HOME RULE, EXTRATERRITORIAL IMPACT, AND THE REGION

LAURIE REYNOLDS†

INTRODUCTION

In its recent decision in *Town of Telluride v. San Miguel Valley Corp.*,[1] the Colorado Supreme Court surprised many when it held that home rule units were immune from the state legislature's explicit statutory prohibition[2] of extraterritorial eminent domain for parks and open space by all Colorado municipalities.[3] Newspaper editorials decried the holding as improperly insulating home rule units from legitimate state legislative efforts to restrict their powers and called the opinion a "sleazy power play[]."[4] They predicted that the court's protection of extraterritorial eminent domain would lead to endless attempts by other Colorado cities "to ride roughshod over [non]residents who can't even fight back by trying to vote them out of office."[5]

This somewhat hyperbolic criticism has ignored two important facts. First, the court's opinion is limited to protecting the state constitutional right of home rule municipalities to exercise extraterritorial eminent domain in the pursuit of legitimate police power objectives. It has both an explicit textual basis in the state constitution and a clear pedigree of precedent in its support.[6] Thus, the court's opinion has no effect at all

† Prentice H. Marshall Professor, University of Illinois College of Law. This paper was presented at a conference on home rule co-sponsored by the Byron R. White Center on Constitutional Law at the University of Colorado and the *Denver University Law Review* on January 30, 2009. Many thanks to Michelle Anderson and Clayton Gillette for their comments, and to all conference participants for their helpful observations and critiques.

1. 185 P.3d 161 (Colo. 2008).

2. COLO. REV. STAT. ANN. § 38-1-101(4)(b)(II) (West 2009) ("[N]o home rule or statutory municipality shall . . . acquire by condemnation property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views or scenic vistas, or for similar purposes . . . .").

3. The court did not rule on the statute's effect on non-home rule municipalities, that is, those acting pursuant to explicit statutory authorization. *See Telluride*, 185 P.3d at 164 n.1.

4. Vincent Carroll, Editorial, *Unleashing Mischief*, ROCKY MTN. NEWS, June 6, 2008, at 39. The *Denver Post*, though also extremely critical, was more restrained. *See* Editorial, *Wrong Course on Eminent Domain*, DENVER POST, June 4, 2008, at B12.

5. Carroll, *supra* note 4, at 39.

6. The Colorado Constitution establishes that a home rule unit has "the power, within or without its territorial limits, to construct, condemn and purchase . . . and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part . . . ." COLO. CONST. art. 20, § 1. Although that language does not explicitly confer home rule powers of extraterritorial eminent domain for parks and open space, the Colorado court has long construed the constitutional text as conferring on home rule units the "full power to exercise the right of eminent domain in the effectuation of any lawful, public, local and municipal purpose." Fishel v. City & County of Denver, 108 P.2d 236, 240 (Colo. 1940). As the Colorado court repeated in its recent opinion, "the purposes specified in section 1 are

on the legislature's preemptive powers in the more usual context, in which the constitution is silent about the particular home rule power being exercised. Second, and perhaps more importantly, those who fear that the state's highest court is opening the door for lots of [extraterritorial] "high handed [municipal] bullying"[7] should pause to consider the totality of the Colorado courts' decisions interpreting home rule powers. In Colorado, as in many states, concerns about extraterritoriality can lead to judicial invalidation of a wide range of home rule enactments. In this paper, I consider extraterritoriality in that broader context and argue that the judicially imposed extraterritorial impact limit is an improper and unnecessary restriction of home rule powers. I come at this topic from the perspective of regionalism, of the way in which our legal rules are informed (or not) by the fact that more than 80% of our population now lives in what can be defined as metropolitan areas,[8] with their multiplicity of local government units and the corresponding overlapping and intersecting boundary lines.

In the regionalism debate,[9] home rule surfaces regularly as the villain, criticized for having legitimized (or even, perhaps, championed) a parochial, selfish approach to regional problems.[10] In this view, exclusionary zoning, lack of affordable housing in the region, and metropolitan inequality generally are seen as the product of the strong local autonomy or independence provided by home rule, as affluent suburban enclaves retreat behind their borders and ignore the plight of their less fortunate local government neighbors.[11] Yet, as David Barron has so in-

---

merely examples of a broader grant of power, namely the power to condemn property for any lawful, public, local, and municipal purpose." *Telluride*, 185 P.3d at 165. Thus, the sole legal question before the court was whether the exercise of extraterritorial eminent domain powers for open space and parks constituted a lawful purpose. The court easily found that it did. *See id.* at 167-69. The court did not break new ground by holding that all constitutionally protected home rule powers are immune from state legislative interference. *See* City of Thornton v. Farmers Reservoir & Irrigation Co., 575 P.2d 382, 389 (Colo. 1978).

7. *See* Carroll, *supra* note 4, at 39.

8. *See* Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon's Measure 37*, 21 J.L. & POL. 397, 403 (2005). The U.S. Census Bureau defines a metropolitan area as "at least one urbanized area that has a population of at least 50,000 [people]." Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82,228, 82,238 (Dec. 27, 2000).

9. See Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 489-95 (2007), for a summary of the various strands of academic commentary that debate the wisdom of regional approaches to service and social problems confronting all metropolitan regions in the country.

10. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2331-34 (2003). For elaboration of the arguments, see generally Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000) (book review); Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173 (1996).

11. The socio-economic stratification among local governments in metropolitan regions is increasing, resulting in growing numbers of "rich" and "poor" suburbs, with fewer towns and cities fitting within the category of "middle class." *See* TODD SWANSTROM ET AL., BROOKINGS INST.,

sightfully pointed out, those criticisms may be wide of the mark, because they blame home rule communities for not solving problems that in fact are currently beyond their legal competence.[12] For example, Barron points out, courts frequently invalidate home rule attempts to provide antidotes to the lack of affordable housing,[13] or to expand civil rights protection for discrete segments of the metropolitan region,[14] thus preventing home rule governments from adopting initiatives that would counteract the negative impacts of localism that others have so strongly condemned.[15] And unlike other critics of "parochial localism,"[16] Barron looks to the home rule system itself and the reshaping of home rule powers as the way to encourage a more equitable and sensibly planned regional landscape.[17]

Professor Barron's critique informs this analysis of the extraterritorial impact factor in the judicial analysis of home rule powers. I argue here that not only is the factor improperly used by the courts to limit the scope of home rule powers, but that it is also unnecessarily anti-regional in its impact, because it helps to keep home rule units on the sidelines in the search for regional solutions to pressing social problems and service needs. After describing the breadth of meaning encompassed by the courts' understanding of extraterritorial impact, I offer several reasons why it should not form a part of the judicial analysis. I then suggest how removing the cloud of the extraterritorial impact factor from the home rule analysis might affect the role of home rule units as primary actors in formulating regional policy. Though I understand that home rule powers (or metropolitan regions themselves) would not be magically transformed by the courts' abandonment of one judicially created limitation, I conclude that the extraterritorial impact factor should be discarded because it reinforces a misguided perception about the proper reach of home rule initiatives and involvement in problems common to all government units in metropolitan regions.[18]

PULLING APART: ECONOMIC SEGREGATION AMONG SUBURBS AND CENTRAL CITIES IN MAJOR METROPOLITAN AREAS 1 (2004), http://tinyurl.com/dff7oy.

12. *See* Barron, *supra* note 10, at 2345-61.

13. *See, e.g.*, Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000).

14. *See, e.g.*, Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995).

15. *See* Barron, *supra* note 10, at 2347-62.

16. *Id.* at 2334. The term describes Rick Hill's critique and his claim that while local government may be the level of government at which direct political participation is maximized, it also seems to be the level that more easily promotes "social inequality and parochialism." *See* Hills, *supra* note 10, at 2011-12.

17. As additional reasons for not giving up on home rule, Barron stresses the strength of the localist tradition in our legal and political structures, the positive opinion most Americans have of their local governments, and the normative defenses of localism (subsidiarity, efficiency, and protection of community character, to name a few). *See* Barron, *supra* note 10, at 2337-45.

18. Although Barron prefers legislative rather than judicial reforms to create the reconfigured home rule powers he endorses, noting that the latter raises "the familiar conundrums of judicial legitimacy," *id.* at 2364, the extraterritorial impact factor is purely a creature of judicial analysis and its fate lies squarely with the courts themselves.

I. HOME RULE AND EXTRATERRITORIALITY

According to most standard accounts, home rule powers do not include the power to act outside the local government's borders.[19] As a result, the vast majority of courts requires explicit constitutional or statutory enabling authority for any extraterritorial home rule government action. Extraterritorial eminent domain,[20] annexation and disconnection,[21] and extraterritorial regulatory jurisdiction[22] are the most common examples of extraterritorial powers for which courts refuse to find inherent home rule authority.[23] From this strong and nearly universal limitation, it has been perhaps a small step for the courts to entertain arguments that a particular home rule initiative, though it applies only within the borders of the home rule unit, has an impermissible extraterritorial im-

19. In *Seigles, Inc. v. City of St. Charles*, the Illinois court called that assertion "axiomatic." 849 N.E.2d 456, 458 (Ill. App. Ct. 2006); *see also* 1 CHESTER JAMES ANTIEAU, MUNICIPAL CORPORATION LAW § 3.08 (Supp. 1967); 2 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 7:2 (3d ed. 2006). Professor Terrance Sandalow's important critique of home rule powers agreed with that territorial limit. He pointed out, though, that the more modern legislative home rule system endorsed by the National Municipal League, should be interpreted as having given (improperly, in his view) extraterritorial powers to home rule units. *See* Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 692 n.193 (1964). That view of has never taken hold in the courts, which routinely require explicit legislative authorization for home rule units to exercise extraterritorial powers. The statement of the Illinois Supreme Court is typical: "[W]hatever extraterritorial governmental powers home-rule units may exercise were to be granted by the legislature." City of Carbondale v. Van Natta, 338 N.E.2d 19, 21 (Ill. 1975).

20. *See, e.g.*, City of Phoenix v. Harnish, 150 P.3d 245, 250-51 (Ariz. Ct. App. 2006); City of Mesa v. Smith Co. of Ariz., Inc., 816 P.2d 939, 943 (Ariz. Ct. App. 1991); City of Peoria v. Keehner, 449 N.E.2d 1376, 1379-80 (Ill. App. Ct. 1983); Britt v. City of Columbus, 309 N.E.2d 412, 415, 416 (Ohio 1974). In all of these cases, the court explicitly concluded that home rule units do not have the inherent power of extraterritorial eminent domain. Note that the Colorado court's opinion in *Telluride* is not inconsistent with those cases, because the court found independent explicit textual authorization of extraterritorial eminent domain in the state's constitution. Town of Telluride v. San Miguel Valley Corp., 185 P.3d 161, 169 (Colo. 2008).

21. *See, e.g.*, La Salle Nat'l Trust v. Vill. of Mettawa, 616 N.E.2d 1297, 1302-03 (Ill. App. Ct. 1993); Indep. Sch. Dist. No. 700 v. City of Duluth, 170 N.W.2d 116, 120 (Minn. 1969); State *ex inf.* Hannah *ex rel.* Christ v. City of St. Charles, 676 S.W.2d 508, 509-10 (Mo. 1984) ; City of New York v. State, 557 N.Y.S.2d 914, 916 (N.Y. App. Div. 1990); Vill. of Beachwood v. Bd. of Elections of Cuyahoga County, 148 N.E.2d 921, 923 (Ohio 1958); Costco Wholesale Corp. v. City of Beaverton, 161 P.3d 926, 931 (Or. 2007); Mid-County Future Alternatives Comm. v. City of Portland, 795 P.2d 541, 546 (Or. 1990). In contrast, the Iowa Supreme Court in *City of Asbury v. Iowa City Development Board* upheld a home rule city's ability to offer more in the way of inducements for annexation than state law authorized for non home rule units, thus seemingly concluding that annexation powers fall within the scope of home rule and thus need no statutory authorization. 723 N.W.2d 188, 198 (Iowa 2006).

