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INTERGOVERNMENTAL COOPERATION, METROPOLITAN EQUITY, AND THE NEW REGIONALISM

Laurie Reynolds*

Abstract: The economic gap between affluent suburbia and the urban core has recently received widespread attention among state and local government law scholars. Although the underlying normative arguments rest on very different rationales, scholars with a wide range of doctrinal approaches appear to have formed a consensus that the current concentration of wealth and resources in metropolitan areas is unacceptable. Their common goal of reducing regional disparities has made the scholarly dialogue a dispute over how, rather than whether, to achieve a better distribution. For many of what can be described as the “New Regionalist” scholars, voluntary intergovernmental cooperative efforts may appear to offer the potential to accomplish many of their stated goals. This Article examines the common types of intergovernmental cooperative efforts and concludes that they fail to correct, and often exacerbate, the socioeconomic gap. Thus, the regionalist agenda must be reworked to take account of the negative impacts that many of the highly touted regional governance efforts actually produce in metropolitan areas.

I. INTRODUCTION

Metropolitan America remains stubbornly resistant to attempts to limit local government proliferation and the political fragmentation and territorial overlapping it produces.¹ Frequent and repeated calls for local government consolidation,² regional legislatures,³ strengthened municipal

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1. In his evaluation of the repeated failures of consolidation movements, Anthony Downs ascribes the lack of political will for metropolitan government to the following factors: local government officials' opposition to power sharing; residents' fear of more remote, less responsive government; and suburban fears of wealth redistribution. His negative assessment of the potential for region-wide consolidation is categorical: “In short, 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).

2. 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); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *STAN. L. REV.* 1115, 1117–19 (1996); John Kincaid, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, 13 *PACE L. REV.* 449, 461–63 (1993). Some commentators continue to urge consolidation as a solution to regional inequity. See DAVID RUSK, *CITIES WITHOUT SUBURBS* 91–95 (1993) (endorsing regionalism through strengthening urban counties, consolidating cities and counties, or combining counties into regional governments).

annexation powers,⁴ and anti-sprawl growth policies have not altered the patterns of local government formation and growth.⁵ New municipalities continue to form at ever increasing distances from central cities. And demographic statistics confirm that as suburbanization trends proceed unabated, central cities in major metropolitan areas suffer the loss of high taxpaying residents who prefer to live in smaller, less urbanized, more homogeneous communities. This increasing stratification between city and suburb may be the intended result of state laws pertaining to local government formation, which allow affluent, homogeneous enclaves to form their own government and thus prevent the redistribution of resources that occurs when wealthy and poor pay property taxes to the same general purpose municipality. In the alternative, it may merely reflect the nostalgic American dream of a single family home in a safe and small community. Whatever the underlying cause, the population trends document the overall out-migration of middle- and upper-class residents from central city to suburb.⁶ As a result, in terms of job creation,⁷ quality of schools,⁸ affordable housing, and income,⁹ to name a

3. See Briffault, *supra* note 2, at 1164–71.

4. See RUSK, *supra* note 2, at 9–11; Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 258–71 (1992).

5. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2037–42 (2000). In the urban studies literature, the calls for a reversal of the government policies that have produced sprawl are forcefully articulated in ANDRES DUANY ET AL, *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2000) and JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993). Urban economists have also made the case for anti-sprawl policies. See, e.g., DOWNS, *supra* note 1; Rosalind Greenstein and Wim Wiewel, *Introduction to Urban-Suburban Interdependencies*, in *URBAN-SUBURBAN INTERDEPENDENCIES 1–5* (Rosalind Greenstein & Wim Wiewel eds., 2000). In a similar vein, the historian Kenneth Jackson documents and criticizes the suburbanization of the United States in *CRABGRASS FRONTIER* (1985).

6. The most recent census statistics suggest that, in terms of absolute numbers at least, the net out-migration from many major cities may have been reversed. In fact, between 1990 and 2000, only nine of the 50 largest U.S. cities experienced a population decline. U.S. CENSUS BUREAU, *CENSUS 2000 REDISTRICTING DATA* (2001). For the cities that have gained population during the most recent census period, the news is still mixed. For the most part, the newcomers tend to have lower incomes and education levels than the city residents who have left for the suburbs. See, e.g., Kenneth T. Jackson, Editorial, *Once Again, the City Beckons*, N.Y. TIMES, Mar. 30, 2001, at A23. See also Renee Elder, *Population Swap Costs Metro; Nashville's Average Income Keeps Falling as Higher-Income Families Migrate to Suburbs*, THE TENNESSEAN, Aug. 19, 1997, at 1A. Between 1994 and 1995, for example, 7,600 people moved from central Nashville to outlying suburban areas, while 7,000 people moved in. The new residents had incomes that were 5% lower than the incomes of those moving out. The resulting decrease in the city's average income will likely increase the demand for social services while decreasing the government's tax revenues.

7. See Cashin, *supra* note 5, at 2011.

few indicia of municipal well-being, the gap continues to widen between affluent suburbia (now often referred to as the “favored quarter”¹⁰) and the rest of the metropolitan area.

Responding to this well-documented disparity in terms of wealth and service provision, and loosely connected under the broad doctrinal umbrella of the New Regionalism,¹¹ a growing number of commentators

8. See, e.g., *Campaign for Fiscal Equity v. State*, 719 N.Y.S. 2d 475, 489-520 (N.Y. Sup. Ct. 2001), *rev'd on other grounds*, 744 N.Y.S. 2d 130 (N.Y. App. Div. 2002); *Sheff v. O'Neill*, 678 A.2d 1267, 1272-74 (Conn. 1996).

9. Between 1960 and 1990, the income of central city residents fell from \$1.05 for every suburban dollar earned to \$.59. See H.V. Savitch & Ronald K. Vogel, *Paths to New Regionalism*, 32 ST. & LOC. GOV'T REV. 160, 162 (2000). One recent study documents the impact on city populations when suburbanization pulls higher educated and higher earning individuals out of the city. See Paul D. Gottlieb, *The Effects of Poverty on Metropolitan Area Economic Performance*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 36-40. See generally David Rusk, *Growth Management: The Core Regional Issue*, in REFLECTIONS ON REGIONALISM 78 (Bruce Katz ed., 2000); NEAL PEIRCE, CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD 17-23 (1993).

10. Myron Orfield, a Minnesota state legislator, was the first to document how the city-suburb schism is more accurately described as a gap between, affluent suburbia (the favored quarter) and the central city and adjacent ring of older suburbs. See generally MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY (1997). According to Orfield, all major metropolitan regions display a remarkably similar distribution of population and wealth: 20-40% live in central cities; 25-30% in older declining suburbs; 10-15% in low tax base suburbs; and the remainder, the favored quarter, in high tax base, wealthy suburbs. See Myron Orfield, *Conflict or Consensus? Forty Years of Minnesota Metropolitan Politics*, 16 BROOKINGS REV. NO. 4, at 31, 34 (1998). Orfield seeks to promote natural political alliances between central city and older suburbs, many of which face similar problems with aging infrastructure, high social service needs, increasing poverty and declining tax base. His recent book, METROPOLITICS, offers a strategy for those who seek stronger regional governance structures. His recipe for successful regionalization efforts can be summed up in one piece of advice for the central city: “It’s the Older Suburbs, Stupid.” *Id.* at 168. That phrase captures much of the current political reality of many major metropolitan areas. As the first ring of suburbs age, he argues, they have begun to show the same signs of decline and decay as the central city. Influx of the poor, aging infrastructure, and exodus of the mobile middle class to ever more distant suburbs, is a story told by central city and older suburbs alike. *Id.* at 47-51. To capitalize on what he sees as a natural alliance, Orfield recommends joint legislative efforts to seek the imposition of regional fair housing obligations, property tax sharing, and a redirection of government infrastructure spending from urban fringe to central city and inner suburban ring. *Id.* at 78-103. Though in practice, alliances between central cities and older suburbs have proved difficult to create and sustain, Orfield’s critique offers a perspective on regionalism that suggests the political feasibility of some regional efforts. See also MYRON ORFIELD, CHICAGO METROPOLITICS: A REGIONAL AGENDA FOR MEMBERS OF THE U.S. CONGRESS 27 (1998). For a recent article in the legal literature that explores Orfield’s theories in depth, see Cashin, *supra* note 4, at 1987 (describing favored quarter as “high-growth, developing suburbs that typically represent about a quarter of the entire regional population but that also tend to capture the largest share of the region’s public infrastructure investments and job growth”).

11. See generally, Kathryn A. Foster, *Regional Capital*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 85 (noting that as to regional equity, “[a]n influential

now advocates structural reforms in local governmental law. While some continue to endorse full city-county consolidation¹² or the creation of a new regional governmental unit,¹³ most recommend more flexible governance solutions.¹⁴ In the legal literature, the New Regionalism has yet to emerge as a clearly defined doctrinal movement, yet the term has begun to appear as a shorthand for the scholarship that examines and criticizes the allocation of regulatory power among and between state and local governments in metropolitan areas.¹⁵ Calls for full scale consolidations have largely disappeared, and the focus has shifted to more limited solutions, including the establishment of a regional legislature in metropolitan areas,¹⁶ a reformulation of the local franchise to allow cross-border voting,¹⁷ and the encouragement of voluntary intermunicipal “burden sharing.”¹⁸

empirical focus of the *new regionalism* tradition now links social equity to economic growth”) (emphasis in original); Rosabeth Moss Kanter, *Business Coalitions as a Force for Regionalism*, in REFLECTIONS ON REGIONALISM, *supra* note 9, at 157–59; Cashin, *supra* note 5, at 1988 n.11; Symposium, *New Regionalism and Its Policy Agenda*, 32 ST. & LOC. GOV’T REV. 158 (2000).

12. See RUSK, *supra* note 2, at 91–97; Savitch & Vogel, *supra* note 9, at 162 (describing the consolidationist approach).

13. See Margaret Weir, *Coalition Building for Regionalism*, in REFLECTIONS ON REGIONALISM, *supra* note 9, at 127–53; Briffault, *supra* note 2, at 1165.

14. See Savitch & Vogel, *supra* note 9, at 161 (defining governance as “the notion that existing institutions can be harnessed in new ways, that cooperation can be carried out on a fluid and voluntary basis among localities, . . . that people can best regulate themselves through horizontally linked organizations . . . [and that] localities can provide public services without . . . producing them”). In contrast to governance, the authors define government as “formal institutions and elections and established decision-making processes and administrative structures.” *Id.* In fact, many of the New Regionalists’ “governance” proposals involve the creation of a regional special district, which is a formal institution that exercises many governmental powers and typically has its own bureaucratic administrative structure. See *infra* Part III.A.3.

15. See Cashin, *supra* note 5, at 1988–89 n.11. In a recent article, Professor Gerald Frug recognized the evolution of the New Regionalism, but noted that “[i]t is hard to pin down exactly what new regionalism is.” Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1786–87 (2002).

16. See Briffault, *supra* note 2, at 1164–71.

17. See, e.g., Richard Thompson Ford, *Beyond Borders: A Partial Response to Richard Briffault*, 48 STAN. L. REV. 1173, 1188–95 (1996); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 273–338 (1996).

18. See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 194 (2001). Professor Gillette coined the term for his consideration of interlocal efforts to redistribute wealth. He describes burden sharing as: “subsidies from some localities (typically suburbs) to others (typically central cities) that bear disproportionate redistributive burdens Such subsidies may entail accepting a fair share of undesirable land uses or a fair share of residents who need redistributive services . . . or the dedication of tax revenues generated in suburbs to the central city.” *Id.* Although this Article may have some relevance for the first two types of subsidies

Intergovernmental Cooperation

The current landscape of multiple, fragmented units of local government is the exclusive province of state law. At least since the United States Supreme Court's 1907 decision in *Hunter v. City of Pittsburgh*,¹⁹ state governments are the undisputed masters of their political subdivisions. States determine the rules under which local governments are created, the powers they exercise, and the relationships they have to the other local governments in the state. In that capacity, the states have displayed a remarkably uniform unwillingness to force regional consolidation or regional redistribution of wealth on their political subdivisions. State statutory frameworks that determine the rules of local government formation and operation are decidedly anti-regional. In fact, a variety of legal rules shore up the insular and insulated status of American municipalities. The ease with which new governments are formed, the ways in which municipal incorporation allows a community to capture the wealth derived from its property tax levy, the general inability of existing municipal governments to annex development on their borders, and broad municipal powers to regulate land use development without consideration of its impact on the overall regional welfare, are a few of the more salient examples.

In apparent contrast to the localist predilection evidenced in those common state laws, many states have adopted statutes that announce strong state support for cooperative ventures among and between local government units.²⁰ In the modern state and local government law

Professor Gillette describes, it focuses primarily on the redistribution of resources that may occur through intergovernmental cooperative efforts.

19. 207 U.S. 161 (1907).

20. See, e.g., ARIZ. REV. STAT. § 11-952(A) (2001) (“[i]f authorized by their legislative or other governing bodies, two or more public agencies by direct contract or agreement may contract for services or jointly exercise any powers common to the contracting parties and may enter into agreements with one another for joint or cooperative action or may form a separate legal entity, including a nonprofit corporation, to contract for or perform some or all of the services specified in the contract or agreement or exercise those powers jointly held by the contracting parties”); FLA. STAT. ch. 163.01(2) (2001) (“[i]t is the purpose of this section to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities”); IOWA CODE § 28E.4 (2002) (“[a]ny public agency of this state may enter into an agreement with one or more public or private agencies for joint or co-operative action pursuant to the provisions of this chapter, including the creation of a separate entity to carry out the purpose of the agreement. Appropriate action by ordinance, resolution or otherwise pursuant to law of the governing bodies involved shall be necessary before any such agreement may enter into force”); OR. REV. STAT. § 190.010 (1999) (“[a] unit of local government may enter into a written agreement with any other unit or units of local government for the performance of any or all functions and activities that a party to the

literature, the regionalist critique of intergovernmental cooperation is either generally positive or neutral. Some, for instance, find value in its voluntary nature, as well as in the fact that it frequently does not involve the creation of a new government entity.²¹ A less enthusiastic assessment asserts that autonomous and affluent local suburban governments are unlikely to resort to intergovernmental cooperation to solve intra-regional disparities.²² In general, though the regionalist commentary may not see intergovernmental cooperation as likely to enhance overall metropolitan equity, it typically does not reject intergovernmental efforts as anti-regional. This Article, in contrast, suggests that that assessment fails to probe the ways in which intergovernmental cooperation negatively affects the metropolitan landscape. Building on the suggestion made recently by Professor Gerald Frug,²³ this Article's evaluation of intergovernmental cooperative efforts leads to the somewhat counter-intuitive claim that intergovernmental cooperation may actually have a non-trivial anti-regional impact.

Part II begins with a brief summary of the debate in the legal literature between localists and regionalists, summarizing their normative bases and the empirical evidence on which their proposals rest. It then describes how the emerging New Regionalism builds on the longstanding disputes between, on the one hand, localists, who favor significant local government autonomy and object to many regionalization efforts, and, on the other hand, regionalists, who endorse varying degrees of curtailment of local autonomy in favor of regionwide regulatory, fiscal, or general governmental mechanisms. Though it is easy to identify clear divergences among the localist camps, and between the localists and those whose viewpoints are better described as regionalist, a review of the substantive proposals currently offered by each major doctrinal strain in local government law reveals some unmistakable convergence. That is, just as the regionalist scholars have moved away from calls for full scale governmental consolidation in

agreement, its officers or agencies, have authority to perform. The agreement may provide for the performance of a function or activity"). See also ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, INTERGOVERNMENTAL SERVICE ARRANGEMENTS FOR DELIVERING LOCAL PUBLIC SERVICES: UPDATE 1983 41 (1985) [hereinafter ACIR] (describing how states encourage intergovernmental cooperation through the use of incentive grants, direct financial assistance for planning, and technical assistance to local governments).

21. See Cashin, *supra* note 5, at 2027 (describing New Regionalism); see also Savitch & Vogel, *supra* note 9 at 161-65.

22. See Briffault, *supra* note 2, at 1144-51.

23. See Frug, *supra* note 15, at 1781-88.

metropolitan areas, so too the localists have tempered their support of local autonomy with a recognition of the need for some regionwide government action and/or apparatus. Thus, the initial parts of this Article will compare the analytical frameworks and specific proposals of the predominant strands of scholarship in this area, emphasizing how regionalism is very much on the minds of local government law scholars, localists and regionalists alike.

Against that general doctrinal backdrop of the New Regionalism's tenets, normative bases, and goals, in Part III the Article focuses specifically on the role of intergovernmental cooperative efforts in regional governance. Proceeding to a critique of the most common types, it evaluates their strengths, weaknesses and policy implications. Following on that assessment, the Article suggests that the New Regionalists may have been too quick to conclude that intergovernmental cooperation is consistent with their stated policy goals. It describes how, in the existing legal framework, multi-purpose local governments are able to obtain the purported efficiency benefits of being part of a metropolitan region. At the same time, though, because the cooperative efforts are voluntarily undertaken by the participating entities,²⁴ local governments are able to selectively pick and choose the parts of metropolitan governance they wish to join. That is, when it comes to services needing large capital expenditures and a supra-municipal service territory to reach acceptable levels of efficiency, local governments are quick to turn to their neighbors to establish regionwide solutions. When however, the regional agenda focuses on the existing urban crises in affordable housing, education, job creation, or other social services, the local government boundaries allow the more affluent municipal governments to refuse to participate in regional redistributive efforts. Thus, local governments in metropolitan areas are not required to take the bad with the good, to bear the costs while they enjoy the benefits of their position in the metropolitan region. Rather, under the framework existing in nearly all states, the applicable legal rules enable them to preserve and solidify their privileged status. Though this system may be

24. Because it focuses on intergovernmental cooperative efforts, this Article does not consider single purpose governments that are created directly by state action. *See generally* Hoogasian v. Reg'l Transp. Auth., 317 N.E.2d 534 (Ill. 1974). For a full description of the various types of special districts existing across the country, see Kathryn A. Foster, *The Political Economy of Special-Purpose Government*, in AMERICAN GOVERNANCE AND PUBLIC POLICY 7-15 (Barry Rabe & John Tierny eds., 1997).

perfectly consistent with their perceived self interest²⁵ and with established state and federal²⁶ legal doctrine, it vastly limits the opportunities and incentives for redistribution of wealth at the regional level, and contributes to the preservation of inequalities within the region.

This Article recognizes that wholesale abandonment of intergovernmental cooperation among general purpose local governments is even less likely to occur than the consolidation proposals the New Regionalism seeks to replace. Nor does the Article endorse such an unlikely reformulation of local government powers. Instead, it more modestly urges heightened awareness of the regional costs of intergovernmental cooperation and the ways in which it may actually hinder the achievement of regional equity. It joins the ranks of those who have argued that overall metropolitan equity cannot be achieved through voluntary cooperative efforts and calls for states to take action to correct the gap that their laws and urban policies have facilitated and preserved.

II. THE MANY FACES OF REGIONALISM

Though the term means different things to different people, regionalism is enjoying a revival on both the academic and political fronts. As it subjects metropolitan regions to reexamination with renewed vigor and enthusiasm, the New Regionalism may be a “mixed bag of old prescriptions and new remedies to address problems both new and longstanding.”²⁷ Refining the regionalists’ traditional focus on the central city and its decline, New Regionalists expand their scrutiny to consider

25. See Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 27 (2000) (noting that resistance to regionalism in the political process is “largely a matter of the self-interest of those who benefit from the status quo, such as local elected officials, land developers, corporations that are the subjects of interlocal bidding, and the businesses and residents located in the high-tax base localities of the metropolitan area”). Briffault observes that in practice, localism is less about the normative values of efficiency, democracy, or community, and more about “preserving existing political control over local resources, protecting residents of high wealth localities from the needs of their lower-wealth neighbors, and providing opportunities for businesses to take advantage of the interlocal competition for tax base.” *Id.*

26. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 86–111 (1990) for a detailed analysis of how U.S. Supreme Court doctrine protects local autonomy and applies localist values to uphold local government actions with decidedly anti-regional impacts, specifically in the areas of land use regulation and education finance.

27. Roger B. Parks & Ronald J. Oakerson, *Regionalism, Localism, and Metropolitan Governance: Suggestions from the Research Program on Local Public Economies*, 32 ST. & LOC. GOV'T REV. 169, 169 (2000).

how the phenomenon of suburban growth forms a crucial part of urban and metropolitan development. The resulting endeavor, which searches for solutions to metropolitan problems in the absence of metropolitan governments, has become, in the words of noted commentators, “so proactive, so compelling, so urgent.”²⁸

A. *In Defense of Local Government Fragmentation*

Local government law has been the focus of a long and rich debate between localists and regionalists, a debate that seeks to determine the proper allocation of governmental power by the state to its political subdivisions.²⁹ In the modern era, the post-World War II baby boom and

28. Savitch & Vogel, *supra* note 9, at 161.

29. The debate over whether decentralized, independent local government units are preferable to centralized, higher level government units was left unresolved at the founding of the nation. As a result, it is no surprise that the debate has continued unabated to the present. Though the Constitution makes no mention of local governments, their creation, or their status, foundational writings articulate the differing viewpoints on the debate between local autonomy and more centralized levels of government power. James Madison, writing in the Federalist Papers, defended centralization of governmental power to protect against the tyranny of the majority. In his view, it is more difficult for a faction to control a centralized unit of government than a smaller, more decentralized one. See THE FEDERALIST NO. 10 at 46-47 (James Madison) (Gary Willis ed., 1982). Moreover, he asserted, because a higher level of government has a larger territory and higher population within its territorial jurisdiction, it is more likely that government offices will be filled with qualified individuals. See *id.* at 47. Though Madison's arguments were directed at the debate between allocation of power between the states and the national government, his insights on the dispute over the vertical allocation of power have broader relevance for the debate over the allocation of power at the local level, particularly in large metropolitan areas. In contrast to Madison's endorsement of centralization, Alexis de Tocqueville's commentaries on early 19th century America made the classic case for localism. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (G. Lawrence trans., J.P. Mayer ed., 1969) (1848). Tocqueville's preference for decentralization of power to the levels of government closest to the people were based on his belief that local government provides greater, rather than lesser, protection against the tyranny of powerful interests. See *id.* at 89. Fundamentally, the strength of local government in Tocqueville's analysis lies in the ease with which the citizenry can participate in government when power is centered at the local level. See *id.* at 68-70, 189-95. In Tocqueville's view, active local governments, with their ability to entice citizen participation because of their direct and immediate contact with the citizenry, provided the crucial protection against tyranny. See *id.* at 192. Though views of both Tocqueville and Madison were formulated at a time when population centers were separated by large distances and the impacts of their decisions could largely be limited to the territory and the people under their jurisdiction, the insights and the arguments articulated in this early localism debate have continuing endurance for current urban policy. For a review of the philosophical and historical underpinnings of the decentralization debate in local government law, see generally WILLIAM D. VALENTE, DAVID J. MCCARTHY, JR., RICHARD BRIFFAULT AND LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 1-24 (5th ed. 2001); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 403-04, 416. (1990); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1071-73 (1980); Cashin, *supra* note 4, at 1986-87.

the accompanying explosive growth of suburbia³⁰ produced a new demographic reality for the localism debate. Central cities found themselves surrounded by increasing numbers of municipal governments, autonomous in the sense that they were able to control the territory and tax the resources within their borders, but integrated in the sense that they were a functional part of the metropolitan region. The well-documented loss of central city wealth and families to the suburbs and the inability of cities to share in the suburban prosperity that was occurring all around them, set the stage for the most recent iteration of the battle between localists and regionalists.

