RIGHTSIZING LOCAL LEGISLATURES

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ABSTRACT

A serious defect in governmental design is hiding in plain sight: local councils, boards, and commissions have all the lawmaking powers of a "legislature," but they are far too small to deserve them. With an average size of only four members, local legislatures depart from the norm observable at all other levels of government. Only in the past few years have legal scholars turned their attention to the institutional design of these bodies, but this developing literature has yet to address their most striking feature—their small size.

This Article takes up this project. It claims that local micro-legislatures are both unrepresentative and undemocratic, and that their size affects the content of local law and the way that it is perceived. The fundamental problem with a micro-legislature is that it is not inclusive of the diversity of interests in a modern society. Too few seats results in a deficit of descriptive representation—meaning the legislature will not "look" like its community—and also of democratic deliberation, since all voices will not be a part of political debate. This works to silence or muffle minority viewpoints, resulting in more extreme legislation. Moreover, minorities will perceive this exclusion, and may view local law as less legitimate because of it.

Recognition of the phenomenon of micro-legislatures, and its implications, should lead to further skepticism of the long-dominant theory of participatory localism. Rather than being models of democratic involvement, localities—at least as they are currently structured—are sites of exclusion, not inclusion. The path forward involves a rightsizing of local legislatures, and, in the interim, heightened judicial scrutiny of local legislation.

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TABLE OF CONTENTS

INTRODUCTION

In the United States, like in most countries, it is axiomatic that legislatures are the primary lawmaking institutions. This is of course true federally[1] but also in the states, which all have legislatures of their own. The same paradigm of legislation-by-legislature is similarly apparent at the level of local government, with councils, boards, and commissions proliferating.[2] But beyond sharing this basic power, the similarities between local legislatures and their state and federal "superiors" are few. Only very recently has the legal academy turned its attention to the institutional design of local councils and boards, with a nascent body of literature emerging regarding

[1] U.S. CONST. ART. I § 8.
[2] Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 999 (2019) (describing various categories).

features such as their unicamerality,[3] professionalism,[4] and compensation models.[5] This endeavor has yet to describe and assess what is, I believe, the most striking dissimilarity between local and state or federal legislatures: their size. Specifically, local legislatures are extremely small in membership, with an average size of *four members*, while state legislatures are large, with an average size of approximately 150 members.[6] Local government in the United States, then, presents a phenomenon of *micro-legislatures* that deviates from the norm at higher levels of government.

This is highly significant. While the optimal size of a legislature is surely a contested question of institutional design that admits of no easy answers, at some point membership numerosity becomes so small or so large that this feature, on its own, renders the legislature a different type of institution entirely. Put another way, one can view legislative membership size as a constitutive feature of the concept of a legislature. Given this, localities' use of a micro-legislative model is worthy of sustained inquiry. That is the goal of this Article. Overall, I will argue that micro-legislatures are deficient with respect to both their representative and their democratic qualities, and that these theoretical deficiencies have practical implications. Unrepresentative and undemocratic legislatures fail to be inclusive of the diversity of interests in a modern, pluralistic community. This can result in the creation of local law that ignores or muffles minority viewpoints, and can damage the sociological legitimacy of that law by utilizing decision-making processes that create perceptions of exclusion.

But when tens of thousands of local governments all coalesce on a given model of legislature, one should criticize this choice only after first considering whether it might somehow be defensible. Three potential defenses will be addressed,[7] but all are unavailing. First, one might claim that local political communities are insufficiently populous (and therefore insufficiently diverse) to justify the larger legislature that a state-level community has and needs. But unless one relies on a very reductive understanding of diversity, one should accept that in any community of reasonable size there are a multitude of divergent opinions and interests about communal life. Second, one might say that localities depart from standard models of legislative size because local government's primary purpose in the trifecta of government levels is to be a direct service provider (e.g., garbage

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[3] Noah Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 HASTINGS L.J. 1147 (2018).
[4] Zale, *Part-Time Government* at 1000.
[5] Kellen Zale, *Compensating City Councils*, 70 STANFORD LAW REVIEW 839 (2018)
[6] *1992 Census of Governments: Government Organization—Popularly Elected Officials*, U.S. CENSUS BUREAU (1995), at *1, available at https://www2.census.gov/programs-surveys/gus/tables/1995/gc92-1-2.pdf.
[7] See *infra*, Part II

and fire trucks), and that this function is better suited to a smaller, quasi-executive board. But attention to a primary purpose cannot come at the expense of greatly undermining a secondary purpose, which is legislation, and micro-legislatures' size does precisely that. Finally, micro-legislatures in local governments might be justified on pragmatic grounds: there may be insufficient citizen interest to populate a normal sized legislature in a smaller locality. This pessimistic assumption is mere speculation, though, and should not be a basis for deficient institutional design.

With potential defenses of local micro-legislatures rejected for the above reasons, the path is clear for their critique. This Article will begin with a thorough assessment of these institutions through the lens of contemporary political theory.[8] Given that this phenomenon has never been considered by legal scholars or political theorists, this foundation is a necessary predicate to more practical inquiries which will follow. The applicability of theories of representation will be discussed first, followed by the applicability of theories of democracy.

A central purpose of a legislature is to function as a representative institution, but I will argue that local micro-legislatures' small size renders them *unrepresentative*. Theories of representation abound in political theory and are contested, but this literature helps to identify most precisely the deficit that minimal numerosity of membership creates. This is a deficit of so-called "descriptive representation"—a lack of representatives who reflect the diversity of interests, beliefs, and opinions present in the larger community. Legislatures in the states, the federal government, and in all modern democracies are large assemblies, and a major reason for this is to facilitate descriptive representation. Modern pluralistic societies will possess a great diversity of views among individuals, and these will regularly conflict with one another. Given this reality, the legitimacy of legislation—which will always involve choices and tradeoffs between competing interests—depends on a legislative institution that includes all relevant interests. Legislatures that are very small, like those in local governments, simply cannot approximate the complexity of a modern, pluralistic society in even a small population locality.[9] Micro-legislatures fail spectacularly with respect to descriptive representation.

Legislatures also must be democratic, though, and local micro-legislatures fail on this count as well. Perhaps no other concept has received more attention in political theory than that of democracy. Despite considerable disagreement when getting into details, most contemporary theorists agree that what makes a democracy valuable and legitimate is its

[8] See *infra*, Part III.
[9] See *infra*, Part III.A.

facilitation of deliberation.[10] Unlike older theories that equated democracy merely with the aggregating of majority preferences by voting, so-called "deliberative democracy" claims that the process leading up to the voting—when reasons are communicated reciprocally and considered—is the essence of a democracy.[11] Some deliberative democrats ground this in the epistemic benefits of deliberation; better decisions can be expected when a larger and more diverse group of people discuss and debate the way forward.[12] Others ground the claim in fairness.[13] Even when one's choice is not the choice taken by the community, the inclusion of that voice in a deliberative process leading up to the vote allows one to accept the result as legitimate. Both versions of deliberative democracy depend on an assumption of an inclusive process—that the diverse interests, opinions, and beliefs in a political community will be part of the deliberation. Exclusion vitiates epistemic benefits and also fairness. When a group has no meaningful voice in the deliberative process, its knowledge and perspective cannot work to enhance the outcome, nor will that group recognize the outcome as fair, and as reflecting their participation. Local micro-legislatures, through their small size, stack the deck in favor of the exclusion of diverse interests and voices. In this way, they are *undemocratic*.

After laying the theoretical foundation of the critique, this Article will proceed to a discussion of its practical implications. In so doing, case studies and examples from recent history will help to illustrate the problem.

One implication is that when a local micro-legislature fails to include the diversity of interests in a community, the groups most likely to have their voices silenced or muffled are those in the minority. This can have concrete effects on the policies adopted by local law—it can result in *noninclusive legislation*.[14] Without a dissenting voice or voices demanding compromise or moderation, majority groups are free to pursue more extreme legislation reflecting their unvarnished preferences. The Article will present three case studies of minorities silenced or muffled by a micro-legislature that enacts policies detrimental to the group: (1) LGBT individuals in two suburban counties (one in Maryland and another in Georgia), (2) student populations in various university towns, and (3) homeless individuals in Newark, New Jersey. To preview just one example, consider the case of the student population in Ann Arbor, Michigan (home of the University of Michigan). In 2010, Ann Arbor's 11-person micro-legislature—none of whom were

[10] See *infra*, Part III.B.
[11] Id.
[12] Id. at 31.
[13] Id. at 33.
[14] See *infra*, Part IV.A.

students—passed an ordinance prohibiting the placement of couches on porches.[15] This was clearly targeted at the student community, but that population (40% of Ann Arbor) had no meaningful voice in the legislative process, and could only protest this exclusion through their Student Assembly.[16]

A second implication of a legislature that is non-inclusive of diverse societal interests is that the unincluded interests will *perceive exclusion*.[17] The expressive effects of micro-legislatures are worth considering alongside any concrete effects that their size has on enacted law. The literature on sociological legitimacy and procedural justice suggests that these effects will be harmful to civic bonds.[18] Minorities that are either totally excluded from micro-legislatures, or who are not meaningfully represented, will begin to feel as if their local government is no longer their own. It is not just that their do not "win" in a given policy debate, but that they feel as if they have no seat at the table when the debate is happening. This Article will discuss two case studies on this point: (1) Black communities' perceptions regarding their control over policing, and (2) partisan minorities in deep-red and deep-blue localities. For example, in 2021 the city of Lebanon, Ohio's six-person, all-Republican legislature voted unanimously to "outlaw[] abortion" within city limits.[19] The substantial minority presence (at least one quarter)[20] of Democrats in Lebanon who presumably would have opposed such a law had no voice after the sole Democrat legislator (and sole woman) resigned in protest, stating that the council had been "hijacked."[21] This purely symbolic flex of majority partisan power communicated to Lebanon's Democrats that

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[15] *City Council*, A2GOV.ORG (2022), available at https://www.a2gov.org/departments/city-council/Pages/Home.aspx; Ryan J. Stanton, *Ann Arbor City Council passes ordinance banning couches on porches*, THE ANN ARBOR NEWS (Sep. 20, 2010), available at http://www.annarbor.com/news/ann-arbor-city-council-passes-ordinance-banning-couches-on-porches/

[16] http://www.annarbor.com/news/ann-arbors-new-ban-on-porch-couches-doesnt-sit-well-with-university-of-michigan-students/

[17] See *infra*, Part IV.B.

[18] Id. at 46.

[19] Ordinance 2021-053, Lebanon, Ohio, available at https://www.scribd.com/document/509488876/ORDINANCE-2021-053-of-Lebanonl; *Minutes for the Lebanon City Council Meeting*, LEBANON CITY COUNCIL (May 25, 2021), available at https://cms8.revize.com/revize/lebanonoh/05-25-2021.pdf.

[20] See *infra*, n.238.

[21] Audra Heidrichs, *How anti-abortion advocates are pushing local bans, city by small city*, THE GUARDIAN (Nov. 23, 2021), available at https://www.theguardian.com/world/2021/nov/23/anti-abortion-local-bans-ohio.

the local government was akin to an occupying force, and that it was totally unconcerned with their viewpoints.

All these observations have significant implications for the lens through which legal scholars should view local government. Specifically, these claims are a major blow to proponents of the school of participatory localism—those who argue that the value of local government is its small scale, which facilitates accessibility to officials and also participation as officials.[22] If the primary lawmaking institutions in localities are unrepresentative and undemocratic, thus enabling the exclusion of minority voices in diverse communities, then localism takes on a more sinister aspect. The extremely small size of local legislatures is yet another[23] strike against them—another reason to believe that participatory localism "substitute[s] romance for reality."[24] Moreover, one of the basic claims of this article is that certain political institutions shouldn't be small.

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[22] See, e.g., Joshua S. Sellers, Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1399–400 (2020) ("Local governments, it is argued, foster political awareness and, in turn, participation both formal and informal….Because the scale is small, advocates of localism assert, local government officials are more accessible than their state or federal counterparts. This availability encourages greater involvement by constituents in a variety of matters that directly affect day-to-day life. The availability of multiple avenues for meaningful political participation at the local level has the attendant benefit of building community, which further promotes democratic deliberation."). Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000) ("According to this tradition, participation in local politics is not only a good way to control government, but also a useful way to transform citizens, imbuing them with civic spirit, a taste for public affairs, and political skills.").

[23] One might say that the first strike is their unicamerality. Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 Hastings L.J. 1147, 1156 (2018) ("Within local government law, local unicameralism cuts against established theories of participatory localism, which praise local government as a site for civic engagement. Local legislatures are designed for efficiency and instrumentalism, not participation. Those seeking consensus and deliberation in their local governments would do well to look outside the legislative branch."). A second problem, at least for very large cities, is the lack of partisan competition in council elections. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & Pol. 419, 426 (2007) ("The lack of parties makes city government both unrepresentative and uncreative…. [D]etermining that local governments are not particularly democratic problematizes much recent work in local government law aimed at enhancing local power and reforming local government structures."). Schleicher's claims regarding representation and democracy deficits are limited to very large city councils, and are predicated on different aspects of those concepts than are the claims made here. See id. at 426 (deploying aggregative concept of democracy and responsive concept of representation). He suggests that in smaller cities the opportunity to exit or vote-with-one's-feet compels the councils to be more responsive to citizen policy preferences. Id. n.49.

[24] Hills, *Romancing* at 2012.

But legislative membership size is not an immutable fact, and it is not the exercise of local legislative power that we have identified as problematic, but instead who is exercising it. Rather than end with a sense of hopelessness, then, this Article concludes by briefly considering some paths forward. Local legislatures should retain their powers but should be expanded, gradually, to the size of a standard legislature. In the meantime, there should be even greater judicial scrutiny of local legislation via intrastate preemption doctrines than there already is. Such scrutiny would be "representation reinforcing" in that it would further stack the deck in favor of state policies over local ones, and thus in favor of standard-sized legislatures over micro-legislatures.[25]

This Article proceeds as follows. Part I describes the general features of a local legislature and introduces census data, yet unrecognized by legal scholars, that demonstrates that the average legislative size is extremely small. Part II surveys some possible defenses of local "micro-legislatures," and rejects them all. Part III moves to a critique of the phenomenon, and uses the tools of contemporary normative political theory to make two claims: (1) micro-legislatures are un*representative*, and (2) they are un*democratic*. Part IV assesses the practical implications of these claims, using case studies and examples to show how micro-legislatures' size can impact both the content of local law and the perceptions of its legitimacy. The Conclusion considers paths forward.

I. The Features of a Local Legislature

It is notoriously difficult to make general claims about local governments. The last US Census counted 38,917 general-purpose localities (this does not include special districts, like school boards),[26] with populations ranging from the smallest town to the largest city. While New York City is a local government with a population of over eight million, over 18,000 of the general-purpose localities have a population of less than 1,000.[27] With respect to sub-county level governments (the vast majority), census data reveals that more than 99% of these localities have populations of fewer than 100,000 (35,397 of 35,748), and that this class of localities contains about

[25] See *infra*, Conclusion at 45.
[26] *2017 Census of Governments – Organization*, US Census Bureau (2017), available at https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html.
[27] Id. Tables 5 & 6.

62% of the population (266,421,114 of 368,288,999).[28] Most of the phenomenon of local government, then, is a story of the small city, town, and village. This combination of high numerosity and small size, though, makes these localities the most difficult to understand at the level of generalities. The same is true of the legislatures of these localities, which vary greatly in powers and in character. However, scholars and commentators have observed certain phenomena and patterns. First, we shall consider the legal status of local legislatures and their legislation ("ordinances"), and next we shall consider a yet-under analyzed feature which is the topic of this Article: the size of the membership.

A. General Features

1. Relationship to Executive Power

The most common way local legislatures are categorized is their power in relation to executive power. Recent work by Kellen Zale ably describes the basic schema.[29]

First is the "mayor-council" form of government. In this arrangement, a local legislature has legislative authority to pass ordinances and resolutions, and a mayor either chairs the council as a first-among-equals (a "weak" mayor-council)[30] or serves as a separate executive and administrative head (a "strong" mayor-council).[31] The strong form resembles traditional notions of a government with separation of powers that one observes at the state and

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[28] Id. Tables 6 & 7.

[29] Kellen Zale, *Part-Time Government*, 80 Ohio St. L.J. 987, 999 (2019) (describing general categories).

