REGIONALISM, FEDERALISM, AND THE PARADOX OF LOCAL DEMOCRACY: RECLAIMING STATE POWER IN PURSUIT OF REGIONAL EQUITY

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INTRODUCTION

Americans now live in an age defined by macroeconomic pressures, metropolitan interests, and microdemocratic structures of governance. Economic globalization has forever altered the national job market and constrained access to middle-class jobs. Suburban sprawl has amplified seemingly intractable conflicts of interest between cities and their suburbs. The ideology of localism, reified as "home rule," has transmuted the municipal boundary line into something far more valuable than gold: a tool for passively maintaining socioeconomic order without overt class warfare or evidence of unconstitutional discrimination.[1] Wealth entrenches itself in the suburbs[2] as urban poverty concentrates to historical highs.[3] Yet public responsibility remains diffuse, state authority remains delegated,[4] and the social contract continues to be evaded[5] quietly, subterraneously, with a kind of rational aplomb.

It is known, of course, that inequality of opportunity exists. But too often it is believed, with equal conviction, that the fundamental

1. *See infra* Part II(A)(3).

2. *See generally* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1997).

3. *See generally* Douglas S. Massey & Nancy A. Denton, *Hypersegregation in U.S. Metropolitan Areas: Black and Hispanic Segregation Along Five Dimensions*, 26 DEMOGRAPHY 373 (1989).

4. *See infra* Part I(B)(2).

5. 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, 532 n.295; *see infra* Part I(B)(3).

causes of inequality of opportunity are known as well. Some characterize the contraction of the middle class and the plight of the poor to be almost exclusively attributable to macroeconomic forces.[6] That is to say, they are far more likely to believe that the lower and middle classes are getting bilked by large financial institutions, or by Congress, or by 'free-riding illegal immigrants,' or by Asian outsourcing, or by some other exogenous factor beyond their control, than to believe that local zoning ordinances or municipal boundary lines have a particularly meaningful impact on their lives.

But macroeconomic forces are not the only ones working to constrain the pursuit of the American Dream Regional forces—forces which inhere at the metropolitan level—also play a role in distributing wealth, consolidating political power, and structuring opportunity, whatever the influence of global economic trends.

The field of study concerned with regional economic forces, local structures of governance, and geographic patterns of racial, social, and economic inequality is known as "regionalism."[7] Though it evades precise definition, regionalism may be described as a perspective on law and public policy that recognizes the fundamental interconnectedness (social, political, economic, and environmental) of cities, suburbs, and other state subdivisions that constitute metropolitan areas.[8] It observes, measures, and critically examines (to take a few examples) disparities in local taxable property wealth, patterns of affordable housing allocation, racial and economic segregation, job availability, school financing, exclusionary zoning, and the legal mechanisms, political ideologies, and social preferences that shape each of these issues.[9]

Regionalism differs most noticeably from other schools of thought concerned with governmental efficiency and social justice by couching its analysis of opportunity in geographic terms.[10] Methodologically, regionalism approaches issues of racial and economic inequity as intimately interconnected, but attempts to strike at the root cause of both without the restrictive preconceptions of either. Substantively, regionalism conceives of economic opportunity as fundamentally a

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6. *See, e.g.*, *International Trade / Global Economy,* POLLINGREPORT.COM, http://www.pollingreport.com/trade.htm (last visited Jan. 29, 2015) (cataloguing American perspectives on international trade and the globalized economy from the early 1990s to 2014).

7. *See, e.g.*, Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2015 (2000); Matthew J. Parlow, *Equitable Fiscal Regionalism*, 85 TEMP. L. REV. 49, 52 (2012).

8. *See* Cashin, *supra* note 7, at 2015.

9. *See* Parlow, *supra* note 7, at 52.

10. For further exposition on the claims regarding regionalism in this paragraph, see *infra* Part III(A) (discussing regionalism at length).

property of socially engineered space. It posits that this social engineering, which results in local jurisdictional fragmentation and interlocal inequalities, is enabled by States' indiscriminate delegation of power to their local subdivisions and facilitated by the *laissez faire* attitude of courts with respect to the same. It further posits that the candid recognition of these realities as fundamentally untenable, unsustainable, and unfair, would allow for inequality of opportunity (a notoriously slippery concept) to be addressed more concretely by courts and legislatures through the powerful lens of place. The use of geography as a heuristic device—as an organizing principle for understanding the exercise of public and private power—is what is liberating about regionalism. It is also what makes it so difficult to apply within existing jurisprudential frameworks, which too often do not comprehend harms of a regional or even interjurisdictional sort.[11]

Though common in their support for what could fairly be called the 'spatial opportunity hypothesis,' the opinions and analytic methodologies which fly under the banner of regionalism are diverse. The number of doctrinal[12] and philosophical[13] approaches are rivaled by the number of statistical[14] and cartographic[15] ones. This is not to say that any one approach is more meritorious than another, or that the presence of such diversity indicates a damning lack of consensus. It is simply to say that, with no lack of earnest effort, and with decades of scholarship produced, an adequate solution to the problem of regional inequality of opportunity has not yet been found.

The general trend in regionalist literature has been to advocate for reforms that neither harm extant local boundaries nor seriously question the soundness of "home rule" provisions that justify them. The proposals for reform have included reliance on voluntary interlocal agreements, single-function special districts, two-tier regional governments, regional legislatures, fiscally and democratically permeable local boundaries, and strategies that incorporate different aspects of the above.[16] Generally, however, scholars have not taken seriously the contention that states should pursue regional reform directly, by divesting local governments of

11. *See infra* Part II (discussing three United States Supreme Court cases illustrating judicial norms for classifying and addressing interjurisdictional harms).

12. *See, e.g.,* Richard Briffault, *Our Localism: Part 1—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) [hereinafter Briffault, *Our Localism*].

13. *See, e.g.,* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999) [hereinafter Ford, *Law's Territory*].

14. *See, e.g.,* David Rusk, *Measuring Regional Equity*, THE CTR. ON LAW IN METROPOLITAN EQUITY. (Sept. 20, 2013), http://www.clime.newark.rutgers.edu/sites/CLiME/files/Rusk,%20David-%20Measuring%20Regional%20Equity_0.pdf.

15. *See generally* MYRON ORFIELD, AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY (2002).

16. *See infra* Part III(B)(2).

some portion of their delegated powers.

If this is not surprising, it should be. The most obvious, most elegant, most direct solution to the puzzle of regional inequality has been uniformly disregarded by all who ventured to solve it. Why? Have the precepts of "home rule" and "local control" become so unassailably sacrosanct, so politically indispensible, that they now prevail over even the most basic reaffirmations of state sovereignty? Has the political impossibility of pursing even modest increases in states' power vis–*à*–vis their local subdivisions become such a foregone conclusion that it does not pass the laugh test in the academy? Or, are we simply jaded, unable to believe that state legislatures will take responsibility for reforming a system of governance which, by passively institutionalizing the affluence of some and passively preserving the systemic disenfranchisement of others, enables state politicians to evade public accountability for the consequences of state action?[17]

Whatever the reason, the absence of state-level solutions is conspicuous in a field which concerns itself with the unequal distribution of wealth and opportunity and the myopic self-destructiveness of unfettered local power. This Note attempts to fill this void in the literature by advocating for a regional reform strategy that provides a new jurisprudential perspective on the state-local relationship and acknowledges the need for a greater exercise of centralized state power in the pursuit of regional equity.

Part I of this Note reviews the doctrines and ideologies that shape the modern state-local relationship, including jurisdictional theory and the ways in which federal state-local jurisprudence facilitates the evasion of the social contract.[18] Part II conducts a targeted inquiry into the racial and socioeconomic contours of this evasion through an analysis of three landmark Supreme Court cases. Part III surveys the dominant regionalist responses to unfettered local power, and argues that the barriers to regional reform are fundamentally political, not institutional, in nature. Part IV articulates the need to utilize existing political machinery to achieve regionalist goals, and argues that progressive state legislation, coupled with an innovative use of existing geographic statistical tools, provides the best means for pursuing regional equity from the perspectives of simplicity, efficacy, and political viability. A short conclusion follows.

17. *See infra* Part III(C).

18. Boudreaux, *supra* note 5, at 526 (observing how metropolitan "fragmentation" and concentration of affluence in the suburbs had been "a means of escaping the social contract.").

PART I: STRUCTURES AND IDEOLOGIES OF THE STATE-LOCAL RELATIONSHIP

A. The Modern State-Local Relationship

1. Dillon's Rule to Home Rule

The traditional relationship between state and local government is one of "complete hegemony" of the former over the latter.[19] According to the traditional view, local governments are creatures, delegates, and agents of the state.[20] They are creatures of the state because they can be created or destroyed at the state's pleasure.[21]They are delegates of the state because they "possess[] only those powers the state has chosen to confer upon [them]", which the state may freely "expand, contract, or abolish."[22] They are agents of the state because the state can compel them to enact or obey the state's policies and administer the state's services.[23]

Dillon's Rule, a rule of statutory construction that narrowly defines local powers as only those expressly granted, fairly implied, or necessarily implicated by state law, has served to bracket local autonomy and reaffirm States' superiority over their political subdivisions since 1868.[24] Over a century ago, in *Hunter v. City of Pittsburgh*, the Supreme Court expressly endorsed Dillon's rule by reaffirming the hegemonic power the Constitution grants to the states over their local subdivisions.[25]

The Court's holding in *Hunter*, though technically still good law, has in practice been eroded at the state level by the widespread embrace of home rule.[26] Rather than limit the powers of municipalities to only those expressly stated, fairly implied, or necessarily implicated, home rule states endow their political subdivisions with powers[27]

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19. Briffault, *Our Localism*, *supra* note 12, at 7.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 8.

24. *Id.*; *see* Clinton v. Cedar Rapids & the Mo. River R.R., 24 Iowa 455, 475 (1868) ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."); *see also* Ford, *Law's Territory*, *supra* note 13, at 895 (discussing John Dillon's theory of local governments).

25. 207 U.S. 161, 178-79 (1907).

26. Briffault, *Our Localism, supra* note 12, at 10-14. Today, the vast majority of states have home rule statutes or constitutional provisions. *Dillon's Rule or Not?,* NAT'L ASS'N OF CNTYS. (Jan. 2004), http://www.celdf.org/downloads/Home%20Rule%20State%20or%20Dillons%20Rule%20State.pdf.

27. The specific power delegated by states to their local governments is the police

(such as land use regulation)[28] and responsibilities (such as financing education)[29] deemed necessary to implement the ideal of autonomous local self-government.[30] Both state and federal courts have largely sanctioned this wide interpretation of local power. As a result, whatever the "technically limited" powers of local governments and their "formal subservience to the state," home rule has resulted in "real local legal authority."[31] In theory, home rule maximizes democratic values and local autonomy by establishing a similar relationship between state government and local governments as between federal government and state governments.[32] In practice, as discussed below, these ideals are realized for some localities only at the expense of others.[33]

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power, which is "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice." BLACK'S LAW DICTIONARY 1821 (9th ed. 2009). It is carved out (or rather, preserved) by the Tenth Amendment's guarantee that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

28. Briffault, *Our Localism*, *supra* note 12 at 3.

29. *Id.*

30. *See id.* at 16 n.53 ("The core of home rule is the creation and preservation of governmental structures for independent local decision making and political participation."). New Jersey's home rule provisions are representative. *See, e.g.*, Article IV, Section VII, Clause 11 of the New Jersey Constitution:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

The Home Rule Act of 1917, N.J. STAT. ANN. 40:42-4 (West 1991) similarly guarantees:

> In construing the provisions of this subtitle, all courts shall construe the same most favorably to municipalities, it being the intention to give all municipalities to which this subtitle applies the fullest and most complete powers possible over the internal affairs of such municipalities for local self-government.

