

LEGAL PLURALISM AND EQUAL TREATMENT IN THE CONTEXT OF ZONING VARIANCES

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American Neighborhoods as a Situs of Legal Pluralism

The world is comprised of neighborhoods. Instances of legal pluralism can be observed almost anywhere as each neighborhood seeks to govern itself within the constraints of state-established law. What a neighborhood is or what it will become depends to a significant degree on its physical structure. A neighborhood changes incrementally as new buildings are built and old ones demolished. These incremental changes in the structural landscape are channelled by the legal mechanisms of municipal zoning law. Hence, instances of legal pluralism abound in the study of neighborhood change. To study neighborhood change, it is important to pay close attention to the details of these channelling legal mechanisms.

In the United States, one of the most significant legal mechanisms on the local level is the zoning board of adjustment. Each community that engages in zoning must do so with the aid of a zoning board of adjustment.¹ These local zoning boards are required by state law and are intended to serve the function of granting variances when a strict application of the community's zoning ordinances poses too great a hardship for the individual property owner.

More recently, a different social function has been ascribed to the zoning boards of adjustment. They have become increasingly valued as forums for public

¹ *A Standard State Zoning Enabling Act* 9 (rev. ed. 1926). Some form of the zoning board of adjustment provision of this statute has been adopted in almost all American states.

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debate on land use issues.² This change in function has been recognized as a result of ever more sophisticated and intricate zoning ordinances. In earlier decades, city zoning ordinances simply prescribed land uses and the spacing of buildings in general terms. Now, as zoning laws have become more specific and restrictive, they have come to function as 'trip wires' to trigger petitions for variances, an early warning system to notify the neighborhood of any change that might threaten the status quo.³ Usually, any significant modification of a building will trip one of the strictures of the zoning ordinances and require the builder to seek a variance. Change and the impetus for change in the physical structure or use patterns in a neighborhood tends to show up first in the variance process.

New buildings and different aesthetics tend to threaten the neighborhood's sense of stability.⁴ Professor Amos Rapaport has written that the built environment operates as a mnemonic device "reminding people of the behavior expected of them".⁵ Erecting a new building or remodeling an old familiar one threatens to disrupt the neighborhood's sense of homeostasis. When the property owner proposing a change petitions the zoning board for a variance, the zoning board posts notice of the prospective change. This sounds the alarm. The neighborhood often responds by attempting to preserve the present structure, as a cherished 'icon', and by attempting to defeat the proposed change, as a threatening 'alien'.⁶

The variance procedure sets in motion the notification of the neighborhood and shifts the situs of decisionmaking from the relatively private one of conversation between the builder and the city inspector to the much more public forum of a community board mediating the interests of the builder, the immediate neighborhood, and the public at large. This public regulation of building options inevitably implicates social regulation.

2 Rose, 'Planning and dealing: piecemeal land controls as a problem of local legitimacy,' 71 *California Law Review* 837 (1983); Steele, 'Community participation, the function of rules: the case of the zoning boards,' 9 *Law & Policy* 279 (1987).

3 Steele, *supra* note 2.

4 Costonis, 'Law and aesthetics: a critique and a reformulation of the dilemmas,' 80 *Michigan Law Review* 355 (1982).

5 A. Rapaport, *The Meaning of the Built Environment: A Nonverbal Communication Approach*, 80-81.

6 Costonis, *supra* note 4.

It is with this context in mind, from the perspective of observing hundreds of small-scale, incremental building changes channelled through the variance procedure, that I began to examine three related questions of legal pluralism. First, what is the nature of the relationship between exogenously provided law and local adaptation of that law? In the zoning context, the primary state law in most states in the United States is the Standard Zoning Enabling Act [SZE].⁷ This state-provided law has been the primary law of zoning in the United States for more than half a century. The SZE mandates the creation of the zoning board as a prerequisite of the exercise of zoning power; the SZE gives the board its charge and allows it to operate with very little state-level monitoring or supervision. In practical effect then, there is very little oversight by the state to see whether its mandates are being carried out.