[30] "[T]he mayor may be independently elected or may be chosen from among city council members and largely serves a ceremonial role as the head of the city. The mayor may have full voting rights on city council or may only have power to break a tie; and the council, not the mayor, appoints department heads and has primary control over the city budget…. [T]here is no traditional separation of powers: the mayor typically has minimal executive powers and may simply share legislative power with the council (if she is a voting member)." Id. at 1000-01.

[31] "[T]here is a separation of powers between the city council, which has legislative authority, and the mayor, who is separately elected and vested with executive and administrative powers…. [T]he mayor is an independently elected official who typically has authority to supervise city agencies and oversee personnel, as well as a significant amount of discretion over budgetary decisions and veto power over council legislation. … [S]eparation of powers most closely mirrors that of federal or state government: while the city council may disagree with how the mayor is administering (or failing to administer) policies enacted by the council, council has limited authority to interfere with the mayor's decisions over personnel or the day-to-day administration of city departments." Id. at 999-1000.

federal level, while the weak form blends executive and legislative power in the council.

A second very common form of local government is the "council-manager" form.[32] This form is like the "weak" mayor-council in that executive and legislative power are both possessed by the council, but with the addition of a professional, appointed manager to run the administration of the local government.[33]

Last to consider are two other categories that are much less prevalent: commissions and town meetings. A commission form of government is an old form in which the legislature is composed of the elected heads of the various executive departments (e.g., the police commissioner, the fire commissioner).[34] Thus, like in the council-manager and weak mayor-council forms, both executive and legislative power are combined in the multi-member institution. Finally, some local governments are organized as direct democracies—called "town meeting" governments—where citizens regularly vote on matters of policy without any delegation to a representative body or an executive.[35]

Most localities have a mayor-council or council-manager form of government. According to a 2008 study, about 49% of municipalities (not including townships) with a population greater than 2,500 utilized a council-

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[32] Id. at 999 ("[V]ests all governmental authority-- legislative, executive, and administrative--in the city council. The council in this system delegates its administrative authority to an appointed city manager who is tasked with the day-to-day administration of city government and implementation of policies enacted by the council.").

[33] Zale notes that managers may also be employed by systems that have either a strong or weak mayor. Id. at 1000.

[34] Id. at n.51 ("In a commission form of government, the city is governed by an elected commission, which holds all legislative and executive authority and has no elected executive or appointed professional manager. Each member of the commission is responsible for a specific aspect of city governance (such as fire, police, or public works).").

[35] Id. Zale notes two categories: a town meeting form, and a representative town meeting form. In the former there is true direct democracy, while in the latter, the representative assembly is very large and more closely approximates the entirety of the community. "In a town meeting form of government, all eligible voters make decisions about policy directly, and in a representative town meeting form of government, residents elect a large number of their fellow residents to serve as selectmen who vote at town meetings." Id.

manager government, and about 44% utilized a mayor-council form.[36] Only 5.6% used a town meeting, and only 2% used a commission.[37]

Thus, in almost all local governments—all but the town meeting—a representative institution exists and it possesses what we think of as legislative power. Most significantly, this includes the power to make local laws—usually called ordinances.[38] That ordinances constitute "legislation" should be obvious, but we can explicate a few features to drive home the point. First, ordinances are written down; like statutes, they possess what Jeremy Waldron calls the "textuality" of legislation.[39] They are not like the verbal commands of a police officer. Moreover, they are written in the same form as statutes, deploying obligatory language such as "shall," and with sections and subsections (unlike, say, a judicial opinion). They are also usually organized in a code.[40] They create *rules* for citizens and for officials, and these rules have the force of law within the local jurisdiction. They are authoritative and binding (although subordinate to state and federal law).[41]

Consider the following ordinance from the Town of Hempstead, NY: "No person shall sell or permit the sale of age-restricted [smoking] products to any person under the age of 21."[42] This ordinance looks much like any

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[36] JAMES H. SVARA & DOUGLAS J. WATSON, MORE THAN MAYOR OR MANAGER: CAMPAIGNS TO CHANGE FORM OF GOVERNMENT IN AMERICA'S LARGE CITIES 9 (Georgetown UP, 2010). Note that this leaves out many thousands of small municipalities as well as townships. Still, it provides the best snapshot we have on the prevalence of the different governmental forms. On the difference between municipal and township government, *see 2017 Census of Governments*, *Individual State Descriptions*, U.S. CENSUS BUREAU (April 2019) at *4, available at https://www.census.gov/content/dam/Census/library/publications/2017/econ/2017isd.pdf ("There are two types of subcounty general-purpose governments, municipalities, and townships. The subcounty general-purpose governments enumerated in 2017 include municipal governments and town or township governments. These two types of governments are distinguished by both the historical circumstances surrounding their incorporation and geographic distinctions. That is, incorporated places are generally associated with municipalities, whereas townships are generally associated with minor civil divisions (MCDs)").

[37] SVARA & WATSON at 9.

[38] Zale, *Part-Time Government* at 1004 (describing the following as a power of councils—"Enactment of local ordinances, resolutions, and/or motions in furtherance of public health, safety, welfare (i.e., legislative exercise of police powers)").

[39] Jeremy Waldron, *The Dignity of Legislation*, 54 Md. L. Rev. 633, 653–54 (1995).

[40] See Brenner M. Fissell, *Local Offenses*, 89 Fordham L. Rev. 837, 838 (2020) ("[L]ocal governments—even the smallest village—possess vast powers to criminalize conduct and to punish violators with months in prison or probation.").

[41] See, e.g., "In applying implied preemption analysis, we presume that the municipal ordinance is valid." City of Davenport v. Seymour, 755 N.W.2d 533, 539 (Iowa 2008).

[42] Hempstead Town Code § 121-3.

other statute, including the state analogue: "Sale of tobacco products…shall be made only to an individual who demonstrates…that the individual is at least twenty-one years of age."[43] Local ordinances are a locality's form of legislation.

Unsurprisingly, then, these features result in judicial treatment of ordinances that is indistinguishable from that of statutes. Take for example the famous case of *Lambert v. California*, where the Supreme Court invalidated a Los Angeles felon registration ordinance.[44] That the law came from a locality and not from a state statute was immaterial; instead, the Court discussed the ordinance in the context of other "registration laws" more generally.[45] The local origin of legislation is irrelevant to its judicial interpretation or to its effect on individual rights and duties.

2. Other Features: Unicamerality, Professionalism, & Compensation

We have established that nearly all local governments have a council that possesses legislative power—the power to make written rules that are binding on citizens and on officials. But what do these councils themselves look like? How are they structured, and who are their members? A burgeoning new literature is emerging on this question.

First, Noah Kazis recently discovered that *all* local legislatures, unlike nearly all state legislatures and the U.S. congress, are unicameral.[46] Kazis recounts a history in which, starting with the Progressive era in the early 20th Century, American localities—even those that started with bicameral legislatures—converged on unicameralism as the chosen model.[47] By championing the values of cost-savings and efficiency in government (by reducing barriers to consensus and action), "unicameralism could be deemed the Progressive Era's most complete success in restructuring local government."[48] Now, one cannot find a bicameral legislature in any locality.

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[43] N.Y. Pub. Health Law § 1399-cc (McKinney).
[44] Lambert v. People of the State of California, 355 U.S. 225 (1957).
[45] "Registration laws are common and their range is wide." Lambert, 355 U.S. at 229.
[46] Noah M. Kazis, *American Unicameralism: The Structure of Local Legislatures*, 69 Hastings L.J. 1147 (2018).
[47] Id. at 1159 ("Local unicameralism is the convergence of thousands of individual actors independently reaching the same conclusion across a period of more than a century. Local governments were not always unicameral. They have moved steadily in that direction over two centuries. In 1903, one-third of large cities still had bicameral councils. Bicameralism was a common, high-profile option for local legislatures at the turn of the 20th century.").
[48] Id. at 1159-60, 1163.

Next, Kellen Zale has classified councils as full-time or part-time, and also as professional or nonprofessional.[49] The time-burden of council membership may seem self-explanatory, but since many legislators are not classified as "employees," but as elected officials, proxy indicia (such as permissibility of outside employment and salary amount) are the best indicators.[50] While not comprehensive or randomized, a recent survey conducted by a non-profit reported 92% of respondent localities maintained a part-time council.[51] "Professionalism" is an even harder quality to pin down. Zale notes that some indicators include staff, other forms of support, length of session, turnover, and level of compensation.[52] Perhaps given the vagueness of the category, there appears to be no data regarding the prevalence of professional councils.

B. Legislative Size: The "Micro-Legislature"

Under-recognized and never-theorized is a feature of local legislatures that is the focus of this Article: they are extremely small in size.[53] The most recent comprehensive data regarding the size of general-purpose local legislatures comes from the 1990 Census.[54] In a report published in 1992, the Bureau calculated that the *average size of a local legislature was four members*.[55] Since it seems unlikely that any local legislature would have as few as two members, this mean number indicates that a very high number of localities opt for a three or four-person board. Less comprehensive studies similarly report small legislature size. The International City/County

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[49] Kellen Zale, *Compensating City Councils*, 70 Stan. L. Rev. 839, 855 (2018).
[50] Id. at n.81.
[51] International City/County Management Association, *2018 Municipal Form of Government Survey – Summary of Survey Results* (Washington, DC: ICMA, 2019), available at, https://icma.org/sites/default/files/2018%20Municipal%20Form%20of%20Government%20Survey%20Report.pdf
[52] Id.
[53] I am aware of no scholarship addressing this point directly. Kazis alludes to it when he writes that "Local legislatures range in size from New York City's fifty-one-person Council…to as few as three members…." Kazis, *Service Provision and the Study of Local Legislatures: A Response to Professor Zale*, 81 Ohio St. L. J. Online 1, 4 (2020). But to say that there is great variation is perhaps an overstatement: it is the very small form that predominates.
[54] *1992 Census of Governments: Government Organization—Popularly Elected Officials*, U.S. CENSUS BUREAU (1995), at *1, available at https://www2.census.gov/programs-surveys/gus/tables/1995/gc92-1-2.pdf. There is no indication that this number has changed greatly in the intervening years.
[55] *1992 Census of Governments* at *1.

Management Association conducted a 2018 survey of the approximately 13,000 municipal governments in their database (almost all with populations greater than 2,500) and, with a 32% response rate, reported that 90% of these legislatures have seven or fewer members.[56] A study of upstate New York localities conducted by the University of Buffalo in 2009 reports similar numbers.[57]

The juxtaposition of the average local legislative size reported by the Census Bureau (4) alongside the average state legislative size (149.2) is jarring.[58] Consider also that the average size of a lower house or unicameral legislature in Europe is 216 members, and that globally the average is 182.[59] These numbers would be even higher were upper houses taken into account. Local legislatures are, therefore, extreme deviations from standard conceptions of legislative design—so extreme that they deserve their own term: *micro-legislatures*. While deviant from the norm at the level of ideal institutional design, micro-legislatures are nevertheless ubiquitous within American local government. Such a combination of deviance and ubiquity would seem to call out for a justification, yet there is no sustained defense of the micro-legislative model. In what follows, I will assess potential defenses and explanations.

II. Local Micro-Legislatures: Potential Defenses

Local micro-legislatures diverge from standard institutional design, but to frame them as outliers is to ignore that they themselves vastly outnumber the legislatures of the states. An enduring social practice chosen by tens of thousands of localities cannot be dismissed out-of-hand as aberrant.

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[56] International City/County Management Association, *2018 Municipal Form of Government Survey – Summary of Survey Results* (Washington, DC: ICMA, 2019)/

[57] *Sizing Up Local Legislatures*, University at Buffalo Regional Institute (2009) ("A survey of towns and villages in five New York counties with large central cities—Erie, Albany, Monroe, Onondaga and Westchester—revealed all but one of the 87 towns and 69 villages with boards of either five or seven members. In this sample, board size was the same for communities with population below 2,000 (Towns of Brant, Spafford, Rensselaerville, for example) and over 90,000 (Towns of Greenburgh and Amherst). Only the Village of Marcellus in Onondaga County differed from this norm with a threemember village board of trustees. Residents of West Seneca and Evans voted in 2009 to become the first towns in this group to use the three-member structure, effective 2010.").

[58] Id.

[59] See Inter-Parliamentary Union – Parline (2022) (dataset available at https://data.ipu.org/compare?field=chamber%3A%3Afield_statutory_members_number&structure=any__lower_chamber#map).

Some effort must be made to reconstruct[60] why non-assembly legislatures might be valuable in local government. We shall make this effort, but will, in the end, conclude that the potential defenses surveyed are unavailing.

Many localities may have followed the lead of the influential National League of Cities' Model City Charter, which recommends that local governments utilize micro-legislatures.[61] The Charter's brief statement on the subject contains the lineaments of a number of arguments for micro-legislatures that we must assess:

> The Model does not specify the exact number of council members but recommends that the council be small – ranging from five to nine members.… In the largest cities, a greater number of council members may be necessary to assure equitable representation. However, smaller city councils are more effective instruments for the development of programs and conduct of municipal business than large local legislative bodies. In the United States, it has been an exceptional situation when a large municipal council, broken into many committees handling specific subjects, has been able to discharge its responsibilities promptly and effectively…. In determining the size of the council, charter drafters should consider the diversity of population elements to be represented and the size of the city.[62]

The NLC's endorsement of micro-legislatures appears based on (1) the implication that there is insufficient diversity in most localities to justify a large legislature, and (2) the increased efficiency in government action provided by a micro-legislature.[63] We will address versions of these claims below, as well as a third: the idea that it would be practically impossible—

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[60] J.M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105, 122 (1993) ("[R]ational reconstruction is the attempt to see reason in legal materials—to view legal materials as a plausible and sensible scheme of human regulation.").

[61] *Model City Charter*, NATIONAL CIVIC LEAGUE (9th Ed. 2021), available at http://www.nationalcivicleague.org/wp-content/uploads/2021/11/Model-City-Charter%E2%80%949th-Edition.pdf.

[62] Id.

[63] The NLC also stated the following in their Model Charter: "In large councils, members usually represent relatively small districts with the frequent result that parochialism and 'log-rolling'—bargaining for and exchanging votes on a quid pro quo basis— distract attention from the problems of the whole city." Id.

either due to financial strain or lack of interest—to create a normal sized legislature in a standard sized locality.

A. Lack of Necessity for Assembly-Type Legislature: Homogenous Communities

One potential defense of micro-legislatures in most localities is that the small population of the locality (recall that 99% have fewer than 100,000 people) reduces the diversity of the citizenry to the extent that even a board of four members is sufficient to be representative.

This argument should be rejected as empirically implausible. We should question whether it is *ever* true that our paradigmatic locality of, say, tens of thousands of people, could be accurately described as homogenous.

When one thinks of the "diversity" in need of representation, or its inverse—homogeneity—one immediately thinks of racial or ethnic diversity. But the interests a legislature represents are multitudinous, and moreover, racial groups are obviously not monolithic in their views about politics. When one considers an individual and the various aspects of that person's life, the notion of their "interests" becomes quite complicated. In the words of economist George Stigler, "We should expect the number of…interest groups to be large relative to the population, and conceivably even to exceed the population. Jones may be a wheat grower, a protestant, a war veteran, a resident of county X, a consumer of many products subject to political influences etc."[64]

The presence of intra-racial diversity in need of representation is illustrated well by the community of Bozeman, Montana: population 53,293, legislature size of four (not including the mayor).[65] While this community is about 92% white and in a distinctive geographic location,[66] the latest mayoral race (2019) resulted in a vote split of 62% to 37% for two candidates, and with two commission slots up for grabs that year three candidates received a vote breakdown of 33%, 10%, and 55%, respectively.[67] The point is this: in

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[64] George J. Stigler, *The Sizes of Legislatures*, 5 JOURNAL OF LEGAL STUDIES 17, 17 (1976).
[65] *City Commission*, BOZEMAN MT.NET (2022), available at https://www.bozeman.net/government/city-commission; population from 2020 U.S. CENSUS, available at https://www.census.gov/quickfacts/bozemancitymontana.
[66] Id.
[67] *Gallatin County Election Results*, MONTANA RIGHT NOW (Nov. 5, 2019), available at https://www.montanarightnow.com/gallatin-county-election-results/article_5889e20c-0002-11ea-8e16-932a6d2fb134.html.

our imagination, an all-white "flyover city" of only 50,000 people may seem like a homogenous community, but even there 50,000 human beings disagree greatly about local politics. Surface level homogeneity belies an invisible diversity of thought.

