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I. INTRODUCTION

What is the federal constitutional status of local governments? This question, though capable of succinct and simple articulation, is one that seemingly lacks a similarly short or simple answer. In fact, the question is one that has bedeviled the United States Supreme Court for many years, appearing most frequently—though sometimes only implicitly—in those cases that have grappled with recurring questions of whether particular constitutional restrictions place limitations on the ability of states to freely structure their local governments.[1] This grappling has often led to facially inconsistent results.[2]

One important commentator, Professor Briffault, has highlighted these apparent facial inconsistencies by identifying three facially distinct conceptualizations of local governments appearing in Supreme Court

1. The Supreme Court has also examined the federal constitutional status of local governments in the related context of determining whether certain benefits to which states are entitled under the federal constitution (e.g., sovereign immunity protection) are applicable to local governments. These cases are not explored in depth in this Comment, but current sovereign immunity jurisprudence is arguably consistent with the descriptive framework proposed by this Comment. However, a normative analysis of whether sovereign immunity should appropriately extend to municipalities is outside the scope of this Comment. For an article comprehensively treating this topic, see generally Melvyn R. Durchslag, *Should Political Subdivisions be Accorded Eleventh Amendment Immunity?*, 43 DEPAUL L. REV. 577 (1994).

2. *See* discussion *infra* Part II. There are two principal types of cases in which the Court has repeatedly been asked to grapple with this issue: first, cases in which local governments assert that they are entitled to constitutional protections from state attempts to interfere with their internal management, *see, e.g.*, City of Trenton v. New Jersey, 262 U.S. 182 (1923), and second, cases in which it is alleged that the state's choice to structure its local governmental entities in a certain manner has led to the deprivation of personal rights guaranteed by the Constitution, *see, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960). It could be asserted that there is really no distinction at all between these two types of cases because both categories of cases involve allegations that states are restricted by personal rights in their ability to freely structure municipalities. That is, even under the first principal category of cases, it could be asserted that alleged restrictions stem from the fact that stakeholders in such governments allegedly obtain vested rights in the existence and functioning of the established local government that might be infringed by later state action interfering with that local government. Nevertheless, given that the Court has generally been less solicitous of assertions that local governments are entitled to protections from state attempts to interfere with their operation and functioning, it probably makes more sense to maintain the distinction between the two types of cases.

opinions that have examined the federal constitutional status of such entities.[3] First, some of these cases portray local governments as mere instrumentalities of the state, with no independent status in the federal constitutional hierarchy.[4] Second, other cases conceptualize local governments as independent polities, entitled to some independent recognition in the constitutional hierarchy.[5] Finally, other cases seem to view certain local governments as quasi-proprietary firms, much akin to private business corporations.[6]

Briffault's observation of this inconsistency raises several fundamental questions. First, is there a rationalizing principle underlying these decisions at all, or are these inconsistencies simply a result of the Supreme Court's ad hoc approach?[7] Second, if there is a rationalizing principle, what is the principle and how does it functionally operate? Finally, if there is a rationalizing principle, what does this rationalizing principle suggest about the federal constitutional status of local governments? I attempt to answer the first two questions, with the primary aim of being better able to answer the third.

In this Comment, I explain that there is an implicit rationalizing principle underlying relevant Supreme Court precedent: a presumption of federalism.[8] I further explain that each of Briffault's three

3. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 68–69 (7th ed. 2009).

4. *See id.* at 70–98.

5. *See id.* at 98–146.

6. *See id.* at 147–73.

7. Briffault himself argues that the Court has, in an attempt to protect the "values of federalism," moved toward a conceptualization that views local governments more like independent polities entitled to some recognition in the constitutional hierarchy. *See* Richard Briffault, "*What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1311–17 (1994).

8. Given that the term "federalism" is concededly susceptible to more than one possible construction, it is helpful to explain what I mean when I refer to the "presumption of federalism" within this Comment. Justice O'Connor, writing for the Supreme Court in *Gregory v. Ashcroft*, explained that the Constitution established a "federalist structure of joint sovereigns" designed to, through "a healthy balance of power between the States and the Federal government," "reduce the risk of tyranny and abuse from either front." 501 U.S. 452, 458 (1991). In this system, "the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Id.* at 457 (quoting Tafflin v. Levitt, 493 U.S. 455, 458 (1990)). Federalism deals with the "proper balance [of power] between the States and the Federal Government." *Id.* at 459. Consistent with these statements, I use the term "presumption of federalism" in this Comment to refer to the notion that the states should be free to make decisions relating to the "structure of [their local] government[s]," *id.* at 460, without meddling from external sources—including Congress and the federal courts—because it is only through providing states

"conceptualizations" of municipalities is really nothing more than a consistent manifestation of the interaction between supremacy and the presumption of federalism in the Court's jurisprudence.

While it is likely obvious—and certainly not novel—to suggest that federalism plays a role in the Court's local government jurisprudence, this Comment contributes to the relevant scholarship by proposing a new framework that better explains federalism's actual role. The Comment notes that federalism plays dual roles, both (1) limiting the likelihood that the Court will find that a state's choices about structuring its local governments are constitutionally impermissible[9] and (2) leading the Court to tailor its remedies as narrowly as possible in order to produce minimal disruption where it finds that a state has run afoul of particular constitutional prohibitions in structuring its local governments. Thus, federalism limits the extent to which the supremacy of federal law interferes with a state's choices about how to structure its local governments.

with this freedom that "a State defines itself as a sovereign," *id.* Thus, in using the term federalism, I am not referring to the assertion—advanced by certain scholars—that federalism refers to a group of "values" that are relatively better advanced by greater decentralization of government. *See, e.g.*, Briffault, *supra* note 7, at 1303–05 (explaining that "[c]ontemporary legal discourse concerning federalism ha[d] shifted from the formal to the normative, that is, from a focus on the fifty states as unique entities in the American constitutional firmament to a concern with the *values* of federalism" and noting that "[i]n this way, federalism tends to become merely an emphatic way of speaking of decentralization—a rhetorical trope with special resonance in American history and law—without any particular application to the states"); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 961–62 (2007) ("The Court in its modern federalism jurisprudence has built a largely instrumental case for devolving and decentralizing governmental power. This vision of federal structure privileges state sovereignty in order to promote efficiency and intergovernmental competition, check governmental tyranny, draw on pluralism and the experimental values of decentralized governance, and reinforce community and democratic participation. These core instrumental concerns are served even more forcefully by enhancing the autonomy of local governments. Thus, the very values of federalism that the Court invokes to enhance state sovereignty provide a compelling case for the particular exercise of federal authority represented by cooperative localism . . . .").

9. While this principle has generally heretofore only been implicit in those cases that have directly examined constitutional limitations on a state's ability to freely structure its municipal governments, the Court's reticence to place limits on a state's ability to freely control and structure its municipal governments has been recognized more explicitly in the related context of determining the applicability of federal legislation to state and local government entities, where the Court has imposed the super-strong clear statement canon from *Gregory v. Ashcroft*. *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 140–41 (2004) (involving a determination by the Court that a federal enactment did not apply to local governments where applying the enactment to the Missouri municipality at issue in the case would have granted it a power that the state did not wish for it to have).

Finally—and most importantly—this Comment also considers the implications of its proposed framework. It explains that recognition of federalism's dual-faceted role is valuable for four reasons. First, this recognition will likely allow for modestly improved predictability of the outcome of future cases. Second, and of primary importance for purposes of this Comment, this recognition suggests that scholars who have identified a trend toward greater Supreme Court recognition of the independent importance of local governments have missed the mark[10]: any status afforded to local governments in the Court's jurisprudence is merely derivative of their status as creations of the sovereign states. Third, it indicates that because the Court has heretofore only implicitly suggested that it views the status of local governments as derivative, as opposed to being independent or nonexistent, the Court should improve the clarity of its relevant jurisprudence by explicitly articulating the role federalism plays in its local government decisions, thus clarifying the derivative status of local governments. Finally, although this Comment does not normatively critique the implications of the Court's choice to conceptualize local governments as enjoying only derivative status in the constitutional hierarchy, this observation should facilitate future scholarly assessment of the normative defensibility of the Court's jurisprudence.

The main body of this Comment proceeds in five parts, including this introductory part. Part II briefly provides illustrative examples of each of Briffault's three conceptualizations of local governments from the Supreme Court's key, past local-government jurisprudence, illustrating the tensions between these conceptualizations. The point of this exercise is simply to illustrate the tensions that exist in the Court's jurisprudence, not to exhaustively catalog the Court's relevant jurisprudence. Part III then explores some of the prior scholarly work that has attempted to explain the Supreme Court's facially confusing jurisprudence. Part IV—the principal portion of this Comment—then presents this Comment's suggested dual-faceted, descriptive federalism framework and suggests that the framework allows for the rationalization of the Supreme Court's precedents as a descriptive matter, providing relevant application examples. Part V concludes by very briefly setting forth the implications of the proposed framework, suggesting that—if correct—the framework presented by this Comment suggests local

10. *See* discussion *infra* Part III.

governments merely enjoy derivative status in the Court's jurisprudence but leaving a critique of whether the Supreme Court's failure to afford greater independent status to local governments is normatively defensible until another day.

II. PRIOR SUPREME COURT JURISPRUDENCE EXAMINING THE CONSTITUTIONAL STATUS OF STATE SUBDIVISIONS

As mentioned above, the Supreme Court's cases examining the constitutional status of local governments have often appeared to be facially inconsistent. Briffault's widely used casebook on state and local government highlights this facial inconsistency by presenting examples of three, apparently distinct, conceptualizations for local governments. Below, this Part of the Comment provides case examples fitting within each of Briffault's three conceptualizations in order to showcase the apparent inconsistency between these cases, thus illustrating the need for the descriptive framework proposed in Part IV.

A. Local Governments as Mere Instrumentalities of the State

The first group of cases—those that conceptualize local governments as mere instrumentalities of the states—trace their lineage to principles enunciated in the seminal case of *Dartmouth College v. Woodward*.[11] There, the Court examined whether the New Hampshire legislature's attempts to change the composition of the Dartmouth College Board of Trustees were permissible.

The Court ultimately concluded that Dartmouth College was a private entity, not a subdivision of the state; consequently, the Court further concluded that New Hampshire's attempts to control the Board of Trustees violated the Contracts Clause. But in reaching this determination, Chief Justice Marshall's opinion for the Court also provided instructive commentary on the result that would have obtained if the Court had instead concluded that Dartmouth College was a local government entity. Marshall noted that "the framers of the constitution did not intend to restrain the states in the regulation of their civil institutions, adopted for internal government."[12] He further explained:

> If the act of incorporation be a grant of political power, if it create a

11. 17 U.S. 518 (1819).

12. *Id.* at 629.

> civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New-Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.[13]

This quoted language is significant because it suggests that if an entity is a "civil institution" or subdivision of the state, then the Constitution does not place any restrictions on the choices the state may make in structuring that entity.

The prototypical example of these principles at work is *Hunter v. City of Pittsburgh*.[14] In *Hunter*, residents of the city of Allegheny, Pennsylvania, brought suit in an attempt to stop the city of Pittsburgh from swallowing Allegheny in a merger between the two cities.[15] A Pennsylvania state law permitted cities to merge with one another pursuant to a popular vote of all citizens in the area that would be affected by the proposed joining of the cities.[16] A majority vote of the combined citizenry of Pittsburgh and Allegheny had sanctioned the proposed joining of the two cities.[17] The citizens of Allegheny, who had invested substantial amounts of time and effort into the infrastructure of their city, believed that this joining of the two cities was unfair and brought suit to stop the proposed merger. The Supreme Court was unpersuaded by the residents' challenge to the merger of the cities, noting in very strong language that localities were nothing more than subdivisions of the state.[18] Therefore, given that Pennsylvania law had sanctioned this joining of the two cities, the Court was uninterested in examining the propriety of the state's choice. Thus, because the city of Allegheny was viewed by the Court as an entity with no independent status in the constitutional hierarchy, *Hunter* provides a perfect example

13. *Id.* at 629–30.

