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## How Localism's Rationales Limit New Urbanism's Success and What New Regionalism Can Do About It

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# HOW LOCALISM'S RATIONALES LIMIT NEW URBANISM'S SUCCESS AND WHAT NEW REGIONALISM CAN DO ABOUT IT

*Timothy Polmateer\**

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### INTRODUCTION

Thomas Jefferson dreamt of an agrarian republic for his newly liberated country.<sup>1</sup> He envisioned a nation populated with small, independent farmers, each cultivating the land to provide just enough sustenance for economic self-sufficiency.<sup>2</sup> Jefferson said, “Dependence begets subservience and venality, suffocates the germ of virtue, and prepares fit tools for the designs of ambition.”<sup>3</sup> For Jefferson, the city epitomized this vitriolic view of dependence.<sup>4</sup> He wrote, “The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body.”<sup>5</sup> Jefferson believed urban living was detrimental to the health of society and preferred other forms of settlement.<sup>6</sup>

Consequently, this anti-urban rhetoric became encoded in early national opinion and strategy.<sup>7</sup> For example, while in the Continental Congress, Jefferson authored the Land Ordinance of 1785 (the Ordinance).<sup>8</sup> Among other things, the Ordinance established a system of surveying the land west of the Appalachian Mountains and east of the Mississippi River to create ten new states.<sup>9</sup> The sale of that

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1. See Matthew O’Brien, *Are the Suburbs Where the American Dream Goes to Die?*, ATLANTIC (Jul. 23, 2013, 6:42 PM), <http://www.theatlantic.com/business/archive/2013/07/are-the-suburbs-where-the-american-dream-goes-to-die/278014/>.

2. See Harry W. Fritz, *The Agrarian*, DISCOVERING LEWIS & CLARK, <http://lewis-clark.org/content/content-article.asp?ArticleID=1749> (last visited Mar. 1, 2014).

3. *Id.*

4. *See id.*

5. *Id.*

6. Leonardo Vazquez, *Thomas Jefferson: The Founding Father of Sprawl*, PLANETIZEN (Feb. 20, 2006, 7:00 AM), <http://www.planetizen.com/node/18841>.

7. *See id.*

8. *See id.*

9. *See* Va., Land Ordinance of 1785 (May 20, 1785), available at <http://research.archives.gov/description/1943531>.

land provided a revenue stream to pay the debts of the American Revolution.<sup>10</sup> The Ordinance initiated a rectangular system for dividing the land within six-mile square townships.<sup>11</sup> Each square was divided thirty-six times into 640-acre sections.<sup>12</sup> Of the total sections, one section was reserved for public education, and thirty-five were offered for sale to the public at one dollar per acre.<sup>13</sup> This arrangement would lay the foundation of American land policy for the next century.<sup>14</sup> Although the Ordinance did not mention anti-urban policies, it clearly discouraged urban growth by providing a system for people to literally sprawl across large plots of land.<sup>15</sup> Through his political vision and actions, Jefferson linked the future of American development to what we classify today as suburban sprawl.<sup>16</sup>

Not coincidentally, over the last one hundred years, American land use policy has embodied Jefferson's sprawl philosophy. Regulations were designed to segregate uses of land, reduce population density, and facilitate the use of automobiles.<sup>17</sup> Residential areas became segregated from commercial developments, and neighborhoods were thinly spread across vast tracts of open land.<sup>18</sup> Originally hailed as a solution to the "evils of city life," suburban sprawl has come to represent the American dream, where citizens can own a home, two-car garage, both back and front yards, and if you are truly lucky, a pool.<sup>19</sup>

Unfortunately, suburban sprawl has also had regrettable side effects. Critics of sprawl claim that it causes a splintered and segregated development of society, which leads to social and economic inequalities.<sup>20</sup> Additionally, sprawl displaces agrarian and natural spaces while emptying American cities of their populations

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10. *See id.*

11. Scott D. Warner, *Land Ordinance of 1785*, LAND SURVEYORS UNITED (May 11, 2011, 10:36 PM), <http://landsurveyorsunited.com/group/historyandsurveyingusa/forum/topics/land-ordinance-of-1785>.

