

# Local Government as a Choice of Agency Form

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*Lawyers concerned with local government insist ubiquitously that their field is not administrative law. State administrative law, similarly, defines its subject to exclude local governments. Nevertheless, state agencies and local jurisdictions are functionally similar. Both are organized to afford state governments, which have broad scope and general jurisdiction, the benefits of specialization.*

*This similarity is under-recognized. Recovering the deep similarities between local governments and state agencies is not only true to state constitutional design but can advance more productive and sensible approaches to various problems in local government and state administrative law. I support this final claim with a brief sketch of four exemplary problems: judicial review of claims that government has acted *ultra vires*, the extraterritorial reach of local government, the use of political information by agencies, and the design of specialized or hybrid institutions of state government.*

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## I. INTRODUCTION

Both local governments and state administrative agencies are specialist entities created by generalist state governments. States assign to both some limited portion of their plenary police power.<sup>1</sup> This is done in the expectation that, compared to the state's general-jurisdiction legislature, executives, and judiciary, the specialist institution will be more comprehensive in its understanding of its limited domain. It will be more expert in that domain's circumstances, better attuned to its needs and requirements, and therefore more adept in its governance.

The conceptual distinction between the state agency on one hand and the local government on the other is simply the dimension along which specialization occurs. Local governments exercise a portion of the general police power limned by geography. They are general-purpose governments, but their jurisdiction extends only to Cleveland, or Franklin County, or New York City. State administrative agencies exercise the state's power in a substantive area: education, or environmental protection, or motor vehicles. Their jurisdiction, generally statewide, is confined to a particular field.

Given the shared characteristic of specialization, it is striking how discrete the constitutional and legal foundations of the two kinds of institutions are. Local governments and state agencies are distinct legal genres. Local government law and state administrative law have different foundational doctrines, different requirements, and different restrictions. We teach about them in different courses and use different casebooks. Specialists in local government take pains to emphasize that

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<sup>1</sup>For local governments, see *Baldwin Union Free Sch. Dist. v. Cty. of Nassau*, 9 N.E.3d 351, 359 (N.Y. 2014) (“Given that the authority of political subdivisions flows from the state government and is, in a sense, an exception to the state government’s otherwise plenary power, the lawmaking power of a county or other political subdivision ‘can be exercised only to the extent it has been delegated by the State.’”) (quoting *Albany Area Builders Ass’n v. Town of Guilderland*, 74 N.Y.2d 372, 379 (1989)); *Geauga Cty. Bd. of Comm’rs v. Munn Rd. Sand & Gravel*, 621 N.E.2d 696, 699 (Ohio 1993) (Ohio counties, which unlike Ohio municipalities lack home rule, may only act pursuant to a “specific statutory grant of authority”). For state agencies, see *City of New York v. State of New York Comm’n on Cable Television*, 390 N.E.2d 293, 295 (N.Y. 1979) (“An administrative agency, as a creature of the Legislature, is clothed with those powers expressly conferred by its authorizing statute, as well as those required by necessary implication.” (citations omitted)); *State ex rel. Lucas Cty. Bd. of Comm’rs v. Ohio Envtl. Prot. Agency*, 724 N.E.2d 411, 417 (Ohio 2000) (per curiam) (“An administrative agency has no authority beyond the authority conferred by statute and it may exercise only those powers that are expressly granted by the General Assembly.”).

their field “is not administrative law.”<sup>2</sup> State administrative lawyers similarly reject the possibility that local governments might fall within their purview.<sup>3</sup> If the latter group is interested at all in matters local, its interest is in local agencies.<sup>4</sup>

State agencies and local governments *are* different, as I explain in Part II. But, I argue in Part III, the gap between them is no chasm. It is functionally more precise, doctrinally more accurate, and civically more productive to think of the two forms as points along a spectrum that ranges from pure sovereignty to pure agency. Doing so reveals the analogy between local governments and state agencies to be a strong one, which should be relied upon in thinking about both. That analogy is descriptively and prescriptively superior to analogies between state and federal agencies on one hand and between local and state governments on the other.

Part IV sketches some ways in which the agency/locality analogy can help to address some perennial problems that face both local government law and state administrative law. For example, courts reviewing claims that government has acted *ultra vires* construe ambiguity in statutory delegations to agencies fairly liberally, but (outside the home rule context) read similarly ambiguous delegations to localities narrowly, to limit local power. I suggest that in both areas a middle ground, closer to that of administrative law, might be more desirable.<sup>5</sup> The similarities of agencies to local governments also suggest innovative approaches to the perennial problem in local government law of extraterritorial jurisdiction and the extraterritorial franchise.<sup>6</sup> Local government law principles, in turn, offer useful models for administrative law with respect to the use of political information by agencies and the design of specialized or hybrid

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<sup>2</sup> RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 9 (7th ed. 2009); *accord* David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 563–64 (1999) (“A local community is not simply a type of state administrative agency to be shaped at will to serve the need of the central state.”); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 690 (2001) (resisting the idea that “local governments are no more nor less than creatures of the state government, analogous therefore to administrative sub-units of government”).

<sup>3</sup> *See infra* note 21 and accompanying text.

<sup>4</sup> *See, e.g.*, Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. (forthcoming 2017); Paul A. Diller, *Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson*, 40 FORDHAM URB. L.J. 1859, 1864–65 (2013).

<sup>5</sup> *See infra* Part IV.A.

<sup>6</sup> *See infra* Part IV.B.

institutions of state government.<sup>7</sup>

## II. SOVEREIGNTY VERSUS AGENCY

The regnant view is that local government law and state administrative law have little to say to one another. The two forms are animated by different theories of government. Local governments are in some sense *sovereigns* distinct from the state, giving expression to a local, popular will. Agencies, by contrast, are *agents* of the state, deploying expertise and resources to advance its aims.

Lawyers, along with political scientists, philosophers, and historians, often see in the locality the first and perhaps conceptually cleanest polis or demos.<sup>8</sup> The sovereignty of local government is primal. States and nations are built on the foundation of local governments; large republics are built on the foundation of many local democracies.<sup>9</sup> Moreover, localities enjoy a particularly strong form of political legitimacy because its citizens choose, fairly directly, to subject themselves to its authority. The numerous and fairly small local governments of the United States roughly approximate a Tieboutian world in which citizens select a locality based upon their preferences across diverse competing jurisdictions, each offering different bundles of local public goods and taxes.<sup>10</sup>

In the United States, locality and sovereignty are also associated historically. American local government precedes state government in time.<sup>11</sup> It begins as an institution that exercises fundamentally private power, as the municipal corporation.<sup>12</sup> This private power was then reconceptualized as public, local sovereignty.<sup>13</sup>

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<sup>7</sup> See *infra* Part IV.C–D.

<sup>8</sup> See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 340 (1994) (“[L]ocalism tends to enhance a community’s self-determination in the initial making of policy . . . .”); Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875, 896 & n.61 (2006) (citing de Tocqueville and John Stuart Mill).

<sup>9</sup> See, e.g., Jonathan L. Marshfield, *Models of Subnational Constitutionalism*, 115 PENN ST. L. REV. 1151, 1169 (2011).

<sup>10</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 94 (2009).

<sup>11</sup> See, e.g., Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 HASTINGS CONST. L.Q. 621, 628 (1999) (“The county concept predates California statehood.”).

<sup>12</sup> GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 36–39 (1999).

<sup>13</sup> See *id.* at 39–45.

The political and historical associations of locality and sovereignty survive even as state constitutional law has come to understand local sovereignty in most places as an expression of the state's plenary power to advance the public good. As a formal matter, local power generally exists only insofar as it is delegated to the locality by the state legislature. Local governments under this theory are "creatures of the state."<sup>14</sup> Only in a relatively small number of municipalities was local sovereignty preserved under the constitutional institution of home rule.<sup>15</sup> But even home rule jurisdictions are far from exercising general police powers. Both state constitutions and especially state legislatures routinely limit the extent of home-rule authority.<sup>16</sup>

For theoretical, historical, and doctrinal reasons, therefore, those who think about American local government law generally focus upon issues related to sovereignty and democratic legitimacy, such as self-determination, the franchise, representation, democratic participation, and bottom-up governance.

This set of concerns overlaps only modestly with that of the administrative lawyer working at the state level. State agencies, unlike local governments, have no sovereignty at all. They lack any prior claim to authority or jurisdiction. They are understood to be the province of bureaucrats and technocrats. They are without cavil not just *creatures* of the state but *agents* of the state. And these two things are different. Local governments, though created by the state, are expected while they exist to pursue local interests. Agencies, as agents, should strictly pursue state interests.

Citizens do not choose to be subject to the authority of state agencies in anywhere near as active a sense in which they choose a locality. And, historically, agency power is a late development. The bureaucratization of state government, like the bureaucratization of the federal government, has its early roots in the Progressive Era's devotion to expertise and quickly accelerated only in or after the New Deal period.

The state administrative lawyer, therefore, has been concerned only marginally with sovereignty, voting, and representation. Administrative

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<sup>14</sup>David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2280–81 (2003).

<sup>15</sup>*See id.* at 2289–90.

<sup>16</sup>*See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1125–26 (2007) (distinguishing between "imperio" home rule, which limits the home-rule jurisdiction to "local" matters—and relies upon state courts to define what is "local"—and "legislative home rule," in which states determine by statute what authority is devolved to the home-rule locality and what is retained at the state level).

lawyers are surely interested in participation, governance, and, especially, democratic legitimacy.<sup>17</sup> But such lawyers' context for thinking about these issues is broader than the franchise and representativeness. That context is shaped by concerns mostly foreign to the local-government theorist: concerns about procedural adequacy, notice, and the roles of rationality and expertise.