14. 207 U.S. 161 (1907).

15. *Id.* at 174.

16. *Id.* at 174–75.

17. *Id.*

18. *E.g.*, *id.* at 178–79 ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . . [T]he State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.").

of Briffault's first conceptualization of municipalities.[19]

B. Local Governments as Independent Polities

Unlike *Hunter* and other analogous precedent, a number of other Supreme Court cases instead appear to view local governments as entities with some independent status in the federal constitutional hierarchy—consistent with Briffault's second conceptualization.

One segment of the Supreme Court's local government jurisprudence that has often seemed to adopt Briffault's second conceptualization of local government entities is the Court's one-person, one-vote jurisprudence. By imposing one-person, one-vote requirements on local governments, many of these cases have implicitly rejected the notion that municipalities are only subdivisions of the state, created for the state's convenience. If municipalities were no more than subdivisions of the state, then reason would suggest that the states should be afforded nearly absolute discretion in their decisions about establishing and ordering these local governments. There would be no need for judicial policing of state arrangements for local governments because adequate recourse for state choices about ordering local governments could be had through

19. This conceptualization of municipalities has also appeared in a number of other cases. For example, in *Trenton v. New Jersey*, 262 U.S. 182 (1923), the Court reviewed New Jersey's attempt to collect a license fee for water that the City of Trenton was diverting from the Delaware River. New Jersey had passed a law in 1907 requiring the payment of such fees. However, the City of Trenton claimed that it was not required to pay the fee required by this law because it had acquired the right to divert water by purchasing it from a private company, and this company had been authorized by an 1852 act of the New Jersey legislature to take this water from the river perpetually and without paying a licensing fee. Thus, the argument went, given that the City of Trenton was the successor and assign to this contract between New Jersey and the predecessor private water company, New Jersey should not be permitted to charge this fee. The Court, though, in a unanimous opinion, rejected the City of Trenton's argument. The Court reasoned that although the City was an assign of the private company, "[t]he relations existing between the State and the water company were not the same as those between the State and the City." *Id.* at 185. Whereas the company, that had been "organized . . . for pecuniary profit," had "rights and property [that] were privately owned and therefore safeguarded by the constitutional provisions" that were asserted by Trenton, "[t]he City [was] a political subdivision of the State, created as a convenient agency for the exercise of such of the governmental powers of the State as may be entrusted to it." *Id.* at 185–86. Therefore, "[i]n the absence of state constitutional provisions safeguarding" the City, Trenton, had "no inherent right of self-government which [was] beyond the legislative control of the State." *Id.* at 187. Consequently, the state was free to "withhold, grant or withdraw powers and privileges as it [saw] fit. However great or small [a local government's] sphere of action, it remains the creature of the State exercising and holding powers and privileges subject to the sovereign will." *Id.*

state political processes. Nonetheless, the Court, in a number of cases, has chosen to impose one-person, one-vote requirements directly on various local governments.[20] Thus, the Court has suggested that it views these governments as having some sort of independent status as polities within the constitutional hierarchy, thereby justifying interference with the states' choices about structuring these local governments.

Although many of the Court's cases that have apparently adopted

20. For example, in *Avery v. Midland County*, 390 U.S. 474 (1968), the Court examined the county government established for a small county in West Texas and chose to impose one-person, one-vote requirements in county elections. The plaintiff, a resident and voter in these elections, asserted that his Fourteenth Amendment rights had been violated by the manner in which county election districts—used to elect the Commissioners Court, the governing body of the county—had been drawn. The Commissioners Court of Midland County was the five-member governing body for the county. While one of the five members was elected based on a popular vote of the entire county, the other members were elected from four election districts. One of these election districts had a population of 852, another had a population of 414, another had a population of 828, and the district in which the plaintiff lived had a population of 67,906. Although the Court referred to the County as a "subdivision" of the State, the Court nevertheless imposed one-person, one-vote on the County government, rejecting the argument that proper apportionment of the state legislature made apportionment at the local government level irrelevant. *See id.* at 479–80. The Court noted that the Commissioners Court engaged in "much policy and decisionmaking" and that it had "power to make a large number of decisions having a broad range of impacts on all the citizens of the county." *Id.* at 481, 483.

Consequently, the *Avery* Court determined, it made sense to impose the one-person, one-vote requirement in this case. Nonetheless, though, the Court attempted to cautiously articulate and limit the overall scope of its holding. The Court noted that "[w]e hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body," *id.* at 484–85, and that the Court was very aware of the "greatly varying" problems faced by local governments and did not want to place a "uniform straitjacket" on the ability to "devis[e] mechanisms of local government suitable for local needs and efficient in solving local problems," *id.* at 485. As examples of the flexibility it had previously afforded in structuring governments, the Court cited to two prior decisions, *Sailors v. Board of Education*, 387 U.S. 105 (1967) (sustaining against one-person, one-vote challenge, "a procedure for choosing a school board that placed the selection with school boards of component districts even though the component boards had equal votes and served unequal populations"), and *Dusch v. Davis*, 387 U.S. 112 (1967) (involving a case where the Court had allowed "Virginia Beach to choose its legislative body by a scheme that included at-large voting for candidates, some of whom had to be residents of particular districts, even though the residence districts varied widely in population"), where the Court had chosen not to impose one-person, one-vote requirements on other local government elections. *But see* Board of Estimate v. Morris, 489 U.S. 688, 690 (1989) (The Court later chose to impose one-person, one-vote on a New York City body of elected officials lacking general authority to legislate. While some members of the governing board were elected on a city-wide basis, other members were elected from each borough, such that certain individuals had far greater voting power than others.). Professor Briffault has exhaustively catalogued the one-person, one-vote cases, as they relate to local governments. *See generally* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993).

Briffault's second conceptualization of local governments have been one-person, one-vote cases, these cases do not stand alone. The *Milliken* case,[21] presented below as the primary example of Briffault's second conceptualization, is not a one-person, one-vote case. I utilize *Milliken* because it serves to effectively illustrate the tension between the different conceptualizations.

Milliken involved a claim that the Detroit metropolitan area school districts had engaged in impermissible racial discrimination.[22] The plaintiffs sought a remedy that would span the entire metro area. Nevertheless, the Court, though finding a violation within the Detroit School District, still refused to extend the busing remedy sought beyond the Detroit School District, noting that there was no evidence that the state itself had engaged in purposeful discrimination in the drawing of district lines.[23] Thus, even though it arguably would have been more effective to ignore the school district all together, creating a metropolitan-area-wide remedy, the Court chose not to ignore the school district. Thus, the *Milliken* Court appeared to view the school district as an independent polity entitled to some status and recognition within the constitutional hierarchy.[24]

C. Local Governments as Quasi-Proprietary Firms

A third and final group of Court cases appears to conceptualize local government entities as quasi-proprietary firms—Briffault's third typology.

A prototypical example is *Ball v. James*,[25] which involved the Court's examination of whether one-person, one-vote should apply to the

21. Milliken v. Bradley, 418 U.S. 717 (1974).

22. *Id.* at 722.

23. *Id.* at 745. Justice White's dissent disagreed and would have imposed a metropolitan-area-wide remedy. *Id.* at 762–64 (White, J., dissenting). Justice White criticized the Court strongly for "draw[ing] the remedial line at the Detroit school district boundary, even though the Fourteenth Amendment is addressed to the State and even though the State denies equal protection of the laws when its public agencies, acting in its behalf, invidiously discriminate." *Id.* at 771–72. White later continued, "[t]he actions of the State itself directly contributed to Detroit's segregation. Under the Fourteenth Amendment, the State is ultimately responsible for the actions of its local agencies. And, finally, given the structure of Michigan's educational system, Detroit's segregation cannot be viewed as the problem of an independent and separate entity. Michigan operates a single statewide system of education, a substantial part of which was shown to be segregated in this case." *Id.* at 797.

24. *Id.* at 741–46, 752–53.

25. 451 U.S. 355 (1981).

Salt River Project Agricultural Improvement and Power District ("Power District"). The Power District was an Arizona entity created to provide irrigation water to the owners of land in central Arizona, which financed its operations by providing utility services to hundreds of thousands of Phoenix-area residents. The Power District limited voting to those who owned land to which it supplied water, with the grant of the franchise being proportional to the acreage owned by individuals. The Power District enjoyed a variety of governmental powers, including the right "to condemn land, to sell tax-exempt bonds, and to levy taxes on real property."[26]

Nevertheless, the Court ultimately concluded that one-person, one-vote restrictions should not apply to the entity, noting that (1) the Power District exercised only limited governmental authority, which did not include "such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services";[27] (2) the water distributed by the Power District was "distributed according to land ownership" such that the entity was only of "nominal public character";[28] (3) the "provision of electricity [was] not a traditional element of governmental sovereignty"; and (4) the "relationship between [the nonvoting individuals who purchased power from the Power District] and the [Power] District's power operations [was] essentially that between consumers and a business enterprise from which they buy."[29] Together, these considerations influenced the Court to conclude that the operations of the Power District had a "disproportionately greater" effect on those landowners who had been given the right to vote.[30] Thus, because the Court believed the Power District was more similar to a private business entity than a governmental entity, the Court concluded that constitutional restrictions—one-person, one-vote—that it had imposed on other general purpose local government entities should not apply to the Power District.

26. *Id.* at 360.

27. *Id.* at 366.

28. *Id.* at 367–68.

29. *Id.* at 368, 370 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)).

30. *Id.* at 371.

D. Paradigm Tension Between the Conceptualizations: Milliken *and* Hunter

Although tension exists between all three of Briffault's conceptualizations—and all three are addressed by this Comment's proposed framework in Part IV—outright inconsistency between the conceptualizations is best revealed by comparing the first and second conceptualizations. Comparing *Hunter* and *Milliken* illustrates this inconsistency. Recall that in *Hunter*, the city of Allegheny was viewed as an entity lacking independent status in the constitutional hierarchy,[31] whereas in *Milliken* the Court appeared to view the school district at issue as an independent actor entitled to some status in the constitutional hierarchy.[32]

These cases appear facially inconsistent in their conceptualizations of the constitutional status of local governments. If local governments are only subdivisions of the state, as they were found to be in *Hunter*, then there is no reason why the Court should have avoided imposing a metropolitan-area-wide remedy in *Milliken*; after all, school district lines would not matter for constitutional purposes if the only relevant constitutional actor was the State. Nonetheless, the Court—somewhat enigmatically—respected the existence of the local government in *Milliken*, while apparently discounting the importance of the local subdivision in *Hunter*. These apparent inconsistencies, however, can be reconciled using this Comment's proposed, dual-faceted, presumption-of-federalism framework. Nevertheless, before presenting this framework, I briefly survey some of the scholarship that has previously attempted to reconcile the Court's relevant jurisprudence.

III. SCHOLARLY COMMENTARY REGARDING THE STATUS OF LOCAL GOVERNMENTS

Although the primary purpose of this Comment is to present and defend this Comment's proposed framework—which I do in Part IV—it is instructive to first survey some of the prior scholarly work that has attempted to provide a principled description for the apparently inconsistent Court precedent described above in Part II.

Quite a few scholars have pointed out the inconsistent manner in

31. *See supra* notes 14–19 and accompanying text.

32. *See supra* notes 22–24 and accompanying text.

which the Court has often treated local governments.[33] Some of these scholars have also attempted to explain these apparent inconsistencies.

