

RESPONSE

The Township, The Hope of Democracy?: History As Moral Act¹

*Jane Manners**

INTRODUCTION

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| INTRODUCTION | 69 |
| I. TOWNSHIPS IN NORTH CAROLINA’S 1868 CONSTITUTION: A CASE STUDY | 73 |
| II. ANNEXATION IN NEW ENGLAND: LOCAL GOVERNMENT LESSONS FROM THE HOME OF THE COMMUNITARIAN TOWN MODEL..... | 78 |
| III. THE HOPE OF DEMOCRACY: HISTORY AS EVIDENCE OF COMMUNITARIAN LOCALISM’S POTENTIAL? | 83 |
| CONCLUSION: THE FUNDAMENTAL ISSUE OF AMERICAN POLITICAL THOUGHT | 85 |

“The Government is in the hands of the people at large. They are an excellent check against high salaries, extravagant establishments, and every species of expenditure which they do not see or, in which they do not participate. But they receive an immediate benefit from the money expended amongst themselves, either as being employed in opening roads, the erection of buildings &c., or as being more interested in the application of public money to schools, the payment of jurors + other petty offices, and even prospectively in the provision for the poor. They in

1. This title plays on *The City, The Hope of Democracy: The Casebook as Moral Act*, 103 HARV. L. REV. 1174 (1990), Joan Williams’ review of Gerald E. Frug’s local government law casebook. Williams’ title, in turn, plays on F. HOWE, *THE CITY: THE HOPE OF DEMOCRACY* (1905).

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fact pay little or no portion of the direct tax, (occasionally enough in towns, but indirectly by the increase in rents) and receive the greater part of its proceeds.

You perceive that I do not disguise what I think to be the defects, and I know no other, of any importance in our system of taxation. I do not know any remedy for it here but in the exertions to obtain the best men we can for our municipal officers. But where institutions are yet to be formed, I may say that I have not discovered any evil to arise from universal suffrage in the choice of Representatives to our legislative bodies, but that for municipal officers who have no power over persons, but only that of applying the proceeds of taxes, those who contribute to such payment ought alone to have the privilege of being electors.”²

“The fundamental issue of American political thought was how this most politically democratic country in the world could avoid the threat of coerced economic equality.”³

In the fall of 1832, the Marquis de Lafayette wrote to his old friend Albert Gallatin with an urgent question. Concerned by the growing strength of France’s anti-liberal forces, Lafayette wanted to hear, from the venerated statesman who had served as both ambassador to France and secretary of the treasury under both Thomas Jefferson and James Madison, what the cost of republican government actually was. How did taxes under the republican institutions of the United States compare to taxes under France’s monarchical regime? Were they really, as his opponents were claiming, that much higher? “A few words from you,” Lafayette explained, “would greatly contribute to enlighten the public mind and set the question at rest.”⁴

Gallatin’s response was probably not what Lafayette had been hoping for. Popular sovereignty, Gallatin acknowledged, was strong protection against forms of wasteful government spending from which the public did not directly benefit, such as “high salaries” and “extravagant establishments.” But where the people did reap rewards—from employment in the construction of roads and buildings, from access to public schools, even (“prospectively,” Gallatin surmised) from poor relief—a broad franchise was likely to increase taxes, not lower

2. Letter from Albert Gallatin to the Marquis de Lafayette (May 12, 1833), in PAPERS OF ALBERT GALLATIN (on file with the New York Historical Society) [hereinafter 1833 Letter from Gallatin to Lafayette].

3. MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 9 (1992).

4. Letter from the Marquis de Lafayette to Albert Gallatin (Oct. 18, 1832), in PAPERS OF ALBERT GALLATIN (on file with the New York Historical Society).

them. In municipal government in particular, Gallatin saw a worrying mismatch: a town's eligible voters usually far outnumbered its property-owning taxpayers. In general, Gallatin hastened to add, he wasn't opposed to universal suffrage, and he certainly didn't think rate of taxation was the correct measure of the happiness and prosperity of a nation. But "where institutions are yet to be formed," he advised Lafayette, participation in the elections of local officers—positions with "no power over persons, but only that of applying the proceeds of taxes"—should be restricted to taxpayers alone.⁵

How much does representative government cost? Who benefits? Who pays? These are not the central questions in Professor Daniel Farbman's illuminating article, *Reconstructing Local Government*, which looks at the role of racial resentment in the rise and fall of local, participatory governance in the Reconstruction South. But they are, I believe, questions that lurk in the shadows of his cautionary tale, and they are the questions that I will focus on here in an effort to tease out some additional factors that may have been at play in this historical moment and to reconsider the lessons Farbman draws from it. Local government law scholars have long argued that for participatory localism⁶ to achieve its desired effects—civic education, sustained democratic engagement, broadly shared prosperity—municipalities must possess both a sufficient tax base and the power to spend to meet their populations' needs.⁷ The same was true, I suspect, in the Reconstruction South. Focusing on Farbman's North Carolina case study, I will explore the possibility that, in addition to the racial and

5. 1833 Letter from Gallatin to Lafayette, *supra* note 2.

6. In a footnote, Farbman identifies this term as the contemporary analog of the communitarian localism he describes. See Daniel Farbman, *Reconstructing Local Government*, 70 VAND. L. REV. 413, 420 n.16 (citing Richard Briffault, *Our Localism Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 393–403 (1990)). I use the term in this sense.