Localism is most prominently defended by two distinct doctrinal camps that come together in their conclusion that strong local governments are highly preferable to centralization in metropolitan regions. However, the two localist doctrines are based on divergent political ideologies. First, the so-called “public choice” approach, as articulated in the work of Professor Clayton Gillette,³¹ uses legal economic analysis to defend localism as the most efficient way of providing services. It heralds the competition in the marketplace of local governments as providing effective checks against government inefficiencies and abuses of power. In marked contrast, Professor Gerald Frug’s “participation theory”³² of localism rejects the notion that a city’s most fundamental role is that of service provider³³ and urges enhanced local powers as a mechanism for empowering communities and their

30. For a description of the ways in which the housing market responded to a shortage of approximately 6,000,000 housing units in 1947, see JACKSON, *supra* note 5, at 231–45. Professor Jackson identified five characteristics of the postwar suburbs: increasingly distant from central cities, low density development, architectural sameness in construction, low prices associated with mass production, and racial and economic homogeneity. See *id.* The growth of suburbia continues to outpace central city growth. See *id.* at 283.

31. I use the term “public choice” as a shorthand convenience to describe generally those whose work finds support in Charles Tiebout’s theory, which is described *infra* at notes 35–38 and text accompanying. Professor Gillette’s work constitutes the most prominent articulation of the Tiebout theory as applied to questions about distribution of powers to local government in the legal literature, yet he seems to take issue with the use of the term. In a recent article, Professor Gillette referred to another commentator’s “critique of what he labels the ‘public choice approach’ to interlocal relationships.” Gillette, *supra* note 18, at 246. I use the term here with the purely descriptive intent described above.

32. In *Our Localism: Part II—Localism and Legal Theory*, *supra* note 29, at 346, 393–94, Professor Briffault used that term to describe the theory of localism propounded by Professor Frug. In the urban development literature, one study uses “metropolitan ecology” as a term to describe Frug-like belief “in the importance of local autonomy and small-scale governance,” see Foster, *supra* note 24, at 44–47. Professor Frug does not label his own theory.

33. See generally Gerald E. Frug, *City Services*, 73 N.Y.U. L. Rev. 23, 28 (1998).

citizens through meaningful involvement in grass roots levels of government.³⁴ Both models continue to animate the localism debate as it turns its attention to the metropolitan regions of the 21st century.

Published in 1956, Charles Tiebout's *A Pure Theory of Local Expenditures*³⁵ remains the seminal academic foundation of the economic defense of localism in urban government. According to Tiebout's model, local governments will strive to provide a desired mix of services in order to retain their constituents, the individual citizens whom he described as "consumer-voters."³⁶ 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. Crucial to Tiebout's theory was the ability of citizen consumers to translate their preferences for a particular mix of public services into a choice of local government by exercising their power of "exit," thereby ensuring ongoing competition among municipalities to attract and retain taxpayer citizens. Although Tiebout did not take a position in the political debate between localism and greater centralization in metropolitan America, his theories led to the conclusion that a greater number of competing local government units would produce higher citizen satisfaction and greater government efficiency. Successive generations of scholars have modified and refined Tiebout's theory,³⁷ yet the basic premises continue as the foundation for

34. Compare the following two assertions about the proper scope of local governmental power; they illustrate well the ideological chasm between the two approaches. On the one hand, the public choice theory rests on the normative claim that: "The primary function of a municipality is to provide local public goods." Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L. J. 75, 88 (1998). In contrast, Professor Frug's defense of localism on the basis of participation insists that: "[T]he role that cities ought to play in American society . . . is community building." Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1048 (1996). By community building, Frug means "the cultivation and reproduction of the city's traditional form of human association." *Id.* at 1077.

35. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

36. *Id.* at 419.

37. Professor Clayton Gillette is the leading exponent of Tiebout's theory in the legal literature. *See, e.g.*, Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996) (applying Tiebout's theory to the privatization of municipal services.). At the same time, Gillette has frequently recognized that Tiebout's assumptions do not reflect current realities. *See, e.g.*, Gillette, *supra* note 18, at 197-210; Clayton P. Gillette, *Reconstructing Local Control of School Finance: A Cautionary Note*, 25 CAP. U. L. REV. 37, 40 (1996) (recognizing that "the Tiebout world, however, is obviously not the world in which we live"); Clayton P. Gillette, *Courts, Covenants, and Communities* U. CHI. L. REV. 1375, 1389 n.59 (1994) (noting that Tiebout's model predicts the correct allocation of public services only so long as a series of externalities, and choice among substantial numbers of localities); Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946, 956 (1986) (stating that the documented inequality of municipal services provision itself disproves the assumptions underlying the Tiebout hypothesis).

those who herald the efficiency advantages of decentralization of power to local governments and reject arguments for regionalization or centralization of governments in metropolitan areas.³⁸

Scholars have criticized Tiebout's theory from two main vantage points. Some question the accuracy of Tiebout's assumptions about human behavior, while others disagree with the theory's normative bases and practical results. Various commentators, for instance, have challenged the premise that local government units are formed to provide a specific mix and level of services. They point to evidence that local governments are often created for the sole, less benign, purpose of excluding poor and minority residents.³⁹ Others have rejected Tiebout's assumption that individuals choose a municipal home that satisfies their desires for a particular mix and level of services, noting that choice is an inaccurate term to describe the plight of the poor who live with inadequate service levels.⁴⁰ Critics also fault Tiebout for ignoring how the costs of exercising that choice fall disproportionately on those with the fewest resources.⁴¹ They question too whether the much noted lack of

More recently, Professor Lee Anne Fennell has documented the limits of both exit and voice in the economic analysis of local government services. See Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1 (2001). Professor Fennell asserts that the exit-voice phenomena cannot capture the fact that local citizens have a dual role, as both consumers and producers, with regard to important services such as schools and public safety. See *id.* at 11–12.

38. See Ellickson, *supra* note 34, at 82–85; Gillette, *supra* note 18, at 208–10.

39. See, e.g., NANCY BURNS, *THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS* 117 (1994) (noting how the formation of local government units creates boundaries that exclude others, she claims “Americans have discovered in local institutions effective barriers to racial and economic integration”); GARY J. MILLER, *CITIES BY CONTRACT* 63–84 (1981) (describing how wealthy enclaves use municipal incorporation to avoid redistribution of wealth to poorer citizens; concluding that city formation in these cases “had little to do with the gratification of distinct collective tastes for public goods.” For additional economically based criticism of Tiebout, see generally Foster, *supra* note 24, at 39–41.

40. Moving is an expensive proposition, both in terms of the financial costs and the personal costs it imposes on citizens. As Professor Frug has noted, “[p]eople who live in unsafe neighborhoods or send their children to inadequate schools don’t do so because they have taste for them If they had a choice . . . , they would prefer better schools and less crime.” See Frug, *supra* note 33, at 31. Along those same lines, some have rejected the Tiebout theory because of its unrealistic assumption of full knowledge on the part of citizens. See GREGORY R. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 17 (A. Gary Dworkin ed., 1991).

41. See, e.g., Briffault, *supra* note 29, at 420 (stressing that the exercise of the choice of municipality comes at different prices to different citizens). For the poor, the costs of moving, the constraints imposed by the need to be close to jobs, and the limited availability of affordable housing in many municipalities means that “poorer, less educated potential movers will have fewer options and will be forced to bear more costs if they attempt to move.” *Id.* See also *id.* at 422 (noting that wealthy communities, with their high levels of property wealth, can tax at low rates and generate

affordable housing in suburban areas makes moving an illusion even for many moderate income individuals who are willing and able to assume the costs of the move.⁴² And finally, even some who share Tiebout's enthusiasm for the role of market mechanisms in achieving efficiency in the provision of public services suggest that the theory improperly emphasizes the consumer-voter's likely exercise of choice in the selection of local government. Instead of focusing exclusively on the threat of "exit," they argue, the theory should recognize the importance of citizen "voice" in motivating local government officials.⁴³

The second line of critical attack on Tiebout's model questions the normative acceptability of the metropolitan landscape the theory produces. Though the criticism is wide-ranging, it coalesces around four main points. First, the critique asserts the highly fragmented local government world envisioned by Tiebout inevitably results in a self-destructive competitive "race to the bottom," as municipalities try to out-bid each other in the incentives they are willing to offer to entice business and the property wealth it brings into their jurisdictions.⁴⁴ Second, it allows self-contained local government units in a metropolitan region to take actions with negative spillover impacts on their neighbors.⁴⁵ Third, in the view of some critics, Tiebout's depiction of local communities as aggregations of like-minded individuals primarily concerned with the consumption of public services denigrates and trivializes humanity and ignores other important local government functions.⁴⁶ Finally, some commentators argue that Tiebout's theory unacceptably assumes, indeed encourages, socioeconomic segregation and the preservation of the widening gap between wealthy suburb and

substantially more revenue than poor communities that tax at a much higher rate). *See also* Miller, *supra* note 39, at 204–06.

42. *See* Briffault, *supra* note 29, at 420.

43. *See, e.g.,* Parks & Oakerson, *supra* note 27, at 173–75. The importance of voice in determining the mix of services offered by a local government was first described in ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 30–43, 120–26 (1970). *See also supra* notes 37–38.

44. *See* Frug, *supra* note 33, at 33–34.

45. *See* Briffault, *supra* note 2, at 1132–33; Briffault, *supra* note 29, at 429–30. This critique applies to both Frug's and Tiebout's theories of localism. As a matter of political theory, it argues, localism is flawed. Because government decisions should be made at the level that is coterminous with the impacts of its decision, for many issues, the region or metropolitan level is the proper level for decisionmaking. *See* Briffault, *supra* note 25, at 20–23.

46. *See* Frug, *supra* note 33, at 28–31. Professor Frug bemoans Tiebout's reliance on the dues-paying mentality of citizenship and its abandonment of norms of equality, "replacing the one-person, one-vote principle associated with democracy with the one-dollar, one-vote rule of the marketplace." *Id.* at 31.

declining city.⁴⁷

In contrast to Tiebout's efficiency based analysis, the second prominent localist doctrine rests on the conception of local government as the place where democratic ideals can most easily be realized. This participation theory of localism originated in the modern legal literature with Professor Gerald Frug's 1980 publication of *The City as a Legal Concept*.⁴⁸ That article has become a classic in local government law scholarship as a preeminent justification of localism. Though Frug favors the same redistribution of wealth as many of those scholars who support centralization of power as a means towards that end,⁴⁹ he views highly centralized levels of government as unresponsive, ineffective, and impersonal. In this view, centralized governments are incapable of building the sense of community so necessary to defeat the alienation and loss of collective well-being that plague modern metropolitan areas. Municipal governments could offer the opportunity for community building and meaningful participation, Frug asserts, but the rules of local government law make them powerless.⁵⁰ In turn, city powerlessness produces citizen apathy and destroys their incentive to participate in local government. Without grassroots participation in local government, powerful elites are able to exercise real power at the expense of the community's broader collective interest. In Frug's view, then, enhanced local power will both increase the individual's connectedness with and involvement in the business of government, and achieve higher levels of social justice and equality.⁵¹

47. See PEIRCE, *supra* note 9, at 17 (arguing that the huge socioeconomic gap between poor cities and wealthy suburbs constitutes a major barrier to economic prosperity); WEIHER, *supra* note 40, at 87-115 (1991) (political fragmentation produces segregation along municipal borders); Briffault, *supra* note 29, at 420, 425 (criticizing public choice model for its acceptance and reinforcement of inequality among local government units); Frug, *supra* note 33, at 33-35 (criticizing ability of wealthy suburbs to enhance wealth by excluding poor and spending tax revenues only on themselves).

48. Frug, *supra* note 29. For a fuller exploration of Frug's localism, see generally GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999).

49. Gerald E. Frug, *Against Centralization*, 48 *BUFF. L. REV.* 31, 32 (2000) (critiquing the view that centralization is the only alternative to the current fragmentation of America's metropolitan areas).

50. See Frug, *supra* note 29, at 1062-67. Frug describes how cities are subject to the states' absolute discretion to delegate power to municipal governments and how federal constitutional limits have similarly weakened municipal authority. *Id.*

51. Professor Richard Thompson Ford has also championed the preservation of local autonomy while recognizing the negative consequences of local insularity in metropolitan regions. He opposes the creation of regional governments, because he believes that "we will lose the opportunities for participatory, or at least responsive, democratic government, effective place based political initiatives, and civic interaction and identification with the public sphere. Meanwhile government

As Frug's theory has acquired prominence, his premises have been questioned on several fronts. In his important articles on localism,⁵² Professor Richard Briffault argued that Frug's description of city powerlessness does not reflect the political reality of major metropolitan regions.⁵³ In Briffault's view, affluent suburban governments, far from displaying the powerlessness Frug bemoaned, actually exercise substantial autonomy and independence.⁵⁴ Second, Briffault rejected Frug's assertions that localism will enhance citizen participation or local autonomy, arguing (1) that the presence of a large number of small local governments in metropolitan regions narrows, rather than increases, the range of local powers; and (2) that citizens in metropolitan regions have bonds to numerous jurisdictions, thus weakening the ties with a home city that the localist theory envisions.⁵⁵ Third, Briffault challenged the

will become more distant, more bureaucratic and less responsive." See Ford, *supra* note 17, at 1184. For Professor Ford's proposals to make local borders "permeable" through a system of cross border voting, see Richard Thompson Ford, *The Boundaries of Race: Peolitical Geography in the Legal Analysis*, 107 HARV. L. REV. 1841, 1909-10 (1994).

52. See Briffault, *supra* note 26; Briffault, *supra* note 29.

53. See Briffault, *supra* note 26, at 1-3, 56; Briffault, *supra* note 29, at 389-406.

54. See Briffault, *supra* note 26, at 18-58. Using school financing schemes and land use regulation as examples, Briffault asserted that local powerlessness exists more as a matter of legal doctrine than as a description of the ways in which the favored quarter currently exists in most states. The allocation of local government powers in major metropolitan areas, he argued, has created powerful, affluent suburban municipalities with significant autonomy and control over the wealth within their territorial borders and over the course of development that territory will follow. In contrast to the black letter law of local powerlessness at the whim of the state creator, Briffault showed how common state statutory schemes for local government incorporation, see *id.* at 73-77, annexation, consolidation, see *id.* at 77-81, and home rule, see *id.* at 9-11, display a commitment to local autonomy.

Similarly, Briffault's analysis of the Supreme Court's deference to local autonomy in a variety of cases revealed similar staunch support of local insularity. Using a variety of justifications, the Court has upheld local power against attack from different quarters. For instance, in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974), the Court appeared to rely on a notion of local government as an autonomous community with the power to maintain the community character it desires. Briffault discussed a number of cases displaying similar localist tendencies. See Briffault, *supra* note 26, at 86-96. In Briffault's view, the Court elevated the autonomous status of local governments above the interests of those who were adversely affected by their actions. Based on his review of the Court's opinions, Briffault concluded that not only is the localist claim of local powerlessness inaccurate as a descriptive matter, it has also ignored the many ways in which local governments have been able to exercise power so as to impose negative extraterritorial impacts on other areas within the metropolitan region. See *id.* at 109-11.

55. See Briffault, *supra* note 29, at 407. In a similar vein, others have pointed to the loss of sense of place, and the alienation and dulling sameness of suburban communities. See, e.g., RICHARD MOE & CARTER WILKIE, *CHANGING PLACES: REBUILDING COMMUNITY IN THE AGE OF SPRAWL* (1997); Bruce Katz & Jennifer Bradley, *Divided We Sprawl*, THE ATLANTIC MONTHLY, available at www.theatlantic.com/atlantic/issues/99dec/9912katz.htm (Dec. 1999); James Howard Kunstler,

claim that enhanced local powers will result in redistribution of wealth, pointing out that local governments now have and always have had the power to redistribute and arguing that their failure to engage in greater redistribution is explained, not by a lack of power, but rather by their fear of losing high tax-paying citizens.⁵⁶ Finally, some of the normative critique leveled at the Tiebout theory applies to Frug's participation theory as well. That is, the critics question Frug's underlying judgment that municipalities should receive enhanced powers to act in metropolitan regions. They note the spillover effects of many local decisions, suggesting that enhanced local power in the metropolitan setting improperly allows an individual unit of government to impose negative costs on neighboring local governments.⁵⁷ According to that critique, localism becomes a perpetrator of inequalities rather than a mechanism for maximizing the community's overall welfare.⁵⁸

B. *Regionalist Solutions for Metropolitan Localism*

Professor Richard Briffault's path-breaking articles brought regionalism squarely front and center in the local government law literature. In *Our Localism—Part I*⁵⁹ and *Part II*,⁶⁰ both published in 1990, Briffault offered an extensive critique of localism and its consequences for overall metropolitan well-being. First, Briffault turned his attention to a rebuttal of the localists' claim of local powerlessness, documenting the very real and important local government powers routinely exercised by

Home From Nowhere, THE ATLANTIC MONTHLY, available at www.theatlantic.com/atlantic/issues/96sep/kunstler/kunstler.htm (Sept. 1996).

56. See Briffault, *supra* note 29, at 407–10. Another commentator has taken this critique one step further, rejecting the basic underlying assumption of the participation theory of localism that local governments are “natural benevolent institutions that are the perfect training ground for democratic citizens.” See BURNS, *supra* note 40, at 116. In contrast, Burns argues that local governments are often created for anti-democratic, exclusionary reasons. See *id.*

57. See Briffault, *supra* note 29, at 426–28; Cashin, *supra* note 5, at 2012–15; Briffault, *supra* note 2, at 116–17; Briffault, *supra* note 26, at 6–7.

58. Under this view, one possible solution short of total metropolitan area consolidation would be the creation of a regional government unit with the power to address only those policy matters with substantial region wide effects. See Briffault, *supra* note 25, at 21–22 (“In metropolitan areas, democracy requires giving the regional electorate a voice in local decisions that have regional consequences. Only by widening the scale of participation to include all those affected by local actions can local decision-making in metropolitan regions be made truly democratic.”).

59. Briffault, *supra* note 26, at 1.

60. Briffault, *supra* note 29, at 407. Since publication of the *Localism* articles, Professor Briffault's defense of regionalism has been a constant theme of his scholarship. In particular, two later articles elucidate the normative bases and describe the solutions he suggests for implementation of a regionalist agenda. See generally Briffault, *supra* note 25; Briffault, *supra* note 2.

municipal governments across the country.⁶¹ In the second part of the work, Briffault's *Localism* rejected the normative assumptions of localist doctrine.⁶² Finally, Briffault offered some tentative suggestions for reform of the localism dilemma in metropolitan America. As described in *Localism* as well as in later articles, he concluded that the formation of a regionwide, politically accountable local government unit is the only realistic means of ensuring that the impacts of government decisions in metropolitan areas are coterminous with their political boundaries.⁶³ Noting that neither the small size of existing local governments nor their sheer numbers in metropolitan areas was itself inconsistent with regional well-being, Briffault stressed that his critique was based on the ease and frequency with which local governments in metropolitan areas are able to take actions whose impacts extend far beyond their borders.⁶⁴ In his view, then, regional government units are necessary, not as a substitute for nor as a consolidation of existing local governments, but rather as an additional, politically accountable legislative body, whose functions would be limited to issues with demonstrable regionwide impacts.⁶⁵ As he recently noted, "[R]egionalism is . . . localism for metropolitan areas."⁶⁶

For a large number of commentators, Briffault's work offered tantalizing possibilities for ways in which social policies could be improved with regionalist solutions. The 1990s saw a resurgence of

61. Briffault, *supra* note 29, at 392–435. See also *supra* notes 39–47, 52–58, and accompanying text.

62. That critique has been described in this Article's earlier review of localism. See *supra* Part II.A. Briffault's critique of the public choice defense of a marketplace of municipal governments in competition for citizens asserts that it is based on erroneous assumptions about human behavior and inaccurate assessments about the freedom of many individuals to act as an enlightened consumer in the choice of municipal service provider. See *supra* notes 38–47, and accompanying text. Though Frug's participation defense of local government was sensitive to and critical of the ways in which affluent autonomous localities can preserve their privilege and imposed costs on other local government territories in the region, Briffault concluded that the theory is, like Tiebout's approach, seriously flawed. In Briffault's view, Frug's localism is based on a misguided perception of the local government as community and home for the vast majority of suburban Americans, rather than one that perpetuates inequalities within a region. See *supra* notes 52–58 and accompanying text. Fundamentally, he claimed, both localist theories ignore the harm caused when the impacts of the local governments' exercise of power extend far beyond their borders, exacerbating regional inequalities. See *id.*

63. See Briffault, *supra* note 25; Briffault, *supra* note 2.

64. See Briffault, *supra* note 29, at 426–30.

65. See Briffault, *supra* note 2, at 1165.

66. Briffault, *supra* note 25, at 1. Crucial powers to be exercised at the regional level, in Briffault's view, include land use, local taxation, and service provisions that could be enhanced with a supra-municipal territorial base. See Briffault, *supra* note 2, at 1166.

regionalist proposals. One author, for instance, argued that regional government is the *sine qua non* of an effective policy to combat poverty.⁶⁷ Another asserted that low and moderate income housing policy is doomed to failure without regional control of land use and taxation powers.⁶⁸ Yet another commentator urged the establishment of a regional tax base. She argued that regionwide taxation would more evenly distribute resources and spread the costs of the negative impacts associated with high levels of urbanization and concentrated poverty.⁶⁹ For these scholars, regional efforts are preferred because of their potential to promote equity and social justice. In their view, regional action is the only way to combat metropolitan America's pronounced racial segregation and sharp disparities in local wealth, local tax bases, and the quality of local services.

Though many scholars, policy analysts, and urban planners agree that regional approaches are preferable to the status quo, regionalization has its critics as well. Especially when regionalism is defined as advocating the creation of a new general purpose regionwide government, localists argue that regionalism would unwisely deprive citizens of their choice of service providers. In their view, it also would eliminate the advantage of having a large number of small government units that compete to attract citizens by differentiating themselves with the type and quality of services they offer.⁷⁰ Others assert that bigger government brings a reduced sense of community empowerment and decreases government responsiveness.⁷¹ Moreover, the political hurdles are enormous. Entrenched local government bureaucracies and the apparent public preference for continued suburbanization are but two of the major obstacles to metropolitan governance.⁷² In the view of one commentator,

67. In Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 VA. J. SOC. POL'Y & L. 471, 502-19 (1998), the author argued that a regional government structure is necessary to combat poverty.

68. See Peter Salsich Jr., *Thinking Regionally About Affordable Housing and Neighborhood Development*, 28 STETSON L. REV. 577, 580, 600-05 (1999).

69. See Georgette C. Poindexter, *Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses*, 47 WASH. U. J. URB. & CONTEMP. L. 3, 24-30 (1995).

