

January 2009

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Recommended Citation

Michelle Wilde Anderson, Between State and Local: A Response to Professor Reynolds, 86 Denv. U. L. Rev. 1303 (2009).

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Between State and Local: A Response to Professor Reynolds

BETWEEN STATE AND LOCAL: A RESPONSE TO PROFESSOR REYNOLDS

MICHELLE WILDE ANDERSON[†]

INTRODUCTION

Do concepts like “local” versus “statewide” problems have salience today? Can city borders demarcate a meaningful realm of public policy that permits cities to confront the challenges of urban complexity and metropolitan fragmentation? Can we address problems of regional inequity and inefficiency using city-led solutions? In her article on the little-noticed but powerful extraterritorial impact limit on home rule powers,¹ Professor Reynolds has triggered these and other important theoretical questions and drawn our attention to local borders in a new way.

As she describes, the judicially crafted doctrine of an extraterritorial impact limit blocks local legislation that technically applies only within the borders of a home rule city,² but in fact imposes an extraterritorial impact on areas or people outside city lines. The doctrine is derived from the “axiomatic”³ principle that home rule cities do not have the power to act beyond their borders in the absence of express statutory authorization to the contrary.⁴

As currently applied, the extraterritorial impact limit constrains cities’ ability to enact laws that have indirect spillover consequences on people or places outside their borders or are targeted to address problems that originate outside those borders. This interpretation, Professor Reynolds argues, squelches local efforts to address regional problems. For instance, the limit has been invoked to strike down an inclusionary zoning ordinance passed by a major regional employment center as well as a

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1. See Laurie Reynolds, *Home Rule, Extraterritorial Impact, and the Region*, 86 DENV. U. L. REV. 1271 (2009).

2. Though this discussion refers primarily to home rule cities, its core arguments and doctrinal foundations apply equally to home rule counties.

3. See Reynolds, *supra* note 1, at n.19 (quoting *Seigles v. City of St. Charles*, 849 N.E.2d 456 (Ill. App. Ct. 2006)).

4. Most notably, such authorization includes, in some states, regulatory powers (like zoning authority), condemnation powers, or both. See Richard Briffault, *Town of Telluride v. San Miguel Valley Corp.: Extraterritoriality and Local Autonomy*, 86 DENV. U. L. REV. 1311 (2009).

traffic control measure passed by a city within a regional commuter corridor.⁵

Professor Reynolds makes a strong case that, in addition to constraining regionalism, courts' interpretations of the extraterritorial impact limit have been undisciplined and unduly expansive. She forcefully argues that some strands of interpretation have undermined the very experimentation and local legal diversity that home rule authority was designed to foster. For instance, the extraterritorial impact limit has immobilized home rule cities between contradictory rules; it blocks some legislation that may cause a cumulative impact (because adjacent units may adopt similar laws), while also blocking legislation that may create a confusing and inefficient "patchwork" of laws (because adjacent units may adopt different laws).⁶ Further, the doctrine has subjected home rule cities to amorphous, unpredictable standards like the prohibition on extraterritorial "ripple effects," which can include any effect on the costs or conduct of persons or businesses outside the home rule city.

Despite these problems, the extraterritorial impact limit is rooted in some important rationales that warrant our continued observance. With my brief comments here, I will make the case for a few of these rationales, then provide a more modest alternative proposal for fixing, rather than eliminating, the doctrine. Before embarking on either goal, however, I'll follow Professor Reynolds's lead to cast one more stone at the extraterritorial impact limit, as it is currently interpreted.

I. ONE MORE RISK OF THE EXTRATERRITORIAL IMPACT LIMIT

Picture the following two scenarios. In one, a home rule county establishes new rules governing the performance of service contracts within the county, such as the right to cancel the contract without penalty within three days after signing.⁷ In the other, a home rule county brings an affirmative lawsuit challenging extortionate fees by so-called "payday lenders."⁸ Both scenarios fall within the general rubric of consumer protection. Both are intended to protect persons within the jurisdiction. But both will also exert inevitable spillover protections (or impositions) on persons outside.⁹ Under the extraterritorial impact limit as currently un-

5. See *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000); *City of Commerce City v. State*, 40 P.3d 1273, 1281-82 (Colo. 2003); Reynolds, *supra* note 1, at 1294-98.