That gulf between the two areas is reinforced, moreover, by the way in which the constitutional and conceptual development of both local government law and state administrative law have rested upon analogies to their federal counterparts. The analogy between federal and state agencies is strong indeed. Administrative law is a preeminent example of "lockstep" jurisprudence.<sup>18</sup> Not only has judicial development of state administrative law (over)depended upon analogous federal law decisions, but legislative design of state administrative procedure has relied heavily as well upon the federal Administrative Procedure Act.

The parallel analogy with respect to local government law, between national–state federalism and state–local relations, has also been deeply influential among both lawyers and political scientists.<sup>19</sup> Although local government law systematically acknowledges the ways in which the two varieties of intergovernmental relations differ, a shared concept of dual sovereignty dominates its discourse. States are sovereign, within the sovereign nation; at least a substantial subset of localities, not limited to home-rule jurisdictions, are sovereign in some important sense within the larger sovereign state.<sup>20</sup> This kind of thinking about local government treats it as federalism writ small, albeit with attention to differences as well as similarities with the national relationship that is American federalism.

The dichotomy between sovereignty and agency, buttressed by doctrinal and institutional parallels to the practices of national and federal government in the United States, has meant that local

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<sup>17</sup> See Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1761 (2007); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1512, 1512 (1992) (understanding administrative law as seeking a form of "civic republicanism").

<sup>18</sup> Jeffrey S. Sutton, Introduction, *State Constitutions in the United States Federal System*, 77 OHIO ST. L.J. 195, 202 (2016); Robert F. Williams, Foreword, *Justice William J. Brennan, Jr. and the Evolving Development of State Constitutional Law*, 77 OHIO ST. L.J. 203, 209–10 (2016).

<sup>19</sup> See, e.g., PAUL E. PETERSON, CITY LIMITS 66–76 (1981) (for a political science perspective).

<sup>20</sup> See Heather K. Gerken, Foreword, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010).

governments and state agencies evolved as distinct legal silos.<sup>21</sup> Most lawyers think that local governments are chalk and state agencies cheese.

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<sup>21</sup> The insistence of expositors of local government law that their subject is different from state administrative law has already been noted. *See supra* note 2 and accompanying text. It is fair to say that administrative law endorses this dichotomy with equal heartiness, although some confusion has been introduced by a 2010 change in the language of the Model State Administrative Procedure Act (MSAPA) with respect to this issue. The 1981 MSAPA clearly defined “[a]gency” to mean any “administrative unit of this State” but specifically excepted “a political subdivision of the state or any of the administrative units of a political subdivision.” MODEL STATE ADMIN. PROCEDURE ACT § 1-102(1) (NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS 1981). The 2010 revisions define the same term to mean “a state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by law of this state to make rules or to adjudicate” with specific exemptions only for the “the Governor, the [Legislature], [and] the Judiciary.” REVISED MODEL STATE ADMIN. PROCEDURE ACT § 1-102(3) (NAT’L CONFERENCE OF COMM’RS ON UNIFORM STATE LAWS 2010) [hereinafter 2010 MSAPA] (first alteration in original). The Uniform Law Reporters’ comment to this definition, moreover, avers that “the definition applies only to state actors, not local agencies.” *Id.* § 1-102 cmt. at 11.

As a textual matter, this change could be read to suggest that local governments *are* state agencies. An explicit definitional exclusion of local governments from the category of state agencies was removed. And the replacement definition seems almost determined to leave a window open for understanding local governments as agencies. This is further buttressed by the comment. Moreover, localities are “state actors” under both federal and state law. *E.g.*, *Avery v. Midland Cty.*, 390 U.S. 474, 480 (1968) (“The actions of local government *are* the actions of the State.”). And local governments are not local “agencies,” by definition. Rather, they are local principals.

Nevertheless, it seems unlikely that the change in the MSAPA is meant to suggest that local governments could fall under the terms of the act. The sense of the reporters’ comment, notwithstanding its semantic meaning, is that localities are excluded from the definition of agency. I find no evidence that the 2010 drafters sought to alter the common state practice of defining agencies to exclude local governments.

Indeed, this exclusion is explicit in administrative procedure statutes in thirteen states. *See* ALA. CODE § 41-22-3(1) (LexisNexis 2013) (“The term [‘agency’] shall not include . . . counties, municipalities, or any agencies of local governmental units.”); ARIZ. REV. STAT. ANN. § 12-901(1) (2016) (“[A]dministrative agency or agency does not include . . . any political subdivision or municipal corporation or any agency of a political subdivision or municipal corporation.”); DEL. CODE ANN. tit. 29, § 10102(1) (2003) (“Agency . . . does not include . . . municipalities, counties, school districts, . . . and other political subdivisions, joint state-federal, interstate or intermunicipal authorities and their agencies.”); FLA. STAT. ANN. § 120.52(1) (West 2013) (“‘Agency’ . . . does not include a municipality or legal entity created solely by a municipality . . . or a legal or administrative entity created by an interlocal agreement . . . .”); 5 ILL. COMP. STAT. ANN. 100/1-20 (West 2013) (“‘Agency’ means each officer, board, commission, and agency created by the Constitution, whether in the executive, legislative, or judicial branch of State government, . . . other than units of local government . . . .”); IND. CODE ANN. § 4-21.5-1-3 (West 2015) (defining “[a]gency” to exclude “a political subdivision”); IOWA CODE ANN. § 17A.2(1) (West 2010) (“‘Agency’ does not mean . . . a political subdivision of the state or its offices and units.”); LA. STAT. ANN. § 49:951(2) (2010) (“‘Agency’ means each state

### III. BLURRING THE BOUNDARIES BETWEEN FORMS

Localities and state agencies are distinct institutions. Local governments have specific obligations and powers, constitutional and statutory, different from those of administrative agencies. There is no confusing the Ohio Department of Rehabilitation and Correction, doubtless an agency, with a local government. Nor can there be any doubt that Columbus (where the main office of the Department of Rehabilitation and Correction is located) is not an agency but a political subdivision of Ohio.

But although the two institutions are distinct, their designs, missions, and structures overlap. In light of state constitutional categories, they are much more similar than they first appear.<sup>22</sup> They are certainly more similar than their counterparts one level up, states and federal agencies, are to one another. This Part outlines these similarities.

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board, commission, department, agency, officer, or other entity which makes rules, regulations, or policy . . . except . . . any political subdivision . . . and any board, commission, department, agency, officer, or other entity thereof . . . .”); ME. REV. STAT. ANN. tit. 5, § 8002(2) (2013) (“‘Agency’ . . . does not include . . . school administrative units, . . . special purpose districts or municipalities, counties or other political subdivisions of the State.”); MINN. STAT. § 14.02(2) (2015) (“‘Agency’ means any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, having a statewide jurisdiction . . . .”); N.C. GEN. STAT. § 150B-2(1a) (2013) (“A local unit of government is not an agency.”); 71 PA. STAT. AND CONS. STAT. ANN. § 745.3 (West 2015) (explicitly excluding from the definition of “agency” “any court, political subdivision, municipal or local authority”); UTAH CODE ANN. § 63G-3-102(2) (LexisNexis 2014) (explicitly excluding from the definition of “agency” “the political subdivisions of the state”); *cf.* CONN. GEN. STAT. ANN. § 4-166 (West Supp. 2016) (defining “[a]gency” to exclude “town or regional boards of education”); MD. CODE ANN., STATE GOV’T § 10-202 (LexisNexis 2014) (defining “[a]gency” as a “unit that: (i) is created by general law; (ii) operates in at least 2 counties”); S.D. CODIFIED LAWS § 1-26-1 (2012) (defining “[a]gency” to *include* “a home-rule municipality that has adopted its own administrative appeals process, whose final decisions, rulings, or actions rendered by that process are subject to judicial review” but otherwise to *exclude* “any unit of local government”). Most remaining states, tracking to a greater or lesser degree the Model State Administrative Procedure Act, define “agency” in a way that uses the term “state” and lend themselves to being read as excluding localities, although they do not say so explicitly. *See, e.g.*, ALASKA STAT. §§ 44.62.330(a), 44.62.640(b) (2014). *But see* CAL. GOV’T CODE § 6252 (West 2008) (defining “[p]ublic agency” to include any “local agency,” which is in turn defined to include “a county; city, whether general law or chartered; city and county; school district; municipal corporation; district; political subdivision; or any board, commission or agency thereof”); HAW. REV. STAT. ANN. § 91-1(1) (West 2008) (“‘Agency’ means each state *or county* board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases . . . .” (emphasis added)).

<sup>22</sup> *Cf.* Gerken, *supra* note 20, at 29 (all decentralized sites of governance have similarities as well as differences).



The next Part suggests various ways in which these similarities should inform the legal treatment of each.

### A. *Delegation*

Most essentially, local governments and state agencies are each specialist organizations that exercise delegated power in their special areas. The State of Ohio delegates its power to govern the part of its territory called “Columbus” to the government of Columbus. That government’s charge can fairly be described as the power to operate Columbus governmental institutions and make Columbus policy. In a very similar sense, a classic state agency like the Ohio Department of Rehabilitation and Correction is empowered by the State of Ohio to operate its prisons and make correctional policy.

In this sense it is accurate to describe local governments, although sovereign, also as “agents” of the state, like agencies proper. Yishai Blank describes this duality well:

The tension between the bureaucratic and the democratic conception of localities marks not only the field of local government law, but the nature of the city as a legal concept. In many domestic jurisdictions, the attitude towards localities reflects the same ambivalence: On the one hand, the bureaucratic conception envisions localities as an integral part of the state, an administrative convenience, or a local branch of the central national government; and on the other hand, the democratic conception understands local governments to be independent and autonomous corporations, reflecting the will of a local community, a semi-sovereign democratic entity distinct from and independent of the state.<sup>23</sup>

The state delegates power to agencies and localities alike.<sup>24</sup>

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<sup>23</sup>Blank, *supra* note 8, at 894–95 (footnotes omitted); *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (“Municipal corporations are . . . created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.”); BRIFFAULT & REYNOLDS, *supra* note 2, at 70 (characterizing various cases as reflecting a view of “Local Government as Agent of the State”).

