1976

# Judicial Review in Local Government Law: A Reappraisal

Harold H. Bruff
*University of Colorado Law School*

# Judicial Review in Local Government Law: A Reappraisal

**Harold H. Bruff***

Judicial review of actions taken by the cities[1] has traditionally fallen into three distinct stages. First, since cities receive their power to govern from the states,[2] courts examine the delegating statute for state and federal constitutional validity. Second, courts determine whether the local exercise of power is within the terms of the delegating statute. Third, they examine the local ordinance or administrative action itself for state and federal constitutional validity, concentrating on due process and equal protection requirements. It is the thesis of this Article that, as presently applied, this three-tiered mode of analysis inadequately controls the cities in the exercise of their powers. Focusing on the state courts,[3] the Article therefore suggests a form of review that will provide the necessary control. The three stages of the traditional review process provide a framework for analysis.[4] The Article describes present doctrines and discusses their deficiencies. Finally, it outlines a proposal for reform.

The Article recommends that the state courts focus principally on the local exercise of power—[5] but with a lessened emphasis on statutory authorization and broad constitutional doctrine and an increased emphasis on forcing the cities to reform

---

* Associate Professor of Law, Arizona State University.

1. Unless otherwise indicated, terms such as "city," "local government," and "municipality" are used in the generic sense to include all technical categories of general purpose local governments, such as towns, villages, and cities. Much of what follows applies as well to special function districts and to counties.

2. *See* text accompanying notes 43-49 *infra*. This Article does not deal with the unusual situation in which a city receives power directly from the federal government, without state participation in the delegation. *See, e.g.*, City of Tacoma v. Taxpayers of Tacoma, 60 Wash. 2d 66, 371 P.2d 938 (1962).

3. The role of the federal courts in deciding local government cases is receiving sufficient attention in general discussions of federal constitutional law. This Article focuses on the more neglected role of the state courts, discussing federal constitutional law only as it bears on them.

4. The special status of "home rule" cities demands a distinct analytical framework. It is discussed separately in text accompanying notes 209-20 *infra*.

5. *See* text accompanying notes 72-80; 117-219 *infra*.

their own governmental processes by instituting standards (substantive rules) and procedures to diminish arbitrariness.[6] This prescription is intended to place judicial review within appropriate bounds. The alternative of attempting to force state legislatures to control the cities would unnecessarily aggrandize the courts' role by increasing the number of decisions declaring statutory delegations of power unconstitutional. Conversely, the present practice of deferring excessively to both state and local action unnecessarily diminishes that role.

The suggested requirement for local standards and procedural safeguards raises complex implications for the conduct of local government. This Article explores some of them in a preliminary fashion and identifies the limits of their effectiveness. It then argues that in some situations, judicial supervision of statutes delegating power to the cities remains a necessity.

## I. THE NEED FOR JUDICIAL CONTROL OF CITY GOVERNMENT

The first task in examining judicial review of the actions of local governments is to identify the reasons why courts should impose controls on the cities—whether directly, by reviewing their conduct, or indirectly, by reviewing delegating statutes for the presence of appropriate limitations on their power. Since state decentralization through the formation of local governments increases political accountability,[7] perhaps it should not be subjected to judicial control.[8] And since the city council, the major recipient of this state power, is politically responsible through the electoral process, perhaps it should be accorded the latitude courts have traditionally extended to legislatures. But reflection on the characteristics of local government reveals a number of reasons for imposing substantial judicial restraint somewhere in the decentralization process. The question whether courts should constrain statutory delega-

6. This recommendation has its source in an analogous context. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.00-.17 (Supp. 1970), urging courts to force administrative agencies to confine their own discretion through rulemaking and fair procedures. Of course such requirements have different implications for local governments than for administrative agencies. *See* notes 117-219 *infra* and accompanying text.

7. *See* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 54 (abr. ed. 1965) [hereinafter cited as JAFFE].

8. *See* Gino's of Maryland, Inc. v. Mayor, 250 Md. 621, 244 A.2d 218 (1968); LaRoque v. Board of County Comm'rs, 233 Md. 329, 196 A.2d 902 (1964).

tions or local exercises of power (or both) can be reserved for the moment.

First, municipal actions frequently have important effects beyond the city limits. For example, statutes often authorize cities to impose land use regulations or to exercise the power of eminent domain beyond their borders.[9] Since such extraterritorial powers affect persons not represented in the city government, the absence of political controls suggests the advisability of judicial ones.[10] But not only extraterritorial powers create external, or "spillover" effects—they are present in many if not all local exercises of power.[11] For example, spillovers inhere in exclusionary zoning.[12] When a city excludes a particular land use, such as apartments, mobile homes, or low-income housing, its action affects persons in other communities, who may be precluded from settling in the offending city. Moreover, as concentrations of these comparatively burdensome land uses develop in other communities, their residents may be forced to bear increased costs for municipal services.[13]

Second, state court decisions often reflect an unarticulated distrust of city government,[14] which commentators have attributed in part to the historical reputation of the cities for corruption.[15] A more theoretical reason for this distrust is the danger

---

9. *See generally* 1 C. ANTIEAU, MUNICIPAL CORPORATION LAW §§ 5.10-.12 (1975) [hereinafter cited as ANTIEAU]; F. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA (1962).

10. *See* F. MICHELMAN & T. SANDALOW, MATERIALS ON GOVERNMENT IN URBAN AREAS 250 (1970, Supp. 1972) [hereinafter cited as GOVERNMENT IN URBAN AREAS].

11. *See generally* G. BREAK, INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES 63-74 (1967); W. HIRSCH, THE ECONOMICS OF STATE AND LOCAL GOVERNMENT 9-10 (1970); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN AMERICA: CHALLENGE TO FEDERALISM 6 (1966); Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 700-07 (1964) [hereinafter cited as Sandalow].

12. *See generally* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING, LAND USE REGULATION AND HOUSING IN THE 1970'S (1973); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

13. *See generally* Warth v. Seldin, 422 U.S. 490 (1975) (affirming a federal court's dismissal for want of standing of a series of plaintiffs attempting a broadly based attack on urban exclusionary zoning); Note, *Challenging Exclusionary Zoning: Contrasting Recent Federal and State Court Approaches*, 4 FORDHAM URBAN L.J. 147 (1975).

14. *See generally* Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965).

15. *E.g.*, M. ROYKO, BOSS (1971); L. STEFFENS, THE SHAME OF THE CITIES (Am. Cent. ed. 1960); White, *Municipal Affairs Are Not Political,*

that majority interests will oppress minorities in the local political process.[16] The problem was identified as early as the Federalist Papers:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.[17]

Thus a central danger is that the formation of stable factions will break down the normal political process of negotiation and compromise that ordinarily prompts courts to refuse to intervene in political decisionmaking.[18] At the local level, population groupings may be relatively homogeneous[19] and political issues relatively few and fundamental. If one group is able to form a majority on most issues of local importance without having to pay regard to the presence or intensity of minority opposition, favoritism or oppression can easily occur. And since local governments possess power to resolve important and sensitive issues, such as to define misdemeanors and to regulate land use, the consequences of abuse of power can be severe.[20]

Third, the danger of municipal abuses of power is aggravated by the absence of complicated checks and balances in local governmental structure. Although delegations commonly include a mixture of legislative, executive, and judicial types of power, as in zoning,[21] local governments ordinarily lack clear structural separations of power—their primary decisional body

---

in URBAN GOVERNMENT 271 (E. BANFIELD rev. ed. 1969). *But see* note 95 *infra*.

16. The phenomenon is described in detail in Note, *supra* note 14. *See also* Sandalow, *supra* note 11, at 710-12.

17. THE FEDERALIST No. 10, at 83 (New Am. Lib. ed. 1961) (J. Madison).

18. *Cf.* Kramer v. Union Free School Dist., 395 U.S. 621, 627-28 (1969); Reynolds v. Sims, 377 U.S. 533, 570 (1964); Hobson v. Hansen, 269 F. Supp. 401, 507-08 (1967), *affirmed sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969). *But cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

19. *See* U.S. NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS, REPORT 1 (Bantam ed. 1968); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, METROPOLITAN AMERICA: CHALLENGE TO FEDERALISM 13-21 (1966); U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, GOVERNMENT STRUCTURE, ORGANIZATION, AND PLANNING IN METROPOLITAN AREAS 7 (1961).

20. *See* JAFFE, *supra* note 7, at 76-81.

21. *See* Avery v. Midland County, 390 U.S. 474, 482 (1968).

is often a small, unicameral council possessing legislative and executive responsibilities.[22]

Fourth, state statutes do not ordinarily mandate local procedural safeguards[23] having the sophistication of the federal Administrative Procedure Act.[24] For all of these reasons, it is clear that supervision of city governments is warranted. Thus, when a lawsuit uncovers the potential for abuse of power, the state courts must decide whether to attempt to force the legislatures to exercise more control over the cities, or whether to undertake the supervision themselves.

## II. CONSTITUTIONAL LIMITATIONS ON STATE DECENTRALIZATION

The foregoing attempted to demonstrate that local governments are in need of legal controls from some source, whether it be the state legislature or the state courts. Statutes delegating power to the cities both define one set of limits on local power and necessitate judicial review of the statutory framework of state government for federal and state constitutional sufficiency.

### A. THE FOURTEENTH AMENDMENT

There is no need here for another review[25] of the vast body of fourteenth amendment doctrine, which constrains both the states and their local governments in many important particulars. The inquiry here is a narrow one, concentrating on the presence and stringency of federal constitutional limits on the process of decentralization, that is, on the statutory distribution of power to the cities in enabling grants of varying generality.

The Supreme Court has traditionally demonstrated a marked reluctance to supervise the states in their decentraliza-

22. *Id.*; C. ADRIAN, STATE AND LOCAL GOVERNMENTS 200-23 (3d ed. 1972); ANTIEAU, *supra* note 9, § 4.00. Separation of powers requirements that are enforced against state governments are not extended to the cities. *See* note 126 *infra.*

23. R. BABCOCK, THE ZONING GAME 154-56 (1969) [hereinafter cited as BABCOCK]; 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.10 (1958, Supp. 1970) [hereinafter cited as DAVIS].

24. 5 U.S.C. § 551 *et seq.* (1970).

25. For recent discussions citing the earlier ones, see Gellhorn & Hornby, *Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action,* 60 VA. L. REV. 975 (1974); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality,* 61 VA. L. REV. 945 (1975).

tion of power.[26] The major modern exception has been reapportionment.[27] The Court's general diffidence and its particular activism reflect the pursuit of a value of unfettered local self-government, qualified by a high regard for equality in voting.[28] The qualification suggests that when decentralization causes unequal treatment of citizens in important respects, the Court might intervene for the limited purpose of ensuring that the framework of state government is fairly and equally constituted. In a series of recent cases, however, the Court has reconfirmed its tradition of restraint.[29]

The most comprehensive recent challenge to the current structure of state and local government occurred in the landmark school finance case, *San Antonio Independent School District v. Rodriguez*.[30] The Texas school financing scheme under attack depended in part, as does American local government finance generally, on the real property tax, the fund-raising capacity of which varies with the value of taxable property in the jurisdiction. As a result, the poorest school district involved in

26. *See generally* Baker v. Carr, 369 U.S. 186, 218-32 (1962); Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 381, 905-10 (1970). *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 n.66 (1973) ("this court has never questioned the State's power to draw reasonable distinctions between political subdivisions within its borders"); *id.* at 54 n.110 ("This Court has never doubted the propriety of maintaining political subdivisions within the States and has never found in the Equal Protection Clause any *per se* rule of 'territorial uniformity.'"); Griffin v. County School Bd., 377 U.S. 218, 231 (1964); McGowan v. Maryland, 366 U.S. 420, 427 (1961); Salsburg v. Maryland, 346 U.S. 545, 551 (1954); Missouri v. Lewis, 101 U.S. 22, 30-31 (1879).

