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State-Local Relations and Constitutional Law

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A persistent theme in the literature on state-local relations has been the plenary power of state governments and the legal powerlessness of local governments. The "black letter" rules of state-local relations are that the state governments enjoy complete hegemony over their political subdivisions, that local governments are mere "creatures" of the states, with only those powers that the states delegate to them, and there is no such thing as an "inherent right" of local self-government.

This notion of plenary state power/inherent local powerlessness significantly understates the degree to which state courts have supported the concept of local control, and, as a result, it also misses the substantial amount of real power enjoyed by many local governments in most states. The force of the local control idea in state jurisprudence has been dramatically underscored by the consequences of two major law reform initiatives during the last two decades—the challenges to the local property tax based system of funding public schools and to suburban exclusionary zoning.

The school finance and exclusionary zoning litigations are of central significance in understanding the structure of contemporary state-local relations. They concerned the most important service provided by local governments and the principal local regulatory activity. The parties frequently framed their arguments in terms of state constitutional doctrines and presented their cases in state supreme courts. Moreover, the challenges addressed weaknesses in the concept of local autonomy which even advocates of local power recognize: the limited fiscal capacity of many localities to provide basic services, and the problems associated with local decisions that have significant extralocal consequences.

Nevertheless, neither law reform initiative actually did much to weaken local responsibility for public schools or local power over land use. The state courts displayed a strong localist orientation. Most concluded that local control of education is a legitimate state interest worthy of judicial protection even at the cost of significant taxing and spending inequalities among school districts. The courts which found that local control of education violated state constitutional provisions have nevertheless affirmed the wisdom of continued local autonomy over the schools and sought to reconcile greater state financial responsibility with a constitutional commitment to local control. Similarly, the states have generally left undisturbed the delegation of zoning authority to local governments.

The Setting

The school finance and exclusionary zoning litigations of the 1970s and 1980s grew out of four underlying conditions in state-local relations.

First, the states have generally delegated to local governments the responsibility for providing many basic public services, including police, fire, sanitation, local roads and public schools, and authority to control land use. Second, local governments derive the bulk of their revenue from the real property tax. Third, there is an enormous variety in taxable wealth among localities. Finally, although localities operate within essentially fixed boundaries, people and industry are legally free to move.

The school finance reform effort sought to sever the link between local wealth and the quality of local public educational programs by requiring the states to assume a significant degree of financial responsibility for public education. The attack on exclusionary zoning attempted

to open up the suburbs to lower-income housing, thus reducing the concentration of the poor in central cities and increasing the degree of social and economic integration in metropolitan areas generally. The goals of the two movements were interrelated. Reducing or eliminating the school finance role of local governments would greatly reduce local tax burdens and the incentive to zone out lower-income residents. Opening up the suburbs to lower-income families would reduce the disparity in property wealth per capita among communities, thereby reducing the difference in communities' ability to spend on education.

Both challenges were initially brought as claims under the Fourteenth Amendment to the U.S. Constitution. During the early 1970s, however, the U.S. Supreme Court rejected these claims, and the focus of litigation shifted from the federal courts to the states.

School Finance Cases in the State Courts

Two aspects of the Supreme Court's rejection of the challenge to the school finance system gave plaintiffs some grounds for hope as they turned to the state courts. First, the Court had indicated that federalism concerns persuaded it to defer to state legislatures on the subject of state taxing and spending. Federalism would not play a role in state court decisions, and the state courts have a long history of considering issues of state and local tax and finance. Second, the court based its determination that education is not a "fundamental" interest for equal protection purposes on the fact that education is not afforded explicit or implicit protection under the federal Constitution. By contrast, most of the state constitutions explicitly direct the state to provide for a system of free public education.

The challenges to school finance relied heavily on the state constitutions' education articles. Plaintiffs contended that the explicit inclusion of education in state constitutions made education a "fundamental interest," triggering strict scrutiny under state equal protection clauses. They also urged that the enormous interdistrict disparities in the funding of public schools constituted a failure on the part of the states to satisfy the independent mandate of the education articles. Most state courts were, however, unpersuaded.