<sup>24</sup>One area where this equivalence has been rejected is the Supreme Court’s sovereign immunity jurisprudence. The Court extends state sovereign immunity to its agencies but not its localities:

[T]he Eleventh Amendment shields an entity from suit in federal court only when it is so closely tied to the State as to be the direct means by which the State acts, for instance a state agency. In contrast, when a State creates subdivisions and imbues them with a significant measure of autonomy, such as the ability to levy taxes, issue bonds, or own land in their own name, these subdivisions are too separate from the State to be considered its “arms.” This is so even though these political subdivisions exist solely at the whim and behest of their State.

The necessity and legitimacy of such delegations get extensive treatment both in local government law and in administrative law. In local government law, the principle that local power is delegated power is the organizing concept of the creatures-of-the-state theory of local government associated with the nineteenth century figure of John Dillon. Gerald Frug quotes Dillon's 1872 exposition of the expansive nature of state power over localities: It "is supreme and transcendent: it may erect, change, divide, and even abolish, at pleasure, as it deems the public good to require."<sup>25</sup> Local power is entirely derivative of the state decision to delegate. Dillon calls the contingent and delegated nature of local power a principle of "foundation[al]" importance.<sup>26</sup>

Dillon's approach is widely understood to be the dominant approach to local power today, even by those scholars who uncover and highlight a competing tradition of core local sovereignty inoculated against some state encroachments. Even such scholars recognize the general power of states *qua* states to "erect, change, divide, and even abolish" local governments. To the extent that states have ratified constitutions that provide for home rule or for other, indestructible forms of local sovereignty, this is a design choice that departs from the norm.

At the same time, the creature of the state theory is a formal one. In practice, what might be called the political safeguards of state-local relations protect local power, even when state authority is expansively understood.<sup>27</sup> The states of New York and Ohio are not about to abolish Columbus or New York City anytime soon. There are rare cases of forced consolidation or substitute administration, where states exercise their power to destroy. As discussed below,<sup>28</sup> these bring with them enormous controversy; they are exceptions that prove the rule.

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Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 313 (1990) (quoting *Graham v. Folsom*, 200 U.S. 248, 252 (1906)). This distinction rests in part upon the content of state statutory definitions, like those listed *supra* note 21, that define localities as "entities" distinct from the state itself. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Some scholars read this doctrine to demand a fairly bright line between the agency and local-government forms. See Michelle Wilde Anderson, *Dissolving Cities*, 121 *YALE L.J.* 1364, 1426 & n.271 (2012).

<sup>25</sup> FRUG, *supra* note 12, at 45–50.

<sup>26</sup> JOHN F. DILLON, 1 *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* § 237(89) (5th ed. 1911), (quoted in GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 149 (6th ed. 2015)). The canonical statement of the parallel doctrine in federal law is *Hunter*, 207 U.S. at 161.

<sup>27</sup> See, e.g., Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 *DENV. U. L. REV.* 1337, 1345 (2009).

<sup>28</sup> See *infra* notes 44–51 and accompanying text.

Whatever controversy still surrounds the idea of delegation in local government law, there is none in state administrative law. There, the principle of delegation goes without saying: agencies have no power absent a delegation from the state. As with local governments, the baseline presumption is that states may erect, change, divide, empower, and abolish agencies as they see fit. At the same time, also like local governments, agencies whose power is formally entirely contingent nevertheless often enjoy a political status that guarantees them substantial practical autonomy. And, again like local governments, there also exist formal exceptions to the principle that agencies' power is dependent upon state acquiescence. The presumption of agency contingency can be overcome. When a state constitution directs that a particular agency be created or sets out its authority, general state government is bound by these directives. Many agencies enjoy such independent constitutional authority.<sup>29</sup>

Frug's treatment of Dillon's thinking emphasizes that the parallel between the centrality of delegation in local government and administrative law is no coincidence. Frug argues that Dillon should be seen "as a forerunner of the Progressive tradition: he sought to protect private property not only against abuse by democracy but also against abuse by private economic power. To do so, he advocated an objective, rational government, staffed by the nation's elite . . ." <sup>30</sup> Dillon also insisted upon a robust and stringent role for courts in insuring that localities did not exceed their proper bounds. These same principles are familiar to any student of administrative law. It was upon a foundation of Progressivism that modern administrative power was established and continues to be legitimated.

In practice, attention to the scope of delegations to localities has meant that local governments are specialist organizations not only as to geographical reach but as to substantive scope as well. Numerous issues of local concern are outside of the usual grant of power to local government. Many general local governments effectively control only issues of land use and direct municipal services.<sup>31</sup>

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<sup>29</sup> See N.Y. CONST. art. 5, § 4 (providing for state departments "of audit and control," law, education, and "agriculture and markets"); OHIO CONST. art. 6, § 4 (establishing state board of education and requiring appointment of a superintendent of public instruction); *id.* art. 14, § 1(A) (creating Ohio Livestock Care Standards Board "for the purpose of establishing standards governing the care and well-being of livestock and poultry in this state").

<sup>30</sup> FRUG, *supra* note 12, at 46.

<sup>31</sup> J. ERIC OLIVER ET AL., LOCAL ELECTIONS AND THE POLITICS OF SMALL-SCALE DEMOCRACY 24 (2012).

### B. *Popular Vote Versus Appointment*

One potential rebuttal to the claim of similarity is to emphasize the distinction between sovereignty and technocratic expertise developed in Part II. Local governments may be created by the state, but they are founded in a local franchise. By contrast, appointed officials run agencies and are supposed to govern them in light of their expertise. Agency governance is not based upon voting or the aggregation of popular sentiment, except in the attenuated sense that appointment is carried out by popularly elected, general-government officials.

This distinction would be fairly convincing were one comparing federal agencies to state government. But it is unpersuasive in the state–local context. In many states, both major and minor state agencies are elected rather than appointed. At the same time, local governments sometimes dispense with the franchise, allowing technocratic or elite governance to replace popular politics in whole or part.

The practice of electing agency heads is well-established in the states. It is not just that states have plural executives, though they do (which has implications for various administrative law doctrines that were developed at the federal level and therefore assume a unitary executive). Laying aside the independent election of governors and lieutenant governors, Christopher Berry and Jacob Gersen have documented the apparent trend in the states towards what they call executive “unbundling.”<sup>32</sup> More than three-quarters of the states (in their 2002 survey) elected attorneys general, treasurers, and secretaries of state independently of the state’s general executive.<sup>33</sup> Berry and Gersen identified a dozen or more states that also directly elect commissioners or secretaries in charge of insurance, agriculture, education, and fiscal management, and substantial numbers of other state agencies whose leaders stand for periodic election.<sup>34</sup> More idiosyncratic agencies are also subject to election.<sup>35</sup>

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<sup>32</sup> Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1399–1401 (2008). Plural executives with specific “agency” responsibilities are also common at the county level. George W. Liebmann, *The New American Local Government*, 34 URB. LAW. 93, 100 (2002).

<sup>33</sup> Berry & Gersen, *supra* note 32, at 1433 tbl.4.

<sup>34</sup> *Id.*

<sup>35</sup> See *Rice v. Cayetano*, 528 U.S. 495, 498–99 (2000) (election of nine trustees of the “state agency known as the Office of Hawaiian Affairs,” per HAW. CONST. art. XII, § 5).

Texas offers an extreme example of this trend.<sup>36</sup> The only major executive officer appointed by the Governor is the Secretary of State. Otherwise, all major executive officials—the Lieutenant Governor, Attorney General, Comptroller of Public Accounts, Commissioner of the Land Office, and the multi-member Railroad Commission and State Board of Education—are subject to direct election.<sup>37</sup> Nor do these officials run as a slate.<sup>38</sup> The Governor does control appointments to lead many state agencies, but most of these are small and of limited impact; he uses these appointments as a source of patronage.<sup>39</sup>

The converse holds as well. Arrangements for institutional leadership reminiscent of agencies are ubiquitous in the practice of local government. David Barron has demonstrated that the home-rule movement itself was founded upon an “administrative” view of local government.<sup>40</sup> Home-rule proponents sought a city “run by principles of expertise and efficiency rather than by the crass practices of partisan politics” and emphasized “the apolitical and administrative character of local matters—properly understood.”<sup>41</sup> This is reflected, for example, in the institution of the city manager, a role traditionally understood to call for a “neutral expert[]” at some remove from politics.<sup>42</sup> This is the Progressive model for the head of an administrative agency.

Similarly, contemporary counties generally are managed by plural boards rather than single executives.<sup>43</sup> Multiple-member boards are common in agencies but relatively rare in other governments. County boards, moreover, often operate with simultaneous legislative and executive authority.<sup>44</sup> In this respect, they are also similar to agencies, which, unlike other popularly elected governments in America routinely

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<sup>36</sup> UNIV. OF TEX., TEXAS POLITICS: THE EXECUTIVE BRANCH § 9, [http://www.laits.utexas.edu/txp\\_media/html/exec/0900.html](http://www.laits.utexas.edu/txp_media/html/exec/0900.html) [<https://perma.cc/QFK6-46NA>].

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* § 9.10.

<sup>40</sup> See Barron, *supra* note 14, at 2300.

<sup>41</sup> *Id.*

<sup>42</sup> See Richard J. Stillman II, *The City Manager: Professional Helping Hand, or Political Hired Hand?*, in LOCAL GOVERNMENT MANAGEMENT: CURRENT ISSUES AND BEST PRACTICES 12, 14, 18–19 & n.16 (Douglas J. Watson & Wendy L. Hassett eds., 2003) (but also noting contemporary scholarship recognizing the many political dimensions of city managers’ roles).