Consider also that even in a locality that is homogenous racially, religiously, and with respect to economic class, there will always be diversity with respect to age-cohorts in a community. College-aged young people, parents with young children, empty nesters, and elderly widows all have different interests, even if they are all wealthy Anglo-Saxon Protestants.

The invisible diversity of thought becomes visible, moreover, when one considers political party demographics.[68] Consider Lea County, New Mexico, population approximately 75,000.[69] Lea County was the most pro-Trump county in New Mexico in the 2020 election, voting by a margin of +60 for the Republican candidate.[70] However, this means that about 20% of those who voted chose the Democrat.[71] Lea County, though, has a five-member legislature that is all Republican.[72] Lea's micro-legislature completely stifles the representation of the minority group of Democrats who have very different political viewpoints than do the members of the legislature.

B. Legislation as Secondary Purpose of Local Legislatures: Service Provision and the Need for Efficiency

The second potential defense to the phenomenon of local micro-legislatures is the most significant—it is the claim that local legislatures are very small because these institutions are not *really* legislatures in the proper sense. The paradigmatic feature of a "legislature" is to create "legislation,"

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[68] The lack of partisan competition in local elections is not evidence of a lack of diversity of views about local policy. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & Pol. 419, 433 (2007) ("There are frequent debates about what public goods cities should provide and what policies work best at achieving these goods. They are just not the subject of partisan debates.").

[69] *QuickFacts: Lea County, New Mexico*, 2020 U.S. CENSUS, available at https://www.census.gov/quickfacts/fact/table/leacountynewmexico/PST045219.

[70] *An Extremely Detailed Map of the 2020 Election*, NEW YORK TIMES (2021), available at https://www.nytimes.com/interactive/2021/upshot/2020-election-map.html.

[71] Id.

[72] *Lea County Board Of County Commissioners*, LEACOUNTY.NET (2022), available at https://www.leacounty.net/p/elected-officials/lea-county-commissioners.

after all, which is a source of law that is formally enacted in a text.[73] This is not the primary purpose of local boards and councils, one might say, and the small size of these bodies follows from their different purpose. The primary purpose of local councils, according to this view, is to efficiently direct the provision of services to the local populace. This objection should not placate our concerns regarding micro-legislatures.

First, we should be clear that this objection does not and cannot claim that local legislatures lack legislative power. The discussion above regarding widespread local codes of ordinances—including criminal laws—demonstrates the opposite.

Rather, this objection claims that the *primary purpose* of local legislatures is not to create legislation; legislative power inheres in local legislatures, but it is ancillary. Support might be found in the observation that in the majority of local governments (all but those with a strong mayor-council form), the council possesses both legislative *and* executive power. This observation could be coupled with the observation that the actual activity of local councils is predominantly executive—relating mostly to the direction of service provision. Executive-type functions such as this are incompatible with large, inefficient assembly-type legislatures, and therefore localities have compromised by retaining a legislature, but making it micro-sized.[74]

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[73] See, e.g., Jeremy Waldron, *The Dignity of Legislation*, 54 Md. L. Rev. 633, 642 (1995) ("Certainly, it is important to most modern positivist theories that there be legislatures and legislation. H.L.A. Hart thought, for example, that the mark of a modern legal system is the community's capacity to deliberately change its rules through formalized procedures. Hans Kelsen believed that the dynamic role of the Grundnorm contained 'nothing but . . . the authorization of a norm-creating authority' and that in a modern legal order, 'the creation . . . of general legal norms has the character of legislation.' But even on this the positivists are not unanimous.").

[74] I am channeling here, with some modifications, a version of Noah Kazis's response to Kellen Zale's work on city councils, as well as his rationalization of the choice made by localities to use a unicameral legislature. I refrain from quoting him above the line out of recognition that I am not attempting to address his precise views on micro-legislatures, since he has not himself addressed the issue. In his response to Zale, Kazis notes that while scholars should continue to evaluate the "constitutional design of local government," they should do so without "los[ing] sight of one of local government law's most traditional claims: that local government's special (though hardly only) role in our federalist system is as a direct service provider." Kazis, *Service Provision*. Kazis links this to a historic concern for efficiency that motivated the Progressive-era reforms of local government structure. Kazis, *Unicameralism* at 1160 (noting desire for local government to be "more efficient, not hampered by the need for consensus across two fractious bodies, and evoked images of modernity to support their desired overhaul of the legislative machine."); id. at 1163 ("Efficiency formed the heart of the intellectual argument for charter reform in Philadelphia."). He is sympathetic to the

It makes sense to structure an institution so that it can best advance its primary purpose, but what if the features that best advance a primary purpose are inimical to the advancement of a secondary purpose? This, in my view, is the state of local micro-legislatures: a schizophrenic identity-crisis of institutional design. Local councils possess both executive and legislative power, but their micro-structure is solely aimed at advancing the efficiency values of executive-type action. These efficiency-related values, and the institutional structure they require in order to be advanced, are incompatible with a healthy legislative process. Localities can't have it both ways. The solution for the efficiency deficits of a legislative body is not to shrink that body to the point that it becomes a quasi-executive council—it is to separate powers and to create an executive. Given that this has not happened in most local government forms, we should be concerned by the extreme efficiency of a local council. A council that can very easily address an emergent garbage problem (using its executive-type power) can also very easily create new crimes (using its legislative-type power).

We should pause to consider how important this secondary purpose is. Recent years have made clearer that local governments often legislate around contentious political issues that have national salience, at times provoking sharp rebukes from state legislatures.[75] An excellent example of this is in the area of gun rights.[76] While localities' distinctive role may be service provision (in that no other layer of government is so service-oriented), this does not diminish their great power—however secondary it is—to alter the rights and duties of their citizens. As mentioned earlier, localities create codes of ordinances that prohibit conduct and impose licensure regimes.[77] These can be expansive. The DOJ wrote in its "Ferguson Report" that "Ferguson's municipal code addresses nearly every aspect of civic life for

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consensus of history, I think. He argues that we have less to fear from an efficient local legislature with an ability to easily pass new ordinances because ordinances can only affect our lives in a comparatively minimal way. Id. Additionally, this is even less worrisome when one considers the ability to "vote with one's feet" and the ability of a state to preempt an ordinance. Id. "That said, constraints on local power, whether interlocal competition or state oversight, do provide a partial explanation of local unicameralism: The worst-case scenarios of unchecked power are somewhat less threatening." Id. at 1155.

[75] Nestor M. Davidson and Laurie Reynolds, *The New State Preemption, The Future of Home Rule, and The Illinois Experience*, 4 ILL. MUNICIPAL POL'Y J. 19 (2019).

[76] Id.

[77] See Brenner M. Fissell, *Local Offenses*, 89 FORDHAM L. REV. 837 (2020).

those who live in Ferguson . . . ."[78] Recent scholarship on the misdemeanor criminal justice system reveals that offenses with even light penalties can result in a web of managerial social control,[79] facilitated by local police and local courts.[80] Local power is in the garbage truck rolling by, but also in the police officer arresting someone for an open container, and in the local court thereafter imposing fines, fees, and onerous procedural hurdles.

C. Practical Impossibility: Lack of Resources or Interest

The last defense of micro-legislatures that we must consider is a defense borne of practical realities: that it would be impossible, either financially or due to lack of interest, to convene a normal-sized legislature in most normal-sized localities (think of our core case of the locality with fewer than 100,000 people).

Financial impossibility should be dismissed immediately: legislators can be unpaid. Kellen Zale discusses the financial concern exhaustively in her assessment of full versus part-time councils.[81] However, she explicitly limits her analysis to "midsize and large cities," noting that "membership on the city council in small cities may be considered a quasi-volunteer role: The position is often unpaid or provides a de minimis stipend, and members are expected to devote only a few hours a month to council responsibilities."[82] Most localities fall in this category, and therefore most legislatures are likely to be quasi-volunteer. Indeed, were quasi-volunteer micro-legislatures converted to regular-sized legislatures, even the "quasi" could be dropped: stipends could be eliminated altogether. Moreover, the small workload required would be further reduced, as work would be shared with a larger

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[78] U.S. Department of Justice, Civil Rights Division, *Investigation Of The Ferguson Police Department* at 7 (2015), available at https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/ 03/04/ferguson_police_department_report.pdf.

[79] See Fissell, *Local Offenses* at n.235 ("The three most significant characteristics of the managerial model [are]: (1) its aim of 'marking' defendants by putting arrests and convictions on their records so that they could be tracked and later controlled; (2) putting up 'procedure hassles' to test the 'rule-abiding propensities' of the marked individuals (e.g., appearing in court); and (3) 'performance' in place of a sentence, meaning 'the set of activities the defendant is instructed by the court or prosecution to undertake,' such as drug treatment (also aimed at testing rule-abidingness) (quoting ISSA KOHLER-HAUSMANN, MISDEMEANORLAND 21 (2018)); see also ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME (2018).

[80] Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964 (2021).

[81] Kellen Zale, *Compensating City Councils*, 70 STAN. L. REV. 839 (2018).

[82] Id at 851.

group of representatives. Resources constraints are not a valid reason to limit the size of a local legislature.

A more serious impediment that cannot be so easily dismissed is the lack of interest in legislative service. When a 2013 Massachusetts state audit recommended that the Town of Deerfield—population approximately 5,000—increase the size of its three-person legislature to five, the chair of the legislature expressed reservations: "I think it would be worthwhile, but we already don't have anyone to run for a three-member board. I don't know where you'd find people."[83] Another shared the same concerns: "I can't imagine trying to find five people to run. We already have a hard time filling any of our boards…."[84] While it may be that the existing Deerfield legislators were motivated by a desire to preserve their aggrandized influence on a small board, their concerns seem to track an observed phenomenon in local elections. Many may see the position of local legislator as a thankless job with little power or prestige to justify the unpaid extra work.

This argument should be considered speculative. Arguments about lack of interest are presumably premised on the lack of candidates standing themselves up for the few seats that are currently available, and perhaps especially on the widespread phenomenon of uncontested elections.[85] But a large percentage of seats in *state* legislatures go uncontested.[86] In Massachusetts 73% of seats were uncontested in 2020.[87] This is also true federally: in Alabama almost 40% (3 of the 7) congressional seats were uncontested in 2020.[88] Surely it is not that more of the nearly seven million residents of Massachusetts are uninterested in being on the state legislature;

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[83] *Deerfield split on state's recommendations*, 2013 WLNR 29007159 (2013).

[84] Id.

[85] "We don't have the same data on local races, but we have every reason to believe that the percentage of local races — so school board races, city council races, etc — that are uncontested is even higher." *When Election Day Comes And There's Only One Candidate On The Ballot*, NPR (Nov. 4, 2017), available at https://www.npr.org/2017/11/04/561408611/when-election-day-comes-and-theres-only-one-candidate-on-the-ballot. For a discussion of why there is not *partisan* competition in many "big city" local elections, see David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & Pol. 419, 426 (2007) (rejecting "natural explanation" of lack of policy disagreement and instead positing explanation rooted in "unitary party rules" imposed by election law).

[86] *2020 election analysis: Uncontested races by state*, BALLOTPEDIA (Dec. 16, 2020), available at https://ballotpedia.org/2020_election_analysis:_Uncontested_races_by_state.

[87] Id.

[88] Jaclyn Beran, *30% of seats nationwide were uncontested in the 2020 general election*, BALLOTPEDIA NEWS (Dec. 18, 2020), available at, https://news.ballotpedia.org/2020/12/18/30-of-seats-nationwide-were-uncontested-in-the-2020-general-election/.

nor is it Alabama's almost five million people cannot produce three candidates interested in being members of Congress. Interest in legislative participation may be a function of how easy it is for someone to get the job. In any event, we just do not know. Institutional design must accommodate reality, but it should not pessimistically anticipate, without evidence, that a given aspiration is practically impossible.

III. LOCAL MICRO-LEGISLATURES: THE CRITIQUE

Potential defenses of the micro-legislative model in American local government have been assessed and rejected; it remains, then, to sharpen and illuminate the bases of the critique. I shall argue that the micro-legislatures one observes throughout American localities are deficient in two respects: (1) they are unrepresentative, and (2) they are undemocratic. In this Part I will use the tools of normative political theory to advance these claims. I will not rely on fringe theories or on doctrinaire positions, but instead on mainstream, contemporary schools of thought.

A. Unrepresentative

Micro-legislatures are too small to be representative of the communities they govern. To understand this claim, we must understand both what representation is and why it deserves our normative commitments.

Representation is a central concept in democratic political. Because democracy presupposes free and equal citizens and therefore self-determination, legitimate authority and its attendant coercive power must reside in an institution that is representative of those citizens.[89] In the words of Dario Castiglione and Mark Warren, "[T]he basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions…[and] [i]n all but directly democratic venues (and

[89] Nadia Urbinati and Mark E. Warren, *The Concept of Representation in Contemporary Democratic Theory*, 11 ANNUAL REVIEW OF POLITICAL SCIENCE 378, 394 (2008) ("Although there are important variations in the normative presuppositions embedded in this principle, most democratic theorists hold that (a) individuals are morally and legally equal and (b) individuals are equally capable of autonomy with respect to citizenship—that is, conscious self-determination—all other things begin equal. It follows that collective decisions affecting self-determination should include those affected. The advantage of such a norm—call it democratic autonomy or simply collective self-government—is that it enables us to avoid reduction of 'democracy' to any particular kind of institution or decision-making mechanism. It allows us to assess emerging institutions and imagine new ones by asking whether they fulfill the norm of democratic autonomy…").

even sometimes then), this norm of democratic inclusion is achieved through representation."[90] Direct democracy—decision by all members of the community—passes the legitimacy test, but is impractical in complex modern societies and also unwise.[91] Representation is actually a refinement of direct democracy, and not just a regrettable compromise: it relieves the individual citizen of making decisions on every political matter, and places that responsibility in the hands of a dedicated agent.[92]

But what is representation? Hannah Pitkin's seminal 1967 work *The Concept of Representation* helped to schematize centuries of disparate political thought on the subject, but in the face of so many thinkers claiming so many different things about representation, Pitkin eschewed a singular theory.[93] Instead, hers was a plea for conceptual clarity: "The most that we can hope to do when confronted by such a multiplicity [of theories] is to be clear on what view of representation a particular writer is using, and whether that view, its assumptions and implication, really fit the case to which he is trying to apply them."[94] Despite voicing this caution, Pitkin was nevertheless able to extract three aspects of representation, each advanced as central by prior theorists, which, when put together, show a large part[95] of what many

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[90] Dario Castiglione and Mark E. Warren, *Rethinking democratic representation: eight theoretical issues and a postscript*, in Lisa Jane Disch, Mathijs van de Sande, and Nadia Urbinati (eds), THE CONSTRUCTIVIST TURN IN POLITICAL REPRESENTATION 25 (Edinburgh: Edinburgh University Press, 2019).

[91] These feasibility problems include the practicality of so many people being able to assemble at a single time, but also the lack of consistency of a plenary assembly's edicts. See PHILIP PETIT, ON THE PEOPLE'S TERMS 188 ("I begin with a model in which the citizens gather periodically in a plenary assembly, a committee-of-the-whole, to determine the laws of the community. This model, which is reminiscent of Rousseau's assembly, offers a plausible, initial interpretation of what it might be for the people to enjoy equally accessible influence over government. Whatever its other faults, however, I argue that the model is quite infeasible, even in an electronic age in which people might assemble virtually.").

[92] ERIC BEERBOHM, IN OUR NAME 193 ("Representation is more than a strategy for reducing decisional costs. Mediating agents can reduce the risks of empirical and moral error. They can guard against attempts to prey on our psychological vulnerabilities. If we design the agency relationship between citizens and lawmakers in the right way, we can guard against our vulnerability to framing effects, self-bias, and political priming."). See also Chiara Valentini, *The Legislative Assembly and Representative Deliberation*, 64 AM. J. JURIS. 105, 106 (2019) ("Representative democracy, then, is not a lesser alternative to direct democracy; rather, the former is an improvement on the latter, much as it is an improvement on rule by the prince….").

[93] See HANNAH PITKIN, CONCEPT OF REPRESENTATION (1967).

[94] Id. at 228.

