

INTRODUCTION

LOCAL GOVERNMENT LAW FOR THE NEXT MILLENNIUM*

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With this Fifteenth Anniversary Issue, the *Stetson Law Review* continues its rich tradition of serving as a forum for cutting-edge scholarship in the field of local government law. Professor Callies's article on the evolution of land use law, Professor Salsich's article on housing and urban development, together with the other excellent works in this edition, exemplify the high caliber of challenging and provocative materials that have appeared in these pages over the years.

The Anniversary Issue comes at an opportune time. The advent of the Second Millennium is a critical moment in history to re-think our conceptions of local government law in America. Our society is changing in many and profound ways that ultimately will be reflected in local government law: baby boomers are aging, resulting in greater demands for health care facilities and housing for the elderly; immigration and the rapid increase in minority populations will challenge our ability to provide child care and educational ser-

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Professor Martinez has a distinguished record of litigation and scholarly experience spanning two decades in a variety of areas of law and public administration. His areas of experience include environmental law, civil rights, government tort liability and immunity, public contracts, zoning, public schools, eminent domain, inverse condemnation, public borrowing and taxation, public budget controls and fiscal administration, special assessments, public personnel issues, and writs of mandate and related proceedings.

vices to incorporate these newcomers into the mainstream of society; and widespread computerization will tend to isolate us in our home offices, thereby changing our understandings and expectations about work and leisure. Middle class flight from central cities to the suburbs continues unabated, resulting in the loss of open space in the countryside for new residential construction. Moreover, the problems of crime, homelessness, and infrastructure degradation afflict the poorer inner city residents left behind.

These changes come at a time when metropolitan areas are emerging as critically important centers in our nation's economy. Metropolitan areas now account for over eighty percent of the nation's employment, income, and production of goods and services.¹ If counted as a single country, the gross domestic product of the ten largest U.S. metropolitan areas would rank them fourth among the world's economies, behind only the United States, Japan, and Germany.²

Local government scholars have tried to keep pace with these social and economic changes. In our own Local Government Law treatise,³ Professor Libonati and I identified the principal cross-currents in local government law decisions in state and federal courts, and thereby attempted to provide scholars, attorneys and public administrators with the tools to understand, utilize and change the fabric of local government law and governance.

Other scholarly proposals for changing the way we look at local government law and governance in order to deal with the changes in our society have ranged from modest to revolutionary. Professor Haar and others remind us that suburbs too must share the responsibility for integrating the poor into our society.⁴ Reconciling the

1. See STANDARD & POOR'S *DRI*, THE ROLE OF METROPOLITAN AREAS IN THE NATIONAL ECONOMY 1 (1998) (prepared for the Joint Center for Sustainable Communities of the United Conference of Mayors and the National Association of Counties) (copy on file with the *Stetson Law Review*).

2. See *id.*

3. See C. DALLAS SANDS & MICHAEL E. LIBONATI (now MICHAEL E. LIBONATI & JOHN MARTINEZ), LOCAL GOVERNMENT LAW (1998) [hereinafter LIBONATI & MARTINEZ].

4. See CHARLES HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES (1996); see also Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665, 666-67, 694 (1998) (reviewing DAVID RUSK, CITIES WITHOUT SUBURBS (1993); NEAL R. PIERCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD (1993); and DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA (1995)).

need for safe urban spaces with the problems of the homeless has proved particularly intractable.⁵ Professor Frug has proposed a “community building” justification for city services to counteract the pressures for suburbanization inherent in a privatized conception of city services.⁶ Professor Briffault views the governance of metropolitan areas as the central problem for local government law today, and proposes that we address it through a “mixed strategy” that would both reduce the significance of existing local boundaries and create elected regionally bounded governments to address matters of regional significance.⁷ Professor Gillette has considered why we sometimes pay for the provision of public goods or services, such as education, through taxes, while simultaneously purchasing such goods or services from the private sector as well, such as sending our children to private schools.⁸ More radical, perhaps, is Professor Poindexter's suggestion that we view the existing structures and operations of local governments as the “manifestation of revealed choice based on the collective individualism of its citizens.”⁹

I would like to add my own proposals to the stew. Local government law should not focus exclusively on local government institutional structures and their operations as if such entities had an existence separate from the people who live, work, and play there.¹⁰ It is probably not surprising that there is a close correlation between the economic productivity of our metropolitan areas and the concentration of people in those areas.¹¹ After all, *people* make wealth, the law simply recognizes its existence. Similarly, *people* make local government structures and operations important. Therefore, we should ask

5. See, e.g., Rob Teir, *Restoring Order in Urban Public Spaces*, 2 TEX. REV. L. & POL. 255, 291 (1998).

6. See Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 23 (1998); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1080–81 (1996).

7. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1115 (1996).

8. See Clayton P. Gillette, *Opting out of Public Provision*, 73 DENV. U. L. REV. 1185, 1187 (1996).

9. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 609 (1997).

