

5-2018

American Unicameralism: The Structure of Local Legislatures

Noah M. Kazis

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal



Part of the [Law Commons](#)

Recommended Citation

Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. 1147 (2018).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol69/iss4/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

American Unicameralism: The Structure of Local Legislatures

NOAH M. KAZIS*

The bicameral legislature is a cornerstone of the Madisonian system, a basic assumption of American constitutionalism. But a different constitutional vision is hidden in plain sight. Of the more than 90,000 local governments in the United States—many of which began as bicameral before abandoning the federal model—each has now chosen a single chambered legislature. Efficiency and majoritarianism, not internal checks and balances, have driven the design of local legislatures. Local governments are not merely smaller units than states or the federal government; they have their own structure and their own animating principles. Theories built on bicameralism, including statutory interpretation methodologies and modes of judicial review, must be adapted for local, unicameral governments.

* Corporation Counsel Honors Fellow, New York City Law Department. Yale Law School, J.D. 2015. This Article reflects the Author's views alone, and not those of the New York City Law Department. I am grateful for insightful comments from Robert Ellickson, Suzanne Kahn, Richard Kazis, David Schleicher, Danny Townsend, and from Nestor Davidson, Nadav Shoked and the other participants in the Fordham International and Comparative Urban Law Conference. Thank you also to my very helpful editors at the *Hastings Law Journal*.

TABLE OF CONTENTS

INTRODUCTION	1149
A. DEFINING UNICAMERALISM	1157
I. HOW WE GOT HERE	1159
A. A HISTORY OF LOCAL UNICAMERALISM	1159
B. UNICAMERALISM IN SUBURBIA.....	1167
C. AN ANOMALY: NEW YORK CITY	1169
D. A HISTORY OF STATE BICAMERALISM	1172
II. WHY ARE LOCAL GOVERNMENTS UNICAMERAL?.....	1180
A. LOCAL GOVERNMENT IS CONSTRAINED—BUT IT ISN'T WEAK.....	1181
B. TIEBOUT SORTING AND SUBURBAN UNICAMERALISM	1187
C. CHECKS AND BALANCES IN AN EXECUTIVE-DOMINATED GOVERNMENT	1192
D. LACK OF SENTIMENT IN LOCAL LEGISLATURES.....	1197
E. CONVERGENCE IN THE FACE OF LOCAL DIFFERENCE	1200
III. THEORY AND DOCTRINE IN A UNICAMERAL WORLD	1202
A. LOCALISM, PARTICIPATION, AND UNICAMERALISM	1203
B. INTERPRETING STATUTES FROM UNICAMERAL LEGISLATURES.....	1210
C. JUDICIAL REVIEW AND LOCAL MAJORITARIANISM	1215
CONCLUSION.....	1221

A single branch of Legislation is a many headed Monster which without any check must soon defeat the very purposes for which it was created, and its members become a Tyranny dreadful in proportion to the numbers which compose it.¹

Today here in Philadelphia, we have an autocracy due to the rigidity of the present organization and the cumbersomeness of the city's government machinery.²

1. Letter from William Hooper, Delegate from N.C. to the Cont'l Congress, to the Cong. at Halifax (Oct. 26, 1776), in 10 COLONIAL RECORDS OF NORTH CAROLINA, 1775–76 867 (William L. Saunders ed., 1886) (quoted in John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 770 n. 283 (2002)).

2. *One Council Plan Gains in Favor, Charter Revision Along That Idea Is Indorsed Generally*, PHILA. INQUIRER, Jan. 11, 1919, at 6 (quoting Clinton Rogers Woodruff on Philadelphia's bicameral city council).

INTRODUCTION

On December 16, 2013, the Common Council of Everett, Massachusetts met for its regularly scheduled session.³ The Common Council moved through its sixteen-item agenda in just over an hour, performing such ordinary civic tasks as voting to accept \$20 in donations for the city's Veterans Services Department and adopting amendments to the zoning ordinance.⁴ Its meeting complete, the Common Council never convened again.⁵ Neither did the Everett Board of Aldermen, which had met the same evening.⁶ Effective January 2014, Everett had abolished its bicameral legislature, replacing the Common Council and Board of Aldermen—established 119 years before—with a single new City Council.⁷ With that, America's last bicameral local government was no more.⁸

Our national legislature, of course, has a Senate and a House of Representatives.⁹ Bicameralism is heralded as a cornerstone of the American system of government, a hallmark of checks-and-balances taught proudly in grade school civics.¹⁰ In the states, too, bicameralism is also the standard. Of the fifty states, forty-nine are bicameral—Nebraska is the sole exception.¹¹ From the traditional perspective of a two-level, national/state vision of federalism,¹² bicameralism appears as the American form of legislature.

But one Congress and fifty state legislatures are only the tip of the iceberg, quantitatively. There are more than 90,000 local governments in the United States.¹³ Each and every one has a single legislative chamber. Peering upwards from the local point of view, unicameralism appears predominant; the few bicameral governments appear

3. Joseph Domelowicz, Jr., *Zoning By-laws Updated to Match New Charter*, EVERETT INDEP. (Dec. 20, 2013), <http://www.everettindependent.com/2013/12/20/zoning-by-laws-updated-to-match-new-charter/>.

4. *Id.*

5. *Id.*

6. *Id.*

7. Steven A. Rosenberg, *Everett Finally Abandoning Its Bicameral Government*, BOS. GLOBE (Dec. 8, 2011), http://archive.boston.com/news/local/massachusetts/articles/2011/12/08/Everetts_bicameral_government_will_become_historical_footnote_in_2014/?page=1.

8. *Id.*

9. U.S. CONST. art. I.

10. See, e.g., MICH. DEP'T OF EDUC., MICHIGAN K-12 STANDARDS, SOCIAL STUDIES, AUG. 2015 DRAFT REVISIONS 54 (2015), http://www.michigan.gov/documents/mde/SS_COMBINED_August_2015_496557_7.pdf (listing bicameralism among key terms and features of Constitution for eighth grade history curriculum).

11. Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791, 792 (1997).

12. See Heather K. Gerken, *The Supreme Court 2009 Term Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 22 (2010).

13. U.S. CENSUS BUREAU, 2012 CENSUS OF GOVERNMENTS tbl. 2, LOCAL GOVERNMENTS BY TYPE AND STATE (2012).

exceptional. On this most fundamental question of legislative structure, one chamber or two, local government law has rejected the consensus of the state and federal governments. Local government law has adopted its own constitutional vision and this constitutional alternative has been hidden in plain sight.

This Article provides the first sustained exploration of local unicameralism. It fills a major gap in our understanding of the institutional structure of local governments—and therefore our federalist system. As Nestor Davidson recently argued, legal scholars pay far “too little attention to the inner workings of local government.”¹⁴ Local government scholarship has, for decades, focused on intergovernmental relationships: in the vertical direction, local autonomy from state control; in the horizontal direction, competition and coordination between municipalities.¹⁵ These are important, distinctive features of local government, whose powers are legally limited by the states that create them, and practically constrained by city/suburb relationships.

But local governments are also distinct in their internal structure. For too long, courts and scholars alike have treated local governments as “the smallest matryoshka doll nestled within increasingly larger state and federal counterparts, with the classic tripartite structure repeated in miniature” when, in fact, local governments are organized entirely differently.¹⁶ Scholars understand that federal constitutional structure has wide-ranging implications across all areas of the law. But only recently have local government scholars turned their attention to intra-governmental structure.¹⁷ This Article adds to that nascent literature. Recent scholarship has looked at local administrative law,¹⁸

14. Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 570 (2017).

15. *Id.* at 575; see also Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 900–01 (2013) (most local government law “is engaged in foundational debates surrounding the role of local governments within our state and federal constitutional structures”); Nestor M. Davidson, *Leaps and Bounds*, 108 MICH. L. REV. 957, 957–58 (2010) (reviewing GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008)) (noting that Professors Frug and Barron set out to provide a “comprehensive, empirical look at the legal frameworks under which cities and other local governments operate” but describing their actual subject as “home rule”).

16. Davidson, *supra* note 14, at 596.

17. See, e.g., Davidson, *supra* note 14; Clayton P. Gillette, *Can Municipal Political Structure Improve Fiscal Performance?*, 33 REV. BANKING & FIN. L. 571 (2013–2014); Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2546 (2006) (noting, in discussion of strong mayoral form of government, that “almost nothing has been written about the mayoralty in the legal literature”); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013) (explaining land use politics through lens of election law and internal legislative processes).

18. Davidson, *supra* note 14.

local election law,¹⁹ local judiciaries,²⁰ and the various ways the mayoralty can be structured.²¹ This Article turns to a different branch—the legislative—and begins the work of understanding how local governments' distinct legislative structures affect local government law and public law more broadly.²²

At the national level, legislative structure is given its proper due. Bicameralism stands as a pillar of federal constitutionalism, widely, and correctly, understood to be a foundational feature of the national government. The Framers argued vociferously for a bicameral federal legislature. In Federalist 22, for example, Alexander Hamilton declared that should a newly empowered federal government share with the Articles of Confederation a unicameral legislature, it would be “inconsistent with all the principles of good government,” and liable to “accumulate, in a single body, all the most important prerogatives of sovereignty, and thus entail upon our posterity one of the most execrable forms of government that human infatuation ever contrived.”²³ Better, Hamilton argued in a later publication, “to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.”²⁴ During the constitutional convention, James Wilson stated that a unicameral legislature would lead to “a Legislative despotism.”²⁵ Explained Wilson, “If the Legislative authority be not restrained, there can be neither liberty nor stability; and it can only be restrained by dividing it within itself, into distinct and independent branches.”²⁶

Indeed, the importance of bicameralism—both the fact of it and the details—led the Framers to make the “equal suffrage in the Senate” of each state the only proviso of the Constitution that could never²⁷ be

19. Schleicher, *supra* note 18, at 1699–1704; David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419 (2007).

20. Leib, *supra* note 15; Ethan J. Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 707 (2015).

21. Schragger, *supra* note 17.

22. In spoken remarks at a 2004 N.Y.U. symposium, Richard Briffault called out for a new analysis of legislative process in state and local government. Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 23 (2003). Without drawing any conclusions, Briffault briefly outlined a slew of differences between Congress and subnational legislatures, offering each as worthy of scholarly understanding. Although Briffault's call has not been widely heeded, this Article is in many ways an attempt to take up that banner.

23. THE FEDERALIST NO. 22 (Alexander Hamilton).

24. THE FEDERALIST NO. 51 (Alexander Hamilton).

25. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 254 (Max Farrand ed., 1911) (statement of James Wilson, June 16, 1787).

26. *Id.*

27. Amendments affecting the Constitutional provisions concerning slavery were immune to amendment until 1808. U.S. CONST. art. V.

amended according to the ordinary procedures of Article V.²⁸ Bicameralism was given special stature in the constitutional scheme even compared to other fundamental structural features of the new national government.²⁹

Contemporary constitutional observers paint bicameralism in the same glorious light as did the founding generation. The Supreme Court has described bicameralism as serving “essential constitutional functions,” and meant “to protect the people from the improvident exercise of power.”³⁰ Leading scholars and officials have described bicameralism as one of “the base institutions of the Constitution,”³¹ part of “the machinery of our popular form of government,”³² and a “hallmark[] of American government.”³³

But these paeans to bicameralism notwithstanding, “American government” is not, in fact, defined by bicameralism, nor do unified legislatures inexorably extinguish liberty and stability alike. Quantitatively and qualitatively, unicameral governments play a substantial role in our system of self-governance. In 2012, the country had 3031 counties,³⁴ all of which were unicameral.³⁵ There were 19,519 municipalities and 16,360 towns and townships, all unicameral.³⁶ The nation’s 51,146 special districts serve a dramatic array of functions, but never is a second chamber used to govern the nation’s hospital, highway, or housing districts.³⁷ Unicameralism, deemed “inconsistent with all the principles of good government” at the federal level, is preferred for every

28. *Id.* (“[N]o state, without its consent, shall be deprived of its equal suffrage in the Senate.”). There is scholarly debate over whether this provision can be amended or evaded although practically speaking, the Senate is not going anywhere. See Douglas Linder, *What in the Constitution Cannot Be Amended?* 23 ARIZ. L. REV. 717 (1981); Lester B. Orfield, *The Scope of the Federal Amending Power*, 28 MICH. L. REV. 550 (1930); Sanford Levinson, *The Political Implications of Amending Clauses*, 13 CONST. COMMENTARY 107 (1996); Lynn A. Baker & Samuel H. Dinkin, *The Senate: An Institution Whose Time Has Gone?*, 13 J.L. & POL. 21, 68–72 (1997).

29. Baker & Dinkin, *supra* note 28, at 21 (“The apportionment of representation in the United States Senate has always held an exalted place in our constitutional democracy.”). Of course, bicameralism’s status represents raw political compromise as well as principled commitment, but principles were in play. Indeed, there was always agreement about the need for bicameralism, even if the “Great Compromise” between large and small states was necessary to determine the apportionment of the two chambers. Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 NW. U. L. REV. 1091, 1145–51 (2012).

30. *I.N.S. v. Chadha*, 462 U.S. 919, 951, 957 (1983).

31. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1561 (1988).

32. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981–82 (1987).

33. Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 275–76 n.6 (2001).

34. U.S. CENSUS BUREAU, *supra* note 13, at tbl. 2.

35. TOM TODD, MINN. HOUSE OF REP., UNICAMERAL OR BICAMERAL STATE LEGISLATURES: THE POLICY DEBATE 12 (1999), <http://www.house.leg.state.mn.us/hrd/pubs/uni-bicam.pdf> (“Local governments in the United States all have unicameral governing bodies.”); see *supra* notes 7–8 and accompanying text.

36. U.S. CENSUS BUREAU, *supra* note 13, at tbl. 2.

37. U.S. CENSUS BUREAU, *supra* note 13, at tbl. 9.

local function in the country.³⁸ Nor are those local functions inconsequential. Local unicameral governments oversee more than 10.5 million public employees: the frontline workers in basic governmental functions from education to law enforcement to sanitation.³⁹ Citizens, serving as legislators in these tens of thousands of governments, learn the traditions and practices of unicameralism. The contrast between constitutional conventional wisdom and the on-the-ground reality of local government serves as the conceptual engine for this Article, its driving puzzle.

It deeply misunderstands American government, therefore, to elevate bicameralism to the special status it has been granted. Bicameralism is an essential American institution. Unicameralism is an essential American institution. It is impossible to understand American government without understanding bicameralism, yet scholars and courts have made the same mistake by ignoring the unicameral side of our constitutional structure. This Article recognizes the dual nature of our legislative institutions.

Judges have not reshaped doctrine to distinguish between unicameral and bicameral legislatures. In the rare instances where courts even discuss local unicameralism, it is usually because a local board was improperly constituted as unicameral or bicameral under local law.⁴⁰ In the still-less-common cases where litigants have attempted to distinguish unicameral legislatures on principle, the courts have not followed.⁴¹

Other scholars have noted the unicameral nature of local government only in passing. Richard Briffault, in short spoken remarks, has identified local unicameralism as important and unique to local government.⁴² But beyond posing the question of what unicameralism might mean, Briffault offered no answer, noting only that that “it does change the dynamic of the legislative process.”⁴³ As for the causes of local unicameralism, Saul Levmore has addressed local unicameralism as part of a short exploration of why bicameralism might be favored over alternative forms of supermajority requirement.⁴⁴ Levmore asserts that

38. THE FEDERALIST No. 22, *supra* note 23.

39. U.S. CENSUS BUREAU, 2015 ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL tbl. EP1500A3, Local Government Employment and Payroll Data: March 2015 (2015).

40. See *Lowe v. City of Bowling Green*, 247 S.W.2d 386, 387 (Ky. 1952) (invalidating statute enacted by unicameral “Common Council” after city grew to size that, under state law, required bicameral “General Council”); *Rhode Island Episcopal Convention v. City Council of Providence*, 159 A. 647, 648 (R.I. 1932) (invalidating statute enacted by both chambers of city council voting in aggregate, as single entity).

41. See, e.g., *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613 (8th Cir. 1980) (holding that absolute legislative immunity does not depend on legislative structure).

42. Briffault, *supra* note 22, at 26.

43. Briffault, *supra* note 22, at 26.

44. Saul Levmore, Commentary, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT’L REV. L. & ECON. 145 (1992). Specifically, Levmore argues that bicameralism is meant to block

while state governments require the stopping power of bicameralism, local governments can be checked by residents' exit power, their ability to vote with their feet.⁴⁵ While Levmore's analysis provides an important kernel of insight for understanding local unicameralism, his aim is only to sketch a simple framework for understanding state and national bicameralism. He does not offer any empirical evidence for his conception of local unicameralism, any additional factors driving local governments to adopt unicameralism, or any indication of why local unicameralism might matter.

For others, unicameralism is offered as a stand-alone data point that helps distinguish local government from the states. Helen Hershkoff has argued that federal justiciability doctrines are not applicable in state courts.⁴⁶ In a single sentence, she notes that local governments may be even more different from the federal model than states, noting that, among other things, they "may be unicameral."⁴⁷ Paul Diller, in a wonderfully creative article asking why cities have led policy innovation in public health, suggests as one of many reasons that local legislatures have fewer veto points: not only are they unicameral, but they tend not to require supermajorities to pass legislation and have a less complex committee structure.⁴⁸ Clayton Gillette, in a sustained analysis of why local governments pursue redistribution, includes the fact that "[s]tate legislative processes are also more likely than local ones to be characterized by bicameral legislatures" as one variable explaining the power of the status quo in state legislatures.⁴⁹ Finally, Lynn Baker argues that unicameral local governments are less likely to protect racial minorities and that, as a result, her defense of state-level plebiscites would be stronger at the local level.⁵⁰

legislation enacted in haste or by small minorities without stopping too much legislation that enjoys the support of majorities—it is meant to help quality legislation supported by, say, fifty-five percent of the public, to pass. *Id.* at 157–58.

45. *Id.* at 161 ("The imposition of external costs requires a captive set of losers.").

46. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1834 (2001).

47. *Id.* at 1925.

48. Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1266–67 (2014).

49. CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 181 (2011).

50. Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT. L. REV. 707, 716 n.21 (1991) ("To the extent that even these representative bodies are not found to provide racial minorities better protection against disadvantageous legislation than plebiscites, the case will be even stronger with regard to local representative lawmaking bodies."). Somewhat strangely, Baker also suggests that there is "no analogue of the gubernatorial veto" at the local level, *id.*, when mayoral vetoes are common in "strong mayor" systems. *See, e.g.*, SEATTLE CITY CHARTER, art. IV, § 12 (describing veto power). This is indicative of how even where scholars have identified local unicameralism as important, local government has been an afterthought.

These mentions of local unicameralism—some as fleeting as one sentence—indicate its importance. As these scholars demonstrate, unicameralism has implications across issue areas. But these scholars' attention is elsewhere, and they provide no sustained investigation of local unicameralism. This Article provides the thorough explanation of both the causes and implications of local unicameralism that this basic structural fact merits.

This Article proceeds in three parts. After this introduction, Part I offers a historical perspective, laying an empirical foundation for how both local and state legislatures took their present forms. Local governments were not always unicameral, and state governments were not always bicameral. Each made choices—contested, ideological choices—over how to structure themselves. Returning to those moments of contest reveals why citizens settled on the legislative structures that now seem intuitive. With a zeal for efficiency, American cities across the country and across more than a century—from the mid-1800s to the late 20th century—embraced modernization and paid short shrift to tradition. The states, in contrast, sought the dignity of sharing a legislative structure with the federal government and feared unchecked legislative power.

Part II then marries those historical foundations to contemporary theoretical understandings of local government to identify the root causes of local unicameralism. I reject the simplest explanation for local unicameralism that local governments are so powerless that checks and balances are pointless. Local government wields enormous power within its sphere of influence, and residents care deeply about its choices. Neighbors pack zoning hearings, parents intervene in the smallest classroom decisions, and people march and sometimes riot over police behavior. That said, constraints on local power, whether interlocal competition or state oversight, do provide a partial explanation of local unicameralism: The worst-case scenarios of unchecked power are somewhat less threatening.

But at the same time, paradoxically, local power—particularly over land use and education—also explains unicameralism. At the local level, residents sort themselves into communities with shared values and a common (often exclusionary) political agenda. Voters want their local governments to exercise their powers efficiently, even ruthlessly, to defend the land use controls and school systems that define their communities and support their property values. Unicameralism removes the roadblocks to these popular forms of local authority.

The structure of local legislatures also reflects the executive branches with which they interact. Local governments are disproportionately responsible for implementation and service delivery, as compared to policymaking, and accordingly, they are dominated by

their executive branches. Local unicameralism is a response to executive power. If executives control government—and can act even without legislative input—legislatures must speak with one voice in order to counteract the administration, as unicameral legislatures are better able to do.

The executive nature of local government provides a final explanation for local unicameralism. Local legislatures are not imbued with great symbolic significance. While state and federal legislatures (or local executives) are sites of civic identity, not lightly changed, local legislatures simply are not. Local legislatures, and perhaps local governments generally, are perceived more instrumentally.⁵¹

Local unicameralism is important in its own right—we should understand how our cities, towns, school districts and counties function—but its significance ripples across the law. In Part III, I explore how local unicameralism might affect three long-running debates in legal scholarship. Within local government law, local unicameralism cuts against established theories of participatory localism, which praise local government as a site for civic engagement. Local legislatures are designed for efficiency and instrumentalism, not participation. Those seeking consensus and deliberation in their local governments would do well to look outside the legislative branch. Next, widening the lens to broad questions of statutory interpretation, local unicameralism might allow greater reliance on legislative history. The constitutional arguments against using legislative history do not translate to a unicameral context. Finally, when reviewing local statutes' constitutionality, courts should adjust their practice of judicial review to the hyper-majoritarianism of local government. Judges should grant greater leeway to experimentalism and policy innovation but impose stricter oversight over exclusionary or expropriative actions.

This Article offers no definitive or comprehensive declaration of the meaning of local unicameralism. A single fact about legislative structure could hardly resolve such essential issues as judicial review, and conversely, unicameralism is so foundational a fact about local governmental structure that it surely has other implications. Necessarily, this Article only begins a conversation it cannot conclude. Our constitutional system, when taken as a whole, divides the work of legislation between bicameral and unicameral governments. We must no longer ignore the second half of that system.

51. This is consistent with the doctrinal fact that local governments are mere instrumentalities of the state. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (“Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the state . . .”).

A. DEFINING UNICAMERALISM

In the local context, precisely defining unicameralism and bicameralism proves surprisingly difficult. It is more or less obvious that Congress is bicameral: Both the House and Senate must each act, separately but concurrently, to pass a bill.⁵² However, the explosion of local governmental forms, which rarely parallel national institutions exactly, renders this more complex. Bicameral local legislatures need not look like Congress and unicameral local legislatures need not look like the House of Representatives.

First, there is not always separation of powers at the local level.⁵³ In weak mayor systems, the mayor is simply the first council member among many. In council-manager systems, as in parliamentary systems, there is no elected executive at all.⁵⁴ Some entities, such as zoning boards, perform legislative, judicial, and executive functions.⁵⁵ Thus, it can be more difficult to identify where the legislative power is exercised.

Second, while in the federal system “all legislative powers” are granted to Congress,⁵⁶ legislative powers can be disaggregated by function at the local level. A school board might be elected separately from a city or town council, for example.⁵⁷ These are two separate bodies, each essentially legislative, but without concurrent authority. This Article is not about the separation of legislative powers across different government entities, but about the separation of powers within the legislature of a single local government. Even within a single government, the legislative power might be divided functionally across different entities. For example, in a small number of Maine towns, an

52. That committees within each chamber might be required to act, that the Senate has an effective supermajority requirement in the filibuster, and that the President may veto legislation affects the shape of the legislative process but not the basic fact of bicameralism. That the Senate alone acts on treaty ratification and in confirming presidential appointments arguably does make our legislature unicameral in those areas. U.S. CONST. art. II, § 2.