6. Reynolds, *supra* note 1, at 1279.

7. See *Holiday Universal, Inc. v. Montgomery County*, 833 A.2d 518, 520-21 (Md. 2003); see also Reynolds, *supra* note 1, at 1280-81 (discussing *Holiday Universal*).

8. See First Amended Complaint at 1, 24, *California v. Check 'n Go of Cal. Inc.*, No. 462-779 (Cal. Super. Ct. S.F. County, Jan. 5, 2009); see also Kathleen Morris, San Francisco and the Rising Culture of Engagement in Local Public Law Offices (forthcoming 2009 in *Why the Local Still Matters* monograph of papers from the 11th Annual Liman Colloquium at Yale Law School 2008).

9. In the first case, such spillover effects are arguably twofold: the law would reach persons entering into such contracts outside the jurisdiction but intending to perform the specified service inside the jurisdiction, and the law would reach persons entering contracts within the jurisdiction, but

derstood, the first approach of addressing the problem through legislation exceeds the county's powers. Yet the second approach, to address the problem through affirmative litigation, is subject to no such constraints.

Does such a differentiation make sense? It advantages litigation as a means of solving urban problems, where legislation might achieve a more efficient and tailored result. If cities are limited to the second scenario, they may only take action against a problem affecting their constituents where state or federal law already prohibits the conduct. They cannot enact new laws to address a problem that affects only a small portion of the public and thus has not warranted the attention of state or federal lawmakers or is otherwise not reachable by existing laws. The current regime curtails home rule cities' ability to address problems proactively—including problems that are present only in certain communities, for instance, or shared within one region but not common across a state—that fall between the cracks of local and statewide concern.

II. HAVING SAID THAT, A FEW GOOD THINGS ABOUT AN EXTRATERRITORIAL IMPACT LIMIT

As problematic as the application of the extraterritorial impact limit may have become, we should pause before discarding it entirely. Underlying the principle are some important attributes worth preserving.

First of all, a law that truly causes an extraterritorial impact is not democratically accountable to some or all persons affected by that law. While it is important to distinguish acts causing an extraterritorial impact from acts of coercive extraterritorial authority like extraterritorial regulation and eminent domain, these are matters of degree more than difference. In either scenario, law should check a city's power to affect outsiders who have no participation or protest rights in that city's politics. My own research on high-poverty neighborhoods just outside of city lines illustrates this argument—local borders may not encompass all neighborhoods most affected by local lawmaking, and outsiders' lack of local voting rights compounds and perpetuates these spillover effects.¹⁰ Because extraterritoriality tracks the boundaries of representative government, it is an obvious, logical metric for courts to demarcate local

intending to perform the specified service outside the jurisdiction. In the second case, the spillover effects arise because once the defendant has been deemed in violation of specific consumer protection laws it will be prohibited from undertaking those activities anywhere under the jurisdiction of those same laws.

10. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095 (2009); Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. (forthcoming April 2010).

authority and to determine the balance of power between cities and the state.¹¹

Second, the concept of what is "local" versus what is "extraterritorial" is not merely a sword against local legislation. It can also be a shield from state intervention in so-called imperio states (which carve out exclusive realms of "local" versus "statewide" control), where home rule jurisdictions enjoy a field of complete autonomy over "municipal" or "local" affairs.¹² That means they are immune from state meddling and intervention in these domains, even where a state explicitly tries to preempt local legislation.

Professor Reynolds seems to accept the loss of this shield were we to eliminate the extraterritorial impact limit, arguing that we should in fact transfer the decisional baton from judges to state legislatures, because extraterritoriality (and any demarcation of exclusive domains of local versus state regulation) has proven elusive and outmoded. This change would not be wholly unreasonable on its face, but it would be quite dramatic, even radical. It would undermine local autonomy by granting state legislatures the final word in defining their authority compared to that of local governments, something that imperio states expressly chose not to do in designing their home rule systems. As a result, it would elide the differences between imperio and legislative versions of home rule power and strengthen state authority over local governments.

