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## Local Home Rule in the Time of Globalization

Kenneth A. Stahl

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## Local Home Rule in the Time of Globalization

*Kenneth A. Stahl\**

### ABSTRACT

*Cities are increasingly taking the lead in tackling global issues like climate change, financial regulation, economic inequality, and others that the federal and state governments have failed to address. Recent media accounts have accordingly praised cities as the hope of our globally networked future. This optimistic appraisal of cities is, however, undermined by local governments' cramped legal status. Under the doctrine of home rule, local governments can often only act in matters deemed "local" in nature and cannot regulate "statewide" issues that may have impacts beyond local borders. As a result, the global issues that local governments are being praised for confronting are, almost by definition, the very sort of matters that home-rule doctrine prohibits them from addressing.*

*This Article has three goals: first, it aims to show why home rule has persisted in its present form despite its incompatibility with globalization; second, it explains some of the implications of our adherence to an outmoded conception of home rule; and third, it draws on these observations to suggest a new approach to home rule. I argue that the extant home-rule doctrine is part of an ideology that the judiciary finds attractive, called liberalism. Liberalism seeks to disaggregate various aspects of human life—the state, the market, and the family, particularly—and assign them to distinct spheres. The dichotomy between statewide and local affairs is a means of preserving the boundaries among the state, the market, and the family by tasking the state to regulate the marketplace and local governments to regulate the family. In light of globalization, however, it is clear that the liberal*

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*separation of spheres has had a different result. Following Karl Marx, scholars have argued that the separation of spheres has masked the dominance of capitalism, or, alternatively, the state, in all the putatively autonomous realms. Home rule has had precisely this effect. The idea that regulation of the family is local disguises the hegemonic role of the state in family matters, while the idea that commercial regulation is statewide has enabled mobile capital to overwhelm regulatory constraints. I propose a new model of home rule that is not married to obsolete notions of separate spheres, and thus enables the local to serve as a vital counterweight to capital and the state.*

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## INTRODUCTION

Cities in the United States are increasingly taking on problems of global concern that the federal government and many state governments are unwilling or unable to address. While Congress is engaged in a farcical debate about whether human activity is contributing to climate change,<sup>1</sup> cities are acting—unilaterally and in concert with other cities around the world—to promote sustainable development and limit their carbon emissions.<sup>2</sup> As the federal government dithers on regulating the global financial industry that

1. On January 21, 2015, the United States Senate voted 98-1 that climate change “is real and is not a hoax” as part of an amendment to an energy bill but rejected a second amendment that “climate change is real and human activity significantly contributes to climate change” by a 50-49 vote (60 votes being necessary for the amendment to pass). See Laura Barron-Lopez, *Senate Votes That Climate Change Is Real*, HILL (Jan. 21, 2015, 4:48 PM), <http://thehill.com/policy/energy-environment/230316-senate-votes-98-1-that-climate-change-is-real>. The recent international Paris Climate Accord was deliberately framed as a nonbinding agreement rather than a treaty so as to avoid requiring ratification by the Senate. See Coral Davenport, *Nations Approve Landmark Climate Deal*, N.Y. TIMES, Dec. 13, 2015, at A1.

2. See Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537 (2009) (discussing how cities rather than nation-states have become the front lines for fighting climate change and promoting sustainable development). A recent study by the C40 Cities Climate Leadership Group reports that 228 cities worldwide have so far pledged to cut carbon emissions by a total of 2.8 gigatons by 2020. See C40 CITIES CLIMATE LEADERSHIP GROUP ET AL., WORKING TOGETHER: GLOBAL AGGREGATION OF CITY CLIMATE COMMITMENTS (2014), [http://issuu.com/c40cities/docs/global\\_aggregation\\_glossy\\_final\\_3\\_\\_](http://issuu.com/c40cities/docs/global_aggregation_glossy_final_3__).

caused the devastating recession of 2008, cities are aggressively cracking down on dubious financial practices.<sup>3</sup> And while the federal government stands idle in the face of mounting evidence that globalization has intensified socioeconomic inequality, cities have enacted living-wage laws and affordable-housing mandates in an effort to alleviate the impacts of inequality.<sup>4</sup> On a range of other global issues including security, immigration, and even foreign policy, it is cities rather than state or federal governments that are now leading the way.<sup>5</sup> In light of this emergent pattern, several

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3. Chicago, Los Angeles, and Miami, among other cities and counties, have brought suit against several financial institutions under the federal Fair Housing Act alleging that the institutions engaged in “predatory lending,” a broad label given to the practice of providing low-income home buyers with mortgage loans that are structured in such a way as to strip all the home’s equity. *See, e.g.*, Complaint for Violation of the Federal Fair Housing Act, City of Los Angeles v. Citigroup, Inc., No. 2:13-cv-09009-ODW(RZx) (C.D. Cal. dismissed Oct. 7, 2015); Complaint for Violation of the Federal Fair Housing Act, City of Los Angeles v. Wells Fargo & Co., No. 2:13-cv-9007-ODW(RZx), 2015 WL 4398858 (C.D. Cal. 2015), *appeal docketed*, No. 15-56157 (9th Cir. July 29, 2015); Complaint, County of Cook v. Bank of Am. Corp., No. 1:14-cv-02280 (N.D. Ill. Mar. 31, 2014); Complaint for Violations of the Federal Fair Housing Act, City of Miami v. CitiGroup Inc., No. 1:13-cv-24510-CMA (S.D. Fla. Dec. 13, 2013), *aff’d in part, rev’d in part*, 801 F.3d 1268 (11th Cir. Sept. 1, 2015); Complaint for Violations of the Federal Fair Housing Act, City of Miami v. Bank of Am. Corp., No. 1:13-24506-JAL (S.D. Fla. Dec. 13, 2013), *aff’d in part, rev’d in part*, 800 F.3d 1262 (11th Cir. Sept. 1, 2015). These lawsuits have met with uneven success thus far, as some have been defeated by dispositive motions while others have survived the early motion stage. *Compare Miami v. Citigroup*, 801 F.3d (reversing district court’s holding that city lacked standing), *and County of Cook v. HSBC North America Holdings, Inc.*, No. 14-cv-2031, 2015 WL 5768575 (N.D. Ill. Sept. 30, 2015) (holding that city had standing to sue), *with Los Angeles v. Wells Fargo*, 2015 WL 4398858 (ordering summary judgment in favor of defendants), *and County of Cook v. Wells Fargo & Co.*, 115 F. Supp. 3d 909 (N.D. Ill. 2015) (holding that city lacked standing to sue).

4. The evidence of increasing socioeconomic inequality is now overwhelming, as Thomas Piketty’s celebrated work *CAPITAL IN THE TWENTY-FIRST CENTURY* (2014) makes clear. On city efforts to address inequality, see, for example, Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057 (2007) (discussing merits of local living wage ordinances), and Matthew J. Parlow, *Whither Workforce Housing?*, 40 FORDHAM URB. L.J. 1645 (2013) (discussing city efforts to increase stock of affordable housing).

5. *See, e.g.*, Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008) (on cities’ regulation of immigration); Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT’L L. 875, 922–26 (2006) (on local governments’ adoption of international human rights laws).

recent accounts have foretold the death of the nation-state and praised cities as the hope of our globally networked future.<sup>6</sup>

As is often the case, however, this optimistic appraisal of the local is undermined by cities' cramped legal status.<sup>7</sup> In the United States, most local governments are authorized to initiate legislation without a specific state delegation through the doctrine of home rule. Usually, though, local governments' initiatory home-rule power is limited to matters deemed "local" in nature.<sup>8</sup> Municipalities are prohibited from acting on issues that may have impacts outside their borders or impede regulatory uniformity throughout the state, which are deemed "statewide" in nature.<sup>9</sup>

Therein lies the central problem this article sets out to resolve: the global issues that local governments are being praised for tackling are, almost by definition, the very sort of matters that current home-rule doctrine prohibits them from addressing. Any local effort to regulate financial activity, for example, will necessarily have extraterritorial impacts and result in statewide variations, given that financial institutions operate across a wide range of geographic jurisdictions whereas local authority is territorially bounded. Accordingly, courts have either invalidated or cast doubt upon local governments' home-rule authority to undertake many of the

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6. See, e.g., BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* (2013); BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY* (2013); Harold Meyerson, *The Revolt of the Cities*, AM. PROSPECT, May–June 2014, at 30.

7. The notion that law has constrained cities from assuming a more prominent place within our democratic system is a classic motif in local government law scholarship. See, e.g., GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008).

8. About half of the states that have home rule follow the "imperio" or "constitutional" home rule model in which the home rule initiative power is limited to local matters. See Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337 app. (2009) (listing home rule status for all fifty states). The other half follow the "legislative" model, which, in principle, does not contain such a limit. See *id.* Nevertheless, as I explain *infra* in Section III.A., courts in legislative states have generally restricted the home-rule initiative power to local matters under the guise of a preemption analysis.

9. See Baker & Rodriguez, *supra* note 8, at 1349 ("[T]he two factors that seem to loom largest" in judicial determinations of whether a power is statewide or local are "the extraterritorial effects of the local regulation[] and the need for statewide uniformity in the relevant regulatory area.").

measures cities have enacted to address the challenges of globalization, including financial regulation,<sup>10</sup> living wage ordinances,<sup>11</sup> labor laws,<sup>12</sup> and affordable-housing mandates.<sup>13</sup>

10. See *Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916, 929 (Cal. 1991) (striking down municipal tax on financial institutions as conflicting with state statute and finding that such taxation is “a subject of statewide concern”). A number of courts have found local financial regulation ordinances preempted by state law, but as I discuss *infra* in Section I.A., the logic of these decisions suggests that local governments lack the home rule authority to regulate financial matters because such matters are inherently statewide. See *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813 (Cal. 2005) (finding municipal predatory lending ordinance impliedly preempted by state law because predatory lending is an inherently statewide matter); see also *Am. Fin. Servs. Ass'n v. City of Cleveland*, 858 N.E.2d 776 (Ohio 2006) (holding municipal predatory lending ordinance preempted by state statute); *Mayor of New York v. Council of New York*, 780 N.Y.S.2d 266 (Sup. Ct. 2004) (holding that state predatory lending statute occupied the field and thus preempted local predatory lending ordinance).

11. See, e.g., *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1107–08 (La. 2002) (invalidating city minimum wage law as conflicting with state law on the subject and observing that “state regulation of minimum wage rates is of vital interest to the citizens of Louisiana”). The *New Orleans* case included a spirited debate among various justices about whether New Orleans had the home-rule authority to enact the minimum wage law in question and whether its status as a home-rule (or “charter”) city entitled its wage law to immunity from state preemption. See *id.* at 1108 (majority opinion); *id.* at 1108–11 (Calogero, C.J., concurring); *id.* at 1111–20 (Weimer, J., concurring); *id.* at 1120–25 (Johnson, J., dissenting). But see *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149 (N.M. Ct. App. 2005) (upholding municipal minimum wage law as valid exercise of home-rule authority).

12. See, e.g., *McCrory Corp. v. Fowler*, 570 A.2d 834 (Md. 1990) (holding that municipality lacks home-rule authority to create cause of action for employment discrimination); *Baker & Rodriguez*, *supra* note 8, at 1360–61 (“[C]ourts almost always rule that local interests give way to state interests in a general labor law.”).

13. See *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) (holding that municipalities lack home rule authority to enact rent control ordinances); *cf.* *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000) (holding that local affordable housing ordinance was preempted by state law because state interest in uniform regulation trumps local interest in ensuring affordable housing for local residents); *Greater Bos. Real Estate Bd. v. City of Boston*, 705 N.E.2d 256 (Mass. 1999) (invalidating local ordinance giving tenants certain rights when rental building is converted to condominiums as exceeding scope of home rule power).

In some cases, the courts have struck down municipal ordinances dealing with labor laws or affordable housing on the grounds that home rule grants prohibit local governments from regulating “private law.” See, e.g., *Marshal House, Inc. v. Rent Review & Grievance Bd.*, 260 N.E.2d 200 (Mass. 1970). Though the origins and underlying rationale for the “private law exception” to home rule are mysterious, it is commonly believed that the exception is rooted in a desire for statewide uniformity with respect to certain matters. See Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 687–90, 750–56 (1973). Thus, the exception is consistent with the broader doctrinal principle that local governments’ home rule authority does not extend to matters requiring statewide uniformity.

If home rule thus constrains local governments from effectively addressing the challenges of globalization, it also empowers them in a way that creates a similar problem. Though home rule drastically limits what cities can do in many areas, critics have long assailed home rule for giving local governments *too much* power in one specific area: land-use control.<sup>14</sup> Courts consider land use to be a paradigmatically “local” matter and afford local governments wide-ranging home-rule authority with respect to land use.<sup>15</sup> Ironically, local land-use control often creates substantial statewide variations and extraterritorial impacts; for instance, one municipality’s decision to build a new housing development may increase traffic on roads in neighboring communities. Though uniformity and extraterritoriality are often critical factors in judicial determinations about home-rule power in other subject-matter areas, courts rarely invalidate an exercise of the land-use power for these reasons.<sup>16</sup> The ability of local governments to regulate land use without regard to extraterritorial impacts encourages municipalities to act in narrowly self-interested ways and often prevents them from cooperating to address global concerns. As an example, under the authority of home rule, communities frequently engage in “exclusionary zoning,” a practice of de facto or de jure exclusion of unwanted land uses such as low-

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14. As David Barron points out in his now-classic article *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2288–322 (2003), it has long been the conventional scholarly wisdom that home rule gives local governments too much power. Barron’s article challenged this conventional wisdom and argued that home rule as currently structured both empowers and limits local governments in important ways.

15. See *infra* notes 117–24 and accompanying text.

16. See *infra* note 125 and accompanying text. Previous scholars have argued that local governments’ inability to act extraterritorially has inhibited them from tackling issues such as sprawl. See, e.g., Barron, *supra* note 14, at 2345–62; Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271, 1297–302 (2009). It is important, though, to distinguish between a municipality regulating land use outside its borders, which courts generally prohibit, and a municipality regulating land *within* its borders in a way that creates impacts outside its borders, which courts typically permit. It is this combination of powers and limitations that causes local governments to act parochially in land use matters—since they cannot regulate outside their borders but can regulate within their borders so as to cause external impacts, each municipality acts in its own interest and ignores the regional impacts of its activity. See Jonathan Rosenbloom, *New Day at the Pool: State Preemption, Common Pool Resources, and Non-Place Based Municipal Collaborations*, 36 HARV. ENVTL. L. REV. 445, 456–61 (2012).



income housing.<sup>17</sup> Exclusionary zoning by one community shifts the burden of accommodating these undesirable, but regionally necessary, land uses onto neighboring communities, but those communities often reciprocate by enacting similar zoning laws.<sup>18</sup> The result is a regional shortage of affordable housing and increasing suburban sprawl as developers are forced to look beyond existing communities for places to build new housing.<sup>19</sup> Exclusionary zoning thus exacerbates economic inequality by raising the cost of housing and contributes to climate change by increasing vehicle-miles travelled and the consumption of undeveloped land.

In short, insofar as home rule both empowers *and* constrains local governments based on the idea that there is a fixed sphere of “local” authority within which their power is absolute and outside of which they are impotent, home rule prevents municipalities from meaningfully addressing global issues such as climate change, economic inequality, and others. One way to solve this problem would be to change the meaning of home rule so that state and local governments no longer have separate and impregnable domains, allowing the allocation of power between state and local governments to be adjusted as the challenges of globalization demand. Nevertheless, despite some efforts at reform,<sup>20</sup> the notion of home rule as confined to the “local” has been persistent in our jurisprudence.

While previous scholars have criticized the state/local distinction in home-rule doctrine,<sup>21</sup> none have examined why the current model of home rule has proven so difficult to dislodge from our

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17. See, e.g., Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1132 (2007) (discussing a common criticism of home rule: it enables and encourages exclusionary zoning).

18. See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1134 (1996) (“When one locality acts to exclude a use, its neighbors may feel compelled to adopt comparable regulations to protect themselves from the growth they fear will be directed to them by the initial locality’s regulation.”).

19. See Barron, *supra* note 14, at 2257–77; 2334–84 (explaining how home rule worsens affordable-housing crises and suburban sprawl).

20. See *infra* at notes 283–92 and accompanying text (discussing “legislative” home rule reforms).

21. See, e.g., Reynolds, *supra* note 16, at 1290–91; Barron, *supra* note 14, at 2347, 2349–50; cf. Yishai Blank, *Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance*, 37 FORDHAM URB. L.J. 509, 556–57 (2010) (noting fluidity of distinction between global and local).

jurisprudence or fully explored the implications of our adherence to an outmoded model of home rule in an era of globalization. Any successful reform effort must grapple with these questions. Accordingly, Part I argues that home rule endures in its current form because it is consistent with an ideology the judiciary finds attractive, called liberalism. Liberalism attempts to disaggregate the various aspects of human life—the state, the market, and the family, particularly—and assign them to distinct, territorially demarcated spheres. The statewide/local distinction is a means of preserving the boundaries among the state, the market, and the family, specifically by tasking the state to regulate the marketplace and local governments to regulate the family. This division of power helps explain why courts so often invalidate local commercial and financial regulation, which are perceived as affecting the sphere of the marketplace, while deferring widely to local regulations regarding land use and public schools, which are perceived as affecting the home and family.

In light of globalization, however, it has become clear that the liberal separation of spheres is a largely futile and, in fact, counterproductive enterprise. Hence, Part II provides a normative critique of the extant model of home rule. This Part begins by drawing on the insights of Karl Marx, who saw liberalism as a hopelessly naïve effort to cabin the influence of global capitalism. In his view, the liberal separation of spheres in fact did nothing but reinforce and obfuscate capitalism's dominance. Subsequently, scholars in both law and geography have followed Marx's analysis and shown that the state uses territory (the notion that a political authority exercises control over everything within a particular place rather than over specific individuals or conduct<sup>22</sup>) to reinforce and disguise both its own hegemony and that of capitalism. Home rule is a case in point. Assigning the market and the family to distinct

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22. See Robert D. Sack, *Human Territoriality: A Theory*, 73 ANNALS ASS'N AM. GEOGRAPHERS 55, 56 (1983) (defining territoriality as “the attempt by an individual or group (x) to influence, affect, or control objects, people, and relationships (y) by delimiting and asserting control over a geographic area”); see also SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS 6 (updated ed. 2008) (defining territorial sovereignty as meaning that an entity has “exclusive authority over a given territory and at the same time this territory is constructed as coterminous with that authority”); *id.* at 41–53 (explaining how medieval cities destabilized feudal authority by substituting impersonal relationship between the sovereign and the territory in place of in-kind, personal relationships that undergirded feudalism).

territorial spheres (the state and the local, respectively) masks the nature of the relationship among the supposedly autonomous spheres. On one hand, the idea that commercial regulation is statewide in nature precludes local governments from regulating the financial sector and thus enables capital investors to treat land as a commodity rather than a community resource. On the other hand, the notion that regulation of home and family is a peculiarly local responsibility provides a veneer of local control while disguising the hegemonic role of the state in regulating family affairs. For instance, though exclusionary zoning appears to be a parochial policy choice by selfish municipalities, it is in fact largely an imperative that has been foisted on municipalities by *state* policies regarding public school financing. The effect of the liberal separation of spheres is thus to perpetuate the dominance of the state and mobile capital over the local, and to suppress local governments' potential role in global governance.

On the surface, home-rule doctrine thus suits the agenda of both the state and capital. As Marx predicted, however, globalization has caused the alliance between the state and capitalism to unravel as the increasing mobility of capital across porous borders has weakened the ability of the territorially bounded state to regulate it. I argue that the state's best hope of reining in capital is to reinvigorate the local, because despite capital's mobility it is deeply dependent on cities, and cities have powerful incentives to regulate capital. In short, home rule has matters precisely backwards in entrusting the state rather than the local to regulate the marketplace. In Part III, I propose a new conception of home rule that recognizes the vitality of the local in our global age but resists the temptation to carve out a fixed sphere for the local. Appropriately, in light of the challenges of globalization, I find the inspiration for this potential new model of home rule in the realm of international law and governance.

## I. LIBERALISM, THE SEPARATION OF SPHERES, AND IMPERIO HOME RULE

### *A. The Illogic of Home Rule*

As the Introduction pointed out, the manner in which home rule both limits and empowers municipalities makes it difficult for them to take on global challenges. To illustrate the basic problem, this Section discusses two cases, *American Financial Services Ass'n v. City*

of *Oakland*<sup>23</sup> and *DeVita v. County of Napa*,<sup>24</sup> both decided by the California Supreme Court. *American Financial Services* addressed an effort by the city of Oakland to regulate predatory lending, a dubious financial practice that contributed to the 2008 global recession. The court effectively held that local governments lacked the home-rule authority to enact legislation in this area because predatory lending requires uniform treatment throughout the state and is thus a matter of statewide rather than local concern.<sup>25</sup> *DeVita* addressed a land-use regulation enacted by Napa County that drastically reduced development throughout the county. As I have already observed, such a regulation would likely increase suburban sprawl and raise local housing costs. Moreover, as the dissent noted, Napa's move would put pressure on neighboring communities to enact similarly restrictive zoning laws and thus further increase sprawl, carbon emissions, and home prices.<sup>26</sup> Despite these clear extraterritorial impacts, the court held that the Napa regulation was valid because land use is a local rather than a statewide function.<sup>27</sup> Viewing these cases in tandem, it becomes clear that the California Supreme Court selectively applies its supposed concerns about uniformity and extraterritoriality. As I will demonstrate in the remainder of this Part, what really drives the judicial analysis is the notion that commercial regulation is inherently a matter of statewide concern because it implicates the marketplace, whereas land-use regulation is inherently a matter of local concern because it implicates the family. This conclusion begs the question of how to truly distinguish commercial regulation from land-use regulation, a question I take up in the next Part.