27. *See, e.g.*, Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968). *Salyer* and *Mahan* seem to represent a reining in of the reapportionment line. *See The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 85-105 (1973). The de jure segregation cases do not represent another exception, since they focus upon findings of racial discrimination, not on impermissible kinds of decentralization. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974).

28. The Court's regard for local self-government surfaced recently in Milliken v. Bradley, 418 U.S. 717, 741-43 (1974), and cases cited. For the proposition that equal treatment in voting is a fundamental right meriting strict equal protection review, see San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973).

29. Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); James v. Valtierra, 402 U.S. 137 (1971).

30. 411 U.S. 1 (1973). *See generally The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 105-16 (1973). The Court repeatedly indicated awareness that its resolution of the case would have a profound impact on American state and local government. 411 U.S. at 6, 17, 40-44, 53-59.

the case would have had to impose a tax rate more than eight times that of the richest in order to raise the same amount of local funds for education.[31] State and federal grants, however, reduced the disparity in total expenditures to the extent that the poorest district had about 60 percent of the total funds for education available to the richest district during one of the years in question.[32]

The Supreme Court reviewed the funding discrepancy under the traditional rationality standard despite the claim that strict scrutiny should apply.[33] Refusing to find wealth discrimination, the Court distinguished its earlier cases[34] on the ground that in *Rodriguez* no child was deprived of an education—the disadvantages due to less funding were only relative, not absolute. Moreover, the Court concluded that the financing scheme was too complex to allow the identification of any manageable class of persons disadvantaged on a wealth basis.[35] The Court held the Texas scheme rational on the ground that it furthered the legitimate state purpose of ensuring a degree of local control over education.[36]

For present purposes, the importance of *Rodriguez* is that it unequivocally prevents the use of strict equal protection review to force a general restructuring of state and local government.[37] The fourteenth amendment does not subject the states to a general duty to show compelling reasons for substantial disparities in treatment of their citizens due to decentralization.[38]

31. 411 U.S. at 67 (White, J., dissenting).
32. *Id.* at 11-14 (majority opinion).
33. *Id.* at 40.
34. *Id.* at 20-22 (distinguishing, *e.g.*, Tate v. Short, 401 U.S. 395 (1971); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956)).
35. 411 U.S. at 18-29. Both grounds advanced by the Court for distinguishing the earlier wealth discrimination cases are open to serious question. First, the earlier cases can be regarded as involving relative deprivations, *see id.* at 118-20 (Marshall, J., dissenting); second, a sufficiently precise class for analytical and remedial purposes would seem to have been those persons living in districts with less tax base than the state average. *See id.* at 20 & n.51 (majority opinion); *id.* at 91 (Marshall, J., dissenting). For the current state of health of the wealth discrimination line of cases, see generally Wilkinson, *supra* note 25, at 999-1017.
36. 411 U.S. at 49-55.
37. The Court's rigid two-tier equal protection approach has been under heavy attack from the scholars for some time, and there are indications that the Court sometimes departs from it in favor of a more flexible approach. The articles cited in note 25 *supra* summarize the controversy. The point here is not that the Court should have taken a more flexible approach in *Rodriguez*, but that it did not do so.
38. In Milliken v. Bradley, 418 U.S. 717 (1974), the cross-district

Indeed, the extent to which the Court will likely defer to state judgments concerning the wisdom of particular distributions of power between the state and its local governments is shown by its approval of the Texas scheme despite substantial differences both in local power to raise school funds, and in overall school expenditures.[39] Apparently, the equal protection clause allows a state to structure its internal organization in any fashion that is facially neutral and has some rational tendency to promote a legitimate governmental end, despite the presence of substantial resulting inequalities in the treatment of its citizens. The Court's restraint was surely due in part to its perception of the difficulty of distilling manageable classifications for equal protection purposes from the complexities of state decentralization.[40] Values of federalism and judicial self-restraint also help to explain the Court's attitude. Of course, cases involving suspect classifications or fundamental rights as the Court has defined them still merit strict equal protection review.[41] And the possibility remains that in a given case, the Court may find an impermissible purpose that invalidates purportedly neutral state action.[42]

busing case, the Court made it clear that local boundaries drawn without a demonstrable impermissible purpose, such as racial discrimination, are not subject to invalidation under the equal protection clause, despite the effect of de facto segregation resulting from the decentralization of power. The Court held that a district court may not order desegregation relief that ignores school district lines unless the lines themselves are the result of constitutional violations, or unless a violation in one district has caused provable segregative effects in another. *Id.* at 744-49.

39. *Id.* at 50-51, 54-55. The presence of defects in the Texas scheme was conceded by all. *See id.* at 17, 58; *id.* at 59 (Stewart, J., concurring). Mr. Justice White dissented on grounds that the delegated power of local choice was so meaningless as to render the scheme arbitrary. *Id.* at 63-70.

40. *See* James v. Valtierra, 402 U.S. 137 (1971), which upheld a provision of the California constitution subjecting low-rent housing projects to mandatory referendum approval. The Court rejected a wealth discrimination argument on the ground that California had not singled out low-rent housing for special treatment since the referendum requirement also applied to some other questions of long-term importance to the community, such as bonding and annexations. The Court cautioned against attempts to determine whether neutral governmental structure operates in a given case to disadvantage "any of the diverse and shifting groups that make up the American people." *Id.* at 142. *See generally* Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971).

41. *Rodriguez* took a restrictive approach to the availability of strict equal protection review. The Court observed that wealth discrimination alone had never been held sufficient to invoke strict scrutiny, 411 U.S. at 29, and declined to define education as a fundamental right. *Id.* at 29-39.

42. *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964); Gomillion v. Lightfoot, 364 U.S. 339 (1960).

For the most part, however, current fourteenth amendment doctrine seems a poor tool for judicial review of state decentralization; perhaps state constitutional law can provide a better one. That inquiry follows.

### B. State Constitutional Law: The Delegation Doctrine

The polestar for state law doctrines defining the city-state relationship is a theoretical concept of the source of local power. It is commonly said that the cities receive all their power from the states: No generally recognized right to self-government inheres in the cities.[43] This conclusion stems from a basic constitutional premise that all legislative power not allocated elsewhere by state or federal constitution vests in the state legislature.[44] The legislature accordingly holds plenary power over local governments, which are mere subordinate instrumentalities of the state.[45] For the most part, local governments lack even the dignity of federal constitutional protection against state legislative interference.[46] A doctrine of state legislative supremacy

43. A doctrine recognizing a right to local self-government enjoyed some support in the late nineteenth century, but was soon repudiated and seems to have no significant force today. *See* ANTIEAU, *supra* note 9, §§ 1.01, 2.00, 2.06; I J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS §§ 98-99 (5th ed. 1911) [hereinafter cited as DILLON]; Sandalow, *supra* note 11, at 646 n.11; McBain, *The Doctrine of an Inherent Right to Local Self-Government* (pts. 1-2), 16 COLUM. L. REV. 190, 299 (1916); Lutz v. City of Longview, 83 Wash. 2d 566, 520 P.2d 1374 (1974); Paddock v. Town of Brookline, 347 Mass. 230, 197 N.E.2d 321 (1964). The question of a right to local self-government in state law should be distinguished from a value of local self-government accorded deference by the Supreme Court. *See* text accompanying note 28 *supra*. Also, local power can come directly from the federal government. *See* note 2 *supra*.

44. *See generally* sources cited in note 43 *supra;* T. COOLEY, CONSTITUTIONAL LIMITATIONS 173-88, 389-400 (8th ed. 1927). One should recognize that constitutional limits on a legislature's power may be without explicit textual basis: The right to travel and the right of privacy are examples.

45. *See* Waller v. Florida, 397 U.S. 387, 392 (1970); Reynolds v. Sims, 377 U.S. 533, 575 (1964); Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907); ANTIEAU, *supra* note 9, §§ 1.01, 2.00, 2.06. The major qualification to the plenary nature of this power lies in limitations on state power to divest localities of property without compensation. *See generally* Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property*, 67 COLUM. L. REV. 1083 (1967). Another possible qualification might be that a city cannot be forced to lay a tax for purely municipal purposes. *See* Sandalow, *supra* note 11, at 646 n.11.

46. Williams v. Mayor, 289 U.S. 36 (1933) (privileges and immunities); Newark v. New Jersey, 262 U.S. 192 (1923) (equal protection); Trenton v. New Jersey, 262 U.S. 182 (1923) (contract and due process

seems incongruous in view of the early and universal American practice of creating local governments having some practical independence[47] and perhaps more visibility to their citizens than the state governments.[48] But the important point is that the doctrine remains as an initial premise, and any alteration in the relationship between state and local governments must consider it as such.[49]

The doctrine of state legislative supremacy must be seen in relation to another ancient constitutional tenet, based on the separation of powers principle, which holds that power vested by the constitution in the legislature may not be delegated.[50] The policies underlying separation of powers are fundamental: first, protection against arbitrariness through the prevention of undue concentrations of power in one branch of government; second, functional efficiency through the allocation of tasks to the branches of government best suited to exercise them.[51] Thus it is not surprising that a rule of nondelegability arose in the state courts, notwithstanding the absence of a recognized federal constitutional mandate that the states follow the separation of powers principle in their internal organization.[52] Some, but

clauses). Yet the source of the limits on state power to divest local governments of property may be the fourteenth amendment. *See* ANTIEAU, *supra* note 9, § 2.03; note 45 *supra*; Note, *supra* note 45. And in the rare situations where legislative purpose to cause unconstitutional discrimination can be established, the fourteenth amendment applies. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960). *See generally* Sailors v. Board of Educ., 387 U.S. 105, 107-09 (1967).

47. *See generally* Avery v. Midland County, 390 U.S. 474, 481 (1968); Eaton, *The Right to Local Self-Government* (pts. 1-3), 13 HARV. L. REV. 411, 570, 638 (1900); Lucas, *Dragon in the Thicket: A Perusal of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194, 214.

48. *See* Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967).

49. Some state constitutions partly reverse the doctrine, granting cities direct authority to govern themselves by framing and adopting "home rule" charters. *See generally* ANTIEAU, *supra* note 9, §§ 3.00-.13. These constitutional home rule provisions may give local governments some freedom from legislative interference. *Id.* §§ 3.14-.17. And even states without such provisions frequently impose various specific constitutional limits on legislative power over local matters. These are collected in *id.* §§ 2.08-.16. Unless otherwise indicated, the text deals with the more common situation, *i.e.*, the absence of home rule power. Home rule is discussed in text accompanying notes 208-19 *infra*.