22. *See, e.g.*, City of Carbondale v. Van Natta, 338 N.E.2d 19, 23 (Ill. 1975) (invalidating home rule unit's attempt to enjoin violation of local zoning ordinance by owners of land located outside city borders); Harris Bank of Roselle v. Vill. of Mettawa, 611 N.E.2d 550, 559 (Ill. App. Ct. 1993) (invalidating home rule attempt to prohibit private treatment of wastewater on property outside its borders); City of Riverview v. Sibley Limestone, 716 N.W.2d 615, 619-20 (Mich. Ct. App. 2006) (invalidating a home rule ordinance purporting to require city permit for sandblasting outside the city limits); Sanders v. Snyder, 178 N.E.2d 174, 176 (Oh. Ct. App. 1960).

23. In some states, the explicit authorization of extraterritorial powers comes from state constitutional, rather than statutory, sources, thus rendering the powers immune from legislative preemptive powers. *See, e.g.*, COLO. CONST. art. XX, §1.

pact.[24] This more free floating use of the extraterritoriality limit is grounded not in specific statutory enactments or constitutional limits, but rather in a reviewing court's assessment of the context in which a challenged home rule ordinance will operate. Though courts may disagree about the circumstances in which they will conclude that home rule regulation impermissibly crosses over into extraterritorial, many use a finding of extraterritoriality as the basis for the conclusion that the home rule ordinance either has exceeded the permissible scope of home rule initiative powers, or has been preempted by the state legislature.

The use of the extraterritorial impact factor in the judicial analysis will depend on, or at least be shaped by, the type of home rule system adopted by the state in which the court sits. Thus, before examining the factor's role in the judicial analysis, some basic background information about the two major types of home rule, and how the systems differ in both their attitudes about the scope of home rule powers and the role of preemption in the judicial analysis, may be helpful.

A. The Differences Between Imperio and Legislative Home Rule

Notwithstanding the substantial interstate variety in constitutional schemes, statutory authorization, and judicial attitudes, home rule systems can be categorized as pertaining either to the "imperio" or "legislative" variety. The former derives its name from the United States Supreme Court's description of the home rule city of St. Louis as an "imperium in imperio"[25] and denotes the original form of home rule, which envisioned two distinct spheres of local and statewide concerns and powers.[26] Articulation of the two exclusive spheres was left in the hands of the courts.[27] The system of so-called legislative home rule,[28] introduced

24. Professor Sandalow's critique expressed as much disapproval, indeed condemnation, of what he called the "Extraterritorial Impact of Intramural Legislation," *see* Sandalow, *supra* note 19, at 700, as he did of claims that home rule units had the inherent authority to exercise extraterritorial powers such as annexation, eminent domain, and extraterritorial regulatory jurisdiction. *See id.* at 692-700. Underlying Sandalow's critique was a distrust of the fairness and quality of the municipal legislative process as well as the more prevalent view that local governments tend toward "municipal parochialism." *Id.* at 702. The Supreme Court has noted and accepted as inevitable the conundrum that the "indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than the direct regulation contemplated by [state laws conferring extraterritorial regulatory jurisdiction]." Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69 (1978). For purposes of federal law, at least, it is clear that the extraterritorial impacts of local action provide no legal basis for challenge by affected nonresidents.

25. St. Louis v. W. Union Tel. Co., 149 U.S. 465, 468 (1893).

26. *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1124-25 (2007).

27. Typical imperio language enables home rule units to legislate with respect to "municipal affairs," CAL. CONST. art. XI, § 5; or grants "all powers of local self-government," OHIO CONST. art. XVIII, § 3; or grants powers over "local affairs and government," WIS. CONST. art. XI, § 3. The scope of those terms is determined by judicial analysis. Diller, *supra* note 26, at 1125.

28. That term is used to highlight that the theory underlying the new approach is to shift the determination whether a matter is within the scope of home rule powers from the courts to the state legislature. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 333-34 (7th ed. 2009). Although some understand "legislative home rule" as referring to home rule systems created pursuant to statutory, rather than constitutional,

in the 1950s and 60s by the National Municipal League,[29] offers an antidote to what its supporters viewed as the unnecessary judicial meddling characteristic of the imperio model. Based on the view that home rule should provide local governments with the full range of government powers that the state is capable of transferring to its political subdivision,[30] legislative home rule contemplates a much reduced judicial role, with the determination of the scope of home rule power left almost entirely in the hands of the legislature.

Although they have distinctly different origins and starting premises, in both systems, judicial evaluation of a home rule ordinance for consistency with state constitutional and statutory mandates involves two distinct steps.[31] First, the ordinance is evaluated to determine whether it is within the scope of home rule powers. In imperio states, this may involve consideration of the meaning of "pertaining to its affairs" or "local," while in legislative states, the primary question before the court is whether the power exercised by the home rule body is one of those powers that the legislature was capable of transferring to its political subdivision. At this point the imperio analysis adds one more twist—if the court deems a home rule enactment to be exclusively local, it will have immunity[32] from the impact of conflicting state laws, even if legislative intent to preempt home rule regulation is explicit.

Once the home rule enactment has been found to fit within the scope of transferred power, the second question is whether the local law has nevertheless been preempted by state law. In imperio states, the

provisions, see, for example, Sarah Burgundy, Comment, *Charming the Eight-Hundred-Pound Gorilla: How Reconsideration of Home Rule in Oregon Can Help Metro Tame Measure 37*, 85 OR. L. REV. 815, 820-21 (2007), our review of judicial opinions in preparation of the casebook did not find that the source of home rule power was important to the legal analysis. And in fact, many legislative home rule systems are explicitly created in state constitutions. *See, e.g.*, ALASKA CONST. art. 10, § 11 ("A home rule borough or city may exercise all legislative powers not prohibited by law or by charter."); N.M. CONST. art. 10, § 6(D) ("A municipality which adopts a charter may exercise all legislative powers and perform all functions not expressly denied by general law or charter.").

29. Actually, the system was first introduced in the 1950s by the American Municipal Association, and revised in the 1960s by the National Municipal League to make clear that a "city may exercise any legislative power . . . not denied . . . by general law." NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION 16 (6th ed. 1963). The Louisiana Supreme Court provided a helpful recounting of the development in *City of New Orleans v. Bd. of Commr's of the Orleans Levee Dist*., 640 So. 2d 237, 243 (La. 1994).

30. That basic premise of legislative home rule was described by the Louisiana Supreme Court when it noted that the newer form of home rule envisioned that "all delegable legislative powers would be granted to the local government, subject to the legislature's power to deny local government's exercise of authority by state statute." *New Orleans*, 640 So. 2d at 243.

31. *See* BRIFFAULT & REYNOLDS, *supra* note 28, at 447-49.

32. The scope of this immunity varies among the imperio states. In Colorado, for instance, home rule immunity from conflicting state legislation extends to all matters deemed exclusively local, *see, e.g.*, City & County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990)—while in Oregon the immunity is much narrower. *See* City of La Grande v. Pub. Employes Ret. Bd., 576 P.2d 1204, 1215 (Or. 1978). If state legislation addresses "a concern of the state with the modes of local government," local immunity is typically forthcoming, but any state law that focuses instead on a "substantive social, economic, or other regulatory objective," will preempt a conflicting local law. *Id.* at 1211.

analysis is wide-ranging and relies on both express and implied preemption, typically involving an "occupation of the field" or an "inconsistency with state law" analysis.[33] In legislative home rule systems, in contrast, courts turn to state law to see only whether the legislature has clearly, some say explicitly,[34] articulated its intent to supersede local law, either by prohibiting the exercise of a particular power at the local level or by declaring that state law is to be exclusive.[35] Though some courts clearly distinguish the two steps,[36] others blend their analysis of the scope of home rule powers with their assessment whether state law should be deemed preemptive.[37]

A review of the cases shows that the extraterritorial impact factor is important in both imperio and legislative states, although its use and scope are different. I argue here that the factor is inappropriate in both systems, because it muddies the judicial analysis, usurps the legislative function, and unnecessarily limits the scope of home rule initiatives and the role of home rule units in the region.

B. Extraterritorial Impact in the Courts

Although the extraterritorial impact factor has formed part of the judicial analysis of home rule for many years,[38] and is, at least in one state, a step in a required three part inquiry in all challenges to home rule

33. For a thorough analysis of implied preemption in state courts see Diller, *supra* note 26, at 1140-57.

34. For example, the Montana courts have interpreted their constitution as requiring explicit legislative preemption. *See, e.g.*, Town Pump, Inc. v. Bd. of Adjustment of Red Lodge, 971 P.2d 349, 357 (Mont. 1998) (refusing to invalidate local alcohol regulation because the legislature had not "specifically denied" the challenged power). Other courts in legislative home rule states have been unwilling to give up the judicial power to find preemption in the absence of an explicit preemptive statement. *See, e.g.*, Casuse v. City of Gallup, 746 P.2d 1103, 1105 (N.M. 1987) (concluding that a finding of clear legislative intent to preempt, though not explicitly stated, is sufficient basis on which to find preemption of a home rule ordinance).

35. Thus, for a home rule enactment to be immune from state preemption in a legislative home rule state, specific constitutional protection is required. The Illinois Constitution, for instance, explicitly authorizes home rule units to license, tax, and to incur debt. ILL. CONST. art. VII, § 6(a).

36. For an example of clear judicial separation of the two legal questions, see Goodell v. Humboldt County, 575 N.W.2d 486, 492 (Iowa 1998).

37. The Colorado Supreme Court's opinion in *City of Northglenn v. Ibarra* illustrates judicial blending of the two issues. 62 P.3d 151, 155 (Colo. 2003). In that case, the court simultaneously concluded that the local ordinance pertained to a statewide concern (and was thus not within the scope of home rule authority) and that the ordinance had been preempted. *See id.* (holding that the ordinance "is a matter of statewide concern and is preempted"). Further obfuscating the judicial analysis was the court's application of the extraterritorial impact factor. In *Ibarra*, the term was used as a measure of the ordinance's invalidity rather than, as is usually the case in Colorado judicial analysis, to determine whether the issue being regulated falls within a category of "shared state and local" concern, in which case, the ordinance is a candidate for preemption. *See id*. at 163-67 (Coats, J., dissenting).

38. Although the Colorado Supreme Court did not use the terminology of extraterritorial impact, its invalidation of Denver's regulation of local telephone rates more than 55 years ago was based on its concern about "the impact and effect which it may or may not have upon the areas outside the municipality." People *ex rel*. Pub. Utils. Comm'n v. Mountain States Tel. & Tel. Co., 243 P.2d 397, 399 (Colo. 1952).

initiatives,[39] its meaning remains vague. In one unusually straightforward and objective interpretation of the extraterritorial impact factor issued during the state's first decade of home rule, the Illinois Supreme Court concluded that a home rule landlord tenant ordinance had no extraterritorial impact because it was limited to the regulation of "leases for property within its own borders . . . . [and made] no attempt to control rental property outside its own boundaries."[40] That language suggests a simple tracking of the territory in which a regulation applies and would limit extraterritoriality to those instances in which the home rule unit attempted to apply its police powers to activity occurring beyond its borders, asserting, for example, that it has inherent home rule power to annex, regulate, or condemn outside its territory.[41] Most courts, however, have not adopted such a limited and objective definition.

A survey of the many faceted judicial applications of the extraterritorial impact factor reveals little in the way of categorizing or generalizing principles. Rather, use of the term has extended in all encompassing ways and can be used to catch virtually any home rule initiative within its reach. To determine whether a particular home rule initiative impermissibly imposed an extraterritorial impact, courts have considered arguments about where and upon whom the impact has been felt, about how the impact is to be measured, and about the directness of the connection between home rule initiative and the extraterritorial impact. Notwithstanding judicial assurances that the criterion will not apply to invalidate home rule ordinances with impacts that are "incidental"[42] or "*de minimis*,"[43] the test's application belies this limit and, in fact, the extraterritorial impact factor can be all things to all people.

1. Focusing on the ordinance's cumulative impact

In some cases, the court's conclusion of extraterritoriality reflects concerns about potential cumulative impact. If the court concludes that it is likely that most home rule units would or have adopted regulations similar to the one being challenged, the impermissible extraterritorial impact lies in the cumulative "squeeze" that the regulated entity will feel. In a challenge to a Colorado municipality's regulation that prohibited

39. In Colorado, the courts apply three factors to determine whether a home rule initiative should be categorized as local (and immune from conflicting state regulation), shared state and local (and thus pre-emptible), or statewide (and beyond the scope of home rule powers). Those factors, as first made explicit in *City & County of Denver v. State*, consist of the need for statewide uniformity, the impact of the ordinance on persons outside the municipality, and whether the matter has been traditionally governed by state or local government. 788 P.2d 764, 768 (Colo. 1990).