7. The literature on local power and its connection to participatory democracy is vast. See, e.g., PAUL E. PETERSON, CITY LIMITS 218 (1981) (concluding that changes in the legal structure of local government would empower cities to meaningfully redistribute wealth and "make greater equity more possible"); Briffault, *supra* note 6, at 111–15 (arguing city power is most accurately defined not as the power of cities to prevail in city-state conflicts, but rather as the power of localities to exercise revenue-raising, regulatory, and spending authority, a power that often benefits wealthier suburbs to poorer cities' detriment); Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849–57 (1994) (arguing that the wealth gap between whites and blacks and America's history of racial segregation means that, even in the absence of de jure segregation and racial animus, municipalities are unlikely to become significantly more integrated, because wealthier white towns will tend to have fewer needs and superior public services (e.g. education), giving whites an economic leg up and making it difficult for poorer blacks to achieve the wealth necessary to integrate the rich white towns); Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23 (1998) (treating city services not as public goods, but as agents of "community building"); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (arguing that the law has rendered cities powerless vis a vis states, leaving them unable to fulfill their potential as sites of robust participatory democratic engagement).

outsider resentments Farbman rightly highlights, constraints on the new localities' power of the purse also contributed to their ultimate undoing. Strict limits on local governments' taxing ability, found throughout North Carolina's 1868 constitution, suggest that, perhaps, the newly formed townships were strapped for cash from the get-go, undermining their ability to provide the services that might have bolstered their popularity and legitimacy in the eyes of their constituents. Without a meaningful power to tax, North Carolina towns would have been unable to redistribute wealth within their borders, leaving them without the means to achieve either the widespread prosperity or the neighborly common cause reformers had hoped for. Township residents, with few public goods and even less in common, likely had a hard time understanding what local government was for. Left without an apparent reason for being, the few officials employed by the towns must have seemed a needless expense, rendering the entire township experiment vulnerable to the racial and outsider resentments, stoked by its conservative opponents, that ultimately did them in.

All of the foregoing is admittedly conjectural: I have no idea if limits on the North Carolina townships' taxing power actually contributed to their demise. It's possible that the reverse was true: that the townships redistributed local wealth *too* effectively, fueling a conservative revolt that led to their undoing. Or maybe the truth lies somewhere in the middle: North Carolina's experiment gave local governments enough power to make wealth redistribution seem frighteningly possible to elites, but not enough to demonstrate the popular public benefits local taxation can bring. Whatever the causal chain back then, the hurdle posed by restraints on local power is a live problem today, one that has taken on added urgency as contemporary scholars and reformers look increasingly to local government to make up for shortcomings at the federal and state level.⁸ In Farbman's able

8. David Barron has long argued that municipalities should test the boundaries of conventional "home rule" doctrine by exercising greater legal autonomy. See David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255 (2003). More recently, many scholars have urged progressives to "look to the local," both because of the current conservative cast of state (and now federal) governments, and because popular political pressure is often more effective at the local level. See, e.g., Heather Gerken, *Federalism as the New Nationalism: An Overview*, 123 Yale L. J. 1889, 1890 (2014) (describing "the nationalist school of federalism"); Daniel Rodgers, *What Next for Liberalism?*, 43 DEMOCRACY: A JOURNAL OF IDEAS (2017) (arguing that local government is both a more receptive forum for liberal policies and a must-win for liberalism's future); Ezra Levin, Leah Greenberg, & Angel Padilla, Opinion, *To Stop Trump, Democrats Can Learn From the Tea Party*, N.Y. TIMES, Jan. 2, 2017, at A23 (arguing that Democrats should employ the local organizing tactics of "Tea Party" conservatives to build progressive political momentum); Jeffrey Rosen, Opinion, *States' Rights for the Left*, N.Y. TIMES, Dec. 3, 2016, at SR4 (arguing that in the Trump era, progressives must "use Jeffersonian means to achieve Jeffersonian ends"); Theda

telling, North Carolina's story shines light on the role of racism and outsider animus in foreclosing local government's communitarian promise. Perhaps the North Carolina experiment can also teach us about the connection between that communitarian promise and the fiscal structure that underlies it.

I. TOWNSHIPS IN NORTH CAROLINA'S 1868 CONSTITUTION: A CASE STUDY

Farbman's story is of a failed experiment in racial integration told through the revealing lens of local government. Through a collection of case studies, he recounts the unsuccessful efforts of idealistic Republicans to import a Northern model of local governance to the South in the wake of the Civil War, thereby inculcating habits of civic participation and communal self-governance among a racially diverse, socially and economically stratified population accustomed to neither. Prior to the War, Farbman tells us, Southern society was essentially feudal: the plantation was the basic unit of governance, with planters' authority over their slaves and nearby poor whites backstopped by county officials whose primary role was to protect private property (a category that included slaves). Union victory meant an end to this mode of social organization, and Northern reformers hoped that it also meant an opportunity to introduce what Farbman terms "communitarian localism": local governments grounded in robust, broad-based participation and a tradition of joint endeavor. Foremost in the minds of some of these reformers was the model of the New England town, with its emphasis on what Farbman terms "communal gatherings and collective effort." In the North, they believed, the model had created an engaged citizenry and widespread prosperity. In the impoverished, racially diverse Reconstruction South, they hoped it would do the same. Thanks to the South's plantation economy, whites and blacks had always lived in geographic proximity to each other; now, reformers hoped, that proximity would enable racially integrated municipal governance to thrive. These reformers believed in the virtues of participation, almost as a religious tenet: through the institutionalized practice of communal decisionmaking, whites and blacks, rich and poor, would learn to live together in the South's new free labor regime.

Skocpol, Opinion, *Trump is Going After Health Care. Will Democrats Push Back?*, N.Y. TIMES, Dec. 21, 2016, at A27 (arguing Democrats must organize locally to effectively resist Republican efforts to repeal the Affordable Care Act).