31. Briffault, *Our Localism*, *supra* note 12 at 3, 15; *see* Ford, *Law's Territory*, *supra* note 13, at 852 n.20 ("A sharp distinction between sovereign and subordinate jurisdictions is . . . misleading . . . . [D]espite their formally subordinate status, a common conception of American local governments is that of 'imperium in imperio': a sovereignty within a sovereign.").

32. Home rule has traditionally understood a given locality to be *imperium in imperio*—a state within a state. Richard Thompson Ford, *The Boundaries of Race*, 107 HARV. L. REV. 1843, 1865 n.52. (1994) [hereinafter Ford, *The Boundaries of Race*]. Home rule now functions loosely as a reflection of the Tenth Amendment, which "grant[s] to the locality all powers not specifically denied by the state legislature." *Id.* As discussed in Part I(C) *infra*, the analogy is not perfect, and it need not be, to demonstrate the presence of a federalism-within-federalism in practice.

33. *See infra* Part II(B); *see also* Ford, *Law's Territory*, *supra* note 13, at 909 ("A subordinate group may insist that it only wishes to attain the type of 'autonomy' that

2. The Ideology of Localism

Localism[34] is the primary public policy justification for home rule. Taken broadly, it is an embodiment of the fundamental tension between individuals and society that lies at the heart of American political culture.[35] An early American attitude towards public education, for instance—that it was the province of "parents, church, and charity,"[36] not of government—is echoed in the more modern assertion that local government should be "primarily centered on the affirmation of private values,"[37] not furtherance of the public interest. In 1937, the Educational Policies Commission described one aspect of this fundamental tension as a

> [Jacksonian] reaction against the cultural outlook of Washington, Madison, Jefferson, and John Quincy Adams . . . [which] culminated in a conception that America was not a nation at all, but an aggregation of sovereign states, . . . [each] which could legally withdraw from the Union at its pleasure. . . . [S]tress was laid on individual liberty in economy, individual equality in democracy, and individual rights against society. This reaction . . . meant a dispersion of energies, not a concentration such as had carried through the Revolution against Great Britain, the establishment of the Constitution, and the formulation of economic and social policies on a national scale.[38]

Localism posits, and home rule perfects, the idea that local governments should have similar rights against the state as the states constitutionally possess against the federal government. Just as the adherents of Jackson's vision of federalism embraced a "dispersion of energies,"[39] localism "tend[s] not to build up public life, but rather contribute[s] to the pervasive privatism that is the hallmark of contemporary American politics."[40] These attitudes are not perfectly

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members of the majority enjoy. But the position of security that the dominant group enjoys requires the subjugation of a subordinate group. No group can entirely control its own fate without also controlling other groups around it. The coveted position in question is not autonomy, but *hegemony*—a position that, by definition, everyone cannot occupy. Autonomy is a false promise because it promises access to a *space outside of power*, a safe haven from the threat of subjugation, control or influence by outsiders. Such a space does not exist.").

34. Localism may have an acquired pejorative connotation. I do not invoke such a connotation here, and intend localism to be synonymous with "local control," or "local sovereignty."

35. *See* DAWSON HALES, FEDERAL CONTROL OF PUBLIC EDUCATION: A CRITICAL APPRAISAL 20-21 (1954).

36. *Id.* at 21.

37. Briffault, *Our Localism*, *supra* note 12, at 1.

38. HALES, *supra* note 35, at 20-21.

39. *Id.* at 20.

40. Briffault, *Our Localism*, *supra* note 12, at 1-2.

analogous, of course, but the comparison can fairly be made.[41] More "an obstacle to achieving social justice and the development of public life than a prescription for their attainment,"[42] localism is the proof that the popular mantra 'all politics is local' still retains an element of truth.

There are many arguments for localism as it is embodied in home rule. The three strongest are that localism fosters efficiency, facilitates local democracy, and inculcates a strong sense of community.[43] First, localism fosters efficiency because it allows local policies to be tailored to local needs and preferences, enables individuals to choose communities that fit their preferences by 'voting with their feet,' and maintains a marketplace of governments which forces each to compete with the others to provide the most services at the lowest cost.[44]Second, localism facilitates democracy by providing a sense of ownership and pride in local political life that qualitatively results in more passionate civic engagement and quantitatively provides more political power per capita due to power being distributed over a smaller population of voters.[45] Finally, localism inculcates a sense of organic commonality, including "a distinctive history, identifiable characteristics, and a unique identity,"[46] that weds geography to political authority, increases potential for the homogenization of preferences (resulting in a more harmonious social interactions), and contributes to the creation of a vibrant public sphere.[47] In the aggregate, these three principles champion 'autonomy' as the supreme

41. *See infra* note 81 and accompanying text. *But see* Gerald Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763, 1796 (2002) [hereinafter Frug, *Beyond Regional Government*] ("The United States Supreme court has rejected 'the federal analogy' for state and local governments because '[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions.'") (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)). As a matter of strict constitutional law, this is conceded. But, as with the formal preeminence of Dillon's Rule in the wake of the widespread adoption of home rule, as a *practical* matter, local governments wield significant delegated authority and possess real autonomy.

42. Briffault, *Our Localism*, *supra* note 12, at 2.

43. Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 15-17 (2000) [hereinafter Briffault, *Localism and Regionalism*].

44. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1124-25 (1996) [hereinafter Briffault, *The Local Government Boundary Problem*].

45. *Id.* at 1123-24.

46. *Id.* at 1126-28.

47. The argument for community has built within it the implication that such localism results in communities that are essentially suburban in character. *See* ROBERT FISHMAN, BOURGEOIS UTOPIAS, THE RISE AND FALL OF SUBURBIA x (1987) ("[Suburbs] express a complex and compelling vision of the modern family freed from the corruption of the city, restored to harmony with nature, endowed with wealth and independence yet protected by a close-knit, stable community.").

civic virtue to which all American communities should aspire, and the principle by which all American society should be organized.

The problem with these arguments for localism is that they are aspirational, not empirical, descriptions of modern community dynamics. The argument from efficiency has two central flaws. First, efficiency requires, as Charles Tiebout observed, that the costs and effects of local actions remain wholly internal to the locality.[48] Yet local choices often have negative economic and ecological effects on other communities in their region.[49] In the past, when individual communities were often separated by expanses of unincorporated land and the policies enacted by those communities would not have occasion to conflict, such a claim may have had some basis in fact.[50] Today, however, many Americans live in metropolitan regions in which *there is virtually no more unincorporated land*.[51] Communities directly abut each other, and choices that are ostensibly local in character "are sure to generate externalities."[52] These negative inter-jurisdictional effects, also referred to as "spillovers,"[53] indicate that few, if any, local policies are truly as efficient as they are made out to be.

Second, the efficiency promised by local control is an empty platitude in light of local fiscal realities. Disparities in tax bases and spending power among localities do not result solely from local preferences, but instead reflect patterns of residential and commercial land use, access to transportation, and concentrations of poverty that

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48. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416-24 (1956).

49. Briffault, *Localism and Regionalism*, *supra* note 43, at 9 ("Although an individual locality is unlikely to be able to affect the regional housing market, local land use controls can have a ripple effect across the region. When one locality acts to exclude lower-cost housing, its neighbors may feel compelled to adopt comparable regulations to protect themselves from the growth they fear will be diverted to them by the initial locality's regulation. As a result, exclusionary zoning can spread throughout a metropolitan area, driving up the cost of housing and denying less affluent people the opportunity to live in large numbers of communities within the region.").

50. *See id*. at 18.

51. *See id.* In most places, the land that is available is almost always on the periphery of the metropolis, furthest from the central city. There certainly are states and regions that contain considerably unincorporated land, but those places are not where almost everyone lives. They are, generally speaking, not places to escape to. *See id*.

52. *Id.* More tangible externalities such as traffic and pollution, while also prevalent, are ancillary to more direct fiscal decisions. For instance, the decision of where to build an office park can have a profound impact on where the traffic headed to that office park ends up on a daily basis. *See* Briffault, *The Local Government Boundary Problem*, *supra* note 44, at 1135. The most potent externality, however, is fragmentation itself. By dividing into separate jurisdictions, affluent municipalities can separate their property tax base from other, typically less affluent municipalities in the region. *Id.* at 1136-37. This itself results in the externalization of social and economic burdens, though no express act appears to take place. *See id*.

53 Briffault*, Localism and Regionalism*, *supra* note 43, at 18-19.

are wholly independent from (and in many cases antithetical to) the preferences of residents.[54] Disparities in individual and family affluence limit inter-local mobility, a precondition for choosing a community most aligned with ones preferences.[55] Inter-local mobility is similarly inhibited by zoning and land use policies that drive up the cost of housing and preclude less affluent people from choosing to live in areas they simply cannot afford.[56] Autonomy has a price. By quarantining wealth and balkanizing regional tax bases, fragmented structures of local governance ensure that poor residents "will have fewer choices, not more."[57]

The argument from democracy is also undermined by two criticisms. First, the externalities created by local decisions often have negative impacts on individuals who have no meaningful opportunity to dispute the decision made.[58] Zoning, in particular, implicitly regulates people both within and without the deciding locality's boundaries.[59] Such subjugation to regional constraints, in the absence of meaningful regional representation, is inherently undemocratic. Second, despite the fear that "democracy becomes more attenuated"[60] with increased distance, the small size of most localities actually prohibits communities from adequately addressing issues of critical local significance, such as "sprawl, the adequacy of local tax bases to local service needs, and economic development," not to mention ecological concerns arising from shared resources.[61] As a result, the democracy argument actually supports the case for some form of regionalism.[62] Indeed, local fiscal autonomy, which is profoundly unequal among local jurisdictions,

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54. *See id.* at 19.

55. *Id.* at 18-19.

56. *Id.*

57. *Id.* at 19.

58. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 69 (1978). ("A city's decisions inescapably affect individuals living immediately outside its borders. The granting of building permits for high rise apartments, industrial plants, and the like on the city's fringe unavoidably contributes to problems of traffic congestion, school districting, and law enforcement immediately outside the city. A rate change in the city's sales or ad valorem tax could well have a significant impact on retailers and property values in areas bordering the city . . . . Indeed, the indirect extraterritorial effects of many purely internal municipal actions could conceivably have a heavier impact on surrounding environs than the direct regulation contemplated by [the statutes in question]. Yet no one would suggest that nonresidents likely to be affected by this sort of municipal action have a constitutional right to participate in the political processes bringing it about.").

59. *See* Briffault, *Localism and Regionalism*, *supra* note 43, at 8-9.

60. Christopher J. Tyson, *Localism and Involuntary Annexation: Reconsidering Approaches to New Regionalism*, 87 TUL. L. REV. 297, 328 (2012).

61. Briffault, *Localism and Regionalism*, *supra* note 43, at 20-21.

62. *Id.* at 22.

> may fuel further class segregation, as residents of more affluent communities seek to escape sharing in the tax burdens of the poor . . . . In a setting of interlocal and interpersonal wealth inequalities, not only does the value of local autonomy turn on the wealth of the locality, but such autonomy often tends to exacerbate the disparities between rich and poor . . . . Local residents seek to use local powers to insulate their parochial interests from broader regional concerns.[63]

The argument for community is often the least explicitly articulated, but most earnestly believed, by advocates for local control. Again, there are two dominant criticisms. First, much of the romance of cultural commonality alleged to flourish in small, independent communities is undermined by the realities of urban sprawl and automobile dependency.[64] Many towns lack a legitimate town center, and the opportunities for meaningful civic interaction are greatly diminished by the relative rarity of face-to-face interactions among residents. Second, many localities cannot provide for all of their residents' social and economic needs. Residents must frequently "live, work, shop, and go to school in different localities"[65]—a fact which undermines the sentiment that the municipality of one's residence is strongly linked to one's local identity. This is not to deny, of course, the existence of organic, undivided, like-minded groups of people. It is only to dispute that the feelings of commonality exhibited by these communities are necessarily related to the legal boundaries that circumscribe them.