40. City of Evanston v. Create, Inc., 421 N.E.2d 196, 200 (Ill. 1981). Unfortunately, the Illinois courts have not always adhered to this narrow definition. See *Bernardi* and *Des Plaines* for examples of a judicial ripple effect analysis similar to the ones developed in other states. People *ex rel.* Bernardi v. City of Highland Park, 520 N.E.2d 316, 321-22 (Ill. 1988); Metro. Sanitary Dist. of Greater Chi. v. City of Des Plaines, 347 N.E.2d 716, 718-19 (Ill. 1976).

41. *See* text accompanying notes 19-23.

42. City of Northglenn v. Ibarra, 62 P.3d 151, 161 (Colo. 2003).

43. *Denver v. State*, 788 P.2d at 769.

convicted sex offenders from living in the same residence, the court noted its concern that other municipalities would follow suit. In fact, in the immediate area of the targeted ordinance, many communities had adopted a similar exclusion, thus giving the plaintiff foster family, which cared for adjudicated juveniles pursuant to a state license, few if any choices of a home.[44]

If, in contrast, the court's concern is not that all neighboring communities will adopt the same regulation, but rather that widespread local regulation will produce a maze of varying and potentially inconsistent regulations by other similarly situated home rule municipalities, the extraterritorial impact lies in the "patchwork"[45] or the "confusion"[46] resulting from "a significant variety of conflicting local legislation."[47] If home rule is based on the assumption that local governments need flexibility to meet their communities' needs, the patchwork created by a multiplicity of different home rule approaches to the same problem should be evidence that home rule is accomplishing its intended result, not that it has exceeded its limits.[48]

---

44. See *Ibarra*, 62 P.3d at 162, in which the court noted that "at least sixteen counties and municipalities in Colorado" had adopted ordinances regulating the living arrangements of adjudicated sex offenders. *See also id.* at 162 n.17. In contrast, in *Denver v. State*, the court noted the absence of evidence about the "aggregate economic impact" of municipal residency requirements such as the one before it and refused to invalidate Denver's. *Denver v. State*, 788 P.2d at 769 n.7; *see also* Denver & Rio Grande W.R.R. Co. v. City & County of Denver, 673 P.2d 354, 358 (Colo. 1983) (speculating that if all home rule municipalities were to impose the same costs upon the railroad as Denver sought to in this case, "the possible result is that the affected railroads may well decide to reduce service, or even, in some cases, to terminate service"); Commercial Nat'l Bank of Chi. v. City of Chicago, 432 N.E.2d 227, 243 (Ill. 1982) ("[U]nrestrained extraterritorial exercise of [home rule] powers in zoning, taxation and other areas could create serious problems. . . . [E]ach home rule unit in the State of Illinois could pass a similar ordinance.").

45. Its concern that "patchwork electrical-transmission legislation" would "handicap compliance with safety regulations and inhibit the efficient distribution of electrical power" led the Rhode Island Supreme Court to invalidate a home rule unit's three year moratorium on the construction of high voltage electric power transmission lines. Town of East Greenwich v. O'Neil, 617 A.2d 104, 111-12 (R.I. 1992). An Ohio appellate court used the same concern in its analysis invalidating a residency requirement for municipal employment. *See* Am. Fed'n of State, County & Mun. Employees Local # 74 v. City of Warren, 895 N.E.2d 238, 249 (Ohio Ct. App. 2008).

46. City of Commerce City v. State, 40 P.3d 1273, 1281 (Colo. 2002). In some cases though, the court finds a patchwork of potentially conflicting legislation to be legally unremarkable. *See, e.g.*, Winslow Constr. Co. v. City & County of Denver, 960 P.2d 685, 694 (Colo. 1998).

47. *Commerce City*, 40 P.3d at 1281. On that basis, the *Commerce City* court found that home rule traffic regulations that used automated vehicle identification systems had an extraterritorial impact, nothing that "a driver—simply by commuting to work on a typical day—could be subjected to a patchwork of rules and procedures by individual cities." *Id.* at 1282; *see also* People *ex rel*. Pub. Utilities Comm'n v. Mountain States Tel. & Tel. Co., 243 P.2d 397, 401 (Colo. 1952) (speculating about the difficulties the company would face if subjected to a multiplicity of home rule regulations); City & County of Denver v. Sweet, 329 P.2d 441, 447 (Colo. 1958) (speculating that state preemption of local income taxes could reflect a "fear of permitting a veritable tax jungle of separate city income taxes . . . .").

48. As a court more protective of home rule initiative has noted: "Home rule ... is predicated on the assumption that problems in which local governments have a legitimate and substantial interest should be open to local solution and reasonable experimentation to meet local needs." Kalodimos v. Vill. of Morton Grove, 470 N.E.2d 266, 274 (Ill. 1984).

In essence, the courts' concerns about the cumulative effect of home rule regulation operates as a double edged sword. It means that whenever home rule units in the same area are all affected by, and respond to, the same issue, the resulting landscape is ripe for challenges of extraterritorial impact. If the court believes that many municipalities will take the same approach to a problem, the extraterritorial impact lies in the way in which the ordinances would combine to impose a broad blanket of exclusion or similar restrictions. If, however, the court believes that neighboring municipalities' regulatory efforts are likely to take different forms, the impermissible impact comes from the regulatory inconsistency of legal obligations found from one local government unit to the next. Taken to an extreme, perhaps, this inquiry could potentially leave standing only those home rule initiatives dealing with issues unattended to in the surrounding home rule units. This creates the particularly unrealistic and unjustified result that home rule initiatives will be found to be free of impermissible extraterritorial impact only when they deal with a problem not common to their similarly situated neighbors.

2. Restricting the analysis to the impact of the individual ordinance

In contrast to some courts' projection or extrapolation of cumulative effects, others have restricted their analysis to the possible extraterritorial impact of the challenged ordinance operating alone. In those cases, the judicial inquiry focuses more narrowly on the conduct or individuals affected by the ordinance to evaluate whether the local government's border is effective to contain the cause and effect of its regulation. In this context, local inability to prevent permeation, seepage, or cross border movement can be fatal to the home rule ordinance's validity.

In *City of Des Plaines v. Chicago & North Western Railway Co.*,[49] the home rule city adopted a noise control ordinance to moderate the disturbances caused by diesel locomotives as they prepared for their morning commuter trips into Chicago. The court invalidated the ordinance because of its extraterritorial impact. Movement in and out of the home rule city was crucial: because the unwanted sound could not be contained within Des Plaines' borders, and also because the ordinance purported to regulate sounds that originated outside of the city but whose effects were felt inside, the ordinance had a double extraterritorial impact.

The constant movement of people through the home rule unit may also form the basis of impermissible extraterritoriality. In *Holiday Universal, Inc. v. Montgomery County*,[50] the Court of Appeals of Maryland invalidated a home rule county's attempt to prohibit certain unfair prac-

49. 357 N.E.2d 433 (Ill. 1976).
50. 833 A.2d 518 (Md. 2003).

tices in the performance of service contracts.[51] The ordinance purported to apply both to contracts signed in the county, as well as those that were to be primarily performed within its limits. For the court, both aspects of the law's coverage were problematic, and both fell under the extraterritorial impact umbrella. After all, it reasoned, contracts signed in Montgomery County could be performed outside the county, outside the state, and even outside the country.[52] And the extraterritoriality extended further: even if some of the contract were performed within the county, the ordinance would apply to service contracts "where as much as forty-nine percent of the performance of the contract takes place outside of Montgomery County."[53] By failing to find a way to seal the county's borders from the constant movement of people, the ordinance's inevitable application to people outside its borders rendered it impermissibly extraterritorial in its scope.[54]

Given the courts' concerns about the impact of the ordinance extending to some conduct or activity that is not totally contained within the unit's territory, it might be expected that the extraterritorial impact label would not apply when the conduct being regulated occurs completely within the home rule unit's borders. In *City of Commerce City v. State*,[55] however, the city adopted an automated photograph system for purposes of imposing fines for traffic violations. Although the offending conduct took place entirely within the city's borders, the extraterritorial impact came from the fact that the city was in essence in a "commuter corridor[],"[56] with numerous non-residents passing through on a daily basis. According to this line of reasoning, then, impermissible extraterritorial impacts can be created by the inevitable porousness of local borders and the movement of people, commerce, and pollution from one home rule unit to another,[57] even though all behavior targeted by the home rule ordinance occurs exclusively within the unit's territory. Although this version of extraterritoriality does not involve judicial speculation about the cumulative effect of similar ordinances throughout the

51. The ordinance imposed a number of consumer protections on service contracts, the most important one being the right to cancel the contract without penalty within three days after signing. *See id.* at 520-21 (citing section 11-4A of the Consumer Protection Chapter of the Montgomery County Code).

52. *See id.* at 525

53. *Id.*

54. This approach to extraterritoriality stands in stark contrast to the Illinois courts' approach in some local tax cases, which rejects out of hand the claim that a local tax on out of town sellers doing business within the home rule unit is impermissibly extraterritorial. *See, e.g.*, Mulligan v. Dunne 338 N.E.2d 6 (Ill. 1975); Ill. Wine & Spirits Co. v. County of Cook, 548 N.E.2d 416 (Ill. App. Ct. 1989).

55. 40 P.3d 1273 (Colo. 2002).

56. *Id.* at 1282.

57. *See* Baggett v. Gates, 649 P.2d 874, 880 (Cal. 1982). In that case, the court found an impermissible extraterritorial impact in the fact the law applied to numerous nonresidents who visited the city daily, and to property within the city owned by nonresidents. Because those nonresidents would feel the effect of the challenged local law, the court held that the city was powerless to adopt a regulation governing dispute resolution procedures for municipal employees.

region, it imposes another substantial restriction on the home rule unit's potential scope of initiative powers.[58]

3. The ripple effect

Of the different approaches applied by the courts, it is undoubtedly the ripple effect that provides the broadest sweep for the extraterritorial impact factor. Under this line of argumentation, the court is willing to consider impacts allegedly felt by other municipalities as government units,[59] by the individuals residing in those municipalities,[60] or by the marketplace generally.[61] Even with the stated caveat that these effects must be more than de minimis,[62] the potential breadth of the ripple effect analysis is enormous. Though the Colorado Supreme Court is undoubtedly the term's staunchest proponent, it has been rather vague in specifying its intended reach. As applied in a number of cases, it seems that the ripple effect of the extraterritorial impact will rise to the level of impermissible when the court throws the home rule pebble into the waters within the home rule unit's territory and then devises a theory as to how the resulting ripples will extend beyond its borders.

The ripple effect has been found in a wide variety of situations. For one thing, if a local regulation reduces the statewide supply of some entity, business, or program, it may have an impermissible extraterritorial

58. The court in *Commerce City* concluded that because the home rule ordinance may apply to nonresidents in ways that interfere with their expectations as state residents, its impact becomes impermissibly extraterritorial. *Commerce City*, 40 P.3d at 1284. This use of extraterritorial impact is circular, of course, because the expectations of state residents are shaped in no small part by the judicially accepted contours of home rule. One of home rule's essential premises is that local conditions demand particularly tailored local responses; citizens' expectations of uniformity in local regulation, then, is fundamentally inconsistent with the basic premise of home rule itself. Compare the same court's analysis in *Fraternal Order of Police, Colorado Lodge # 27 v. City & County of Denver*, in which the court refused to conclude that the numerous daily contacts between nonresidents coming into Denver and the city's deputy sheriffs were sufficient to create an impermissible extraterritorial impact. 926 P.2d 582, 590 (Colo. 1996).