For example, some scholars, including Richard Briffault, have suggested that the apparent inconsistency among Court cases might stem from paradigm shifts in Court thinking about federalism over time.[34] This view suggests that the cases are inherently inconsistent with one another and cannot be reconciled without the aid of different paradigmatic lenses.

Specifically, Briffault has argued that the Court's jurisprudence may appear confused because the Court has tried to promote the "values associated with federalism."[35] He has argued that this focus has led to excessive promotion of local government action and interest, further arguing that "[t]he [proper] role of the courts is to protect the formal features of the federal structure . . . . The Constitution provides for and

33. *See, e.g.*, David J. Barron, *The Promise of Tribe's City: Self-Government, The Constitution, and a New Urban Age*, 42 TULSA L. REV. 811, 815 (2007) ("[A]t various times, courts have seized upon radically different legal conceptions of what a city is. Because the city has been a legal enigma, lawyers representing it cannot restrict their field of vision to the technical doctrines and specific regulatory provisions that bear directly on a discrete dispute over city power. They also must attend to the deeper conceptual choices that such disputes inevitably pose. While courts sometimes conceive of cities as if they are no different from any other level of government, that is not always the case. Sometimes they question whether it is right to think of cities as governments at all. And even when they conclude cities *are* governments, they are often uncertain whether to classify them as political subdivisions of their states or as independent democratic polities in their own right. A lawyer for a city, then, confronts some basic questions about what a city is."); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1845–46 (1994) (explaining that "legal analysis oscillates between two contradictory conceptions of local political space." One of these conceptions "regards local jurisdictions as geographically defined delegates of centralized power, administrative conveniences without autonomous political significance." The other conceptualization views them as "autonomous entities that deserve deference because they are manifestations of an unmediated democratic sovereignty."); Joseph P. Viteritti & Gerald J. Russello, *Community and American Federalism: Images Romantic and Real*, 4 VA. J. SOC. POL'Y & L. 683, 688, 742 (1997) (repeatedly suggesting that community government has "ambiguous and weak legal standing under our federalist system"); Nicholas S. Zeppos, *The Dynamics of Democracy: Travel, Premature Predation, and the Components of Political Identity*, 50 VAND. L. REV. 445, 454 (1997) (suggesting there was tension between the "series of cases arising early in the twentieth century" in which "the Supreme Court held that municipalities and citizens thereof had no constitutional status" and some later cases "in which the Court extended the right to vote to municipal elections"); Brian P. Keenan, Note, *Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue its Parent State Under Federal Law*, 103 MICH. L. REV. 1899, 1902 (2005) (arguing that the Court's local government jurisprudence is riddled with "seemingly conflicting precedents" and explaining that this has "produced confusion in the federal circuit courts of appeals when a political subdivision sues its parent state").

34. *Cf.* Briffault, *supra* note 7, at 1311–12, 1328–35.

35. *Id.* at 1306.

protects the formal aspects of the states' existence, not the values conventionally ascribed to federalism."[36] Briffault suggests that the change in the Court's jurisprudence is a result of the "ero[sion]" of "some of the conceptual underpinnings that supported the traditional view of the states as special" by "supplant[ing] to a significant degree the common understanding that the United States was formed out of a compact of the states" with "a historical account of the Constitution as a compact of the *people* of the United States."[37] Briffault terms this movement toward promoting local government "localist federalism," although cautioning that the Court still "continues to distinguish between states and localities in a number of doctrinal settings."[38] He argues that because "local governments have been distinguished from their states in a sufficient number and variety of doctrinal settings . . . it would seem that the normative values of local, as well as state, autonomy have been subsumed into the definition of federalism."[39] He explains that this doctrinal movement "can result in a paradox: the use of the values of federalism to undermine a traditional tenet of federalism—the states' power to determine the structure and powers of their local governments."[40] Briffault argues that this emerging jurisprudence ignores fundamental differences between the important federal constitutional status of states and the nonexistent status of local government entities.[41]

Similarly, Professor Nicholas S. Zeppos asserts that the Court's jurisprudence has shifted over time, explaining that although early cases seemed to conceptualize municipalities as mere subdivisions of the states that created them, some later cases (e.g., one-person, one-vote cases) appear to conceptualize them as important, independent actors entitled to certain recognition in the constitutional hierarchy. Furthermore, despite

36. *Id.*

37. *Id.* at 1309.

38. *Id.* at 1309–11, 1334.

39. *Id.* at 1334.

40. *Id.* at 1335.

41. *Id.* at 1335–44. Interestingly enough, although Briffault argues that the Court has sometimes given local governments a measure of individual autonomy in an attempt to promote local autonomy, some scholars have argued that traditional, dual-sovereign federalism is actually the best model for promoting local autonomy. *See, e.g.*, Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 188 (2005). Other scholars, though, strongly disagree. *See* Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 915–17 (1994).

the Court's "states' rights revival," which facially suggests that "the Court would [not] have much interest in . . . embracing a conception of federalism that recognizes more local government units and the individual as a citizen of a municipality," some more modern decisions suggest that the Court has accepted the "political significance of . . . local political-geographic lines."[42]

Other scholars have carried Briffault's concept of emerging localism one step further, arguing that the Court has begun affirmatively granting local governments a "realm" in which "local governments [are protected] from contrary state commands."[43] These scholars have sometimes labeled this recent empowerment of local government "constitutional home rule,"[44] arguing that the Court grants local governments such power in order to protect "substantive constitutional rights."[45]

42. *See* Zeppos, *supra* note 33, at 454–55. Other scholars appear to share views similar to those held by Professors Briffault and Zeppos. For example, Mark C. Gordon observed, "Court decisions have recognized the key role of localities without explicitly saying so. This is particularly true when one considers the federalist values of local decisionmaking, citizen participation, and responsiveness to diverse community needs, all of which occur far better on the municipal than on the state level." Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 218 (1996). Professor Gordon, however, unlike Professor Briffault, believes that the Court's increased recognition of local government is normatively a positive thing and that the Court should be more explicit in recognizing the important role of local governments. *See id.* at 218–19. Two other scholars, Joseph P. Viteritti and Gerald J. Russello, also have argued that somewhat-analogous values have become the motivating factor in the Court's jurisprudence. They argue that the "Court . . . connects the geographical boundaries of a locality with the power to create and support the values held by those within it. Communities have the ability to preserve their own sphere of values that represent the manner in which they choose to live." Viteritti & Russello, *supra* note 33, at 714. Thus, for Viteritti and Russello, the Court's changing recognition of community values provides the rational principle that undergirds the Court's relevant decisions, decisions which have "imposed significant legal restraints on local governments" but have also led "the Supreme Court [to] recognize[] that localities represent the values and interests of their constituents," thereby leading the Court to "provide[] some measure of autonomy for them to reflect their priorities in law." *Id.* at 710. Unlike Gordon, however, Viteritti and Russello do not view the Supreme Court's recognition of the importance of communities as a positive development, noting that "[t]o the extent and on the occasions that communities have been granted discretion to enact public policy, these collective enterprises have not on the whole exhibited an extraordinary level of civic virtue and public spirit, and at times have necessitated corrective intervention from federal and state authorities." *Id.* at 742.

43. *See* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 147, 152, 174 (2005).

44. *Id.* at 168.

45. *See id.* at 148, 178–80; *see also* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 586–94 (1998–1999); Lawrence Rosenthal, Romer v. Evans *as the Transformation of Local Government Law*, 31 URB. LAW. 257 (1999).

In Part IV, I argue that these "emerging localism" scholars are incorrect in suggesting that the Supreme Court's recognition of local governments means that the Court now views these governments as having *independent* importance in the constitutional hierarchy.[46] I instead suggest that the Court's jurisprudence can be explained by recognizing that cities have only *derivative* significance in the constitutional hierarchy, which is different than suggesting that they have *no* importance at all but is also different than asserting that they have *independent* significance.[47] And this observation is important. Making it

46. As noted in Part IV, I disagree with these scholars' assertion that there has been a shift in the Court's jurisprudence over time. Nevertheless, to the extent that I am incorrect in asserting that there has not been a shift in the Court's jurisprudence, my thesis and proposed framework is still relevant because this framework provides an alternate explanation for such a shift that attributes more coherence to the Court's jurisprudence. This is because, instead of asserting that the shift towards localism stems from the Court's attempts to promote the "values" inherent in federalism, my framework would instead attribute such a shift to the Court's more nuanced, modern attempts to protect traditional, dual-sovereignty federalism. *See supra* note 8. That is, to the extent that the Court now shows greater solicitude to local governments in certain instances than it once did, my framework suggests the Court does so because—recognizing that local governments derive their powers from the states that created them or put in place the mechanisms that allowed for their creation—the Court recognizes that, in some instances, respecting local governments is important to respect state decisions regarding the creation of these governments. Thus, even to the extent that my conclusion that there has not been a shift in the Court's relevant jurisprudence over time is not correct, my framework is still relevant in suggesting that local governments only enjoy derivative, not independent, status in the constitutional hierarchy.

47. Although I don't discuss other relevant scholarship that examines and attempts to explain the apparent inconsistency in the Court's local government jurisprudence, I recognize that other explanations have been advanced. For example, some scholars attempt to explain portions of the Court's local government jurisprudence without referencing federalism or explicitly recognizing that cases involve local governments. James A. Gardner attempted to explain inconsistency in the Court's voting rights jurisprudence. Gardner concluded that the proper background principle for explaining these decisions was a communitarian one—that is, that the Court's voting rights jurisprudence favors claims that are based on assertions that voters who are "members of the relevant political community" are being deprived of the franchise. James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 910 (1997). Gardner also pointed out that other voting rights claims generally fail where these claims are instead based on notions of "protective democracy"—that is, whether individuals claim they are being remotely "governed by a political community different from the one to which they belong[]." *See id.* at 910–11. Ultimately, Gardner explained that the source of the Court's apparently confused jurisprudence was its "fail[ure] to distinguish between the two theories," or its choices to "speak[] the language of one concept while acting according to the other." *Id.* at 982. Gardner suggests that the Court should fix its troubled jurisprudence by adopting a "coherent political theory." *See id.* at 985. Nevertheless, while interesting, such articles do not contribute substantially to the overall dialogue relating to the appropriate constitutional status of localities, since such articles focus directly on other topics, ignoring the nuance introduced into the equation by local governments.

allows me to propose a more cohesive explanation for the Court's jurisprudence than any prior scholar because the observation obviates the need for accepting that the Court's thinking about local governments has shifted over time.

IV. DESCRIPTIVE DUAL-FACETED FEDERALISM FRAMEWORK

As highlighted above, the Supreme Court's jurisprudence related to the federal constitutional status of local governments appears facially inconsistent. And no prior scholar has yet been able to present a cohesive framework that rationally explains how the Court views municipalities. This section of the Comment attempts to provide such a descriptive framework.

As explained earlier, federalism provides the unifying principle that allows for rationalization of all the relevant cases—and permits the development of this Comment's proposed framework.[48] That federalism is the appropriate rationalizing principle is best illustrated by returning to *Milliken* and *Hunter*. Although, as noted previously, in *Hunter* the Court viewed the local government at issue (Allegheny) as a mere subdivision of the state,[49] while in *Milliken* the Court viewed the local government at issue (Detroit School District) as an independent actor,[50] a conclusion that these cases are inconsistent with one another is erroneous. The cases are actually consistent with one another when they are viewed against the background norm of federalism. That is, the local government conceptualization adopted by the Court in each of the two cases allowed the state to have relatively free reign in structuring the relevant local government as it saw fit.

