COMMENTARY

The Constitutional Position of American Local Government: Retrospect for the Burger Court and Prospect for the Rehnquist Court

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Introduction

In this, the bicentennial year of the United States Constitution, it is especially appropriate to reexamine the interaction among our political institutions. This Commentary focuses upon the rarely discussed interaction between local government and the federal courts. In particular, it analyzes the special, though often ambiguous, treatment of local government by the United States Supreme Court, especially in constitutional cases decided during the period in which Warren Burger served as Chief Justice.

American local governments play, or can play, three principal political roles. They can serve as: (1) structures for "community self-determination," allowing localities to make majoritarian choices about the nature and style of the community without interference by other political institutions, in particular unelected courts; (2) organs for "public participation," allowing local residents to participate directly in political

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decisionmaking; and (3) providers of public services.[1]

During the first decade of Chief Justice Burger's tenure, community self-determination seemed to attain the status of a penumbral, quasi-constitutional principle that provided substantial protection for local governments against constitutional claims asserted in the federal courts,[2] especially claims premised upon the Equal Protection Clause.[3] Indeed, in some cases, the Court even deferred to local government decisions which had severe exclusionary effects or which undercut the important principle of public participation.[4] Yet, during that same period, the Burger Court acquiesced to congressional expansion of individual rights against local governments.[5] Thus, the Court's general pattern was broad deference toward local government structures and decisionmaking,[6] coupled with deference to many congressional determinations (in Constitutional cases) regarding individual rights.[7] However, the Burger Court in that period also erected a limited "state sovereignty" barrier intended to protect state and local governments from certain kinds of federal interference with their service-provider role.[8]

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1. More precisely, "community self-determination" and "public participation" can be viewed as related sub-elements of "self-rule," a perspective on local government that often is contrasted with a perspective that focuses only upon local government as a "service provider." *See generally* Gelfand, *The Burger Court and the New Federalism: Preliminary Reflections on the Roles of Local Government Actors in the Political Dramas of the 1980's*, 21 B. C. L. REV. 763, 764-66 (1980) [hereinafter Gelfand, *Burger Court Federalism*], and sources cited therein.

2. *See id.* at 799.

3. *Id.* at 768-80, 799, 834-39. This Commentary is, to some extent, a less detailed companion piece to that 1980 article, as is Gelfand, *Local Government in the American Federal System: The Bicentennial as a Time of Crisis and Opportunity*, 19 URB. LAW. (No. 3, Summer 1987) [hereinafter Gelfand, *Bicentennial*].

4. *See infra* note 16 and accompanying text.

5. *See infra* notes 55-56.

6. It must be noted that this was only a general pattern of broad deference to local government based upon community self-determination, not a situation of complete deference. During its first decade, the Burger Court did intervene where local government choices had purposely infringed upon what a majority of the Court perceived to be fundamental interests. *See generally infra* note 17 and accompanying text; Gelfand, *Burger Court Federalism*, *supra* note 1, at 790-800.

7. *See* Gelfand, *Burger Court Federalism*, *supra* note 1, at 800-12. In a more recent article, Professor Williams agrees that these Burger Court cases "reveal a pattern of solicitude for localities' structural integrity and a broad judicial deference to their programmatic choices." Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 84, 104-05, 120-21. Though she does employ the term "community self-determination," most of her discussion relies upon more straightforward, descriptive terms— "municipal liability cases" and "local sovereignty decisions"—better suited to her purpose than the terminology used here and in my 1980 (*Burger Court Federalism*) article.

8. National League of Cities v. Usery, 426 U.S. 833 (1976). *See infra* notes 103-106 & 117-124 and accompanying text.

Although limitations of time and space prevent a full exegesis, Part I of this Commentary examines the development of this pattern in cases decided during the later years of the Burger Court. Part II considers some of the questions left open by the Burger Court, regarding the constitutional status of local government, which are likely to confront the Rehnquist Court in the coming years.

I. Further Reflections: The Burger Court in the 1980's

During the final years of Chief Justice Burger's tenure, the Court continued its practice of deferring to community self-determination,[9] with some interesting new exceptions for protected fundamental rights.[10] The Court also took a somewhat more aggressive stance toward protecting certain aspects of public participation.[11] In general, the Court continued to defer to congressional determinations,[12] though with some interesting developments regarding civil rights and antitrust liability.[13] Finally, during this period, the Court acknowledged the inadequacy of its attempt to create a state sovereignty barrier to protect state and local governments from federal interference with their service-provider role.[14]

A. Community Self-Determination Cases

1. Deference to Local Programmatic Decisions

As noted above,[15] the Burger Court during its first decade broadly deferred to local government programmatic decisions. Cases arose in land use, education, public employment, finance, and other fields.[16] Lim-

9. *See infra* notes 18-36 and accompanying text.
10. *See infra* notes 40-54 and accompanying text.
11. *See infra* notes 98-101 and accompanying text.
12. *See infra* notes 57-58 and accompanying text.
13. *See infra* notes 60-91 and accompanying text.
14. *See infra* notes 103-106 and accompanying text.
15. *See supra* text accompanying notes 2-6.
16. Key community self-determination cases decided during that first decade included: City of Mobile v. Bolden, 446 U.S. 55 (1980) (racial effects of a municipal at-large election system held insufficient to establish equal protection or fifteenth amendment violations; purposeful discrimination must be proven); Ambach v. Norwick, 441 U.S. 68 (1979) (upholding exclusion of resident aliens from teaching in public schools); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (rejecting a takings clause attack upon a broad local historic preservation law); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (racial exclusionary effects of zoning decisions held insufficient to establish an equal protection violation; purposeful discrimination, based primarily upon the procedural history of the zoning enactment or decision, must be proven); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (rejecting a first amendment attack upon a zoning dispersion law applied to "adult businesses," even though the materials involved had not yet been proven to be obscene); Rizzo v. Goode, 423 U.S. 362 (1976) (reversing, on various grounds, a district court injunction ordering the creation of a civilian complaint board for a police department found to have a

ited exceptions were made, however, when a majority of the Court could agree that there was at stake a fundamental interest substantial enough to outweigh community self-determination.[17] Much the same pattern has been followed in the 1980's: broad judicial deference to local decisionmakers, with a few noteworthy exceptions.

a. Land Use

In the field of land use, the decision in *City of Renton v. Playtime Theatres*[18] continued the Court's deference toward local zoning that af-

pattern of frequent violations of constitutional rights); Warth v. Seldin, 422 U.S. 490 (1975) (wide range of interested groups held not to have standing to challenge the exclusionary purpose and effects of zoning ordinance); Milliken v. Bradley, 418 U.S. 717 (1974) (district court exceeded its authority in ordering a metropolitan-wide, interdistrict desegregation plan in the absence of proof that the school districts being consolidated had themselves committed constitutional violations); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding a single-family zoning ordinance which defined "family" to include no more than two unrelated persons living and cooking together); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (rejecting an equal protection attack upon a school financing system which produced substantial fiscal disparities among districts); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (rejecting an equal protection attack upon a scheme that allowed only landowners to vote for directors of a local water district and which weighted their votes according to the value of land owned). Unfortunately, these brief summaries of the holdings cannot convey the language employed in these and other opinions, the voting patterns of particular Justices, or the practical implications of the decisions. For a more detailed discussion, see generally M.D. GELFAND, FEDERAL CONSTITUTIONAL LAW AND AMERICAN LOCAL GOVERNMENT: A TREATISE FOR CITY ATTORNEYS, PUBLIC INTEREST LITIGATORS, AND STUDENTS 23-25, 39-43, 79-80, 176-82, 197-98, 205, 281-85, 288-91, 299-300, 312-18, 336-46 (1984); Gelfand, *Burger Court Federalism*, *supra* note 1, at 767-80, 784-90, 834-39; *see also* Williams, *supra* note 7, at 104-12 (providing a similar analysis of *Belle Terre*, *Arlington Heights*, *Milliken*, and *Rodriguez*, and linking the "rhetorical universe" of the opinions to Jefferson and nineteenth century commentators).