In short, the three dominant arguments for localism are not only internally inconsistent, but antithetical to the ideals they espouse. Localism is an ideological tool, not a uniformly applicable means of local empowerment. Rather than enhance efficiency, maximize democratic influence, or nurture community self-determination, home rule simply "reflects territorial economic and social inequalities and reinforces them with political power."[66] Rather than "strengthen local interests against the state," localism serves to "insulate one set of local people or interests from the regulatory authority and population of [other] local government[s]."[67] The ideology of localism, reified as home rule, is therefore fundamentally inconsistent with basic principles of regional equity.[68] The modern state-local relationship must be restructured to account for these basic truths.[69]

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63. Briffault, *Our Localism*, *supra* note 12, at 5-6.

64. Carrie Daniel, Note, *Land Use Planning—The Twin Cities Metropolitan Council: Novel Initiative, Futile Effort*, 27 WM. MITCHELL L. REV. 1941, 1945 (2001).

65. Briffault, *Localism and Regionalism*, *supra* note 43, at 23.

66. Briffault, *Our Localism*, *supra* note 12, at 1.

67. *Id.* at 84.

68. *Id.* at 25-26.

69. *See infra* Part III(B)(1) (reviewing traditional regional approaches to reforming

B. Fragmentation, Federalism, and the Normative Mechanics of Local Boundaries

This section will establish a basic philosophical and doctrinal foundation for understanding why the unrestrained exercise of local power within a fragmented system of governance constitutes an inescapably normative enterprise. The purposes for going to this level of abstraction are threefold. First, to demonstrate that the inequities and normative tensions prevalent in the interlocal context are not endogenous to that context, but rather that they originate from more general principles of territorial jurisdiction. Second, utilizing these general principles, to frame the relationship between local governments and the state as a loose analogue to that of states and the federal government (a "federalism-within-federalism"). Third, to demonstrate that this federalism-within-federalism, characterized by broad delegation of state power to local governments, operates as a subterfuge by which the provision of "public security, order, health, morality, and justice"[70] is given the appearance of equitable distribution.

1. Principles of Territorial Jurisdiction

The concept of territorial jurisdiction[71] forms the philosophical foundation of localism and the justification for home rule. At the highest levels of conceptual abstraction, territorial jurisdiction may be defined as the basic "architecture of government,"[72] which "reduce[s] space to an empty vessel for governmental power."[73] It is a "spatial structure and . . . 'governmental technique'"[74] that "establishes a form of status identity"[75] and constitutes "a foundational technology of political liberalism."[76] More concretely, territorial jurisdictions possess three primary attributes. First, they are defined in terms of *physical* space; they are not defined by subject matter or by any other metric.[77] Second, they are "definitely bounded."[78] Third, they are "abstractly

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the modern state-local relationship). *See generally infra* Part III (discussing the restructuring of modern state-local relationships).

70. BLACK'S LAW DICTIONARY, *supra* note 27, at 1821.

71. *See generally* Ford, *Law's Territory*, *supra* note 13. Professor Ford's monograph is unique in its treatment of jurisdiction, and provides a philosophical foundation for understanding jurisdiction that cannot be found elsewhere. It will therefore be necessary to draw somewhat extensively from his work.

72. *Id.* at 846.

73. *Id.* at 854.

74. *Id.* at 846 (quoting Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 72 (1978)).

75. *Id.*

76. *Id.* at 897.

77. *Id.* at 852.

78. *Id.*

and homogeneously conceived,"[79] which causes them to "present social and political relationships as impersonal," even irrelevant, in the eyes of the sovereign.[80]

Beyond these basic principles, however, the use of territorial jurisdictions becomes a paradoxical, dichotomous, and rhetorical exercise. The jurisdictional boundaries that bracket much of public life are ultimately "a legal paradox because they are both absolutely compelling and hopelessly arbitrary."[81] A given territorial jurisdiction's "organic" (compelling) or "synthetic" (arbitrary) character,[82] rather than being a natural fact or immutable attribute of socially engineered space, is subjectively determined by the interests of whoever is empowered to do the characterizing.

It is this dialectical property of territorial jurisdiction, however, that makes it such a powerful tool for the social engineering of space. Through this dialectic, the legal boundaries that delineate territorial jurisdictions can operate as bulwarks of wealth, or as walls of disenfranchisement,[83] depending on the socioeconomic or ideological composition of the jurisdictions in question.[84] Thus, in a federal system, socioeconomic conflicts of interest are institutionalized through a decentralized framework of fragmented territorial jurisdictions. Such a system will, by design, thwart redistributive schemes by keeping those interested in carrying out such schemes politically divided and unable to assemble the full force of their

79. *Id.* at 853.

80. *Id.*

81. *Id.* at 850.

82. *See id.* at 859-61. Whereas "[o]rganic jurisdictions are the natural outgrowth of circumstances, conditions and principles that, morally, preexist the state" and "are defended against attack in terms of autonomy, self-determination and cultural preservation," "[s]ynthetic jurisdictions exist for the convenience of the institutions they serve" and constitute a "fungible" territory inhabited by "rational profit maximizers and technocratic modern citizens" which has "no moral relevance" to the state or to any other local jurisdiction. *Id.* One can feel the inherent tension between localism and regionalism in this dichotomy. Whereas "[t]he deployment of the organic jurisdiction corresponds with *the production of the local*," "[t]he synthetic mode tends to devalue claims of incommensurability and uniqueness in favor of fungibility and market exchange." *Id.* at 862.

83. *See id.* at 922 ("Jurisdictional boundaries help to promote and legitimate social injustice, illegitimate hierarchy and economic inequality.").

84. *See id.* at 848 ("Why do we have separate local governments, defining city and suburb, rich and poor, racial and religious communities? . . . . [M]any people think that these jurisdictions define political groups or communities that have some moral weight. If territorial groups do have moral weight, sometimes we must restrict the franchise to such a select group. In fact, the word 'sometimes' is misplaced. We *always* restrict the franchise to a select group; the question is how such a group is defined. The institution of jurisdiction is one significant mechanism for defining the boundaries of the political community and hence the limits of the [political] franchise.").

strength.[85] While in principle this interest-isolating function of federalism applies equally to all factions regardless of their particular views, in practice it provides a justification for the status quo and entrenches stratified differences in power already present among socioeconomic classes.

Territorial jurisdiction is, in other words, the formal recognition of difference. It is how the law makes basic distinctions among places and the people who inhabit them, and creates walls of wealth and status.[86] The distinctions created by local jurisdictions, in particular, thus pose "a vexing problem for normative democratic theory" because, even assuming the primacy of majority rule, there is no way to "define the limits of the community within which a majority will rule" except by appealing to an explicitly and artificially abbreviated section of the public sphere.[87] In this way, especially at the local level, territorial jurisdiction perpetuates socioeconomic and political inequalities by consolidating the power of certain interests and dividing the power of others.

2. The Federalism-Within-Federalism

These insights on the power of territorial jurisdiction are not new. Indeed, the tool of territorial jurisdiction lies at the heart of the American federal republic.[88] In the Federalist No. 10, James Madison observes that "the most common and durable source of factions has been the various and unequal distribution of property."[89] The "great object" of federalism is "[t]o secure the public good and private rights against the danger of such a [tyrannous] faction, and at the same time to preserve the spirit and the form of popular government."[90] This is to be accomplished by rendering majorities, "by their number and local situation, unable to concert and carry into effect schemes of oppression" on a scale wider than the jurisdiction to which their direct

85. *See infra* Part I(B)(2) (discussing the Federalist Papers).

86. *See* Ford*, Law's Territory, supra* note 13, at 844 ("The jurisdictional boundary does more than separate territory; it also separates types of people: native from foreign, urbanites from country folk, citizen from alien, slave from free.").

87. *Id.* at 847.

88. *See* THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 2003) ("A rage for paper money, for an abolition of debts, *for an equal division of property,* or for any other improper or wicked project, will be less apt to pervade the whole body of the Union than a particular member of it, in the same proportion as such a malady is *more likely to taint a particular county or district than an entire State*") (emphasis added). *See also* THE FEDERALIST NO. 51, at 320-21 (James Madison) (Clinton Rossiter ed., 2003) ("If a majority be united by a common interest, the rights of the minority will be insecure . . . . [*T]he society itself will be broken into so many parts, interests, and classes of citizens*, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.") (emphasis added).

89. THE FEDERALIST NO. 10, *supra* note 88, at 74.

90. *Id.* at 75.

democratic influence is confined.[91]

Indeed, with regard to the utility of federal governance as a means for preserving and insulating minority interests, Madison is overwhelmingly clear. In Federalist 10, he contends:

> The influence of factious leaders may kindle a flame within their particular States but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, *will be less apt to pervade the whole body of the Union than a particular member of it*, in the same proportion as such a malady is more likely to taint *a particular county or district than an entire State*.[92]

In Federalist 51, he magnifies this contention:

> If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: the one by creating a will in the community independent of the majority—that is, of the society itself; the other, by comprehending in the society *so many separate descriptions of citizens* as will render an unjust combination of a majority of the whole very improbable, if not impracticable . . . . [T]he society itself will be *broken into so many parts, interests and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority*.[93]

At the national level, these fragmenting and decentralizing aspects of federalism provided for the unification of disparate political cultures within the centralizing force of industrial capitalism.[94] At the state-local level, however, those same principles of fragmentation and decentralization create a sea of shadow governments—a federalism-within-federalism[95]—which our federal system is not historically designed to accommodate.[96]

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91. *Id.* at 75.

92. *Id.* at 79 (emphasis added).

93. THE FEDERALIST NO. 51, *supra* note 88, at 320-321 (emphasis added).

94. *See* Ford, *Law's Territory*, *supra* note 13, at 890.

95. *See* Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 964 (20010) ("[Local governments are] a separate tier of American federalism—like mini-polities with independent legitimacy . . . ."); *see also* Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 101 n.29 (2003) ("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.") [hereinafter Reynolds, *Intergovernmental Cooperation*].

96. *See* Reynolds, *Intergovernmental Cooperation*, *supra* note 95, at 101 n.29 ("The debate over whether decentralized, independent local government units are preferable

It is through this shift in geographic scope that the arguments for federalism come to support the argument for localism.[97] The deleterious effects of one municipality's internal regulatory decisions on other municipalities, for example, can be likened to the deleterious effects of one state's internal regulatory decisions on other states. While the effects of the latter circumstance are governed and limited by the (dormant) Commerce Clause's prohibition on protectionist policies that unduly burden interstate commerce,[98] the former is governed by no equivalent doctrine. At the state level, there is virtually no attempt to regulate the conduct of individual municipalities whose actions (through, for instance, exclusionary zoning) burden businesses, governments, or residents of other municipalities. In this way, state-local "federalism" does not function like federal-state federalism at all. It functions as its foil, often serving to sabotage, rather than facilitate, the implementation of statewide norms.[99]

Local zoning decisions, for instance, can have the cumulative effect of eviscerating a central city's tax base, centralizing low cost housing in undesirable areas, and ultimately concentrating poor minorities in jurisdictions other than the one exercising regulatory authority.[100] In this way, the concentration of poverty in urban centers and inner suburbs becomes a natural consequence of autonomous local decisionmaking, and can take place without overtly discriminatory action by any one locality.[101] Thus, where federalism promotes unity among racially and economically diverse states, the federalism-within-federalism tends to promote disunity among racially and economically diverse municipalities.[102]

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to centralized, higher level government units was left unresolved at the founding of the nation . . . . [T]he Constitution makes no mention of local governments, their creation, or their status . . . .").

