

## NOTES

### FORMALIZING LOCAL CONSTITUTIONAL STANDARDS OF REVIEW AND THE IMPLICATIONS FOR FEDERALISM

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#### INTRODUCTION

WITH respect to public schooling, a matter traditionally governed at the local level, the Supreme Court has held two seemingly opposed positions. On the one hand, the Court has pointed out that “[t]he Constitution does not dictate to the States at what level of government decisions affecting the public schools must be taken,”<sup>1</sup> and, indeed, the Constitution does not carve out any particular authority for municipal governments over public education or otherwise.<sup>2</sup> On the other hand, the Court has also noted that “local control over the operation of schools . . . has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process.”<sup>3</sup> It is no wonder, given these somewhat contradictory messages, that the constitutional status of local government is less than clear. Despite formal legal rules suggesting that local governments are subject to constitutional standards that are the same as or in some cases stricter than those applied to their states,<sup>4</sup> in a number of constitutional cases involving core local issues—education, land use, and law enforcement—courts have ap-

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\* J.D. expected 2012, University of Virginia School of Law. This Note is dedicated to the memory of my father, Craig A. King (1953–2010), former Commissioner of Development for the City of New Rochelle, N.Y., whose life-long dedication to local government and public service continues to inspire me. I would also like to thank Professor Richard Schragger for his guidance and feedback.

<sup>1</sup> *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 500–01 (1982) (Powell, J., dissenting).

<sup>2</sup> This Note refers interchangeably to localities, local government, municipalities, and municipal government throughout.

<sup>3</sup> *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974).

<sup>4</sup> See *infra* Section I.B.

proached localities with varying degrees of leniency. Often, like in Chief Justice Warren Burger's opinion in *Milliken v. Bradley*,<sup>5</sup> courts invoke locality-empowering language to insulate local government from constitutional challenges.<sup>6</sup> Many of these pro-locality arguments arise in cases dealing with federalism issues, where courts appear to embed local deference within language describing the benefits of decentralization of power from the federal government to local government.

While perhaps claiming to support decentralization as a justification for local deference in some cases, the Supreme Court and other federal courts have not only failed to, but have refused to establish clear standards to identify when it is appropriate to treat municipalities differently than their states under existing constitutional doctrines.<sup>7</sup> To correct this failure, and to remain consistent with opinions praising decentralization, courts should explicitly differentiate between states and localities in their application of constitutional doctrines. More specifically, the Supreme Court should separate its implicit support for localism from its explicit federalism, which currently encompasses both state and local government, by creating an overarching principle that permits courts to grant constitutional deference to municipal decision making.

Creating such an overarching principle would serve three primary purposes. First, a local constitutional principle, although it would create difficult questions in the short term regarding when it is appropriate to defer to localities, would create more certainty in the long term by formalizing the ability of courts to provide constitutional protection to localities, thereby eliminating the ambiguity regarding local authority.

Second, an overarching principle would legitimize court decisions tying decentralization to federalism, while also providing an opportunity to resolve questions over how localities fit into, and whether they actually benefit from, federalism.<sup>8</sup> To the extent that the Supreme Court continues to embrace the "New Federalism" of

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<sup>5</sup> 418 U.S. at 741–42.

<sup>6</sup> See *infra* Part II.

<sup>7</sup> See *infra* note 125 and accompanying text.

<sup>8</sup> Compare Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 *J.L. & Pol.* 187 (2005), with David J. Barron, *A Localist Critique of the New Federalism*, 51 *Duke L.J.* 377, 411 (2001).

the Rehnquist Court,<sup>9</sup> providing a framework for local constitutional standards of review will strengthen the Court's federalism jurisprudence by ensuring that the decentralization arguments on which the Court bases these federalism decisions are backed up with concrete standards aimed at preserving local power.

Third, such a principle may also help establish a stronger federal-local relationship as courts begin to develop local constitutional tests. Specifically, by establishing a distinct constitutional place for local government, the Court would remove municipalities from the shadow of the Court's often state-centered federalism jurisprudence and provide a platform for local government to exercise more autonomy.

It is also important to clarify what this Note does *not* aim to achieve. Most importantly, despite evidence that courts defer to localities implicitly, this Note does not argue that courts do so in a majority of cases. In fact, even implicit local deference may be the exception to the rule.<sup>10</sup> Nor does this Note argue that courts should defer to local government in the majority of cases. Instead, it calls for a formalization of courts' ability to defer to local government for the three reasons described above, while preserving courts' discretion over whether and what level of local deference is appropriate across various constitutional doctrines. This Note also does not suggest that the current Supreme Court is likely to embrace a local constitutionalism principle. Indeed, the future of federalism jurisprudence in the Roberts Court, and thereby the Court's potential support for decentralization to localities, is unclear.<sup>11</sup> Rather than predicting the future of federalism, which is a topic far beyond the scope here, this Note points out the potential benefits of a local constitutionalism principle and describes why such a principle would be consistent with the reasoning behind a number of court opinions.

Part I of this Note places municipal governments in the context of the federal system by providing a description of state-municipal and federal-municipal relations. This Part then provides a brief overview of the Supreme Court's New Federalism and explains

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<sup>9</sup> See *infra* notes 150–54 and accompanying text.

<sup>10</sup> See *infra* notes 124–26 and accompanying text.

<sup>11</sup> See *infra* notes 150–58 and accompanying text.

how its support for decentralization offers at least one rationale for some of the Court's federalism decisions. Part II points out cases in which federal courts appear to have drawn a distinction between state and local government in applying constitutional doctrines, including equal protection and substantive due process under the Fourteenth Amendment, free speech under the First Amendment, cruel and unusual punishment under the Eighth Amendment, and commandeering under the Tenth Amendment. Part III provides three potential models for the development of local constitutional standards of review—a general tailoring principle, a presumption of deference, and a canon of statutory interpretation—and responds to possible critiques of these models. This Part points out some weaknesses of these models and explains why a general tailoring principle is likely to be the most effective model among the three. Part III also explains how adopting specific constitutional standards of review for local action would both elucidate the constitutional status of localities, as well as provide an opportunity to enhance local autonomy.

## I. LOCAL GOVERNMENT IN THE FEDERAL SYSTEM: FEDERALISM AND DECENTRALIZATION

### A. *State-Municipal Relations*

In contrast to the federal-state relationship,<sup>12</sup> since the Supreme Court's turn-of-the-century ruling in *Hunter v. City of Pittsburgh*,<sup>13</sup> courts have considered municipalities to be "political subdivisions of the State" and have held that "[t]he number, nature and duration of the powers conferred upon [them] . . . rests in the absolute discretion of the State."<sup>14</sup> Accordingly, the powers of localities are limited to those delegated to them by their respective state governments through state statutes or constitutional provisions.<sup>15</sup> Furthermore, some state courts to this day (Virginia is one example)

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<sup>12</sup> See, e.g., *New York v. United States*, 505 U.S. 144, 188 (1992) ("States are not mere political subdivisions of the United States.")

<sup>13</sup> 207 U.S. 161, 174–76 (1907) (authorizing annexation of the City of Allegheny by the City of Pittsburgh despite disapproval by majority of Allegheny residents).

<sup>14</sup> *Id.* at 178; see also *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

<sup>15</sup> Daniel R. Mandelker, *State and Local Government in a Federal System* 26 (6th ed. 2006); Gerald E. Frug, *The City as a Legal Concept*, 93 *Harv. L. Rev.* 1057, 1062 (1980).

construe the powers delegated to localities very narrowly pursuant to “Dillon’s Rule,” named after its nineteenth-century author, John Dillon, whose 1872 treatise on municipal government called on courts to limit the power of local government whenever possible.<sup>16</sup>

Some scholars dispute *Hunter*’s “extreme, positivist conception of localism,” which they argue fails to acknowledge the importance of local communities in a constitutional democracy<sup>17</sup> and ignores long-standing claims of local-government sovereignty.<sup>18</sup> The Supreme Court has also imposed limits on the broad power of states over municipalities with respect to state actions that constrain the constitutional rights of local residents.<sup>19</sup> Moreover, despite the weak legal standing of localities in light of Dillon’s Rule and *Hunter*, most states have granted municipalities control over local affairs such as land use and municipal services through the adoption of “home rule” statutes and state constitutional amendments.<sup>20</sup> Nonetheless, it is clear that despite the trends in favor of providing more autonomy to localities, states still exercise a significant degree of control over local governments and are willing to overrule local decisions,<sup>21</sup> while courts continue to narrowly construe the power of localities as granted by their states.<sup>22</sup>

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<sup>16</sup> John F. Dillon, *Treatise on the Law of Municipal Corporations* § 55, at 101–02 (Chicago, James Cockcroft & Co. 1872); see also Frug, *supra* note 15, at 1112.

<sup>17</sup> David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. Pa. L. Rev. 487, 563–64 (1999).

<sup>18</sup> Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 88–89 (describing conflicting views on local legal status held by Thomas M. Cooley and John Dillon).

<sup>19</sup> *Gomillion v. Lightfoot*, 364 U.S. 339, 344–45 (1960) (rejecting state’s alleged power to draw municipal boundaries and indicating that “[l]egislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States Constitution”).

<sup>20</sup> Mandelker, *supra* note 15, at 128–30; Osborne M. Reynolds, Jr., *Local Government Law* § 35, at 111, § 37, at 119 (3d ed. 2009).

<sup>21</sup> Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 Yale L.J. 2542, 2558 (2006).

<sup>22</sup> For a more pessimistic view of home rule, which contends that limits on local legal power embedded in home rule provisions restrain localities, see David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2347–50 (2003).

*B. Federal-Municipal Relations*

In contrast to the apparent power imbalance in the state-locality relationship favoring the state, federal-locality relations do not often differ in many respects from federal-state relations, at least with respect to courts' express application of constitutional law. As municipalities are considered subdivisions of the state, courts generally extend constitutional protections to municipalities as they would to states, considering the state and its localities as unitary actors.<sup>23</sup> In *Printz v. United States*, for instance, the Court indicated that the distinction between states and municipalities "is of no relevance" in considering whether a federal law requiring local law enforcement officials to conduct background checks on gun purchasers violated the Tenth Amendment.<sup>24</sup>

Federal courts do, however, explicitly differentiate between state and local governments with respect to Eleventh Amendment sovereign immunity. Since the Court's decision in *Monell v. Department of Social Services*,<sup>25</sup> it is well established that, unlike states, local governments are considered "persons" pursuant to the Federal Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, and are therefore subject to liability for unconstitutional actions. It is notable, however, that the Court in *Monell*, focusing primarily on the legislative history of the Act and Congress's intent in 1871 to treat municipal corporations as persons, did not suggest that the differential treatment of localities should extend to any other areas of law, nor did it argue on policy grounds that municipal liability is more appropriate than state liability.<sup>26</sup> Indeed, the extension in *Monell* of Section 1983 liability to municipalities may be more the product of a clash between Justice William Brennan and Chief Justice William Rehnquist over the scope of civil rights remedies in federal courts. According to Professor Joan Williams, Justice

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<sup>23</sup> Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 Va. L. Rev. 959, 982-84 (2007) (citing areas of constitutional law in which federal courts treat localities as indistinguishable from states, including sovereign immunity cases, double jeopardy, the Commerce Clause, and the Tenth Amendment).