[95] Much of Pitkin's work is an unearthing of "partial truth[s]" about representation. Id. at 66. She does not attempt to advance a theory of the "whole truth." Martha L. Minow, *From Class Actions to Miss Saigon: The Concept of Representation in the Law*, 39 CLEV. ST. L.

people mean by "representation." First, representatives must be *authorized* to act ex ante; second, representatives must be *accountable* for their actions ex post; finally, representatives must act in furtherance of the interests of the represented.[96] While political theorists continue to debate these propositions,[97] Pitkin's schema, and its reception, has come to be known as the "standard account" of representation.[98]

Authorization and accountability are "formalistic" components of representation, and they give us no way to evaluate the quality of representation or the conduct of the representative. Either the representative was authorized and is now accountable, or she was not and is not.[99] The third

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REV. 269, 280–81 (1991) ("Professor Pitkin demonstrates the inadequacy of any single definition for the concept.").

[96] "Nonetheless, Pitkin sketched out the generic features of political representation in constitutional democracy. For representatives to be "democratic," she argued, (a) they must be authorized to act; (b) they must act in a way that promotes the interests of the represented; and (c) people must have the means to hold their representatives accountable for their actions." Urbinati & Warren at 393.

[97] The assessment of the standard account of representation in political theory, while fascinating and voluminous, is beyond the scope of this article. For our purposes we will merely adopt it for the purposes of application to a new phenomenon—local legislative size—while also noting its criticisms. For deeper reading of its critics, see Castiglione & Warren at 24-27 ("Recently, this 'standard view' has come under increasing pressure [citing sources], and it has become increasingly evident that political representation in democracies is a rather more complex process…. Democratic theories tend to combine authorisation and accountability, but the way in which they combine is neither obvious nor necessarily fixed once and for all.").

[98] Andrew Rehfeld, *Towards a general theory of political representation*, 68 THE JOURNAL OF POLITICS 1, 3 (2006) (noting dominance of Pitkin's tripartite theory: accountability through deliberation, authorization through electoral reform, and pursuit of interests—calling it the "standard account"); Urbinati & Warren at 393 ("Pitkin did not, however, inquire more broadly into the kind of political participation that representation brings about in a democratic society. Nor were her initial formulations further debated or developed. Instead, they stood as the last word on representation within democratic theory for three decades, until the appearance of Manin's *The Principles of Representative Government* (1997)."). The standard account is not limited to Pitkin, but also the account's reception. Castiglione & Warren at 45 ("Overall, we think of the standard account as the consolidated view of a model of political representation institutionalised in the course of the twentieth century across a number of constitutional democracies, and not as the particular theoretical construct of a single author or even a group of authors. The work of Hanna Pitkin, for instance, is a theoretically sophisticated reflection about such a dominant view, but cannot be described as the 'standard account' itself, nor can some of the limits of the standard account be attributed to her own theorisation, which in a number of cases offers elements for a critique.").

[99] Pitkin at 39 ("Representation is a kind of 'black box' shaped by the initial giving of authority, within which the representative can do whatever he pleases."); id. (there is "no such thing as representing well or badly" under this conception).

component—promotion of interests—introduces a substantive aspect to representation, and a further conceptual division. Substantive representation can be "descriptive," "symbolic," or action-based.[100] Descriptive representation is maximized when "a representative body is distinguished by an accurate correspondence or resemblance to what it represents, by reflecting without distortion."[101] Descriptive representation is when something "stands for" another, and thus "depends on the representative's characteristics, on what he is or is like, on being something rather than doing something…."[102] Symbolic representation, by contrast, is the representation one might see in a flag, and is based mostly on the emotional or affective response it provokes in the viewer.[103] Finally, action-based representation involves not "standing for" the represented, but "acting for" them—acting in their interests and "in a manner responsive to them."[104]

Representative institutions transcend regime type (one might conceive of a polity in which only certain groups are represented), but our concern is with representative democracy. The primary manner in which a democracy implements authorization and accountability of representatives is through election.[105] The manner in which a democracy legitimately implements descriptive and action-based representation is the creation of an *assembly* of elected representatives. As Philip Pettit argues, the alternative to a plenary assembly (direct democracy), is a non-plenary assembly "selected by the people to debate and enact laws on their behalf."[106]

But beyond saying that an electoral assembly should be non-plenary, how big should it be? This basic question of institutional design has received almost no theoretical attention.[107] The only sustained treatment is that undertaken by Jeremy Waldron. Rather than tackling the question ex nihilo, he begins with an empirical observation: legislatures in contemporary nation-states are made up of large numbers of members. "Everywhere in the modern

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[100] Pitkin at 60, 92, 112.
[101] Id. at 60.
[102] Id. at 61.
[103] Id. at 92.
[104] Id. at 209.
[105] Urbinati & Warren at 397-98 ("Electoral democracy is that subset of representative relationships in which representatives are authorized through election to represent the citizens of a constituency to act on behalf of their interests, and then are held accountable in subsequent elections.").
[106] PHILIP PETIT, ON THE PEOPLE'S TERMS 197.
[107] Despite the ubiquity of the legislature-as-assembly phenomenon, Waldron writes that legal theory had "systematically neglected" it as unworthy of further discussion. Jeremy Waldron, THE DIGNITY OF LEGISLATION, 54 MD. L. REV. 633, 634-35 (1995).

world, legislatures are institutions which comprise hundreds of members, members who take their decisions collectively, and deal with one another formally as equals."[108] Numerosity of membership is what makes a legislature an "assembly" of persons,[109] and the ubiquity of the numerosity phenomenon is explainable (and defensible) for normative reasons: the size of the legislative body "makes a difference to our understanding of the concept of law [and] our understanding of the authority of law."[110]

The essential ingredient added by numerosity—by legislature-as-assembly—is not democratic authorization or accountability, but representativeness. Specifically, numerosity facilitates the *descriptive representation* described earlier—the aspect of representation in which a legislative body mirrors those it represents. Consider the following discussions of descriptive representation from prominent Framers John Adams and James Wilson. Adams wrote that a legislature "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them."[111] Wilson, similarly, argued that "the legislature ought to be the most exact transcript of the whole society."[112]

For Waldron, the justification for these claims, and for the ubiquity of large legislatures, begins with the recognition that we live in political communities in which people will often disagree sharply about the most important issues (including the meaning of life itself). This fundamental disagreement is not some unusual aberration to be corrected, but is instead a normal state of affairs that political and legal theory must account for—it is the "circumstances of politics."[113] This is a standard presumption of liberal political theory[114] and a predicate for institutional design.

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[108] Id. at 635. Elsewhere he calls this a "constitutional instinct about legislation." Jeremy Waldron, *Legislation by Assembly*, 46 LOY. L. REV. 507, 512 (2000).

[109] The lawmaker—the legisla*tor*—as a single person had been a dominant theme in the history of political thought prior to modern democracy. Waldron, *Legislation by Assembly*, at 517.

[110] Id.

[111] *Letter from John Adams to John Penn*, in IV THE WORKS OF JOHN ADAMS 205 (Boston, Little Brown 1851).

[112] J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 74 (A. Koch ed. 1966).

[113] Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2198 (1996) ("We may say, along similar lines, that the felt need among members of a certain group for a common framework, decision, or course of action on some matter, even in the face of disagreement about what that framework, decision, or action should be, are the circumstances of politics….").

[114] JOHN RAWLS, POLITICAL LIBERALISM 441 (Columbia, 2005) ("[A] basic feature of democracy is the fact of reasonable pluralism—the fact that a plurality of conflicting

In a real-world community that must confront the "circumstances of politics," and in which citizens are held to be both free and equal, political decisions must not be made on the basis of the inherent correctness of chosen policy, but instead on the basis of majority vote.[115] The institutional vehicle for such a process is an elected assembly—a body that is big enough such that, when it votes, it can be seen as capturing the "diversity" in opinions, experiences, and interests[116] in society confronting the circumstances of politics:

> [T]aken together their diversity represents, along various dimensions, the diversity of the community at large. Their democratic credentials consist partly in the fact that when they talk to one another, different sections of society (different regions, different interests, different ethnic groups) can be taken, through their representation, to be talking to one another. In their plurality, they represent the larger plurality of the community...[117]

Given the reality of fundamental and intractable disagreement in a political community of free and co-equal citizens, a lawmaking institution that aims

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reasonable comprehensive doctrines, religious, philosophical, and moral, is the normal result of its culture of free institutions.").

[115] This is a requirement of fairness. See JEREMY WALDRON POLITICAL POLITICAL THEORY 264 ("In democratic theory, the most powerful case that can be made for [Majority Decision] is that it is required as a matter of *fairness* to all those who participate in the social choice…. Informally, people may be persuaded that [Majority Decision] is fair because, although they are losers this time around, they may be winners in the next political cycle…. Formally, we may defend [Majority Decision] as a way of respecting political participants as equals.").

[116] Waldron clarifies that this is not just "diversity" in the racial or demographic sense, but of "opinions" "experiences" and "interests." JEREMY WALDRON, POLITICAL POLITICAL THEORY 132 (2016). Of these, the need for diversity of "interests" appears to be primary. Id. at 133 (claiming that in political disputes "*impact on interests is often the main issue*") (emphasis in original).

[117] Waldron, *Dignity of Legislation* at 635. Id. at 654 (referencing claim by John Adams that "a representative legislature 'should be an exact portrait, in miniature, of the people at large,' so that when the legislators talk to one another, different parts of society can be taken, through their representation, to be talking to one another.").

to be representative (and therefore legitimate)[118] must accommodate diversity in membership, which is in turn facilitated by numerosity.[119]

If representation is necessary for legitimate political authority, and if numerosity of the legislative assembly is necessary for fulsome descriptive representation, then one can view numerosity as necessary for political legitimacy. Waldron is right to make this connection. Descriptive representation is not merely a desirable feature of a legislative institution—it is central to the authoritativeness of the rules it creates. "[L]aw may properly elicit allegiance only from those that the law respects, and you respect a person not just by taking their interests and views into account, but by taking them into account as active intelligences and consciences," Waldron writes.[120] A legislature claiming to consider the interests of those who are not represented in that legislature is insufficiently authoritative.[121] Thus, in a society with a diversity of interests the legislature must *itself* be diverse: "Laws must stake their claim to authority among not only a diversity of interests but also among a diversity of law-thinkers."[122]

When one applies this analytical framework to local micro-legislatures, the conclusion is readily apparent: their size makes the approximation of an adequate amount of descriptive representation impossible. A legislature with four seats, for example, cannot possibly

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[118] Recall the words of Castiglione and Warren, "[T]he basic norm of democracy is empowered inclusion of the community of those affected in collective decisions and actions…[and] [i]n all but directly democratic venues (and even sometimes then), this norm of democratic inclusion is achieved through representation." Castiglione & Warren at 25.

[119] Waldron is not the *only* theorist to make these claims, but he is the only one to analyze them thoroughly. For related discussions, see ELKINS, NATURE OF LEGISLATIVE INTENT 149 ("[T]he assembly is not just a group, as is any committee or council. It is a large group that is structured to represent the community…in the sense that it is drawn from the community…The reason for the large size of the assembly is that with several hundred members it is practical for individual legislators to represent particular groups or districts."; J. Carey, *Legislative organization,* in OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 432 ("Legislatures are plural bodies with larger membership than executives, and so offer the possibility both to represent more accurately the range of diversity in the polity…." Among the diverse interests that numerosity enables representation of are "geographical location, partisanship, race, ethnicity, gender, language, religion").

[120] Jeremy Waldron, *Legislation by Assembly*, 46 Loy. L. Rev. 507, 529 (2000).

[121] "It is not enough to have one person trying to represent diverse views in his own mind; they should be actively present, each arguing its case as forcefully as it can." Id. at 530; "The point of a legislative assembly is to represent the main factions in the society, and to make laws in a way that takes their differences seriously rather than in a way that pretends that their differences are not serious or do not exist." JEREMY WALDRON, LAW AND DISAGREEMENT 27.

[122] Id.

account for the multiplicity of interests in a complex modern society—even in a small city of 100,000 people or fewer. Micro-legislatures are unrepresentative.

B. Undemocratic

Just as legislative size bears on representativeness, so too does it bear on whether an institution can be said to be "democratic." For the reasons explained in what follows, local micro-legislatures do not deserve this label. Again, to criticize the democratic bona fides of local legislatures requires us to understand what "democracy" is and why it is desirable.

Like with representativeness, one must tread carefully when claiming that something is or is not "democratic." In the words of Dan Kahan, "[D]emocracy is an essentially contested concept: there is not just one, but rather a plurality of competing conceptions of democracy, each of which emphasizes a different good commonly associated with democratic political regimes."[123] Democratic theory recognizes this complexity and approaches the subject by positing various "models of democracy," with each model focusing on an "ideal typical feature of democracy."[124] There are many "models,"[125] and a full consideration of the range of these approaches goes

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[123] Dan M. Kahan, *Democracy Schmemocracy*, 20 CARDOZO L. REV. 795 (1999). For a criticism of the use of "democracy" in assessment of contemporary American institutions see Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 725–26 (2001) ("[A]s soon as we invoke the term 'democracy,' therefore, we are smuggling outmoded values, that will inevitably conflict with the government we actually possess, into our political discourse. Consequently, this Article proposes that we simply set the term 'democracy' aside and cease using it in scholarly discussions of modern government."); Rikki Dean, Jean-Paul Gagnon, and Hans Asenbaum, *What Is Democratic Theory?*, 6 Democratic Theory v (2019) ("Robert Dahl…famously argued that 'there is no democratic theory – there are only democratic theories.'").

[124] Mark E. Warren, *A Problem-Based Approach to Democratic Theory*, 111 AMERICAN POLITICAL SCIENCE REVIEW 39, 39 (2017) (criticizing the model approach while recognizing that "democratic theorists usually think in [these] terms").

[125] Andrew Sabl, *The Two Cultures of Democratic Theory: Responsiveness, Democratic Quality, and the Empirical-Normative Divide*, 13 PERSPECTIVES ON POLITICS 345, 349 (2015) ("On a civic republican view, the test of democracy—or, better, of a 'republic' based on civic equality—is widespread devotion to the common good; on a more sober republican view, it is non-domination, the prevention of arbitrary power. On an 'epistemic' view…the purpose of democracy is to achieve through aggregation not the enactment of popular wishes but maximally accurate judgments regarding public problems that admit, more or less, of objectively better and worse answers. On an Emersonian view, democracy is valuable to the extent that it fosters independent and egalitarian mores, disinclined to docility. On a mitigated-elitist view, democracy allows for a salutary mix of democratic and aristocratic elements…. Conversely, on a radical view, full democracy would entail a universal 'ability

well beyond our present concern. For our purposes it is sufficient to mark out what theorists have recognized to be the two major categories of models: aggregative theories and deliberative theories.[126]

Perhaps the most succinct description of this division is that given by Mark Warren: deliberative theories make as their touchstone "the giving and responding to reasons and coming to a collective decision," while aggregative theories identify as key the feature of "voting (making decisions by aggregating preferences)."[127] Ian Shapiro's survey of the state of the art in 2009 described the divide this way:

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to use and develop ... presently unusable or denied human capacities.' On a different and more power-based radical view, democracies should be assessed by how well they 'undermine and otherwise mitigate the corrosive effects of social hierarchies.' On a social-democratic account of democracy…a key—perhaps the key—indicator of democratic quality is the level of economic equality."); Warren, *Problem-Based Approach* at 40 ("The consequence is that we now have a proliferation of adjectives that name and differentiate models: electoral democracy, competitive elite democracy, competitive multiparty democracy, pluralist democracy, corporatist democracy, developmental democracy, republican democracy, advocacy democracy, agonistic and adversarial democracy, pragmatic democracy, participatory democracy, progressive democracy, and—of course—deliberative democracy."); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 43 (2004); DAVID HELD, MODELS OF DEMOCRACY (3rd ed., 2006); Dean, Gagnon, & Asenbaum at xii ("Take, for instance, the 'model wars' that have characterized much democratic theory – a kind of ideological struggle to define a best form of democracy situated around a particular form of practice…. The struggle is evident in battles over representative democracy vs. direct democracy, participatory democracy vs. elite democracy, and agonist democracy vs. deliberative democracy.").