97. *See* Richard Briffault, "*What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1315 (1994) [hereinafter Briffault, *What About the 'Ism'*].

98. *See*, *e.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 141-43 (1970).

99. *See infra* Part II(B).

100. *See, e.g.*, Janai S. Nelson, *Residential Zoning Regulations and the Perpetuation of Apartheid*, 43 UCLA L. REV. 1689, 1693-1708 (1996).

101. *See* Briffault, *Our Localism*, *supra* note 12, at 81 ("Each jurisdiction may decide based on its own perception of its self-interest, without considering the interest of the region as a whole.").

102. *See* Tyson, *supra* note 60, at 323. Local fragmentation serves "to operationalize and reinforce a social order organized around race and economic class," not to create a system of normative and economic pluralism which will serve the common good. *Id.* at 329. The laws supporting localism are "one of the many, seemingly neutral, legal regimes that ultimately reinforce geographic segregation and the maldistribution of income, wealth, and resources within metropolitan regions." *Id.* at 331. The result is a classism and racism that tacitly caters to the interests of those already in power. *Id.* at 331-32.

3. The Evasion of the Social Contract

In the local context, the principles that govern the normative mechanics of jurisdictional boundaries are brought into their sharpest focus. As with jurisdictional fragmentation generally, local jurisdictional fragmentation tends to "insulate one set of local people or interests from the regulatory authority and population of another local government."[103] Indeed, the widespread delegation of state power causes "[p]ublic goods [to be] increasingly . . . transferred into private hands,"[104] and local control to become a proxy for private control. Wealthy local governments (municipal *corporations*) acting within a fragmented jurisdictional framework and possessing substantial delegated power, can in some circumstances function more like private firms[105] or even country clubs,[106] than governmental institutions designed to serve the public interest.[107]

The need to fund local government, education, and public safety employees with property tax revenue, creates a strong incentive for wealthy residents of a municipality to keep their property wealth and the tax revenue it generates within the borders of their small slice of the State.[108] A foreseeable consequence of this incentive structure is that a given municipality's access to taxable property wealth often fails to comport with the educational, infrastructural, or other fiscal needs of its population.[109]

Such a state of affairs presents a prototypical "free-rider problem,"[110] and constitutes an evasion of the social contract in a very tangible sense. Self-containment from regional social and economic

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103. Briffault, *Our Localism*, *supra* note 12, at 84.

104. Tyson, *supra* note 60, at 337.

105. Briffault, *The Local Government Boundary Problem*, *supra* note 44, at 1131 ("[O]ur legal system has long emphasized two . . . attributes of local governments: their role as quasi-firms providing proprietary services . . . and their formal legal status as arms of the state.").

106. Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 29-30 (1998) [hereinafter Frug, *City Services*]; *see also* Rusk, *supra* note 14, at 43 n.62 (characterizing two extremely wealthy municipalities that incorporated solely to avoid the surrounding township's blue laws as "private golf clubs," and therefore "not . . . real places").

107. The same phenomenon can be observed with respect to the jurisdictional construction of racially segregated, and not just economically segregated, space. *See* Ford, *The Boundaries of Race*, *supra* note 32, at 1846 ("Because private as well as public institutions create and maintain racially identified spaces, and because both do so through the coercive power of government, it is impossible to segregate the 'public' inputs, or state action, from the 'private,' or non-governmental, factors.").

108. *See* Parlow, *supra* note 7, at 60-61.

109. Briffault, *Our Localism*, *supra* note 12, at 20-21 ("Typically, the magnitude of local needs is totally unrelated to the extent of local resources.").

110. *See* Cashin, *supra* note 7, at 1990; *see also* Briffault, *Our Localism*, *supra* note 12, at 50-52.

burdens allows for the "institutionalization" [111] of political, economic, and cultural power by the "favored quarter"—the "high-growth, developing suburbs that typically represent about a quarter of the entire regional population" but that also attract a disproportionately high amount of public investment, and, through "local powers . . . avoid taking on any of the region's social service burdens."[112] By exercising delegated police powers such as zoning and taxation, affluent communities are able to "export" the costs of sprawling suburban development (such as environmental stress, wasted public infrastructure, and the concentration of poverty and crime that comes as a necessary consequence of excluding the poor) to those communities unable to leverage their property wealth to counteract this effect or defend their own interests.[113] Jurisdictional fragmentation at the local level is therefore "not only a barrier to effective growth management, but also a leading cause of social separation, sprawl, and fiscal disparities"[114] among the parties to the "contract." The structure of local governance thus serves primarily to allow the residents of a subset of municipalities to tax themselves for their own benefit, to escape the social burdens of those less fortunate than themselves, and to insulate their wealth from the wider needs of the society of which they are—or ought to be—an integral part.[115]

PART II: FEDERAL STATE-LOCAL JURISPRUDENCE

A. Localism Defended: Warth, Rodriguez, Milliken

There is a mass of case law that has shaped the nuances of federal local government jurisprudence. It cannot all be covered here, and it need not be.[116] Instead, this section conducts a targeted inquiry into a trio of landmark cases decided by the Berger Court in the 1970s—*Warth v. Seldin,*[117] *San Antonio v. Rodriguez,*[118] and *Milliken v.*

111. *See* Cashin, *supra* note 7, at 2022-27.

112. *Id.* at 1987.

113. *Id.* at 2012-13.

114. ORFIELD, *supra* note 15, at 130; *see also* Ford, *Law's Territory*, *supra* note 13, at 902 ("Private social groups used jurisdiction in order to maintain status hierarchies based on race and national origin, and because the groups were not a part of a formal state apparatus, the practices were defended as free association and the exercise of the right of contract . . . . Private actors supplied the content that would have been constitutionally impermissible if developed by the state, while the state supplied the coercive force of law, unavailable to private individuals.").

115. *See* Tyson, *supra* note 60, at 328-32.

116. For far more comprehensive analyses of relevant case law, see generally Briffault, *Our Localism*, *supra* note 12 (discussing the mistaken assumption that American local governments lack power); *see also* Ford, *Law's Territory*, *supra* note 13 (discussing the relative modernity of territorial jurisdictions).

117. 422 U.S. 490 (1975).

118. 411 U.S. 1 (1973).

Bradley[119]—to illustrate the Supreme Court's unwillingness to recognize local interjurisdictional harms. The legal tensions in this triage of cases provide necessary background for understanding the regionalist responses surveyed in Part III(B). Importantly, discussion of state precedent, some of which differs profoundly from federal precedent, is omitted in the interest of maintaining the sharpest possible focus on the constitutional status of local government in relation to the state.

1. *Warth v. Seldin*

In *Warth*, a diverse group of individuals and organizations residing in Rochester claimed that they were precluded from living in Penfield, a nearby suburb, as a result of the latter's exclusionary zoning ordinance.[120] Because the vast majority of Penfield was zoned for single-family housing on large lots, the plaintiffs alleged that low and moderate income people were effectively barred from living within its boundaries.[121] The Court was skeptical of the causal nexus used to substantiate plaintiff's' particularized injury, however, and dismissed plaintiffs' claims for lack of standing.[122]

The Court's preoccupation with causality was not without good reason. There is an obvious causal problem if Rochester and Penfield were considered to be the entirety of the relevant jurisdictional universe. After all, Rochester was certainly not *solely* responsible for diminishing Penfield's relative affluence or its residents' means of residential mobility. The type of harm alleged necessarily relies on the aggregated effects of exclusionary local zoning ordinances throughout the Rochester metropolitan area.[123] According to the Court, the residents of Rochester were put in 'check' by the collective exclusion of the more advantageously situated suburbs around it—a few kings caught in the crosshairs of more affluent bishops and rooks.[124] Thus, the Court reasoned that the Rochester plaintiffs' inability to live in Penfield was necessarily (and, the Court implies, predominantly) due to forces outside of Penfield's control:

> [T]he record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. Indeed, petitioners' descriptions of their individual financial situations and housing needs suggest precisely the contrary—that their inability to reside in Penfield is the consequence of the

119. 418 U.S. 717 (1974).
120. *Warth*, 422 U.S. at 494-95.
121. *Id.* at 495.
122. *Id.* at 517-18.
123. *See id.* at 496.
124. *See id.* at 505-07.

> economics of the area housing market, rather than of respondents' assertedly illegal acts. In short, the facts alleged fail to support an *actionable causal relationship* between Penfield's zoning practices and petitioners' asserted injury.[125]

A harm framed in this way cannot easily satisfy the case or controversy requirement of Article III.[126] And even if it could, the Court acknowledged that fashioning an appropriate remedy would necessitate judicial intervention far beyond the single jurisdiction of Penfield.[127] This is not to say that the Court was correct in its decision to affirm the lower court's dismissal for lack of standing; it is simply to say that the affirmance makes sense in light of the majority's decision to frame the plaintiffs' claims as a tale of two independent, autonomous cities, and not a network of economically interconnected jurisdictions that ultimately depend for their existence on the state.

Along with *Village of Arlington Heights v. Metropolitan Housing Corp.*[128] and *Village of Euclid v. Amber Realty Co.*,[129] *Warth* provides a veritable "localist manual" for using local jurisdictional boundaries for exclusionary purposes.[130] In addition to rejecting claims based on economic discrimination (a sentiment which would be echoed in *Rodriguez*), the Court's decision to affirm the district court's dismissal for lack of standing effectively "worked the . . . procedural equivalent of the zoning ordinance's purpose: It defined and excluded outsiders and denied any regional responsibility a suburb might have for their housing needs."[131] Further, though the Court rightly identified that the Rochester plaintiffs' inability to live in Penfield was a "*consequence* of the economics of the area housing market,"[132] it failed to identify the zoning laws of towns like Penfield as a sufficient *cause* of those economics.[133]

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125. *Id.* at 506 (emphasis added) (citations omitted).

126. U.S. CONST. art. III, § 2.

127. *See* Warth, 422 U.S. at 500.

128. 429 U.S. 252 (1977).

129. 272 U.S. 365 (1926).

130. David D. Troutt, *Katrina's Window*: *Localism, Resegregation, and Equitable Regionalism*, 55 BUFF. L. REV. 1109, 1150-52 (2008).

131. *Id.* at 1150. In his dissent, Justice Brennan makes precisely this point:

> [T]he Court turns the very success of the allegedly unconstitutional scheme into a barrier to a lawsuit seeking its invalidation. In effect, the Court tells the low income minority and building company plaintiffs they will not be permitted to prove what they have alleged—that they could and would build and live in the town if changes were made in the zoning ordinance and its application—because they have not succeeded in breaching, before the suit was filed, the very barriers which are the subject of the suit.

Warth, 422 U.S. at 523 (Brennan, J., dissenting).

132. *Warth*, 422 U.S. at 506 (emphasis added).