<sup>24</sup> 521 U.S. 898, 931 n.15 (1997).

<sup>25</sup> 436 U.S. 658, 663 (1978).

<sup>26</sup> *Id.* at 690. For a discussion of the Court's interpretation of the congressional intent of the Act, see Steven S. Cushman, *Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker*, 34 B.C. L. Rev. 693 (1993).

Brennan's cancellation of Section 1983 local-government immunity in *Monell* was merely part of a larger effort to expose states to Section 1983 liability as well, although he was not able to achieve the latter.<sup>27</sup>

Courts also differentiate between states and localities in their application of antitrust law. While state action is generally immune from antitrust liability irrespective of whether such action imposes a restraint on trade in violation of the Sherman Act,<sup>28</sup> the Supreme Court has taken a different approach to localities. In *Lafayette v. Louisiana Power & Light Co.*, the Court held that cities "do not receive all the federal deference of the States that create them" and are thus not immune from antitrust liability without evidence of a state policy meant to "displace competition" through state regulation in the particular regulated area.<sup>29</sup> Subsequently, in *Hallie v. City of Eau Claire*, the Court voiced its concern that a narrow reading of local antitrust immunity would interfere with municipalities' "local autonomy and authority to govern themselves."<sup>30</sup> Nonetheless, the Court ultimately upheld its prior ruling in *Community Communications Co. v. City of Boulder*,<sup>31</sup> where it held that Colorado's broad home rule amendment to its state constitution did not provide localities general immunity from antitrust law with respect to any regulations of local concern.<sup>32</sup>

The Court's special treatment of local government under antitrust law is not without its critics. Prominent antitrust scholars have argued that the exemption of municipalities from state-action immunity improperly subjects local government to federal supervision and ignores the affirmative empowerment of local government represented by home rule grants.<sup>33</sup> Others have argued that the Court's approach improperly cedes authority to states to decide

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<sup>27</sup> Williams, *supra* note 18, at 125–30.

<sup>28</sup> *Parker v. Brown*, 317 U.S. 341, 352–53 (1943).

<sup>29</sup> 435 U.S. 389, 412–13 (1978).

<sup>30</sup> 471 U.S. 34, 44 (1985); see also *Lafayette*, 435 U.S. at 429 (Stewart, J., dissenting) (pointing out that localities exercise state sovereign powers as delegated to them by the state). It is notable that Justice Brennan joined in the *Hallie* opinion and the *Lafayette* dissent. Professor Joan Williams argues that, like Section 1983, local antitrust liability also originates from Justice Brennan's efforts to counteract the Burger Court's expansion of state sovereign immunity. Williams, *supra* note 18, at 131–34.

<sup>31</sup> 455 U.S. 40 (1982).

<sup>32</sup> *Hallie*, 471 U.S. at 43.

<sup>33</sup> 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 223c (3d ed. 2006).

which local actions should be exempt from antitrust liability.<sup>34</sup> Furthermore, in combination with federal legislative action granting antitrust immunity to local governments in private actions for damages<sup>35</sup> and the establishment of a higher hurdle for both state and local government to trigger the “concerted action” requirement of Section 1 of the Sherman Act,<sup>36</sup> localities have gained increased protection from antitrust liability.<sup>37</sup> Moreover, a majority of lower courts, in applying *Lafayette* and *Boulder*, have resisted the Supreme Court’s stricter standard of review for localities and instead extended immunity.<sup>38</sup> Thus, while local government is subjected to a formally higher standard than state government, the actual application of this standard may not result in a much greater burden on municipalities.

### C. Decentralization as a Rationale for New Federalism

Although the previous Section suggests that courts hold local governments to equal if not stricter constitutional standards than their states, localities also receive a certain level of deference along with their states pursuant to federalism principles. In general, federalism refers to the system whereby the central government interacts with its subordinate levels of government,<sup>39</sup> focusing specifically on the division of power between states and the federal government.<sup>40</sup> Since the early 1990s, the Supreme Court has in-

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<sup>34</sup> Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 *UCLA L. Rev.* 719, 724 (1985) (arguing that federal courts should identify markets for which local government is an efficient regulator deserving antitrust immunity).

<sup>35</sup> Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34–36 (2006).

<sup>36</sup> *Fisher v. City of Berkeley*, 475 U.S. 260, 266–67 (1986) (holding that no concerted action occurs when local government compels behavior that would otherwise constitute an antitrust violation).

<sup>37</sup> See generally Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 *Yale L.J.* 486 (1987); E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism’s Triumph Over Competition, The Last Fifty Years*, 3 *Wash. U. J.L. & Pol’y* 473 (2000).

<sup>38</sup> Hovenkamp & Mackerron, *supra* note 34, at 738–40.

<sup>39</sup> Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *Colum. L. Rev.* 543, 543–44 (1954).

<sup>40</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971) (describing federalism as “a system . . . in which the National Government, anxious though it may be to vindicate and protect



creasingly imposed constitutional limits on federal power over states and localities pursuant to what some scholars have called the “federalist revival” or “New Federalism.”<sup>41</sup> Rooted in the classical federalist/anti-federalist debate, New Federalism seeks to define the relationship between the federal government and state governments in terms that are more favorable to the states.<sup>42</sup> Specifically, New Federalism aims to limit federal courts’ interference with state decision making<sup>43</sup> while empowering courts to invalidate federal legislative action that infringes on state sovereignty.<sup>44</sup> With the addition of Justice Clarence Thomas in 1991, the Rehnquist Court issued a series of decisions limiting federal power over state and local government across a wide range of constitutional doctrines including the Commerce Clause,<sup>45</sup> the Tenth Amendment,<sup>46</sup> state sovereignty under the Eleventh Amendment,<sup>47</sup> and Section 5 of the Fourteenth Amendment.<sup>48</sup>

There is significant debate over the underlying theory and rationale behind the Court’s New Federalism, but most scholars view the Court’s decisions as focusing on protecting state sovereignty.<sup>49</sup>

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federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States”).

<sup>41</sup> Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism: New York, Printz, and Yeskey*, 1998 Sup. Ct. Rev. 71, 72; Ernest A. Young, *The Rehnquist Court’s Two Federalisms*, 83 Tex. L. Rev. 1, 2–3 (2004).

<sup>42</sup> See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (relying on Federalist No. 45, which indicates that the “powers delegated by the proposed Constitution to the federal government are few and defined,” while states’ powers “are numerous and indefinite”); see also *Printz v. United States*, 521 U.S. 898, 919–22 (1997) (same). But see *id.* at 945–46 (Stevens, J., dissenting) (arguing that Founders intended to empower the federal government to “demand that local officials implement national policy programs”).

<sup>43</sup> Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 Va. L. Rev. 1301, 1311–12 (2002); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1486 (1994).

<sup>44</sup> John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. Cal. L. Rev. 1311, 1357–58 (1997) (arguing that the Constitution provides for judicial review of federal-state balance of power questions).

<sup>45</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>46</sup> *Printz*, 521 U.S. 898.

<sup>47</sup> *Alden v. Maine*, 527 U.S. 706 (1999).

<sup>48</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>49</sup> See Richard H. Fallon, Jr., *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. Chi. L. Rev. 429, 430 (2002); Heather K. Gerken, *The Supreme Court 2009 Term: Forward: Federalism All the Way Down*, 124 Harv. L.

Yet while state sovereignty concerns may provide the foundation for New Federalism, key decisions suggest that at least part of the justification for the Court's shift toward federalism can be traced to its support for decentralization of power from the federal government to local levels of government. In *Gregory v. Ashcroft*, a seminal federalism case marking the Court's departure from the anti-activist view of federalism in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>50</sup> the Court explicitly stated that the locality-oriented benefits of decentralization provide one justification for federalism.<sup>51</sup> Justice Sandra Day O'Connor writing for the majority noted that federalism

assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.<sup>52</sup>

In subsequent decisions, the Supreme Court has relied both directly<sup>53</sup> and indirectly<sup>54</sup> on Justice O'Connor's reasoning to support federalism, and scholars have also detailed how the Court shores up its federalism decisions based on pluralist theories regarding the value of decentralization.<sup>55</sup>

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Rev. 4, 12 (2010); David A. Super, Rethinking Fiscal Federalism, 118 Harv. L. Rev. 2544, 2552–53 (2005); Young, *supra* note 41, at 23.

<sup>50</sup> 469 U.S. 528 (1985).

<sup>51</sup> 501 U.S. 452, 458 (1991).

<sup>52</sup> *Id.* The benefits of decentralization outlined by Justice O'Connor mirror the claimed advantages of local autonomy, namely, efficiency, participation, and exit. See *infra* note 180 and accompanying text.

<sup>53</sup> See, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187, 1205 (2009) (Thomas, J., concurring).

<sup>54</sup> See *infra* Part II; see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 705 (1999) (Breyer, J., dissenting) (arguing, in question involving state sovereign immunity, that the majority decision fails to “satisfy modern federalism’s more important liberty-protecting needs” by making it “more difficult for Congress to decentralize governmental decisionmaking and to provide individual citizens, or local communities, with a variety of enforcement powers”).

<sup>55</sup> Steven G. Calabresi, Federalism and the Rehnquist Court: A Normative Defense, 574 *Annals Am. Acad. Pol. & Soc. Sci.* 24, 27–28 (2001); Davidson, *supra* note 23, at 1005–10; Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 *UCLA L. Rev.* 903, 907 (1994); Super, *supra* note 49, at 2556–57.