50. *See generally* DAVIS, *supra* note 23, §§ 2.01-.15; JAFFE, *supra* note 7, at 32-34, 73-85.

51. *See* United States v. Nixon, 418 U.S. 683, 707 (1974).

52. *See* Avery v. Midland County, 3909 U.S. 474, 480 (1968); 1 F. COOPER, STATE ADMINISTRATIVE LAW 45 (1965) [hereinafter cited as COOPER]; *cf.* Sailors v. Board of Educ., 337 U.S. 105, 109 (1967); Seeley, *supra* note 26, at 905-10.

not all, state constitutions contain a clause explicitly requiring separation of powers, but state courts are virtually uniform in requiring it.[53]

In an absolute form, the rule of nondelegability could not have hoped to survive, given the plain necessity for legislatures to delegate power to administrative agencies and local governments. The delegation doctrine in state law has accordingly evolved, after a period of lip service and evasion, into a recognition that delegation may occur and a requirement that legislation contain standards to guide the exercise of delegated power.[54] Modern delegation doctrine thus attempts to serve the separation of powers principle by ensuring that major policy decisions are made by elected representatives and by facilitating judicial review.[55]

Delegations to local governments raise issues somewhat different from those raised by delegations to state administrative agencies. For the latter, the separation of powers objection is that law-making decisions are lodged in the hands of bureaucrats, who are not elected. Since delegation to local governments usually grants power to elected city councils, perhaps there is no separation of powers objection. But attention to the policies underlying separation of powers suggests that its requirements apply here as well. First, consider the policy against undue concentration of power in one branch of government. Prior discussion observed that city governments lack the structural separations of power common to state and federal government.[56] Since local governmental power is concentrated in the local legislature, a grant of unrestricted power to that body clearly gives rise to a danger of arbitrariness. The danger is increased by the tendency of city actions to affect unrepresented persons outside the city limits, by the suspect nature of the local political process, and by the frequent absence of careful procedural safeguards for the exercise of local power.[57]

The second policy underlying separation of powers requirements, functional efficiency, is relevant also. Since local governments have territorially limited jurisdictions and perspec-

53. *See* COOPER, *supra* note 52, at 45; JAFFE, *supra* note 7, at 30.
54. *See* sources cited in note 50 *supra.*
55. Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting); JAFFE, *supra* note 7, at 32-34; Bickel, *Foreword: The Passive Virtues, The Supreme Court, 1960 Term,* 75 HARV. L. REV. 40, 68 (1961).
56. *See* text accompanying notes 21-22 *supra.*
57. *See* text accompanying notes 9-24 *supra.*

tives, they are ill suited to decide matters of statewide consequence. The state courts have recognized this shortcoming in their application of the delegation doctrine. Not surprisingly, they pose the issue in terms of the delegability of matters of local or municipal concern, and the nondelegability of matters of statewide concern.[58] The categories, however, are oversimplified: As an empirical matter, any simple cleavage allocating issues wholly to state or city ill fits the reality of our mobile, interdependent society.[59] State and local governments share responsibility for many functions;[60] examples are education and highway regulation. Given the difficulty and inappropriateness of any serious attempt to apply a distinction phrased in terms of simplistic polarity, one might expect courts to substitute labeling for analysis. A tendency toward opacity in the cases suggests that this has occurred.[61] Recommendations for a method of defining more precisely the outer limits of delegation to local governments appear below.[62]

Analysis to this point has developed the following propositions. First, state constitutional law should set limits on the delegation of power to local governments. Second, in determining the nature of those limits, the prevention of arbitrariness in the local exercise of power should be a principal goal. Third, since local governments are politically responsible (unlike state administrative agencies), the delegation of policy-making power to them is objectionable per se only when it interferes excessively with policies of truly statewide importance.

The next question is how the state courts should go about enforcing the necessary constitutional limits. The first possibility is the means traditionally chosen: a requirement for legislative standards, defined simply as the substantive resolution of important policy issues by legislation. But before discussing whether courts should force state legislatures to adopt standards, it is necessary to identify the functions standards can serve in the local government context. It is clear that the state legislature can provide some very important legal controls upon

58. GOVERNMENT IN URBAN AREAS, *supra* note 10, at 244-48. Examples of nondelegable matters may be legislative control over the type and rate of local taxation, *cf. id.* at 423-24, and home rule power in the absence of constitutional authorization. *See* Sandalow, *supra* note 11, at 669 n.100, and sources cited.

59. GOVERNMENT IN URBAN AREAS, *supra* note 10, at 209-10.

60. Sandalow, *supra* note 11, at 656-57.

61. GOVERNMENT IN URBAN AREAS, *supra* note 10, at 245-46.

62. *See* text accompanying notes 199-207 *infra*.

the cities. If harmful spillover effects accompany local action, the legislature can remove some of them simply by changing the city's authorized power. For example, the legislature might forbid the city to exclude certain types of land uses. Similarly, if the legislature mistrusts the local political process, it can set substantive policy itself, especially for subject matter heavily freighted with statewide interests, such as open housing. And if the legislature finds defects in local governmental structure or procedure, it can mandate reform.

There are, however, reasons for restraining one's enthusiasm for state legislative standards. The statehouse does not provide the ideal vantage point from which to identify and cure all problems of local government; city hall may often provide a better one. And local governments and local conditions vary widely enough to indicate that courts should hesitate to force the resolution of all problems into the mold of a single statutory framework. Legislative standards limiting the discretion of the cities may achieve control at the cost of rigidity.[63] They run counter to a general modern consensus on the desirability of according the cities broad powers to govern without explicit statutory authorization.[64] A system favoring statutory standards would inhibit creative government at the local level by increasing the cities' dependence upon the legislature for authorization.[65]

These policy considerations suggest that the state courts should be cautious about imposing standards requirements on delegations by the state legislatures. Further reasons for caution in this regard emerge from a review of the unhappy experience of the state and federal courts in attempting to enforce statutory standards requirements.[66] The state court decisions usually fail to distinguish between cases involving administrative agencies and those involving local governments. However, since the present issue is the relation of court to legislature, the distinction is not important here. The federal decisions, of course, are those reviewing congressional delegations to federal agencies.

The case law reveals a tendency on the part of both the state legislatures and Congress to delegate power without mean-

63. The confining effect of legislative standards is increased by the operation of Dillon's rule, which enjoins strict construction of statutory delegations of power to cities. *See* text accompanying notes 81-102 *infra.*

64. *See* Sandalow, *supra* note 11, at 652; text accompanying notes 90-93 *infra.*

65. *See* text accompanying notes 88-96 *infra.*

66. *See generally* sources cited in note 50 *supra.*

ingful standards.[67] Sometimes the legislators merely tack on platitudinous requirements that the delegate advance the public interest or the public health, safety, and welfare. Of course, the presence or absence of explicit statutory statements of policy should not be determinative; the structure or the legislative history of a statute may provide a court ample means to determine the policy that the delegate is to follow.[68] Legislatures, however, often attempt to delegate even the most basic policy determinations to an agency or to local governments. The courts must then decide whether to void the statute with an admonition to the legislature to resolve the fundamental policy questions. But nothing better may be forthcoming from the legislature. The absence of policy may be due to political impasse or to a legislative judgment that it is unwise or impossible to set policy in advance of experience.[69] It is not surprising, then, that the courts have failed to distinguish themselves in terms of the effectiveness of their restraints on broad legislative delegations, or even in terms of predictability.[70]

The case law applying the delegation doctrine thus reveals that legislative standards requirements have always proved difficult to enforce, and have sometimes seemed unwise. In local government cases, legislative standards are unnecessary unless there is a need for statewide policy; otherwise, they tend overly to restrict local discretion. A retreat from the standards requirement to a due process emphasis on fair administrative procedure has appeared in some federal cases.[71] An analogous search for an alternative approach is in order in local government law. It is the principal recommendation of this Article that the state courts concentrate on requirements for locally adopted standards and procedures, and that only when a need for statewide statutory policy renders these insufficient to control the local exercise of power should the courts invalidate statutes delegating power to the cities for the insufficiency of legislative standards.[72]

---

67. *Id.*

68. The process is illustrated by Judge Leventhal's fine opinion in Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971).

69. DAVIS, *supra* note 23, § 2.00-3 (Supp. 1970).

70. *See generally* COOPER, *supra* note 52, at 46-91; DAVIS, *supra* note 23, §§ 2.07-.15; JAFFE, *supra* note 7, at 73-85.

71. *See* G. ROBINSON & E. GELLHORN, THE ADMINISTRATIVE PROCESS 102-06 (1974). *But see* Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971); Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307 (1976).

72. *See* note 6 *supra*.

In two important cases, federal courts have read the fourteenth amendment to contain a requirement for local standards and procedures. In *Hornsby v. Allen*[73] the Fifth Circuit required the adoption of ascertainable criteria and procedural safeguards for the issuance of liquor licenses. In *Holmes v. New York City Housing Authority*[74] the Second Circuit required the adoption of standards and fair procedures for determining eligibility for public housing. These cases raise the possibility that the fourteenth amendment will become an effective mandate to the cities in this application. For reasons advanced below, however, it would be unfortunate should federal constitutional law be relied on as the only source for this kind of judicial control of local action.[75]

A system favoring locally adopted standards is less rigid than one favoring state legislative standards. It allows variation according to differences in local conditions or local preferences. And local standards are similar to administrative rules in that they are subject to any change in prospective operation that does not exceed legislative authorization.[76] The courts should be more comfortable with such a system because the cities are both more in need of judicial control than the state legislature, and more amenable to it. They are more in need of it for reasons already given,[77] and because local legislation is apt to involve strong economic or social self-interest on the part of the city, as in exclusionary zoning.[78] They are more amenable to it because the local council does not stand on the elevated plane of the legislature in state constitutional law.[79]

Moreover, the need for the courts to control local governmental action is especially strong because the cities are less

73. 326 F.2d 605 (5th Cir. 1964). For a discussion of *Hornsby*, see text accompanying notes 127-28 *infra*.

74. 398 F.2d 262 (2d Cir. 1968). For a discussion of *Holmes*, see text accompanying note 119 *infra*.

75. *See* text accompanying notes 164-98 *infra*.

76. The possibility of retroactive change should not be rejected out of hand, cf. DAVIS, *supra* note 23, § 5.08; the intent here is to posit the simplest case.

77. *See* text accompanying notes 9-24 *supra*.

78. Cities differ from the state legislature in this regard because the limited territorial jurisdiction of the city precludes effective political pressure from the unrepresented, whereas the state legislature represents nearly everyone who might be affected by its actions.

79. State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915); Fasano v. Board of County Comm'rs, 264 Ore. 574, 580, 507 P.2d 23, 26 (1973). The statement in text is perhaps less true for some home rule cities. *See* text accompanying notes 208-19 *infra*.

amenable to legislative supervision than are state administrative agencies. The cities are more numerous and more often remote from the capital, and, above all, they have territorial political bases of their own.