59. *See, e.g.*, Am. Fed'n of State, County & Mun. Employees Local # 74 v. City of Warren, 895 N.E.2d 238, 249 (Ohio Ct. App. 2008) (invalidating local residency requirement for municipal employment because of extraterritorial impact) ("The requirement impairs competition among the municipalities for residents; it affects the tax revenue, housing market, and school systems of all surrounding communities."); *see also* People *ex rel.* Bernardi v. City of Highland Park, 520 N.E.2d 316, 321-22 (Ill. 1988) (invalidating local attempt to exempt city contracts from the Prevailing Wage Act because of impact on wages in other parts of the region); Metro. Sanitary Dist. of Greater Chi. v. City of Des Plaines, 347 N.E.2d 716, 718-19 (Ill. 1976) (invalidating local home rule regulation of regional special district because the regional special district's territory included numerous other local governments, and thus the home rule regulation would indirectly affect those municipalities).

60. *See, e.g.*, City of Northglenn v. Ibarra, 62 P.3d 151, 152 (Colo. 2003).

61. *See, e.g.*, Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 32-33 (Colo. 2000).

62. The *Ibarra* case stressed this aspect of the extraterritorial impact when it said: "To find a ripple effect . . . the extraterritorial impact must have serious consequences to residents outside the municipality, and be more than incidental . . . ." 62 P.3d at 161. Three years earlier, the court had found that the ripple effect of an inclusionary zoning ordinance "may well be minimal," but condemned it anyway. *Lot Thirty-Four*, 3 P.3d at 39.

impact.[63] For another, if the regulation imposes a cost on a business within the home rule unit, which the business may in turn pass on to its customers outside the home rule unit, it may also have an impermissible extraterritorial impact.[64] In addition, if the regulation imposes a cost on business that may encourage the business to relocate to another community, an impermissible extraterritorial impact may be found.[65] This line of reasoning is extremely potent, since the purpose of most home rule initiatives is to regulate conduct or recuperate costs imposed by actors within the unit, and exit to avoid unwelcome government regulation is a typical response to all sorts of home rule regulatory initiatives.[66] Nearly any restriction or regulation of a business entity's flexibility and ability to participate in the market can be translated into a monetary cost, either in terms of opportunities lost or reduced profitability resulting from the imposition of regulations.

In some cases, courts have found invalid rippling in a regulation's effect on other municipalities, either on their competition for money or people[67] or on their legal obligations.[68] An Ohio appellate court recently illustrated this line of reasoning when it invalidated a municipal residency requirement for municipal employees, noting that the local regulation "impairs competition among the municipalities for residents; it affects the tax revenue, housing market, and school systems of all surrounding communities."[69] Though the Colorado Supreme Court has expressly held that Denver's similar residency ordinance did not have an impermissible extraterritorial impact,[70] the Ohio court's articulation of the ripples seems to come straight out of the Colorado playbook of the ripple effect's intended application.

---

63. *See, e.g.*, *Ibarra*, 62 P.3d at 161-62 (extraterritorial impact of local residency restriction comes from reduction of total number of foster homes statewide).

64. *See* Denver & Rio Grande W.R.R. Co. v. City & County of Denver, 673 P.2d 354, 358-59 (Colo. 1983) (imposing cost of rebuilding viaduct in Denver on railroad may cause railroad to reduce or terminate service to people outside Denver). *But see* U.S.W. Commc'ns, Inc. v. City of Longmont, 924 P.2d 1071, 1079 (Colo. App. 1995) (finding company's argument that home rule imposition of cost will require it to raise rates statewide is outweighed by local government's interest in regulating).

65. *Lot Thirty-Four*, 3 P.3d at 38. *Compare id.*, *with* JAM Rest., Inc. v. City of Longmont, 140 P.3d 192, 196 (Colo. App. 2006) (no impermissible extraterritorial impact from local amortization of sexually oriented businesses).

66. *See* Richard Briffault, *Our Localism Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 399-403 (1990).

67. *See* Am. Fed'n of State, County & Mun. Employees Local # 74 v. City of Warren, 895 N.E.2d 238, 249 (Ohio Ct. App. 2008).

68. *See, e.g.*, People *ex rel.* Bernardi v. City of Highland Park, 520 N.E.2d 316, 317 (Ill. 1988).

69. *Am. Fed'n*, 895 N.E.2d at 249.

70. In *City & County of Denver v. State*, 788 P.2d 764 (Colo. 1990), the Colorado Supreme Court refused to find an impermissible extraterritorial impact in a challenge to Denver's residency requirement for municipal employees. Because local government employees in Denver constituted merely 1/7 of 1% of the total Colorado work force, the impact, in the court's view, could not be substantial. *Id.* at 769.

And finally, if the judicial application of the ripple effect assumes that all extraterritorial impacts are beyond the scope of home rule powers, then even beneficial impacts should be within the term's reach. The Colorado Supreme Court has suggested as much in its evaluation of Telluride's inclusionary zoning ordinance. Though it found plenty of negative extraterritorial impacts, the court also turned the tables on Telluride, using the ordinance's stated goals as evidence of its hoped-for extraterritorial impact. Because the ordinance articulated the goals of alleviating the area's shortage of affordable housing and of improving regional quality of life by reducing traffic congestion and reducing the distance between home and work for those employed in Telluride or other communities,[71] it had apparently acted beyond its limited mandate to think only of itself.

In summary, judicial application of the extraterritorial impact factor, whether in the form of the cumulative, individual, or ripple effect approach, essentially provides untethered freedom to choose the measuring stick of the alleged extraterritorial impact. More than a balanced evaluation of in-unit interests and out-of-unit impacts, the extraterritorial impact factor has created an opportunity for judicial insertion of its own notions of good government on the home rule landscape. Taken to its logical ending point, application of the ripple effect would mean that only ordinances without an impact of any kind can pass scrutiny under the extraterritorial impact analysis. An Ohio appellate court suggested as much when it upheld a home rule unit's domestic partner registry against challenges of extraterritorial impact, by noting that the ordinance could not have an extraterritorial impact because it essentially accomplished nothing at all.[72]

II. REMOVING THE EXTRATERRITORIAL IMPACT FACTOR FROM THE JUDICIAL ANALYSIS

As a doctrinal tool, the extraterritorial impact factor skews the judicial analysis and upsets the balance between legislature and judiciary in the definition of home rule powers. The term's inherent vagueness and imprecision mean that it can apply in numerous, and often self-contradictory, ways. Thus, for instance, courts have found impermissible extraterritorial impacts in an ordinance because of the likelihood that the community's neighbors would follow suit by adopting similar ordi-

71. Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 38 (Colo. 2000).

72. City of Cleveland Heights *ex rel.* Hicks v. City of Cleveland Heights, 832 N.E.2d 1275, 1278 (Ohio Ct. App. 2005) ("The registry confers no right or obligation upon registrants, is administered exclusively within the city of Cleveland Heights, and has no effect outside the territory of the city."). Actually, the court may have been too quick to conclude that the ordinance in this case would have no effect on the behavior of people outside the home rule unit. The domestic partner registry may in fact send the message that the community is gay friendly. That message could affect the choice of residence made by individuals for whom tolerance of sexual preferences is important. *See* Diller, *supra* note 26, at 1131.

nances,[73] while in other cases the extraterritorial impact has come from the likelihood that neighboring jurisdictions would adopt different ordinances and create the much maligned "crazy patchwork."[74] An extraterritorial impact can come from the way a law imposes costs on a business that might be recouped in that business's out of town activities,[75] or it may come from the likelihood that a regulation will encourage a business to leave the home rule unit's territory and take its business elsewhere.[76] If the impact measurement is limited to the effect of the individual ordinance on the larger region or state, it will likely be trivial and unassailable,[77] but if the court decides to speculate on the aggregate effect of many similar ordinances, the composite extraterritorial impact effect will cross the line into impermissible.[78] All in all, the inconsistency of meaning and measurement essentially gives courts a cover for imposing their own political assessment of the local laws at issue. Not only does that create a powerful tool that is beyond the reach of legislative directives, but it also leaves home rule units themselves without guidance as they try to predict the best way to adopt a legally sustainable ordinance.

A. Elevating Judicial Intent Over Legislative Intent

If the majority of judicial decisions applying the extraterritorial impact factor involved cases with no indication of legislative intent, its application could be defended, perhaps, as a necessary substitute for the unavailable best evidence. Yet in many of the cases in which it has been an important factor, the legislature's intent was unequivocal. In imperio courts, because the absence of the extraterritorial impact is an important contributor to a judicial conclusion that the law is exclusively local, and thus immune from state preemption, its application has meant the difference between the court's decision to defer to the legislature's clear intent to preempt and its decision to disregard that statutory intent by awarding immunity to the home rule ordinance. And because of the extraterritorial impact's enormous breadth and imprecision, it is impossible to identify a consistent analysis or judicial metric.

In one case, the Colorado court immunized a municipal residency requirement from explicit preemptive intent because of its conclusion that the extraterritorial impact was trivial.[79] Yet in another case, the

73. *See, e.g.*, City of Northglenn v. Ibarra, 62 P.3d 151, 161-62 (Colo. 2003).

74. *See, e.g.*, *Am. Fed'n*, 895 N.E.2d at 248-49; Town of E. Greenwich v. O'Neil, 617 A.2d 104, 111-12 (R.I. 1992).

75. *See, e.g.*, Denver & Rio Grande W.R.R. Co. v. City & County of Denver, 673 P.2d 354, 358-59 (Colo. 1983).

76. *See, e.g.*, *Lot Thirty-Four*, 3 P.3d at 39.

77. *See, e.g.*, City & County of Denver v. State, 788 P.2d 764, 769 (Colo. 1990).

78. *See, e.g.*, *Ibarra*, 62 P.3d at 161-62.

79. *Denver v. State*, 788 P.2d at 769. In contrast, an Ohio appellate court recently applied the analysis to a similar Cleveland ordinance and concluded that its extraterritorial impact meant that the home rule initiative was subject to state statutory prohibition of municipal residency requirements. *See Am. Fed'n*, 895 N.E.2d at 248-49.

court's recognition that the extraterritorial impact was likely to be "minimal"[80] did not result in home rule immunity. In one opinion, the home rule ordinance's application to large numbers of nonresidents within the home rule unit's borders was key to a finding of extraterritoriality;[81] while in another, that same fact was irrelevant to the judicial analysis, and immunity from conflicting state regulation was forthcoming.[82] In all of these cases, the state legislature had explicitly articulated its intent that local regulation should yield to uniform statewide standards.[83] The court's resolution of the extraterritorial impact factor determined whether that state legislative intent would be honored or disregarded.

The extraterritorial impact factor has also been applied to frustrate explicit legislative intent to allow concurrent regulation. In *Holiday Universal, Inc. v. Montgomery County*,[84] the Maryland Court of Appeals concluded that a home rule county's unfair practices law had an impermissible extraterritorial impact because its application to all contracts "primarily" performed within the county meant that some out-of-county conduct came within its sweep. Concluding that the impact of the regulation was impermissibly extraterritorial, the court held that the county law was beyond the scope of its home rule powers.[85] Although the Maryland legislature had explicitly, and strongly, encouraged local governments to adopt consumer regulations to supplement the state law,[86]

80. *Lot Thirty-Four*, 3 P.3d at 39-40.

81. City of Commerce City v. State, 40 P.3d 1273, 1282 (Colo. 2002). The Colorado Supreme Court's own holding nearly 25 years earlier in *People v. Hizhniak*, 579 P.2d 1131 (Colo. 1978), in which it had upheld a home rule municipality's ability to "regulate speed limits on its streets and prescribe its own penalties for violations thereof," *id.* at 1132, seemed persuasively on point and suggestive of a judicial conclusion of immunity. *See Commerce City*, 40 P.3d at 1285-1287 (Mullarkey, C.J., dissenting) (citing *Hizhniak*, 579 P.2d at 1132).

82. Fraternal Order of Police, Colo. Lodge # 27 v. City & County of Denver, 926 P.2d 582, 592 (Colo. 1996) (granting immunity to home rule unit from statewide training requirements for deputy sheriffs).