*1. Home rule and predatory lending: American Financial Services Ass'n v. City of Oakland*

In the postmortem on the global economic recession that began in 2008, many critics pointed the finger squarely at the failure of

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23. 104 P.3d 813 (Cal. 2005).

24. 889 P.2d 1019 (Cal. 1995).

25. See *infra* notes 35–42 and accompanying text.

26. See *infra* notes 47–50 and accompanying text.

27. See *infra* notes 50–52 and accompanying text.

nation-states to more assertively regulate the financial industry.<sup>28</sup> Before the crash, financial institutions deployed a number of risky and esoteric new mortgage instruments to squeeze the maximum amount of profit from a booming real estate market.<sup>29</sup> Expanding the pool of mortgage loans was critical to this enterprise, so financial institutions for the first time began marketing loans to low-income borrowers with bad or no credit, the “subprime” market. To induce subprime borrowers, lenders engaged in a variety of tactics often referred to as “predatory lending,” such as offering low introductory “teaser” rates that later ballooned, lending without regard to a borrower’s ability to repay the loan, deceiving borrowers or failing to disclose important information to borrowers, and so on.<sup>30</sup> Although predatory loans were structured in such a way as to make foreclosures highly likely, with attendant risks for both the borrowers and the real estate market at large, federal and state governments did little to regulate the mortgage industry even as predatory loans began to flood the marketplace; to the contrary, these governments actively engaged in de-regulating the financial markets so that lenders would continue extending mortgage loans to subprime borrowers.<sup>31</sup> Of course, once a critical mass of subprime loans predictably ended in foreclosure, consumers lost confidence in the real estate market and home prices sharply declined, sparking the financial crisis.<sup>32</sup>

If federal and state governments were blind to the risks of predatory lending in the run-up to the financial crisis, *city* governments were not. During the real estate boom, cities

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28. See, e.g., Antony Page, *Revisiting the Causes of the Financial Crisis*, 47 IND. L. REV. 37 (2014) (arguing that deregulation was one of the major causes of the financial crisis); Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1181–82 (2012) (arguing that the failure to regulate mortgage industry was the “leading cause” of the financial crash).

29. See generally Levitin & Wachter, *supra* note 28.

30. See Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757, 759–62 (2007) (describing some predatory lending practices); Nicole Lutes Fuentes, Comment, *Defrauding the American Dream: Predatory Lending in Latino Communities and Reform of California’s Lending Law*, 97 CALIF. L. REV. 1279, 1286 (2009) (describing some predatory lending practices).

31. See Page, *supra* note 28, at 52–54 (arguing that federal government failed to sufficiently regulate subprime mortgage industry prior to the crash).

32. See, e.g., Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373 (2008).

throughout the United States enacted tough restrictions on predatory lending practices under their home-rule authority.<sup>33</sup> While federal and state governments were concerned about increasing liquidity in the mortgage market at the state and national level, city governments were focused more on the negative localized impacts of predatory lending practices—residents saddled with mountains of debt and neighborhoods devastated by swaths of deteriorating, abandoned homes. Perhaps the reason cities were more attuned than the state or federal government to these impacts was that predatory lending was highly concentrated in urban areas with large numbers of low-income people of color.<sup>34</sup> Thus, it would seem that localities were ideally positioned, and certainly better positioned than state and federal authorities, to police predatory lending practices.

However, in most cases—including the highest profile cases in New York, Cleveland, and Oakland—the courts invalidated municipal predatory lending ordinances.<sup>35</sup> As an example, let us consider the Oakland case, *American Financial Services Ass’n v. City of Oakland*.<sup>36</sup> In this case, the California Supreme Court held that Oakland’s predatory lending ordinance was preempted by a much weaker state law dealing with the same matter.<sup>37</sup> The ruling was curious because the standard for preemption in California is that state legislation must demonstrate a clear intent to preempt local activity,<sup>38</sup> yet, as the dissent observed, the evidence in this case decisively pointed *against* any such legislative intent.<sup>39</sup> Indeed, the

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33. See Entin & Yazback, *supra* note 30, at 770–80.

34. Cities like Oakland were “prime targets” for predatory lending practices “because of the high number of minority and lower-income homeowners,” as well as “the pressures of gentrification in certain neighborhoods that increase property values and home equity.” Fuentes, *supra* note 30, at 1282 n.23 (quoting the Oakland ordinance); see also Entin & Yazback, *supra* note 30, at 757 (“Predatory lending is heavily concentrated in low- and moderate-income neighborhoods and disproportionately affects minorities and the elderly.”).

35. For a discussion of the New York, Cleveland, and Oakland cases, see Entin & Yazback, *supra* note 30, at 770–80.

36. 104 P.3d 813 (Cal. 2005).

37. See *id.*; see also Fuentes, *supra* note 30, at 1282 (“The Oakland ordinance provided additional protections including: requiring independent loan counseling; prohibiting lending without regard to repayment ability; prohibiting the financing of points and fees; and prohibiting lenders from recommending default or refinancing without borrower benefit.”).

38. See *Am. Fin. Servs.*, 104 P.3d at 829–30 (George, C.J., dissenting) (citing *Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534 (Cal. 1993)).

39. See *id.* at 830–31.

state legislature carefully considered whether to preempt local predatory lending ordinances such as Oakland's and chose not to include any preemption language in the final bill.<sup>40</sup> The court nevertheless found that the legislature had impliedly preempted Oakland's ordinance because, according to the court, the matter of predatory lending is inherently statewide rather than local in nature.<sup>41</sup> The court reasoned that statewide uniformity in the regulation of predatory lending was essential to ensuring that subprime borrowers would have access to low-cost credit and that Oakland's ordinance would, if duplicated elsewhere, lead to a proverbial crazy-quilt of local predatory lending regulation.<sup>42</sup>

The court's reasoning was notable for what it implied about the limits of local regulatory authority. Oakland's ordinance was preempted *not* because of anything the legislature said or failed to say, but because of the court's own conclusion that predatory lending requires uniform statewide regulation and is therefore not an appropriate subject of local regulatory activity. In short, though formally styled as a preemption case, the court treated it more as a question of Oakland's home-rule authority. Under home-rule doctrine, Oakland would have the inherent power to regulate predatory lending if the matter were local in nature and no power to act if the matter were statewide in nature, regardless of state legislative intent.<sup>43</sup> In substance, the court held that Oakland lacked the home-rule authority to enact a predatory lending ordinance because predatory lending is not a local matter.<sup>44</sup> As a result, cities

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40. See *id.*; Fuentes, *supra* note 30, at 1281–82, 1281 n.18 (noting that the financial industry had actively lobbied for an express preemption provision in the state bill and leaving out such a provision was a “concession” to the consumer advocates who wanted to leave room for stronger local laws).

41. See *Am. Fin. Servs.*, 104 P.3d at 823.

42. See *id.* at 823–24.

43. See Baker & Rodriguez, *supra* note 8, at 1340–49 (describing the “imperio” model of home rule, under which state and local governments have mutually exclusive spheres of regulatory authority).

44. If my interpretation is correct, it means that Oakland would be unable to enact predatory lending regulation even in the absence of state legislation dealing with predatory lending. The *American Financial Services* court did not address this point, but the point is largely moot in any event because the court's expansive reading of the scope of state preemption, see *supra* text accompanying notes 38–41, effectively nullifies municipalities' home rule power to initiate legislation. See also *infra* note 135 (making a similar point about *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000)).

like Oakland were left vulnerable to Wall Street's financial manipulations, and the real estate crash had predictably harmful impacts in those cities.<sup>45</sup>

## 2. *Home rule and land-use planning: DeVita v. County of Napa*

If home rule often prevents local governments from dealing with global challenges by prohibiting them from acting in areas such as financial regulation, it simultaneously, and somewhat paradoxically, prevents them from addressing global challenges by *empowering* them in a way that incentivizes them to act parochially. In this regard, it is useful to contrast *American Financial Services* with the case of *DeVita v. County of Napa*.<sup>46</sup> *DeVita* concerned the question whether voters within a county could adopt, by initiative, a change to the land-use element of a county's general plan (a document all California cities are required to adopt as a sort of "constitution" to guide the municipality's land-use regulation) to designate large swaths of the county as undevelopable open space. The dissent argued intently that the local voters could not amend the land-use element by initiative because the matter of land-use planning was statewide in nature rather than local.<sup>47</sup> According to the dissent, land-use decisions by a single municipality "may have profound ramifications for neighboring entities, the region[,] and the state" and, therefore, the adoption of a general plan is a matter of statewide interest.<sup>48</sup> The dissent noted, in fact, that the plan amendment adopted by the voters of Napa County, which placed thousands of acres of land in a highly desirable region of California off limits for development, was "clearly intended to limit and redirect the county's future development of housing stock, with a view to influencing metropolitan growth patterns throughout the region."<sup>49</sup> Napa's

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45. The uncertainty surrounding local governments' home rule authority to enact predatory lending ordinances has induced many local governments to bring either *parens patriae* suits on behalf of predatory lending victims against financial institutions alleged to have engaged in predatory lending under existing state consumer protection laws or suits under the Federal Fair Housing Act (FHA). As described previously, courts have so far reached divergent conclusions as to the viability of these suits. *See supra* note 3 (collecting cases).

46. 889 P.2d 1019 (Cal. 1995).

47. *See id.* at 1053–58 (Arabian, J., dissenting).

48. *Id.* at 1053.

49. *See id.* at 1056.



move would necessarily push growth pressures onto neighboring communities, which would likely be forced to respond by similarly limiting densities, decreasing the stock of affordable housing in the region and increasing sprawl. The general plan change would thus make it more difficult for California to implement uniform regional or statewide goals with regard to affordable housing, climate change, or other aspects of land-use planning. In this regard, the dissent's reasoning was consistent with the *American Financial Services* court's concern about the deleterious impacts of local predatory lending regulation on statewide uniformity.

Nevertheless, the court in *DeVita* held that the voters of Napa could validly enact the plan change by initiative because land-use planning was an issue of *local* rather than *statewide* concern.<sup>50</sup> In response to the dissent's argument regarding the disuniformities and extraterritorial impacts of local land-use regulation, the court answered that the state had the authority to preempt local land-use regulation with such impacts but had evidenced no intention to do so.<sup>51</sup> While this reasoning makes sense on its face, it stands at odds with *American Financial Services*. In *American Financial Services*, as I have just observed, there was similarly no evidence of an intent to preempt local predatory lending regulation—in fact, there was substantial evidence of a contrary intent—but the court found Oakland's predatory lending ordinance impliedly preempted merely because of the likely effect the ordinance would have on statewide uniformity. Thus, the two cases are almost precise mirror images.

There is one way to distinguish these cases, however. The *DeVita* court held that land use was a local matter because it had “historically been a function of local government.”<sup>52</sup> In *American Financial Services*, conversely, the court noted that financial regulation was historically a function carried out by the state, and Oakland's predatory lending ordinance was evidently the first time a municipality in California had undertaken to regulate such activity.<sup>53</sup> Thus, the two cases may be understood as resting on “traditional” notions of statewide and local powers, respectively. Reconciling the

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50. *See id.* at 1032 (majority opinion).

51. *See id.*

52. *See id.* at 1030–31.

53. *Am. Fin. Servs. Ass'n v. City of Oakland*, 104 P.3d 813, 822–23 (Cal. 2005).

cases in this way only raises more questions, however. The conclusion that land-use control is a traditional local function whereas financial regulation is a traditional state function leads to the descriptive question of how those functions came to be vested at those particular levels as well as the normative question of why those functions *should* be vested there.<sup>54</sup> These are especially salient questions considering that, as we have already seen, Oakland was apparently far better suited than the state of California to regulate predatory lending, whereas localities such as Napa County seem rather poorly positioned to take on the challenges of climate change and affordable housing. The statewide/local distinction, in other words, does not properly allocate power in this age of globalization.

As the remainder of this Part explains, the “traditional” division of power between state and local is a component of a liberal project of nation-building. Specifically, liberal ideology required that the various “spheres” of human activity, most notably the state, the market, and the family, be rigidly separated (both conceptually and, in some ways, physically). The construction of a firm state/local dichotomy is an effort to maintain that separation, as is the assignment of financial regulation to the state level and land-use control to the local level. In the next Part, I will demonstrate that the separation of spheres has not quite worked as intended; in fact, it has served as an illusion that effectively disguises the dominance of the state and mobile capital over the local.

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54. In light of my thesis below that the circular “traditional function” inquiry actually reflects liberal ideology’s division of governmental power into distinct territorial spheres, it is noteworthy that the courts have used this inquiry in several other contexts to either draw the line between public and private spaces, or to delineate firm borders between scales of governmental authority. *See, e.g.*, *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (deciding whether government must permit free speech activity on public property depends on whether the area is a “traditional” public forum); *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that Congress may not interfere in traditional state functions even if acting pursuant to an enumerated power), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Importantly, the *Usery* doctrine proved short lived precisely because the Court could not articulate a principled definition of traditional government functions. *See Garcia*, 469 U.S. 528. As the discussion in the text demonstrates, however, and as we shall see further in Part III, the courts have not entirely abandoned their efforts to determine fixed boundaries between scales of governmental authority. And “tradition” still plays a role in determining those boundaries.

*B. The Liberal Art of Separation**1. "Liberalism is a world of walls"*

A signature characteristic of the modern nation-state—what separates it decisively from medieval regimes—is the fracturing of society into several distinct and autonomous spheres. Medieval society was “conceived as an organic and integrated whole.”<sup>55</sup> There was no distinction between the state and civil society. Corporate entities such as guilds, churches, and cities were simultaneously regulatory authorities, business enterprises, cultural and educational institutions, and organizers of social life. The modern state, however, has disaggregated these corporate bodies into a “public” sphere of coercive authority subordinate to the state and a “private” sphere of purely volitional activity subsumed within civil society, which is conceptualized as autonomous from the state.<sup>56</sup> Both the public (state) and the private (civil society) realms have in turn been subdivided into distinct sub-spheres. State power is allocated among discrete scalar units of governmental power—in the United States, federal, state, and local—whereas civil society is comprised of separate domains such as the market and the family.<sup>57</sup> These spheres have juridical significance: for instance, courts freely enforce commercial contracts on the theory that the marketplace is a realm of arm’s-length dealing between abstract individuals but refuse to enforce contracts between spouses on the principle that the marriage relationship is governed by affection and altruism.<sup>58</sup>

The separation of spheres has often been considered a cornerstone of the ideology of “liberalism,” which posits that individual freedom can only be secured when each realm of human

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55. See Michael Walzer, *Liberalism and the Art of Separation*, 12 POL. THEORY 315, 315 (1984).

56. The public/private distinction under modern liberal ideology has been extensively explored by legal scholars, particularly with reference to local government law. See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1083–90 (1980) (asserting that the public/private distinction has been critical in establishing local governments’ subordinate legal status); Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225 (1985) (book review).

57. A classic discussion of the family/market divide in the law review literature is Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

58. See *id.* at 1520–22.

activity is sealed off from interference by the others. According to Michael Walzer, one of the most vigorous defenders of this ideology, “Liberalism is a world of walls, and each one creates a new liberty.”<sup>59</sup> Crafting an autonomous sphere for the market enables private economic activity to take place free from both state interference<sup>60</sup> and the sentimental distractions of the family,<sup>61</sup> while designating a sphere for family life facilitates a right of privacy against state intrusion as well as a refuge from the crass commercialism of the marketplace.<sup>62</sup> The state itself is also “liberated” by the separation of spheres, as it can theoretically expel the influence of money<sup>63</sup> and family ties<sup>64</sup> from the political sphere, assert a monopoly on the legitimate use of coercion (since the market and the family are seen as spheres of private, voluntary activity), and assume a posture of universality by defining the boundaries between the market and the family—such as by legislating maximum working hours or prohibiting child labor.<sup>65</sup> As I show later in this Part, one other

59. Walzer, *supra* note 55, at 315. Walzer most extensively defends the liberal separation of spheres in his celebrated book SPHERES OF JUSTICE. MICHAEL WALZER, SPHERES OF JUSTICE (1983).

60. See Walzer, *supra* note 55, at 316 (“[T]he separation of civil society and political community creates the sphere of economic competition and free enterprise, the market in commodities, labor, and capital.”).

61. See Olsen, *supra* note 57, at 1520–21 (noting that liberal ideology considered the cooperative ethos of the family counterproductive in the market sphere where “self-interested behavior . . . not only was acceptable, but also benefited society in general”).

62. See WALZER, *supra* note 59, at 300 (noting that protection of the “domestic sphere” from market and political interference provides “a space for withdrawal, rest, intimacy, and (sometimes) solitude”); Olsen, *supra* note 57, at 1504 (noting that family is both “the repository for values being destroyed in the marketplace,” and “the sanctuary of privacy into which one can retreat to avoid state regulation”).

63. See Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 31, 33–34 (Robert C. Tucker ed., 2d ed. 1978) (observing that the state is “emancipated” from civil society by expelling economic considerations from the political sphere). The clearest concrete example of this form of emancipation—and one strikingly observed by Marx one hundred years before the modern civil rights movement—is the abolition of property qualifications for voting, which eliminates wealth as a criterion for political participation. See *id.* at 33; see also Kenneth A. Stahl, *Local Government, “One Person, One Vote,” and the Jewish Question*, 49 HARV. C.R.-C.L. L. REV. 1 (2014) (analyzing Marx’s discussion of voting rights in context of the modern “one person, one vote” rule).

64. See Walzer, *supra* note 55, at 316–17 (noting that the separation of family and state through abolition of dynastic government and nepotism “creates the sphere of office and then the freedom to compete for bureaucratic and professional place”).

65. See, e.g., DAVID HARVEY, *Money, Time, Space and the City*, in CONSCIOUSNESS AND THE URBAN EXPERIENCE 1, 31 (1985).

important way in which the state has maintained the separation between the market and the family, as well as its own distance from the realm of civil society, is through the scalar division of power into federal, state, and local spheres.

The separation of spheres had a liberating effect on another institution as well: the judiciary. The ascendancy of liberalism coincided with the rise of a “classical” mode of jurisprudential thinking. As Morton Horwitz writes, judges worried about “the dangerous and unstable redistributive tendencies of democratic politics” during the nineteenth century and they sought to create a “neutral and apolitical system of legal doctrine and legal reasoning” that would “sharply separate law from politics.”<sup>66</sup> They did this, according to Duncan Kennedy, by positing that the legal system was populated by a set of distinct institutions—such as the state and the market—each of which “was absolute within but void outside its sphere.”<sup>67</sup> Under this legal system, “[t]he role of the judiciary (its sphere of absolute power) was the application of a single, distinctively legal, analytic apparatus to the job of policing the boundaries of these spheres.”<sup>68</sup> Determining the boundaries between the spheres was, moreover, not a political or democratic task, but an “objective, quasi-scientific one.”<sup>69</sup>

What enables this judicial task to appear objective is that each sphere takes on the quality of being something natural and pre-political, rather than something that is consciously constructed by the state. In a classic law review article on the market/family dichotomy, Frances Olsen describes that dichotomy as a “structure of consciousness,” meaning “a shared vision of the social universe that underlies a society’s culture and also shapes the society’s view of what social relationships are ‘natural’ and, therefore, what social reforms are possible.”<sup>70</sup> Under this structure of consciousness, “[t]he

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66. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425–26 (1982).

67. See Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 7 (1980).

68. *Id.* at 5.

69. *Id.* at 7.

70. Olsen, *supra* note 57, at 1498.

status quo itself is treated as something natural and not as the responsibility of the state.”<sup>71</sup>

Thus, liberalism has had two distinct advantages for the judiciary: first, it enables the courts to effectively check redistribution by keeping the state out of the private sphere; and second, it legitimizes the judiciary as an impartial institution peculiarly suited to the essential task of separating the various spheres.

One lingering question about the classical approach to jurisprudence is its currency. Kennedy and Horwitz largely treat classical jurisprudence as a historical relic, whereas Olsen characterizes it as an extant and predominant jurisprudential mode. As I will argue below in Section 3, home-rule doctrine demonstrates that classical juridical thinking still persists within local government law.

## *2. Liberalism in space (civil society): The separate spheres ideology*

My task in this Part is to explain how the distribution of governmental power between the state and local spheres via the doctrine of home rule reinforces the liberal division among the state, the market and the family. Relatedly, I will also show how the state/local distinction burnishes the judiciary’s credentials as an arbiter of the boundaries between the spheres. As a starting point, it must be understood that liberalism has a strong spatial or territorial dimension; that is, the separation of spheres is not a merely conceptual or temporal divide but an actual, physical separation. Both the market/family distinction in the private realm and the state/local distinction in the public realm exhibit this territorial separation. As we will see, the spatial component of these distinctions plays a powerful role in legitimizing the liberal separation of spheres. This Section deals with the territorial division within the private realm of civil society; the following Section addresses the public realm of the state.

During the late nineteenth century, under the pressure of an industrializing economy, work began migrating from the home to factories in urban centers.<sup>72</sup> The market became physically separated

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71. *Id.* at 1506.