As Justice O'Connor noted, decentralization of power to states and municipalities provides an opportunity for more public participation and collective self-government.<sup>56</sup> Decentralization may also encourage more policy experimentation at the local level,<sup>57</sup> and, indeed, the view of states as "laboratories of democracy" has long predated the Court's federalist revival as grounds to support local autonomy.<sup>58</sup> In addition, pluralists argue that decentralization reduces the risk of dangerous aggrandizement of power by centralized government and prevents unnecessary and inefficient market intervention.<sup>59</sup> The efficiency argument for decentralization presumes that a government authority closer to the matters it regulates will be more knowledgeable about and responsive to such matters than a more distant, centralized authority.<sup>60</sup>

While the usefulness of federalism to achieve the desired ends of decentralization is controversial,<sup>61</sup> the Court's invocation of decentralization suggests that New Federalism seeks at least to some extent to grant both state and municipal governments more autonomy rather than merely protect state sovereignty from federal interference. Accordingly, if support for decentralization has contributed to the Court's federalism shift, one might expect to see signs of local preference reflected in the Court's application of constitutional doctrines to municipalities as compared to states. Indeed, states are arguably more "centralized" and less able to secure the benefits of decentralization. More specifically, in its federalism cases, the Court may have reason to view localities more sympathetically than states and, in response to this sympathy, tailor its application of constitutional law more favorably to localities than it would to other levels of government.<sup>62</sup> The following Part provides

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<sup>56</sup> *Gregory*, 501 U.S. at 458; see also *Hills*, supra note 8, at 191; *Super*, supra note 49, at 2556–57.

<sup>57</sup> *Super*, supra note 49, at 2556.

<sup>58</sup> See, e.g., *Fay v. New York*, 332 U.S. 261, 296 (1947) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (internal quotation marks omitted))).

<sup>59</sup> *Super*, supra note 49, at 2556–57.

<sup>60</sup> *Rubin & Feeley*, supra note 55, at 910.

<sup>61</sup> See infra notes 159–63 and accompanying text.

<sup>62</sup> For discussion of local constitutional tailoring, see infra notes 130–31 and accompanying text.

examples of cases where federal courts, relying on decentralization values, appear to engage in such tailoring, albeit implicitly.

## II. DO FEDERAL COURTS FAVOR LOCALITIES: EXAMPLES OF DEFERENTIAL TREATMENT

Some scholars have argued that the Supreme Court treats localities differently in some respects under what has been referred to as “shadow constitutional protection” of localities.<sup>63</sup> For example, Professors David Barron and Richard Schragger have suggested that the Supreme Court has adopted municipality-deferential “local constitutionalism” in some instances, specifically with respect to equal protection claims.<sup>64</sup> Expanding upon these observations, this Part examines a broader set of cases, a number of which have thus far been overlooked by localism scholars, where courts appear to depart from the traditional unitary constitutional treatment of states and their localities.

### *A. Equal Protection and Substantive Due Process: Referenda, Education, and Land Use*

In perhaps the clearest demonstration of the “shadow constitutional protection” of localities, the Supreme Court and federal circuit courts appear to extend stronger deference to municipalities in certain equal protection and substantive due process cases. The most striking example is the U.S. Court of Appeals for the Sixth Circuit’s opinion in *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*.<sup>65</sup> In reaction to two ordinances adopted by the City Council of Cincinnati that prohibited discrimination on the basis of sexual orientation, a proposed city charter amendment prohibiting the enactment of any ordinance providing special status on the basis of sexual orientation and declaring that any such previously enacted ordinances would be void was submitted by refer-

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<sup>63</sup> Davidson, *supra* note 23, at 994–95.

<sup>64</sup> Barron, *supra* note 17, at 549–52; Richard C. Schragger, Reclaiming the Canvassing Board: *Bush v. Gore* and the Political Currency of Local Government, 50 *Buff. L. Rev.* 393, 414 (2002).

<sup>65</sup> 128 F.3d 289, 297–98 (6th Cir. 1997).

endum directly to the voters, and the amendment passed.<sup>66</sup> Reversing the district court, which concluded that homosexuals constitute a quasi-suspect class for the purposes of equal protection review,<sup>67</sup> the Sixth Circuit rejected the lower court's intermediate heightened scrutiny of the city charter amendment and held that, under rational basis review, the amendment was constitutional.<sup>68</sup> In light of the Supreme Court's ruling in *Romer v. Evans*, however, which held that an amendment to the Colorado State Constitution denying special status to homosexuals was unconstitutional,<sup>69</sup> the Supreme Court vacated the Sixth Circuit's judgment and remanded for further consideration.<sup>70</sup>

Upholding the amendment on remand, the Sixth Circuit found that, unlike the broad language of the Colorado amendment, which could be interpreted to deny homosexuals protection under state laws of general applicability, the city charter amendment focused specifically on preferential treatment at the municipal level.<sup>71</sup> The Sixth Circuit implied in its holding that a local charter amendment, because it "constitute[s] a direct expression of the local community will," should receive more deferential treatment under rational basis review than a *Romer*-like state constitutional amendment which "deprive[s] a politically unpopular minority, but no others, of the political ability to obtain special legislation at every level of state government, including within local jurisdictions having pro-gay rights majorities."<sup>72</sup> The Sixth Circuit noted that "a local measure adopted by direct franchise, designed in part to preserve community values and character . . . carries a formidable presumption of legitimacy and is thus entitled to the highest degree of deference from the courts."<sup>73</sup> Despite the fact that the Colorado and Cincinnati amendments were justified on the same grounds, the Sixth Circuit held that the city amendment "constituted local legislation

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<sup>66</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 54 F.3d 261, 263–64 (6th Cir. 1995).

<sup>67</sup> *Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 860 F. Supp. 417, 440 (S.D. Ohio 1994).

<sup>68</sup> *Equal. Found.*, 54 F.3d at 270–71.

<sup>69</sup> 517 U.S. 620, 635 (1996).

<sup>70</sup> *Equal. Found.*, 128 F.3d at 294.

<sup>71</sup> *Id.* at 296.

<sup>72</sup> *Id.* at 297.

<sup>73</sup> *Id.*

of purely local scope” and was therefore entitled to the presumption that “the City’s voters had clear, actual, and direct individual and collective interests in that measure,” thus ruling out the possibility of pure animus.<sup>74</sup>

The Sixth Circuit’s locality-deferential opinion likely found inspiration in Justice Antonin Scalia’s dissent from the Supreme Court’s prior decision to vacate and remand, in which Chief Justice William Rehnquist and Justice Clarence Thomas joined.<sup>75</sup> Similar to the Sixth Circuit’s argument, Justice Scalia pointed out that, in contrast to *Romer*, the Cincinnati amendment “involves a determination by what appears to be the lowest electoral subunit that it does *not* wish to accord homosexuals special protection.”<sup>76</sup> By specifically basing their argument on the level of government rather than the content of the amendments, the dissenting justices seemed to imply that local ordinances are entitled to a stronger presumption of constitutionality. Although Justice Scalia lacked a majority in this opinion, the Court later chose to deny certiorari in the Sixth Circuit’s decision on remand despite the fact that the Sixth Circuit’s reasoning closely followed Justice Scalia’s dissent.<sup>77</sup>

A similar rationale for upholding local action can be found in other referendum cases. In *City of Eastlake v. Forest City Enterprises, Inc.*, for example, the Court reversed the Supreme Court of Ohio and held that a city charter amendment requiring that any proposed land-use changes be approved by a fifty-five percent vote in a referendum did not constitute a violation of substantive due process.<sup>78</sup> Although purportedly subjecting the referendum to the typical rational basis standard of review for zoning challenges established in *Euclid v. Amber Realty Co.*,<sup>79</sup> the Court stressed that a referendum “is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to

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<sup>74</sup> Id. at 300.

<sup>75</sup> Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 518 U.S. 1001, 1001 (1996).

<sup>76</sup> Id.

<sup>77</sup> Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 525 U.S. 943, 944 (1998).

<sup>78</sup> 426 U.S. 668, 679 (1976).

<sup>79</sup> Id. at 676; see also *Hunter v. Erickson*, 393 U.S. 385, 392–93 (1969) (indicating that popular referendum does not immunize from constitutional protections).

what serves the public interest.”<sup>80</sup> The Court’s locality-focused praise of direct democracy is not unlike the court’s language in *Equality Foundation*,<sup>81</sup> even if it did not explicitly establish a more deferential approach to a city referendum as opposed to a state referendum.

While it could be argued that *Equality Foundation* and *City of Eastlake* are distinguishable because they involve referenda, which one might argue could trigger a court’s deference,<sup>82</sup> courts also seem to treat localities differently in other equal protection cases. School issues are one example. In *San Antonio Independent School District v. Rodriguez*, the Supreme Court upheld the State of Texas’s public-school financing system, which drew a portion of its funding from an ad valorem property tax imposed by each school district.<sup>83</sup> Despite the disparity in education funding between low tax base and high tax base districts which resulted in less funding per pupil in lower-income districts, the Court held that the system survived rational basis review.<sup>84</sup> Noting that questions of federalism are “inherent” in establishing the level of scrutiny imposed by the Court on states,<sup>85</sup> the Court relied on essentially localist arguments to find that Texas’s system was not irrational. Specifically, signaling its support for decentralization, the Court celebrated the fact that “[i]n an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived.”<sup>86</sup> The Court pointed out that the Texas system “permits and encourages a large measure of par-

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<sup>80</sup> *Eastlake*, 426 U.S. at 678 (quoting *Southern Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 294 (9th Cir. 1970) (internal quotation marks omitted)).

<sup>81</sup> See *Equal. Found. of Greater Cincinnati v. City of Cincinnati*, 128 F.3d 289, 297 (6th Cir. 1997) (“An expression of the popular will expressed by majority plebiscite, especially at the lowest level of government (which is the level of government closest to the people), must not be cavalierly disregarded.”); see also *James v. Valtierra*, 402 U.S. 137, 143 (1971) (noting that a referendum “gives [residents] a voice in decisions that will affect the future development of their own community”).

<sup>82</sup> See, e.g., Julian Conrad Juergensmeyer & Thomas E. Roberts, *Land Use Planning and Development Regulation Law* 329 (2d ed. 2007) (claiming that municipalities submit growth-management plans to referendum to “insulate such programs from equal protection . . . and related attacks”).

<sup>83</sup> 411 U.S. 1, 9–10 (1973).

<sup>84</sup> *Id.* at 54–55.

<sup>85</sup> *Id.* at 44.