83. State law relevant to *Denver v. State* declared that "no residency requirement may be imposed on any employee by any local government." COLO. REV. STAT. ANN. § 8-2-120(4)(a) (West 2009), *quoted in* 788 P.2d at 765 n.4. State law found applicable in *Lot Thirty-Four* prohibited the adoption of any municipal law "which would control rents on private residential property," COLO. REV. STAT. ANN. § 38-12-301 (West 2009), *quoted in* 3 P.3d at 34, and explicitly intended to apply to "any city, town, or city and county which has chosen to adopt a home rule charter." COLO. REV. STAT. ANN. § 38-12-302 (West 2009), *quoted in* 3 P.3d at 37. In the statute at issue in the *Commerce City* dispute, the legislature had declared that "the enforcement of traffic laws through the use of automated vehicle identification systems under this section is a matter of statewide concern and is an area in which uniform state standards are necessary." COLO. REV. STAT. ANN. § 42-4-110.5 (West 2009), *quoted in* 40 P.3d at 1280. And finally, state law in the *Fraternal Order* case mandated a particular type of training for all deputy sheriffs "employed by the state or any city, city and county, town, or county within this state." COLO. REV. STAT. § 18-1-901(3)(l)(I) (2002) (repealed 2003), *quoted in* 926 P.2d at 585 n.3.

84. 833 A.2d 518 (Md. 2003).

85. *Id.* at 526-27.

86. In its statement of purpose, the state's Consumer Protection Act noted its intention "to set certain minimum statewide standards for the protection of consumers across the State, and the General Assembly strongly urges that local subdivisions which have created consumer protection agencies at the local level encourage the function of these agencies at least to the minimum level set forth in the standards of this title." MD. CODE ANN., BUS. OCC. & PROF. § 13-102(b)(1) (West 2008).

that clear evidence of state intent was irrelevant, trumped by the court's conclusion on extraterritorial impact.

While the extraterritorial impact factor seems to surface most frequently in cases in which the legislature has clearly spoken, it can also be an important part of an imperio court's preemption analysis in cases with no legislative statement of preemptive intent. In that situation, the extraterritorial impact factor has become a proxy for legislative intent. The Colorado Supreme Court's analysis in *City of Northglenn v. Ibarra*[87] most clearly illustrates this point for the imperio home rule system.

In *Ibarra*, a home rule city's ordinance prohibited registered sex offenders from living together in a single family residence. Juliana and Eusebio Ibarra, who were certified by a child placement agency (which in turn was licensed by the state of Colorado), offered foster care to children placed in their home by the state agency. When Northglenn's ordinance became effective, three of the four children living in the Ibarras' home were adjudicated juvenile sex offenders. The Ibarras were convicted of violating Northglenn's residency restriction, and their legal challenge alleged that the local law was beyond the scope of home rule powers.[88] The state's highest court agreed with the Ibarras, concluding that the local ordinance was inapplicable to the Ibarras as foster care providers for adjudicated juvenile offenders. Although that conclusion may seem intuitively correct, the court's analysis unnecessarily muddied the waters with its insertion of extraterritorial impact into the preemption analysis.

Clear state precedent, developed first in the supreme court's holding in *City & County of Denver v. State*,[89] instructs Colorado courts to evaluate challenges to home rule ordinances to determine, first, the nature of the ordinance as local, statewide, or shared; and second, if necessary, to consider whether the local law has nevertheless been preempted by the state legislature. The extraterritorial impact factor (along with a consideration of the state's need for uniformity and the tradition of state and local regulation with regard to the issue at hand)[90] forms a part of the analysis of that first question. If the court applies the factors and concludes that the ordinance is best described as dealing with a shared state and local concern, application of its well-established preemption test is

87. 62 P.3d 151 (Colo. 2003).

88. The Ibarras' other allegations consisted of claims that the local law discriminated on the basis of family status in violation of the Fair Housing Act, 42 U.S.C. § 3601, that it violated their associational rights under the U.S. Constitution, and that it violated the Ibarras' right to make important personal choices in their family life. *See Ibarra*, 62 P.3d at 154.

89. 788 P.2d 764 (Colo. 1990). This opinion is recognized as the origin of the three factor inquiry. *See also* Fraternal Order of Police, Colo. Lodge # 27 v. City & County of Denver, 926 P.2d 582, 588-89 (Colo. 1996).

90. Consideration of these additional factors is beyond the scope of this paper, but it is worth noting that the other two factors established by the court more obviously relate to judicial exploration about likely legislative intent and thus are arguably legitimate parts of the inquiry.

the second step. Only if the local law conflicts with state statutes will the local law be preempted.

In *Ibarra*, and unlike most other Colorado cases applying the extraterritorial impact factor, the state legislature had not explicitly preempted the challenged local regulation. Application of the *Denver v. State* factors should have occurred at the first step in the analysis, that is, to determine whether the local regulation dealt with an exclusively local, exclusively statewide, or shared concern. Based on case precedent, it seems likely that the matter fit within the category of shared state and local concern, which would then have triggered the preemption analysis. The *Ibarra* court, however, failed to separate the two steps, conflating the categorization question with the preemption question, and thus converting the extraterritorial impact factor into an argument about the state law's preemptive effect.[91] The subtle yet important consequence of that blending of the issues is that the court favored application of a vague judicial metric and failed to analyze the relevant local interests and the existence or extent of conflict between state law and the home rule initiative.[92]

While the extraterritorial impact factor surfaces most frequently in imperio states, it has been used by courts in legislative home rule states as well. In a slightly different scenario than the one presented in imperio states, where the extraterritorial impact factor has emerged as a way for courts to disregard legislative intent, the legislative home rule court's use of the extraterritorial impact will invalidate local regulation in an area in which the state legislature has remained silent, and thus, non-preemptive. In legislative home rule courts, then, the extraterritorial impact factor functions more as a tool of implied preemption. Even though the Illinois Supreme Court has frequently stressed that implied preemption is incon-

91. Pursuant to the analysis developed in *Denver v. State*, home rule ordinances dealing with exclusively local concerns are immune from conflicting state law, even if the legislature has explicitly indicated its desire to preempt local law. Thus, when the state has explicitly articulated its intent to preempt, the resolution of the immunity question also answers the question whether the local law has been preempted, not because extraterritorial impact is a relevant factor to preemption, but because the state's intended preemption can take effect only if the court concludes that the law is not exclusively local, and thus, preemptible. In most of the cases applying the *Denver v. State* factors—see, for example, *City of Commerce City v. State*, 40 P.3d 1273, 1280 (Colo. 2003); *City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001); *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 37 (Colo. 2000); *Fraternal Order*, 926 P.2d at 589—the facts were similar, involving a local law that conflicted with an explicit state preemptive declaration. It is only when the state has not provided clear evidence of legislative intent to preempt that the two questions are necessarily separate. *Ibarra* was one such case, yet the court failed to distinguish them. *See generally Ibarra*, 62 P.3d 151.

92. The preemption analysis would have forced the court to grapple with difficult questions about whether state law articulated a reasonable need for unfettered discretion in its agents' placement of adjudicated juvenile offenders in foster care. Although the court did identify a number of state concerns and interests, it neither identified the relevant local interests nor identified the extent of the conflict between state and local law. The dissent, for instance, raised the possibility that the majority's holding could be broad enough to authorize placement of a foster child in a building that violated a city's health or building codes. *See Ibarra*, 62 P.3d at 165-66 (Coats, J., dissenting).

sistent with Illinois' clear adoption of legislative home rule,[93] on occasion it has applied the extraterritorial impact concept to do just that.

For example, in *City of Des Plaines v. Chicago & North Western Railway Co.*,[94] the court invalidated a home rule noise ordinance for its impermissibly extraterritorial intent to regulate something whose origin was not always within the home rule unit, and which could not be contained within the home rule unit. Similarly, in *People ex rel. Bernardi v. City of Highland Park*,[95] the court invalidated a home rule unit's attempt to exempt itself from the application of the state's Prevailing Wage Law, identifying an impermissible extraterritorial impact on the computation of the prevailing wage in the area, which could decrease for other municipalities because of Highland Park's actions. In essence, judicial application of the extraterritorial impact factor in the legislative home rule system means that the legislature has not taken steps to preempt the law, but the court believes it should have.[96] This approach improperly ignores the court's duty to uphold local regulation "in the face of less stringent or conflicting State regulation, following a determination that the State's expression of interest in the subject as evidenced by its statutory scheme did not amount to an express attempt to declare the subject one requiring exclusive State control."[97]

In the contexts described above, application of the extraterritorial impact factor elevates judicial over legislative intent. In some cases, it makes questions of legislative attitudes about the local law irrelevant to the analysis, even when the state has clearly and explicitly articulated that intent pursuant to statutory enactment. In others, when legislative intent is not explicit, it substitutes judicial application of a vague metric for evaluation of whether, and if so to what extent, local laws based on legitimate home rule concerns conflict with state law. Application of indeterminate terms may be necessary and even appropriate when it comes to protection of constitutional norms[98] but when a clear constitutional green light shines on a home rule enactment,[99] and when other parts of the judicial analysis would involve well established inquiries to determine the relationship between state and local law, the extraterritorial impact factor serves only to trump what would otherwise be a state legislature's political decision about the proper allocation of power between state and local governments. In both cases, the court cuts off the oppor-

93. *See* Kalodimos v. Vill. of Morton Grove, 470 N.E.2d 266, 274 (Ill. 1984) (rejecting application of a "free-wheeling preemption rule to the exercise of home rule power").

94. 357 N.E.2d 433 (Ill. 1976).

95. 520 N.E.2d 316 (Ill. 1988).

96. Both cases had vigorous dissents, making the argument described in the text. *See Bernardi*, 520 N.E.2d at 323 (Miller, J., dissenting); *Chi. & Nw. Ry. Co.*, 357 N.E.2d at 436 (Ryan, J., dissenting).

97. *Kalodimos*, 470 N.E.2d at 275.

98. *See* Sandalow, *supra* note 19, at 707-21.

99. *See infra* text accompanying notes 108-11.

tunity to find the best evidence about legislative intent and arrogates to itself the final say in an essentially political dispute.[100]

The extraterritorial impact inquiry appears to have originated in courts in imperio states and may derive from that system's original focus on carving out two self-contained spheres of regulation, one local and one statewide.[101] In this inquiry, the absence of extraterritorial impact supported the argument that the local ordinance fell within the sphere of exclusively local regulation and was thus immune from all conflicting state laws. Instances of concurrent regulation or overlap between state and local laws were few, thus minimizing the need for judicial analysis to resolve conflict.[102] Yet as the courts in the more recent cases recognize, the increasing interconnection brought about by new technology, faster modes of transportation, new methods of communication, and increasing urban density, make the definitions of an exclusively statewide concern and an exclusively local concern extremely difficult to identify.[103] In fact, the Kansas Supreme Court has suggested that the line itself may be ephemeral: "Few, if any, ordinances and resolutions deal with an exclusively local matter and no statute regulates a matter which can be exclusively of statewide concern."[104] If the majority of home rule disputes involve overlapping regulations and potentially conflicting assertions about valid state and local interests, the extraterritorial impact

100. In his very thoughtful and comprehensive analysis of state court preemption of local law, Professor Paul Diller urged that the judiciary assume the role of "partners [with the state legislature] in the process of interpreting state laws and developing the vertical distribution of power in a home rule system," Diller, *supra* note 26, at 1159, thus rejecting arguments that state courts are better suited to act as "'agents' merely searching for a specific instruction from the legislature." *Id.* Diller offers three main arguments in support of this position—that courts are more impartial in a geographic sense, *id.* at 1160-64, enjoy a "tempered political insulation," *id.* at 1164-66, and are likely to resolve disputes more quickly than the legislature, *id.* at 1166-68. For the contrary view that courts should require explicit legislative articulation of intent to preempt, see Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 265 (2004). At least in legislative home rule states, Professor Diller's proposal seems to violate the system's essential feature, that is, the absolute legislative supremacy and flexibility in determining the scope of home rule.

101. *See* Diller, *supra* note 26, at 1124-25.

102. *See id.* According to the standard history of home rule, opposition to the narrow judicial construction of the exclusively local sphere in the imperio system prompted the introduction of legislative home rule, with its focus on total legislative flexibility to delineate the scope of home rule powers. *See* BRIFFAULT & REYNOLDS, *supra* note 28, at 303; Diller, *supra* note 26, at 1124-27. Professor Terrance Sandalow led the opposition to the legislative home rule system, arguing that judicial decisions in imperio states had been protective of home rule. *See* Sandalow, *supra* note 19, at 652, 661-63. He agreed that home rule initiative powers should be broad, see *id.* at 652-58, but defended the preservation of a vigorous judicial role "to curb abuse of municipal authority." *Id.* at 691.