133. As such, it is "the perfect procedural complement to *Belle Terre*, *Arlington Heights* and the other substantive local zoning cases" because, while *Belle Terre* and *Arlington Heights* make it difficult for outsiders to make substantive claims based on

2. *San Antonio v. Rodriguez*

The dispute in *Rodriguez* concerned a challenge to educational funding inequalities caused by disparities in local property wealth. The plaintiffs in *Rodriguez* framed their case around two San Antonio school districts, both in Bexar County: Alamo Heights, which allocated $594 per student; and Edgewood, which allocated only $356.[134] These select inequalities, however, far from being peculiar to Bexar County, were indicative of a far more general trend. For the 1967-68 school year, the ten wealthiest school districts in Texas were able to provide an average of $610 per student, while the four poorest districts were able to provide an average of only $63 per student—a disparity of nearly ten to one.[135] Further, in the early 1970s, virtually every state in the Union had its Edgewoods and its Alamo Heights, many with fiscal and educational disparities even more statistically compelling than those found in San Antonio.[136] The plaintiffs in *Rodriguez* sought to address these local funding inequalities by arguing that they were unconstitutional under the equal protection clause of the 14th amendment.[137]

There were two fundamental constitutional questions at stake in *Rodriguez*. The first question was whether the poor (or at least the residents of poor school districts) constituted a suspect class of individuals whose claim of discrimination would receive strict scrutiny.[138] The second question was whether a fundamental right to education could be found in the United States Constitution.[139] In its 5-4 decision, a majority answered both questions in the negative and, applying a rational basis standard, upheld the constitutionality of Texas's system of public school finance notwithstanding the State's acquiescence in stark inter-district funding disparities.[140]

Writing for the Court, Justice Powell held that disparities which resulted from a system of local funding are simply not "the product of a system that is so irrational as to be invidiously discriminatory."[141] First, echoing *Warth*, he suggested that the class of plaintiffs ("poor" people) allegedly discriminated against was too vague to constitute a suspect class, and that, as a result, the State's delegation of authority

interjurisdictional harm, *Warth* precludes individuals residing in other localities from the possibility of impacting local regulatory decisions outright. Briffault, *Our Localism*, *supra* note 12, at 108.

134. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 12-13 (1973).

135. *Id.* at 74 (Marshall, J., dissenting).

136. *Id.* at 7-8 (Majority opinion).

137. *Id.* at 5-6.

138. *Id.* at 17.

139. *Id.* at 17-18.

140. *Id.* at 29.

141. *Id.* at 50-55.

to its local subdivisions need only survive rational basis review.[142] Second, because the Texas system only produced relative disparities in school funding and not an absolute deprivation of education itself, and because the Court held that there was no fundamental Constitutional right to education, the very relevance of the equal protection clause was in question.[143] Despite Justice Powell's apparent commitment to *Brown*'s admonition that education "is a right which must be made available to all on equal terms," and his agreement with the lower court that "the grave significance of education both to the individual and to our society cannot be doubted," he nonetheless concluded that "the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."[144]

In a vigorous dissent, Justice Marshall disputed the majority's attempt to equivocate away the State's role in sanctioning interdistrict wealth disparities, as well as its decision to deny the status of public education as (at least) a 'functional' or de facto fundamental right.[145] Justice Marshall criticized the majority on the grounds that it

> decide[d], in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside . . . . [T]he majority's holding can only be seen . . . as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens . . . . [T]he right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record.[146]

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142. *Id.* at 50-52.

143. *Id.*

144. *Id.* at 30 (internal quotations omitted); *see also Shofstall v. Hollins*, 110 Ariz. 88, 91 (1973), in which the Arizona supreme court acknowledged "that the citizens of one county shoulder a different tax burden than the citizens of another and also receive varying degrees of governmental service" but, similar to the Court's majority reasoning in *Rodriguez*, could find "no magic in the fact that the school district taxes herein complained of are greater in some districts than others." Despite the open admission of unequal taxation burdens and unequal access to a constitutionally guaranteed service, observable inequality, in and of itself, was not deemed sufficient by the court to establish that children in poorer communities were being denied the equal protection of the laws. Indeed, citing *Rodriguez*, the Arizona court argued that if local taxation is in fact an unconstitutional means of funding public schools, "then it may be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds." *Id.* Neither the Arizona court in *Shoftstall* nor the Supreme Court in *Rodriguez* was willing to establish a precedent that would provide a legal foundation for these analogous, more radical claims.

145. *Rodriguez*, 411 U.S. at 70-133 (Marshall, J., dissenting).

146. *Id.* at 70-71.

Two baseline observations can be made from the majority and minority's disagreement in *Rodriguez*. First, none of the Justices, whether in the majority or minority, disputed the reality of funding inequalities in Texas's schools. Justice Stewart went so far as to say that "[t]he method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust." [147] Second, only the justices in the minority implicated Texas's fragmented structure of educational governance as a reason for the funding disparity between Edgewood and Alamo Heights.[148] Justice Marshall conceded that "as an abstract matter, [local control] constitutes a very substantial state interest," but he also acknowledged that "on this record, it is apparent that the State's purported concern with local control is offered primarily as an *excuse* rather than a *justification* for interdistrict inequality."[149] He continued:

> It ignores reality to suggest . . . that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. . . . Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control.[150]

Although the plaintiffs contended that it was "arbitrary to make educational quality turn on local wealth and 'the fortuitous positioning of the boundary lines of political subdivisions,'"[151] the majority reasoned that "the very existence of identifiable local governmental units . . . requires the establishment of jurisdictional boundaries that are inevitably arbitrary," and, therefore, that "[it] is equally inevitable that some localities are going to be blessed with more taxable assets than others."[152] That the majority would characterize the disparities in wealth among various localities as a "blessing"—as some sort of fortuitous matter of chance, rather than one of controllable civic design—is indicative of its willingness, in Justice Marshall's words, to

147. *Id.* at 59 (Stewart, J., concurring). He added: "it does not follow . . . that this system violates the Constitution of the United States." *Id.*

148. *Id.* at 63-70 (White, J., dissenting); *id.* 126-128 (Marshall, J., dissenting).

149. *Id.* at 126 (Marshall, J., dissenting) (emphasis added).

150. *Id.* at 127-28.

151. Briffault, *Our Localism, supra* note 12, at 99-100 (quoting *Rodriguez*, 411 U.S. at 53).

152. *Rodriguez*, 411 U.S. at 54.

"ignore reality."[153] Still, the majority in *Rodriguez* did at least find the interdistrict school funding disparities to be justiciable. *Rodriguez* thus establishes that a state's right to delegate crucial school funding decisions to its local subdivisions *does* have limits, even if the likelihood of ever triggering those limits under a rational basis test is exceedingly low.[154]

3. *Milliken v. Bradley*

If *Rodriguez* brought the Court's state and local government jurisprudence one step closer to reality, the Court's decision in *Milliken* took it two steps back. In *Milliken*, plaintiffs alleged that the Detroit public school system was racially segregated in violation of the Fourteenth Amendment.[155] In another 5-4 decision, the Court rejected plaintiff's equal protection claim because there was no evidence of *de jure* racial discrimination by Detroit's surrounding suburbs, and any attempt to desegregate Detroit would necessarily compel suburban participation without suburban wrongdoing.[156] Unperturbed by the Sixth Circuit's observation that "hold[ing] that school district boundaries are absolute barriers to a Detroit school desegregation plan . . . would be opening a way to nullify Brown v. Board of Education",[157] the Court declined to "impose a multidistrict, areawide remedy" on what it characterized as "a single-district *de jure* segregation problem"[158] because it did not believe intentional, state-sanctioned discrimination had been substantiated by the record.[159]

The Sixth Circuit's fears were confirmed. As a result of the Court's holding in *Milliken*, "*Brown*'s contemporary relevance [has become] largely symbolic," and, "as effective legal precedent . . . reduced to irrelevance."[160] The Court acknowledged extreme racial segregation between Detroit and its surrounding school districts, but it refused to

153. *Id.* at 94 (Marshall, J., dissenting).

154. As in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), where an allegedly exclusionary zoning ordinance was upheld under rational basis review, Texas's decentralized and fragmented system of school finance, considered to be within the same class of "mere economic and social legislation" reviewable under the rational basis test, could easily be upheld. *See* Briffault, *Our Localism*, *supra* note 12, at 102.

155. Milliken v. Bradley, 418 U.S. 717 (1974).

156. Briffault, *Our Localism*, *supra* note 12, at 94 ("[T]he Supreme Court relied on the formal legal disjuncture of a state from its localities to reject interdistrict busing as a remedy for unconstitutional segregation.").

157. Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973).

158. *Milliken*, 418 U.S. at 721.

159. *See id.* at 756 n.2 ("[The conclusion that] 'Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools' . . . . is simply not substantiated by the record . . . . [S]egregative acts within the city alone cannot be presumed to have produced . . . an increase in the number of Negro students *in the city as a whole*.").

160. Ford, *Law's Territory*, *supra* note 13, at 918.

impose an interdistrict remedy to address, ostensibly, "segregation found to exist in only one district."[161] Justice Burger set out the majority's view of what plaintiffs must prove to justify the imposition of an interdistrict remedy:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation . . . . In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.[162]

There are nuanced problems with this account. First, Justice Burger's characterization of the school districts in question as "separate and autonomous," though a fair characterization of how states regard their school districts and municipalities, is in tension with Dillon's rule[163] and the Court's holding in *Hunter*[164]—that local subdivisions are ultimately creatures, delegates, and agents of the state, whatever the effect of home rule provisions with which states have voluntarily circumscribed their own authority. Further, it is unclear why the requisite constitutional violation must occur "within one district" and "[produce] a significant segregative effect in another district."[165] Why cannot the violation occur as a relationship *between* districts, as a function jurisdictional separation itself? The problem is that the *lines themselves* that divide Detroit's school district from the surrounding suburban districts, and the surrounding suburban districts from each other, are never interrogated. As in *Warth*, the Court's preoccupation with establishing causality and discriminatory intent among the school districts involved is cautious and understandable. But if the State's participation in creating the *district lines themselves* cannot be scrutinized, then Michigan's acquiescence in a racially segregated patchwork of school districts will be impossible to address. In dissent, Justice Douglass questioned the majority's unwillingness to implicate the state of Michigan directly:

> The issue is not whether there should be racial balance but whether the State's use of various devices that end up with black schools and

161. *Milliken*, 418 U.S. at 744.

162. *Id.* at 744-45.

163. Briffault, *Our Localism*, *supra* note 12, at 7.

164. Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

165. *Milliken*, 418 U.S. at 744-45.

> white schools brought the Equal Protection Clause into effect. Given the State's control over the educational system in Michigan, the fact that the black schools are in one district and the white schools are in another is not controlling—either constitutionally or equitably. . . . [S]ince Michigan by one device or another has over the years created black school districts and white school districts, the task of equity is to provide a unitary system for the affected area where, as here, *the State washes its hands of its own creations*.[166]

In effect, by holding that the state, its suburbs, and its school districts "stood on independent legal footings," the majority concluded, in effect, that *no one* could be held responsible for racial segregation in Detroit's schools.[167] Though the majority overtly recognized the presence of segregation in a single district, it concluded that it was powerless to remedy it due to the diffuse, inter-district causation of the harm.[168] Putting aside the most obvious criticism of such a conclusion,[169] the Court held that racial segregation in public schools that arises out of institutional design—that is to say, segregation that occurs as a result of the State's acquiescence in (if not intentional creation of) a certain structure of educational governance, but which is not sanctioned by local school districts as a matter of express local policy—does not trigger an equal protection violation. "At best, [then,] we have a normative principle of compulsory provincialism: minority sub groups can expect favorable treatment only when they accept social isolation and only within the boundaries of 'their' jurisdiction."[170] Such a normative principle is untenable on its face, and must be reconceived if federal state-local jurisprudence is to be brought into alignment with reality.

B. Reconceiving the State-Local Relationship

If the interjurisdictional harm precluded from evaluation in *Warth* and perpetuated in *Rodriguez* and *Milliken* is to be addressed—whether through courts or legislatures—there must be a reconceptualization of the state-local relationship. Because the "social landscape" the Court's jurisprudence relied on was "one of fragmented, even antagonistic quasi-autonomous jurisdictions," any semblance of State responsibility for local actions was absent from the Court's analysis.[171] But by refusing to hold state governments responsible for

166. *Id.* at 761-62 (Douglas, J., dissenting) (emphasis added).