<sup>86</sup> *Id.* at 49.

ticipation in and control of each district's schools at the local level," which, according to the Court, strengthened the State's rational basis claim.<sup>87</sup> Without specifically calling for a different level of scrutiny for localities, the Court seemed to suggest that state action seeking to empower localities should receive more favorable treatment by the Court.

The same support for decentralization with respect to school policy is seen in the Court's school desegregation decisions after *Brown v. Board of Education*. In its early decisions, the Court emphasized concerns over excessive centralization,<sup>88</sup> and more recent decisions pay homage to the importance of empowering localities with control over public schools, frequently echoing the Court's earlier call for the return of schools to local control.<sup>89</sup> For instance, in *Washington v. Seattle School District No. 1*, the Court struck down a state initiative limiting local discretion over school desegregation plans on equal protection grounds, noting that "responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards" and holding that the restructuring of local control over education policy unconstitutionally singled out and burdened minorities in their participation in the political process.<sup>90</sup> More recent affirmative action cases also raise decentralization arguments.<sup>91</sup>

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<sup>87</sup> *Id.*; see also Eric P. Christofferson, Note, *Rodriguez* Reexamined: The Misnomer of "Local Control" and a Constitutional Case for Equitable Public School Funding, 90 *Geo. L.J.* 2553, 2555 (2002).

<sup>88</sup> See, e.g., *Milliken v. Bradley*, 418 U.S. 717, 741–42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools."); see also *Wright v. Council of Emporia*, 407 U.S. 451, 478 (1972) (Burger, J., dissenting) ("Local control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well.").

<sup>89</sup> See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 131 (1995) ("We have long recognized that education is primarily a concern of local authorities."); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (justifying dissolution of desegregation decree on basis of importance of local decision-making).

<sup>90</sup> 458 U.S. 457, 477–78, 483–84 (1982).

<sup>91</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 848–49 (2007) (Breyer, J., dissenting) (claiming local control as justification for permitting school to continue desegregation efforts after achieving unitary status); *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (providing deference to state university, in part justified by "laboratories for experimentation" argument); *Cavalier ex rel. Cavalier v. Caddo Parish Sch. Bd.*, 403 F.3d 246, 265–66 (5th Cir. 2005) (Wiener, J., dissenting).



Outside of desegregation, the Court's reasoning in *Rodriguez* has also been carried over to other more recent court decisions involving schools. For example, in *Schroeder v. Hamilton School District*, which concerned an equal protection claim brought against a school district for failing to prevent students and teachers from harassing the plaintiff on the basis of his homosexuality,<sup>92</sup> the U.S. Court of Appeals for the Seventh Circuit, while formally applying a rational basis test, appeared to signal greater deference to local school districts by noting that "federal judges should not use rational basis review as a mechanism to impose their own social values on public school administrators who already have innumerable challenges to face."<sup>93</sup>

As at least one court has reasoned, the Court's apparent deference in school cases could be explained by education's "unique position in our constitutional tradition."<sup>94</sup> While this theory is possible, it is just as likely that the Court's deference stems not from the treatment of the school as a constitutionally unique institution, but rather from the Court's view that limiting federal intervention in local school policy, a core responsibility of local government, preserves local autonomy more generally.<sup>95</sup> This point is reinforced by the Court's apparent deference to localities in equal protection contexts outside of education. For example, in addition to the Court's deference to referenda discussed above, the Court has traditionally granted significant discretion to municipalities facing equal protection and substantive due process challenges against zoning actions.<sup>96</sup> While the Court's rational basis review of municipal zoning decisions does not distinguish between state and local

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<sup>92</sup> 282 F.3d 946, 950 (7th Cir. 2002).

<sup>93</sup> *Id.* at 956; see also *Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1, 6 (1st Cir. 1983) ("[D]istrict lines reflect a strongly felt need in our society for local control of decisions vitally affecting the education of our children . . .").

<sup>94</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1188 n.33 (9th Cir. 2005), *rev'd*, 551 U.S. 701 (2007). See generally Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 *Wm. & Mary L. Rev.* 1691, 1705–39 (2004).

<sup>95</sup> Cf. Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 *UCLA L. Rev.* 1635, 1641–43 (2007) (offering institutional theory rather than level-of-government theory to explain school deference in First Amendment cases).

<sup>96</sup> See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926); *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1293 (7th Cir. 1977).

action, the Court's leniency regarding local zoning appears to set municipalities apart from their states with respect to judicial scrutiny of the effect of land use on other constitutional rights, as discussed in the next Section with respect to First Amendment rights.

Another example of federal deference to localities in the context of equal protection doctrine can be found in the Supreme Court's approach to infringement of the fundamental right to travel. Whereas it is well settled that a state may not treat residents differently from non-residents solely for the purpose of discouraging new entry into the state,<sup>97</sup> the Court has declined to extend the same protection to intrastate travel between localities. In at least one case, the Court has expressly indicated that the fundamental right to travel does not protect against restrictions on intrastate movement.<sup>98</sup> As one scholar has argued, the Court appears to specifically authorize through its deferential position toward local zoning the exclusion of "entire socio-economic classes" from the constitutional protection of the freedom of travel.<sup>99</sup> Although it has not invoked federalist or decentralist language in its right-to-travel opinions, it is notable that the Court appears to draw a constitutional distinction between state and local governments, applying the more stringent standard to state government.

### *B. First Amendment: Free Speech*

The Court has also provided protection to localities in its First Amendment doctrine, especially regarding freedom of speech. In

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<sup>97</sup> See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (holding that statute denying welfare assistance to residents of less than a year is an unconstitutional violation of fundamental right to freedom of travel under Equal Protection Clause); see also *Att'y Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 901–02 (1986); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 256 (1974).

<sup>98</sup> *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 277 (1993) ("[R]estricting movement from one portion of the Commonwealth of Virginia to another . . . does not implicate the right of interstate travel . . ."); see also *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 7 (1974) (holding that exclusionary zoning ordinance did not violate right to travel because not aimed at transients); *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768, 776 (10th Cir. 2010). But see *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) (extending right to travel to intrastate residency); *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) (same); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1579 (S.D. Fla. 1992) (same).

<sup>99</sup> Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 Va. L. Rev. 1091, 1114 (2008) [hereinafter Schragger, *Cities*].

*City of Renton v. Playtime Theatres, Inc.*, a case involving local zoning restrictions on adult entertainment, the Court relied on a “laboratories of experimentation” argument to defend its deferential review of municipal action.<sup>100</sup> Finding that the zoning ordinance was content-neutral since it targeted the secondary effects of constitutionally protected speech rather than the speech itself, the Court claimed to apply intermediate scrutiny, which requires a showing that a government action is “designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.”<sup>101</sup> Similarly, in *City of Los Angeles v. Alameda Books, Inc.*, the Court addressed a free speech claim against Los Angeles for a zoning ordinance prohibiting the establishment of more than one adult entertainment business in a single building.<sup>102</sup> In applying the *Renton* standard, the Court placed a highly deferential evidentiary burden on the city to prove its substantial government interest in enacting the zoning, observing that “the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems.”<sup>103</sup>

In light of *Alameda Books* and *Renton*, a number of lower courts have also adopted a similar standard of review regarding local zoning measures infringing on free speech. The Fourth Circuit, for example, has echoed the Court’s language in *Alameda Books* granting significant discretion to localities to regulate speech,<sup>104</sup> while the Ninth Circuit has reached a similar outcome based on the importance of local experimentation as noted in *Renton*.<sup>105</sup> Other circuits

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<sup>100</sup> 475 U.S. 41, 52 (1986) (“The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.”).

<sup>101</sup> *Id.* at 49–50.

<sup>102</sup> 535 U.S. 425, 429 (2002).

<sup>103</sup> *Id.* at 440; see also *id.* at 451 (Kennedy, J., concurring) (“As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners.”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 297–98 (2000) (“The city council members, familiar with commercial downtown Erie, . . . can make particularized, expert judgments about the resulting harmful secondary effects.”).

<sup>104</sup> *McDoogal’s E., Inc. v. Cnty. Comm’rs*, 341 F. App’x 918, 929 (4th Cir. 2009) (refusing to “second-guess” county zoning decision and granting “certain amount of deference”).

<sup>105</sup> *World Wide Video of Wash., Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004) (noting “paramount role of local experimentation . . . given local governments’ superior understanding of their own problems”).

have demonstrated a similar deference to localities seeking to regulate secondary effects of speech.<sup>106</sup>

Stopping short of explicitly applying a different constitutional standard to city ordinances than it might have applied to content-neutral state laws, the Court's language in *Alameda Books* and *Renton* suggests that a municipality, while facing standard intermediate scrutiny, receives some deference based on the decentralist view that localities are in a better position to evaluate conditions at the local level and experiment with solutions. The four dissenting justices in *District of Columbia v. Heller* took the same view by relying on *Alameda Books* and *Renton* to support their claim that the District of Columbia local government had a "compelling interest" to ban handguns despite the ban's infringement of Second Amendment rights.<sup>107</sup> Noting that "deference to legislative judgment seems particularly appropriate . . . where the judgment has been made by a local legislature, with particular knowledge of local problems and insight into appropriate local solutions," the dissent called on the Court to give the "democratic process some substantial weight in the constitutional calculus."<sup>108</sup> Inferring a more lenient standard of review for localities in *Alameda Books* and *Renton*, the dissenting Justices appear to call for similar leniency in the context of Second Amendment strict scrutiny review.

As it has in equal protection cases, the Court has also extended deference to local school officials in free speech cases. For example, in *Bethel School District No. 403 v. Fraser*, the Court granted broad discretion to school officials to punish a student for lewd speech, noting that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."<sup>109</sup> Other courts have specifically linked *Fraser* to an assumption of local deference. For example, the Sixth Circuit, in a case involving facts similar to those in *Fraser*, made the following observation:

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<sup>106</sup> See, e.g., *N.W. Enters. Inc. v. City of Houston*, 352 F.3d 162, 180 (5th Cir. 2003); *G.M. Enters., Inc. v. Town of St. Joseph*, 350 F.3d 631, 640 (7th Cir. 2003); *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1199 (10th Cir. 2003).

<sup>107</sup> 554 U.S. 570, 705 (2008) (Breyer, J., dissenting).

<sup>108</sup> *Id.*; see also *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*, 567 F.3d 856, 860 (7th Cir. 2009) ("Federalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon.").

<sup>109</sup> 478 U.S. 675, 683 (1986).