State courts upholding the existing school finance system: Challenges to the school finance system were heard by the supreme courts of 17 states. Both the state equal protection and education article claims were rejected outright in ten states: Arizona, Colorado, Georgia, Idaho, Maryland, Michigan, New York, Ohio, Oregon and Pennsylvania. In a related case, the high court of Wisconsin also affirmed the traditional system. These states denied that explicit references in their constitutions made education "fundamental," and they generally concluded that provision of a minimally adequate education in each district could satisfy state requirements. Moreover, many courts treated local control of education as integral to effective local self-determination. The constitutional provisions for state maintenance and support of public schools were no bar to the delegation of administration and funding to the school districts. Indeed, the courts often treated such a delegation as highly desirable.

Plaintiffs did not challenge the legitimacy of the local control idea but rather sought to turn it to their own advantage. They argued, first, that local administrative authority could be preserved even if fiscal responsibility were shifted to the state; and second, that for poorer districts, local control required equalization aid as these districts lacked the taxable wealth necessary to support the educational programs their residents desired. These courts, however, determined that local control entailed local fiscal responsibility and that the benefits of local empowerment were worth the costs to the poorer districts. The courts held that full state funding of the schools, or other state efforts to equalize spending, would erode local control. The New York, Ohio and Pennsylvania courts expressly vindicated the right of individual school districts to spend more than their neighbors. The Wisconsin court held that the local interest in administering and funding schools is of a constitutional magnitude comparable to the state's.

State courts finding constitutional violations: Seven state courts upheld plaintiffs' claims, at least in part. These courts fell into two groups—those that found a violation of the education articles, and those that found a violation of the state equal protection clauses.

Three states proceeded on an education article basis: New Jersey, Washington and West Virginia. Their holdings were strikingly narrow. The courts stressed the exemplary position of education among all public services, and denied that their decisions had any implications for the funding of other local services or for inequalities in local taxation. Even within the context of education, these courts limited the force of their decisions by denying that the states had any duty to fund education fully or to equalize interlocal wealth and spending differences. The courts affirmed the right of local districts to spend above state requirements, and to outspend their neighbors.

Four state supreme courts—Arkansas, California, Connecticut and Wyoming—determined that the school finance system based on local property taxes violated the state's equal protection clause. Three courts concluded that education was a "fundamental" interest for equal protection purposes, triggering strict judicial scrutiny, and that the existing system failed the compelling state interest test. The fourth court, Arkansas, held that the state's reliance on the local property tax base to fund the public schools served no rational purpose.

These four courts held that their states had acted unconstitutionally in making educational opportunity dependent on the "fortuitous circumstance" of the assessed

valuation of each district. They rejected the conclusion of the other state courts that local authority over education required local fiscal responsibility. They found that greater equalization and state support would not reduce local autonomy.

The courts were unclear as to what their state constitutions would allow in terms of local wealth disparities under a reformed system, and there is some indication from later cases that despite the strong language about equalization these courts would be satisfied with a remedy comparable to that ordered in the New Jersey case, *Robinson* v. *Cahill,* i.e., increasing the resources available to the poorest districts without either capping the richest districts or compelling full equalization of district tax bases. Moreover, none of these courts interpreted their state constitutions to require either full state funding or complete equality in district spending.

Exclusionary Zoning Cases in the State Courts

During the last two decades, courts in several states have rejected the view that local zoning is to be assessed solely in terms of its effect on the "welfare of the particular community," have required municipalities to take into account the extralocal consequences of their zoning decisions, and have invalidated exclusionary ordinances. These cases have been seen as part of a "quiet revolution" in land use, in which state-level institutions—legislatures and administrative agencies as well as the courts—are said to be asserting greater oversight and operational responsibilities in an area traditionally delegated to local governments. Whatever the magnitude of the legislative and administrative dimensions, the extent of the judicial limitation of local exclusionary zoning has been overstated.

Only four state supreme courts have undertaken significant review of exclusionary zoning—California, New Jersey, New York and Pennsylvania. Each of these courts has pointed to the regional effects of local zoning decisions and compelled localities to consider the extralocal consequences. Each court has also urged the state to monitor local zoning regionally or statewide. Yet, with the exception of New Jersey, each court has largely left the structure of local zoning authority intact.

New York. The New York Court of Appeals (the highest court) in its 1975 decision in *Berenson* v. *Town of New Castle* held that a zoning ordinance must not only provide a balanced and well-ordered plan from the perspective of the community but must also reflect attention to regional needs. *Berenson* also affirmed the legitimacy of the community's desire to maintain the status quo. But the decision gave little indication as to how to strike the balance between local interest and regional needs.