167. Briffault, *Our Localism*, *supra* note 12, at 95.

168. *Milliken*, 418 U.S. at 745.

169. Namely, that "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy." Marbury v. Madison, 5 U.S. 137, 163 (1803) (citation omitted).

170. Ford, *Law's Territory*, *supra* note 13, at 926 (footnote omitted).

171. *Id.* at 920; 926 ("Nowhere in this narrative is it acknowledged that the state is responsible for creating local governments . . . ."); *see also* Richard T. Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV.

local governance, the Court allowed the municipal form to function as a decoy—a way of shielding the state from liability, if not for its acts, then for its omissions—that infringed upon the constitutional rights of its citizens. Thus, after *Rodriguez* and *Milliken*, one may seriously question whether the *Hunter* model of local autonomy—the model which reaffirms Dillon's Rule and conceives of local governments exclusively as creatures, delegates, and agents of the state—is still taken seriously by the Court. Where there is local action, there must be state action.[172] If the soundness of this syllogism is questioned—if the inference is treated by the courts not as necessary, but discretionary—then the very fabric of federalism comes apart at the seams.[173]

PART III: REGIONALIST RESPONSES

A. What is Regionalism?

Before specific regionalist alternatives to the modern state-local status quo are discussed, it is necessary to more thoroughly define what is meant by "regionalism." Although regionalism generally evades precise definition,[174] is may be described as a perspective on law and public policy that recognizes the fundamental interconnectedness (social, political, economic, and environmental) of the cities, suburbs, and other state subdivisions that constitute metropolitan areas, and that seeks to reconcile their conflicts of interest in pursuit of the common good.[175] Three basic observations of

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1365, 1394 n.110 (1995) ("Courts have thus far failed to explain why the delegation of power to local governments is not subject to the same due process review as the delegation of power to subdivisions of larger jurisdictions . . . .").

172. *See* Ford, *The Boundaries of Race*, *supra* note 32, at 1875 n.99 ("We must not forget that, as a federal constitutional matter, local boundaries should not matter at all: for constitutional purposes the policies at issue in both *Milliken* and *Rodriguez* were *state* policies, and the discrimination to be addressed was discrimination on a state-wide level.").

173. *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law,* 1986 WIS. L. REV. 83, 110 (1986) ("[A] central contradiction recurs: if local units such as municipalities and school districts are mere subdivisions of the states, how can their inviolable core of local sovereignty function to limit federal courts' ability to enforce fourteenth amendment mandates on the states? Perhaps the Court senses the severe doctrinal difficulties in *Milliken* and *Rodriguez*, for in neither case is its deference to local autonomy elevated to the level of a formal holding. Instead, in both cases . . . the quasi-constitutional principle of local sovereignty serves to divert attention from the fact that established federalism principles are not available to justify constrictions on the ability of plaintiffs to recover under the fourteenth amendment.").

174. *See* Ashira Pelman Ostrow, *Emerging Counties? Prospects for Regional Governance in the Wake of Municipal Dissolution*, 122 YALE L.J. ONLINE 187, 189 n.11 (2013).

175. Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 489-502 (2007) (describing the ideological and practical aspects of regionalism)

its contours can be made. First, regionalism recognizes real, interconnected, economic and political units—whatever their size, and whatever legal boundaries they cross—as holding a place of analytic primacy in social, political, and economic discourse.[176] Regionalism consequently has a naturalizing effect on this discourse, because it evokes a metaphor of ecological interconnectedness, framed in the language of equity and efficiency, which it applies to the city-suburb relationship.[177] Second, regionalism regards the twin goals of equity and efficiency as being mutually reinforcing, not mutually exclusive.[178] Because both social and economic inequities fall within its purview, regional principles can be brought to bear on a wide range of subject matters, from watershed management[179] and the reallocation of public resources within metropolitan areas[180] to the structural, post-racial causes of racial segregation.[181] Finally, though regionalism is traditionally concerned with urban issues generally and the decline of central cities specifically,[182] it has since grown to encompass the complex economic, social, political, and fundamentally spatial interests of "at-risk suburbs," "bedroom-developing suburbs," "affluent job centers," and every other metropolitan layer in between.[183] Regionalism, in other words, observes that affluence and opportunity are properties of socially engineered space.

As an empirical matter, regionalism simply provides the most accurate description of metropolitan demographic trends in the 21st century. America's residential demographics have changed dramatically in recent decades.[184] In 1950, 60% of the population within the nation's 168 metropolitan areas fell within the jurisdiction of 193 local governments.[185] In 1990, 70% of the population living in metropolitan areas fell within the boundaries of "9,600 suburban

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[hereinafter Reynolds, *Local Governments*].

176. *See* Briffault, *Localism and Regionalism*, *supra* note 43, at 3-6.

177. *See* Ostrow, *supra* note 174, at 189-90.

178. *See id.*

179. *See generally* J.B. Ruhl, Christopher Lant, Tim Loftus, Stephen Kraft, Jane Adams & Leslie Duram, *Proposal for a Model State Watershed Management Act*, 33 ENVTL. L. 929 (2003).

180. *See* Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 56 FLA. L. REV. 373, 374 (2004) [hereinafter Reynolds, *Taxes*].

181. Ford, *The Boundaries of Race*, *supra* note 32, at 1844-45.

182. Reynolds, *Intergovernmental Cooperation*, *supra* note 95, at 100-01 (2003).

183. ORFIELD, *supra* note 15, at 2-3. *See generally* LINCOLN INST. OF LAND POLICY, URBAN-SUBURBAN INTERDEPENDENCIES (Rosalind Greenstein & Wim Wiewel eds., 2002).

184. *See* Troutt, *supra* note 130, at 1164.

185. *Id.* at 1163-64 (citing DAVID RUSK, INSIDE GAME OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA 66-67 (1999)).

municipalities, towns, villages, townships, and counties."[186] Today, more than 80% of Americans live within one of 300 metropolitan areas, with nearly half of the entire population living in the largest 25 regions,[187] all of which "consist of central cities, suburban fringes, edge cities, and rural areas undergoing development."[188]

As a normative matter, regionalism attempts to bring our legal precepts into alignment with the social and economic relationships they govern.[189] It combats localism and the fragmented metropolis it perpetuates by pursuing interjurisdictional reforms that recognize metropolitan areas as the "real economic, social, and ecological unit[s]"[190] they are. It advocates for a wider conception of community that transcends local boundaries and more equitably distributes socioeconomic benefits and burdens throughout the region.[191] Regionalism is not a panacea for every species of interjurisdictional harm. But regionalism does provide a framework and methodology—a way of thinking about social and economic inequality as a property of legally and politically engineered space—that can transcend jealous parochialism and overcome dogmatic conceptions of the state-local relationship.

B. Dominant Institutional Approaches to Regionalism

There is a startling lack of consensus within the scholarly community about the best way to actually *implement* regional reforms.[192] In his article *Equitable Fiscal Regionalism*, Professor Matthew Parlow employs a typology consisting of four primary denominations—Old Regionalism, New Regionalism, Fiscal Regionalism, and Equitable Regionalism[193]—to describe the archetypical approaches to the problem of place-based inequality. Employing a condensed version of Parlow's typology that collapses his four categories into two—Old Regionalism and New Regionalism—the following section describes and critiques some of the dominant regionalist proposals. This is necessary not only to demonstrate substantive differences between them, but also to identify (and

186. *Id.* at 1164.

187. ORFIELD, *supra* note 15, at 1.

188. Janice C. Griffith, *Regional Governance Reconsidered*, 21 J. L. & POL. 505, 507 (2005).

189. *See* Briffault, *Localism and Regionalism*, *supra* note 43, at 3-8.

190. *Id.* at 3-4.

191. Cashin, *supra* note 7, at 2033-34.

192. *See* Parlow, *supra* note 7, at 69-70.

193. *Id.* at 64-70. There are even more variants than this. *See, e.g., id.* at 64 n.103 (coordinating regionalism, administrative regionalism, and structural regionalism) (citing DAVID Y. MILLER, THE REGIONAL GOVERNING OF METROPOLITAN AMERICA 8 (2002)). Foreseeably, Parlow's own contribution is the eponymous *Equitable Fiscal Regionalism*. *Id.* at 77.

ultimately critique) the institutional mechanisms through which each is designed to be implemented.

1. Old Regionalism

Old Regionalism is characterized by "consolidation or centralization of decision-making authority" into bona fide, general purpose regional governments.[194] Old regionalists reason that because the fundamental problem afflicting metropolitan areas is their fragmented, decentralized, and uncoordinated structure, the solution is defragmentation, centralization, and coordination.[195] They acknowledge that these prescriptions necessarily come at the expense of local autonomy.[196] The hallmark of old regionalism is its commitment to unitary regional *government*, and not a reliance on innovations in regional *governance*, to reign in the self-interested exercise of delegated local power.[197]

The work of David Rusk, a celebrated proponent of regional reform and scholar of urban-suburban dynamics, falls relatively neatly into the old regionalist paradigm. Rather than advocate for a discrete regional body designed to achieve a symbiotic relationship between cities and their suburbs, Rusk advocates for the "elastic[ity]" of central cities themselves.[198] Elasticity is defined as the ability for a city to expand its boundaries via annexation in order to capture sprawling suburban growth on the city's unincorporated suburban periphery.[199] Rusk employs a distinction between "big box states" and "little box states" to describe states varying degrees of urban elasticity and suburban fragmentation.[200] The greater a city's elasticity, Rusk argues, and the larger the jurisdictional boxes which compose it, the greater the economic health (measured in terms of equitable poverty distribution) of the region the city economically anchors.[201]

The problem as Rusk frames it is fundamentally one of 'capturing' sprawling suburbs and incorporating them into the unitary multi-purpose government of the city itself. The less jurisdictionally fragmented the metropolitan area is, the better. Rusk's approach therefore represents a regionalist approach that fits squarely within the Old Regionalist framework: the pursuit of regional government through direct consolidation, annexation, and dissolution of local governments into city or county governments, with the resulting entity

194. *Id.* at 64.
195. *See id.*
196. *Id.*
197. *Id.*
198. *See* Rusk, *supra* note 14, at 4.
199. *Id.*
200. *Id.* at 5-6.
201. *Id.* at 4-7.

possessing the full panoply of local government powers.[202]

2. New Regionalism

New Regionalism incorporates the basic insights of Old Regionalism—the need for more rational and equitable forms of social organization—without an accompanying commitment to regional government. Instead, New Regionalists prefer to design policies or institutions to facilitate voluntary interlocal cooperation, rather than involuntary subservience implied by a governmental approach.[203] This emphasis on regional *governance*, not regional *government*, is designed to preserve local autonomy to the greatest extent possible, while simultaneously furthering the cooperation and rationalization of the regional political economy.[204]

a. Voluntary Interlocal Agreements

Voluntary interlocal agreements are contracts between municipalities regarding public safety, waste disposal, transportation, or some other matter of local import.[205] Conceived as a positive method for pursuing regional reform, voluntary municipal cooperation represents the most radical departure from the foundational principles of Old Regionalism. Where old regionalists sought to impose unitary governments that obviated the utility of local boundaries or abolished them altogether, proponents of voluntary interlocal agreements believe that local governments, through pursuit of common interests, can contractually resolve problems beyond their borders without incentive or coercion from state or regional government.[206]

b. Single-Function Special Districts

Single-Function Special Districts are public authorities designed to address specific problems, such as transportation and waste management.[207] Special districts are easily created, and are staffed by the governor's appointees.[208] They typically address narrow technical matters, rather than matters such as zoning or taxation.[209] For this

202. *See* Briffault, *Localism and Regionalism*, *supra* note 43, at 9 n.15.