12. *See id.*

13. *See id.*

14. *See* Va., Land Ordinance of 1785.

15. *See* Vazquez, *supra* note 6.

16. *See generally id.*

17. *See generally* Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257 (2006).

18. *See id.* at 257.

19. JOEL KOTKIN, REASON PUB. POL'Y INST., OLDER SUBURBS: CRABGRASS SLUMS OR NEW URBAN FRONTIER 1 (2001).

20. *See* PETER CALTHORPE & WILLIAM FULTON, THE REGIONAL CITY 11 (2001).

and resources.<sup>21</sup> Additionally, as more space on the outskirts of development is consumed, people must travel further to their workplace and to places of commerce. Accordingly, suburbanites spend more time in their personal automobiles and less time interacting with one another,<sup>22</sup> which can have a deteriorating effect on American communities.<sup>23</sup>

Recently, however, greater metropolitan areas that include suburban enclaves have grown more dense as people move back towards the city center.<sup>24</sup> “Over the past 60 years, the urbanized areas of the planet have gone from 29 percent in 1950, to half of the world’s population today, and by 2050, 70 percent of the world’s population is expected to live in urban regions.”<sup>25</sup> Similarly, reflecting these trends, in the United States the suburban metropolis contains more than half of its citizens, compared with roughly twenty-three percent in 1950.<sup>26</sup> In fact, according to the 2000 census, one third of all Americans live in twenty of the largest metropolitan areas.<sup>27</sup> Some predict that by 2050, ninety percent of the United States population will live in cities.<sup>28</sup>

These metropolitan areas have also emerged as single, cohesive economic units that compete in the world economy.<sup>29</sup> This phenomenon has made economic interdependence of the smaller municipalities within the metropolitan area a reality.<sup>30</sup> Problems of

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21. *See id.* at 12.

22. *See* Jeremy Meredith, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 448 (2003).

23. The consequences of sprawl have been most detrimental to the “environment, health and quality of life.” BASUDEB BHATTA, ANALYSIS OF URBAN GROWTH AND SPRAWL FROM REMOTE SENSING DATA 29 (2010). A study by Smart Growth of eighty-three metropolitan areas concludes that “[e]ven when controlling for income, household size, and other variables, people drive more, have to own more cars, breathe more polluted air, face greater risk of traffic fatalities, and walk and use transit less in places with more sprawling development patterns.” Reid Ewing, et al., *Measuring Sprawl and Its Impact* 47 (Smart Growth America, Working Paper vol. I, 2002), available at <http://www.smartgrowthamerica.org/documents/MeasuringSprawlTechnical.pdf>.

24. *See* Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 535 (2006).

25. Peter Steinbrueck, *Urbanism Needs to Move Beyond City Boundaries*, CROSSCUT (Sept. 3, 2011), <http://crosscut.com/2011/09/03/urban/21265/Urbanism-needs-move-beyond-city-boundaries>.

26. *See* Kotkin, *supra* note 19, at 5.

27. *See* CALTHORPE & FULTON, *supra* note 20, at 15.

28. *See* Steinbrueck, *supra* note 25.

29. *See id.* at 15–16.

30. *See id.* at 21.

the typical “inner city” were previously seen as independent from the suburbs, but it is now necessary to examine these issues from a regional perspective.<sup>31</sup> Even if a person lives and works in a single municipality, his economic and ecological footprints reverberate throughout the region.<sup>32</sup>

As urbanization develops, its patterns of growth follow the path of least resistance.<sup>33</sup> For instance, urban revitalization offers developers an opportunity to reclaim previously abandoned lots.<sup>34</sup> Reclamation of individual lots creates the possibility for disorganized development with little potential to be “stable, self-sustaining, and self-renewing.”<sup>35</sup> Additionally, empty lots have become integrated into the communities of the inner city by utilizing them as parks and gardens.<sup>36</sup> As these types of places are consumed by economic demand, inner cities run the risk of losing their sense of community. This potential consequence of urbanization, coupled with sporadic patterns of development, presents a risk to stability. Therefore, it is imperative that the redevelopment of inner cities occurs under a conscious plan to retain the culture of the inner city, while addressing some of the traditional downsides of the urban environment.