17. Key cases in this category included: Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (ordinance which, as a practical matter, forbade door-to-door solicitations by public advocacy groups, was unconstitutionally overbroad); Moore v. City of East Cleveland, 431 U.S. 494 (1977) ("family autonomy" protected by the Due Process Clause was violated by a zoning ordinance that defined "family" so narrowly as to exclude an extended family); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (retroactive repeal of bond covenant violated the Contract Clause where repeal was neither "reasonable" nor "necessary"); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (invalidating a vagrancy ordinance on vagueness grounds because it failed to give fair notice of forbidden conduct, allowed arbitrary police action, and made normally innocent behavior criminal). Again, the context of these and similar cases cannot be conveyed simply by summarizing their holdings. For a more detailed analysis, see generally M.D. GELFAND, *supra* note 16, at 112-17, 297-300, 368-71, 384-88; Gelfand, *Burger Court Federalism*, *supra* note 1, at 790-800. The wide divergence of views on the Court often made it difficult to predict exactly which rights would fall within this narrow fundamental rights exception, though some very general patterns did emerge. *See infra* text accompanying notes 38-39.

18. 472 U.S. 1006 (1986) (upholding an ordinance that forbade adult motion picture theaters within 1,000 feet of any residential zone, or single or multiple family dwelling, church, park, or school).

fects adult businesses, even in the face of first amendment claims.[19] A more interesting case is *Hawaii Housing Authority v. Midkiff*,[20] in which the Court concluded that redistribution and deconcentration of land ownership was a legitimate "public use" for the condemnation of private property.[21] This decision acknowledges the broad authority of state and local governmental agencies to engage in redevelopment and other innovative land use projects, provided they pay "just compensation." At the same time, the Burger Court managed to avoid a decision on the hotly debated topic of whether compensation is required for regulatory actions that are claimed to result in inverse condemnation.[22] In the process, however, it confirmed the importance of and showed respect for local government land use procedures in effect requiring landowners to exhaust these local administrative procedures before seeking relief in a federal court.[23]

19. *Renton* drew upon Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (rejecting a first amendment attack upon a zoning law applied to "adult businesses," even though the materials involved were not yet shown to be obscene), and, therefore, limited the scope of Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) (town could not place absolute ban on live nude entertainment).

20. 467 U.S. 229 (1984). Justice O'Connor's opinion was joined by all members of the Court, except Justice Marshall, who did not participate in the decision.

21. *See* U.S. CONST. amend. V. The Fifth Amendment provides that "private property [shall not] be taken for public use without just compensation." The Takings Clause is made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment. *See* Chicago, B & Q R.R. v. Chicago, 166 U.S. 226 (1987).

22. In Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (takings clause attack upon a broad local historic preservation law), and in Agins v. City of Tiburon, 447 U.S. 255 (1980) (takings clause attack on a land use regulation requiring single unit development), a majority of the Court concluded that no taking had occurred. In San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981) (takings clause attack on a land use regulation designating landowner's undeveloped property as green space), the decision below was deemed not a final judgment. In Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (takings clause challenge to land use regulations imposing improvement requirements and limiting development density), a plurality of the Court concluded that the challenged decision was not ripe for adjudication because the landowner had failed to seek a variance through the local government's procedures and had not sought compensation through procedures provided by the state. *Id.* at 186-87. In MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2651 (1986), a majority ruled that the county planning commission had to make a final and authoritative determination before the Court could decide whether a taking had occurred. *See generally* M.D. GELFAND, *supra* note 16, at 347-55; Williams, *supra* note 7, at 135-37, and sources cited therein.

23. Though the general rule is that plaintiffs do not have to exhaust state administrative remedies before bringing an action under 42 U.S.C. § 1983, *see* Patsy v. Board of Regents, 457 U.S. 496 (1982), *Williamson County* and *Yolo County* seem to require landowners to seek relief under state and local land use procedures before bringing an inverse condemnation claim in federal court. *See generally* L. MCDOUGAL & M.D. GELFAND, MUNICIPAL LAND USE LIABILITY § 3:08 (1988 forthcoming).

b. Public Employment

In the field of public employment, Burger Court decisions of the 1980's provide few bright lines for local government officials, lower courts, or litigants.[24] For example, *Connick v. Myers*[25] sharply curtails the free speech rights of public employees, but the full extent to which its fluid language cuts back prior precedent[26] remains to be seen.

In *Cabell v. Chavez-Salido*,[27] the Court continued the questionable practice of upholding, on a case-by-case basis, the exclusion of aliens from government positions that are not particularly sensitive or significant.[28] In *Branti v. Finkel*,[29] the Court articulated an even more open-ended standard for evaluating party patronage dismissals that are challenged on first amendment grounds.[30] Finally, sharp divisions within the

24. The employment cases described *infra* in notes 48-49 & 53 and accompanying text add further complexity.

25. 461 U.S. 138 (1983) (ruling that an employee survey about practices of the district attorney's office, distributed to fellow employees, was not protected by the First Amendment). Justice White wrote the majority opinion. It was joined by Chief Justice Burger and Justices Powell, Rehnquist, and O'Connor. Justice Brennan dissented, in an opinion joined by Justices Marshall, Blackmun, and Stevens. *Id.* at 156 (Brennan, J., dissenting). Justice Brennan contended that the employee survey did address matters of public concern and that it did not interfere with the operations of the district attorney's office or with the plaintiff's relationships with her fellow employees. *Id.* at 169.

26. Justice White concluded that the "limited First Amendment interest involved here does not require that Connick [the employer] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." White also stressed that the Court would not lay down general standards for judging future statements made by public employees about their superiors. 461 U.S. at 154. Prior cases in this field are reviewed in M.D. GELFAND, *supra* note 16, at 139-44.

27. 454 U.S. 432 (1982).

28. Ambach v. Norwick, 441 U.S. 68 (1979), had upheld the exclusion of resident aliens from positions as teachers (who served as "role models"), even though they apparently were not excluded from serving in the policymaking position of community school board member. *Id.* at 81-82 n.15, 86-87 (Blackmun, J., dissenting). The ruling in *Cabell* suffers from a similar incoherence:

> [A] criminal defendant in California may be represented at trial and on appeal by an alien attorney, have his case tried before an alien judge and appealed to an alien justice, and then have his probation supervised by a county probation department headed by an alien. [But after this decision, he] cannot be entrusted to the supervised discretion of a resident alien deputy probation officer.

454 U.S. at 461 (Blackmun, J., dissenting). Subsequently, the Court arrived at the more reasonable conclusion that a statute excluding aliens from the position of notary public violated the Equal Protection Clause. Bernal v. Fainter, 467 U.S. 216 (1984).