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Local school officials, better attuned than we to the concerns of the parents/taxpayers who employ them, must obviously be accorded wide latitude . . . . We may disagree with the choices, but unless they are beyond the constitutional pale we have no warrant to interfere with them. Local control over the public school, after all, is one of this nation's most deeply rooted and cherished traditions.<sup>110</sup>

While such language does not discard the application of First Amendment law to local school officials, it appears to reduce a school's burden based on the decentralist perception that the decisions of school administrators, who are closer to the people, will more accurately reflect public values than those of federal and perhaps even state entities.

### *C. Eighth and Tenth Amendments: Criminal Law*

Another area in which the Supreme Court appears to have granted localities deference is local law enforcement. While the Court has not hesitated in the past to invalidate local vagrancy laws on vagueness grounds,<sup>111</sup> some have observed that the Court appears to have backed away from its traditionally skeptical view of municipal law enforcement in favor of a decentralist-driven deference to local decision-making.<sup>112</sup> This shift is demonstrated in *City of Chicago v. Morales*.<sup>113</sup> Although a plurality of the Court held that a "Gang Congregation Ordinance" prohibiting gang members from loitering in public places was unconstitutional for vagueness,<sup>114</sup> the concurring opinion of Justice Sandra Day O'Connor qualified the Court's ruling as narrow and emphasized Chicago's right to "reasonable alternatives" to combat gang violence.<sup>115</sup> Moreover, in his

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<sup>110</sup> Poling v. Murphy, 872 F.2d 757, 762–63 (6th Cir. 1989).

<sup>111</sup> See, e.g., Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) (invalidating vagrancy statute used to arrest individuals engaging in non-criminal activity); Coates v. Cincinnati, 402 U.S. 611, 614 (1971) (invalidating ordinance criminalizing assembly on city sidewalks).

<sup>112</sup> Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, 105 Yale L.J. 1165, 1247–48 (1996); Wayne A. Logan, The Shadow Criminal Law of Municipal Governance, 62 Ohio St. L.J. 1409, 1416–17 (2001).

<sup>113</sup> 527 U.S. 41 (1999).

<sup>114</sup> Id. at 64.

<sup>115</sup> Id. at 67 (O'Connor, J., concurring).

dissenting opinion, Justice Clarence Thomas, joined by Chief Justice William Rehnquist and Justice Antonin Scalia, criticized the plurality for failing to recognize the local impact of its decision.<sup>116</sup>

While recent federalism trends may be a source of the rising deference to local law enforcement, there is evidence that the Court has long recognized the federalist aspect of criminal law cases. The clearest example can be found in *Powell v. Texas*, where the Court affirmed the conviction of an individual arrested under a state public intoxication law.<sup>117</sup> In rejecting the appellant's claim that punishing the "condition" of chronic alcoholism violated the Cruel and Unusual Punishment Clause of the Eighth Amendment, the majority noted that "essential considerations of federalism" require the Court to abstain from interfering with the states' discretion over the "process of adjustment" with respect to doctrines of criminal law, including tests for insanity.<sup>118</sup> Although the decision focused on state action, Justice Hugo Black, using broad decentralist language on which at least one lower court has relied to uphold local law enforcement efforts challenged under the Eighth Amendment,<sup>119</sup> made the following point in his concurring opinion:

It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow.<sup>120</sup>

Another example of this locality-oriented federalism in the context of law enforcement can be seen in the Court's Tenth Amendment jurisprudence. The most notable example is *Printz v. United*

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<sup>116</sup> Id. at 114–15 (Thomas, J., dissenting) (“[T]he people who will have to live with the consequences of today’s opinion do not live in our neighborhoods.”).

<sup>117</sup> *Powell v. Texas*, 392 U.S. 514, 530, 535 (1968).

<sup>118</sup> Id. at 535–36.

<sup>119</sup> *Joyce v. City & Cnty. of S.F.*, 846 F. Supp. 843, 858 (N.D. Cal. 1994) (upholding city’s “Matrix Program” targeting a range of offenses in public places and allegedly aimed at the city’s homeless population).

<sup>120</sup> *Powell*, 392 U.S. at 547–48 (Black, J., concurring).

*States*,<sup>121</sup> one of the defining cases of the Court's New Federalism. In *Printz*, the Court held that the Brady Act, which regulated the distribution of firearms, violated the anticommandeering requirement of the Tenth Amendment because it improperly compelled states to implement a federal regulatory program by requiring county law enforcement officials to run background checks on handgun purchasers.<sup>122</sup> Although it focused on the dual-sovereignty aspect of federalism, the Court, quoting Madison in the Federalist Papers, noted that "[t]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere."<sup>123</sup>

The above cases do not offer enough evidence to claim that courts are more willing to permit potentially unconstitutional behavior by local law enforcement than by state law enforcement, but it is notable that municipal action appears in at least some cases to receive more flexible treatment. These cases illustrate, to at least some extent, a recognition of the unique position of local government vis-à-vis the federal government—a position that in some instances may call for a different constitutional approach.

#### *D. Examples of Localism or Merely Federalism?*

One potential criticism of this case analysis may be that it overstates the actual importance that courts place on local government over state government. With the exception of *Equality Foundation*, it is unclear whether the courts would have decided the previous cases differently if state governments rather than municipal governments had been involved. The decentralization arguments seen in these cases are equally applicable to state action. In addition, there is some affirmative evidence that the Supreme Court is not willing to formally favor localities over states, despite its willingness to do so implicitly. For example, in *Washington v. Seattle*

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<sup>121</sup> 521 U.S. 898 (1997).

<sup>122</sup> *Id.* at 933.

<sup>123</sup> *Id.* at 920–21 (quoting The Federalist No. 39 (James Madison)); see also *Petersburg Cellular P'ship v. Bd. of Supervisors*, 205 F.3d 688, 701 (4th Cir. 2000) (relying in part on decentralization aspect of federalism to argue that forcing locality to grant permit for communications tower under Telecommunications Act of 1996 violated Tenth Amendment).

*School District No. 1*, despite language suggesting some deference to local government,<sup>124</sup> the Court specifically rejected the dissent's claim that it was providing special constitutional protection to localities when it held that a state voter initiative unconstitutionally singled out and restructured the political processes affecting a racial issue by terminating municipal use of mandatory busing to integrate public schools.<sup>125</sup> Furthermore, empirical research suggests that courts are generally less likely to side with local government compared to state and federal government in constitutional cases.<sup>126</sup>

Although such evidence undermines the claim that courts broadly favor localities, it fails to explain why courts continue to employ decentralist language rather than, or perhaps in addition to, state sovereignty language to justify their decisions. Even assuming, *arguendo*, that many of the cases described here are merely state-focused federalism cases rather than localism cases, this ambiguity highlights the need for the Court to provide clearer guidance on the application of its constitutional doctrines to localities. As described below, the announcement of a general local tailoring principle would at least provide a formal structure for courts to encourage decentralization through local deference if they find it appropriate, as they implicitly appear to do in these cases. If, however, the same courts found local deference to be inappropriate, they could equally state so under the proposed principle, but they would have to explain their reasoning and thereby provide guidance to subsequent courts.

### III. RECOMMENDATIONS ON LOCAL CONSTITUTIONAL STANDARDS OF REVIEW

While the areas of constitutional law noted above provide some examples of court deference to localities, these cases are not com-

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<sup>124</sup> 458 U.S. 457, 477 (1982).

<sup>125</sup> *Id.* at 480 n.23.

<sup>126</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *Vand. L. Rev.* 793, 822 (2006) (demonstrating strict scrutiny survival rate of 17% for local, 29% for state, and 50% for federal actions challenged under Free Speech and Equal Protection Clauses); Adam Winkler, *Free Speech Federalism*, 108 *Mich. L. Rev.* 153, 155 (2009) (reporting that federal courts upheld federal speech restrictions 56%, state restrictions 24%, and local restrictions only 3% of the time).



prehensive. For example, scholars have also observed the Supreme Court's approval of local action in federalism cases involving the Fifth Amendment Takings Clause,<sup>127</sup> the Commerce Clause,<sup>128</sup> and Section 5 of the Fourteenth Amendment.<sup>129</sup> Given the numerous instances in which courts appear to implicitly favor localities, it is perhaps surprising that no court has explicitly established a unique constitutional standard of review for localities with respect to any of these doctrines. While the Court's federalism embraces decentralization to at least some degree and the Court has applied the principle to localities in addition to states, the Court has been reluctant to establish a set of rules to explicitly set localities apart from states. This Part offers three potential avenues for establishing a local constitutional test, offers justifications for these approaches, and responds to possible challenges to the creation of local constitutional standards of review.

#### *A. Three Potential Models to Establish Local Standards of Review*

The idea of "tailoring" constitutional principles to different institutions, including different levels of government, is a well-established concept.<sup>130</sup> Professor Mark Rosen, for example, has argued in favor of differentiating constitutional standards in order to reflect factors that make specific levels of government "sufficiently

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<sup>127</sup> Robert C. Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 *Tulsa L. Rev.* 751, 762 (2009) (arguing that the Court was correct in *Kelo v. City of New London*, 545 U.S. 469 (2005), "to refrain from imposing a restrictive set of national rules on cities' use of the power of eminent domain").

<sup>128</sup> Schragger, *Cities*, supra note 99, at 1108 (describing leniency of courts with respect to protectionist land-use policies between cities compared to strict anti-protectionist approach to interstate commerce). For an example of such leniency, see *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1276 (2d Cir. 1995), where the court rejected a Commerce Clause challenge to a city's waste management plan based on the reluctance to interfere with intrastate activity, noting that such interference would "threaten the future fashioning of effective and creative programs for solving local problems and distributing governmental largesse."

<sup>129</sup> Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 *Harv. L. Rev.* 1810, 1838 (2004) [hereinafter Schragger, *Role of the Local*] (arguing that *City of Boerne v. Flores*, 521 U.S. 507 (1997), by limiting the scope of Congress's Fourteenth Amendment enforcement power, aimed to shift decisions on religious accommodations to the local level).