53. *Cf.* *Moreau v. Flanders*, 15 A.3d 565, 579–80 n.16 (R.I. 2011) (noting that “the separation of powers doctrine is a concept foreign to municipal governance” and collecting cases).

54. *See* Schragger, *supra* note 17, at 2548 (describing council-manager systems); H. George Frederickson et al., *The Changing Structure of American Cities: A Study of the Diffusion of Innovation*, 64 PUBLIC ADMIN. REV. 320, 320 (2004) (comparing council-manager cities to parliamentary systems).

55. *See, e.g.*, Jeffrey M. Taylor, Note, *Untangling the Law of Site-Specific Rezoning in Florida: A Critical Evaluation of the Functional Approach*, 45 FLA. L. REV. 873, 892 n.155 (1993) (“[Z]oning boards are vested with the legislative function in creating a comprehensive plan, the judicial function in granting variances and special exemptions, and the executive function in hiring agents to enforce zoning and building codes.”).

56. U.S. CONST. art. I, § 1.

57. *See, e.g.*, MASS. GEN. LAWS ch. 71, § 37 (2018) (describing school committees as part of towns and cities); *see also* MASS. GEN. LAWS ch. 41, § 1 (2018) (describing process for election of school committees in towns).

open town meeting votes on the budget while an elected council passes all other legislation.⁵⁸

To tread carefully, I use the following definition of unicameralism. Unicameralism means the entity that exercises a given legislative power is organized as one chamber. That chamber can take legislative actions according to any sort of internal decisionmaking processes. Whether that is majority vote or supermajority, guided through committees or otherwise, is immaterial, even if those internal processes create multiple “vetogates.”⁵⁹ In bicameralism, two separate and independent chambers must concurrently agree to take legislative action.

Accordingly, a local government can have two or more separate unicameral legislatures with nonoverlapping substantive jurisdictions: a general legislature and a specialized school committee or planning board, for example. Those legislatures might be parliamentary or, in their field, paired with an independent executive.

Notably, this means that local unicameralism might involve a diminution in checks and balances or an abandonment of the checks-and-balances model altogether. In some cases, the legislature and the executive still check each other, but the legislature no longer checks itself.⁶⁰ In others, the legislature is the only body of local government, without any internal separation of powers: the mayor might be part of the legislature and the judiciary separately operated by the state. Unicameralism is always a move away from the Madisonian system, but how far a local government departs from that model varies. For this Article, what matters is the concurrency of decisionmaking within the designated legislative zone.⁶¹ Under this definition, many local governments began as bicameral, and all have now converged on unicameral legislative designs. The next Part describes that history.

58. *Citizen's Guide to Town Meeting*, ME. MUN. ASS'N, <https://www.memun.org/TrainingResources/LocalGovernment/AGuidetoTownMeeting.aspx> (last visited Apr. 21, 2018).

59. Vetogates are the many points in the legislative process where a bill can die, from substantive committees and rules committees to conference between two chambers to an executive veto. See William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–46 (2008).

60. Legislative unicameralism is often accompanied by *increased* checks from the executive branch. This is notably common in the land use context. For example, zoning decisions may be made in the first instance by an executive-branch planning commission, then ratified by the city council. See, e.g., N.Y.C. CHARTER § 197-d (2011). While this shares important features with bicameralism, in that two multimember bodies must both vote on a proposal for it to become law, it implicates interbranch separation of powers, not intra-legislative bicameralism: It is more akin to the presidential veto than to Congressional bicameralism. Indeed, the relative importance of checks between the executive and legislative branches at the local level, as opposed to checks within the legislature, is a major theme of this Article. See *infra* Part II.C.

61. Although outside the scope of this Article, it could be illuminating to compare the structure of local legislatures to the structure of local multimember executive boards and commissions, especially where those boards are elected. There may be patterns to local organization that cross the branches.

I. HOW WE GOT HERE

A. A HISTORY OF LOCAL UNICAMERALISM

All local governments—not many or most, but all—are unicameral. The choice to have one legislative chamber rather than two is a defining feature of the design of local governments. And it is a choice. Unlike most structural features of our government, no constitutional rule—federal or state—requires local legislatures to have a single chamber. Despite its utterly uniform nature, there is nothing compulsory or fixed about local unicameralism. Moreover, local unicameralism is not one constitutional choice, made at the Founding, or even fifty constitutional choices made in the states. Local unicameralism is the convergence of thousands of individual actors independently reaching the same conclusion across a period of more than a century.

Local governments were not always unicameral. They have moved steadily in that direction over two centuries. In 1903, one-third of large cities still had bicameral councils.⁶² Bicameralism was a common, high-profile option for local legislatures at the turn of the 20th century. Nor did American local governments slide into unicameralism unawares. Local unicameralism is the product of political conflict and intellectual debate, carried out city-by-city and state-by-state. Yet that debate has long since ended, making unicameralism appear to be the natural form of local government. To uncover what pushes local governments into unicameralism, it helps to turn to the past, when the choice of local legislative form was a live controversy.

This Part traces the history of local unicameralism from the colonial era—when the basic separation of government into branches was not yet present at the local level—through 2014, when Everett, Massachusetts finally gave up its status as the last bicameral city in America. That history shows consistent motives for local unicameralism, across centuries and from coast to coast. Its proponents saw unicameral legislatures as more efficient—not hampered by the need for consensus across two fractious bodies—and evoked images of modernity to support their desired overhaul of the legislative machine. More mundanely, the unicameralists also pointed to cost savings: eliminating one legislative chamber meant fewer salaries to pay.

The defenders of bicameralism, in turn, claimed the ground of tradition, a tradition ennobled by the federal example. They cited the value of checks and balances to restrain government overreach. Finally, they celebrated two-chamber legislatures as offering more positions for more politicians, increasing public access to their officials and offering more opportunities for those officials to advance. Of course, mixed in

62. George W. Liebmann, *The New American Local Government*, 34 URB. LAW. 93, 107 (2002).

with these principles was politics: one faction or another, varying from city to city, always perceived a potential advantage in a new legislative design. But putting the contingencies of any place's particular political line-up aside, the debates over local unicameralism—pitting tradition against modernity and efficiency against restraint—provides a rigorous foundation for beginning the study of local legislative form.

The earliest American local governments did not share even the most basic trappings of contemporary municipal government. Legally, cities were understood as corporations.⁶³ As such, their internal governance diverged dramatically from what we now consider democratic norms. For example, under Philadelphia's 1701 Proprietor's Charter, which governed the city until 1776, the officers of the Corporation of Philadelphia chose their own successors.⁶⁴ These corporations—like business corporations today⁶⁵—operated with a single council and generally without a clear separation of powers.⁶⁶ Councils during the colonial period and the early republic were often unicameral, but did not particularly resemble legislatures as we know them today.

Local government began to take its modern shape only after the Constitutional convention gave the national government a fixed and culturally resonant form. Baltimore created the first recognizably bicameral city council in 1797.⁶⁷ The new Baltimore legislature consisted of a sixteen-member lower house and an eight-member upper house.⁶⁸ This structure expressly mimicked the federal model: in an innovation that did not spread, Baltimore elected its mayor using an electoral college.⁶⁹

Older American cities shifted away from colonial modes of governance and towards bicameralism during the early 19th century.

63. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1095–98 (1980). Frug contests whether early American local governments were in fact corporations or “quasi-corporations,” but agrees that the law treated them as corporations. *Id.*

64. *City Council*, CITY OF PHILA. DEP'T RECORDS, <http://www.phila.gov/phils/Docs/Inventor/graphics/agencies/A120.htm> (last visited Apr. 21, 2018).

65. *Cf.* Levmore, *supra* note 44, at 162 (comparing unicameralism of local government to corporate boards).

66. Michele Frisby, *Separating the Powers*, in HOW AMERICAN GOVERNMENTS WORK: A HANDBOOK OF CITY, COUNTY, REGIONAL, STATE AND FEDERAL OPERATIONS 105 (Roger L. Kemp ed., 2002); *see also* Hendrik Hartog, *Because All the World Was Not New York City: Governance, Property Rights, and the State in the Changing Definition of a Corporation, 1730–1860*, 28 BUFF. L. REV. 91, 98 (1979) (“As in other governmental entities, the practice of government in colonial New York City was functionally undifferentiated; judicial, administrative, and legislative powers were blurred and diffuse.”).

67. Frisby, *supra* note 66, at 106. *But see City Council*, *supra* note 64 (describing Philadelphia's Council, created in 1789, consisting of both aldermen and Common Council members. Both sets of councilors jointly selected the Mayor, who sat with them to form a unitary Council).

68. Frisby, *supra* note 66, at 106.

69. Frisby, *supra* note 66, at 106.

Boston abandoned its town meeting form of government in its 1822 charter.⁷⁰ The new charter replaced the popular assembly as the site of legislative power, with a forty-eight-member common council and a twelve-person board of aldermen.⁷¹ Bicameralism was widespread among early American cities.⁷²

By the turn-of-the-century Progressive Era, however, the tide had turned against bicameralism. The shift to unicameralism in Philadelphia provides a representative illustration. In Philadelphia, the City Charter was revised to institute a unicameral City Council in 1919.⁷³ The fight for charter reform, which included a variety of other “good government” reforms,⁷⁴ was led by two factions: business and civic elites, on the one hand, and on the other, one of two warring factions of the Pennsylvania Republican party, which meant to use reform to take power in Philadelphia.⁷⁵ The reformers, quintessential Progressives, saw unicameralism as a force for modernity and efficiency—making it an effective form of self-governance—as well as a force against the urban machines they despised.⁷⁶

Efficiency formed the heart of the intellectual argument for charter reform in Philadelphia. Pennsylvania Governor William Sproul, who went so far as to advocate for Philadelphia charter reform in his inaugural address, described bicameralism as “unwieldy.”⁷⁷ Clinton Rogers Woodruff, a leader of the charter reformers, called the bicameral legislature “probably the worst governing body that has ever mis-administered over a great city,” and identified as the remedy a single, unicameral Council.⁷⁸ In fighting for unicameralism, elite reformers fought for a vision of “strong, simple, representative government.”⁷⁹ Woodruff described Philadelphia’s bicameral (and gerrymandered) legislature as “an autocracy” given the “cumbersomeness of the city’s

70. Charlie Tebbets, *Charter Changes in Boston from 1885-1949*, 32 HIST. J. MASS. 21 (2004).

71. *Id.*

72. According to a 1922 political scientist, a bicameral council originally governed “the majority of the cities.” EVERETT KIMBALL, *STATE AND MUNICIPAL GOVERNMENT IN THE UNITED STATES* 411 (1922). The reliability of this estimate is uncertain, but the author’s research provides enough evidence to believe that bicameralism was at least commonplace.

73. *City Council*, *supra* note 64.

74. See *Stamp out Bolshevism at Home, Demands Governor Sproul Education and Sane Laws Best Antidote*, PHILA. INQUIRER, Jan. 22, 1919, at 12 (describing other charter reform elements of home rule, fiscal controls, and the attempted depoliticization of the police force).

75. F. W. Coker, *Notes on Municipal Affairs*, 13 AM. POL. SCI. REV. 643, 643 (1919).

76. See, e.g., RICHARD HOFSTADTER, *THE AGE OF REFORM: FROM BRYAN TO F.D.R.* 174–86 (1966) (describing Progressive Era local politics); Joan Chalmers Williams, *The City, the Hope of Democracy: The Casebook as Moral Act*, 103 HARV. L. REV. 1174 (1990) (reviewing GERALD FRUG, *LOCAL GOVERNMENT LAW* (1988)).

77. *Stamp Out Bolshevism at Home*, *supra* note 74.

78. *City Laws Passe, Says Woodruff, Charter Revision Urged by Speaker at Business Club Luncheon Present*, PHILA. INQUIRER, Jan. 21, 1919, at 8.

79. Clinton Rogers Woodruff, *Progress in Philadelphia*, 26 AM. J. SOC. 315, 315 (1920).

government machinery.”⁸⁰ He wanted, and believed democracy required, a legislature that could act swiftly and decisively: “the substitution of an effective instrument for a clumsy one.”⁸¹

These higher-minded ideals were paired with the desire to dislodge one faction of the Republican Party from its entrenched control of city government. Because legislative action required the concurrence of two large chambers, then totaling 146 members, reformers believed that machine control was necessary to coordinate action.⁸² That elites believed the machine to be “the one reaping the greatest benefits from the present bicameral Councils”—as did the machine’s political rivals, who fortuitously controlled the state legislature⁸³—and considered this fact an essential argument for political reform.⁸⁴

Those advocating for unicameralism in Philadelphia necessarily argued that what was appropriate for the national and state governments was inapt at the local level. Said Leslie Miller, a leader of the Committee of Seventy, an elite Philadelphia civic organization:

The existing system of copying and repeating in the management of municipal affairs the government machinery of the Nation and the State—legislative, executive, judicial, and all that—is certainly a mistake. It has had a fair trial and has continued far too long already, and whatever is to replace it, it should be abolished as completely as possible.⁸⁵

Writing in the *American Journal of Sociology*, Woodruff argued, “To expect satisfactory results from such a body modeled on the federal plan of government was to expect the impossible.”⁸⁶ These leaders did not extend their critique of bicameralism to higher levels of government. Indeed, they saw it as self-evident that local government was different

80. *One Council Plan Gains in Favor, Charter Revision Along That Idea is Indorsed Generally*, *supra* note 2, at 6.

81. Woodruff, *supra* note 79, at 316.

82. David R. Contosta, *George Woodward, Philadelphia Progressive*, 111 PA. MAG. HIST. & BIOGRAPHY 341, 357 (1987).

83. THE COMM. OF SEVENTY, *The Charter: A History* 2 (1980), <https://www.seventy.org/uploads/files/127709242549666483-1980-charter-history.pdf>. In Philadelphia and elsewhere, pushes for bicameralism were usually paired with efforts to reduce the total number of councilmembers. Efficiency thus took two distinct, though related paths: Reformers wanted to streamline operations within each chamber as well as across them. There is an extensive political science literature describing the public choice consequences of changing the number of legislatures per chamber and positing that a “law of 1/n” applies wherein more logrolling in larger bodies leads to increased government spending. See generally, e.g., Barry R. Weingast et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 642, 642, 654 (1981). But see David M. Primo & James M. Snyder, Jr., *Distributive Politics and the Law of 1/n**, 70 J. POL. 477, 477 (2008) (describing many variables affecting “law”).

84. *Big Men to Attend Charter Hearing*, PHILA. INQUIRER, Mar. 23, 1919, at 14.

85. *Charter Revision Bills Soon Ready, Committee Plans to Present Bills to Legislature Next Month Indorsements*, PHILA. INQUIRER, Jan. 10, 1919, at 22.

86. Woodruff, *supra* note 79, at 315.

than state or national government, providing little principled argument for the difference.

The Philadelphians' distinction proved accurate descriptively: while state government remains largely bicameral, "the movement for simplified local government continue[d] on its triumphant way" throughout the late 19th and early 20th centuries.⁸⁷ As with many Progressive Era urban reforms, change came first to the West. After San Francisco ended the *alcalde* and *ayuntamiento* system of governance it inherited from Spain and Mexico, it experimented with a bicameral city council from 1850 to 1856 as its first Anglo-American-inspired system of government, moving to unicameralism just six years later.⁸⁸ In charter revision fights that lasted the next half-century,⁸⁹ it considered returning to bicameralism at various points, but never did so.⁹⁰ Seattle's brief fling with bicameralism lasted just as long. Seattle had a bicameral council under its original 1890 charter, but abandoned it only six years later.⁹¹ The city considered two houses inefficient and paying two sets of legislators expensive.⁹² Indeed, the Seattle city council issued a joint resolution in its first year calling for a reduction in the number of city councilors.⁹³

In the East, too, advocates of unicameralism also saw reform as a modernizing and streamlining endeavor. Boston rewrote its charter in 1909, moving to a unicameral, at-large system.⁹⁴ As in Philadelphia and Seattle, good government groups wanted to replace an "unwieldy" system.⁹⁵ The new system was modeled after the National Municipal League's model charter, evidencing the importance of national intellectual trends and new Progressive institutions.⁹⁶ Indeed, unicameralism could be deemed the Progressive Era's most complete success in restructuring local government. While Progressive reforms like non-partisan elections and appointed city managers were important,

87. Woodruff, *supra* note 79, at 317.

88. WILLIAM A. BULLOUGH, *THE BLIND BOSS & HIS CITY: CHRISTOPHER AUGUSTINE BUCKLEY AND NINETEENTH-CENTURY SAN FRANCISCO* 54–55 (1979).

89. *Id.* at 257.

90. See CHARTER, PREPARED AND PROPOSED FOR THE CITY AND COUNTY OF SAN FRANCISCO art. II, § 1 (1887) ("The Legislative power of the City and County of San Francisco shall be vested in two Houses of Legislation, which shall be designated the Supervisors of said city and county, and shall consist of a Board of Aldermen and a Board of Delegates.").

91. *Seattle City Council Members, 1890-1896*, SEATTLE MUN. ARCHIVES, <http://www.seattle.gov/cityarchives/seattle-facts/city-officials/city-council-members/city-council-1890-1896> (last visited Apr. 21, 2018).

92. *Seattle's New Charter*, OREGONIAN, Jan. 29, 1896, at 5.

93. *Reconstruct the Charter*, TACOMA DAILY NEWS, Dec. 3, 1890, at 4.

94. Tebbetts, *supra* note 70, at 14–15.

95. LAWRENCE W. KENNEDY, *PLANNING THE CITY UPON A HILL: BOSTON SINCE 1630* 122 (1992).

96. JAMES J. CONNOLLY, *THE TRIUMPH OF ETHNIC PROGRESSIVISM: URBAN POLITICAL CULTURE IN BOSTON, 1900-1925* 90 (2009).

new, and popular innovations in local government, neither was implemented so uniformly across the nation.⁹⁷

While factional politics were always important to the passage of unicameralism—as is usually the case in urban politics—there was no fixed arrangement of who lined up on which side of the issue. In Boston, for example, unicameralism (and associated reformers) was meant to “subvert the influence and power of the ward bosses, who had been the focal point of Irish and poor immigrant political opportunity.”⁹⁸ But in Richmond, Virginia, disempowered groups were essential allies in the fight for unicameralism.

Due to restrictions in the Virginia Constitution,⁹⁹ Richmond remained one of the last cities with a bicameral council, changing to unicameralism only in a 1947 vote.¹⁰⁰ Business elites once again led the fight for a single-chambered legislature, as elsewhere believing bicameralism to be “antiquated and clumsy” and not fit for a “modern” city.¹⁰¹ Interestingly, future Supreme Court Justice Lewis Powell, then a leader in the Richmond business community, chaired the charter commission that ultimately ended bicameralism in the city.¹⁰² Richmond’s black community allied with Powell and the business community.¹⁰³ Black leaders, including unicameralism supporters such as the president of the local NAACP, saw charter reform as a way to “kill red tape and political expediency by which Negroes are denied jobs and social justice.”¹⁰⁴ Indeed, their bet paid immediate dividends. After charter reform, civil rights attorney Oliver Hill was elected to the City Council, the first African American to hold that position since

97. See Chris Tausanovitch & Christopher Warshaw, *Representation in Municipal Government*, 108 AM. POL. SCI. REV. 605, 612–13 (2014) (identifying these reforms as characteristic of Progressive Era attempts to make government more responsive); *Partisan vs. Nonpartisan Elections*, NAT’L LEAGUE OF CITIES, <http://www.nlc.org/partisan-vs-nonpartisan-elections> (categorizing thirty largest cities between partisan and nonpartisan electoral systems).

98. Tebbets, *supra* note 70, at 15; see also Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 474 (2005) (reviewing RICHARDSON DILWORTH, *THE URBAN ORIGINS OF SUBURBAN AUTONOMY* (2005)) (describing religious and ethnic politics of the era).

99. See VA. CONST. OF 1902, art. VIII, § 121, http://confinder.richmond.edu/admin/docs/Virginia_1902.pdf; see also William Bennett Munro, *Notes on Current Municipal Affairs*, 3 AM. POL. SCI. REV. 245, 249 (1909) (noting that Richmond Mayor D.C. Richardson declared himself in favor of unicameral government, but constrained by Virginia constitution).

100. *Many Cities O.K. Change in Government: Richmond Will Have Manager*, CHI. DAILY TRIB., Dec 1, 1947, at 15 (identifying only fourteen American cities as still having bicameral councils after Richmond’s vote).

101. Associated Press, *City Manager Is Advocated in Richmond*, WASH. POST, Dec. 26, 1941, at 19 (statement of the Richmond First Club).

102. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 124 (1994).

103. WILLIE AVON DRAKE & ROBERT D. HOLSWORTH, *AFFIRMATIVE ACTION AND THE STALLED QUEST FOR BLACK PROGRESS* 39 (1996).

104. *Unicameral Council Advantages Explained: White Lawyer Advises Race To Study City Structure*, RICHMOND NEW JOURNAL AND GUIDE, Mar. 6, 1937, at A2.

Reconstruction.¹⁰⁵ While civic and business leaders supported unicameralism as a general rule, whom they allied with—and whom unicameralism empowered—varied depending on the particular political context and the other charter reforms with which it was paired.

Despite the relentless trend towards unicameralism—which was nearly unheard of for cities to move from a single-chambered to a double-chambered legislature after the Civil War—there was opposition in each city as debates actually took place. The debate in Atlanta, another late adopter of bicameralism, is instructive. In Atlanta, unicameralism was first enacted¹⁰⁶ as part of a wide-ranging “Plan of Improvement” passed in the early 1950s which included the annexation of eighty-two square miles of territory, the consolidation of certain city and county functions, and other governmental reforms.¹⁰⁷ The immediate impetus for change was a diagnosis of “suburbanitis . . . the inability of cities to cope with the paralyzing problem of urban developments on fringes just outside municipal limits,” and the cure was “more efficient local government” and “streamlin[ing].”¹⁰⁸ A century after West Coast cities moved to unicameral legislatures, Atlanta was offering the same arguments in its favor, simply updated to the postwar context.

The Atlantan arguments for retaining bicameralism, too, were the traditional ones found in other cities. Following the traditional arguments for bicameralism at the national level, some saw local bicameralism as providing important “checks on city finances.”¹⁰⁹ In Atlanta, these opponents were mollified with new procedural limits on the unicameral legislature’s power: Specifically, allowing a single member to effectively filibuster by delaying a matter involving city

105. DRAKE & HOLSWORTH, *supra* note 103, at 39. For a biography of Hill, an important civil rights leader, see *Oliver W. Hill Building Dedication*, VA. DEP’T GEN. SERVS. (Oct. 28, 2005), https://www.dhr.virginia.gov/registers/Cities/Richmond/127-6048_FinanceBuilding_2008_NR_final.pdf.

106. Atlanta’s City Council had been bicameral since the city’s incorporation in 1847. *A Chronology of the History of Atlanta, 1782-2010*, ATLANTA CITY COUNCIL, <http://citycouncil.atlanta.gov/historynew.htm> (last updated Apr. 17, 2003).

107. See Hoke Smith May, *Plan Adds 100,000 Population, 82 Sq. Miles to Atlanta Proper*, ATLANTA CONST., Feb. 12, 1951, at 24; see also Cleghorn Reese, *What’s Happened in Year Under Atlanta-Fulton ‘Plan of Improvement,’* ATLANTA CONST., Dec. 28, 1952, at 1D; Herman Hancock, *Stronger Hand for Hartsfield Seen in City Council Shakeup*, ATLANTA CONST., Dec 13, 1953, at 2C. Thus, while this Article primarily identifies unicameralism with antigrowth or NIMBY sentiments in the suburbs, see *infra* Part II.B, here, unicameralism is associated with the so-called “growth machine” of urban development (or the related “regime theory” originally developed to describe Atlanta itself). See David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 266 n.13 (2005) (describing theories).