It is also clear that courts are struggling in these cases to maintain the free flow of people, goods, and services across municipalities, which requires some level of legal harmonization and coordination. Such a motive helps to explain extraterritorial impact cases striking down local rules governing service contracts or regulating utility companies.¹³ In this sense, extraterritorial impact constraints are challenging and controversial for judges in ways similar to federal commerce clause questions. Few would argue that in light of these interpretive challenges, we should let Congress resolve conflicts with states over the breadth of Congress's interstate commerce authority. We should be cautious of reaching an analogous conclusion here. When it comes to balancing power between two governments, the courts are better suited to the task than the larger governmental unit, if we care, as Professor Reynolds and I both do, about the autonomy of the smaller unit.

11. The Supreme Court has reasoned similarly. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69-70 (1978) (finding that cities always exert spillover effects, so borders are the only finite line by which to corral and demarcate participatory rights).

12. For a more complete description of the imperio versus legislative home rule systems see Reynolds, *supra* note 1, at 1275-77.

13. See *Holiday Universal*, 833 A.2d at 520-21; *People ex rel. Pub. Utilities Comm'n v. Mt. States Tel. & Tel. Co.*, 243 P.2d 397, 401 (Colo. 1952); see also Reynolds, *supra* note 1, at 1280-81 & n.38 (discussing these cases).

Lastly, I agree with Professor Reynolds that local governments are capable of alleviating regional harms through innovative leadership. Yet we should not lose sight of the fact, as Professor Reynolds has argued in other contexts, that many forms of regional inequity are the result of local parochialism and self-interest at the expense of other jurisdictions.¹⁴ Whether they mandate the exclusion of affordable housing, landfills, or residence by convicted sex offenders, exclusionary zoning laws lead to the siting of such land uses in ways that have concentrated poverty and polarized the material conditions within metropolitan areas.¹⁵ Local legislatures may, or may not, have regional interests at heart when setting policy. The extraterritorial impact limit represents freedom from regional impacts of self-interested local lawmaking as well as a constraint on regionally benevolent lawmaking. Consequently, we need consistently applied rules that define local and state power without presuming who will be the more regionalist lawmaker.

III. COMING INTO BALANCE—FIXING, WITHOUT DISCARDING, THE EXTRATERRITORIAL IMPACT LIMIT

An extraterritorial impact limit on home rule authority thus has important rationales that should caution care before discarding the doctrine entirely,¹⁶ even given Professor Reynolds's strong arguments that the extraterritorial impact limit has led to unpredictable and speculative results, concentrated excessive power with the courts, and undermined regionalism. To reconcile these concerns, I would favor the more moderate goal of disciplining rather than abandoning this doctrine, with the goal of continuing to control extraterritorial impacts in a society where borders are less likely to contain regulatory influence.

To achieve this, I would advocate that instead of placing the focus on "extraterritoriality," we focus on giving meaning to the concept of "impact." Currently, as Professor Reynolds discusses, the only threshold for cognizable "impact" under the doctrine is that it must be greater than "de minimis" or "incidental."¹⁷ This is an unnecessarily weak and vague standard. Federal statutory laws governing fair housing and environmental protection, by contrast, require that a cognizable "impact" or "effect"

14. See Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93 (2003).

15. For a discussion of exclusionary zoning and its consequences see, for example, David Dante Troutt, *Ghettoes Made Easy: The Metamarket/Antimarket Dichotomy and the Legal Challenges of Inner-City Economic Development*, 35 HARV. C.R.-C.L. L. REV. 427, 434-54 (2000); Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1083-89 (1996); JONATHAN LEVINE, *ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAND-USE* (2006).

16. This reform would simply mean taking the concept of "territory" within "extraterritorial" seriously, focusing on the location of the regulated activity with no concern for "impact" outside city borders. It would continue to prohibit a home rule unit from applying its police powers to activity occurring beyond its borders.

17. Reynolds, *supra* note 1, at 1278 (quoting *City of Northglenn v. Ibarra*, 62 P.3d 151, 161 (Colo. 2003), and *City & County of Denver v. State*, 788 P.2d 764, 769 (Colo. 1990)).

must mean something significant (provably so), with a causal link to the state action. They provide models for setting a higher minimum standard for the extraterritorial impact reachable by an extraterritorial impact limit.