The second question that concerns me is: Do words of legal doctrine really matter? The state gives the zoning board members a specific charge phrased in specific words of legal doctrine. It is inevitable that local culture will transform that charge. The transformation may be conscious or subconscious. The transformation may be the result of the fact that certain words have locally specific meanings which differ from those intended by the centralized exogenous law provider. Moreover, the meanings of words rarely remain fixed over time. Changes in the meanings of regulatory words are most likely to occur in application, in local settings as local entities seek to inquire whether the legal words of categorization wall a specific instance inside or outside of the legally specified category. Furthermore, in some cases, the state's directive may actually be antithetical to the local community that is given the charge. As a result, the locality may attempt to comply with the letter, but not with the spirit of the law, transforming the law's meaning in application. With these possibilities for divergent interpretation, why then does the local culture not simply transform all external law to meet local needs when state oversight is rare? Do the words of legal doctrine really matter?

Thirdly, from the standpoint of the larger system of laws, the problem posed by legal pluralism for lawyers to solve is: how the larger society (be it the nation, the state, the larger metropolitan area, or any regional grouping greater than the neighborhood)⁸ can both permit local variation of the kinds it considers desirable (or, at least, tolerable) and override those local customs that it considers tyrannical, arbitrary, or abusive of individual or minority interests

7 D. Mandelker and R. Cunningham, *Planning and Control of Land Development* (2d ed. 1985).

8 Frug, 'The city as a legal concept,' 93 *Harvard Law Review* 1057 (1980).

within the control of the local majority? This is the basic issue of legal pluralism posed when central government accords the responsibility to local government to carry out state law. How can the larger society have confidence that the local community to which it entrusts powers of self-government is actually carrying out that task within a system of laws, a system that entails substantive regularity and equal treatment?

Iowa City As A Locus of Observation

It was from the vantage point of the variance procedure, this vantage point of frequent, multiple, small scale changes, that I became a participant-observer of how variance decisions are made in one small American town, Iowa City, Iowa. The supporting variance examples were drawn from observing the variance decisions of the Iowa City Zoning Board of Adjustment on which I served for three years.

If any community is ideally suited to study the effects and defects of this legal doctrine, it is a small midwestern college town, like Iowa City. Because of its culture, size, geographic location, and demographics, this setting is one where law should work. Iowa City has a population of roughly 50,000 inhabitants and is dominated by only two major economic activities: 1) a major university, the University of Iowa, and 2) a service sector for the surrounding agricultural county. The range of wealth and incomes within the city is not wide, nor is there any strong division along ethnic, racial, or political party lines. Instead, the town/gown split is the primary sociological division in the city. At the same time, the relatively small size of the community means that there is considerable cross-over between these two groups in both social and political life. The small size of Iowa City also allows the members of the community to be quite well informed about both city issues and each other's interests.⁹ Getting along with each other and accommodating each other's interests reflect affirmative local and regional values.

Iowa City is an appropriate baseline for evaluating the success or failure attributable to the words of legal doctrine because the city is relatively free from

⁹ As the largest city in and seat of government for a predominantly rural county, Iowa City is free from the economic, developmental, demographic, or cultural domination of any metropolitan area. As a result, the attitudes and behaviors regarding self-governance that occur in Iowa City are determined by the events that take place within the city itself, rather than forces beyond its boundaries.

those other influences which might interfere with proper government functioning. Local government decisionmaking can go wrong for reasons unrelated to defects in the words of legal doctrine. For example, corruption, high threshold costs to participation, or attitudes of scepticism or distrust by segments of the community will impair proper government decisionmaking. These factors, when present, will interfere with an accurate estimation of the relationship between doctrine and unjust local government practices. Hence, to study the doctrinal causes of local government failure, it is best to observe local government in a setting as free of these interferences as possible, a setting where one would expect government to work. If local government decision-making can be expected to work anywhere, it should work in a fairly homogeneous, educated community where individuals believe in their government, and have a strong sense of citizen participation in civic affairs, and low threshold barriers to doing so. As a relatively small midwestern university town, Iowa City meets these criteria.¹⁰ An illustration of this kind of commitment to citizen participation is the Iowa Political Caucuses held every four years as an early national barometer of the popularity of presidential candidates. These events often draw over 90% of the population out of their homes on a snowy February weeknight to debate with their neighbors the political issues of the day.