103. *See* City of Commerce City v. State, 40 P.3d 1273, 1281 (Colo. 2002) (noting that increasing metropolitan area integration may change "local" concerns into "statewide" issues); City & County of Denver v. Qwest Corp., 18 P.3d 748, 755 (Colo. 2001) (concluding that globalization increases the need for uniformity of regulation).

104. Mo. Pac. R.R. v. Bd. of County Comm'rs of Greeley, 643 P.2d 188, 194 (Kan. 1982).

factor, and its search for exclusivity of regulation, seems to have lost its original justification and has become ill-suited for the judicial analysis.[105]

Nor can the extraterritorial impact factor be defended with the argument that it marks the line beyond which home rule regulation cannot extend.[106] As a matter of state constitutional law, even imperio courts have adjusted their attitudes to accept that home rule is more properly viewed as a transfer of all transferable powers from the state to its political subdivisions.[107] In that regime, home rule enactments should be upheld so long as they meet state constitutional standards, meaning that the extraterritorial impact of local actions should be the basis for judicial condemnation only when it results in a violation of constitutional guarantees. The New Jersey,[108] New Hampshire,[109] and California[110] Supreme Courts are among the very few that have concluded that the extraterritorial impact of local action may rise to the level of a state constitutional violation.[111]

B. Judicial Analysis Without the Extraterritorial Impact Factor

Judicial abandonment of the extraterritorial impact factor would clarify and strengthen the judicial analysis. In legislative home rule states, application of the factor is one of the few situations in which the courts

---

105. Justice Hans Linde's opinion in *City of La Grande v. Pub. Employes Ret. Bd.*, 576 P.2d 1204 (Or. 1978), implicitly accepted this argument, when it established a narrow sphere of immune local regulation. *See id.* at 1215. Though his opinion, which subjected home rule units to statewide retirement laws for city police and firefighters, has been criticized as improperly restrictive of home rule powers, it really takes no position on that issue. Justice Linde's basic point, rather, is that it is up to the legislature, and not the court, to determine the scope of home rule initiative. *See* Burgundy, *supra* note 28, at 830-33 (discussing *La Grande* and the opinion's strenuous dissents).

106. As a matter of federal constitutional law, municipal government extraterritoriality would raise concerns only if the government extraterritorial regulatory jurisdiction reached the level of "annex[ation] . . . in all but name." Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 70 n.8 (1978). In *Holt*, the Supreme Court rejected constitutional challenges based on the one person, one vote doctrine to an Alabama statute that granted municipalities extraterritorial regulatory jurisdiction over nearby unincorporated territory. *Id.* at 62-63.

107. In *Fishel v. City & County of Denver*, 108 P.2d 236 (Colo. 1940), the state supreme court asserted: "[T]he Legislature, prior to the adoption of the Home Rule Amendment, constitutionally could have conferred upon a municipality the power here questioned and . . . it must be considered that such authority now is vested in the city by virtue of the [Home Rule] amendment." *Id.* at 241. More recently, the Colorado court declared that "[t]he effect of the [home rule] amendment was to grant to home rule municipalities '*every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs." City & County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990) (quoting Four-County Metro. Capital Improvement Dist. v. Bd. of County Comm'rs of Adams, 369 P.2d 67, 72 (Colo. 1962)); *accord* City & County of Denver v. Bd. of Comm'rs of Arapahoe County, 156 P.2d 101, 103 (Colo. 1945)).

108. *See* S. Burlington County NAACP v. Twp. of Mt. Laurel, 456 A.2d 390, 415 (N.J. 1983).

109. *See* Britton v. Town of Chester, 595 A.2d 492, 496 (N.H. 1991) (refraining from reversing the lower court's holding that a zoning ordinance with extraterritorial impact was unconstitutional); Cmty. Res. for Justice, Inc. v. City of Manchester, 949 A.2d 681, 685 (N.H. 2008).

110. *See* Assoc. Home Builders v. City of Livermore, 557 P.2d 473, 483 (Cal. 1976).

111. As a proxy for legislative intent to limit home rule, the extraterritorial impact limit is on equally weak ground. Most obviously, this justification is belied by the fact that the factor's most frequent use has been to enable the courts to flaunt, rather than follow, their state legislature's explicit intent. *See supra* text accompanying notes 81-95.

have not been consistent with their home rule system's clear mandate for legislative, rather than judicial, preemption. Giving up the extraterritorial impact factor would mean the relinquishment of what is essentially a tool of implied preemption, or, more exactly, a factor with which the court expresses its desires about what it believes the legislature should have done.

In imperio states, the loss of the extraterritorial impact factor would not strip the courts of the higher level of active involvement they currently enjoy. The judiciary would still have a broad mandate to decipher legislative intent through application of its preemption analyses. In addition, it would retain its ability to limit state preemptive authority to those instances in which the preemptive law falls within the state court's definition of a "general law"[112] or to those instances in which the state legislature has a legitimate interest, rather than merely a stated intent, to preempt.[113]

The courts in at least two imperio states have decided to follow that course. The Supreme Court of Kansas jettisoned the extraterritorial impact inquiry from its analysis, concluding that "[e]ven if a local act has extraterritorial effect which makes its impact other than 'purely local,' the local act should stand if not in conflict with a state statute and not in an area clearly pre-empted by the state."[114] The Iowa Supreme Court adopted a similar view, concluding that "almost anything qualifies as a local affair."[115] By shifting the focus of judicial analysis to one of ascertaining legislative intent, the courts relinquished the opportunity to apply their own policy preferences and left the resolution of the legal dispute to a determination of the local law's consistency or conflict with state law. In these imperio states, then, the judiciary has voluntarily assumed a backseat in the analysis of the relationship between state and local law, eschewing the opportunity to delineate the line between the permissibly local and impermissibly extraterritorial, and focusing instead on the iden-

112. In its interpretation of the state constitutional provision that home rule authorizes "all powers of local self-government . . . as are not in conflict with general laws[]", OHIO CONST. art. XVIII, § 3, the Ohio Supreme Court has adopted a four-part test to evaluate whether an explicit state intent to preempt qualifies as a "general law." *See, e.g.*, City of Canton v. State, 766 N.E.2d 963, 968 (Ohio 2005) (holding that for a state enactment to qualify as a preempting "general law," it must "(1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike . . . , (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation . . . , and (4) prescribe a rule of conduct upon citizens generally"), *quoted in* Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 783 (Ohio 2006).

113. *See Denver v. State*, 788 P.2d at 768 & n.6 (stressing that legislature's declaration of statewide concern is not conclusive nor automatically binding on the court); *accord* City & County of Denver v. Qwest Corp. 18 P.3d 748, 755 (Colo. 2001); Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 37 (Colo. 2000).

114. Mo. Pac. R.R. v. Bd. of County Comm'rs of Greeley, 643 P.2d 188, 194 (Kan. 1982). The court invalidated the local ordinance based on its direct conflict with several provisions of state law. *Id.* at 196; *see also* Blevins v. Hiebert, 770 P.2d 486, 489 (Kan. Ct. App. 1989).

115. Worth County Friends of Agric. v. Worth County, 688 N.W.2d 257, 261 (Iowa 2004).

tification of legislative intent. Though judicial control over home rule through application of the extraterritorial impact factor may have made sense at a time when home rule units were regarded as self-contained empires, the reality of today's metropolitan landscape means that the term applies in a way that is not responsive to home rule units' needs nor to the state's decisions about how to allocate power to its political subdivisions.

III. NEGATIVE CONSEQUENCES OF THE EXTRATERRITORIAL IMPACT FACTOR FOR HOME RULE UNITS

A. Reducing Home Rule Initiative

In my estimation, the negative implications of the extraterritorial impact analysis extend beyond its effects on the judicial inquiry and are felt by the home rule unit itself. Most importantly, the factor restricts the scope of home rule initiative in significant ways. It can invalidate policy initiatives that might otherwise, in the words of Paul Diller, "percolat[e] 'out' to other cities and 'up' to the state level."[116] If, as Professor Diller has persuasively argued,[117] the most valuable feature of home rule is its ability to facilitate local policy experimentation and innovation, the extraterritorial impact factor impedes the full realization of that benefit. By targeting those home rule initiatives whose causes and effects cannot be contained within the home rule unit's territory, the extraterritorial impact limit is likely to catch within its sweep many cutting edge initiatives trying to grapple with the region's most pressing problems.[118]

Recent scholarship on immigration regulation is a good illustration of how the extraterritorial impact factor can reduce the breadth of home rule initiative power dramatically. Over the past few years, several legal scholars have suggested a rethinking of the longstanding and long unquestioned common wisdom that immigration regulation is exclusively

116. *See* Diller, *supra* note 26, at 1119.

117. *See id.* at 1117-33.

118. On occasion, application of the extraterritorial impact factor in Colorado has protected a greater, rather than lesser, scope of home rule initiative powers. That is because the *absence* of extraterritorial impact can produce a finding that the local law is immune from conflicting state regulation, even when that legislation explicitly articulates a preemptive intent. *See, e.g.*, Fraternal Order of Police, Colo. Lodge # 27 v. City & County of Denver, 926 P.2d 582, 589 (Colo. 1996); City & County of Denver v. State, 788 P.2d 764, 767 (Colo. 1990). Without the extraterritorial impact factor, then, the local laws challenged in these cases would have been preempted. In most states, however, the extraterritorial impact factor applies only to restrict home rule regulation. *See, e.g.*, City of Des Plaines v. Chi. & Nw. Ry. Co., 357 N.E.2d 433, 435 (Ill. 1976); Metro. Sanitary Dist. of Greater Chi. v. City of Des Plaines, 347 N.E.2d 716, 719 (Ill. 1976); Holiday Universal, Inc. v. Montgomery County, 833 A.2d 518, 524 (Md. 2003); Am. Fed'n of State, County & Mun. Employees Local # 74 v. City of Warren, 895 N.E.2d 238, 249 (Ohio Ct. App. 2008); Town of E. Greenwich v. O'Neil, 617 A.2d 104, 111 (R.I. 1992). More fundamentally, though, defending the courts' application of the extraterritorial impact factor because of its strategic potential to thwart explicit legislative intent to restrict home rule would mean giving the judiciary the power to ignore state legislative intent in what is clearly a political debate about the allocation of government power between state government and its political subdivisions.

within the province of the federal government.[119] They argue that, in fact, state and local immigration regulation may properly allow an inter-jurisdictional approach to an issue that has a multi-faceted impact on communities and states, as well as on our nation.[120] As Rick Su has observed, many local ordinances that appear to be examples of immigration regulation are better understood as reflections of longstanding local attention to regulatory initiatives defining community character and quality of life; he urges that their legitimacy be evaluated through a localist lens.[121] Yet, surely the extraterritorial impact factor would apply to keep local regulation out of the mix altogether, for after all, it is hard to imagine an area of the law more susceptible to claims about extraterritorial impact. If the recent scholarship is correct that the breadth of interests, actions, and impacts of what can be loosely defined as "immigration regulation" is too complicated and nuanced to be summarily pushed beyond the permissible scope of home rule, the application of a vague judicially created term that would do just that has no place in the analysis.[122]

B. Misunderstanding the Region

With its underlying premise that the impacts of home rule regulation should be contained within the governmental unit's borders, the extraterritoriality limit ignores the essential fact that regions are by definition interconnected, interdependent, and affected by one another's actions. In the words of Neal Peirce, a region is "a fully integrated organism . . . . the closely interrelated, geographic, economic, environmental

119. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 830 (2008); Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 641 (2008); Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619, 1636 (2008).

120. Professors Rodriguez and Huntington focus more specifically on the state-federal relationship, although Prof. Rodriguez notes that her proposal of an "antipreemption norm," must ultimately deal with the states' power to preempt local regulation and the fact that "state preemption of local law is even more effective in flattening out diverse preferences than the immigration preemption sometimes employed by courts, because state preemption is not constrained by functional parallels to the constitutional doctrines that protect states' interests." Rodriguez, *supra* note 119, at 637. Professor Su, as a state and local government law scholar, focuses explicitly and exclusively on the realm of local regulation and the way in which our country's longstanding acceptance of localism and localist values must inform the legal analysis of municipal regulation that implicates immigration and regulates immigrants.