The reformers' vision was short-lived. After early successes, their township experiments fell prey to what Farbman describes as three distinct yet related forces: Southern resentment at the imposition of a Yankee township model; widespread resentment at the money and time required by active government; and white resentment of black political power. Rejecting the idea that the townships would serve as "schools where the lessons of statesmanship will be learned [and] which may be afterwards displayed in the government of the State," Southern conservatives caviled at the changes to what Farbman terms their "proprietary localism": a model of local government whose primary purpose is the protection of private property.⁹ Fear of local black power proved a potent rallying cry, both for drumming up white support for conservative candidates for town offices and, ultimately, for eradicating those positions entirely. By 1875, the Republicans' experiment in local government had been defeated throughout the South, leaving political control firmly in the hands of conservative white state legislators.

Although Farbman canvasses township efforts in Reconstruction-era Virginia, West Virginia, and South Carolina, he focuses on North Carolina, where townships lasted the longest (in all other states, the township system was thwarted practically as soon as it was launched). The leader of the effort to remake North Carolina's local governance was the colorful Albion Tourgée, whom Farbman describes as "part missionary, part capitalist, and part militant." Taking a cue from fellow Northerners like the Massachusetts cotton manufacturer Edward Atkinson, who envisioned a postbellum South "permeated and regenerated by New England men and by New England ideas,"¹⁰ Tourgée used North Carolina's 1868 constitutional convention to usher in judicial, penal, and electoral reforms (including universal suffrage for men over 21) and to initiate statewide public education and a push for legal codification. Key to Tourgée's hopes for reform, Farbman explains, were the townships: the fora in which newly enfranchised men would learn the power and responsibility of self-governance.

Farbman's description of the resulting constitution focuses, naturally, on how the townships would be laid out and governed. Tourgée had drafted the township provisions in committee, and the convention adopted his words essentially untouched and, with one exception—a prohibition on the collection of local taxes to pay debts

9. Farbman, *supra* note 6, at 449 n.127 (citing JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NORTH CAROLINA AT ITS SESSION 1868, at 486 (Raleigh, Joseph W. Holden 1868)).

10. Farbman, *supra* note 6, at 438 n.78 (citing Edward Atkinson, *The Future Supply of Cotton*, 98 N. AM. REV. 477, 485 (1985)).

incurred in supporting the rebellion—unopposed. The townships were to have a biennially elected, three-member Board of Trustees to oversee roads, bridges, and taxation, and a biennially elected, three-person school committee, whose duties would be prescribed by law. In Farbman’s reading, these provisions prepared the ground for a robust, communitarian localism to take root.

I read the township provisions differently. Undoubtedly, they were meant to establish townships where none had existed before, and undoubtedly, universal male suffrage and the regular election of town officials were key to Tourgée’s vision of participatory, responsive local government. But other provisions suggest that Tourgée’s vision included important constraints on local power—in particular townships’ power to tax and spend. County commissioners, for instance, were to review and revise township trustees’ assessments of towns’ taxable property.¹¹ Local voters had to approve, by majority vote, any new municipal debt or tax for any purpose other than “necessary expenses.”¹² And, in case those provisions weren’t sufficient protection against runaway spending, the constitution included one more:

It shall be the duty of the Legislature to provide for the organization of cities, towns, and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debts, by such municipal corporation.¹³

11. N.C. CONST. of 1868, art. VII, § 6. Alleged inadequacies in localities’ methods for assessing taxable property were a common target of critics of local taxation in this era. *See, e.g.*, NOAM MAGGOR, *BRAHMIN CAPITALISM: FRONTIERS OF WEALTH AND POPULISM IN AMERICA’S FIRST GILDED AGE 57–74* (2017).

12. N.C. CONST. of 1868, art. VII, § 7. Howard McBain, a turn-of-the-century political scientist and student of constitutional home rule provisions, speculates that this provision was intended to prevent townships from lending their credit to railroad corporations. HOWARD LEE MCBAIN, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 57* (1916).

13. N.C. CONST. of 1868, art. VIII, § 4. The language in this provision, as elsewhere, is strikingly similar to that in the 1851 constitution of Ohio, Tourgée’s home state. *Compare* OHIO CONST. of 1851, art. XIII, § 6 (“The General Assembly shall provide for the organization of cities, and incorporated villages by general laws, and restrict their powers of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power.”), *with* N.C. CONST. of 1868, art. VIII, § 4. It is also nearly identical to provisions incorporated in the constitutions of New York in 1846, Wisconsin in 1848, California in 1849, Michigan in 1850, Oregon in 1857, Kansas in 1859, Nevada in 1864, Alabama in 1867, as well as South Carolina and Arkansas in 1868. *See* McBain, *supra* note 12, at 52–53. The continuities between Reconstruction constitutions in the South and their Northern antecedents may prove a fruitful way to explore the roots and motivations of the Southern township experiment. *See, e.g.*, JED SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA 103–04* (2012) (describing the fiscal conservatism and government skepticism of the state constitutional revisions of the 1840s and 50s).

The intent of such provisions could not be clearer: local expenses¹⁴ should be few and cheap, and it was the state legislature's job to make sure that was so.