Another part of the culture of Iowa City is that the inhabitants have a strong desire to be law-abiding and to have the law make sense. For the most part, Iowa City residents are not cynical about law or about their local institutions. Instead, they tend to identify with their local and state institutions. They see these institutions as places they can go to change the law if it is unjust or irrational. Consequently, they will actively search for interpretations that give the law consistency and meaning as they attempt to follow the rules of legal doctrine. If the doctrine fails to provide meaningful guide-lines for decisionmaking in Iowa City, it will in all likelihood fail in other localities to an even greater extent.

The Functioning of Exogenous Doctrine in the Iowa City Context

What I discovered when I began to address these three major questions in the context of the Iowa City Zoning Board was that the state provided a very rigid doctrinal formula for the granting of variances. In its simplest form, the

10 Perhaps an even better setting would have been a slightly larger town. There is a certain amount of cronyism and familiarity present in smaller towns which may affect the representativeness of the behaviors of its local government institutions.

predominant state law doctrine¹¹ provides that the zoning board is authorized to grant variances from zoning regulations only when 1) the impact of the regulation constitutes an unnecessary hardship on the petitioner, 2) granting the variance won't harm the public welfare, and 3) the situation is unique.¹² In further judicial interpretation of the elements necessary for a variance, the Iowa Supreme Court, like most state supreme courts, has required that the hardship to the owner be an economic hardship of such severity that it renders it impossible for the owner to earn a reasonable return from the property.¹³

On first reflection, there is nothing obviously flawed with this state doctrine. It speaks authoritatively. It is framed in a language of mercy and rationality; the zoning board can issue a variance when the restriction imposes "an unnecessary hardship". The doctrine attempts to limit the number of variances that can be issued from a very real concern that if too many exceptions were granted to the rule, the rule could be overrun by exceptions. Thus, the formulation of the rule gives no clue that the rule is so troublesome in application or leads to the instances of systemic failure that it has produced in the experiences of the Iowa City zoning board.

And yet, what I observed in the results of the decisions was a system of little or no law. The pattern of results lacked an internal coherence. To the extent that the system operated to produce results that were at all predictable, the factors that best predicted results were factors that both the larger society - the state that created the system - and the smaller society - the city that carried out the system - would disdain. Variances were granted by the dozen, despite the directive that variances only be granted in the rare instance.¹⁴ Moreover, there was no clear predictability of which variances would be granted and in one particularly striking pair of cases, that I will discuss later, petitioners asking for virtually identical privileges were treated differently.

11 *Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939). The *Otto* criteria have been adopted in one form or another in most states. The Iowa Supreme Court adopted the *Otto* criteria in *Deardorf v. Zoning Board of Adjustment*, 254 Iowa 380, 118 N.W.2d 78 (1962).

12 3 R. Anderson, *American Law of Zoning*, § 18:15 at 172.

13 *Greenawalt v. Zoning Board of Adjustment*, 345 N.W. 2d 537, 542 (Iowa 1984).

14 This observation was consistent with empirical findings of studies of other cities' zoning boards. Dukeminier & Stapleton, and Iowa Law Review Contemporary Studies Project.

The Words' Effect on the Decisionmaking Process: The Failure of Economic Hardship Criteria as a Standard for Variances

What went wrong when the Iowa City Zoning Board attempted to take the doctrine seriously? Attempting to be true to state court interpretations of the hardship criteria, the Iowa City Zoning Board methodically focused its inquiry on each of the three elements necessary for a variance. However, the element that was most heavily stressed by the courts as the most significant and delimiting criteria - whether the zoning restriction posed an unnecessary economic hardship in any particular case - did not seem to lend itself to determinate resolution in any specific case. There were no set standards of comparison of how much of an economic loss was too much of an economic loss for the property owner to bear.

Each inquiry floundered in relativism. Too much economic loss as compared to what? The board had no common understanding of what constituted a reasonable return on an owner's property. In any particular case, the individual board member would conclude that the restriction either did or did not impose a sufficient hardship on the property owner to deprive him or her of a reasonable return without explanation of the conclusion. The board had no consistent point of reference for evaluating when economic loss failed to give a property owner a reasonable return.

