: The Role of Childhood Events and Economic Circumstances, 75 *Rev. Econ. & Stat.* 195, 206–07 (1993) (reporting a correlation between a mother's education level and a daughter's likelihood of teen out-of-wedlock pregnancy, and thus her eligibility for welfare support); Orley Ashenfelter & John Ham, Education, Unemployment, and Earnings, 87 *J. Pol. Econ.* S99, S114–15 (1979) (finding that schooling reduces the incidence of unemployment).

<sup>172</sup> See Gregory D. Wozniak, Human Capital, Information, and the Early Adoption of New Technology, 22 *J. Hum. Resources* 101, 101–02 (1987).

<sup>173</sup> Richard R. Nelson, Recent Exercises in Growth Accounting: New Understanding or Dead End?, 63 *Am. Econ. Rev.* 462, 468 (1973).

<sup>174</sup> Milton Friedman, *Capitalism and Freedom* 86 (1962).

<sup>175</sup> The struggles to equalize school funding across district lines teach that, left to act on their own, education units will not bargain among themselves to assure that each internalizes education's effects. In the financing cases, interference from above (the state level) was necessary to assure that weaker school districts received necessary subsidies to invest in education and produce positive externalities. E.g., *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 1181–82 (Ill. 1996); *Serrano v. Priest*, 487 P.2d 1241, 1244–48 (Cal. 1971); see also Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* (2010) (exploring the effect of state level litigation and legislation on the equalization of school funding across district lines in New Jersey and Kentucky).

management decisions must be preserved. The state should, for example, set the list of approved teachers and required study areas, and the local district should stop education's under-consumption by weaker residents.<sup>176</sup> Concurrently, externalities contained within the smaller sphere—namely, within the classroom, school or neighborhood—can be managed by the micro-local entity. Decisions respecting dress code, community involvement in the school, selection of teachers from those deemed qualified by the larger-scaled government, or of teaching methods from those pre-approved by that government, have few far-reaching externalities and can be entrusted to the micro-local individual school.<sup>177</sup> As these examples show, the fourth efficiency inquiry—regarding externalities and their internalization—indicates that micro-local school councils' powers must be capped and regulated. To be efficient, micro-localism in education must emphasize the district's supervisory role over the individual school. It must not isolate the individual school.

This conclusion is strengthened when productive efficiency is considered—as required by the fifth and final efficiency inquiry, which highlights economies of scale and peer-effects. It is true that the former, economies of scale, are normally exhausted early in the production of education because education is more labor-intensive than capital-intensive.<sup>178</sup> Furthermore, education may be a case of “diseconomies of scale”: Some, though not all, studies show that large classes and schools provide less effective education.<sup>179</sup> Hence, at first glance the inquiry respecting economies of scale in production appears to endorse micro-localism in education.

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<sup>176</sup> The power-sharing arrangements that most current school-based management schemes implement promote the internalization of still other externalities: They allow for flexibility in budgeting, hiring, and curriculum, but within a district-set framework. For example, in Chicago, the district intervenes to attend to struggling schools' financial shortcomings. Archon Fung, *Empowered Participation* 90 (2004).

<sup>177</sup> In Kentucky, for example, the principal and school council select personnel from a list of approved applicants submitted by the superintendent. Ky. Rev. Stat. Ann. § 160.345(2)(h)(1) (LexisNexis 2009).

<sup>178</sup> See William F. Fox, *Reviewing Economies of Size in Education*, 6 *J. Educ. Fin.* 273, 285–86 (1981) (“[P]er pupil school costs appear to be characterized by a U-shaped average cost curve. Size economies do exist over a limited range of student populations.”).

<sup>179</sup> For an overview of this debate, see Susan L. Averett & Michele C. McLennan, *Exploring the Effect of Class Size on Student Achievement: What Have We Learned Over the Past Two Decades?*, in *International Handbook on the Economics of Education* 329, 329 (Geraint Johnes & Jill Johnes eds., 2004).

It is important, however, to distinguish the two entities whose size is relevant for economies of scale in production of education: the educational facility and the administrative body. While smaller classes and schools arguably generate gains, smaller managing districts inarguably generate losses. For example, operating one administrative team supervising all schools in the district is cheaper than subjecting each school to a separate team.<sup>180</sup> The consolidated team saves employment and operation costs and enjoys expanded expertise. Similarly, it is cheaper for one district to offer a special educational program (for example, a foreign language of limited popularity) made available to all its schools, than to have each school operate that program independently. Since these and similar services that the administrative body provides—as opposed to those offered within the teaching arena proper—are often more capital- than labor-intensive, they benefit from economies of scale. Micro-localism in education concerns itself with further localizing the local administrative body, not with reducing the size of classes or schools. Thus, it presents a threat to such economies of scale that might otherwise reduce certain costs associated with the provision of education services.

Micro-localism further compromises productive efficiency in another fashion: It checks peer-effects. Education is the quintessential service impacted by peer-effects—by the consumers' own character. As one scholar noted, “the social composition of the student body is more highly related to achievement, independently of the student's own social background, than is any school factor.”<sup>181</sup> Studies show substantial welfare gains from socioeconomic integration. Introducing weaker students into middle-class schools greatly improves those students' achievements,<sup>182</sup> without depressing middle-class students' achievements.<sup>183</sup> Since geographical boundaries track socio-economic lines,<sup>184</sup> sanctification of school boundaries, achieved through micro-localism in student assignment and school closure decisions, forsakes integration and its peer-effects. It thereby causes social welfare losses. Any micro-local re-

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<sup>180</sup> See Christopher R. Berry, *School District Consolidation and Student Outcomes: Does Size Matter?*, in *Besieged*, supra note 73, at 56, 76–77.

<sup>181</sup> James S. Coleman, *Equality and Achievement in Education* 119 (1990).

<sup>182</sup> James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 *Yale L.J.* 2043, 2106 (2002).

<sup>183</sup> Richard D. Kahlenberg, *All Together Now: Creating Middle-Class Schools Through Public School Choice* 38–42 (2001).

<sup>184</sup> See Ryan & Heise, supra note 182, at 2093–96.



form must be careful to preserve the boundaries and supervisory powers of the local level since, thanks to its larger size, the latter is more likely to be able to promote integration and its attendant gains in productive efficiency.

This final element of the efficiency framework's fifth and last question reinforces the inescapable conclusion regarding micro-localism in education reached through the application of the efficiency framework. The two micro-local reforms promoting the neighborhood school—changing assignment policies and enabling parents to contest school closures—always fail the efficiency analysis. Standing alone, they do not create more varied options as necessary for gains through competition. Accompanied by direct micro-local reforms instituting school councils, which do generate variation, they still fall short, since mobility costs limit parents' ability to choose neighborhoods. Maintaining the primacy of local, rather than micro-local, boundaries lowers such costs, allows dissemination of information necessary for effective resident sorting, enables better internalization of externalities, and permits economies of scale and exploitation of peer-effects. Thus, the least popular of the reforms further localizing local government in education—direct creation of school councils—when implemented as part of a district-wide open enrollment program (that is, when decoupled from the micro-local reforms instituting neighborhood schools), is the lone micro-local education policy promising efficiency gains. And even with respect to this reform, the promise solely holds if the key supervisory role of the district is conserved.

*b. Applying the Efficiency Theory of Micro-Localism to Historic Districting Ordinances*

Like micro-localism in education, reforms further localizing local government in land use are urged in order to attain efficiency gains through expanded competition over residents between growing numbers of governments regulating land uses.<sup>185</sup> Yet, such projections must be put to closer scrutiny, since, as this Section has shown, they can only materialize if the micro-local reforms create more land use options that

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<sup>185</sup> For a prominent and forceful example of this claim, see Robert H. Nelson, *Zoning and Property Rights* 173–82 (1977) (advocating the creation of a market for zoning rights based on collective rights held by the neighborhood, which will replace the city in controlling neighborhood zoning).

will motivate residents to move among them, in an informed manner, without generating effects that they cannot experience or threats to productive efficiency.<sup>186</sup> Unlike in education, micro-localism in historic districting can meet these conditions, a conclusion established by subjecting the reforms in the field to the five questions synthesized to unpack the conditions.

As required by the first efficiency inquiry, historic districts create more options within the city. By protecting unique physical characteristics of the designated area against homogenizing trends in design and use, attaching the historic district status to a specific area within a city expands the aesthetic choices available to city residents and thus offers greater potential for effective sorting based on preferences. The second efficiency inquiry, regarding the likelihood that these differences between further localized local units instigate moves, also points at the potential of micro-local historic districting to promote efficiency. A neighborhood's physical appearance is one of the most powerful factors affecting moves, coming second only to neighborhood social attributes.<sup>187</sup> The ability to enjoy a neighborhood's look is inescapably tied to the house's location and thus aesthetic preferences are particularly salient when a resident chooses a home. Historic districting, by generating diverse environments, enables resident sorting based on residents' aesthetic preferences, as is necessary for efficiency.

Efficiency further requires, in light of the framework's third question, that residents be able to accurately discern the further localized unit's potential to satisfy those preferences. Historic districts pass this knowledge test, since preservation laws' effects are extremely visible. A stroll suffices for visitors to appreciate a neighborhood's unique physical attributes, the legal standing of which can then be easily confirmed. Cities publicize their historic districts, and thus individuals, especially potential homebuyers, are on notice of the restricted area's existence.<sup>188</sup>

Based on the replies to the first three efficiency inquiries reviewed so far, the physical variety that historic districts foster should be endorsed

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<sup>186</sup> See *supra* Subsection II.A.2.