<sup>43</sup> See Liebmann, *supra* note 32, at 99–100.

<sup>44</sup> DANIEL R. MANDELKER ET AL., STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 19 (6th ed. 2006); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 348–49 (1993).

exercise simultaneous executive and quasi-legislative power.<sup>45</sup> These similarities are sufficiently strong to tempt some to conceptualize counties in particular as resembling state agencies more closely than general-purpose local governments.<sup>46</sup>

Recently, efforts to detach local government from local voting in distressed localities have become particularly visible. Michelle Wilde Anderson has called attention to the phenomenon of “municipal dissolution,” whereby cities “indefinitely remove a layer of municipal government and return a population to unincorporated county or township jurisdiction.”<sup>47</sup> If one accepts the suggestion that counties are analogues of state agencies, dissolutions are choices to shift institutional form from that of classic local government towards that of agencies.

Similarly challenging to local democracy is the practice, still unusual but becoming both more ubiquitous and more controversial, of state governments placing general local governments and school districts under emergency management or into financial or general receivership.<sup>48</sup> Such arrangements supplant the powers and sometimes the offices of elected local officials, supplanting or replacing them with officials appointed by the state. It is difficult indeed to determine whether a local government in receivership is best categorized as a local government or whether it has become a state agency. On the one hand, the local form persists. A locality, though partially or entirely in the hands of its receiver, retains its substantive mandate, its powers, its duties to its citizens, and its borders.<sup>49</sup> On the other hand, the democratic institutions of the locality are dissolved, and the appointed receiver is responsive to state, not local, officers and constituencies.<sup>50</sup> Localities under receivership easily fall within the definition of the Model State Administrative Procedure Act definition of “agency” as “a

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<sup>45</sup> See, e.g., Ronald M. Levin, *The Case for (Finally) Fixing the APA’s Definition of “Rule,”* 56 ADMIN. L. REV. 1077, 1080 (2004).

<sup>46</sup> See Anderson, *supra* note 24, at 1426.

<sup>47</sup> See *id.* at 1367.

<sup>48</sup> Michelle Wilde Anderson, *Democratic Dissolution: Radical Experimentation in State Takeovers of Local Governments*, 39 FORDHAM URB. L.J. 577, 584 (2012); Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 COLUM. L. REV. 1373, 1373, 1447 (2014); Richard C. Schragger, *Democracy and Debt*, 121 YALE L.J. 860, 881 (2012); Aaron Saiger, Note, *Disestablishing Local School Districts as a Remedy for Educational Inadequacy*, 99 COLUM. L. REV. 1830, 1848–89 (1999); Julie Bosman & Monica Davey, *Anger in Michigan Over Appointing Emergency Managers*, N.Y. TIMES (Jan. 22, 2016), <http://www.nytimes.com/2016/01/23/us/anger-in-michigan-over-appointing-emergency-managers.html> [<https://perma.cc/M7HS-CACY>].

<sup>49</sup> See Anderson, *supra* note 48, at 600.

<sup>50</sup> *Id.* at 585, 600, 602.

state board, authority, commission, institution, department, division, office, officer, or other state entity that is authorized by law of this state to make rules or to adjudicate.”<sup>51</sup>

The identity of local receivers and replacement officials with agencies is not merely formalistic. Clayton Gillette observes that a substitute administration, put in place by the state to supplant local officers, owes duties to and in fact represents nonresidents: creditors to be sure, but more generally the entire state polity.<sup>52</sup> This is similar indeed to the structure of representation we associate with agencies: although those concerned with the regulated industry or subject matter attach special importance to the work of the agency, and may enjoy special access to its decision-making process, the agency is an organ of an undivided state polity, open to its comments, and expected to pursue its broad public interest.

### *C. Special Local Government as an Intermediate Form*

The difficulty of deciding whether localities subject to state receivership remain local governments or are better thought of as agencies demonstrates vividly that the two forms lie along a kind of spectrum. That spectrum includes many intermediate cases. One set of these are the special districts. The precise institutional limits of the special district are difficult to define, although its exemplary members are clear. Special districts are “autonomous local governments that provide a single or limited services.”<sup>53</sup> The jurisdiction of special districts, like that of local governments, is thus limited to their local borders. But they are special purpose, with jurisdiction limited to a particular subject matter, such as drainage, sewage, water quality, or electricity.

School districts are a distinct, intermediate form. They are like special districts in the sense that they are both local and have limited substantive jurisdiction. But, unlike special districts, every location is part of some school district. School districts are ubiquitous and politically salient in a way most special districts are not.<sup>54</sup>

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<sup>51</sup> 2010 MSAPA, *supra* note 21, § 1-102(3) (the Model Act provides specific exclusions only for “the Governor, the [Legislature], or the Judiciary” (alteration in original)).

<sup>52</sup> See Gillette, *supra* note 48, at 1383, 1401.

<sup>53</sup> KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT 2* (1997).

<sup>54</sup> See Aaron J. Saiger, *The School District Boundary Problem*, 42 *URB. LAW.* 495, 502 (2010).

Special districts and school districts both elide by definition the standard distinction between local sovereign and state agency: they specialize both by location and by purpose. As the special district's purpose narrows, or the local boundaries grow relative to the size of the state, the special district becomes more and more similar to an agency. As its substantive mandate grows and its borders shrink, it seems more like a local government. The similarities are especially striking when one considers that many state agencies, such as those concerned with economic development,<sup>55</sup> the environment,<sup>56</sup> and transportation,<sup>57</sup> are organized into regions, and therefore also have simultaneous geographic and substantive specializations.<sup>58</sup>

Kathryn Foster's canonical treatment of special districts emphasizes their "independence" from their "parent government"—but Foster means by this independence from the locality's general government, not from the state. Similarly, she says, a special district has "[a]dministrative independence" from a parent government if it either has elections or is led by appointed officials who perform "distinct" functions. She also emphasizes factors such as "perpetual succession."<sup>59</sup> What she is describing sounds in every respect like an administrative agency.

The intermediate nature of the special district can be obscured because those who study it understand and categorize it as a type of local government. But it is not subject to local government law across the board. The most glaring exemption is with respect to the franchise. The federal courts have interpreted the Fourteenth Amendment to require one person, one vote in elections for general local

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<sup>55</sup> See, e.g., *Regional Overviews*, N.Y. EMPIRE ST. DEV., <http://www.esd.ny.gov/RegionalOverviews.html> [<https://perma.cc/AHU6-GDAL>] (ten regions in New York Empire State Development Agency).

<sup>56</sup> See, e.g., *DEC Regional Office Directory*, N.Y. ST. DEP'T ENVTL. CONSERVATION, <http://www.dec.ny.gov/about/558.html> [<https://perma.cc/DA45-HGQD>] (nine regions in New York Department of Environmental Conservation); *District Offices*, OHIO ENVTL. PROT. AGENCY, <http://www.epa.state.oh.us/districts.aspx> [<https://perma.cc/UC5G-T2VW>] (five regions in Ohio Environmental Protection Agency).

<sup>57</sup> See, e.g., *Regional Offices & Counties*, N.Y. ST. DEP'T TRANSP., <https://www.dot.ny.gov/regional-offices> [<https://perma.cc/7WJB-3PN8>] (eleven districts in New York State Department of Transportation).

<sup>58</sup> Some important federal agencies also share this feature. See Dave Owen, *Regional Federal Administration*, 63 UCLA L. REV. 58, 61–62 (2016); *About EPA*, U.S. ENVTL. PROTECTION AGENCY, <http://www2.epa.gov/aboutepa> [<https://perma.cc/9GKG-2JKW>] (ten regions in the United States Environmental Protection Agency, each with a regional administrator and deputy regional administrator).

<sup>59</sup> FOSTER, *supra* note 53, at 10.



governments.<sup>60</sup> But, as Richard Briffault has emphasized, the requirement that elected local offices obey the one-person-one-vote rule is limited to those local governments that, under a hazy standard imperfectly articulated by the Supreme Court, are “general purpose governments.”<sup>61</sup> It is unclear how general a government must be to qualify; the Court, without apparent difficulty, has extended the one-person-one-vote rule to local school districts, for example.<sup>62</sup> Nevertheless, many special districts are clearly exempt.

If a special district is sufficiently special, in other words, it sheds its duty to be representative and instead is directed to behave with special solicitude towards the needs and desires of its regulated population. Precisely this sort of special relationship between regulator and regulated is not just standard operating procedure for many agencies but an intentional design feature for more than a few. Agencies are not intended to be captured by those whom it regulates—although they often are. But they are designed in the expectation that they will be regularly connected and intertwined with regulated entities, so that they can understand their practices, appreciate their problems, and communicate with them.

The Court further notes the possibility that special district officials could be appointed and not elected at all. “[T]here might be some case in which a State elects certain functionaries whose duties as so far removed from normal governmental activities and so disproportionately affect different groups that a popular election . . . might not be required.”<sup>63</sup> This would make special districts even more like agencies. And, indeed, most nontaxing special districts today are designed in this way, with “appointed boards with members selected by the chief executive or legislative body of the parent government.”<sup>64</sup>

#### D. Powers

The paradigmatic powers of an agency are rulemaking and adjudication. Cognate processes are also core characteristics of local government: the passage of local ordinances and the hearing of cases by

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<sup>60</sup> Avery v. Midland Cty., 390 U.S. 474, 476 (1968).

<sup>61</sup> Briffault, *supra* note 44, at 360.

<sup>62</sup> Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 622 (1969).