72. See Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 *CARDOZO L. REV.* 1193, 1245–51 (2008);

from the family. Having already rationalized the conceptual separation of the market and the family, liberalism now provided an elaborate justificatory scheme for the physical separation of home and work under industrial capitalism, the “separate spheres” ideology.<sup>73</sup> The separate spheres ideology rationalized the geographic separation between home and work then occurring by stressing that home and work were two philosophically opposed realms—the former a sanctuary for familial solidarity and the latter a crucible of cutthroat competition—and that the unique characteristics of each realm could only be preserved if it were rigidly segregated from the other.<sup>74</sup> The home was idealized as a refuge from work, where relations were governed not by the hostile whims of the marketplace but by the “rule of love.”<sup>75</sup> Developers marketed homes in suburban subdivisions as ideal retreats from the commercial world of the city.<sup>76</sup> Likewise, though less often stated explicitly, it was perceived that the marketplace would benefit by being segregated from the family, enabling it to hone the pecuniary values of “[r]ationality, discipline, and a focus on objective reality” absent in the sphere of the home.<sup>77</sup>

The state has played an active role in enforcing the separate spheres ideology. Just as the state enforces the liberal division between working time and family time through working-hours and child-labor laws, it likewise polices the distinction between family places and working places through single-use zoning laws that mandate the segregation of residential from commercial and industrial spaces. Single-use zoning laws emerged in the early twentieth century, just as the separate spheres ideology reached

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Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1199–201 (2001); Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate Over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 416 (1994).

73. As I discuss *infra* Part II, there is a close relationship between liberalism and capitalism. It is therefore not surprising that liberalism would provide an ideological justification for a pattern created by the rise of capitalism.

74. See Stahl, *supra* note 72 (describing the changing nature of economy and rise of separate spheres ideology); Garnett, *supra* note 72 (same); Lees, *supra* note 72, at 415–20 (same).

75. See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2142–50 (1996).

76. Garnett, *supra* note 72, at 1201–03.

77. Olsen, *supra* note 57, at 1500.

maturity. And the courts, who were especially invested in the liberal commitment to boundary maintenance, affirmed these zoning laws using rhetoric that was clearly suffused with the separate spheres ideology. For instance, the Wisconsin Supreme Court upheld the constitutionality of a suburban zoning ordinance creating districts designated for single-family residences by reasoning: “The home seeker shuns a section of the city devoted to industrialism, and seeks a home at some distance from the business center. A common and natural instinct directs him to a section far removed from the commerce, trade, and industry of the community.”<sup>78</sup> The New York Court of Appeals, in a similar vein, stated that “[t]he primary purpose of such a [single family residential] district is safe, healthful, and comfortable family life rather than the development of commercial instincts and the pursuit of pecuniary profits.”<sup>79</sup> Though the rhetoric today is often less florid, single-use zoning remains predominant throughout the nation, and courts are highly deferential toward local zoning practices.<sup>80</sup>

The spatial separation of spheres is a critical tool of classical judicial reasoning because it aids the judicial effort to remove politics from law and create an objective science of jurisprudence. The physical segregation of the family from the market, like the conceptual separation described by Olsen, is a “structure of consciousness,” that is, the organization of space is understood to be natural and authentic, and therefore requires no critical analysis by courts or other observers. As Richard Ford states:

Doctrine and policy often assume both that particular political aspects of a spatial entity are the inherent property or immediate consequences of the space that defines the entity and are therefore

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78. *State ex rel. Carter v. Harper*, 196 N.W. 451, 455 (Wis. 1923).

79. *Wulfsohn v. Burden*, 150 N.E. 120, 123 (N.Y. 1925). As this rhetoric indicates, the spheres of the market and the family were not considered morally equivalent: the sphere of the family was thought to be morally superior to the market. In Part II, however, I explain that the rhetorical elevation of the family over the marketplace actually disguises the ways in which the family functions to support the marketplace by neutralizing resistance to the increasing exploitation taking place there under industrial capitalism. See Olsen, *supra* note 57, at 1524 (“The family offered men an altruistic motive and justification for carrying on their individualistic struggles in the marketplace. It also offered men compensation for their suffering in the debasing world and thus reduced resistance to the increasing dehumanization of the market.” (footnote omitted)).

80. See *infra* notes 118–25 and accompanying text.



beyond dispute, and also that the shape and location of the spatial entity are of no real consequence and therefore need not be examined or justified.<sup>81</sup>

Here, the physical separation between the market and the family assumes the character of something “inherent” and “beyond dispute.” For instance, both the Wisconsin Supreme Court and the New York Court of Appeals quoted above make reference to the “instincts” that draw people toward particular spheres. This rhetoric suggests that the separation of spheres is something primordial that resists rational analysis. As the geographer Henri Lefebvre writes, under liberalism “[t]he family, the school, the workplace, the church, and so on—each possesses an ‘appropriate’ space. . . . In these spaces, a system of ‘adapted’ expectations and responses—rarely articulated as such because they seem obvious—acquire a quasi-natural self-evidence in everyday life and common sense.”<sup>82</sup> The judiciary is able to avoid making out a normative case for the spatial separation of the market and the family because that case is “self-evident” within the spaces themselves.

### *3. Liberalism in space (the state): Dual federalism*

At around the same time the separate spheres ideology emerged, demanding the physical division of civil society into distinct realms for the market and the family, a new judicial doctrine also appeared that mandated the subdivision of the *state* into impregnable, quasi-territorial spheres: federal, state, and local. The doctrine of “dual federalism,” much like the separate spheres ideology, used territory as a means of providing an objective, scientific determination as to the appropriate scope of governmental power. As we shall see in the next Section, the “appropriate scope of governmental power” specifically meant the degree of state interference that courts would permit into the spheres of the market and the family. In other words, the division of power among federal, state and local authorities was designed to maintain the liberal boundary between the state and civil

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81. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1859–60 (1994).

82. See HENRI LEFEBVRE, *Space and the State*, in STATE, SPACE, WORLD 223, 225 (Neil Brenner & Stuart Elden eds., Gerald Moore et al. trans., 2009).

society, just as the separate spheres ideology was designed to maintain the boundary between the market and the family.

*a. The Commerce Clause and the National/Local Distinction.* If under liberalism there is a designated space for the market and a space for the family, there is also a space for the state. The modern nation-state is an archetypal example of a territorial sovereign, meaning that it has “exclusive authority over a given territory and at the same time this territory is constructed as coterminous with that authority.”<sup>83</sup> Sovereignty thus extends to everything within the nation-state’s territory and nothing outside of it.

During the late nineteenth century, the principle of territorial sovereignty that had effectively resolved the division of power as among competing nation-states evolved to take on a new task: the division of power among the various authorities *within* the individual nation-state. The conception that became known as dual federalism<sup>84</sup> postulated, according to Duncan Kennedy, “that there is an essential similarity between the territorial line dividing conventional sovereigns and the non-material line dividing state and federal jurisdictions.”<sup>85</sup> Under dual federalism, federal and state governments exist within “two mutually exclusive, reciprocally limiting fields of power.”<sup>86</sup> As with conventional nation-states, each government has absolute power vis-à-vis other authorities within its respective “field of power,” but is impotent outside that field of power.

Furthermore, like conventional nation-states, under dual federalism power is divided between state and federal authorities

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83. SASSEN, *supra* note 22, at 6.

84. Ernest Young distinguishes dual federalism from the related concept of dual sovereignty, noting that the latter divides sovereignty without necessarily requiring distinct spheres for each sovereign, whereas the former is predicated on the existence of distinct spheres. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 143–44 (2001).

85. DUNCAN KENNEDY, *THE RISE & FALL OF CLASSICAL LEGAL THOUGHT* 33–34 (2006).

86. See Young, *supra* note 84, at 143 (quoting Alpheus Thomas Mason, *The Role of the Court*, in *FEDERALISM: INFINITE VARIETY IN THEORY AND PRACTICE* 8, 24–25 (Valerie Earle ed., 1968)) (“Dual federalism’ means ‘two mutually exclusive, reciprocally limiting fields of power—that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions.’”).

using a principle of territoriality. Though there is no formal territorial boundary separating state and federal governments as there is between nation-states, the scope of each government's authority under dual federalism is determined based on its territorial reach. For example, it was widely accepted in the nineteenth century that per the Commerce Clause and its implicit corollary, the "dormant" Commerce Clause, the federal government had the *exclusive* authority to regulate commerce deemed "interstate" in nature, while states had the exclusive authority to regulate commerce deemed to be purely "intrastate."<sup>87</sup> A major factor in determining whether a matter was interstate or intrastate was the need for nationwide uniformity in regulating the matter.<sup>88</sup> The goal, according to Ernest Young, was to categorically distinguish matters of "national" concern from matters of "local" or state concern.<sup>89</sup> As we recall, the judicial ideology of the day required a decisive and objectively ascertainable boundary line between the various institutions within the legal system. Under dual federalism, as under the separate spheres ideology, territory provided just such an objective basis for distinguishing state from national spheres of competence. As Kennedy notes, "[w]ithin the system of [dual federalism], the role of the federal judiciary was that of umpire and line drawer."<sup>90</sup>

It is hotly debated today whether Commerce Clause jurisprudence remains under the influence of dual federalism.<sup>91</sup> I address this point further in Part II, but for the present it is of little moment because dual federalism undoubtedly still survives in the doctrine of home rule.

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87. *Id.* at 146.

88. See *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299 (1851); Young, *supra* note 84, at 147.

89. See Young, *supra* note 84, at 147.

90. See KENNEDY, *supra* note 85, at 39.

91. Many scholars argue that the Supreme Court's recent federalism jurisprudence constitutes a return to the earlier era of "dual federalism." See, e.g., Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998). Others, including Ernest Young, argue that the "new federalism" is distinct from dual federalism because there is a widespread judicial recognition of concurrent state and federal spheres of authority, and the courts give the federal government substantial latitude in exercising the commerce power. See, e.g., Young, *supra* note 84, at 150–63.

*b. Imperio Home Rule and the State/Local Distinction.* Apparently inspired by the idea of dual federalism, progressive urban reformers during the early twentieth century sought to create a form of “home rule” for cities that would divide power between state and local governments in exactly the same way that dual federalism divided power between the federal and state governments.<sup>92</sup> The reformers were deeply concerned about what they saw as excessive meddling by corrupt state legislators into the affairs of urban government, and they attributed this state of affairs in part to a crabbed judicial doctrine, known as Dillon’s Rule, under which local governments had only the powers expressly delegated to them by states.<sup>93</sup> The reformers envisioned local government as an imperium in imperio, or a “state within a state,” and they successfully pushed to give local governments what became known as “imperio” home rule, which conferred upon local governments the independent authority to initiate legislation without an express delegation from the state, as well as immunity against state interference into local prerogatives.<sup>94</sup> The Commerce Clause jurisprudence of the day, which categorically distinguished between “national” and “local” (the latter confusingly meaning “state”) spheres of competence, provided an obvious precedent. Accordingly, imperio home rule provides that states and local governments have distinct and mutually exclusive spheres of activity, determined in a quasi-territorial fashion: local governments may only regulate in matters of “local” or “municipal” concern, and

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92. See, e.g., DALE KRANE ET AL., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 12 (2001) (noting that early home rule reforms were consistent with dual federalism).

93. See, e.g., *id.* at 10–11; Barron, *supra* note 14, at 2285–88.

94. See KRANE ET AL., *supra* note 92, at 11–12. The idea of a “state within a state” makes a curious contrast with the Russian anarchist Petr Kropotkin’s idea of liberalism. In his view, “[t]he State, by its very essence, cannot tolerate free federation because the latter represents that nightmare of the legist: ‘The State within the State.’ The State . . . only deals with *subjects*.” Petr Kropotkin, THE STATE: ITS HISTORIC ROLE 31 (1946), *quoted in* NICHOLAS K. BLOMLEY, LAW, SPACE AND THE GEOGRAPHIES OF POWER 38–39 (1994); see also Frug, *supra* note 56 (arguing that the liberal state requires suppression of intermediate entities such as local governments). David Barron has shown, however, that liberalism does not necessarily demand the obliteration of the local but can deploy the local as a means of preserving the line between the public and the private, citing home rule as an example. See Barron, *supra* note 14, at 2296 n.142 (noting that according to home rule advocates, “the law’s special recognition of cities as important intermediate entities could be used to *defend* the sharp boundary between public and private”).

the state can only legislate in matters of greater than local concern, often called “statewide” matters.<sup>95</sup>

Because imperio home-rule provisions rarely specified what powers were “local” or “municipal,” an important role was necessarily left for the courts in defining the meaning of these terms. Like the national/local distinction in Commerce Clause jurisprudence, courts have often determined whether a matter is local or statewide based on the need for statewide uniformity in regulation of a particular matter, as well as the extent to which local regulation has significant extraterritorial impacts.<sup>96</sup> Consistent with dual federalism, furthermore, the notion that there is a clear quasi-territorial boundary between state and local spheres of authority enables the judiciary to act as a neutral arbiter of the boundaries between spheres. Though there is some question as to the current status of dual federalism in Commerce Clause jurisprudence, it remains alive and well in home-rule doctrine. As we have seen, the factors of uniformity and extraterritoriality are often decisive in modern home-rule cases, such as *American Financial Services*.<sup>97</sup>

There is a clear conceptual link between the division of power within the state under imperio home rule (state/local) and the

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95. See Baker & Rodriguez, *supra* note 8, at 1341, 1349–55. Though Baker and Rodriguez make reference to a third sphere of “mixed” state/local concern, the idea of the mixed sphere has so far only been recognized in Colorado and even there, as I discuss further *infra* note 135, the “mixed” analysis largely replicates the statewide/local dichotomy prevalent in other imperio states.

96. See *id.* (“[T]he two factors that seem to loom largest [in judicial determinations of whether a power is statewide or local are] the extraterritorial effects of the local regulation, and the need for statewide uniformity in the relevant regulatory area.”); Reynolds, *supra* note 16. One of the major difficulties in drawing the line between statewide and local functions, of course, is that virtually all local government activities have extraterritorial impacts, and there are always arguments in favor of and against the need for statewide uniformity in any particular case. The early home-rule reformers were apparently untroubled by this, as they seemed to think that the simple act of drawing a firm line between state and local was more important than where the line was actually drawn. See Barron, *supra* note 14, at 2306 (describing home-rule advocate Frank Goodnow’s description of home rule as “a hazy depiction of the precise powers that would fall within the ‘local’ sphere—a depiction that seemed to range from virtually all to virtually none”). As I address at the end of this Part, courts have attempted to resolve this difficulty largely by focusing on the subject matter at issue. This has not solved the problem, however, because courts have had equal difficulty distinguishing between different subject matters.

97. See generally Baker & Rodriguez, *supra* note 8 (discussing cases in which uniformity and/or extraterritoriality have been decisive); Reynolds, *supra* note 16 (same).

separation of spheres within civil society (market/family). In accordance with liberal ideology, each institution has its own distinct, territorially demarcated sphere that, at least in principle, does not overlap with the other spheres. The idea that each sphere is exclusive within a designated territorial envelope gives the separation of spheres a veneer of naturalness and authenticity that enables the judiciary to characterize the adjudicative process as an objective science of boundary maintenance.

But there is more. As I argue in the next Section, the statewide/local dichotomy under imperio home rule is actually designed to maintain the parallel market/family distinction, as well as the broader distinction between the state and civil society. To put it another way, power is divided territorially between the state and the local in order to keep the state, the market, and the family within their respective spheres. This is accomplished primarily by assigning regulation of the marketplace to the state and regulation of the family to the local sphere.

### *C. The State/Local Distinction Meets the Market/Family Distinction*

#### *1. The state and the market*

I begin with the proposition that, under imperio home rule, the state is considered the appropriate sphere for regulating the market. Undoubtedly, one underlying purpose of the scalar division of state power is to limit government regulation of commercial activity—that is, to keep the state from invading the sphere of the marketplace. As we have already seen, the concept of dual federalism at the state/national level was primarily implemented within the field of commercial regulation. The Commerce Clause under dual federalism simultaneously prohibited the federal government from regulating purely intrastate commerce and the states from regulating interstate commerce, thus cabining the ability of *both* authorities to regulate the marketplace. As Barry Cushman writes, the national/local distinction in Commerce Clause jurisprudence tracked the wider liberal distinction then being drawn between the public and private spheres and was used for the same purpose—to prevent government

from regulating the “private” affairs of the commercial realm.<sup>98</sup> It is not a coincidence that dual federalism reached its apogee during the *Lochner* era, when judicial doctrine was infused with a highly libertarian strain.<sup>99</sup> We have already seen that one reason the judiciary was so invested in the liberal ideology of separate spheres, which likewise emerged in the *Lochner* era, was to keep the state from redistributing wealth.<sup>100</sup> Maintaining separate spheres for the state and the market was a way of keeping the state from excessive interference with private property and commercial activity.

Imperio home rule, likewise, was intended as a mechanism for maintaining the boundary between the market and the state via the scalar subdivision of state authority. David Barron has argued that one original goal of the home-rule movement was to protect business from meddling by the political machines that controlled state and city governments during the Gilded Age. Gilded Age cities engaged in “unprecedented levels of taxing and spending,” redistributing wealth in favor of special interests.<sup>101</sup> In other words, these cities did not respect the boundary between the state and the market. What Barron calls the “old conservative” model of home rule was designed to secure a “self-regulating, competitive market economy presided over by a neutral, impartial[,] and decentralized ‘night-watchman’ state,”<sup>102</sup> and specifically “to maintain separation between the market and the government”<sup>103</sup> by prohibiting local governments from profligate taxing and spending. In a similar vein, Richard Schragger argues that local government law doctrines such

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98. See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1127–29 (2000).

99. See OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910*, 8 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 45–49, 155–84 (1993) (Stanley N. Katz ed.) (on the ideology of the *Lochner* era).

100. See *supra* note 66 and accompanying text.

101. See Barron, *supra* note 14, at 2293.

102. *Id.* at 2292–93 (quoting Daniel R. Ernst, *Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1037 (1993) (book review)); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, 4 (1992) (defining “old conservatism”).

103. Barron, *supra* note 14, at 2316. Barron describes the “old conservative” idea as one of three popular ideological frameworks used to justify home rule during the early twentieth century, along with the “administrative” city model and the “social” city model. See *id.* at 2291–321.

as home rule were efforts to “defin[e] the appropriate spheres for government and business,” and that these efforts were “consistent with classical legal thought generally, which sought to police the line between private and public by limiting legislative interference in the market.”<sup>104</sup> Limiting city authority over the market was, in short, a way of preserving the boundary between government and the market.

Initially, as Barron observes, the home-rule reformers were just as skeptical of state government as they were of local government, if not more so, and they saw home rule as a means of preventing state interference in local affairs.<sup>105</sup> But as states and local governments became more assertive in regulating commerce, the courts drew upon the obvious comparison between the Commerce Clause and home rule and began to find that, just as the Commerce Clause prevented states from interfering with national economic objectives, home rule prohibited local governments from interfering with *statewide* commerce. In an important 1964 article on home rule, Terrance Sandalow argued that the amorphous doctrine prohibiting local governments from exercising the home-rule initiative power so as to cause extraterritorial impacts was analogous to the dormant Commerce Clause’s limitation on state regulation of interstate commerce.<sup>106</sup> Sandalow pointed out that while courts had placed very few limits on the municipal use of the home-rule initiative power, one area in which courts had prevented local governments from exercising the initiative was in cases where the municipality had “obstruct[ed] the flow of commerce within the state.”<sup>107</sup>

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104. See Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 498 (2009). According to this classical legal view, Schragger argues, “the city’s powers had to be read narrowly to ensure that the city regulated in the public interest and operated as a neutral framework for private economic activity.” *Id.* at 500. Though the quoted passage pertains specifically to Dillon’s Rule, Schragger sees Dillon’s Rule and home rule as stemming from similar ideological impulses to restrain cities from excessive involvement in the private market. See *id.* at 500–02; see also Barron, *supra* note 14, at 2294 (arguing that “old conservative” home rule reformers shared with Dillon the goal of circumscribing local power).

105. See Barron, *supra* note 14, at 2286–96; see also KRANE ET AL., *supra* note 92, at 10–11.

106. See Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 702–03 (1964).

107. See *id.* at 703–04 (citing *Ferran v. City of Palo Alto*, 122 P.2d 965 (Cal. Ct. App. 1942); citing *City of Arlington v. Lillard*, 294 S.W. 829 (Tex. 1927)).



Sandalow argued that courts were correct to hold that commercial regulation was a statewide rather than a local matter because, given the large number of local governments in any state, local regulation of commercial activity would risk “balkanizing” the state’s economy into a multitude of small fiefdoms.<sup>108</sup> Sandalow also argued, echoing James Madison’s famous *Federalist No. 10*,<sup>109</sup> that local home-rule power should be narrowly construed because local governments are, by virtue of their relatively smaller size, far more likely than states to be captured by special interests who can exploit vulnerable minorities for their own benefit.<sup>110</sup> The argument was reminiscent of the “old conservative” home-rule reformers, who expressed concern about local governments redistributing wealth to favored interests. Such favoritism made local governments incapable of being what Rich Schragger has called the “neutral framework for private economic activity” that liberal ideology requires the state to be.<sup>111</sup> Maintaining the boundary between the market and the government thus required that economic affairs be vested at the level of the state.

Sandalow’s observations proved prescient. Ever since, as we have seen, one clear thrust within imperio home-rule doctrine is for courts to consider efforts to regulate commerce—banking regulation, predatory lending, wage controls, rent control—as statewide rather than local in nature, due primarily to the need for statewide uniformity and the extraterritorial impacts of local commercial regulation.<sup>112</sup> And the Madisonian critique of local

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108. See Sandalow, *supra* note 106, at 704.