70. For a recent articulation of the case against regionalism, see Gillette, *supra* note 18, at 197-210.

71. See Frug, *supra* note 29, at 1062-67.

72. Briffault identified the enormous practical political barriers to the implementation of his regional agenda. Fundamentally, he observed, "Localists do not become regionalists simply because they live in metropolitan regions." Briffault, *supra* note 25, at 2. Existing local bureaucracies are not likely to support relinquishment of significant regulatory and taxing powers. Nor are many segments of the private sector, such as "land developers, corporations, . . . and the businesses and residents located in the high-tax base localities," *id.* at 27, likely to agree to reorganization of the government

it is the minds of the American public, and not the governmental framework in which it operates, that imposes the major barrier to regionalism: “[I]t is unlikely that any structural innovation, like the establishment of metropolitan government” can change the political and social attitudes that have led to segregated suburbs; the need is not “to recast the structure of municipal government, but . . . to revise the preferences of the American people; in this area, organizational reform cannot substitute for the alteration of popular predilections.”⁷³

C. *Framing the New Regionalism Inquiry*

In various branches of urban development studies, academic commentators have heralded the arrival of the New Regionalism.⁷⁴ Like many of its doctrinal predecessors, the New Regionalism is an outgrowth of earlier metropolitan strategies; it is a term that catches a wide range of ideologies within its sweep. In general, however, those who congregate under the broad umbrella of the New Regionalism have focused their attention on the disparities between central city and favored quarter: in terms of wealth, job creation, earning power, and racial and socio-economic integration, the central city and the inner suburban ring are falling dramatically behind their wealthy suburban counterparts.⁷⁵ From a historical perspective, the New Regionalism turns its attention to the radical transformation of major metropolitan areas that began in post-World War II America. It confronts an urban landscape that displays a continually growing number of local government units located at ever

bureaucracies in which they have prospered. Thus, identifying an appropriate entity for the drawing of the regional boundaries would itself be a controversial and intensely political issue. Finally, Briffault recognized, many metropolitan regions span two or more states, bringing an interstate complication to the regionalist solution. See Briffault, *supra* note 2, at 1167.

73. See Edward Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665, 667 (1998); see also Anita Summers, *Regionalization Efforts Between Big Cities and Their Suburbs*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 181 (noting failure of most consolidation votes); Robert D. Yaro, *Growing and Governing Smart: A Case Study of the New York Region*, in REFLECTIONS ON REGIONALISM, *supra* note 9, at 44, 70–71.

74. See Cashin, *supra* note 5, at 1988; Foster, *supra* note 11, at 83; Savitch & Vogel, *supra* note 9, at 158–61. See also *supra* note 11 and accompanying text.

75. Commentators have defined New Regionalism as “a set of policies designed to reduce inequality arising from the way the metropolis developed and to improve the overall quality of life.” See H.V. Savitch & Ronald K. Vogel, *Metropolitan Consolidation Versus Metropolitan Governance in Louisville*, 32 ST. & LOC. GOV'T REV. 198 (2000). Other authors have noted New Regionalism's focus on reducing the gap between urban core and favored quarter. See, e.g., Foster, *supra* note 11, at 85 (noting that New Regionalism “links social equity to economic growth”); Bennett Harrison, *It Takes a Region (or Does It?): The Material Basis for Metropolitanism and Metropolitanics*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 143–45.

increasing distances from central cities. It documents the undisputed gap between suburban prosperity and central city decline. At the same time, however, it notes the repeated failure of local government consolidation efforts in major metropolitan areas and stresses the permanence of existing multi-purpose local governments. Thus, it looks for regional answers to metropolitan area inequalities through a lens that is tempered with the pragmatic realization that proposals to eliminate existing local government units are unlikely to succeed.

Though loosely united in their articulation of policy goals, the New Regionalists embrace a wide range of divergent strategies. In fact, rather than a cohesive ideology with a well-accepted policy agenda, New Regionalism refers more precisely to shared concerns and goals for metropolitan area equity. At the level of specific proposals, the variety is significant. Though some continue to advocate consolidation between central city and the county it inhabits, most New Regionalists reject the so-called “big box” government approach⁷⁶ in favor of more flexible, informal, governance arrangements.⁷⁷ Examining possible solutions such as the “multitiered”⁷⁸ approach, “linked functions,”⁷⁹ or “complex

76. See, e.g., Mark S. Rosentraub, *City-County Consolidation and the Rebuilding of Image: The Fiscal Lessons from Indianapolis's UniGov Program*, 32 ST. & LOC. GOV'T REV. 180, 189–90 (2000) (concluding that Indianapolis's revival could have happened without consolidation, noting the many other factors that produced economic growth and pointing out that the fastest growing areas in the Indianapolis region are beyond the borders of UniGov); Savitch & Vogel, *supra* note 75, at 210 (concluding that consolidation in the Louisville area would not achieve metropolitan equity). One study of several city-county consolidations concluded that supporters of consolidation do not seek to equalize suburban-city disparities. Successful consolidation agendas focused on “local services, governmental ‘turf,’ taxes, and race”). See Arnold Fleischmann, *Regionalism and City-County Consolidation in Small Metro Areas*, 32 ST. & LOC. GOV'T REV. 213–24 (2000). An analysis of the Jacksonville, Florida consolidation concluded that the benefits of consolidation are overstated. See Bert E. Swanson, *Quandaries of Pragmatic Reform: A Reassessment of the Jacksonville Experience*, 32 ST. & LOC. GOV'T REV. 227, 236 (2000). In contrast to the pervasive anti-consolidation approach to metropolitan regions, David Rusk continues to advocate large scale local government consolidation in metropolitan areas. Rusk, the former mayor of Albuquerque, has become a vocal proponent of metropolitan governments. He urges state governments to consider four different approaches: 1) unifying local governments, either by empowering urban counties, by consolidating county and municipal governments, or by creating a regional government that extends throughout the multiple cities and counties that comprise most major metropolitan areas; 2) authorizing municipal annexation without approval of property owners; 3) limiting the creation of new municipalities; and 4) promoting public partnerships for joint action among local governments. Rusk, *supra* note 2, at 90–102.

77. A recent symposium issue on the New Regionalism explored these and other proposals for regional redistribution of wealth, service provision, and regulatory powers. See Symposium, *New Regionalism*, *supra* note 11.

78. See Savitch & Vogel, *supra* note 9, at 162–63. The multitiered approach to regionalism allocates power among existing and/or new layers of government according to the scope of the impact of the power being exercised. Metropolitan area government “is supposed to better deal with

networks,”⁸⁰ they tend to endorse the establishment of limited purpose governments or the execution of voluntary intergovernmental agreements over proposals for wholesale consolidation of existing units of government. As a result, New Regionalism offers a middle ground for the dispute over the allocation of state and local government power. It attracts localists by recognizing that large scale consolidations are unlikely to be a successful political strategy, and that large numbers of local governments are an enduring feature of the metropolitan region. At the same time, New Regionalism appeals to the critics of localism, by documenting the ways in which fragmented local government authority and the phenomenon of suburbanization have contributed to central city decline and a widening gap between urban core and affluent suburbia.

1. *The Normative Bases of the New Regionalism*

Though the New Regionalists may agree about the ultimate goals for metropolitan America, the normative claims on which their arguments rest are quite diverse. At least four criteria underlie their proposals: efficiency, economic interdependence, participatory democracy, and equity.⁸¹ With regard to economic efficiency, the New Regionalist questions the traditional public choice localist claim that a multiplicity of autonomous local governments maximizes local wealth and efficiency by forcing local government units to compete with each other to attract citizen taxpayers. They point to recent empirical studies that suggest that fragmentation actually creates inefficiencies by allowing local governments to impose costs on others, and by allowing suburbs to

issues that cut across a number of local jurisdictions or involve redistributive policies.” *Id.* at 163. Lower level, municipal governments retain control over “labor-intensive services, which call for close relationships between service deliverers and citizen-consumers.” *Id.* at 162. The authors note that metropolitan level governments “often find themselves crushed between the grindstones of local and higher levels of government” and conclude that their record is mixed. *Id.* at 163.

79. *See id.* This approach results in a functional consolidation for service provision across jurisdictions, usually through the formation of interlocal service agreements. No new levels of government are required. In practice, the authors claim that linked functions are frequently perceived as an incomplete, temporary solution to a regional problem. For a review of the experiences of several cities that have used the linked functions approach, *see* Timothy D. Mead, *Governing Charlotte-Mecklenburg*, 32 ST. & LOC. GOV’T REV. 192, 194–96 (2000); Savitch & Vogel, *supra* note 75, at 198–212.

80. *See* Savitch & Vogel, *supra* note 9, at 164 (defining complex networks as “large numbers of independent governments (voluntarily) cooperating through multiple, overlapping webs of interlocal agreements”). Complex networks produce “numerous jurisdictions with overlapping services,” *id.*, thus maximizing the citizens’ range of choices.

81. *See* Valente et al., *supra* note 29, at 350–52; Briffault, *supra* note 25, at 15–26; Cashin, *supra* note 5, at 2042–47. *See also* Summers, *supra* note 73, at 182.

maximize their own wealth at the expense of the central city they surround.⁸² The New Regionalists also claim that excessive fragmentation of local government units establishes barriers to the efficient provision of some services.⁸³ In metropolitan areas especially, a large territorial base would better distribute the costs of infrastructure and produce a higher quality, if not less expensive, service.⁸⁴ Currently, nearly all participants in the New Regionalist debate appear to concur that some type of regionwide action would enhance regional efficiency and provide a necessary antidote to extensive local autonomy.

The second regionalist norm, the asserted economic interdependence of the metropolitan region, rests on evidence that suburban economic well-being suffers as the gap between suburb and city widens. According to the suggested "interdependence imperative,"⁸⁵ central city health becomes an item of suburban self-interest; suburbia ignores the fate of the city at its peril and to the detriment of its own prosperity. One well known commentator has identified numerous ways in which suburban welfare depends on a strong central city, including: (1) central city image is crucial to regional welfare; (2) new regional employers will need to tap city markets to fill their work force; (3) failure to address inner-city social problems will come back to haunt all taxpayers in the form of higher costs for prisons and welfare; (4) inner-city crime affects the image of the entire region; (5) environmental issues can only be addressed regionwide; and (6) regional cooperation will bring enhanced

82. See, e.g., Briffault, *supra* note 25, at 18–20; Cashin, *supra* note 5, at 2000–01. Several empirical studies support those claims. See, e.g., Joseph Persky & Wim Wiewel, *The Distribution of Costs and Benefits Due to Employment Deconcentration*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 67 (concluding that expansion of suburban manufacturing employment opportunities imposes substantial costs on inner city residents and represents a "subsidy from low- and moderate-income black and Hispanic residents of the city and inner suburbs to stockholders elsewhere in the nation"); Richard Voith, *The Determinants of Metropolitan Development Patterns: What are the Roles of Preferences, Prices and Public Choices*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 50, 78 (study of recent transportation investments in the Philadelphia area shows that cities subsidize suburban transit development, leading to inefficient suburbanization, diminished opportunities for central city, and a clear causal link between city and suburban dependency).

83. See, e.g., Briffault, *supra* note 2, at 1166.

84. A recent book by Kathryn A. Foster on special districts concludes, somewhat surprisingly perhaps, that services provided by regional single purpose government units are actually more expensive than having the general purpose government provide the same service. Foster, *supra* note 24, at 148–88. Foster speculates that the higher cost is due to "inflationary influence of political isolation, functional specialization, and administrative and financial flexibility," *id.* at 174–76. She recognizes, however, that the higher cost may merely reflect the fact that regional special districts provide a higher quality of service. See *id.* at 184.

85. See PEIRCE, *supra* note 9, at 131.

political clout.⁸⁶ In addition, the economic well-being of the suburbs appears to correlate significantly with the prosperity of their central cities.⁸⁷ Stated simply, the claim is that healthier metropolitan regions contain more prosperous central cities. In fact, in the twenty-five metropolitan areas with the most rapid income growth, central city incomes also increased.⁸⁸ Conversely, as the gap between central city and suburban prosperity widens, the overall absolute level of suburban wealth tends to be lower: in the eighteen metropolitan areas that recently experienced declines in income, central city income also decreased in all but four instances.⁸⁹ Thus, the reduction of socio-economic disparities in metropolitan regions can be justified as a matter of favored quarter self-interest, rather than exclusively dependent on municipal selflessness and charitable intent. If in fact the fate of the region depends on the health of the central city, redistribution from favored quarter to urban core is imperative.

Third, the New Regionalism rejects the localist claim that ideals of democratic participation militate against metropolitan area government reform. Recognizing that localists have long used the preservation of responsive, accountable units of government as an argument against regionalization,⁹⁰ some New Regionalists argue that, in fact, a regionally bounded multi-purpose government would better promote those

86. See *id.* at 131–32. Anthony Downs identifies similarly vital functions served by cities in metropolitan areas. See DOWNS, *supra* note 1, at 52–59.

87. See LARRY C. LEDEBUR & WILLIAM R. BARNES, NATIONAL LEAGUE OF CITIES, “ALL IN IT TOGETHER”: CITIES, SUBURBS AND LOCAL ECONOMIC REGIONS (1993). In that study, the authors found that in the 25 metropolitan areas with the most rapid income growth, central city incomes also increased. *Id.* at 6. Conversely, in the 18 metropolitan areas that recently experienced income decline, central city income declined in all but four instances. *Id.* On this basis, the authors asserted that “the economic fate and fortune of cities and suburbs are inextricably intertwined.” *Id.* at 4. Other analyses have reached similar conclusions about the interdependence of suburb and city. See, e.g., Persky & Wiewel, *supra* note 82; Richard Voith, *Central City Decline: Regional or Neighborhood Solutions*, BUS. REV., Mar.–Apr. 1996, at 3; H.V. Savitch et. al, *Ties that Bind: Central Cities, Suburbs, and the New Metropolitan Region*, 7 ECON. DEV. QUARTERLY 341 (1993); Richard Voith, *City and Suburban Growth: Substitutes or Complements*, BUS. REV., Sept.–Oct. 1992, at 21 (concluding that an economically vital central city is essential to the health of the metropolitan area).

88. NATIONAL LEAGUE OF CITIES, *supra* note 87, at 6. Whether the relationship is one of causation or merely of correlation remains subject to dispute. Compare the sources cited *supra* notes 82, 87, with Gottlieb, *supra* note 9, at 21 (arguing that empirical studies demonstrate that the causal link between central city-suburb complementarity is debatable, at best); Harrison, *supra* note 75, at 141 (concluding that the relationship between suburban and central city health is correlative, not causative); Gillette, *supra* note 18, at 242; Briffault, *supra* note 25, at 27 (noting the inconclusiveness of the empirical evidence on economic interdependence of city and suburb).

89. NATIONAL LEAGUE OF CITIES, *supra* note 87, at 6.

90. See *supra* notes 48–50, and accompanying text.

longstanding democratic ideals.⁹¹ In that view, the existing ability of many local governments to take actions whose impacts extend far beyond their borders underscores the fundamentally anti-democratic disparity between local governments' physical territory and the scope of their powers in U.S. metropolitan regions.

Equity, the fourth criterion advanced by many New Regionalists, is rooted in the assertion that the current economic schism between city and affluent suburb is fundamentally unfair. In this view, local government boundaries enhance the preservation of privilege and prevent the redistribution of wealth in metropolitan areas. Though the norms of efficiency, economic interdependence, and democratic participation can be debated with economic and statistical analyses, equity stands alone with its roots in moral convictions about fairness and justice. It starts with a recognition of the fact that suburbanization and the central city decline that accompanied it were the results of government policies that transferred large amounts of public resources from city to suburb. Metropolitan highway systems, government funding of commuter rail systems, education spending, government mortgage financing, and the privileged tax status of real property tax payments⁹² represent huge public subsidies of the suburbs at the expense of the cities.⁹³ But the strength of the equity norm does not depend on empirical corroboration. More simply, it is rooted in the conviction that regional redistribution of wealth is "the right thing to do."⁹⁴

91. See, e.g., Briffault, *supra* note 2, at 1164–70; Cashin, *supra* note 5, at 2035–47.

92. Because local property tax payments are deductible for federal income tax purposes, and because local school funding relies heavily on the property tax, the deductibility provides a huge indirect federal subsidy to schools. As Richard Rothstein explained: "A family in the 28% bracket that pays \$1000 in local property taxes for public schools can deduct that payment on its income tax returns, reducing its income tax bill by \$280. Of the \$1000 going to schools, the family pays only \$720 out of its earnings. The federal government contributes the \$280 balance." See Richard Rothstein, *How the U.S. Tax Code Worsens the Education Gap*, N.Y. TIMES, Apr. 25, 2001, at A17. A Stanford University economist theorizes that this federal subsidy makes families more willing to pay higher taxes for better schools. *Id.*

93. See, e.g., Cashin, *supra* note 5, at 2003–14 (citing various examples where the "favored quarter" receives a disproportionate share of public infrastructure funds for roads, highways, expensive sanitary sewage treatment systems); DUANY ET AL., *supra* note 5, at 8–15; Richard Voith, *The Determinants of Metropolitan Development Patterns: What are the roles of Preferences, Prices, and Public Choices*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 78–80 (claiming that in the case of Philadelphia and possibly other cities, the central city subsidized public transit for suburbanites); ORFIELD, METROPOLITICS, *supra* note 10, at 71 (noting that in the fee structure of regional sewage disposal, Minneapolis and St. Paul pay \$6 million more in fees than they incur in costs).

94. In the words of one urban economist who recently concluded that the regionalists' economic interdependency argument is at best subject to empirical dispute:

2. *New Regionalism in the Legal Literature*

Although New Regionalism is fairly new to the legal literature and the incidents of self-identification are rare, some of the academic commentary has begun to use the term. Professor Sheryll Cashin's recent article described the movement in the following terms: "[The New Regionalism] attempts to bridge metropolitan social and fiscal inequities with regional governance structures, or fora for robust regional cooperation, that do not completely supplant local governments."⁹⁵ Irrespective of the label used, the current work of both localists and regionalists can fairly be said to come under the wide doctrinal umbrella of the New Regionalism. Public choice theorists, for instance, temper their enthusiasm for the asserted efficiency benefits of a fragmented metropolitan region, proposing voluntary cooperation among and between units, and suggesting that wealthier local governments will recognize that their own welfare is maximized by a regionwide sharing of burdens.⁹⁶ In addition, those who evaluate local government structures from the public choice perspective applaud the use of regional governance efforts for the provision of regionwide services, especially those that require large investments in capital infrastructure.⁹⁷ Similarly, New Regionalism's tenets appear to have appealed to such staunch localists such as Professor Frug, who recognizes that local autonomy produces unacceptable negative impacts in a metropolitan region and proposes ways in which a regionwide entity could produce a more equitable distribution of burdens.⁹⁸ Though still fundamentally opposed

Why is it that programs to help our neighbors pull themselves out of poverty must be justified in terms of the economic self-interest of those who provide the cash? We worry that by contributing to this literature, we have changed the terms of the debate to a positivist realm in which, if the numbers don't come out right, metropolitan anti-poverty programs will have been proven to be a 'bad idea.' But a number of us believe that antipoverty programs are always a good idea, simply because they are the right thing to do.

Gottlieb, *supra* note 9, at 43. See also DOWNS, *supra* note 1, at 5 (discussing the affluent quarter's moral responsibility to central city).

95. See Cashin, *supra* note 5, at 2027, 2033–34. For other references and descriptions of the New Regionalism, see also, Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 540 (2000); John Kincaid, *Regulatory Regionalism in Metropolitan Areas: Voter Resistance and Reform Persistence*, 13 PACE L. REV. 449, 474–75 (1993).

96. See, e.g., Parks & Oakerson, *supra* note 27, at 169; Gillette, *supra* note 18, at 190, 241–45. See also *infra* notes 206–219 and accompanying text.

97. See, e.g., Parks & Oakerson, *supra* note 27, at 170–72.

98. See, e.g., GERALD E. FRUG, CITY MAKING, BUILDING COMMUNITIES WITHOUT BUILDING WALLS 85–89, 106–09 (outlining a proposal for regional government); Ford, *supra* note 17, at 1183–90. Their proposals involve making territorial borders more permeable and reflective of the fact that

to wide-scale consolidation of metropolitan area governments, both Frug and the public choice scholars admit the need for some regional entities or agreements. And finally, Richard Briffault's critique of localism anticipated the New Regionalism's acceptance, indeed support, of local autonomy. Briffault's pragmatic assessment of the likely failure of general purpose regional governments, coupled with his endorsement of regional legislatures with well defined powers, would leave untouched the large number of pre-existing autonomous local government units in metropolitan areas.⁹⁹ Localist and regionalist doctrine alike, thus, enter the 21st century tempered with a recognition that local government law and theory must take into account both the reality of metropolitan regions and the interconnectedness among units of government, as well as the stubborn permanence of those units of local government.

Notwithstanding the emerging consensus on the importance of the region in metropolitan areas, it would be foolish to claim that localists and regionalists have put aside their differences and found salvation in the New Regionalism.¹⁰⁰ Rather, the allure of the New Regionalism may be simply that it holds something for everybody, that its wide ranging normative concerns and diversity of proposals allow all who study urban development to find something in the New Regionalist agenda to support. Those who emphasize economic efficiency arguments are likely to champion voluntary cooperation to produce supra-municipal service providers. In contrast, those who stress the economic interdependence norm are likely to support regionalist proposals that rely on enlightened suburban self-interest to cure metropolitan area inequality. The participation localists, who place primary importance on the role of small

local governments are not self-contained atomistic entities but rather part of a larger region. See Ford, *supra* note 17, at 1188–89. The authors also suggest that a regional legislature with limited negotiation powers would assist regions in working toward these goals. See Frug, *supra*, at 106. Their ideas capture the reality that metropolitan area citizens may live in one local government, work in another, and have numerous contacts with many other local governments. See *id.*; see also Ford, *supra* note 17, at 1188–89. The cross border voting proposal would allow citizens of the region to cast their vote in the unit of government that they identify with the most. See *id.* More recently, Professor Frug has suggested that local government law scholars might learn from the experience of the European Union in the formation of its regional entities. See Frug, *Beyond Regional Government*, *supra* note 15.

99. Briffault, *supra* note 29, at 453–54.

100. In fact, a comparison of the localist approaches to the New Regionalism reveals major differences in the ways in which scholars support regionalization. While public choice advocates such as Professor Gillette seem to endorse only those regionalist efforts that preserve local autonomy, see Gillette, *supra* note 18, at 197–210, Professor Frug and the participation theorists advocate a real infusion of regional values into local decisionmaking, see Gerald E. Frug, *Against Centralization*, 48 BUFF. L. REV. 31, 36–37 (2000) and Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 271–312 (1993).

governmental units in the preservation of democracy, will undoubtedly favor those regionalist proposals that tinker the least with local autonomy. And finally, those who come to regionalism with an eye toward ensuring a closer tie between government's territory and the scope of the impact of its actions are likely to defend regionalism reforms that entail the establishment of new, regional government bodies.¹⁰¹

III. INTERGOVERNMENTAL COOPERATION IN METROPOLITAN AREAS

The preceding description of New Regionalists' emerging shared articulation of policy goals for metropolitan areas lays the background for this Part, which begins with a brief overview of the legal structural framework within which intergovernmental cooperation is established and operates. It then describes and evaluates the major types of intergovernmental cooperation techniques available in metropolitan areas. Finally, this Part reviews the New Regionalism's analysis of intergovernmental cooperation and notes the incomplete and/or inaccurate assumptions on which it is based. It concludes by arguing that that these voluntary efforts are actually unlikely to promote, and may in fact work counter to, many of the New Regionalism's goals.