203. *See* Parlow, *supra* note 7, at 64-65; *see also* Note, *Old Regionalism, New Regionalism, and Envision Utah: Making Regionalism Work*, 118 HARV. L. REV. 2291, 2292 (2005).

204. *See* Parlow, *supra* note 7, at 64-65; *see also* Cashin, *supra* note 7, at 1989 n.11 ("[New Regionalism] focuses primarily on achieving regional cooperation and limited-purpose regional governance, rather than on creating regional governments that supplant fragmented local governments.").

205. Frug, *Beyond Regional Government*, *supra* note 41, at 1781.

206. *See id.* at 1781-82.

207. *See id.* at 1781.

208. *Id.* at 1782.

209. *Id.*

reason, they are generally seen as "innocuous" and "less controversial" alternatives to more comprehensive forms regional authority.[210]

c. Two-Tier Regional Governments

Two-tier approaches to regional government, which relocate a portion of local power to a regional governing body while maintaining legitimate spheres of power for local governments,[211] grew out of public opposition to the unitary solutions which characterize Old Regionalism.[212] Typically, a new regional body is superimposed over existing local governments, with the resulting entity sharing responsibilities according to their regional importance.[213] Myron Orfield, one of the most prominent proponents of two-tier approaches, advocates for discrete regional governing bodies that are both democratically accountable and possessed of regulatory power.[214] Depending on the circumstances presented, consolidation, annexation, and adoption of metropolitan planning organizations (MPOs) are all potential steps in the right direction.[215]

Advocates of two-tier approaches argue that MPOs should take precedence to "gradually assume the power to promulgate an efficient and orderly regional land-use plan" and deal with other regional challenges, such as tax base disparities and environmental concerns, that individual localities cannot unilaterally address.[216] Rather than pursuing direct defragmentation via annexation or consolidation, the two-tier structure of MPOs is designed to protect legitimate domains of local autonomy.[217] Existing MPOs, such as the Twin Cities Metropolitan Council, attempt to rebalance the distribution of public benefits and burdens and rationalize the regional administration of services "by dividing public functions into those that could best be performed on a regional level and those that should remain at a local level."[218] As such, they embrace the two core tenets of New Regionalism: governance over government, and cooperation over coercion.[219]

d. Regional Legislatures

The regional legislature is a variation on the theme of regional

210. *Id.* at 1784-85.
211. *See id.* at 1788.
212. *See* Briffault, *The Local Government Boundary Problem*, *supra* note 44, at 1118.
213. *Id.*
214. ORFIELD, *supra* note 15, at 148.
215. *See id.* at 137-39.
216. *See id.* at 148-49.
217. *Id.* at 148.
218. Frug, *Beyond Regional Government*, *supra* note 41, at 1773.
219. *See* ORFIELD, *supra* note 15, at 148-49.

governance without regional government.[220] A regional legislature would encourage the conflicting interests of city and suburb to resolve themselves in a regional forum of democratically elected representatives from cities and suburbs themselves.[221] This forum, which would maintain decentralized power and real domains of local autonomy, would enable local governments to "voluntarily realize their mutual interdependence"[222] without relying on a regional government that would inevitably "ape the powers of the state."[223] Rather, the only purpose of the regional legislature would be to enable local governments to allocate local entitlements among themselves by facilitating "regional negotiations."[224]

e. Fiscally and Democratically Permeable Local Boundaries

In line with the preference of new regionalists for governance over government, some scholars attempt to pursue regionalist reforms by attempting to alter the normative mechanics of local boundaries themselves. Fiscal permeability approaches are concerned primarily with resource inequality within metropolitan areas.[225] These approaches (which Parlow categorizes under "fiscal regionalism")[226] seek to redistribute regional resources by rendering local boundaries more economically and politically permeable.[227] Tax base sharing renders local boundaries more fiscally permeable, allowing the taxable resources of each locality (usually as a percentage of regional growth) to flow more freely through the region.[228] This permeability essentially makes tax revenue a public resource in a meaningful sense, rather than allowing it to be used by municipalities in a private, self-serving manner.[229] Democratic permeability approaches, on the other hand, attempt to "avoid the evils of parochialism and insularity" by decoupling voting rights from residence, allowing all local elections to be open "to all members of a metropolitan region or even to all citizens of a state."[230] This would serve to "institutionalize a person's multiple identities" by providing them with votes in jurisdictions other than the

220. *See* Frug, *Beyond Regional Government*, *supra* note 41, at 1791-92.

221. *See id.* at 1790-92.

222. Briffault, *The Local Government Boundary Problem*, *supra* note 44, at 1152.

223. Gerald Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 295 (1993).

224. *See id.* at 295-96.

225. Parlow, *supra* note 7, at 67-68.

226. *Id.*

227. *See* Briffault, *The Local Government Boundary Problem*, *supra* note 44, at 1151-52.

228. *See* Parlow, *supra* note 7, at 67-68.

229. *See supra* part I(A)(2).

230. Ford, *The Boundaries of Race, supra* note 32, at 1909.

one in which they live, such as where they work, or where they shop.[231]

C. "Pragmatic Regionalism"?

We do not need any more "isms." If forced to fit the proposal for strong states into Parlow's typology, perhaps it would be called "pragmatic regionalism." Unlike Old and New Regionalism, however, such a description is not intended to acquire the status of a proper noun. "Pragmatic regionalism" would designate no new regional governments. It would rely on no grand innovation in interlocal governance. It would not divide regional institutional power among tiers, or enumerate their powers in comparison to one another, in an attempt to create yet another quasi-federation between the state and its municipalities. Rather, "pragmatic regionalism" would suggest that we use the regional governments we already have: states themselves.

In the contest of exclusionary zoning, Professor Edward Zelinsky puts this argument succinctly:

> [T]hose favoring radical alteration of land use patterns in the United States have had little success in convincing the American public to integrate its suburbs; until the battle for public opinion is won, it is unlikely that any structural innovation, like the establishment of metropolitan government . . . will achieve by fiat what cannot be accomplished by politics. Conversely, if a strong political consensus existed to integrate America's suburbs, *the governmental means to accomplish that end already exist*—in particular, the ultimate supremacy of the states over local zoning and land use planning . . . . [W]e *already have metropolitan government in the form of the states* and their authority of local affairs. The fundamental problem is that the states use that authority to protect the zoning status quo.[232]

The crucial realization is that *the greatest barriers to the implementation of regional reforms are not institutional, but political.*[233] States have all the power they need to address problems of interlocal and regional concern within their borders. The problem is that, just as "[s]uburbanization has regularly outpaced the ability of the central cities to expand,"[234] "the city-as-a-community [has]

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231. Robert Fishman, *City Making by Gerald E. Frug,* HARVARDDESIGNMAGAZINE.ORG, http://www.harvarddesignmagazine.org/issues/13/city-making-by-gerald-e-frug (last visited Nov. 14, 2014).

232. Edward A. Zelinsky, *Metropolitanism, Progressivism, and Race*, 98 COLUM. L. REV. 665, 667-68 (1998) [hereinafter *Metropolitanism*] (reviewing DAVID RUSK, CITIES WITHOUT SUBURBS (1993); NEAL R. PEIRCE ET AL., CITISTATES: HOW URBAN AMERICA CAN PROSPER IN A COMPETITIVE WORLD; DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING AND THE SOUL OF SUBURBIA (1995)) (emphasis added).

233. William Miller, *Metropolitan Regionalism: Legal and Constitutional Problems*, 105 U. PA. L. REV. 588, 601-02 (1957).

234. Frug, *Beyond Regional Government*, *supra* note 41, at 1770 (2002).

expand[ed] more rapidly than the city-as-a-political-entity."[235] In short, "our legal and political precepts have not kept pace"[236] with the reality of metropolitan growth. This is by design. By allowing states to delegate authority without incurring constitutional liability, the Supreme Court has permitted the lowest levels of government to frustrate our highest constitutional principles. State legislators benefit from the relative weakness of state government because they are insulated from responsibility for interlocal harm—they are shielded from having to remedy complex, interjurisdictional inequality within their borders. States *want* to be able to 'pass the buck' to their local subdivisions; as Justice Douglass criticized, to "wash[] [their] hands of [their] own creations."[237]

If regional equity is to be pursued in earnest, this sort of negligent abdication of the basic responsibilities of governing must cease to be tolerated. A culture of accountability, not acquiescence, must pervade state legislatures. Where appropriate, centralized policies and procedures must supplant the anarchy of interlocal competition, which serves only to exacerbate and reinforce existing class stratifications. A proposal which attempts to satisfy these criteria is described below.

PART IV: O DILLON, WHERE ART THOU? THE CASE FOR STRONG STATES

It is important, from the outset, to explain what is *not* meant by a "strong state" approach to regional equity. A strong state approach is not one in which the state wholly divests all powers from local governments and re-vests those powers into itself. Nor is a strong state approach one which completely abolishes local boundaries outright, creating a unitary state government responsible for all economic and political decisions. A strong state approach is not one which commands the burning of every book containing the words "local control" ever written. A strong state is not a tyrannical state. It is an active, accountable state.

A strong state, in other words, is one which facilitates the resolution of interlocal harms and parochial conflicts of interest through the traditional legislative process. A strong state is one which reserves for itself ultimate authority over the actions of its subdivisions, and which does not countenance blatant inequalities within its borders even if federal courts allow them to do so. A strong state demonstrates that the choice between regional government and regional governance is a false one: without the state itself acting as a regional government, there can be no 'pure governance' solutions to interlocal dilemmas.

Regionalism itself—whether Old or New—exists because there is

235. Miller, *supra* note 233, at 588.

236. *Id.*

237. Milliken v. Bradley, 418 U.S. 717, 762 (1974) (Douglas, J., dissenting).

something fundamentally defective with the modern state-local relationship. Proponents of purely voluntary, non-coercive solutions ignore this basic observation at their peril. The scholarship on regionalism has become preoccupied with imagining the ideal institutional arrangements for superimposing new regional governments on existing political frameworks, or for conceiving new forms of regional governance altogether, instead of addressing the inequitable consequences of unfettered home rule. Pursuing regional reform need not (indeed, ought not) be an exercise in creative institutional problem solving. Regionalists should instead make a commitment to the revitalization of state politics that uses the crises of fragmentation, decentralization, and delegated state power, as well as the host of other regional issues, from housing affordability and school funding disparities to suburban sprawl and environmental harm, as lightning rods for substantive, progressive legislation.

Having noted that the barriers to regional reform are political, not institutional, there are three reasons why a strong state approach to regional reform should be taken seriously: simplicity, efficacy, and political viability. Each of these reasons will be expanded upon and, where appropriate, contrasted with the institutional approaches to regionalism reviewed in Part III(B).

A. Simplicity

1. States are Regional Governments

States *are* regional governments, and should be treated and utilized as such.[238] Utilizing the states themselves avoids introducing additional complexity and bureaucracy into an already complex and bureaucratic system. The establishment of "metropolitan behemoths" is "unlikely to achieve the increased racial and ethnic integration promised by their proponents."[239] The reason that many regional reforms, especially regarding land use, have not been vigorously adopted is not because of some sort of institutional inadequacy attributable to state and local government, but simply because there is insufficient political traction for making radical changes to the spatial organization of society,[240] especially when radical change would inevitably result in the creation of "winners" and "losers."[241] In

238. *See* Zelinsky, *Metropolitanism*, *supra* note 232, at 685 ("[W]e already have governments of general jurisdiction actively overseeing metropolitan affairs, i.e. the states.").