[126] Warren, *Problem-Based Approach* at 39 ("Most of those who originated the model contrasted 'deliberative' to 'aggregative' models of democracy…In particular, deliberation (the giving and responding to reasons and coming to a collective decision) was contrasted with voting (making decisions by aggregating preferences).") (citing sources); IRIS YOUNG, INCLUSION AND DEMOCRACY 4-10 (2000); GERRY MASHAW, REASONED ADMINISTRATION 165-170 (aggregative and deliberative are the "two main paradigms" in "contemporary democratic theory"); JACK KNIGHT, AGGREGATION AND DELIBERATION: ON THE POSSIBILITY OF DEMOCRATIC LEGITIMACY 278; Holning Lau, *Identity Scripts & Democratic Deliberation*, 94 Minn. L. Rev. 897, 910 (2010) ("Views of collective governance usually take one of two forms: an aggregative model or a deliberative model."); James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 933 (2011) ("Although there are almost as many democratic theories as there are democratic theorists, for the most part contemporary accounts of democracy tend to fall into one of two categories often designated in consideration of their historical antecedents as liberal or republican, or in consideration of their most prominent conceptual features as aggregative or deliberative."); Nimer Sultany, *The State of Progressive Constitutional Theory: The Paradox of Constitutional Democracy and the Project of Political Justification*, 47 HARV. C.R.-C.L. L. REV. 371, 436 (2012) ("Contemporary debates have largely focused on two rival sets of conceptions: aggregative conceptions and deliberative conceptions.").

[127] Warren, *Problem-Based Approach* at 39.

> The aggregative tradition has bequeathed a view of democracy in which competing for the majority's vote is the essence of the exercise, and the challenge for democratic theorists as they conceive of it is to come up with the right rules to govern the contest. Deliberative theorists, by contrast, … tak[e] a transformative view of human beings. They concern themselves with the ways in which deliberation can be used to alter preferences so as to facilitate the search for a common good. For them the general will has to be manufactured, not just discovered.[128]

The aggregative account is undoubtedly the thinner of the two, and was more popular in earlier years of democratic theory. Perhaps the most famous aggregative theorist, Joseph Schumpeter, emphasized that while elections occurred in democracies, the real power was wielded by the elite professional politicians who were elected—not the people.[129] So-called "pluralist" aggregative theorists, such as Robert Dahl, modified Schumpeter's view of preference aggregation by highlighting the importance of interest groups politics in constraining elite action.[130] But aggregative accounts of democracy no longer predominate. Instead, many contemporary theorists now advance a deliberative version that focuses less on electoral procedures, and more on the value of the reciprocal communication that hopefully takes place during the democratic decision-making process.

Deliberative democracy is the dominant contemporary theory of democracy.[131] As Shapiro noted earlier, the key shift from aggregative to

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[128] IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY (2003) (cleaned up).

[129] Held, *Models* at 154 ("By democracy, Schumpeter meant a political *method*, that is, an institutional arrangement for arriving at political…decisions by vesting in certain individuals the power to decide on all matters as a consequence of their successful pursuit of the people's vote."). Schumpeter himself wrote, "If we wish to face facts squarely, we must recognize that, in modern democracies…politics will unavoidably be a career. This in turn spells recognition of a distinct professional interest in the individual politician and of a distinct group interest in the political profession as such." JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 284. Id. ("[D]emocracy is the rule of the politician.").

[130] Held, *Models* at 176: "The account of interest group politics offered by classic pluralists was a significant corrective to the one-sided 'elite politics', and the overemphasis on the capacity to shape contemporary life, found in the writings of the competitive elitists."

[131] Warren, *Problem-based Approach* at 40 (calling deliberative model "now arguably the most productive research paradigm within democratic theory"); FRANK CUNNINGHAM, THEORIES OF DEMOCRACY: A CRITICAL INTRODUCTION (London: Routledge, 2002) (calling deliberative democracy the "currently popular school of democratic theory"). This is not to say that it is without its critics. "Critics pounced, arguing that deliberative democracy failed to pay attention to power and interests []; that it was insufficiently 'political' because it failed to attend to the deeply agonistic character of politics []; that it overlooked inequalities of

deliberative democracy is a refusal to accept citizen viewpoints as givens, or to accept their tabulation as the litmus test of political legitimacy.[132] In the words of David Held, "At issue is enhancing the nature and form of political participation, not just increasing it for its own sake."[133] Legitimacy, according to this theory, is instead conferred by democracy on the basis of the deliberation that democratic institutions facilitates—the public, mutual exchange of reason-giving for a specific political choice.[134] "[T]he source of legitimacy," writes Bernard Manin, "is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself."[135] For some deliberative theorists, legitimacy is bound up with the expectation that deliberation will produce better policy outcomes. The "epistemic goods" of deliberation "include[e] revealing preferences and pooling information."[136] But other deliberative theorists root democratic legitimacy in the inherent fairness of deliberation, regardless of its instrumental benefits. Deliberation makes political authority legitimate because it (ideally) requires rationality[137] and equal participation.[138] When given the opportunity to deliberate, this "increases chances that participants will recognize their preferences (their interests, values, and ethics) in

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voice and power (there were many critics, including some working within the model, such as Young []); that deliberation is subject to distortion and pathology when operating within political fields populated by strategic actors []; and that deliberative models justify ideological domination because deliberation (in effect) alters individual consciousness under the coercive pressure of collective action []." Warren, *Problem-based Approach* at 40 (citations omitted).

[132] Held, *Models* at 244 ("The major contention of deliberative democrats is to bid farewell to any notion of fixed preferences and to replace them with a learning process in and through which people come to terms with the range of issues they need to understand in order to hold a sound and reasonable judgment.").

[133] Held, *Models* at 243.

[134] James A. Gardner, *Anonymity and Democratic Citizenship*, 19 WM. & MARY BILL RTS. J. 927, 934–36 (2011) ("Deliberation is thus doubly important in these theories: it is not only the forum in which citizens forge agreement on what to do, but also the very means by which they legitimately bind themselves to what they have collectively decided.").

[135] Bernard Manin, *On legitimacy and political deliberation*, 15 POLITICAL THEORY 338 (1987).

[136] Warren, *Problem-Based* at 48. The major proponent of this version of deliberative democracy is David Estlund. See DAVID ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2009).

[137] Seyla Benhabib, *Toward a deliberative model of democratic legitimacy*, in S. Benhabib, (ed.) DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL 67–94 (1996).

[138] Bernard Manin, *On legitimacy and political deliberation*, 15 POLITICAL THEORY 338 (1987).

collective wills or agendas, thus increasing the legitimacy of collective decisions."[139]

Having laid out this framework, we can now say that an institution is less democratically legitimate if it reduces deliberative opportunities. According to the epistemic-benefit version of deliberative democracy, this is true if features of the institution work against the epistemic payoffs that deliberation is hoped to provide. According to the version of the theory that finds deliberation inherently legitimating (because it facilitates recognition of one's preferences in policies), this is true if features of the institution shut out voices and groups of voices.

First, consider the epistemic-benefit theory of deliberative democracy. Two important contemporary proponents of this argument are David Estlund and Hélène Landemore.[140]

Estlund preceded Landemore in claiming that "there is something about democracy other than its fairness that contributes to our sense that it can justify authority and legal coercion," and this is because democratic laws "are produced by a procedure with a tendency to make correct decisions."[141] Estlund's theory of the "modest epistemic value" of democracy is grounded in the epistemic value of the deliberation that democracy facilitates.[142] Deliberation, under the right conditions (such as equal access to forum),[143] "is likely to have a significant tendency to make [better] decisions."[144] Estlund's theory appears to be predicated on the Hayekian concept of "dispersed knowledge"—if knowledge about the world is not held by an oligopoly of the few, then deliberation with more and more people will reintegrate the knowledge that was dispersed into a single decisionmaking body.[145] Under the right conditions, deliberation "[B]rings together diverse perspectives, places a wide variety of reasons and arguments before the

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[139] Warren, *Problem-Based* at 48.
[140] See generally, ESTLUND, DEMOCRATIC AUTHORITY (2009); LANDEMORE, DEMOCRATIC REASON (2013).
[141] Estlund at 6, 8. Note that he is not claiming that this results in epistemic perfection, but merely that it is superior to other forms of decisionmaking. "It is not an infallible procedure, and there might even be more accurate procedures. But democracy is better than random and is epistemically the best among those that are generally acceptable in the way that political legitimacy requires."
[142] Id. at 159 (a "democratic theory that emphasizes the value of public deliberation").
[143] See id. at 175-76 for his list of ideal deliberative conditions.
[144] Id. at 176.
[145] Id. at 177.

public, and prevents inequalities of power or status from skewing the results…."[146]

Landemore's work is a more robust elaboration of the epistemic-benefit theory.[147] According to her, the three "classic[]" arguments for the "known epistemic properties of deliberation" include (1) enlarging "pools of ideas and information," (2) "weed[ing] out the good arguments from the bad," and (3) working toward "consensus on the 'better' or more 'reasonable' solution."[148] But Landemore finds these arguments to be "very general claims" in need of further explication and defense.[149] The missing sophistication, for her, is supplied by the social science concept of "cognitive diversity."[150] "Cognitive diversity is the difference in the way people will approach a problem or a question," she writes: "It denotes more specifically a diversity of perspectives (the way of representing situations and problems), diversity of interpretations (the way of categorizing or partitioning perspectives), diversity of heuristics (the way of generating solutions to problems), and diversity of predictive models (the way of inferring cause and effect)."[151] Social scientists have demonstrated that "in a problem-solving context, cognitive diversity actually matters more to the production of smart

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[146] Id. at 185; Warren, *Problem-Based* at 48 ("revealing preferences and pooling information").

[147] Landemore at 145. She sees the second mechanism of majority rule, the aggregative mechanism, as also essential: "This chapter argues that simple majority rule is an essential component of democratic decision making with its own distinct epistemic properties and a certain task specificity, namely a predictive function: majority rule is ideally suited to predict which of two options identified in the deliberative phase is best."

[148] Id. at 97.

[149] Id.

[150] Id. at 89.

[151] 102. Landemore, presumably confining her claim to the work of Hong and Page, excludes diversity of interests from her claim regarding the epistemic benefits of cognitive diversity. "Cognitive diversity is not diversity of values or goals, which would actually harm the collective effort to solve a problem." Id. She does not elaborate on this or cite to any further work. For our purposes, it is sufficient to note that this limitation is not essential to the theory of deliberative democracy. Landemore herself notes that many deliberative theorists, which she calls "type II deliberative democrats," still see value in diversity of values. Id. at 94. She quotes Jane Mansbridge, who argues that "when interests and values conflict irreconcilably, deliberation ideally ends not in consensus but in a clarification of conflict and structuring of disagreement, which sets the stage for a decision by non-deliberative methods, such as aggregation or negotiation among cooperative organisms." Id. (quoting Jane Mansbridge, James Bohman, Simone Chambers, David Estlund, Andreas Føllesdal, Archon Fung, Cristina Lafont, Bernard Manin, and José Luis Martí, *The Place of Self-Interest and the Role of Power in Deliberative Democracy*, 18 JOURNAL OF POLITICAL PHILOSOPHY 64 (2010).

collective solutions than individual ability does…."[152] Thus, democracy's benefits flow from its facilitation of deliberation, but more precisely, its expansion of cognitive diversity in decision-making. Landemore is explicit that deliberative bodies with more numerous memberships are therefore preferable:

> [T]he advantage of involving large numbers is that it automatically ensures greater cognitive diversity. In that sense, more is smarter, at least up to the point of deliberative feasibility. I thus propose to generalize the Diversity Trumps Ability Theorem into a Numbers Trump Ability Theorem, according to which, under the right conditions and all things being equal otherwise, what matters most to the collective intelligence of a problem-solving group is not so much individual ability as the number of people in the group.[153]

Representative democracy, with its core organ of a representative assembly, most approximates this goal of "inclusive deliberation."[154]

Many deliberative theorists, though, see legitimacy flowing from deliberation not because of its expected policy benefits, but because it is fair: it allows for the recognition of one's voice as having an equal part to play in the decision-making process.[155] A foundational assumption of these theorists is the reality of fundamental moral disagreements in a political community (what Waldron called the "circumstances of politics").[156] Given this

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[152] Id. at 90 (citing Hong & Page study).

[153] Id. at 104.

[154] Id. at 106 ("Here, the function of representation is to reproduce the cognitive diversity present in the larger group on a scale at which simple deliberation remains feasible."; see id. at 89 (regarding need for inclusion).

[155] See, e.g., Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POLITICAL THEORY 338, 352 (1987) ("As political decisions are characteristically imposed on all, it seems reasonable to seek, as an essential condition for legitimacy, the deliberation of all or, more precisely, the right of all to participate in deliberation….The deliberative principle is both individualistic and democratic. It implies that all participate in the deliberation, and in this sense the decision made can reasonably be considered as emanating from the people (democratic principle). The decision also proceeds from the liberty of individuals: those individuals deliberate together, form their opinions through deliberation, and at the close of the process each opts freely for one solution or another (individualistic and liberal principle). We must affirm, at the risk of contradicting a long tradition, that legitimate law is the result of general deliberation, and not the expression of the general will.").

[156] Note that one school of deliberative theorists would not accept this. According to the so-called "impartialists," the point of deliberation is to engage in communicative reason-giving that *all* could accept—no matter their identities or interests. Held, *Models* at 252.

background presumption, which presents an obvious problem to harmonious political life and to the taking of political action, majority voting can be complemented by pre-voting deliberation to enhance the legitimacy of chosen policies. In the words of some of the most famous deliberative theorists, Amy Guttman and Dennis Thompson, "If we have to disagree morally about public policy, it is better to do so in a democracy that as far as possible respects the moral status of each of us."[157] An institution works to respect equal moral status through deliberation, in that deliberation engenders "reciprocity"—the acknowledgement that a given reason for a policy is mutually acceptable even though one might oppose the conclusion that flows from it.[158] "Reciprocity aims at deliberative agreement," Guttman and Thompson write, "whereby citizens are motivated to justify their claims to those with whom they must cooperate."[159]

One might add that, along with fundamental moral disagreements, scarce resources will make most policy decisions result in winners and losers. But deliberation (and its reciprocity principle) can work to assuage the wounded feelings of even the losers:

> Deliberation contributes to the legitimacy of decisions made under conditions of scarcity….The hard choices that democratic governments make in these circumstances should be more acceptable even to those who receive less than they deserve if everyone's claims have been considered on their merits rather than on the basis of wealth, status, or power. Even with regard to political decisions with

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Deliberation should be "impartial," in that deliberators should "be[] open to, reason[] from, and assess[] all points of view before deciding what is right or just; it does not mean simply following the precepts of self-interest, whether based on class, gender, ethnicity or nationality." Id. Critics of impartialism, such as Iris Young, respond that this is practically fanciful but also normatively undesirable, in that it "represses difference" and presupposes only one correct form of reasoning. IRIS YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 103 (1990). Young argues alternatively for "a politics of inclusion" and an "ideal of a heterogeneous public." Id. at 119. While it is impossible for me to weigh in on this debate here in a satisfactory way, I will note that the form of deliberative democracy that I invoke in this Article is one that does not require impartialism. The discussion in this section should clarify that I rely on the work of those deliberative theorists who accept the intractable reality of divergent interests and worldviews, and who nevertheless advance a normative argument for deliberation.

[157] AMY GUTMANN & DENNIS F. THOMPSON, WHY DELIBERATIVE DEMOCRACY 26 (2004).

[158] Id. at 54. Reciprocity would preclude advancing a reason based on social status, for example.

[159] Id.

> which they disagree, citizens are likely to take a different attitude toward those that are adopted after careful consideration of the relevant conflicting moral claims and those that are adopted only after calculation of the relative strength of the competing political interests. Moral justifications [communicated during deliberation]…help to sustain the political legitimacy that makes possible collective efforts…in the future, and to live with one another civilly in the meantime.[160]

Again, it is not just that a citizen had the chance to vote, but that he or she also had the chance to communicate his or her reasons for voting a certain way, and also to persuade others to change their votes. Moreover, one learns that the reasons for "the other side" voting a certain way are hopefully intelligible and satisfy the reciprocity principle. This pre-decisional deliberation therefore helps even the "losers" of the vote tally to live with the result.

An essential precondition to deliberation that satisfies the reciprocity principle and enhances legitimacy, then, is *inclusive* deliberation.[161] Significant groups of shared interests or viewpoints cannot be left of out the discussion, and thereby rendered unable to express their reasons for their preferred decision. Such a group would not recognize their viewpoints as having the potential to shape policy, and resentment would breed if the group's policy "lost." As Bernard Manin argues, "A diversity of points of view and of arguments is an essential condition … for the rationality of the process (for the exchange of arguments and criticisms creates information and permits comparing the reasons presented to justify each position)."[162]

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[160] Id. at 41-42.