<sup>63</sup> Hadley v. Junior Coll. Dist. of Metro. Kan. City, 397 U.S. 50, 56 (1970) (cited in Briffault, *supra* note 44, at 357).

<sup>64</sup> FOSTER, *supra* note 53, at 12.

local courts.<sup>65</sup> This is just to say that both are governmental institutions with the power to bind citizens to duties and adjudicate their rights. The overlap is particularly striking given the contemporary activism of cities in areas that one might once have expected to be fully in the purview of state or even federal agencies. Broadband regulation<sup>66</sup> and public health<sup>67</sup> are just two among many examples.

The converse comparison is somewhat more complex. Nadav Shoked has argued that there are institutions, other than the franchise, that are at the core of sovereignty and therefore peculiarly associated with entities that are local governments.<sup>68</sup> These include the levying of taxes, the issuance of debt, and the use of eminent domain.<sup>69</sup> These distinctions are far from clean, however. Although they may reflect the weight of ordinary practice in each sector, they do not reflect formal powers. Both general and special local governments levy all manner of fees and charges as well as taxes.<sup>70</sup> Regulatory fees are as old as regulation<sup>71</sup> and many agencies levy user fees, though not taxes, ubiquitously.<sup>72</sup> The distinction between taxes and fees can be a fine one.<sup>73</sup> Eminent domain is similarly ubiquitously exercised across the spectrum of institutional forms: by agencies, both federal and state; by local governments, both general and special-purpose; and in some states, by certain private entities.<sup>74</sup>

Only with respect to the issuance of debt do governments operate differently than agencies. A local government, whether special or general, can issue special bonds, but agencies relying on income not generated through fees are generally funded through their parent government's budget, which may or may not rely upon debt as circumstances vary. However, public-private entities up to and

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<sup>65</sup> See Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 904 (2013).

<sup>66</sup> See Olivier Sylvain, *Broadband Localism*, 73 OHIO ST. L.J. 796, 836 (2012).

<sup>67</sup> See Diller, *supra* note 4, at 1862–67.

<sup>68</sup> Nadav Shoked, *Quasi-Cities*, 93 B.U. L. REV. 1971, 1974 (2013).

<sup>69</sup> *Id.*

<sup>70</sup> Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay for” Model of Local Government*, 56 FLA. L. REV. 373, 379–81 (2004).

<sup>71</sup> *Id.* at 408 & n.174.

<sup>72</sup> See 31 U.S.C. § 9701 (2012) (“The head of each agency . . . may prescribe regulations establishing the charge for a service or thing of value provided by the agency.”).

<sup>73</sup> *E.g.*, Cynthia B. Faulhaber, *Government Law*, 43 WAYNE L. REV. 1023, 1028 n.31 (1997) (cataloguing Michigan cases resolving disputes over whether charges were taxes or fees); Reynolds, *supra* note 70, at 409–15.

<sup>74</sup> See, *e.g.*, *Kelo v. City of New London*, 545 U.S. 469, 474–75 (2005); Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 693 (2008).

including quasi-governmental organizations, which are in some important senses agencies, can and do issue their own debt.<sup>75</sup>

### E. *Constitutional Generality*

State constitutions clearly anticipate the existence of both local governments and state agencies. But they are fairly nondirective regarding how these forms are to operate. They give government substantial freedom to design both state agencies and local government to suit their need for specialization.

With respect to agencies, except for those agencies who are elected, state constitutions are largely (but not completely) silent as to questions about whether and how.<sup>76</sup> This is not true of local governments; state constitutions do more often than not provide for municipal home rule, which typically allocates to specified cities a zone of action free of state interference.<sup>77</sup> But the ability to create and rearrange cities persists, and home rule still allows states plenty of room to tailor municipal powers.<sup>78</sup> Certainly states have more freedom to adjust those powers than the federal government has to pre-empt state action or commandeer its officials.

In short, local governments and state agencies are much more similar than generally acknowledged. Both depend on delegation. Both specialize, geographically and substantively. Both are accountable but can also be removed from politics. Both are blurry about the franchise. Both impact some people directly and others indirectly. Both can benefit from decision-making that is at some remove from politics. States have substantial freedom of institutional design with respect to both.

Moreover, these similarities show a pitfall of over-reliance upon a fractal theory of federalism under which institutions at one level of government are similar in their essentials to those one level up. There are, of course, strong similarities between state and federal agencies on the one hand and (perhaps somewhat less so) between state and local governments with respect to the governments “above” them. But this analysis demonstrates that this goes only so far. The dominance of such

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<sup>75</sup> A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 595; Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 857–58 (2014).

<sup>76</sup> MICHAEL ASIMOW ET AL., *STATE AND FEDERAL ADMINISTRATIVE LAW* 12 (2d ed. 1998).

<sup>77</sup> FRUG ET AL., *supra* note 26, at 149.

<sup>78</sup> Barron, *supra* note 14, at 2306–07.

fractal thinking has suppressed the close resemblance between local governments and state agencies. *That* analogy has no federal parallel. State governments are not at all like federal agencies. True, each specializes. But state governments are not exercising a portion of federal power with respect to their (geographic) specialty the way that agencies do with respect to their substantive ones.

Rather, as everyone knows, state governments are the original sovereigns of American government. They have general jurisdiction and broad police powers. The federal government cannot redefine the existence, borders, or scope of power enjoyed by the states. It cannot redesign or commandeer them.<sup>79</sup> When federal authorities seek state cooperation, they cannot, as the Supreme Court has emphasized, treat states as “agents” of the nation.<sup>80</sup>

#### IV. CROSS-POLLINATING ACROSS DOMAINS

The previous Part argues that the conventional boundaries between local government law and state administrative law lead the former to focus upon sovereignty and the latter upon fairness, accountability, and expertise. It then shows that local governments and state agencies are more similar and less discrete than commonly understood, and that these categories blur precisely on the dimensions of sovereignty, fairness, accountability, and expertise. Therefore, I argue in this Part, it is sensible for both fields, while maintaining their traditional concerns, also to look for opportunities to take advantage of categories and techniques developed in the other field.

This Part catalogs several problems in administrative law and local government law that the agency–locality analogy helps to address, offering solutions not available to those in thrall to the federal administrative-law and federalism analogies. These approaches could provide a more effective and less derivative state administrative law, and a more robust sense of the potentialities of local government.

##### A. *Judicial Review*

When an aggrieved party argues that a local government or state agency lacks authority to act as it has, the reviewing state court must adjudicate the scope of the relevant delegation. Ordinarily, this requires

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<sup>79</sup> *But cf.* U.S. CONST. art 4, § 4 (federal duty to guarantee states a “Republican Form of Government”).

<sup>80</sup> *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 161 (1992).

courts to construe the statute that delegates power to locality or agency. Courts, however, do not undertake that task in the same way across the two types of institutions. The analogy between localities and agencies suggests that these processes would benefit were methods of judicial review in such cases to converge. In particular, judicial review of challenges to local government authority would benefit from being conducted more like review of administrative authority.

Setting aside the important category of jurisdictions with home rule, state courts reviewing the extent of local powers generally apply the principle known as “Dillon’s Rule.”<sup>81</sup> The Rule insists that state grants of power to localities either be explicitly stated or necessarily implied. “[R]easonable doubt concerning the existence of [local] power is resolved by the courts against” the locality.<sup>82</sup> Any power not clearly granted to a locality is retained by the state. Under this principle, delegations that are ambiguous or vague are given no force. Courts act to limit local government by construing delegations narrowly.<sup>83</sup>

This is not at all the approach taken when a plaintiff argues that a state agency has acted in excess of the powers granted by an authorizing statute. Indeed, in a plurality of states, reviewing courts defer to an agency’s interpretation of ambiguous terms in its authorizing statute. This approach, a sister or cousin to the federal practice of judicial deference to administrative interpretation laid out in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*<sup>84</sup>—whether it is sister or cousin depends upon the state and the context<sup>85</sup>—is the polar opposite of the strict construction demanded by Dillon’s Rule. *Chevron*-style deference treats ambiguity as a signal of a legislative decision to delegate authority,<sup>86</sup> whereas Dillon’s Rule treats ambiguity as indicating a legislative decision to retain authority.

Many states do not engage in *Chevron*-style deference when reviewing agency interpretations of their delegated powers. Some states

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<sup>81</sup> See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1546–47. But see David W. Owens, *Local Government Authority to Implement Smart Growth Programs: Dillon’s Rule, Legislative Reform, and the Current State of Affairs in North Carolina*, 35 WAKE FOREST L. REV. 671, 699 (2000) (The “North Carolina courts have generally recognized, albeit belatedly and inconsistently at times, that Dillon’s Rule no longer applies,” although local governments in the state do not enjoy home rule).

<sup>82</sup> JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 101–02 (1872).

<sup>83</sup> See Schleicher, *supra* note 81, at 1548.

<sup>84</sup> *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>85</sup> Aaron Saiger, *Chevron and Deference in State Administrative Law*, 83 FORDHAM L. REV. 555, 558–60 (2014).

<sup>86</sup> *Chevron*, 467 U.S. at 844.

abjure deference entirely, and others limit its applicability or aggressiveness.<sup>87</sup> Moreover, as Jim Rossi has shown, state courts have been substantially more willing than their federal counterparts to insist that delegations of power to agencies include definable limitations upon agency power, and to void delegations that they consider too vague or expansive.<sup>88</sup> This version of the nondelegation doctrine is much more robust than the weak nondelegation doctrine of the federal courts.<sup>89</sup> Moreover, it echoes Dillon's Rule in its insistence that delegations to agencies will not be honored unless they are coherent and specific.