A. *Types of Intergovernmental Cooperation Efforts*

All intergovernmental cooperative efforts operate against a backdrop of state enabling authority. The possible sources of authority are wide-ranging, and may include a state constitutional provision,¹⁰² municipal home rule powers,¹⁰³ a general state statute enabling intergovernmental

101. As the preeminent proponent of regionalism in local government law, Richard Briffault recently summarized the normative defense of a redistribution of government power in metropolitan areas: "in contemporary metropolitan areas, the economically, socially, and ecologically relevant local area is often the region. Consequently, in metropolitan areas, concerns about efficiency, democracy, and community ought to lead to support for some shift in power away from existing localities to new processes, structures, or organizations that can promote decision-making on behalf of the interests of a region considered as a whole. Regionalism is, thus, localism for metropolitan areas." Briffault, *supra* note 25, at 2.

102. See, e.g., ILL. CONST. art. 7, § 10; FLA. CONST. art. 8, § 4.

103. See *Cape Motor Lodge, Inc. v. City of Cape Girardeau*, 706 S.W.2d 208, 212-13 (Mo. 1986) (en banc) (upholding intergovernmental agreement as a valid exercise of home rule power without independent statutory authorization).

cooperation,¹⁰⁴ or a specific enabling act for a particular type of intergovernmental action.¹⁰⁵ In some cases, independent statutory restrictions,¹⁰⁶ the primacy of other provisions of state law,¹⁰⁷ or the interaction between different intergovernmental cooperation statutes¹⁰⁸

104. See, e.g., ARK. CODE ANN. §§ 25-20-101-104 (Michie 2002); 5 ILL. COMP. STAT. 220/3 (1996); IOWA CODE § 28E (2001); WASH. REV. CODE § 39.34.010 (2000); WIS. STAT. § 66.031 (1999).

105. See, e.g., OH. REV. CODE. § 308 (West 1998) (law detailing formation of a regional airport authority); WASH. REV. CODE 54.16.200 (1989) (Washington law regulating the formation of public utility districts); WIS. STAT. § 200.13 (2002) (detailing formation of metropolitan sewerage districts).

106. See, e.g., *City of Hamilton v. Public Water Supply Dist.*, 849 S.W.2d 96 (Mo. Ct. App. 1993). In this case, the city's contract to supply water to a public water district stated that no capital costs would figure into the rates charged by the city. When the city undertook to raise rates to cover the cost of repaying bonds for capital improvements, the water district filed suit to block the rate increase. The appellate court upheld the city's power to ignore the contract limitation, noting that a state statute required the city to set rates at a level high enough to recoup the costs of financing the bonds. See *id.* at 101. See also *Jefferson v. Mo. Dep't of Natural Res.*, 863 S.W.2d 844, 849-50 (Mo. 1993) (local government must follow statute authorizing creation of intergovernmental solid waste management districts and cannot rely on state constitutional provision for intergovernmental cooperation); *Info. Techs., Inc. v. St. Louis County*, 14 S.W.3d 60, 62 (Mo. Ct. App. 2000) (application of state statutory requirements on bidding for public contracts depended on whether intergovernmental contract involved governmental function).

107. A contract for services, though adhering to statutory requirements on intergovernmental cooperation, may be invalidated for noncompliance with other statutory directives. See e.g., *W. Wash. Univ. v. Wash. Fed'n of State Employees*, 58 Wash. App. 433, 440, 793 P.2d 989, 992 (1990) (invalidating university contract with city for the provision of police services because of overriding statutory mandate that disbanding of university police department must adhere to labor rules regarding layoffs and interpretation of university police collective bargaining agreement). See also *Elk Grove Township Rural Fire Prot. Dist. v. Vill. of Mount Prospect*, 592 N.E.2d 549, 552 (Ill. App. Ct. 1992) (intergovernmental agreement involving promise to execute future tax levies invalidated by general principles of Illinois law; agreement improperly "denies prospective administrations and taxpayers any input into future levies . . . [and] is therefore void *ab initio*"); *City of New Smyrna Beach v. County of Volusia*, 518 So.2d 1379, 1382 (Fla. Dist. Ct. App. 1988) (Florida constitutional requirement for a dual referendum to uphold intergovernmental transfer of "function and power relating to services" not applicable to intergovernmental transfer of regulatory powers). Compare, e.g., *Farlouis v. LaRock*, 315 So.2d 50, 56 (La. Ct. App. 1975) (state bidding requirements not applicable to industrial district created by municipality), with *Smith v. Intergovernmental Solid Waste Disposal Ass'n*, 605 N.E.2d 654, 663 (Ill. App. Ct. 1992) (statutory requirements for competitive bidding applies to regional special district).

108. In *State v. Plaggemeier*, 93 Wash. App. 472, 474-75, 969 P.2d 519, 521 (1999), five local governments entered a mutual aid agreement for the purpose of reducing drunk driving in their area. Two state enabling statutes were relevant to the scope of the agreement. First, under Washington's Mutual Aid Act, a local sheriff or chief of police can give consent to mutual aid agreements with neighboring municipalities, see WASH. REV. CODE § 10.93.070 (2002). Under Washington's Interlocal Cooperation Act, WASH. REV. CODE § 39.34 (2000), however, all intergovernmental cooperative efforts require ratification by the governing legislative bodies. In its decision to uphold an arrest made pursuant to a Mutual Aid Agreement that had not been ratified by the participants' legislative bodies, the court invalidated all other aspects of the agreement, which included the establishment of an interjurisdictional task force. *Plaggemeier*, 93 Wash. App. at 476-81, 969 P.2d at 522-25. Though the court stressed that the Mutual Aid Act was not an independent source of

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may limit local governmental flexibility. Moreover, general state constitutional limits on government power, such as the anti-delegation doctrine,¹⁰⁹ the prohibition of special commissions,¹¹⁰ the prohibition of special legislation,¹¹¹ restrictions on government subscription of stock,¹¹² public purpose requirements,¹¹³ debt limitations,¹¹⁴ and the general state requirement that local governments not contract away their police

enabling authority for Washington police departments, it is difficult to see how the extraterritorial arrest provision, which did not comply with the Interlocal Cooperation Act, can be upheld on any other basis.

109. See *Vt. Dep't of Pub. Serv. v. Mass. Mun. Wholesale Elec. Co.*, 558 A.2d 215, 219–23 (Vt. 1988) (notwithstanding state statute authorizing municipal electrical utility to enter intergovernmental contracts for the purchase of power, utility's agreement to transfer all decisionmaking power to joint utility agency invalidated as prohibited attempt to delegate governmental authority; and stating "any contract whereby legislative authority or duty is attempted to be delegated by a city is absolutely null and void"); *Barnes v. Dep't of Housing and Urban Dev.*, 341 N.W.2d 766, 772 (Iowa 1983) (delegation doctrine invalidates city attempt to transfer approval power over siting of low income housing to regional housing authority created pursuant to state Intergovernmental Cooperation Act); *County of Racine v. City of Oak Creek*, 477 N.W.2d 318, 320 (Wis. Ct. App. 1991) (stating county duty to guard prisoners cannot be transferred to city pursuant to intergovernmental contract; state statutes create non-delegable duty). *But see, e.g.*, *Local 22, Phila. Fire Fighters' Union v. Commonwealth*, 613 A.2d 522, 526 (Pa. 1992) (rejecting delegation challenge to formation of joint financial services authority); *Goreham v. Des Moines Metro. Area Solid Waste Agency*, 179 N.W.2d 449, 456 (Iowa. 1970) (same); *Vill. of Sherman v. Vill. of Williamsville*, 435 N.E.2d 548, 552 (Ill. Ct. App. 1982) (rejecting delegation challenge to an intergovernmental contract for services); *Clayton v. Vill. of Oak Park*, 453 N.E.2d 937, 945 (Ill. Ct. App. 1983) (court rejects delegation challenge to establishment of village agency). Professor Gillette's recent analysis of intergovernmental actions examined the nondelegation doctrine and concluded that, though it may properly restrict local government ability to act, it imposes significant costs on formal interlocal contracts. See Gillette, *supra* note 18, at 219–31.

110. See, e.g., *Specht v. City of Sioux Falls*, 526 N.W.2d 727, 731 (S.D. 1995) (invalidating regional authority as unconstitutional special commission); *but see Local 22, Phila. Fire Fighters' Union*, 613 A.2d at 526 (rejecting special commission challenge).

111. See, e.g., *City of Rye v. Metro. Transp. Auth.*, 249 N.E.2d 429, 431 (N.Y. 1969) (statute creating authority did not constitute prohibited special legislation).

112. See *Pease v. Bd. of County Comm'rs*, 550 P.2d 565, 567–58 (Okla. 1976) (holding that intergovernmental entity did not run afoul of constitutional prohibition on government subscription of stock).

113. See, e.g., *Mulkey v. Quillian*, 100 S.E.2d 268, 270–71 (Ga. 1957) (intergovernmental contract involving state loan to political subdivision of state violates state constitutional requirement that tax revenues be spent for a public purpose).

114. See, e.g., *Nations v. Downtown Dev. Auth.*, 338 S.E.2d 240, 243 (Ga. 1986) (holding intergovernmental contracts clause of state constitution limited by separate constitutional provision requiring voter consent to city decision to incur debt pursuant to intergovernmental agreement). *But compare with Ambac Indem. Corp. v. Akridge*, 425 S.E.2d 637, 640 (Ga. 1993) (county's contract for services with regional special district, which involved issuance of revenue bonds for financing of waste disposal system, did not constitute debt in violation of state constitution).

power,¹¹⁵ may reduce the breath of state enabling authority. In addition, states disagree on whether both entities in an intergovernmental agreement must independently have the power to engage in the activity that is subject to the agreement, or whether it is sufficient for one unit to be enabled. Known as the debate between the “mutuality of powers”¹¹⁶ approach and the “power of one unit”¹¹⁷ approach, the principle also has a substantial impact on the breadth of potential intergovernmental cooperative efforts. Within those general parameters, however, local discretion is quite broad.

According to the categorization adopted by the Advisory Commission on Intergovernmental Relations¹¹⁸ intergovernmental cooperative efforts

115. *See, e.g.*, *City of Hamilton v. Pub. Water Supply Dist. #2 of Caldwell County*, 849 S.W.2d 96, 103–04 (Mo. Ct. App. 1993) (invalidating intergovernmental contract provision in which city improperly agreed to limit its rate); *Elk Grove Township Rural Fire Prot. Dist. v. Vill. of Mount Prospect*, 592 N.E.2d 549, 522 (Ill. App. Ct. 1992) (contracting governmental unit cannot bind itself to future tax levies); *Cibolo Creek Mun. Auth. v. City of Universal City*, 568 S.W.2d 699, 703 (Tex. Ct. App. 1978) (stating in dicta that an intergovernmental contract cannot limit regional district’s right to charge connection fees to its system).

116. Under the “mutuality of powers” approach to intergovernmental cooperation, governments can only contract with each other for services if each governmental unit has independent authority to engage in the subject of the contract on its own. *See, e.g.*, *United Water Res., Inc. v. N. Jersey Dist. Water Supply Comm’n*, 685 A.2d 24, 31 (N.J. Super. Ct. App. Div. 1996) (concluding that intergovernmental cooperation act “was not intended as a vehicle to enhance the enumerated powers granted to local units”); *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 49 (Colo. Ct. App. 1991) (applying COLO. CONST. art. XIV, § 18(2)(a), which authorizes intergovernmental cooperation and contracts to provide any function, service, or facility lawfully authorized to each of the cooperating or contracting units). The issue is not always as straightforward as it might appear. The Washington Interlocal Cooperation Act, WASH. REV. CODE § 39.34 (2000), for instance, clearly articulates a mutuality of powers standard. When the city of Spokane created a public facilities district for the purpose of financing and building a new public arena jointly with the county, it proceeded to condemn private property for the district to use as the arena site. The landowners challenged the condemnation, arguing that, because the district has no powers of condemnation, the interlocal cooperation act prohibited the city’s actions. The court upheld the city’s actions, saying that the its role as a “partner” and not as an “agent” in the agreement meant that the mutuality provision did not prohibit the condemnation. *See Schreiner v. City of Spokane*, 74 Wash. App. 617, 624, 874 P.2d 883, 888 (1994).

117. Under the “power of one unit” approach, so long as one of the contracting governments has the power to undertake the activity, an intergovernmental contract will be upheld. The result is an increase in governmental power. *See, e.g.*, *County of Wabash v. Partee*, 608 N.E.2d 674, 679 (Ill. App. Ct. 1993) (“The very purpose of [the Intergovernmental Cooperation provision of the Illinois Constitution] is to allow a local government to do indirectly that which it cannot do directly, as long as it is otherwise lawful.”). For a comparison of the two approaches to intergovernmental cooperation, *see* ACIR, *supra* note 22, at 9; VALENTE ET AL., *supra* note 29, at 407–14.

118. A survey of these state statutes on intergovernmental cooperation, conducted by the Advisory Commission on Intergovernmental Relations, concluded that intergovernmental cooperation efforts are widely used and suggested a three part categorization that describes the most prevalent types of intergovernmental cooperative efforts: contracts for services; joint provision of services; and the creation of a new governmental entity. *See* ADVISORY COMMISSION ON

can be characterized as contracts for services; joint provisions of services; and the creation of a new unit of government.¹¹⁹ In addition, Professor Clayton Gillette has recently described a fourth type of intergovernmental cooperation, which he refers to as “voluntary burden sharing.”¹²⁰ The following analysis will consider whether any of these efforts constitute a realistic mechanism for reducing regional disparities. It will suggest that the New Regionalism’s generally positive assessments of intergovernmental cooperation are flawed. The availability of voluntary regionwide cooperative efforts may improperly remove an incentive to meaningful regional burden sharing and may facilitate the ongoing off-loading of metropolitan burdens onto the less affluent segments of metropolitan areas. In fact, by allowing independent local governments to participate in metropolitan governance only when it benefits their own short-term interests, intergovernmental cooperation may exacerbate the metropolitan regional inequality that the New Regionalism seeks to eliminate.

1. *Contracts for Services*

Pursuant to statutes or state constitutional provisions, local

INTERGOVERNMENTAL RELATIONS, STATE AND LOCAL ROLES IN THE FEDERAL SYSTEM 327 (1982). Another publication by the same group concluded that in 1983, more than half of U.S. municipalities and counties had cooperative units with other units of government. See ACIR, *supra* note 20, at 25. The ACIR was abruptly terminated by Congress in its 1996 budget, in which it allocated funds for the “prompt and orderly termination of the Advisory Commission on Intergovernmental Relations.” PUB. L. NO. 104-52, tit. IV, 109 STAT. 468, 480. See Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”*: Devolution, Revolution or Reform?, 81 MINN. L. REV. 97, 104 (1996) for a description of how the ACIR was originally created.

119. As in the case in any attempted typology of local government laws, these categories are not completely insular and discrete. Consider, for instance, the intergovernmental arrangement described by the court in *Glassy Creek Neighborhood Alliance v. City of Winston-Salem*, 542 S.E.2d 296, 298 (N.C. Ct. App. 2001). In that case, the city and county consolidated their water and sewer systems, and created a joint Utility Commission to operate it. Though in some ways the resulting entity falls into the special district category, in other important ways it operated much like a joint services agreement. *Id.* at 298. Though the commission exercised a fair amount of independence and autonomous discretion, the oversight of both participating general purpose units was substantial. *Id.* See also *City of Oakland v. Williams*, 103 P.2d 168, 169 (Cal. 1940) (contract transferring to one of seven municipal signatories the power to create a binding plan for joint waste disposal). Thus, although the categories described by the ACIR are helpful for purposes of general analysis and illustration, the enormous variety of possible intergovernmental cooperative efforts defies simple categorization.

120. See Gillette, *supra* note 18, at 194, in which Professor Gillette defines voluntary burden sharing as “interlocal agreements to alleviate socio-economic disparities within a region.” For an evaluation of his proposal, see *infra* notes 206–220 and accompanying text.

governments in most states¹²¹ are empowered to contract with another local government to receive services provided by one of the contracting units.¹²² Presumably, two general purpose local government entities, such as municipalities or counties, will not enter into a contract for services unless the receiving entity can buy the service at a price that is lower than what it would have to spend to produce and provide the service itself. At the same time, the providing entity is unlikely to contract to provide the service unless it derives a benefit as well, for instance, by being able to exploit excess capacity that would otherwise go unused, by being able to price the service at a level that allows it to derive a profit, or by enhancing the welfare of its own citizens by providing the service on a larger scale.

Consider, for instance, the facts of *Durango Transportation, Inc. v. City of Durango*.¹²³ In that case, a city-county agreement required the city to extend its municipally owned and operated bus service outside of the city but within the county's territorial limits. Questioning the legality of the intergovernmental contract, a private company sued to stop the municipal service provider from encroaching on its own service territory within the county. Under the terms of that intergovernmental contract, a Transit Advisory Board was established to provide advice and recommendations to the city, which had the ultimate decisionmaking power. The Board, in turn, was comprised of individuals appointed by both the city and the county. The county had no "financial or

121. According to an ACIR study undertaken several decades ago, virtually all states authorize intergovernmental cooperation, either by constitutional provision, statutory enabling acts, or both. See ACIR, *supra* note 20, at 91.

122. This Section will focus on services provided pursuant to intergovernmental contracts between general purpose local governments. It is worth noting that these intergovernmental contracts may deal with either ongoing services (as is the more common case discussed in the text) or for the provision of a particular capital improvement, see, e.g., *Skybort Props. of Or. v. Multnomah County Drainage Dist.*, 844 P.2d 909, 912 (Or. Ct. App. 1997) (culverts) and *Beckwith v. County of Stanislaus*, 345 P.2d 363, 367 (Cal. Ct. App. 1959) (bridges). Although local governments frequently contract with private service providers, those contracts for services are beyond the scope of this Article. Contracts for services involving a regional special district are considered at text accompanying notes 174–205, *infra*. Closely related to intergovernmental contracts for services, and with potential impact on regional well-being are intergovernmental boundary agreements. Under those intergovernmental contracts, two or more governmental units pledge to respect the others' annexation authority in territory as allocated under the agreement. In *Village of Long Grove v. Village of Kildeer*, 497 N.E.2d 319, 321 (Ill. App. Ct. 1986), the court held that boundary agreements are not included within the scope of Illinois' Intergovernmental Cooperation Act. Subsequently, the Illinois legislature specifically authorized the execution of intergovernmental boundary agreements. See *Groenings v. City of St. Charles*, 574 N.E.2d 1316, 1320 (Ill. App. Ct. 1991). This Article will not analyze this type of intergovernmental contract.

123. 824 P.2d 48 (Colo. Ct. App. 1991).

management participation”¹²⁴ nor did it assume any “potential liability” from the operation of the bus system.¹²⁵ Although the *Durango* court upheld the legality of the intergovernmental contract, it did not discuss the underlying motivation for its formation. A wide range of explanations is plausible. It is possible, for instance, that the expanded service would not require the purchase of additional buses, or that the city could price the county service at a level that would produce a profit for city revenues, or that the enhanced service territory met the demand of city citizens for county-wide public transportation. On the other side of the bargain, the county may not have had the financial capability nor the political will to establish its own transportation service. In any event, its transfer of power to the city and its own limited involvement suggests that the county was confident in the city’s ability to protect the welfare of county residents.

A survey by the Advisory Commission on Intergovernmental Relations identified several local disincentives to intergovernmental contracts for services. For one thing, the receiving unit is likely to be wary of the potential loss of local autonomy and control that results from the relinquishment of its authority over the service production and provision.¹²⁶ The other major disincentive, according to the survey, is that local governments fear that their contracting partners will not apportion costs equitably.¹²⁷ Notwithstanding these perceived drawbacks, intergovernmental contracts for services are widely used across the country. The question remains, however, whether they enhance or decrease the general regional welfare.

Intergovernmental contracts for services would seem to provide an opportunity for maximized efficiency and overall enhancement of service delivery. In his important study of municipal incorporation in Los Angeles County, however, Gary Miller analyzed a series of intergovernmental contracts for services that had the opposite effect.¹²⁸ Known as the Lakewood Plan in honor of the first community to use an intergovernmental contract to avoid annexation by larger cities in the county, Los Angeles County became the provider of many services to newly incorporated municipalities. Citizens living in the unincorporated areas of Los Angeles County had three options—to remain in unincorporated county territory, which typically meant no local control

124. *Id.* at 53.

125. *Id.*

126. See ACIR, *supra* note 20, at 39–40.

127. *Id.* at 40.

128. See MILLER, *supra* note 39.

over services or land use; to be annexed by the existing cities; or to incorporate as separate municipalities.¹²⁹ Before the Lakewood Plan, the costs of incorporation were substantial, requiring the new municipality to establish departments to provide police, fire, and other basic urban services. However, Los Angeles County, was willing to contract with newly incorporated municipalities to continue providing the services these communities had received from the county prior to their incorporation.¹³⁰ With the problem of providing municipal services solved, and with the attractive opportunity to form communities whose property tax revenues would now be kept largely within the community rather than redistributed throughout the county, numerous incorporations occurred, typically of wealthy, homogeneous residential areas. In fact, not only did the Lakewood Plan stop the redistribution of revenues that had occurred prior to incorporation, Miller's analysis showed that in fact the county priced the services at such a low level that non-Lakewood Plan parts of the county were providing a substantial subsidy to the Lakewood Plan communities.¹³¹

129. *See id.* at 21.

130. *See id.* at 10–22.

131. Miller claims that the county charged Lakewood Plan cities an artificially low rate and then spread the total cost across the entire county. *See id.* at 22–26. To some extent, this phenomenon occurs naturally in most U.S. counties, because of the ways in which counties service two distinct populations. First, they provide county-wide services, such as the judicial system, to all county residents. In addition, they serve as the general service provider to the unincorporated areas of the county. If the county tax rate is equal for all county residents, city residents, who do not receive many county services, subsidize county residents. In the Lakewood Plan, this subsidization extended to contract cities, for which the price of services was typically set at pre-incorporation levels. In fact, a private study suggested that the subsidization of contract cities exceeded \$5 million a year for police services alone. *Id.* at 24. Miller suggests that the county was in fact eager to set its prices at this low rate to cement its position as the dominant service provider and to guarantee the preservation of a large bureaucracy. *See id.* at 22–23. The real losers, of course, were the cities in Lakewood County that provide their own services while paying taxes to the county. Because county officials are elected by all county voters, it may well be that the non-Lakewood Plan cities did not have a strong enough political voice to end the subsidy. Of course, the county may have had other, more benign, reasons to set the contract price so low. For one thing, the county may have doubted its continued ability to serve its own residents if its territorial base were to lose the population of the newly incorporated areas. That loss might have brought the county's service base beneath the critical mass necessary to provide services on an efficient level. As a result, the county may have concluded that it was ultimately to the benefit of its citizens in the unincorporated area to provide service to nonresidents, even when the contract price imposed a loss on the provider.