These problems were further confounded by the cultural ethic of individuals in a small town not wanting to ask each other too pointedly about their financial affairs. In a small town, where much is known about each inhabitant anyway, the members of the board did not wish to appear intrusive in inquiring into the petitioner's finances. The board members were often unwilling to actually inquire whether the zoning restriction threatened to force the property owner to sell his property at a loss, whether the threatened economic exigency was merely self-serving puffing on the property owner's part, or whether some other feature of the economic environment contributed to the claim of economic hardship. Owners of small businesses in particular tended to assert privacy interests in how well or poorly their businesses were doing and consequently, limited the information they were willing to provide in the public forum.

In fact, the criterion of 'economic hardship' became something a ruse for deciding each matter on some other unconscious or unarticulated grounds. The practice of the Iowa City Zoning Board meeting was for each member, in turn, to state his or her opinion on the matter at the close of the hearing and before the official vote. On the hardship issue, opinions would be stated simply as 'Yes, the ordinance causes a hardship', or 'No, this case is not a hardship', but the discussion rarely went further. Board members did not, and probably could

not, explain why they saw the ordinance as causal of some economic loss figure selected from the multiple figures available in the economic environment of the variance request. Without a more probing discussion of reasons, individual board members could not be certain they themselves were identifying the same respective figures as the relevant ones in different cases. Often, board members voting against the finding of hardship concluded simply that the petitioner had not demonstrated that the case presented a hardship. But these board members could not specify what type of proof would be necessary or sufficient to demonstrate hardship. Thus, discussions of hardship tended to dead-end in conclusory findings.

By contrast, the criterion of whether the proposed variance would harm the 'public welfare' produced seemingly endless discussion by members of the board. The Board would discuss at length whether or not something as seemingly innocuous as a dog house or a swimming pool would harm the character of the existing neighborhood.¹⁵ The Board could discuss in detail the various characteristics of a particular project, what alternatives were available to the petitioner, and how they would feel if they were the petitioning property owner or one of the neighbors. The board members had little difficulty in identifying with the petitioner or with surrounding neighbors and evaluating the project according to predominant norms of the local culture.

Why did one element yield an expansive discussion, in which members persuaded or attempted to persuade each other to share their views of the matter, when the other produced such truncated conclusoriness? Despite the fact that there were no shared views on where economic hardship lay, there continued to be an unfounded and unsubstantiated belief that economics gave objective criteria which when rigorously applied would yield a definite and determinate answer.

Focusing on 'public welfare', on the other hand, appeared to the Board to be more subjective, but it opened the discussion to possibilities. One did not expect 'public welfare' to have a delimiting function in the same way that economic hardship was expected to be determinate. One expected the criterion to produce differences of opinion. What constituted 'the public welfare' in any particular case, let alone in the abstract, was recognized as impossible to determine with any definiteness by any fixed reference point. This indeterminateness did not render the phrase useless or harmful. As differences of opinion were produced they were tolerated and occasionally resolved in an accord of understanding. Instead, by the recognition that this criterion was not determinate, it may have

15 Iowa City Iowa, Variance petition V-8228 for a permit to maintain an above-ground swimming pool and raised deck. (Oct. 13, 1982).

become an important and valuable basis for opening public debate and discourse among decisionmakers over matters of community policy.

What then distinguishes 'hardship' as a criterion from 'public welfare' as a criterion? 'Hardship' was a poor chancellor of decisionmaking as evidenced by the unpredictability of result and the conclusory discussion process. Board members reached their own conclusions from selecting different economic variables as the relevant ones, but the term did not lend itself to an examination of whether those chosen variables were the most relevant or whether they were being consistently applied. 'Public welfare', by contrast, though susceptible to as wide a variety of interpretations, tended to produce a more constructive discussion of the rule's purpose, the community interest, and what was at stake. In urging one definition of public welfare over another, board members felt compelled to explain why their chosen definition was better. The Board discussed what they saw in the governing ordinance and whether the purpose was served in the petitioner's case. In addition, the board members felt comfortable discussing the 'public' aspect of 'public welfare' even when the subject was as personal, for example, as dog ownership or a disabled person's need for a garage, whereas the board members were uncomfortable discussing the 'private' nature of their neighbors' financial affairs.