Nevertheless, state courts' review of delegated agency powers is much friendlier to delegation than their review of delegated local powers. There is no rule of strict construction or a presumption of nondelegation for agencies. For most administrative lawyers, even those who recognize that *Chevron* has been received and incorporated by the states only partially and spottily, such rules would seem anachronistic and at odds with the basic impulse to delegate, which is to take advantage of specialization. To local government lawyers, however, Dillon's Rule seems natural.

There is little constitutional basis for this difference in treatment. To the extent that the separation of powers established by state constitutions impede the delegation of power by the state legislature and general executive to other constitutional organs of government, the two cases raise similar concerns.<sup>90</sup> Nor is there any reason to expect a

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<sup>87</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION* 1258–61 (4th ed. 2007) (“Note on Deference to Agencies in the State Courts”); William R. Andersen, *Chevron in the States: An Assessment and a Proposal*, 58 ADMIN. L. REV. 1017, 1020–30 (2006); Bernard W. Bell, *The Model APA and the Scope of Judicial Review: Importing Chevron into State Administrative Law*, 20 WIDENER L.J. 801, 818–22 (2011); Ann Graham, *Chevron Lite: How Much Deference Should Courts Give to State Agency Interpretation?*, 68 LA. L. REV. 1105, 1109–19 (2008); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 980–1007, 1010–24 (2008); Saiger, *supra* note 85, at 558–60.

<sup>88</sup> Jim Rossi, *Overcoming Parochialism: State Administrative Procedure and Institutional Design*, 53 ADMIN. L. REV. 551, 562 (2001) [hereinafter Rossi, *Overcoming Parochialism*]; Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1191–1201 (1999).

<sup>89</sup> Rossi, *Overcoming Parochialism*, *supra* note 88, at 560.

<sup>90</sup> Indeed, it is ironic that many states have adopted a more robust nondelegation doctrine than the federal government, given that the separation of powers problem that gives rise to the doctrine is more attenuated in the states than at the federal level. This is not only because state agencies are more robustly integrated into state constitutions than federal agencies are into the United States Constitution, but because so many state constitutions provide for a plural executive whose power is exercised partly through agencies, which is not the case at all at the federal level. Berry & Gersen, *supra* note 32, at

systematic difference in the proclivity to exceed powers properly delegated as between state agencies and local governments. For both, the temptation to do so will be ubiquitous, sometimes motivated by high-minded concerns related to the public good, and sometimes by self-serving desires to increase one's power and externalize costs onto outsiders.

Rather, the practice of narrower construction of local government power than of agency power is most straightforwardly explained as a consequence of the type of review faced by government action once that action is conceded to be within the scope of a delegation. For local governments, such review proceeds on the ultra-deferential standard of rational basis review.<sup>91</sup> If a locality acts within its sphere of authority, it need not justify its decisions beyond the barest requirement of minimal rationality. Administrative action, on the other hand, is reviewed under the arbitrary-and-capricious standard of the state administrative procedure acts. This sort of review is also for rationality, but, as developed by the courts, is much more demanding than rational-basis review. It requires agencies to demonstrate a connection between ends and means and to consider consequences and alternatives.

Consciousness that this kind of review is available at the back end cannot but invite a relatively more liberal or even deferential attitude towards the delegation of power to agencies at the front end. As Richard Murphy observes relative to federal review of agency action for reasonableness, "far more judicial energy goes into policing the *manner* in which agencies exercise their discretion than its permissible scope."<sup>92</sup>

Similarly, the unavailability of anything more rigorous than rational-basis review with respect to local action encourages narrow reviews of local delegations. Judicial construction of local power is less deferential than construction of agency power precisely because review of agency action within the scope of the delegation is less deferential than the review of local power within the scope.

Preemption also fits nicely into this structure. Localities are not allowed to legislate in areas that have been preempted by state legislation, whether by explicit legislative statement, an inconsistent state demand or requirement ("obstacle" or "impossibility" preemption), or a judicial determination that a state statute implies a legislative

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1399–1401. For an overview of nonunitary executives in the states, see Rossi, *Overcoming Parochialism*, *supra* note 88, at 557–59.

<sup>91</sup> See, e.g., *Town of N. Hempstead v. Exxon Corp.*, 421 N.E.2d 834, 834 (N.Y. 1981); *Toledo v. Tellings*, 871 N.E.2d 1152, 1158 (Ohio 2007).

<sup>92</sup> Richard W. Murphy, *The Limits of Legislative Control over the "Hard-Look,"* 56 ADMIN. L. REV. 1125, 1132 (2004).

intention to control the entirety of a particular regulatory endeavor (“field” preemption).<sup>93</sup> Preemption, like Dillon’s Rule, offers courts a way to reject local action as being in excess of local power before arriving at hyper-deferential rational-basis review. Thinking of preemption analysis as an (imperfect) functional substitute for review on the merits helps to explain why it can seem idiosyncratic and unpredictable.<sup>94</sup>

The similarities of state agencies and localities suggest that it is neither necessary nor wise to confine judicial review entirely to the question of power. Doing so tempts courts to curtail the scope of local power when their real objection to local action is that they are unreasonable. Rational basis review of local action in this way unnecessarily reinforces a regime of “city powerlessness.”<sup>95</sup> A conscientious arbitrary-and-capricious doctrine like that used to review agency action, perhaps given a particularly deferential coloration, would avoid this problem. The availability of such review would allow judicial analysis of the scope of particular delegations and of preemption genuinely to address those issues, making analysis of such questions less idiosyncratic. Judges could reject local actions (again laying home rule aside) because they were unreasonable, because they failed to consider important alternatives, or because they unjustifiably created externalities to be borne by those outside of the local jurisdiction.

Such a proposal seems counterintuitive, even radical: it seems to be a way to give state judges veto power over a local demos that is supposed to be sovereign in its sphere. But this objection is ill-founded, for at least five reasons. One, especially given the ubiquity of judicial election at the state level, is that judges face political checks. The countermajoritarian difficulty that comes immediately to the mind of lawyers weaned on federal law does not apply with nearly the same force in the state context. State court judges are officials of the sovereign that has delegated power to localities.

Second, local sovereignty is limited. Localities exercise delegated state power and therefore ought to be expected to do so rationally, just as agencies are.

Third, state agencies are also sometimes supposed to be representative, with leadership often popularly elected. Such agencies

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<sup>93</sup> See, e.g., *Cohen v. Bd. of Appeals of Vill. of Saddle Rock*, 795 N.E.2d 619, 622 (N.Y. 2003); Diller, *supra* note 16, at 1115–16.

<sup>94</sup> See Diller, *supra* note 16, at 1116.

<sup>95</sup> Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062–67 (1980).



are able simultaneously to represent constituents and to operate in the shadow of this kind of judicial review.

Fourth, judicial review for reasonableness is already entrenched with respect to a preeminent local power.<sup>96</sup> That power is zoning.<sup>97</sup> The judicial convention is to regard zoning decisions as quasi-adjudicative, and therefore meriting such review. Regardless of labels, however, the effect of this doctrine is to subject the exercise of a preeminent local power to review for reasonableness, not just rational basis.

Finally, arbitrary-and-capricious review is far from veto power. Even “hard look” review at its most demanding remains an inquiry only into reasonableness, not desirability or wisdom.<sup>98</sup> Courts, used to this distinction from reviewing agency action, should have no problem upholding local actions with which they disagree.

A nice side effect of such a regime, moreover, would be to nudge the practice of local decision-making away from purely political horse trading and in the direction of reason-giving and the careful consideration and weighing of alternatives. The ability to demonstrate that these had occurred would protect a locality against adverse judicial review. Administrative law is prepared to accept evidence of rationality from wherever it comes, demanding no formal record. Rather, the political quasi-record created by the local decision-making process as it exists would be expected to demonstrate consideration and nonarbitrariness. Although such demands would raise concerns about sovereignty if applied to the federal or state legislative process, they seem entirely appropriate for localities, where sovereignty is absent and where institutional design otherwise strongly encourages the pursuit of parochial ends.

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<sup>96</sup> See Barron, *supra* note 14, at 2318 (“[T]he zoning power [is] now regarded as the essence of the home rule that cities and suburbs possess . . .”).

<sup>97</sup> See Richard K. Norton, *Who Decides, How, and Why? Planning for the Judicial Review of Local Legislative Zoning Decisions*, 43 URB. LAW. 1085, 1087 (2011); see also *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 811 (2015) (holding that the requirement of the Telecommunications Act of 1996 that “[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record” requires the decision-maker to explain its reasons (alteration in original) (citing 47 U.S.C. § 332(c)(7)(B)(iii))); *id.* at 822 (Roberts, C.J., dissenting) (notwithstanding being in dissent, agreeing that the Act imposes a standard of review “familiar” from administrative law by which a reviewing court must be able to determine the reasons for a denial).

<sup>98</sup> See Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 722–23 (2014).

## B. Extraterritoriality

Extraterritoriality is a central preoccupation for scholars of local government law. Local government activities necessarily impact, whether directly or indirectly, many people outside of local borders; but the local franchise applies, with rare exceptions, only to residents.<sup>99</sup> The mismatch between who decides and who is affected is often deeply troubling, both because it encourages the externalization of costs and because the mismatch often reflects yawning inequalities based upon race and class. These concerns have led to a host of proposals advocating consolidation, regionalism, and creative variations on the local franchise.<sup>100</sup>

Administrative law has underappreciated potential to mitigate such problems. Review of local action for reasonableness, advocated in the previous section, would help on its own. It would put courts in a position to reject local action that constitutes an unjustifiable externalization of costs upon others.