In 1868, concerns about local spending were not limited to North Carolina. Around the country, conservative reformers were focusing increasingly on what they saw as two related and growing local government problems: rising taxes and speculative investments in public improvements, railroads in particular. Eager to attract railroad development and the boom times they hoped would follow, legislators had, from the 1850s on, issued municipal bonds and pledged municipal

14. The constitution's state level taxation provisions suggest the drafters also wanted to limit the state legislature's power of the purse. On the one hand, to ensure sufficient revenue, they required taxation of all real and personal property, including "all monies, credits, [and] investments," as well as "adequate taxation" to cover the interest and eventually the principal of the state's public debt. N.C. CONST. of 1868, art. V, §§ 3–4. (This language, too, is identical to that in Ohio's 1851 Constitution. See OHIO CONST. of 1851 art. XII, § 2.) But they also imposed strict rules governing the passage of such taxes, requiring them to be uniform (barring a progressive rate structure) and limiting their extent and purpose. Article II, Section 16 requires any state law imposing a tax or contracting a debt, or permitting municipal corporations to do the same, to be read and passed three times, on three different days, by each legislative house, with the yeas and nays of the second and third readings entered on the official record. N.C. CONST. of 1868, art. II, § 16. Article V, devoted exclusively to taxation, prohibits the state from issuing any additional debt, except to pay a casual deficit or suppress insurrection, until its bonds are traded at par, unless it passes a special tax (pursuant, presumably, to Article II, Section 16's procedures) to pay the annual interest. *Id.* at art. V, § 5. It also prevents the state, with few exceptions, from lending its credit to any project without first gaining approval through a statewide voter referendum. *Id.* And it limits to two dollars the annual total of both state and county capitation taxes, to be imposed on every adult male over twenty-one and under fifty, stipulating that the revenue derived therefrom is to be dedicated to education and poor relief, in a ratio not to slip below three to one. *Id.* at § 1. Some of these stipulations were likely intended to prevent corruption, such as suspect state financing of private enterprise. Corrupt bond issues supporting railroad construction were, by 1868, a national concern for Republicans and Democrats alike. See CHARLES FAIRMAN, A HISTORY OF THE SUPREME COURT—RECONSTRUCTION AND REUNION 935 (1971); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 93 (1986); *infra* text accompanying notes 15–17. Indeed, it bears mention that 1868 was also the year in which Thomas Cooley, focused on curbing capital's manipulation of state legislation, published what would soon become the nation's most authoritative interpretation of constitutional law, his *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*. See *id.* at 145–46. But a concern for corrupt legislation doesn't explain all of the restraints that North Carolina's 1868 constitution placed on legislative authority. Other aspects—particularly those limiting the taxes going to poor relief and subjecting any new government expenditures and investments to a voter referendum—seem to reveal a concern with taxation in general, regardless of whether it was intended to support a new railroad, public education, or poor relief. This, too, fits the historical pattern: as David Barron and others have described, constitutional reform projects in the 1870s and 1880s were often driven by concerns over excessive taxation and government spending. See Barron, *supra* note 8, at 2294 (describing the home rule movement in part as an effort to "rejigger the city-state relationship in a way that would restore the idealized, small-scale, low-tax, low-debt, highly privatized" vision of local government); see also McBain, *supra* note 12, at 48–55 (cataloguing the introduction of constitutional limitations, beginning in the 1870s and extending through the turn of the century, on legislatures' powers to tax and borrow at both the state and local level).

credit to underwrite railroad ventures in their home towns.¹⁵ By the 1860s, however, it was becoming clear that riches did not always follow railroads, as towns were left with large debts and consequently heavy tax burdens. Conservative reformers, eager to stem such improvident investment, turned to constitutional amendment to impose permanent limits on legislators' ability to make what they saw as rash, unwise, and often corrupt development deals.¹⁶

North Carolina's constitutional limitations on municipal taxes and municipal spending fit this pattern, and they may well have been effective at preventing costly missteps on the part of the state's new local governments. Concerns about railroad aid were certainly warranted: by 1872, the state's subsidies to railroad construction had doubled its debt and eviscerated its credit, and around the South, government-sponsored capitalist development led to rising taxes, shrinking credit, and rampant corruption.¹⁷ But I suspect that these fiscal restraints, well-intentioned as they might have been, also constrained the radical, redistributive potential of communitarian localism in North Carolina from the start. With limited power to determine their own needs and to tax their citizens accordingly, townships would have struggled to realize the vision of local self-governance—that of “communal gatherings and collective effort”—that Farbman attributes to Tourgée and his fellow reformers. North Carolina's 1868 constitution was in many other ways truly revolutionary: it introduced universal male suffrage, designed elections to ensure that elected officials accurately represented the wishes of their constituents, and mandated statewide public education and poor relief, funded by a statewide tax. And Tourgée may well have believed that, given the rural, sparsely populated nature of his adopted home state, local taxes were largely unnecessary; the urban needs of Northern cities would not trouble North Carolinians, and tying local officials' hands was a small price to pay to save them from the corrupt railroad deals plaguing their counterparts around the country. Nevertheless, by establishing limits on local taxing and spending, Tourgée's constitution constrained the capacity of North Carolina's most democratic, participatory units of government to provide for their

15. Williams, *supra* note 14, at note 65 and accompanying text (describing the “exponential increase in municipal railroad aid” incurred in the decades before and after the War).

16. See MCBAIN, *supra* note 12, at 55–58; Barron, *supra* note 8, at 2288–321 (describing three dramatically different visions of home rule reform, which can be summarily described by their hoped-for substantive ends: low taxes, strict administrative oversight of legislative activity, and enhanced local power over taxation and the provision of local services).

17. For an account of the role of railroad construction in the demise of Radical Reconstruction, see ERIC FONER, *A SHORT HISTORY OF RECONSTRUCTION* 162–68 (1990).

communities' welfare. Local governments were, by Tourgée's design, highly attuned to the needs of their constituents. But in many cases, they may not have been able to do much to respond to them.