The Supreme Court of Iowa appears to have prohibited a "Lakewood-like" arrangement proposed by a group of citizens seeking to incorporate in *Citizens of Rising Sun v. Rising Sun City Development Commission*, 528 N.W.2d 597, 600 (Iowa 1995). In that case, the proponents of incorporation asserted that the newly incorporated entity would contract with all pre-existing service providers to obtain all required municipal services. In its affirmance of the denial of the incorporation petition, the court concluded that petitioners had not met their statutory burden of

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Rather than the win-win situation hypothesized earlier for intergovernmental contracts for services such as the one described in *Durango*, the Lakewood Plan suggests that not all contracts may be so benign. The Lakewood Plan allowed wealthy enclaves to incorporate without having to face the costs associated with producing services for their constituents.¹³² At the same time, the act of municipal incorporation allowed them to capture their high property value for their own municipal taxation purposes, while artificially reducing the costs they would incur to provide the services their residents demanded. Though the Lakewood Plan communities were undoubtedly better off because of the high tax revenues and decreased service needs that resulted from their incorporation, not all segments of the area were so fortunate. In fact, the county suffered the loss of substantial tax revenues and lost money in the provision of the contract for services, while cities in the county were deprived of the opportunity to annex the highly valued properties.¹³³

A second potential weakness of intergovernmental contracts for services is the reduction of the legal oversight and potential for legal redress that might otherwise be available to regulate government provision of services. Normally, when a local government provides services to individuals living outside its territorial borders, a range of judicial doctrines and statutory limits apply to regulate the provider's relationship with the service recipient. Rates are frequently required to be "reasonable and uniform,"¹³⁴ and courts may invalidate what they perceive as municipal attempts to gouge nonresident recipients of municipal services.¹³⁵ When the nonresidents receive service pursuant to intergovernmental contract, however, these limitations do not apply,¹³⁶ perhaps because of the assumed equal bargaining position of the two contracting units of local government. Similarly, although a municipality has no general duty to provide services to nonresidents, it may have such

showing that an incorporating entity has the ability "to provide customary municipal services." *Id.* at 602.

132. *See id.* at 20–22.

133. *See id.* at 100.

134. *See, e.g.,* Township of Aston v. S.W. Del. County Mun. Auth., 535 A.2d 725, 728 (Pa. Commw. Ct. 1985) (quoting state requirements that a municipality's water rates for individual nonresident customers must be "reasonable and uniform"); Platt v. Town of Torrey, 949 P.2d 325, 311 (Utah 1997) (ruling town may charge nonresidents a higher rate, but there must be a reasonable basis for difference—court also notes that reasonableness standard applies to city's provision of services to its residents as well).

135. *See* City of Texarkana v. Wiggins, 246 S.W.2d 622, 628 (Tex. 1952).

136. *See* Township of Aston, 535 A.2d at 728; Township of Raccoon v. Mun. Water Auth. of the Borough of Aliquippa, 597 A.2d 757, 762 (Pa. Cmmw. Ct. 1991).

a duty in particular instances. Under the “holding out” doctrine, courts have determined that when a municipality agrees to provide a particular service to nonresidents, it will have impliedly assumed a duty to provide service to all similarly situated nonresidents.¹³⁷ The holding out exception also appears inapplicable to intergovernmental contracts that establish exclusive service territories or condition nonresident receipt of municipal service on annexation to the providing municipality.¹³⁸

In addition, under the law of many states, municipal service providers are exempt from the regulatory regime that would apply to private providers of utilities and transportation services. This exemption often extends to a municipality’s provision of services to nonresidents pursuant to an intergovernmental contract for services.¹³⁹ It is true that lawsuits brought by frustrated private sector competitors who seek to provide the same services may provide some check against governmental abuse in this context.¹⁴⁰ If the rationale for the lack of regulatory oversight over municipal utilities is that the political process operates to ensure the fair treatment of citizens, however, it is not immediately obvious how the intergovernmental nature of the contract removes the need for regulatory oversight of a government’s agreement to provide services to nonresidents.

And finally, to the extent that Professor Frug’s critique of localism offers a persuasive rearticulation of the role of local governments as community builders,¹⁴¹ any decision by a local government to divest

137. For brief descriptions of the holding out exception to the rule that municipal governments have no duty to extend services to non-residents, see, e.g., *Town of Rocky Mount v. Wenco of Danville*, 506 S.E.2d 17, 20–21 (Va. 1999) and *Barbaccia v. County of Santa Clara*, 451 F. Supp. 260, 264 n.2 (N.D. Cal. 1976).

138. See, e.g., *Allen’s Creek Properties, Inc. v. City of Clearwater*, 679 So.2d 1172, 1176 (Fla. 1996); *Haik v. Town of Alta*, 176 F.3d 488, 1999 WL 190717 (10th Cir. 1999) (unpublished opinion).

139. See *City of Durango v. Durango Transp. Inc.*, 807 P.2d 1152, 1160 (Colo. 1991) (Public Utilities Commission has no jurisdiction over municipally owned bus service providing extraterritorial service pursuant to intergovernmental contract). *Contra Texas Water Comm’n v. City of Fort Worth*, 875 S.W.2d 332, 355 (Tex. Ct. App. 1994) (holding that state commission has jurisdiction to review rates charged by city to another city pursuant to intergovernmental contract for sewer services, notwithstanding a provision in state Interlocal Cooperation Act that the power to enter an intergovernmental contract “prevails over a limitation in any other law,” TEX. GOV’T CODE ANN. § 791.026 (Vernon 1994)).

140. See, e.g., *Durango Transp. Inc.*, 807 P.2d at 1152; *Lockheed Info. Mgmt. Servs. Co. v. City of Inglewood*, 948 P.2d 943, 949–51 (Cal. 1998) (rejecting the challenge of a company that bid on city contract for the processing of parking tickets to the city’s decision to award the contract to another municipality).

141. For a full development of the argument that cities should focus on the development of strong personal ties between citizens and government and among citizens generally, see Frug, *supra* note 34, at 1081–1107 (1996).

itself of control over the provision of services only contributes to the government's own further disempowerment and increasing irrelevancy in the eyes of its citizens.¹⁴² Though Frug was referring specifically to the way in which special districts exercise power over city services and residents, syphoning off what would otherwise be important municipal functions, his critique applies equally to the self-inflicted divestment that occurs when local governments voluntarily transfer power to other co-equal units of government: "Power and participation are inextricably linked: a sense of powerlessness tends to produce apathy rather than participation, while the existence of power encourages those able to participate in its exercise to do so."¹⁴³ By removing responsibility from the general purpose government, intergovernmental contracts for services may reinforce citizen opinions of local government irrelevance and contribute to the widespread lack of interest in municipal affairs as expressed in the low (and generally decreasing) rates of voter participation at the local level. Moreover, following along the lines of a related Frug critique, the emphasis on municipal services and their severance from other important local government functions operates to the detriment of the role of government as community builder and enhances the "consumer-oriented vision"¹⁴⁴ of local government. And with that vision comes a fundamental shift in citizen mentality, in which citizens choose their municipalities in the same way they choose their television sets, by evaluating where their dollars will go the farthest and where they will maximize the "get what you pay for" assessment of local government services.¹⁴⁵

Though the above critique may temper the enthusiasm with which intergovernmental contracts are embraced by state legislatures and judiciaries, the New Regionalist might be willing to tolerate the drawbacks in exchange for the enhanced regional equity the contracts are said to promote. On closer inspection, however, several potential anti-regional impacts can be identified. For one thing, as others have noted, because intergovernmental contracts for services typically encompass only one subpart of a metropolitan region, the well known prisoners' dilemma makes it unlikely that an intergovernmental contract for services will be used to promote regionalization.¹⁴⁶

142. See Frug, *supra* note 29, at 1065.

143. See *id.* at 1070.

144. See Frug, *supra* note 33, at 31.

145. See *id.* at 29.

146. See Cashin, *supra* note 5, at 1988. As she explains: "the classic collective action problem occurs when the interest of each individual is too small relative to the costs of participation to justify

Second, the New Regionalist critique would do well to analyze the likelihood that the providing entity in an intergovernmental contract will promote the welfare of its newly enhanced territory, much less the welfare of the entire region of which it is a part. In that vein, consider the *Durango* intergovernmental contract.¹⁴⁷ In an earlier Colorado Supreme Court opinion in that litigation, which had denied the applicability of state regulatory oversight of the intergovernmental contract at issue in *Durango*, the court noted that the city's proposed county bus service would provide transportation to nearby ski slopes and to the area's airport.¹⁴⁸ Although the opinion did not mention whether the frustrated competitor had provided more extensive county-wide bus service, it is at least possible that these two presumably more profitable lines subsidized its provision of transportation services to other parts of the county. The city's incentive to use the profitable routes for subsidization, of course, is quite different than that of the private provider. For the city, the profit derived from the ski slopes and airport routes are more likely to be used to subsidize intra-city bus service; the city would seem to have no incentive to provide county service more widely unless its own residents would profit from that enhanced service.¹⁴⁹ Though this calculation may be perfectly sensible from the city's own self-interested vantage point and the welfare of its citizens, the broader welfare of county residents appears to go unprotected.

Similarly, consider the intergovernmental contract for water and sewer services described by the Tenth Circuit in an unpublished opinion,

his or her participation, so there is no incentive to take individual action. The collective interest of all the individuals combined may be very great, but because they are separated from each other, they either do not see the benefits of organizing or are unable to organize." *Id.* at n.9. See also Briffault, *supra* note 2, at 1147; Harrison, *supra* note 75, at 147-49. But see Gillette, *supra* note 18, at 246-50 (arguing that prisoners' dilemma may not apply to some intergovernmental burden sharing).

147. For a description of the intergovernmental contract in that case, see *supra* notes 123-125 and accompanying text.

148. See *City of Durango v. Durango Transp. Inc.*, 807 P.2d 1152, 1152 (Colo. 1991) (en banc).

149. If the city residents and the county residents have the same interests, the political process, by protecting the residents' interests, will also protect the interests of nonresidents. Although in some intergovernmental contracts for service that congruence may exist, the circumstances of *Durango* are unlikely to be such a case. With regard to items such as route designation and scheduling, city and county interests are probably markedly different. In a different context, Professor Clayton Gillette has noted that residents may sometimes be satisfactory defenders of nonresident interests. Gillette gave the following example in a discussion of municipal taxation of nonresidents: "shopowners who fear that nonresident customers will gravitate to suburban shopping malls, or employers of nonresidents who fear that they will have to increase wages or lose nonresident employees to suburban employers, should serve as pretty good proxies for those who initially would bear the incidence of the tax." See Gillette, *supra* note 18, at 210.

Haik v. Town of Alta.¹⁵⁰ In that case, the Town of Alta refused to issue a building permit for the development of several lots near the local ski resort. As a prerequisite to the permit, the property owners had to obtain sewer and water services from Salt Lake, the service provider to Alta. Pursuant to an intergovernmental contract between Alta and the City of Salt Lake, however, decisions about the extension of those services were within Salt Lake's exclusive control.¹⁵¹ When the landowner sued Alta to compel the extension of services, the court upheld the town's right to rely on the terms of the intergovernmental contract.¹⁵² Because the court was not concerned with the potential regional impact of this contract, its opinion did not evaluate whether Salt Lake City could be expected to protect the welfare of the territory beyond its borders that formed the basis of the intergovernmental contract.¹⁵³ In any dispute, however, the city is likely, and indeed should be expected, to protect the interests of its residents over the interests of other parties.¹⁵⁴

It seems unrealistic to expect that regionwide regulatory power can be exercised fairly by a governmental entity that makes up only a part of the region being regulated. Political reality and the check of the ballot box appear to guarantee that elected officials will exercise their duties to the region through the lens of their constituents' self-interest. Intergovernmental contracts cannot transform a municipal entity into a regional entity; they merely enlarge the service area of the provider, leaving intact the preexisting representational allegiance to the subunit the provider represents. Contracts for services between general purpose local governments, then, do not create a mechanism that will bring a regional approach to the evaluation of regional problems. In the best of situations, the regional welfare will not suffer. In many others, however, the potential for elevation of the provider's welfare at the expense of the broader region is likely, and perhaps inevitable.

Finally, intergovernmental contracts for services can be faulted for

150. D.C. No. 96-CV-732-J, 1999 WL 190717 (10th Cir. April 5, 1999), *cert. denied*, 120 U.S. 166 (1999).

151. *Id.* at *1.

152. *Id.* at *4.

153. Environmentalists have long argued for a more ecologically based distribution of regulatory power over water resources, thus making the watershed an attractive territorial border. *See generally* R.W. ADLER, *Addressing Barriers to Watershed Protection*, 25 ENVTL. LAW. 973 (1995). It is doubtful, however, that Salt Lake City would be the proper entity to control that larger territory. In any event, the agreement between Salt Lake and Alta did not encompass the entire watershed, but merely extended Salt Lake's power beyond its territorial limits to cover Alta and its environs.

154. *See* Briffault, *supra* note 25, at 28; Briffault, *supra* note 29, at 447-54. So long as state law authorizes local governments to undertake actions that impose costs on or ignore the regional welfare, those actions are likely to continue.

allowing the realization of several anti-regional incentives. By offering alternatives to service production, municipalities are better equipped to avoid annexation and consolidation into broader regional units. In reality, the potential for intergovernmental contracts for services is just one card in a deck that is already solidly stacked against regionalization in metropolitan areas. So long as the rules of annexation, incorporation, and property tax distribution allow the formation of self-contained, autonomous units within a metropolitan region, intergovernmental contracts for services will remain an attractive option for local government entities.

2. *Joint Provision of Services*

As its name suggests, and in contrast to the contracts for services described above, a joint services agreement requires that all government participants be involved in both the production and the provision of the service that is the subject of the agreement. Just as with contracts for services, however, the categorization is not rigid. In some instances, joint services agreements share characteristics with contracts for services.¹⁵⁵ Similarly, the distinction between a joint services agreement and the creation of a new entity may blur. In a Nebraska case, for instance, the court was called upon to resolve an intergovernmental dispute arising out of a joint agreement that established a civil defense agency for a county and a municipality within its borders. Though the agency was in some ways an independent entity,¹⁵⁶ both government participants retained considerable power and ongoing involvement in the agency. In fact, it was precisely this ambiguity that gave rise to the lawsuit, when the county purported to exercise its power as employer to fire the director without the city's approval. The court noted that the intergovernmental

155. See *PPC Enters., Inc. v. Texas City*, 76 F. Supp. 2d 750 (S.D. Tex. 1999). In this case, two Texas cities passed identical fireworks bans followed by a mutual agreement that one of the cities would enforce the ordinance in the other's extraterritorial jurisdiction. The court upheld the interlocal agreement against challenges that it violated the due process and equal protection clauses of the federal constitution, that it was unconstitutionally vague, and that it exceeded the cities' power under the state's Interlocal Cooperation Act, TEX. LOC. GOV'T CODE, § 217.042 (Vernon 1998). See 76 F. Supp. 2d at 755-59. For an example of an agreement that actually shows features of all three categories of intergovernmental cooperation, see *Murphy v. City of Topeka-Shawnee County Department of Labor Services*, 630 P.2d 186 (Kan. Ct. App. 1981), in which a city and county entered a "Cooperative Agreement for the Administration of Employment and Training Services" pursuant to which the county transferred significant authority to the city, yet at the same time retained important powers over program evaluations and funding. *Id.* at 189. The agreement also created a joint City-County joint department, which the court described as "solely an agency of the city." *Id.*

156. Creation of a new entity is discussed *infra* Part A.3.

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agreement provided that employees of the agency served “during the pleasure” of the county and of the city. As a result, it upheld the county’s prerogative to act individually to terminate the agency’s director without the city’s concurrence.¹⁵⁷ The active governmental participation and retention of government authority displayed in this case is a salient feature of joint services agreements; though precise categorization may be impossible, some generalizations do appear.¹⁵⁸

At the risk of oversimplification, and in light of the above caveat, joint services agreements most typically involve one of two fact patterns. Most common of all, perhaps, are the many mutual aid provisions executed by neighboring municipal governments. Pursuant to these agreements, local governments cross-cede extra-jurisdictional enforcement powers to police, fire, and emergency service providers. Mutual aid agreements are typically designed to allow for emergency back-ups, or to authorize a municipal officer to complete a traffic or criminal chase begun in his or her own territory.¹⁵⁹ Courts are usually

157. *Heinzman v. Hall County*, 328 N.W.2d 764, 768–69 (Neb. 1983). For an example of other intergovernmental agreements that display characteristics of a joint services agreement as well as involving intergovernmental creation of a new entity, see, e.g., *Borough of Lewistown v. Pennsylvania Labor Relations Board*, 735 A.2d 1240 (Pa. 1999). In this unusual case, three municipal governments created a regional police department. Pursuant to the intergovernmental agreement establishing it, the police department was under the control of an appointed board of directors. The municipalities delegated to the board “all the functions, powers and responsibilities which the municipalities respectively have with respect to the operation, management, and administration of a municipal police department,” *id.* at 1241 n.3. In resolving the labor dispute before it, the court held that the constituent members of the regional department were also deemed to be the employers of the complaining police officers. *See id.* at 1244–45. *See also* *City of Oakland v. Williams*, 103 P.2d 168, 172 (Cal. 1940) (upholding joint action taken by seven municipalities to plan for joint sewage disposal services; agreement created joint agency and then transferred all decisionmaking authority to one of signatory municipalities); *Magnon v. Acadian Metro. Code Auth.*, 413 So.2d 972, 973 (La. Ct. App. 1982) (joint services agreement for licensing contractors resulted in creation of intergovernmental public corporate body, the Metropolitan Code Authority); *Ky-Ind. Mun. Power Ass’n v. Pub. Serv. Co. of Ind., Inc.*, 393 N.E.2d 776, 779 (Ind. Ct. App. 1979) (joint agreement created an agency that was an “instrumentality of the cities,” indicating ongoing municipal involvement and control over the agency, notwithstanding its corporate existence as a separate legal entity).

158. In terms of frequency, the ACIR study on intergovernmental cooperative efforts noted that local governments tend to use joint service agreements for the same types of services, for the same reasons, and with approximately the same frequency as they use contracts for services. *See* ACIR, *supra* note 20, at 30–35. The survey did note, however, that local officials evaluated contracts for services more positively than joint service arrangements. *Id.* at 43. Unfortunately, it did not indicate the basis of that more favorable assessment.

159. For examples of cases in which courts have upheld mutual aid agreements, see, e.g., *State v. Hauser*, No. 97-1-00152, 2001 WL 1287831, at *4 (Wash. App. 2001); *Commonwealth v. McCrohan*, 610 N.E.2d 326, 330 (Mass. App. Ct. 1993) (arresting police officer acted lawfully pursuant to a mutual aid agreement); *State v. Rasmussen*, 70 Wn. App. 853, 858, 855 P.2d 1206, 1209 (1993) (same). A similar type of joint services agreement, providing “mutual aid” of another

quite deferential to the goal of intergovernmental cooperation in this context and routinely reject challenges to official actions taken pursuant to these agreements.¹⁶⁰

The second common type of joint services agreement, broader in its scope than the typical mutual aid agreement, facilitates the implementation of a jointly articulated program or regulatory goal. Consider, for instance, the facts of *State v. Plaggemeier*,¹⁶¹ which involved a five-party intergovernmental contract to implement a county-wide drunk driving effort. In addition to the agreement's mutual aid provision,¹⁶² it established a joint task force and other coordinating mechanisms.¹⁶³ Other common types of joint services agreements involve some division of labor between the participating governments based on the expertise or specialized interests of the different units. An agreement between the Port of Seattle and the City of SeaTac, for instance, authorized joint provision of some services while transferring authority over other services to one of the two participating units of government.¹⁶⁴

type, consists of joint insurance pools, see *Washington Public Utility Districts' Utilities System v. Public Utility District No. 1*, 112 Wash. 2d 1, 6–10, 771 P.2d 701, 704–06 (1989) (upholding joint self-insurance agreement).

160. In fact, one New Jersey court upheld the validity of a search and seizure conducted by one police officer within the jurisdiction of another city, even though the two municipalities operated under an informal, unwritten policy of mutual aid. See *State v. Montalvo*, 655 A.2d 476, 480 (N.J. Super. Ct. App. Div. 1995). See also *Commonwealth v. Mays*, 431 A.2d 322 (Pa. Sup. Ct. 1981) (rejecting challenge to police officer's extraterritorial arrest that had not followed mutual aid agreement provision that police assistance would be provided to neighboring units "upon proper request" by one of the units). But see *State v. Allen*, 790 So.2d 1122, 1124–25 (Fla. Dist. Ct. App. 2001) (invalidating seizure of marijuana by city police officer at county residence; quoting mutual aid agreement provision that city police "shall not routinely commence investigations of crimes or actively seek out criminal activity outside of their primary jurisdiction," and stressing that court would not allow mutual aid agreements to expand police power jurisdiction).

161. 93 Wash. App. 472, 969 P.2d 519 (1999).

162. In the case, the court used the mutual aid agreement to uphold the arrest of the defendant by a police officer acting outside his city limits. See *id.* at 483, 969 P.2d at 525.

163. *Id.* at 474–75, 969 P.2d at 521. The court actually invalidated that part of the agreement, not because it was beyond the scope of intergovernmental cooperation, but rather because the legislative bodies of the participating entities had not ratified the mutual endeavor. *Id.* at 481–82, 969 P.2d at 524. Under the state's Mutual Aid Act, the individual sheriff or chief of police can enter binding mutual aid agreements with neighboring municipalities, see WASH. REV. CODE § 10.93.070 (2002). The more general Interlocal Cooperation Act, WASH. REV. CODE § 39.34 (2000), however, requires that intergovernmental cooperative efforts receive ratification by the governing legislative bodies.

164. In *Teamsters Union Local 117 v. Port of Seattle*, No. 36366-2-I, 1996 WL 523973 (Wash. Ct. App. 1996) (unpublished opinion), the Port of Seattle (owner of the Seattle-Tacoma Airport) leased property to the city of SeaTac for municipal operation of a park. *Id.* at *1. The joint agreement established "concurrent law enforcement jurisdiction" in the park, but specified that emergency 911 services would be provided by the city, whereas the Port would "retain primary responsibility for all law enforcement related to airport operations." *Id.*

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In both of these cases, units of local government were able to advance their own constituency's health, safety, and welfare by acting jointly to articulate and implement common policies.