108. Herman Hancock, *Other Cities Study Plan Improvement: Atlanta Sets Pattern*, ATLANTA CONST., July 26, 1953, at 4C.

109. *Reduction in Council And Number of Wards To Face Senate Today: Millican Bill Is Assailed By Aldermen*, ATLANTA CONST., Feb. 5, 1952, at 1.

finances for one meeting.¹¹⁰ Other opponents relied on tradition itself, arguing that divided government was the most familiar, or even the most American, form of legislative structure.¹¹¹ At the most mundane level, legislators argued that the bicameral structure simply provided more seats for legislators, improving constituent services.¹¹²

These defenses of bicameralism—checks and balances, tradition, and size—mirror those made across the country. Bicameralism advocates everywhere, like the framers of the federal Constitution, saw the system as a necessary check against imprudent legislation.¹¹³ For opponents of unicameralism in conservative Richmond that meant a fear of higher taxes,¹¹⁴ but the content could vary.¹¹⁵ In Philadelphia, it was argued that the size of a bicameral legislature provided a larger pool of trained politicians fit for higher office.¹¹⁶

Even today, the battle lines remain fixed in place: in Everett, Massachusetts, the same arguments arose on each side. Advocates of unicameralism saw the old council as “a place of bickering, gridlock, and confusion. When you have 18 in one branch and seven in the other, there’s no consensus.”¹¹⁷ Financial savings played a significant role, with Everett Mayor Carlo DeMaria citing the councilors’ salaries and health premiums as major expenses worth eliminating.¹¹⁸ The same modernizing rhetoric was deployed: “[i]t’s time to bring Everett into the 21st century,” said the Chairman of the Charter Revision Commission.¹¹⁹ “It’s time to have a more efficient, more accountable, more straightforward form of government.”¹²⁰

110. Gilliam White & Raleigh Bryans, *Irked Councilmen To Seek ‘Rights’ in Home Rule*, ATLANTA CONST., Feb. 17, 1952, at 10B.

111. *Id.* (“Some council members resent the change—even though the present bicameral system has been virtually inoperative for years—for the sake of sentiment and continuity.”); Hoke Smith May, *Solon Views Atlanta Plan as Red ‘Plot,’* ATLANTA CONST., Feb. 6, 1951, at 1 (quoting the Chairman of the Georgia House Municipal Government Committee, who described the Plan of Improvement as “a typical Communist plot to consolidate government.”).

112. *Reduction in Council And Number of Wards To Face Senate Today: Millican Bill Is Assailed By Aldermen*, *supra* note 109, at 1 (“Councilman Jesse Draper objected to any reduction in council’s membership, and said the duties of the office are now arduous because of the demand made by constituents.”).

113. KIMBALL, *supra* note 72, at 411.

114. JEFFRIES, JR., *supra* note 102, at 124.

115. *The Seattle Charter Will Soon Be Submitted to the People. City Officers All Elective*, OREGONIAN, July 18, 1890, at 2 (describing Seattle’s 1890 charter, which included a bicameral legislature, as “very stringent and the object has been to place the strongest possible safeguard around the public treasury”).

116. Woodruff, *supra* note 79, at 316.

117. Rosenberg, *supra* note 7.

118. Rosenberg, *supra* note 7.

119. John Laidler, *New Effort to Downsize Government*, BOSTON GLOBE (Mar. 6, 2011), http://archive.boston.com/news/local/articles/2011/03/06/in_everett_a_new_effort_to_streamline_government/.

120. *Id.*

Defenders of the old, bicameral legislature, like those that came before them, emphasized the importance of checks and balances, the value of tradition—especially the conventional understanding of bicameralism as a crowning achievement of American constitutionalism and the benefits of a larger legislature. “Why would you fix something that is not broken?” asked one member of the Everett Common Council.¹²¹ “I thought it was the best form of government. You had checks and balances.”¹²² The President of the Board of Aldermen highlighted the additional access that citizens had to their officials with two overlapping legislative bodies.¹²³ Another Everett Alderman, like Philadelphians before him, asked where Everett would find its mayors without a bicameral city council serving as a farm system.¹²⁴ Everett weighed the same arguments as American cities have for centuries and then, finally, abandoned ship on bicameralism.

What unicameralism and bicameralism have been understood to offer local governments has remained remarkably constant for 150 years and in every case, unicameralism has won out. Legislators and voters, then and now, see local government as in need of modernization, not bound to tradition, and chafe at local government’s inefficiencies without fearing an unchecked single chamber. They see bicameralism as so useless at the local level that it is not worth even paying the salaries of a second set of councilmen. Local government was consciously designed and adapted to embody a particular set of values and not the values of the federal Constitution.

B. UNICAMERALISM IN SUBURBIA

So far, this history has focused on large cities. Urban centers embraced bicameralism early on, and their transition from one legislative structure to another shows the contingency and conflicts that marked the adoption of unicameralism. These transitions are where the values behind local unicameralism are made most visible. In contrast, unicameralism has always been firmly entrenched in the suburbs.

In suburbs, as compared to cities, government structure is more often set forth by generally applicable statutes. Larger cities tend to be governed by customizable charters, where drafters write on a blank slate and generally could have the choice to adopt bicameralism.¹²⁵ In contrast,

121. Rosenberg, *supra* note 7.

122. Rosenberg, *supra* note 7.

123. Rosenberg, *supra* note 7.

124. Independent Staff, *Everett Charter Commission Holds Public Hearing on Restructuring of City Government*, EVERETT INDEP. (Apr. 6, 2011), <http://www.everettindependent.com/2011/04/06/everett-charter-commission-holds-public-hearing-on-restructuring-of-city-government/>.

125. *Cf.* Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN ST. L. REV. 647, 661 (2014) (connecting liberalized municipal incorporation laws with “an explosion in the number, size, and character of suburban municipalities” outside historic urban centers).

smaller local governments instead use “off-the-rack” governmental forms set by the states.¹²⁶ State incorporation statutes generally do not provide for bicameralism.

For example, in Massachusetts—where heated debate over the structure of Boston’s city council implicated issues of ethnicity, religion, corruption, and good government,¹²⁷ and where Everett remained resolutely bicameral until just a few years ago—the general incorporation statute offers no option for bicameralism. It provides six different plans for cities to choose between, each of which is unicameral.¹²⁸ The Massachusetts menu of options is not limited to unicameralism out of a fear of difference. One option provides for proportional representation,¹²⁹ a fairly exotic electoral structure in this country.¹³⁰ But to the Massachusetts legislature, even proportional representation is more appropriate for local governments than bicameralism—no matter the latter’s constitutional pedigree.

Massachusetts is not alone in denying bicameralism as an option in its general municipal incorporation statutes. California, for example, offers choices between strong and weak mayoral systems, between district-based and at-large council elections, and between numbers of council districts, but all within a unicameral framework.¹³¹ Texas requires its general law municipalities to be unicameral, although they may choose between a city council, a Board of Aldermen, a Board of Commissioners, and a city manager-type system, each with its own structure.¹³² Moreover, under the Texas Constitution, small municipalities are required to be incorporated under general law, not by custom charter, meaning there is no chance to develop their own

126. *Id.*

127. *See supra* notes 94–98 and accompanying text.

128. MASS. GEN. LAWS ch. 43, § 1 (2018) (defining Plans A–F); § 2 (requiring choice of Plan); §§ 50, 59, 67, 82, 96 (providing additional detail on Plans). To be precise, these Plans are available to municipalities defined as “cities” and not “towns” under state law, which tends to mean mid-size municipalities. *See* MASS. CONST. art. LXXXI, § 2 (limiting city forms of government to municipalities of 12,000 or more residents). Towns have a separate set of unicameral local governments they may choose, growing out of the town meeting tradition. *See* MASS. GEN. LAWS ch. 43A (2018).

129. MASS GEN. LAWS ch. 43, § 96 (2018). This option exists for the benefit of Cambridge, which uses a proportional system. *McSweeney v. City of Cambridge*, 665 N.E.2d 11 (Mass. 1996).

130. *See, e.g.*, Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257 (1985); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1594–95 (1993) (suggesting proportional representation replace “current doctrinal approaches”).

131. *See* CAL. GOV'T CODE § 34871 (West 2017); *see also* CAL. GOV'T CODE §§ 36801, 36802, 36810 (each describing the meetings of “the city council” in a manner which necessarily implies a unicameral city council).

132. *See* TEX. MUN. LEAGUE, 2015 HANDBOOK FOR MAYORS AND COUNCILMEMBERS ch. 1 (2015), <http://www.tml.org/Handbook-M&C/Chapter1.pdf> (summarizing Texas incorporation law).

(potentially bicameral) model.¹³³ New York's Town Law,¹³⁴ Second Class Cities Law,¹³⁵ and Village Law¹³⁶ each provide for unicameral structures for the forms of local government they regulate. While large, chartered cities have chosen unicameralism,¹³⁷ small general-law municipalities have unicameralism chosen for them.

Bicameralism does not appear to have had any significant presence in suburban governance. While two-chambered legislatures were once common in city governments, small towns and bedroom communities have always been exclusively unicameral. Whatever forces drive local governments towards unicameralism, they are stronger in the suburbs.

C. AN ANOMALY: NEW YORK CITY

One anomalous case bears separate mention: New York City. New York is often an outlier in local government law,¹³⁸ and its path to unicameralism is distinct from that of other cities. First, New York is the rare (perhaps unique—I can find no other) city that has moved from bicameralism to unicameralism and back again. Prior to consolidation, New York (then limited to Manhattan) created a bicameral legislature in 1830 and moved to unicameralism in the “Reform Charter” of 1873.¹³⁹ After the consolidation of the five boroughs, New York briefly used a bicameral system, likely to reflect the independent political identities of the boroughs.¹⁴⁰ A unicameral city council was reinstated nearly immediately in 1901 due to concerns about bicameralism “snarling” city government.¹⁴¹ New York flipped back to bicameralism between 1924 and 1936 and has stayed unicameral since.¹⁴² But even since then, New York

133. TEXAS CONST., art. 11, § 4.

134. N.Y. TOWN LAW § 20(1) (West 2014).

135. N.Y. SECOND CLASS CITIES LAW § 31 (West 2017).

136. N.Y. DEP'T OF STATE, DIV. OF LOCAL GOV. SERVS., LOCAL GOVERNMENT HANDBOOK 70 (6th ed. 2011), https://www.dos.ny.gov/lg/publications/Local_Government_Handbook.pdf (citing N.Y. VILLAGE LAW art. 2).

137. Not in all instances, of course: state legislation has been the path to unicameralism for many large cities. See, e.g., Coker, *supra* note 75.

138. See, e.g., Jon C. Teaford, *The Birth of a Public Corporation, 1730-1870*, 83 MICH. L. REV. 690, 701 (1985) (reviewing HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW* (1983)) (“New York City was an unusual case both before and after the Revolution.”); Robert A. Dahl, *The City in the Future of Democracy*, 61 AM. POL. SCI. REV. 953, 968 (1967) (“To regard the government of New York as a local government is to make nonsense of the term.”).

139. Edward T. O'Donnell & Alex Poole, *Changes to the City Charter, 1653-2008*, in THE ENCYCLOPEDIA OF NEW YORK 230-31 (Kenneth T. Jackson, ed., 2d ed. 2010).

140. See *id.* at 232; see also James W. Lowe, *Examination of Governmental Decentralization in New York City and A New Model for Implementation*, 27 HARV. J. ON LEGIS. 173 (1990) (describing history of New York legislature).

141. O'Donnell & Poole, *supra* note 139, at 232; Frederick A. O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 775, 783-86 (1998).

142. Schwarz, Jr. & Lane, *supra* note 141, at 784.

has more than once seriously considered returning to a bicameral City Council, unlike other American cities.¹⁴³

Second, through most of the 20th century, New York's unicameral legislature played second fiddle to a quasi-legislative entity, the Board of Estimate, with which it shared certain powers. The City Council (or Board of Aldermen, depending on the styling of the time) formally held the legislative power of New York City.¹⁴⁴ But the Council exercised little power in practice. In their authoritative description of mid-century New York politics, Wallace Sayre and Herbert Kaufman described the City Council's record as "an abundance of trifles"¹⁴⁵ and archly noted that "[t]he Council has disappointed even its least hopeful members."¹⁴⁶ One City Council member joked that the Council "was not even a rubber stamp because 'a rubber stamp leaves an impression.'"¹⁴⁷

Instead, the Board of Estimate exercised much of what might be considered legislative power. The Board of Estimate shared lawmaking power with the Council on taxation levels and charter revision, had a dominant role in the budget process compared to the Council, and had sole authority over city planning and zoning, control of city property and city personnel, and the granting of franchises.¹⁴⁸

But while sometimes compared to the upper chamber of a legislature,¹⁴⁹ the Board of Estimate was not a legislature. The Board was not independently elected, but rather was a "caucus of officials, acting *ex officio* as members of the Board of Estimate."¹⁵⁰ It generally lacked broad policymaking power; with the exception of the budget, its authority generally focused on narrower case-by-case determinations.¹⁵¹ Its

143. See *infra* notes 154-158 (discussing debates during 1989 charter revisions); see also Hal Hazelrigg, *Charter Hopes Mount in City, Despite Curbs*, N.Y. HERALD TRIB., May 6, 1934, at A1 (describing proposal by former governor Al Smith to create new bicameral New York City legislature "similar to the State Legislature").

144. WALLACE S. SAYRE & HERBERT KAUFMAN, *GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS* 607 (1960). The city charter provided that "[t]he council shall be vested with the legislative power of the city, and shall be the local legislative body of the city, with the sole power to adopt local laws." *Id.*

145. *Id.* at 611.

146. *Id.* at 652.

147. Schwarz, Jr. & Lane, *supra* note 141, at 781.

148. SAYRE & KAUFMAN, *supra* note 144, at 627-28.

149. See, e.g., Michael A. Cardozo, *Reflections on the 1989 Charter Revisions*, 58 N.Y.L. SCH. L. REV. 85, 90 (2013-2014) ("The 1989 Commission replaced bicameral approval of the budget by the Board of Estimate and Council, with unicameral approval by the Council alone.").

150. SAYRE & KAUFMAN, *supra* note 144, at 650 ("[W]hile the Board exercises many of the powers of a legislature, it does not function like one."); see also Todd S. Purdum, *A 2-House Legislature for New York City?*, N.Y. TIMES (Apr. 20, 1989), <http://www.nytimes.com/1989/04/20/nyregion/a-2-house-legislature-for-new-york-city.html> (noting that the Board of Estimate, although quasi-legislative, "does not have the size or structure or committees of a legislature").

151. Schwarz, Jr. & Lane, *supra* note 141, at 771-72 (The Board of Estimate "lacked the broad legislative authority needed to promote and effectuate policies different from a mayor's. . . . The

functions were as much executive as legislative. The President, after all, has roles in the legislative process similar to those of the Board of Estimate: the constitutional power to veto and, by statute, the first step in the budget process.¹⁵² Imprecise analogies notwithstanding, New York fell into its own category of legislative structure: not truly bicameral, for the Board of Estimate was its own entity entirely, but with some of the features of bicameralism and evidencing a greater comfort with multiple entities coexisting in the legislative sphere.

As a result of these differences, the final move to full unicameralism looked somewhat different in New York City than elsewhere. In 1989, in the wake of a Supreme Court decision holding the Board of Estimate unconstitutional, New York embarked on a major charter reform.¹⁵³ The charter reform commission seriously considered whether a bicameral Council should replace the Council-plus-Board structure.¹⁵⁴ New York worked through familiar arguments for and against unicameralism. The charter commission saw bicameralism as promoting a “more disciplined and deliberative regimen” and avoiding “precipitous legislative action.”¹⁵⁵ Bicameralism was also touted as a way to double the opportunities for citizen participation, to elevate the city’s status to something more akin to a state government, and simply to preserve the status quo.¹⁵⁶ Unicameralists argued that a single chambered-legislature would be more powerful and effective, touted the city as distinct from the state—“[s]lavish adherence to the state model may not be appropriate,” noted then-Bronx Borough President Fernando Ferrer—and once again flagged the issue, hardly of constitutional import, of a second set of salaries.¹⁵⁷ Ultimately, however, bicameralism was rejected because the bicameral proposals under consideration would have diminished the political power of racial minorities.¹⁵⁸ Still, although New York has ended up with the same legislative structure as all other local governments—a

members strike bargains on homeless shelters, for example, but never consider how to solve homelessness.”).

152. Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-44, § 201-1-17, 88 Stat. 297 (1974).

153. Bd. of Estimate of City of N.Y. v. Morris, 489 U.S. 688 (1989).

154. Schwarz, Jr. & Lane, *supra* note 141, at 778-79; *see also* Purdum, *supra* note 150 (describing bicameralism debates as “perhaps the most contentious question” addressed by Charter Revision Committee).

155. Schwarz, Jr. & Lane, *supra* note 141, at 786.

156. Purdum, *supra* note 150. Another argument for bicameralism—which unsurprisingly failed to carry the day—was that it allows for “pass[ing] the buck” between the two chambers. Purdum, *supra* note 150.

157. Purdum, *supra* note 150.

158. Schwarz, Jr. & Lane, *supra* note 141, at 786, 813; *see also* Todd S. Purdum, *Black and Hispanic Officials Are Cool to 2-House Plan*, N.Y. TIMES (May 1, 1989), <http://www.nytimes.com/1989/05/01/nyregion/black-and-hispanic-officials-are-cool-to-2-house-plan.html>.

stand-alone City Council—it consistently showed a greater inclination towards bicameralism.

There are many reasons why New York might have leaned more toward bicameralism. New York was formed out of the merger of two large, independent cities and various smaller towns: Like the states represented in the Senate, a demand for independent representation of these original political subdivisions, as subdivisions, remains.¹⁵⁹ New York is also simply larger than any other American city. The city has a larger population than 40 out of 50 states,¹⁶⁰ and its budget is larger than those of every state but California, Texas, Florida, and New York State.¹⁶¹ In terms of size and capacity, New York is more akin to a state than most other local governments, and may, like states, have more need for bicameralism. New York's size also makes New York particularly diverse, generating demand for more forms of representation. Whatever the reasons, New York is an unusual example of unicameralism. It bolsters the fact of uniform local unicameralism: even New York City has fully adopted it. But in many ways, it is the exception that proves the rule, the outlier that keeps flirting with bicameralism.

D. A HISTORY OF STATE BICAMERALISM

At the national level, bicameralism is firmly entrenched—given special protections by the federal constitution and afforded special normative value by the Framers and contemporary scholars—and not the subject of any meaningful amendment efforts. In contrast, local governments have uniformly moved towards unicameralism, embracing efficiency as the highest value for a legislative structure and minimizing the importance of both tradition and checks and balances. Examining the intermediate level of state government helps make sense of this divide. The states are overwhelmingly bicameral: Only Nebraska has adopted a unicameral legislature.¹⁶² Yet unlike the national government, Article V

159. Schwarz, Jr. & Lane, *supra* note 141, at 786 (“For some members of the Commission . . . the small upper house was initially seen as an opportunity to give a legislative role to borough presidents.”); *see also* Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 816 (1992) (“*Morris* makes it much more difficult for a state to require, or for a city to provide, special representation for a distinctive territorial subunit within the city.”).

160. *New York City Population*, N.Y.C. DEP’T CITY PLANNING, <https://www1.nyc.gov/site/planning/data-maps/nyc-population/population-facts.page> (last visited Apr. 21, 2018).

161. FISCAL POL’Y INST., *NEW YORK CITY TAXES—TRENDS, IMPACT AND PRIORITIES FOR REFORM 1* (2015), <http://fiscalpolicy.org/wp-content/uploads/2015/01/NYC-Tax-Report-Summary.pdf>.

162. Additionally, Washington, D.C. has a unicameral government that in certain ways is better analogized to a state than a city. *See* Johnny Barnes, *Towards Equal Footing: Responding to the Perceived Constitutional, Legal and Practical Impediments to Statehood for the District of Columbia*, 13 U.D.C. L. REV. 1, 20 (2010) (cataloguing examples of Congress or the courts treating D.C. as a state). But D.C. is run by a “mayor” and its home rule act describes itself as a “charter for local government.” Pub. L. 93–198, 87 Stat. 774 (1973). Regardless, Washington is an anomalous case. Unlike either cities

and other legacies of the constitutional convention cannot explain their bicameralism. State constitutions are changed more frequently and more thoroughly than the federal constitution.

This Part shows how the divergent choices of legislative structure by state and local governments cast into sharper contrast the purposes and nature of local government itself. While states are seen as dual sovereigns with the national government¹⁶³—fundamentally similar and therefore requiring basically similar legislatures—local governments are not understood as simply another, still smaller, level of government. While state government, like the national government, is seen as requiring constraint, local government is empowered. While state government, like the national government, has its structure infused with cultural meaning, not to be discarded lightly, local government is seen as a tool to be freely adapted to the needs of the moment. Citizens and politicians want states to look like the federal government, but they impose no such requirement on local governments.

In the Revolutionary period, the form of state legislative power was contested, and the eventual dominance of bicameralism was not a foregone conclusion. The two most influential early state constitutions were those of Massachusetts, enacted in 1780, and of Pennsylvania, from 1776.¹⁶⁴ The former represented a more conservative approach to constitutionalism, marked by checks and balances between the branches; the latter a more radical alternative marked by “ultrademocratic” legislative supremacy.¹⁶⁵ The Massachusetts model is familiar—it inspired the federal constitution.¹⁶⁶ Pennsylvania, in contrast, adopted a structure much more similar to today’s local governments than to today’s federal government. Pennsylvania adopted a unicameral legislature with a weak executive and weak judiciary.¹⁶⁷

Although unfamiliar to us today as a model for state government, Pennsylvania’s embrace of unicameralism—and its identification of unicameralism with democracy and the recent revolution—had a distinguished intellectual legacy. Thomas Paine’s *Common Sense* called

or states, it is subject to direct Congressional control and falls outside the bounds of normal local government law. U.S. CONST. art. IV, § 3.

163. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (“As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government.”).

164. Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania’s Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 546 (1989).

165. *Id.* at 554.

166. *Id.* at 541–42 (quoting John Adams’ declaration “I made a Constitution for Massachusetts, which finally made the Constitution of the United States.”).

167. *Id.* at 556. Other limits on governmental power included one-year terms and restrictive term limits, as well as requirements that bills be passed in successive legislative terms. *Id.* at 557.

for establishing unicameral legislatures.¹⁶⁸ Benjamin Franklin, too, supported unicameralism in the states, and his influence was strongly felt in his home state.¹⁶⁹ Nor did Pennsylvania stand alone in its constitutional structure. Vermont and Georgia each employed unicameral legislatures during the early republic,¹⁷⁰ and other states seriously considered the idea.¹⁷¹

The theories behind early unicameralism are particularly relevant for understanding the more widespread adoption of unicameralism at the local level. Some of Pennsylvania's democrats, like their opponents, understood the risks of concentrating power in a single branch made of a single chamber.¹⁷² Their solution, however, relied on "bicameralism from below."¹⁷³ They expected additional popular participation to check the legislature, rather than a second elite branch to do the same.¹⁷⁴ Alternatively, some believed, following the Whig ideology of the time, that societies were fundamentally homogeneous, and that "the people" shared a basic set of interests which their legislature could represent.¹⁷⁵ Under this theory, limits on government power or efficacy could only hamper the state's ability to do the people's work (or introduce aristocratic distortions). As historian Gordon Wood phrased it, "a tyranny by the people was theoretically inconceivable."¹⁷⁶ Thus, either of two arguably interconnected conditions could be seen as justifying unicameralism: strong institutions of public participation allowing for direct control and discipline of the legislature or a homogeneous citizenry

168. THOMAS PAINE, *COMMON SENSE* 96 (Isaac Kramnick ed., Penguin Classics 1986) (1776) ("LET the assemblies be annual, with a President only. The representation more equal. Their business wholly domestic, and subject to the authority of a Continental Congress."); see also Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 783 (2014) ("Thomas Paine, in *Common Sense*, suggested that in governments based on popular sovereignty, all power should reside in a unicameral legislature.").