II. ANNEXATION IN NEW ENGLAND: LOCAL GOVERNMENT LESSONS FROM THE HOME OF THE COMMUNITARIAN TOWN MODEL

In the years after the war, Tourgée and his fellow reformers weren't the only advocates showering public praise on the New England town model. New Englanders with no role in Southern Reconstruction also celebrated the particular history and enduring virtues of their own mode of local governance. Farbman quotes Joel Parker, a conservative Harvard Law School professor, as describing towns as "the arterial system of New England, through which has circulated the life-blood which has invigorated, sustained, and strengthened her...."¹⁸ Parker's paeans to local New England history had nothing to do with providing a model for Southern townships. (Indeed, Parker was an outspoken opponent of Reconstruction, which he deemed an unconstitutional exercise of executive power.¹⁹) Nor was Governor Bullock's assertion, also quoted by Farbman, that New England towns "have trained the people in democratic habits and principles" an effort to inspire Southern Reconstruction. Instead, what prompted Bullock's comment, and what may have inspired Parker's local history, was a political battle closer to home: the effort to annex to Boston several neighboring cities, including Charlestown, Roxbury, and Dorchester.²⁰ For Tourgée and other

18. Farbman, *supra* note 6, at 438 n.81 (citing JOEL PARKER, ORIGIN, ORGANIZATION, AND INFLUENCE OF THE TOWNS OF NEW ENGLAND: A PAPER READ BEFORE THE MASSACHUSETTS HISTORICAL SOCIETY, DECEMBER 14, 1865 5-6 (1867)). Parker, who delivered his speech in December of 1865, less than a year after the Union's victory, even asserted that New England's town model deserved credit for the colonies' success in the Revolutionary War. The idea that participatory local governments produce self-reliant, independent-minded citizens was often repeated by postbellum boosters of the New England town model. *See, e.g.*, ALFRED CHANDLER, ANNEXATION OF BROOKLINE TO BOSTON: OPENING ARGUMENT FOR THE TOWN OF BROOKLINE BEFORE THE COMMITTEE ON TOWNS OF THE MASSACHUSETTS LEGISLATURE, THURSDAY, MARCH 11, 1880 (1880).

19. *See, e.g.*, JOEL PARKER, REVOLUTION AND RECONSTRUCTION: TWO LECTURES DELIVERED IN THE LAW SCHOOL OF HARVARD COLLEGE IN JANUARY 1865 AND JANUARY 1866 10-12 (1866).

20. In 1865, when Parker was preparing his history of New England towns, the annexation debate was roiling local politics. Prominent Bostonians, including the recently-deceased Josiah Quincy, a fellow Massachusetts Historical Society member and former Harvard College president, had spoken forcefully against annexation, often summoning the New England town's storied past as evidence of its democracy-enhancing qualities. *See, e.g.*, JOSIAH QUINCY, ET. AL., ANNEXATION OF ROXBURY AND BOSTON: REMONSTRANCE OF BOSTONIANS AGAINST THE MEASURE (1865). While Parker does not mention it in his report, it seems plausible that the contemporary annexation debate made the history of New England's towns a particularly salient topic to Parker and his audience.

southern reformers, the deliberative democracy of the iconic New England town made it a model for their bold republican experiment. But in New England, conservatives used that same icon to a different end: the retention of town borders, ethnically homogenous populations, and low taxes.

Unlike their Southern counterparts, radical Republicans in the North saw small municipalities an obstacle to reform. Where Reconstructionists sought to instill democratic habits and practices in the South by carving up county governments into smaller, more responsive local units, radicals in New England adopted the opposite approach. By merging cities and suburbs to form new, enlarged localities, they hoped to recapture tax revenue from wealthy individuals (who were increasingly congregating in upscale suburbs to avoid higher urban rates of taxation) and to use the enhanced tax base to spread urban amenities like sewer lines and high quality public schools to outlying areas. This way, they reasoned, urban artisans and other skilled workers would gain access to more affordable suburban real estate without having to sacrifice the city's desirable public goods.²¹

In postbellum Boston, these annexationists²²—the self-described “industrial classes”²³—sought to reduce social disparities among towns by bringing all of Boston's metropolitan region under one government. In their eyes, a centralized municipality would be both more efficient and more equitable, enabling Boston to recapture the suburban tax base and spread urban amenities over a broader area.²⁴ Initially, their efforts succeeded, resulting in the annexation of Roxbury in 1868, Dorchester in 1870, and West Roxbury in 1873. But elite opposition, centered on concerns about higher taxes, the spread of urban corruption, and racialized fears of immigrants' growing political

21. The story of early metropolitan expansion in the United States has been told often, in such works as SAM BASS WARNER, *STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870–1900* (2d ed. 1978); J. TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA, 1850–1970* (1979); DOLORES HAYDEN, *BUILDING SUBURBIA: GREEN FIELDS AND URBAN GROWTH, 1820–2000* (2003); and KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987). As these scholars note, state policy in the United States favored annexation throughout much of the 19th century. Noam Maggor explores Boston's nineteenth-century expansion specifically as a political struggle over taxation, public finance, and wealth distribution, and it is his account upon which I primarily draw. See MAGGOR, *supra* note 11, at 80–84.

22. Contemporary accounts sometimes distinguish between annexation and consolidation, with the former describing the addition to a city of unincorporated land and the latter describing the absorption of one municipality by its neighbor. See, e.g., JACKSON, *supra* note 21, at 144–48. Here, I conform to the usage of the historical actors, who described the absorption of Boston's neighboring municipalities as annexation, rather than consolidation.

23. “City Document No. 28, Report of the Commissioners on the Annexation of Dorchester,” BOSTON CITY DOCUMENTS (1869).