<sup>187</sup> Herting & Guest, *supra* note 130, at 107–08; Oropesa, *supra* note 157, at 442–47.

<sup>188</sup> E.g., Austin, Tex., Code of Ordinances § 25-2-357 (2013) (mandating the designation of historic districts on city zoning map); N.Y.C., N.Y., Admin. Code tit. 25, ch. 3, § 25-303(k) (2013) (stating that for every relevant property and district, preservation status must be recorded in the land register).

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as it creates options, among which residents are likely to move in an informed manner. None of these inquiries, however, suggest that the establishment and regulation of these districts ought to be micro-localized; until this point, the analysis did not indicate that district residents should be involved in the designation process. All that was established was that designating certain subareas within the city as historic districts can promote Tieboutian efficiency. The grounds on which to lay the claim for micro-local involvement in the districting process are found in the externalities investigation, required by the fourth efficiency inquiry.

Historic preservation ordinances are premised upon the proposition that buildings' appearances generate important externalities. Many of these are contained within the district where preservation is ordered. Neighbors reap preservation's benefits: They enjoy the resultant pleasant environment as well as any surge in property values.<sup>189</sup> Concurrently, they carry preservation's costs: Their freedom to develop their properties is curtailed by the restrictions imposed by the preservation ordinance. Since district residents, rather than citizens of the wider local community, thereby bear most of preservation's benefits and costs, Professor Thomas Merrill recently endorsed a New Haven preservation ordinance granting neighbors veto powers: an ordinance that follows, in its key aspects, the Houston model from Section I.C.<sup>190</sup>

However, this pro-micro-localism stance is born of considering some of preservation's externalities, as necessitated by the fourth efficiency inquiry, but not others. It ignores effects of historic district designation, or lack thereof, felt outside the district. Though their magnitude fluctuates, these externalities exist whenever a district is considered for recognition.<sup>191</sup> Neighborhoods may hold cultural values that render preservation important to society as a whole. For example, had residents of Beacon Hill, a neighborhood mentioned in Section I.C and steeped in historic and cultural values of national significance, been allowed to block preservation, society would have suffered. Moreover, besides the benefits that preservation generates for national society, it is advanta-

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<sup>189</sup> Edward L. Glaeser, *Preservation Follies*, City J., Spring 2010, at 4–5, available at [http://www.city-journal.org/2010/20\\_2\\_preservation-follies.html](http://www.city-journal.org/2010/20_2_preservation-follies.html).

<sup>190</sup> Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. Chi. L. Rev. 275, 276, 307, 310 (2010).

<sup>191</sup> Thus New Haven's ordinance explains that these districts "promote the educational, cultural, and general welfare of the public through their continued existence." New Haven, Conn., Zoning Ordinance art. VI, § 54 (1970).

geous to the specific city containing the district because it will attract tourists and new residents.<sup>192</sup>

While thereby reaping some of preservation's fruits, the wider city is also often detrimentally affected by a new historic district. Historic districts depress development by restricting growth. Not unrelatedly, they carry exclusionary effects. Preservation ordinances limit buildings' quantity, character, and size. Thence they curb housing supply, push prices up, and block the entrance of lower-income residents.<sup>193</sup>

Therefore, an externalities analysis indicates that preservation decisions must not be left to the sole discretion of residents. True, a micro-local reform ushering in residents' involvement has benefits. Since residents endure most of the decision's effects, they are the best discerners of those effects and should have a say in the process. Yet, as broader effects are involved, the traditional, larger-scale government—the city—must be ready to intervene. The Houston model wisely reserves for the city a veto over a micro-local decision creating a historic district, thereby allowing the consideration of historic districting's negative externalities. The Houston model does not go far enough to deal with preservation's externalities, though, for it does not allow the contemplation of the positive externalities of historic designation: It fails to grant the city a veto to override a residents' decision *against* preservation. A better model, I suggest, in light of the efficiency framework's externalities inquiry, authorizes the city to preserve an area despite a disapproving micro-local decision.

Still, even in this suggested model, the micro-local, neighborhood vote should not be rendered meaningless. District residents, as noted, experience preservation's effects more keenly than residents elsewhere. To close this gap and verify that a city override of the micro-local decision is grounded in a serious exploration of costs and benefits, the city override must be passed by supermajority vote of the city council, following a detailed recommendation by the zoning commission.<sup>194</sup>

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<sup>192</sup> Dallas, for example, lists among its historic districts' many purposes their ability "to strengthen the economy of the city" as well as "to protect and enhance the city's attraction to tourists and visitors." Dall., Tex., City Code art. IV, § 51A-4.501(a)(2), (10) (2013).

<sup>193</sup> Glaeser, *supra* note 189, at 4.

<sup>194</sup> Such supermajority procedures are not unheard of in this and similar contexts. In Chicago, if fifty-one percent of owners in a proposed landmark district express written objection to its designation, at least six of the nine members of the city's landmarks commission must vote to approve it. Chi., Ill., Mun. Code art. XVII, § 2-120-690 (2013). In Dallas, adoption of an ordinance establishing a conservation district (not to be confused with historic districts)

As this discussion of the fourth efficiency inquiry exemplifies, externalities analysis is front and center when land use controls are considered. Conversely, productive efficiency—subject of the fifth and final efficiency inquiry—is of limited relevance. Peer-effects are irrelevant in this context since current residents do not produce the historic district's aesthetic benefit. Economies of scale are of minimal relevance; small historic districts serve a different function than larger ones, but they do serve a function (as even individual landmarks do). The only pertinent consideration is the inferior expertise of a commission managing one district.<sup>195</sup> Such a further localized local government cannot draw on the cumulative experience of a larger-scale commission that manages many historic districts. Still, guidance from city authorities can assure that differences between the effectiveness of micro-local and local commissions are bridged. In addition, the city can insist that some members of the micro-local commission have backgrounds in architecture, arts, history, or real estate.<sup>196</sup>

This Section's efficiency theory indicates that micro-localism in historic districting is normatively desirable. Historic districting generates diverse environments between which residents are likely to complete informed moves, thereby sorting themselves to maximize preference satisfaction. Residents internalize most costs and benefits generated by a historic district and thus should play key roles in its designation and management, as envisioned by further localized local governments put in place in many cities. Still, since some externalities extend beyond the district, the larger local government should be allowed to intervene under certain conditions as detailed above.

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normally requires an affirmative majority vote of present city council members. However, if a written protest has been signed by the owners of twenty percent of either the land within the proposed district or within two hundred feet of its boundaries, a favorable vote of three quarters of all council members is required. Dall., Tex., City Code art. IV, § 51A-4.505(g)(6) (2013).

<sup>195</sup> See Rebecca Lubens & Julia Miller, *Protecting Older Neighborhoods Through Conservation District Programs*, 21 *Preservation L. Rep.* 1001, 1015, 1039 (2002).

<sup>196</sup> Many localities require that local commissions' members be experts. One reason is that to be eligible for certain federal preservation grants and assistance programs provided under 16 U.S.C. § 470a (2012), localities must have review commissions of professional members. 16 U.S.C. § 470w(13)(A) (2012). Seattle diversifies its Pike Place Market Historical District Commission. The Commission consists of two property owners, two local merchants, two residents, but also two members of the Seattle Chapter of the American Institute of Architects and two members of an arts organization. Seattle, Wash., Mun. Code § 25.24.030 (1971).

#### 4. Conclusion

Calls for micro-localism are often cloaked in efficiency terms. Since competition promotes efficiency, breaking up unitary governments appears promising. But a sophisticated efficiency theory points at the simplistic nature of this reflexive embrace of micro-localism. Micro-localism can promote competition and the resultant satisfaction of residents' preferences, but only when meeting certain conditions; it must generate differentiation in service provision, which will be salient enough to entice informed residential moves without producing grave externalities or upending economies of scale and peer-effects. The two examples on which this Article expounds illustrate that this theory generates revelatory—and distinct—policy recommendations for different micro-local reforms. On the one hand, in education, indirect micro-localism promoted through widespread reforms in assignment policies fails the theory's conditions. Direct micro-local reforms in the field, empowering individual school councils, can increase efficiency, but only if accompanied by open enrollment and conservation of the district's authority. On the other hand, micro-localism in historic districting, by inviting neighborhood input, advances efficiency, as long as the larger-scale local government's power to intervene in specified circumstances is maintained.

#### B. Participation

##### 1. *The Belief that Micro-Localism Inevitably Promotes Participation: Its Basis and Flaw*

Efficiency, explored so far in this Part of the Article, is not the only normative value employed to justify micro-localism. A traditional good associated with small-scale government is democratic participation. Indeed, limited-sized government may be a prerequisite for individual participation in political life. This notion is of esteemed provenance. A defining element in traditional republicanism,<sup>197</sup> it engendered early doubts regarding the tenability of a continental republic.<sup>198</sup> More recently, fur-

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<sup>197</sup> See, e.g., Letter from Thomas Jefferson to Joseph C. Cabell, Esq. (Feb. 2, 1816), in 14 *The Writings of Thomas Jefferson* 417, 422–23 (Albert Ellery Bergh ed., 1907).

