

THE CENTRAL-LOCAL RELATIONSHIP

Gerald E. Frug*

There are three common ideas about how to organize the city-state-federal relationship. All three, I think, are misguided. The first seeks to consolidate power in a centralized government—sometimes at the national level, but more often at the state or regional level. The second is the opposite idea: it seeks to empower city governments by giving them autonomy to make their own decisions about the policies that shape their future. The third seeks a middle course, dividing the functions of government into different categories, with each level of government having jurisdiction over some, but not all, of the categories. After sketching what is wrong with these three ideas, I will offer a different approach.

The temptation of centralized governmental power should be familiar to everyone. It is based on the notion that government, like every other institution, needs an ultimate decision-maker who can direct the organization. This attitude generates a suspicion of local power. Local government is seen as too parochial, too small to grapple with the scale of urban problems, sometimes even corrupt. By moving power to some form of centralized government, it is thought, the self-interested competition among localities can be overcome. In urban studies circles, this argument has led to a call for either increased state power or a national urban policy.¹ More frequently, it has embraced a particular version of the idea of regionalism. Under this definition, increasing regional power means diminishing local power. The local is seen as the problem, and centralization is the solution.²

Even those who argue for centralization, however, recognize its problems. The history of centralized power in the world is not a happy one. One doesn't need simply to think about the centralized tyrannies of the twentieth century,

* Louis D. Brandeis Professor of Law, Harvard Law School. An earlier version of this essay was presented at the Canadian Center for Architecture in Montreal as the James Sterling Memorial Lecture on the City in October 2010.

1. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 356 (1990) (“[E]nhancing state power need not injure all localities. . . . [S]tates have the potential to regulate interlocal competition, address interlocal inequality and promote local interests on a state-wide basis”); Daniel Moynihan, *Toward a National Urban Policy*, 17 PUB. INT. 3, 3 (1969).

2. See, e.g., DAVID RUSK, *CITIES WITHOUT SUBURBS* (1993).

although they come to mind. In the United States, the history of urban renewal and of the racial discrimination built into the federal government's mortgage policy are prime examples.³ When mistakes are made by a central government, they affect everyone. Local decisions are more limited; others can learn from their failures. Besides, localities are different from each other, not just across the country but even within one metropolitan region. It's absurd to treat New York City and New Rochelle as if they were the same.⁴ Perhaps the most troublesome aspect of centralization is its diminishment of the possibilities of democracy. On a local level, democracy can be a lived experience—it enables engagement in public issues that goes far beyond voting. In a state or metropolitan region where millions of people live, popular control of public policy becomes more rhetorical than real. The gap between this rhetoric and people's sense of what's happening in their own community has helped generate the contemporary loss of faith in democratic governance.

But the answer to these defects of centralization cannot be local autonomy. No one can trust a single city, let alone a single neighborhood, to make decisions unchecked by the larger society. One reason for this is that local parochialism is real. Localities protect themselves by shifting problems to outsiders. The most familiar example of this is exclusionary zoning. The point of exclusionary zoning is to ensure that neighboring jurisdictions—rather than your city—have to deal with the people you want to exclude. There are countless other examples as well, such as attracting a shopping center so that you, rather than your neighbor, get its tax benefits, or excluding undesirable land uses so that someone else has to take them. The problem with local autonomy is not just its impact on outsiders. Local governments can be, and often are, hostile to minorities who live within their own borders. Hostility to recent immigrants is a current and troublesome example of this; racial discrimination is another. Local autonomy can threaten human rights, and there must be a check on this threat. Besides, the idea of a general grant of local autonomy is problematic. Consider two cities, side by side. The first wants to protect itself from pollution, and the second generates pollution. Given this setup, would a central government's regulation of pollution levels undermine local autonomy? The answer is yes and no.⁵ It would undermine the autonomy of the polluter, but it would increase the ability of the green city to control its own destiny, something that it could not do by itself. Centralized control is not

3. See, e.g., KENNETH JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 203-18 (1985); Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 *FORDHAM URB. L.J.* 699, 701 (1992).