<sup>130</sup> See generally Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 *UCLA L. Rev.* 1747 (2007).

different to justify Tailoring.”<sup>131</sup> In contrast to Rosen, however, who explained the justifications for tailoring without expressing a position on which level of government should benefit from such tailoring or what such tailoring might look like with respect to each constitutional doctrine, this Part, responding to the Court’s implicit support for decentralization and local autonomy, focuses specifically on tailoring constitutional doctrines to localities. In addition, while others have offered recommendations on how courts should modify specific constitutional doctrines when applied to localities,<sup>132</sup> this Part describes three possible overarching principles—a broad tailoring principle, a presumption of deference, and a canon of statutory interpretation—that courts might adopt in order to provide a foundation for further development of doctrine-specific local constitutional tailoring.<sup>133</sup>

First, the Court could establish a broad tailoring principle applicable to local government in general, while reserving the right to create different standards of review for specific areas of constitutional law over time. The Court appears to have begun to formulate locality-specific standards in the cases described in Part II, but it has failed to carry out the first step of this model: announcing a broad principle of local tailoring. In contrast to the current ad hoc approach to localities, the announcement of a broad local tailoring principle, followed by case-by-case application of such a principle to particular areas of constitutional law, would more closely model the Court’s current approach to state and federal action. Indeed, invoking the general principle of federalism, the Court has carved out specific standards of review for state action in a variety of circumstances.<sup>134</sup>

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<sup>131</sup> Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. Pa. L. Rev. 1513, 1580–81 (2005).

<sup>132</sup> See *infra* note 136.

<sup>133</sup> It is notable that the simplest approach to local tailoring would likely be for the Court to apply a more deferential constitutional standard of review to all local action than to state or federal action. For example, the Court could simply announce that it will apply rational basis review to localities while applying strict or intermediate scrutiny to states. Although the easiest to administer, given the wide range of constitutional doctrines and the drastic differences between these levels of scrutiny, it would be unwise to apply such a sweeping rule to local government.

<sup>134</sup> See *infra* note 168 and accompanying text.

While this would be a far more flexible and less drastic approach than one which, for example, simply called for a shift from strict scrutiny to rational basis review, it would also be more difficult to administer, as it would require the eventual formulation of new locality-specific tests and careful judgment on which areas of constitutional law call for such tests in the first place. Difficulty in administration should not, however, rule out the creation of a local tailoring principle. As Professor Schragger notes in advocating for a somewhat similar case-by-case review of how substantive constitutional rights should be enforced at different levels of government, the lack of existing local constitutional tests simply means that “there is work to be done” for the courts.<sup>135</sup>

Second, instead of adopting locality-specific tests for its constitutional doctrines pursuant to a broad tailoring principle, the Court could merely announce a principle of local deference that would carry across all constitutional doctrines and would not disturb its existing constitutional tests. Under this approach, instead of tailoring its standards of review to localities, the Court would apply its traditional constitutional tests, but modify its analysis within each test. For example, while reviewing a challenged rezoning ordinance under substantive due process review and looking at whether the decision was substantially related to a legitimate state interest, a court, following an established principle of local deference, might include the existence of local decision-making as a relevant factor weighing in favor of a finding that the action had a legitimate purpose.<sup>136</sup> This model appears to most closely reflect the current ap-

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<sup>135</sup> Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & Pol. 147, 181 (2005) [hereinafter Schragger, *Cities as Constitutional Actors*]; see also Schragger, *Role of the Local*, supra note 129, at 1818–19.

<sup>136</sup> Professor Schragger notes a similar example in which the level of government would play a role in a court’s determination of whether a decision is unconstitutionally driven by animus in equal protection cases. Schragger, *Cities as Constitutional Actors*, supra note 135, at 179; see also Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & Pol. 223, 246–47 (2005) (recommending greater deference to local regulation of sexually-oriented businesses); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. Rev. 1624, 1628 (2006) (proposing different application of Takings Clause to local government, including lowering compensation requirement); Randall L. Jackson, Comment, *Comfort v. Lynn School Committee*: Illustrating the Untapped Potential of an Explicit Link Between Voluntary Desegregation and Local

proach to local deference as noted in a variety of the cases in Part II,<sup>137</sup> although in the current environment a presumption of deference is not explicitly stated.

While this approach also provides courts with flexibility, it is likely too unstructured. Although it would certainly improve today's implicit and ad hoc approach, a broad local deference principle provides little guidance on how much weight a court should place on the presence of local government. This approach also risks providing deference when it is not appropriate because, unlike a neutral tailoring principle, a presumption of deference would always favor localities. Indeed, creating a broad presumption of deference would likely come up against resistance even among supporters of localism because of its support for "localism qua localism" without a substantive basis for such support.<sup>138</sup> As described below, however, a general rule of deference should not be discounted out of hand. Ultimately, the decision of when to apply deference would rest on the courts, which would have the ability to balance local deference against other considerations, including majoritarian concerns and state interests. In practice, therefore, it is possible that a local deference principle would not differ in many respects from a general tailoring approach since both would encourage more concrete standards for localities within each area of constitutional law. Nonetheless, the risk of providing too much deference to localities weighs in favor of choosing a broad tailoring principle over a general presumption of local deference.

A final approach would be for the court to adopt a canon of construction for local issues similar to its federalism canon, which calls for avoidance of statutory interpretations that result in "federal encroachment upon a traditional state power" absent a clear expression of congressional intent to do so.<sup>139</sup> Although it would have little effect on cases involving challenges to local action, such an

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Constitutionalism, 41 Harv. C.R.-C.L. L. Rev. 553, 577 (2006) (supporting "modest relaxation of strict scrutiny" in review of school desegregation decisions).

<sup>137</sup> *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002), provides perhaps the closest example of this model.

<sup>138</sup> Barron, *supra* note 17, at 600 (calling for local constitutionalism protecting local action only when it would "serve some independent substantive constitutional value").

<sup>139</sup> *Solid Waste Agency of N. Cook Cnty. [SWANCC] v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001).

approach could be used in cases involving federal and state statutes.<sup>140</sup> Whereas the Court's federalism canon instructs courts to construe statutes to preserve core state functions, a locality canon would suggest a presumption against interpretations infringing on local-government prerogatives, like land use, education, and law enforcement. Given the fact that the court already applies its federalism canon to municipalities,<sup>141</sup> a new localism canon may have limited impact. Furthermore, even more than the federalism canon, it may unnecessarily create line-drawing problems in which the court is forced to choose spheres of local government versus state and federal government power.<sup>142</sup> Nonetheless, in the interest of signaling the Court's recognition of formal constitutional protections for localities, this approach could be helpful, perhaps as a supplement to one of the first two tests.

Given the breadth of the three tests described above, it is also appropriate to limit their scope by providing that a presumption of local tailoring or deference would be rebuttable in some cases. The task of deciding in what circumstances the presumption would be rebuttable should be left up to the courts as they formulate standards within each constitutional doctrine. It is notable, however, that cases in which localities come into direct conflict with their states may call for less local deference, as discussed below. For now, it is sufficient to point out that the models described above, while recognizing a distinct position for local governments in constitutional jurisprudence, would not represent a limitless grant of power to localities.

### *B. Justifications for a Local-Standards Principle and Critiques*

There are two primary reasons why courts should adopt one or a combination of the above principles.<sup>143</sup> First, given the fact that

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<sup>140</sup> Among others, this list might include *SWANCC*, 531 U.S. 159; *Printz v. United States*, 521 U.S. 898 (1997); and *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>141</sup> See, e.g., *SWANCC*, 531 U.S. at 159.

<sup>142</sup> See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545–46 (1985); see also Schragger, *Cities as Constitutional Actors*, *supra* note 135, at 179.

<sup>143</sup> While this Note argues that the first suggested model, a local tailoring principle, is probably the most viable, it seems appropriate at such an early stage in this relatively unexplored discussion to leave the exact form of a local constitutionalism principle open for future debate.

courts already implicitly treat localities differently across a variety of constitutional doctrines, establishing explicit standards would provide more predictability and consistency in the long term, despite the potential for uncertainty in the short term. Under a local tailoring principle, courts would be forced to look at local action more closely and ask how the level of government affects the constitutional rights of those involved. While opponents and proponents of local control are unlikely to agree on the question of whether deference to localities is desirable, setting a broad constitutional principle, followed in time with the development of clear standards for localities within each doctrinal area, would help guide lower courts and would likely foster high-level discussion on the positive and negative aspects of decentralization. The alternative, evident in the Sixth Circuit's decision in *Equality Foundation*,<sup>144</sup> is the creation of ad hoc local constitutional standards that lack any meaningful guiding principles for other courts. While such decisions could cumulatively have the same effect, a clear principle handed down by the Supreme Court would accelerate the process and provide more direction to lower courts.

While providing more consistency with respect to the constitutional treatment of local governments, the approaches described above, acknowledging that all constitutional doctrines are not equal, provide sufficient flexibility to allow variation from doctrine to doctrine. Indeed, such flexibility is essential in order to reconcile the already divergent approaches courts have taken regarding localities. For instance, these models would not force courts to immediately discard the less deferential approach to localities under Section 1983 and under antitrust law.<sup>145</sup> While these higher standards of review for localities might come under greater scrutiny with the introduction of a local tailoring principle, it would be possible to preserve such standards based on a finding by a court that higher scrutiny for local government is appropriate. In the case of antitrust law, for example, the Court decided to subject localities to antitrust liability at least in part because of its heightened concern over the conflict between parochial economic interests and the "comprehensive national policy" established by Congress through

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<sup>144</sup> See *supra* notes 65–77 and accompanying text.

<sup>145</sup> See *supra* Section I.B.

the antitrust laws.<sup>146</sup> While the Court's concern over local parochialism has faded somewhat since *City of Lafayette* and prominent antitrust scholars also question the appropriateness of municipal liability,<sup>147</sup> the Court's position is perhaps justifiable in light of the need to harmonize local autonomy with a national policy in favor of competition. There is no reason why the local deference and tailoring principles outlined above would not permit such particular exceptions. Equally, however, if the antitrust and Section 1983 distinctions are not justifiable,<sup>148</sup> a flexible tailoring principle would permit the Court to change course.

Second, establishing clear constitutional standards for localities would add legitimacy to the Court's claimed support for decentralization as part of its federalism jurisprudence. Instead of merely invoking the decentralizing benefits of federalism in dicta, the Court could use a locality-specific standard to affirmatively encourage local autonomy. This approach would likely temper the critics of the Court's New Federalism who claim that the Court's decisions are driven by ideology rather than true federalism principles.<sup>149</sup>

One possible objection to this justification might arise, however, from evidence that the Rehnquist Court's New Federalism has run its course. Indeed, in its final years, the Rehnquist Court scaled back the scope of its previous decisions, sometimes with Chief Justice Rehnquist and the traditional federalist justices dissenting,<sup>150</sup> but other times with Chief Justice Rehnquist taking the lead.<sup>151</sup> Furthermore, with the departures of Chief Justice Rehnquist and Jus-

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<sup>146</sup> *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 408 (1978).