109. See THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 2003) (arguing that smaller jurisdictions are more likely than larger ones to enable oppressive “factions” to unfairly exploit minorities).

110. See Sandalow, *supra* note 106, at 710–21.

111. Schragger, *supra* note 104, at 500.

112. See *supra* notes 10–13 (collecting cases). Considering the link between home rule and the dormant Commerce Clause, it is noteworthy that courts today still use the dormant Commerce Clause, in an analogous fashion to home rule, to strike down laws that interfere with interstate commerce in the course of effectuating local interests. See, e.g., *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Nat. Res.*, 504 U.S. 353 (1992) (striking down a state law prohibiting counties from accepting solid waste from outside the county as a violation of the dormant Commerce Clause).

governments as especially vulnerable to special-interest capture has become a standard trope in the literature on local government.<sup>113</sup>

## *2. The local and the family*

If imperio home rule helps to maintain the boundary between the state and the market by conceptualizing commercial regulation as statewide in nature, it maintains the boundary between the state and the family, and between the market and the family, in exactly the opposite way: by conceptualizing matters relating to home and family as local rather than statewide in nature (thus providing a literal meaning to the term “home” rule). Earlier I discussed the “separate spheres” ideology, which posited that the home and market should be physically as well as conceptually separated in order to preserve the market as a realm for competitive self-seeking and the home as a refuge from the marketplace. The separate spheres ideology was essentially codified in single-use zoning ordinances, which courts enthusiastically endorsed, that required the geographical separation of residential from commercial and industrial uses.<sup>114</sup> Most often, these zoning laws had the express purpose of protecting single-family residential districts from “invasion” by other uses, and the courts, in the course of upholding such laws, rationalized them as legitimate efforts to protect the home and family from the adverse influence of the marketplace.<sup>115</sup>

The connection that early zoning advocates and courts drew between zoning and the protection of the home and family made it inevitable that land-use regulation would come to be apprehended as a peculiarly local power. Since de Tocqueville, the local has been perceived as having a certain closeness to the home and family that

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113. See, e.g., Schragger, *supra* note 104 at 491–98 (explaining that cities are likely to exploit immobile capital and be exploited by mobile capital); Carol M. Rose, *Planning and Dealing: Piecemeal Land Use Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 853–57 (1983) (observing that local governments are susceptible to special interest “capture” under Madison’s model). *But see* Gillette, *supra* note 4, at 1114–17 (challenging conventional wisdom and arguing that states may be more likely than local governments to be captured by special interests).

114. See *supra* notes 77–80 and accompanying text.

115. See *supra* notes 77–80 and accompanying text.

more remote levels of government lack.<sup>116</sup> We have seen already that under dual federalism, courts interpreted interstate commerce as an inherently “national” function; at the same time, they also interpreted matters related to home and family as “local.” As Reva Siegel explains, it was widely held in the late nineteenth and early twentieth century that the power to regulate the family was reserved for “local self-government.”<sup>117</sup> Hence, the national/local distinction replicated the market/family distinction in civil society.

Although in dual federalist lingo the term “local” was used interchangeably to mean state *or* local, perhaps reflecting the ambiguous place of local governments in our constitutional order, home-rule doctrine grafted the national/local dichotomy onto the state/local distinction; thus, just as commerce became a statewide function, the family came to be perceived as local in the literal sense (although we will have occasion to see some lingering ambiguity about the regulation of the family in Part II). According to Richard Briffault, courts consider “[t]he central function of local government” to be the protection of “the home and family—enabling residents to raise their children in ‘decent’ surroundings, servicing home and family needs and insulating home and family from undesirable changes in the surrounding area.”<sup>118</sup> Indeed, the connection between the family and the local is so strong that, where local governments act in matters that are perceived as affecting home and family, such as land-use regulation and school control, courts often conceptualize local governments as organic outgrowths of the

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116. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 53–54 (Sanford Kessler ed., Stephen D. Grant trans., 2000) (1835) (“It is in the township, at the center of the ordinary relations of life, that are concentrated the desire for esteem, the need born of real interests, the taste for power and *éclat*; these passions, which so often disturb society, change character when they can be thus exercised close to hearth and home and in a way in the bosom of the family.” (footnote omitted)).

117. See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 997–1003 (2002). While Siegel interprets the enactment of the Nineteenth Amendment as a rebuke to the “local self-government” argument, she also views the Supreme Court’s modern federalism jurisprudence as reprising that conception. See *id.* at 951–52, 1028–29, 1030–38. I discuss the new federalism jurisprudence *infra* notes 155–157 and accompanying text.

118. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 382 (1990).

family, extensions of the “private” sphere, not coercive governmental entities.<sup>119</sup>

A well-known example is the Supreme Court’s decision in *Village of Belle Terre v. Boraas*,<sup>120</sup> wherein the Court upheld a zoning ordinance limiting a community to single-family residences. The Court reasoned that a locality’s police power “is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.”<sup>121</sup> According to Briffault, the Court perceived Belle Terre as “an extension of the home, not an arm of the state, a defender of the family rather than an oppressor of individual liberty.”<sup>122</sup> In short, assigning family matters to the sphere of the local preserves the boundary between the family and the market by empowering local governments (through zoning laws) to protect the family from the market, and also preserves the boundary between the state and the family by keeping the coercive regulatory state at arm’s length from the local sphere of the family.<sup>123</sup>

As a result, in contrast to their stance on economic matters, courts broadly defer to local governments in matters involving land use and school control, and in doing so, as in *Belle Terre*, they often equate local control of such matters with the protection of home and family.<sup>124</sup> Furthermore, consistent with the imperio conception of

119. See Ford, *supra* note 81, at 1880–81 (explaining that courts cede local governments autonomy when they “understand the controversy in question to be analogous to the property or associational rights of individuals”).

120. 416 U.S. 1 (1974).

121. *Id.* at 9.

122. Briffault, *supra* note 118, at 383.

123. In light of my argument that imperio home rule assigns matters related to home and family to the sphere of the local, it is curious that under the aforementioned “private law” exception to home rule, *see supra* note 13, local governments have no authority to create family law. See, e.g., Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 153–55 (2005). Rather, as I explain in the next Part, local governments have the apparently exclusive authority to *defend* the normative conception of the family that the state *defines* through family law. In Part II, I will argue that this apparent inconsistency is actually a feature of liberalism because it uses the rhetoric that the local is the sphere of the family to conceal the state’s hegemony over family matters. See *infra* notes 243–69 and accompanying text. *Infra* note 125, I discuss at greater length the apparent inconsistency between the rhetoric of local control over land use and the reality of state control.

124. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49–50 (1973) (upholding a school financing scheme based on local property tax revenues despite severe

home rule, courts have, at least on occasion, immunized local governments against state legislative or federal judicial interference in matters affecting the home and family.<sup>125</sup>

interlocal inequalities in tax base on the grounds that “local control means . . . the freedom to devote more money to the education of one’s children”).

125. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 480–82 (1982) (invalidating a statewide initiative prohibiting local school districts from using race-based school assignment plans on grounds of respect for long-standing tradition of local control over public education); *Milliken v. Bradley*, 418 U.S. 717 (1974) (holding that federal district court lacked equitable power to order interdistrict school bussing as remedy for racial segregation in area schools due to tradition of local control of public schools); *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008) (en banc) (invalidating a state statute attempting to prohibit local government’s extraterritorial exercise of eminent domain power as unconstitutional interference with local government home rule authority); *Baker & Rodriguez*, *supra* note 8, at 1357–60 (observing that “[l]ocal zoning power is generally upheld against state intervention” in part because “the core idea of local control over land use has become a deeply embedded norm”); *id.* at 1359 (“[T]he states are quite limited in their ability to displace local regulations dealing with land.”).

It is true that, these cases notwithstanding, local governments generally exercise the land use power as delegates of the state, and the state can therefore dictate the terms on which local governments exercise that power. For instance, as David Barron mentions, background state laws, such as the requirement that localities finance services primarily from the local property tax, affect local government incentives in exercising the land use power. See Barron, *supra* note 14, at 2378–79. Notwithstanding the strong degree of state involvement in this area, however, my point here is that the courts *rhetorically* treat land use as a peculiarly local power. In *Rodriguez*, for example, the Supreme Court upheld a scheme of financing schools through local property taxes that was *imposed by the state* on the grounds that “local control means . . . the freedom to devote more money to the education of one’s children.” 411 U.S. at 49–50.

As I explain further in Part II, this is not empty rhetoric. First, the notion of local control has, on occasion, caused courts to vindicate local control even against the state itself, as in *Washington*. 458 U.S. at 480–82 (invalidating a statewide initiative prohibiting local school districts from using race-based school assignment plans on grounds of respect for long-standing tradition of local control over public education). Second, the idea that land use is a peculiarly local function has the paradoxical effect of strengthening and disguising *state* control over land use. Joan Williams argues that the Court’s rhetorical move in cases like *Rodriguez* was necessary because, in the aftermath of the Court’s Civil Rights-era jurisprudence holding that the Bill of Rights is incorporated against the *states*, state laws could only be immunized against Fourteenth Amendment challenges if characterized as *local* rather than state laws. See Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 106–15. Williams analogizes this rhetorical move to classical jurists’ efforts to create a “theory of powers absolute within their spheres,” in which the judge’s “task . . . is to make technical, legal judgments, not political ones.” *Id.* at 115–16. Thus, the liberal separation of spheres legitimizes state regulation in areas such as land use and school control by disguising it with a sentimental rhetoric of local control. This is a key component of my thesis that the liberal separation of spheres is an illusion that obfuscates the dominance of the state and capital over the local. See *infra* notes 243–69 and accompanying text.

### 3. *Uniformity and extraterritoriality*

Interestingly, as we have already seen in the *DeVita* case, when local governments enact policies that affect land use or public schools, the concerns about uniformity and extraterritoriality that were so important in cases involving commerce simply disappear. In some cases, indeed, the courts deny that local land-use and school policies even have any extraterritorial impacts.<sup>126</sup> In fact, however, because local land-use authority is often fragmented across dozens of municipalities within a single metropolitan area, local regulations involving land use and schools can have substantial extraterritorial impacts and cause significant statewide problems, such as poor regional land-use and transportation planning, shortages of regionally necessary but locally undesirable land uses, wide interlocal disparities in taxable resources and school quality, and the like.<sup>127</sup>

Though courts rarely articulate why uniformity and extraterritoriality are so important in cases involving commerce, only to vanish in cases dealing with the home and family, the discussion up to this point gives us some reason to speculate. Under the separate spheres ideology, as we have already seen, market and family are constructed as philosophically opposed spaces—the former the realm of competitive self-seeking, the latter the realm of love. This crudely drawn contrast enabled liberal jurists to draw a broader distinction: they conceptualized the market as “universal,” as having uniform application everywhere, whereas they conceptualized the family as “particular,” adapted to the unique circumstances of individual places.<sup>128</sup> All market transactions are fundamentally the same insofar as they are all arm’s-length transactions between self-

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126. See *Warth v. Seldin*, 422 U.S. 490, 509 (1975) (denying standing to challenge exclusionary zoning ordinance to taxpayers in neighboring community on grounds that zoning ordinance had no impact on tax rates in adjacent town); *Milliken*, 418 U.S. at 739–47 (holding that district court lacked equitable powers to order interdistrict bussing as remedy for segregated school system in Detroit area because neighboring suburbs had no responsibility for the predominantly black population of the Detroit school system).

127. See Briffault, *supra* note 18, at 1132–41 (describing some of these implications).

128. See Janet Halley, *After Gender: Tools for Progressives in a Shift from Sexual Domination to the Economic Family*, 31 PACE L. REV. 887, 895–97 (2011); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 756–58 (2010); cf. DOREEN MASSEY, SPACE, PLACE, AND GENDER 9–11 (1994) (explaining that, in Western thought, the universal is coded as masculine and the local as feminine).

interested individuals, but the family is governed by a spirit of altruism and affection that emerges organically from the particular local culture—hence, courts freely apply the universal law of contracts to all commercial transactions on the theory that contracts are simply impersonal transactions between juridical equals, whereas they decline to enforce contracts between family members because such contracts could threaten the ethos of altruism within the family.<sup>129</sup> The idea of the market as universal would explain why courts focus on extraterritoriality and uniformity when they perceive a matter as affecting the market, whereas the idea of the family as particular would explain why those factors become immaterial when courts perceive a matter as implicating the family. Because the market is universal, all commercial transactions must be governed by a uniform set of rules, but since families are produced by particularized local cultures, there is no uniform body of family law.<sup>130</sup>

The imagined dichotomy between the universal market and the particular family reinforces the classical judicial effort to construct an objective science of jurisprudence. By virtue of the separate spheres

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129. See *supra* note 58 and accompanying text. As Halley and Rittich point out, the universal/particular dichotomy can also be reversed, with the market being perceived as particular insofar as “[e]very [c]ontract is [u]nique,” and the family as universal insofar as “it is [f]undamental [e]verywhere.” See Halley, *supra* note 128, at 895–97; Halley & Rittich, *supra* note 128, at 756–58. As I discuss *infra* notes 215–17, 243–69 and accompanying text, home rule disguises the ways in which the family is universal (i.e., controlled by the state) by assigning family matters to the “particular” sphere of the local, and home rule also disguises that ways in which the market is particular by creating the appearance that capital has uniform impacts everywhere.

130. An alternative explanation for the commerce/land use distinction in home-rule doctrine is suggested by economic analysis. According to David Schleicher’s provocative theory, the division of power between state and local governments under home rule can be seen as resting on a distinction between “agglomerative efficiency” and “sorting efficiency.” See David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507. The state reserves to itself the power to regulate matters that have substantial spillover effects (hence the focus on extraterritoriality) while delegating to local governments control over matters, such as zoning and school control, that enable members of the population to “vote with their feet” and choose a municipality in which to settle. See *id.* at 1555–62. On closer inspection, Schleicher’s agglomeration/sorting dichotomy appears to be a structure of consciousness much like the market/family distinction. Zoning and school control, no less than financial regulation, have substantial spillover impacts that would seemingly call for agglomeration (i.e., a regional land use authority), but as I have noted, courts typically ignore those spillovers because of a pre-commitment to local control of family matters. Conversely, a municipality’s decision to protect the local public from predatory lending could be seen as a sorting mechanism intended to lure prospective residents who desire that protection.

ideology, the universal/particular distinction becomes a structure of consciousness that acquires what Lefebvre called “a quasi-natural self-evidence in everyday life and common sense.”<sup>131</sup> As such, the judiciary need not justify the boundary between the family and the market but merely identify it. As applied to home rule, once the court labels a matter as “commercial,” that is sufficient to evoke the whole set of cultural considerations bound up with the universal market, including a focus on uniformity and extraterritoriality.<sup>132</sup> Conversely, when a matter is identified as land use, that calls up the cultural understandings associated with the idea of the particular family, specifically the need for local diversity. A passing reference to “traditional” notions of state and local powers is all that is necessary to explain the division between the spheres. Of course, this observation begs the question that the next Part will answer: what if the market and the family are not as clearly distinguishable as this judicial construction makes them appear?

To sum up the argument so far, the separation of state and local authority via imperio home rule is also a mechanism for keeping the family, the market, and the state within their designated territorial spheres. Imperio home rule assigns commercial regulation to the sphere of the state and land-use regulation to the sphere of the local. Doing so creates a contrast between the market and the family in which the market can be seen as universal and the family as particular. As a result, courts strike down local commercial regulation as “statewide” based on its perceived extraterritorial impacts and effect on uniformity, while validating municipal land-use regulation and school control as “local” despite having similar impacts. The unspoken expectations attaching to each sphere and the apparent naturalness of the state/local and market/family distinctions cause this judicial line-drawing to appear objective and inexorable.

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131. See LEFEBVRE, *supra* note 82, at 225.

132. See Kennedy, *supra* note 67, at 6 (defining “legal consciousness” to mean that judges “share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind”).



*D. A Test of the Theory: Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*

If this summary is correct, it follows that the *subject matter* of any home-rule dispute will carry more weight in determining the outcome than the mechanical application of factors such as uniformity and extraterritoriality; indeed, the subject matter will determine whether those factors are even relevant.<sup>133</sup> To the extent a matter is characterized as commercial, extraterritoriality and uniformity will be paramount considerations, and they will weigh in favor of statewide control; if the matter is characterized as land use, these factors will be less weighty, perhaps even immaterial, and the matter will likely be perceived as local. The problem that inevitably arises, as we will see, is that commerce and land use, like the market and the family, are not neatly divisible.

Consider a test case, *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*<sup>134</sup> This case will demonstrate the significance of the land use/commerce distinction under imperio home rule but will also reveal that distinction to be untenable. In *Telluride*, the court considered whether a local affordable housing ordinance enacted by the ski resort town of Telluride, Colorado, which set maximum rental rates for new housing within the community, was preempted by a state law prohibiting local governments from enacting rent control. Under the imperio doctrine, the state law could not preempt Telluride's ordinance if the ordinance dealt with a matter of local concern. The Colorado Supreme Court, though, found that the ordinance did not address a matter of local concern.<sup>135</sup> The court

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133. See Baker & Rodriguez, *supra* note 8, at 1355 (suggesting that "regulatory categories explain some of the pattern of home rule decisions").

134. 3 P.3d 30 (Colo. 2000).

135. The court found that the ordinance addressed a matter of "mixed" local and statewide concern and therefore was preempted by a state law prohibiting "rent control." See *id.* at 39. Colorado is the lone state I have discovered to recognize a "mixed" sphere of state/local authority. The existence of the mixed sphere may appear to mark a departure from the imperio model. But, as the text describes, the analysis the Colorado courts apply to determine whether a matter is of "mixed" local and statewide concern is the traditional imperio inquiry of whether local regulation has extraterritorial impacts and impedes statewide uniformity. Moreover, consistent with the imperio model, these factors become irrelevant once the matter is characterized as land-use regulation rather than economic regulation.

The court's finding that rent control was a matter of "mixed" concern would presumably mean that a municipality could enact rent control under its home-rule initiative

recited the familiar factors of uniformity and extraterritoriality, reasoning that statewide “[u]niformity in landlord-tenant relations” was a priority because it “fosters informed and realistic expectations by the parties to a lease”<sup>136</sup> and that the ordinance had an impermissible extraterritorial impact because “[r]estricting the operation of the free market with respect to housing in one area may well cause housing investment and population to migrate to other communities already facing their own growth problems.”<sup>137</sup>

What is striking about the court’s description is that it makes *Telluride*’s ordinance sound like a pretty typical example of the kind of land-use regulation that courts routinely find to be within the local sphere. We recall, for example, that the *DeVita* court upheld Napa County’s general plan amendment drastically limiting growth in the county, notwithstanding that the amendment would clearly, as *Telluride* put it, “cause housing investment and population to migrate to other communities already facing their own growth problems,” on the theory that land-use regulation is a traditional area of local concern.<sup>138</sup> As we have just seen, courts generally consider land-use regulations to be local regardless of their effects on uniformity or their extraterritorial impact. Indeed, the principal *Telluride* dissent argued that even if the law had the impacts the majority claimed, it nevertheless fell within the scope of local control because it was “fundamentally a land use regulation.”<sup>139</sup>

The fact that the *Telluride* court struck down the affordable housing ordinance might then suggest that the court was challenging the imperio model and holding—as the dissent in

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power in the absence of preemptive state legislation. That implication is a fairly meaningless one, however, because the *Telluride* court takes such a sweeping approach to preemption as to effectively disable local governments from acting within the mixed sphere. Specifically, as the principal dissent noted, the court characterized *Telluride*’s ordinance as rent control despite the fact that the state law regarding rent control was clearly not directed at ordinances such as *Telluride*’s. *See id.* at 40–44 (Mullarkey, C.J., dissenting). Under such a broad approach to preemption, finding a matter to be of “mixed” concern would effectively mean that the matter was statewide. Coincidentally, many courts in other states have held that local governments lack the home-rule initiatory power to enact rent control. *See supra* note 13. Hence, the “mixed” analysis simply replicates the imperio analysis in a different guise.

136. *See Telluride*, 3 P.3d at 38.

137. *See id.* at 39.

138. *See supra* notes 46–50 and accompanying text.

139. *See Telluride*, 3 P.3d at 45–46 (Mullarkey, C.J., dissenting).

*DeVita* would have—that land-use regulation is not purely local in nature because it has impermissible extraterritorial impacts. That is not, however, how the court characterized its holding. Instead, the court answered the dissent by holding that the law was *not* a land-use regulation, which it acknowledged was traditionally a local matter, but rather an instance of “economic legislation.”<sup>140</sup> By implication, if the ordinance were properly characterized as land-use regulation, Telluride would have the freedom to act even if it did cause substantial extraterritorial impacts. Indeed, in a subsequent case involving an effort by Telluride to assert the eminent domain power over territory outside its borders, the Colorado Supreme Court held that Telluride *could* act extraterritorially, and that the state had no power to prevent Telluride from doing so, because Telluride was exercising the “local” prerogative of land-use regulation.<sup>141</sup>

Both the majority and the dissent in the first *Telluride* case were thus playing by the same set of imperio rules. To the extent the ordinance could be characterized as economic legislation, uniformity and extraterritorial impact were predominant concerns. But to the extent the ordinance was characterized as land-use regulation, those concerns evaporated. Both opinions implicitly agreed that the validity of the ordinance turned not on whether it had extraterritorial impacts or adversely affected uniformity but whether it could be characterized as commercial or land-use regulation. Both opinions are thus consistent with the liberal imperio model’s categorical separation of commercial regulation from land-use regulation, the market from the family.