29. 445 U.S. 507 (1980).

30. The "ultimate inquiry" under *Branti* "is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Id.* at 518. Justice Stewart dissented, arguing that the Court should retain the clearer tests of "confidentiality" and "policymaking" developed in their prior patronage dismissal case, Elrod v. Burns, 427 U.S. 347 (1976). *Branti*, 445 U.S. at 520 (Stew-

Burger Court over affirmative action have resulted in few coherent precedents in this area, though they do provide sufficient authority for local officials to undertake certain limited forms of affirmative action.[31]

c. Procedural Limitations

In addition to these decisions[32] narrowing the scope of substantive constitutional rights when in conflict with community self-determination interests, the Burger Court continued to develop procedural devices that prevent constitutional attacks upon certain types of local government decisions. For example, in *City of Los Angeles v. Lyons*,[33] the Court approved a standing requirement that makes injunctions against police misconduct—and, possibly, similar abuses by other lower echelon officials—extremely difficult to obtain in federal court.[34] Similarly, the comity rule articulated by Justice Rehnquist in *Fair Assessment in Real Estate v. McNary*[35] substantially reduces the number and type of federal

art, J., dissenting). Justice Powell dissented in *Branti*, as he had in *Elrod*, presenting the more general objection that patronage practices actually contributed to state and local government self-rule. *Id.* at 521 (Powell, J., dissenting).

31. See, e.g., Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 106 S. Ct. 3019 (1986); Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986); Fullilove v. Klutznick, 448 U.S. 448 (1980); and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), each requiring careful analysis of a range of opinions. In *Wygant*, Justice O'Connor hazarded the following synthesis:

> The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program. This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination . . . as long as the public actor has a firm basis for believing that remedial action is needed.

Wygant, 106 S.Ct. at 1853 (O'Connor, J., concurring). However, her description of a "carefully constructed" program seems rather narrow. *See id.* at 1853-55.

32. *See also* Daniels v. Williams, 106 S. Ct. 662 (1986) (negligence alone is insufficient to establish a due process violation by a jail official); New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding that students are protected by the Fourth Amendment, but articulating a more relaxed standard for permissible student searches); Hewitt v. Helms, 459 U.S. 460 (1983) (one of many cases articulating rights for prisoners while deferring broadly to disciplinary decisions of prison officials); City of Memphis v. Greene, 451 U.S. 100 (1981) (upholding the city's decision to close a street, despite its racial impact); Heffron v. International Soc'y of Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding restrictions upon the location, for both sale and free distribution, of religious literature at a state fair); *see generally* M.D. GELFAND, *supra* note 16, at 215, 236-78, 391-93.

33. 461 U.S. 95 (1983).

34. Though the *Lyons* petitioner had been injured before bringing suit, the Court denied him standing to sue for an injunction because he was not presently suffering from, nor could he show a sufficient likelihood that he would suffer in the future from, the challenged policy of administering chokeholds to citizens stopped for routine traffic violations. *Id.* at 105. The difficulties of this standing requirement are manifest if, for instance, police adopted a policy of shooting citizens stopped for routine traffic violations.

35. 454 U.S. 100 (1981).

court suits that can be brought to challenge the administration of state and local tax schemes.[36]

2. *Exceptions for Fundamental Rights*

As noted above,[37] the broad judicial deference that marked the Burger Court's first decade was somewhat balanced by intermittent protection of certain fundamental interests when they were found to outweigh community self-determination. As the cases demonstrated, this fundamental rights exception was very narrow in scope, appearing to apply only to claims arising under explicit constitutional protections,[38] when no detailed examination of local government processes was required, or when the community self-determination interest itself was weak.[39]

During the 1980's, there again were a number of cases in which individual rights prevailed over community self-determination. For example, in *Plyler v. Doe*,[40] the Court ruled that denying illegal alien children access to free public education violated the Equal Protection Clause. Noting that denial of a basic education imposed "a lifetime hardship on a discrete class of children not accountable for their disabling status," Justice Brennan applied an intermediate scrutiny standard, which required the challenged statute to further a substantial interest or goal of the state.[41] Although this was a somewhat unusual posture for a majority of the Burger Court to assume, the concurring opinions by Justices Black-

36. The principle of comity enunciated by then Justice Rehnquist would require plaintiffs to pursue most of their federal constitutional challenges to such schemes in state court.

37. *See supra* text accompanying note 17.

38. Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980) (First Amendment violated by an ordinance that directly and substantially restricted door-to-door and on-street financial solicitations by public advocacy organizations); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (Contract Clause prohibits impairment of a covenant between two states and bondholders). During the 1970's, challenges brought under constitutional provisions such as the Equal Protection Clause generally did not give rise to an exception to the Court's pattern of deferring to the programmatic choices of local governments. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

39. *See* sources cited *supra* note 17.

40. 457 U.S. 202 (1982). *See generally* M.D. GELFAND, *supra* note 16, at 183-88.

41. 457 U.S. at 224. *See also id.* at 217-18. Justice Powell described the intermediate scrutiny test as follows: "In these unique circumstances, the Court properly may require that the State's interests be substantial and that the means bear a 'fair and substantial relation' to these interests." *Id.* at 239 (Powell, J., concurring). Justice Marshall also concurred in *Plyler*. He relied, however, upon the sliding scale for equal protection analysis proposed in his *Rodriguez* dissent. *See id.* at 230-31 (Marshall, J., concurring).

Chief Justice Burger countered that the *Plyler* majority had simply "patch[ed] together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis" to construct a theory of heightened scrutiny "custom-tailored" to the *Plyler* facts. *Id.* at 244 (Burger, C.J., dissenting). For a general discussion of the levels of judicial scrutiny under

mun and Powell stressed that the essential holding of *San Antonio Independent School District v. Rodriguez*[42] remained undisturbed—that education is not a fundamental right requiring all types of state and local restrictions to be justified on the basis of a compelling state interest.[43] Indeed, they observed, the *Plyler* outcome essentially sprang from dictum in Justice Powell's majority opinion in *Rodriguez*.[44] Significantly, the *Plyler* ruling did not require a detailed analysis of the local financing scheme.

In *City of Cleburne v. Cleburne Living Center, Inc.*,[45] the Court invalidated a zoning ordinance requiring a special use permit for a proposed group home for mentally retarded persons. The claim was based on a denial of Equal Protection. Although purporting to employ a rational relationship test, the *Cleburne* Court actually took a fairly interventionist stance. This decision built upon *Moore v. City of East Cleveland*,[46] which had invalidated a single-family zoning ordinance that effectively outlawed extended families. Both cases, therefore, limited an overly expansive reading of the very broad deference to residential zoning articulated in *Village of Belle Terre v. Boraas*.[47] Yet, like *Moore*, the *Cleburne* ruling could be limited to a discrete set of circumstances and did not involve the Court in a detailed examination of local land use procedures.

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the Equal Protection Clause, see M.D. GELFAND, *supra* note 16, at 58-60, and sources cited therein.

42. 411 U.S. 1 (1973) (described *supra* note 16).

43. *See* 457 U.S. at 235 (Blackmun, J., concurring); *id.* at 238-39 nn.2-3 (Powell, J., concurring). Justice Blackmun had joined Justice Powell's majority opinion in *Rodriguez*. *See also* Martinez v. Bynum, 461 U.S. 321 (1983) (upholding a residency requirement for tuition-free public education).