The Resulting Unequal Treatment

Understandably this type of decisionmaking procedure produced a certain randomness of results. Only when a proposed variance request was perceived as clearly harmful to the public welfare would it be denied. In all other cases there was little predictability of outcome; there seemed to be as great a chance that a variance would be granted as there was that it would be denied. The real problem with the ambiguity of the doctrinal criteria in this case was that the exception-granting body was not directed to think in terms of consistency with the rule's objectives or in terms of consistent treatment of like cases.

The problem of unequal treatment came about not only when there was sharp disagreement between board members on what was desirable, but also when individual board members were ambivalent as to the ordinance's effect on the public welfare. One particularly dramatic example of unequal treatment was presented in the cases of Spenler Tire and Autohaus, two auto-related businesses located on the same stretch of commercial highway.¹⁶

¹⁶ In the Autohaus variance request, City of Iowa City, Iowa, Variance V-8401 (March 22, 1984), the Board of Adjustments voted to approve the

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In these two cases, different property owners sought variances to the same zoning restriction. The zoning restriction at issue banned an enterprise from having more than one freestanding stanchion sign. Both enterprises were classified as auto-related uses and sold a variety of auto products as the local dealer for several different franchises. Each owner petitioned for an additional stanchion sign by making the identical argument - that the business should be allowed a second sign to advertise its additional franchise because as the regional distributor and franchisee of two different automotive products, each product's respective franchise agreements required it to advertise on a separate freestanding sign and prevented its product's sign from being posted on the same stanchion with other products. Mazda, for example, would not allow its registered trademark to be posted on the same sign as Audi; Mazda demanded its own freestanding sign from the franchisee. In this manner, each property owner's respective franchisors demanded of the property owner exclusive control of the single freestanding stanchion sign that the ordinance allotted to the business. These demands were made under threat of forfeiture of the franchise.

Although these cases were heard by the same board within two months of each other, the Iowa City Zoning Board granted a variance to Autohaus but denied a variance to Spenler Tire. Making matters worse, Spenler Tire was ordered to tear down the sign that it had erected long before the sign ordinance was adopted, and Autohaus was permitted a variance to construct a brand-new stanchion.¹⁷

More importantly, these decisions were reached without any attempt by the Board to reconcile or distinguish the two cases. No attempt was made in the earlier case to consider the consequences of granting that variance for other cases. Nor was any attempt made in the second case to note the similarity to the case decided only two meetings earlier. There was simply no reference at all made to the identical circumstances of the petitioners.

variance request by the vote of 3-1. Board members Randall, Fisher, and Slager voted to approve the variance, while VanderVelde voted to deny the variance. In the Spenler variance request, City of Iowa City, Iowa, Variance V-8403 (April 18, 1984), the Board of Adjustments voted to deny the variance request by the vote of 0-3. Board members Fisher, Randall, and VanderVelde voted to deny the variance.

¹⁷ The sign ordinance required amortization and removal of non-complying existing signs within a period of years, when a business had erected two separate signs before the ordinance went into effect.

This unusual result highlights the problem of relying on 'public welfare' as the sole test for variances. 'Hardship' was not a relevant basis for distinguishing between the two cases. Each property owner faced the same loss; presumably, each would lose one of his franchises without the additional sign.¹⁸ Neither property owner introduced evidence of sales or profit. As for the second criterion, 'not contrary to the public welfare', both properties were also similarly situated. In each case, the zoning board discussed the purpose of an ordinance limiting an enterprise to a single sign. Each time the Board considered what purpose such a limitation would achieve when two enterprises within the same length of highway frontage would each be able to have a sign.¹⁹ In both sessions, the Board expressed considerable ambivalence about whether granting the variance would be 'contrary to the public welfare'. The Board was uncertain whether it was really harmful to the congestion along the street to allow an additional highway sign.