[161] It should be noted that some theorists argue that the concept of deliberation contains no inherent requirement of inclusion. In the words of Mark Warren, "[W]e should not expect deliberation to address problems of empowered inclusion. The key reason is that deliberation is not, in itself, a mode of empowerment, nor is it a mechanism for distributing empowerments according to entitlements for inclusion." Mark E. Warren, *A Problem-Based Approach to Democratic Theory*, 111 AMERICAN POLITICAL SCIENCE REVIEW 39 (2017). The version of deliberation that I invoke here, though, incorporates such a requirement. Warren's claim, I think, is simply that this additional requirement is not one *necessitated* by deliberation.

[162] Manin, *On Legitimacy* at 355. Manin does not go on to claim that *all* viewpoints must be represented, as in the analogy of a "marketplace of ideas." "[I]f the object of the conflict among varying points of view is the forming of the will, he writes, "then some degree of diversity *and not an extreme multiplicity* is necessary." Id. at 356 (emphasis added).

Applying all these insights to the case of local micro-legislatures, one should conclude that these institutions are insufficiently deliberative. The small size creates inclusion-deficits that are insurmountable, preventing deliberation from producing either epistemic benefits or the recognition of fairness on the part of those affected by its decisions. With an average of four seats, local legislatures are not large enough to provide a platform for representation of the multiplicity of interests in a modern society. Thus, *descriptive representation* is inextricably connected with *deliberative democracy*, and the size of the local legislature renders them deficient with respect to both qualities.

IV. IMPLICATIONS

Much of the preceding discussion has been conceptual—establishing, through the use of normative political theory, that local micro-legislatures are unrepresentative and undemocratic. But there are practical implications for these theoretical claims. Lack of assembly-type legislatures, and the concomitant lack of diversity of interests in the legislative body, can have concrete effects. In what follows, I will unpack two primary potential consequences: *noninclusive legislation*, and *perceptions of exclusion*. Along the way, I will attempt to illustrate these points with real world case studies. I will mostly focus on local laws that govern primary conduct by the citizens—especially criminal and civil offenses. It is the possession of this power that makes local legislatures most resemble state legislatures, and therefore here where their comparatively small size makes them most objectionable.

The first category of effects—noninclusive legislation—will focus on how the absence of minority interests in the legislative body actually affects the laws that it creates. The most significant problem is that, given the absence of any opposition group to critique or demand moderation, this can result in more extreme legislation. The second category of effects—perceptions of exclusion—will focus not on the concrete policy outputs that legislative size can have, but instead on the perceptions of the legitimacy of those policies in the eyes of the community. An interest group may successfully obtain its legislative preferences in a *manner* that is nevertheless objectionable; even when a group agrees with a law being enacted, it may view it as less legitimate if the group was not included in the decision-making.

A. Noninclusive Local Legislation: Silenced (or Muffled) Minorities

Representation and democracy deficits due to legislative size can affect what policies are enacted by local ordinances and how these ordinances are written. We should care about representation and democracy, after all, most primarily because they have concrete effects on the law. In what follows, consider a phenomenon that could come from a legislature that is too small to incorporate diverse community interests: it silences or muffles minorities, and thereby results in more extreme legislation.

Legislatures with a small number of seats cannot account for all the interests in a pluralistic community, and therefore many interests—especially minority group interests that cannot garner enough votes to win a seat—will have no place (or no meaningful place) at the table. They will be unrepresented (or underrepresented), and their voice will not be a part of the deliberative exchange. The result will be more extreme local legislation.[163]

Think of how this moderating function would work in a larger, more representative legislature. While a minority group in such a legislature would control only a minority of seats, the group's presence in the deliberative body compels the majority to at least *consider* compromise solutions, or to modify extreme proposals in light of the minority's view.[164] For example, the Congressional Black Caucus has only 56 members in the 177th Congress—

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[163] A recent study by renowned deliberative theorist James Fishkin (and others) provides empirical support for the underlying claim that deliberation and polarization have an inverse relationship. "These results from a national field experiment offer proof of concept that deliberation, with an appropriate design, can dramatically narrow differences between Republicans and Democrats on issues where they are initially deeply polarized." Fishkin et. al., *Is Deliberation an Antidote to Extreme Partisan Polarization? Reflections on "America in One Room*, 115 AM. POL. SCI. REV. 1464 (2021).

[164] There is political science research on state legislatures supporting the claim that a larger chamber allows for more "non-elite" members, and that this can correlate with policy proposals favoring "non-elite" groups. Scot Schraufnagel & Benjamin S. Bingle, *Legislature Size and Non-Elite Populations: Theory and Corroborating Evidence*, 8 J. POL. & L. 242 (2015) ("The theoretical assumption is that larger legislatures will be populated by a more diverse group of members, who will better represent and advocate for non-elites….The research demonstrates that larger Lower Chambers are marginally associated with a lower percentage of adults without a high school diploma, easily associated with a larger percentage of the states' poor receiving Medicaid, and also related to smaller state prison populations."). For evidence of the effects of descriptive racial representation on state policies, see, R. R. Preuhs, *Descriptive Representation as a Mechanism to Mitigate Policy Backlash: Latino Incorporation and Welfare Policy in the American States,* 60 POLITICAL RESEARCH QUARTERLY 277 (2007); R. R. Preuhs, *The Conditional Effects of Minority Descriptive Representation: Black Legislators and Policy Influence in the American States*, 68 THE JOURNAL OF POLITICS 585 (2006).

far, far, short of a majority of votes in the House—yet the Caucus is influential in affecting legislation.[165] As described by Kareen Crayton, "The key to the CBC's success over time was its ability to leverage its bloc of votes within the Democratic House Caucus to further the shared policy concerns of its members. Due partly to increases in its size and its greater share of influence within the House leadership structure, the group has enhanced its role in the party's decision-making processes."[166]

With a very small legislature, representatives of the majority are free to pursue their chosen policy preferences without any pushback within the legislative body. The only routes for a minority group to voice its viewpoints are public comment at a meeting, or by protests. The result can be that extreme positions, unmoderated by serious opposition, become law. This may be an explanation for the phenomenon of comparatively radical, one-sided policies enacted by localities (versus states and the federal government).

1. Case Study: LGBTQ Individuals in Two Counties

In most localities, LGBTQ-identifying persons will be an extremely small minority of residents and voters. Polling data indicates that even in the metropolitan area (San Francisco) with the highest percentage of these sexual minorities, the percentage is only 6.2%.[167] One interest that sexual minorities have, of course, is the freedom to engage in sexual behavior that the majority has no interest in engaging in, and which it may in fact find repugnant (for whatever reason). When one combines this minority group's lack of electoral power with the often-prevalent sentiments of the majority group, the outcome

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[165] *About*, CONGRESSIONAL BLACK CAUCUS (2022), available at https://cbc.house.gov/about/.

[166] Kareem Crayton, *The Changing Face of the Congressional Black Caucus*, 19 S. CAL. INTERDISC. L.J. 473, 476 (2010). While the CBC is often influential when the Democratic party is in power, Crayton cites an example of when, in the early years of the group, the CBC was able to make its voice heard to a Republican administration. Id. at 478 ("On repeated occasions, Nixon had abruptly denied individual requests from blacks in Congress to discuss a White House agenda described by its critics as 'benign neglect'--an indifference to racial discrimination and economic blight within the black community. After the membership staged a much publicized boycott of one of the President's State of the Union addresses, the Caucus soon received an invitation to visit the White House for an informal policy discussion.").

[167] Frank Newport & Gary Gates, *San Francisco Metro Area Ranks Highest in LGBT Percentage*, GALLUP NEWS (Mar. 20, 015), available at https://news.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx?utm_source=Social%20Issues&utm_medium=newsfeed&utm_campaign=tiles

is predictable. It should be no surprise that local governments have been on the front line of LGBT-oppressive policymaking.

Consider the case of Harford County, Maryland. Harford has a population of 260,924, with a seven-person legislature.[168] As of late 2021, all seven members are men, and six are married to women (and the seventh appears to be single).[169] There is no indication that LGBT people are represented in this legislature, and they likely never have been.

Harford's code of ordinances has an article regulating the operation of adult bookstores.[170] The article punishes as misdemeanors (with up to 6 months imprisonment),[171] among other things, "knowingly allow[ing] a sexual act on the premises"; failing to "regularly check the parking lot to try to keep customers and members of the public from loitering or committing sexual acts there"; and failing to "ensure that each viewing booth is separated from others by a solid wall…."[172] According to the Fourth Circuit, the law was enacted in 1992 "to protect the health, safety and welfare of the County's citizens by minimizing the undesirable secondary effects generally associated with sexually oriented businesses," with the Council finding that "such businesses frequently are used for unlawful sexual activities, may facilitate the transmission of sexual diseases, contribute generally to crime, decrease property values and adversely impact the quality of life in their surrounding areas."[173] The likely unspoken subtext of this law, though, was an attempt to crack down on gay men congregating for consensual sex with each other. Many scholars have observed that adult bookstores and theaters were focal points for gay life when gay sex was still criminal.[174]

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[168] 2020 U.S. CENSUS, available at https://www.census.gov/quickfacts/fact/table/harfordcountymaryland,US/POP010220; *City Council*, HARFORDCOUNTYMD.GOV, available at https://www.harfordcountymd.gov/155/County-Council.

[169] Id. (see biographies). Councilmember Giangiordano appears to be single.

[170] HARFORD COUNTY MARYLAND CODE OF ORDINANCES Chapter 58.

[171] Id. § 58-13.

[172] Id. § 58-8.

[173] *Chesapeake B & M, Inc. v. Harford Cty., Md.*, 58 F.3d 1005, 1007 (4th Cir. 1995).

[174] See e.g., William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 852 (1997) ("As applied in consensual situations, sodomy laws were used as the legal basis to monitor gay cruising areas (like public rest rooms) and to investigate or raid quasi-public forums—adult bookstores [], sex clubs, gay baths, and massage parlors []."); Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 28 (2008). Paul Brest and Ann Vandenberg recount a debate about an ordinance in Minneapolis that took place at a city council meeting. Paul Brest and Ann Vandenberg, *Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis*, 39 STAN. L. REV. 607, 629 (1987) (telling story of one witness who "thought that the current

This ordinance is actively enforced. News reports indicate that crackdowns took place regularly in 2012, and again in May 2021.[175] In a January 2012 raid, sheriffs noticed violations of the "solid wall" requirement, as well as a half-naked patron.[176] These raids stemmed from complaints raised a local "community council": "Most of the complaints about the bookstores are from parents, who have to drive past the three stores in their area and worry about what to tell their children about why, what is essentially a bookstore, has so many cars in front of it and so many people going in and out…."[177] The more recent raid in the county was also prompted by complaints.[178] According to a journalistic account, a gay man arrested during the raid said, "[Y]ou know, I went inside and was hooking up with someone and the next thing I know, eight of us were against the wall with handcuffs with plastic zip ties on them…. And we all spent the night in jail…. I don't know why people have a problem with this. We go there to meet people like us."[179]

One cannot know for sure whether having LGBT people on the Harford County Council would lead to a repeal of the adult bookstore ordinance. But given the small size of that body, and given the small proportion of LGBT individuals in Harford, we can know that the interests and viewpoints of those affected by the ordinance did not have representation in the deliberative process leading up to the ordinance's enactment.

Going back further in time, one can find an even more extreme example of local anti-LGBT discrimination. In 1993, Cobb County,

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'movement against pornographic bookstores has had a terrible effect on the gay community,' leading to police brutality and the arrests of gay men. Still another emphasized the importance of adult bookstores as meeting places for gay men and as 'a place to be sexual together.' Gay men, he explained, 'have had to develop signals in order to recognize each other and cultivate places where we can feel relatively safe. Adult bookstores have come to be part of that picture. So I do not take lightly that such places will be lost to the gay community when this ordinance comes to be successful.'").

[175] Erika Butler, *Police crack down on Harford 'adult bookstores'*, BALTIMORE SUN (Jan. 25, 2012), available at https://www.baltimoresun.com/ph-ag-adult-bookstores-0125-20120124-story.html ("Throughout the year, the sheriff's office checks all the 'adult bookstores.'"); Lou Chibbaro, *Gay men arrested under Md. sodomy law in adult bookstore raid*, WASHINGTON BLADE (Jul. 21, 2021), available at https://www.washingtonblade.com/2021/07/21/gay-men-arrested-under-md-sodomy-law-in-adult-bookstore-raid/

[176] Butler, *Crack Down* at *1.

[177] Id.

[178] Id.; Chibbaro, *Gay men arrested* at *1.

[179] Id. According to The Blade, the 2021 raid resulted in only state law charges against the patrons, and it appears that no violations of the local ordinance (regarding the proprietors) were charged.

Georgia's five-member Board of Commissioners cut all of its arts funding after a "complain[t] about references to homosexuality in a play" that was presumably supported in part by public money.[180] The same month the commissioners passed a resolution stating that "lifestyles advocated by the gay community should not be endorsed by government policy makers, because they are incompatible with the standards to which this community subscribes."[181] The Cobb County incident illustrates the limits of public protest as a form of inclusion and representation in deliberation. As one scholar recalls, protests against the resolution were vigorous and organized (including the creation of a petition signed by many faculty and students at the local college), but they were immediately met by counter protests.[182] The result, according to him, was that "meetings between gay and human rights groups and the commissions have shown no progress toward rescinding the resolution."[183] Petitions and protests are a weak substitute for the advocacy of voting members of a deliberative body.

2. Case Study: Student Populations in Various University Towns

Another minority interest group that has historically clashed with local governments—and almost always lost—is that of college students in college towns. Universities are often in smaller localities where their residential student bodies comprise a recognizable minority of the population. The interests of students—due to age, occupation, transience, income level, etc.—often diverge sharply from those of older, longer-term residents of a college town.[184] Students are, in general, interested in living and socializing

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[180] Peter Applebome, *County's Anti-Gay Move Catches Few by Surprise*, NEW YORK TIMES (Aug. 29, 1993), available at https://timesmachine.nytimes.com/timesmachine/1993/08/29/762093.html?pageNumber=17.The play was a Terrance McNally play, *Lips Together, Teeth Apart*. Holly Selby, *Ga. town suffers unwanted fame for anti-gay action*, BALTIMORE SUN (Jul. 21, 1994), available at https://www.baltimoresun.com/news/bs-xpm-1994-07-21-1994202112-story.html

[181] John Gentile, *"That's the Night that the Arts Went Out in Georgia": The Passing of the Anti-Gay Resolution and Arts Defunding in Cobb County, Georgia, as Social Drama*, 19 STUDIES IN POPULAR CULTURE 287 (Oct. 1996).

[182] Id. at 296.

[183] Id.

[184] See Blake Gumprecht, *The American College Town*, 93 GEOGRAPHICAL REVIEW 51 (2003). For an excellent discussion of this phenomenon playing out in the community of Ithaca, New York, see Blake Gumprecht, *Fraternity Row, The Student Ghetto, And The Faculty Enclave*, 32 JOURNAL OF URBAN HISTORY 231 (2006) ("College towns are highly segregated residentially. College faculty and other permanent residents seldom want to live near undergraduates because of the different lifestyles they often lead. For students, the

together in close proximity and at a standard that older, wealthier people would not accept for themselves. Long-term residents, who are almost always in the majority, often have the traditional interest portfolio of a "homevoter"[185] interested in quiet, more isolated family life in a house that is steadily increasing in value. The interests of a comparatively small student population can therefore clash with those of a dominant majority of homevoters,[186] and their minority status—as well as other factors such as transience and apathy—usually leave them politically powerless. The small size of local legislatures can play a role in this marginalization.

Local micro-legislatures have successfully waged war on student populations throughout the United States, passing anti-student ordinances aimed at reducing or preventing altogether student rentals and the partying that takes place in and outside of them. The most famous local ordinance having anti-student effects[187] was a restriction on renting to two or more people who were not part of the same "family"—ostensibly an attempt at preventing rentals to students from a nearby university.[188] The Supreme Court upheld this restriction against a constitutional challenge, writing that "It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for

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college years represent their first chance to live relatively free from adult interference, so they, too, prefer to live among their own. Dissimilarities within the student body contribute still further to residential differences within college towns.").

[185] "The 'homevoter hypothesis' is deceptively straightforward: decentralized, local governments provide a desirable balance of taxes and government services because the homevoter seeks to maintain or increase the value of her single largest asset--the family home…." Richard Schragger, *Consuming Government* 101 MICH. L. REV. 1824 (2003).