Other commentators do not ignore the jurisprudential nuance introduced by local governments, but focus exclusively on cases within one area of the Court's local government jurisprudence. For example, one student Comment attempted to rationally explain local government suits directly against the states that created them. *See generally* Brian P. Keenan, Comment, *Subdivisions, Standing and the Supremacy Clause: Can a Political Subdivision Sue Its Parent State Under Federal Law*, 103 MICH. L. REV. 1899 (2004–2005). This student, in arguing that local governments should be able to sue state governments in certain instances, argued that those prior cases that had involved suits by local governments against the states that had created them could be rationally explained simply by looking at the "[constitutional] clauses at issue in th[ose] cases." *Id.* at 1905. The problem with this approach, though, is that through its myopic focus on only one type of case, it fails to answer the broader question of how the Court generally views local governments.

48. *See supra* note 8.

49. *See supra* notes 14–19 and accompanying text.

50. *See supra* notes 22–24 and accompanying text.

In *Hunter*, because the state had adopted laws whereby the city of Allegheny could be merged out of existence, the Court best respected the will of the state by allowing the city to be merged. On the other hand, in *Milliken* the state had chosen to create school districts and presumably did not want the lines that it had allowed to be drawn on the map to be ignored. So, to give effect to the state's wishes, the Court had to respect the existence of the school districts that the state had chosen to create, although ignoring these school district boundary lines and imposing a metropolitan-area-wide remedy might have allowed the Court to fashion a more effective remedy.

This recognition that federalism seems to play a role in explaining the results in *Hunter* and *Milliken*, though important, is not sufficient by itself for two reasons. First, this bare recognition fails to provide a principled framework into which other relevant cases could be inserted. Second, this bare recognition fails to provide a nuanced description of how federalism functionally operates in each of the two cases (and other cases). In particular, this recognition ignores the fact that in *Hunter* the Court found that there was *no* constitutional violation at all, thus choosing not to provide any remedy whatsoever,[51] whereas in *Milliken* the Court found that there *was* a constitutional violation, yet chose to impose a narrow remedy.[52]

The dual-faceted federalism framework proposed below does not ignore either of these two important considerations.

A. Proposed Descriptive Framework

This Comment's proposed dual-faceted federalism framework has two prongs. These prongs operate in sequential fashion, with each prong operating as a rebuttable presumption. The analysis under the first prong ("Prong 1") determines whether the state has violated the Constitution in the structuring of its local governments, cautioning the Court against finding a constitutional violation in the first instance. The analysis under the second prong ("Prong 2") determines the scope of the remedy that the Court should impose in a circumstance where it finds a violation, counseling the Court to minimally invade a state's sovereign choices even in those circumstances where the Court finds a constitutional violation.

51. Hunter v. City of Pittsburgh, 207 U.S. 161, 178–81 (1907).

52. Milliken v. Bradley, 418 U.S. 717, 744–46, 752–53 (1974).

Given that my discussion of the details of the framework is relatively complex, it is important that the reader maintain in mind my purpose for presenting a nuanced description of the framework. The implications of my proposed, two-part framework—if it is accurate—are relatively straightforward. Particularly, my framework illustrates that local governments enjoy only derivative status in the constitutional hierarchy. That is, if federalism cautions the Court against even finding violations in the state's decisions about how to structure its municipalities, then in cases where the Prong 1 presumption is not overcome, the result is deference to the state's choices about how to structure its municipalities, whether the state made those decisions directly or indirectly by enabling local governments to act in certain ways. This deference may or may not require the Court to "recognize" the existence and importance of a particular local government entity. Nevertheless, in either case the local government entity has no "independent" status in the constitutional hierarchy, acquiring whatever status it has derivatively from its maker and its maker's wishes regarding it.[53]

If, though, the Prong 1 presumption is overcome, then some interference with the state's decisions about how to structure its municipalities is inevitable. Supremacy of federal law dictates as much. Thus, the Prong 2 presumption comes into play. Nevertheless, under Prong 2, the Court will still limit its remedy as much as possible to avoid undue infringement of state sovereign prerogatives. The Court's efforts to avoid such interference can give the illusion that the local government has independent constitutional status, because the Court generally limits its remedy to the offending government. But the motivation underlying the Court's efforts is deference to the state's decisions about how to structure its municipalities. Thus, any "independent" constitutional status is actually just derivative, derived from the state's decisions about how to structure its local government entities.

In rare instances, where the Prong 2 inquiry suggests that a state has purposefully used its power to structure a local government in order to deprive individuals of constitutionally guaranteed rights, the Court simply disregards the particular, purposeful state action that led to the deprivation of these rights. In these rare instances, the Court might

53. If local governments enjoyed "independent status" in the constitutional hierarchy, the Court would instead be required to automatically take cognizance of these governments' existence and importance.

actually ignore a state's local government structuring decision, although this result is not inevitable. That is, in circumstances where the particular offending state decision involved the creation or modification of the boundaries of a particular local government, by ignoring the impermissible state decision, the Court might completely or partially ignore that particular local government entity. On the other hand, where the offending state decision instead dealt with either granting powers to local government entities or limiting their powers, the Court's decision to disregard the state's offending decision might instead lead to either an augmenting or diminishing of local government powers, without leading the Court to necessarily disregard the local government entity all together. Thus, even in these circumstances, the status of local governments is merely derivative, since they will only be completely disregarded in those circumstances where the very act of creating or modifying them represented an illegitimate exercise of state power. Circumstances where the Prong 2 presumption is overcome are rare, though, and the Court is reticent to ignore the state's decisions about ordering its local governments. Although, the Court is willing to do so where such action is necessary in order to impose an effective remedy. Such action in these limited circumstances is justified to preserve the supremacy of federal law.

Therefore, in summary, in nearly all instances, the Court respects—to some degree—the states' choices about how to structure their local governments, only completely disregarding the states' choices where the states have acted purposefully in violating constitutionally guaranteed rights. Together, then, this framework suggests that any significance ever afforded to local governments is only derivative, which in turn suggests that local governments do not have independent constitutional status.

This explanation of the implications of my framework was presented here to remind the reader not to get lost in the details of my presentation of the framework, forgetting the purpose for which the framework is presented. While the presentation of the framework will likely modestly improve ability to predict the outcome of future cases, the primary reason for presenting the nuanced discussion below is to convince the reader that my two-pronged framework is correct as a descriptive matter, because persuading the reader that my framework is adequate as a descriptive matter is probably a necessary antecedent to persuading the reader that this Comment's conclusions about the federal constitutional status of local governments—which, as shown by the discussion in the foregoing paragraph, flow quite naturally from the simple presentation of

the

dual pronged federalism presumption above—are descriptively accurate.

1. Framework Prong 1 – determining whether there is a violation necessitating some remedy

The first prong of this framework—the more complex and admittedly less determinative of the two parts—provides operational content to federalism by limiting the likelihood that the Court will find that a state's choices about structuring its local governments are constitutionally impermissible in the first instance, thereby minimizing the number of judicial incursions upon state sovereignty.

This prong of the framework sets up a rebuttable presumption that decisions a state makes about structuring its municipalities are constitutionally permissible. While this principle appears relatively simple on its face, the key complexity arises in identifying those factors that are useful in predicting whether the first presumption has been overcome in a particular case. The subsequent paragraphs attempt to identify such factors.

In identifying these factors, it is useful to begin the inquiry by identifying the key policy tension in the Court's relevant jurisprudence. Although often only implicit, the relevant cases show that the Court's precedent attempts to balance the competing values of federalism and supremacy.[54] Unfortunately, however, because the Court's cases in this area are nearly always comparative (e.g., the Court already applied one-person, one-vote to one particular type of government entity, and now

54. This tension is more explicit in the related context of the *Nixon* clear-statement rule, where the Court has explicitly imposed a clear-statement rule upon Congress for those times when it attempts to interfere with the structure of local governments by providing such governments with authority or power that the states did not choose to give to them. *See* Nixon v. Mo. Mun. League, 541 U.S. 125, 140–41 (2004). Arguably, whereas the *Nixon* clear-statement rule restrains the legislative and executive branches in their attempts to infringe on state rights to structure local government as the states see fit, the dual-pronged federalism presumption proposed by this Comment similarly makes the other federal branch—the judiciary—take pause before interfering with the mechanisms by which states have chosen to govern themselves. Like the *Nixon* clear-statement rule, the dual-faceted federalism check I propose in this Comment operates only as a presumption, thereby preserving the supremacy of federal law. Both the *Nixon* rule and the clear-statement rule proposed by this Comment are manifestations of the tension between the federal and state governments that Chief Justice John Marshall famously observed "is perpetually arising, and will probably continue to arise, as long as our system shall exist." McCulloch v. Maryland, 17 U.S. 316, 405 (1817).

the Court is seeking to determine whether this same stricture should be applied to another government entity), the Court's use of prior precedent obscures what otherwise would be the explicit resolution of the inherent tension between these two values.

To determine what the Court's analysis would look like if it were forced to engage in this balancing inquiry directly—by explicitly resolving the tension between supremacy and federalism—it is useful to engage in a thought experiment. This thought experiment asks what factors the Court would weigh if it were forced to explicitly confront the tension between federalism and supremacy in a particular case without the crutch of prior precedent upon which to rely. I propose that the Court's inquiry in such a world would likely have two principal aspects.

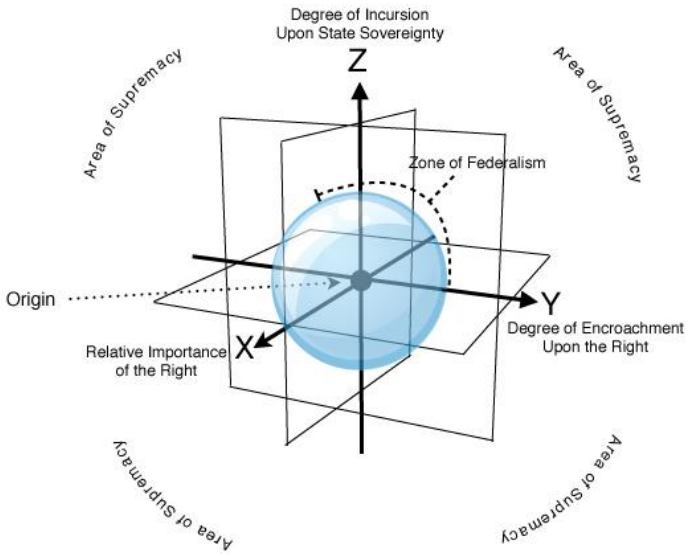
First, the Court would attempt to assess the extent to which a fundamental right would be compromised by its failure to impose a restriction in a particular case. In making this assessment the Court would explicitly weigh (a) the relative importance, in the constitutional rights pantheon, of the right that the petitioner alleges has been deprived, and (b) the degree of encroachment upon this right that is actually occasioned by the particular state municipality-structuring decision before the Court.

Second, the Court would balance its determination under the first aspect of the inquiry against an assessment of the degree of incursion upon state sovereignty that would be occasioned by imposition of the restriction.

This theoretical inquiry ("Theoretical Inquiry") suggests that a relatively greater encroachment upon a relatively more important right would be required for the Court to impose a restriction in a circumstance where imposition of the restriction necessary to protect the right would lead to a relatively greater encroachment upon state sovereignty. Alternately, it suggests that a relatively lesser encroachment upon a relatively less significant right would be required if imposition of such a restriction would lead to a relatively more minimal incursion upon state sovereignty.