44. Justice Powell's *Rodriguez* opinion had reserved judgment on the constitutionality of a system that "occasioned an absolute denial of educational opportunities to any of its children . . . ." 411 U.S. at 37. *See also id.* at 25 (noting that the financing scheme upheld in *Rodriguez* did not result in "absolute denial of education").

45. 105 S. Ct. 3249 (1985). Justice White's opinion for the Court was joined by Chief Justice Burger and Justices Powell, Rehnquist, Stevens, and O'Connor. Justice Stevens filed a separate concurring opinion, in which Chief Justice Burger joined. *Id.* at 3260-63 (Stevens, J., concurring). Justice Marshall concurred in the judgment in part and dissented in part, arguing that the appropriate standard was a fully articulated sliding scale, such as he had suggested in *Rodriguez* and *Plyler*. *See supra* note 41. Justice Marshall's *Cleburne* dissent was joined by Justices Brennan and Blackmun. 105 S. Ct. at 3263-77 (Marshall, J., concurring in part and dissenting in part).

46. 431 U.S. 494 (1977).

47. 416 U.S. 1 (1974) (described *supra* note 16). For a discussion of the relationship between *Belle Terre* and *Moore* prior to the *Cleburne* decision, see Gelfand, *Burger Court Federalism*, *supra* note 1, at 791-93. The current situation is discussed in L. MCDOUGAL & M.D. GELFAND, *supra* note 23, §§ 2:12-2:13.

In *Cleveland Board of Education v. Loudermill*,[48] the Court required a pretermination hearing for public employees who have acquired a property interest in continued employment. Though it might have resulted in detailed judicial examination of local government employment practices, the *Loudermill* holding required only that the employee be given notice and an opportunity to be heard. Consistent with its deferential treatment of local government practices, the Court did not prescribe any particular form of hearing.[49]

Similar to the Court's revival of the Contract Clause[50] in the 1970's,[51] several cases decided during the 1980's have revived the Privileges and Immunities Clause.[52] Most of these cases relate to employment opportunities,[53] and they do represent an expansion of individual rights.

In summary, the Burger Court's deference to community self-determination has preserved the programmatic flexibility of local governments in a variety of fields. As a result, civil rights and civil liberties litigants are denied many of the constitutional litigation opportunities they had enjoyed during the Warren Court era. When the precedents upholding fundamental rights are read together, however, it is clear that some possibilities remain for those who employ creative litigation strategies.[54]

48. 105 S. Ct. 1487 (1985).

49. *Id.* at 1493-94. *See also* M.D. GELFAND, *supra* note 16, at 99-112 (analyzing prior procedural due process cases).

50. The Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10.

51. *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (described *supra* note 17); *see also* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (also closely scrutinizing a state's modification of private contractual relations); *see generally* Gelfand, *Burger Court Federalism*, *supra* note 1, at 796-98.

52. The Privileges and Immunities Clause applied in these cases provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2. It should not be confused with the Privileges and Immunities Clause of section one of the Fourteenth Amendment which, currently, has a narrower scope.

53. *See, e.g.*, Supreme Court of New Hampshire v. Piper, 470 U.S. 275 (1985) (invalidating residency requirement for bar admission); Camden United Bldg. & Constr. Trades v. City of Camden, 465 U.S. 208 (1984) (ordinance requiring 40% of the employees of contractors and subcontractors working on city construction projects to be city residents may violate the Privileges and Immunities Clause, even though it would not violate the Commerce Clause); Hicklin v. Orbeck, 437 U.S. 518 (1978) (invalidating resident-hiring preference for employment related to development of the state's revenues). *See also* Austin v. New Hampshire, 420 U.S. 656 (1975) (invalidating on privileges and immunities grounds a tax which applied only to commuters).

54. Often a constitutional claim will have to be cast in an unusual or unexpected mold. *See, e.g.*, Zobel v. Williams, 457 U.S. 5, 71-74 (1982) (O'Connor, J., concurring) (system distributing dividends from Alaska's natural resources fund based upon years of state residency should be invalidated on right to travel and privileges and immunities clause grounds); Board of Educ. v. Pico, 457 U.S. 853, 867 (1982) (plurality opinion) (recognizing the "right to receive

3. *Congressional Intervention*

As noted above, during its first decade the Burger Court, while interpreting constitutional rights fairly narrowly, acceded to congressional expansion of individual rights claims[55] against local government.[56] In general, this pattern continued during the 1980's,[57] though some cases

ideas"); DeWeese v. Town of Palm Beach, 812 F.2d 1365 (11th Cir. 1987) (invalidating ordinance requiring men to wear shirts when appearing in public, on the ground that it violated the liberty interest in personal dress of a shirtless jogger and did not bear a rational relationship to any legitimate town interest); Service Mach. & Shipbuilding v. Edwards, 617 F.2d 70 (5th Cir.), *aff'd*, 449 U.S. 913 (1980) (invalidating workers' identity card and registration scheme on dormant commerce clause grounds); Wallace v. Town of Palm Beach, 624 F. Supp. 864 (S.D. Fla. 1985), *appeal dismissed*, 809 F.2d 1525 (11th Cir. 1987) (invalidating a similar registration scheme on commerce clause grounds). The author represented the prevailing parties in *DeWeese*, *Service Machine*, and *Wallace*.

55. *See, e.g.*, City of Rome v. United States, 446 U.S. 156 (1980) (accepting discriminatory effect as the standard under the Voting Rights Act, even though discriminatory purpose is required under the Equal Protection Clause); Gladstone v. Village of Bellwood, 441 U.S. 91 (1979) (accepting congressional expansion of standing); Monell v. Department of Social Services, 436 U.S. 658 (1978) (municipalities are potential defendants in suits under 42 U.S.C. § 1983); City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 413 (1978) (antitrust liability of municipalities); Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that height and weight requirements for prison guards violated the discriminatory effect standard of Title VII of the 1964 Civil Rights Act); Hills v. Gautreaux, 425 U.S. 284 (1976) (accepting broad remedial order where federal agency involved); *see also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 271 (1977) (finding no equal protection violation because purposeful discrimination not proven, but remanding for consideration of the claim under the Fair Housing Act). *But see* New York Transit Auth. v. Beazer, 440 U.S. 568 (1979) (applying the discriminatory effect standard of Title VII very restrictively in a public employment case). *See generally* M.D. GELFAND, *supra* note 16, at 48-53, 63, 88-89, 94; Gelfand, *Burger Court Federalism*, *supra* note 1, at 800-09, 811-12.

56. Although I have consistently presented this same analysis of these Burger Court decisions throughout my 1980 article, Gelfand, *Burger Court Federalism*, *supra* note 1, and in subsequent books and articles, Professor Williams reports that my position is exactly the opposite. *See* Williams, *supra* note 7, at 121 n.201. Since she follows, accepts and, at some points, even cites the 1980 article, I assume that her reversal of my position is simply a typographical error or similar oversight. I also assume that Professor Williams' description of the analysis in my 1980 article as "groundbreaking" is a genuine compliment, which I gratefully accept.