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140. See *id.* at 39 n.9 (majority opinion). Although the court stated that “[t]he constitution does not assign the issue of rent control, or economic regulation generally, either to state or local regulation,” *id.* at 39, the combined effect of the court’s broad approach to preemption, as discussed *supra* note 135, and its relatively narrow conception of the local sphere, was to make rent control a statewide matter.

141. See *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161 (Colo. 2008); Baker & Rodriguez, *supra* note 8, at 1359. For discussion of the Telluride cases, see, for example, *id.* at 1358–60; Richard Briffault, *Town of Telluride v. San Miguel Valley Corp.: Extraterritoriality and Local Autonomy*, 86 DENV. U. L. REV. 1311 (2009). In addition to *Telluride*, David Barron discusses a few other cases in which courts have struck down local affordable-housing measures as outside the scope of local home-rule authority. See Barron, *supra* note 14, at 2357–61. In at least two of these cases, as in *Telluride*, the courts characterized the affordable-housing law at issue as something other than a land-use regulation.

At the same time, *Telluride* gives us reason to doubt the viability of the imperio model. As we have seen, the model presupposes that the various spheres could be neatly separated by a disinterested judiciary. *Telluride* makes clear, however, that the boundaries between the spheres are not readily ascertained. Was *Telluride*'s ordinance commercial regulation or land-use regulation? The court reasoned that the law was not a land-use regulation because it did not dictate the use of property.<sup>142</sup> But many modern land-use laws—such as subdivision regulations, growth controls, or concurrency requirements—similarly do not dictate permissible uses but are nevertheless municipal efforts to control how land is used.<sup>143</sup> Moreover, it is not clear that *Telluride*'s ordinance would have had the extraterritorial impacts the court described. As the dissent pointed out, *Telluride*'s affordable housing ordinance would not externalize the costs of housing restrictions to neighboring communities. To the contrary, *Telluride* enacted the ordinance in order to ensure that it absorbed the demand for low-income housing that it had itself created by approving new non-residential development.<sup>144</sup> Rather than having any extra-local impact, *Telluride*'s law was designed to *prevent* any extraterritorial impact by internalizing the impacts of its own local decisions.<sup>145</sup>

*Telluride* thus demonstrates how difficult it is to distinguish land-use regulation from commercial regulation. In this respect, as we will see presently, *Telluride* is emblematic of our “postmodern” age of globalization, in which the boundaries between the global and the local, the market and the family, are increasingly blurred. Yet, *Telluride* also shows that courts remain married to a model of judicial review that requires the assignment of matters to fixed categories despite the stubborn resistance of human life to being categorized. The disconnect between the reality and the judicial “consciousness” has important consequences that the following Part now explores.

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142. See *Telluride*, 3 P.3d at 39 n.9.

143. See *id.* at 45 (Mullarkey, C.J., dissenting) (providing examples of land use regulations that do not dictate the permissible uses of property).

144. See *id.* at 46–47.

145. *Id.*

## II. THE MARXIAN VIEW OF IMPERIO HOME RULE

If it has been liberalism's central ambition to erect clean boundaries between the various spheres of human activity, one signature characteristic of our "postmodern" global age is the evident unsustainability of those boundaries.<sup>146</sup> *Telluride*, as we have just seen, demonstrates how the distinction between land-use regulation and commercial regulation, seemingly so firm in the liberal imagination, is actually quite fuzzy in practice. This observation indicates that the broader market/family distinction, which the commercial/land-use distinction replicates at the doctrinal level in imperio home rule, has itself become unstable. Indeed, as Janet Halley points out, rather than being distinct from the market, the family is an economic unit, deeply bound up with the marketplace in numerous ways. The family is a "crucial site of consumption" under capitalism, where individuals "pool income and labor resources in that they allocate work responsibilities and income streams among household members for the purposes of reproducing both existing and new humans, securing social security, and contextualizing and distributing the costs and benefits of consumption."<sup>147</sup> Moreover, the family cannot be distinguished from the marketplace as an affective realm where the "rule of love" predominates over self-interest because the family is, no less than the marketplace, a site of arm's-length negotiation "in which conflicts of interest are just as likely as altruism, merger, and selfless cooperation."<sup>148</sup>

Likewise, the *spatial* boundary that liberalism sought to erect between the market and the family has also proven untenable, as modern technological developments and the shift from an industrial to a service- and information-based economy has enabled millions of Americans to work from home and also enabled millions of women to enter the workforce, undermining the sexual division of labor that

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146. See, e.g., DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 3–9 (1989) (explaining that postmodernism recognizes and celebrates the fragmentary nature of social life, in contrast to the "modern" liberal effort to create a homogenous, unified social order); BLOMLEY, *supra* note 94, at 51 (noting that "postmodern" legal scholarship denies asserted unity of liberal jurisprudence, "emphasizing instead the diversity of the micro-constituents of social life").

147. Halley, *supra* note 128, at 901.

148. Halley & Rittich, *supra* note 128, at 760.

underlay the home/work dichotomy.<sup>149</sup> In lockstep with these changes, urban design movements like the New Urbanism have challenged the predominant tradition of single-use zoning and sought to create mixed-use communities.<sup>150</sup> In fact, urban form as a whole is becoming increasingly “ageographical,” an endless vista of mixed high- and low-density housing, commerce, and industry, linked together in a regionally interdependent economy in which work, residence, and recreation all occur across porous boundaries.<sup>151</sup> The ageographical nature of urban form confounds the liberal notion of a defined physical sphere within which municipalities are licensed to act.

At the same time that the spatial boundary between home and work is being exposed as unsustainable, so is the quasi-territorial boundary dividing scalar levels of government, as well as the territorial boundary dividing different nation-states. Since the New Deal, the national government has increasingly asserted itself into areas once seen as statewide and local on the theory that any state or local action has extraterritorial impacts that affect national economic or cultural objectives; conversely, states frequently regulate matters that were once thought to fall within the national sphere of interstate commerce.<sup>152</sup> More recently, the onset of our current era of globalization has entailed increased capital and labor mobility across national borders and diminished the ability of nation-states to effectively regulate what has become a transnational economy and labor market.<sup>153</sup> As the Introduction pointed out, cities and states have assumed a far greater role in regulating the impacts of globalization to fill the vacuum left by federal government inaction.

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149. See Garnett, *supra* note 72, at 1193–95 (documenting evidence of an increasing home-working trend).

150. See *id.* at 1222–28 (commenting on the “New Urbanism”).

151. See Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 319–20 (1993) (citing Michael Sorkin’s use of term “ageographical city” to critique local government law’s depiction of municipalities as autonomous subjects).

152. See Young, *supra* note 84, at 150–53.

153. For some useful discussions of globalization’s effect on the nation-state, see, for example, YALE H. FERGUSON & RICHARD W. MANSBACH, *GLOBALIZATION: THE RETURN OF BORDERS TO A BORDERLESS WORLD?* 75–78 (2012); Mauro F. Guillén, *Is Globalization Civilizing, Destructive or Feeble? A Critique of Five Debates in the Social Science Literature*, in *READINGS IN GLOBALIZATION* 4, 11–13 (George Ritzer & Zeynep Atalay eds., 2010); Susan Strange, *The Westfailure System*, in *READINGS IN GLOBALIZATION*, *supra*, at 161.

It is perhaps for all of these reasons that courts have strayed from the liberal separation of spheres in Commerce Clause jurisprudence, recognizing that states and the national government have concurrent authority.<sup>154</sup>

However, courts have proven reluctant to abandon the idea of dual federalism entirely. Recent Supreme Court cases in the Commerce Clause area demonstrate that the Court is still concerned with determining the boundary line between the “truly national” and the “truly local,”<sup>155</sup> and that the market/family distinction remains a preferred mechanism for drawing this boundary line.<sup>156</sup> Moreover, as *Telluride* demonstrates, local government law in particular remains firmly entrenched in its liberal imperio phase. On this point, it is notable that many of the Supreme Court’s recent cases arguably reviving dual federalism involved disputes between national and *local* governments, not state governments.<sup>157</sup> In the following section, I speculate as to why courts have persisted in maintaining their attachment to liberal ideology despite its evident unworkability and why local government law appears particularly in thrall to that ideology. The remainder of this Part then discusses some of the consequences that have followed from the effort to maintain separate spheres during an increasingly borderless age.

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154. See Young, *supra* note 84, at 152 (stating that dual federalism has waned in Commerce Clause jurisprudence because “changes in the American economy and society at large . . . made exclusive enclaves of state (or federal) authority increasingly difficult to identify and to police”).

155. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000).

156. See *id.* at 615 (striking down the federal Violence Against Women Act as exceeding commerce power and noting that an expansive reading of commerce power would authorize Congress to improperly encroach upon “family law and other areas of traditional state regulation”); *United States v. Lopez*, 514 U.S. 549, 564–65 (1995) (reasoning that an expansive view of the Commerce Clause would inappropriately allow the federal government to regulate “family law (including marriage, divorce, and child custody)”).

157. See *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (holding that a federal statute cannot preempt state law governing municipal provision of telecommunications services because it would interfere with state authority over municipalities); *Printz v. United States*, 521 U.S. 898, 928 (1997) (prohibiting the federal government from commandeering local law enforcement officers to enforce federal statutes on the grounds that states “remain independent and autonomous within their proper sphere of authority”).

*A. The Enduring Appeal of Liberalism in a Global Age*

How can the liberal separation of spheres survive in this postmodern time of globalization? In part, as we have already seen, courts are wedded to a mode of jurisprudence in which law can be decisively separated from politics, so that the judicial process can be portrayed as objective and scientific, rather than messy, contingent, and political.<sup>158</sup> Though judicial thought has evolved from the “classical” era of legal reasoning and courts often recognize that law involves the balancing of competing interests, the lure of an objective science of jurisprudence remains strong, as evidenced by the courts’ inability to completely disavow dual federalism in the Commerce Clause context.

While globalization has undoubtedly complicated the liberal confidence in the separation of spheres, it has also in many ways intensified the allure of liberalism. Importantly, the liberal divide between the family and the market initially gained popularity in response to an earlier era of globalization during the nineteenth century. Emerging nation-states found the separation of spheres invented by liberal jurists congenial because it enabled states to be merged together into a transnational economy but at the same time allowed them to assert the necessity and legitimacy of the individual state as a protector of the family, which was now defined as something “popular, political, religious, cultural and particular, and therefore . . . eminently *national*.”<sup>159</sup> In our current age of globalization, observers have similarly remarked that nation-states must navigate between the competing pressures of global economic

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158. The Supreme Court’s “political question” doctrine, under which federal courts must decline to adjudicate matters deemed more appropriate for political than judicial decisionmaking, is one area in which the Court has expressed its continuing desire to separate law from politics. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 277–81 (2004) (holding the claim of political gerrymandering to be a nonjusticiable political question because of the lack of judicially discernible and manageable standards, noting that “law pronounced by the courts must be principled, rational, and based upon reasoned distinctions”); *see also infra* note 197 and accompanying text (discussing the political question doctrine in context of home rule).

159. Duncan Kennedy, *Two Globalizations of Law & Legal Thought: 1850-1968*, 36 SUFFOLK U. L. REV. 631, 646 (2003); Duncan Kennedy, *Savigny’s Family/Patrimony Distinction and Its Place in the Global Genealogy of Classical Legal Thought*, 58 AM. J. COMP. L. 811, 839 (2010) (stating that during nineteenth-century globalization, nations throughout the world “all adopted the same distinction between at least nominal respect for local family law and insistence on the adoption of the universal private law of the market”).



homogeneity and cultural particularity, between “McWorld” and “jihad.”<sup>160</sup> The notion of separate spheres for the market and the family is one way of balancing these considerations.

In striking this balance, local governments play a critical role. On one hand, cities have long been considered impediments to the creation of a universal economic market. Indeed, David Barron has shown that the fear of big-city political machines meddling in private economic affairs was one of the central concerns of the home-rule movement.<sup>161</sup> On the other hand, as we have also seen, the local was perceived as the only hope of preserving the sentiment of family life against the creeping homogenization and impersonality of modern commercial society.<sup>162</sup> Hence, the need to fix the status of local governments within the market/family divide has been amplified by the pressures of globalization.

There is an additional difficulty. The tension between the universality of the global marketplace and the particularity of the local sphere threatens to leave out the national. To maintain its salience in a global age, the nation-state must simultaneously assert itself as the vanguard of the nation’s cultural particularity against global capitalism *and* its status as a transcendent and universal force against local parochialism.<sup>163</sup> The notion of separate spheres—a clear divide between the family and the market, presided over and mediated by the state—can preserve the integrity of all three domains.

### *B. The Marxian Critique of Liberalism*

Thus, at least, in theory. In practice, as we have just seen, it has been extremely difficult to maintain the separation of spheres. This

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160. See BENJAMIN BARBER, *JIHAD V. MCWORLD: TERRORISM’S CHALLENGE TO DEMOCRACY* (1996) (describing the conflict in the globalizing world between “McWorld,” referring to the homogenizing force of globalization, and “jihad,” referring to groups that seek to turn back this homogenizing process by redrawing boundaries and asserting ethnic, racial, tribal, or religious identities).

161. See *supra* notes 101–04 and accompanying text.

162. See *supra* notes 74–79, 114–15 and accompanying text.

163. See FERGUSON & MANSBACH, *supra* note 153, at 30 (describing how the nation-state is being pulled apart by both globalization and localization); *infra* notes 224–37 (describing how the state attempts to resolve this difficulty by deploying different conceptions of territory).

difficulty was noticed early in the life of the modern nation-state by one of liberalism's most insightful critics, Karl Marx.<sup>164</sup> Marx saw clearly that the neat liberal boundary between the public and the private could not be maintained because capitalism was incapable of being bounded and would necessarily obliterate institutions designed to constrain it.<sup>165</sup> In such an environment, the liberal separation project could only serve to disguise the predominance of capitalism in all the supposedly independent spheres. In his famous essay on the Jewish question, Marx mocked the state's claim to be independent of civil society as an "unreal universality."<sup>166</sup> The state emancipates itself "politically" from civil society by formally excluding criteria such as wealth, property, or religious affiliation from the political sphere (e.g., prohibiting the establishment of religion, abolishing property qualifications for voting), but fails to accomplish genuine "human" emancipation because distinctions based on wealth and the like are allowed to persist in civil society outside the realm of the state.<sup>167</sup> Worse, political emancipation casts a veneer that legitimizes, while disguising, the continued enslavement to economic affairs in civil society. In his later works, Marx and his collaborator Friedrich Engels viewed the state and liberal ideology as mere "superstructures" that disguised an underlying conflict between labor and capital.<sup>168</sup> As they wrote: "[A]ll struggles within the state . . . are merely the illusory forms . . . in which the real struggles

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164. See Walzer, *supra* note 55, at 317 (noting that Marxists have been skeptical of the liberal "art of separation" because they "have generally stressed both the radical interdependence of the different social spheres and the direct and indirect causal links that radiate outward from the economy"); see also PETER SAUNDERS, SOCIAL THEORY AND THE URBAN QUESTION 16–17 (2d. ed. 1986) (arguing that for Marx "any explanation of the part can only be accomplished through an analysis of the whole").

165. See GEORGE RITZER, GLOBALIZATION: A BASIC TEXT 6 (2010) (describing how, according to Marx, "many of the solid, material realities that preceded capitalism (e.g.,[.] the structures of feudalism) were 'melted' by it and transformed into liquids").

166. See Marx, *supra* note 63, at 32–34. For a discussion of Marx's essay that stresses its connections to local government law in the United States, specifically the applicability of the "one person, one vote" rule to local governments, see Stahl, *supra* note 63, at 20, 24–25, 46–47.

167. See Marx, *supra* note 63, at 30–34.

168. See KARL MARX & FRIEDRICH ENGELS, THE GERMAN IDEOLOGY 47 (Prometheus Books 1998) (1845).

of the different classes are fought out among one another.”<sup>169</sup> The capitalist class, being stronger, inevitably dominates, and the state, though appearing to be independent and autonomous of capitalism, becomes an instrument of class domination.<sup>170</sup>

While Marx did not expressly take on the market/family distinction, Frances Olsen’s classic article on the market and the family used Marx to argue that this distinction was a pretense designed to habituate individuals to the harshness of the capitalist economic system. As Olsen writes: “The family offered men an altruistic motive and justification for carrying on their individualistic struggles in the marketplace. It also offered men compensation for their suffering in the debasing world and thus reduced resistance to the increasing dehumanization of the market.”<sup>171</sup> At the same time, the depiction of the marketplace as a sphere of cutthroat competition made it “a fearsome alternative to the home and thus tended to reconcile women to being consigned to their own sphere.”<sup>172</sup> The ill consequences of the market/family divide were hidden from people, however, because it became a structure of consciousness that they internalized as a natural feature of civil society rather than a deliberate construction of the state.<sup>173</sup>

Imperio home rule, which incorporates the market/family distinction within its state/local distinction, has a similar effect to that described by Marx and Olsen. As Section C below demonstrates, the neutral rhetoric of boundary maintenance that characterizes the state/local distinction disguises the ways in which imperio home rule actually secures the dominance of mobile capital over immobile local governments. However, imperio home rule also complicates the Marxian narrative a bit. As I have just emphasized, the state has not resigned itself to being a mere fig leaf for capitalism, but has sought to assert its independence by cultivating a sense of national cultural distinctiveness. Because the *local* has long been seen

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169. See *id.* at 52; see also DAVID HARVEY, *The Marxian Theory of the State*, in SPACES OF CAPITAL 267, 269 (2001).

170. See MARX & ENGELS, *supra* note 168, at 67–71, 98–101 (arguing that although the state is organized to effect the will of the ruling class, it presents itself as representative of a “universal” public interest).

171. Olsen, *supra* note 57, at 1524.

172. *Id.*

173. See *id.* at 1498.

as the fount of such distinctiveness, the state has accordingly encouraged local parochialism to flourish. At the same time, to preserve its status as a “universal” entity, the state must also keep a firm controlling hand on the local. Imperio home rule, as we shall see in Section D, gives the impression that local distinctiveness is being permitted to proliferate insofar as local governments have the exclusive power to regulate and protect the family, while under that guise the state plays a predominant role in determining what familial arrangements it will allow local governments to protect. In short, imperio home rule disguises the *state’s* hegemony over the local in much the same way that it disguises *capital’s* hegemony over the local.

It makes sense that both capital and the state have a similar interest in the suppression of the local. Despite the tensions between them, capital and the modern state have long been linked together, and to the ideology of liberalism. As the geographer David Harvey explains, capitalism and the state are both dependent upon an impersonal mode of authority, the concept of an abstracted “juridical person” or individual citizen, a uniform standard of exchange, the concepts of liberty and economic equality, and free capital and labor mobility.<sup>174</sup> For these reasons, they have each been threatened by the city, which poses collectivism against individuality and asserts the value of place as against free mobility.<sup>175</sup> Accordingly, it has long been a touchstone of local-government scholarship that liberal ideology has attempted to displace local governments with state control, to create a direct relationship between the state and individuals without the mediation of collectivities like the city.<sup>176</sup>

As Section E concludes, however, globalization has caused the liberal alliance between capitalism and the state to unravel. In accordance with Marx’s prediction, capitalism is beginning to

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174. See HARVEY, *supra* note 169, at 272–73 (internal quotation marks omitted).

175. See, e.g., Thomas Bender, *Intellectuals, Cities, and Citizenship in the United States: The 1890s and 1990s*, in CITIES AND CITIZENSHIP 21, 24–25 (James Holston ed., 1999) (describing the context that led to the adoption of home rule: “Cities and the essential character of city life seemed to constitute a challenge to the premises of the laissez-faire market celebrated by the regnant political economy of the Gilded Age. Cities were collective in spirit and in experience. Thus, they might be the staging ground for mounting a collectivist challenge to excessive individualism.”).

176. See, e.g., Frug, *supra* note 56, at 1074–82, 1099–109.

overtake the nation-state, threatening the state's authority and relevance. At the same time, as Marx also predicted, the liberal notion of separate spheres effectively disguises capital's emerging predominance over the state. As it turns out, our best hope to resist capital's ambitions is to re-energize the local.

### *C. Capital*

#### *1. Marx in space: Geography and capital*

Following Marx and Olsen, this section shows how imperio home rule enables and disguises the dominance of capital over the local via the market/family distinction. As we recall, imperio home rule instantiates the market/family distinction *spatially* by assigning commercial matters to the sphere of the state and family matters to the sphere of the local. Though Marx largely neglected the problem of space (as he did the family),<sup>177</sup> over the past few decades scholars in the field of geography have explored the role of space within Marx's analytical framework. The geographer Robert Sack has argued that territory—the notion that a political authority exercises control over everything within a particular place rather than over specific individuals or conduct<sup>178</sup>—is ideologically useful for the state because it enables politically-charged decisions to be disguised under the seeming neutrality and pre-political nature of spatial boundaries: “[l]egal and conventional assignments of behavior to territories” are “so important and well understood in the well-socialized individual that one often takes such assignments for granted and thus territory appears as the agent doing the controlling.”<sup>179</sup> One manifestation of this phenomenon, according to Sack, is that socioeconomic tensions or inequalities are often described as conflicts between territories, such as the city versus the suburb or Rustbelt versus Sunbelt.<sup>180</sup> In this regard, territory is, much like the market/family distinction, what Olsen refers to as “a structure of consciousness” that “shapes

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177. See JOHN R. LOGAN & HARVEY MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 10 (1987) (“Marx gave relatively little attention to space as an analytical problem.”); HARVEY, *supra* note 65, at xiii (noting that Marx was given to “dismissing the question of geographic variation as an ‘unnecessary complication’”).