For instance, a plaintiff alleging a racially disparate impact in violation of the Fair Housing Act¹⁸ must show that a challenged practice by the defendant “actually or predictably results in racial discrimination.”¹⁹ Further, that effect must be “significant,”²⁰ and “an inference” of such an impact is not sufficient—a plaintiff “must show a causal connection between the facially neutral policy and the alleged discriminatory effect.”²¹ Case law applying these standards is strict, ordinarily requiring plaintiffs to document statistically the effects caused by the legislation.²²

The National Environmental Policy Act provides a second model. That statute requires federal agencies to prepare an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment.”²³ The statute distinguishes “direct effects” from “indirect effects,”²⁴ with direct effects defined as “caused by the action and occur[ing] at the same time and place,” while “indirect” effects are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”²⁵ Land use changes that are “induced” by the federal action, for instance, are classified as indirect effects.²⁶ Both classifications require causation. Effects that warrant consideration in an environmental impact statement must be “probable”—not “remote” or “highly speculative.”²⁷

Applying that rubric to the present setting, courts could impose much greater discipline on the extraterritorial impact limit by, for instance, invalidating local laws only where they “directly” cause a “significant” outcome outside city borders. A plaintiff challenging an inclusionary zoning ordinance would thus have the burden to prove both the fact and extent of impacts predicted outside city lines.

18. 42 U.S.C.A. § 3604(a) (West 2009).

19. N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988) *aff'd per curiam*, 488 U.S. 15 (1988) (quoting United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974)).

20. Reinhart v. Lincoln County, 482 F.3d 1225, 1229 (10th Cir. 2007) (emphasis added); see also Huntington, 844 F.2d at 938 (finding “a substantial adverse impact on minorities”).

21. Tsombanidis v. West Haven Fire Dept., 352 F.3d 565, 575 (2d Cir. 2003).

22. *Id.* at 575. For instance, the Second Circuit rejected a Fair Housing Act claim that new housing regulations would create a disparate impact by increasing land prices in a community where members of the protected class were priced out of purchasing homes above a certain cost. Instead, the court found that the required proof would have shown the specific cost of dwellings before and after the regulation took effect and the percentages of protected and nonprotected persons who would be priced out of the post-regulation market. See Reinhart, 482 F.3d at 1230-31.

23. 42 U.S.C.A. § 4332(C) (West 2009); 40 C.F.R. §§ 1508.9(a), 1508.13.

24. 40 C.F.R. § 1502.16(a)-(b).

25. *Id.* § 1508.8(a)-(b).

26. *Id.* § 1508.8(b).

27. Trout Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974).

In combination with shifting our focus from extraterritoriality to impact, the private law exception to home rule authority—which is premised in part on the inherent extraterritorial impacts of certain kinds of lawmaking—can assist courts in implementing their concern for legal predictability.²⁸ This rule constrains local governments from altering common law property, tort or contract rules; imposing substantial extraterritorial effects; or causing “undue burdens and extreme inefficiency” on parties in multiple localities.²⁹ Without excessive reliance on extraterritorial impact, courts can nonetheless pursue interlocal uniformity.

Such an approach would continue to vest judges with interpretive authority, but it would better protect a realm of genuine autonomy for home rule governments that is not subject to state preemption, while also limiting those governments to democratically accountable decisions.

CONCLUSION

Whatever our solution might be, Professor Reynolds has drawn our attention to a doctrinal mechanism that currently confines home rule cities’ ability to apply legislative innovation and experimentation to urban problems. In an era when local governments are increasingly flexing their wings to address social, economic, and environmental problems, we should be particularly concerned about such a mechanism. Yet, in my view, our response should be tempered to preserve the core notion of an extraterritorial impact limit while imposing greater discipline on its application. Like home rule authority in general, the limit can function as both sword and shield—it can suppress desirable local legislation, but so too can it protect cities from neighbors’ undesirable spillover effects and a state legislature’s divergent interests. To remove such a limit entirely would not eliminate the eroding categories of “local” versus “statewide” interests; rather, it would permit legislatures rather than judges to establish the boundaries of those categories. Such a change would fundamentally undermine the autonomy of home rule cities while granting little assurance of the kind of interlocal responsibility that both Professor Reynolds and I prize.

28. Indeed, both of the consumer protection scenarios described in Part II are captured by the underlying logic of leaving private law matters, including contract law, outside the scope of home rule powers. See Gary Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973).

29. See *id.* at 728-39, 750.