169. Williams, *supra* note 164, at 577 (James Madison, recalling the constitutional convention, noted that only the Pennsylvania delegation dissented from the decision to adopt a bicameral Congress, "probably from complaisance to Doctr. Franklin who was understood to be partial to a single House of Legislation."). Williams, *supra* note 164, at 577 (quoting 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 25, at 48 (statement of James Madison, May 31, 1787)).

170. John Dinan, *Framing A "People's Government": State Constitution-Making in the Progressive Era*, 30 RUTGERS L.J. 933, 957–58 (1999).

171. Williams, *supra* note 164, at 564 (describing North Carolina's constitutional convention adopting bicameralism only after debate and compromise with more democratic factions); Williams, *supra* note 164, at 585 n.229 (the famous Shays Rebellion in Massachusetts advocated for an end to the Massachusetts Senate and the imposition of unicameralism).

172. Williams, *supra* note 164, at 558.

173. Williams, *supra* note 164, at 565 (quoting STAUGHTON LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* 171 (1968)).

174. Williams, *supra* note 164, at 558 ("[C]heck it from below—with more democracy—rather than from above, with less.") (quoting Jesse Lemisch, *The American Revolution Seen from the Bottom Up*, in *TOWARDS A NEW PAST: DISSIDENTING ESSAYS IN AMERICAN HISTORY* 14–15 (Barton Bernstein ed., 1968)).

175. Williams, *supra* note 164, at 581.

176. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 62 (1969).

with shared interests. Both these conditions exist at the local level to a far greater degree than at higher levels of government, as will be discussed later.

Of course, these early experiments with unicameralism at the state level did not last. Prominent constitutional thinkers of the time argued vociferously against unicameralism. In his influential 1776 essay “Thoughts on Government,” John Adams painted single-chambered legislatures—whether possessed of full parliamentary power or sharing authority with an executive and judicial branch—as “apt to be avaricious,” “apt to grow ambitious,” “liable to all the vices, follies, and frailties of an individual,” and “subject to fits of humor, starts of passion, flights of enthusiasm, partialities, or prejudice—and consequently productive of hasty results and absurd judgments.”¹⁷⁷ Adams won the day, not only at the national level, but also eventually among all the early states. Georgia switched to bicameralism in 1789, Pennsylvania in 1790, and Vermont in 1836.¹⁷⁸ Even so, the ideological debate of the founding era illuminates the ultimate divergence of state and local legislative structure.

The states began to reconsider their choice of legislative structure in the Progressive Era. During the early 20th century, many Progressives came to believe that existing forms of government were creaky, inefficient, and often corrupt.¹⁷⁹ Government reform took many shapes—at the state level, the introduction of the initiative and referendum may have been the most obvious constitutional amendments¹⁸⁰—and a reconsideration of bicameralism was one. Progressives hoped to make local governments more businesslike, and corporations are generally unicameral.¹⁸¹ Bicameralism was also seen as one of many structural features permitting conservative interests to block legislation like minimum wage statutes or workers’ compensation, and therefore an impediment to a truer form of democracy.¹⁸² As California Governor Hiram Johnson put it, describing his own set of institutional

177. John Adams, *Thoughts on Government*, in *THE POLITICAL WRITINGS OF JOHN ADAMS* 87 (George A. Peek, Jr. ed., Hackett Publ. 2003) (1776).

178. G. ALAN TARR, *BICAMERALISM OR UNICAMERALISM?*, TESTIMONY BEFORE THE MAJORITY POLICY COMMITTEE, PENNSYLVANIA LEGISLATURE 2 (2010), <https://statecon.camden.rutgers.edu/sites/statecon/files/publications/bicameralism.pdf>.

179. See *supra* note 76 and accompanying text discussing progressive ideology.

180. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1512 (1990) (“Direct democracy, the conventional history tells us, was a response of the Progressive Reform movement to the widely perceived corruption and control of legislatures by corporate wealth.”).

181. See Schleicher, *supra* note 19, at 465 (on Progressive analogy of governments to business); Levmore, *supra* note 44, at 162 (noting that corporate boards are generally unicameral).

182. Dinan, *supra* note 170, at 958–59 (“Whereas bicameralism had originally been viewed as a guarantee of legislative deliberation, on the ground that it permitted a refinement of the public views, a number of convention delegates began to conclude that this arrangement did more to thwart than to secure the public interest.”).

reforms (not including unicameralism), “[t]he historic system of checks and balances guarded against the old danger of governmental aggression, but not sufficiently against the new danger of [private] aggression . . . we found it necessary that the system of checks and balances that some view with such idolatry and with such pride, should be eliminated in our constitution.”¹⁸³

In Massachusetts, the state that paved the way for bicameralism at the founding, the constitutional convention of 1917-1919 debated both an outright move to unicameralism and a proposal to give the lower house the power to override the state Senate.¹⁸⁴ Constitutional conventions in Nebraska, Oklahoma, and Ohio also debated unicameralism seriously.¹⁸⁵ Governors proposed unicameralism in Arizona, California, Kansas, Minnesota, Washington, and South Dakota.¹⁸⁶ Unicameralism received fifty-eight percent of the vote in an Oklahoma referendum but was not enacted due to the large number of abstentions denying unicameralism an outright majority of votes cast.¹⁸⁷

In Arizona, the state Senate passed a bill eliminating its own chamber in 1912, although the bill died in the House.¹⁸⁸ The bill’s chief sponsor, Senator Worsley, argued for a form of “bicameralism from below,” familiar from debates a century earlier. He pointed to the new powers of initiative, referendum and recall as providing the citizens themselves with all the power of a second legislative body.¹⁸⁹ The opposition focused on the importance of tradition and the dignity of bicameralism with the federal government and all Arizona’s sister states. “This system of government was thought best by the men who framed our national constitution . . . that sacred document,”¹⁹⁰ editorialized one major newspaper. Another newspaper claimed that unicameralism would “make Arizona the laughing stock of her neighbors or a scarecrow for capital.”¹⁹¹ The modeling of the federal system carried the day over the call for more radical democracy in Arizona.

183. Dinan, *supra* note 170, at 946–47.

184. Dinan, *supra* note 170, at 960.

185. Dinan, *supra* note 170, at 960.

186. Kim Robak, *The Nebraska Unicameral and Its Lasting Benefits*, 76 NEB. L. REV. 791, 793 n.9 (1997).

187. James R. Rogers, *Judicial Review Standards in Unicameral Legislative Systems: A Positive Theoretic and Historical Analysis*, 33 CREIGHTON L. REV. 65, 70 (1999).

188. Anthony Tsontakis, *The Arizona Senate Suicide Attempt of 1912*, ARIZ. ATT’Y, Nov. 2012, at 40, 43–46. The House debates were largely satirical, with that body never taking seriously the idea of unicameralism. Before voting down the bill, the House passed amendments to permanently disenfranchise all sitting Senators, to move the state capital to the state penitentiary, and to redraft the bill in the form of poetry rather than legislative language. *Id.* at 44–46.

189. *Id.* at 41.

190. *Id.* at 43.

191. *Id.* at 44.

Only one state enacted unicameralism in the early 20th century: Nebraska, in a 1934 referendum. Senator George Norris, the leading advocate for unicameralism, believed that the two-house system was a relic of the English class system, with its Commons and Lords, and inappropriate for a fully democratic and ostensibly class-free American society.¹⁹² He also believed that bicameralism introduced a secretive and unaccountable step in the legislative process when the two chambers met in conference to resolve their differences, that efficient businesslike operations demanded unicameralism (no corporation would have two boards of directors) and that having two chambers was, if nothing else, costly and wasteful.¹⁹³ The opposition once again cited tradition, calling the plan “un-American,” and argued that a unicameral legislature would pass too much legislation.¹⁹⁴ The passage of the plan sparked renewed interest in unicameralism—12 state legislatures considered unicameralism in 1935 and 21 legislatures did so in 1937—but only Nebraska adopted it.¹⁹⁵ To this day, Nebraskans mark their Unicameral a point of pride. They considered placing it on their state quarter¹⁹⁶ and leading politicians describe it in the same breath as college football and as having an “almost mystical quality.”¹⁹⁷ Nebraskans see their legislature, like “[c]ity councils and county and school boards,” as a way to provide deliberation without a “redundancy that slows the process,” and as adequately checked by the governor.¹⁹⁸ State reports have also touted the direct cost savings from paying fewer legislators.¹⁹⁹

The states continue to debate the merits of unicameralism periodically. Alaska seriously considered unicameralism in its 1956 constitutional convention, but it was concerned with how Congress—then debating Alaskan statehood—would view its “political maturity.”²⁰⁰ A two-house legislature was seen as more familiar to

192. Robak, *supra* note 186, at 795–96. *But see* Rogers, *supra* note 187, at 76–77 (noting that historically, American bicameralism did not have its roots in the British class system but was rather “thoroughly republicanized”).

193. Robak, *supra* note 186, at 795–97.

194. Robak, *supra* note 186, at 799.

195. Rogers, *supra* note 187, at 72.

196. Jonathan S. Ross, *A New Answer for an Old Question: Should Alaska Once Again Consider A Unicameral Legislature?*, 27 ALASKA L. REV. 257, 279 (2010) (citing Scott Bauer, *Heineman to Receive Final State Quarter Designs Next Week*, LINCOLN JOURNAL-STAR, Apr. 26, 2005, at 1).

197. Robak, *supra* note 186, at 791–92.

198. Robak, *supra* note 186, 807–08, 816.

199. Ross, *supra* note 196, at 277 (citing Roger V. Shumate, *The Nebraska Unicameral Legislature*, 5 W. POL. Q. 504, 506 (1952)).

200. Michael Schwaiger, *Understanding the Unoriginal: Indeterminant Originalism and Independent Interpretation of the Alaska Constitution*, 22 ALASKA L. REV. 293, 310 (2005) (quoting Gerald A. McBeath & Thomas A. Morehouse, *ALASKA POLITICS AND GOVERNMENT* 121 (1994)); *see also* Ross, *supra* note 196, at 258.

Congress, more “ordinary,” and was ultimately adopted.²⁰¹ At least fourteen states considered unicameralism in the 1990s.²⁰² California’s Constitution Revision Commission, for example, recommended unicameralism in 1995, although it later reversed itself.²⁰³ Yet bicameralism remains firmly entrenched as the legislative form for forty-nine states.²⁰⁴

This history of bicameralism offers important insights into local government’s contrasting unicameralism. First, the states show that bicameralism is not merely a relic of the founding, locked into place by the strictures of Article V. States chose bicameralism just as local governments chose unicameralism. In some sense, federal bicameralism needs no explanation. It exists for principled reasons, as described in the introduction, but it also reflects a brute political compromise between large and small states. Turning to unicameralism would still require either large or small states to lose their influence, depending on which chamber was retained, and as such it is nearly impossible to imagine how the votes for such an amendment could be mustered.

In contrast, state constitutions are sites of constant and deep change. “State constitutional amendments are frequent, if not routine.”²⁰⁵ One analysis of state constitutional amendments from 1999 counted over 230 state conventions and over 6000 amendments to state constitutions.²⁰⁶ In some states, the amendment process is particularly easy or common. In Colorado, for example, it is no more difficult to enact a constitutional amendment by initiative than it is to enact a statute, and the result has been more than 150 amendments over a period of 138 years.²⁰⁷ Alabama has the world’s longest constitution, inflated in size by

201. Ross, *supra* note 196, at 258. Early advocates of Alaskan unicameralism felt that Congress was too “bound by tradition” and unappreciative of “experimental democracy.” Ross, *supra* note 196, at 260 (citing JEANETTE P. NICHOLS, *ALASKA: A HISTORY OF ITS ADMINISTRATION, EXPLOITATION, AND INDUSTRIAL DEVELOPMENT DURING ITS FIRST HALF CENTURY UNDER THE RULE OF THE UNITED STATES* 403 (1923)).

202. Rogers, *supra* note 187, at 73–74.

203. Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 *HOFSTRA L. POLY SYMP.* 1, 18 n.69 (1996); Rogers, *supra* note 187, at 74.

204. For additional accounts of states considering unicameralism, see Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 *MD. L. REV.* 528, 549 n.115 (1999) (a Maryland commission deciding against a “modern” unicameral model by a single vote); Fritz Snyder, *Montana’s Top Document: Its Transition into the 21st Century*, *MONT. LAW*, Aug./Sept. 2009, at 8.

205. Daniel B. Rodriguez, *State Constitutionalism and the Domain of Normative Theory*, 37 *SAN DIEGO L. REV.* 523, 528 (2000).

206. Dinan, *supra* note 170, at 935 (citing G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, in *CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS* 3 (1996)).

207. Jim Griesemer, *Colorado Should Say “No” to Constitutional Amendments*, *DENVER POST* (Oct. 24, 2014, 10:38 PM), <http://www.denverpost.com/2014/10/24/colorado-should-say-no-to-constitutional-amendments/>.

890 amendments as of 2015.²⁰⁸ Unlike federal constitutionalism, a resistance to formal amendment does not mark state constitutionalism.²⁰⁹

Since no procedural obstacle to unicameralism exists at the state level, in the form of either general hurdles to constitutional amendment or special protections for bicameralism,²¹⁰ there must instead be a substantive distinction drawn between states and localities.²¹¹ A choice has been made to treat the two levels of government differently, a choice which must reflect something about each. As a delegate to Massachusetts' Progressive Era constitutional convention put it, in rejecting the relevance of local unicameral structures to the state's own system, "[a] city government is not a Legislature."²¹²

Second, the debates over state legislative structure essentially marshalled the same arguments as those over local legislative structure. Efficiency and democracy were laid against tradition, the federal analogy, and the importance of checks and balances.²¹³ What differed was the weight placed on each of those values. Citizens and legislators, at least after the Revolutionary period, worried more about constraining potentially oppressive state government and less about unshackling states from burdensome supermajority requirements. States also highly valued the stature imparted by mirroring the federal structure—in

208. Lorelei Laird, *Supersized Alabamans Are Readying Yet Another Effort to Reform the State's Famously Long Constitution*, ABA J., Mar. 2015, at 12.

209. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 590 (2009) (describing difficulty of Article V amendment process and shift to alternative forms of constitutional change).

210. See Rodriguez, *supra* note 205, at 528 (identifying state constitutional amendments, unlike federal constitutional amendments, as concerning "fundamental" features of government, including unicameralism).

211. It is notable that this line was drawn differently in the United States than in most other federal systems. While most federations have bicameral national legislatures, "unicameralism is increasingly the norm in subnational constitutions." John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837, 841 (2008). As of 2001, only seventy-three state legislatures across the world were bicameral out of 450, with the long-term trend towards subnational unicameralism. *Id.* at 857 (citing Louis Massicotte, *Legislative Unicameralism: A Global Survey and a Few Case Studies*, 7 J. LEGIS. STUD. 151, 151 (2001)). For example, while five Canadian provinces once had bicameral legislatures, none do today, and the last German bicameral state, Bavaria, turned to unicameralism in 1998. Dinan, *supra*, at 858. Many national constitutions require subnational bicameralism, while other states have been given the choice and opted for bicameralism. Dinan, *supra*, at 857. Australia is the only other country with largely bicameral state government. Dinan, *supra*, at 859. Perhaps this is so because Australian state constitutions are both important symbolic documents (therefore resistant to change) and were originally limited to bicameralism due to British legislation. Cheryl Saunders, *Australian State Constitutions*, 31 RUTGERS L.J. 999, 1002, 1011 (2000).

212. Dinan, *supra* note 170, at 962.

213. One argument common among proponents of local bicameralism—the virtue of a larger legislature—was not relevant at the state level, given the generally larger size of state legislative chambers.

Alaska and Arizona this issue appeared decisive²¹⁴—while local governments quickly moved away from federally inspired structures. Likewise, those who saw their polity, state or local, as sharing fundamental interests embraced unicameralism, but as time went on, the illusion of homogeneity was easier to maintain at the local level than in large states.

Third, and most importantly, states saw local governments as a form apart, different in kind from themselves and the federal government. States drew the federal analogy upwards, but they did not extend it down—states neither thought that local governments ought to be structured like the federal government nor like themselves. Local government was distinct and needed a distinct structure to match. Indeed, insofar as it was sometimes state legislatures imposing unicameralism on cities directly, it was often the very same entity selecting different forms for the two levels of government. In choosing bicameralism for themselves and unicameralism for local governments, the states determined that local governments should not merely be miniature states, but rather take their own shape.

II. WHY ARE LOCAL GOVERNMENTS UNICAMERAL?

Legislators and voters alike distinguished between state and local governments, consistently converging upon bicameral legislatures for the former and unicameral legislatures for the latter.²¹⁵ Any equivalence between the two levels of government was rejected. Local governments were meant to further different values and given the legislative structure to do so effectively. But why?

Presumably, efficiency, modernization, democratic vigor, and cost savings all provide benefits for state government—all things being equal—and tradition, deliberation, and checks and balances do the same at the local level. To understand why local governments adopted unicameralism, while states did not, it is necessary to identify features shared by all local governments that distinguish them from the states,

214. See *supra* notes 188-191, 200-201 and accompanying text.

215. James Gardner has identified the convergence of state governments on substantially identical structures—including bicameral legislatures—as an important and unexplored feature of American constitutionalism. James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 33-35 (2014). This Article makes a similar claim with respect to local constitutional convergence. However, Gardner's conclusions are either inapplicable to local governments (while states might all coordinate around the federal model, *id.* at 44, local governments have not) or unpersuasive in context. Gardner suggests that structural convergence stems from easy access to information about standard government structures, *id.* at 65, but this seems to minimize the reasoned debates that occurred over bicameralism, the lengthy period of time over which change occurred, and the remaining diversity of local forms on issues other than unicameralism. This Part provides its own explanations for the analogous convergence of local structures.

and which make these particular governmental virtues particularly attractive.

This section examines the features of local government that made unchecked majoritarianism so much more appealing at that level. Two explanations focus on local government's position in an intergovernmental system: first, the constraints imposed by higher levels of government and by interlocal competition, which offer some insurance against disastrous government action; and second, the internal homogeneity driven by residents who sort themselves into preferred towns and cities, which drives demand for swift majoritarianism. The executive-focused nature of local government—which plays a proportionally smaller role in regulation and a larger role in administration compared to the state and federal governments—provides two other explanations. At the local level, unicameralism allows legislatures to more effectively check and balance executives. Additionally, local executives have not only greater institutional power than local legislatures, but also greater symbolic resonance. Local legislatures are more purely instrumental than state and federal legislatures, and thus easier to restructure; sentiment and tradition do not stand in the way.

A. LOCAL GOVERNMENT IS CONSTRAINED—BUT IT ISN'T WEAK

A tempting explanation for local unicameralism is that local governments are weak and in no need of checks and balances.²¹⁶ Undoubtedly, this provides part of the explanation. Interlocal competition and state oversight²¹⁷ each help assure residents that, even without the brake of a second chamber, their local government cannot do too much harm. But local powerlessness cannot be the full story. For while these forces limit local government power relative to state or national governments, in an absolute sense, local governments retain an enormous ability to impose terrible costs on voters. All evidence suggests that residents care intensely about the choices of their local governments. They do not feel that they can trust either the political marketplace or the state legislature to entirely defang local governments. Thus, the legal weaknesses of local government provide only the beginnings of an explanation for local unicameralism.

216. See Levmore, *supra* note 44, at 161 (“The imposition of external costs requires a captive set of losers, and these are . . . most difficult to find from the vantage point of City Hall.”).

217. Federal oversight also protects against abuses by local government. See, e.g., 42 U.S.C. § 1983 (2015). However, this is true for state governments and does not explain what leads to a distinctively local form of government.

The tale of legally helpless local governments has a long scholarly lineage.²¹⁸ On the one hand, many local government law scholars see local governments as disempowered by state constitutions, which render local governments entirely subordinate to the states²¹⁹ and confine them to delegated powers interpreted narrowly under Dillon's Rule.²²⁰ On the other hand, political scientists working in the public choice tradition, most famously Paul Peterson, have argued that local government is so constrained by interlocal competition that it can only exercise a small fraction of the power that it holds.²²¹ In particular, they argue that local governments cannot pursue redistributive policies.²²² Because citizens will move to another town if they are taxed to pay for services that they do not receive—or even for services that they value at less than the bill they pay for it—they claim that it is effectively impossible to sustain any policies that do not benefit all taxpaying, mobile residents.²²³

Both of these claims have been hotly contested, however, and debates over the extent of local power continue with full force.²²⁴ I need not wade deeply into that debate. Legally, local governments are relatively weaker than states—no one contests this. And each story of local powerlessness offers residents at least some reason not to fear their local government.

From the public choice perspective, Tiebout competition (on which Peterson's model is based) offers residents some security from local abuse. Charles Tiebout's famous theory of interlocal competition

218. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 6–8 (1990) (describing “traditional account of local legal powerlessness”).

219. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907):

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . the state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest.

220. See, e.g., David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 506–09 (1999); Briffault, *supra* note 218, at 8; see also GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 4 (2008); Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109–13 (1980).

221. See, e.g., PAUL E. PETERSON, *CITY LIMITS* (1981); Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1058 (2007) (describing “conventional wisdom that localities should play little role in fulfilling the redistributive functions of government”).

222. Gillette, *supra* note 221, at 1058.

223. Gillette, *supra* note 221, at 1058.

224. See, e.g., Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 489–91 (2009) (describing debate over constraints on city power and ultimately arguing that urban areas could show renewed autonomy). See generally Kasim Reed, *Progressive Cities: Innovative Solutions to Urban Problems*, 7 HARV. L. & POL'Y REV. 219 (2013) (arguing for assertive and progressive local government and introducing symposium on that subject).

imagines local governments as fighting for residents and firms by selling bundles of public services for the “price” of the local tax rate.²²⁵ Residents and firms, the consumers in the location market, migrate to those jurisdictions that best match their preferences for services and taxes.²²⁶ Though the model is highly stylized and in its pure form requires implausible assumptions about the mobility of residents and the information available to them,²²⁷ the Tiebout model captures important dynamics shaping local government.²²⁸

In a Tiebout world, interlocal competition serves as a check on local power, not an outright bar on its exercise. For example, in a Tiebout analysis, cities can (and do)²²⁹ pursue redistribution and other policies that a rigid Petersonian public choice perspective might suggest are near impossible, so long as self-sorted residents are willing to pay for those policies. More importantly, there are many limits to Tiebout competition’s disciplining power. Those without the wherewithal to relocate—people of color facing residential discrimination, for example, or low-income people who cannot afford the up-front costs of moving, expensive suburban housing, or an automobile necessary to leave a center city—cannot impose “market” discipline on their local governments.²³⁰ Likewise, those whose tax payments are less than their service consumption, and who therefore impose a fiscal cost on local governments, are undesirable from a fiscal perspective; local governments may actively avoid satisfying their preferences.²³¹ Without the power to vote with their feet, these groups are inadequately protected by Tiebout competition.

Even so, Tiebout competition checks at least certain exercises of local power and therefore arguably makes intra-legislative checks and balances less important. Residents can check their local legislatures not only by voting for and lobbying the members of a second chamber but also by voting with their feet—or credibly threatening to do so. That

225. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956).

226. *Id.*

227. *Id.* at 419 (listing assumptions); Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 AM. ECON. REV. 93, 93 (1981) (“The pure [Tiebout] model, however, involves a set of assumptions so patently unrealistic as to verge on the outrageous.”).

228. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 511–28 (1991) (observing empirical evidence that jurisdictions in fact compete for residents with service/tax packages); David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1508 (2010) (observing empirical evidence that local policies are “capitalized” into housing prices).

229. CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS xi (2011).

230. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 420–21 (1990) (describing barriers to mobility).