Her further characterization of that analysis as "somewhat formalistic" seems to spring from the differences in our goals. My first purpose in the 1980 article, and in some other writings, was to identify certain coherent themes in Burger Court decisions (at a time when most commentators were finding only incoherence there). This was done by viewing a wide range of cases through a local government lens. Specifically, I sought an explanation—from the perspective of the opinions' authors themselves—for deference to (elected) local government in most constitutional cases, deference to Congress (a superior elected body) in most statutory cases, and refusal to defer when a statute interfered with the local service-provider function. The resulting patterns were then critiqued both from internal and external perspectives. Professor Williams' purpose is apparently somewhat different, though we agree on several points.

57. *See, e.g.*, Thornburg v. Gingles, 106 S. Ct. 2752 (1986) (interpreting the 1982 amendments to the Voting Rights Act of 1965, which replaced a discriminatory purpose standard with a discriminatory "results" standard); EEOC v. Wyoming, 460 U.S. 226 (1983) (rejecting

did narrowly interpret particular federal statutes.[58] In this connection, several important developments regarding antitrust and civil rights laws merit special examination.

The issue of municipal antitrust liability involved an interesting interaction between the Court and Congress. In 1978, the Court ruled that municipalities were not automatically entitled to the "state action" defense available to states in antitrust cases.[59] In 1982, the Court took an even more dramatic step by ruling that even a grant of home rule authority to a municipality was insufficient to constitute state authorization of municipal anticompetitive behavior.[60] The decision led to several enormous monetary judgments against municipalities,[61] set back the home rule movement by several decades,[62] and flew in the face of well established precedent providing that federal courts should not interfere with state-city relations.[63] Congress responded to the enormous monetary awards by passing legislation that essentially forbids antitrust damage remedies against local governments.[64] Shortly thereafter, the Court approved more favorable standards, from the perspective of the municipalities, even as to the remaining forms of antitrust liability.[65]

Despite the growing opposition of several Justices, the Burger Court did not directly retreat from its holding in *Monell v. Department of Social*

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a tenth amendment attack upon an amendment extending the Age Discrimination in Employment Act to cover public employees).

58. *See, e.g.*, Hendrick Hudson Central School Dist. Bd. of Educ. v. Rowley, 458 U.S. 176 (1982) (narrowly interpreting the Education for All Handicapped Children Act); Pennhurst State School v. Halderman (Pennhurst I), 451 U.S. 1 (1981) (narrowly interpreting the Developmentally Disabled Assistance and Bill of Rights Act of 1975).

59. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978) (Brennan, J., writing for a plurality) (local governments seeking to assert the defense must be acting "pursuant to state policy to displace competition with regulation or monopoly public service").

60. Community Communications Co. v. City of Boulder, 455 U.S. 40, 54 (1982) (Brennan, J.) (insisting, *inter alia*, that America is a "nation not of 'city-states' but of States").

61. The enormity of the awards resulted, in part, from the mandate of the Clayton Act that antitrust damage awards "shall be trebled." 15 U.S.C. § 12 (1982).

62. *See generally* Freilich & Carlisle, *The Community Communications Case: A Return to the Dark Ages Before Home Rule*, 14 URB. LAW. v. (1982); Williams, *supra* note 7, at 125-26 n.220, 131-34, and sources cited therein. Professor Williams presents an interesting analysis, which links Justice Brennan's antitrust opinions to his *Monell* opinion and his position on sovereign immunity. *See infra* note 114 and accompanying text.

63. *See, e.g.*, Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

64. Local Government Antitrust Act of 1984, 15 U.S.C. §§ 16-36 (1986).

65. *See* Fisher v. City of Berkeley, 106 S. Ct. 1045 (1986); Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); *see generally* Greilsheimer, *Potential Liabilities of Issuers and Other Parties*, in STATE AND LOCAL GOVERNMENT DEBT FINANCING § 12:08.10 (M.D. Gelfand ed. 1986 Supp.).

Services[66] that individuals whose constitutional rights are violated can sue local governments directly under section 1983 of the Civil Rights Act.[67] Indeed, the principal[68] question left open in the *Monell* opinion was resolved favorably to the plaintiffs in *Owen v. City of Independence*.[69] In *Owen*, a closely divided Court[70] ruled that local governments sued in section 1983 suits could not assert the "good faith immunity" defense that was available to their officers.[71] As Justice Brennan, writing for the majority, explained:

> The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole.[72]

In most cases, this approach will produce a fairly equitable system of compensation, depending upon how far other defenses are expanded or contracted. Justice Powell, however, was prompted to write in his dissent that municipalities had gone "in two short years from absolute immunity under § 1983 to strict liability."[73]

The Court opened the door of municipal liability even further in two

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66. 436 U.S. 658 (1978) (municipalities are "persons" and, therefore, potential defendants in suits under 42 U.S.C. § 1983, but they will not be liable solely on a respondeat superior theory).

67. Section 1983 of the 1964 Civil Rights Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982). Its jurisdictional counterpart is 28 U.S.C. § 1343(3) (1982). For detailed discussions of various aspects of litigation under section 1983, see SECTION 1983: SWORD AND SHIELD (R. Freilich & R. Carlisle eds. 1983); M.D. GELFAND, *supra* note 16, ch. 6; S. NAMOD, CIVIL RIGHTS LITIGATION (1984).

68. The other open question involved the "contours of municipal liability." 436 U.S. at 695. *See infra* notes 74-79 & 83-86 and accompanying text.

69. 445 U.S. 622 (1980). *See generally* M.D. GELFAND, *supra* note 16, at 424-27.

70. In *Owen*, Justice Brennan's majority opinion was joined by Justices White, Marshall, Blackmun, and Stevens. Justice Powell's dissenting opinion was joined by Chief Justice Burger and Justices Stewart and Rehnquist. *Id.* at 658 (Powell, J., dissenting).

71. *See, e.g.*, Stump v. Sparkman, 435 U.S. 349 (1978) (absolute immunity for judges); Procunier v. Navarette, 434 U.S. 555 (1978) (qualified or "good faith" immunity for prison officials); Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity for school board members). For a discussion of more recent cases dealing with these personal defenses, see *infra* note 89 and accompanying text.

72. 445 U.S. at 657.

73. *Id.* at 665 (Powell, J., dissenting). *See also* Parratt v. Taylor, 451 U.S. 527 (1981).

cases decided in the same year as *Owen*. In *Maher v. Gagne*[74] and *Maine v. Thiboutot*,[75] the Court held that the reference in section 1983 to "deprivation of any rights . . . secured by the Constitution and laws"[76] should be read literally, thereby allowing section 1983 suits based upon violations of federal *statutes*, including non-civil rights statutes.

The opponents of *Monell*, however, have also been active in the 1980's. Although they have not succeeded in overruling the decision, they have placed several significant limitations upon section 1983 suits brought against local governments and state and local officials. For example, the broad contours of *Maher* and *Thiboutot* were quickly reduced by decisions severely limiting the number and type of statutory claims which can be pursued under section 1983.[77] As a result, a statutory section 1983 claim will not lie if the statute: (1) does not create an enforceable right; (2) provides its own exclusive remedy for violations of its terms; or (3) creates a sufficiently comprehensive remedial scheme.[78] Read together, these cases produce an anomalous outcome: some business-oriented statutory claims can be asserted under section 1983, while many other statutory claims cannot, even though they are closer to the more traditional civil rights actions.[79]

In addition, the "under color of state law"[80] requirement of section 1983 has been severely restricted by several Burger Court decisions of the 1980's.[81] As a result, privately owned institutions that have enormous influence over the lives of citizens and that receive substantial govern-

74. 448 U.S. 122 (1980).