121. Professor Su challenges the implicit assumption in the recent immigration federalism scholarship that local immigration regulation is a reflection and embodiment of the same political forces and debates over immigration as those that are evident at the state and national levels. He argues that much local immigration regulation has its own source, one that has little if anything to do with the larger picture of immigration policy. Rather, he argues, it is better understood as a consequence of localism, in which local governments have long sought to protect their residents' quality of life. *See* Su, *supra* note 119, at 1649-54. Professor Su does not dispute that the regulations target immigrants but makes the important observation that understanding the total picture requires sensitivity to the localism context. His specific analysis of North Carolina's state and local government law structure illustrates this point nicely. *See id.* at 1654-76.

122. The argument here is not a strategic one about which level of regulation is more likely to implement a favored political agenda in immigration regulation but rather whether home rule units should be automatically disqualified from participation. *See* Rodriguez, *supra* note 119, at 594-95.

entity that chiefly defines . . . [our] civilization."[123] Just as the fate of each particular local government in the region depends on the fate of the entire region,[124] the actions of one inevitably have an impact on the other. In fact, it is that very interrelatedness and interconnection that undergirds the law and economics explanation of why the ability of "consumer voters"[125] to choose among diverse local governments in the region enhances overall welfare. After all, the competition among municipalities to attract residents and revenues presupposes meaningful interjurisdictional regulatory differences.

Applying a factor that seeks to cordon off a local government so that it becomes an isolated unit whose actions have no impact on any other part of the region misunderstands the essence of a region and the inevitability of interlocal contacts and impacts. Although a court may try to insist that local governments operate in a way that affects nothing beyond their own borders, it is a futile attempt to change the reality of the regions in which most home rule units exist. The very nature of metropolitan regions insures that transactions, people, services, and goods cross many local government borders on a regular and routine basis.[126] A judicial term that views those inevitable cross-border connections as evidence of a home rule ordinance's invalidity reduces the scope of home rule initiative to the trivial. For the growing interconnectedness among municipalities to serve as the basis for invalidation of local regu-

123. NEAL R. PEIRCE WITH CURTIS W. JOHNSON & JOHN STUART HALL, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD 291(1993). He further describes metropolitan regions, which he refers to as "citistates", as "a concentration of human development, of roads and rivers and bridges and masses of buildings, all arrayed together, people and vehicles, air, water, and energy, information and commerce, interacting in seemingly infinite ways." *Id.*

124. *See* LARRY C. LEDEBUR & WILLIAM R. BARNES, NAT'L LEAGUE OF CITIES, "ALL IN IT TOGETHER": CITIES, SUBURBS AND LOCAL ECONOMIC REGIONS 1, 3-7 (1993). In that study, the authors found that in the 25 metropolitan areas with the most rapid income growth, central city incomes also increased. Conversely, in the 18 metropolitan areas that recently experienced income decline, central city income declined in all but four instances. The report implies that metropolitan area suburbs have a stake in the economic well-being of their central cities. Other analysts reached similar conclusions about the interdependence of suburb and city. *See, e.g.*, Joseph Persky & Wim Wiewel, *The Distribution of Costs and Benefits Due to Employment Deconcentration, in* URBAN-SUBURBAN INTERDEPENDENCIES 49, 50 (Rosalind Greenstein & Wim Wiewel eds., 2000); H.V. Savitch et al., *Ties that Bind: Central Cities, Suburbs, and the New Metropolitan Region*, 7 ECON. DEV. Q. 341, 341 (1993); Richard Voith, *Central City Decline: Regional or Neighborhood Solutions?*, BUS. REV., Mar.-Apr. 1996, at 3; Richard Voith, *City and Suburban Growth: Substitutes or Complements?*, BUS. REV., Sept.-Oct. 1992, at 21, 22 (concluding that an economically vital central city is essential to the health of the metropolitan area).

125. Published in 1956, Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956), first articulated the economic defense of localism in urban government. According to his model, local governments compete with each other to provide a desired mix of services to retain their constituents, the individual citizens whom he described as "consumer-voters." *Id.* at 419. Competition between and among government units should produce greater efficiency in the provision of public services as well as more variety in the range and level of services offered by different government units.

126. *See, e.g.*, Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1116 (1996).

latory initiatives[127] means that the sphere of permissible home rule activity becomes smaller, while the problems become more urgent.[128]

In fact, if the inescapable interconnectedness in a metropolitan region forms the basis of impermissible extraterritorial impacts in home rule ordinances, the incongruous result is that home rule initiatives will be on stronger legal footing when they are adopted in rural areas, because rural communities lack the multiple intergovernmental connections that come from the density and sprawl of metropolitan regions. A home rule traffic regulation[129] or a regulation of local service contracts[130] adopted in a part of the state with few incorporated municipalities, dense urban areas, or regional employment or transportation centers, is unlikely to have the same impermissible extraterritorial effect on nonresident movement as the courts have found in urban areas. Yet home rule was envisioned precisely to allow local governments located in denser areas to deal with the problems caused by increasing urbanization. In fact, the drafters of the 1970 Illinois Constitution favored the state's adoption of home rule precisely because of the pressing need for local government flexibility and initiative in metropolitan regions:

> [H]ome rule powers are most urgently needed by larger municipalities in the more highly urbanized areas of the state. Although the problems of urban society affect many small localities, they are felt most intensely in larger cities and villages. Dense concentrations of population and industry call for the creative use of flexible governmental powers to achieve and maintain order, social justice and a satisfactory quality of life. The renewal of old and deteriorating neigh-

127. For the court in *City of Commerce City v. State*, 40 P.3d 1273 (Colo. 2002), for instance, the increasing interlocal integration results in decreasing home rule ability to deal with local problems. In the court's words, "[a]s motor vehicle traffic in the state and between home-rule municipalities becomes more and more integrated it gradually ceases to be a 'local' matter." *Id.* at 1281. Similarly, the court in *City & County of Denver v. Qwest Corp.*, 18 P.3d 748 (Colo. 2001), opined that "advances in technology and the phenomenon of globalization have greatly increased the need for uniformity of regulation." *Id.* at 755. In this view, then, the trend is towards a decreasing sphere for home rule regulation.

128. Several state supreme court decisions illustrate how the extraterritorial impact factor fundamentally ignores the basic nature of metropolitan regions. In *Holiday Universal, Inc. v. Montgomery County*, 833 A.2d 518 (Md. 2003), for instance, the Maryland Court of Appeals invalidated a home rule ordinance because its application was not limited to behavior occurring exclusively within the territory of the home rule unit, but rather extended to regulate contracts whose implementation occurred "primarily" within the home rule unit. For the court, the fact that up to 49% of the contract could be performed beyond the borders of the home rule unit meant that "the impact . . . is too great for the ordinance to be a local law . . . ." *Id.* at 526. The Colorado Supreme Court in *Commerce City*, applying that concern in a different direction, found an impermissible extraterritorial impact in local regulations' application to numerous non-residents who entered the home rule unit on a daily basis on their way to work. In this case, between 40 and 90% of the tickets issued under the home rule units' photo radar system went to non-residents driving through on their way to work or other activities. *See Commerce City*, 40 P.3d at 1282. Thus, the extraterritorial impact in this case came not from the way in which the law pulled out-of-unit conduct within its reach but rather in the way it applied to numerous people coming into the unit on a daily basis. In both instances, the extraterritorial impacts identified by the courts merely reflect our metropolitan reality.

129. *Commerce City*, 40 P.3d at 1285.

130. *Holiday Universal*, 833 A.2d at 520.

> borhoods and business districts which characterize larger municipalities requires extra revenue, better planning and more efficient administration.[131]

Thus, in many instances, the extraterritorial impact factor puts the law in the counter-intuitive position of limiting home rule units in metropolitan areas more than their rural counterparts, when in reality, governments in denser urban areas are more likely to need broader legislative and initiative powers and were the primary intended beneficiaries of home rule in the first place.[132]

Moreover, when local actions are invalidated because of their impermissible extraterritorial impact, a regulatory vacuum may result, for there is no government unit whose boundaries are coterminous with the impact found by the court. Regional governments are virtually nonexistent in U.S. metropolitan areas,[133] yet regional problems abound. When home rule initiatives dealing with these issues are found to have impermissible extraterritorial impacts, they are invalidated simply because they affect an issue that is also of pressing concern to other home rule units in the area.[134] Although the courts' condemnation of extraterritorial impacts may come with the add-on that a regional solution is needed, regional solutions have not been forthcoming.[135] As a result, pressing

131. 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, at 1628-29 (1972), *quoted in* City of Evanston v. Create, Inc., 421 N.E.2d 196, 201 (Ill. 1981).

132. Admittedly, it is possible to imagine a situation in which an ordinance adopted in a rural setting is likely to have a greater extraterritorial impact than if the same ordinance were applied in a denser urban area. Regulation of confined animal feeding operations (CAFO) is one obvious example. *See* Worth County Friends of Agric. v. Worth County, 688 N.W.2d 257, 264 (Iowa 2004). Presumably, a rural county's CAFO ban would have far greater extraterritorial effect than a ban adopted in a densely populated suburb, where hog factories are unlikely to be a pressing local issue.

133. For discussion of the few exceptions to this rule, see BRIFFAULT & REYNOLDS, *supra* note 28, at 588-99. *See also* Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 510 (2005); Todd Swanstrom, *What We Argue About When We Argue About Regionalism*, 23 J. URB. AFF. 479, 479 (2001) (describing Portland as the only metropolitan region with elected officials serving on a regional governmental body).

134. Given that home rule initiatives with the most pernicious and pervasive extraterritorial impact, exclusionary zoning and suburban municipal incorporation are typically upheld as well within the powers of home rule authority, this one-sided gap-creation seems unfairly lopsided against regional initiatives that might counter the anti-regional tendencies of many home rule actions.

135. In *City of Des Plaines v. Chicago & North Western Railway Co.*, 357 N.E.2d 433 (Ill. 1976), for instance, the court invalidated a home rule unit's noise ordinance because of the city's inability to limit its regulation to noise that originated in and could be contained within its borders. *Id.* at 435. Similarly, in *Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30 (Colo. 2000), the court pointed to an affordable housing ordinance's many potential impacts outside its borders as evidence that the matter was not a local concern. *Id.* at 38. In both cases, the courts' condemnation of the extraterritorial impact came with the add-on that what was needed was a regional solution to the problem. According to the *Chicago & North Western Railway* court, "noise pollution is a matter requiring regional, if not statewide, standards and controls." 357 N.E.2d at 435. The Colorado Supreme Court in *Lot Thirty-Four Venture* expressed a similar concern: "[T]he growth of the one community is tied to the growth of the next, thereby buttressing the need for a regional or even statewide approach." 3 P.3d at 39.

local problems have been relegated to the status of an untouchable regional problem.[136]

C. Disadvantaging Home Rule Units Vis-à-Vis Other Units of Local Government

In terms of the relationship between home rule units and other local governments located nearby, the extraterritorial impact factor is unwisely restrictive, and selectively so. In fact, it may shortchange general purpose municipal governments vis-à-vis the other predominant types of local governments in the region, specifically the counties in which the municipalities sit[137] and the specialized, limited purpose government units that intersect, surround, and overlap with the borders of home rule units.

Regional special districts are a pervasive phenomenon in all metropolitan areas, and their impact is quite pronounced.[138] Their territory inevitably includes numerous home rule units, and their objectives are typically narrowly drawn and limited to service provision, with explicitly authorized revenue raising powers. They are usually governed by an appointed board, have no real constituent base, and not charged with any general health, safety, and welfare responsibility toward the territory they serve.[139]

When regional special districts act, they affect the interests of general purpose home rule units. Their actions are thus always extraterritorial, in the sense that they intrude into home rule units' spheres of interest

136. Proposals for consolidation and merger of existing local governments in metropolitan regions have long fallen on deaf ears. Anthony Downs believes that the political opposition to consolidated regional government comes from existing local government officials, who want to retain power; residents, who are afraid of a more remote, less responsive government; and general opposition to wealth redistribution. In his view, "almost no one favors metropolitan area government except a few political scientists and intellectuals. Proposals to replace suburban governments completely are therefore doomed." ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 170 (1994). For a survey of the repeated rejection of metropolitan consolidation movements, see JOHN J. HARRIGAN & RONALD K. VOGEL, POLITICAL CHANGE IN THE METROPOLIS 350–62 (6th ed. 2000). Although some commentators continue to favor consolidation, see, for example, DAVID RUSK, CITIES WITHOUT SUBURBS 91–95 (1993), most scholars currently focusing on regionalism have turned their attention to other solutions. In the current literature, the most common proposals are based either on the use of regional special districts as limited purpose regional responses or on the potential for reconfiguring home rule units so that they can better deal with the regional realities in which they must exist. For explanation and critique of the regional special district "governance" solution, see Reynolds, *supra* note 9; for elaboration of the latter proposal, see Barron, *supra* note 10.