<sup>198</sup> David W. Carrithers, *Democratic and Aristocratic Republics: Ancient and Modern*, in *Montesquieu's Science of Politics* 109, 127 (David W. Carrithers et al. eds., 2001) (“[I]t is the nature of a republic to have only a small territory. Otherwise it can hardly subsist.” (quoting Montesquieu)). On the reliance of anti-federalists on such arguments in their opposition

ther localized governance has been celebrated as a panacea for modern democracy's ailments.<sup>199</sup> Today's citizen encounters difficulty in having her voice meaningfully heard on the federal or state levels,<sup>200</sup> and given the extraordinary growth of cities, the local level cannot serve her much better.<sup>201</sup> Further localized local governments are pressed as democracy's last resort and only hope.<sup>202</sup>

This argument was prominently expressed, for example, in a foreword to the *Harvard Law Review* written by Professor Heather Gerken, who urged "federalism-all-the-way-down."<sup>203</sup> She sought to promote the recognition of non-city entities within states—a category encompassing this Article's micro-localities—as important cogs in the federal machinery.<sup>204</sup> Justifying this advocacy of further localized local governments, she claimed that such entities provide avenues for participation by voices unheard in larger-scale governments.<sup>205</sup> Therefore, they promote "minority rule"—the ability of "national minorities to constitute local majorities"—which is how federalism sustains participatory democracy.<sup>206</sup>

Heeding Gerken's appeal, the following entities should enter our conversation of federalism: the neighbors allowed to block public housing projects;<sup>207</sup> the minority-controlled school council firing majority teach-

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to the proposed federal constitution, see, for example, Carey McWilliams, *The Anti-Federalists, Representation, and Party*, 84 *Nw. U. L. Rev.* 12, 24–26 (1989).

<sup>199</sup> See, e.g., Hannah Arendt, *On Revolution* 283 (1963); Robert A. Dahl, *The City in the Future of Democracy*, 61 *Am. Pol. Sci. Rev.* 953, 967 (1967).

<sup>200</sup> See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 *Sup. Ct. Rev.* 341, 402.

<sup>201</sup> Dahl, *supra* note 199, at 968; Ellickson, *supra* note 27, at 84–89 (arguing that small, block-level governments are preferable to city-level governments because, unlike the latter, they are scaled to the size of closely knit communities and thereby allow meaningful citizen involvement and monitoring of government).

<sup>202</sup> See, e.g., Benjamin R. Barber, *Strong Democracy* 267–73 (1984); Stephen L. Elkin, *City and Regime in the American Republic* 171–72, 179, 182 (1987); David Morris & Karl Hess, *Neighborhood Power* 97, 99, 104–06 (1975).

<sup>203</sup> Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 *Harv. L. Rev.* 4, 8 (2010).

<sup>204</sup> *Id.* at 7–8, 22–25.

<sup>205</sup> *Id.* at 7–8.

<sup>206</sup> *Id.* at 11–12.

<sup>207</sup> *Walker v. City of Mesquite*, 169 F.3d 973, 978, 988 (5th Cir. 1999) (empowering owners to challenge a remedial order to desegregate public housing by constructing projects in their neighborhood).

ers;<sup>208</sup> the planner who, through command over independent special districts, reinvented New York City's urban landscape;<sup>209</sup> and the community board meeting where two residents cofounded an association that eventually established a successful park.<sup>210</sup> Do all these instances represent minority rule? Do they all promote its values?

The equation of democratization with decentralization is common. It is intuitive. Unfortunately, it is also simplistic. The pattern is reminiscent of that encountered when micro-localism's promise of efficiency was explored. Calls for further localized local governments under participation's banner ignore major empirical and theoretical questions. As the preceding paragraph's list of examples tentatively illustrates, and as this Section will methodically establish, before invoking democracy to justify a micro-local reform, we must know whether the reform will enable citizens' political participation; whether the participation opportunities thus created will increase participation rates; and whether enhanced participation will advance the two social benefits that writers have traditionally ascribed to participation<sup>211</sup>—promotion of a notion of “the public” or production of policies better reflecting the preferences of citizens. These four factors will be analyzed separately in order to isolate the inquiries for ascertaining the presence of each factor in a given case.

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<sup>208</sup> New York's teachers' strike of 1968 was sparked by the decision of the recently created school council in largely black Ocean Hill-Brownsville in Brooklyn to fire unionized white teachers. Jerald E. Podair, *The Strike That Changed New York* 1, 5, 104–05 (2002).

<sup>209</sup> Famously, Robert Moses hovered for decades between the city and state levels as the most powerful—yet never elected—official designing the city's future. Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* 15–17, 19 (1974).

<sup>210</sup> The Friends of the High Line association's advocacy led to the saving of the elevated train rail in western Manhattan and its conversion into a park (the “High Line”). See generally Joshua David & Robert Hammond, *High Line* (2011).

<sup>211</sup> For similar categorizations of participation's social benefits, see, e.g., Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1503 (1988); Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, 9 *Pol. Theory* 327, 327, 331–33 (1981); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1541–42, 1555–57 (1988).



## *2. A Participation Theory for Appraising Micro-Localism: The Conditions Participation Requires*

### *a. Meaningful Political Devolution as Opposed to Administrative Reform*

The assertion that all instances of further localized local government enable meaningful “minority rule,”<sup>212</sup> or citizen empowerment more generally, is strikingly naïve. Any observer of governmental structures would note the major difference between political and administrative decentralization. Political decentralization entails assigning decision-making authority to a separate, smaller government accountable to citizens; administrative decentralization is merely an internal management process whereby municipal authorities organize smaller service areas, such as neighborhood offices of the city’s licensing department, which are staffed by city bureaucrats.<sup>213</sup>

Such administrative micro-localism does not engage citizens. For micro-localism to serve participation, it must count a political feature. And that feature must be more than symbolic. The mantra “citizen participation” can obscure practices where political participation “mean[s] nothing more” than “attending scores of meetings that have no significant role in making decisions that matter.”<sup>214</sup> If residents view their interests as thusly unaddressed by local politics, local politics degenerate. The outcome is that, as vividly put by H. G. Wells discussing early twentieth-century England, “[l]ocal politics remain . . . more and more in the hands of the dwindling section of people whose interests really are circumscribed by the locality. These are usually the small local tradesmen, the local building trade, sometimes a doctor and always a solicitor.”<sup>215</sup> For micro-local politics, this is doubly true—as the failed American ex-

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<sup>212</sup> Gerken, *supra* note 203, at 11.

<sup>213</sup> New York City, for example, has “district service cabinets.” N.Y.C., N.Y., Charter ch. 69, § 2701(d) (2004). City agencies must organize their service delivery districts to be conterminous with city-delineated community districts and designate an official to serve on the district cabinet. *Id.* §§ 2704(e), 2705(a)(1). In contrast, ch. 70, § 2800(a), (d)(2), of the Charter creates advisory neighborhood boards. Planning scholars thus distinguish “subarea planning” or “community planning” (administrative) from “neighborhood planning” or “community-based planning” (political). Barry Checkoway, Two Types of Planning in Neighborhoods, 3 *J. Plan. Educ. & Res.* 102, 102 (1984).

<sup>214</sup> Tom Angotti, *New York for Sale* 29 (2008). For a taxonomy of planning reforms and their different levels of actual citizen participation, see Sherry R. Arnstein, A Ladder of Citizen Participation, 35 *J. Am. Inst. Planners* 216, 217 (1969).

<sup>215</sup> H. G. Wells, *Mankind in the Making* 407–08 (1903).

perience with neighborhood councils in the 1960s and 1970s shows.<sup>216</sup> Micro-localism can only engage residents in participatory politics if real political powers, pertaining to issues that “matter,” are delegated to them.

*b. Size and Participation*

For micro-localism to spur participation, the delegation of significant political decision-making powers to residents is a necessary condition. It is not, however, a sufficient condition. The question of whether citizens will choose to participate in the new, micro-local political forum remains. Traditional calls for further localized forums gloss over this question. Thanks to the recent works of political scientists, a reliable answer is available. At first glance, quantitative works bear out the old assumption: *Controlling for all other variables*, there is an inverse relationship between participation and size—average participation rates decline in larger places.<sup>217</sup> The reason is that residents in larger places are “much less likely to be mobilized by friends or neighbors.”<sup>218</sup>

Unfortunately, this finding still cannot support the embrace of further localized local government in the name of increased participation. For in contemporary America, *all other variables are not controlled*; in our cities, smaller political units do *not* stimulate political participation. Metropolitan fragmentation in America is associated with extreme racial and economic segregation, which has a chilling effect on participation that more than counteracts smaller size’s virtues in enticing participation.<sup>219</sup> Researchers found that homogeneity—political, economic, or racial—diminishes political participation—for example, voting, attending board meetings, or contacting officials.<sup>220</sup> People are roused to political action when they perceive their interests as threatened, and in homogenous

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<sup>216</sup> See Nathan Glazer, *The Limits of Social Policy* 147 (1988) (discussing the limited success of 1960s and 1970s initiatives for more participatory and decentralized local government and social service provision); Douglas Yates, *Neighborhood Democracy* 159 (1973) (concluding, based on the experience of the neighborhood movement of the late 1960s, that decentralization “will not achieve the town meeting ideal of participatory democracy unless the community involved is extremely small”).

<sup>217</sup> J. Eric Oliver, *City Size and Civic Involvement in Metropolitan America*, 94 *Am. Pol. Sci. Rev.* 361, 364–65 (2000).

<sup>218</sup> *Id.* at 369.

<sup>219</sup> *Id.* at 372.

<sup>220</sup> J. Eric Oliver, *The Effects of Metropolitan Economic Segregation on Local Civic Participation*, 43 *Am J. Pol. Sci.* 186, 204 (1999).

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communities, such perception of urgency is absent.<sup>221</sup> Where demographics cannot give rise to divisions affecting all debates, a perception of urgency and the accompanying increased participation can only be generated with regard to specific topics that are sharply divisive by nature, regardless of voters' social similarities.