Berenson invalidated a local ordinance excluding multifamily housing where it was plain that the town had given no consideration to regional issues. In subsequent decisions, however, the court upheld a five-acre lot minimum and an ordinance excluding multifamily housing.

California. A close reading of the 1976 landmark case *Associated Home Builders of the Greater East Bay, Inc.* v. *City of Livermore* also gives rise to doubts as to just how far the court was willing to limit local land use regulations. The Livermore ordinance imposed a complete moratorium on local growth through a ban on new housing construction permits. The court noted that local land use controls would satisfy state judicial review so long as the "general welfare" was served. The court had previously considered general welfare to refer to the zoning community, but plaintiffs here alleged that "the ordinance may strongly influence the supply and distribution of housing for an entire metropolitan region." The court ruled that the ordinance must be measured by its impact both on the community and the region.

While this was an apparent setback for local autonomy, other aspects of the opinion tended to preserve local power. Like the New York court, the California court ruled that the desire to exclude new residents was not illegitimate per se, and it gave little guidance on how to balance the interests of the community and the region. The court was ambivalent as to how strictly lower courts were to review local exclusionary actions. In this case, the court placed the burden of proof on the challengers, presumed that Livermore had balanced local and regional interests in good faith, and affirmed that since nonresidents had no constitutional entitlement to move into the community, the ordinance would be measured by the traditionally more liberal standards for validity of local land use restrictions. The ordinance was upheld.

Pennsylvania. The Pennsylvania Supreme Court was the pioneer, invalidating in 1965 a suburban ordinance requiring four-acre minimum lots, and in 1970, a two-acre minimum and an exclusion of multifamily housing. In 1975 and 1977, the court upheld the rights of landowners or developers to build apartments on tracts zoned for single families in communities which had zoned token amounts of land for apartments but would not permit building. In a pair of cases decided in 1983, the court upheld the application of municipal ordinances which prevented the construction of townhouse developments, but in 1985 it held unconstitutional the total exclusion of multifamily dwellings from a suburban community with most of its land zoned for five-acre minimum lots.

The court, however, has permitted municipalities to continue to zone, to impose some costs on new housing and to reduce the availability of multifamily residences, without any new state or regional legislative or administrative oversight.

New Jersey. The assault on exclusionary zoning has been carried out furthest in New Jersey. In the well-known *Mount Laurel* case in 1975, the New Jersey Supreme Court declared that "the zoning power is a police power of the state and the local authority is acting only as

a delegate of that power." Since there was no state interest in excluding low-income people from a community, the *Mount Laurel* court ruled that municipalities could not impose requirements which unnecessarily drive up the cost of housing. Moreover, the court found that the community's duty to zone for the general welfare entailed an obligation to "affirmatively plan and provide, by its land use regulations, the reasonable opportunity for an appropriate variety and choice of housing, including, of course, low-and moderate-cost housing."

Despite the strong language of the *Mount Laurel* doctrine, the court initially acted cautiously and preserved a substantial amount of local autonomy over zoning. In 1977, the court held that localities need not come up with a precise formula to measure their "fair share" of regional housing needs. Reviewing courts could look simply to the "substance" of a challenged zoning ordinance and the "bona fide efforts" of a municipality to remove the exclusionary barriers. The court expressed a strong preference for legislation to determine and allocate regional housing needs.

In 1983, the New Jersey court decided that it would no longer defer to local decision making or wait for the state to come up with regional plans. In *Mount Laurel II,* the court put the burden on the suburbs to demonstrate that they were providing for their fair share of present and prospective housing needs. Localities were required to remove all excessive restrictions and exactions; the court's prior decision upholding local power to ban mobile homes was overruled; suburbs were directed to provide incentives for the construction of low-and moderate-cost housing; and the trial courts were authorized to enter remedial orders directing that developers who include a low-income housing component in their plans be allowed to build.

Mount Laurel II, especially its remedial provision, galvanized the state legislature into action. The *Fair Housing Act of 1985* requires communities to use their land use regulations to provide a realistic opportunity for the construction of low-and moderate-income housing. The legislation preserved a measure of local autonomy while greatly increasing the state's role: the locality would determine its fair share of the housing and prepare implementation plans, but a new State Council on Affordable Housing would set criteria and guidelines, monitor municipal actions and, through its power to immunize municipalities from lawsuits, affect the content of municipal zoning and housing plans. The legislation was far more protective of the local interest in controlling growth than the court had been. Challenges to exclusionary zoning were transferred from the courts to a new administrative process, and a moratorium was imposed on builders' remedies. The New Jersey Supreme Court upheld the act.