231. See Vicki Been, *Comment on Professor Jerry Frug’s The Geography of Community*, 48 STAN. L. REV. 1109, 1111 (1996) (describing practice of fiscal zoning and collecting sources).

threat, of course, is only rarely credible at the state or national level; it is relatively more costly for an individual or firm to move across state lines or abroad than to move within their current region, where they have established social and economic networks.²³² Tiebout competition's greater force at the local level helps explain why a second legislative chamber is considered less necessary at the local level than for states and the federal government.

Likewise, state control of local governments theoretically offers meaningful protections to worried residents. State governments already limit the powers of local government, variously empowering and constraining cities, towns and counties in manners that shape what ends local governments can pursue.²³³ In addition to that static structuring of local government's powers, states can intervene in local affairs at will, whether in one-off decisions or broader limitations of local power. Depending on the form of home rule, state legislatures have the power to preempt between some and all of a local government's actions.²³⁴ As a practical matter, states can overrule nearly any local decision they find troubling.²³⁵ And states use this power constantly.²³⁶

Should a local government enact patently unwise legislation, in most cases residents could petition the state government to undo it. More commonly, when a local government enacts controversial legislation, the losing side can also petition the state government, where their allies might constitute a majority, to pull rank.²³⁷ In either situation, the state legislature serves as a counterweight against local power: Rather than a second chamber whose concurrent assent is necessary for legislation to

232. See Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1353 (2014) ("Naturally, the costs of, and job barriers to, switching governmental providers are lowered when the relevant government is smaller."); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201, 274 (1997) ("Competition for residents is more likely among localities within a state, or states within a federation, than among nation states.").

233. See generally FRUG & BARRON, *supra* note 220.

234. Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126–27 (2007) (discussing varieties of home rule and noting difficulties of precisely categorizing or quantifying each variety, given state-by-state distinctions).

235. David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 392 (2001) ("[H]ardly any impediments to the exercise of state power vis-à-vis local governments exist in state constitutional law.").

236. See Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 254 (2004) (collecting cases "from local tobacco and firearm regulation, to gay and lesbian rights, and domestic partnership ordinances, to campaign finance reform measures, and 'living wage' laws").

237. Shaila Dewan, *States Are Blocking Local Regulations, Often at Industry's Behest*, N.Y. TIMES (Feb. 23, 2015), https://www.nytimes.com/2015/02/24/us/govern-yourselves-state-law-makers-tell-cities-but-not-too-much.html?_r=0 ("[P]re-empting the power of local governments is becoming a standard part of the legislative playbook in many states where Republicans who control statehouses are looking to block or overturn the actions of . . . municipalities that are often more liberal.").

pass, the state legislature retains the option of vetoing (or modifying) the local legislation.

As with interjurisdictional competition, preemption affects local governments more than states. First, both states and the federal government can preempt local governments, while only one body can preempt states.²³⁸ Second, home rule provisions, even where they provide some protections to local government, rarely have the heft of the national constitution's protections for federalism.²³⁹ In the wake of the Rehnquist Court's revival of federalism doctrines,²⁴⁰ there are renewed protections for states, ranging from canons of statutory interpretation²⁴¹ to sovereign immunity doctrines.²⁴² While home rule has its own jurisprudence, its protections are generally considered not nearly as strong.²⁴³ With local legislation easier to preempt than state legislation, bicameralism should be less necessary at the local level.

But local government's relative powerlessness is not enough to explain local unicameralism. In an absolute sense, local governments remain extremely powerful. They routinely take actions that might seem to require checking and balancing. The Department of Justice's investigation into police practices in Ferguson, Missouri, for example, found that local policies treated residents "less as constituents to be protected than as potential offenders and sources of revenue," and were pervaded with "deeply embedded constitutional deficiencies," including systematic harassment, racial discrimination and violence.²⁴⁴ Of course, those deficiencies ended in the death of a teenager at the hands of local police and a violent confrontation between Ferguson residents and Ferguson police.²⁴⁵ The images of tanks, tear gas, and incendiary devices

238. Diller, *supra* note 234, at 1114.

239. See Barron, *supra* note 235, at 392 (describing home rule provisions "mini-Tenth Amendments" that are supposed to defend against state assertions of preemptive power, but which are rarely construed as such by state courts).

240. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 430–33 (2002) (summarizing federalism trends in constitutional law and statutory interpretation).

241. *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

242. *Alden v. Maine*, 527 U.S. 706, 754 (1999).

243. For example, David Barron observes that there are "state constitutional prohibitions against special legislation that may limit a state's capacity to regulate a particular city, but these often are honored in the breach." Barron, *supra* note 235, at 392 n.35. See Briffault, *supra* note 236, at 257 ("Even within state systems, home rule does not change the fact that local governments are creatures of state law."). Of course, given the wild diversity of forms of home rule, it is dangerous to generalize. Barron, *supra* note 235, at 253 (finding that home rule doctrines "vary[] from state to state, and even within a state").

244. U.S. DEP'T OF JUSTICE, CIV. RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2, 6 (2015).

245. See Wesley Lowery, *Police Use Tear Gas On Crowd In Ferguson, Mo., Protesting Teen's Death*, WASH. POST (Aug. 12, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/08/12/police-use-tear-gas-on-crowd/?utm_term=.5279a1a70423.

being used by police made painfully clear that local governments are not entirely impotent. Neither state supervision nor the mobility of black residents prevented the Ferguson government from exercising power in its rawest form. Local control over police—sovereignty instantiated²⁴⁶—is enough, on its own, to reject any blanket claims of local incapacity.²⁴⁷

Policing is not the only area in which local governments remain powerful. Richard Briffault has noted that local governments have the dominant role in setting education and land use policy in this country, and that, as a practical matter, the courts have guarded that local role even against constitutional claims of equality and individual rights.²⁴⁸ These policies in turn affect residents' lifelong economic opportunity, social mobility, and physical and mental health in ways that social scientists are only just beginning to uncover.²⁴⁹ Exclusionary land use policies, set overwhelmingly by local governments, have been estimated to cost the U.S. economy \$1.95 trillion²⁵⁰ and at the individual level, the personal devastation wrought upon the losers in the housing market can be incalculable.²⁵¹

Moreover, residents are acutely aware of the importance of their local governments, participating frequently and deeply in order to assure that the right decisions are reached. They do not trust competition or their state representatives alone to protect them. Research shows that between eleven percent and twenty-five percent of people, depending on the size of the jurisdiction, attend community board meetings, and between twenty-five percent and forty percent of people contact their

246. See Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. LAW. 417 (2016) (describing special connection between local governments, policing and sovereignty).

247. See Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409 (2001) (describing importance of local governments in criminal law).

248. Briffault, *supra* note 218, at 112.

249. For a summary of the recent “neighborhood effects” literature, see Barbara Sard & Douglas Rice, *Realizing the Housing Voucher Program’s Potential to Enable Families to Move to Better Neighborhoods*, CTR. ON BUDGET & POL. PRIORITIES (Jan. 12, 2016), <http://www.cbpp.org/research/housing/realizing-the-housing-voucher-programs-potential-to-enable-families-to-move-to>. Particularly important recent studies include PATRICK SHARKEY, STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY (2013); Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855 (2016); Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. OF ECON. 1553 (2014).

250. Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth*, at 3 (Kreisman Working Paper Series in Housing Law and Policy, Paper No. 21154, Apr. 2015), https://chicagounbound.uchicago.edu/housing_law_and_policy/36/.

251. See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016) (providing quantitative and qualitative sociology of the eviction process in low-income communities).

local officials.²⁵² Impassioned neighbors pack zoning hearings to register their opposition to nearby developments.²⁵³ The felt importance of local government to its residents is perhaps best illustrated by the fact that eighty-nine percent of parents of K-12 students surveyed in 2007 said that they had attended a school or PTA meeting since the start of the school year, a level of involvement in governance unimaginable in state or federal agencies.²⁵⁴ Local government is not simply allowed to be unicameral because the stakes are low, either from the perspective of policymakers or residents.²⁵⁵ Local governments exercise deadly force—and local legislatures set policies governing the use of that force. That alone makes local governments powerful enough that structural constraints on local power, like bicameralism, might be deemed necessary. Something more is necessary to explain why unicameralism, instead, is preferred.²⁵⁶

B. TIEBOUT SORTING AND SUBURBAN UNICAMERALISM

Tiebout competition likely plays a second important function in explaining local unicameralism: By sorting residents into relatively homogeneous communities, it fosters political environments eager for majoritarianism. The dominant political blocs in any particular jurisdiction—and in particular, “homevoters” in the suburbs—can

252. J. Eric Oliver, *City Size and Civic Involvement in Metropolitan America*, 94 AM. POL. SCI. REV. 361, 365 (2000); see also Mike Maciag, *The Citizens Most Vocal in Local Government*, GOVERNING (July 2014), <http://www.governing.com/topics/politics/gov-national-survey-shows-citizens-most-vocal-active-in-local-government.html> (reporting survey data showing that 19 percent of Americans recently contacted their local elected officials and twenty-four percent attended a public meeting).

253. See ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUS., U.S. DEP’T OF HOUS. & URBAN DEV., “NOT IN MY BACKYARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING 1–8 (1991) (“NIMBY groups . . . can be very effective at packing hearing rooms and leaving the impression that public opinion is strongly against whatever project they oppose.”); Morton Gitelman, *The Role of the Neighbors in Zoning Cases*, 28 ARK. L. REV. 221, 221 (1974) (“[T]he petitions will invariably be circulated and the angry neighbors will crowd the room at the hearing glowering at planning commissioners or councilmen and muttering curses at the petitioner.”).

254. Chuck Dervarics & Eileen O’Brien, *Back to School: How Parent Involvement Affects Student Achievement*, CTR. FOR PUB. EDUC. (Aug. 30, 2011), <http://www.centerforpubliceducation.org/Main-Menu/Public-education/Parent-Involvement/Parent-Involvement.html>.

255. See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 422–23, 432–36 (2007) (rejecting Peterson’s vision of powerless and depoliticized local government and describing broad range of ideological issues which local government must address).

256. Another argument which may tempt, but which does not stand up to scrutiny, is that local unicameralism represents a commitment to equal representation at the local level: that bicameralism involves a second, more malapportioned chamber (like the U.S. Senate) and that turning to unicameralism represents a move toward fairness. But local unicameralism coexisted with gross inequalities in representation for a century. *Avery v. Midland County*, the case which first applied one-person one-vote to local government, concerned a five-member, unicameral county commission where one district contained 414 residents and another 67,906. 390 U.S. 474, 476 (1968).

confidently embrace legislative capacity, secure in the knowledge that they and their like-minded neighbors will be the ones to benefit. Like Progressive Era advocates of state unicameralism, residents of a Tiebout-sorted town want a legislative structure that can consistently effectuate the majority's demands: they demand the vigor of unicameralism, not the constraint of bicameralism.

In the Tiebout model, mobility has (at least) two separate effects.²⁵⁷ The first, already discussed, is forward-looking. It stems from the threat of future mobility: Local governments must cater to people and businesses that can leave if dissatisfied. The second arises from the past fact of mobility. Since local governments do offer different bundles of taxes and services, residents over time arrange themselves into the localities that best satisfy their preferences. Although limits on residential mobility limit the amount of sorting that takes place, in the aggregate, local governments take on a more homogeneous cast than the region or state in which they are situated.

There is substantial, although not entirely uniform, empirical evidence that Tiebout sorting in fact occurs.²⁵⁸ For example, one influential study found that Michigan municipalities were more homogeneous in areas with more local governments for residents to choose between.²⁵⁹ Although much sorting takes place on the basis of wealth, not political preferences,²⁶⁰ both shape the composition of local jurisdictions. The result is at least some degree of homogeneity among local voters: some rough consensus on what aims their local government should pursue.

257. Indeed, this is an oversimplification. This paragraph's sketch of the Tiebout model draws on Wallace Oates' much more thorough review of this complex literature, which describes the many varieties of theoretical and empirical research arising out of the Tiebout framework. Wallace E. Oates, *The Many Faces of the Tiebout Model*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 21 (William A. Fischel ed., 2006).

258. David Schleicher, *I Would, But I Need the Eggs: Why Neither Exit nor Voice Substantially Limits Big City Corruption*, 42 *LOY. U. CHI. L.J.* 277, 280 (2011) ("[T]here is substantial evidence that sorting does occur."); Keith Dowding et al., *Tiebout: A Survey of the Empirical Literature*, 31 *URB. STUD.* 767, 787 ("[A]n impressive array of evidence suggests that the Tiebout family of models holds a number of important truths about urban politics.").

259. Edward M. Gramlich & Daniel L. Rubinfeld, *Micro Estimates of Public Spending Demand Functions and Tests of the Tiebout and Median-Voter Hypotheses*, 90 *J. POL. ECON.* 536 (1982) (finding greater homogeneity in metropolitan areas with more local governments and more opportunities for sorting).

260. Lee Anne Fennell, *Homes Rule*, 112 *YALE L.J.* 617, 638 (2002) (reviewing WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)) ("[T]he charming image of Tieboutian foot-shoppers choosing from different bundles of goods and services based on their individual preferences begins to be supplanted by the somewhat less charming image of community choice based primarily on the number of investment dollars that each citizen-consumer holds."); Gerald E. Frug, *City Services*, 73 *N.Y.U. L. REV.* 23, 31 (1998) ("People who live in unsafe neighborhoods or send their children to inadequate schools don't do so because they have taste for them. They do so because they feel they have no other choice.").

This homogeneity is sharpened by the dominance of a particular type of citizen in local politics: the “homevoter.”²⁶¹ A species first identified by William Fischel, the homevoter is motivated to participate in local politics by her need to protect the (uninsurable) value of her home from disadvantageous land use or taxation decisions, which are capitalized into housing prices.²⁶² There is a rough consensus that the homevoter controls governance in suburban politics,²⁶³ and the homevoter has recently been gaining power in large cities as well.²⁶⁴ Homevoter power stems first and foremost from numerical superiority. Homeowners substantially outnumber renters in the suburbs and commonly use their power in local politics to exclude new renters.²⁶⁵ Homevoters also have access to informal sources of power, rooted in social ties in a small community and a compelling cost-benefit calculus for participation.²⁶⁶ Indeed, homevoters are considered so powerful that they can effectively control local governments without even needing to vote.²⁶⁷

The combination of Tiebout sorting and homevoter dominance within those already homogenous jurisdictions produces a strong foundation for local unicameralism. It is a truism that local politics are usually more majoritarian, and less protective of minorities, than larger politics.²⁶⁸ But bicameralism, and checks and balances more generally, are rooted in a distrust of government action. Bicameralism is meant both to slow the pace of lawmaking generally and in particular to slow

261. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001).

262. *Id.*

263. Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEG. STUD. 227, 229 (2014). *Id.* at 235 (summarizing empirical research as mostly consistent with the homevoter theory). *But see* Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824 (2003) (reviewing WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* (2001)) (contesting homevoter hypothesis).

264. Been et al., *supra* note 264, at 229 (“We find a surprising level of empirical support for the homevoter-based theory, even though New York City is probably the last place in the United States that one would expect to see zoning policy catering to the interests of homeowners . . .”).

265. Fennell, *supra* note 261, at 629.

266. Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1648–50 (2006).

267. *Id.* at 1649 (“There is little need for the majority of homeowners to vote if all of the available choices in a local election are likely to serve their fundamental interests.”).

268. *See, e.g.*, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 405 (1977) (arguing that “[s]mall municipalities combine the majoritarian building blocks of single issues and few voters[.]” and tracing idea back to Madison); Serkin, *supra* note 267, at 1645 (“Received wisdom suggests that, unlike the state and federal governments, local governments are majoritarian.”); Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1686 (2007) (describing conventional wisdom that local governments more likely to “gang up” on permanent minorities). *But see* Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (pointing out that national minorities may be local majorities).

majoritarian lawmaking. As such, bicameralism offers little to homogeneous, homevoter-dominated local governments. Homevoters can rest secure, knowing that they control their local governments and that, in any case, their neighbors already agree with them about what matters. Given that control, homevoters should want a mechanism for reliable and uninterrupted translation of their preferences into policy.²⁶⁹ Unicameralism, not bicameralism, gives homevoters in homogeneous communities what they want.

This explanation for local unicameralism also explains why suburban unicameralism is so deeply entrenched. Suburbs are smaller, allowing greater differentiation across jurisdictions and therefore additional sorting.²⁷⁰ Suburbs, due to their higher homeownership rates, are also more dominated by homevoters, assuring a tighter identity of interest among members of the majority.²⁷¹

Another way of looking at it is that due to homevoter power, local governments generally, and suburbs in particular, exemplify the qualities that advocates of *state* unicameralism emphasized in their own arguments. While believing that societies have fundamentally shared interests may have been a misguided bit of Whig ideology when applied to the entire state of Pennsylvania at the Founding,²⁷² that belief might well reflect reality along the Main Line. And while popular participation might not constitute “bicameralism from below” at the state level,²⁷³ the omnipresent oversight of the homevoter really does help govern suburbs. Finally, suburbanites really do demand active government protection from “private aggression,”²⁷⁴ albeit in the form of “out-of-scale” development rather than the monopolies feared in the Progressive Era.

Notably, local powerlessness—whether from Interlocal competition or state control—does not explain the special affinity of suburbs for unicameralism. As Richard Briffault has demonstrated, local autonomy is at its peak in the suburbs.²⁷⁵ Legislatures and courts alike have been solicitous of suburban power to resist urban demands for integration, particularly in the areas of education and land use, and suburbs have successfully raised walls around their own resource bases.²⁷⁶ If

269. In a truly homogeneous polity, the challenges of bicameralism are easily overcome, as the two chambers are likely to agree. The costs of bicameralism are therefore diminished in this context, arguably making it once again more appealing. But in that case, bicameralism offers nothing but a procedural hurdle to clear, if an easy one. Why bother?

270. See Gramlich & Rubinfeld, *supra* note 260.

271. See Been et al., *supra* note 264.

272. See Williams, *supra* note 176 and accompanying text.

273. See *supra* notes 174–75 and accompanying text.

274. See *supra* note 184 and accompanying text.

275. See generally Briffault, *supra* note 219; Briffault, *supra* note 231.

276. Briffault, *supra* note 231, at 355.

bicameralism existed only to serve as a check on empowered legislatures, one might expect to see a greater openness to it in suburbia. But the opposite is true. This suggests that bicameralism is not driven only by a demand for checks and balances.

Rather, bicameralism's purpose is to provide checks and balances in the specific context of diversity, in order to protect disparate groups within a single polity.²⁷⁷ Such diversity is present at the national and state levels, and generally in large cities as well, and thus bicameralism is more valued in those places. Bicameralism's specific variety of checks and balances is not necessary in the more homogeneous suburbs. Thanks to Tiebout sorting, suburban power and suburban unicameralism can comfortably coexist. Local autonomy allows suburbs to create communities of shared interests and then to assertively protect those communities against outside demands. Since this sort of suburban power, as identified by Briffault, is employed for the benefit of residents against non-residents, voters do not seek to check that power (why would they?) but rather to enhance it.²⁷⁸

Put differently, suburban power has substantial negative externalities, but its internalized effects are generally positive.²⁷⁹ The potential losers of suburban policymaking do not reside in the relevant jurisdictions, and their concerns are muffled or redirected as a result. In

The core of local legal autonomy is defensive and preservative, enabling residents of more affluent localities to devote local taxable resources to local ends, exclude unwanted land uses and users and protect the autonomous local political structure that allows them to pursue local policies . . . Suburbs benefit from the localist values of courts and legislatures that discourage modifications of this highly satisfactory status quo and protect them from outside interference.

277. See *I.N.S. v. Chadha*, 462 U.S. 919, 948–51 (1983) (describing one purpose of bicameralism as preventing minority factions—a relevant concern only where minority and majority groups coexist in the first place).

278. Admittedly, state legislatures, in which all groups are represented, provide the menu of legislative structures under general-law incorporation. I assume in this section that suburban interests dominate the state legislatures, as is overwhelmingly true in American politics, and that they are able to coordinate on this issue. See Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1538 (2007) ("Legislatures in most states are heavily dominated by suburban majorities . . ."). I describe suburban jurisdictions, rather than the state legislature, as selecting unicameralism for simplicity of argument: It might be more precise to say that suburban jurisdictions select unicameralism through the state legislatures.

279. See Briffault, *supra* note 231 at 355. There are many examples of these externalities. Suburban autonomy over land use policies causes environmentally destructive suburban sprawl, see David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2263 (2003) ("[T]he current form of home rule directs local power in a way that fuels sprawl."); Nicole Stelle Garnett, *Trouble Preserving Paradise*, 87 CORNELL L. REV. 158, 161–62 (2001) (cataloguing environmental harms of sprawl); economically inefficient regional growth, see John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91 (2014); and unjust exclusion of disadvantaged social groups from opportunity, see e.g. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993)—negative effects all felt outside suburban borders. In contrast, suburban autonomy over education is used to protect educational outcomes for residents. See James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043 (2002).

contrast, at the state and national level, where bicameralism reigns, most legislative decisions are internalized; while there are winners and losers, both groups tend to reside within the jurisdictional lines. State legislative power appears more fearsome than suburban legislative power—although the latter can be immensely destructive—because suburbanites have already sorted themselves into communities with relatively unified interests (or more precisely, in which supermajorities share relatively unified interests).²⁸⁰

Thus, Tiebout provides not one but two explanations for local unicameralism. On the one hand, the threat of exit disciplines local governments, providing a substitute check to unicameral legislatures. On the other, the fact of Tiebout sorting assures residents that the unicameral legislature's power will be used consistently for their own benefit. Paradoxically, both local powerlessness and local power drive local unicameralism.

C. CHECKS AND BALANCES IN AN EXECUTIVE-DOMINATED GOVERNMENT

So far, the explanations for local unicameralism have assumed that bicameralism indeed promotes checks and balances—as is generally believed at the federal level. But that isn't always so. Local government is, at its heart, executive. Its programmatic focus on administration and implementation means that, counterintuitively, unicameralism often *promotes* a healthier system of checks and balances at the local level. Bicameralism constrains government by making legislation more difficult. But local governments' role in our federalist system rests primarily in administration and implementation, not legislation.²⁸¹ Even as local unicameralism paves the way for swift and efficient lawmaking, it also allows the legislature to more effectively oversee the executive, where, at the local level, real power operates.²⁸²

Local governance is lodged primarily in the executive branch: Local governments are service providers.²⁸³ Public employment data make this clear. In 2014, local governments employed over 10.5 million public

280. See Serkin, *supra* note 267, at 1628 (describing extent of externalities as “uniquely local”).

281. Cf. Lael R. Keiser, *Why It Matters Whether State Bureaucrats as Opposed to Federal Bureaucrats Administer Federal Programs*, in *POLITICS, POLICY, AND ORGANIZATIONS: FRONTIERS IN THE SCIENTIFIC STUDY OF BUREAUCRACY* 207, 208 (George A. Krause and Kenneth J. Meier eds., 2003) (“[M]ost public policy is *carried out* at the state and local levels . . .”) (emphasis added).

282. Notably, the previous sections emphasized zoning—a quintessentially legislative local function—in showing how local governments seek efficiency in legislative design. Taxation and budgeting might be another important example.

283. Mayor Fiorella LaGuardia famously announced that “[t]here is no Democratic or Republican way to pick up garbage.” See Schleicher, *supra* note 20, at 421 & n.16.

employees,²⁸⁴ while the states employed only 3.75 million people,²⁸⁵ and the federal government employed 2.7 million civilian workers.²⁸⁶ While no one would claim that local government has a dominant role in the American system of policymaking, local government plays an outsize part in on-the-ground policy implementation.²⁸⁷

This service delivery-focused role vests particular power in the executive branch. The executive can manage public workers in a way that legislatures simply cannot. Many of the most important local functions operate at the level of personnel, not policy.²⁸⁸ No ordinance can meaningfully delineate every step a teacher must take in responding to a classroom disruption or an unexpected question from a student, for example. Teachers are “street-level bureaucrats,” whose work is necessarily difficult to supervise and dependent on individual professional judgment.²⁸⁹ So are police, social workers, and many other local employees.²⁹⁰ Broad legislative dictates govern the behavior of public employees, of course, but direct management often plays a larger role.²⁹¹ Put differently, the superintendent has considerable advantages over the school board. This further strengthens executive dominance as a default condition of local government.