The conclusion is that normally, a smaller political unit will increase participation, but not if it is more homogenous than the larger unit; in the latter case, it will often actually decrease participation. Only if the constituency of the micro-locality is heterogeneous—an exceptional prospect in America—or if the issue tackled is extraordinarily schismatic, will micro-localism increase, rather than decrease, political participation.<sup>222</sup>

*c. The Different Benefits of Participation*

The discussion so far unpacked the prediction that further localizing local government will promote participation, pointing at its invalidity when the micro-local reform is not political or when it creates a homogenous electorate. Still, the discussion proceeded along the track laid by the prediction's proponents; it assumed that for democracy's sake, the goal of governmental reforms must be increases in rates of political participation. But democratic participation is a much richer and more nuanced concept, and here once more the superficiality of many calls for micro-localism is revealed. A high participation rate is hardly a good in and of itself. Different readings of democracy's role assign different values to participation, and an instance of micro-localism will promote all or one of these values only if additional conditions—extending beyond the reform's ability to augment voter turnout—are met. Two understandings of participation's value in a democracy are possible—participation as serving a “public” function or participation as assuring that policies reflect citizens' preferences—and each requires certain inquiries, supplementing the two already identified, before endorsing a micro-local reform.

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<sup>221</sup> Daniel Rubenson, Community Heterogeneity and Political Participation in American Cities, Remarks at the 2005 Canadian Political Science Association Meeting (May 2005).

<sup>222</sup> Note that in such homogeneous units other, nonpolitical forms of participation are incentivized. These are often grouped under the heading “civic participation”: for example, volunteering or joining citizen groups. David E. Campbell, *Why We Vote* 22–24, 27 (2006).

*i. Participation Serving a Public Role*

The first of participation's two potential functions in a democratic culture is facilitating a public life. For increased political participation through micro-localism to advance this purpose it must feature certain attributes. The ensuing exploration of participation's role as enabling a public life will single out these necessary qualities and the tests for ascertaining their presence.

Participation, for many thinkers, is meaningful solely when it engages individuals in public life. Such engagement, these thinkers believe, is vital for individual well-being and for national welfare. As Hanna Arendt argued, the individual must experience "public freedom": She cannot achieve freedom and happiness without active participation in the general public's decision-making processes.<sup>223</sup> The nation, for its part, cannot be sustained unless, through participation, individuals identify with it and accept its political power over their lives as flowing from themselves rather than from an external body. Thus from both the individual's and the nation's perspective, micro-local politics are useful—indeed, indispensable—when, and only when, they pave the road for accepting, and participating in, larger-scale, national, political decision making. In Thomas Jefferson's words, "[T]he[] little republics [should] be the main strength of the great one."<sup>224</sup>

Toward this end, participatory small-scale governance units are effective when they educate citizens,<sup>225</sup> teaching them self-government by, as John Stuart Mill explained,

taking them out of the narrow circle of personal and family selfishness, and accustoming them to the comprehension of joint interests, the management of joint concerns—habituating them to act from public or semi-public motives, and guide their conduct by aims which unite instead of isolating them from one another. Without these habits and powers, a free constitution can neither be worked nor preserved.<sup>226</sup>

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<sup>223</sup> Arendt, *supra* note 199, at 114–15, 119–20.

<sup>224</sup> Letter from Thomas Jefferson to Governor John Tyler (May 26, 1810), *in* 12 *The Writings of Thomas Jefferson*, *supra* note 197, at 391, 393–94.

<sup>225</sup> Letter from Thomas Jefferson to Joseph C. Cabell, Esq. (Jan. 17, 1814), *in* 14 *The Writings of Thomas Jefferson*, *supra* note 197, at 67, 70; Alexis de Tocqueville, *Democracy in America* 331 (Arthur Goldhammer trans., The Library of America 2004) (1835).

<sup>226</sup> John Stuart Mill, *On Liberty* 212 (7th ed. Boston, James R. Osgood & Co. 1871).

To be useful, the greater expanse micro-localism opens for participation must teach citizens that they can impact public decisions. Even more fundamentally, it should educate them “to act from public or semi-public motives,”<sup>227</sup> that is to say, to transcend private interests when reaching collective decisions. Can micro-localism do so? While micro-local governments’ smaller size may be conducive to an enhanced sense among citizens that they can play meaningful political roles,<sup>228</sup> it does not necessarily inculcate the citizenry with a sense that citizens must rise above individual interests when managing public concerns. Indeed, further localized local government may actually be detrimental to the promotion of a sense of public duty because individuals are unlikely to perceive a limited-size group—for example, a meeting of the block’s residents to assign parking spots—as a civic forum rather than a battlefield or market. Individuals may then generalize their experience of the smaller-scale arena and understand all public decision-making arenas in these privatized terms.<sup>229</sup>

To play the positive democratic role stipulated by Arendt, Jefferson, and Mill, the micro-local participatory forum must be designed so as to counter this unwanted effect. It must render the individual aware that when participating in the public decision-making process she inhabits her public, rather than private, character. This implies the careful construction of formal or ceremonial contexts forcing on the individual her role as a citizen by detaching her from everyday life. For example, when an interested person is asked to cast a one-time vote dealing with one issue closely connected to her daily dealings—as when voting in the special block meeting assigning parking spots—she will not switch into her civic mode of thinking. Such a vote is participatory, but it does not invoke a sufficiently powerful cultural constraint charging participation with public meaning. Conversely, that goal is achieved by an invitation to participate in the decision-making process of a forum with which the individual identifies and which maintains a continuing salience in her consciousness of political life—say a broader neighborhood association

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<sup>227</sup> Id.

<sup>228</sup> Research into the 1970s experience of neighborhood empowerment appears to support this contention. See Howard W. Hallman, *Neighborhoods* 249–50 (1984).

<sup>229</sup> See generally Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *Ind. L.J.* 145, 186 (1977) (arguing that a court dedicated to a public interest reading of the role of participation would not allow delegation of decision-making powers to such forums).

holding periodic meetings. Furthermore, the question dealt with in that forum must be associated with an issue of general principle so that the participating individual regards herself as expressing a public, rather than private, will in answering it.<sup>230</sup>

*ii. Participation Assuring that Policies Reflect Citizens' Preferences*

Even when, in accordance with the principles just enumerated, a given micro-local reform increases political participation in a manner that entwines the private individual with the public collective, that reform may still fail an important, and concluding, test presented by the participation framework. In addition, or alternatively, to the goal assigned to participation by some thinkers of enabling a public life, participation has a second purpose in a democracy that does not rely on the severing of a collective interest from individual interests.<sup>231</sup> Quite the opposite: For many, participation in government is a tool—often termed “voice”—for assuring that public decisions correspond to individuals' preferences.<sup>232</sup> To promote this function, the participation made possible by micro-localism must meet certain, and final, criteria.

Micro-localism is viewed as particularly propitious for erecting governments that accurately conform to citizens' desires since the closer government is to the citizen the better the citizen can convey her preferences to her representatives.<sup>233</sup> Small-scale government can do still more to attenuate, even abolish, the government-citizen divide by turning to direct democracy, which may be impracticable for large-scale traditional governments. Nonetheless, the relative facility of transmitting signals to a small-scale government does not assure that micro-local governments will better serve the ideal of responsiveness to citizens' true desires. For

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<sup>230</sup> *Id.* at 183–85.

<sup>231</sup> On this general distinction between the understandings of participation's role, see generally Hanna Fenichel Pitkin, *The Concept of Representation* 168–88 (1967) (detecting in the writing of Edmund Burke, the famed eighteenth-century philosopher and statesman, two contrasting views of representation: one as the reflection of the interests of the varied components of the nation's population, and the other as discovery of what is best for the nation, regardless of the general will of the population).

<sup>232</sup> The other tool furthering this result is the individual's ability to move between governments, that is, her “exit” option, explored *supra* Section II.A. See also Albert O. Hirschman, *Exit, Voice, and Loyalty* 21–29 (1970) (explaining that consumers or members of an organization have two options when they are dissatisfied with the quality of the good provided by the organization: to switch organizations or to communicate to the organization their complaint).

<sup>233</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

government to act in a manner reflecting its citizens' preferences it does not suffice that the government easily receives the signals citizens send. Those signals must also accurately reflect all residents' true desires. Otherwise, governments will act upon mistaken readings of residents' preferences. Government falls victim to such misleading preference conveyance for three reasons: ill-informed citizen participation; participation mechanisms that disfigure citizens' preferences; and participation mechanisms that cause some citizen preferences to be persistently ignored. The micro-local forums capable of promoting effective participation are those that can better minimize these three risks than existing local government forums.

First, a resident's opinion on a policy transmitted through participation reflects her preferences only if she is well informed of the policy's influence on those preferences. Unfortunately "[t]he political ignorance of the American voter is one of the best-documented features of contemporary politics."<sup>234</sup> Micro-local politics compound the problem since they cannot draw on the "wisdom of the masses": the phenomenon whereby in large electorates individual errors cancel each other out, bringing actual collective choices into close alignment with hypothetical fully informed collective choices.<sup>235</sup> The population of a sub-city unit may be too small an electorate to overcome individual errors through these dynamics.<sup>236</sup> Thus, micro-local participation can only generate choices that are more accurate than those produced by traditional local participation, which does enjoy the wisdom of the masses, when individual errors regarding the issue at hand are unlikely. This is the case when the topic of the decision is "symbolic rather than technical"; deals

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<sup>234</sup> Larry M. Bartels, *Uninformed Votes: Information Effects in Presidential Elections*, 40 *Am. J. Pol. Sci.* 194, 194 (1996).