178. See Sack, *supra* note 22, at 55; see also SASSEN, *supra* note 22, at 6.

179. Sack, *supra* note 22, at 59.

180. See *id.* at 63.

the society's view of what social relationships are 'natural' and, therefore, what social reforms are possible."<sup>181</sup>

As Sack notes, because territory has this naturalizing quality, it meshes neatly with Marx's analysis of capitalism and class conflict: though the state generally supports the hegemony of capitalism, it can obfuscate that hegemony and assert its own neutrality as between capital and labor by making capitalism's dominance appear as the product of territorial divisions that occur naturally rather than being created by capitalism and the state.<sup>182</sup> This again echoes Olsen's assertion that the market/family distinction assumes the character of "a natural attribute of civil society rather than the responsibility of the state."<sup>183</sup>

In their celebrated book *Urban Fortunes*, John Logan and Harvey Molotch subsequently elaborated on Sack's ideas. According to Logan and Molotch, conflicts over space are part of a broader struggle between capitalists who seek to exploit space as a fungible market commodity ("exchange value") and those who wish to maintain the space's non-commercial value as a site of collective sentiment or tradition ("use value").<sup>184</sup> These competing interests seek to manipulate the scale of governmental decision making—statewide or local, for example—depending on which scale favors their own interests in particular situations.<sup>185</sup> Logan and Molotch even mention home rule specifically, noting that the "[t]he limits of home rule . . . expand and contract in response to the power shifts" between use and exchange value interests.<sup>186</sup> Inevitably, according to Logan and Molotch, either because of capital's superior resources or the bias of the state in favor of capitalism, exchange value prevails over use value.<sup>187</sup>

181. Olsen, *supra* note 57, at 1498.

182. See Sack, *supra* note 22, at 67.

183. Olsen, *supra* note 57, at 1528.

184. See LOGAN & MOLOTCH, *supra* note 177, at 31–49.

185. *Id.* at 36–37 (stating that efforts to influence the scale of regulation "represent strategic manipulations of the sites of decision making in order to influence distributional outcomes among and within places").

186. *Id.* at 36.

187. *Id.* at 178 ("[T]he most durable feature in U.S. urban planning is the manipulation of government resources to serve the exchange interests of local elites . . .").

As Marx, Sack, and Olsen would predict, the essentially instrumental nature of land-use conflicts, and the inevitable triumph of exchange value over use value in those conflicts, are disguised because territorial scale has a quality of apparent naturalness that can easily be exploited by mobile capital. According to Boaventura de Sousa Santos, the state uses scale to “promote the expression of certain types of interests and disputes and suppress that of others” because “[e]ach scale reveals a phenomenon and distorts or hides others.”<sup>188</sup> For instance, Richard Walker and Michael Heiman argue that efforts during the 1970s to displace local land-use control with statewide control were often couched in neutral rhetoric about the benefits of statewide uniformity but were in fact driven by large developers seeking a more favorable forum for land-use decision making.<sup>189</sup> Under these circumstances, the rhetoric of the public interest “serves as an ideological screen for pursuit” of exchange values over use values.<sup>190</sup>

Likewise, Logan and Molotch argue that land-use regulatory structures such as planning and zoning are purportedly neutral devices, surrounded with “‘strategic rituals’ that connote expertise and efficiency,” but are actually designed to systematically favor exchange value interests.<sup>191</sup> In this sense, again, scale and territory function as structures of consciousness that shape our worldview of what is normal or natural, and thus minimize our capacity to challenge the ideological underpinnings of those structures.

## 2. *Exchange value and use value in home-rule doctrine*

Logan and Molotch’s argument that space disguises the class conflict embedded in the use value/exchange value distinction applies readily to imperio home rule. In home-rule doctrine, the use value/exchange value distinction is incorporated into the state/local and market/family distinctions, which have of course now assumed a spatial dimension. The consequence is that the ideological struggle

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188. Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC’Y 279, 284, 297 (1987).

189. See Richard A. Walker & Michael K. Heiman, *Quiet Revolution for Whom?*, 71 ANNALS ASS’N AM. GEOGRAPHERS 67 (1981).

190. See *id.* at 82.

191. See LOGAN & MOLOTCH, *supra* note 177, at 154, 147–99.

between exchange value and use value interests is disguised as a technical question about the appropriate boundary between the spheres. I first explore exchange value's embeddedness within the conception of statewide matters, then turn to how use value has been incorporated into the conception of local matters. In both cases, as we will see, the way that home-rule jurisprudence obscures the exchange value/use value dichotomy facilitates the dominance of capital.

*a. The state, the market, and exchange value.*

(1) *Class conflict and the rhetoric of neutrality.* Let us reconsider two of the cases we have seen so far, *Telluride* and *American Financial Services*. *Telluride*, we recall, involved a local affordable housing ordinance that capped rental rates on new housing in the city for the sake of ensuring that *Telluride*'s workforce could afford to live locally. As the court summarized it, the ordinance implicated on one hand "preserving investment capital in the rental market"<sup>192</sup> and "protecting the state's overall economic health"<sup>193</sup> by ensuring uniform statewide regulation of rents. On the other hand, *Telluride* had a "valid interest in controlling land use, reducing regional traffic congestion and air pollution, containing sprawl, preserving a sense of community, and improving the quality of life of the Town's employees."<sup>194</sup> *American Financial Services* dealt with Oakland's effort to regulate predatory lending. In challenging the ordinance, lenders stressed the importance of uniform lending standards throughout the state; in defending it, the city emphasized the impacts of predatory lending on particular low-income, minority neighborhoods.<sup>195</sup> Reviewing these cases in light of Logan and Molotch's framework, it becomes evident that the disputes between the parties in these cases were essentially conflicts between exchange and use values, the former being capital's interest in treating land as a fungible object of market exchange and the latter being local residents' desire to treat land as a collective asset to

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192. *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 39 (Colo. 2000).

193. *Id.*

194. *Id.*

195. *See supra* notes 28–45 and accompanying text (discussing *American Financial Services*).



be preserved for its non-pecuniary value to the community. As Logan and Molotch suggest, we can speculate that these competing interests have “strategic” motivations for advocating in favor of statewide or local control; namely, a ruling that the matter was statewide would resolve the conflict in favor of exchange value and a ruling that it was local would resolve the matter in favor of use value.<sup>196</sup>

As the geographical analysis further suggests, moreover, the state/local question involved in these cases was not a technical one but rather a political question as to whether use or exchange value should prevail: that is, whether to favor mobile capital or community residents.<sup>197</sup> As we have already seen, there is no objective, technical way in our global age to choose between the statewide and the local because these categories, like the market and the family, constantly overlap. Any argument in favor of statewide uniformity can be met with an equally forceful argument on behalf of local diversity, and vice versa. As Nestor Davidson writes of *Telluride*, “[t]he court’s discussion of extraterritorial impact and the value of uniformity could as easily have been replaced with debates about the instrumental value of local control of housing markets and the interests of vulnerable renters.”<sup>198</sup> The court was presented, in other words, with an ideological choice between two competing sets of values.

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196. See LOGAN & MOLOTCH, *supra* note 177, at 36–37 (stating that efforts to influence the scale of decision making “represent strategic manipulations of the sites of decision making in order to influence distributional outcomes among and within places”).

197. I use the term “political question” in the colloquial sense that the matter involves complex policy issues that are not resolvable on formal grounds rather than the legal sense that the matter is nonjusticiable under the “political question” doctrine. Nevertheless, the absence of principled, judicially-manageable standards for distinguishing state from local matters suggests that home rule could be considered a political question in the legal sense as well. See, e.g., *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (holding a claim of political gerrymandering to be a nonjusticiable political question because of the lack of judicially discernible and manageable standards, noting that “law pronounced by the courts must be principled, rational, and based upon reasoned distinctions”).

198. Nestor M. Davidson, *Vertical Learning: On Baker and Rodriguez’s “Constitutional Home Rule and Judicial Scrutiny,”* 86 DENV. U. L. REV. 1425, 1430–31 (2009) (“Discerning some inherent meaning in concepts like ‘local’ and ‘statewide’ can prove a tempting ground on which to make proxy judgments about the merits of whatever it is the state and local governments are fighting over in the first place.”).

Nevertheless, the judges involved in *Telluride* and *American Financial Services* did not frame the inquiry this way; rather, in much the same manner that Logan and Molotch described elites using “strategic rituals” and neutral rhetoric about the “public interest” to disguise the instrumental nature of land-use conflict, *Telluride* and *American Financial Services* approached the statewide/local question as if there were a straightforward, objectively verifiable and noncontroversial way of resolving it. In *Telluride*, for example, the court began from the presupposition that *Telluride*’s regulation was “commercial,” and thus began its analysis by arguing that “uniform access to state markets” is “an important state concern.”<sup>199</sup> Accordingly, it focused on the effect the regulation would have on mobile commercial interests to the near exclusion of the interests of the local population in regulating the use of land within its territory.<sup>200</sup>

Similarly in *American Financial Services*, the court began its analysis by citing the proposition that “[c]ertain areas of human behavior command statewide uniformity, especially the regulation of statewide commercial activities.”<sup>201</sup> Starting from this premise, the court asserted that “[c]ommercial reality today would confound any effective regulation of mortgage lending based on potentially hundreds of competing and inconsistent measures at the local level,”<sup>202</sup> and largely neglected the arguments advanced on Oakland’s behalf for why the matter required local treatment. On the other hand, the two dissents in *Telluride*, characterizing the matter as a land-use regulation, focused on how *Telluride*’s ordinance would affect the community itself and gave less attention to how it affected statewide financial markets.<sup>203</sup> Of all five relevant opinions, only the

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199. 3 P.3d at 38.

200. Interestingly, though the *Telluride* court apparently recognized that its task was to balance the competing interests in statewide versus local regulation, and although it gave lip service to what it called *Telluride*’s “valid interest” in enacting the affordable housing regulation, its substantive analysis focused entirely on the interest in uniformity and did not engage at all with *Telluride*’s argument for local control. *See id.* at 38–39.

201. *Am. Fin. Servs. Ass’n. v. City of Oakland*, 104 P.3d 813, 823 (Cal. 2005) (emphasis added) (quoting *N. Cal. Psychiatric Soc’y v. City of Berkeley*, 223 Cal. Rptr. 609, 612 (Ct. App. 1986)).

202. *Id.*

203. *See* 3 P.3d at 45–47 (Mullarkey, C.J., dissenting); *id.* at 47–48 (Hobbs, J., dissenting).

dissent in *American Financial Services* actually *balanced* the interests of the community against the interests of mobile capital.<sup>204</sup>

It should be clear that although the judges in these cases did not expressly use the rhetoric of exchange value and use value, the opinions nevertheless trafficked in those ideological constructs. When the majority opinions speak of the need for uniformity and the imperative to create universal economic markets unencumbered by local idiosyncrasy (“[c]ommercial reality today would confound any effective regulation of mortgage lending based on potentially hundreds of competing and inconsistent measures at the local level”),<sup>205</sup> they are implicitly prioritizing exchange value over use value. When the dissents speak of the need for communities to preserve the nonpecuniary values of place in the face of capital’s impositions (predatory lending threatens “the degradation of entire neighborhoods” and worsens “urban blight” in targeted communities),<sup>206</sup> they are prioritizing use value over exchange value.

In these opinions, however, the conceptual and rhetorical tools of imperio home rule enable the judges to mask what is in essence an ideological choice between use and exchange value under the guise that they are simply engaged in the neutral, objective task of judicial boundary maintenance. As both *Telluride* and *American Financial Services* demonstrate, imperio home rule creates an automatic association between commercial regulation and the notion of statewide uniformity (the sphere of the market), and a similar association between land-use regulation and the idea of local diversity (the sphere of the family). By “automatic,” I mean that there is no need for a judge to explain how he or she leapt from the premise that a matter is “commercial” to the conclusion that uniformity should be favored over diversity (or exchange value over use value) because it is simply understood that commercial matters require uniformity and therefore the point requires no further analysis or justification.<sup>207</sup> What makes these associations automatic

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204. See 104 P.3d at 832–34 (George, C.J., dissenting).

205. *Id.* at 823 (majority opinion).

206. *Id.* at 834 (George, C.J., dissenting).

207. This automatic association is part and parcel of a structure of consciousness. As Duncan Kennedy explains, legal consciousness means that judges “share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind.” Kennedy, *supra* note 67, at 6.

are the dual structures of consciousness at work—the state/local divide and the market/family divide. As we recall, Sack tells us that “[l]egal and conventional assignments of behavior to territories are . . . so important and well understood in the well-socialized individual that one often takes such assignments for granted and thus territory appears as the agent doing the controlling.”<sup>208</sup> The state/local divide is of course a way of assigning “behavior to territories.” In turn, the particular behaviors assigned to each territory are the suite of cultural expectations associated with the market and the family, respectively. We recall the words of Henri Lefebvre: “The family, the school, the workplace, the church, and so on—each possesses an ‘appropriate’ space. . . . In these spaces, a system of ‘adapted’ expectations and responses—rarely articulated as such because they seem obvious—acquire a quasi-natural self-evidence in everyday life and common sense.”<sup>209</sup> The marketplace is the “universal” sphere of abstract impersonal transactions, and, therefore, it is natural that we should favor mobile capital interests whenever a matter is framed as commercial in nature; the family is the “particular” sphere of the hearth and home, and, therefore, it is natural that we should favor existing local residents when a matter is framed as affecting the family. By structuring our behavior in this way, imperio home rule treats the exchange value/use value dichotomy “as something natural and not as the responsibility of the state.”<sup>210</sup>

(2) *Capital, uneven development, and territory.* Thus, as Marx predicts, the separation of spheres under imperio home rule functions to disguise class conflict. The dichotomy between use and exchange value is made to appear as the natural outcome of a common-sense territorial division between state and local, market and family. But Marx predicted more: by disguising class conflict, liberalism would also disguise the inevitable predominance of capitalism within that conflict.<sup>211</sup> Inevitable or not, it is surely not

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208. See Sack, *supra* note 22, at 59.

209. See LEFEBVRE, *supra* note 82, at 225.

210. Olsen, *supra* note 57, at 1506.

211. See MARX & ENGELS, *supra* note 168, at 67–71, 98–101 (arguing that the state is organized to effect the will of the ruling class but presents itself as representative of a “universal” public interest); Marx, *supra* note 63, at 30–34 (describing how “political

coincidental that the majority in *Telluride* and *American Financial Services* sided with exchange value over use value. The very idea of territory embodied in imperio home rule is deeply enmeshed with capitalism. Territory, Sack explains, is designed to create an impersonal connection between individuals and authority based on place.<sup>212</sup> Place becomes a conceptually empty substance that can be filled as the state's administrative needs require.<sup>213</sup> The idea of place's impersonality and conceptual emptiness is useful for the courts because it gives territory the appearance of neutrality. But it also necessarily privileges exchange value over use value. Conceptualizing land as an abstract, homogenous space, stripped of its idiosyncratic value as a particular place, enables it to be treated as a fungible commodity suitable for market exchange.<sup>214</sup>

The notion of land as abstract, homogenous space suitable for market exchange is reinforced by imperio home rule's territorial division of authority between state and local spheres. Cases like *Telluride* and *American Financial Services*, as we have seen, train their focus on the impacts of local regulation on statewide markets and largely ignore the converse—the impacts of statewide markets on local places. This occurs because the exchange value/use value dichotomy makes markets and places appear to be opposing forces in a zero-sum conflict. We are led to believe that, were it not for local regulation, capitalism's impacts would be smoothly uniform across local borders. Place, on this reading, is something entirely abstract and impersonal, a neutral space within which market transactions can occur. Geographers have shown, however, that it is a crucial component of capitalism to unevenly exploit space, investing in

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emancipation" disguises failure to achieve "human emancipation"). See generally *supra* notes 164–70 and accompanying text.

212. See Sack, *supra* note 22, at 59, 60 (stating that territory makes relationships, especially hierarchical relationships, impersonal).

213. See LEFEBVRE, *supra* note 82, at 227 (arguing that the state's aim is to make space "appear homogenous, the *same* throughout, organized according to a rationality of the identical and the repetitive that allows the State to introduce its presence, control and surveillance in the most isolated corners").

214. See Stahl, *supra* note 63, at 26–27 ("Once land's value was expressed through the universal medium of money, stripped of its local particularities, it could be easily bought and sold in the market by impersonal, absentee investors with no connection to the soil."). Geographers often distinguish between abstract, homogenous "space" and particularized, collective "place." See generally YI-FU TUAN, *SPACE AND PLACE* (1977).

certain places and disinvesting in others.<sup>215</sup> Importantly, this uneven development often has a class and racial dimension, as affluent whites have access to the spaces preferred by capital investors while the poor and minorities are left to fend for themselves in the spaces neglected or exploited by investors.<sup>216</sup> Indeed, as the dissent in *American Financial Services* emphasized, practices like predatory lending were heavily concentrated in low-income, minority communities like Oakland, devastating those areas while leaving others unscathed.<sup>217</sup>

Nevertheless, because the logic of imperio home rule dictates that regulating the marketplace is a statewide function requiring uniformity across borders and that the market is sharply distinguishable from the local sphere of the family where place is paramount, the court's characterization of predatory lending as commercial (i.e., within the sphere of the market) *a fortiori* caused it to ignore the localized impacts of mobile capitalism. The class, racial, and spatial inequality that capital investment begets is obfuscated by the rhetoric of commerce and uniformity. As such, the case for local regulation of capital is weakened. In this way, imperio home rule supports and disguises capital's hegemony over the local.

*b. The local, the family, and use value.* Based on the foregoing, it might be concluded that courts always rule in favor of statewide uniformity, as that tends to advantage exchange value and mobile capital. In fact, as we have already seen, courts are often highly deferential toward local government land-use regulation, even where such regulation is very restrictive of new development, leading to the counterintuitive conclusion that courts often prefer use value over exchange value. This is a deceptive picture, though. In our discussion of the separate spheres ideology, we saw that courts rhetorically elevated the family over the marketplace; as Frances Olsen observes, however, this rhetoric actually served to neutralize resistance to the increasing dominance of the market. She writes:

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215. See, e.g., SASKIA SASSEN, *THE GLOBAL CITY* 346–55 (1991) (arguing that capital is drawn to advantages of particular places and is only imperfectly mobile); HARVEY, *supra* note 146, at 293–96 (arguing that capital investment is heavily place-dependent).

216. See, e.g., NORMAN I. FAINSTEIN & SUSAN S. FAINSTEIN, *RESTRUCTURING THE CITY* 2–3 (1986) (arguing that uneven development in urban spaces leads to class and racial inequality among those spaces).

217. See *Am. Fin. Servs. Ass'n. v. City of Oakland*, 104 P.3d 813, 832–34 (Cal. 2005).

“The family offered men an altruistic motive and justification for carrying on their individualistic struggles in the marketplace. It also offered men compensation for their suffering in the debasing world and thus reduced resistance to the increasing dehumanization of the market.”<sup>218</sup>

The exchange value/use value dichotomy performs a similar function. Although the rhetoric surrounding local government land-use regulation sounds in use value, local government land-use regulation often has the practical impact of advantaging exchange value.<sup>219</sup> Capital investors—developers, real estate financiers, and the like—often prefer uniformity when they can exploit the advantages of particular places (such as Oakland’s vulnerability to predatory lending). When capital investors are indifferent as between different places within a region, however, they may prefer local control because they can then leverage one “autonomous” municipality against another simply by threatening to relocate to a different municipality. The ability of mobile capital to so exploit local government is facilitated by the fact that authority over land-use decisions in any particular metropolitan area is often fragmented among dozens of municipalities, a state of affairs that nominally exists in order to enable local control of the home and family.<sup>220</sup> According to Logan and Molotch, the fragmentation of local land-use authority means that the scale at which real estate capital operates is not matched by the scale of the jurisdictional units regulating it. This “pattern of suburban growth has provided capital investors with new opportunities for playing one small unit against another, thereby maximizing their options and further straining the resources of weak places.”<sup>221</sup>

As Logan and Molotch argue, then, mobile capital interests often seek to manipulate the scale at which decisions are made based on

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218. Olsen, *supra* note 57, at 1524.

219. LOGAN & MOLOTCH, *supra* note 177, at 14 (“In contrast to the use value rhetoric that regularly cloaks government policy making, the policies themselves routinely bolster exchange gains for the powerful.”).

220. See Briffault, *supra* note 18, at 1132–41 (describing the fragmentation of land use authority); Schragger, *supra* note 104, at 488–98 (describing the interlocal competition arising from fragmentation and how mobile capital can exploit this competition); Briffault, *supra* note 118, at 382–86 (arguing that local government law has been structured around the concept of local government as protector of home and family).

221. LOGAN & MOLOTCH, *supra* note 177, at 187.

what suits their needs in particular situations.<sup>222</sup> And they usually have the ability to manipulate scale in this way because they are territorially unbounded and thus can choose the scale of regulation they prefer on an ad hoc basis whereas local governments—thanks to imperio home rule—cannot escape from their territorial spheres to regulate capital more broadly. At the same time, though capital investors’ reasons for advocating one scale versus another are entirely instrumental, they can always present their arguments in the neutral language of statewide uniformity or local diversity, drawing upon the “natural” cultural associations of the different territorial spheres. Likewise, the fragmentation of authority among dozens of competing municipalities causes the phenomenon of uneven economic development—along with all the racial and socioeconomic inequality it entails—to appear as a consequence of the territorial diffusion of governmental power rather than a conscious choice by capital investors.<sup>223</sup> This phenomenon confirms Marx’s insights that capitalism cannot be constrained within a conceptual envelope and that efforts to do so ultimately facilitate and disguise its dominance.