<sup>147</sup> See supra notes 33–38 and accompanying text.

<sup>148</sup> As noted, some evidence suggests that these distinctions sought to counter Justice Rehnquist's efforts to protect state sovereign immunity and are not based on a substantive difference between local and state government. See supra notes 26–27 and accompanying text.

<sup>149</sup> See infra note 163 and accompanying text.

<sup>150</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (rejecting Commerce Clause claim against Controlled Substances Act); *Tennessee v. Lane*, 541 U.S. 509 (2004) (denying state courthouses Eleventh Amendment immunity from Americans with Disabilities Act).

<sup>151</sup> *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (rejecting Eleventh Amendment immunity from Family Medical Leave Act). See generally Linda Greenhouse, Foreword: The Third Rehnquist Court, in *The Rehnquist Legacy* (Craig Bradley ed., 2006).

tice O'Connor and the addition of Chief Justice John Roberts and Justice Samuel Alito, it is unclear whether the contemporary Supreme Court will continue to embrace the federalism of the Rehnquist Court. For example, while the Roberts Court has followed the Rehnquist Court's lead in citing federalism principles to limit the scope of statutes infringing on state and local sovereignty,<sup>152</sup> Chief Justice Roberts has also signaled greater deference to the federal government in cases involving state challenges to federal action.<sup>153</sup> Others also note that the Roberts Court's federalism decisions, at least with respect to preemption cases, reflect stronger support for private business at the expense of state and local interests.<sup>154</sup>

In addition, the Court may also be placing less emphasis on the decentralization aspect of federalism. Indeed, in *Parents Involved in Community Schools v. Seattle School District No. 1*, a plurality of the Justices, including Chief Justice Roberts and Justice Alito, called for a relatively mechanical application of strict scrutiny to racially based school desegregation efforts, while practically ignoring the Court's prior support for local control over education.<sup>155</sup> Furthermore, in its most recent term, the Court in *McDonald v. City of Chicago*, in incorporating the Second Amendment into the Fourteenth Amendment and thereby overturning a Chicago ordinance banning handguns, expressly rejected the city's argument that divergent views and conditions at the local level warranted less

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<sup>152</sup> Compare *Rapanos v. United States*, 547 U.S. 715, 737–38 (2006) (majority opinion by Scalia, J., joined by Roberts, C.J., and Alito, J.) (holding that the phrase “navigable waters” in Clean Water Act does not extend to wetlands because of potential for “significant impingement of the States’ traditional and primary power over land and water use”), with *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) (majority opinion by Rehnquist, C.J.) (same).

<sup>153</sup> *Massachusetts v. EPA*, 549 U.S. 497, 536–37 (2007) (Roberts, J., dissenting) (rejecting claim that state receives “special solicitude” with respect to Article III standing); *Gonzales v. Oregon*, 546 U.S. 243, 275–76 (2006) (Scalia, J., dissenting) (finding federal authority to declare assisted suicide illegal under the Controlled Substances Act).

<sup>154</sup> J. Mitchell Pickerill, *Something Old, Something New, Something Borrowed, Something Blue*, 49 Santa Clara L. Rev. 1063, 1073–78 (2009); Sandra Zellmer, *Preemption by Stealth*, 45 Hous. L. Rev. 1659, 1662 (2009).

<sup>155</sup> 551 U.S. 701 (2007); see also Wendy Parker, *Limiting the Equal Protection Clause Roberts Style*, 63 U. Miami L. Rev. 507, 533–34 (2009) (arguing that Roberts Court has underemphasized local control in school cases).



than full incorporation of the Second Amendment.<sup>156</sup> Furthermore, the Court did not even take up the issue of whether federal judicial review of local action under the Second Amendment should entail a “less rigorous form of constitutional scrutiny,” as advocated by at least one amicus brief.<sup>157</sup>

On the other hand, some recent decisions appear to suggest that the preservation of traditional municipal spheres of power remains as important to the Roberts Court as it was to the Rehnquist Court.<sup>158</sup> Given this uncertainty, it is too soon to say whether New Federalism is coming to an end or may still be subject to revitalization. More importantly, the argument for local constitutional standards does not derive its legitimacy from the Rehnquist Court’s New Federalism and the erosion of New Federalism does not necessarily weigh against the decentralization arguments supporting local deference, nor does it undermine the argument that an overarching principle of local constitutionalism would help remove ambiguity regarding the constitutional status of local government. While establishing a local constitutional principle would strengthen the decentralist rationale for the Court’s New Federalism, this rationale clearly predated the federalism revival, as demonstrated by the Court’s long line of cases voicing support for local autonomy. This Note does not argue that the Roberts Court *will* embrace local constitutionalism; it merely explains that the Court’s past reliance on localist arguments *could* support its adoption.

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<sup>156</sup> 130 S. Ct. 3020, 3046 (2010).

<sup>157</sup> Brief of Law Professor and Students as Amici Curiae in Support of Respondents at 2, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) (No. 08–1521) (calling on the Court to “consider the importance of developing Second Amendment jurisprudence that is especially attentive to local needs”).

<sup>158</sup> See, e.g., *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 344 (2007) (rejecting dormant Commerce Clause challenge against county ordinance based in part on recognition of “local government’s vital role in waste management”); *Rapanos v. United States*, 547 U.S. 715, 738 (2006) (“Regulation of land use . . . is a quintessential state and local power.”); see also Stephen M. Johnson, *The Roberts Court and the Environment*, 37 B.C. Envtl. Aff. L. Rev. 317, 333 (2010) (pointing out that in environmental matters, “the Roberts Court has ruled in favor of the interests of States and local governments in every case”). It is notable, however, that in *United Haulers* Chief Justice Roberts did not join in the portion of the opinion analogizing dormant Commerce Clause application in the case to *Lochner*, *United Haulers*, 550 U.S. at 347, and Justice Alito signaled even less deference to local government, *id.* at 357–58 (Alito, J., dissenting).

Third, clear constitutional standards could help foster a stronger federal-local relationship. By treating localities as distinct entities rather than powerless subdivisions of their states, the Court would send a signal that local decision-making is important and worthy of doctrinal protection in some cases. By detaching decentralization from the Court's arguably state-focused federalism, the Court could open the door to more federal cooperation with local governments—cooperation that might provide localities with the resources and authority to actually take advantage of a more deferential constitutional standard.

Some may claim that granting constitutional deference to local government fails to actually empower localities for the same reasons that some scholars are skeptical that federalism, even with its decentralization language, benefits localities. Although disputed,<sup>159</sup> some argue that decentralization of power to state government benefits localities more than decentralization to local government because state governments, based on their close proximity to localities, are more likely to promote and protect local political autonomy.<sup>160</sup> Others argue that deference to local government through federalism inhibits local autonomy by limiting the federal government's ability to get involved in local matters.<sup>161</sup> Pointing to *Printz*, for example, Professor Barron claims that the federal statute struck down by the Court could just as well have been viewed as an attempt to protect localities from having to devote their time to investigating crimes committed with out-of-state guns.<sup>162</sup> Finally,

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<sup>159</sup> Frank B. Cross, *The Folly of Federalism*, 24 *Cardozo L. Rev.* 1, 39–40, 45 (2002) (indicating that larger, more heterogeneous states are more likely to decentralize power to localities to bolster the claim that unitary federal government would be more likely to transfer power to localities). But see Hills, *supra* note 8, at 210–12 (rejecting Professor Cross's methodology and arguing that small states should be treated as if they were localities).

<sup>160</sup> Hills, *supra* note 8, at 214. Professor Hills also rejects the notion that federal judges might provide more leniency to municipalities, claiming that federal courts are not willing or able to monitor localities. *Id.* at 220 (“Federal judges cannot liberate the municipal baby from the playpen unless they themselves are willing and able to act as babysitters.”).

<sup>161</sup> Barron, *supra* note 8, at 411; see also Schragger, *supra* note 21, at 2564 (“[F]ormal localism often checks central interference when it would do certain localities the most good . . .”).

<sup>162</sup> Barron, *supra* note 8, at 413–14. Professor Barron distinguishes New Federalism, which views central lawmaking as directly opposed to local autonomy, from the more nuanced view of federalism described in the Court's preceding federalist movement

others claim that the Supreme Court merely chooses to invoke the decentralizing virtues of federalism as a justification for striking down federal laws which it substantively opposes.<sup>163</sup>

While these arguments are all potentially legitimate, this Note does not suggest that greater federal constitutional deference to localities represents a silver bullet with respect to the claimed weakness of localities. A formal set of constitutional rules on federal review of local decisions would, however, foster a more positive federal-local relationship and may spur greater willingness to cooperate in other areas. Furthermore, the Court could avoid “constitutional departmentalism”<sup>164</sup> and its potentially harmful effects on localities by focusing on the decentralization aspect of federalism rather than the sovereignty aspect, which would presumably permit greater federal-local cooperation so long as it is consistent with local empowerment.

### *C. Two Additional Criticisms: Constitutional Basis and State Conflicts*

In addition to some of the critiques mentioned in the preceding Sections, two additional objections should be addressed. First, a likely objection to the creation of constitutional standards for localities is that the Constitution does not expressly entitle localities to constitutional protection. Professor Akhil Amar makes this point in discussing the constitutional amendment banning protected status based on sexual orientation in *Romer v. Evans*, where he notes that “if Amendment 2 is unconstitutional because it singles out a named class of persons for status-based disadvantage, it does not matter whether it is a state constitution, a state statute, or a local ordinance.”<sup>165</sup>

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exemplified in *National League of Cities v. Usery*, 426 U.S. 833 (1976). *Id.* at 407. According to Barron, the Court in *National League of Cities* did not simply forbid federal involvement in spheres of “traditional state and local authority;” it focused on the question of whether federal involvement “actually impaired the capacity of state and local institutions” to provide services. *Id.*

<sup>163</sup> Rubin & Feeley, *supra* note 55, at 948.

<sup>164</sup> Schragger, *supra* note 21, at 2563.

<sup>165</sup> Akhil R. Amar, Attainder and Amendment 2: *Romer*’s Rightness, 95 Mich. L. Rev. 203, 225 (1996).