<sup>235</sup> The claim originates in Condorcet's "jury theorem," demonstrating that the probability of a correct majority vote in a group of individuals, each of whom is on average even only slightly more likely than not to vote correctly, increases as group size grows. See Adrian Vermeule, *Common Law Constitutionalism and the Limits of Reason*, 107 *Colum. L. Rev.* 1482, 1490 (2007).

<sup>236</sup> A large electorate is often a prerequisite for efficient decision making through wisdom of the masses. See Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 *J. Pol. Phil.* 277, 295 (2001) (concluding that in the worst case scenario as far as voter reliability is concerned, it takes "city-sized electorates" to generate correct outcomes through wisdom of the masses).

with policy ends, not means; and remains on the political agenda for a long while.<sup>237</sup>

Second, even if thanks to such “easiness” of the topic voters are informed, the voting process itself may fail to accurately reflect voters’ preferences. In any participatory system, a voter might be limited to pre-determined options, none representing her ideal preference; she might be barred from ranking preferences<sup>238</sup> or registering their intensity;<sup>239</sup> she might be denied effective means to oversee elected officials’ ongoing decision making. Only if the micro-local participatory process is designed thoughtfully to address such potential pitfalls can it outperform traditional forums in reflecting private preferences. For example, a micro-local participatory process that invites the citizen to vote on a proposal drafted by officials is likely to disfigure her real preferences; conversely, a micro-local process involving the citizen in molding the options she later votes on can produce policy results tracing her actual preferences.

Third, even if residents conceive informed preferences that the participatory process then enables them to convey to the government, government may still ignore those preferences if it is “captured”—consistently controlled by one group’s preferences. In such a scenario participation does not engender policies reflecting the balanced aggregate preferences of residents, because the preferences of some will always be kept outside the decision-making calculus.<sup>240</sup> Despite the assured claims of the promoters of further localized local government, micro-localism’s effect on the likelihood of such government capture is complex. Smaller-scale units are hailed since they supposedly block powerful actors from exploiting superior resources to transform themselves into unbeatable interest groups.<sup>241</sup> Hence traditional local governments, such as cities, are more vulnerable to capture by rent-seeking groups—“political machines, municipal unions, public works lobbies,

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<sup>237</sup> Edward G. Carmines & James A. Stimson, *The Two Faces of Issue Voting*, 74 *Am. Pol. Sci. Rev.* 78, 80–81 (1980) (laying out these prerequisites and contrasting desegregation, an easy issue, with Vietnam, a hard issue).

<sup>238</sup> M. de Borda, *On Elections by Ballot*, in *Classics of Social Choice* 83, 84 (Iain McLean & Arnold B. Urken eds., 1995).

<sup>239</sup> On the problem of measuring preference intensities, see Einer Elhauge, *Statutory Default Rules* 270–71 (2008).

<sup>240</sup> On the problem of entrenched majorities leading to the failure of democratic processes, see John Hart Ely, *Democracy and Distrust* 135–36 (1980).

<sup>241</sup> See, e.g., Ellickson, *supra* note 27, at 89; Gillette, *supra* note 122, at 206, 229–30.



and downtown business interests”—than further localized governments.<sup>242</sup>

But these prevalent assertions ignore the fact that micro-local arenas present their own threats of government capture. “[The] organization of political life by small constituencies tends . . . to discriminate in favor of elites . . . . [D]ecentralization will generally tend to accentuate any inequality in the distribution of power.”<sup>243</sup> As James Madison famously explained in *The Federalist* No. 10, a larger polity generates a multiplicity of factions.<sup>244</sup> To govern in such a larger-scale realm coalitions must be formed, and it is harder for one group to capture government.<sup>245</sup> In a smaller arena, such as the micro-local one, broad coalitions are unnecessary and tyranny of one group is much more easily sustained.<sup>246</sup>

Thus the hopeful boasts of micro-localism’s champions notwithstanding,<sup>247</sup> smaller-scale governments do not exhibit an inherent propensity to escape capture. Rather, at most they flip the identity of the group capturing government. Groups’ relative transaction costs for influencing government (that is, number of members, similarity of interests among members, stakes involved for each member)<sup>248</sup> vary on different government levels. While traditional larger-scale government is an easier target for rich yet diffuse groups, the smaller-scale government is more congenial to less rich yet concentrated groups. Data validates this prediction. In Los Angeles homeowners dominate neighborhood coun-

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<sup>242</sup> Ellickson, *supra* note 27, at 89.

<sup>243</sup> Grant McConnell, *Private Power and American Democracy* 6, 107 (1966).

<sup>244</sup> *The Federalist* No. 10, at 63–64 (James Madison) (Jacob E. Cooke ed., 1961).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 61, 63–64.

<sup>247</sup> See sources cited *supra* note 241; see also Matthew J. Parlow, *Civic Republicanism, Public Choice Theory, and Neighborhood Councils: A New Model for Civic Engagement*, 79 *U. Colo. L. Rev.* 137, 178, 182–83 (2008); 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, 100–02 (1989).

<sup>248</sup> Neil K. Komesar, *Law’s Limits* 61 (2001). These are the organizational attributes normally associated with effective interest groups. However, the argument’s logic remains obscure and open to counterclaims. Steven Croley, *Interest Groups and Public Choice*, in *Research Handbook on Public Choice and Public Law* 49, 51, 80 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

cils,<sup>249</sup> and New England-style town meetings are hospitable to longtime residents and the elderly.<sup>250</sup>

It is thus necessary to identify the group standing to benefit from the micro-local political reform, and then determine whether that group's empowerment will lead to better representative government. As explained, captured government is unrepresentative of citizens' desires since it disregards some preferences (those not felt by the capturing group). If those other preferences are calculated into the decision-making process thanks to the standing of the holders of those preferences in another governmental forum, representative government is not endangered. In other words, it is not the powerful interest group's dominance that is troublesome; it is the inability to counter its influence that generates losses.<sup>251</sup> If the group that is projected to control the further localized government enjoys little influence in the larger-scale government, micro-localism can promote effective representation. Said group's preferences go ignored in the larger forum where the group is disfavored, and thus having those preferences disproportionately impact another, smaller forum should not lead to policies unreflective of the populace's preferences. On the other hand, micro-localism should be avoided if the group standing to benefit from the micro-local reform is already advantaged in the larger-scale government. In such cases that group will gain a stranglehold over all levers of power, rendering it even more likely that other groups' preferences are never taken into political account.

To recapitulate, for a reform further localizing government to promote representative government through participation, three conditions must be met: The pertinent policy must be easy for residents to grasp; the participatory procedure must allow them to express their actual preferences; and the participant groups whose preferences will dominate at process's end should not have the same commanding position in the larger-scale government.

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<sup>249</sup> Juliet Musso et al., *Representing Diversity in Community Governance: Neighborhood Councils in Los Angeles 1–3* (2004), available at [http://www.lacityneighborhoods.com/documents/nc\\_diversity.pdf](http://www.lacityneighborhoods.com/documents/nc_diversity.pdf).

<sup>250</sup> Jane J. Mansbridge, *Beyond Adversary Democracy* 39–58, 97–114 (1980) (noting however, that the findings should be interpreted cautiously).

<sup>251</sup> See Iris Marion Young, *Justice and the Politics of Difference* 92 (1990) (arguing that the “problem with interest-group pluralism is not . . . that people promote their own interests,” but that “inequality of resources, organization, and power allows some interests to dominate”).

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*d. Conclusion: The Questions We Should Be Asking*

The idea that further localizing local government will serve democracy is extremely influential. It is not a groundless idea, but it is an idea whose prevalent articulation is very shallow. Participation is a complex concept, and so is the effect micro-localism may have on it. Micro-localism cannot serve democratic participation (1) if it does not devolve meaningful political powers to residents, (2) who must be spurred to political action by a sense of conflict likelier to exist in heterogeneous communities. Even then, (3) participation bred through micro-localism is unlikely to promote a civic life if it does not clearly separate private from public interests; and (4) it will not promote representative government if it cannot assure the accurate transmission and calculation of the preferences of all residents. As elaborated in the different Subsections, the presence of each condition can be discerned through questions posed about a given reform:

1. Is the reform meaningfully political, devolving real decision-making powers to residents?
2. Does the reform actually incentivize participation, by delegating decision-making powers to a heterogeneous electorate or by pertaining to an issue spurring political disagreements?
3. Will the participating residents transcend their particular individual interests and act on “public” concerns?
4. Will participation enable reflection of residents’ desires or will these desires be disfigured by misinformation, the limits of voting processes, or the unyielding advantage of one group controlling both the local and the further localized government?

*3. Examples*

These questions of the participation theory of micro-localism can ascertain the desirability, in democratic terms, of any reform further localizing local government. To illustrate their usefulness, this Subsection will apply them to the reforms reviewed in Part I—in education and historic districting—to determine whether these micro-local reforms promote participation.

*a. Applying the Participation Theory of Micro-Localism to Education Law Reforms*

The drive to further localize local government in education, reviewed in Section I.B, forms part of a crusade to promote citizen participation. For decades great concern has been aired as studies show that citizens have little influence on the educational decision-making process, mainly due to their disinterest in, and inability to impact, the politics of the relevant traditional local governments—school districts.<sup>252</sup> As a cure, commentators advocate micro-localism and imbuing intra-district boundaries between schools with meaning. They argue that these new, smaller-scale, school-based arenas will enable true participation in education governance.<sup>253</sup> Yet, as this Section's elaboration on the participation theory of micro-localism has illustrated, standing alone, such claims are hollow. Before they can be embraced as a boon to democracy, reforms further localizing local government in education must be tested to see if they actually delegate real political powers to an electorate likely—considering its composition—to actually participate, and whether the political processes the reforms create will allow said electorate to identify an overriding public interest, and/or will accurately reflect voters' preferences.<sup>254</sup> To discern the presence of these conditions enabling the promotion of participation, the micro-local education reforms described in Section I.B must be confronted with the framework's four questions. The answers to these questions will indicate that most of these reforms are futile—if not outright counterproductive—efforts to promote participation.