The relationship between the three relevant factors in the Theoretical Inquiry can be visualized by imagining a three-dimensional graph with three axes (X, Y, and Z), any two of which are at perpendicular, ninety-degree angles from one another, and which intersect at a single point (the "Origin").[55]

Zone of Federalism and Area of Supremacy



The X axis would be labeled "relative importance of the right the

55. *See* Visualization of *Cartesian Coordinates in Three Dimensions*, THE UNIV. OF SYDNEY, http://www.maths.usyd.edu.au/u/MOW/vectors/vectors-7/v-7-1.html (last updated Nov. 9, 2009).

petitioner alleges has been deprived," with the importance of the right increasing in proportion to the distance away from the Origin. The Y axis would be labeled "the degree of encroachment upon this right occasioned by the state's decision about how to structure its municipal government," with relative encroachment upon the right increasing in proportion to the distance away from the Origin. The Z axis would represent the "degree of incursion upon state sovereignty that would be occasioned by imposition of the sought-after restriction," with relatively greater incursion on state sovereignty falling closer to the Origin. This imaginary graph could be subdivided into two areas. The area closer to the Origin would be called the "zone of federalism," or the area within which Courts would be unwilling to impose any sort of restriction on the state's structuring of its subdivisions to protect a particular right. Beyond this zone, however, the remainder of the graph would be called the "area of supremacy." This area of supremacy would represent the area in which a Court would be willing to impose some sort of restriction upon a state's ordering of a local government to protect a particular right. Any given instance of encroachment upon a particular right would be represented by a single point on the graph. The farther away from the Origin this point fell, the greater the likelihood that it would fall within the "area of supremacy." However, because in each instance the process of plotting would begin at the Origin and move outward, there would be a natural, rebuttable presumption that, unless the relevant factors suggested otherwise, the Court would not impose a restriction, because the zone of federalism lies closer to the Origin.

When viewed in isolation, these insights available from the Theoretical Inquiry and hypothetical graph above appear less than impressive. Besides appearing somewhat obvious, the conclusions based upon the Theoretical Inquiry almost appear completely useless, as a practical matter. This is because the standards—such as "relative importance" and "degree of encroachment"—that appear in the Theoretical Inquiry and on the graph axes would, standing alone, provide mostly rudderless and minimal—if any—predictive guidance. Nonetheless, the Theoretical Inquiry and hypothetical graph are not useless. Indeed, they become extremely useful when it is recalled that the Court's actual jurisprudence does not generally engage in a pattern of inquiry that follows the pattern set forth in the Theoretical Inquiry. Rather, the Court engages in a proxy for this inquiry that resolves the inherent tension between federalism and supremacy implicitly through the device of comparative precedent.

In its basic form, the Court's actual comparative inquiry asks a question that is eminently more ascertainable than the questions posed by the Theoretical Inquiry. It asks whether the Court's prior precedents justify imposing a particular restriction on the local government entity that is before the Court. While this inquiry concededly lacks scientific precision, it is not as completely rudderless as the bare Theoretical Inquiry discussed above because it allows the prognosticator to take guidance from earlier precedents, either distinguishing or analogizing to earlier cases in which the Court has or has not imposed restrictions on other municipalities.[56] Nevertheless, standing alone, the comparative standard is also a weak predictive tool, because it does not reveal *which* factors are or should be relevant in making this comparison.

This is where the Theoretical Inquiry becomes instrumental. The suggestion that the Court's comparative precedential inquiry is merely a proxy for the Theoretical Inquiry is extremely valuable because it highlights that the Theoretical Inquiry can help identify which factors are relevant in the Court's comparative jurisprudence. That is, by using the insights garnered from the Theoretical Inquiry as a paradigm for viewing the Court's actual comparative jurisprudence, we can hopefully identify and extract those substantive factors that the Court uses in its comparative analysis as proxy factors to approximate the "pure" analysis under the Theoretical Inquiry. We can then use these factors to better predict the outcomes of future comparative analyses by the Court, because these factors should allow us to identify those distinctions between cases that are relevant and those that are not. Thus, we can assess the boundaries of the zone of federalism and area of supremacy on our imaginary graph by comparative proxy.

We begin by turning to the first dimension of the Theoretical Inquiry and asking which comparative proxy factors would be relevant in determining "the extent to which a fundamental right would be compromised by a failure to impose a restriction."

Under the first element (the "X Axis" inquiry in our hypothetical graph above) of the first dimension Theoretical Inquiry, we ask what comparative factors would serve as effective proxies to help the Court

56. While it is possible to conceive of some cases in which earlier analogous precedents might not provide meaningful guidance, such instances are likely to be quite rare given that, generally, most of the Court's jurisprudence within this area falls within only a few limited categories (e.g., one-person, one-vote or Contracts Clause challenges). Thus, for the vast majority of cases, prior precedent will likely provide significant guidance.

implicitly ask the pure Theoretical Inquiry of "the relative importance, in the constitutional rights pantheon, of the right that the petitioner alleges has been deprived."

Probably, the primary inquiry under this element is one that seeks to determine whether the Court has already imposed restrictions on other local governments to protect the particular right; such an imposition suggests that, at least in some instances, supremacy might outweigh federalism, thereby justifying imposition of a restriction. In instances where the Court has not previously protected the same right, another relevant inquiry is whether the Court has protected similar rights in the past. In determining whether the Court has imposed similar restrictions, the Court might compare the source of the alleged right with the source of other rights for which the Court has previously imposed restrictions. Unsurprisingly, the Court's jurisprudence reveals that it is somewhat more likely to impose restrictions upon the states based upon the Reconstruction Amendments, because these Amendments were arguably meant to impose restrictions that the states should not be able to subvert through their local-government-ordering decisions.[57] The Court's jurisprudence also indicates that the Court is more likely to impose a restriction where the specific right violated is an individual right explicitly guaranteed by the Constitution,[58] instead of a right that a local government asserts directly against the state.[59] This also makes sense, given that one of the purposes of federalism is to protect individual rights.[60] Consequently, federalism counsels interference much more strongly in instances where individual rights are at stake, and, alternately, counsels strongly against interference where cities claim rights under the Constitution as against their makers, since the risk of undue interference

57. *Cf., e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (suggesting that certain constitutional provisions—including the Fifteenth Amendment—place greater restrictions on states in the structuring of their local governments than others).

58. *See id.*

59. *See, e.g.*, Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

60. *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2363–64 (2011) ("The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State . . . . The limitations that federalism entails are not therefore a matter of right belonging only to the States. States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.").

with state sovereignty is at its greatest height in such instances.[61]

Moving on to the second element (the "Y Axis" inquiry in our hypothetical graph above) of the first dimension of the Theoretical Inquiry, we next ask what comparative proxies the Court uses to implicitly ask the pure Theoretical Inquiry of the "degree of encroachment upon the right that is actually occasioned by the particular state decision about how to structure a municipality." This inquiry recognizes that not every assertion that a state has trammeled upon a right—even an important right—establishes that the right has been infringed. The primary proxy inquiry here is one that is more contextual than the one discussed above, in the sense that it pays greater attention to the particular type of government entity before the Court. Here, the Court's primary inquiry likely asks whether the Court has previously imposed a restriction on a *similar* type of local government entity in order to protect the right, or a similar right. In looking at its prior case law, the Court might examine the extent of governmental power exercised by the particular local government entity before the Court over the petitioner vis-à-vis the governmental power exercised by other entities upon the petitioners in those cases in which the Court has previously imposed the same or similar restrictions. This inquiry recognizes that local governmental entities with broad, general governmental powers are more likely to be able to significantly impede individual rights than those entities that exercise limited, insignificant powers.[62] Similarly, the Court would likely examine whether it had previously imposed analogous restrictions on the states in order to protect the asserted right, and would further ask whether failure to protect the right at the local government level would make the right guaranteed at the state level significantly less meaningful, since supremacy counsels less interference in instances where the effective substance of a right is already protected.[63] Finally, the Court would

61. *See* Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

62. *Compare* City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (involving application of one-person, one-vote to a bond election for a municipality that exercised broad powers) *with* Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978) (choosing to not extend one-person, one-vote to the extraterritorial residents of the contiguous zone outside of the city of Tuscaloosa, Alabama, noting that the city exercised relatively small amounts of governmental power in this contiguous zone).

63. This might be the case where the Supreme Court has previously determined that a

likely assess whether the record reveals that the state has acted more purposefully in attempting to deprive individuals of the asserted right than in other cases in which the Court has previously imposed restrictions, recognizing the fact that federalism values are significantly weakened where the states illegitimately use their power to purposefully impede constitutionally guaranteed rights.[64]

We next turn to the second dimension of our Theoretical Inquiry (the "Z axis" inquiry in our hypothetical graph above). We seek comparative proxies for the Theoretical Inquiry that consider the "degree of incursion upon state sovereignty that would be occasioned by imposition of the restriction" upon a particular entity. Given that all federal impositions trammel upon state sovereignty to some degree, examination of the cases reveals that the only real comparative inquiry considers which particular restrictions previously have been imposed upon the particular type of local government entity before the Court.[65] To the extent that the same restriction has been imposed on the same type of local government entity in the past, it suggests that the entity can survive imposition of such a restriction. On the other hand, to the extent that the Court has not imposed a similar restriction on this type of local government in the past, it is necessary to examine where on the spectrum (ranging from municipal government exercising a broad range of power to quasi-private corporation financed publicly) of governmental entities the particular local government falls, and compare this with other local governmental entities upon which the Court has previously imposed such past

particular restriction applies to the states (e.g., need for relatively proportional apportionment in state elections) and extension of the same restriction to municipal governments is necessary to meaningfully protect the right (e.g., given that much power is exercised at the local level, arguably if the Supreme Court had required relatively proportional apportionment in only state elections, but not in local governmental elections, the meaningfulness of the right to equal vote in state elections would be diminished, because states delegate much of their power to local governments). *See, e.g.*, Avery v. Midland Cnty., 390 U.S. 474 (1968).

64. *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960) (imposing a remedy in a circumstance where the state had purposefully drawn the lines of the city in order to exclude black voters).

65. Thus, this proxy inquiry is quite similar to the "Y axis" inquiry above, in that it focuses on particular restrictions vis-à-vis particular types of government entities. The difference in these inquiries, though, stems from their focus. Whereas the "Y axis" inquiry focuses on the effect of the particular restriction on a petitioner's rights, the "Z axis" inquiry focuses on the effect of the imposition of a restriction upon a particular local government that the state has chosen to create. Thus, asking a fairly similar proxy question two times, yields multiple groups of insights.

restrictions.[66] If the Court has already imposed the same restriction on an entity that is less like a general government and more like a private entity, then we can confidently predict that the Court will likely impose the restriction. To the extent it has not done so, the Court is less likely to impose the restriction. This step in the inquiry allows the Court to account for the fact that many types of quasi-governmental entities that states choose to create would not be created at all were certain constitutional restrictions (e.g., one-person, one-vote) applied to them. The affront to a state's dignity from imposing a constitutional restriction on one if its subdivisions reaches its greatest level in those instances where the Court's choice to impose a restriction would likely come at the cost of destroying a particular type of government.[67]

Having identified, by using the lens of the Court's comparative inquiry, those relevant factors that likely would serve as proxies for the Court's Theoretical Inquiry, we can return to our imaginary, three-dimensional graph. Recognizing that the comparative proxies we identified are simply substitutes for our X, Y, and Z axis inquiries under the pure Theoretical Inquiry allows us to recognize that we can roughly "derive" the "zone of federalism" and "area of supremacy" on our theoretical graph indirectly through our comparative inquiry. In other words, by using the comparative proxy factors identified in the foregoing paragraphs as substitutes for the X, Y, and Z axes labels under the pure Theoretical Inquiry, we can plot the Court's precedents that are relevant to the current issue on the graph, creating an imaginary, three-dimensional scatter plot. If we imagine that we "color" these points two colors, one color representing circumstances in which the Court has chosen to impose some sort of restriction, and the other color representing those circumstances in which the Court has not chosen to do

66. This type of inquiry is illustrated in *Ball v. James*, 451 U.S. 355 (1981), where the Court spent a significant portion of its opinion trying to determine whether the local governmental entity at issue was more like the governmental entity in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), upon which the government had not chosen to impose one-person, one-vote restrictions, or whether it was more like the governments on which it had imposed one-person, one-vote restrictions in *Hadley v. Junior College District*, 397 U.S. 50 (1970), and in other similar cases.