In the absence of a clear consensus on whether the effect of the variance would harm the public welfare, the Board may have subconsciously resolved the difficult decision by evening the score: one petitioner won, one lost. Without an express admonishment to treat similar cases similarly, the board members seemed to follow the consequences of the rule of probability by splitting the outcomes in the two situations.²⁰ The Board appears to have flipped a coin when faced with situations where the public welfare interest was unclear. Such a result is heuristically understandable,²¹ but it violates the notion of equal

18 It is possible that the cases could be distinguished on the basis of the importance of the loss to the community of the specific kind of franchise. In one case, an automobile franchise was at stake, in the other, a line of tires and gasoline was at stake. This possible distinction was never discussed or acknowledged by the Board, however.

19 Autohaus minutes, *supra*. Spenler minutes, *supra*.

20 This hypothesis is speculative because there was no comparative discussion of the cases by the board. Nonetheless, the score would be even if the situation was left to probability rather than intentional conscious decisionmaking.

21 This type of explanation is similar to Professor Dworkin's example of checkerboard cases. Dworkin, *Law's Empire*, 1986. In his section, 'Internal Compromises', *id.* at 178-184, Professor Dworkin argues against the "Solomonic model of treating a community's public order as a kind of commodity to be distributed in accordance with distributive justice, a cake to be divided fairly by assigning each group a proper slice." *Id.* at 178-79. This treatment violates the notion of integrity and is "unjust by definition because it treats different people differently for no good reason, and justice requires treating like cases alike...."

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treatment of similarly situated individuals and highlights the defect of the present variance doctrine in that it fails to require the zoning board to be conscious of acting consistently.

The result: when no consensus emerged from the zoning board that a proposed project would be clearly harmful to the immediate neighborhood, the same decisionmakers voted one way once and the opposite way the next time. Exogenous law failed to direct the local decisionmakers to treat like cases similarly.

Despite the failure of exogenous law to require equal treatment, a question remains: why did this sense of similar treatment not arise from the local culture itself? Certainly, equal treatment of like cases is such a deeply embedded mid-western American legal ethic that it should have arisen from understandings of fairness in the local culture itself. Instead, in this tribunal, the decisionmakers had internalized a countervailing ethic that prevented them from recreating the notion of equal treatment. The members of the zoning board had internalized the uniqueness ethic that each case should be decided on its own facts. It was considered a hallmark of fairness to give each petitioner individualized justice. That 'each case should be decided on its own facts' was stated frequently by board members with the conviction that 'otherwise the petitioner would be denied his day in court'. Thus, in the *Spencer Tire and Autohaus* cases, there was little room for argument based on the custom or precedent of what the Board had established by its action just two meetings earlier. The zoning board did not act by building a consensus based on shared norms of what constituted public welfare in the cases. Nor did it learn from its own earlier decisions.

The Dilemma of Legal Pluralism for the State

This brings me ultimately to the third question: How can larger society both permit local variation and override local customs when it considers them tyrannical? This is the primary dilemma that legal pluralism poses for the larger society.

Consider what may seem to be a very different source. In reading the Congressional debates of the American Reconstruction, I was struck by the attention given to centralized federal control versus state autonomy and states

[F]or if checkerboard solutions do have a defect, it must lie in their distinctive feature, that they treat people differently when no principle can justify the distinction." *Id.*

rights in the debate over abolishing slavery. The Civil War fought in United States between 1861-1865 had its impetus in the abolition of slavery. A key objection made to the abolition of slavery, even by those who did not favor the institution, was the primacy of local rule and legal pluralism. The debate eventually led to a constitutional amendment, a legal change of a most major sort. What prompted the change to occur at that time, when the basic ethical, political, and moral arguments against slavery had been made in the country ever since its founding almost 75 years earlier?

One must conclude that the larger society was prodded to strip local communities of power when it was forced to encounter the dramatic differentiation in the way members within those local communities were treated.²² When the tyrannical abuses of local government became sufficiently graphic, the larger state learned to distrust the exercise of power by the more local government and reign in its power. But must larger society await such a cataclysmic turn of events before requiring greater fairness by local government. It would seem that larger society, in providing exogenous law to local government, would be well-advised to repeatedly phrase each new law in terms of equality for its members.²³

The concern with equality in the value of legal pluralism is not posed by the local variation between Seattle and Miami, or even really between Iowa City and Des Moines, as much as it is within Iowa City itself or within the same neighborhood in Iowa City. Non-uniformity and the concomitant resulting inequality in the terms of property ownership must be permitted across recognized jurisdictional lines. That, it seems, contributes to the choices of environment and to a neighborhood's autonomy in choosing different futures. But at some point when identically situated property owners exist in close proximity within the same zone in the same municipal jurisdiction, differential treatment challenges the legitimacy of legal pluralism.