The implications and limits of the recommendation that state delegation doctrine focus on requirements for locally adopted standards and procedures are explored below.[80] It is first necessary, however, to outline and evaluate the second and third stages of traditional judicial review in local government law. These examine local actions for statutory authorization and for state and federal constitutionality.

## III. STATUTORY AUTHORIZATION FOR LOCAL ACTION: DILLON'S RULE

If a statutory delegation of power survives examination for constitutional defects under the delegation doctrine, traditional judicial review proceeds to the question whether the local action is within the terms of the authority granted. Strict construction of these statutes is mandated by another venerable maxim of local government law, Dillon's rule, which is ordinarily stated as follows:

> It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others:* First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[81]

In part this rule is simply a theoretical deduction from the root principle of state legislative supremacy.[82] Having no inherent power to govern themselves, local governments must show that state law warrants their actions. Dillon's rule seems

---

80. *See* text accompanying notes 117-219 *infra*.

81. DILLON, *supra* note 43, § 237 (emphasis in original). *See, e.g.*, City of Osceola v. Whistle, 241 Ark. 604, 410 S.W.2d 393 (1966); Nance v. Mayflower Tavern, Inc., 106 Utah 517, 150 P.2d 773 (1944). The usual statement of the rule leaves courts some room to maneuver, especially in finding implied powers. Not surprisingly, courts vary in their emphasis on the potential breadth or narrowness of the rule. *See* ANTIEAU, *supra* note 9, § 5.05. Judge Dillon did not mean to be overrigid. He would have allowed the exercise of powers "reasonably proper" to effectuate powers expressly granted. DILLON, *supra* note 43, § 238, at 452.

82. *See* DILLON, *supra* note 43, § 237, at 450; § 238, at 452.

to have a policy basis as well—the prevention of majority oppression in city government.[83] That is a worthy purpose, but the rule itself is largely irrelevant to its accomplishment. Dillon's rule directs the attention of the courts to the question whether the city has generalized subject-matter authorization to act. The apparent premise is that the presence of explicit legislative authority to undertake a given kind of program, such as zoning, provides an important control upon its administration. Of course, the legislature can qualify its delegations of power with restrictions designed to prevent arbitrariness,[84] but it does not always do so. When it does not, Dillon's rule provides no protection against the arbitrary exercise of a generally authorized power.[85]

It should surprise no one that the courts, supplied with a tool so badly designed, have used it poorly. In their application of Dillon's rule, they have tended toward literalism and inconsistency, inquiring whether the local ordinance is grammatically within the statute's bounds without explicitly addressing its potential for abuse.[86] Of course, both the literalism and the apparent inconsistency can be explained as a tendency of the courts simply to state the rule but to respond in fact to its underlying policy concern.[87]

---

83. "In aggregate corporations, as a general rule, . . . the act of a majority is deemed in law the act and will of the whole, — as the act of the corporate body. The consequence is that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty, —to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz., *that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects.*"

*Id.* § 238, at 451 (quoting Spaulding v. City of Lowell, 40 Mass. (23 Pick.) 71, 75 (1839)) (emphasis added by Dillon).

84. *See* text accompanying note 63 *supra.*

85. *See* DILLON, *supra* note 43, § 239, at 453 (emphasis in original): The rule of strict construction does not apply to the *mode adopted* by the municipality *to carry into effect powers expressly or plainly granted,* where the mode is not limited or prescribed by the legislature, and is left to the discretion of the municipal authorities.

86. ANTIEAU, *supra* note 9, §§ 5.01-.06; GOVERNMENT IN URBAN AREAS, *supra* note 10, at 254; S. SATO & A. VAN ALSTYNE, STATE AND LOCAL GOVERNMENT LAW 91-92 (1970). *See, e.g.,* Bredice v. City of Norwalk, 152 Conn. 287, 206 A.2d 433 (1964); Ives v. Chicago, 30 Ill. 2d 582, 198 N.E.2d 518 (1964); Early Estates, Inc. v. Housing Bd. of Review, 93 R.I. 227, 174 A.2d 117 (1961).

87. *See* S. SATO & A. VAN ALSTYNE, *supra* note 86, at 90-94. Even

Dillon's rule creates significant practical problems for both local governments and state legislatures. Its erratic application causes city officials to fear that authorization for local action is absent whenever relevant legislation is less than unambiguously explicit.[88] This can cause excessive reluctance to act or frequent resort for authorization to the legislature, which may not be disposed to grant it.[89] One source of legislative reluctance to confer desired authority is the difficulty of drafting legislation that will satisfy both the constitutional command of the delegation doctrine and the practical needs of the cities. If a statute is drawn broadly enough to confer ample power on the cities and to avoid technical invalidations of ordinances, the legislative standards requirement may invalidate it. On the other hand, if a statutory delegation is drawn with narrow specificity, it should survive the perils of the delegation doctrine, but the cities will have a difficult time exercising power under it without running afoul of Dillon's rule.

Another serious policy objection to Dillon's rule lies in basic principles of governmental organization: Cities should be allowed to govern generally and not be limited to particular functions.[90] Local governments share responsibility with the states and with the federal government over a wide range of matters. And the cities confront a highly complex, changing set of problems to which their response can only be hampered by allocating them fragmented areas of limited subject-matter jurisdiction.[91] Notice that the legislative grant of a general power to initiate local action without explicit legislative approval does not prevent the legislature from withdrawing local authority when experience so counsels. Also, the presence of broad initiative powers does not prevent the legislature or the courts from controlling particular exercises of appropriately delegated power by requiring local standards and procedural safeguards. Granting initiative does not confer autonomy.[92] It does eliminate worries of local officials about authority to proceed with the untried, and it places initial legislative responsibility with

---

when the courts identify subject matter for which some latitude in application of the rule is clearly appropriate, they tend to use misleading labels. *See* ANTIEAU, *supra* note 9, § 5.06 (describing liberalized review for "proprietary" functions such as the operation of a utility).

88. Sandalow, *supra* note 11, at 653-56.
89. *Id.*
90. *Id.* at 656-57.
91. *Id.*
92. *Id.* at 657-58.

the city council, presumably the body best informed about local problems. Thus, authorizing cities to govern generally on local matters fosters development of and choice between rational local preferences and alternatives.[93]

Legislatures have often reacted to the authorization problems caused by Dillon's rule by delegating broad powers to the cities.[94] It is ironic that insofar as the presence of Dillon's rule has thus encouraged the legislature to grant powers in sweeping and often thoughtless fashion, it has achieved the opposite of its purpose to confine local power. Frequently, these delegations include "general welfare" clauses apparently granting a general power to legislate without specific statutory authority.[95]

To be sure, courts do not always construe general welfare clauses as broadly as they might.[96] But their resistance to turning Dillon's rule inside out probably stems from several considerations: a concern about the dictates of the delegation doctrine, a need to reconcile general welfare clauses with other, specifically limited authorizations, and a desire to retain the power to force legislative reappraisal of a delegation whose implementation by the cities has raised unforeseen problems.

Continued reliance on Dillon's rule as a device to control local governments is unwarranted. The courts should discard the rule of strict construction; it is overrigid and counterproductive. They should seek statutory policy in the normal ways and continue to ask whether particular local actions offend state policy discernible in the statutes delegating power or elsewhere.[97] For example, parochial local action such as exclusion-

---

93. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973).

94. State constitutional bans on special legislation applying only to selected local governments also contribute to a need for broad delegation. *See* Sandalow, *supra* note 11, at 649-50 n.24.

95. *See generally* ANTIEAU, *supra* note 9, § 5.07. This development may reflect a slackening of traditional distrust of city government. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONAL AND STATUTORY RESTRICTIONS UPON THE STRUCTURAL, FUNCTIONAL, AND PERSONNEL POWERS OF LOCAL GOVERNMENT 72 (1962): "The abuse by local government of broad powers troubles the Commission minimally. It is not currently widespread in any serious way."

96. ANTIEAU, *supra* note 9, § 5.07; GOVERNMENT IN URBAN AREAS, supra note 10, at 283-84.

97. Some state courts occasionally void local actions on grounds of conflict with "public policy." Perhaps this is a form of preemption by state common law. *See generally* S. SATO & A. VAN ALSTYNE, *supra* note 86, at 95-102.

ary zoning can be voided as ulta vires, on the ground that the state delegates only the power to act consistently with the welfare of all of its citizens.[98]

In deciding whether to imply authority for a given local action from a state statute, the courts should concentrate on the dangers that inhere in the particular exercise of power and on the presence or absence of local standards and procedures sufficient to prevent arbitrariness. There is usually no reason to forbid local experimentation unless the city's action is clearly beyond statutory authorization or is dangerously uncontrolled. There is reason for greater caution, however, in upholding local assertion of powers that are novel[99] or that, however exercised, have a special capacity for abuse.[100] In these situations, a holding that statutory authorization is absent has the effect of inviting legislative consideration of the appropriateness of a particular local program.[101] The courts can also avoid deciding serious constitutional issues by construing the local action to be unauthorized.[102] But the courts should be aware that the effect of invalidating an overenthusiastic local exercise of power as unauthorized is to create a precedent that may prevent the city from correcting its own mistakes by passing a new ordinance with better standards and procedures. Such a holding also may deny the power in question to all cities to which the statute applies, regardless of their varying characteristics and needs. To avoid

98. *See* Bristow v. City of Woodhaven, 35 Mich. App. 205, 217-18 n.6, 192 N.W.2d 322, 328 n.6 (1971); Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Vickers v. Township Comm., 37 N.J. 232, 261-63, 181 A.2d 129, 145-46 (1962) (Hall, J., dissenting), *cert. denied and appeal dismissed,* 371 U.S. 233 (1963); BABCOCK, *supra* note 23, at 176-83.

99. It is easier to identify the substantive limit that the legislature intended when a broad delegation is enacted against a background of past administrative practice by the delegate. *See, e.g.,* Zemel v. Rusk, 381 U.S. 1 (1965). The danger is that a court will read past practice as the limit of present authority without good reason (such as to avoid a constitutional question), thus unduly limiting a power to experiment that the legislature meant to confer.

100. *See, e.g.,* City of Osceola v. Whistle, 241 Ark. 604, 410 S.W.2d 393 (1966) (taking a strict approach toward the existence of an extraterritorial eminent domain power).

101. A good example of the value of this technique is Port of New York Authority v. Weehawken Township, 14 N.J. 570, 576-77, 103 A.2d 603, 606-07 (1954) (Brennan, J.), reading the Authority's enabling legislation narrowly to force the Authority to undergo legislative consideration of the appropriateness of building a new tunnel that would cause substantial housing relocation.

102. *E.g.,* City of Des Plaines v. Trottner, 34 Ill. 2d 432, 216 N.E.2d 116 (1966); *cf.* Kent v. Dulles, 357 U.S. 116 (1958).

these results, the courts should state ultra vires holdings as narrowly as possible.