75. 448 U.S. 1 (1980).

76. *See supra* note 67.

77. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Pennhurst State School v. Halderman, 451 U.S. 1 (1981) (Pennhurst I).

78. *Middlesex*, 453 U.S. 1 (1981); *Pennhurst*, 451 U.S. 1 (1981). *See generally* M.D. GELFAND, *supra* note 16, at 432-35.

79. We obviously have come a long way from the "original intent" of the drafters of section 1983, who, in 1871, were concerned about guaranteeing a federal court forum in which recently freed blacks could assert their new civil rights under the Thirteenth, Fourteenth, and Fifteenth Amendments (and closely related statutes).

80. *See supra* note 67. This phrase means that a section 1983 action can be brought only when "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State" (or its political subdivisions). Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982). This is the same as the test for "state action" under the Fourteenth Amendment, so both sets of precedents are applicable.

81. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982) (state action requirement not met despite allegations that state and federal regulations had encouraged the challenged actions by defendant private nursing home and that 90% of the patients' medical expenses were paid by the state); Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (no state action by private school, even though nearly all its students were referred by public schools and had fees paid by government agencies); Polk County v. Dodson, 454 U.S. 312 (1981) (public defender, though paid by the state, did not act "under color of" state law); *see also* Jackson v. Metropolitan Edison Co., 419

mental support are generally immune from section 1983 suits. Furthermore, sovereign immunity has become a more effective and powerful defense for state agencies and their officials as a result of Justice Powell's rereading of the precedents in the Court's second decision in *Pennhurst State School v. Halderman*.[82] In fact, that opinion provides a possible defense for local governments in a limited set of circumstances.[83] A more supportable position was taken by the Court in *City of Newport v. Fact Concerts*,[84] which held that punitive damages cannot be claimed against local governments in section 1983 suits.[85] Also, various procedural issues have been resolved by reference to state law.[86]

In another set of recent cases, the Court tinkered in important ways with the calculation of attorney's fees in section 1983 and other civil rights cases.[87] By making it more difficult for successful civil rights plaintiffs to recover respectable attorney's fees from local government de-

U.S. 345, 350 (1974) (extensive, detailed regulation of privately owned utility company insufficient to constitute state action).

82. 465 U.S. 89 (1984) (Pennhurst II).

83. *See id.* at 123-24 (relieving counties from liability with respect to a joint state-city institution where the state was protected by sovereign immunity). Fortunately, lower courts have not given this possible defense an expansive reading. *See, e.g.*, Crane v. State of Texas, 759 F.2d 412, 415-20 (5th Cir.), *reh'g denied*, 766 F.2d 193 (5th Cir.), *cert. denied*, 106 S. Ct. 570 (1985); Braintree Baptist Temple v. Holbrook Public Schools, 616 F. Supp. 81 (D. Mass. 1984); *see generally* Lee, *Sovereign Immunity and the Eleventh Amendment: The Uses of History*, 18 URB. LAW. 519 (1986).

84. 453 U.S. 247 (1981).

85. Punitive damages, however, can be awarded against individual state or local government officials or employees. *See* Tower v. Glover, 467 U.S. 914 (1984); Smith v. Wade, 461 U.S. 30 (1983). Thus, in some cases, plaintiffs may be able to obtain a punitive damages award against officials who are indemnified by their governmental employers or insurance policies.

86. State law, unless "inconsistent with the Constitution and laws of the United States" governs suits brought under section 1983 (or certain other statutes), whenever the latter is "deficient in the provisions necessary to furnish suitable remedies and punish offenses against law . . . ." 42 U.S.C. § 1988 (1982). Applying this standard to the rather sparse language of section 1983, the Court has concluded that state statutes of limitations, survival statutes, and res judicata rules will generally govern such actions. *See generally* M.D. GELFAND, *supra* note 16, at 458-64 (critiquing some of these cases).

87. Plaintiffs prevailing in cases under various civil rights acts (including section 1983) can recover reasonable attorney's fees from state governments, local governments, and their officials under 42 U.S.C. § 1988 (1982). Defendants prevailing in these cases can recover attorney's fees only when the plaintiff's claim is "groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14 (1980). *See generally* M.D. GELFAND, *supra* note 16, at 464-69.

Legislative immunity of an individual defendant will bar an attorney's fee award, Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 738 (1980), but judicial immunity will not. Pulliam v. Allen, 466 U.S. 522 (1984). States cannot assert an eleventh amendment defense to attorney's fee awards in section 1983 cases because Congress, in passing section 1988, has abrogated state sovereign immunity from such awards. *See* Hutto v. Finney, 437 U.S. 678 (1978).

fendants, these opinions[88] may well reduce the extent to which individual citizens can act as private attorneys general to enforce constitutional rights. This result is especially significant at a time when the United States Attorney General has reduced the extent of federal government enforcement of civil rights.

Personal defenses for government officials sued in section 1983 cases were also clarified and expanded somewhat by the Burger Court.[89] This result would have been appropriate, for the reasons noted in *Owen*,[90] if the liability of governmental entities were correspondingly expanded, thereby furthering both the compensation and deterrence purposes of section 1983. As explained above,[91] however, the Burger Court has reduced governmental entity liability through restrictive interpretations of substantive constitutional rights and the imposition of various procedural barriers, often based upon extreme interpretations of community self-determination.

B. Public Participation Cases

The Burger Court's decisions of the 1980's dealing with public participation in community decisionmaking have produced mixed results. Although "one-person, one-vote" remained the general equal protection standard for both state and local government election districts,[92] several members of the Court have indicated their willingness to tolerate greater deviation from mathematical equality than the majority has, so far, allowed.[93] Of more immediate concern was the decision in *Ball v. James*,[94] in which a closely divided Court[95] held that a water and electricity dis-

88. *See* Marek v. Chesny, 473 U.S. 1 (1985); Webb v. Board of Educ. of Dyer County, 471 U.S. 234 (1985); Blum v. Stenson, 465 U.S. 886 (1984); Hensley v. Eckerhart, 461 U.S. 424 (1983); *see generally* L. MCDOUGAL & M.D. GELFAND, *supra* note 23, § 3:03.

89. *See* Davis v. Scherer, 468 U.S. 183 (1984); Pulliam v. Allen, 466 U.S. 522 (1984); Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980); *see generally* L. MCDOUGAL & M.D. GELFAND, *supra* note 23, § 3:04.

90. *See supra* text accompanying note 72.

91. *See supra* notes 2-4, 16-36 and accompanying text.

92. This standard was established for state legislative districts in Reynolds v. Sims, 377 U.S. 533 (1964), for general purpose local governments in Avery v. Midland County, 390 U.S. 474 (1968), and for school districts in Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

93. *See* White v. Weiser, 412 U.S. 783, 798 (1973) (Powell, J., concurring, joined by Burger, C.J., and Rehnquist, J.); *see also* Brown v. Thomson, 462 U.S. 835 (1983); Karcher v. Daggett, 462 U.S. 725, 780-84 (1983). (White, J., dissenting); Mahan v. Howell, 410 U.S. 315 (1973); *see generally* M.D. GELFAND, *supra* note 16, at 10-15.