4. See Briffault, *supra* note 1, at 356 (“The different kinds of local governments, with their diverse needs and often conflicting concerns, cast real doubt on the utility of ‘local government’ as a category for advancing legal analysis.”).

5. David J. Barron, *A Localist Critique of the New Federalism*, 51 *DUKE L.J.* 377, 386 (2001).

the opposite of local power. Sometimes a restriction of one kind of local power enables another.

These two arguments—one against centralization and the other against local autonomy—have generated an argument for a middle course. The idea is to come up with a list of topics and allocate the topics to the appropriate level of government. Under this view, some issues are properly dealt with by the city, some by the region, some by the state, and some by the federal government. The problem with this middle course is coming up with the list. Name an urban problem and try to locate it in only one level of government. It will rapidly become clear that the problem is simultaneously a local problem, a regional problem, a state problem, and a national problem. Shall we begin? Education. Housing. Transportation. Crime. The Environment. Drinking Water. Poverty. Which of these is not a local problem? Which is not a state and regional problem? Which is not a national problem? All levels of government are, or should be, concerned with these issues. Everyone has a hand in every game. This basic point frustrates the middle course, whether it's labeled federalism or subsidiarity.

We thus need another idea: another way to think about the relationship between centralized and local power. To sketch such an alternative architecture of governance, I begin with a quotation from the South African Constitution. Chapter 3, Section 40 of the constitution provides, “In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent, and interrelated.”⁶

We need to go over this sentence slowly: there's a lot in it. I intend to do so by examining it as an idea rather than by describing how the sentence has been implemented in South Africa. South Africa has had to interpret this provision in its own context: a long history of apartheid followed by a radical expansion of municipal boundaries; the domination of national and virtually all provincial and municipal governments by a single powerful political party; and the necessity of economic growth in a society with a dramatic, and racially based, inequality of economic power. Examining how South Africa has implemented its constitution given these complexities is well worth doing, but that is not my task here. Instead, it is South Africa's innovative conceptual advance—one of many innovations in its remarkable constitution—that interests me. The constitutional provision I have quoted can be interpreted in many different ways, depending on the local context. But it provides a way to conceptualize central-local relations in any country seeking to decentralize power.

The South African Constitution embraces the empowerment of national, provincial, and local governments—but it calls them spheres, not levels. The structure is not presented as a hierarchy. Each sphere has its own role to play, without one being the boss of the others. This idea of spheres is very different from the traditional conception of government in the United States. Under

6. S. AFR. CONST., ch. 3, § 40(1), 1996.

current law, a state legislature in the United States can delegate power or refuse to delegate power to local governments in any way that it wants. And city governments are subject to preemption by both state and federal legislation. The South African Constitution opens up the possibility of another way to allocate power.

Having labeled the different governments “spheres,” the South African Constitution then says that each is “distinctive.” The word “distinctive” is designed to demonstrate the importance of the difference among the spheres; each has its own contribution to make. But this embrace of distinctiveness does not grant local autonomy. The very next word in the constitution, after all, is “interdependent.” If the spheres are interdependent, none of them can be autonomous. The idea of interdependence recognizes that each of the spheres always affects what the others do. Finally, the constitution says that the spheres are “interrelated,” suggesting the need for cooperation among them. Given their distinctiveness and interdependence, the different spheres of government need to be organized in a way that enables them to work together. What this means, I think, is that the constitution envisions managing intergovernmental relations through a political process rather than as a hierarchy or fixed division of authority.

I want to explore what this means by looking more closely at the words “distinctive,” “interdependent,” and “interrelated.” What is distinctive about local government is its deep connections to people’s lives. A large part of everyday life is affected by the nature of the specific area in which people live. The quality of education, the safety of the streets, the affordability and quality of housing, the availability of clean water, the access to jobs, the vitality of public space—these are critical matters in defining who we are and who we become. When these kinds of issues go unaddressed, the lives of local residents are diminished. Local governments’ current inability to connect with people on these kinds of matters has generated a demand not just for centralized government but for privatization and referenda. These alternatives are based on the idea that because government can’t do anything, we have to take matters into our own hands. I think, instead, that we need to make elected local governments work better.