Because joint services agreements may blur or eliminate the lines between provider and recipient of services, difficult interpretative questions may arise about the scope of the powers being shared by the participating entities.¹⁶⁵ A comparison of two judicial opinions nicely illustrates the analytical problem. In *In re Condemnation of 30.60 Acres of Land*,¹⁶⁶ the court upheld the joint condemnation of land for construction of a school and public park facility pursuant to an agreement between a township and a school district.¹⁶⁷ Under applicable state law, the township had condemnation power exclusively for park purposes, while the school district was authorized to condemn land only for use as a public school. Focusing on the fact that each local governmental unit possessed condemnation power, the court found that the agreement was lawful. It rejected the landowner's argument that, because the school district has no power to engage in park purposes and the township cannot build schools, the agreement had improperly enhanced each entity's government powers through the subterfuge of an intergovernmental contract.¹⁶⁸

In contrast, the Supreme Court of Nebraska reached the opposite result in *Gallagher v. City of Omaha*,¹⁶⁹ when it invalidated a similar joint agreement. In that case, the city and a state university negotiated an intergovernmental use agreement whereby the city authorized the university to construct and use parking facilities on city park land. During the week, from 7 a.m. until 10:00 p.m., the facilities were to be used exclusively by the university; at all other times, the usage was joint. Although the court noted that the city was authorized to provide parking for its park patrons, it concluded that the interlocal agreement constituted an improper diversion of park lands.¹⁷⁰ Thus, for the *30.60 Acres* court, the joint exercise of powers could extend to include actions that only one of the units could have lawfully undertaken while acting individually. In contrast, the *Gallagher* court implicitly rejected that argument and

165. This discussion patterns the "mutuality of powers" vs. "power of one unit" debate in intergovernmental contracts for services, see *supra* notes 116–117, but the courts do not appear to use those labels to delineate the disputes in the context of joint services agreements.

166. 572 A.2d 242 (Pa. Commw. Ct. 1990).

167. *See id.* at 245.

168. *See id.* at 244.

169. 204 N.W.2d 157 (Neb. 1973).

170. *Id.* at 160–62.

invalidated the joint agreement because, though all actions were within the scope of power of *one* of the contracting entities, neither unit had the power to engage in *all* of the activities undertaken pursuant to the contract's terms.

The decision to enter a joint services agreement requires a commitment to a formal, ongoing relationship with another unit of local government. To a lesser extent than in the typical contract for services, governments entering joint services agreement assume a certain risk of incompatibility in the execution of the agreement. Presumably, each unit has satisfied itself that its partner's policies are consistent with its own; otherwise, the mutual provision of a service or enforcement of extraterritorial powers runs the risk that the "foreign" entity will violate the other's policies. Once the agreement is operational, moreover, all government participants are actively involved in the ongoing implementation of its terms.¹⁷¹

Although they may be more cumbersome to implement and execute, joint services agreements may offer several attractive qualities to local governments. First, and in contrast to contracts for services, they are less likely to involve a relinquishment of local police power or other governmental autonomy, because each entity is an active participant in the provision of the service or in the implementation of the policy under contract. In addition, the ongoing involvement, though it may be more costly, has the added benefit of making it more likely that each unit will be able to ensure compliance with its own goals and interests. Again in

171. This continuous involvement of multiple entities of government may create difficult questions regarding legal liability. For example, the nature of each entity's involvement in the joint agreement may have important implications for tort immunity or workers compensation issues. *See, e.g., Drain v. Galveston County*, 999 F. Supp. 929, 937 (S.D. Tex. 1998) (city may be liable for actions of county employee who responded pursuant to mutual aid agreement); *Hauber v. County of Yakima*, 107 Wash. App. 437, 440, 27 P.3d 257, 260 (2001) (extent of recovery by widow of firefighter depends on whether deceased was acting pursuant to normal firefighter duties, a mutual aid agreement, or as a member of a special search and rescue team); *Ewing v. State*, 757 So.2d 843, 847 (La. Ct. App. 2000) (holding joint agreement to pay for and cover drainage ditch insufficient to impose tort liability on contributing entities); *N.H. Ins. Co. v. City of Madera*, 192 Cal. Rpt. 548, 550 (Cal. Ct. App. 1983) (holding city immune while engaged in fighting fires extends to county firefighters who responded to alarm pursuant to mutual aid agreement); *Garcia v. City of South Tucson*, 640 P.2d 1117, 1120 (Ariz. Ct. App. 1981) (city police officer injured while responding to mutual aid agreement request not limited to workers compensation relief because mutual aid agreement does not transform requesting city into statutory employer of injured officer); *Murphy v. City of Topeka-Shawnee County Dep't of Labor Servs.*, 630 P.2d 186, 189, 192-93 (Kan. App. 1981) (determining program administered solely by city, though jointly sponsored by city and county may create county liability under Workmen's Compensation Act for alleged retaliatory discharge); *Lauria v. Borough of Ridgefield*, 291 A.2d 155, 158 (N.J. Super. Ct. App. Div. 1972) (only holding responding municipality to be liable to estate of firefighter killed during fire in summoning municipality pursuant to mutual aid agreement).

contrast to contracts for services, and because of the cooperative implementation of the agreement, the danger of subversion of the receiving entity's interests is minimized.

From a regional standpoint, a review of the case law and the literature suggests that joint services agreements have not been used to provide a truly regional solution to metropolitan area problems. Rather, and perhaps because of the need for ongoing monitoring and involvement, the agreements tend to be narrowly defined and limited. Generally, joint services agreements involve, not an attempt to implement a grand joint vision for improving the overall welfare of the constituents of all participating governments, but rather a carefully delineated description of specific ways in which joint action will complement pre-existing local government policy. In terms of the New Regionalists' hopes for regionwide articulation of a common agenda, however, joint services agreements offer one potential advantage over contracts for services. As Professor Cashin has noted, "locational sorting"¹⁷² on the basis of race and socioeconomic class is extremely strong in metropolitan areas. To the extent that joint services agreements require meaningful cross-boundary collaboration and joint exercise of powers, they may create an opportunity for highly segregated local governments to become acquainted with "the other."¹⁷³ Unlike the contract for services, in which one government cedes total responsibility for performance and implementation of contract obligations to the providing entity, a joint services agreement may provide an intangible boost to the reduction of barriers between communities and the enhancement of a sense of true regional community.

3. *Creation of a New Government Entity*

Despite the anti-regionalist ethic that pervades local government law, the United States has no shortage of regionwide governmental units. With a few notable exceptions,¹⁷⁴ however, these are not general purpose,

172. See Cashin, *supra* note 5, at 2016.

173. Professor Cashin describes how the desire for lower taxes, avoidance of redistribution of tax dollars, and racial exclusionary intent are important catalysts for "sectoral segregation" in metropolitan areas. *Id.* at 2016. In his analysis of that phenomenon, Professor Frug used the metaphor of local governments as exclusive country clubs, where residents equate taxes with dues. See Frug, *supra* note 33, at 29. These critiques are based on the reality that territorial boundaries in metropolitan America, notwithstanding the frequency with which they are crossed, are nevertheless quite effective in establishing the "us" vs. "them" mentality at the level of local government.

174. The Minneapolis area's Met Council, Portland's Metropolitan Service District, and Seattle's Metro are examples of single purpose regional districts that have evolved into government units with a broader mandate. For a discussion of the history and scope of operation of these entities, see

or even multi-purpose, elected entities. Rather, the well documented government growth industry across the country consists of single purpose governments,¹⁷⁵ generically known as special districts¹⁷⁶ or public authorities.¹⁷⁷ While the numbers of other local government units remains more or less constant, special districts continue to increase.¹⁷⁸

Special districts vary greatly in terms of the territory they service: while some are sub-local in scope, others are coterminous with existing

VALENTE ET AL., *supra* note 29, at 425–66. See also Briffault, *supra* note 2, at 1118–19; Cashin, *supra* note 5, at 2028–33.

175. Although the special district is but one type of single purpose local government unit, the Article uses the terms interchangeably.

176. Regional special districts are sometimes referred to as “quasi-municipal corporations;” though in some ways they act like municipalities, their powers may be quite narrowly focused. Special districts may have a range of revenue raising powers, see, e.g., ILL. COMP. STAT. 19/160.1 (1996); KAN. STAT. ANN. §§ 19-2769-70 (1995), the ability to condemn property, see, e.g., WASH. REV. CODE § 14.07.020 (1993); *Cherokee Village Homeowners Protective Ass’n v. Cherokee Village Road & Street Improvement District No. 1*, 455 S.W.2d 93, 95 (Ark. 1970), and the power to enact and enforce ordinances, *Village of Glencoe v. Metro. Sanitary District of Greater Chicago*, 320 N.E. 2d 524, 528–29 (Ill. App. Ct. 1974).

The legal status of regional special districts has been litigated in a variety of contexts. If, for instance, a regional special district is deemed to be a municipal corporation, it will not be entitled to assert the state’s sovereign immunity; if it constitutes an instrumentality of the state, in contrast, sovereign immunity will attach. See, e.g., *Calvert Invs. v. Louisville & Jefferson County Metro. Sewer Dist.*, 805 S.W.2d 133, 138–39 (Ky. 1991) (regional special district, as a municipal corporation, is liable under state tort law). The scope of potential liability may also depend on its characterization. For instance, a Texas court concluded that a regional transit authority performed essential public functions, and thus was protected by a statutory damages cap available to governmental, but not proprietary, activities undertaken by local governments. *Salvatierra v. Via Metro. Transit Auth.*, 974 S.W.2d 179, 183 (Tex. Ct. App. 1998). See also *Scott v. Shapiro*, 339 A.2d 597, 599 (Pa. 1975) (Southern Pennsylvania Transportation Authority not a state instrumentality and thus immune from state sunshine laws requiring disclosure and transparency in state proceedings); *Fisher v. S.E. Pa. Transp. Auth.*, 431 A.2d 394, 397 (Pa. Commw. Ct. 1981) (Authority not subject to state law that provides full pay to state employees while they are on active duty with any reserve unit of the armed services).

177. Public authorities, which are single purpose governments designed to be led by professional, apolitical managers, became popular in the 1920s as part of reform movements intending to take power away from corrupt political bosses. These newly created entities, which typically have no taxing power but are able to borrow and issue bonds, took control over a number of public sector functions. They were seen as embodying the “values of efficiency, neutral competence, and professionalism in municipal affairs . . .” Foster, *supra* note 24, at 18. The success of the Port Authority of New York (and later of New Jersey) spurred widespread adoption of this model of government. *Id.*

178. Between 1952 and 1997, the number of special purpose governments nearly tripled, rising from 12,340 to 34,683. See U.S. CENSUS BUREAU, 1997 CENSUS OF GOVERNMENTS, Volume I, Government Organization 4, 6 (2002). Over that same time period, subcounty general purpose local governments increased from 34,009 to 36,001. *Id.* at 4. In comparison to other units of local government, the proportion of spending by special districts has increased two to three times more quickly. See Foster, *supra* note 24, at 1–3.

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municipal boundaries, and still others extend beyond the borders of existing municipal governments. Approximately eighty percent of all single purpose governments are created at the supra-municipal level, thus encompassing the territory of more than one general purpose local government. These regional special districts either serve some section of a county, an entire county, or multiple counties.¹⁷⁹ In addition to the differences in their geographical scope, single purpose governments vary with regard to their revenue raising abilities: while some have general taxation powers, others are restricted to user fees or other more specific revenue raising devices.¹⁸⁰ A similar range of variation occurs in their manner of creation. Some are formed directly by state legislation,¹⁸¹ some by petition of citizens,¹⁸² and others by voluntary local government action.¹⁸³ Because this Article focuses on the regional impact of intergovernmental cooperation, it does not specifically evaluate regional special districts created by the state. Much of the following critique,

179. The remaining 20% are either co-terminous with municipal borders or cover a section of a municipal government. See Foster, *supra* note 24, at 123.

180. Special districts exercise a wide range of revenue raising powers, and the scope of those powers appear unaffected by whether the district has appointed or elected commissioners. See note 186, *infra*. Many special districts whose commissioners are appointed exercise general powers of taxation. Courts have generally approved of this combination. See, e.g., Solomon v. N. Shore Sanitary Dist., 269 N.E.2d 457, 464 (Ill. 1971); Madison Metro. Sewerage Dist. v. Stein, 177 N.W.2d 131, 138-39 (Wis. 1970); Buffalo, Dawson, Mechanicsburg Sewer Comm'n v. Boggs, 470 N.E.2d 649, 651-53 (Ill. App. Ct. 1984). Some special districts are limited to recouping their operating costs through charging user fees. See, e.g., Beatty v. Metro. St. Louis Sewer Dist., 867 S.W.2d 217, 221 (Mo. 1993) (describing district's power to collect user charges and per unit charges for capital improvements, but holding that district must get voter approval to raise the rates). Some are allowed to levy property taxes. See, e.g., City Brookfield v. Milwaukee Metro. Sewerage Dist., 491 N.W.2d 484, 492, 498 (Wis. 1992) (authorizing district to charge for capital costs on the basis of property value); WASH. REV. CODE § 70.44.060(6) (2002) (authorizing hospital district to levy a property tax "not to exceed fifty cents per thousand dollars of assessed value, and an additional annual tax on all taxable property within such public hospital district not to exceed twenty-five cents per thousand dollars of assessed value"). Other special districts impose general charges on property and activity within the district. See, e.g., Anema v. Transit Constr. Auth., 788 P.2d 1261, 1263 (Colo. 1990) (affirming district's ability to finance planning of a transit system by imposing a charge on all commercial property and by levying an "employment assessment" on each employer). Still others can impose sales taxes. See, e.g., Camp v. Metro. Atlanta Rapid Transit Auth., 189 S.E.2d 56, 61 (Ga. 1972) (upholding legislative delegation of sales tax power to regional special district to fund rapid transit system).

181. See, e.g., Seto v. Tri-County Metro. Transp. Dist. of Or., 814 P.2d 1060, 1061 (Or. 1991); Hoogasian v. Reg'l Transp. Auth., 317 N.E.2d 534, 536 (Ill. 1974).

182. See, e.g., Reg'l Serv. Auth. v. Bd. of County Comm'rs, 618 P.2d 1105, 1108 (Colo. 1980); State *ex rel.* Angel Fire Home & Land Owners Ass'n, Inc. v. S. Cent. Colfax County Special Hosp. Dist., 797 P.2d 285, 286 (N.M. Ct. App. 1990).

183. See, e.g., Goreham v. Des Moines Metro. Area Solid Waste Agency, 179 N.W.2d 449, 452 (Iowa 1970). For a general survey of the ways in which regional special districts are created, see Foster, *supra* note 24, at 7-15.

however, may be relevant to an assessment of those state-created districts as well.¹⁸⁴

Many commentators have criticized single purpose governments as anti-democratic and anti-localist.¹⁸⁵ These critics have noted, for instance, that special districts are unaccountable¹⁸⁶ and invisible.¹⁸⁷ They

184. In fact, some of the following critique of regional special districts may have less to do with their voluntariness and more to do with shortcomings of regional special districts in general. Nevertheless, because of the enthusiasm with which New Regionalists have turned to regional special districts in their search for regional redistribution, this Section will suggest a number of criticisms that may apply primarily to state-created regional special districts. In addition, it is important to keep in mind that every regional special district will not display all of the weaknesses identified in the following section.

185. See, e.g., BURNS, *supra* note 39; Frug, *supra* note 15, at 1781–88; Gillette, *supra* note 18, at 204–06.

186. Commissioners or trustees of regional special districts are often appointed, either directly by the state or by elected officials of the government units that are located within the district's territory. Many single purpose local governments are immune from the judicial doctrine that requires proportionally elected, rather than appointed, officials. As first established in *Avery v. Midland County*, 390 U.S. 474, 485–86 (1968), the one person, one vote principle applies to general purpose local government units. In a series of cases, the Court has articulated an exception to that principle to allow restrictions on or elimination of the franchise for "special limited purpose districts" whose actions disproportionately affect those who are assessed financial charges by the government unit. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973); *Bail v. James*, 451 U.S. 355, 370 (1981). For a full discussion of the difficult legal questions surrounding the right to vote and limited purpose governments, see Richard Briffault, *Who Rules at Home: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993); Richard Briffault, *A Government For Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 434–46 (1999); see also VALENTE ET AL., *supra* note 29, at 81–147. So long as the government unit does not exercise general governance powers, states retain broad discretion over the manner in which special district commissioners are selected. Courts routinely reject challenges to appointed special district commissioners. See, e.g., *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1089 (5th Cir. 1981) (holding one person, one vote principle not applicable to transit authority); *Eastern v. Canty*, 389 N.E.2d 1160, 1165–69 (Ill. 1979) (upholding method of appointing sanitary district commissioners; extent of county boards' appointment powers determined by percentage of total assessed property each county had in district's territory); *Van Zanen v. Keydel*, 280 N.W.2d 535, 539 (Mich. Ct. App. 1979) (upholding appointment of commissioners of metropolitan district with powers to establish and operate parks; one county-one commissioner allocation valid notwithstanding wide divergence of population among member counties). If a special purpose district acquires additional powers and expands its functions, however, at some point the norm of one person, one vote will apply. *Cunningham v. Municipality of Metropolitan Seattle*, 751 F. Supp. 885, 889–90 (W.D. Wash. 1990) traces the history of Seattle's "metropolitan municipal corporation," a local government entity (Metro) created in 1958 to provide regional sewer services and focus on the area's urgent water quality problems. Pursuant to state law, members on Metro's governing council were appointed by the legislative bodies of the participating government units. By the late 1980s, Metro's functions had grown to include the provision of mass transit services and the development of regional land use planning policies. See *id.* at 890. In *Cunningham* the court found that one person, one vote applied to Metro and invalidated the manner of selection of its council members. As the unelected commissioners of many special districts are granted substantial control of regional services and revenues, and as many regional special districts are granted substantial taxing

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are frequently immune from land use regulations and free to disregard local concerns.¹⁸⁸ They may allow local governments to pass the buck on difficult policy questions,¹⁸⁹ to avoid tort liability,¹⁹⁰ and to avoid state

authority, metropolitan area voters lose the ability to define and shape the important government services that affect their daily lives. See VALENTE ET AL., *supra* note 29, at 439–47.

187. Even when special district commissioners are elected, the elections can rarely attract more than a 5% voter turnout. See BURNS, *supra* note 39, 12–13 (1994). Burns also explains her claim that the invisibility of special districts has both positive and negative effects: “the benefits of special districts are that they can fund and provide services and infrastructure; they are able to get things done in a fragmented American polity. The difficulties are two: They do this while no one watches except interested developers, and they are gradually becoming the realm where much of the substance of local politics happens. Thus local politics becomes quiet, not necessarily through . . . consensus . . . , but rather through the invisibility of special district politics.” *Id.* at 117. Moreover, because their purpose is so narrowly defined, regional special districts frequently remain below the metropolitan area political radar screen. Even for the diligent citizen, identification of all local government units in a metropolitan area may prove daunting. See WEIHER, *supra* note 40, at 17–19 (summarizing several studies that describe the complexity of mapping local government units in metropolitan areas and noting the frequency with which citizens are unaware of local government structures that apply to them).

188. Coupling immunity from zoning laws with the narrow purpose of the special district’s mission creates potential for enormous conflict at the local level. See, e.g., *Austin Indep. Sch. Dist. v. City of Sunset Valley*, 502 S.W.2d 670, 675 (Tex. 1973) (determining regional school district able to build large football stadium and field house in violation of small town’s zoning ordinance); *Evanston v. Reg’l Transp. Auth.*, 559 N.E.2d 899, 905 (Ill. App. Ct. 1990) (holding RTA’s proposal to construct a bus storage and maintenance facility immune from city zoning ordinances); *City of Heath v. Licking County Reg’l Airport*, 237 N.E.2d 173, 179 (Ohio Misc. 1967) (ruling airport authority’s proposal to widen runways immune from local zoning).

189. Transferring the responsibility for a contentious local issue to an appointed body may ease the political heat on elected officials. For example, in *Barnes v. Department of Housing and Urban Development*, 341 N.W.2d 766, 768 (Iowa 1984), the court essentially refused to let participating municipalities transfer decisionmaking responsibility over the siting of public housing to a regional housing authority they had created pursuant to the state’s intergovernmental cooperation statute. Because the cities themselves would have been unable to approve a low-income housing project without city council approval, the housing authority was similarly limited. *Id.* at 768. Thus, the court concluded that the housing authority’s decisions required approval by the city councils of all participating entities. *Id.* This opinion seems inconsistent with two other Iowa Supreme Court interpretations of the status of government entities created pursuant to intergovernmental cooperation. In *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449, 455 (Iowa 1970), the court upheld the creation of a regional solid waste district against challenges that the participating local governments had improperly delegated power to that agency. Similarly, in *Allis-Chalmers Corp. v. Emmet County Council of Governments*, 355 N.W.2d 586, 589 (Iowa 1984), the court recognized that the county council of governments had broad powers, including

[T]he right to acquire and dispose of property, the right to enter contracts, the right to operate a solid waste disposal and collection service, . . . the right to fix and charge fees for its services, the right to establish a budgeting system . . . , the right to borrow money and issue bonds, the right to provide for remedies in the event of default

Id. at 589. Presumably, if the city itself were to exercise those powers, many, if not all of the actions would require city council action. It is perhaps no coincidence that the court was less deferential to the regional housing authority’s claimed power to site low income housing; the *Barnes* case, ironically, represents a rare example of a group of municipalities joining together to provide a social

limitations on borrowing and spending.¹⁹¹ Though touted as a way to reduce the cost of service provision, services provided by special districts may actually be more expensive than those produced and provided directly by the general purpose government itself.¹⁹² And for the

service on a regionwide basis. It appears that some state courts may share the anti-regional bias of their citizens when it comes to municipal attempts to provide a regionwide solution to difficult social problems. Or it may be that the court was reluctant to let elected municipal officials avoid the political accountability that comes with being forced to take a position on contentious issues such as public housing. In general, though, the unaccountability phenomenon may be doubly perverse. General purpose governments become less accountable to their own constituency by transferring power to local government units that themselves are frequently unaccountable.

190. Parties injured by negligent actions taken by regional special districts or who seek to challenge other aspects of the district's operations are likely to be limited to the intergovernmental entity as a source of recovery. As a separately organized governmental body, it is a distinct unit of government. Courts have been reluctant to impose liability on the constituent members of the special district. *See, e.g., Allis-Chalmers Corp.*, 355 N.W.2d at 591 (government creators of joint county council not liable on suit for breach of contract filed against county council).

191. In essence, regional special districts may offer an attractive way for a local government unit to circumvent taxing, borrowing, or spending limits. Creation of a new unit of government brings with it an untapped line of taxing, borrowing, and spending opportunities. *See BURNS, supra* note 39, at 16, in which she described the common wisdom that formation of special districts is "largely a technical financing maneuver." Though Burns recognizes the strength of that dynamic, she believes that it is an incomplete explanation, because it ignores the real, political struggle that frequently underlies the formation of special districts. *Id.*; *see also Foster, supra* note 24, at 16–17. Foster also describes how, in the state of New York, public authorities are the only units of local government able to issue revenue bonds that are not backed by the full faith and credit of the lending unit. Since all other units of government have strict limits on the amount of full faith and credit debt they can incur, public authorities become an even more attractive mechanism for financing the construction of capital infrastructure. *See id.* at 111. Courts typically reject arguments that a special district was created for the sole purpose of evading other provisions of state laws. *See, e.g., Rider v. City of San Diego*, 959 P.2d 347, 350–51 (Cal. 1998) (rejecting plaintiffs' arguments that special district created to finance a new convention center was no more than a "hollow shell that exists only on paper," noting that the newly created district was run, financed, and managed by the city that created it solely for the purpose of avoiding restrictions on municipal debt); *Johnson v. Piedmont Mun. Power Agency*, 287 S.E.2d 476, 480–81, 484 (S.C. 1982) (holding state constitutional requirement for voter approval of local government debt not applicable to intergovernmental agency; while dissenting Judge Littlejohn characterizes the intergovernmental entity as an "alter ego created for the purpose of doing indirectly that which the Constitution forbids municipalities to do directly"); *Goreham v. Des Moines Metro. Area Solid Waste Agency*, 179 N.W.2d 449, 463 (Iowa 1970) (Becker, J., dissenting) (criticizing the creation of the new regional special district as a "barely-disguised technique for debt ceiling avoidance"). For those who view these state limits on local revenue powers as archaic and unresponsive to modern economic realities, evasion of the limits may seem desirable. By providing an easy end run around a state imposed limitation, however, courts have allowed legislatures to avoid grappling with difficult policy issues about the proper parameters of local government borrowing. *See generally VALENTE ET AL., supra* note 29, at 671–716 for analysis of the growing use of "non-debt debt" as a way for municipal governments to raise revenue without running afoul of state law limits.