The participation framework's first inquiry, setting political reforms apart from their administrative counterparts, suffices to persuade that the most prevalent reform fortifying micro-local school boundaries is unrelated to democratic concerns. The assurance that a child attends the "neighborhood school" rather than other district schools—the most common of the three educational micro-local reforms—does not engender participation gains. It is an administrative reform: a change in the

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<sup>252</sup> See Marilyn Gittell et al., *Limits to Citizen Participation* 241 (1980).

<sup>253</sup> For a forceful and highly influential argument in this vein, see Richard Sennett, *The Uses of Disorder* 190–94 (1970) (employing, in order to illustrate the promise of a vibrant urban life, the hypothetical example of a young person growing up in a diverse neighborhood community whose members, among other things, discuss and settle among themselves issues pertaining to the local school).

<sup>254</sup> See *supra* Subsection II.B.2.

district's assignment policies. It does not establish any new political forum for parents' or citizens' participation in school politics; it does not grant them any new decision-making powers.<sup>255</sup>

Thus for the vast majority of micro-local reforms, which center on the neighborhood school, participation values are irrelevant. They only become pertinent when micro-localism assumes a political guise. Powers must be delegated to the individual school, and parents included in the school-level decision-making body. As Subsection I.B.2 explained, some states indeed create school-level management mechanisms. Several are purely administrative, such as curriculum teams consisting of staff members,<sup>256</sup> and others that involve parents are solely advisory. In two exceptional places—Kentucky and Chicago—the micro-local bodies are both open to citizen or parent participation and wield real powers.<sup>257</sup> Only there are residents able to participate in the new further localized governance and thus, in light of the first participation inquiry, for these reforms alone is the value of participation germane.

Unlike micro-local reforms elsewhere, Kentucky's and Chicago's reforms can thus offer gains in participation. But for those potential benefits to materialize these reforms must meet the criteria set by the remaining three inquiries of the participation framework. The second participation inquiry revolves around the chances of increased participation in the new political micro-local forum. As explained, this desired eventuality is likely if the smaller-scaled electorate is demographically heterogeneous. This observation highlights another deficiency of current micro-local reforms in education. Since America's neighborhoods are extremely homogenous,<sup>258</sup> micro-local control of a neighborhood school should not propel residents to participate. Indeed, when New York experimented with community-controlled schools in the 1970s, school election turnout was less than eleven percent.<sup>259</sup> The current average turnout rate for school-level councils in Chicago mostly hovers around

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<sup>255</sup> It might even achieve the opposite. The *Parents Involved in Community Schools v. Seattle School District No. 1* decision, for example, as Justice Breyer opines, elevated micro-local boundaries by overruling a decision citizens reached through the democratic process: It struck down plans transferring children between micro-local schools even though those plans were adopted by elected boards. 551 U.S. 701, 862–63 (2007) (Breyer, J., dissenting).

<sup>256</sup> E.g., W. Va. Code Ann. § 18-5A-6 (LexisNexis 2012).

<sup>257</sup> See supra notes 75–80 and accompanying text.

<sup>258</sup> See Ryan & Heise, supra note 182, at 2093–96.

<sup>259</sup> Diane Ravitch, *The Great School Wars* 389 (1974).

that same figure.<sup>260</sup> Furthermore, from 1991 to 2000, thirty to fifty percent of Chicago school elections went uncontested.<sup>261</sup>

As these disappointing figures demonstrate, political participation cannot flow from micro-local school control of neighborhood schools. To promote participation, micro-localism in education must not only contain a political reform, as indicated by the first inquiry, but, in light of the second inquiry, that political reform must actively be decoupled from the other micro-local reforms that sanctify the neighborhood school. Individual school control can boost participation only in open enrollment districts—where, thanks to the larger area from which the schools draw students, schools are at least somewhat likelier to be heterogeneous.

But will any increased participation that might thereby occur serve the two purposes usually assigned to participation in a democracy: promotion of public citizenship and accurate reflection of preferences, as required, respectively, by the third and fourth participation inquiries? Sadly, it will probably serve neither.

At first glance, micro-local school councils do appear to satisfy the third participation criterion. Given the constituency's small-scale and transient nature, participation in school management can extend beyond voting, in a manner rallying public citizenship. Parents can seek election for school office, attend meetings, serve on committees, etc. Community-controlled councils offer parents democratic skills they do not acquire elsewhere, converting them into effective citizens.<sup>262</sup> But the third participation inquiry demands still more, and at the end of the day, further localized school control cannot measure up. The campaign for micro-local school control assaults the idea of the common school.<sup>263</sup> It seeks to replace the school "which is supported by all, controlled by all, and which propagates no particular . . . view[]" with a school still "supported by all," but "controlled and . . . directed by whoever" wins the micro-local school council elections.<sup>264</sup> A public question—which schools are best for our community?—is transformed into a personal question—which school is best for my child? For participation to serve a higher "public"

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<sup>260</sup> Fung, *supra* note 176, at 104 tbl.4.1.

<sup>261</sup> *Id.*

<sup>262</sup> See Mario Fantini et al., *Community Control and the Urban School* 198 (1970).

<sup>263</sup> For a history of the idea of the common school, see Daniel Walker Howe, *What Hath God Wrought* 453–55 (2007).

<sup>264</sup> Ravitch, *supra* note 259, at 397 (making the argument in a similar context).

interest—not the resident-parent’s private interest—the resident-parent must be asked to address concerns reaching beyond her immediate, personal educational needs. She must participate in school district, rather than school, politics.

Micro-localism in school government thus fails the third participation inquiry. Furthermore, these reforms cannot be justified through the fourth and final inquiry either. This inquiry—about the participatory process’s ability to reflect individual preferences—counts three components: likelihood that participants express informed preferences, the process’s capacity for accurately transmitting preferences, and the process’s competence at balancing different groups’ preferences. Micro-local educational government does not outperform traditional local government—that is, school districts—in any of these.

First, parents lack relevant knowledge, and their participation in school level management is ill informed.<sup>265</sup> While mandatory training may educate parents elected to councils,<sup>266</sup> it cannot remedy the ignorance of those who merely vote. Second, projections that micro-local processes will do better than local processes that supposedly fail at reflecting parents’ desires<sup>267</sup> are unpersuasive. They are discredited by findings indicating that local officials are closely monitored by voters and that, accordingly, local boards’ policies reflect residents’ preferences. “American public education may be the most democratically accountable institution in this nation or any other.”<sup>268</sup> Reforms encumbering the powers and status of those currently responsible for the system’s management—that is, school districts—can only detract from these results. Third, today there is little cause to believe that micro-local school councils will balance citizens’ preferences more fairly than district-level boards. Agitation for micro-local school government historically referenced the benefits such schemes of control offered to minorities.<sup>269</sup> Micro-local reforms were promoted since the preferences of minority

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<sup>265</sup> See supra notes 161–63 and accompanying text.

<sup>266</sup> See, e.g., 105 Ill. Comp. Stat. 5/34-2.3b (2012); Ky. Rev. Stat. Ann. § 160.345(6) (LexisNexis 2013).

<sup>267</sup> See Howell, supra note 73. The argument was applied in the radical work of Stokely Carmichael & Charles V. Hamilton, *Black Power* 164–67 (1967).

<sup>268</sup> Christopher R. Berry & William G. Howell, *Democratic Accountability in Public Education*, in *Besieged*, supra note 73, at 150, 168.

<sup>269</sup> See, e.g., Henry M. Levin, *Introduction to Community Control of Schools* 3, 3–9 (Henry M. Levin ed., 1970); Kenneth O’Neil Salyer, *Beyond Zelman: Reinventing Neighborhood Schools*, 33 J.L. & Educ. 283, 288 (2004).

groups were excluded from district-level politics, which were dominated by mainstream groups.<sup>270</sup> But over the past two decades minorities grew extremely successful at electing representatives to local school boards. Consequently, the decision-making process of local districts is no longer tilted against their preferences.<sup>271</sup> Conversely, further localized school governments' record in representing minority preferences is underwhelming. When Detroit experimented with micro-local control in the early 1970s, white candidates won control of most school councils even though whites represented a minority of students.<sup>272</sup> In the late 1990s, among racially diverse Chicago schools whose student body was at least fifty percent white, an average of eighty-five percent of council members were white.<sup>273</sup> These instances point to the general problem: The individual school is simply not a political arena congenial to minority residents. Low-income parents lack the time and resources to control effectively an individual school.<sup>274</sup> Even more troubling, when the school is majority-minority and accordingly minority parents gain control over its micro-localized management, that power is a "hollow prize."<sup>275</sup> Since majority-minority schools are systematically underfunded compared to other schools in their districts,<sup>276</sup> it is impossible to leverage control over

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<sup>270</sup> See Gittell et al., *supra* note 252, at 241; Kevin G. Welner, *Legal Rights, Local Wrongs* 230–32 (2001).

<sup>271</sup> Melissa J. Marschall, *Minority Incorporation and Local School Boards*, *in* *Besieged*, *supra* note 73, at 173, 194–96.

<sup>272</sup> William R. Grant, *Community Control vs. School Integration—The Case of Detroit*, 24 *Pub. Int.* 62, 76 (1971).