Based on the discussion so far, it appears that the state plays a fairly passive role, simply bolstering capitalism’s efforts to suppress local autonomy. This conclusion would be consistent with Marx’s assertion that the state is a mere superstructure that exists to support the capitalist economic system. As I have indicated, however, Marx’s depiction of the state is incomplete. To maintain its relevance in a global age, the state must simultaneously assert its stature as the vanguard of local particularity against global capitalism and its stature as a universal state transcending local particularism. The state accordingly manipulates the state/local distinction under imperio home rule to navigate between the universal and the particular.

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222. See *id.* at 36–37 (arguing that efforts to influence the scale of decision making “represent strategic manipulations of the sites of decision making in order to influence distributional outcomes among and within places”).

223. See SAUNDERS, *supra* note 164, at 155–58 (describing how municipal fragmentation deflects accountability for uneven development). The next section pursues further how the rhetoric of municipal autonomy over land use and school control disguises the *state’s* responsibility for interlocal inequalities.



*D. The State**1. Law in space: The perspective from law and geography*

While geographers like Sack, Logan, and Molotch emphasize that territory reinforces and obfuscates the hegemony of capitalism, legal scholars like Richard Ford, working at the intersection of law and geography, have stressed how law deploys territory to serve and disguise the agenda of the nation-state.<sup>224</sup> The mechanism through which the state does this, according to Ford, should by now be familiar: it manipulates scale by constantly vacillating between competing territorial conceptions of local governmental authority, what Ford calls the “synthetic” and the “organic” modes.<sup>225</sup> In the synthetic mode, which we can loosely analogize to Logan and Molotch’s notion of exchange value, sub-national territorial authorities such as local governments are conceptualized as artificial creations of the state, “transitory, ephemeral and random.”<sup>226</sup> Under the synthetic mode, the state acts directly on territorially disembodied individuals, providing “a generic set of services to a mobile population.”<sup>227</sup> The synthetic mode is useful because it enables the state to present itself as “universal,” the only relevant scale of authority, thereby establishing its predominance over other, potentially competing territorial authorities.<sup>228</sup> As Ford is quick to note, the synthetic mode is also conducive to a capitalist economic

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224. See generally Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999).

225. See *id.* at 858–61.

226. *Id.* at 893.

227. *Id.* at 895.

228. See *id.* at 860–61, 888–97 (observing that the synthetic mode demonstrates the extent to which “American political history is characterized by the progressive centralization of power at the expense of locally distinctive political communities such as the states and local governments”); see also Santos, *supra* note 188, at 287 (“The modern state is based on the assumption that law operates on a single scale, the scale of the state.”); Stahl, *supra* note 63, at 8, 16–17 (describing the “centralization narrative” in which the state seeks to displace local territorial diversity “in favor of a universal state that is divorced from all local diversity and idiosyncrasy”).

system, which is likewise based on impersonal transactions among abstractly conceived individuals.<sup>229</sup>

While the synthetic mode facilitates the state's universality, Ford argues that the state, much like capital, often has an interest in deploying local distinctiveness, and here it uses the "organic" mode, which is loosely comparable to the notion of use value. Under the organic mode, the state emphasizes the degree to which local governments are natural outgrowths of civil society with inherent legitimacy, rather than mere creatures of the state.<sup>230</sup> The organic mode helps the state overcome one of the central dilemmas confronting it: while the state desires to transcend parochialism and assert its universality, it must also maintain its own independence from the homogenizing effects of capitalism and distinguish itself culturally from other territorial nation-states. This it does by sanctioning and often encouraging local difference. As Ford explains: "The emerging national governments needed to assert the sameness and uniformity of all their subjects. . . . But at the same time they needed to emphasize local distinctiveness because such distinctiveness helped to distinguish one *nation* from another."<sup>231</sup> As we recall, the market/family distinction was also initially conceived as a way of maintaining national cultural distinctiveness while linking states together into a common economic market.

The organic mode enables the state to strike a delicate balance between the universal and the particular. On one hand, while states have desired to exploit local distinctiveness, this was not something that states—most of which were themselves artificial creations, or "imagined communities"—could consciously produce; rather, this distinctiveness had to be perceived as emerging "organically" from the authentic local people.<sup>232</sup> On the other hand, to maintain their

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229. See Ford, *supra* note 224, at 890 (stating that the synthetic mode "served both to strengthen the federal government and perhaps more importantly, to support the homogenizing influence of industrial capitalism").

230. See *id.* at 859–61.

231. *Id.* at 867.

232. See *id.* at 884 (describing how English jurists rooted the common law in local customs at the same time they asserted the common law's universality in order to give the common law an "organic connection to England that would distinguish it from Roman or Justinian law"); see also BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (1983) (describing the nation as an "imagined community" whose members have little organic connection to each

own authority and the project of national centralization, states could not simply allow this distinctiveness to flourish independently. They required the ability to control the production of local culture, and they did so, according to Ford, through the practice of territorial jurisdiction. A key component of Ford's argument is that states use territory as a way of choosing which particular local interests to recognize, while at the same time making those interests appear as the natural outgrowths of an organic local community, thus disguising the state's own role in choosing what interests are recognized.<sup>233</sup> The state is able to do this, following Sack's argument, because of the seeming naturalness of territorial distinctions. According to Ford, "We imagine that the boundaries that define local governments and private concentrations of real property are a natural and inevitable function of geography and of a commitment to self-government or private property."<sup>234</sup> And "because local governments are commonly assumed to be the product of individual citizens' choices, which government only 'recognizes,' we tend to ignore or downplay the role and responsibility of government in their creation."<sup>235</sup> Accordingly, states use the "organic" conception of local government to manipulate the substantive content of local culture while maintaining the pretense that it is the localities themselves that independently produce this content.<sup>236</sup> The courts are only too happy to oblige the state in this endeavor because, as we have seen, the asserted neutrality of territory enables them to portray their own task as the entirely neutral one of identifying boundaries between territorial spheres.<sup>237</sup>

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other but imagine themselves as part of a single community thanks to novels and print media creating a sense of shared identity).

233. See Ford, *supra* note 224, at 887 ("The division of the body politic into organic territorial jurisdictions, then, can be seen as a part of a highly centralized scheme of political control—a scheme that recognizes particular interests and fails to recognize others and that defines and organizes groups through political territories.").

234. Ford, *supra* note 81, at 1857.

235. Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1368 (1997).

236. See *id.* at 1382–93 (arguing that courts permit racial discrimination in the creation of local governments by using a rhetoric of neutrality that makes such discrimination appear as the product of voluntary choice rather than state action).

237. See *id.* at 1368 (arguing that courts like territory because it enables them "to reduce normative questions to empirical questions").

Practically speaking, one of the most important consequences of the organic/artificial divide is that it disguises interlocal fiscal inequalities and de facto racial segregation by making them appear to be the product of voluntary choices by “organic” communities rather than policy decisions imposed by the state. As Ford writes, the state is allowed to “sanction and facilitate segregation” by creating and empowering local governments in a way that fosters segregation but then disclaiming any responsibility for the segregation that follows by characterizing local governments as “voluntary associations.”<sup>238</sup> For example, in *Missouri v. Jenkins*, the Supreme Court claimed that the phenomenon of “white flight” from urban areas was a response by white residents to governmental desegregation efforts.<sup>239</sup> As Ford puts it, the Court saw white flight as resulting from private choices to “live and congregate in racially separate spheres.”<sup>240</sup> According to Ford, however, white flight occurred against a background of decades of state-enforced separation of races and within a context in which the state has enabled white residents to easily flee urban centers for neighboring suburbs.<sup>241</sup> The notion of local governments as “organic” communities causes white flight to appear as a voluntary decision that the state merely recognizes, rather than as the result of state policies.<sup>242</sup> In this respect, the organic/artificial dichotomy functions much like the exchange value/use value dichotomy, which similarly masks the reality of uneven economic development with the rhetoric of uniformity and a corresponding rhetoric of local land-use control.

In sum, where Logan and Molotch see the scalar division of governmental authority as advancing, while obscuring, the hegemony of capital, Ford sees it as advancing, while obscuring, the state’s role in defining and controlling the contours of local life. Both schools, though, follow Marx and Sack in arguing that territory and scale function as ideological constructs that conceal and perpetuate spatial inequality.

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238. See *id.* at 1386.

239. 515 U.S. 70, 94–96 (1995) (finding the lower court’s determination that white flight is result of de jure segregation “inconsistent with the typical supposition” that white flight is more likely to result from desegregation).

240. See Ford, *supra* note 235, at 1387.

241. See *id.* at 1387–88.

242. See *generally id.*

*2. The local and the family, reconsidered*

Ford's analysis provides further insight into the consequences of imperio home rule. By designating the local as the sphere of the home and family, imperio home rule allows the state to exercise strict control over family affairs while publicly professing that such affairs are a peculiarly local matter. The result is that the state is able to deflect responsibility for the interlocal inequalities it creates by making them appear as voluntary choices by parochial municipalities.

Though Ford does not mention the market/family distinction explicitly, his discussion of how the state obscures its role in creating interlocal inequalities by using the supposed naturalness of territory recalls Frances Olsen's argument that the state obfuscates the inequalities it creates within the marketplace and the family by drawing upon the apparently natural dichotomy between those spheres. Under the market/family dichotomy, Olsen writes, "[i]nequality was said to result from the private relations among people and was thus a natural attribute of civil society rather than the responsibility of the state."<sup>243</sup> It is for this reason that Olsen describes the market/family distinction as a structure of consciousness. In the previous section, I emphasized that the state/local distinction under imperio home rule is also a structure of consciousness with a similarly obfuscatory impact in the realm of economic affairs.

In the realm of family affairs, imperio home rule combines these two structures of consciousness—the state/local distinction and the family/market distinction—to naturalize and disguise the state's role in producing local inequalities (or, depending on one's perspective, local cultural distinctiveness). Consider initially the famous case of *San Antonio Independent School District v. Rodriguez*.<sup>244</sup> This case presented two school districts within the city of San Antonio, Texas, one rich and one poor. Because of the disparity in the tax base between the two districts, the affluent district was able to spend almost twice as much per student as the poor school district.<sup>245</sup> Parents in the poorer district asserted that this inequality in school financing amounted to an equal protection violation. The U.S.

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243. Olsen, *supra* note 57, at 1528.

244. 411 U.S. 1 (1973).

245. *See id.* at 11–14 (describing a poorer district that spent approximately \$356 per student, compared with \$594 per student in an affluent district).

Supreme Court rejected the equal protection argument and, in the course of doing so, extolled the virtues of local control of education, tying that notion to the idea of home and family. According to the Court, local control of school financing entails “the freedom to devote more money to the education of one’s children” and an opportunity “for participation in the decisionmaking process that determines how those local tax dollars will be spent.”<sup>246</sup> Moreover, the Court reasoned that a more state centered financing system could “result in a comparable lessening of desired local autonomy.”<sup>247</sup> In response to the contention that the financing system was unequal, the Court observed that it is “inevitable that some localities are going to be blessed with more taxable assets than others.”<sup>248</sup> A system committed to local autonomy, in other words, must also tolerate some degree of interlocal inequality.

*Rodriguez* thus depicts public education funding as a product of local choices and local circumstances, an organic outgrowth of whatever resources a municipality happens to be “blessed” with. The state, as a coercive regulatory entity, is absent from the picture. However, as the dissent and commentators since have pointed out, the system for financing public education in Texas and elsewhere has not been chosen by localities, but is ordained and mandated by the *state* government.<sup>249</sup> The *Rodriguez* Court’s lionization of local control is especially inapt because the state of Texas has perhaps the most centralized system of public education in the country, in which the state board of education makes many of the critical curricular decisions for schools throughout the state.<sup>250</sup> This means that, at

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246. *See id.* at 49–50.

247. *Id.* at 52.

248. *Id.* at 54.

249. *See Williams, supra* note 125, at 108 (“A notable irony is that the fiscal scheme involved in *Rodriguez* was not imposed on the local level: the plaintiffs were challenging a mechanism of school financing imposed by the state of Texas.”).

250. The Texas Board of Education’s control over the textbooks used in Texas schools has received considerable media attention because the elected board, generally composed of non-experts in education, has frequently insisted that textbook publishers adapt the text for partisan ideological purposes having little pedagogical value—such as including material on the discredited “intelligent design” theory alongside the theory of evolution. Furthermore, the sheer size of the Texas textbook market enables the state to dictate to publishers the content of textbooks that are then distributed nationwide. *See, e.g.,* Marielle Elisabet Dirks, *Big Brother is Reading: An Examination of the Texas Textbook Controversy and the Legacy of Pico*, 17 U.C. DAVIS J. JUV. L. & POL’Y 29 (2013).

bottom, the inequality between school districts in San Antonio is neither “inevitable” nor a natural product of geographical diversity, but a deliberate policy decision by the state. Yet, because the logic of home rule dictates that home and family fall within the sphere of the local, the Court is able to evade the state’s responsibility for creating an unequal system of school financing by attributing it to the happenstance of local difference. Local control of the family is unassailable, even when the Court is directly confronted with contrary empirical evidence, because two structures of consciousness—the market/family distinction and the parallel state/local distinction—conspire to make it seem natural and inevitable rather than an affirmative construction of the state.

A similar pattern is evident in the case of *Milliken v. Bradley*,<sup>251</sup> which followed closely on the heels of *Rodriguez*. There, a federal district court found that the state of Michigan had undertaken affirmative de jure measures to racially segregate the Detroit public schools and, as an equitable remedy, ordered that students within the predominantly black Detroit public schools be bussed across district lines to predominantly white school districts in the Detroit suburbs.<sup>252</sup> The Supreme Court held, however, that the district court lacked the equitable power to order such a remedy because to do so would violate the integrity of suburban school districts and thus disrupt local autonomy over education.<sup>253</sup> As the Court stated, “the notion that school district lines may be casually ignored or treated as a mere administrative convenience” would offend the “deeply rooted” tradition of “local control over the operation of schools.”<sup>254</sup> Disturbing local autonomy over education would be especially unwarranted, in the Court’s view, because the district court found evidence of intentional racial discrimination only within the Detroit school system; there was no evidence that neighboring suburban jurisdictions committed any acts of de jure segregation. Therefore, those suburban school districts could not be held responsible for discriminatory actions taking place within Detroit.<sup>255</sup>

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251. 418 U.S. 717 (1974).

252. *See id.* at 732–34.

253. *See id.* at 739–47.

254. *Id.* at 741.

255. *See id.* at 744–45.

As in *Rodriguez*, *Milliken* conceals the role of the state in creating and perpetuating interlocal inequality by invoking the seeming neutrality and naturalness of local borders. In asserting that suburban municipalities could not be held responsible for acts taking place within Detroit, the Court elided the fact that those municipalities, as well as Detroit, are *all* creatures of the state. As such, any action taken by the state of Michigan (including the intentional discrimination the district court found) is attributable to its delegates.<sup>256</sup> If municipalities are simply creatures of the state, then the distinction between Bloomfield Hills and Detroit has no normative significance.<sup>257</sup> But imperio home rule gives local governments a status more elevated than the mere “creature,” that of a state within a state, an organic expression of popular will.<sup>258</sup> In this way, home rule deflects the state’s responsibility for actions taken within the local government’s autonomous sphere and makes those actions appear to result from “voluntary” local decisions rather than from state mandates.

At least two important consequences follow from home rule’s deceptive treatment of the relationship between state and local in the arena of family affairs (which I have defined to include school control and land use). First, the state’s regulation of the family, while disguised, is also legitimized by reference to the local. As Joan Williams perceptively writes, in the aftermath of the Civil Rights movement and the Warren Court’s recognition that the Fourteenth Amendment had incorporated the Bill of Rights’ protections against the states, it was problematic for the Court to endorse any notion of

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256. See *id.* at 770 (White, J., dissenting) (stating that constitutional violations “were committed by governmental entities for which the State is responsible”); *id.* at 808 (Marshall, J., dissenting) (opining that a state should not “be allowed to hide behind its delegation and compartmentalization of school districts to avoid its constitutional obligations to its children”).

257. See *id.* at 759 (Douglas, J., dissenting) (“[A]s a matter of Michigan law the State itself has the final say as to where and how school district lines should be drawn.”); Ford, *supra* note 81, at 1862 (“If local government is only a delegate, then all local concerns are really state concerns, all local policies really state policies, all local citizens really only state citizens, and all local elections really sub-state elections.”).

258. As discussed *supra* note 94, some theorists like Petr Kropotkin and Jerry Frug believed that the “state within a state” concept was inconsistent with liberalism’s drive for centralization. The analysis in the text shows, however, that the rhetoric of decentralization often supports centralization. See Ford, *supra* note 224, at 889 (stating that local difference is “a mechanism of the centralization of power”).



states' rights in opposition to the plaintiffs' equal protection claims in *Rodriguez* and *Milliken*.<sup>259</sup> Using the notion of separate spheres to decisively separate the state from the local, and then identifying matters related to the family as peculiarly local, enabled the Court to circumvent this difficulty. Indeed, Williams expressly analogizes the Court's rhetorical move in these cases to the classical juridical effort to identify distinct spheres of activity.<sup>260</sup> Second, home rule masks the negative consequences of state policy decisions regarding the home and family. For example, it has been well documented that requiring municipalities to finance services from local property taxes gives municipalities an incentive to use their zoning power to exclude uses that do not contribute positively to the tax base (a practice known as exclusionary zoning).<sup>261</sup> Exclusionary zoning, as I have discussed earlier, leads to sprawl, interlocal fiscal inequalities, de facto racial segregation, and other problems.<sup>262</sup> But because the *Rodriguez* Court characterizes local fiscal assets as something municipalities are naturally "blessed" with, exclusionary zoning and its consequences likewise appear to be natural and inevitable, rather than the consequences of state choices.

It is true that, at least on occasion, the Court must make good on its rhetoric of local control when there is a direct conflict between states and local governments. Thus, in the case of *Washington v. Seattle School District No. 1*,<sup>263</sup> the Court actually held that a statewide initiative could not override a city's race-based school assignment scheme, citing *Milliken* for the proposition that local control of schools was a fundamental principle that states could not violate.<sup>264</sup> But even in cases where local control of the family is vindicated, the invisible hand of the state is present. Although localities are often cast as the defenders of the home and family against the incursions of the outside world (including, as in *Seattle*, the state), it is ultimately the state rather than local governments that

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259. See Williams, *supra* note 125, at 106–15.

260. See *id.* at 115–16.

261. See FRUG & BARRON, *supra* note 7, at 148–61 (discussing how state policies structure local governments' exercise of the land use power); see also *supra* notes 17–19 and accompanying text.

262. See *supra* notes 17–19, 127 and accompanying text.

263. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

264. See *id.* at 480–82.

*defines* the family that local governments are then tasked to defend. One of the express limitations on local governments' home-rule powers in most states is that they cannot legislate in matters of "private law," which is usually construed to mean that local governments have no authority to make substantive decisions about the content of family law.<sup>265</sup> This limitation was dramatized when the city of San Francisco attempted a highly publicized but ultimately futile effort to confer marriage licenses on homosexual couples.<sup>266</sup> Thus, while land-use regulation and school control are mechanisms through which local governments may protect the family, they can only protect the normative conception of the family that the state has itself produced. Perhaps for this reason, though local land-use control is often lauded for allowing municipalities to meet their communities' unique needs and circumstances,<sup>267</sup> most municipalities nationwide have strikingly similar land-use laws.<sup>268</sup> Not surprisingly, the land-use regime adopted by the vast majority of communities is a banal single-use zoning scheme that rigidly separates home from work, thereby reinforcing the market/family distinction.<sup>269</sup> Yet, the

265. See, e.g., Schragger, *supra* note 123, at 155.

266. See *id.* at 148–50 (discussing efforts by San Francisco and other cities to issue same-sex marriage licenses); David J. Barron, *Why (And When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006). Notably, in his discussion of how the state "produces" localism as a means of asserting state control over the local, Richard Ford analogizes this "production" to the Victorian-era movement to control human sexuality by similarly "producing" it (i.e., categorizing and defining all kinds of sexual behavior). See Ford, *supra* note 224, at 906–09. Ford criticizes *Romer v. Evans*, 517 U.S. 620 (1996), which vindicated local efforts to provide civil rights protections to homosexuals against a state effort to deprive those protections, as an example of how sexual behavior is controlled by being confined to a particular local territory. See Ford, *supra* note 224, at 922–28. Hence, in *Romer*, the discourse of the local and the discourse of the family are fused in a way that, while purporting to empower the local, actually limits it.

267. See, e.g., *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 85 (1981) (Burger, C.J., dissenting) ("[A] community of people are—within limits—masters of their own environment . . .").

268. See DANIEL P. SELMI ET AL., *LAND USE REGULATION* 65 (4th ed. 2012) ("Zoning ordinances throughout the United States tend to be remarkably similar in their features despite the fact that no overarching federal law dictates uniformity.").

269. Single-use or "Euclidean" zoning became and remained the predominant form of zoning after the U.S. Commerce Department promulgated the Standard State Zoning Enabling Act (SSZEA) in 1922, which authorized municipalities to enact single-use zoning ordinances. The popularity of single-use zoning was further cemented by the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), upholding the constitutionality of single-use zoning. See Stahl, *supra* note 72, at 1257–60 (2008) (discussing

imperio idea that local government is the realm of home and family makes these zoning schemes appear as natural products of local choice and thus obscures the role of the state in defining and controlling the family.