24. See MAGGOR, *supra* note 11, at 58–62.

power,²⁵ persisted and ultimately prevailed in shifting the state legislature away from the doctrine of forcible annexation—under which the state legislature could enact a municipal merger, regardless of local sentiment—to a process requiring the approval of all affected residents, an impossible hurdle for most annexation efforts to clear.²⁶ The surer path to metropolitan success, argued annexation’s opponents, was municipal decentralization, leaving each population to govern its own affairs on the classic model of the New England town.²⁷

The virtues of local government and the lore of the New England town; the potential for minority political power; the worrisome connection between democratic governance, profligate spending, and rates of taxation: the hopes and concerns raised by government reformers in postbellum Boston sound remarkably similar to those animating North Carolina’s township experiment. As radicals on the question of race, Tourgée and his fellow reformers would have been particularly attracted by the promise of the New England town model: government on a human scale that could offer African Americans both civic education and the possibility of true political power, even elected office. But the fiscal power of those towns would have to be capped to avoid the burdensome taxes and alleged corruption that dogged their Northern counterparts; no pecuniary pitfall could be allowed to undermine the South’s fragile new democracies. Like his fellow Republican reformers, Tourgée undoubtedly saw some public goods, such as public schools and penitentiaries, as vital to the common welfare.²⁸ But the taxes funding such goods should not issue from townships, where the potential for promiscuous spending and

25. See, e.g., CHANDLER, *supra* note 18, at 6 (arguing against annexation of Brookline, an elite suburb west of Boston, by noting that annexation petitioners represented only seven percent of Brookline’s property interests and arguing that large cities “tend[ed] from their very size toward corruption”) (quoting a May 24, 1873 editorial in the BOSTON JOURNAL); JAMES R. MCGOVERN, YANKEE FAMILY 128 (1975) (quoting Chandler’s concern with the “danger” Brookline faced from “the coming of vast numbers of people into America from continental Europe” who were “quite out of harmony with the political trains peculiar to the Anglo-Saxon peoples”).

26. JACKSON, *supra* note 21, at 150–53 (describing the role of wealthy towns in defeating forcible annexation).

27. CHANDLER, *supra* note 18, at 22–24, 31–35. In particular, page 31, where Chandler excerpts an 1878 BOSTON DAILY ADVERTISER editorial decrying annexation, to wit: “The New England town has often been eulogized, but its simplicity as a political system and its efficacy as a political discipline, have never been exaggerated and cannot be. There never was contrived a better way to school the whole body of citizens in the duties and responsibilities of self-government. . . . The town is the exemplification of pure democracy.” It’s worth noting that Edward Atkinson, the Northern cotton manufacturer who envisioned a South “permeated” by New England ideas, was, together with Chandler and Henry V. Poor (a railroad analyst and founder of what became Standard & Poor’s, the financial research firm), one of the key opponents of the ultimately unsuccessful effort to annex the wealthy suburb of Brookline to Boston. See MAGGOR, *supra* note 11, at 69–70.

28. FONER, *supra* note 17, at 156.

corruption was too great and the institutions of government were too insecure. To ensure proper stewardship, Tourgée et al. must have reasoned, the fiscal authority to tax and spend for such ends must lie with a central government entity: the state legislature.

Midway through his article, Farbman devotes a footnote to Dillon's Rule, the widely accepted idea, articulated in an 1873 treatise by the jurist John Dillon, that local governments are creatures of state governments, with all of their powers derived from and thus subject to the legislatures of those states. To Farbman, Dillon's Rule is rooted in laissez-faire principles,²⁹ and its embrace by conservative North Carolinians in the wake of Reconstruction—epitomized by their effort to gut the township system by handing control over local and county affairs to the state legislature—represented a striking about-face from the approach of their Republican predecessors. By “put[ting] local government in the hands of the one branch safely controlled by the elite and then us[ing] that control to keep the state out of the way of private owners' business,”³⁰ Farbman concludes, retrenchment politicians effectively resurrected the South's antebellum plantation localism.

I don't doubt that Southern Redeemers³¹ were deeply committed to using state control to limit local power and protect private property. But I suspect that a similar commitment to state authority also motivated the 1868 constitution's initial township design. While Tourgée and his fellow Republicans probably did not share the Redeemers' firm adherence to laissez-faire principles,³² they almost

29. See Williams, *supra* note 14, at note 47 and accompanying text (stating that Dillon's Rule was widely accepted by 1900 and remains so today). Many scholars have argued that although Dillon's Rule was widely adopted by state jurists, the subsequent incorporation of home rule provisions into many state constitutions effectively superseded it. More recently, however, contemporary surveys have shown that in fact, judges still frequently apply Dillon's Rule to cases regarding municipal authority. See Barron, *supra* note 8, at note 68 (citing examples of the standard historiography), and note 7 (arguing that the fact that most judges still apply Dillon's Rule is not inconsistent with the widespread adoption of home rule provisions).

30. Farbman, *supra* note 6, at 463.

31. The term Redeemers refers to those conservative Southern politicians who worked, in the final decades of the nineteenth century, to upend the social and political changes wrought by Reconstruction. See FONER, *supra* note 17, at 238–53.

32. It's worth noting that Dillon's own ideological commitments defy easy categorization: although a firm opponent of public subsidies to private enterprise, he was also a vocal supporter of child labor protections, maximum hours laws, and the unrestricted right of labor combination. For Dillon's support for protective legislation, see John Dillon, *Property—Its Rights and Duties in Our Legal and Social Systems*, 29 AM. L. REV. 161, 166, 177 (1895) (advocating, among other reforms, the revision of state inheritance laws to prevent “the existence of enormous private fortunes,” which he believed to be “injurious in its consequences to the community in accumulating

certainly feared democratic excess. Like Gallatin, Tourgée would not have wanted his new republican experiment to founder on grievances regarding the magnitude of taxes or the alleged corruption of elected officials. And the 1868 constitution's deep commitment to universal male suffrage only amplified the problem: the certainty of a broad franchise made the need for some other check on public spending that much more acute.³³ By placing that check at the state level, together with a mandate that the state legislature fund such public goods as public education and poor relief, Tourgée ensured funding for critical public needs without imperiling local governments' legitimacy. Vesting authority over taxing and spending at the state level thus avoided the Scylla and Charybdis of local republican governments: a surfeit of democracy would not cause municipalities to tax and spend either excessively or insufficiently, because the power was not theirs to begin with.