<sup>273</sup> Fung, *supra* note 176, at 125.

<sup>274</sup> Amy Gutmann, *Liberal Equality* 194 (1980).

<sup>275</sup> See generally H. Paul Friesema, *Black Control of Central Cities: The Hollow Prize*, 35 *J. Am. Inst. Planners* 75, 75 (1969) (coining the phrase to describe office-holding in distressed cities).

<sup>276</sup> See *Educ. Trust-West, California's Hidden Teacher Spending Gap 5* (2005), available at <http://www.edtrust.org/sites/edtrust.org/files/publications/files/CAHiddenTeacherSpendingGapReport.pdf> (stating that, of "the 50 largest California school districts, 42 spend less on teachers in schools serving mostly low-income students" and "on average, an estimated \$2,576 less per teacher"); Marguerite Roza et al., *Do Districts Fund Schools Fairly?* 7 *Educ. Next* 68, 69–70 (2007) (stating that, in Texas, funding within school districts was considerably less equal than funding between districts); Marguerite Roza et al., *How the Federal Government Can Strengthen Title I to Help High-Poverty Schools 2 tbl.1* (2005), available at [http://www.crpe.org/sites/default/files/brief\\_crpe\\_title1\\_aug05\\_0.pdf](http://www.crpe.org/sites/default/files/brief_crpe_title1_aug05_0.pdf) (stating that, in Denver, schools with the greatest need receive just 95% of the district funding average, while those with the smallest need receive 105%; in Houston, schools with the smallest enrollment of low-income students receive from the district \$3,152 per student, while those with the highest such enrollment receive \$2,680).



them into promotion of the educational policies parents seek. The micro-local school, even when enabling political control by minority interests, reduces minorities' ability to meaningfully pursue their preferences. It increases their isolation, which, as others note, is the greatest political problem facing America's minority and poor population.<sup>277</sup> Participation in a micro-local educational forum is thus unlikely to enable a better reflection of the diverse preferences of the entire population than participation in local forums. Since it is also often uninformed and ineffective at conveying accurate preferences, it is of doubtful value in promoting reflective governance.

In summation, an informed analysis under the participation theory developed in this Article shows that further localizing local government in education, touted as restoring democracy to the educational sphere, cannot promote democratic participation. The only reform with potential to promote participation is direct creation of school councils. Reforms in assignment policies are apolitical and depress political participation since they establish homogenous neighborhood schools. Even in non-homogenous schools, micro-local school council participation is inferior to district-level participation both at serving the broader public interest and at reflecting voters' preferences.

*b. Applying the Participation Theory of Micro-Localism to Historic Districting Ordinances*

Like its counterpart in education law, the mighty drive for further localized local government in historic preservation processes is attributable to disaffection with centralized, bureaucratic local government. Micro-localism is offered as an opportunity to jumpstart democracy in land use and planning.<sup>278</sup> These claims are rarely the product of reasoned and systemic analysis aimed at discerning whether micro-local reforms in historic districting actually politically empower residents, entice them to take advantage of political powers given the electorate's composition,

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<sup>277</sup> Paul A. Jargowsky, *Poverty and Place* 193 (1997); Douglas S. Massey & Nancy A. Denton, *American Apartheid* 1–16 (1993).

<sup>278</sup> See Dolores Hayden, *The Power of Place* 9 (1995) (arguing that local communities, particularly those that do not form part of the mainstream, must be afforded an opportunity to leave their marks on public spaces); Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 *Stan. L. Rev.* 473, 519 (1981) (arguing that, in light of the problematic history of urban renewal, experts and government officials should not be allowed to control the planning process).

and guarantee participation that discloses an overriding public interest and/or accurately balances individual preferences—as is required for micro-localism to promote participation.<sup>279</sup> Fortunately, as the ensuing application of this Article’s participation framework’s four inquiries determines, micro-local reforms in historic districting meet most of these conditions—provided that several adjustments to current practices are introduced.

The first participation inquiry demands that the micro-local reform carry a political character. Ordinances inserting a further localized component into the preservation process along the Austin or Houston models reviewed in Section I.C—that is, ordinances that invite district residents to take part in the designation decision—indeed portend such meaningful political devolution. They open avenues for consequential resident political participation since the issue over which political authority is delegated—land use—is exceptionally important for local owners.<sup>280</sup> As a result, these reforms can also pass the hurdle posed by the second participation inquiry, which asks whether increased participation will occur. Generally participation is low in America’s current, highly homogenous neighborhoods. But land use issues are inherently divisive enough to generate heterogeneous stances even among a socioeconomically homogenous populace. They thereby create conflicts motivating people to head to the polls.<sup>281</sup> Indeed, socially-homogenous residents have shown no inclination to shy away from vociferously expressing contending opinions regarding historic designation even when the districting process confines them to a minimal role, as in the Austin model,<sup>282</sup> or grants them no role at all, as in the New York model.<sup>283</sup>

The attributes rendering historic districting controversial, thereby increasing participation as required by the first two participation inquiries surveyed so far, may paradoxically hamper the ability of the relevant

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<sup>279</sup> See *supra* Subsection II.B.2.

<sup>280</sup> See Fischel, *supra* note 122, at 93–94.

<sup>281</sup> See, e.g., Merrill, *supra* note 190, at 289, 293 (reporting that ballots were cast by 188 of 280 eligible properties in a New Haven neighborhood whose conversion into a historic district was considered).

<sup>282</sup> See Wells Dunbar, *What’s Historic? Latest Arguments over Historic Zoning Sound Like Déjà Vu*, *Austin Chron.*, Feb. 26, 2010, at 26–28.

<sup>283</sup> See Constance Rosenblum, *Argument in Brownstone*, *N.Y. Times*, Feb. 23, 2014, at RE10 (describing local mobilization and debate about a preservation decision). As explained *supra* Subsection I.C.2, in New York City, neighborhood residents have no formal role in the designation process.

micro-local reforms to satisfy the third and fourth inquiries—so long as the reforms are not thoughtfully designed. The third inquiry focuses on the prospects that participants in the micro-local forum act in a public-minded fashion. Land use issues are too closely intertwined with private concerns for residents to transcend individual interests when resolving them. The one-time vote on such questions epitomizes the private view of democracy's role.<sup>284</sup> To outweigh local voters' mundane real estate considerations and enable them to engage in more general debates about cultural and historical values, the micro-local participatory process in historic districting must therefore be broadened. Residents' role ought to be ongoing. They should not only be invited for a one-time vote approving the designation; they should be deeply immersed in the process leading up to the designation and then in the management decisions following the designation. More specifically, the designation proposal should be initiated and developed through a series of neighborhood-based meetings allowing for true deliberation.<sup>285</sup> Similarly, and also to satisfy the third inquiry, cities ought to follow the Boston model where residents take part in the day-to-day management of the designated district through micro-local preservation commissions.<sup>286</sup> With these adjustments, micro-localism in historic districting can surmount the third participation requirement, assuring that residents' participation transcends individual concerns. The historic districting process can thus live up to preservation's promise of "foster[ing] civic and neighborhood pride and a sense of identity" envisioned by local ordinances.<sup>287</sup>

While the third inquiry points at the need—and ability—of micro-localism in historic districting to overcome individual residents' interests in property values, the fourth and final inquiry highlights the process's ability to harness these interests to promote representative government. For participation to generate policies reflecting citizens' preferences, the fourth inquiry noted three demands: participation based on informed preferences, participation procedures that do not disfigure preferences, and participation processes allowing fair balancing of participants' preferences. In the micro-local governance of historic districts, the first two

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<sup>284</sup> See Michelman, *supra* note 229, at 148.

<sup>285</sup> On deliberative democracy's importance for public-minded participation, see Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 *J. Contemp. Legal Issues* 9, 13–14 (2006).

<sup>286</sup> See *supra* note 108 and accompanying text.

<sup>287</sup> Dall., Tex., City Code art. IV, § 51A-4.501(a)(4) (2013).

conditions are met, while the third can be met if the process is sensibly designed.

Due to the high stakes involved—seeing preservation’s impact on home values—owners tend to become adequately informed on the matter,<sup>288</sup> as required by the first criterion. Ordinances also create many junctures at which residents can agitate for amending the micro-local preservation regulation. Residents can submit petitions, file objections, and participate in hearings.<sup>289</sup> These mechanisms permit residents to tweak the proposal to accurately correlate with their preferences, as required by the second criterion.

The third component of the fourth inquiry merits closer attention. For its boosters, small-scale decision making regarding historic preservation is attractive since it allows homeowners’ preferences to dominate, while on the traditional local level, other interest groups such as businesses, developers, and tenants muffle homeowners’ voices.<sup>290</sup> However, this belief that owners are not powerful enough on the local level<sup>291</sup> and that therefore a micro-local forum is necessary for their preferences to be heard is questionable. Economist William Fischel argues persuasively that homeowners control local politics and hence local governments reflect their preferences.<sup>292</sup> Creating a micro-local level to empower homeowners even more may disadvantage other groups whose preferences will be further ignored. Micro-local government of land uses sidelines commercial interests, outsiders, and potential residents excluded from the neighborhood due to the restrictive land use regime adopted.<sup>293</sup> To impede homeowners’ preferences from dominating all facets of the

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<sup>288</sup> Merrill, *supra* note 190, at 293.

<sup>289</sup> See e.g., Hous., Tex., Code of Ordinances § 33-222.1(c), (h) (2014) (setting the designation process, which includes at least one public hearing upon acceptance of an application and a hearing before final approval pursuant to which the Houston Archaeological and Historical Commission may alter the district’s boundaries).