[186] In one acrimonious case, a local mayor compared college students to "toxic waste," prompting a state court judge to issue an eloquent description of the divergent interests of the two groups: "The Court cannot but be disheartened at a mental climate that classifies college students, presumably the brightest and best of our society, as less worthy than toxic waste. True, they may have peculiar lifestyles; true, they frequently exhibit a less respectful attitude toward their elders than those in present authority would prefer and they sometimes behave in such a manner as to drive their elders to distraction. Yet it cannot be forgotten not only that they are entitled to their lifestyle as a matter of constitutional right, but in a few fleeting years they will stand in the shoes of those they now offend-those whose present occupancy of power is but fleeting." *Borough of Glassboro v. Vallorosi*, 221 N.J. Super. 610, 620–21, 535 A.2d 544, 549 (Ch. Div. 1987).

[187] Since I am not sure, and the case does not indicate, whether the ordinance in *Belle Terre* referenced in the next sentence was actually motivated by anti-student animus, I say here that the ordinance had anti-student "effects." All of the subsequent ordinances discussed in this section, themselves implicitly blessed by *Belle Terre*, are more clearly the product of anti-student animus.

[188] *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

people."[189] Since then, many localities have availed themselves of this option to the detriment of students.

Consider one iconic feature of college student neighborhoods: upholstered couches used as outdoor furniture on a porch. A number of micro-legislatures in localities with student populations have created ordinances prohibiting this practice, including Lincoln, Nebraska (7 members, home of University of Nebraska),[190] Chico, California (7 members, home of Chico State),[191] Boulder, Colorado (9 members, home of the University of Colorado),[192] Murfreesboro, Tennessee (7 members, home of Middle Tennessee State University),[193] and Columbus, Ohio (7 members, home of Ohio State University).[194] There is no evidence of student representation on these micro-legislatures.

The couch ban enacted by Ann Arbor, Michigan (home of the University of Michigan) in 2010 illustrates the students' silence well. Spurred

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[189] Id. It is interesting to note that currently the Village of Belle Terre, NY—the locality that passed the ordinance—has a legislature of five people. See *Mayors and Trustees*, BELLETERRE.US (2022), available at https://belleterre.us/village-people-2/mayors-and-trustees. One suspects that this number was not larger at the time that the ordinance was passed.

[190] *College town bans the porch couch*, 6 ACTION NEWS (Sept. 23, 2008), available at https://6abc.com/archive/6408391/ ("Supporters of the ban say it's a way to help revitalize older neighborhoods. It also likely targets college students who move in and out of rental homes. Lincoln is home to the campus of the University of Nebraska at Lincoln.")

[191] *City Council*, CHICO.CA.US (2022), available at https://chico.ca.us/city-council; *City council bans furniture outside homes*, THE ORION (Sept. 28, 2015), available at https://theorion.com/51278/news/city-council-bans-furniture-outside-homes/

[192] *City Council*, BOULDERCOLORADO.GOV (2022), available at https://bouldercolorado.gov/government/city-council; Nick Madigan, *Peace Plan In Boulder Bans Sofas On Porches*, NEW YORK TIMES (May 30, 2002), available at https://www.nytimes.com/2002/05/30/us/peace-plan-in-boulder-bans-sofas-on-porches.html ("Appalled by several small but destructive disturbances near the University of Colorado in the last few years, events in which inebriated students invariably stole couches off porches and burned them, Boulder officials last week approved an ordinance that forbids keeping upholstered furniture outside. The measure, effective Aug. 1, applies only to University Hill, a residential area near the campus where the worst of the disturbances occurred."). This ordinance carries a penalty of up to 90 days incarceration. Id.

[193] *City Council Members*, MURFREESBOROTN.GOV (2022), available at https://www.murfreesborotn.gov/496/City-Council-Members; Michelle Willard, *It's official: Indoor couches banned for outdoor use*, MURFREESBORO POST (Dec. 9, 2007), available at https://www.murfreesboropost.com/news/it-s-official-indoor-couches-banned-for-outdoor-use/article_1544ddb4-3474-551a-a2d9-dd020a3dc780.html

[194] Mark Ferenchik, *Law largely keeping couches off porches*, COLUMBUS DISPATCH (Nov. 22, 2012), available at https://www.dispatch.com/story/news/crime/2012/11/23/law-largely-keeping-couches-off/24014197007/; *City Council*, COLUMBUS.GOV (2022), available at https://www.columbus.gov/council/members/.

by the advocacy of the mother of a student who died in a fire allegedly aggravated by the presence of a porch-couch, Ann Arbor's 11-person micro-legislature decided to act.[195] At the hearing in which the ban passed, only two people of the more than dozen people who spoke voiced opposition to the ban—both were Michigan students.[196] The week following the ban, the Michigan Student Assembly's (MSA) executive board issued a statement condemning the ordinance and their lack of student inclusion in the deliberative process:

> Only after MSA asked for a postponement did the City Council consult students on this issue…. However, a one-week delay allowed little time for students to express their concerns and sidestepped the much larger issue — the City Council acted unilaterally and offered no opportunities for students to review and discuss the proposal during the legislative process. With consideration largely during the summer months, the couch ban never had an opportunity to receive reasonable oversight and criticism from the student body.[197]

With no representation on the deliberative body, the students' interests in preserving an activity that some characterized as a "way of life" in a college residential community was not voiced, and no compromise or moderation was demanded.[198]

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[195] *City Council*, A2GOV.ORG (2022), available at https://www.a2gov.org/departments/city-council/Pages/Home.aspx; Ryan J. Stanton, *Ann Arbor City Council passes ordinance banning couches on porches*, THE ANN ARBOR NEWS (Sep. 20, 2010), available at http://www.annarbor.com/news/ann-arbor-city-council-passes-ordinance-banning-couches-on-porches/

[196] Id.

[197] http://www.annarbor.com/news/ann-arbors-new-ban-on-porch-couches-doesnt-sit-well-with-university-of-michigan-students/

[198] Ryan J. Stanton, *Ann Arbor's new ban on porch couches doesn't sit well with University of Michigan students*, THE ANN ARBOR NEWS (Sep. 23, 2010), available at http://www.annarbor.com/news/ann-arbor-city-council-passes-ordinance-banning-couches-on-porches/; In Bloomington, Indiana—home of Indiana University, with a local legislature of nine members—couches were banned in 2013. Jon Blau, *Bloomington ban on upholstered furniture on porches leaves IU students wondering why*, THE HERALD TIMES (Jan. 12, 2013), available at https://www.heraldtimesonline.com/story/news/2013/01/12/bloomington-ban-on-upholstered-furniture-on-porches-leaves-iu-students-wondering-why/47167823/.
Student reactions to the ban indicated that the non-students on the council seemed unaware of the value the couch had to the students: "Where college-aged men and women see porch couches as comfy, city officials see damp and squishy. The heads of neighborhood associations cringe at yellow stuffing bursting from seats and armrests…. The student renters

3. Case Study: Homeless Population in Newark, NJ

Another very small—and politically powerless—minority are those experiencing homelessness. Consider the city of Newark, New Jersey. The federal agency tasked with addressing homelessness estimates there are around 10,000 people experiencing homelessness on a given day in the entire state of New Jersey;[199] an NGO estimates that about 1,250 of these people live in Newark.[200] The city's general population is over 300,000 people, and its city council has nine members.[201] It is unlikely that a member of the council has ever experienced homelessness, or even housing insecurity. Such non-inclusion of the interests of those who are extremely impoverished may help to explain Newark's aggressive campaign against homelessness. In late 2019, the City Council passed legislation preventing New York City from relocating homeless people to Newark.[202] More recently, in December 2021, the Council announced a proposal to pass an ordinance prohibiting the feeding of homeless persons without a local permit.[203] One non-profit surveyed 187 cities in 2019 and found that 9% of these localities have ordinances restricting the sharing of food with the homeless.[204] The small size of local legislatures may be a cause of these extreme policy outputs. It is

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of Bloomington, who aren't necessarily tuned in to city politics, are puzzled by why anyone would legislate their furniture choices.….It is an understated part of the culture to these students — not sacred, but a worthwhile addition to their college experience. 'It will be a sad day,' said Devon McShane, a former IU student who took a moment to imagine Bloomington without porch couches. 'Ever since I moved in, it was the first thing: let's find some couches.'"

[199] *New Jersey Homelessness Statistics*, UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS (2022), available at https://www.usich.gov/homelessness-statistics/nj/

[200] *Essex County Point-in-Time Count of the Homeless – January 26, 2021*, MONARCH HOUSING ASSOCIATES (2021), at *10, available at https://www.monarchhousing.org/wp-content/uploads/njcounts21/Essex%20County%20PIT%20Report.pdf. Another estimate is 1,366. Andy Newman, *Feed the Hungry? You'll Need a Permit for That*, New York Times (Dec. 14, 2021), available at https://www.nytimes.com/2021/12/14/nyregion/newark-prohibiting-feeding-homeless.html.

[201] *Council Members*, NEWARKNJ.GOV (2022), available https://www.newarknj.gov/council-members.

[202] Sara Dorn, *Newark mayor effectively bans NYC's homeless-export program*, NEW YORK POST (Nov. 23, 2019), available at https://nypost.com/2019/11/23/newark-mayor-effectively-bans-nycs-homeless-export-program/.

[203] Newman, *Feed the Hungry* at *1.

[204] *Housing Not Handcuffs 2019*, NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY (Dec. 2019), at *46, available at https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf.

not that we can guarantee that a larger legislature would have a member who was or had been homeless, but that an assembly-size legislature would bring in enough experiences and interests that the viewpoints of the homeless or of those with housing insecurity would be seriously considered. With only seven seats for a city of 300,000, this is extremely unlikely in Newark.

B. Perceptions of Exclusion

While we considered above how micro-legislatures' size concretely impacts policy by silencing or muffling minority viewpoints, we must also consider how the lack of minority inclusion has expressive effects that go beyond the content of a chosen policy. The expressive function of inclusive legislative procedures creates a perception of legitimacy that can have concrete effects. "Sociological" legitimacy with respect to an institution, in the words of Richard Fallon, means that "the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."[205] It is an "active belief by citizens, whether warranted or not, that particular claims to authority deserve respect or obedience for reasons not restricted to self-interest."[206] The possession, or not, of such legitimacy has significant impact on whether a political institution can function in a healthy way. As Tom Tyler argues, "Considerable evidence suggests that the key factor shaping public behavior is the fairness of the processes legal authorities use when dealing with members of the public."[207] So-called "legitimacy theory" or "procedural justice" theory has been applied to many areas of law,[208] and it has obvious relevance for the composition of a legislature. Thus, even when a non-inclusive micro-legislature makes law that the excluded minority group *agrees* with, it nevertheless communicates something to that group: they do not matter.

Kim Forde-Mazrui writes that "The acceptability of legislatures, like juries, depends in part on the extent to which their membership represents the

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[205] Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795 (2005).
[206] Id.
[207] *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME AND JUSTICE 283.
[208] Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 277 n.213 (2004) (citing "large literature on procedural justice").

diverse constituencies within their jurisdictions."[209] The perception of a legislature's representational and deliberative legitimacy matters wholly apart from any effect representation or deliberation would have on the actual legislation.[210] "The public may find laws enacted by a representative legislature more acceptable because it understands (or assumes) that the content of the legislation reflects a real consensus among various interests."[211] Describing this view,[212] Lani Guinier writes that many theorists view racial integration in legislative bodies as significant to their perceived legitimacy: "Once integrated, legislative bodies will deliberate more effectively and will be 'legitimated' as a result of their more inclusive character."[213]

The small size of local legislatures inhibits fulsome inclusion of diverse interests, and therefore places constraints on the sociological legitimacy of the institution. Consider two case studies.

1. Case Study: Black Communities & Policing

Nearly all policing is done by local departments, and that these local departments can be directly controlled by local legislatures.[214] The granularity of the legislature's regulation is entirely dependent on legislative will. For example, the month after the killing of George Floyd, the

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[209] Kim Forde-Mazrui, *Jural Districting: Selecting Impartial Juries Through Community Representation*, 52 VAND. L. REV. 353, 377–78 (1999).

[210] "This legislative legitimacy gained through representativeness is distinct from the effect of representativeness on the content of legislation." Id.

[211] Id. "Third, undemocratic legislation is illegitimate even if the legislation would have been approved by citizens had they been afforded an opportunity to do so. Rights of democratic participation are essential to the legitimacy of legislative processes." Solum, *Procedural Justice* at 277.

[212] Guinier finds this to be insufficient, since descriptive representation of a minority group in a body with majority decision rules does not result in "effective legislative power" for that group. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1513 (1991). See id. at 1434 ("Electing representatives from majority-black, single-member districts may simply transfer the 'discrete and insular minority' problem from the polling place to the local municipal or county legislative council."). I need not take a position here on Guinier's claim regarding the need for *more* than descriptive representation, since, in the case of local micro-legislatures even this has not been achieved. While she calls for a "third-generation strategy" of political equality, local micro-legislatures have not even attained a "second-generation model" of "access-based" legitimacy. Id.

[213] Guinier, *No Two Seats* at 1415.

[214] Anthony O'Rourke, G. Binder, & R. Su, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327 (2021). An exception to this, noted by O'Rourke, Binder, and Su, is the case of sheriff's offices that may have independent status under state constitutions.

Minneapolis City Council directly amended the Police Department Policy and Procedure Manual—a departmental document[215]—by legislative action in order to ban the use of chokeholds.[216] While there are limits on disbanding or defunding police agencies,[217] it is not an exaggeration to say that local legislatures have near plenary authority over policing *policy* in their locality.

Policing is also racially disparate—specifically, Black communities are overpoliced[218] with respect to petty crimes, and under-policed with respect to serious volent felonies.[219] In the words of Sarah Swan, "Like overpolicing, underpolicing expressively 'devalues the lives' of people of color, destabilizes families, erodes communities, and causes deep psychic harms."[220] It is unsurprising, then that the policing preferences of poorer communities of color elude easy description. Many scholars report that these communities fear police repression, and therefore hope to be less policed, but also fear criminal victimization, and therefore hope for protection. In the words of Tracey Meares and Dan Kahan:

> The attitude of inner-city minorities toward the criminal law is suffused with ambivalence. They obviously resent their exposure to disproportionate criminal victimization, and expect relief. But unlike many whites who also strongly resent crime, they have not renounced

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[215] THE MINNEAPOLIS POLICE DEPARTMENT POLICY AND PROCEDURE MANUAL (Jan. 17, 2022) ("Adopted by the Minneapolis Police Department on 09/09/17"), available at https://www.minneapolismn.gov/media/-www-content-assets/documents/MPD-Policy-and-Procedure-Manual.pdf

[216] Order, *Lucero v. Minneapolis PD*, MN D. Ct. (Jun. 2020), available at https://www.courthousenews.com/wp-content/uploads/2020/06/minneapolis-tro.pdf; Andy Monserud, *Minneapolis Bans Police Chokeholds in First Step of Reforms*, COURTHOUSE NEWS SERVICE (Jan. 20, 2022), available at https://www.courthousenews.com/minneapolis-bans-police-chokeholds-in-first-step-of-reforms/

[217] "[P]olice agencies are harder to disband than many other governing institutions. They are entrenched, not only politically, but legally." Anthony O'Rourke, G. Binder, & R. Su, *Disbanding Police Agencies*, 121 COLUM. L. REV. 1327, 1334 (2021).

[218] "[A] substantial amount of research has shown that racial and ethnic minorities, particularly young Black men, are especially likely to be overpoliced…." Rick Trinkner et. al., *Bounded Authority: Expanding "Appropriate" Police Behavior Beyond Procedural Justice*, 42 LAW & HUM. BEHAV. 280, 291 (2018) (Citing Trinkner, R., & Goff, P. A., *The color of safety: The psychologic of race and policing*, In B. BRADFORD, B. JAUREGUI, I. LOADER, & J. STEINBERG (EDS.), THE SAGE HANDBOOK OF GLOBAL POLICING (Sage)).

[219] Sarah L. Swan, *Discriminatory Dualism*, 54 GA. L. REV. 869, 877–78 (2020).

[220] Id.