239. *Id.* at 667.

240. *Id.* at 677 ("If there were a strong popular consensus favoring the aggressive dispersal of the urban underclass into suburban neighborhoods, that consensus could be implemented within the current structure of municipal government via the states and their ample authority over local zoning and land use policies.").

241. *See id.*

the absence of such traction, the establishment of discrete regional governments will not be any more successful in pursuing regional reform than pursuing reform through the state itself.[242]

2. The Basic Tools for Implementing Regional Reforms Are Already in Existence

In addition to the various configurations of counties and municipalities traditionally utilized by states as the basic building blocks of regionalization, states could utilize geographic metrics such as Metropolitan Statistical Areas (MSAs),[243] Micropolitan Statistical Areas (MiSAs),[244] and Combined Statistical Areas (CSAs),[245] among other regional units, to facilitate the regionalization of core state policies. One could imagine, for instance, a state government funding schools, planning public transportation routes, and allocating the construction of affordable housing on the basis of MSAs. Such an approach would be sure to capture true regions—that is, real, territorially defined economic units—while simultaneously keeping institutional complexity to a minimum. The utility of these metropolitan tools is discussed further below.[246]

Contrast such a proposal with Professor Frug's "regional legislature."[247] Frug's regional legislature would "serve as a vehicle for intercity negotiations designed to forge a regional perspective on metropolitan issues . . . [but] would have to have the power to ensure that its decisions, once made, will be followed."[248] Further, "[t]he regional legislature . . . [would] consist of democratically elected representatives of the cities themselves" and be loosely modeled after the institutional structure of the European Union.[249] The sole task of the regional legislature—"the allocation of entitlements to local governments"—would enable "[t]he contradictory pulls of the situated self—between particularism and universalism, between immanence and transcendence . . . [to] become the structure of decisionmaking about decentralizing power."[250]

Frug's poeticism is inspiring, but unhelpful. The proposal for regional legislatures is complex and unwieldy. [251] Further, in service

242. *See id.*

243. *USA: Metropolitan Areas*, CITY POPULATION, http://www.citypopulation.de/php/usa-metro.php (last updated Mar. 28, 2014).

244. *Id.*

245. *USA: Combined Metropolitan Areas*, CITY POPULATION http://www.citypopulation.de/php/usa-combmetro.php (last updated Mar. 28, 2014).

246. *See infra* Part IV(B)(1) and IV(B)(2).

247. Frug, *Beyond Regional Government*, *supra* note 41, at 1791.

248. *Id.* at 1791-92.

249. *Id.* at 1792.

250. Frug, *Decentering Decentralization*, *supra* note 223, at 296-97.

251. A regional legislature for the Boston metropolitan area, for instance, would

to his EU analogy, Frug is forced to invent new concepts and institutions that are untenably novel.[252] Such a proposal crumbles under the weight of its complexity. The citizens of each state already have "regional legislatures;" they call them "legislatures." A strong state, exercising direct regulatory power through existing democratic organs, offers a simpler, preferable solution to the problem of regional inequality.

B. Efficacy

Still, one may fairly ask: do states truly have the capacity to directly affect regional reforms? And even if states do have such a capacity, to what degree are metropolitan areas contained by, or coextensive with, state boundaries? Since properly scaled programs are crucial to the success of the regional enterprise "the geographic scope of equity-enhancing policies must . . . include entire metropolitan areas—entire housing and labor markets." [253]

States are by far the most proximate jurisdictional units to metropolitan areas themselves. Given their power to regulate the local subdivisions which comprise the metropolitan areas within (and, through interstate collaboration, even outside of) their borders, strong, direct state action utilizing the extant metropolitan tools would be sure to capture geographic areas of the proper scope. The following analysis of state jurisdictional relationships with MSAs, MiSAs, and CSAs will further substantiate this point.

1. The Vast Majority of Metropolitan Areas Fall Within the Jurisdiction of Single States

a. Micropolitan Statistical Areas (MiSAs)

The vast majority of MiSAs fall within the boundaries of single states. Of the 536 MiSAs in the United States,[254] 522 (or ~97%) fall within the boundaries of a single state; 14 (or ~3%) cross one state boundary; and only one (or less than 1%) crosses two state boundaries.[255] No MiSAs cross three or more state boundaries.

require 4000 representatives by Frug's estimation. *See* Frug, *Beyond Regional Government*, *supra* note 41, at 1801. (4000 representatives for the Boston Metro area).

252. *See id.* at 1826 (describing "regional citizenship").

253. ORFIELD, *supra* note 15, at 100-01.

254. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 13-01, REVISED DELINEATIONS OF METROPOLITAN STATISTICAL AREAS, MICROPOLITAN STATISTICAL AREAS, AND COMBINED STATISTICAL AREAS, AND GUIDANCE ON USES OF DELINEATIONS OF THESE AREAS 2 (Feb. 28, 2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/bulletins/2013/b13-01.pdf.

255. *See id.*; *USA: Metropolitan Areas*, CITY POPULATION (Mar. 28, 2014), http://www.citypopulation.de/php/usa-metro.php.

b. Metropolitan Statistical Areas (MSAs)

The vast majority of MSAs also fall within the boundaries of single states. Of the 381 MSAs within the United States,[256] 334 (or ~88%) fall within the boundaries of a single state; 39 (or ~ 10%) cross one state boundary; 6 (or ~1.5%) cross three state boundaries; and only 2 (or ~0.5%) cross three state boundaries.[257] No MSAs cross 4 or more state boundaries.

c. Combined Statistical Areas (CSAs)

CSAs are larger conglomerations of MiSAs and MSAs. This makes them far more ambitious units for pursuing regional reform. Nevertheless, like its constituent MiSAs and MSAS, even the majority of CSAs fall within the boundaries of single states. Of the 166 CSAs in the United States, 126 (or ~76%) fall within the boundaries of single states; 29 (or ~17%) cross one state boundary; 7 (or ~4%) cross two state boundaries; 3 (or ~2%) cross three state boundaries; and only 1 (or less an ~1%) cross four state boundaries. No CSAs cross 5 or more state boundaries.[258]

These statistics cut against some scholars' characterizations of states as poor vehicles for addressing issues of a metropolitan scope,[259] and lend considerable credence to the efficacy of states as the potential prime movers of regional reform. Using nothing but the power of the state and metropolitan regions themselves, regionalism can be pursued.

2. MiSAs, MSAs, and CSAs That Do Not Fall Within Single States Can Be Addressed Via Interstate Compact

With respect to the small number of MiSAs, MSAs, and CSAs that extend beyond the territorial jurisdiction of single states, the prospect of two, three, four, or even five states entering into interstate compacts to address matters of regional concern is far from inconceivable. The Constitution explicitly provides for the creation of such compacts, subject to congressional approval.[260] In fact, there are dozens of compacts already in existence, many of which address matters of explicit regional concern, usually by creating a discrete state agency with regional planning powers.[261] Thus, even taking into account their

256. *See* OFFICE OF MGMT. & BUDGET, *supra* note 255, at 2.

257. *See id.*

258 *Id.*

259. *See, e.g.*, Frug, *Beyond Regional Government*, *supra* note 41, at 1771 n.33 (surveying various metropolitan statistics which demonstrate that some of the largest metropolitan areas "have not only crossed state lines but have also grown larger than many states").

260. U.S. CONST. art. I § 10.

261. *See, e.g.*, Colorado River Compact of 1922, *available at*

vastly different geographic footprints, states themselves are capable of capturing entire regional ecosystems (both natural and economic) within their jurisdictions, either acting alone or in cooperation with other states.

C. Political Viability

1. States Already Intervene in Matters of Regional Significance

States already regularly intervene in municipal affairs, imposing mandates (often unfunded) on local government within their borders to conform to certain state requirements.[262] Indeed, "[g]overnors and state legislatures vigorously and routinely intervene in municipal governance."[263] New Jersey's experience with the "Mount Laurel Doctrine,"[264] which resulted in "the governor and state legislature acting as the ultimate arbiters of New Jersey zoning,"[265] is a representative example of state intervention. In pursuit of this outcome, however, the plaintiffs

> sought neither to alter municipal boundaries nor to combine local governments into metropolitan units, but instead accepted the basic, decentralized structure of local government in New Jersey with the state, acting as metropolitan government, effectively allocating to each locale responsibility for its share of each region's need for low-income housing.[266]

The issue was not *whether* there was metropolitan authority to change affordable housing patterns in New Jersey, but how to harness

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http://www.usbr.gov/lc/region/g1000/pdfiles/crcompct.pdf (providing for the apportionment, regulation, and management of water among seven states and Mexico); PORT AUTHORITY OF NEW YORK AND NEW JERSEY, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED DECEMBER 31, 2002 4-8, *available at* http://www.panynj.gov/corporate-information/pdf/annual-report-2002.pdf (describing the NY/NJ region and laying out the powers of the Port Authority); Northwest Power and Conservation Council, *Mission and Strategy*, *available at* http://www.nwcouncil.org/about/ (last visited Feb. 2, 2015) (designed to "ensure, with public participation, an affordable and reliable energy system while enhancing fish and wildlife in the Columbia River Basin").

262. *See generally* Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment*: *On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993); Edward A. Zelinsky, *The Unsolved Problem of the Unfunded Mandate*, 23 OHIO NORTHERN L. REV. 741 (1997).

263. Zelinsky, *Metropolitanism*, *supra* note 232, at 685.

264. *See* Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) (Mt. Laurel I); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 N.J. 158 (1983) (Mt. Laurel II); *see also* The New Jersey Digital Legal Library, *History*, http://njlegallib.rutgers.edu/mtlaurel/aboutmtlaurel.php. (last visited Feb. 2, 2015).

265. Zelinksy, *Metropolitanism*, *supra* note 232, at 685.

266. *Id.* at 685-86.

that authority for regional change.[267]

Regional reform does not require regional government or even regional governance. It simply requires "political will on the part of the states to use their existing authority over local affairs."[268] Because state intervention in matters of regional significance is commonplace—or, at least, its legitimacy is not questioned—a strong state approach to regional form is more politically viable than one which posits new institutions or mechanisms of governance that are untested and wholly foreign to the public.

2. A Strong State Approach is More Intuitively Appealing than Institutional Approaches

At the very least, a strong state approach is capable of being described, critiqued, and implemented within the boundaries of existing governmental institutions and political vernacular. In other words, a strong state approach is one which is compatible with our common political sensibilities and consonant with our existing political parties.[269] It is far more likely to pass the "laugh test" than proposals which require complex institutional or conceptual innovations. Such a proposal may not be capable of achieving bipartisan support. If it is politically divisive, supported only by one party, so be it. At least regional equity will then be something that all interested parties can productively argue about.

CONCLUSION: THE NEED FOR STRONG STATES

The strong state approach to regional equity must be taken seriously. For too long, states have abdicated their responsibility to provide for the health, safety, and welfare of their citizens through the indiscriminate delegation of power to their local subdivisions. The Supreme Court has not only enabled this evasive behavior, but has given it its jurisprudential blessing. Scholars of regionalism, though accurate in their diagnosis and sincere in their efforts, have precious little to show for the creativity of their institutional prescriptions. A strong state—one which is willing to reclaim the regional exercise of its police power, and whose legislature is willing to take more direct responsibility for the crucial task of regional governance—will protect the interests of its people far better than one which relies so thoroughly, so unquestioningly, and so counterproductively on the value of fragmentation and the sanctity of home rule. The pursuit of regional equity poses not an institutional puzzle, but a political problem. It must receive a political solution.

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267. *Id.* at 686.

268. *Id.* at 687.

269. ORFIELD, *supra* note 15, at 155-62.