The irony is thus twofold. On the one hand, North Carolina's state legislature proved a remarkably poor bulwark against improvident spending and corrupt dealmaking;³⁴ on the other hand, there is the possibility that by limiting townships' ability to meet local needs, Tourgée may have unwittingly undermined their legitimacy. The time, energy, and money required by local government, decoupled from many of the material benefits local government can bring, would have

in a few hands so large a portion of the property and wealth, which ought to be more generally distributed.”). Most analyses of Dillon's jurisprudence and legal philosophy interpret Dillon as a laissez-faire constitutionalist, as Farbman does here; his embrace of protective legislation generally receives less attention. I think the fairest interpretation of Dillon is as a proto-progressive, concerned with advancing the public good through governmental regulation, administrative expertise, and strict, judicially-enforced protections for private property. For standard descriptions of Dillon as a laissez-faire constitutionalist, see, e.g., C. FAIRMAN, RECONSTRUCTION AND REUNION 1864–88, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 834–39 (1971); David Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PENN. L. REV. 487, 506–10 (1999) (underscoring Dillon's fear of democratic politics); Williams, *supra* note 14, at 90–100 (describing Dillon as a corporate lawyer eager to identify with the ruling elite). *But cf.* Frug, *The City as a Legal Concept*, *supra* note 7, at 1109–10 (arguing that Dillon, concerned to protect private property against both democratic excess and corporate exploitation, is more an early progressive than a crude instrument of elite advancement).

33. For an insightful discussion of a contemporaneous attempt to protect private property from democratic majorities by limiting the franchise, see Sven Beckert, *Democracy and its Discontents, Contesting Suffrage Rights in Gilded Age New York*, 174 PAST & PRESENT 116 (2002). David Barron describes how state constitutions' home rule amendments, enacted in the 1870s and 80s, often employed mechanisms to blunt democratic power over taxation. *See, e.g.*, Barron, *supra* note 8, at 2296–98 (describing how home rule in St. Louis was designed to give disproportionate law-making authority to a small group of property holders). Limiting the franchise and limiting legislative power were, effectively, two solutions to the same problem: the tension between participatory democracy and the wealth redistribution such democratic governance makes possible.

34. *See* FONER, *supra* note 17, at 164.

made the townships an easy target. Indeed, as Farbman recounts, conservatives didn't rely only on racism and outsider resentment to stoke opposition to the township experiment. They also attacked town governments as a needless expense, describing them as "ill suited to the wants or desires of the people"³⁵ and "not suited to our sparsely settled communities."³⁶ The prospect of African American local power heightened the outrage, making townships a prime target of conservative opposition. As Farbman explains, their demise meant the end of democratic local governance and the resurrection of proprietary localism throughout the South, establishing a status quo³⁷ that endured through the Civil Rights Movement, and which, at least with regard to the absence of participatory town government, still exists in much of the South today.

III. THE HOPE OF DEMOCRACY: HISTORY AS EVIDENCE OF COMMUNITARIAN LOCALISM'S POTENTIAL?

Although Farbman's article recounts a political defeat, he concludes on a cautiously optimistic note. After rightly suggesting that some contemporary left-leaning arguments for local-government federalism too easily overlook the conservatism of the communities they seek to empower, Farbman nevertheless concludes that local governments still hold promise as both laboratories and engines of democratic, progressive reform. Liberals would do well, he concludes, to look to the local, so long as they take care to identify the communitarian values they seek to cultivate and avoid the proprietary outlook that defines so much of localist thought. Despite Tourgée's ultimate failure, local governments may have been the best hope for meaningful reform of Southern society in the wake of the Civil War, and they remain, Farbman suggests, an important, largely unexploited opening for progressive change today.

Farbman's hopefulness is appropriate; local governments do represent an overlooked opportunity for activism and reform. Indeed, at least since the Progressive Era, urban reformers have looked to cities as "the hope of democracy":³⁸ the optimal forum for edifying, communal

35. Farbman, *supra* note 6, at 460 n.171 (quoting *The North Carolina Convention Question Abroad*, CHARLOTTE OBSERVER at 2, Mar. 31, 1875).

36. Farbman, *supra* note 6, at 460 n.172 (quoting *Courts*, WILMINGTON MORNING STAR at 2, June 12, 1875).

37. As Jim Crow effectively disfranchised black voters, Farbman notes, the prospect of participatory governance grew less alarming, easing the introduction of some elements of communitarian localism at the county level. Farbman, *supra* note 6, at 465–66.

38. See HOWE, *supra* note 1. Joan Williams has described intellectuals' views of the role of cities in American government as "the whore/madonna syndrome of local government law": cities

self-government. Contemporary scholars such as Jerry Frug and David Barron argue that empowering cities vis-à-vis states will liberate citizens from alienating bureaucracies, enabling them to participate in meaningful, democratic decisionmaking and to forge powerful bonds across lines of race, religion, and class in the process.³⁹

For sympathetic local government law scholars like Farbman, the most common question raised by the prospect of such decentralized authority is not the appropriateness of the desired outcome, but its feasibility. Can returning significant decisionmaking power to local governments actually achieve the democratic, community- and prosperity-enhancing results such proposals seek, given the intense race and class segregation of America's cities and suburbs and the thorny extraterritorial impact of nearly every substantive issue (sprawl, the funding of public schools, exclusive zoning, to name three) facing localities today?⁴⁰ There is, in other words, wide agreement on the ends: it's the means that make scholars doubt.