10. Cf. John J. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept*, in CORPORATIONS AND SOCIETY 148–49 (1987) (criticizing the view that corporations have “rights”). See generally John J. Flynn, *The Chicken and the Egg*, in FUNDAMENTALS OF THE ECONOMIC ROLE OF GOVERNMENT 69 (Warren J. Samuels ed., 1989) (discussing the relationship between legal concepts and their consequences).

11. See STANDARD & POOR'S DRI, *supra* note 1, at 15–21, 28–35.

whether people's needs are being met. Thus, for example, it is not enough to ask whether a city has the power to annex property; we should also ask how the needs of the people in the areas to be annexed and those of the people in the annexing jurisdiction will be affected.¹² The questions asked in a relational approach to property are instructive for our purposes as well:

What relations have been established? What expectations have been generated on both sides by continuation of the relationship? To what extent should those expectations be protected? What was the explicit agreement[, if any, among] the parties? What is the distribution of power in [the existing] relationship? What alternatives do the parties have open to them? How have the parties relied on continuation of the relationship? How have the parties contributed to the [creation of wealth involved]? What are the consequences of giving complete control [over the annexation to the governmental entities involved]? What are the consequences of imposing greater obligations on [such entities]? What moral obligations should the more powerful party have in this context to protect the more vulnerable party?¹³

If Felix Frankfurter was right in supposing that “the law and lawyers are what the law schools make them,”¹⁴ then it is time to broaden the emphasis of teaching and research in our field. The pursuit of egalitarian values has predisposed the American intellectual community toward strong, centralized government committed to social democracy, while casting a cold eye on “localism.”¹⁵ Recent work, however, has re-engaged the positive values embedded in the project of local self-government under the banner of

12. *But see* 1 LIBONATI & MARTINEZ, *supra* note 3, § 8.30 (Boundary Changes — Annexation), at 8-123 to 8-130 & n.10 (noting that under accepted doctrine, cities are not constitutionally required to obtain landowners' consent to annexation).

13. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 658-59 (1988) (footnote omitted); *see also* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Leon Green, *Relational Interests*, 31 U. ILL. L. REV. 35 (1936).

14. Letter from Felix Frankfurter to Mr. Rosenwald (May 13, 1927), *quoted in* Paul Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 742 (1992).

15. *See generally* JACK R. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* (rev. ed. 1993); JOHN RAWLS, *A THEORY OF JUSTICE* (1971); Serge-Christophe Kolm, *Distributive Justice*, in *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 438 (Robert E. Goodin & Philip Pettit eds., 1993).

communitarianism.¹⁶

We should also educate lawyers to think of self-government in forms beyond those of contemporary local governments, to private, regional, and state governments. Private governments consist of the growing number of entities which straddle the shifting boundary between the private and the public sector — malls, residential communities, business improvement districts, and even university campuses. These private governments engage in the production and provision of a wide range of services, including security, which traditionally are regarded as “governmental.”¹⁷ Regional governments are those agencies whose boundaries overlap existing municipalities, and include the kinds of arrangements, whether collaborative or competitive, which occur between and among municipalities in a “local public economy.”¹⁸ State governments have gained increased importance through the genuine devolution of responsibilities from the federal to the state level of government over a wide range of policy areas, notably welfare.¹⁹

Finally, we should not overlook the profound influence of diversity and human imagination on the theory and practice of state and local government law. From the colonial period to the closing of the frontier, states such as Massachusetts, Connecticut, Pennsylvania, and Utah embodied particular, even peculiar, shared dreams and ideals. Many cities owe their origin and development to the commercial vision of land speculators and entrepreneurs. Various neighborhoods embody the hopes and aspirations of immigrant or migrant communities — churches, businesses, clubs, and fraternal organiza-

16. See, e.g., ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* (1991); AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* (1993).

17. See, e.g., 515 Assocs. v. City of Newark, 623 A.2d 1366, 1368 (N.J. 1993) (upholding an ordinance requiring multiple dwelling unit owners to provide armed security guards on their premises).

18. See ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, *THE ORG. OF LOC. PUB. ECON.* 6 (1987). The work of Vincent and Elinor Ostrom, institutionalized in the Workshop on Political Theory and Policy Analysis at Indiana University, has brought multi-disciplinary analysis to bear on every aspect of our field and has contributed greatly to our understanding. For a concise overview of their contributions, see Elinor Ostrom, *The Comparative Study of Public Economies*, 42 AM. ECONOMIST 3, 3–17 (1998).

19. The project of devolution of powers invites our attention to parallel developments in other countries. The United Kingdom will soon have operating parliaments with varying degrees of autonomy in Northern Ireland, Wales, and Scotland. For a study of devolution of power in Italy, see ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK* (1993).

tions stand as monuments to the creativity and ingenuity of the oppressed or marginalized.²⁰

Regardless of what theoretical perspectives we adopt, we must make certain that local government law evolves in ways that meet people's needs in the new social collectives of the Second Millennium.

20. *See generally* HORACE R. CAYTON & ST. CLAIR DRAKE, *BLACK METROPOLIS* (1945); HERBERT GANS, *THE URBAN VILLAGERS* (1962).