## IV. TRADITIONAL CONSTITUTIONAL REVIEW OF LOCAL ACTION

Local governmental actions found to be within the terms of a valid delegation must still satisfy the requirements of state and federal due process and equal protection clauses. For present purposes, it is important to observe how the fourteenth amendment's test of rationality operates, and how it interrelates with the other stages of judicial review.[103] Rationality review is illustrated by the Supreme Court's recent opinion in *Village of Belle Terre v. Boraas*,[104] an exclusionary zoning case. The village's ordinance permitted only one-family dwellings and excluded all multiple occupancy. It defined a "family" as persons related by blood, adoption, or marriage and living together as a unit, or as a number of persons not exceeding two, not related by blood or marriage, but living together. Six university students leased a house and challenged the ordinance. The Court began by reviewing its landmark decision upholding the zoning power, *Village of Euclid v. Ambler Realty Co.*[105] *Euclid* had upheld zoning classifications against fourteenth amendment attack by placing some emphasis on the prevention of identifiable harm such as fire hazards and overcrowding.[106] In *Boraas*, the Court cautioned that *Euclid* also established that "those historic police power problems need not loom large or actually be existent in a given case."[107] The Court reasoned that existing nuisance-like problems need not be proved because cities need reasonable

103. Cases involving fundamental rights and suspect classifications as the Supreme Court has defined them merit far stricter review. *See* text accompanying notes 25-42 *supra*. The purpose here is to outline existing review used for the bulk of cases, in order to judge its effectiveness. Of course, state courts can read state equal protection and due process clauses to impose more stringent requirements than their federal counterparts. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 133 n.100 (Marshall, J., dissenting). They usually do not do so, however. *See* ANTIEAU, *supra* note 9, §§ 5.18, .20. Whether they should is considered in text accompanying notes 164-98 *infra*. Some state courts profess the power to invalidate local actions for unreasonableness without reaching constitutional issues. GOVERNMENT IN URBAN AREAS, *supra* note 10, at 286; Sandalow, *supra* note 11, at 673 n.117, 709 n.261.

104. 416 U.S. 1 (1974).

105. 272 U.S. 365 (1926).

106. *Id.* at 388; Village of Belle Terre v. Boraas, 416 U.S. 1, 4 (1974).

107. 416 U.S. at 4.

margins to ensure effective enforcement, and because imperfections inhere in any attempt to draw legislative lines across the subtle shadings of reality.[108] As a result, the Court gave its sanction to all "fairly debatable" zoning classifications.[109] Moreover, the Court in *Boraas* broadened the permissible purposes of zoning from the nuisance analogies of *Euclid* to the almost unconfined aesthetic and preferential values recognized in *Berman v. Parker*:[110] " 'It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.' "[111]

The plaintiffs in *Boraas* contended that the ordinance burdened rights of travel, association, and privacy. But these claims were swiftly dispatched. Reviewing the ordinance for rationality only, the Court characterized it as economic and social legislation, whose imperfections short of complete irrationality should be tolerated.[112] Since boarding houses could cause overcrowding or noise, the ordinance survived. Thus *Boraas* fails significantly to restrain local legislation.[113] A standard of overall rationality and a recognition of broad value preferences as legitimate police power purposes combine to render local legislative exercises of

---

108. *Id. See also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388-89 (1926).

109. 416 U.S. at 4 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)).

110. 348 U.S. 26 (1958).

111. 416 U.S. at 6 (quoting Berman v. Parker, 348 U.S. 26, 33 (1958)).

112. Significantly, the Court did not seize the opportunity offered it by the opinion of the Second Circuit, which had applied a standard of review more demanding than traditional rationality review, yet less so than strict scrutiny. *See* Boraas v. Village of Belle Terre, 476 F.2d 806, 814-18 (2d Cir. 1973). Such an intermediate standard would require that the legislative classification be substantially related in fact to a legitimate purpose. *See generally* Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1 (1972) [hereinafter cited as Gunther]; *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 4, 124-28 (1974). The appropriateness of adopting such a "strict rationality" test in state local government law is appraised below. *See* text accompanying notes 193-98 *infra*. One reason for the rejection of strict rationality review in *Boraas* may have been the difficulty of applying it to the broad, subjective purposes that the Court recognized as valid pursuits of zoning.

113. A caveat is in order. Because of the Court's reliance on *Euclid* and *Berman*, the precedential value of *Boraas* beyond land-use regulation is unclear. *The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 129 (1974).

powers such as zoning very difficult to overturn under the equal protection clause.[114]

That present doctrines of judicial review in local government cases reduce the effectiveness of the courts is shown by the relationship between review of local ordinances for constitutional rationality and their review for statutory authorization under Dillon's rule. The courts should read enabling statutes broadly for the existence of various powers, in order to prevent constant pilgrimages to the legislature, but they should be more strict in deciding whether a particular exercise of a concededly legitimate power is reasonable.[115] Instead, they theoretically exercise strict review in determining whether the power is authorized by statute, and exercise leniency in reviewing the local action for rationality.[116] The issue never becomes clearly focused on whether more can be done to prevent arbitrariness in local government.

## V. THE EFFECTS OF REQUIREMENTS FOR LOCAL STANDARDS AND PROCEDURES UPON CITY GOVERNMENT

Judicial review in local government law is presently far less effective than it should be. The remainder of this Article focuses on the implications for the courts and the cities of the prescription for reform advanced above—that the courts should concentrate on requirements for locally adopted standards and procedures; only when these cannot sufficiently control the exercise of local power should courts require state legislatures to include such controls within statutory delegations.[117] The ultimate goal has been well stated in an analogous context:

> [J]udicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. . . . When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of

114. *See also* Warth v. Seldin, 422 U.S. 490 (1975) (lack of standing to challenge urban exclusionary zoning).

115. *See* Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973).

116. *E.g.*, Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962), *cert. denied and appeal dismissed*, 371 U.S. 233 (1963); Mobil Oil Corp. v. City of Rocky River, 38 Ohio St. 2d 23, 309 N.E.2d 900 (1974); *see* Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157-58 (1955).

117. *See* text accompanying note 72 *supra*.

> the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.[118]

The first task is to identify the particular functions that standards and procedural safeguards can perform in city government.

Essentially, a requirement for local standards will force the cities to set clear substantive policy. The value of this is demonstrated by *Holmes v. New York City Housing Authority*,[119] in which persons eligible for low-rent public housing challenged the procedures used by the Housing Authority in admitting tenants. The Authority received 90,000 applications per year but could admit only about 10,000 families to public housing. The plaintiffs claimed that the Authority did not process applications in accordance with reasonable and ascertainable standards. The Court of Appeals for the Second Circuit agreed, holding that due process required selections among eligible applicants to be made in accordance with ascertainable standards. The court then said that if many applicants were equally qualified under the standards, further selections must be made in some nondiscriminatory fashion, such as in the chronological order of application. While *Holmes* may present a situation ideally suited to rulemaking, when it is impossible or unwise to formulate specific rules in advance of experience, standards can be developed in case-by-case adjudication. Either way, standards increase governmental predictability, advance equality in application, and insulate administration from political pressure.[120]

Standards are important, but they cannot ensure effective control of governmental action unless they are combined with procedural safeguards.[121] Experience in zoning variance administration demonstrates the problem: Local boards of adjustment have consistently ignored statutory standards that supposedly restrict the availability of variances to cases of "unnecessary hardship."[122] The wholesale granting of variances has re-

---

118. Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) (Bazelon, J.) (footnotes omitted).

119. 398 F.2d 262 (2d Cir. 1968).

120. *See generally* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 19-24 (1962).

121. *See* Schmidt v. Department of Resource Dev., 39 Wis. 2d 46, 158 N.W.2d 306 (1968).

122. *See* MODEL LAND DEVELOPMENT CODE 51-52 (Proposed Official Draft, 1975) [hereinafter cited as MODEL CODE]; C. HAAR, LAND USE PLANNING 295-96 (2d ed. 1971); Shapiro, *The Zoning Variance Power*, 29 MD. L. REV. 1 (1969); Standard State Zoning Enabling Act § 7,

sulted in frequent judicial reversals in the small percentage of cases that have produced litigation, but more effective control at the administrative level is needed.[123] Procedural safeguards can provide it and can produce an administrative record that facilitates judicial review.[124]

The functions of standards and procedures are no mystery; the harder questions arise in attempting to apply them to the present structure of city government. Courts that have required local standards and safeguards have found it difficult to characterize and control city council actions that formally constitute legislation but functionally resemble adjudication.[125] The problem is a pervasive one because the blending of legislative and administrative functions in the city council is common in American local government.[126] In *Hornsby v. Allen*,[127] for example, an unsuccessful applicant for a liquor license sued the Mayor and Board of Aldermen of Atlanta, alleging that although she met all the requirements for a license, her application had been arbitrarily denied. Granting the defendants' motion to dismiss, the federal district court reasoned that the case involved legislative action by a local legislative body and that procedural due process requirements thus did not apply. The court of appeals reversed. It observed that although a legislative body had taken the challenged action, the decision amounted to adjudication of a particular case[128] rather than passage of a general legislative rule. By contrast, the court noted, promulgation of standards to be met in order to obtain a license would constitute legislation, since decision would rest on fact premises not related to a par-

---

reprinted in 4 R. ANDERSON, AMERICAN LAW OF ZONING § 26.01 (1968) [hereinafter cited as SZEA].

123. MODEL CODE, *supra* note 122, at 51-52.

124. *See* Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952); DAVIS, *supra* note 23, §§ 2.08-.09.

125. A vivid example of judicial confusion on this score is provided by the original majority and en banc majority opinions in South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973), *rev'd*, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 416 U.S. 901 (1974). For the other cases, see sources cited in notes 130 and 132 *infra*.

126. *See* text accompanying notes 21-22 *supra*. Local governments are not held subject to state separation of powers requirements. *See* Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974); County Council v. Investors Funding Corp., 270 Md. 403, 312 A.2d 225 (1973); Smith v. Township of Hazlet, 63 N.J. 523, 309 A.2d 210 (1973).

127. 326 F.2d 605 (5th Cir. 1964). *See* text accompanying note 73 *supra*.

128. 326 F.2d at 608. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.03 (3d ed. 1972).

ticular party. Thus the court held that if the aldermen had established no ascertainable standards by which an applicant could seek to qualify for a license, the district court must enjoin license denials until a standard had been established and due process provided.

One more illustration is necessary to provide grist for analysis. The major current controversy in local government law concerns zoning ordinance amendments that affect only a single tract or a limited portion of the city. Theoretically, these amendments reflect general planning considerations, such as a need for more shopping centers. If treated as legislation, they would ordinarily receive only rationality review.[129] But there are signs that the process is in reality an essentially unplanned administrative means of controlling development by ad hoc grant or denial of requests for amendments according to the subjective desirability of the particular development proposal.[130] Discriminatory administration, often feared in local government, can readily occur.[131]

Some courts and scholars, following the approach of *Hornsby* and emphasizing the reliance of such rezonings on "adjudicative" facts concerning particular parties, have called for the application of trial-type procedural safeguards in all such situations.[132] They distinguish decisions based on "legislative" determinations of broader issues of fact and policy, for which procedures typical of rulemaking or legislation are more appropriate. But suppose the council rezones a somewhat larger

129. *Compare* Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973), *with* South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973), *rev'd*, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 416 U.S. 901 (1974). *See generally* Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

130. *See* Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Udell v. Haas, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); Brough, *Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases*, 53 N.C.L. REV. 925, 925-26 (1975). *See generally* D. MANDELKER, THE ZONING DILEMMA (1971).