94. 451 U.S. 355 (1981).

95. Justice Stewart's opinion for the Court was joined by Chief Justice Burger and Justices Rehnquist and Stevens. Justice Powell concurred. *Id.* at 372 (Powell, J., concurring). Justice White's dissenting opinion was joined by Justices Brennan, Marshall, and Blackmun. *Id.* at 374 (White, J., dissenting).

trict with wide-ranging activities could restrict voting for its board of directors to persons owning land within the district and could distribute voting power according to the number of acres owned.[96] In addition, the Burger Court continued to uphold the questionable practice of excluding aliens from participation even in some nonsensitive public jobs.[97]

Despite these negative public participation cases, the Court in *Rogers v. Lodge*[98] substantially reduced the burden plaintiffs must bear in "fair and effective representation" cases.[99] In the same summer the *Rogers* decision was handed down, Congress reduced the burden even further by amending the Voting Rights Act of 1965.[100] In addition, the Court, though rejecting the particular claim before it, opened the door in *Davis v. Bandemer*[101] for suits based upon political party gerrymandering. As a result of these developments, voting rights is likely to be the most active area of civil rights litigation during the next five years.[102]

C. Service-Provider Cases

In 1976, Justice Rehnquist, writing for a sharply divided Court in *National League of Cities v. Usery*,[103] published a decision designed to protect state and local governments from Congressional interference in their essential functions. In 1985, Justice Blackmun delivered the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*,[104] which overruled *National League of Cities*. His *Garcia* opinion, however,

96. *Ball* built upon and expanded the questionable franchise restriction permitted by Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973). *See supra* note 16; *see generally* M.D. GELFAND, *supra* note 16, at 26-28.

97. *See supra* notes 27-28 and accompanying text.

98. 458 U.S. 613 (1982) (six to three decision). *See also* Hunter v. Underwood, 469 U.S. 878 (1985).

99. These cases involve racial voting rights. *See generally* M.D. GELFAND, *supra* note 16, at 37-48; Gelfand, *Voting Rights and the Democratic Process: Ongoing Struggles and Continuing Questions*, 17 URB. LAW. 333 (1985) [hereinafter Gelfand, *Voting Rights*].

100. Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134, (codified at 42 U.S.C. § 1973 (1982)) (providing that racial voting dilution claims can be established on the basis of discriminatory "results" rather than under the prior discriminatory purpose standard). *See generally* Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

101. 106 S. Ct. 2797 (1986).

102. Much will depend upon the ability of plaintiffs to prove, and of district courts to find, the necessary facts. *See id.* at 2807-09; Rogers v. Lodge, 458 U.S. at 623; 627-28.

103. 426 U.S. 833 (1976). Justice Rehnquist's opinion was joined by Chief Justice Burger and Justices Stewart, Blackmun, and Powell. Justice Blackmun filed a separate concurring opinion, which failed to join the issue debated in other opinions. *Id.* at 856 (Blackmun, J., concurring). Justice Brennan strongly dissented, in an opinion joined by Justices White and Marshall. *Id.* at 856 (Brennan, J., dissenting). Justice Stevens also dissented. *Id.* at 880 (Stevens, J., dissenting). For listings of some of the many comments on this case, see Gelfand, *Burger Court Federalism*, *supra* note 1, at 812 n.262; Williams, *supra* note 7, at 113 n.158.

104. 469 U.S. 528 (1985).

simply supplied the *coup de grace* to a decision which had been eviscerated almost from its inception.[105] Yet, Justice Rehnquist, dissenting in *Garcia*, promised a revival of judicial protection for state sovereignty.[106]

II. Open Questions: The Rehnquist Court in the 1980's

Many interesting issues involving the constitutional position of local government are likely to confront the Rehnquist Court during the remaining years of this decade. This section sets forth some open questions potentially facing the court in the next few years.

A. Community Self-Determination and Public Participation Issues

The principles of community self-determination and public participation are closely linked. After all, judicial deference to the programmatic decisions and structural integrity of local government can hardly be considered legitimate if the local government involved is not selected fairly. Stated differently, structural integrity is not an end in itself, but rather a mechanism for furthering certain basic decisions by citizens.[107]

A new battleground, pitting Chief Justice Rehnquist against Justice Brennan,[108] has developed regarding the contours of the respondeat superior exclusion from section 1983 suits.[109] As articulated in the conflicting dicta in *City of Oklahoma City v. Tuttle*[110] and *Pembaur v. City of Cincinnati*,[111] the dispute revolves around the extent to which inadequate

105. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Rehnquist, J.) (four days after *National League of Cities*, the Court suggested that state sovereignty is not a barrier to civil rights statutes); North Carolina v. Califano, 435 U.S. 962 (1978), *aff'g* 445 F. Supp. 32 (E.D.N.C. 1977) (state sovereignty is not a barrier to Congressional action under the Spending Clause); Massachusetts v. United States, 435 U.S. 444 (1978) (not a barrier to action under the Taxing Clause); City of Rome v. United States, 446 U.S. 156 (1980) (not a barrier to congressional action under the post-Civil War Amendments); Hodel v. Virginia Surface Min. & Reclamation Ass'n, 452 U.S. 264 (1981) (not a barrier to federal regulation of private activities); United Transportation Union v. Long Island R.R. Co., 455 U.S. 678 (1982) (not a barrier to federal regulation of commuter railroad employment practices); FERC v. Mississippi, 456 U.S. 742 (1982) (not a barrier to federal interference with state administrative procedures); EEOC v. Wyoming, 460 U.S. 226 (1983) (described *supra* note 57); *see generally* Gelfand, *Burger Court Federalism*, *supra* note 1, at 812-24, 839-46.

106. *Garcia*, 469 U.S. at 579 (Rehnquist, J., dissenting).

107. This argument is further developed in Gelfand, *Bicentennial*, *supra* note 3; Gelfand, *Voting Rights*, *supra* note 99.

108. Prior disputes have involved the approach to the dormant Commerce Clause and to the rational relationship test for the Equal Protection Clause.

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

110. 105 S. Ct. 2427 (1985) (Rehnquist, J., for plurality) (narrow interpretation of municipal liability standards).

111. 106 S. Ct. 1292 (1986) (Brennan, J., writing for a majority as to several points and for a plurality as to others) (broader interpretation).

training, incomplete supervision, and overdelegation by governmental employers can serve as bases for meeting the "policy," or "causation," requirement for section 1983 suits.[112]

Once this important area of law is clarified,[113] the next dispute may well involve sovereign immunity. That is, if directly confronted with the issue, these two Justices will strongly disagree as to the appropriate treatment of the anomalous, but long standing, situation of allowing oft-wealthy states to assert the Eleventh Amendment sovereign immunity defense, while denying it to oft-poor municipalities.[114]

Though Chief Justice Rehnquist and Justice Brennan seem to agree that some type of monetary remedy may be necessary for inverse condemnation, the Court has, so far, been unable to identify an appropriate case which it deems ripe for adjudication on this issue.[115] Any such judgment must consider the precise contours of municipal liability very carefully.[116]

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112. Section 1983 actions can be brought against a person who, acting "under color of a statute, ordinance, regulation, custom or usage, . . . causes" a deprivation of constitutional (and some statutory) rights. *See supra* note 67. This clause has been interpreted to allow suits based upon either written or unwritten governmental "policies." *See* Monell v. Department of Social Services, 436 U.S. 658, 690-91, 694 (1978).