*E. The Resurgence of the Local in the Time of Globalization*

To summarize the previous two sections, the notion embodied in imperio home rule that the state is the appropriate level for regulating the market and the local is the appropriate level for regulating the family enables both capital and the state to exercise hegemony over the local while disguising that hegemony under the guise of an ideologically neutral territorial divide. An essentially political decision about the scalar division of power is given the appearance of an objective, technical decision capable of impartial judicial divination.

If Marx were correct, though, this situation would be inherently unstable, for eventually capital would come to dominate the state just as it has the local sphere. As we recall, Marx argued that liberalism could not contain capitalism because, by its very nature, capitalism resists being contained; the creation of separate spheres would only leave capital free to manipulate the different spheres, and the state, though asserting its “emancipation” from capital, would ultimately become subservient to capital.<sup>270</sup> Indeed, in our current era of globalization, the liberal alliance between the state and capital has begun to unravel. While for a time capitalism tied its fortunes to the liberal state and the state reciprocated by regulating capital with a light hand,<sup>271</sup> globalization has driven a wedge between them because capital’s increasing mobility threatens to undermine the territorial basis of the nation-state’s authority. The borderless nature of capital is, in other words, difficult to reconcile with the geographic boundedness of nation-states.<sup>272</sup> An outpouring of

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SSZEA); *id.* at 1263–68 (discussing *Euclid*); *id.* at 1268–72 (discussing the continuing popularity of Euclidean zoning).

270. See *supra* notes 164–70 and accompanying text.

271. See, e.g., FERGUSON & MANSBACH, *supra* note 153, at 40–69 (describing historical relations between nation-state and capital).

272. See RITZER, *supra* note 165, at 12 (“Is there a successful way of reconciling the boundary transgressing character of markets with the boundary maintaining activities of nation-states?”); Guillén, *supra* note 153 (summarizing the debate about whether

literature shows how globalization has weakened the authority of the nation-state as borders have become increasingly porous and unmanageable.<sup>273</sup> Because national authority, like local authority, is spatially bounded while capitalism is unbounded, the ability of national governments to regulate capital is inherently limited.

Nevertheless, and as Marx would again predict, imperio home rule disguises capital's power over the state just as it disguises capital's power over the local, allowing the state to maintain its pretense of being emancipated from capitalism. In his classic essay *On the Jewish Question*, Marx argued that the distinction between the state and civil society served the purpose of making the state appear to be universal, even as the state served the interests of capital, because that distinction enabled the state to present itself in an exaggerated contrast with the evident parochialism of the private sphere.<sup>274</sup> As Marx wrote, the state is emancipated "politically" from civil society because it "is conscious of being a *political state* and manifests its *universality* only in opposition to" the realm of civil society.<sup>275</sup> Yet, the state's universality was "unreal" because it had not effected true "human" emancipation, the liberation of humanity from enslavement to economic affairs.<sup>276</sup>

Marx's analysis illuminates the relationship between the state and capital under imperio home rule. In *American Financial Services*, we recall, the court held that the state, as opposed to the local, was the appropriate level of government to regulate capital because the state can assure uniformity in commercial regulation that local governments cannot.<sup>277</sup> The court's implicit assertion is that the state is appropriately scaled to regulate mobile capital. But, as we have just seen, it is doubtful that the state is so appropriately scaled. In

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globalization and increasing capital mobility have diminished authority of the nation-state). Guillén quotes political theorist Michael Mosher: "[I]s there a successful way of reconciling the boundary transgressing character of markets with the boundary maintaining activities of nation-states?" *See id.* at 12.

273. *See, e.g.*, sources cited *supra* note 153.

274. *See* Marx, *supra* note 63, at 31–34. At this time, Marx had not yet developed his very sophisticated critique of capitalism, but his criticism of the liberal state for disguising the predominance of economic considerations in human affairs presages his later theory of how the state's pretense of universality masks class conflict and the predominance of capitalism.

275. *Id.* at 31.

276. *See id.* at 32–34.

277. *See supra* notes 28–45 and accompanying text.

accordance with Marx's analysis, imperio home rule enables the state to "manifest its universality . . . in opposition to" the particularism of the local sphere, although that universality is, in fact, "unreal" because the state is incapable of regulating mobile capital.

Moreover, in holding that states are more appropriately scaled to regulate capital than local governments, courts like *American Financial Services* may have matters exactly backward. As Saskia Sassen has argued, the agglomeration advantages of cities and their connections with other global cities makes them crucial nodes in the network of global capitalism.<sup>278</sup> Globalization has not meant despatialization but rather an intensified interest by capital in the advantages of particular places, which actually reduces capital mobility by making capitalism somewhat dependent on place.<sup>279</sup> This dependency enables at least some local governments to regulate capital without fear of capital flight, in marked contrast to Logan and Molotch's portrayal of mobile capital cynically manipulating local governments.<sup>280</sup> Indeed, the very reason why capital investors often insist on uniform statewide financial regulation in cases like *American Financial Services* is because they cannot simply shift their investment to other localities in response to undesirable local regulation.

Cities also have another advantage over nation-states in regulating mobile capital: the right incentives. If globalization has enhanced the importance of cities as economic centers, it has also made cities the focal points for global troubles—climate change, financial ruin, economic inequality, terrorism, and more.<sup>281</sup> As Zygmunt Bauman states, "cities have become dumping grounds for globally begotten problems."<sup>282</sup> Ninety percent of the world's cities are located on bodies of water that stand to be affected by climate

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278. See SASSEN, *supra* note 215, at 346–55; RITZER, *supra* note 165, at 421–25.

279. See, e.g., HARVEY, *supra* note 146, at 293–95 (arguing that globalization has enhanced competition among capitalists for access to most advantageous places).

280. Yishai Blank explains how cities have become critical components within a global "governance" network. According to Blank, cities have taken on this role because "they seem to embody many of the values that global governance wishes to advance: decentralization of power, voluntariness, participation, and responsiveness." See Blank, *supra* note 21, at 521–22. On Logan and Molotch's argument that capital mobility enables capital to exploit local governments, see *supra* notes 219–21 and accompanying text.

281. See RITZER, *supra* note 165, at 426–29.

282. ZYGMUNT BAUMAN, LIQUID LOVE 101 (2003).

change.<sup>283</sup> Poor cities like Oakland and Detroit, as we have seen, were ravaged by the global recession. Cities are sites of the most extreme global wealth inequality, home to those made rich by globalization and those impoverished by it.<sup>284</sup> They are magnets for immigrants and tempting targets for international terrorists.<sup>285</sup> The imminence of these global challenges at the local level means that local governments must take practical steps to address these issues and cannot fall prey to the ideological disputes that hamstring state and federal authorities.<sup>286</sup> This may explain why, as we saw earlier, cities like Oakland were so much more prescient about the impending global financial collapse than state and federal regulators—these cities saw capitalism’s practical impacts on their neighborhoods and were forced to act.

Of course, imperio home rule prevented Oakland from restraining predatory lending and it did so under the logic that states are better suited than localities to regulate capital. But in an age of globalization, it is becoming clear that exactly the opposite is the case. In this context, imperio home rule simply allows capital to exercise dominion over both state and local authorities.

### III. A NEW MODEL OF HOME RULE

As the previous section demonstrated, globalization challenges the idea that there is a natural scale at which regulation of any particular matter should or does occur.<sup>287</sup> The assignment of particular functions to particular scalar levels is, as Yishai Blank states,

283. See BARBER, *supra* note 6, at 130.

284. See SASSEN, *supra* note 215, at 351 (observing that the global city is a site of “economic and spatial polarization because of the disproportionate concentration of very high and very low income jobs”).

285. See RITZER, *supra* note 165, at 426.

286. See BARBER, *supra* note 6, at 98–102 (stressing the need for urban leaders to be pragmatic and eschew ideology when dealing with global challenges).

287. See, e.g., Blank, *supra* note 21, at 556–57 (arguing that globalization subjects our judgments about the proper allocation of power between centralized and decentralized authorities to “constant empirical challenge”); Reynolds, *supra* note 16, at 1290 (noting that “interconnection” has made statewide and local concerns extremely difficult to distinguish). Reynolds cites *City of Commerce City v. State*, 40 P.3d 1273, 1281 (Colo. 2002) (observing that increasing metropolitan area integration may change “local” concerns into “statewide” issues), and *City of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001) (concluding that globalization increases the need for uniformity of regulation).

“a normative question and a profoundly political one,” rather than “merely a technical one.”<sup>288</sup> Even Michael Walzer, a passionate defender of the liberal separation of spheres, argues that the public, rather than the courts, must determine where to place the boundary lines between the spheres. “Believers, scholars, workers and parents establish the lines—and then the citizens as a body do so, through the political process.”<sup>289</sup> Imperio home rule precludes this political process by transforming normative questions about the allocation of governmental power into technical questions better suited for the judiciary than for public contestation.<sup>290</sup> It follows that we need a new conception of home rule that acknowledges the frankly political nature of any choice about how to apportion power between states and local governments so as to invite an open dialogue about that apportionment. This Part briefly considers how we might revise home rule to accomplish that end.

#### *A. The Legislative Model*

One potential adaptation of home rule along the lines I suggest already exists in the form of the “legislative” home-rule model. During the 1950s, several municipal reform groups, including the National Municipal League and the National League of Cities, attempted to formulate a new approach to home rule. The reformers were disenchanted with the imperio model because, in their view, courts had so rigidly constricted the meaning of the term “local” as to effectively disable local governments vis-à-vis states.<sup>291</sup> The reformers understood that the terms “statewide” and “local” had no fixed meaning capable of judicial determination but were laden with value judgments more appropriately made by legislators than courts. According to Jefferson Fordham, one of the leaders of the reform movement, the imperio model’s state/local distinction improperly “shift[ed] largely political questions to the judicial forum for

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288. See Blank, *supra* note 21, at 556.

289. Walzer, *supra* note 55, at 328.

290. Cf. Olsen, *supra* note 57, at 1564 (“Dividing life between market and family compartmentalizes human experience in a way that prevents us from realizing the range of choices actually available to us.”). As observed *supra* note 197, home rule has many of the characteristics of a nonjusticiable political question.

291. See Diller, *supra* note 17, at 1124–27.

decision.”<sup>292</sup> The reformers advocated a new form of home rule under which states could simply delegate to local governments all the powers that states themselves possessed, regardless of whether the power was characterized as local or statewide (though the state could reserve to itself the right to act exclusively in specific subject-matter areas).<sup>293</sup> According to Paul Diller, this model “intended to substitute the legislature for the judiciary as the primary adjudicator of the extent of home rule powers”<sup>294</sup> and accordingly became known as the “legislative” home-rule model (or alternatively the Fordham model or the NML/NLC model).

Conceptually, the legislative model was a breakthrough because it undermined the notion that there are distinct spheres for state and local action and recognized that states and local government effectively have overlapping areas of authority. And, ironically, though the legislative model sees local governments largely as “state creatures” rather than as semi-autonomous “states within a state,” local governments may actually have *more* power under the legislative than the imperio model because the legislative model enables local governments to perform any governmental functions that have not been expressly reserved by the state, without interference by the often-hostile judiciary.

Nevertheless, despite the legislative reforms, the imperio model of home rule has remained predominant. Though approximately half the states that have home rule have formally adopted the legislative model,<sup>295</sup> in substance imperio home rule remains the order of the day in most of these states. For one thing, despite the legislative model’s effort to shift power away from the judiciary, courts still play an important role in determining whether a particular matter has in fact been preempted by the state.<sup>296</sup> And, in resolving this question,

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292. See MODEL CONSTITUTIONAL PROVISIONS FOR MUN. HOME RULE § 6 cmt. 3 (JEFFERSON B. FORDHAM, COMM. ON HOME RULE, AM. MUN. ASS’N 1953).

293. See MODEL STATE CONSTITUTION § 8.02 (NAT’L MUN. LEAGUE, 6th ed. rev. 1968); see also Barron, *supra* note 14, at 2325-27; Sandalow, *supra* note 106, at 685-92.

294. Diller, *supra* note 17, at 1126.

295. See Baker & Rodriguez, *supra* note 8, app. at 1374 (containing a comprehensive appendix listing home rule status of all fifty states). According to Baker and Rodriguez’s study, twenty-three states have imperio home rule, twenty-three have legislative home rule, and the remainder do not have home rule.

296. See Diller, *supra* note 17, at 1126.



courts frequently call upon the statewide/local distinction that the legislative model supposedly repudiated. For instance, some courts in legislative states continue to ask whether a matter is statewide or local in nature before considering a preemption challenge.<sup>297</sup> Other courts determine whether local action is impliedly preempted by examining, among other things, whether the matter at hand is local or statewide,<sup>298</sup> using the traditional imperio factors of uniformity and extraterritorial impact to guide the analysis.<sup>299</sup> Of course, this approach is entirely inconsistent with the legislative model, under which the local government is entitled to do *anything* that the state itself can do, including acting in matters of statewide concern, unless the state has expressed a clear intent to preempt the local government. In other words, courts are still using the conceptual tools of the imperio model, even within an analytical framework that was supposed to free local governments from the strictures of the statewide/local distinction. It is clear that the judiciary's attachment to the liberal separation of spheres remains strong in the arena of home rule.<sup>300</sup>

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297. See *City of Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 5 P.3d 934, 936–37 (Ariz. 2000) (holding that matters of purely local concern are immune from state preemption).

298. See *Mack Paramus Co. v. Mayor of Paramus*, 511 A.2d 1179 (N.J. 1986) (listing the need for statewide uniformity as one factor in implied preemption analysis); *Duff v. Twp. of Northampton*, 532 A.2d 500, 504 (Pa. Commw. Ct. 1987) (holding a local hunting ordinance preempted by state law because “municipalities have been granted limited police power over matters of local concern” and the scope of municipal power “does not extend to subjects inherently in need of uniform treatment or to matters of general public interest which necessarily require an exclusive state policy”); see also GORDON L. CLARK, JUDGES AND THE CITIES 79 (1985) (“[C]ourts have often read imperio-type language into the NLC [National League of Cities] provision, restricting the municipal initiative to the sphere of local affairs.”). As we have already seen, though California is an imperio state, the California Supreme Court in *American Financial Services* used a similarly tortuous logic to find Oakland’s predatory lending ordinance preempted. See *supra* notes 36–44 and accompanying text.

299. See cases cited *supra* note 298 and *Reynolds*, *supra* note 16, at 1288 (observing that in legislative home rule states, the extraterritorial impact factor is “a tool of implied preemption”).

300. In their comprehensive recent article on imperio home rule, Lynn Baker and Dan Rodriguez largely absolve the judiciary of responsibility for perpetuating the imperio model, arguing that the courts are faithfully attempting to interpret the language of state constitutions that expressly limit home rule to “local” matters. See Baker & Rodriguez, *supra* note 8, at 1366. The fact that courts have imported the statewide/local distinction into legislative home-rule states that have disavowed that limitation, however, shows that imperio home rule is at least as much a creature of the judiciary as it is the state constitutions.

*B. A Global Home-rule Model*

Even if it did work precisely as intended, the legislative model would still be troubling because it fails to acknowledge the importance of the local in our global age. Legislative home rule deliberately returns local governments to the status of state creatures, which it was the very purpose of home rule to change. While in practice, as I have just indicated, the legislative model may actually give local governments greater power than the imperio model, conceptually it enervates local governments because it theorizes them as mere administrative conveniences of the state, with no inherent connection to the lived experience or democratic aspirations of the local people. As such, it leaves us with an impoverished idea of the place of local governments in our political system. Recognizing that the distribution of power between state and local governments is a normative question that should be politically rather than judicially contested would be meaningless if our preconception of the local is that it has no identity distinct from the state.<sup>301</sup>

The imperio model, for all its flaws, at least enables us to envision the local as a vital site of democratic self-government. Though I have devoted considerable energy to maligning the liberal separation of spheres, it does have the virtue of affirming that there is a role for local governments within our constitutional order, that local governments are representatives of a local public rather than simply bureaucratic arms of the state. The legislative model, with all its postmodern mushiness, does little to help us define our vision of the local. In her critique of the liberal dichotomy between male/female and market/family, Frances Olsen strikes a similar chord. She writes that

[t]he division of human beings into male and female could be judged to have been a useful device for enabling us to become conscious of the wide range of human possibilities. The transcending of the male/female dichotomy would then be the

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301. Cf. Frug, *supra* note 151, at 334–35 (arguing that the postmodern conception of local government has the virtue of recognizing the porousness of local borders, but because it is so amorphous, it lacks “the capacity to nurture a sense of community”).

final step in the reclamation of the whole self, the last stage in this historical process.<sup>302</sup>

Likewise, the statewide/local dichotomy was perhaps a “useful device” enabling us to “become conscious of the wide range of” *local* possibilities.

A good example of how useful imperio home rule may have been is San Francisco’s aforementioned effort to address gay marriage by attempting (unsuccessfully) to issue same-sex marriage licenses. San Francisco was unsuccessful because, despite the shopworn liberal idea that the local is the sphere of the family, local governments are actually rather circumscribed in regulating family matters. Home rule is often interpreted to preclude the making of family law. But there is another way to see the San Francisco case. Arguably, the city was emboldened to take on gay marriage because the imperio conception gave it the confidence to believe it *had* the power to define the family, a power it would not have as a mere creature of the state.<sup>303</sup> Though its actions were ultimately invalidated, it could be argued that San Francisco lit the spark that eventually led to widespread public and judicial acceptance of gay marriage a decade later.

Maybe, then, imperio home rule has been “a useful device for enabling us to become conscious of the wide range of human possibilities,” in Olsen’s terms.<sup>304</sup> Our “final step in the reclamation of the whole self,” then, would be “the transcending of the [local/statewide] dichotomy.” In other words, we need a model of home rule that recognizes the vitality of the local but does not create

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302. See Olsen, *supra* note 57, at 1570–71.

303. See *Arlington Cty. v. White*, 528 S.E.2d 706 (Va. 2000) (holding that a statute authorizing municipalities to provide health benefits to employees and their dependents did not include authority to define dependents to encompass same-sex partners).

304. I expect disagreement on my point that imperio home rule enables local governments to act boldly in the belief that they have some conceptual room for action. Benjamin Barber argues, for example, that the key to local government innovation in the global age is that local governments are powerless and know themselves to be powerless. According to Barber, this knowledge requires local governments to be creative and pragmatic, and to form networks with other cities around the world. See BARBER, *supra* note 6, at 23, 70–71, 149. On the other hand, Barron, Frug, and Su argue that the uncertainty surrounding the scope of local governments’ home rule powers makes municipalities extraordinarily timid because they are worried that anything they might do could be invalidated as exceeding their home rule authority. See DAVID J. BARRON ET AL., *DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON* 9–12 (2004). This question calls for further empirical examination.

a fixed and unalterable distinction between statewide and local spheres. In our law, such a framework is missing, but considering the role that globalization has played in exposing the unworkability of the imperio model, it makes sense that we look to the arena of global governance for a new approach to local home rule. Indeed, the model World Charter of Local Self-Government, drafted by the United Nations Human Settlements Programme and organizations of city governments, provides a useful template. In pertinent part, the World Charter provides:

Article 2. The principle of local self-government shall be recognized in national legislation, and where practicable guaranteed in the constitution.

Article 3. Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population.<sup>305</sup>

Like imperio home rule, the World Charter provision recognizes that local governments are a vital part of any political order, and thus requires states to carve out a significant role for local authority. Unlike the imperio model, however, the Charter leaves the precise role of local governments undefined and is blessedly free of any territorial or scalar conception of local power. This framing invites a debate about the scope of local government authority while establishing as a baseline that there should be some meaningful division of power between state and local. In doing so, the charter avoids the imperio model's flaw of defining local power so specifically that it is inflexible and the legislative model's flaw of defining it so amorphously that local power becomes a mere fig leaf.

How exactly would these charter provisions work in practice? If some language were incorporated into state constitutions broadly reserving a role for local governments, it would not automatically solve the problem of how to distribute power between states and municipalities. State legislatures would still have to make substantive

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305. See U.N. Ctr. for Human Settlements (Habitat) and World Ass'ns of Cities and Local Auths. Coordination, *Towards a World Charter of Local Self-Government* (May 25, 1998), <http://www.gdrc.org/u-gov/charter.html>; see also Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1, 29 (2006) (discussing the World Charter).

decisions about what powers to retain and what powers to delegate to the local level, and courts would still have to resolve litigation that would arise as to the scope of the delegated powers. So what will have been achieved? Such language, if adopted in state constitutions, would hopefully have two felicitous consequences: first, it would signal to the public that the allocation of power between state and local governments is a normative political question that has no objective resolution, thus inviting the public to a broad discussion about how to allocate power free from technical or scalar preconceptions; and second, it would signal to the judiciary that courts must steer clear of attempting to discern the appropriate boundary between state and local authority. If all the relevant actors take their cues, we can finally have a long overdue conversation about the fate of local home rule in this time of globalization.

#### CONCLUSION

The terms “statewide concern” and “local concern” have no inherent meaning. These terms are only given meaning as we experience the ways state and local governments affect our lives. As such, the question of how power is to be divided between these authorities is one for the public to decide in an ongoing process of discourse and debate, and it is a question we must be free to revisit as our experience dictates. The first step toward achieving this end is to discard a model of home rule that depicts the state and local as impregnable spheres of authority capable of objective divination by an impartial judiciary.