131. *See* JAFFE, *supra* note 7, at 76-81.

132. South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973), *rev'd*, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 416 U.S. 901 (1974); Ward v. Village of Skokie, 26 Ill. 2d 415, 186 N.E.2d 529 (1962); Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973); Chrobuck v. Snohomish County, 78 Wash. 2d 884, 480 P.2d 489 (1971); BABCOCK, *supra* note 23, at 157-59; Brough, *supra* note 130, at 945-47; Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies*, 15 SANTA CLARA LAWYER 50 (1974); Comment, *supra* note 129.

area, or advances general, "legislative" reasons for its decision. To ask whether adjudicative or legislative facts are the ground of decision becomes oversimplified, since both may be involved.[133] The question also suggests an unnecessary and therefore unwise inquiry into the motive for decision.[134]

This approach errs in attempting to characterize a governmental decision according to a predominant focus that it may well lack, and in imposing blanket procedural requirements that may therefore be inappropriate in a given case. The confusion is understandable; it traces to the theoretical difficulty of ultimate distinctions between rulemaking and adjudication.[135] But a practical resolution of the problem is crucial to the enforcement of a requirement for local standards and safeguards.

There is a way out of this morass, suggested by current developments in federal administrative law.[136] First, local governments require discretion to decide whether to proceed principally through rulemaking or through adjudication in a given situation.[137] The courts can grant the cities this flexibility, yet force them to adapt the procedures they provide to the issues involved. Essentially, this approach contemplates engrafting some adjudicative procedures upon proceedings otherwise typical of rulemaking. It should be accomplished as follows.

Local standards will ordinarily emerge from legislative, or rule-making, proceedings. Experience indicates that courts can review rules effectively only if they are accompanied by statements of the reasons for their adoption.[138] Such statements allow the courts to identify the broad issues of "legislative" fact and policy upon which rules ordinarily rest, and to judge accordingly their rationality and conformity to statutory authority.[139] Statements of reasons should be routinely required for city

133. Hyson v. Montgomery County Council, 242 Md. 55, 217 A.2d 578, 584 (1966).

134. *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

135. *See generally* B. SCHWARTZ, ADMINISTRATIVE LAW § 55 (1976).

136. *See generally* Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38 (1975); Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

137. *Cf.* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

138. *See, e.g.*, Citizens Ass'n of Georgetown, Inc. v. Zoning Comm'n, 477 F.2d 402, 408-09 (D.C. Cir. 1973); UNIFORM LAW COMM'RS, REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 3 (1961); *cf.* Administrative Procedure Act § 4(b), 5 U.S.C. § 553(c) (1970).

139. Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968).

ordinances and rules. It was observed earlier that proceedings formally denominated rulemaking often focus to at least some extent on "adjudicative" facts. When a rule depends for its validity on the identification and resolution of specific factual issues, the courts should require the rule-making proceeding to contain procedures appropriate to the resolution of such issues,[140] for example, cross-examination[141] and formal findings of fact.[142] Thus, to the extent that adjudicative fact issues are significant determinants of a standard, the use of some trial-type procedures may be appropriate to formulation of the standard.

This approach recognizes that the most appropriate occasion for developing the specific factual bases for standards is the rule-making proceeding itself, not an after-the-fact judicial proceeding.[143] Factual development at the earlier stage should promote improvement in the substance of standards, and standards should themselves improve the substantive quality of local decisionmaking. For example, cities forced to elaborate their criteria for zoning amendments would have to make the hard planning decisions that they now tend to abjure through the use of an ad hoc zoning system.

When local governments proceed not by rulemaking but by adjudication or informal procedure, the courts find themselves on relatively solid ground. For insofar as state legislatures have failed to impose detailed procedural requirements upon the cities,[144] the responsibility to ensure fair local procedure has devolved upon the courts. Perhaps the federal procedural due process cases will provide most of the impetus for reform in the immediate future, both in situations calling for full trial-type hearings[145] and in those calling for more informal safeguards.[146]

140. *See generally* Industrial Union Dep't AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974).

141. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973) (Bazelon, J., concurring); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CALIF. L. REV. 1276, 1333-36 (1972); *cf.* Chrobuck v. Snohomish County, 78 Wash. 2d 858, 870-71, 480 P.2d 489, 496 (1971).

142. *See* Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1257 (D.C. Cir. 1973).

143. *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 651-52 (D.C. Cir. 1973) (Bazelon, J., concurring).

144. *See* text accompanying note 23 *supra.*

145. The principal case is Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* Hornsby v. Allen, 326 F.2d 605, 608-09 (5th Cir. 1964).

146. The principal case is Goss v. Lopez, 419 U.S. 565 (1975).

Of course, the precise nature of procedures afforded should vary with the subject matter involved.[147] And while the federal due process cases balance the interests of the individual against those of the government in a search for the minimum protections required by the Constitution,[148] the state courts can require more detailed procedures. The due process cases emphasize functional considerations;[149] the question here is whether a particular procedural device has sufficient utility in resolving the issues found in a given kind of case to warrant its imposition on the city. For example, unless specific issues of fact need resolution, trial-type procedures will prove wasteful.

A standard compendium for a full trial-type hearing would include notice and an opportunity to be heard under procedures published in advance, an opportunity to present and rebut evidence through counsel, the examination under oath of witnesses whose presence is compelled and who are subject to reasonable cross-examination, and the exclusion of irrelevant or unreliable evidence.[150] The decisional body must be impartial, without conflicts of interest or ex parte contacts.[151] Decisions would be made solely on the record and would include specific findings and reasons supported by the record,[152] instead of the boilerplate findings sometimes encountered at present.[153] For situations calling for less formal procedural protections, the courts could begin with the proposition that requirements for an opportunity to meet opposing evidence and for a reasoned administrative decision are fundamental.[154]

147. *See generally* K. DAVIS, DISCRETIONARY JUSTICE 97-141 (1971).
148. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970).
149. *E.g., id.*
150. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Hornsby v. Allen, 326 F.2d 605, 608-09 (5th Cir. 1964); Fasano v. Board of County Comm'rs, 264 Ore. 574, 507 P.2d 23 (1973); MODEL CODE, *supra* note 122, § 2-304; BABCOCK, *supra* note 23, at 156-58.
151 *See* Ward v. City of Monroeville, 409 U.S. 57 (1972); Jarrott v. Scrivener, 225 F. Supp. 827 (D.D.C. 1964); Buell v. City of Bremerton, 80 Wash. 2d 581, 495 P.2d 1358 (1972); BABCOCK, *supra* note 23, at 155.
152. South Gwinnett Venture v. Pruitt, 482 F.2d 389 (5th Cir. 1973), *rev'd*, 491 F.2d 5 (5th Cir.) (en banc), *cert. denied*, 416 U.S. 901 (1974); Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); Dietrich v. District of Columbia Bd. of Zoning Adjustment, 293 A.2d 470 (D.C. Ct. App. 1972); Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); Inland Constr. Co. v. City of Bloomington, 292 Minn. 374, 195 N.W.2d 558 (1972); Ward v. Scott, 11 N.J. 117, 93 A.2d 385 (1952); Fasano v. Board of County Comm'rs, 264 Ore. 574, 588-89, 507 P.2d 23, 30 (1973); BABCOCK, *supra* note 23, at 156-58; DAVIS, *supra* note 23, § 2.15.
153. *See* MODEL CODE, *supra* note 122, § 2-304, Note, at 95.
154. K. DAVIS, DISCRETIONARY JUSTICE 98, 104, 118 (1971).

A prime example of a statute that delegates power to local governments without requiring full procedural safeguards is the Standard Zoning Enabling Act.[155] The Model Land Development Code[156] has attempted to correct the standard Act's deficiencies in this regard, and comparison is illuminating. The Standard Act concentrates on prescribing local organizational structure rather than procedure; it attempts to ensure fairness by mandating tenure for administrative officials, extraordinary majority vote for some decisions, and broad judicial review.[157] The principal defect is that it fails to require an administrative record sufficient to ensure a responsible decision by zoning boards and to provide a basis for judicial review.[158] This state of affairs leaves courts with no choice but to take evidence outside the sparse record[159] and to assume a reviewing role that is insufficiently defined. The courts have adopted a standard of review built around the loose confines of substantive due process rationality.[160] The Model Code, on the other hand, concentrates on prescribing procedural safeguards ensuring a reasoned decision on a more complete administrative record.[161] Adjudications must include the ingredients of fair procedure outlined above.[162] The Model Code thus enables judicial review for the presence of substantial evidence on the record as a whole, a familiar process in state and federal administrative law.[163]

## VI. JUDICIAL REVIEW OF LOCAL STANDARDS AND PROCEDURES

Courts reviewing local standards and procedures could rely in part on federal constitutional doctrine. But the existing state of that doctrine falls well short of solving current prob-

155. SZEA, *supra* note 122. The statute is in effect, with modifications, in 47 states. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 18.01 (1975).

156. MODEL CODE, *supra* note 122.

157. SZEA, *supra* note 122, § 7; *see* MODEL CODE, *supra* note 122, § 2-301, Note, at 82-83.

158. *See* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); MODEL CODE, *supra* note 122, § 2-301, Note, at 83; § 2-304, Note, at 94, 95.

159. SZEA, *supra* note 122, § 7.

160. *See, e.g.*, Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 783-85 (1969); text accompanying notes 103-16 *supra*.

161. MODEL CODE, *supra* note 122, § 2-301, Note, at 82-83.

162. *Id.* § 2-304; *see* text accompanying notes 150-52 *supra*.

163. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974); Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971); MODEL CODE, *supra* note 122, § 9-110(1) & Note, at 489-92.

lems, at least in terms of the standards requirement.[164] If *Hornsby* and *Holmes* are generally followed, the fourteenth amendment will require local standards. But those decisions lack support in Supreme Court precedent,[165] and in any case it seems unlikely that the federal courts will go further than to require standards of minimal specificity—enough perhaps to give affected persons some idea of how to meet them and to give procedural protections some bite. And once local governments satisfy the minimum specificity of standards required by the fourteenth amendment, the federal courts will presumably invoke the abstention doctrine as a reason not to inquire into a need for more detailed standards.[166] Furthermore, review of the substance of existing standards will not be meaningful if current federal doctrine is followed. The *Boraas* case strongly suggests that the traditional, permissive rationality test will be the every-day tool of review.[167] State courts should do more.

The state courts can apply state law to these questions without the constraints of Supreme Court precedents defining the limits of the fourteenth amendment, and without concern for concepts of federalism. The goal is to derive principles from the nature of the subject matter, local government, that will define the appropriate stringency of judicial review. The courts need guidance in deciding when to require more detailed local standards, how closely to review existing ones, what procedural safeguards to require, and when, alternatively, to require state legislative standards. "We need, in short, some standards for when we should require standards."[168] A preliminary effort to meet that need follows.