192. In her recently published book, Professor Kathryn Foster documented that services provided by special district cost more than those provided by multi-purpose municipal governments. *See Foster, supra* note 24, at 148–85. As Professor Foster noted, however, higher cost does not

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participation theory of localism, which stresses the importance of the local government as an accountable, responsive unit of government, special districts can be criticized for the ways in which they disempower the general purpose government that created them.¹⁹³

necessarily indicate less efficiency; that is, regional special districts may provide a higher level and quality of service than the general purpose government service provider. *Id.* at 184. Foster's findings, however, should give pause to the many supporters of regional special districts who tout their ability to achieve cost savings in the provision of urban services. *See, e.g., Connelly v. Clark County*, 307 N.E.2d 128, 131 (Ill. App. Ct. 1974) (noting that cost savings was an important rationale when reviewing the history of the Illinois constitutional amendment authorizing intergovernmental cooperation).

193. By assuming control of a function that would otherwise be left to the multi-purpose local government, the creation of a regional special district strips the participating municipal governments of some of their powers and excludes them from participation in the regional enterprise of the district. It is true that municipalities may voluntarily relinquish power to other government units by transferring power to a regional special district, for some of the reasons noted earlier in this Section. The fact of voluntariness, however, does not disprove the underlying claim that the transfer of power to an obscure single purpose government may create a municipal government that is less important and less relevant in the eyes of its citizens. In some major metropolitan areas, where regional special districts number in the hundreds, it is not unreasonable to speculate that the loss of local control over and input into numerous important regional issues contributes to the well-documented loss of citizen interest and involvement in their municipal governments. In the legal literature, Professor Gerald Frug is a passionate supporter of increased local power. *See generally* GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999). He has long pointed to local government powerlessness as one of the main reasons for citizen cynicism and apathy. *See* Frug, *supra* note 29.

In some situations, states or citizens may have the statutory authority to create a regional special district that will take over service provision from a general purpose municipal government. *See, e.g., Reg'l Serv. Auth. v. Bd. of County Comm'rs*, 618 P.2d 1105 (Colo. 1980) (describing regional service authority created by petition of citizens over objection of county board). Of course, state-created special districts are frequently done with no regard for concerns about municipal disempowerment.

Courts have generally rejected challenges that the creation of regional special districts impermissibly interferes with home rule authority or local autonomy generally. *But compare* *Seto v. Tri-County Metro. Transp. Dist. of Or.*, 814 P.2d 1060, 1065 (Or. 1991) (rejecting municipality's argument of impermissible interference with home rule powers), *with* *Four-County Metro. Capital Improvement Dist. v. Bd. of County Comm'rs of County of Adams*, 369 P.2d 67, 73 (Colo. 1962) (opposite conclusion).

In addition to the somewhat ephemeral disempowerment argument, the proliferation of regional special districts may deprive the municipalities in a region of an important bargaining chip as they seek to bring urbanized development within their borders. If many basic urban services are provided by special districts, rather than by municipalities, property owners in the unincorporated territory on the fringes of metropolitan areas have less incentive to seek annexation to the general purpose local governments they abut. *See* *Fond du Lac Metro. Sewerage Dist. v. Miller*, 166 N.W.2d 225, 229-30, (Wis. 1969) (acknowledging the problem, but noting judiciary's obligation to uphold the formation of the special district under the terms of state law). Many state statutes express a clear desire that urbanization occur within municipal government borders, rather than in unincorporated areas of the county. *See, e.g.,* COLO. REV. STAT. § 31-12-102 (West 2002); MINN. STAT. § 414.01 (2001); N.C. GEN. STAT. §§ 160A-33, 160A-45 (2001); N.D. CENT. CODE § 40-51.2-02 (1983) NEV. REV. STAT.

Notwithstanding these many criticisms, much of the New Regionalist literature touts regional special districts as a means of achieving regionalism while preserving localism. And at first glance, regional special districts appear to promote many of the New Regionalists' goals. Regional special districts are an attractive way to free local government services from the artificial barriers created by political boundaries, which usually do not reflect the natural geographic or economic territory that would achieve greater efficiencies of scale. Moreover, regional special districts appear to corroborate the New Regionalist claim of the economic interdependence of the metropolitan area. After all, by providing a service to all members of a region that would otherwise not be available on a smaller scale, regional special districts promote the welfare of favored quarter and urban core alike. And finally, regional special districts, though they may add another layer of government, do not disturb the pre-existing landscape of independent local government units. For many New Regionalists, then, regional special districts present a cost-free win-win situation for all constituent governments in a metropolitan region.¹⁹⁴ This enthusiastic endorsement of voluntary regional governance efforts, however, merits rethinking.

First, regional special districts are myopic. By definition, they are concerned with one issue only, be it transportation, sewage, water, flood control, or a similar regional infrastructure problem. They ignore broader questions about the general welfare, focusing instead on their own limited mandate.¹⁹⁵ Second, in addition to being expensive, it is fair to

268.572 (1997). At the same time, though, the laws allowing for the creation of special districts to provide regionwide services severely limit the municipality's ability to achieve that state goal.

194. See *supra* notes 76–78 and accompanying text.

195. Consider the following description of regional special districts in California:

The South Coast Air Quality Management District exercises such immense powers over vehicle use, traffic congestion, land use, and job growth that many people call it a *de facto* regional government—albeit unelected and essentially unaccountable. The L.A. region also has multihundred-million or billion-dollar-a-year special districts in charge of transportation, water supply, waste disposal. Each agency's professionals do what seems logical from their own narrow point of view—building roads or transit lines, cleaning up L.A.'s putrid air, dealing with toxic wastes, for example. But *not one of them* is entrusted with the whole—seeing whether and how the pieces fit together. Cumulatively, for example, they spend \$71 million a year on planning activities, virtually none of it coordinated.

PEIRCE, *supra* note 9, at 318.

Similarly, Professor Foster concludes that “The Achilles’ heel of specialized service delivery is its inability to coordinate the planning, budgeting, and delivery of services throughout a metropolitan area When coordination problems occur in a specialized world with separate water, sewer, utility, and highway districts, . . . these problems are predictable outcomes of institutional autonomy combined with functional specialization.” See Foster, *supra* note 24, at 230.

say that regional special districts are greedy. As Professor Kathryn Foster has established, regional special districts capture a bigger slice of the budget than occurs when those same services compete for funds from a general purpose local government.¹⁹⁶ Isolated, single purpose districts are able to avoid what is known as “full-line forcing,”¹⁹⁷ that is, having to compete for their budget dollars with demands for a variety of other services being funded by the same local government. Overall, services provided by special districts get a higher percentage of the available revenues than would be allocated to that service if it were provided by the general purpose government. As a necessary corollary, then, because the total amount of available revenues does not necessarily change when service provision is shifted to a special district, the funds available for services not provided by the special district may experience an overall decrease.

Third, regional special districts may allow a small segment of the community to act in disregard of the broader general welfare. When citizens are able to establish the borders of a regional special district, they can draw the lines in ways that will enhance the value of the property within the district, which in turn will frequently determine the revenue-raising capabilities of the district. Conferring district-drawing ability on self-interested property owners, though it may appear to facilitate regionalization, does not necessarily guarantee fair allocation of regional burdens. Rather, it merely substitutes one narrow self-interested

The uni-dimensional nature of the regional special district’s mission may also result in a failure to address locale-specific problems caused by the district’s operations. Consider, for instance the facts of *Tri-County Metropolitan Transp. District v. Beaverton*, 888 P.2d 74, 78–79 (Or. App. 1995). In that case, the court upheld the district’s unwillingness to respond to municipal concerns about certain details involving the location and amenities to be provided in a local train station being built by the district. *Id.* Though the dispute over whether the district had to install rest rooms and drinking fountains can hardly be defined as having transcendent importance, it illustrates how a special district frequently has no incentive to consider questions of local welfare.

196. Foster notes that most commentators, except those who subscribe to the public choice approach to local government, view special districts as a “legal but underhanded means to achieve greater spending on a service than would occur in a more competitive setting for resource allocation.” Foster, *supra* note 24, at 190.

197. For a full explanation of the way in which special districts are able to capture greater percentages of government revenues by avoiding “full-line forcing,” see *id.* at 189–217. In this regard, joint services agreements may offer a distinct advantage over special districts. Because all joint services agreements leave political and fiscal responsibility with each individual participating unit, the phenomenon of full line forcing will apply to the allocation of resources to the items served by the joint services agreement. See WILLIAM G. COLMAN, A QUIET REVOLUTION IN LOCAL GOVERNMENT FINANCE: POLICY AND ADMINISTRATIVE CHALLENGES IN EXPANDING THE ROLE OF USER CHARGES IN FINANCING STATE AND LOCAL GOVERNMENT 10–13 (1983) (describing the political impact of increased local government user charges. He notes that user fees create a protected stream of revenue that are not “unbundled” at general revenue and budget sessions).

calculation for another.¹⁹⁸

Fourth, regional special districts sustain a myth of self-sufficiency. Though they generally require massive infusions of government funds to pay for their initial capital construction,¹⁹⁹ they typically impose user fees to cover at least a share of their operating costs. As citizens have to reach for their wallet each time they use the service, they come to believe that these services fall into the “get what you pay for” model of local government. Thus, the prevalence of fees as a revenue raising mechanism for regional special districts may have a significant impact on the mindset of the individual service user. If the regional services that *I* use are funded by fees, the reasoning goes, why should *I* support redistribution of my tax dollars to fund regional social services, all of which will be funded by tax revenues rather than by user fees?²⁰⁰ Resistance to increased taxation for social services grows because of the belief that taxes are used only to redistribute wealth to the poor, while users pay their own way for other regional services. This anti-tax mentality, however, ignores the infusion of government money that subsidizes regional infrastructure.

Fifth, and perhaps somewhat perversely, regional special districts may impose greater costs on urban residents than on suburban residents. In part, this is due to the higher cost of providing services to low density sprawling suburbs than to dense urban areas.²⁰¹ In part, too, it may be due

198. In *State ex. rel. Angel Fire Home & Land Owners Ass'n v. South Central Colfax County Special Hospital District*, 797 P.2d 285, 287 (N.M. App. Ct. 1990), for example, objecting property owners argued that their property had been included in a proposed hospital district solely because of its high assessed value. They complained that though residents of their area contained only one fourth of the electorate for the hospital district, they owned one half of the district's tax base. Moreover, they argued that they would not benefit from the construction of the hospital, noting that their homes were substantially closer to an existing hospital than the site of the proposed hospital. *Id.* The court upheld the formation of the district under state law. *Id.* at 289. So long as citizens have the power to form regional special districts, however, state law will give them an incentive to draw district boundaries so as to maximize the district's property wealth without regard for the underlying fairness of their decision.

199. See Foster, *supra* note 24, at 14.

200. Foster noted that most analysts agree that, in contrast to financing services by user fees and charges, “tax financing promotes communal responsibility for important social services and likely narrows service disparities.” *Id.* at 107. However, one important study identified three advantages to the use of user fees over taxes: 1) they prevent waste; 2) they ensure that private benefits will not be subsidized by the public as a whole; and 3) they allow governments to recoup expenses from individuals and groups that are not within the government's taxing territory, such as nonresidents and tax exempt organizations. These benefits can only be attained, however, if the fee is set at the level that reflects individual, rather than community benefit. See COLMAN, *supra* note 197, at 9–10. Moreover, the study recognized that user fees conflict with equity norms when poor citizens are assessed fees for essential services. *Id.* at 13.

201. See DUANY ET AL., *supra* note 5, at 108.

to the difficulty of calculating the costs and benefits of any large regional infrastructure, which may in turn lead to unintended overallocation of costs.²⁰² Or it may reflect a pro-suburban bias against central city areas. Whatever the underlying reason,²⁰³ recent empirical studies make the claim that the urban core has subsidized some regionally provided services.²⁰⁴

202. For example, in a lawsuit against a metropolitan area mass transit district, challenging the allocation of costs as between city riders and suburban commuters, the Second Circuit noted the many subtle costs and benefits that may have been reflected in the computation of the fares. *See N.Y. Urban League, Inc. v. State of New York*, 71 F.3d 1031, 1038–40 (2d Cir. 1995).

203. Many other longstanding patterns of revenue distribution reflect similar anti-urban biases. For instance, with regard to the federal tax treatment of local property tax revenues, Richard Rothstein's short op-ed piece describes a study by a Stanford economist that shows how the federal tax treatment of local property taxes produces a huge indirect subsidy for wealthy districts. Princeton, N.J., for instance, because of its high local property taxes (deductible for federal income tax purposes), got \$2399 in per-student federal aid. Camden, with high direct federal grants through the Title I program, got only \$1140 per student in federal aid). *See* Richard Rothstein, *How the U.S. Tax Code Worsens the Education Gap*, N.Y. TIMES, Apr. 25, 2001, at B8. Similarly, the federal commitment to single family housing and its popular mortgage guarantee programs have provided a tremendous transfer of wealth to suburban Iowa. *See* DUANY ET AL., *supra* note 5, at 7–8; JACKSON, *supra* note 5, at 190–215, (documenting how these longstanding and extremely expensive federal programs contributed to urban decay and implemented a strong bias in favor of single family suburban development). Between 1933 and the late 1960s, almost half of all suburban housing was financed by federal loans. JACKSON, *supra* note 5, at 215. Government spending on thousands of miles of interstate highways constitutes another subsidy of suburbia to which the urban core contributed. *See* DUANY ET AL., *supra* note 5, at 8 (noting that the Interstate Highway Act of 1956 provided for 41,000 miles of roadway, 90% of which was paid for by the federal government, at an initial cost of \$26 billion. The authors also note how common parlance embodies this anti-urban bent, noting the distinction between the use of the terms "highway investment" and "transit subsidy." *Id.* at 96. They quote one study that concludes that government subsidies for highways and parking total somewhere between 8% and 10% of the GNP, totaling approximately \$5,000 per car per year. *Id.* at 94; *see also* JACKSON, *supra* note 5, at 250 (stating that in post World War II America, 75% of government transportation expenditures went to building highways, in contrast to 1% dedicated to urban mass transit). These programs constitute a significant subsidization of suburban amenities by central city residents. And finally, one author has claimed that cities bear an additional redistributive burden because of the amount of money they must devote to serving their poor. Though most direct funding for poverty relief comes from state and federal sources, cities devote more than 12% of their own source revenues to public welfare, health and hospitals which are utilized by the poor. *See* SUMMERS, *supra* note 73, at 183; *see also supra* note 93.

204. Commentators have identified several instances in which central city residents subsidize the provision of suburban infrastructure. One study of the Minneapolis area, for instance, concluded that the central urban areas paid more than \$6 million more in sewer fees than the costs they create; households in the growing suburban areas received subsidies from those central city users ranging from between \$10 and \$136 per household per year. *See* ORFIELD, METROPOLITICS, *supra* note 10, at 71. Another concluded that corporate relocation from city to suburb creates a subsidy by low and moderate income minority city residents of the suburban redevelopment. *See* Persky & Wiewel, *supra* note 82, at 50–69. *See generally* Cashin, *supra* note 5, at 2004–15. City subsidization of suburbia is not a new phenomenon. One study of school funding in the Atlanta area concluded that in 1937, more than 50% of the taxes collected for schools in unincorporated areas around Atlanta came from Atlanta taxpayers. *See* JACKSON, *supra* note 5, at 132.

Sixth, more generally, and perhaps most crucially for the New Regionalism's goal of reducing metropolitan area disparities between favored quarter and the rest of the region, regional special districts remove much of the incentive for true regional burden sharing. If the regional services that are desired and used by the wealthier segments of the metropolitan area can be obtained without loss of local government autonomy, without loss of control of local property tax revenues, and without the imposition of any cost beyond the cost of the service itself, there is no incentive for regionwide action to achieve metropolitan equity. By creating regional special districts for the provision of desired services, the favored quarter governments are able to limit their participation in regionwide endeavors according to their own perceived self-interest. They are able to capitalize on the benefits of their presence in a large metropolitan area, yet they are not required to act as a part of

Similar claims can be made with regard to the funding of regional transportation services. See, e.g., *N.Y. Urban League Inc. v. State of New York*, 71 F.3d 1031, 1036 (2d Cir. 1995). In that case, plaintiffs alleged that city users paid a disproportionate share of the operating costs of the Metropolitan Transit Authority, an umbrella agency that includes the New York City Transit Authority and the operating authorities of several commuter transit lines. Although the U.S. Supreme Court appears to have removed the legal basis of the plaintiffs' Title VI claim, when it held in *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001), that Title VI does not provide a private right of action, the facts of the *NYUL* case support the assertion made in the text of this Article, that city users may in fact subsidize suburban users of regional services. Under state law, the MTA must fully fund its operating costs; in 1995 it proposed several system-wide fare increases to cover projected deficits. 71 F.3d at 1035. The fare proposals established a 20% increase in city fares, with a proposed 8.5% increase in commuter service fares. Consider the following additional facts. City transit serves 1.5 billion passengers per year; commuter lines have 1.35 million riders. City operating expenses were \$3.1 billion annually, whereas the commuter lines had operating expenses of \$1.4 billion. The two services projected different operating deficits: \$316 million for the city compared to \$72 million for the commuter lines. The proposed fare increases would generate approximately \$277.3 million; the 20% city fare increase would generate \$274 million, whereas the 8.5% commuter increase would generate \$3.3 million. These figures suggest several salient comparisons. City transit has ten times as many passengers as commuter lines, yet its operating expenses are only 2 ½ times the size of the commuter lines'. *NYUL*, 71 F.3d at 1033–35. The proposed fare increase would generate almost 88% of the city's projected deficit, but less than half of the commuter lines'. Nevertheless, the Second Circuit rejected the claim of discrimination, stating that the proof offered did "not reveal the extent to which one system might have higher costs associated with its operations—costs stemming from different maintenance requirements, schedules of operation, labor contracts, and so on." *Id.* at 1038. Thus, the cost differential appeared to be tied to either a difference in quality of service or inefficiencies in the provision of the services; the fact of a higher subsidy of commuter lines remains unchallenged. For additional discussion of the ways in which city service users may provide a disproportionately high subsidy of metropolitan area services, see generally Kevin L. Siegel, *Discrimination in the Funding of Mass Transit Systems*, 4 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 107 (1997). Similar conclusions with regard to the development of mass transit in Philadelphia were discussed in Richard Voith, *The Determinants of Metropolitan Development Patterns: What are the Roles of Preferences, Prices, and Public Choices?*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* note 5, at 71–82.

the region when it comes to finding solutions for the pressing educational, housing, and other social needs that inevitably exist in large metropolitan areas. Able to pick and choose the areas of regional governance in which they want to participate, they maintain their privileged position without having to contribute to the overall regional welfare. Thus, regional special districts offer an attractive way for the favored quarter to preserve its privilege and avoid participation in solutions to regional problems that would require redistribution from favored quarter to urban core.²⁰⁵

4. *Voluntary Interlocal Burden Sharing*

In a recent article, Professor Clayton Gillette explored the New Regionalist emphasis on achieving metropolitan equity and pointed to the growing evidence behind the claim that suburban prosperity is closely linked to central city health.²⁰⁶ In light of that clear suburban self-interest in solving urban problems, Gillette went on to speculate why examples of formal intermunicipal “burden sharing,” which he defines as “interlocal agreements to alleviate socio-economic disparities within a region,”²⁰⁷ are so rare. Dismissing the hypothesis that suburban indifference to urban ills or antipathy to urban residents could be the explanation, since, as he had already noted, the suburbs had a selfish reason to be concerned about the health of the city, Gillette theorized that the costs of contracting must be the real barrier to interlocal burden sharing. Specifically, Professor Gillette suggested that legal principles (such as non-delegation, lending of credit, and public purpose doctrines), organizational structures (such as fixed geographical municipal boundaries), and the costs of verifying contract compliance, were the

205. In a recent article, Kathryn Foster attempted to identify characteristics that correlate with high levels of “effective regional governance.” See Foster, *supra* note 11, at 83–87 (explaining desired outcomes for regional governance consist of high levels of economic performance, social equity and regional articulation). Foster then hypothesized that those metropolitan regions with high levels of effective regionalism would display high concentrations of “regional capital.” *Id.* at 90–96. The ability to execute intergovernmental agreements, and the presence of many specialized regional government structures were identified as positive measures of regional capital. See *id.* Somewhat surprising to Foster, her analysis did not reveal high correlations between regional capital and effective regional governance; that is, regions identified as accomplished in regional governance did not display significantly more indicia of regional capital than the unaccomplished areas. *Id.* at 113. If this Article is correct in its suggestion that intergovernmental cooperation and specialized regional governance mechanisms are anti-regional in impact, the lack of correlation Foster observed may be due to a mis-identification of the proper measures of regional capital.

206. See Gillette, *supra* note 18, at 241–47.

207. See *id.* at 194.

likely culprits.²⁰⁸ Rather than revamp the rules to eliminate these substantial disincentives to redistributive regional efforts, however, he suggested that informal voluntary agreements may be at least a partial antidote.²⁰⁹ Gillette's proposal puts him in direct opposition to local government scholars who claim that voluntary efforts will never be an effective means for achieving metropolitan equity and call instead for directive state or federal action.²¹⁰

Professor Gillette's suggestion that voluntary intermunicipal burden sharing could promote regional equity is attractive on several fronts. Most importantly, and consistent with many of the New Regionalist goals for metropolitan areas, it preserves existing local autonomy, it is based on voluntary action rather than coercive direction from a higher level of government, and it requires the creation of no new governmental entities in the regions that are already the most saturated with units of government. For several reasons, however, Gillette's proposal seems unlikely to have a substantial impact on the regional problems he identifies.

First, consider Gillette's suggestion that informal agreements may be preferable to formal intermunicipal burden sharing agreements.²¹¹ That endorsement is in turn based on the claim that existing legal rules and government structures create obstacles to formal contracts for intergovernmental cooperation for regional burden sharing. We are left to wonder, however, why those same rules and structures have not been an impediment to the formation of the numerous formal regional agreements and entities that currently exist in metropolitan areas for regionwide provision of services. Regional special districts are routinely created for provision of capital- or infrastructure-intensive services, and the applicable enabling legislation is frequently broad enough to allow the use of that structure for regionwide provision of the kind of burden-sharing Gillette seeks to foster. When intergovernmental benefits the affluent segment of suburbia, formal legal requirements do not appear to

208. *See id.* at 212–31.