This argument fails to recognize, however, that much of the Court's constitutional doctrine establishing the federal-state relationship cannot be traced to a particular constitutional provision.<sup>166</sup> Indeed, the Constitution and the Bill of Rights apply almost exclusively to the federal government and it is only through the incorporation of the Bill of Rights against the states through the Fourteenth Amendment that the states are held to the same constitutional standards as the federal government. While the contemporary Court applies most of the Bill of Rights guarantees against the states along the same doctrinal lines as it would against the federal government, the Court's early application of the Fourteenth Amendment subjected the state and federal government to different constitutional principles which entailed different standards of review.<sup>167</sup>

Given this history, the Court retains the ability to cater its constitutional tests to the level of government involved. Despite its current preference for a "one-size-fits-all" approach to the application of constitutional principles to federal and state government, the modern Court has in some instances applied more deferential constitutional tests for state action on federalism grounds. For example, the Court has explicitly "lowered [its] standard of review" in equal protection claims alleging discrimination based on alienage, which are usually subject to strict scrutiny, in order to protect the right of states to require citizenship for "positions intimately related to the process of democratic self-government."<sup>168</sup> Accordingly, just as it may establish constitutional doctrine to protect state government decisions that "go to the heart of representative government,"<sup>169</sup> the Court has the power to establish specific standards

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<sup>166</sup> Young, *supra* note 41, at 8 (noting that "despite the absence of any textual evidence," anticommandeering, sovereign immunity, and conflict of laws are all "judge-made principles that mediate the relationships among our national and state governments").

<sup>167</sup> Rosen, *supra* note 131, at 1527–35.

<sup>168</sup> *Bernal v. Fainter*, 467 U.S. 216, 220–21 (1984). Other areas in which the Court has imposed different constitutional tests on state and federal actors include equal protection analysis of state affirmative action programs; application of one-person, one-vote and other vote-apportionment discrepancies; the dormant Commerce Clause; and the Establishment Clause. Rosen, *supra* note 131, at 1562–79; Schragger, *Cities as Constitutional Actors*, *supra* note 129, at 1817.

<sup>169</sup> *Bernal*, 467 U.S. at 221 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)).

of review for local government if it finds that decentralization to localities is a value worth protecting.

A second objection may be that these models are unworkable due to potential state-locality conflicts. It is likely that states would strongly resist special federal deference to localities because of concerns that this deference would infringe on their control over localities. Indeed, states have traditionally been hostile to attempts by the federal government to deal directly with localities.<sup>170</sup> This critique fails to recognize, however, that while states may seek to preserve control over their municipalities, such opposition does not necessarily outweigh the potential value of constitutional standards for localities.

Furthermore, the proposed models permit courts to strike a balance between state sovereignty and deference to localities. For instance, federal constitutional deference to local government would not prevent state governments from applying constitutional doctrines in their own state constitutions in a more rigorous manner as they have in the past and as federal courts and the Supreme Court have permitted.<sup>171</sup> While some scholars argue that federal courts should go further in protecting local autonomy by affirmatively protecting local constitutional power from state interference,<sup>172</sup> the local constitutional principles proposed in this Note do not weigh in on this debate. Instead, the principles focus on providing federal courts flexibility to determine the level of deference that is appropriate for each area of constitutional law on a case-by-case basis. Whether federal protection of localities from state interference should become a part of particular local constitutional doctrines would be left to the courts, guided perhaps by a presumption in fa-

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<sup>170</sup> See, e.g., *City of Columbus v. Ours Garage & Wrecker Serv.*, 536 U.S. 424, 448–49 (2002) (Scalia, J., dissenting) (noting that federal “interference” with state-centered control over localities “has long been a subject of considerable debate and controversy”).

<sup>171</sup> See *Kelo v. City of New London*, 545 U.S. 469, 489 (2005) (eminent domain); *RRI Realty Corp. v. Southampton*, 870 F.2d 911, 914 n.1 (2d Cir. 1989) (substantive due process challenges against state zoning law); *S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel*, 336 A.2d 713, 725 (N.J. 1975) (substantive due process and equal protection challenges against zoning laws).

<sup>172</sup> See, e.g., Barron, *supra* note 17, at 600; Gerald E. Frug, *Empowering Cities in a Federal System*, 19 *Urb. Law.* 553, 554–55 (1987).

vor of local deference, but also acknowledging and leaving room for the criticisms of local decision-making.

In some cases, however, state-local conflicts, especially involving federal grants of power to localities that conflict with state laws regulating localities,<sup>173</sup> might raise difficult issues when combined with formal local deference by federal courts to localities. For instance, the Supreme Court appears to have adopted a canon of statutory interpretation presuming that Congress does not wish to “disturb a State’s decision on the division of authority between the State’s central and local units” absent a clear statement from Congress to the contrary.<sup>174</sup> This presumption, while its breadth is questionable,<sup>175</sup> would directly conflict with a presumption that localities should be afforded deference above states within their typical spheres of power. There is no reason to assume, however, that federal courts would not be able to effectively balance the interest of a state in preserving control over its localities against the interest in preserving local autonomy. Indeed, the local constitutional principles described above provide sufficient flexibility for courts to consider the importance of state sovereignty as they formulate specific constitutional doctrines regarding localities.

In addition, there are likely additional routes courts could take to help resolve potential conflicts between local constitutional deference and state sovereignty. For example, Professor Roderick Hills has suggested that a “presumption of institutional autonomy,” whereby federal courts would presume that localities are authorized by state law to use federal grant money as directed absent an

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<sup>173</sup> See, e.g., *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (involving Missouri law prohibiting municipalities from providing telecommunication services despite inconsistency with federal Telecommunications Act); *Lawrence Cnty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256 (1985) (involving conflict between federal grant program providing for county discretion and state statute governing distribution of federal payments).

<sup>174</sup> *City of Columbus*, 536 U.S. at 440; see also *Nixon*, 541 U.S. at 140 (“[F]ederal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism . . .”).

<sup>175</sup> See *City of Columbus*, 536 U.S. at 448 (Scalia, J., dissenting) (rejecting majority inference that State power to control relationship with localities should be “sacrosanct” and noting that federal programs may prohibit states from delegating power to localities).

express state prohibition, could help preserve local autonomy.<sup>176</sup> While Professor Hills's presumption is narrowly restricted to revenue-enhancing state laws, it provides at least one example of how locality-protecting principles or canons, if they became necessary, could be devised concurrently to court formulations of each specific local constitutional doctrine. On the other side of the debate, Professor Nestor Davidson proposes a much more locality-deferential approach in which courts would seek to promote federal-local collaboration by seeking local protection against state interference with such collaboration.<sup>177</sup> Perhaps striking a middle ground, Professor Barron suggests that federal courts should side with local government when states invade local political processes that protect federally underenforced constitutional norms,<sup>178</sup> but he also acknowledges that state interests may trump local action when the state determines that such action violates competing underenforced constitutional norms.<sup>179</sup>

Without specifically adopting any one of these positions and acknowledging the potential for serious state-locality conflicts arising from a broad principle of local constitutional deference or tailoring, any principle should remain flexible enough to respond to such concerns and, where necessary, permit courts to strike a balance between local and state interests. Proposals such as those above merely illustrate that courts could adopt a number of approaches to confront this potential conflict without sacrificing a broader principle of local tailoring.

#### CONCLUSION

The cases discussed in this Note support the claim that federal courts show a certain degree of deference to localities and, as these cases do not provide a comprehensive survey, there are certainly

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<sup>176</sup> Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 Mich L. Rev. 1201, 1232 (1999).

<sup>177</sup> Davidson, *supra* note 23, at 1001.

<sup>178</sup> Barron, *supra* note 17, at 603–04 (discussing, for example, the Court's deference to local school board in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), based on federal courts' underenforcement of Equal Protection Clause).

<sup>179</sup> *Id.* at 605.

other cases which reinforce this claim. In contrast, beyond antitrust law and Section 1983, there are also likely other cases in which federal courts approach municipal actions with less deference. It is this inconsistency, when combined with the Court's general acknowledgment of the theoretical benefits of decentralization, that would make a clear constitutional approach to localities particularly helpful.

This Note provides three potential models with which courts could begin to affirmatively shape specific local constitutional standards of review and decide when it is appropriate to provide deference to local governments. It is important to add that this Note is not merely a normative recommendation that courts *should* adopt constitutional standards unique to localities, nor is it an argument that courts should always grant localities deference. While there are strong arguments to support favorable federal judicial treatment of localities,<sup>180</sup> courts should, and generally do,<sup>181</sup> recognize long-standing concerns regarding local decision-making based on the Madisonian critique of direct democracy and the threat of majoritarian factions.<sup>182</sup> Instead, this Note primarily emphasizes

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<sup>180</sup> In addition to the traditional arguments in favor of decentralization described *supra* in the text accompanying notes 52–59, see, for example, Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473 (1991) (arguing that market competition will restrain localities from imposing inefficient regulation); Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1, 19 (1986) (suggesting that local regulation of free speech may be “less menacing” because of exit options and resulting intergovernmental competition for residents); Carol M. Rose, Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy, 71 Calif. L. Rev. 837, 882–87 (1983) (rejecting Madisonian skepticism of localities and claiming participation and exit as grounds to support local land-use control); Rosen, *supra* note 131, at 1588, 1595, 1602 (noting that, at the sub-federal level, minority classifications may be less suspect, minoritarian influence reduced due to ease of participation, and magnitude of constitutional interference reduced).

<sup>181</sup> See, e.g., *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (“The law has had to respect a cross-purpose as well, for the Framers’ distrust of economic Balkanization was limited by their federalism favoring a degree of local autonomy.”).

<sup>182</sup> The Federalist No. 10 (James Madison); see also Neil K. Komesar, Law’s Limits 114 (2001) (arguing that, although less susceptible to “minoritarian” bias, local zoning decisions are characterized by majoritarian bias producing overregulation and exclusionary zoning); Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 Colum. L. Rev. 1 (1990) (describing exclusionary zoning resulting from local autonomy); Lawrence Gene Sager, Insular Majorities Unabated: *Warth v. Seldin* and *City of Eastlake v. Forest City Enterprises, Inc.*, 91 Harv. L. Rev. 1373 (1978) (criticizing federal deference to local referenda on zoning).



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that courts *do* treat localities differently, albeit implicitly and inconsistently. Acknowledging that decentralization and local deference has at least in some cases prevailed over Madison's arguments in Federalist No. 10, this Note suggests that establishing judicial consistency in the treatment of localities would improve the accountability and predictability of the legal system, while also bolstering the Court's rationale for some of its federalism decisions and strengthening the federal-local relationship.

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