67. Although not a Supreme Court case, the Second Circuit case of *Kessler v. Grand Central District Management Ass'n, Inc.*, 158 F.3d 92 (2d Cir. 1998), referring to *Ball v. James*, 451 U.S. 355 (1981), suggested that this notion was implicit in the Court's *Ball* opinion, noting that "the State legislature could reasonably have concluded that property owners, unless given principal control over how the money is spent, would not have consented to having their property subject to the assessment." *Kessler*, 158 F.3d at 108.

so, then by connecting those points of similar color, we can "derive" a rough estimate of the zone of federalism and area of supremacy. We can then "plot" the current issue before the Court on this graph in order to predict whether the Court will impose some sort of remedy in a particular case.

In other words, to determine whether the Prong 1 presumption of constitutionally permissible entity structuring has been overcome, the Court simply determines whether the point it has drawn on the scatter plot falls within or without the zone of federalism. If the presumption has not been overcome (i.e., the point on the imaginary scatter plot falls within the "zone of federalism"), the Court simply finds that there has been no constitutional violation, dismissing the case. Therefore, if the Court determines that the presumption under Prong 1 of the analysis has not been overcome, the Court best respects the states by allowing them free reign in structuring their local governments. If, on the other hand, the Court determines that the Prong 1 presumption has been overcome (i.e., the point on the imaginary scatter plot falls within the "area of supremacy"), then the Court engages in Prong 2 of the inquiry regarding the presumption.

While my description of the framework in the preceding paragraphs might suggest that I am attempting to claim the ability to predict whether a Court will or will not impose a remedy in future cases with mathematical precision, I will be the first to disclaim any such notion. I recognize that my proposed method does not offer mathematical precision and that use of the proposed method will often produce indeterminate results. Nonetheless, the method is valuable for several reasons. First, by using the proposed Theoretical Inquiry as a lens through which to view the actual comparative inquiry used by the Court, we were able to attempt to identify those factors that are relevant to the Court as it is engaging in its comparative inquiry,[68] thus likely modestly

68. Although I believe that the factors I have identified are some of the factors driving the Court's analysis in the relevant case law, in reality the validity of my assertions regarding the dual-faceted federalism framework are not even directly dependent upon my having identified the correct factors that are relevant to the Court as it engages in its inquiry. This is because my primary assertion is simply that local governments enjoy only derivative status in the federal constitutional hierarchy. In order to prove this point, I assert that federalism plays two roles in the Court's jurisprudence, (1) limiting the likelihood that a Court will find that a state has violated the Constitution at all in structuring its local governments, and (2) counseling the Court, in circumstances where it does impose some remedy, to limit its remedy so as to only minimally interfere with state sovereignty. The more specific factors I have identified are simply intended to

increasing the chance that any particular prediction will be correct. More importantly, though, to the extent that this framework is accurate as a descriptive matter, it allows me to suggest something important about the constitutional status of local governments. Having reiterated my limited purpose in articulating this descriptive framework, I move onward to discuss Prong 2.

2. Framework Prong 2 – assessing the scope of the remedy

Under Prong 2 of the dual-faceted federalism framework, the Court assesses what restriction it should place on a state subdivision. Although the overcoming of the Prong 1 presumption necessitates the imposition of some restriction, the federalism presumption nonetheless counsels the Court to tailor its remedy as narrowly as possible. This tailoring ensures that the Court's interference with a state's choices about structuring its local governments is as minimally invasive as possible. Nevertheless, just as federalism operates as a presumption under Prong 1 of the inquiry, federalism once again acts merely as a presumption at Step 2, not as an absolute bar on Court action. In particular, Prong 2 creates a presumption of not ignoring those lines that states have chosen to draw on the map (i.e., a presumption that the remedy will be geographically tailored to the smallest possible offending area).

Mercifully, it is much easier to determine when the Prong 2 presumption has been rebutted. Instead of wading into the quagmire of factors considered under Prong 1, the Prong 2 presumption is only rebutted in a single circumstance. That circumstance occurs where the evidence shows that the state has structured its municipalities so as to purposefully violate individual rights. In such a circumstance, the Court simply disregards the purposefully discriminatory decision. While disregarding such a decision does not inevitably mean that the local government itself is disregarded, this is often the result where the offending state decision is to create or modify that local government.

This result makes good sense as a matter of policy. To the extent that a state has acted purposefully in attempting to structure its subdivisions

buttress my assertion that federalism plays two roles in the relevant jurisprudence. Thus, as long as the reader accepts my premise that one of the dual roles of federalism will be operative in a particular case, it does not matter whether the reader accepts the particular factors that I have identified.

in a way that would deprive individuals of federally guaranteed constitutional rights (for example, by drawing city boundary lines in a manner intended to restrict minority voting rights),[69] the state has shown it is irresponsible and must be checked. After all, in addition to protecting the states, as previously noted, federalism serves to protect individual rights.[70] On the other hand, if a state itself has not acted purposefully to deprive individuals of certain constitutionally guaranteed rights, the Court should feel more at liberty to constrain its remedy to the particular state subdivision that has been guilty of infringement, because the state itself has not shown that it is incapable or unwilling to safeguard individual rights. In other words, federalism counsels a narrow remedy in those cases where state actors have not acted purposefully, because, in such cases, it is possible to protect the state from undue federal interference while also adequately protecting individual rights. But, where states have acted purposefully to deprive individuals of federal constitutional rights, there is no legitimate reason to protect the states from federal interference—the states' actions are illegitimate, so the only relevant federalism interest at stake is in protecting individual rights.

Having proposed this descriptive framework, I will now deploy it to explain some of the Court's relevant local government jurisprudence.

3. Application of the framework

While space and time constraints will not permit a comprehensive presentation of all the relevant cases that might be discussed here, I discuss four cases that allow for effective illustration of this Comment's proposed framework in action. Three of these cases—*Hunter*, *Milliken*,[71] and *Ball*—were chosen because they each illustrate the three Briffault conceptualizations of municipalities and also illustrate how the apparent inconsistencies between these conceptualizations disappear when viewed in light of this Comment's proposed framework. The facts of these cases were presented in Part II, so they should already be familiar to the reader. The fourth of these cases—*Gomillion*—was chosen, because it illustrates one of those relatively rare instances where both the Prong 1 and Prong 2 presumptions were overcome. This case was not discussed above in Part

69. *See infra* notes 84-103 and accompanying text.

70. *See supra* note 56 and accompanying text.

71. It is fortunate that this discussion of these four cases permits us to return to the paradigm inconsistency used throughout this Comment—the inconsistency between *Hunter* and *Milliken*.

II, so I provide more comprehensive discussion of its facts before applying this Comment's framework to the case.[72]

Together, these four cases will allow me to illustrate each of the three possible outcomes under my proposed framework: (1) situations where the Prong 1 presumption is not overcome, so no Prong 2 analysis is necessary (*Hunter* and *Ball*); (2) situations where the Prong 1 presumption is overcome, but the Prong 2 presumption is not overcome (*Milliken*); and (3) situations where both the Prong 1 and Prong 2 presumptions are overcome (*Gomillion*). Although in this Part I do not comprehensively analyze all the cases previously discussed in Part II, in footnotes that follow, I briefly suggest where these cases, along with certain other cases, might fit.

Once again, before presenting these cases, I caution the reader that although I do suggest relevant factors that the Court might have considered in determining what type of role federalism would play in a given case (e.g., whether it would play a Prong 1 or Prong 2 role), my principal purpose is not to perfectly explain which individual factors are relevant in the Court's analysis. Rather, my primary purpose is to assert that federalism occupies dual roles in the Court's local government jurisprudence. To the extent I am correct in this assertion, my theory that local governments enjoy only derivative status in the constitutional hierarchy will be corroborated.

a. Outcome number one: Prong 1 presumption not rebutted. The first of three possible outcomes available under this Comment's proposed framework exists where the Prong 1 presumption is not overcome, such that no Prong 2 analysis is necessary. *Hunter* and *Ball* effectively illustrate this outcome. Although these cases apparently involve different conceptualizations of municipalities, the cases are actually consistent when viewed through the lens of this Comment's proposed framework.

Recall that *Hunter*—a case that fits within the first of Briffault's three conceptualizations of municipalities—involved a situation where the laws of Pennsylvania permitted the joining of two contiguous municipalities based on a vote of the collective populations of both cities. When the city of Pittsburgh tried to annex its contiguous neighbor, Allegheny, the residents of Allegheny balked and brought suit. The

72. *Gomillion* was not presented in Part II, because I feel that it does not fit neatly into one of Briffault's three proposed conceptualizations.

Supreme Court, using very strong language, rejected the residents' challenge, suggesting that Allegheny could not sue to prevent the merger because cities have no independent status in the constitutional hierarchy.[73]

Ball, unlike *Hunter*, fits within the third of Briffault's three conceptualizations of municipalities. In *Ball*, the Court examined a one-person, one-vote challenge involving a special improvement district election. Voting within this district (the "Power District") was limited to certain property owners who owned sufficiently large tracts of land. Although the Court had previously imposed one-person, one-vote requirements on other local government elections, ultimately the Court refused to apply any such restriction on the Power District.[74]

Thus, *Hunter* and *Ball* appeared to adopt different conceptualizations of the constitutional status of local governments, because the *Hunter* Court completely disregarded the city of Allegheny, whereas the *Ball* Court recognized and respected the importance and existence of the Power District. But both cases can be fully explained by noting that in neither case was the constitutional case sufficiently compelling to justify the imposition of any restriction on the state's ability to freely structure its municipalities (i.e., both cases involved Prong 1 of the proposed federalism framework).

Although *Hunter* involved an entity (a city) that operated as a general government, suggesting that the Court might have been more likely to impose some sort of restriction in order to protect rights, the particular right at issue was not a very compelling one. First of all, the Court did not perceive the right at issue as an individual one, dismissing the notion that individual residents of Allegheny had somehow acquired vested rights in the existence of the city. Instead, the Court functionally viewed the dispute as one directly between the local government and its state. This was significant, because, although the Court previously had imposed restrictions on the otherwise free ability of states to structure their local governments based on the Contracts Clause, these cases had involved assertions that individual rights (generally the rights of creditors) were infringed on by the state action. By contrast, the Court had previously held in *City of Trenton* and in *Dartmouth College* that the Contracts Clause did not provide the same protection to municipal

73. *See* discussion *supra* notes 14–19 and accompanying text.

74. *See* discussion *supra* notes 25–30 and accompanying text.

corporations that it did to private parties.[75]

Therefore, the Court's conclusion that this case did not involve individual rights, along with the Court's earlier precedents suggesting that there was minimal,if any,infringement of rights in analogous situations, likely convinced the Court that the state should be free to structure its municipalities in the manner it saw fit.[76]

The *Ball* Court reached a similar result, ultimately concluding that the state should be permitted to structure its municipalities in the manner it saw fit, although the case was likely a closer one. This is so because the right at issue—voting—was a significant, individual right, attributable to the Reconstruction Amendments that had already been applied to the states and had previously been applied to other local governments. Nevertheless, unlike *Hunter*, *Ball* did not involve a general purpose government, but instead involved a special purpose district. This special purpose government exercised relatively limited and arguably insignificant powers. This special purpose district originally had been created as a private entity, and had only been converted into a quasi-public entity to take advantage of certain financial benefits available to such entities. Furthermore, when the Court previously examined whether to apply the same restriction (one-person, one-vote) to a similar local government entity in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*[77] the Court concluded that the specific right at issue—the right to vote—was inapplicable, thus suggesting that the Court had already determined that applying such a right to this type of entity might trammel significantly upon such entities because states might no longer create them. Therefore, although the right at issue was an important one, the Court likely concluded that the right would not significantly be

75. This previously settled law—derived from *City of Trenton* and *Dartmouth College*—regarding the ability of states to freely structure their municipalities explains why, absent an allegation that the state's structuring of local governments was intended to deprive individuals of constitutionally guaranteed rights, city challenges to state action under the Contracts Clause generally do not overcome the presumption of constitutionality under Prong 1 of the dual-faceted federalism framework.