Another reform that could mitigate problems of extraterritoriality would be to import notice-and-comment procedures into local government from administrative law. The federal Administrative Procedure Act and the Model State Administrative Procedure Act both provide that comments on proposed rules can be made by any “person.”<sup>101</sup> The “franchise” for commenting thus has no territorial restrictions. Anyone, anywhere, has the right to comment.<sup>102</sup> And these comments cannot be ignored. Both the federal and the model state statute require agencies to “consider” all comments.<sup>103</sup>

Specifying a proposal to introduce notice and comment into local deliberations must await future study; and any such plan would undoubtedly raise serious problems. Moreover, this sort of voice is fairly attenuated. The right to have one’s view considered falls short of having a vote that can affect how that consideration proceeds or who does the considering. Nevertheless, the experience of American

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<sup>99</sup> See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 65–66 (1978).

<sup>100</sup> See FRUG, *supra* note 12, at 101; Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1188 (1996).

<sup>101</sup> 5 U.S.C. § 553(c) (2012) (“interested persons”); 2010 MSAPA, *supra* note 21, § 306(a) (“a person”).

<sup>102</sup> CHARLES H. KOCH, JR., 1 ADMINISTRATIVE LAW & PRACTICE § 4:33 (2d ed. 1997) (“Informal rulemaking . . . is open to any ‘interested person,’ a term which theoretically and in practice has no limiting effect. Literally anybody interested in a rulemaking can participate.” (footnote omitted)).

<sup>103</sup> 5 U.S.C. § 553(c); 2010 MSAPA, *supra* note 21, § 306(a).

administrative law demonstrates that a naked participation right, along with a duty to respond, is not trivial. Administrative law thus offers a proven model for meaningful, if limited, participation of nonresidents in local affairs. Given the lack of political viability associated with more ambitious reforms, this step is worthy of consideration.

### C. Considering Popular Opinion

Federal administrative law, deeply influenced by Progressive and New Deal values, reflects a deep commitment to technocratic expertise.<sup>104</sup> A major strain in administrative law therefore conceptualizes administrative decisions, not just adjudicative proceedings but also rulemakings, as properly founded upon the weight of good argument rather than the level of political or popular support a decision might command.<sup>105</sup> Politics are supposed to determine the content of the statute that gives an agency authority but not the content of agency action under that statute.<sup>106</sup> As Kathryn Watts writes, a “blanket rejection of politics in administrative decisionmaking has been casually accepted as the status quo by courts, agencies, and scholars alike.”<sup>107</sup>

On this view, there has been considerable discomfort, to put it mildly, with allowing administrative decisions to take account of the weight of popular or political preference, as opposed to the wisdom of arguments that are presented to the agency.<sup>108</sup> Most scholars and practitioners today would easily grant that federal agencies are entitled, insofar as doing so is consistent with their authorizing statutes, to advance the political agendas of the current Congress or the sitting

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<sup>104</sup> See Bressman, *supra* note 17, at 1759–60; Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 415–16, 426 (2005).

<sup>105</sup> See Bressman, *supra* note 17, at 1759–60; Cynthia R. Farina et al., *Rulemaking vs. Democracy: Judging and Nudging Public Participation that Counts*, 2 MICH. J. ENVTL. & ADMIN. L. 123, 131, 135 (2012) (describing this argument as claiming that “the expression of outcome preferences, per se, has little value in this process: Participation that counts requires reason-giving”); Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1724 (2012).

<sup>106</sup> See Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 906–07 (2006).

<sup>107</sup> Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 7 (2009). Watts, in the federal context, is thinking of presidential and congressional, as well as popular, influence.

<sup>108</sup> See Benjamin, *supra* note 106, at 905 & n.29; Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1815 (2012).

president, which of course reflect public opinion.<sup>109</sup> Nevertheless, many remain chary of permitting agencies directly to take into account the weight of public or interest-group opinion. In what has become an iconic example, this view holds that public fondness for some and indifference to other endangered species should not affect policy towards those species.<sup>110</sup> Other scholars, however, have urged to the contrary that the weight of public opinion should be relevant to rulemaking, not just because the public's normative preferences are sometimes legally relevant,<sup>111</sup> but also because consideration of public opinion is an aspect of democratic accountability, especially regarding the quasi-legislative rulemaking process.<sup>112</sup>

The inclusion of state and local governments as stakeholders in federal administrative decision-making processes poses a particular version of this quandary. Administrative agencies are supposed to consider the views of private membership groups or other entities based on the content of those views, not the size of their membership lists. A comment from an individual environmentalist should be treated identically to an identical comment from the Sierra Club.<sup>113</sup> But governmental actors are different. They derive whatever authority and persuasiveness they might exert in the administrative process precisely because they are representative; that is, their authority rests on their selection on the basis of popular opinion. The view of the State of Ohio is relevant not just because of its technocratic merits but because it is (in a sense) the opinion of the people of Ohio. Ohio and its sister states are sovereign and therefore definitionally public-regarding, unlike private special interest groups. On the other hand, Ohio clearly does not

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<sup>109</sup> See Bressman, *supra* note 17, at 1751; Sheila Jasanoff, *The Practices of Objectivity in Regulatory Science*, in *SOCIAL KNOWLEDGE IN THE MAKING* 307, 327 (Charles Camic et al. eds., 2012); *cf.* *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("It is readily apparent that the responsible members of one administration may consider public resistance and uncertainties to be more important than do their counterparts in a previous administration.").

<sup>110</sup> See Nina A. Mendelson, *Rulemaking, Democracy, and Torrents of E-Mail*, 79 *GEO. WASH. L. REV.* 1343, 1345, 1361 (2011); Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 *UCLA L. REV.* 18–23 (forthcoming 2016), <http://ssrn.com/abstract=2662504> [<https://perma.cc/3DXV-BP2P>]; Stuart W. Shulman, *The Case Against Mass E-Mails: Perverse Incentives and Low Quality Public Participation in U.S. Federal Rulemaking*, 1 *POL'Y & INTERNET* 23, 25 (2009).

<sup>111</sup> See Cuéllar, *supra* note 104, at 460; Mendelson, *supra* note 110, at 1362.

<sup>112</sup> See Mendelson, *supra* note 110, at 1372–73.

<sup>113</sup> *But cf.* Seifter, *supra* note 110, at 48–49 (arguing that the internal structure of membership organizations should lead agencies sometimes to treat their comments differently from those of individuals).

represent the interests of the United States as a whole, but a narrower interest. As an entity with particularistic goals, it is very much like other special interest groups.

Delineating the proper role for the weight of public opinion and of the opinion of subnational governments is, in my view, a difficult question in federal administrative law. Here, I wish only to say that these issues are not nearly as difficult for state administrative law. At the state level, it is difficult to argue that agencies whose heads are elected cannot or should not reflect popular opinion.<sup>114</sup> Localities, moreover, can be conceptualized as specialist entities that operate on the theory that political opinion among those most affected by their regulation is the best available source of expertise regarding that regulation. The citizens of Columbus are, on this view, the community of “experts” relative to Columbus policy.<sup>115</sup> State agencies should embrace localities’ self-understanding with respect to this issue, and make the weight of popular opinion relevant to their conclusions.

Similarly, the participation of localities as stakeholders in agency decision making at the state level should be understood no differently than any kind of inter-agency deliberation or cooperation.<sup>116</sup> Localities’ overtly political nature poses no conceptual or legal obstacle to state agencies weighing their views not only substantively but *qua* views that emerge from a republican political process.

#### D. *The Multiplication of Intermediate Institutional Forms*

When a state wishes to design an institution in order to deal with a specialized policy domain that has a geographic dimension, it too often seems to feel constrained either to establish a local government, which would be subject to local government law, or a state agency, which would be subject to state administrative law. This binary is not

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<sup>114</sup>One might then conclude that appointed state agencies should not rely upon popular opinion, because the state legislature chose a form other than elections in constituting them. The better conclusion, however, is that states should have a single administrative-law principle for all agencies, absent specific legislative requirements to the contrary, given the broad similarities among and interactions of elected and non-elected state agencies.

<sup>115</sup>This model has particular appeal in conjunction with an arrangement, like the notice-and-comment plan described in Part IV.B *supra*, that institutionalizes the recognition that the residents of Columbus are not the *only* experts on Columbus policy.

<sup>116</sup>There is a large literature on interagency coordination at the federal level. *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1182–91 (2012); Jason Marisam, *Interagency Administration*, 45 ARIZ ST. L.J. 183, 188 (2013); Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805, 807–08 & nn.2–3 (2015) (collecting citations).

necessary given how blurry the line is between the two categories. States may, and often should, select elements from both structures and both legal regimes in an effort best to meet the needs of the moment.

Two examples illustrate this phenomenon. The most studied is probably the decision to establish special districts, which, as discussed above, are precisely the kind of hybrid form that I urge here.<sup>117</sup> Nadav Shoked views the proliferation of the special district form, especially with regard to issues traditionally assigned to localities, as “troubling to those concerned with democracy, efficient local government, and equality.”<sup>118</sup> Shoked is troubled precisely because the special district is exempt from some equality guarantees associated with the law of general local governments.<sup>119</sup> He argues that once a special district is given the power “to regulate behavior or land uses beyond what is necessary to maintain the services or infrastructure,” it is “not a special district at all.”<sup>120</sup> “Local government law should look beyond the formal label attached to an entity and treat it as its actual powers command,” he says.<sup>121</sup> A special district with general regulatory power is a “quasi-city,” a city in terms of its powers.<sup>122</sup> Therefore, it should face the rules associated with cities. For Shoked, the most important such rules are those that ensure self-determination through a universal local franchise.<sup>123</sup>

This argument has force to the extent that, as Shoked does, one identifies “community self-determination” as the “overriding value.”<sup>124</sup> But why must states elevate self-determination, much less local self-determination, above other goods in any given case? Even if there are no externalities involved, a state may prefer agency-like structures in order to advance deliberativeness, efficiency, effectiveness, or depoliticization. It is hard to see why one should be more concerned in principle about, say, a local water district, where there is neither franchise nor representativeness, than one is concerned with the clean-water policy of a local region of a state agency for environmental protection.<sup>125</sup> An administrative region, like a special district, is in no

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<sup>117</sup> See *supra* notes 53–64 and accompanying text.