### A. Principles Governing the Stringency of Judicial Review

Three broad categories of local government cases require relatively close judicial review: those involving serious spill-

164. And perhaps in terms of procedural requirements as well. *See* Gellhorn & Hornby, *Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action*, 60 VA. L. REV. 975, 979-83 (1974); text accompanying notes 146-47 *supra*.

165. Gellhorn & Hornby, *supra* note 164, at 990.

166. *See* Holmes v. New York City Housing Authority, 398 F.2d 262, 267 (2d Cir. 1968); Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713, 716 (5th Cir. 1968).

167. *See* text accompanying notes 103-16 *supra*. *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 49-55 (1973). And threshold doctrines such as standing may bar federal court review entirely. *See* Warth v. Seldin, 422 U.S. 490 (1975).

168. Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 587 (1972).

over effects from local actions, the exercise of sensitive powers, or the presence in local actions of significant effects on state policy.

Discussion above maintained that the tendency of local actions to affect people outside the city limits provides a reason for imposing judicial controls on local governments.[169] The nature of such spillover effects should therefore influence the nature of judicial review. As the effects become greater in extent or more intense in impact, judicial review should increase in stringency. The clearest case for relatively strict scrutiny occurs when cities exercise formal extraterritorial powers. The courts should be vigilant, since the persons affected are without representation in the city government. For example, local governments having a power of unilateral annexation sometimes acquire territory for the apparent purpose of exploitative taxation.[170] The courts should also distinguish coercive extraterritorial powers from noncoercive ones. Thus they should be more lenient with noncoercive purchase of land beyond the city limits than with extraterritorial eminent domain or land-use regulation.[171] It is important, however, for the courts to attend not merely to the formalities of power but to its reality as well. For example, the supposedly consensual sale of extraterritorial utility services can reflect a dangerous monopoly power that allows the city to raise the utility rates arbitrarily.[172] The courts must also be alert to the spillover effects of powers that are formally intramural. The courts should give close review to exclusionary zoning, since it may prevent some citizens from settling in the city.[173] By contrast, they should exercise more restraint in reviewing local actions that involve less significant eco-

169. *See* text accompanying notes 9-13 *supra*.

170. *See* Myles Salt Co. v. Board of Comm'rs, 239 U.S. 478 (1916); State *ex rel.* Pan American Prod. Co. v. City of Texas City, 157 Tex. 450, 303 S.W.2d 780 (1957), *appeal dismissed*, 355 U.S. 603 (1958). *See generally* GOVERNMENT IN URBAN AREAS, *supra* note 10, at 628-32. *Myles Salt* and *Pan American Production* reveal the laxity of fourteenth amendment controls upon exploitative taxation. *See also* Morton Salt Co. v. City of South Hutchinson, 177 F.2d 889 (10th Cir. 1949); McLennan v. Aldredge, 223 Ga. 879, 159 S.E.2d 682 (1968); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1230-35, 1246-49 (1971).

171. *See* City of Osceola v. Whistle, 241 Ark. 604, 410 S.W.2d 393 (1966). *See generally* ANTIEAU, *supra* note 9, §§ 5.10-.12.

172. *E.g.*, Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210 (1939). *See also* City of Colorado Springs v. Kitty Hawk Dev. Co., 154 Colo. 535, 392 P.2d 467 (1964).

173. *See generally* sources cited in notes 12 and 13 *supra*.

nomic burdens on outsiders, such as local occupational licensing requirements that affect nonresidents.[174]

Second, the courts should build categories of sensitive city powers involving identifiable dangers and give relatively stringent review to actions taken pursuant to them. In so doing, they will be counterbalancing deficiencies in the cities' political process[175] and governmental structure.[176] The courts should analyze the nature of a power's impact on citizens, and evaluate the type and importance of the governmental interests involved. Analogy may be taken to the fundamental rights and suspect classifications that trigger strict scrutiny in federal constitutional law. However, state courts need not limit their definitions or their standards of review to comport with those employed by the federal courts.[177] Indeed, where federal constitutional issues lie in the background, as with regulation of nude dancing,[178] courts should ensure that local legislation is appropriately narrow. At the state level fundamental rights may include property rights[179] and some important interests not within existing federal doctrine, such as the interests in privacy, travel, and association raised and rejected in the *Boraas* case.[180] Similarly, state courts could define suspect classifications in a broader fashion than have the federal courts, perhaps including classifications with serious impact according to wealth.[181]

The more closely a local government approaches state constitutional limits on its power, such as public purpose limits on expenditures, the more closely the courts should review the local action.[182] Some kinds of local governmental activities have a special capacity for abuse. Examples might include the financ-

174. *See generally* Note, *Occupational Licensing: An Argument for State Control*, 44 NOTRE DAME LAW. 104 (1968).

175. *See* text accompanying notes 14-20 *supra*.

176. *See* text accompanying notes 21-22 *supra*.

177. *See* note 103 *supra*.

178. *E.g.*, California v. LaRue, 409 U.S. 109 (1972).

179. *Cf.* Gunther, *supra* note 112, at 38. Property rights can include the "new property." *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964). Thus, in Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974), the court mandated close judicial scrutiny of local actions affecting fundamental rights, in this case retirement benefits.

180. *See generally The Supreme Court, 1973 Term*, 88 HARV. L. REV. 41, 119-24 (1974); text accompanying note 112 *supra*.

181. In land-use regulation, this should include land uses that are fiscally expensive to local governments, which accordingly tend to attempt their exclusion. *See generally* sources cited in notes 12 and 13 *supra*.

182. *E.g.*, Hawkins v. City of Greenfield, 248 Ind. 593, 230 N.E.2d 396 (1967); Port Authority v. Fisher, 275 Minn. 157, 145 N.W.2d 560 (1966);

ing of city improvements by special assessments against those supposedly most benefited by them,[183] and the attempt of a city council to punish for contempt.[184] A local government exercising powers that involve clear self-interest, such as the regulation of claims against it, should be subject to close scrutiny.[185] Courts should also be alert to local legislation, such as anticompetitive regulation,[186] that tends to demonstrate domination of the local governmental process by a majority of local business interests. Conversely, if the power involved is of a kind traditionally subject to greater judicial deference, such as is true of much economic regulation and the regulation of matters involving technical expertise, the courts should exercise greater restraint. And where local governments exercise novel powers for which they may need some initial latitude, the courts can cooperate.[187]

Third, the courts should adjust their review according to the perceptible effects of local action on defined state policy. For example, if a local government uses its zoning power to exclude a kind of land use apparently favored by state policy, such as the operation of a charitable institution, a state court can review the action more strictly than it would an action not contravening state policy.[188] More stringent review is here a less restrictive alternative to a state preemption holding, which might destroy the power of the city to act at all in connection with the subject matter.[189]

### B. Implementing Requirements for Local Standards and Procedures

The foregoing principles can help the state courts decide the abstract question of whether rigorous judicial review is war-

State *ex rel.* Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 205 N.W.2d 784 (1973).

183. *See generally* Government in Urban Areas, *supra* note 10, at 516-22.

184. *See* State *ex rel.* Peers v. Fitzgerald, 131 Minn. 116, 154 N.W. 750 (1915).

185. Sandalow, *supra* note 11, at 672-74.

186. *E.g.*, Ferran v. City of Palo Alto, 50 Cal. App. 2d 374, 122 P.2d 965 (1942); Eskind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963).

187. *See* note 99 *supra.*

188. *See* Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W.2d 322 (1971); Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); Feiler, *Metropolitanization and Land-Use Parochialism—Toward a Judicial Attitude*, 69 Mich. L. Rev. 655 (1971).

189. *See* text accompanying notes 97 and 102 *supra.*

ranted in a given case, but they do not answer the question of what particular standards of review and remedies the courts should choose. As the state courts begin to require local standards,[190] either due to the prod of the fourteenth amendment or on their own initiative, they will have to confront two closely related questions. First, when should standards be required, and in what detail? Second, how strict a standard of review should the courts exercise in reviewing local standards once promulgated? Ordinarily, these will tend to merge into the single question of whether existing standards are sufficient. But at times the issues may diverge. For example, one might conclude that in *Hornsby* the aldermen should develop detailed standards in order to guard against discriminatory dispensation of valuable liquor licenses, but that, given the traditional breadth of regulatory power in this field, subsequent review of the substance of those standards should be lenient.[191] Thus the court should insist that the council state in advance its grounds for issuing licenses, but defer to the precise identity of those grounds as long as they are reasonable.

The presence of a standards requirement increases the visibility of local policymaking, thus permitting effective judicial review of the substance of the standards, whether the review be strict or restrained. For example, a local zoning standard that fails to provide for low-income housing should be more clearly amenable to scrutiny for possible conflict with state housing policy than should an apparently isolated refusal to rezone a particular tract for low-income housing.[192] But since cities deal with a wide variety of matters, the feasibility of stating prospective standards varies widely. When it seems unwise to require detailed standards in advance, courts can focus more closely on procedural safeguards and on case-by-case rationality review to ensure fair adjudication. The point is that no single standard of review can adequately handle the varieties of potential local government action; courts should take a flexible approach that responds to the needs of the case at hand. They should consider each technique for controlling local power—re-

190. *See* Application of Ellis, 277 N.C. 419, 178 S.E.2d 77 (1970).

191. *See* Barnes v. Merritt, 428 F.2d 284 (5th Cir. 1970); Atlanta Bowling Center, Inc. v. Allen, 389 F.2d 713 (5th Cir. 1968). *See generally* California v. LaRue, 409 U.S. 109 (1972).

192. *Compare, e.g.*, Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975), *with* Southern Alameda Spanish Speaking Organization v. City of Union City, 424 F.2d 291 (9th Cir. 1970).

quirement of substantive standards, of procedural safeguards, and review of standards—in order to arrive at the correct remedy.

State courts can adopt a more flexible approach to reviewing the substance of local standards than the rigid federal two-tier equal protection system, which calls for either rationality review or strict scrutiny. One possibility is to adopt the intermediate standard of "strict rationality" recently suggested for the federal cases. That test was applied by the court of appeals in *Boraas* but rejected by implication by the Supreme Court.[193] It would ask whether the local rule is substantially related in fact to a legitimate governmental purpose, and would require record proof of the relationship instead of judicial speculation. The strict rationality test attempts only to assure that the means chosen by a legislature is actually related to a legitimate purpose and purports to eschew review of the ends sought if they are within the bounds of legitimacy.[194] Such a mode of review would improve current doctrine in the local government context, but its present formulation seems insufficient in at least two respects. First, a state court reviewing local standards should adjust its review in response to the ends that the local government is seeking.[195] Second, a rationality test related only to means fails to reach governmental actions having a substantial tendency to advance a legitimate end but also having seriously undesirable side effects, such as spillovers.[196]

Nonetheless, the strict rationality test can contribute to local government law by requiring an actual relationship between a rule and its purposes. Even situations calling for comparatively relaxed judicial review merit such an inquiry. The courts can adjust the city's burden of persuasion as circumstances warrant.[197] For example, in several recent cases involving apparent

193. *See* note 112 *supra*. *See generally* Gellhorn & Hornby, *supra* note 164, at 985-89.