The distinctiveness of state, regional, and national governments lies elsewhere. It lies in their ability to take a broader view of the same problems that localities face. Part of this broader view involves paying attention to the concerns of neighboring localities, concerns that are often overlooked by people worried about their own city. Part also comes from the fact that we need expertise in public policy decision-making—expertise not just at the local level but from across the country and, sometimes, elsewhere in the world. Very few localities have the capacity to do the kind of analysis necessary to address critical social problems. Yet experiments in political science have demonstrated that people change their minds about issues when they are exposed to other

people's views and information provided by experts.⁷ Experts shouldn't decide public policy, but neither should uninformed voters. Democratic government has to bring the two together. Each is distinctive, and each is necessary.

We reach quickly, then, the idea of interdependence. We have to organize democratic government in a way that honors both local sentiment and the broader view at the same time. You may think that this is how state and national legislatures are presently constituted in the United States. After all, state and national legislators are elected locally, and it is critical that they are. Central governments are supposed to be organized to bring localities together. Central governments are mechanisms that allow people who are locally responsible to hammer out agreements notwithstanding their differences. Although the decision makers are chosen by localities, no locality is able to decide issues by itself. The other localities are in the room and are part of the process. So are experts. Experts testify, executive officials push their agenda, the private sector lobbies.

Although the conception of democratic governance I have just outlined is familiar, the problem with the current architecture of democratic governance in the United States is that it is no longer working the way I have just described. Federal and state legislatures may be locally elected, but they don't actually represent localities in the decision-making process. Current legislative districts do not track local government lines at either the state or national level. As a result, cities themselves are not empowered to participate in state or federal legislative decision-making. Instead, centralized governments have taken on lives of their own, and localities have become, at best, ineffective lobbyists. Rather than central government decisions being the product of interlocal negotiation and compromise, party discipline has replaced the idea of local representation as the basic organizing principle of legislative organization. Localities have therefore sought to defend themselves against central governments, and their defense has been based on the language of local autonomy. In other words, instead of attempting to reform the organization of the central government so that it better reflects their concerns, they have sought to escape from its grasp. I think this is the wrong strategy. As my earlier discussion should suggest, the goal of local autonomy cannot be achieved; in fact, it's a bad idea. But the current form of centralized decision-making—uninformed by genuine local input—is a bad idea too.

Let's consider an example of how local and central governments can be organized in a better way, in a way that recognizes their distinctiveness and interdependence. I want to use as my example the currently popular idea, if only in urban planning circles, of regional government. These days regionalism is usually presented as a form of centralization. Cities are no longer relevant, advocates insist; rather, the growth of the metropolitan area has made current city lines meaningless. If so, we need to create a regional entity that can

7. JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991).

make effective decisions about transportation, housing, and jobs, decisions that will disregard the now-outdated city lines.⁸ It's not surprising that this conception of regionalism has gone nowhere in the United States—and has had difficulty gaining traction in many other countries as well. Ordinary people in their neighborhoods and cities properly see this as just one more form of centralization—one more level of government staffed by people who think of themselves as experts, who want to tell people how to lead their daily lives.

But there's no reason that regionalism has to be defined this way. I am a proponent of regionalism, but not as a form of centralized control. I envision regionalism as a mechanism for exercising interlocal power—as a way of empowering the region's cities, not eliminating them. Localities currently lack power because they are often, quite properly, thought of as parochial. Regionalism can allow them to become less parochial if the regional decision-making body is organized to enable localities to meet with each other and forge a common policy. One form this conception of regionalism can take in the United States, I have argued, is the creation of a regional legislature in which the cities themselves are represented.⁹ Since a region's cities vary widely in population, larger cities would have more say than smaller ones. But every city in a region would be in the room, and each would participate in the formulation of public policy. This structure would not create a form of local autonomy. Localities would not be able to do anything they want: the regional legislature would have authority over all of its member localities. But the decision-makers would be the localities themselves. If the localities are in charge, they are likely to want to decentralize power as much as they can, but they will be able to do so only if each locality is seen not only as distinctive but also as interdependent. To gain allies, localities will have to take into account the impact of decentralization not just on themselves but on others as well.