<sup>290</sup> See Merrill, *supra* note 190, at 278–80.

<sup>291</sup> See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 504–05 (2005) (O’Connor, J., dissenting); *id.* at 521–22 (Thomas, J., dissenting); Asmara Tekle Johnson, Correcting for *Kelo*: Social Capital Impact Assessments and the Re-Balancing of Power Between “Desperate” Cities, Corporate Interests, and the Average Joe, 16 *Cornell J.L. & Pub. Pol’y* 187, 198–203, 210–12 (2006) (reacting to the *Kelo* decision). As part of the backlash against the decision, Utah, for example, adopted a requirement of eighty percent approval by area owners for exercise of eminent domain powers upon single-family owner-occupied homes. Utah Code Ann. § 17C-2-601(2)(c)(ii)(A) (LexisNexis 2013).

<sup>292</sup> Fischel, *supra* note 122, at 87–89.

<sup>293</sup> See, e.g., Glaeser, *supra* note 189, at 3–5.

process with consistent disregard to other citizens' preferences, the local government's right to intervene and overturn micro-local decisions in designating and managing the district must be preserved. In addition to holding a veto right over the district's establishment, as in the Houston model, the city should be empowered to assure the representation of outsider groups (that is, tenants, businesses, and non-neighborhood city residents) in the further localized commission managing the district.<sup>294</sup>

In sum, the participation theory this Article developed highlights the ability of further localized local government in historic districting to promote democratic participation, as long as micro-local reforms are adjusted to satisfy certain principles. Without alteration, current micro-localism in historic preservation processes is likely to increase political participation. Such participation can serve public-minded values if alterations are made transforming the micro-local arena into an ongoing participatory process. With further modifications to retain local oversight, the increased participation delivered by micro-localism in historic districting can also promote effective representation of citizens' preferences.

#### *4. Conclusion*

Further localized local government is almost always justified as a means for reviving democracy through meaningful citizen participation. Since participation is more easily effectuated in smaller-scale government units, many believe that micro-local units are sure to improve on the performance of current local governments. Unfortunately, this popular argument symbolizes a superficial understanding of democratic participation and of micro-localism's ability to serve it. A sophisticated theory of participation illustrates that micro-localism can indeed promote participation by creating more readily accessible civic forums, but only if micro-localism meets certain conditions. The micro-local reform must count a political aspect devolving meaningful powers to residents, who must be spurred to political action by a sense of conflict more likely to exist in heterogeneous communities. Furthermore, for such micro-local participation to promote a civic life, residents must be forced to

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<sup>294</sup> For example, Denver requires that two of the seven members of the Lower Downtown Design Review Board "shall not live in, own property in, own or operate a business in, maintain an office in or otherwise represent interests in the district." Denver, Colo., Rev. Mun. Code § 30-46(a), (d) (2014).

exercise these powers in a manner separating private from public interests; for it to promote representative government, it must take place in a manner assuring accurate transmission and calculation of residents' preferences. The urgency of lawmakers' need to apply this rigorous theoretical framework to reforms further localizing local government is illustrated by the results the framework produced when employed to evaluate two examples of micro-localism. The theory showed that further localizing local government in education cannot meaningfully promote participation, and that for it to do so in historic districting, ordinances must open the process in its entirety to resident participation, while at the same time retaining larger-scale, local supervision.

#### CONCLUSION

The problem with the new local is not that it exists. Micro-localism can offer benefits. As the historic districting example illustrated, when proceeding thoughtfully, law can go smaller and deliver positive effects: promoting efficiency and participation. But micro-localism does not always promote these values. Sometimes it undermines them. The pitfalls of law going smaller are displayed in the reforms further localizing local government in education, where inattention to indirect results of varied rulings, accompanied by tendencies to mechanically fall back on normative mantras unrelated to reforms at hand, engendered a system that is by and large unjustifiable under any normative framework.

The problem with the new local is that we do not pay enough attention to it. Micro-localism should be noticed, discussed, and coherently evaluated in light of the normative modes of analysis this Article developed. These can, for example, help lawmakers realize that the two instances of micro-local governance used to launch this Article's discussion—further localized mental health services in North River, Chicago, and further localized transportation planning in Park Slope, New York City—differ in their normative worth. This conclusion can be reached through a cursory application of the efficiency and participation theories the Article established to these reforms.

In light of the inquiries each framework suggested, empowering the neighborhood to provide mental health services promotes efficiency and participation. It promotes efficiency since residents are sensitive to property taxes and thus a tax levied to provide a service is likely to entice residents to move between micro-localities; tax rates are not only salient but also explicitly reported periodically and thus these residential

moves will be informed; and extended mental services do not generate negative externalities,<sup>295</sup> nor do they interfere with economies of scale or peer-effects—their provision requires small staffs and no capital investments. This further localization of determinations regarding the provision of mental health services also promotes participation, since it is a political reform empowering residents to make policy decisions; it involves taxation—an issue that easily provokes heterogeneous positions and increased participation; participating residents, when they debate their community’s responsibility toward its weaker members, thereby promote a civic understanding of the public sphere; and the use of direct democracy to address one proposal thoroughly developed by community members enables residents to adopt and express informed preferences on the issue, immune from organized strong interests that control wider political processes.

Conversely, residents’ empowerment to legally challenge a city’s decision to dedicate a lane to bicycles is an instance of micro-localism that is both inefficient and anti-democratic, in light of the inquiries each framework generated. It is inefficient, even though transportation conditions are likely to entice informed residential moves, since transportation planning generates impactful externalities for the rest of the city (indisputably, any bike lane would be used by outsiders); and since, relatedly, economies of scale are highly relevant to transportation planning, which, in order to be effective, must, by definition, take into account a wider area extending well beyond any one micro-local unit.<sup>296</sup> This form of indirect micro-localism in planning also fails the preliminary participation test since it does not create any new forum for neighborhood political decision making.

These two examples, along with the two on which this Article focused, highlight the inescapable fact that micro-localism is a reality—and on the rise. Indeed, it is no longer merely an American reality. In England, the Localism Act of 2011 established a “community right to challenge,” which empowers micro-local groups to oblige a local gov-

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<sup>295</sup> They do generate positive externalities, but since micro-localized services can only add to, not subtract from, local ones there is no risk of underproduction.

<sup>296</sup> See, e.g., Edward H. Ziegler, *Sustainable Urban Development and the Next American Landscape: Some Thoughts on Transportation, Regionalism, and Urban Planning Law Reform in the 21st Century*, 42/43 *Urb. Law.* 91, 91–92 (2010–2011) (arguing that effective planning of a transportation system must be conducted on a regional, rather than local, scale).

ernment to thoroughly consider their offer to replace it in the provision of any public service.<sup>297</sup> The Act also entrusts in such micro-local groups the authority to mark certain privately owned buildings as “assets of community value” and thereby gain a right of first refusal whenever those buildings are put to sale.<sup>298</sup> In Canada, the government is currently promoting the Respect for Communities Act which will oblige the federal Minister of Health to consult with “a broad range of community groups,” and not merely with the relevant local government, before issuing a permit to operate a supervised safe injection site for drug addicts.<sup>299</sup> Here in the United States similar moves toward the micro-local are often less straightforward, but still the result is just as dramatic. We may not realize it, yet our laws are not what they used to be: They now empower micro-local units, but often enough they do so in indirect, almost unnoticed, ways. In many of those instances, micro-localism’s actual implications are not critically assessed, and if they are, the temptation to let micro-local government be, or even sign on to it, has proven irresistible to many. If, as it so often is in American political and legal thinking, small is beautiful, smaller must be more beautiful still.<sup>300</sup> But an informed normative analysis illustrates that while in certain cases mi-

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<sup>297</sup> Localism Act, 2011, c. 20, §§ 81–86 (Eng.).

<sup>298</sup> *Id.* §§ 87–99.

<sup>299</sup> B. C-2, 41st Parliament, 2d Sess. § 56.1(2), (3), (3)(p) (Can. 2013). The Bill, detailing factors the Minister of Health must consider before granting an exemption from federal drug laws, has been promoted following a decision of the Supreme Court of Canada holding that the Minister’s refusal to exercise statutory authority to grant an exemption from federal drug laws to supervised safe injection sites was arbitrary and constituted an interference with drug users’ rights to life, liberty, and security of the person protected in § 7 of the Canadian Charter of Rights and Freedoms. *Canada (Att’y Gen.) v. PHS Cmty. Servs. Soc’y*, [2011] 3 S.C.R. 134, para. 136 (Can.).

<sup>300</sup> This traditionally American stance, see *supra* notes 36–39 and accompanying text, has now spread beyond the United States: In the United Kingdom, the Localism Act was promoted in similar terms. In an official government publication, Deputy Prime Minister Nick Clegg praised the proposed Act as:

[M]ark[ing] the beginning of a power shift away from central government to the people, families and communities of Britain. . . .

. . . [W]e are clear and united in our ambition to decentralise and disperse power in our society . . . .

. . . .

. . . [D]ispersing power is the way to improve our public services and get the better schools and safer hospitals we want. Democratic engagement, choice, transparency and diversity will not just make the country more liberal, fairer and more decentralised: they will also help develop the world-class public services people want.

H.M. Gov’t, *Decentralisation and the Localism Bill: An Essential Guide 1* (2010), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/5951/1793908.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/5951/1793908.pdf).



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cro-localism may indeed promote values traditionally associated with small governance, in many other cases it defeats them. This Article's rigorous theory of micro-localism should aid jurists in the important task of telling these cases apart.