194. Gunther, *supra* note 112, at 43-46.

195. *See* text accompanying notes 169-89 *supra*. For an argument that the Supreme Court has begun taking this approach, see Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

196. Gunther, *supra* note 112, at 45.

197. Gunther, *supra* note 112, observed that the strict rationality test would be difficult to apply to ordinances pursuing broad goals heavily laden with value preferences—aesthetic zoning is a striking example. The reason is that such ordinances rest largely on subjective policy considerations not amenable to record proof or persuasive elaboration. Cities should be required to include statements of reasons with their

conflicts between city ordinances and state policies, the courts have reversed the presumption of validity traditionally attending local legislation and have required the cities to justify their actions.[198]

## VII. REQUIREMENTS FOR STATUTORY STANDARDS

The adoption of standards and procedural safeguards by city governments involves inherent problems of coordination, regardless of the good faith of the cities. Some unhappy substantive effects result from broad statutory delegations of power that permit a mosaic of local regulation. Examples are conflicting building codes that retard standardization in housing,[199] or occupational licensing ordinances that result in multiple burdens on those doing business in a metropolitan area.[200] Broad delegations of zoning power cause similar problems—the question of how many mobile homes or how much low-income housing a particular city should allow cannot have a final answer in standards promulgated by that city. The solutions depend on what other cities in the metropolitan area and the state are doing to respond to forces partly national in scope. Since local governments lack the jurisdiction to impose statewide solutions to problems affecting them, it may not be enough for them to attempt to take interests beyond their borders into account in their own actions.[201] The state legislature must provide some answers that need not be provided when it delegates problems to an agency of statewide competence.

The state courts presently take account of these considerations in the delegation doctrine, framing the issue in terms of

rules, to facilitate judicial review. *See* text accompanying notes 138-39 *supra*. The statement in text means that judicial scrutiny of the statements of reasons should vary in stringency. And when judicial review of the substance of rules cannot be very effective, other controls should be emphasized. In aesthetic zoning, for example, cities should be forced to adopt rather detailed standards and procedural safeguards to ensure fairness in application.

198. *See* sources cited in note 188 *supra*; *cf.* City of Osceola v. Whistle, 241 Ark. 604, 410 S.W.2d 393 (1966) (Dillon's rule advanced as justification for requiring a city to prove the necessity of exercising a sensitive power of extraterritorial eminent domain).

199. *See* U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, BUILDING CODES: A PROGRAM FOR INTERGOVERNMENTAL REFORM 1, 11 (1968).

200. *See generally* Note, *Occupational Licensing: An Argument for State Control*, 44 NOTRE DAME LAWYER 104 (1968).

201. *But see* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (1975); BABCOCK, *supra* note 23, at 159-65.

the delegability of matters of local concern and the nondelegability of matters of statewide concern.[202] It was remarked above that these categories are oversimplified.[203] Accordingly, the courts need to reformulate the delegation doctrine to give it greater flexibility and responsiveness to the issues. First, they should continue to recognize a category of matters that may not be delegated at all because local diversity of action is clearly inappropriate. Examples might include the designation of the side of the street on which one drives, or the definition of murder. To be sure, little that the legislature is likely to attempt to delegate will fall into such a category; its use should be sparing. But it could resolve some very important cases. For example, a state court could conclude that local diversity in the capacity to raise school revenues is inappropriate because of the importance of education and could therefore invalidate school financing schemes under the delegation doctrine. The courts are presently more likely to cast their holdings in terms of the state equal protection clause,[204] or possibly state preemption;[205] the point is simply that they can also rest on the delegation doctrine, because the complaint really concerns undue decentralization.

Second, the courts should recognize that although only a few matters are altogether incompatible with local diversity, more may call for state legislative limitations on local discretion. For example, whether each community should accept at least some low-income housing (and how much) could be viewed as a matter for state legislative decision. Only by requiring detailed standards to appear in the delegating statute itself can courts force resolution of such problems. By contrast, sporadic judicial decrees attempting to force reform by individual local governments could result in unequal demands on the cities to accept fiscally expensive land uses. It should be apparent from the courts' current difficulties in enforcing requirements for legislative standards, and from the need for broad local initiative, that wholesale invalidation of broad delegations is not the answer.[206] The suggested alternative is that courts attempt a restrained

202. *See* text accompanying notes 58-62 *supra.*

203. *Id.*

204. *See, e.g.*, cases cited in San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 133 n.100 (1973).

205. Of course, a preemption holding is possible only if there is no explicit delegation of the particular power in question to the cities; a holding that statutory authorization is absent is then an alternative. *See* text accompanying note 102 *supra.*

206. *See* text accompanying notes 63-70, 90-95 *supra.*

identification of those questions that must be further resolved at the state level because of a need for minimum equality and fairness in treatment of those unrepresented in local government.

The courts should thus recognize three categories of delegation cases: nondelegable issues for which the state must provide the substantive rule of decision; issues having sufficient general importance to call for legislative controls on substantive local discretion; and issues appropriate for delegation to the cities without legislative standards. The principles governing the stringency of judicial review that were outlined above should be applied to determine whether the state legislature should be called upon to provide greater substantive controls.[207] For example, where local action has important spillover effects or involves sufficiently sensitive powers, or may conflict with important state policies, local standards should perhaps be supplemented by greater state legislative control. To favor local standards is not to deny an appropriate state role in confining, but not removing, local discretion. The important point is the need to take a flexible approach to the issues that will allow the legislature, the courts, and the cities to assume their proper rules.

## VIII. HOME RULE: THE STATE COURTS AND LIMITS UPON LEGISLATIVE CONTROL OVER LOCAL GOVERNMENTS

Some state constitutions confer authority upon the cities to govern themselves by framing and adopting "home rule" charters.[208] A question thus arises regarding the extent to which the existence of home rule power affects judicial review. One primary function of home rule is to confer a general power to initiate local legislation without specific statutory authorization.[209] This

207. *See* text accompanying notes 169-89 *supra.*

208. *See generally* ANTIEAU, *supra* note 9, §§ 3.00-.11; Sandalow, *supra* note 11, at 668-71.

209. ANTIEAU, *supra* note 9, §§ 3.01, .08, .10; Sandalow, *supra* note 11, at 649-50, 658-60. Professor Sandalow has analyzed the limits of local initiative in detail. *Id.* at 671-721. He has sought to define limits for the initiative power by identifying subject-matter categories of inappropriate or sensitive exercises of local power deserving legislative reexamination. Broadly speaking, he would deny the initiative when a local government asserts novel or important powers threatening fundamental values, even though they fit within the loose bounds of current constitutional doctrine. This Article has advanced a series of similar principles for the stringency of judicial review in local government law, to be implemented by requirements for local and state standards and local procedural safeguards. *See* text accompanying notes 169-89 *supra.*

removes some of the uncertainties concerning the scope of local power that result from basic theories of legislative supremacy and multiply due to the application of Dillon's rule. The respect in which home rule cities are unique for purposes of this Article is the frequent presence of some autonomy from state legislative interference.[210] Although that autonomy does not distinguish home rule cities insofar as judicial requirements for locally adopted standards and procedure are concerned,[211] it may prevent legislative standards confining local discretion. But since the principles offered above for requiring state legislative standards for local action are based on the identification of issues having importance transcending the locality, they should apply to home rule cities as well, with the caveat that since a state constitutional decision is involved, the courts should be more restrained in applying them to home rule cities.[212]

Existing doctrine governing the autonomy of home rule cities, however, is not entirely consistent with this point of view. Autonomy is most frequently held to extend to matters concerning local structure, personnel, and procedure.[213] In part the theory may be that these matters relate only indirectly to the exercise of substantive powers, which are often subject to legislative control.[214] Of course, such an approach is oversimplified.[215] A deeper objection to state interference in the selec-

210. *See* ANTIEAU, *supra* note 9, §§ 3.14-.16; GOVERNMENT IN URBAN AREAS, *supra* note 10, at 308-09, 349-50; Sandalow, *supra* note 11, at 658-59, 668-69.

211. For judicial review, the most important technical difference between the categories of cities is that the delegation doctrine does not apply to subject matter within constitutional home rule powers. The reason is that the separation of powers principle is rendered inapplicable by any explicit state constitutional allocation of powers. But since the need for judicial control of local power is the same whether a city has home rule power or not, *see* text accompanying notes 7-24 *supra*, a judicial requirement for local standards and safeguards is still appropriate. It will have to be based on the state constitution's due process or equal protection clause, however. The stages in the review process then become: whether the statutory implementation of the home rule grant is within the terms of the state constitution; whether the home rule city's charter provisions are within the constitution and the implementing legislation; whether the ordinance or action involved is within both the charter powers and state and federal constitutional limitations.

212. *See* text accompanying note 207 *supra*.

213. *See e.g.*, Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965); State *ex rel.* Canada v. Phillips, 168 Ohio St. 191, 151 N.E.2d 722 (1958). *See generally* GOVERNMENT IN URBAN AREAS, *supra* note 10, at 350, 368.

214. GOVERNMENT IN URBAN AREAS, *supra* note 10, at 368.

215. *See, e.g.*, Boyle v. City of Bend, 234 Ore. 91, 380 P.2d 625 (1963)

tion of local officials seems also to be present;[216] home rule autonomy doctrine reflects a reaction to undue legislative meddling in city affairs during the last century.[217]

Nevertheless, an attempt to prevent legislative abuses should avoid, if possible, the collateral consequence of removing legislative power to prevent local abuses. The effort of the courts should be to define an appropriate role for the state legislature. A useful governing principle might be that the legislature may prescribe local structure and procedure, but only by general rule, not by intervention in a particular case. This principle derives from the policy underlying state constitutional provisions that prohibit legislation directed only to selected local governments.[218] These provisions do not prevent detailed regulation of local matters, but they do prevent legislation creating differential treatment. And since the needs of cities for authorizing legislation vary, bans upon special legislation have often been diluted by a doctrine that the legislature may create reasonable classifications—by population for instance.[219] Thus a state court should rarely conclude that a local government is beyond all legislative supervision on a matter, for essentially the same reason that it should only rarely conclude that an issue may not be delegated at all. The unifying principle is shared responsibility, which includes a responsibility on the part of the legislature to superintend the exercise of decentralized state power.

---

(emphasizing that the availability of such important procedural safeguards as judicial review of special assessments may be more important than the substantive rule applied and should not be considered a matter within local autonomy).

216. This reaction surfaced in the first case advancing the ill-fated notion of an inherent right to local self-government, People *ex rel.* LeRoy v. Hurlbut, 24 Mich. 44 (1871). *See* note 43 *supra*. *Cf.* Stewart v. City of Cheyenne, 60 Wyo. 497, 154 P.2d 355 (1944).

217. *See* GOVERNMENT IN URBAN AREAS, *supra* note 10, at 332-34.

218. *See generally* ANTIEAU, *supra* note 9, § 2.14.

219. Sandalow, *supra* note 11, at 654-55.