This picture of democratic government cannot accurately be described as either bottom-up or top-down. It is both. It is bottom-up because the decision makers are local. But it is top-down because the decisions made by all local representatives collectively can be imposed on dissenting localities without their consent. We should stop talking about governance as if the design choice were between these two ideas. They are not the opposites of each other. Both are part of the process. The critical issue is figuring out how to connect the top and bottom, how to deal with their distinctiveness, interrelationship, and interdependence.

Would the structure I've suggested produce paralysis rather than compromise? It might. It depends on how it is designed, and on how we seek to retrofit it once it's created and defects start to become noticeable. I want localities to learn that the only way to increase local power is to work with their neighbors rather than to work against them. To increase their power, localities

8. See, e.g., RUSK, *supra* note 2.

9. Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1791 (2002).

should collectively become the centralized decision-making body rather than seeking to protect themselves from it. The regional legislature has to be designed to change what we mean by “central government”—and, through its collective decision-making process, to change what we mean by “local government.” That’s what “interrelated” means to me: combining localized concerns with inter-local knowledge and perspective. I want to be clear. I am not proposing that this idea be adopted by every city in the United States. The proper form of metropolitan organization will differ from region to region and, in some places, my suggestion will have to be rethought completely. What I am presenting here is simply an idea—an architect’s drawing offered to generate thought rather than the start of construction.

In case you think the idea is impractical, I’d like to offer you an example of what I have in mind. In mid-2010, the federal government of the United States promulgated nation-wide standards for English and Math from kindergarten through high school.¹⁰ This was quite remarkable since education has traditionally been thought of in the United States as the quintessential local function. Nevertheless, these standards have been widely accepted. Why is that? One important reason lies in the way that the standards were formulated. Rather than being imposed on the states from above, they were generated by the states; they were negotiated over the course of two years by state officials. Then, rather than simply being issued as commands from the national government, the standards were enacted state by state. Forty-five states have currently done so. Not all states have agreed to them; and some may not adopt them. The dangling of federal money was no doubt an encouragement. Nevertheless, a key to the widespread support for the standards, I suggest, was organizing national policy by bringing the states together—by uniting the states—and having them work out policy differences themselves. This story is very unusual in the United States. It should not be.

Designing a new governance system along the lines of the South African constitutional provision—and dealing with the politics of doing so—will not be easy. But the biggest problem facing any reform of the current structure of democratic governance is one not mentioned in the South African Constitution. We need to design our governance system so that it can be changed when its defects become apparent. As architects know when designing a building, it is not easy to ensure that it can be retrofitted; many buildings seem to defy being reused for different purposes. The only option, it seems, is to tear them down. Retrofitting is harder still for governance mechanisms. Many of our current government institutions were designed decades, even centuries, ago. Everyone realizes that there are problems with how they work now, and no one thinks that a radical change in the whole system—particularly along the lines I’ve been suggesting—could happen all at once. The problem is that we do not have

10. See NAT’L GOVERNORS ASS’N CTR. FOR BEST PRACTICES, COUNCIL OF CHIEF STATE SCH. OFFICERS, COMMON CORE STATE STANDARDS (2010), *available at* <http://www.corestandards.org/the-standards> (last visited Feb. 6, 2014).

a way that enables redesigning the structure to be a regular, routine part of governance. So instead of trying to redesign it, we create a series of additions to an otherwise unquestioned structure. We create a governance version of sprawl: badly organized, fragmented, and dysfunctional. We thereby feed the lack of confidence in governance and its reform, and, at the same time, we feed the dysfunction that makes reform harder to accomplish. The only escape from this cycle is to begin to rethink the architecture of governance and then, step by step, government by government, work on redesigning it.