Thus, the distinct substantive tasks assigned to local government demand a different conception of checks-and-balances: one far friendlier to unicameralism.²⁹² This vision of unicameralism-as-check-and-balance is best illustrated by a city manager system. In many towns, cities and

284. U.S. CENSUS BUREAU, 2014 ANNUAL SURVEY OF PUBLIC EMPLOYMENT & PAYROLL, LOCAL GOVERNMENT EMPLOYMENT AND PAYROLL DATA: MARCH 2014 (2014).

285. *Id.*

286. *Id.*

287. This shares themes with those who see local governments are as delegated implementers of state policy, akin to state agencies. *See, e.g.,* Aaron Saiger, *Local Government as a Choice of Agency Form*, 77 OHIO ST. L.J. 423 (2016).

288. *Cf.* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 420 (1993) (“[M]ost—local governments in the United States are not states-in-miniature, possessing broad decisionmaking authority over an array of public services and issues, but are instead highly specialized bodies . . . charged with delivering public services . . .”).

289. *See generally* MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

290. *See* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 57 (2011) (discussing “the difficulty of controlling the inevitable discretion of the ‘street level bureaucrats’—welfare caseworkers, police officers on the beat, classroom teachers—who make on-the-spot, face-to-face decisions that often determine the life chances of citizens”).

291. *See* NORMA M. RICCUCCI, HOW MANAGEMENT MATTERS: STREET-LEVEL BUREAUCRATS AND WELFARE REFORM (2005).

292. Unicameralism is not the only structural feature of local government that emphasizes checks between the legislative and executive branches, rather than within the legislative branch. Many local actions, such as rezonings, require concurrent action between executive bodies and the legislature, through processes more involved and articulated than presentment and the veto power. *See supra* note 60 and accompanying text.

counties, a nonpartisan, unelected manager primarily oversees government.²⁹³ The city manager is given *carte blanche* to run the daily operations of government, subject only to the constraints imposed by the elected council.²⁹⁴ Moreover, many of those daily operations come preapproved by state legislation and need no local legislative authorization.²⁹⁵ Thus, in the absence of legislative action, a manager-operated locality is not dormant, as the federal government would be without Congressional action.²⁹⁶ Rather, the city manager would be empowered to keep running the full panoply of local activities on her own.

In a council-manager system, therefore, the additional veto point of bicameralism does not prevent government action. Rather, bicameralism simply increases the manager's discretion. The baseline state of affairs is continuing executive action, led by the manager. A divided legislature might act slowly, or not at all, to respond to the manager's actions, however controversial. In contrast, a unicameral legislature is better able to monitor and control the city manager. Bicameralism replaces state action by elected legislators with action by a single unelected individual, a person still able to control the police, the schools, the city planners, and the other instruments of local government. This is not the libertarian vision of inaction, or the democratic vision of deliberation, praised by advocates of bicameralism.

Even in a strong mayor system, with an elected executive, the default state of local government is action rather than inaction. Teachers will keep teaching; police officers will keep responding to crimes. The increased friction of bicameralism simply shifts power to the executive branch, which will continue operating on its own terms without legislative intercession.

Moreover, bicameralism interferes even with the informal methods of governance that local legislatures have developed to manage governments full of hard-to-regulate street-level bureaucrats. At the local level, a substantial amount of legislative action takes the form of *intervention*, not new policymaking. In part, this is because efforts at novel local policymaking often are preempted by state governments or

293. See Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2572 (2006) (describing sign on desk of "weak mayor" in a council-manager city: "The buck doesn't stop here. See the city manager.").

294. NAT'L CIVIC LEAGUE, MODEL CITY CHARTER § 3.04 (8th ed. 2003) (listing powers of city manager, including power to "[d]irect and supervise the administration of all departments, offices and agencies of the city," and noting that "the manager will not only perform managerial duties in the city's operations but will also have a significant role in the development of policy").

295. See, e.g., MASS. GEN. L. ch. 40 (2018) ("Powers and Duties of Cities and Towns").

296. Cf. Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

held to fall outside a local government's home rule powers.²⁹⁷ As a result, local legislatures govern as much by communication as through legislation with the force of law. For example, the New York City Council does not enact ordinances to micromanage the lane-by-lane design of the more than 6000 miles of streets in the city;²⁹⁸ this would be impractical and nearly impossible. But the political buy-in of council members is necessary for the Department of Transportation to engage in a project as small as changing a single street from two lanes to one over ten blocks.²⁹⁹ In this context and the many others like it, council members do not legislate; they instruct.

This communication-based role of the legislature would be far less effective in a bicameral system, where the legislature could not speak with one voice. A hearing in one chamber cannot pass messages to the bureaucracy as reliably if the other chamber might disagree; a legislator cannot credibly claim to speak for her district if her colleague from the other chamber voices a contrary opinion. In the face of legislative dissensus, agencies would continue to act, simply without effective legislative oversight.

Of course, members of Congress intercede with administrative agencies as well, through formal hearings and informal communications, bicameralism notwithstanding.³⁰⁰ But the context is different. At the federal level, Congressional intervention most commonly follows the "representative-as-ombudsman" model, in which the legislator simply connects constituents to agencies and helps them navigate the bureaucracy, usually to secure access to public benefits.³⁰¹ When it comes to substantive interventions in the discretionary decisions of an agency, courts look askance at legislative meddling and protect agencies from Congressional intrusions.³⁰² Federal agencies are also more constrained by laws and procedures: they are generally

297. See generally Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007) (describing state preemption of local legislation).

298. *Strategic Plan 2016: 1. Introduction*, NEW YORK CITY DEP'T OF TRANSP. (2016), <http://www.nycdotplan.nyc/introduction> (2016).

299. See Brad Aaron & Stephen Miller, *Tonight: Tell Manhattan CBs That Harlem Needs a Safer Morningside Avenue*, STREETS BLOG NYC (Oct. 23, 2013), <http://nyc.streetsblog.org/2013/10/23/tonight-tell-manhattan-cbs-that-harlem-needs-a-safer-morningside-avenue/>.

300. See Edward J. Markey, *Congress to Administrative Agencies: Creator, Overseer, and Partner*, 1990 DUKE L.J. 967, 971 (1990).

301. See Joshua Bone, *Stop Ignoring Pork and Potholes: Election Law and Constituent Service*, 123 YALE L.J. 1406, 1412–14 (2014); see also Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1135–36 (2005) (observing that constituent services play a particularly important role in local government, compared to Congress).

302. Jamelle C. Sharpe, *Judging Congressional Oversight*, 65 ADMIN. L. REV. 183, 185, 197–202 (2013) (“[C]ourts have decided that federal legislators cannot control or heavily influence how agency officials exercise the powers delegated to them.”); see also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255–60 (2001) (describing relationship between Congress and agencies).

rulemakers and adjudicators, not street-level implementers.³⁰³ Local government both allows for, and requires, more direct dialogue between the legislature and the bureaucracy; unicameralism allows that dialogue to be clear and direct.

It is not just theoretical that local unicameralism is meant to elevate the legislature in order to check the executive. The framers of the 1989 New York City Charter, which finally planted unicameralism firmly into the city's structure, explicitly understood unicameralism to promote checks and balances at the local level. They described their restructuring of the legislative branch to consist of a single chamber as a decision "to empower . . . the Council . . ." ³⁰⁴ Their stated purpose was for the "legislature to balance and check the executive branch." ³⁰⁵ Moreover, they even connected the value of unicameralism to the executive-focused nature of local government. ³⁰⁶ Bronx Borough President Fernando Ferrer, for example, sharply distinguished between bicameral states and the unicameral structure he favored for the city, arguing that cities "fill potholes" and provide direct service delivery. ³⁰⁷ In New York City, unicameralism was an attempt to elevate the status of the legislature against the already-empowered executive.

Indeed, this motivation for unicameralism can even be seen in that bastion of bicameralism: the United States Congress. Where the federal government most resembles local government's executive-focused, highly discretionary structure—in foreign affairs—Congress has attempted to make itself more unicameral, to better check the executive. For example, the President has broad control over the military and, given the exigencies of military action, Congress cannot usually manage military operations through its normal lawmaking process. ³⁰⁸ Thus, when Congress perceived that the President had abused that control, it passed the War Powers Resolution, which, among other things, requires the President to remove American troops from hostilities unless Congress specifically authorizes an operation within sixty days. ³⁰⁹ Effectively, this creates a one-house veto, as either chamber can, on its

303. Cf. Davidson, *supra* note 14, at 591–92 ("As increasingly significant as local regulation may be, the provision of public services has historically been central to local-government identity, more so than at other levels of government.").

304. Schwarz, Jr. & Lane, *supra* note 141, at 776.

305. Schwarz, Jr. & Lane, *supra* note 141, at 777.

306. Schwarz, Jr. & Lane, *supra* note 141, at 777 ("Much of the focus of a city government is on the delivery of services . . .").

307. Purdum, *supra* note 150.

308. Cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 691, 751 (2008) (debating whether Congress may Constitutionally intervene in tactical and operational discussions and describing and acknowledging that many such Congressional interventions would be "absurd").

309. 50 U.S.C. § 1544(b) (2011).

own, force an end to the conflict.³¹⁰ Congress knew that retaining the fullest protections of bicameralism would simply empower the executive to proceed as it wishes—just as police forces and school principals would be able to do if local governments were bicameral. A move toward unicameralism promoted checks-and-balances. Likewise, in the intelligence arena, Congress created a special bipartisan, bicameral body, nicknamed the “Gang of Eight,” which the executive must inform of all covert actions.³¹¹ In other words, it created a quasi-unicameral entity. When the legislature is placed in an essentially reactive position, it must act with unity to check the executive.

Institutional design in federal foreign policy evidences the same principle as in local government design: where the executive is always and necessarily active, the legislature is best structured in a streamlined manner. In local government, the executive branch is dominant and the default condition is executive action. Roadblocks to legislative action, such as bicameralism, only strengthen the executive’s hand further. Unicameralism empowers the legislature to act efficiently, but in a way that often promotes checks and balances.

D. LACK OF SENTIMENT IN LOCAL LEGISLATURES

The executive nature of local government provides another explanation for local unicameralism as well. Local legislatures—if not local governments—may be sites for sentiment and cultural meaning to a lesser degree than state and federal governments. The arguments for unicameralism are fundamentally instrumental, whereas important arguments for bicameralism are symbolic. Symbolism, it turns out, plays a small role in how local legislatures are constituted.

The debates over unicameralism at the state and local levels, as already noted, involved largely the same arguments on each side. However, those arguments had different force in each setting. Unicameralism’s supporters emphasized efficiency, seeing bicameralism as a source of gridlock due to the effective supermajority requirement it imposes.³¹² They even pointed to the truly mundane issue of direct cost savings: One set of legislators requires fewer salaries and health insurance plans than two.³¹³ The defenders of bicameralism, in contrast, did not only discuss the procedural consequences of a second chamber.

310. Whether this survives *I.N.S. v. Chadha*, 462 U.S. 919 (1983) is to some extent an open question, Lori FISLER DAMROSCH, *The Clinton Administration and War Powers*, 63 L. & CONTEMP. PROBS. 125, 129 n.25 (2000), but not one relevant here. As a matter of institutional design, single-chamber action was deemed necessary to constrain executive power in this area.

311. See Kathleen Clark, “A New Era of Openness?: Disclosing Intelligence to Congress Under Obama,” 26 CONST. COMMENT. 313, 318 (2010).

312. See *supra* Part I.A.

313. See, e.g., *supra* notes 92, 117.

They described bicameralism as rooted in tradition and elevated by the blessing of the Framers of the national Constitution.³¹⁴

Cultural, symbolic arguments for bicameralism were available for local government. Most large cities began as bicameral, as Part I.A shows. Cities could have sought to maintain a connection to that past by maintaining their upper legislative chambers, but did not do so.³¹⁵ They could have continued to cultivate comparisons to the federal government, as Baltimore tried to do in its early experiment with a local electoral college.³¹⁶ Indeed, local governments have roughly as strong a historical claim to an early bicameral tradition as do the states: After all, three states adopted unicameral legislatures during the Revolutionary and Founding eras.³¹⁷

Moreover, these traditionalist arguments were made in the debates over local unicameralism; they simply did not take. In Arizona and Alaska, the historical record shows appeals to the traditional two-chambered legislative structure and comparisons to Congress to have been effective, even determinative, arguments.³¹⁸ For states, it was demeaning or unserious to adopt unicameralism. In Atlanta, though, when the same appeals were marshaled, they did not define the public discourse. A rhetoric of modernization dominated in Atlanta (and Philadelphia, and in the newspaper coverage of unicameralism debates across the country), not a rhetoric of traditionalism. Local legislatures were meant to get things done, not serve as repositories for public meaning.³¹⁹

In some sense, Everett—that singular holdout for so long—is the exception that proves the rule. Bicameralism lasted so long in Everett because bicameralism took on special cultural significance as a local tradition, a “badge of pride.”³²⁰ Indeed, for many years, Everett held summertime picnics and softball games with Waterville, Maine, the

314. *See supra* Part I.A.

315. This could be done even with a vestigial upper chamber, akin to the contemporary House of Lords. *See* Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMPARATIVE L. 613, 636 (2014) (describing vestigial upper chambers in the United Kingdom, Belgium and Canada).

316. *Supra* notes 67-70.

317. *Supra* notes 170-72.

318. *Supra* notes 188-92, 200-02 and accompanying text.

319. Perhaps nothing illustrates the contrast with state legislatures better—or at least more colorfully—than Massachusetts’ Sacred Cod. A symbol of the state legislature since the 18th century, this carved wooden fish is treated with such veneration that when the legislature moved to a new State House, representatives carried it wrapped in an American flag. When it was briefly “codnapped,” the loss was deemed important enough to dredge the Charles River. Maria Abate, *History of the Sacred Cod*, EEEF2008: ECOLOGICAL AND EVOLUTIONARY ETHOLOGY OF FISHES, BOSTON U. (2008), <https://www.bu.edu/eef/sacredcodhistory.html>. This sort of ritualism is generally absent at the local level.

320. Rosenberg, *supra* note 7.

second-to-last city to abandon bicameralism.³²¹ Everett was not more or less powerful than any other Massachusetts municipality, subject to different pulls from interlocal competition or state control, or uniquely heterogeneous. But its bicameral legislature had a unique significance for the town, just as bicameralism has a singular place in the popular understanding of the federal constitution. In the rare case where a local legislature became a site for tradition and civic self-understanding, bicameralism showed much more staying power.

The emptiness of local legislature as cultural objects mirrors the formal constitutional status of local governments. Doctrinally, local governments are mere administrative appendages of the state, constitutionally no different than administrative agencies.³²² From this perspective, local governments are merely a helpful mechanism for states, the true holders of sovereignty, to achieve their ends, and they can be created, destroyed, or reorganized as needed by state governments.³²³ If the very identity or existence of a local government has no permanence, why should the structure of its legislature? Rather, the design of local governments is like the design of agencies: functionalist. Agencies are structured by Congressional drafters who seek to advance particular bureaucratic goals through institutional design.³²⁴ The internal organization of an agency, however, is of essentially no symbolic salience to the general public.³²⁵ Likewise, the choice of local legislative structure has historically turned on instrumental rather than cultural calculations. States, which jealously guard their status as “dual sovereigns” from encroachment,³²⁶ mirror federal institutions to visibly and symbolically demonstrate their equality with the national government. Local governments, which lack that formal sovereignty, need not strive for that stature.

321. Rosenberg, *supra* note 7.

322. *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

323. *Id.* But see Briffault, *supra* note 218 (discussing implicit constitutional protections for local government); Kazis, *supra* note 246 (arguing that local governments retain the fundamental quality of sovereignty: a monopoly on the legitimate use of force).

324. See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769 (2013) (analyzing structural features of federal administrative agencies).

325. For example, one think tank article on how to effectively reorganize the executive branch details the potential opposition to reorganization from within the bureaucracy and on Capitol Hill from those guarding their turf and discusses how to manage interest groups and stakeholders. It does not identify public opinion or messaging as relevant to the reorganization process. Harrison Wellford et al., *Executive Reorganization: Six Lessons from the 1970s*, CTR. AM. PROGRESS (June 9, 2011), <https://www.americanprogress.org/issues/general/report/2011/06/09/9732/executive-reorg-anization/>.

326. *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

Although local legislatures are designed instrumentally, one should not overstate the instrumentalism of local government writ large.³²⁷ People identify with their cities and towns. Moreover, they identify with the governmental institutions of their cities and towns, not only the geographic communities those governments happen to cover. Mayors can “generate collective feelings of ownership and belonging and can articulate a city’s civic identity,” as Richard Schragger has argued.³²⁸ Even certain local bureaucracies are sites of public sentiment. Cities rename street corners for slain police officers,³²⁹ and professional sports teams hold moments of silence for firefighters killed in the line of duty.³³⁰ Like soldiers for the nation, public safety workers stand in for the local body politic. But local legislatures are not the sites for this sort of civic religion: for the reasons identified in the previous section, the executive is. Consequently, neither tradition nor the federal analogy pushes local governments toward bicameralism with much force.

Local unicameralism does not reflect only the dynamics of cost and benefit. It is the product of more than a weighing of the risks and rewards of majoritarianism in a particular context of local power and powerlessness. As the city of Everett—or the state of Alaska—demonstrates, cultural forces can overwhelm cool-eyed calculations of institutional design. But at the local level, there is little cultural pressure to retain the federally inspired seemliness of bicameralism or even simply to keep traditional institutions in place. Befitting their constitutional status as mere instrumentalities of the state, local legislatures can be designed and redesigned for instrumental ends.

E. CONVERGENCE IN THE FACE OF LOCAL DIFFERENCE

This Part has offered four explanations for why local governments, but not states, have embraced the efficiency and majoritarianism of unicameralism. All apply to “local governments” in the abstract, but local

327. Aaron Saiger’s provocative and illuminating comparison of local governments and state administrative agencies falls into this trap, underestimating how much citizens understand their local governments to be meaningfully independent, and not actually administrative agencies. Saiger, *supra* note 287. His proposal for importing notice-and-comment procedures, including additional voice for those outside jurisdictional boundaries, into local lawmaking would, I think, meet widespread resistance from residents who see themselves as citizens, not stakeholders. Saiger, *supra* note 287, at 448–49. As one example, participants in local administrative procedures routinely emphasize not only that they are local residents but also how long they have lived there—citizenship is highly valued in this setting.

328. Schragger, *supra* note 17, at 2573.

329. See, e.g., Graham Rayman & Nathan Place, *South Bronx Street Renamed After Kevin Gillespie, NYPD Officer Killed in 1996 Carjacking*, N.Y. DAILY NEWS (Mar. 11, 2016), <http://www.nydailynews.com/new-york/south-bronx-street-renamed-killed-carjacking-article-1.2561733>.

330. See, e.g., Tod Palmer, *Royals, KCFD Hold Moment of Silence Before ALDS Game 5*, KANSAS CITY STAR (Oct. 14, 2015, 2:12 PM), <http://www.kansascity.com/sports/spt-columns-blogs/k-zone/article39156336.html>.

governments are not abstract. They are diverse in size, shape, and function and usually have the institutional differences to match. Why, then, have they all adopted unicameralism in lockstep?

Given the vast differences between individual cities, towns, counties and special districts, the weight of each of these four explanations for local unicameralism will vary across jurisdictions and across decades. Tiebout competition acts more forcefully on some places and during some eras, depending on the costs of moving.³³¹ Some cities are diverse metropolises, not small homogenous communities.³³² A “contract city” that outsources all its services, keeping in-house only taxation and land-use decisions, will be less executive-dominated than one that provides for itself.³³³ Each government has its own path to unicameralism.

Even so, while the relative force of each explanation advanced here varies jurisdiction by jurisdiction, the direction in which each points does not. Each consistently distinguishes local government from the states: It is near-definitional that a city or town will be more constrained than the state it is a part of, for example, or that the policy preferences of its residents will vary less. Thus, some combination of these features of local government always presses down on one side of the scales between efficiency and checks and balances, or between modernization and tradition. In Atlanta, bicameralism might suddenly appear clunky because the city needs to forcefully respond to competition from new suburbs; but in those same suburbs, it might be residents’ unity of interests that most shapes perception of legislative design. In New York City, it might be the enormous power wielded by the mayor and the executive branch, given the scope of services the city provides. Local governments differ from each other, but their shared features, taken together in varying blends, always push toward unicameralism.

Given the more than 90,000 local governments, though, it still remains remarkable that not one retains a bicameral structure.³³⁴ Somehow, all heterogeneity was excised. Most likely, two other features of local government explain the final mopping up of any difference. First, as Susan Rose-Ackerman famously observed, local government leaders

331. See, e.g., Schleicher, *supra* note 228, at 1535 (“[A]gglomeration is interfering with Tiebout sorting; the existence of agglomeration gains reduces the degree to which people sort between local governments on the basis of their policy preferences.”); Jan K. Brueckner & David Neumark, *Beaches, Sunshine, and Public Sector Pay: Theory and Evidence on Amenities and Rent Extraction by Government Workers*, 6 AM. ECON. J.: ECON. POL’Y 198, 227 (2014).

332. It is likely no coincidence that New York City—which is diverse, has the economic strength to resist some interlocal competition and the political strength to resist some state incursions on its power—retained its variant on bicameralism until the end of the 20th century.

333. See GARY J. MILLER, *CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION* (1981).

334. Of course, this is in some ways an accident of timing. Had this Article been published a few years earlier, there would have been one: Everett. In analyzing the uniformity of local legislative design, there is little meaningful difference between zero and a handful of outliers: Until it joined the pack, Everett was merely the exception that proved the rule.

have strong incentives to avoid risky innovation.³³⁵ Moreover, for this kind of structural innovation, the countervailing forces supporting local policy innovation—such as ideology, political parties and interest groups—do not exist in today’s political culture.³³⁶ Put simply, by the end of the 20th century, the founders of a new municipality or special service district incorporating on the edge of a fast-growing city would have every incentive to follow their neighbors and stick to unicameralism, without investing their efforts and political capital in the (local) oddity of bicameralism.

Second, local government budgets are small and tight: the minor direct fiscal savings of unicameralism are enough to matter and enough to tilt the balance for a wavering government.³³⁷ A local budget can always be measured in salaries, and a legislator’s pay can be directly weighed against another teacher in the classrooms. For a city still flirting with bicameralism, “everyone else is doing it” and “we could hire a few more cops” could be determinative arguments: not enough to explain the overwhelming push towards unicameralism in the first place, but sufficient to herd in any outliers. Copycat behavior and the ever-present need to trim the budget consolidated the convergence of local governments on a single legislative design. They brought us to the constitutional condition of today, where unicameralism has swept the field.

III. THEORY AND DOCTRINE IN A UNICAMERAL WORLD

So far, this Article has attempted to explain why local government has become uniformly unicameral. It offered both a historical account of the path taken to unicameralism and a more theoretical exploration of why local government might be better suited to unicameralism. But at this point, local unicameralism is a fact about American government, and a settled one at that. Looking forward, local unicameralism can be taken as a given—although existing scholarship has not done so. In this Part, I show how acknowledging local unicameralism has important implications for three long-running scholarly debates. Within local

335. Susan Rose-Ackerman, *Risk-Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEG. STUD. 593, 594 (1980).

336. See Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1379–97 (2009) (summarizing literature responding to Rose-Ackerman thesis on local risk aversion). Notably, this is not always true: In the Progressive Era, local institutional design had powerful ideological and institutional backers and could provide local innovators with substantial reputational benefits.