76. If we imagine that we plot the unique facts of *Hunter* as a single point on our hypothetical, three-dimensional graph that was examined as part of this Comment's presentation of the proposed framework above, along with the Court's prior relevant precedents, including *City of Trenton* and *Dartmouth College*, the point representing *Hunter* probably falls well within the "zone of federalism." Thus, this signals to us that it was probably quite easy for the Court to conclude that the state was permitted to do what it had done.

77. 410 U.S. 719 (1973).

compromised in this instance, particularly given that no evidence showed that the government entity at issue had been purposefully designed to deprive individuals of certain rights. Therefore, although the case was likely a closer one than *Hunter*,[78] ultimately the *Ball* Court determined that the relative balance between federalism and supremacy tilted in favor of federalism. Consequently, the Court chose not to restrict the state's autonomy in structuring the Power District.

In light of the foregoing, the apparent disparity between *Ball* and *Hunter* is consistent with this Comment's primary thesis that the constitutional status of local governments is derivative, not nonexistent or independent. In other words, the reason the local government at issue in *Hunter* was disregarded was that the state wanted it to be disregarded. After all, Pennsylvania had passed a statute permitting the joining of two contiguous cities based upon a popular vote of the two cities' collective population. Accordingly, allowing the destruction of the city was consistent with the state's wishes. On the other hand, in *Ball*, the state had chosen to permit the creation of local special improvement districts. In that case, respecting the existence of this local government was also consistent with the state's wishes, because the district had been created in accordance with state law. Therefore, in the absence of any constitutional restriction, the relevant local government entities simply assumed derivative roles under the Court's jurisprudence that allowed the Court to respect the states' intents regarding their local governments.[79]

78. Once again, if we imagine that we plot the unique facts of *Ball* on our hypothetical, three-dimensional graph, the results are more equivocal. This is because the Court had already imposed the same restriction on other local governments previously, and the right at issue was an important one. Furthermore, although the Court had not imposed such a restriction in *Salyer*, that case involved an entity that exercised powers that were far less significant in scope. Thus, the point on our graph representing the unique facts of *Ball* likely fell near the border between the "zone of federalism" and the "area of supremacy."

79. *See also* City of Trenton v. New Jersey, 262 U.S. 182 (1923) (sustaining New Jersey's attempt to collect a license fee for water that the City of Trenton was diverting from the Delaware river); City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394 (1919) (upholding a state law giving a state commission the power to regulate public utilities even though the law conflicted with a city's prior franchise agreement with the state giving the city exclusive authority to regulate the utilities because this was "no question under the contract clause of the Constitution of the United States . . . but only a question of local law" and the state was free to change the agreement at will); New Orleans v. New Orleans Water Works Co., 142 U.S. 79 (1891) (upholding Louisiana's imposition of a tax on a New Orleans city water company in the face of a claim that the tax impaired a contract between Louisiana and New Orleans giving the city the ability to freely use certain water because there was no such contract and the state was free to engage in such regulation); East Hartford v. Hartford Bridge Co., 51 U.S. 511 (1850) (holding that because the city of East Hartford

b. Outcome number two: Prong 1 presumption rebutted, but Prong 2 presumption not rebutted. Milliken is an example of the second possible outcome under our proposed framework—where the Prong 1 presumption is overcome, but the Prong 2 presumption is not. This Section's discussion of *Milliken* is significant because it allows for the appropriate reconciliation of the paradigm example of inconsistency used throughout this Comment—the inconsistency between *Milliken* and *Hunter*.

As previously noted, *Milliken* involved a claim that the Detroit metropolitan area school districts had engaged in impermissible racial discrimination. The plaintiffs sought a remedy that would span the entire metro area. Nevertheless, the Court, while finding a violation within a single district, refused to extend the busing remedy sought beyond those district lines even though doing so would make the remedy more effective, noting that there was no evidence that the state itself had engaged in purposeful discrimination in the drawing of district lines. Applying our framework to the school district at issue in *Milliken* is instructive, because it suggests why the Court chose to impose a remedy but limited it to a single school district. Under Prong 1 of the inquiry, it is important to note that the right at issue—the right to attend a unitary school district—was one that the Court had judicially enforced in the past,[80] sometimes by mandating busing. Thus, the Court had previously

was nothing more than a subdivision of Connecticut, the city could not bring a claim against the State challenging as a violation of the Contracts Clause the State's choice to forbid the city from continuing to operate a ferry after a bridge had been opened).

A number of cases in which individuals have asserted that they have the right to vote in local government elections have also led the Court to respect state decisions about how to structure their municipalities. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978); Dusch v. Davis, 387 U.S. 112 (1967); Sailors v. Bd. of Educ., 387 U.S. 105 (1967).

Some of the Court's zoning decisions also fit within this category. *See* Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974) (sustaining a local zoning restriction of a "village on Long Island's north shore" with "about 220 homes inhabited by 700 people" that limited the number of unrelated individuals who could live together in a single household).

80. The Court in *Milliken* clearly recognized this, noting that

> [t]he target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils. This duality and racial segregation were held to violate the Constitution in the cases subsequent to 1954, including particularly *Green v. County School Board of New Kent County*, 391 U.S. 430 (1968); *Raney v. Board of Education*, 391 U.S. 443 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Wright v.*

imposed restrictions on other local government entities, including other entities of the exact same type (school districts) to protect the right to attend unitary districts. Furthermore, the right at issue was an individual right protected under one of the Reconstruction Amendments. Additionally, although school districts are not general purpose governments, they exercise significant powers within their relatively constrained sphere of influence (education). Furthermore, their significant efforts are thought to be public serving and to have broad societal ramifications. Taken together, these and other relevant considerations likely led the Court to conclude that it needed to impose some remedy. In other words, the Prong 1 presumption was overcome.

Nevertheless, the Court still had to decide the scope of its remedy. After all, the Court's concern for federalism does not dissipate simply because it finds a constitutional violation. Rather, this concern continues to inform the Court's Prong 2 analysis, counseling the Court to limit its remedy as much as possible—as long as the state has not acted purposefully to deprive individuals of their constitutionally guaranteed rights. In *Milliken*, the Court clearly noted that there had been no such purposeful behavior on the part of Michigan.[81] Therefore, the Court concluded that the Prong 2 presumption had not been overcome, and the Court limited its remedy to only a single school district, instead of imposing a broader remedy that might have been more effective. Thus, through refusing to impose a metropolitan-area-wide remedy, the Court protected federalism[82] by respecting—to the extent possible—the way in

Council of the City of Emporia, 407 U.S. 451 (1972); *United States v. Scotland Neck Board of Education*, 407 U.S. 484 (1972).

Milliken v. Bradley, 418 U.S. 717, 737 (1974).

81. In fact, in framing the issue before it, the Court noted that the issue was "whether a federal court may impose a multidistrict, areawide remedy to a single-district *de jure* segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts, *absent any claim or finding that the boundary lines of any affected school district were established with the purpose of fostering racial segregation in public schools* . . . ." *Id.* at 721 (emphasis added).

82. Justice White's dissent made explicit the notion that the Court had chosen to impose a remedy that Justice White deemed ineffective out of solicitude for the state. *See id.* at 763 (White, J., dissenting) ("Regretfully, and for several reasons, I can join neither the Court's judgment nor its opinion. The core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public

which the state had chosen to draw its school district boundaries.

This discussion of how the dual-faceted federalism framework applies to *Milliken* also permits resolution of the apparent conflict between *Milliken* and *Hunter*—the paradigm example of apparent inconsistency utilized throughout this Comment. As mentioned, the bare recognition of federalism's role in both cases was insufficient to explain this inconsistency because it did not explain why the *Hunter* court imposed no remedy, whereas the *Milliken* Court imposed one. This core distinction between the cases, however, is fully and easily explained by noting that *Hunter* is a case that fell under Prong 1 of the proposed framework, whereas *Milliken* instead fell under Prong 2. Thus, while federalism played a role in each case, it played a slightly different role in each one. In *Hunter*, the Court's determination that there had been no constitutional violation, along with the fact that state law suggested that it wanted Allegheny to have no constitutional status, led the Court to completely respect the state's decision regarding its local government subdivision. Conversely, in *Milliken*, the Court concluded that some remedy needed to be imposed to protect important constitutional rights, but still gave the maximum deference possible to the state's decisions by choosing to limit its remedy to only a single school district. While this second, *Milliken*-type situation might create the illusion that the Court is recognizing the "independent" status and importance of local governments, this status is in fact only derivative. The Court chose to give maximum possible force to the state's structuring decisions by "recognizing" the local government at issue.[83]

schools in its local school districts. If this is the case in Michigan, it will be the case in most States.").

83. Other relevant decisions fitting into this category include many of the cases in which the Court has imposed one-person, one-vote restrictions. These cases do not provide the same dramatic illustration that *Milliken* does of the role that federalism plays in the Court's decisions about tailoring its remedies once it decides to impose them, since the scope of the necessary remedy in one-person, one-vote cases always relates only to the particular local government before the Court. Nevertheless, in all these cases it is nonetheless true that the one-person, one-vote remedy is only applied to the particular local government entity before the Court. Thus, the Court implicitly accepts both the fact that these local governments exist and the notion that such governments are a permissible means by which to apportion state governmental power, despite the fact that, if a comparison was made between different cities or different counties, one person's vote in a small county election might be worth much more than one person's vote in a county with a substantially larger population. Thus, these cases imposing one-person, one-vote show solicitude for state decisions more implicitly, by never questioning the use of counties and cities to divide up political power in the states. *See, e.g.*, City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (imposing one-person, one-vote requirements in a municipal bond election); Hadley v. Junior Coll. Dist., 397 U.S.

c. Outcome number three: Prong 1 and Prong 2 presumptions rebutted. The third possible outcome under this Comment's framework exists where both the Prong 1 and Prong 2 presumptions are overcome. The most instructive example of this outcome is *Gomillion v. Lightfoot*.[84] In *Gomillion*, the Court heard a challenge to the constitutional validity of an Alabama state law that redrew the boundaries of the city of Tuskegee. The petitioners were a group of black individuals whose residences had—prior to this redistricting—been within the boundaries of Tuskegee.[85] Following the redistricting, they were no longer residents of the city, and they alleged that this redistricting had violated their constitutionally guaranteed rights under the Fourteenth and Fifteenth Amendments, including the right to vote.[86] In the district court, the respondents had alleged that the court had "no control over, no supervision over, and no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama."[87] The district court had

50 (1970) (imposing a one-person, one-vote requirement on an election for a junior college district board of trustees because the board "perform[ed] important governmental functions" and its "powers [were] general enough and ha[d] sufficient impact throughout the district to justify the conclusion" that one-person, one-vote should apply); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (imposing one-person, one-vote restrictions in the election of a school district board); Avery v. Midland Cnty., 390 U.S. 474 (1968) (imposing one-person, one-vote requirements on a single Texas county).