<sup>118</sup> Shoked, *supra* note 68, at 1974.

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

<sup>120</sup> *Id.* at 2000.

<sup>121</sup> *Id.*

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

<sup>123</sup> *Id.* at 1988–89, 2002.

<sup>124</sup> Shoked, *supra* note 68, at 1975.

<sup>125</sup> See Sara Singleton, *Collaborative Environmental Planning in the American West: The Good, the Bad and the Ugly*, 11 ENVTL. POL. 54, 59–68 (2002) (examples of watershed-based state administration in the State of Washington).

way formally representative even as it tailors its work to the needs of, and negotiates its policy directives with, local stakeholders.<sup>126</sup> If local land use were handled by an agency through rulemaking or adjudicatory procedures, there would be no voting; but the agency's work would proceed with more publicity and participation than ordinarily associated with special government. If Shoked would accept the validity of such policies when enacted by a local environmental or land-use agency—and he says nothing to suggest he would not—then his objections to the special district are hard to understand.

Conceptualizing local government as a variety of state agency makes Shoked's problem less troubling.<sup>127</sup> Shoked's claim is that the permissibility of governing an area's land use under procedures other than those associated with general local government must be assessed under the criterion of self-determination. To an administrative lawyer, the question is what procedures best fit the administration of land use in a given area. Self-determination matters, but so might the density of the jurisdiction, the character of its land, the nature of possible spillovers from its decisions, and its place in the state's economy and environment. If one sees local government itself as a choice of agency form, rather than seeing the only alternative as ordinary or "quasi" local government, one may find that one moves away from single-criterion judgments in favor of a more multivalent, variable, and idiosyncratic approach to land use. There is no reason to confine available institutional designs to a binary *numerus clausus* of special and general government.

Similar modes of thinking about what local government has to be have characterized efforts to create regional governance structures. The ability and incentive of multiple, competing local governments to benefit their local constituencies while externalizing costs onto other residents of the metropolis is, as I have noted, perhaps the single greatest problem associated with American local government.<sup>128</sup>

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<sup>126</sup> See Susan Hunter & Richard W. Waterman, *Determining an Agency's Regulatory Style: How Does the EPA Water Office Enforce the Law?*, 45 W. POL. Q. 403, 407, 409–10 (1992).

<sup>127</sup> Indeed Shoked himself makes the striking observations that when cities themselves were broadly conceptualized as "municipal corporations," special districts were thought of as something less. They were understood as "primarily political subdivisions,—agencies in the administration of civil government." Shoked, *supra* note 68, at 1981 & n.40 (quoting *Beach v. Leahy*, 11 Kan. 23, 29 (1873)).

<sup>128</sup> See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1117 (1996); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2003–04 (2000).

Interlocal competition exacerbates income inequality, social stratification, and racial segregation. Especially, but not exclusively, for those concerned about equity issues, metropolitan or regional government has seemed necessary.

Note that the felt necessity seems to be for regional or metropolitan *government*. General-purpose, metropolitan government, with metropolitan boundaries and a metropolitan franchise, is seen by many as the ideal solution.<sup>129</sup> However, even these advocates recognize—along with nearly everyone else who has examined the problem—that massive metropolitan consolidation of existing localities is a political impossibility in the United States today.<sup>130</sup> In practice, a second-best way to move towards regionalization has been to create special district for particular services, like sewage or transportation, with metropolitan jurisdiction. This is often done.<sup>131</sup> But special districts are deeply siloed, and (with a few prominent exceptions) not politically salient. They are therefore prone to capture.

Remarkably, other major proposals to ameliorate the costs of interjurisdictional competition largely focus upon institutional design elements peculiar to local governments. Prominent advocates of regionalism and metropolitanism seem to assume that, given a problem involving the scale of local government, the solution must perforce involve right-scaling those governments. Frug, for example, describes the problem as one of how to design a “democratically organized regional institution.”<sup>132</sup> Such an entity would have “to be organized according to the one-person, one-vote principle.”<sup>133</sup> Frug and others thus focus upon ways to reform and expand the local franchise.<sup>134</sup> Others focus upon boundary reform.<sup>135</sup> Still others emphasize ways to

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<sup>129</sup> Briffault, *supra* note 128, at 1165–67 (1996).

<sup>130</sup> See ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 170 (1994) (“Metropolitan government has almost no political support.”); Briffault, *supra* note 128, at 1117 & n.10; Cashin, *supra* note 128, at 2028.

<sup>131</sup> See Andrew E.G. Jonas & Stephanie Pincetl, *Rescaling Regions in the State: The New Regionalism in California*, 25 POL. GEOGRAPHY 482, 487, 489 n.7 (2006) (characterizing special districts as among the first responses, along with metropolitan consolidation, to the felt need for regional governance); Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 484–85 (2007).

<sup>132</sup> Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1796 (2002).

<sup>133</sup> *Id.*

<sup>134</sup> See generally, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994); Gerald E. Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

<sup>135</sup> Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990).



induce interlocal cooperation.<sup>136</sup> When such proposals pay particular attention to the management of stakeholder politics and processes of consultation, they fall under the rubric known as the “New Regionalism.”<sup>137</sup> All of these approaches address the problem of interjurisdictional competition through the basic institutions that constitute the toolbox of the local-government lawyer.

This is a debate over comparative institutional design; and the argument of this Article suggests that those designers would benefit were they to raid the toolbox of administrative law. Addressing the scale of local governments need not involve only attention to scale; it can also involve attention to what makes a local government. A regional *agency*, empowered to regulate not in a substantive area but in a geographical one, is an underexplored template.<sup>138</sup> Such an institution, in which administrators are given responsibilities in multiple interconnected policy areas as they impact a particular region, has much more flexibility than the ordinary special district. Agencies are familiar with ways, both standard and bespoke, to handle stakeholder politics and consultation. State agencies in particular, unlike federal ones, are also well adapted to being melded with institutions of popular democracy, including elections. In these respects, a regional policymaking agency would avoid the flaws associated with the special district or multijurisdictional commission.

At the same time, however, an agency would bring a level of hierarchical control and deliberativeness to problems that can be undermined by an excess of democratic or popular control. Local

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<sup>136</sup> See JAMESON W. DOIG, *EMPIRE ON THE HUDSON: ENTREPRENEURIAL VISION AND POLITICAL POWER AT THE PORT OF NEW YORK AUTHORITY* 1–3 (2001) (describing the interjurisdictional nature of the Port Authority of New York and New Jersey); Jonathan Cannon, *Checking in on the Chesapeake: Some Questions of Design*, 40 U. RICH. L. REV. 1131, 1132 (2006) (describing the Chesapeake Bay Program as “a series of agreements among Virginia, Maryland, Pennsylvania, the District of Columbia, the United States Environmental Protection Agency (‘the EPA’ or ‘the Agency’), and the Chesapeake Bay Commission (a body composed of state legislators, agency heads and citizen representatives)”); Reynolds, *supra* note 131, at 486. *But see* Briffault, *supra* note 128, at 1164 (“Voluntary interlocal cooperation is not an adequate solution.”).

<sup>137</sup> See Stephen M. Wheeler, *The New Regionalism: Key Characteristics of an Emerging Movement*, 68 J. AM. PLAN. ASS’N 267, 275–76 (2002).

<sup>138</sup> See also DOIG, *supra* note 136, at 22–23 (noting agency-like characteristics at the Port Authority of New York and New Jersey); *cf.* Barron, *supra* note 14, at 2306–08 (noting proposals around 1900 for “state administrative oversight” of local governments, “in the form of various administrative boards charged with specialized functions”). Agency oversight, according to its proponents, would provide “expert administrative oversight” that would inform local decision-making, enhance its legitimacy, and protect it from “political taint.” *Id.*

governments are bottom-up and rawly political. New-regionalist proposals, by contrast, seem to anticipate regional policymaking that would be popular but not at all political. Such paradigms emphasize collaboration, coordination, and activism as ways to defuse deep-seated conflicts of interest in ways that can seem naïve or even utopian.<sup>139</sup> Agencies split the difference. They are reassuringly old-fashioned in their structure: They make sure everyone has their say, they secure a place for stakeholders and for the exchange of opinions, but they also define a place where the buck ultimately stops and a decision can be made.<sup>140</sup>

This Article is of course not the place to present a full-blown proposal for agencies of regional government. But it does urge participants in the regionalism debate to think about how such proposals might advance the conversation.

## V. CONCLUSION

It is time that we recognize that local government law and state administrative law overlap and that they should overlap more than they do. It is both fair and helpful to think of localities and state agencies as two varieties of response to the same basic problem. The locality puts politics front and center: as a political subdivision it requires law that is attentive to its political nature. The agency puts deliberation first; it requires law that is responsive to its distance from politics. But localities could benefit from deliberation on the administrative model, and state agencies, which (unlike federal agencies) already substantially respond to popular opinion, plausibly and in many contexts should do so even more. There is no reason, constitutional or otherwise, that a state, when designing a specialist institution, should have to choose between boxes labeled “local government” and “agency.” It can and should partake of the virtues of both.

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<sup>139</sup> *See id.*

<sup>140</sup> A regional agency would differ from cooperative arrangements like the Chesapeake Bay Plan (which does involve agency participation) not only because it would have a broader substantive mandate, but because it could enjoy rulemaking and adjudicative powers and would be bound by state administrative law. *See Cannon, supra* note 136, at 1135–36 (success of the Chesapeake Bay Plan depends “heavily on voluntary undertakings by a diverse multitude of players—from Congress and federal agencies to state governors and legislatures to local governments, citizen groups and individual landowners”).