The New Jersey Supreme Court probably went further than any other in limiting local autonomy out of concern for broader regional interests and in forcing the state to take back some of its delegated powers over land use. *Mount Laurel* is the best—perhaps the only—contemporary illustration of judicial utilization of the underlying legal norms of plenary state power and inherent local powerlessness in order to curb local autonomy. Yet, even here, the powerlessness of local governments seems overstated. The legislation still allows communities to protect themselves from unwanted development.

Local Control as State Constitutional Value

State supreme courts place a high value on the idea of local control, even against a legal background of presumptive state power and limited local self-government. Why? The courts have actually said surprisingly little about what they mean or why they consider local control to be so valuable. While the general lack of agreement or explanation may confirm the strength of the judicial commitment to the local government idea, it also makes analysis more difficult.

Scholars have put forward two general normative arguments for local autonomy: allocational efficiency and political participation. A third explanation, which seems to capture more closely the tenor of the judicial reasoning, is the courts' apparent equating of local autonomy with individual or family autonomy.

Local Control as Efficiency. Some scholars have argued that local control promotes efficiency because it permits a closer match between services provided and constituents' preferences than would be possible if the decisions were made at a higher level of government. A number of courts have echoed this approach.

In the school finance cases, courts repeatedly noted how local control enabled different communities to act on different preferences. In the land use cases, local zoning was seen as permitting diverse patterns of development so that households could have different kinds of communities available to them.

Local Control and Participation. Other scholars have argued for local control as a means of enhancing opportunities for popular participation in government, and several courts have agreed. The courts which affirmed the traditional school finance system referred to local control in the decision-making process: local fiscal responsibility meant that there was real local power. The land use cases also reflect judicial appreciation of the value of local participation. Only the New Jersey court induced the state to oversee more closely its delegation of power over land use. The other activist state courts left alone continued local participation in land use decisions.

Local Control and Personal Autonomy. While localist courts have been attentive to the values of efficiency and participation, the tenor of their opinions suggests that the strength of the judicial commitment to localism is due to their intuitive linkage of localism to home and family.

Local control of zoning has been supported because it has been seen as more protective of the home than state or regional regulation. Local responsibility for public education has been maintained because local school districts seem more likely to protect the family. Indeed, "home" and "family" were frequently relied on or alluded to in these cases. The linkage of local government to home and family results in a deferential attitude toward local power. These courts tended to view local governments less as decentralized wielders of public or political power and more as extensions of the individual or the family. This connection between local governments and home and family may explain the tendency to protect local autonomy and defer to local judgments in cases where the formal legal primacy of the states might have led to very different results.

These courts tended to downplay the doctrine that local governments are created by the states and instead took local governments and their powers as givens and not as the product of conscious choices by states to structure governmental authority in a particular way and with particular consequences. As a result the courts assumed that in a system of local governments inequalities happen. The state was generally held not responsible for the inequalities or even for the system of local government.

Since, for the most part, these cases involved the efforts of private parties to curb localities or force the states to take a more active role, the power of the state to displace local decisions was not at issue and the inherent-right idea was not directly tested. It is, thus, still good law that there is no inherent right to local self-government and that states have plenary power over their subdivisions. But, in the aftermath of these litigations, it is evident that many courts take the existence and power of local government as given and highly desirable. Such localism has constrained efforts to reduce disparities in the quality of education and to open the suburbs to more low-income residents.

These cases suggest that the issue of state versus local power is a false one because of the overinclusiveness of the term "local government." Not all local governments benefit from localism. Cities faced with heavy demands for public services and the emigration of the middle class are likely to favor greater state support of those services. Local autonomy is of limited use to localities lacking the financial resources to enjoy it.

Many upper-income suburbs do better under localism. Their primary concerns are for control of their schools and the protection of their homes. Those powers have been delegated to them by the state legislatures and, in general, vouchsafed by the courts. These communities may be legally powerless to prevent state legislation interfering with local autonomy, but they are practically powerful due to the strong and continuing tradition of state delegation to local governments in these matters.

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