137. In *City & County of Denver v. Bd. of County Comm'rs of Grand County*, 782 P.2d 753 (Colo. 1989), for instance, the court rejected arguments that county regulation of the city's extraterritorial actions improperly interfered with the city's home rule powers. *Id.* at 759. Although this case illustrates the point I make in the text, I have focused my discussion on regional special districts because of their prevalence and greater importance to the interests of home rule units.

138. Since 1952, the number of special district governments has nearly tripled, increasing from 12,340 to 35,356 in 2002. *See* U.S. CENSUS BUREAU, GOVERNMENT UNITS IN 2002 tbl.5 (2002), *available at* http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf.

139. For an analysis of the role of regional special districts in metropolitan regions, see Reynolds, *supra* note 9, at 501-23.

and authority. But courts and legislatures routinely dismiss the home rule units' interests in this situation,[140] concluding that the regional special district's specifically authorized powers trump the home rule unit's more pervasive, yet less specific, interests. Thus, for instance, regional special districts are frequently found to be immune from the zoning and regulatory frameworks of the general purpose local governments within whose borders they operate.[141] Not only are general regulatory schemes inapplicable to regional special districts; if an ordinance is specifically intended to regulate the effects of regional special district action within the home rule unit's borders, that law is likely to fall within the scope of impermissibly extraterritorial action.[142] The home rule units' inability to affect the actions of regional special districts further unbalances the relationship between home rule municipalities and the region's special districts. This approach, as I have argued elsewhere, fundamentally misunderstands the basic premise that home rule units derive their strength, not from specific statutory authorization but rather from a wholesale transfer of broad initiative power from the state that does not depend on further state action.[143] It improperly gives more authority and autonomy to regional special districts than to the general purpose home rule units in whose territory they operate.

Removing the extraterritorial impact factor from the judicial analysis would not magically make home rule units an equal partner in a region with many political subdivisions. It might, however, help to make home rule units more of a presence to be reckoned with, because in the words of David Barron, they would now have a "credible threat"[144] that they can in fact exercise their own home rule powers with regard to regional issues. Far from establishing a new municipal "bully,"[145] remov-

140. *See, e.g.*, Tri-County Metro. Transp. Dist. v. City of Beaverton, 888 P.2d 74, 78 (Or. Ct. App. 1995) (home rule city had no basis on which to object to, or to demand input into, a regional special district's decision on siting a local transit stop).

141. *See, e.g.*, City of Barling v. Fort Chaffee Redevelopment Auth., 60 S.W.3d 443, 448 (Ark. 2001); Zack v. Marin Emergency Radio Auth., 13 Cal. Rptr. 3d 323, 337 (Cal. Ct. App. 2004); City of Des Plaines v. Metro. Sanitary Dist. of Greater Chi., 268 N.E.2d 428, 430 (Ill. 1971); City of Evanston v. Reg'l Transp. Auth., 559 N.E.2d 899, 905 (Ill. App. Ct. 1990); Laketran Bd. of Trs. v. City of Mentor, No. 2001-L-027, 2002 WL 1446958, at *5 (Ohio Ct. App. July 3, 2002).

142. In *Metro. Sanitary Dist. of Greater Chi. v. City of Des Plaines*, 347 N.E.2d 716 (Ill. 1976), for example, a home rule city sought to require a regional special district to obtain a city permit for construction of a sewage treatment plant and to comply with the city's health ordinance. The Illinois Supreme Court found that both actions had impermissible extraterritorial impacts and were beyond the scope of the home rule powers. Key to the finding of extraterritoriality was the court's observation that the regional special district included a number of other local government units within its borders. *Id.* at 718-19. Thus, application of the Des Plaines ordinance to a governmental unit with such territorial breadth, in the court's view, would improperly extend the power of the home rule unit beyond its borders. *Id.* at 719.

143. *See* Reynolds, *supra* note 9, at 513-14.

144. *See* Barron, *supra* note 10, at 2371-72 (discussing how state authorization of unilateral municipal annexation powers—meaning that the wishes of the residents in the outlying areas to be annexed are irrelevant to the legitimacy of the annexation—gives the city a bargaining tool in disputes over regional revenue sharing and other region wide issues).

145. *See supra* text accompanying note 7.

ing the extraterritorial impact factor responds to the sense that in most metropolitan regions, home rule units are more bullied than the bully. The prevalence of regional special districts, with their powers to act within the borders of many home rule units, frequently prevents the home rule unit from defending its own interests.

Judicial application of the extraterritorial impact factor to home rule ordinances in metropolitan areas is also unnecessarily anti-regional in the way in which it can stymie intergovernmental cooperative action in a region. If no one unit acting alone is empowered to deal with, say, its affordable housing problem,[146] or the low wages currently paid to many of its workers,[147] the problem sits unattended to, waiting perhaps for state action that may never come. And so long as an individual home rule unit cannot act alone to regulate or initiate with regard to a particular problem, a joint approach will also be unavailable. That is because pervasive state law limits on intergovernmental cooperation require that one or all of the participating governmental units be empowered to act with respect to the target of the proposed joint action.[148] The extraterritorial impact factor, then, may remove many of the most likely topics for joint regional action from the list of possible cooperative ventures.

When it comes to the search for regional solutions to any one of a number of problems, the home rule municipality currently finds itself out of the equation in many instances, as the state creates yet another regional special district with a narrowly targeted mandate to deal with one particular regional issue, broad immunity from home rule regulation, and a regional territory that encompasses a number of home rule jurisdictions. With that structure comes the frequently stated or unstated premise that home rule units are part of the problem, rather than part of the

146. *See* Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 40 (Colo. 2000).

147. A Michigan trial court judge invalidated Detroit's living wage as beyond the scope of its home rule powers. *See* Rudolph v. Guardian Protective Servs., Inc., No. 279433 (Mich. Ct. App. filed July 23, 2007). The case is currently awaiting decision from the Michigan Court of Appeals. *See* Michigan Court of Appeals, http://coa.courts.mi.gov/resources/asp/viewdocket.asp?casenumber=279433&fparties=&inqtype+public&yr=0 (last visited Apr. 22, 2009).

148. Laws authorizing joint municipal action tend to fall out into one of two types. The more restrictive "mutuality of powers" acts limit the scope of intergovernmental cooperation to issues that each cooperating unit is independently authorized to undertake. *See, e.g.*, UTAH CODE ANN. § 11-13-212 (2008) (allowing interlocal agreements "to perform any service, activity, or undertaking which each public agency . . . is authorized by law to perform"). The broader "power of one unit" approach to intergovernmental cooperation allows joint action between and among units of local government when only one of the participating entities has the power to undertake the action that is the topic of the cooperation. Illinois appears to take that approach. *See, e.g.*, 5 ILL COMP. STAT. ANN. 220/3 (West 2009). In *County of Wabash v. Partee*, 608 N.E.2d 674 (Ill. App. Ct. 1993), the court described the purpose of the intergovernmental cooperation acts as "to allow a local government to do indirectly that which it cannot do directly." If the extraterritorial impact factor invalidates the individual home rule units' powers to regulate in a particular area, however under either approach that topic will be removed from the scope of potential cooperative action. *Id.* at 679.

solution.[149] If they are part of the problem, it may be because home rule units are hopelessly and essentially parochial, but it may also be that, as David Barron has argued, home rule units are currently operating within a legal framework that prevents them from doing much with respect to these region-wide problems. If the home rule unit's interest is as essentially intertwined with the fate of the region as scholars of many ideological stripes seem to agree,[150] it is reasonable to expect that removal of legal impediments to joint regional action would further promote those self-interests.

CONCLUSION

To those who agree with the Rocky Mountain News that allowing Telluride to exercise extraterritorial eminent domain will result in a lot of high-handed bullying, my proposal undoubtedly seems unacceptable. No municipality in a region should be a bully, but I have no reason to suspect that my proposal would produce any. Fears of municipal abuse are frequently raised by opponents to broad home rule powers, and courts with a solid tradition of support of home rule are familiar with similar "parade of horribles" arguments. In a 2004 opinion upholding the ability of a home rule unit to exempt itself from state prohibitions on the sale of liquor on Sunday,[151] the Kansas Supreme Court rejected the state's typical floodgates argument, noting that the same argument had been made in an earlier case in which the court upheld home rule powers to regulate weapons.[152] And, the court noted, that opinion was issued in 1975, "and the sky has not fallen."[153] Removing the extraterritorial impact factor, I believe, will similarly leave the sky firmly in place.

Much more than the implementation of some perfect plan, it seems to me that regionalism refers to a state of affairs in which the existing units of local government come together to act, jointly and individually, on behalf of the regional welfare generally. There is no single way a region should look. Currently, however, the limits placed on home rule powers guarantee that the region will continue to develop along the existing path, in which numerous regional special districts are created, home rule units are relegated to the margin, and joint regional action does not occur.[154] Opening up the range of options to encompass the "anti-

149. *See, e.g.*, Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 557 (2000) ("The presence of home rule powers is a contributing factor in the problems faced on regional levels by multiple municipalities.").

150. See Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 114-15, 149-53 (2003), for a review of some of the evidence of municipal interdependence in metropolitan regions.

151. State *ex rel.* Kline v. Unified Bd. of Comm'rs. of Unified Gov't of Wyandotte County/Kansas City, 85 P.3d 1237, 1250 (Kan. 2004).

152. *Id.* at 1245 (citing City of Junction City v. Lee, 532 P.2d 1292, 1296 (1975)).

153. *Id.*

154. *See* Reynolds, *supra* note 9, at 495-501.

sprawl,"[155] new urbanist,[156] or new regionalist[157] agenda will require enhanced home rule powers exercised jointly with other members of the region.

The extraterritorial impact factor has two principle negative consequences. For one thing, it unbalances the judicial analysis by tipping the scale in favor of the judiciary, frequently in cases in which the legislature has clearly articulated its intent about the legality of the disputed home rule powers. As used by the courts, it has become a method for flaunting, rather than following, legislative intent. Even in imperio home rule states, where judicial involvement in mediating disputes over home rule is intended to be more pronounced, the extraterritorial impact factor has unwisely extended the judicial role into a domain better left for the legislature. And second, the use of the extraterritorial impact factor as a court-imposed limit on home rule powers unnecessarily limits the ability of home rule units to deal with pressing local problems. It is improperly premised on a vision of home rule municipalities as isolated and self-contained entities whose actions and residents can easily be kept within their borders. This ignores the realities of metropolitan areas, where the actions of one political subdivision of that region inevitably has impacts felt by many others. Removing the factor from the analysis would give home rule units more freedom to experiment with new regulatory initiatives. It would contribute to a restoration of the balance between regional special districts and home rule units, and it might also have a subtle, yet positive, effect on the region's prospects for joint action to tackle its most pressing problems. While the elimination of one factor from the judicial evaluation of home rule powers would not transform the regional landscape, it would remove one impediment currently standing in the way of home rule units assuming a leadership role in regional policy. Though the region should certainly not be forged by a bully, it is equally important that it not be forged by a vacuum or by the unilateral actions of single-purpose service providers, which are the alternatives most frequently left open after judicial application of the extraterritorial impact factor.

155. *See* Barron, *supra* note 10, at 2266-77.

156. *See* ANDRES DUANY ET AL., SMART GROWTH MANUAL: NEW URBANISM IN AMERICAN COMMUNITIES (2009); ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000).

157. *See, e.g.*, Griffith, *supra* note 133, at 521-23.