22 This point, of course, ignores the very important feature of the historical sequence that the North was forced to take action when the South seceded and military actions commenced. Other events like the infamous *Dred Scott* case, which forced the North to encounter dramatically different treatment of people under the institution of slavery, did not seem to prompt the majority to action or to just judicial resolution.

23 Admittedly the American federal-state relationship does not exactly fit the model of delegating state power to the local entity because the prevailing legal ideology is that the federal government derived its limited powers from the state, not vice versa.

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Of course, requiring local government to be conscious of equal treatment in applying its laws and its exceptions will not guarantee equal treatment. Local government decisionmakers can provide all kinds of rationales to justify unequal systems.²⁴ The point is rather that if exogenous law does not require this concern, the consciousness of unequal treatment may not develop from within the local culture itself.

When is unequal treatment by local government most likely to occur? This analysis points to two different situations. First, unequal treatment may occur when there is some attempt to advantage one class over another. The circumstance is presented in the extreme in the slavery example. Of course, all laws advantage one category of individuals over another. The slavery example represents an instance of the most extreme differences in legal treatment and at the time of the American Civil War, diametrically clashing ideologies. Second, unequal treatment is likely to occur even within local communities whose members share a common ideology, particularly in those instances when there is ambivalence within the community over the objective to be achieved by a restriction - the example of Spangler Tire and Autohaus.

Thus, I return to the three questions posed at the beginning. First, what is the nature of the relationship between exogenously-provided law and local adaptation of that law? Without monitoring by the state government, the enforcement of the state law by the local entity may wax and wane unpredictably. In part, this is because 'economic hardship' as a criterion is believed to be determinate, despite the fact that it cannot perform that function and that it is expected to function in a situation where financial inquiries are shielded by a culturally constructed veil of privacy. In part, this is because 'public welfare' as a criterion can evoke in certain circumstances conflicting or ambivalent responses in the decisionmakers.

Second, do words of legal doctrine really matter? Yes, but not as one might expect. They serve less to cabin the discretion of the local decisionmaker, since, of course, the local decisionmaker can translate the state's words to its own sets of meanings and transform them to its own ends, than they serve to shape the discussion. The words chosen do matter in the sense that some words facilitate open, accountable public discussion and others close it off.

Third, how can the larger society both permit local variation of the kinds it considers desirable and override local customs which it considers tyrannical? It must be ever mindful to provide exogenous law by phrasing it in terms of equality for the members within the local community. The Iowa City example

24 Rae, D., *Equalities* (1981).

illustrates that an equality concern may not arise by itself even within communities composed of the best intentioned individuals.

An addendum to the story of Spenler Tire and Autohaus is that Spenler Tire was never required to tear down its second stanchion sign. The community's ambivalence to the sign amortization ordinance eventually worked to Spenler's advantage. Spenler pursued the matter to the Planning and Zoning Commission and the City Council and eventually got the ordinance amended. The City Council, it seems, like the Zoning Board of Adjustment, was ambivalent about the public interest served by limiting a business to a single freestanding sign. Shared cultural norms, in this case, about public welfare, provided greater consistency of result than did the legal constraints of zoning doctrine as exogenous law.

These problems of legal pluralism do not detract from the fact that local government has a unique function in that it holds out the promise of allowing citizens to exercise some control over their immediate environment and, in turn, over their lives. To allow this control, localities must be allowed to evolve differently. As communities are allowed to evolve differently, they offer individuals and families choices of environments in which to live. Furthermore, as state and federal governments seem more and more remote to citizen participation, individuals turn to local government to engage in the participation of governing. As they do so, however, they must continually be reminded by the statements of exogenous law to think in terms of equal treatment.