113. Springfield v. Kibbe, 107 S. Ct. 1114 (1987) (per curiam), appeared to be an appropriate vehicle for resolving the issue because the First Circuit Court of Appeals had accepted a theory of inadequate training as a basis for municipal liability. However, the Supreme Court, in a per curiam opinion (in which Justice Brennan joined), concluded that neither the issue of adequate training nor the standard for testing it could be decided because the municipality had not properly preserved the issue for appellate review. *Id.* at 4240. The dissent, in which Chief Justice Rehnquist joined, took the opportunity to argue that the standard should be "deliberate indifference or reckless disregard for the consequences." *Id.* at 4242 (O'Connor, J., dissenting) (relying heavily upon *Tuttle* dicta). *See also* Mairena v. Foti, No. 86-3238 (5th Cir. May 18, 1987) (post-*Springfield*—imposing liability upon district attorney for callous indifference to the need for proper procedures); Williams v. Butler, 802 F.2d 296 (8th Cir. 1986) (en banc) (reinstating a judgment against the city, based upon overdelegation and final authority theory, after remand in light of *Pembaur*); Crane v. State of Texas, 759 F.2d 412, 427 n.15 (5th Cir.), *reh'g denied*, 766 F.2d 193 (5th Cir.), *cert. denied*, 106 S. Ct. 570 (1985) (articulating a variety of theories); Gelfand, *Bicentennial*, *supra* note 3 (discussing some implications of the different approaches taken by Justices Rehnquist, Brennan, and Stevens).

114. *See generally* Williams, *supra* note 7, at 133-34, 152; *supra* notes 73 & 82-83 and sources cited therein.

115. *Compare* Monell v. Department of Social Services, 436 U.S. 658, 690 n.54 (1978) (no eleventh amendment immunity for municipalities) *with* Edelman v. Jordon, 415 U.S. 651, 669 (1974) (eleventh amendment immunity for states). *See also* Pennhurst State School v. Halderman, 465 U.S. 89 (1984) (discussed *supra* notes 82-83 and accompanying text). *See supra* notes 10-23 and accompanying text.

116. *See generally* MacDonald, Sommers & Frates v. Yolo County, 106 S. Ct. 2561, 2569-74 (1986) (Rehnquist, J., dissenting).

B. Service Provider Issues

Though the demise of *National League of Cities* was readily accepted in some quarters,[117] many commentators feel that its underlying principles need to be revived. Thus, several authors, representing a wide range of political perspectives,[118] have argued that some form of judicial protection for state and local governments against federal interference is desirable. Protection of state and local government structural integrity and *modus operandi* must, however, have a stronger analytical basis than was originally provided in the *National League of Cities* opinion. As an initial matter, the "Constitutional Plan"[119] and similar broad notions of federalism, as structured throughout the Constitution, would provide a more enduring, though perhaps more complex, foundation than the thin reed of the Tenth Amendment.[120] Moreover, the precise role of local government will have to be clarified. In seeking a firmer basis for state sovereignty, however, the Rehnquist Court should not, and indeed need not, undercut basic individual rights.[121]

The Rehnquist Court is likely to have several opportunities to revive some form of state sovereignty, though respect for precedent may well delay an express overruling of *Garcia*. It is always a hazardous enterprise to predict outcomes of future cases, but certain fact patterns can be identified as likely candidates for judicial reconsideration of the issue of protecting state and local governments from congressional interference. They include: taxing state and local revenues under the new federal tax law's arbitrage rebate rules,[122] requiring a mandatory drinking age as a

117. *See, e.g.,* Williams, *supra* note 7, at 114-15.

118. *See, e.g.,* SECTION OF URBAN, STATE AND LOCAL GOVERNMENT LAW OF THE AMERICAN BAR ASSOCIATION, REPORT ON FEDERALISM TO THE HOUSE OF DELEGATES (Dec. 1986); WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, THE STATUS OF FEDERALISM IN AMERICA (Nov. 1986) [hereinafter WORKING GROUP]; Gelfand, *Bicentennial, supra* note 3; Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles,* 19 GA. L. REV. 789 (1985).

119. *See* Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting); *see generally* Gelfand, *Burger Court Federalism, supra* note 1, at 814.

120. The Tenth Amendment provides: "The powers not delegated to the United States by the Consititution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. The suggestion that it is a "truism," United States v. Darby, 312 U.S. 100, 124 (1941), seems to have some justification, at least in the sense that the breadth of the congressional power being challenged must be determined first before deciding how much authority remains to the state or local government claiming some kind of "sovereignty." Yet, even the WORKING GROUP report, *supra* note 118, in calling for a revitalization of state sovereignty, seems to rely upon the Tenth Amendment as the sole basis.

121. *See* Gelfand, *Bicentennial, supra* note 3; Howard, *supra* note 118, at 795-96.

122. *See* I.R.C. § 148(f) (1986); *see generally* Weiner, *Federal Tax Exemption D: Arbitrage,* in STATE AND LOCAL GOVERNMENT DEBT FINANCING, *supra* note 65, § 7:28.10-.60.

condition of receiving federal highway funds,[123] and imposing extreme debt financing regulations.[124] The test should be whether the challenged federal regulations directly undercut political accountability or disrupt the *modus operandi* of a state or local government acting in its capacity as a service provider.

Conclusion

In the bicentennial year of the Constitution, the nature and contours of the relationship between the national government and the states will probably be thoroughly discussed. What may be overlooked in those discussions of federalism, however, is the important role of *local* government in our system.

The decisions involving local government during the seventeen years of the Burger Court have, at times, been ambiguous, even inconsistent; however, when read together they do form a pattern which is both more coherent and more complex than commentators have sometimes suggested. As a result, the remaining years of the 1980's will require creativity on the part of the Rehnquist Court, civil rights and civil liberties litigators, and city attorneys. This should be a very interesting period for commentators, but a difficult one for district court judges.

123. *See* WORKING GROUP, *supra* note 118, at 69; *cf.* Craig v. Boren, 429 U.S. 190, 213 n.5 (1976) (Stevens, J., concurring) (questioning the statistical evidence used to support the state's claim that a law regulating the drinking age on the basis of gender could be justified as a traffic safety measure); Gelfand, *Burger Court Federalism*, *supra* note 1, at 845-47 (questioning other, more tangential, federal regulatory requirements). In South Dakota v. Dole, 791 F.2d 628 (8th Cir. 1986), *cert. granted*, 107 S. Ct. 567 (1986), the Eighth Circuit upheld a statute which conditioned the receipt of federal highway funds upon the raising of the recipient state's drinking age. The court of appeals rejected both tenth amendment and twenty-first amendment claims.

124. South Carolina v. Regan, 465 U.S. 367 (1984) (leave to file complaint granted under Court's original jurisdiction), challenges the federal requirement that state and local obligations be issued in registered form in order to preserve their tax-exempt status. The report of the special master was recently accepted by the Court. South Carolina v. Baker, 107 S. Ct. 1274 (1987) (mem.). *See generally* M.D. GELFAND & P. SALSICH, STATE AND LOCAL TAXATION IN A NUTSHELL 207-10 (1985). Even if the Court finds this requirement permissible, more extreme tax or securities laws regulating state and local debt instruments may be subject to challenge.