Farbman's article can be read as both an invocation of and a historically-informed response to such questions of practicability. Communitarian localism could have thrived in the Reconstruction South, he argues, had it not been thwarted by racial and outsider resentments. By attending to the hardwon lessons of the past, Farbman suggests, today's communitarian localists might profit from Tourgée's failure, anticipating and thereby surmounting the prejudices and proprietary backlash that doomed the Reconstruction experiment.

are either the hope for virtuous government or its downfall. See Williams, *supra* note 1, at 1175. Champions of participatory localism, not surprisingly, fall squarely in the former category. See Gerald E. Frug, *Empowering Cities in a Federal System*, 19 URB. LAW. 553, 559 (1987) (explaining the participation theory of democracy as a recognition of the edifying and community-building aspects of democratic engagement). To participatory localists, a decentralized approach to democratic engagement is seen as a necessary antidote to the anomie and disaffection that results from larger bureaucratic governance. See Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1279–80 (1984). But Williams and others have questioned whether dialogue is enough: whether such engagement will produce the empathy participatory localists seek, and even whether empathy can satisfactorily address the problem to be solved, the unequal distribution of wealth and power. *Id.* at 1182–83, n.35.

39. Both Frug and Barron have written extensively on both the promise of city power and the ways in which such local control might feasibly be enacted. See, e.g., FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999); FRUG, BARRON, and RICHARD T. FORD, LOCAL GOVERNMENT LAW: CASES AND MATERIALS (4th ed. 2005) (mostly making the case, through excerpts from scholarly work and legal cases, for participatory local governance); Barron, *supra* note 8; Barron, *supra* note 32; Frug, *The City as a Legal Concept*, *supra* note 7. For a review of the first edition of Frug's casebook that highlights its political nature, see Williams, *supra* note 1.

40. Sympathetic, skeptical responses include Briffault, *supra* note 6; Ford, *Bourgeois Communities: A Review of Gerald Frug's City Making*, 56 STAN. L. REV. 231 (2003) (suggesting some level of encroachment on individual freedoms may be necessary to preserve the urbanism Frug celebrates); Ford, *supra* note 7; and Williams, *supra* note 1.

I find Farbman's conception of the past as a source of fresh perspectives on contemporary concerns highly persuasive. But I interpret the moral of Turgée's experiment slightly differently. Then as now, I suspect, the realization of localism's redistributive potential required fiscal, institutional, and ideological support. To achieve radical communitarianism, you need radical empowerment: structures to encourage regular, community-fostering engagement on matters of municipal policy⁴¹ (thereby, one hopes, rendering otherness familiar and weakening community-eroding resentments); a socioeconomically diverse population; a tax base capable of supporting that population; and the authority to tax and spend to meet that population's democratically-determined needs.⁴² Without such qualities, North Carolina's townships would have struggled to achieve the civic educational effects and to supply the public goods that would have helped to justify their existence. Frightening elites with the specter of redistribution, they would have failed to deliver meaningfully on its promise.

CONCLUSION: THE FUNDAMENTAL ISSUE OF AMERICAN POLITICAL THOUGHT

Twenty-five years ago, Morton Horwitz wrote that, since the founding, "[t]he fundamental issue of American political thought" has been "how this most politically democratic country in the world could avoid the threat of coerced economic equality."⁴³ The elusive,

41. It is a commonplace among students of local government that the community of affected individuals often does not stop at municipal borders. See, e.g., Frug, *Empowering Cities in a Federal System*, *supra* note 38, at 560 (arguing that the participation theory of democracy requires that all communities affected by a local action, such as exclusionary zoning, have a say in "the process of resolving their interconnected . . . problems"); Frug, *Six Steps Towards Inequality*, THE CITIES PAPERS, July 23, 2014, <http://citiespapers.ssrc.org/six-steps-toward-inequality/> [https://perma.cc/5VTQ-5TL4] (last accessed Feb. 23, 2017) (highlighting six ways in which affected outsiders could participate in local decision making). There is a large body of literature advocating "two-tier" systems, in which regional questions are assigned to regional governments (in some designs voluntary, in others not), while truly "local" questions remain the province of the locality. See, e.g., Barron, *supra* note 8, at note 54 and accompanying text (surveying leading arguments in favor of the two-tier solution); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996) (arguing that local governments should remain units for local decision making, but that questions with regional implications should be decided by regional political institutions). Critics of such models, including Barron, worry that such regional governments would, for most substantive issues, effectively supplant local governments, and thus stand little chance of winning over those who are skeptical that regional governments will meaningfully take into account local concerns. Barron, *supra* note 8, at 2275–76.

42. For discussion of the preconditions for effective participatory localism and redistributive reforms, see *supra* note 6.

43. HORWITZ, *supra* note 3, at 9. The liberal version of this politically conservative apprehension is of course the fear that democratic majorities will trample individuals' civil rights

appropriate balance between democratic participation and the protection of private property was, I suggest, very much in the minds of Albion Tourgée and his fellow Reconstruction reformers as they sought to remake the South in an idealized Northern image. By creating townships with limited powers of taxation, they offered African Americans and other previously disenfranchised Southerners a chance at political success in a forum that did not threaten the basic distribution of wealth in Southern society. In so doing, I speculate, they created townships with relatively little power to improve the lives of their residents, a weakness that rendered the townships vulnerable to conservative opposition and contributed to their eventual demise.

In offering this bleak assessment, I do not mean to suggest that Farbman is wrong to encourage modern progressives to (warily) invest their reforming energies at the local level. Municipalities are, for all of their handicaps, sites where participatory, democratic engagement can flourish. But truly communitarian localism—localism that involves not just democratic participation, but shared prosperity—results from a mix of local, state, and federal policy aimed at encouraging both broad-based communal decisionmaking and broad-based communal resource-sharing. Communitarian reformers must look to all three levels of government to achieve the changes they seek.

and civil liberties. For an insightful discussion of the ways in which jurists' attitudes towards local government are determined by which version of this fear they embrace, see Williams, *supra* note 12, at 149–53.