Some of the Court's zoning decisions also fit within this category. *See* Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (imposing the requirement that any community with any area zoned for commercial use must include an area for adult businesses); Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (striking down a zoning ordinance that restricted the ability of certain extended family members to live with one another). Although, just like the one-person, one-vote decisions, these zoning decisions do not dramatically illustrate the role that federalism plays as the Court determines the scope of the remedy it will impose, I believe that it is nonetheless implicit within these decisions. This is because in both cases the Court implicitly accepts the permissibility of having local governments exercising zoning authority. This authority is never questioned despite the fact that the Court concluded, in both cases, that the local governments abused their authority. Although it could, at least hypothetically, be argued that local governments are too irresponsible to be given such authority, such an argument would seem completely antithetical to federalism and to the principle that states should be able to structure their internal affairs at will. The fact that these arguments are not made, however, suggests that the Court implicitly recognizes the derivative status of local governments, imposing restrictions on these local governments because the states have chosen to delegate substantial power to them.

84. 364 U.S. 339 (1960).

85. *Id.* at 340.

86. *Id.*

87. *Id.* at 340–41 (quoting Gomillion v. Lightfoot, 167 F. Supp. 405, 410 (M.D. Ala. 1958)).

agreed, granting the respondents' motion to dismiss.[88] Although the Fifth Circuit affirmed, the Court, in a majority opinion delivered by Justice Frankfurter, reversed, holding that if their allegations were true, the petitioners' Fifteenth Amendment rights had been violated by this legislative redistricting.[89]

The Court explained that the case raised "serious questions . . . concerning the power of a State over its municipalities in relation to the Fourteenth and Fifteenth Amendments."[90] The Court noted that the redistricting that had taken place had changed the shape of the city from a "square to an uncouth twenty-eight-sided figure," and that this redistricting had "remove[d] from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident," thereby "depriv[ing] the Negro petitioners discriminatorily of the benefits of residence in Tuskegee."[91] The Court reasoned that "the legislation [was] solely concerned with segregating white and colored voters," and noted that there was no "countervailing municipal function which [the Act was] designed to serve."[92]

While the *Gomillion* Court noted that the respondents had cited to *Hunter* for the proposition that a state had "unrestricted power—unlimited, that is, by the United States Constitution—to establish, destroy, or reorganize by contraction or expansion its political subdivisions" and the Court "freely recognize[d] the breadth and importance of this aspect of the State's political power," the Court nonetheless rejected this assertion, noting that "[t]o exalt this power into an absolute is to misconceive the reach and rule of this Court's decisions in the leading case of *Hunter*" and other similar cases.[93] Likely

88. *Id.* at 340.

89. *Id.* at 346.

90. *Id.* at 341.

91. *Id.* at 340–41.

92. *Id.* at 341–42.

93. *Id.* at 342. In an attempt to distinguish these cases and their "seemingly unconfined dicta," the Court explained that these earlier cases simply stood for the proposition that "the State's authority [was] unrestrained by the particular prohibitions of the Constitution considered in those cases," not that "the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations." *Id.* at 344. While it would certainly be convenient if Frankfurter's assertion that the particular constitutional provision at issue in a given case is determinative of whether the Court will choose to impose a restriction on a state's free ability to structure its municipalities in the manner it sees fit were true, later cases, particularly later one-person one-vote cases, suggest that this assertion does not provide a plenary explanation, *see supra* note 20. On the other hand, the framework presented by this Comment does provide a cohesive

recognizing that, given the strong language of *Hunter* and similar opinions, it would be somewhat difficult to distinguish these cases, Frankfurter further attempted to buttress the Court's opinion. First, he noted that other cases had "refused to allow a State to abolish a municipality . . . without preserving to the creditors of the old city some effective recourse for the collection of debts owed them."[94] These cases, the Court reasoned, "conclusively show[ed] that the Court ha[d] never acknowledged that the States have power to do as they will with municipal corporations regardless of consequences," since state control of municipal corporations fell "within the scope of relevant limitations imposed by the United States Constitution."[95] Second, Frankfurter attempted to persuasively distinguish *Colegrove v. Green*, an opinion he had previously written for the Court that had involved the same right at issue in *Gomillion*—voting—but had reached the opposite result, holding that legislative districting was a political question unreviewable by the Court.[96] Frankfurter argued that *Colegrove* was different, because it had involved legislative inaction, as opposed to "affirmative legislative action," noting that "[w]hen a legislature . . . singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment."[97] He stated that here "the Alabama Legislature has not merely redrawn the Tuskegee city limits with incidental inconvenience to the petitioners; it is more accurate to say that it has deprived the petitioners of the municipal franchise and consequent rights and to that end it has incidentally changed the city's boundaries."[98]

Applying this Comment's proposed framework to *Gomillion* demonstrates why the Court reached this conclusion. Under the Prong 1 presumption, the Court might have considered that the local government at issue was a general municipal government that exercised broad, significant, and important powers. Furthermore, the right at issue—framed by the Court as the right to vote under the Fifteenth Amendment[99]—was a significant, individual right guaranteed by the Reconstruction Amendments. Additionally, and perhaps of greater

explanation for these cases.

94. *Id.* at 344.

95. *Id.* at 344–45.

96. *Id.* at 346.

97. *Id.* at 346.

98. *Id.* at 347.

99. *Id.* at 345.

significance, the evidence strongly suggested that the state had attempted to purposefully deprive individuals of this right; after all, the boundaries of the city had been changed by legislative fiat from a "square to an uncouth, twenty-eight sided figure."[100] This purposeful discrimination signaled that state political channels would not likely provide effective recourse for vindication of those individual rights. In other words, the state had used its powers to directly infringe upon important, constitutionally guaranteed rights in a situation involving a general-purpose government that exercised significant power and influence. Thus, it was probably easy for the Court to conclude that the Prong 1 presumption was overcome and that the Court needed to impose some remedy. Furthermore, while the Court's Prong 2 analysis generally would caution the Court to limit its remedy as much as possible, the *Gomillion* evidence overwhelmingly suggested that the state had acted purposefully to deprive certain individuals of constitutionally guaranteed rights.[101] In light of this, the Prong 2 presumption was also overcome. Thus, the Court was free to completely disregard the state's decision about how to structure Tuskegee. Consequently, the Court effectively redrew the city boundary lines that the state had drawn on the map.[102]

100. *Id.* at 340.

101. *Id.* at 346.

102. Another case that seems to fit within this category is *Romer v. Evans*, 517 U.S. 620 (1996). *Romer* involved a challenge to a Colorado constitutional amendment that banned any governmental action designed to protect homosexuals. *Id.* at 623–24. This amendment was passed by referendum in response to antidiscrimination ordinances protecting homosexuals that had been passed in various Colorado municipalities. *Id.* at 624. The Court, in a somewhat confusing opinion by Justice Kennedy, held that the constitutional amendment violated the equal protection clause. *Id.* at 635–36. Although the state argued, in defense of the amendment, that it did not discriminate against homosexuals, because it did no more than put them in the same position as all others, the Court rejected this conclusion, noting that this put "[h]omosexuals, by state decree . . . in a solitary class with respect to transactions and relations . . . withdraw[ing] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies." *Id.* at 627. It noted that this amendment imposed a "special disability" on homosexuals since they were "forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631. Kennedy asserted that the protections that homosexuals could not seek because of Colorado's amendment involved "protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society." *Id.* Thus, the purposeful discriminatory action at issue in *Romer* seemed to lead the Court to conclude that it needed to disregard the particular state local government structuring decision at issue. Interestingly, doing so ultimately led the Court to augment the power of the local government. Notably, however, the Court did not suggest that it would have been impermissible for the state to have completely removed power to pass antidiscrimination legislation from its local governments in

What does the Court's choice to redraw the lines at issue in *Gomillion* suggest? On the one hand, it might suggest that the Court viewed the municipality as having some independent importance in the constitutional hierarchy, thereby justifying the imposition of a remedy. However, the error of this view is easily revealed by imagining what the Court's decision might have been had the state, instead of merely modifying government lines along impermissible but nondiscriminatory grounds, had purposefully incorporated a city along racially discriminatory lines. In such a situation, the Court would have chosen to override the state's decision, just like the Court chose to override the state's decision in *Milliken*.[103] However, the result would not have been respect for a local government. Rather, the result would have been a local government's destruction. In other words, a local government is only respected where the choices leading to the creation of that local government were legitimate, thus suggesting that that the status of local governments is merely derivative. Consequently, decisions about the creation and modification of such entities rise and fall on the constitutional legitimacy of the underlying state decisions, not on the

a nondiscriminatory fashion, thus suggesting solicitude for state decisions.

Similarly, yet another relevant case of this type is *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), which involved a challenge to a state statute that prohibited local school boards from busing students in order to promote desegregation. *Id.* at 461–63. Instead of sustaining this restriction on local government power as permissible, the Court held that the statute violated the Equal Protection Clause. *Id.* at 476–77. The Court reasoned that the shifting of authority to determine when and whether busing was permitted from the local to the state government had "worked a major reordering of the State's educational decisionmaking process," *id.* at 479, and that this decision had been made on the impermissible basis of race, *id.* at 485–87. Given that, in general, the local school board retained most authority for making educational decisions, this limited cutting away of local authority on impermissible grounds was held to be invalid. *Id.* at 479–80.

Critically, in both *Romer* and *Seattle School District*, because the states' impermissible decisions only dealt with the states' decisions to take away a particular power from their local government entities, the Court's conclusions that the states' actions were impermissible did not lead the Court to conclude that it had to disregard the local governments at issue. This is so, because the states' impermissible decisions in these cases were not their decisions to create the municipalities or to redraw their boundaries. These decisions had been permissible. Rather, the Court merely had to reverse the states' purposeful decisions to restrict the powers of their local governments in a discriminatory fashion. Thus, in both cases, the Court, functionally, ultimately augmented the power of the local governments at issue.

103. This is apparently what happened in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), where the Court held that it was a violation of the Establishment Clause for the State of New York to create a special school district to serve handicapped children of the "Satmar Hasidim," a group comprised of "practitioners of a strict form of Judaism." *Id.* at 690.

underlying importance of the local governments. Thus, even this relatively rare third category of cases suggests that the status of local governments is merely derivative.

Having explored each of the different possibilities under this Comment's proposed framework, I close with a brief section summarizing this Comment's implications.

V. IMPLICATIONS

As noted at the outset, this Comment's proposed framework has four principal implications.

First, the framework helps identify some of the factors that the Court uses in determining whether constitutional restrictions should apply to particular state decisions about how to structure their local governments. These factors should lead to somewhat improved predictability of the outcome of future cases in this area, although the minutia of my framework are almost certainly both imperfect and nonexhaustive.

Second, and more importantly, my proposed dual-faceted framework helps identify the constitutional status of local governments by illustrating the nuanced, dual-faceted role that federalism plays in this area of jurisprudence. Recognizing federalism's dual role demonstrates that it is most appropriate to conceive of local governments as enjoying merely derivative constitutional status, as opposed to independent or nonexistent status. This further suggests that the emerging localism scholars are incorrect in their assertions that the Court has an emerging awareness of the importance of local governments.

Third, because the apparent consistency and transparency of the Court's past jurisprudence is enhanced by explicit recognition of the multifaceted role federalism plays, the Court should make more explicit the role federalism plays in its jurisprudence. This explicit recognition would clarify that local governments enjoy only derivative status.

Finally, this Comment contributes to the relevant literature by adding greater descriptive clarity to what the Court actually is doing. This improved descriptive clarity paves the way for future work that could more thoroughly examine whether this derivative status is normatively desirable, or whether it would be superior to adopt some alternative regime that afforded certain independent status to such local governments.

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