337. In Everett, for example, the now-unicameral city council’s personnel costs total \$342,538 in the most recent budget, out of \$56.5 million in total city department spending, excluding schools. CITY OF EVERETT, FY 18 ANNUAL BUDGET (2017), <http://cityofeverett.com/DocumentCenter/View/2608>. At more than half a percent, legislative personnel makes up a meaningful line item in tight times, even if not the driver of the city budget.

government law, the fact of local unicameralism helps recast the conflict between localists and regionalists, and in particular arguments over the importance of political participation in local government. It suggests that local government is structured to promote participation in administrative, not legislative, processes, and that participationist defenses of localism must adjust accordingly.

But the divide between local and state or federal legislative design has implications far outside local government law as well. Statutory interpretation methodologies and theories of judicial review, too, must make room for local difference. This Article only scratches the surface. Its goal is to carve out space for a specifically local jurisprudence, distinct from the doctrines developed for the federal government. But to begin that effort, it shows how courts should be more willing to use legislative history when interpreting local ordinances and argues that the hyper-majoritarianism of local governments requires a recalibration of judicial review to be more supportive of policy experimentation but also more vigilant against failures of the democratic process.

A. LOCALISM, PARTICIPATION, AND UNICAMERALISM

Among scholars of local government law, perhaps no debate is more fundamental than that between localists and regionalists.³³⁸ Generally speaking, the localists seek to devolve power downwards—even to the neighborhood level—while regionalists would push governance upward and away from municipalities.³³⁹ These camps have additional internal taxonomies. One set of localists sees towns, cities, and even neighborhoods as sites for communitarian values: civic engagement and active democratic participation.³⁴⁰ The regionalists, instead, see smallness as fostering parochialism and exclusion, not positive

338. See Briffault, *supra* note 230, at 392–93 (describing and challenging dominance among scholars of “general proposition that local autonomy should be protected and enhanced”); David Schleicher, *Local Government Law’s “Law and ___” Problem*, 40 *FORDHAM URB. L.J.* 1951, 1963 (2013) (expressing disappointment in local government literature for failure to move past localism/regionalism debate).

339. See Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 1–2 (2000) (describing localism, regionalism, and their relationship).

340. See discussion *infra* notes 345–353. Other localists, focused on Tiebout competition and citizen oversight, see smaller levels of government as fostering competition and thereby efficiency. See, e.g., Wallace E. Oates & Robert M. Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?*, 35 *J. PUB. ECON.* 333 (1988) (describing perspective that “views interjurisdictional competition as a beneficent force that, similar to its role in the private sector, compels public agents to make efficient decisions”); Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 *N.Y.U. L. REV.* 190, 200 (2001) (noting that “competition among localities . . . is credited with controlling bureaucratic budgets and facilitating monitoring of local officials[.]” and collecting sources); Robert P. Inman & Daniel L. Rubinfeld, *The Political Economy of Federalism*, in *PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK* 73, 85 (Dennis C. Mueller ed., 1997) (“[T]he current empirical evidence suggests competitive local governments can provide an efficient level of congestible (local) public goods.”).

democratic values, or at least perceive participation not to be worth the high costs of balkanization and inefficient administration.³⁴¹ The fact of local unicameralism—and more importantly, its history—sheds new light on this aspect of the localism debate.

By selecting unicameralism, local governments have already opted against maximum participation in structuring the legislative process. At least within the legislative branch, local government embodies the virtues of efficiency and rough majoritarianism, not participation and consensus. Grappling with local unicameralism reveals the participatory localists to be, as Rick Hills has argued, romantics.³⁴² Deliberative democracy may be a noble vision for local government, but it is not always the choice of local governments themselves. If participatory democracy is to be the basis for a new localist devolution of power, its supporters must understand where that participation occurs in local government—and where it does not.³⁴³

A robust literature exists defending local governments as sites for fostering participation and forming community.³⁴⁴ This tradition traces itself back to Thomas Jefferson's embrace of the New England town meeting as "little republics,"³⁴⁵ Tocqueville and John Stuart Mill's perception that local government teaches the skills of citizenship,³⁴⁶ and to Hannah Arendt's promotion of "public freedom" through civic participation.³⁴⁷ More recently, Jerry Frug, for example, has written extensively about the "values of decentralization—the freedom gained from the ability to participate in the basic societal decisions that affect

341. See, e.g., DAVID RUSK, *CITIES WITHOUT SUBURBS* (2d ed. 1993); MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* (1997); Briffault, *supra* note 339, at 7–14; Cashin, *infra* note 344, at 1990.

342. Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)).

343. This is a practical argument. I take no stand on the appropriate role for participation in local government; the historical choice to minimize participatory values in designing local legislatures does not justify that outcome. Nor do I suggest that participatory localists must make their peace with the form of local legislatures that do not embody their values. But if those localists hope to actually increase participation in local government, they must respond to the structural forces arrayed against them in the legislative sphere.

344. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1998 (2000) ("The *sine qua non* of localism is the idea that small government best facilitates political participation and civic engagement by the public."); cf. Joseph P. Viteritti & Gerald J. Russello, *Community and American Federalism: Images Romantic and Real*, 4 VA. J. SOC. POL'Y & L. 683 (1997) (describing history of "romantic image" of local community in American politics).

345. See Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323, 1382 (2014) (quoting Letter from Thomas Jefferson to Governor John Tyler (May 26, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 391, 393–94 (Albert Ellery Bergh ed., 1907)).

346. Cf. Hills, *supra* note 342, at 2028.

347. Shoked, *supra* note 345, at 1382 (quoting HANNAH ARENDT, *ON REVOLUTION* 114–15, 119–20 (1963)).

one's life, the creativity generated by the capacity to experiment in solving public problems and to tailor possible solutions to local needs, and the energy derived from democratic forms of organization."³⁴⁸ While cognizant of the ways that current local government law supports inequality, Frug dismisses larger governments as unable to "engender the kind of democratic participation in public affairs that is possible on a local basis."³⁴⁹

In a similar vein, Georgette Poindexter has celebrated smaller governments as allowing a citizen to "have a meaningful voice in participatory democracy" and thereby to "count herself as a consensual member of the community."³⁵⁰ She has described the neighborhood as the "optimal level for city government" because it best "fosters community at the local level by increasing participation in democracy" ³⁵¹ For Frug, Poindexter, and others in this civic republican tradition,³⁵² hands-on participation and face-to-face deliberation, possible only at a small scale, promote true democracy.³⁵³ Their support for localism rests, in part, on their belief that local government in fact embodies participatory and consensual norms.

Local government truly is, in certain ways, more participatory and communitarian than state and federal government. Empirical evidence suggests that in smaller jurisdictions, citizens are more likely to contact their elected officials or attend public meetings (although voting rates are lower).³⁵⁴ Additionally, the sheer number of local government officials—around three percent of adult Americans have served in local government in some capacity—makes local government much more accessible.³⁵⁵ But of all the reasons that local government are participatory, local legislatures are not one of them.

By choosing unicameralism, local governments have opted against deliberation, participation, and consensus in the legislative process. Most obviously, bicameralism doubles a citizen's opportunities for direct

348. Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 257 (1993).

349. *Id.* at 271.

350. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607, 616 (1997).

351. *Id.* at 649.

352. See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1908 (1994) ("Participatory politics cannot thrive in a mass democracy. If anything, local units need to become smaller to make meaningful political participation feasible."); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–94 (1997); see also Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 96–97 (1989) (providing a more eclectic vision of local government informed by participatory and republican values).

353. Cashin, *supra* note 344, at 2001–02.

354. See, e.g., J. ERIC OLIVER, *DEMOCRACY IN SUBURBIA* 42–52 (2001).

355. Hills, *supra* note 342, at 2027 (citing SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 51 (1995)).

engagement with their representatives. Instead of one city councilman, she might have a councilman and an alderman. Bicameralism also offers double the hearings, for those who prioritize more public and structured forms of participation. It offers two leadership structures, doubling the chances for ordinary citizens to test the waters of local politics and then rise to positions of power.³⁵⁶ As the president of Everett's Board of Aldermen argued in opposing his city's turn to unicameralism, a second chamber is "an inexpensive way for people to have access to government officials."³⁵⁷ What's more, switches from bicameralism to unicameralism were frequently paired with reductions in the overall size of the local legislature.³⁵⁸ Unicameralism was meant to streamline local legislatures, even at the expense of access.³⁵⁹

Unicameralism makes legislatures less republican in other, subtler ways as well. Bicameralism, famously, functions as a supermajority requirement.³⁶⁰ This prioritizes consensus building, since near-consensus can be required to secure the approval of both houses simultaneously.³⁶¹ Bicameralism also encourages deliberation: Not only must two chambers simultaneously agree on a policy, they must then compromise between themselves as to each detail in another round of negotiation.³⁶² The Framers understood bicameralism to promote deliberation and consensus.³⁶³ In choosing unicameralism, the framers of local government law instead opted for the power of a simple majority to act expeditiously.

And unlike even a supermajoritarian unicameral legislature, bicameral legislatures can be split along partisan lines. Parties are essential mediating entities for political participation, so partisan control

356. Cf. Independent Staff, *supra* note 124 (quoting critic of unicameralism in Everett as arguing that "it's going to eliminate a lot of people that are trying to get into the process. Most of our mayors at some point had come from the city council or started out on a board and worked their way up.").

357. Rosenberg, *supra* note 7.

358. See, e.g., Contosta, *supra* note 82 and accompanying text.

359. Arguably, unicameralism improves access. If your legislator listens to you, he can more easily translate your input into policy and if he does not, you can more easily hold him accountable. But this is still less access, and a shift from a more republican to a more liberal model of representation.

360. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 242 (1962).

361. See John F. Manning, *The Role of the Philadelphia Convention in Constitutional Adjudication*, 80 GEO. WASH. L. REV. 1753, 1781–82 (2012) (noting that bicameralism requires "unusual consensus" and "compromise").

362. Cf. Rogers, *supra* note 187, at 108–09 (describing relationship of conference committees and unicameralism).

363. Sunstein, *supra* note 31, at 1562; see also *THE FEDERALIST* NO. 73, at 443 (Alexander Hamilton):

The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation or of those missteps which proceed from the contagion of some common passion or interest.

of a branch of government critically enhances opportunities for effective civic engagement.³⁶⁴ In a divided legislature, there is no minority party shut out of governance;³⁶⁵ all citizens and all interest groups have a chance to make their voices heard. Unicameral local governments cannot offer that protection to their political minorities. Its proponents saw divided government as gridlock to be avoided.

As might be expected, given their majoritarian unicameralist design, local legislatures are not generally heralded as sites of democratic values or popular participation. City councils in municipalities large and small are routinely described as operating behind closed doors or in smoke-filled rooms.³⁶⁶ Often, leadership is top-down with presidents and speakers exercising total control over the legislative agenda.³⁶⁷ This can be characterized positively or negatively, but it cannot be described as deliberative, participatory democracy.

Rather, participation in local government is concentrated in the administrative process. Neighbors pack zoning hearings, anxiously concerned about changes to their block (and perhaps their property values).³⁶⁸ Parents attend parent-teacher conferences multiple times per year and organize parent-teacher associations to participate further in school governance.³⁶⁹ Under Chicago's community policing model, each of the city's 279 police beats holds a monthly meeting for residents to

364. See Joseph Fishkin & Heather K. Gerken, *The Party's Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. 175, 206–07 (2014) (describing “competition and cajoling, the disagreeing and the deliberating, the buttonholing and bickering that takes place—and should continue to take place—within the party itself”).

365. See Schleicher, *supra* note 19.

366. See, e.g., *McCrea v. Flaherty*, 885 N.E.2d 836, 838 (Mass. Ct. App. 2008) (“The city council of Boston . . . finds itself, not for the first time, on the losing end of a determination that it has improperly excluded the public from its deliberations.”); Jeff McMenemy, *Splaine Ready to Go to Court over City Council's “Non-Meetings,”* PORTSMOUTH HERALD (Nov. 25, 2016, 2:27 PM), <http://www.seacoastonline.com/news/20161125/splaine-ready-to-go-to-court-over-city-councils-non-meetings> (describing legal battles between Portsmouth, New Hampshire city council and assistant mayor over closed sessions); Scott Franz, *Steamboat Springs City Council Doing More Business Behind Closed Doors*, STEAMBOAT TODAY (Dec. 19, 2016), <https://www.steamboattoday.com/news/steamboat-springs-city-council-doing-more-business-behind-closed-doors> (City Council of Steamboat Springs, Colorado met in closed sessions forty-two percent of time, after members campaigned on pro-transparency platform).

367. See, e.g., Harold Jackson, Opinion, *Clarke the Most Powerful Person in City Hall*, PHILA. INQUIRER (Oct. 29, 2014, 10:35 AM), <http://www.philly.com/philly/blogs/under-the-sun/Clarke-the-most-powerful-person-in-City-Hall.html> (“Rarely does any other Council member utter a peep in opposition to their president’s desires.”).

368. Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVT. L. 45, 83–85 (1994) (describing “Zoning as A Participatory Democracy”); WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS 9* (2009) (describing otherwise-sane neighbors suddenly behaving as “crazy” NIMBYs at zoning board hearing).

369. CHILD TRENDS DATABANK, PARENTAL INVOLVEMENT IN SCHOOLS 3 (2013), http://www.childtrends.org/wp-content/uploads/2012/10/39_Parent_Involvement_In_Schools.pdf (collecting data showing that seventy-six percent of students’ parents attended a meeting with teachers and forty-two percent volunteered with the school).

work with officers; an average of twenty-six residents attend each meeting.³⁷⁰ These executive branch encounters—which needless to say, look very different than a HUD or Education Department rulemaking at the federal level—are where local government gains its participatory edge.

Noticing local unicameralism helps clarify where in local government participation occurs. In turn, that can help shape proposals for reform. For example, Gerald Frug has famously and repeatedly called for the creation of new “regional legislature[s].”³⁷¹ These legislatures would lack an attached regional government; administration would still occur through existing municipalities.³⁷² Importantly, Frug’s goal is dialogic, he intends the regional legislature not simply to preempt local powers by a more regionally minded entity—state governments can already do that,³⁷³ and in any case Frug is no regionalist—but to serve as a “forum for inter-local negotiations about how to decentralize power.”³⁷⁴ Frug hopes to “transform[] the subjectivity of the region’s localities” and help them “reach[] for the perspectives of other and different persons.”³⁷⁵

But an examination of local unicameralism reveals that Frug looks in exactly the wrong place for his goal.³⁷⁶ At the local level, legislatures are not sites for dialogue, negotiation, consensus-building, or identity formation. They are designed to enact policy preferences with a minimum of fuss. Nor is there even a glimmer of popular desire to return local legislatures to a bicameral design. Thus, Frug attempts to increase local participation in precisely the manner that faces the fiercest headwinds: he seeks dialogue in the branch where historical and structural features of local government have relentlessly stripped out dialogue and replaced it with arch majoritarianism and flat instrumentalism. To achieve Frug’s goal of restructuring local government law to “build unity out of differences,”³⁷⁷ it might be better to look to the real sites of democratic action at the local level: the executive branch. For example, consolidated school districts, magnet

370. WESLEY G. SKOGAN, ET AL., U.S. DEP’T OF JUSTICE, NAT’L INST. OF JUSTICE, PUBLIC INVOLVEMENT: COMMUNITY POLICING IN CHICAGO 3 (2000), http://www.skogan.org/files/Public_Involvement-Community_Policing_in_Chicago.NIJ_Summary.pdf.

371. Frug, *supra* note 348, at 294–300; *see also* Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002) (one of many elaborations of the idea).

372. Frug, *supra* note 349, at 294–97.

373. *See, e.g.*, Jason Moreira, *Regionalism, Federalism, and the Paradox of Local Democracy: Reclaiming State Power in Pursuit of Regional Equity*, 67 RUTGERS U. L. REV. 501, 536–42 (2015).

374. Frug, *supra* note 349, at 297.

375. Frug, *supra* note 349, at 295, 299 (quoting Frank I. Michelman, *Law’s Republic*, 97 YALE L.J. 1493, 1528 (1988)).

376. Frug’s proposal is subject to a great many other persuasive criticisms. *See, e.g.*, Hills, *supra* note 343; Been, *supra* note 231, at 1112–14.

377. Frug, *supra* note 349, at 300.

schools, or interdistrict busing schemes might all be better placed to promote this pluralistic vision that a regional legislature would be.³⁷⁸

Conversely, Rick Hills has put out a call for “specific regional arrangements,” grounded in empirical reality, that “minimally affect citizens’ capacity and willingness to show up at hearings, educate themselves in the workings of democratic systems, and learn the arts of democratic governance.”³⁷⁹ This Article provides one data point to aid the search for such arrangements. I have shown that citizens themselves place a low value on local legislatures as fora for democratic participation, even as they eagerly crowd meeting rooms to engage with local bureaucracies. It may be that maximizing regionalism’s equities and efficiencies alongside localism’s participation requires shifting policymaking to higher levels of government while devolving administration down.³⁸⁰

Acknowledging local unicameralism will not (and should not!) turn localists into regionalists, or vice versa. It is just one fact about local governments—albeit an important one—and here I have sketched its relevance to just one aspect of the localism debate. But the localism debate has been blinkered by its failure to consider the structural aspects of local government. The localists and the regionalists alike have treated local governments as smaller and more subordinate than states or regional governments, but not as differently designed.

Take education, for example. It is not enough to ask whether education policy and finance should be decentralized or centralized. In one region, decentralization might inevitably mean decisionmaking not just by locals, but by independently elected school districts, operating without separation of powers and, yes, organized unicamerally. Centralization would bring with it the entire state constitutional structure: perhaps a bicameral legislature and an education department separately controlled by the governor. The intergovernmental aspects of local government law do not exist independently of its

378. Cf. Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1465–66 (2014) (describing existing “regionalist-like interdistrict desegregation programs”).

379. Hills, *supra* note 342, at 2034.

380. Or maybe not. Administration is already largely localized—frontline bureaucrats like teachers and firefighters are generally local employees. So this “proposal” may simply reflect the accumulated wisdom of the status quo. Moreover, the politics/administration dichotomy is dead and buried. See Ronald N. Johnson & Gary D. Libecap, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 ARIZ. L. REV. 791, 818 n.180 (1995). If zoning decisions, for example, are made through a series of site-specific exceptions rather than a predetermined zoning map or comprehensive plan, (see Noah M. Kazis, *Public Actors, Private Law: Local Governments’ Use of Covenants to Regulate Land Use*, 124 YALE L.J. 1790, 1802–03 (2015)), is it possible for land use policy be set forth regionally without abandoning local administration? As Hills himself said, any balancing of localism and regionalism will be “always tentative.” Hills, *supra* note 343, at 2034.

intra-governmental, structural dimensions. This Article aims to help bring structure back into the analysis for localists and regionalists alike.

B. INTERPRETING STATUTES FROM UNICAMERAL LEGISLATURES

Local unicameralism also has implications outside local government law, at least as the field is narrowly defined. Statutory interpretation is one of the central functions of the judiciary³⁸¹ and a subject of extensive scholarly and judicial debate. However, as those debates rage on and as interpretive methodologies are refined, there is an unspoken assumption that the statutes being interpreted were enacted by Congress or by state legislatures with a very similar structure.³⁸² Prominent theories of interpretation, spanning the ideological spectrum, rely on the premise that legislation is passed bicamerally. At the local level, where all legislatures are unicameral, those theories do not apply. A new appreciation of local unicameralism (and local legislative difference more generally) will require the development of new interpretive theories, and the adaptation of old ones, for the local context. As an example, this Part discusses the use of legislative history at the local level, suggesting that, all things being equal, courts should be more willing to look to legislative history in a unicameral context than when reviewing state or federal legislation.

Courts have long used legislative history to guide the interpretation of ambiguous statutory provisions,³⁸³ but the use of legislative history has become controversial. Beginning in the 1980s, the New Textualists, led by Justice Antonin Scalia and Judge Frank Easterbrook, generated a comprehensive critique of purposive methods of statutory interpretation, including reliance on legislative history.³⁸⁴ While this critique drew force from numerous sources, one strand of the New Textualism held that the use of legislative history was unconstitutional: unlike legislative text, legislative history was not enacted by both houses of Congress and presented to the President for a signature. Whatever the merits of this argument, it plainly does not apply to local governments. Neither the text of Article I nor its spirit applies to local legislation.

The constitutional attack on the use of legislative history is rooted in Article I, Section 7 of the federal Constitution.³⁸⁵ That section lays out the

381. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1275 (2001) (“The twentieth century inaugurated an age of statutes or, as we prefer, an era of super-statutes.”).

382. In short remarks given at N.Y.U., Richard Briffault challenged this assumption, listing a plethora of differences between the national legislative process and those at the state and local levels, including stronger legislative leaders, shorter sessions and part-time legislators, line-item vetoes, and a lack of separation of powers. Briffault, *supra* note 22, at 24–29.

383. See *Holy Trinity Church v. U.S.*, 143 U.S. 457, 463–64 (1892).

384. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1288–92 (2010).

385. Victoria F. Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313, 324–25 (2014).

requirements for the enactment of a statute, including passage in both the House of Representatives and the Senate (bicameralism) and the assent of the President (presentment).³⁸⁶ Since committee reports, floor statements and other forms of legislative history are not voted on by even one full chamber, much less by both, it is argued that they violate the bicameralism and presentment requirements.³⁸⁷ As Justice Scalia wrote, “[a]n enactment by implication cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed. Committee reports, floor speeches, and even colloquies between Congressmen . . . are frail substitutes for bicameral vote upon the text of a law and its presentment to the President.”³⁸⁸

While the unconstitutionality of using legislative history is only one argument for textualism, it is a particularly important one.³⁸⁹ Most arguments for textualism are pragmatic, rooted in a sense that legislative history is unhelpful or misleading.³⁹⁰ In contrast, the bicameralism and presentment argument suggests that reliance on legislative history is impermissible.³⁹¹ But for courts reviewing local legislation, this uniquely powerful argument does not apply at all.

Obviously, Article I does not formally bind local governments. It governs how Congress enacts laws. In a literal sense, Section 7 refers to the House of Representatives, the Senate and the President; it does not govern legislative processes generally. The federal constitution does not, by any argument, *forbid* the use of legislative history by nonfederal legislatures.

That said, many sophisticated textualists see the spirit, not the text, of Article I as barring the use of legislative history. John Manning, for example, acknowledges that Article I, Section 7 only governs what texts

386. U.S. CONST. art. I, § 7.

387. William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1526–27 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

388. *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring); see also *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.)

The Constitution establishes a complex of procedures, including presidential approval (or support by two-thirds of each house). It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law, while the *real* source of legal rules is the mental processes of legislators.

389. *Cf. Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy As the Court said in 1844: ‘The law as it passed is the will of the majority of both houses’” (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845))).

390. John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 494 (2001).

391. *Id.* Moreover, as Victoria Nourse has argued, the stakes of the constitutional argument against legislative history are high not only for statutory interpretation (itself a central element of the modern judicial role) but also for constitutional law more broadly. Nourse, *supra* note 385, at 318–24 (describing issue’s relationship with countermajoritarian difficulty and theories of judicial review).

are enacted as law, not how to interpret those texts.³⁹² Since textualists frequently refer to dictionaries or the common law as interpretive aids—and neither are passed through bicameralism—the argument against legislative history must go beyond what Article I formally requires.³⁹³ Even so, Manning finds the purpose and function of the bicameralism requirement important, arguing that bicameralism promotes caution, deliberation and adversarial debate, while checking government power and preventing special interest or factional legislation from being enacted.³⁹⁴ According to Manning and other textualists, the values underlying bicameralism require avoiding legislative history, even where the formal requirements of Article I do not.³⁹⁵ Judicial language from leading textualists like Justice Scalia or Judge Easterbrook likewise highlights the bicameral process as importantly “difficult” or “elaborate.”³⁹⁶

For local governments, though, the values of bicameralism are as immaterial as the formal requirements of Article I. Local government has not adopted the structure of bicameralism, and it has not adopted bicameralism’s values. It does not see bicameralism as a necessary block on special interest legislation and dismisses deliberation in favor of efficiency. At the state and federal levels, it can be argued that bicamerally enacted legislative text is more likely to promote the public interest than single-chamber public history, but at the local level, everything is single chambered and that is deemed a virtue. Using legislative history to interpret local legislation may still be unwise, but there is nothing in the federal constitution suggesting as much.³⁹⁷

392. John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 71–72 (2001).

393. *Id.*

394. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 708–10 (1997) (“To appreciate the importance of adopting interpretive rules designed to preserve the integrity of the constitutionally prescribed legislative process, it is helpful to recall the context that gave rise to the inclusion of bicameralism and presentment in the Constitution.”).