> their concern for the very individuals who are, or who are likely to become, criminal victimizers.[221]

The policy preferences of poor communities of color regarding policing are complicated and not monolithic. During the racial justice protests in the summer of 2020, a popular movement led by activists called for defunding or abolition of police, while Gallup survey data indicated that a majority of Black people did not want police presence reduced in their communities.[222]

Plenary local authority over the police, combined with complex viewpoints about policing, would seem to indicate that local legislatures would be appropriate fora in which all residents—especially Black residents—could make their voices heard through representation, all in the effort of making advancements in one of the most vexing issues concerning American public life. But local legislatures often fail to live up to that ideal, and their small size may be part of the problem. Consider that at the time of the killing of Michael Brown, the six-member city council of Ferguson, Missouri had only one Black member while the city's population was two-thirds Black.[223] In a study by Demos based on 2011 municipal survey data, the think tank reported that there were five respondent cities that were majority Black in population and had zero Black legislators.[224] These cities all had micro-legislatures of either five or six members.[225] These are the most

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[221] Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1165 (1998); see also RANDALL KENNEDY, RACE, CRIME AND THE LAW 19 (1997) ("[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws.").

[222] "When asked whether they want the police to spend more time, the same amount of time or less time than they currently do in their area, most Black Americans -- 61% -- want the police presence to remain the same." Lydia Saad, *Black Americans Want Police to Retain Local Presence*, GALLUP.COM (Aug. 5, 2020), available at https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx

[223] Karen Shanton, *The Problem of African American Underrepresentation in City Councils*, DEMOS.ORG (Oct. 30, 2014), available at https://www.demos.org/research/problem-african-american-underrepresentation-city-councils#footnoteref2_nuipnfq

[224] Id.

[225] Vienna, Georgia (five members), see *Elected Officials*, CITYOFVIENNA.ORG (2022), available at https://www.cityofvienna.org/ElectedOfficials.aspx; Riverview, Missouri (five members), see Board of Trustees Meeting Minutes, Village of Riverview, MO (Jan. 28, 2021), available at http://www.riverviewmo.org/uploads/Administration/Minutes/2021/BM1-21.pdf (reflecting size of board); Clarkston, Georgia (six members), see *About the City Council*, CLARKSTONGA.GOV (2022), available at https://www.clarkstonga.gov/about-city-council; Lake Park, Florida (six members), see *Mayor & Commissioners*, LAKEPARKFLORIDA.GOV

extreme cases, where there was complete non-representation even in the case of a majority population group. But the phenomenon is generally observable. Demos summarized the data by concluding that Black residents of the respondent localities were underrepresented in their local legislatures ten times more often than were white residents.[226] How can those who are most affected by policing be able to themselves affect policing if they don't have seats at the table when policing policy is made? And how could such exclusion go unnoticed?

Monica Bell has theorized that, with respect to policing, communities of color suffer from something greater than a legitimacy-perception problem—from "legal estrangement" in which there is "symbolic community exclusion" from the group of those who consider themselves to be protected by the law.[227] This is best explained by Bell in her recounting of the views of a Baltimore high schooler named Shawna:

> Although Shawna sees the law and its enforcers as worthy of obedience as a theoretical matter, she does not believe that law enforcement officials see her, and people like her, as a true part of the polity. She is nothing more than a 'thug.' This understanding of her group's place in the world does not lead to lawbreaking or noncooperation, as a legitimacy perspective might predict. Yet her words nonetheless reveal a cleavage, or estrangement, from the enforcers of the law. Her story reveals that the empirical outcome that

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(2022), available at https://www.lakeparkflorida.gov/government/departments/mayor-commissioners; North Lauderdale, Florida (five members), see *City Commission*, NLAUDERDALE.ORG (2022), available at https://www.nlauderdale.org/quick_links/city_commission/index.php.

[226] "And, though the gap between the absolute numbers of underrepresented whites and African Americans is striking, it doesn't capture the full scope of the disparity. Whites outnumber African Americans 5-to-1 in the communities examined for this report so their smaller absolute numbers are also a smaller share of a larger total population. Just 1.5 percent of whites in the municipalities in the International City/County Management Association's (ICMA) sample have local councils that don't represent them. By contrast, 16.5 percent of African Americans in these municipalities are underrepresented. So, approximately one in every six African Americans lacks full representation on his or her local council, compared to just one in 66 whites." Shanton, *Problem of Underrepresentation*.

[227] Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2099 (2017); Id. at 2066–67 ("I introduce the concept of legal estrangement to capture both legal cynicism--the subjective 'cultural orientation' among groups 'in which the law and the agents of its enforcement, such as the police and courts, are viewed as illegitimate, unresponsive, and ill equipped to ensure public safety'--and the objective structural conditions (including officer behaviors and the substantive criminal law) that give birth to this subjective orientation.").

> legitimacy theory is best used to explain is the wrong outcome: Shawna's problem is not noncompliance, but symbolic community exclusion.[228]

Bell's response to this phenomenon is to call for "structural reform" with "attention to group societal membership…."[229] While she was not thinking of legislative size directly, one can see how a larger, more inclusive legislature at the local level—where policing is controlled—would help to "dismantle legal estrangement."[230] We cannot be sure what communities of color want with respect to police presence and policy, but we *can* be sure that these communities want to have a seat at the table when the decision is made.

2. Case Study: Partisan Minorities in Deep-Red and Deep-Blue Localities

The small size of local legislatures also inhibits representation of political parties that exist as a substantial minority in a given local population. In "solid Blue" or "solid Red" localities, the opposing party may have no representation on a local legislature despite the party's presence in the citizenry, resulting in a sense of alienation from the local political institutions on the part of the excluded group. According to the ICMA survey, most (approximately 70%) of local legislative elections are nonpartisan.[231] But in the approximately 30% where political parties play a role, micro-legislatures can work to exclude minority parties from having a meaningful voice—and in extreme cases, from having any voice at all. The Los Angeles City Council has 15 seats, with 14 held by Democrats and one by an independent; 20% of the population of Los Angeles, though, is registered as Republicans.[232] The same exclusion of a minority party can be true in small communities. In the

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[228] Bell, *Police Reform* at 2099.
[229] Id. at 2131.
[230] Id. at 2126.
[231] International City/County Management Association, *2018 Municipal Form of Government Survey – Summary of Survey Results* (Washington, DC: ICMA, 2019), available at https://icma.org/sites/default/files/2018%20Municipal%20Form%20of%20Government%20Survey%20Report.pdf
[232] Report of Registration as of February 10, 2013 -- Registration by Political Subdivision by County, CALIFORNIA DEPARTMENT OF STATE, available at https://web.archive.org/web/20131103114419/http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-2013/political-sub.pdf; *City Council*, LACITY.ORG (2022), available at https://www.lacity.org/government/popular-information/elected-official-offices/city-council.

borough of Smethport, PA (population about 1,600), [233] the eight-person council is all Republican even though 30% of the borough voted Democratic in the 2020 election.[234] This underrepresentation and, in some cases, lack of representation, communicates something to the excluded party's members: their local government does not speak for them. This becomes especially problematic when local legislatures enact ordinances that are designed to signal fealty to a plank of a national party's platform.

One could find many examples of this signaling phenomenon, and I will mention only one here: the movement for "sanctuary cities for the unborn."[235] Spurred on by the advocacy of a nonprofit leader in Texas, a number of small towns in Red states have adopted ordinances flagging strong

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[233] *Population and Housing Unit Estimates*, UNITED STATES CENSUS BUREAU (May 24, 2020); 23% voted for Hillary Clinton in the 2016 election. Matthew Bloch, Larry Buchanan, Josh Katz, and Kevin Quealy, *An Extremely Detailed Map of the 2016 Election*, NEW YORK TIMES (July 25, 2018), available at https://www.nytimes.com/interactive/2018/upshot/election-2016-voting-precinct-maps.html#9.00/41.809/-78.446

[234] *An Extremely Detailed Map of the 2016 Election*, NEW YORK TIMES, available at https://www.nytimes.com/interactive/2021/upshot/2020-election-map.html. I use this as a proxy for party membership despite the shortcomings of this proxy, since PA appears to not keep sub-county level data on political party registration. The county that Smethport is in—McKean—has a Democratic population of approximately 24%. *Voting & Election Statistics--Current registration statistics,* PENNSYLVANIA DEPARTMENT OF STATE, available at https://www.dos.pa.gov/VotingElections/OtherServicesEvents/VotingElectionStatistics/Pages/VotingElectionStatistics.aspx; *Borough Council*, SMETHPORTPA.ORG (2022), available at https://smethportpa.org/boro/borough-council-members/; *Summary Results Report 2021 Municipal Election*, PENNSYLVANIA DEPARTMENT OF STATE, (Nov. 2, 2021), available at https://cms6.revize.com/revize/mckeanpa/McKean%20Official%20Summary%20Results%20Master%202021.pdf; Nathan Muller, *High Voter Turnout in Smethport*, SMETHPORTPA.ORG (May 20, 2015), available at https://smethportpa.org/high-voter-turnout-in-smethport/ (indicating Yingling as republican); Marcie Schellhammer, *Busy primary season in McKean Co.*, THE BRADFORD ERA (Mar. 14, 2019), available at https://www.bradfordera.com/news/busy-primary-season-in-mckean-co/article_c7ff5032-45fd-11e9-8735-87aaf5e65a17.html (indicating Ognen as republican); Official Absentee Ballot—Smethport Borough, McKean, PA, Municipal Election Held on the 2nd Day of November, 2021, PENNSYLVANIA DEPARTMENT OF STATE, available at https://cms6.revize.com/revize/mckeanpa/departments/voter_registration_and_elections/docs/Smethport%20Boro.pdf (indicating Hill as republican).

[235] Jessica Glenza, *The tiny American towns passing anti-abortion rules*, THE GUARDIAN (April 27, 2021), available at https://www.theguardian.com/world/2021/apr/27/us-tiny-towns-anti-abortion-ordinances.

opposition to abortion via various measures.[236] In November, 2021, the seven-person micro-legislature of the city of Lebanon, Ohio (population approximately 21,000), voted unanimously to "outlaw[] abortion" within city limits.[237] Violations are punishable as misdemeanors with up to six months imprisonment, and they appear to target only doctors performing the operation (not the women undertaking it).[238] This clearly unconstitutional ordinance[239] was symbolic in nature—a flexing of Republican political muscles on the local level.

While the city council in Lebanon is technically nonpartisan, the partisan nature of the ordinance was immediately apparent to observers. The only Democrat of the seven (and the only woman)—Krista Wyatt—resigned before the vote in protest—leaving Lebanon's substantial minority of Democrats (likely at least one quarter of the population)[240] without representation.[241] Her resignation statement illustrates well the alienation a minority party can feel in when a micro-legislature impacts representation in a locality: "There is a core group of people who have hijacked the council to force their personal, political and religious views on the entire citizenship of Lebanon. It is not fair to the citizens and is not the role of a City Council member to be a moral compass."[242] A local activist noted that the nonprofit leader from Texas is "looking for [towns] with an extreme Republican city

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[236] Id. (noting first ordinance passed in Waskom, Texas, that "approved a measure to punish doctors and anyone who "aids and abets" an abortion with a $2,000 fine.").
[237] Ordinance 2021-053, Lebanon, OH, available at https://www.scribd.com/document/509488876/ORDINANCE-2021-053-of-Lebanonl; *Minutes for the Lebanon City Council Meeting*, LEBANON CITY COUNCIL (May 25, 2021), available at https://cms8.revize.com/revize/lebanonoh/05-25-2021.pdf.
[238] Brook Endale & Rachel Smith, *'Sanctuary city for the unborn': Lebanon is first city in Ohio to ban abortions*, CINCINNATI ENQUIRER (May 25, 2021), available at https://www.cincinnati.com/story/news/2021/05/25/lebanon-city-council-vote-abortion-ban/7434551002/
[239] Id. (see ACLU comment and analysis contained therein).
[240] Ohio does not publicize sub-county voter registration data, so the precise number of Democrats in the locality is not known. However, consider the following proxy: in the 2020 presidential election, even in the reddest of Lebanon's precincts the Democratic vote was 27%. *An Extremely Detailed Map of the 2020 Election*, NEW YORK TIMES (2021), available at https://www.nytimes.com/interactive/2021/upshot/2020-election-map.html.
[241] Ed Richter, *Lebanon council fills vacant seat*, JOURNAL NEWS (Jun. 23, 2021), available at https://www.journal-news.com/local/lebanon-council-fills-vacant-seat/P62R6IKSUJAGXDKWD4VPFVXW5E/; Audra Heidrichs, *How anti-abortion advocates are pushing local bans, city by small city*, THE GUARDIAN (Nov. 23, 2021), available at https://www.theguardian.com/world/2021/nov/23/anti-abortion-local-bans-ohio.
[242] Heidrichs, *Local Bans*.

council and Trump supporters."[243] She recounted that one of the council members at the adoption meeting responded to a citizen who opposed the ordinance by saying, "[T]his is a conservative town and you should have done your research before you moved here."[244] The activist concluded, "If all I'm going to get is resistance from a now completely white male extremist rightwing council – because that's what this city elected – I'm not wasting my time on Lebanon."[245] Micro-legislatures can result in the non-inclusion or extreme-underinclusion of partisan minorities on the legislative body, and the result is a feeling of alienation from the institution and a corresponding reduction in sociological legitimacy.

CONCLUSION: THE WAY FORWARD

Local governments in the United States have the power to legislate, but the institutions that create local law are micro-legislatures with an average size of four members. A legislature of this size is unheard of at any other level of American government or, for that matter, in any other nation. Legislatures are always large assemblies, usually with over one hundred members, and for good reason. Only an assembly can satisfy two requirements of a properly designed legislature: that it be representative and democratic. Mainstream normative political theory, when applied to a micro-legislature, reveals defects on both counts. Micro-legislatures cannot be descriptively representative of the diverse political communities that characterize modern societies, and lack of descriptive representation results in a failure of inclusion that is fatal to true deliberation, which is a touchstone of democratic legitimacy.

If one accepts these conclusions, then the path forward for local government will depend on the appetite one has for reform. The most obvious response to the defects of a micro-legislature is to expand its size, bringing it into conformity with the norm at the state level.[246] While the precise contours of reform go beyond the scope of this project, localities should consider gradually expanding the size of their legislatures every election, with a goal

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[243] Id.
[244] Id.
[245] Id.
[246] Another option would be to remove legislative power from local governments, leaving local councils solely with the power that is appropriate for their small size: executive-type power. The latter approach seems to kill the patient instead of treating her disease, though. It is not local legislation that we have identified as a problem, but instead the institution that is creating it. The institution should change, not the power it exercises.

of achieving a standard legislative size. Were a four-person legislature to begin doubling itself every two years, it would achieve this within ten years (reaching 128 members).

Given that such a change is extremely unlikely, an alternative way of addressing the problem of micro-legislatures is to change the scrutiny that the judiciary gives to the legislation that comes out of them. The primary analytical lens through which local ordinances are reviewed by state judges is the doctrine of preemption—whether the local ordinance can survive when viewed in the context of state law (which never yields), and given the powers the state has granted to the locality.[247] Preemption doctrines flow from a recognition of the inherently subordinate status of local governments as creatures of state law,[248] and give teeth to a background skepticism of exercises of local power. Knowing that local legislation, unlike state law, emanates from an unrepresentative and undemocratic micro-legislature should result in greater judicial scrutiny of these ordinances, and should result in more aggressive and more prevalent holdings of preemption.

Those who oppose the judicial invalidation of legislation normally do so because of its "countermajoritarian" effects, [249] but this is premised on the comparative democratic legitimacy of the legislature that is being thwarted. Micro-legislatures undercut this presumption. Moreover, in the context of preemption, this judicial invalidation works to protect and advance a state law policy that was enacted by a normal-sized legislature. Here, therefore, judicial "activism" through preemption—often criticized by localists[250]—is in service to democracy, not counter to it.[251]

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[247] See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1114 (2007).

[248] "Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

[249] Indeed the standard case against judicial invalidation of statutes is called the "countermajoritarian difficulty." See Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 NYU L. REV. 333 (1998).

[250] See, e.g., Nestor M. Davidson and Laurie Reynolds, *The New State Preemption, The Future of Home Rule, and The Illinois Experience*, 4 ILL. MUNICIPAL POL'Y J. 19 (2019).

[251] One of the most important responses to the so-called "counter-majoritarian difficulty," after all, is the theory of "representation reinforcement" crafted by John Hart Ely. See JH ELY, DEMOCRACY AND DISTRUST; John H. Ely, *Toward a Representation-reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451, 453 (1978) ("[T]he pursuit of these 'participational' goals of broadened access to the processes and the payoffs of representative government."). Non-representative local micro-legislatures seem like excellent targets for representation reinforcement. This judicial engagement, however, protects the representative institution of

the state legislature, which is more concrete than Ely's unrepresented discrete and insular minorities.