209. *See id.* at 263–69. Professor Gillette does not suggest that voluntary arrangements can completely solve metropolitan area problems, but rather that “in some situations, interlocal bargains are likely to lead to a better allocation of local resources than we would expect from centralization.” *Id.* at 196.

210. *See, e.g.,* Briffault, *supra* note 29, at 431–35 (arguing that voluntary cooperation among local government units is unlikely to remedy metropolitan area disparities in wealth and quality of services); Briffault, *supra* note 2, at 1149 (“As long as cooperation is voluntary, no locality will cooperate with another unless it sees that it will benefit from such cooperation.”); Cashin, *supra* note 5, at 2030–33 (describing proposals for voluntary burden sharing as “fanciful”).

211. Gillette, *supra* note 18, at 263–69.

impose insurmountable barriers to regionalism.

Second, Professor Gillette claims that voluntary redistributive efforts are superior to solutions mandated by higher levels of governments. Underlying this preference is his assertion that wealthier local governments should be willing to impose a cost on themselves (by executing an agreement to burden share with less affluent localities) in order to receive the vague, indeed indefinite, benefit of enhanced regional well-being.²¹² It is unclear that local governments can be expected to identify their self-interest over such a long term time line.²¹³ Even if the municipality were to make the long term calculation, however, the possibility is high that many more immediate demands for local funds would trump the call for voluntary burden sharing, especially in this era of tax caps and increased state and federal mandates.²¹⁴

Third, Professor Gillette's preference for preservation, as opposed to rearticulation, of the current background rules of local government law appears inconsistent with the examples he offers in support of voluntary burden sharing. His article describes several voluntary interlocal burden sharing agreements to illustrate local government recognition of the importance of regional well-being and the assumption of responsibility for achieving it.²¹⁵ In reality, though, the examples he gives are predictable reactions based on the immediate, short term self-interest of the "giving government." That is, voluntary burden sharing appears to occur when the background legal rules have been modified to give the "receiving government" the right to extract something from the giving government that the giving government values more highly than the price of informal burden sharing. If, for instance, a municipality has the power to annex land in the surrounding unincorporated county, and if the county's residents are opposed to annexation, the county's agreement to

212. *See id.* at 232–40.

213. Policy making in the U.S. appears inextricably tied to short-term, rather than long term, interests. *See* Gottlieb, *supra* note 9, at 38 (noting that "a short-term focus is endemic to American politics and society"). In fact, one of Gillette's examples of voluntary burden sharing suggests that municipal governments have considerable difficulty in properly identifying their own long term interests. In 1982, the city of Charlottesville, in an agreement with Albemarle County, relinquished its power to annex additional territory in exchange for the county's agreement to share tax revenues with the city. Twenty years later, Charlottesville is landlocked, and its income has declined by 31% relative to county income. Its poverty level is now twice as high as the county's, whereas in 1980 the difference was slight. Recent attempts to have the city revert to town status, thus making it a part of the county, have failed. *See* "Does the City of Charlottesville Have a Future as a Town," *reprinted at* www.virginia.edu/insideuva/textonlyarchive/93-09-17/1.txt (last visited Jan. 13, 2003); *Lucy v. County of Albemarle*, 516 S.E.2d 480, 487 (Va.1999).

214. *See* COLMAN, *supra* note 197, at 1, 10–12.

215. *Id.* at 234–36.

share revenue with the city in exchange for the city's agreement to forego annexation is easy to understand. Undoubtedly, it reflects the county's calculation that it is better to share revenues than to engage in lengthy, and ultimately futile, battles to resist annexation.²¹⁶ Similarly, several municipalities within the jurisdiction of a regional district with regulatory land use powers might be expected to establish a common fund to offset the negative impacts of the district's decisions. This joint burden sharing, rather than being motivated by a desire to achieve regional equity, is better understood as a rational method to allocate the future costs of unknown future regulation, much the way that joint municipal insurance pools do.²¹⁷ Yet another example of voluntary burden sharing Professor Gillette provides is in fact mandated by state law.²¹⁸

While Professor Gillette rejects a reworking of the background rules of local government formation as too costly, the examples he uses to illustrate implementation of voluntary burden sharing are for the most part negotiated in jurisdictions that have in fact changed those background rules. Thus, it appears that voluntary burden sharing typically occurs only when the state redefines the background legal rules to create an incentive for burden sharing that generally does not exist. If the current rules allow the imposition of the costs Gillette seeks to remediate, and if his examples of voluntary burden sharing occur in jurisdictions where the usual background rules have been changed, it is difficult to understand the strength of the case for preservation of the status quo.

Finally, and more broadly, Professor Gillette's approach to redistribution of wealth and equalization of services in metropolitan areas appears to downplay the evidence that the current admitted need for "burden-sharing" was in no small part created by the efficiency

216. Under the laws of most states, municipalities do not have involuntary annexation powers. *See generally* Reynolds, *supra* note 4. In Virginia, however, annexation can be ordered by a court irrespective of the wishes of the residents. *See* VA. CODE ANN § 15.2-3211 (1997). The revenue sharing agreement between Albemarle County and Charlottesville, then, was a bargain struck against an unusual set of background legal rules. According to a consultant's report for a multi-county resort area in Colorado, "Revenue-sharing agreements are most commonly used to resolve or prevent annexation disputes." *See* BBC RESEARCH, LOCAL REVENUE-SHARING METHODOLOGIES 22, available at <http://www.hmccolorado.org/Revenuesharingfinalreport.pdf> (2001). In fact, all of the case studies they presented involved revenue sharing to forestall annexation battles.

217. *See* Gillette, *supra* note 18, at 235, for a description of the Meadowlands revenue sharing program.

218. *See id.* for a description of the Louisville-Jefferson County revenue sharing compact. Under state law, some Kentucky cities and their counties are required to share occupational license fees, *see* KY. REV. STAT. ANN. §§ 79.310-330 (Mitchie 1996).

maximizing²¹⁹ he describes in his discussion of voluntary intergovernmental cooperation. For central urban areas, into whose lap many of the costs of these agreements have fallen, the efficiency maximizing regionalization of services was accompanied by a more sinister reverse “burden sharing,” which transferred wealth from urban core to peripheral suburb.²²⁰ As that imposition of costs continues unabated, voluntary burden sharing (of both the formal and informal types) can never be more than a trickle against a flood of efficiency maximizing.

In sum, though Professor Gillette’s underlying premise that voluntary agreements are preferable to coercive state-mandated redistribution has some appeal, his proposal highlights one of the intractable problems with self-contained local governments in a metropolitan region. While he notes that a purely self-interested, affluent municipality should be willing to engage in metropolitan redistribution, on the basis that overall regional health will be enhanced when the less favored quarters of the region prosper, he attributes the paucity of examples of this self-interested behavior to legal doctrine and contracting costs.²²¹ Yet his proposal relies on the preservation of the very legal rules that have already imposed significant costs on the less favored segments of the metropolitan region. To reject reformulation of the rules that have benefited the favored quarter, on the grounds that it would be too costly for that privileged segment of metropolitan regions, seems to value preservation of privilege more than reduction of inequality.

B. The New Regionalist Critique of Intergovernmental Cooperation

Commentators have identified ways in which state laws governing municipal incorporation, annexation, and local taxation facilitate the preservation of local autonomy and intra-regional inequality.²²² In

219. See Gillette, *supra* note 18, at 231–32. Gillette does not use the term efficiency maximizing, but it is an accurate description of the contrast he makes between, on the one hand, intergovernmental burden sharing agreements, and, on the other hand, those that involve “regional allocation functions,” *id.* at 231, and are characterized as “agreements for coordination.” *Id.* at 232.

220. See *supra* notes 93 and 203–04 and accompanying text.

221. See Gillette, *supra* note 18, at 212–31.

222. See, e.g., WEIHER, *supra* note 40, at 176–88. Weiher’s study concluded that local government formation in the United States is “peculiarly ‘anti-government.’” *Id.* at 165. He explained:

Incorporation is an act of anti-government in the sense that it permits residents to escape the collective political demands of larger, more inclusive governmental units. Government becomes not the agency for brokering the legitimate interests of a diverse society, but an instrument for

addition, they have noted the prevalence of intergovernmental cooperation in metropolitan regions and have described the ways in which these collaborative efforts focus on the provision of services, rather than on the elimination of inequalities.²²³ Most have not, however, examined whether the existing pattern of regionalization, in which efficiencies are purportedly achieved without loss of governmental autonomy, may ultimately have a negative impact on overall regional welfare.²²⁴ To the extent that the New Regionalist critique has been applied to intergovernmental cooperation, it has praised this “governance over government”²²⁵ solution as a way for local governments to provide services they are unable to produce,²²⁶ and as a voluntary collaborative approach to metropolitan area problems.²²⁷

protecting parochial interests against the brokering process. It becomes a means of escaping the social contract.

Id. at 182.

Weihert includes several examples, including incorporations done by private corporations to avoid taxation and regulation, as well as incorporations by wealthy citizens to escape from financing services for low income individuals, *id.* at 184. *See also* Miller, *supra* note 39, at 34–62; DOWNS, *supra* note 1 at 19–22; JACKSON, *supra* note 5, at 139; Briffault, *supra* note 26, at 72–81; Cashin, *supra* note 5, at 1992.

223. *See, e.g.*, Cashin, *supra* note 5, at 2030–33; Briffault, *supra* note 29, at 374–82; RUSK, *supra* note 2, at 122–23.

224. In contrast to most current thinking about regionalism, Professor Frug’s recent study of European Union structures and their potential relevance for American metropolitan regions reaches the same conclusion as the one posited here—that the current array of voluntary intergovernmental cooperative agreements “are not stepping stones toward comprehensive regional solutions but successful methods of avoiding them.” *See* Frug, *supra* note 15, at 1787.

225. *See* Savitch & Vogel, *supra* note 9, at 161.

226. Local governments may separate their deliberations over local public services into two discrete components—first, the decision whether to provide a particular service; second, the decision as to which government entity should produce that service. The flexibility afforded to most general purpose local governments under current state laws allow them to enter a wide range of voluntary agreements whereby another entity actually produces the service to be provided by the receiving entity in the contract. *See* Briffault, *supra* note 2, at 1144–45, in which he quotes two urban economists who distinguish the production and provision aspects of local service delivery. Whereas the provision decision results from “collective public choice processes to determine how much of each service to provide and how to pay for it, . . . the production of public services refers to ‘the technical processes of combining resources to . . . render a service.’” *Id.* at 1145 n.148, (quoting Roger B. Parks & Ronald J. Oakerson, *Metropolitan Organization and Governance: A Local Public Economy Approach*, 25 URB. AFF. Q. 18, 20, 21 (1989)). The public choice analysis makes the normative claim that local governments’ primary purpose is to determine the appropriate range and quality of local services; under this view, the production source of the services is irrelevant. *See* Briffault *supra* note 2, at 1145.

227. *See, e.g.*, Cashin, *supra* note 5, at 1989; ACIR, *supra* note 20, at 98 (suggesting that intergovernmental cooperation appeals to local governments because it allows for better service provision without structural governmental reorganization). Professor Kathryn Foster views the ability to execute interlocal service agreements as a factor that correlates positively with heightened

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Voluntary intergovernmental efforts may in fact provide a benefit to all segments of a metropolitan area. Presumably, for instance, central cities and suburbs alike are better off with a regional transportation system than without one. On the surface, then, intergovernmental cooperation may appear to establish a win-win opportunity for enhancing regional welfare. Its appeal is multi-faceted: it is based on cooperation rather than coercion; it preserves the pre-existing local government entities; and it enhances the overall regional welfare by providing better or more efficient services to the constituents of various governments in the region.²²⁸ Missing from the analysis, however, is careful consideration whether the intergovernmental cooperation approach to metropolitan issues has in fact facilitated the preservation of widespread regional disparities.

To answer that question, the inquiry must go beyond the limited focus on whether the central urban core is better off with a particular regional service than without one. More relevant to the New Regionalist analysis is the question whether the central city, and ultimately the entire region, is as well off with the current regime of voluntary cooperation as it would have been if metropolitan area governments had adopted, not only regional transportation and sewerage systems, but also regional policies for things such as housing, job creation, tax revenue distribution, and schools. So long as the favored quarter is not required to participate more broadly in regionwide governance, no empirical evidence will be available to answer that question. And because of the rules of intergovernmental cooperation, the central city is in a “take it or leave it” situation. Like the favored quarter, the city can choose to participate in regional governance when it would advance its own interest, but, unlike the affluent quarter, the regional governance efforts it most needs are responses to problems that are more heavily concentrated in non-favored quarter segments of the metropolitan area. As a result, because the New Regionalism’s primary goal is to correct the socio-economic disparities

regional economic performance, decreased social inequity, and articulation of a regional consciousness. In a recent article, she asserted that the ability to enter interlocal contracts for services constitutes an important component of the “legal capital” that contributes to effective regional governance. The other three variables she identified include municipal powers of involuntary annexation, state authorization of city-county consolidation, and limited home rule powers. See Foster, *supra* note 11, at 93.

228. State courts have commented favorably on the legislative goal of intergovernmental cooperation statutes. See, e.g., *United Water Resources Inc. v. N. Jersey Dist. Water Supply Comm.*, 685 A.2d 24, 30 (N.J. Super. Ct. App. Div. 1996) (“Their aim is the avoidance of duplication, and the fostering of regionalization with concomitant economies and efficiencies of scale.”); *Teamsters Union Local 117 v. Port of Seattle*, No. 36366-2-I, 1996 WL 523973, at *3 (Wash. Ct. App. 1996) (noting legislative endorsement of cooperation between municipalities).

in metropolitan regions, the voluntary intergovernmental cooperation approach to regionalism is likely to leave untouched the root sources of the very disparity it seeks to remedy. The end result is a selective regionalism, for which the metropolitan area is “all in it together” when regional action benefits the favored quarter, but for which the “it’s your problem” response can be given to central city proposals to correct inadequacies in city infrastructure or services.

IV. CONCLUSION: MOVING TOWARDS REGIONAL EQUITY

A. *Recognizing the Anti-Regional Impacts of Intergovernmental Cooperation*

Intergovernmental cooperative endeavors are flourishing in metropolitan areas. Most recently, this trend has received the endorsement of commentators who predict that continued focus on voluntary regionalization efforts, when seen through the self-interested lens of the favored quarter suburbs, will lead to increased metropolitan equity.²²⁹ Yet at the same time, the gap between central city and suburbia has widened. Though the correlation does not necessarily establish a causal connection, this Article has suggested that the two phenomena are related, and that more than mere coincidence is involved. By identifying several ways in which intergovernmental cooperation may both preserve and exacerbate intra-regional inequality, this Article hopes to encourage reexamination of the New Regionalist agenda, at least in so far as it praises intergovernmental cooperation as a realistic tool for narrowing the urban-suburban gap. At a minimum, the analysis offered here should temper the enthusiasm with which the New Regionalist embraces intergovernmental cooperation.

Because of the wide variation in terms of the participants, the services, and the relationships among and between the governmental entities involved, general pronouncements about the anti-regional impact of intergovernmental cooperation would be overstated and unhelpful. Some of the examples discussed in this Article, in fact, suggest that metropolitan equity at times could be enhanced by some voluntary cooperative efforts.²³⁰ At the same time, though, an uncritical

229. See *supra* notes 76–80 and 206–211 and accompanying text.

230. See *supra* note 189 (discussing *Barnes v. Dep’t of Housing & Urban Dev.*, 341 N.W.2d 766 (Iowa 1984), in which the court invalidated actions taken by a voluntarily created regional housing authority). This Article’s discussion of joint services agreements has also suggested ways in which some of those agreements could have positive impacts on regional welfare. See Part III.A.2.

endorsement of widespread intergovernmental cooperation appears misguided. The possible anti-regional impacts are at least three-fold. First, to the extent that intergovernmental cooperative efforts result in the establishment of a separate governmental entity, they remove difficult funding decisions from the general purpose government and ultimately skew the revenue allocation in favor of those regional services, at the expense of what remains to be funded out of the local government's general revenues, most notably spending for social services.²³¹ In addition, intergovernmental cooperation may extract a benefit for wealthier suburban areas while it imposes costs on the central urban areas.²³² And finally, the "pick and choose" phenomenon of intergovernmental cooperation leaves affluent, autonomous local governments in a privileged position to select those aspects of metropolitan policy for which their cooperation is a desirable and interest-maximizing possibility, freeing them from participation in regional policies that would redistribute revenues to the rest of the metropolitan area. The combined impact of these phenomena tips the balance against the urban core, which is left without recourse to state or local laws to correct the imbalance.

B. Refining the New Regionalist Agenda

Though the "New Regionalism" has yet to result in a cohesive doctrinal approach to metropolitan area problems, it appears to have been the catalyst for a growing coalescence around the urgent need for government action to correct metropolitan area inequities. Having come to that position from a variety of ideological and analytical perspectives, commentators and policy makers must now evaluate whether current urban strategies are in fact consistent with their goal. Recognizing the perhaps unintended anti-regional costs of voluntary intergovernmental efforts, both past and ongoing, is itself an important step; articulating alternatives to solve the problem, however, is infinitely more challenging.

Surely, it is too late to envision a metropolitan area without regional special districts and other intergovernmental cooperative endeavors. Not

231. This phenomenon of "full line forcing" is discussed *supra* at note 197. If a service is provided at a regional level by a single purpose government, the absence of full line forcing will result in a disproportionate amount of money for regional services (usually infrastructure intensive services such as waste treatment or transportation), at the expense of what remains to be funded out of the government's general revenues, most notably spending for social services.

232. This claim appears to find clearest support in several studies of funding for regional transportation systems and highway spending. See *supra* note 204.

only are they entrenched in the metropolitan landscape, they also undoubtedly confer many benefits on all segments of metropolitan areas. The favored quarter, however, has received disproportionate benefits from widespread intergovernmental cooperation. Not only has it been subsidized by the rest of the region in the provision of some essential services, it has also solidified its privilege with its ability to choose to participate in regional governance only when it would be to its own advantage. That double advantage requires offsetting recompense and action to counter the misallocation of resources in metropolitan regions. Leaving the elimination of the enormous, and ever-growing, urban-suburban gap in the hands of autonomous local governments implausibly hopes that those who have benefited from the current trends will decide to reverse them.

Central to the New Regionalist analysis is the elimination of the socio-economic disparities that plague all major metropolitan areas. Many scholars and politicians have noted the increasing schism and have presented proposals for change. And not surprisingly, current regionalism proposals vary widely in terms of the structures they propose, the implementation mechanisms they suggest, and the extent of state and local law revision they require. It is not for lack of analysis and proposals to reconfigure metropolitan areas that intra-regional inequality has intensified and that metropolitan regions show increasing levels of fragmentation and overlap of governmental units. Moving beyond voluntary intergovernmental efforts, however, leads to the inevitable conclusion that true regionalism efforts will impose financial and political costs on the favored quarter's local government units. As a result, the political barriers are substantial. In the final analysis, however, it is the responsibility of the state governments that have facilitated the problem to solve it.²³³

Though the similarities of metropolitan area demographics are substantial, it would be a mistake to suggest that the New Regionalism can develop a standard issue, one size fits all solution to metropolitan area disparities. Restoration of the suburban-urban balance can be

233. Federal policies and incentives have also played a role in shaping the current anti-regional landscape in metropolitan areas, but they are beyond the scope of this Article. See, e.g., FOSTER, *supra* note 24, at 111 (noting how federal funding and federal tax laws have often encouraged the proliferation of regional special districts); Mark Alan Hughes, *Federal Roadblocks to Regional Cooperation: The Administrative Geography of Federal Programs in Larger Metropolitan Areas*, in URBAN-SUBURBAN INTERDEPENDENCIES, *supra* 5 at 161 (explaining that housing authorities, county welfare agencies, job training programs all based on the artificial territorial jurisdiction of city and county, in large part because of federal policies); Savitch & Vogel, *supra* note 9, at 164 (noting that most regional plan commissions were established solely in order to qualify for federal transportation funds).

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pursued through many mechanisms, ranging from complete governmental reorganization at the regional level, to the establishment of more limited regional units with control over regional problems such as schools and affordable housing, to more modest redistributive measures, such as tax sharing or restructuring of the regional tax base itself.²³⁴ And, as the few successful efforts to consolidate municipal and county governments in metropolitan areas can teach us, the legal and political context is extremely important. Existing state statutes, the local political climate, the history of the relationships among existing units of local governments, the strengths and interests of minority groups, and the influence of major political parties, are all extremely important determinants of the shape any regional action will take.²³⁵ The suitability of a proposed regional reform in any particular situation will depend on the interplay of these and many other factors. Notwithstanding the wide range of options, however, the failures of voluntary intergovernmental efforts suggests that the one common necessary ingredient is state commitment to the goal of eliminating the suburban gap. Metropolitan area redistribution makes sense, not only because it may be in the favored quarter's own long-term self-interest²³⁶ or because it may now be politically feasible through the forging of metropolitan area alliances among the "unfavored" quarters in the metropolitan area,²³⁷ but also because it is "the right thing to do."²³⁸

234. States might consider, for instance, something like a metropolitan area benefits tax, to be levied on favored quarter participants in all voluntary intergovernmental efforts. This tax would impose distinct and immediate costs on intergovernmental cooperation. It would recognize that although intergovernmental cooperation may produce tangible benefits for some segments of a metropolitan region, it is also likely to impose costs on other areas. It would also work against the "pick and choose" phenomenon of intergovernmental cooperation, by conditioning favored quarter ability to extract a benefit from its presence in a metropolitan area on its willingness to contribute to narrowing the gap with the other segments of the metropolitan area, without which the intergovernmental cooperation would be impossible. It is of course unlikely that this tax would alone close the gap between favored quarter and the rest of the region. Some supra-regional redistribution is likely to be essential to the realization of metropolitan area equity. See Anita A. Summers, *supra* note 73, at 190–92; RUSK, *supra* note 2, at 107. A metropolitan area benefits tax, however, would correctly tax the wealth produced for the favored quarter by intergovernmental cooperative agreements.

235. See VALENTE ET AL., *supra* note 29, at 448–60 for fuller discussion of the consolidation phenomenon and the factors that shape it.

236. See, e.g., Gillette, *supra* note 18; see also *supra* notes 85–88 and accompanying text the discussion of the so-called "interdependence imperative."

237. See generally ORFIELD, METROPOLITICS, *supra* note 10; Cashin, *supra* note 5. This justification for regionalism depends on the ability of central city and surrounding, declining inner ring suburbs to create a new political majority.

238. See *supra* note 94.

As this Article joins the chorus in support of the New Regionalists' call for fairer allocation of resources and opportunities in metropolitan America, it has suggested that intergovernmental cooperation, at least as currently structured, is not a viable tool for the realization of that goal. True regional equity requires a reformulation of the legal rules and structures that preserve and possibly exacerbate the widening disparity between urban core and other metropolitan area constituents. With the anti-regional effects of intergovernmental cooperation identified, one intuitively appealing and popular solution has been taken off the regionalists' table. What remains are proposals that are all likely to produce strong resistance from favored quarter governments. If this Article is correct in its claim that intergovernmental cooperative efforts are facilitating the preservation of the urban-suburban gap, however, it is time to reexamine those alternative, though undoubtedly more controversial, proposals in the elusive search for regional equity.