395. *But see* Eskridge, *supra* note 388, at 1527 (taking contrary position, that “principle (or spirit) derived from Article I, Section 7 is unlikely to support the new textualism”).

396. *Thompson v. Thompson*, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in judgment); *In re Sinclair*, 870 F.2d 1340, 1343–44 (7th Cir. 1989).

397. Some pragmatic arguments against the use of legislative history may also be inapplicable in the local context. For example, textualists deny the possibility of discerning collective intent from a multimember legislature. *See, e.g.*, Frank H. Easterbrook, *Statutes’ Domains*, 50 U. CHI. L. REV. 533, 546 (1983). Local legislatures, unlike Congress or state legislatures, can more plausibly speak in one voice, since they are comprised of only one chamber, and usually a small one at that. There is a dramatically smaller gap between the positions of a single member of a local legislature—who after all may be one of three or five total members—and the intent of the legislature as a whole. But others, such as the manipulability of legislative history by lawmakers or judges, *see Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), or the high cost to litigants of legislative history research, *cf. Nicholas R. Parrillo, Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 380–81 (2013)

The overall force of this argument depends, of course, on one's prior position on legislative history. It rebuts only one argument against legislative history: a committed textualist will still find reason to oppose its use, even in interpreting local legislation. Even so, the fact of local unicameralism should influence statutory interpretation, at least on the margin. The constitutionally inspired arguments against legislative history do not apply to local ordinances. Judges should apply a lighter touch with their textualism in the local context and in particular, should eschew interpretive methodologies that make no allowance for the profound differences in legislative structure at the local level.³⁹⁸

Local unicameralism should also have wider repercussions on the interpretation of local legislation, beyond the specific technique of using legislative history, although the direction of those repercussions may be less clear. Take, for example, the public choice-inspired debate over how statutory interpretation can best promote the public interest, as opposed to special interests. Jonathan Macey has argued that because the bicameral structure of Congress makes Congress more difficult for narrow factions to capture, it promotes "public-regarding" legislation.³⁹⁹ He therefore endorses traditional, holistic approaches to statutory interpretation.⁴⁰⁰ William Eskridge, however, cites the same public choice scholars but reaches a quite different conclusion.⁴⁰¹ For Eskridge, bicameralism is a hurdle that intensely focused special interests can clear but which can trip up diffusely supported general-interest legislation.⁴⁰² He would interpret statutes with asymmetrical benefits and burdens narrowly or broadly, as needed, to compensate for the structural effects of bicameralism.⁴⁰³

(identifying federal government and elite Washington lawyers as specially able to wield legislative history arguments).

Moreover, attempts to use local legislative history will pose their own special challenges, particularly the limited volume and low quality of the legislative history that may exist locally. Briffault, *supra* note 23, at 25 (noting that many local legislatures lack committee reports or reports on floor debates). Whether these challenges can or should be overcome is a complicated question—but not one to which the federal constitution or common textualist arguments speak.

398. State courts, in particular, tend to apply fixed methodological approaches. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1754 (2010). These methodologies do not make allowances for the state/local distinction. See, e.g., *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143, 1146–47 (Or. 1993) (mandating approach for "interpreting a statute" generally).

399. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247–48 (1986).

400. *Id.* at 227.

401. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 291 (1988).

402. *Id.*

403. *Id.* at 323–24.

Both Macey and Eskridge (and the many scholars working in a public choice tradition since)⁴⁰⁴ extract entire theories of statutory interpretation from their analysis of the legislative process. But when that process changes—such as from bicameralism to unicameralism—their theories must change as well. Because the implications of public choice scholarship for statutory interpretation are not settled—and are not likely to be settled any time soon—local unicameralism is a fact that can cut many ways.

One might hypothesize that local ordinances should be interpreted more purposively. To the extent that local government is less deliberative and more reactive, could its enactments all be seen as akin to remedial legislation, which should be interpreted broadly?⁴⁰⁵ Arguably, if local legislation is generally a quick-and-dirty attempt to fix a nagging problem, courts should be more willing to partner with the legislature and help secure the legislation's goals. Or, because local government can more easily amend its legislation, perhaps courts could be less afraid of a proactive, but erroneous, interpretation.⁴⁰⁶ Given how little can be stated decisively about how structure affects lawmaking, though, particularly at the understudy local level, these must remain only hypotheses.

Still, any interpretive methodology based on an empirical understanding of the legislative process must account for the empirical reality that local legislatures are not like state or federal legislatures.⁴⁰⁷ Indeed, they have been consciously designed to diverge from the federal model. Yet process-sensitive theories of statutory interpretation, developed with an eye toward Congressional structure, are blindly applied to the acts of quite different city councils or county commissions. Ours is a tripartite system of government—federal, state, and local—and legislatively, one of those levels is not like the others. This Article provides a first step in the difficult work⁴⁰⁸ of developing a new approach

404. See generally MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009).

405. See *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (“[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.”).

406. This could support even stronger principles of *stare decisis* when interpreting local legislation. See *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972).

407. This describes many, but not all, theories of statutory interpretation. Judge Posner's blunt realism stands out in this regard. See RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 1–2 (2016) (endorsing position that judges take the position “that would prevail if resort to traditional legal materials were disallowed”).

408. Recently, scholars have turned their attention to unpacking the messy details of Congressional process in order to refine statutory interpretation. See generally Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575

to interpretation that acknowledges the unicameral local legislative process—with its strengths and its weaknesses—that we have chosen.⁴⁰⁹

C. JUDICIAL REVIEW AND LOCAL MAJORITARIANISM

Statutory interpretation is not the only judicial task affected by local unicameralism. Judicial review of the constitutionality of legislation must also adapt to the unique qualities of local legislative structure. Theories of judicial review are inherently theories about the interrelationship of courts and legislatures, about their respective strengths, weaknesses, and perhaps most importantly, their charges within a given constitutional structure.⁴¹⁰ Different legislatures—reflecting different visions of good governance—should be reviewed differently. Moreover, the debates over judicial review are plagued by the “countermajoritarian difficulty.”⁴¹¹ Local legislatures are, by design, dramatically more majoritarian than Congress. Whatever uneasy conclusions about majoritarianism have been reached for judicial review of state and national legislation, they cannot hold at the local level. Local unicameralism demands its own jurisprudence. In this Subpart, I briefly set forth one tentative vision for an institutionally aware, localist judicial review: A hands-off approach to most local legislation, meant to support local experimentation and initiative, paired with tougher judicial scrutiny of legislation affecting certain minorities.

Many of the most prominent theories of judicial review draw inspiration and legal grounding from the structure of government set forth in the Constitution.⁴¹² Take, for example, John Hart Ely’s

(2002). These scholars distinguish between types of legislative history, finding some more reliable than others, and wade into the details of “unorthodox lawmaking.” BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* (5th ed. 2017). The same work may need to be done anew at the local level—but across tens of thousands of governments, each with their own institutions and their own traditions.

409. One fascinating avenue of inquiry would be the value of time in the local legislative process. Frank Easterbrook identified “lack of time as a vital ingredient” in the legislative process, noting that even popular bills often fail to be enacted because the clock runs out before Congress can act. Easterbrook, *supra* note 397, at 539. Based on this, Easterbrook argues that post-enactment legislative action (short of amendment) should not affect the interpretation of a statute. *Id.* In unicameral local legislatures, which are designed to pass bills with greater efficiency and less deliberation, the ingredient of “time” may (or may not) have substantially different meaning.

410. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1361–64 (2006) (describing assumptions about legislative and judicial institutions on which his philosophical case against judicial review relies).

411. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013, 1014 (1984) (describing countermajoritarian difficulty as “the starting point for contemporary analysis of judicial review”).

412. Many theories of judicial review, of course, do not. Certain forms of textualism and originalism reject this sort of structural argument, for example. See Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747, 788–89 (1999) (discussing how both “plain-meaning” and “original intent” textualists are each “clause-bound”). Bruce Ackerman has forcefully argued that process and

“representation-reinforcing” theory of judicial review,⁴¹³ as influential a vision as any in legal scholarship.⁴¹⁴ Ely laid out a two-step analysis. He first looked to the structure of the Constitution, from one-off clauses⁴¹⁵ to overall legislative design,⁴¹⁶ to find its “pervasive strategy,” which he believed to be a pluralist guarantee that no one faction could uniformly dominate others.⁴¹⁷ He then offered a method for judicial intervention to correct failures in that strategy: in his case, by protecting political dissidents or racial minorities shut out of pluralist bargaining.⁴¹⁸ Under Ely’s approach—or any other theory of judicial review rooted in constitutional structure—the judge’s role is to further the particular brand of self-government put forward by the Constitution.

Bicameralism is a central structural feature of the federal Constitution, and as might be expected, it plays a prominent role in structuralist theories of judicial review. Cass Sunstein, for example, has identified bicameralism as an embodiment of “the central republican understanding that disagreement can be a creative force” and an effort to create a “constitutional framework” of “deliberative democracy.”⁴¹⁹ For Sunstein, the Constitution’s wide distribution of power—within the legislature, across branches, and between the states and federal government—forces politicians to work through disagreement and gain

substance cannot be disentangled, as Ely and others would have it. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718–19 (1985). One might believe that judges should be counter-majoritarian or majoritarian on principle, regardless of how citizens opt to structure their legislatures. Cf. Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (describing history of majoritarianism and counter-majoritarianism in constitutional law). Local unicameralism will have different effects on different theories of judicial review, and in some is likely to prove entirely immaterial. What I to hope demonstrate, though, is that theories of judicial review cannot be mechanically carried over from the state or federal context to the local; local unicameralism is so fundamental a difference in legislative process that it must be taken into account.

413. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 88 (1980).

414. Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 721 (1991) (“Few, if any, books have had the impact on constitutional theory of John Hart Ely’s *Democracy and Distrust*.”).

415. ELY, *supra* note 413, at 90 (Ex Post Facto Clause); ELY, *supra* note 414, at 96 (Takings Clause).

416. ELY, *supra* note 413, at 90.

417. ELY, *supra* note 413, at 80. Ely of course marshals other arguments for his representation-reinforcing vision of judicial review. In particular, he points to the “underlying premises of the American system of representative democracy” and the core competencies of the judiciary. ELY, *supra* note 413, at 88. The “underlying premises” of the American system are, like the structure of government, different at the local level than at the national level. The competencies of the judiciary may be the same.

418. ELY, *supra* note 413, at 102–03 (recommending that constitutional adjudication intervene in the political process only:

when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority

419. Sunstein, *supra* note 31, at 1562.

the benefits of competition, debate and dissent.⁴²⁰ Then, having found civic republicanism (and not only individualistic liberalism) to drive the Constitutional vision of government, Sunstein argues courts should be friendly to federalism, support campaign finance regulation, loosen Establishment Clause limits on religious organization, inspect the rationality of statutes, and adopt antisubordination conceptions of equal protection.⁴²¹

Subsequent civic republicans have likewise identified bicameralism as a foundation for their constitutional vision. That vision can take many forms. Bicameralism has been used to support, on the one hand, an expansion of judicial power into overseeing the legislative process (rather than only outcomes),⁴²² and, on the other hand, a broadside against the constitutionality of “expansive judicial power.”⁴²³ Civic republicans John McGinnis and Michael Rappaport argue that “the central principle underlying the Constitution is governance through supermajority rules,” one of which is the bicameralist structure of Congress.⁴²⁴ They conclude that this principle requires textualist and originalist approaches to judicial review, to ensure that judicial decisionmaking does not usurp the broad consensus required for supermajority enactments.⁴²⁵

Nor are civic republicans the only ones to summon bicameralism in support of their constitutional vision. Many scholars see bicameralism as part of a distinctly libertarian constitutional vision.⁴²⁶ A very deep literature analyzes whether plebiscites ought to be subject to special judicial scrutiny due to their deviations from the standard legislative model—including their lack of a bicameral check—and scholars come out both ways.⁴²⁷ The list could go on. This brief and entirely

420. Sunstein, *supra* note 31, at 1562.

421. Sunstein, *supra* note 31, at 1576–81. For a description of the “anti-subordination” vision of the Equal Protection Clause, see generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

422. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1934–35 (2011).

423. Jack Wade Nowlin, *The Constitutional Illegitimacy of Expansive Judicial Power: A Populist Structural Interpretive Analysis*, 89 KY. L.J. 387, 412–13 (2000–2001).

424. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 705 (2002).

425. *Id.* at 802–05.

426. See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2386–87 n.1474 (2002) (“The purpose of the federalist structure, the national separation of powers, and the bicameralism and presentment requirements for lawmaking are largely libertarian.”); Gillian Metzger, *Michael Greve’s The Upside Down Constitution: Parasitic Federalism and the Ambiguities of Constitutional Structure*, BALKINIZATION (June 17, 2013), <https://balkin.blogspot.com/2013/06/michael-greves-upside-down-constitution.html> (describing bicameralism as supporting claim that the federal Constitution establishes a system of “competitive federalism”).

427. See, e.g., Robin Charlow, *Judicial Review Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527, 547 (1994); Eule, *supra* note 180, at 1584 (“[W]hen the state departs from the vision reflected in each of the first three Articles—a bicameral legislative body, an executive with the

non-exhaustive review of the relationship between bicameralism and judicial review is not meant to survey the field or to prove any particular case. It is meant only to illustrate that, across issue area and across ideologies, scholars turn to the structure of the Constitution generally, and the fact of bicameralism specifically, to root their theories of judicial review. Put simply, bicameralism is a big deal for judicial review.

But despite the prevalence of unicameralism at the local level, there is no equivalent literature on the implications of unicameralism for judicial review. In the American context,⁴²⁸ the closest article addresses the state level, and expressly disclaims any applicability to local government. James Rogers has argued for special standards of judicial review for Nebraska's unicameral state legislature, specifically arguing that courts should apply stricter scrutiny to unicameral legislative enactments.⁴²⁹ Bicameralism, he asserts, provides a check against factional legislation and introduces more empirical information to the overall legislative process.⁴³⁰ Rogers therefore concludes that "there must be an increase in the rigor of judicial review to substitute for the loss of legislative review otherwise accorded by second chambers."⁴³¹ Whatever the merits of Rogers' argument—and there are reasons to be skeptical of his positive claims⁴³²—it does not apply to local governments, as he freely admits. Rogers essentially argues that two heads are better than one, and local governments are already overseen by the states.⁴³³

What is missing, therefore, is a theory of judicial review that accounts for local unicameralism. As Clayton Gillette has observed, "[v]irtually the entire literature that assesses judicial interpretation

power to veto, and an independent judiciary . . . Federal court invocation of the Bill of Rights . . . may well be the only line of defense against majoritarian tyranny."); Baker, *supra* note 50, at 716 (arguing that despite differences between plebiscitary and legislative lawmaking, including bicameralism as the "most obvious difference[]").

428. This Article does not look comparatively at other countries where unicameral legislatures are common at the national or state/provincial level. See, e.g., Dinan, *supra* note 211, at 857–58 (discussing common pattern among federations of bicameral national legislature and unicameral state legislatures, as well as exceptions). For now, I proceed one institutional variable at a time.

429. Rogers, *supra* note 187, at 66.

430. Rogers, *supra* note 187, at 96, 99.

431. Rogers, *supra* note 187, at 110. Rogers also notes that historically, Nebraska's unicameral legislature emerged during the tail end of the *Lochner* era and its proponents expressly understood the judiciary to be taking such an active role. Rogers, *supra* note 187, at 79–80.

432. For example, it seems implausible that the upper and lower chambers of a legislature would have access to different empirical information, given both modern information technology and political polarization. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006). And, as noted, *supra* notes 400–04 and accompanying text, it is not clear whether bicameralism empowers or disempowers special interests.

433. Rogers, *supra* note 430, at 107 n.140 ("[E]ven though the legislative authority of local governments is typically exercised by a unicameral assembly . . . [T]heir legislative powers and decisions are already subject to state legislative oversight.").

comprises debates about the appropriate scope of federal court intervention into federal legislation.”⁴³⁴ Gillette himself has gone a long way to filling this gap. His book *Local Redistribution and Local Democracy*—ostensibly about the narrow question of when local governments should be allowed to redistribute income—weaves together everything from state constitutional law to urban public choice theory and produces an entirely novel argument for how state judges should police the line between local and state authority.⁴³⁵ My aim is to provide another brick in that wall, offering a hypothesis of how unicameralism fits into theories of judicial review of local action.

Based upon this Article’s analysis of local unicameralism, I conclude that process-conscious courts should be more accommodating of local legislation and—with an important exception—subject it to less scrutiny. Local governments turned to unicameralism in order to make their legislative processes more efficient, nimble, and responsive. To the extent that judicial review should reflect structural constitutional choices, courts ought to honor and support those goals of efficiency. Second-guessing—by an upper chamber or a reviewing court—is not what the designers of local government had in mind when they installed unicameralism.⁴³⁶ In the local vision of democracy, the proper protection against bad legislation is a subsequent majority quickly and easily repealing the law, not roadblocks to the law’s enactment in the first place. Courts attempting to match their review of legislation to the process by which that legislation is passed should look positively on local initiative and loosen judicial strictures on local legislation.⁴³⁷

At the same time, local unicameralism has a darker side, one that triggers the countermajoritarian role of the judiciary. Local unicameralism is also rooted in the confidence of majorities in their own ability to protect themselves even at the expense of minorities. Popular comfort with unicameralism at the local level depends on an assumption that “people like me” will be in charge and stay in charge—hence the strength of unicameralism in homogeneous, homevoter-dominated

434. GILLETTE, *supra* note 50, at 109.

435. See generally GILLETTE, *supra* note 50.

436. Of course, local government is hemmed in by all sorts of legal restrictions. See FRUG & BARRON, *supra* note 220, at 1–4. Indeed, many of the same individuals pushing for local unicameralism were good government Progressives who were highly skeptical of local power, which they saw as generally used in service of corrupt aims; these were not strong home rule advocates. See, e.g., BARRON, *supra* note 279, at 2285–86. My claim is only that *all else being equal*, local unicameralism cuts in one direction: toward lighter judicial scrutiny of local ordinances.

437. There are many affinities between this conclusion and the literature on “experimentalism” in government, which emphasizes the role of local governments in national governance and the need for policy innovation. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998); cf. David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 549–59 (2008) (summarizing, and critiquing, experimentalist literature).

suburbs. For those shut out, the argument for judicial deference turns on its head. When majorities trample on distinct minorities shut out of the permanent homevoter coalition, local unicameralism offers courts a justification for greater scrutiny: the democratic processes have been designed to ignore minority voice, leaving the courts as the only institution well-positioned to vindicate minority rights.

Doctrinally, courts could potentially root this heightened scrutiny in prohibitions on animus-based lawmaking.⁴³⁸ A unicameral legislature can react more swiftly, or even impulsively, and with a more unified purpose, than a bicameral body. Thus, when a law targets a local minority, courts should be more willing to find that law a product of impermissible animus, rather than a legitimate policy outcome with winners and losers. Indeed, courts may already engage in this kind of reasoning implicitly.⁴³⁹

Likewise, when mobility is restricted (for example, by exclusionary land use policies or other forms of housing discrimination), some groups are denied the protections of Tiebout competition on which local unicameralism rests. Judges should step in: groups denied all the benefits of majoritarianism should not be obligated to bear all its costs.

In a sense, local unicameralism supercharges the Ely approach to judicial review. Local constitutional structure shows a greater demand for the quick translation of majority preferences into policy—a constitutional vision which judges should normally help instantiate—but heightens the fear that certain groups will be shut out altogether.

In many ways, this approach to local legislation is already a popular instinct. Local government boosters praise its ability to innovate.⁴⁴⁰ Opponents see it as exclusionary.⁴⁴¹ Both groups see local legislation as basically efficacious—whether banning smoking⁴⁴² or harassing the homeless,⁴⁴³ local governments are understood as getting the job done. Foregrounding unicameralism helps build a framework for better understanding these twin features of local government. Local government is, by its very design, aggressively majoritarian, warts and

438. See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183 (2013); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

439. Compare *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–42 (1993), with *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 593–601 (4th Cir. 2017) (espousing different attitudes toward ability to infer intent and animus of local versus federal governments).

440. See, e.g., BENJAMIN R. BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* 3–8 (2013); BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY* 1–5 (2013).

441. See, e.g., Ford, *supra* note 352, at 1870–74.

442. See Diller, *supra* note 49, at 1225–36.

443. See Anthony D. Lauriello, *Panhandling Regulation After Reed v. Town of Gilbert*, 116 COLUM. L. REV. 1105, 1118–23 (2016) (describing local efforts to limit where and how panhandling can take place).

all. Judicial review of local legislation should conform to that hyper-majoritarianism, bending to its benefits and challenging its abuses.

CONCLUSION

By drafting a constitution outlining the structure of a national government, the Framers put forward a vision for American democracy. Local government has its own constitutional arrangements—unicameralism included—and its own constitutional vision. That vision imagines the legislature as resolutely majoritarian, streamlined and efficient, an instrument for translating resident demands into policy. The executive branch sits at the center of this constitutional vision, which in turns requires unifying the legislature to serve as a counterweight.

This local constitutional vision is not an alternative to federal constitutionalism. Rather, it is embedded in an integrated, national constitutional order where each level of government has its own part to play. Local government structure reflects the pressures of state and federal oversight, the push and pull of Tiebout competition, and the demands of overseeing bureaucracies that must deliver service block by block. In response, local government has developed into something all its own: different not just in size or subordinate status, but in structure.

Like any other constitutionalism, local government's particular vision is multifaceted and even self-contradictory. Local unicameralism demonstrates the immense trust that many Americans hold in their local legislatures,⁴⁴⁴ which they empower to act without check or balance. But that trust is earned in part because local governments have been impaired by the states and boxed in by competition with each other. Local unicameralism is the product of local power and local powerlessness, held in tension. Likewise, local unicameralism is hyper-democratic on the one hand. But on the other, it reflects local governments' formal status, and sometimes practical operation, as little more than administrative agencies: not sites of culturally rich self-rule but of cold instrumentalism. Moreover, these contradictions are played out not once, as with the national constitution, but in tens of thousands of individual contexts: large cities and small towns, rural counties and specialized single-purpose districts, each one different. We have contested the meaning of the national constitution since its enactment; settling the meaning of our local constitutions will not prove any more straightforward.

444. *Cf. State Governments Viewed Favorably as Federal Rating Hits New Low*, PEW RES. CTR. (Apr. 15, 2013), <http://www.people-press.org/2013/04/15/state-governments-viewed-favorably-as-federal-rating-hits-new-low/> (polls find local government rated more favorably than either state or federal government).

Even so, understanding local government requires appreciating its distinct constitutional vision, whatever it might be, and rooting that vision in the details of local structure. Citizens voting in referenda, neighborhood activists on charter reform committees, state legislators passing incorporation statutes: all have chosen different institutions of self-governance for the local level. And every day, around the country, the members of our unicameral legislatures—city councilors, county commissioners, school board members, trustees, freeholders, aldermen, supervisors, and all the rest—take on those challenges of self-governance. It is time for courts and scholars alike to recognize that their unicameralism is every bit as much a part of the American constitutional order as Congress's two chambers.

* * *