As a result of sprawl’s negative consequences along with the trending return to city living, a few urban planners met in the 1990s to rethink traditional zoning codes.<sup>37</sup> One possible remedy that emerged was “new urbanism,” and the Congress for New Urbanism.<sup>38</sup> Instilled with the principles of restoring the walkability of the urban landscape, revitalizing communities through the diversification of land uses and social interactions, and preserving the natural and national legacy of America, new urbanism aims to restore the once vital and influential city center.<sup>39</sup> To sustain these principles, new urbanists intend to create a coherent and supportive physical framework.<sup>40</sup> However, this concept does not attempt to replicate the blueprints of past

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31. *See id.* at 28.

32. *See* Steinbrueck, *supra* note 25.

33. *See id.*

34. *See* Foster, *supra* note 24, at 535.

35. *See* Steinbrueck, *supra* note 25.

36. *See* Foster, *supra* note 24, at 534–35.

37. *See* Janna Blasingame Custer, *New Urbanism and Euclidian Zoning: Can They Co-Exist?*, LAND USE CLINIC, Apr. 1, 2007, at 2.

38. *See id.*

39. *See* *Charter of the New Urbanism*, CONGRESS FOR NEW URBANISM, <http://www.cnu.org/charter> (last visited Mar. 1, 2014).

40. *See id.*

development styles.<sup>41</sup> Rather, new urbanists plan and design using traditional community principles, such as individual home ownership, shared common spaces, and small localized businesses, while also integrating modern technology and amenities.<sup>42</sup> The approach attempts to address the social and economic deterioration of the American urban landscape through precise planning and development.<sup>43</sup>

A major challenge for new urbanism, however, is that planners are dependent on municipal actors who implement localized land use regimes.<sup>44</sup> Traditionally, municipalities have relied on the land use concept known as “Euclidean zoning.”<sup>45</sup> Euclidean zoning segregates uses by area, such as residential from commercial, and both from industrial.<sup>46</sup> Euclidian zoning regulation is also associated with the expansion of sprawl.<sup>47</sup> Even though many local planners and public officials may not advocate for sprawl, controlling governments using Euclidean principles continue to approve sprawl-related projects, and thus perpetuate the defective structure.<sup>48</sup> However, new urbanism depends on integrating uses and the flexibility to work around Euclidean boundaries.<sup>49</sup> New urbanist planners will have to evolve their municipalities’ land use regimes.

Local municipalities control their land use regulations, and have the ability to amend or modify the ordinances and processes used.<sup>50</sup> Even with this flexibility, local land use planners have not created systems for the successful implementation of new urbanism, and it has

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41. See Custer, *supra* note 37, at 2. Older development styles include a defined city center where most of the buildings were within a five-minute walk to the center. See *id.* The dwellings varied in style and function so the community could be inhabited by younger and older, rich and poor. See *id.* There were small playgrounds within the neighborhood and elementary schools were within walking distance of students’ homes. See *id.* After driving along narrow streets that specifically restricted speedy traffic, automobile users were forced to park in the rear of buildings. See *id.* at 3. The neighborhood was laid out using interconnected streets offering numerous traffic options; civic buildings stood at the end of prominent streets. See *id.*

42. See *id.* at 2–3.

43. See *id.*

44. See *id.* at 3.

45. See *id.*

46. See *id.*

47. See *id.*

48. See Peter Katz, *New Urbanism at 20: A Critical Assessment*, BETTER! CITIES & TOWNS (May 23, 2013), <http://bettercities.net/news-opinion/blogs/peter-katz/20202/new-urbanism-20-critical-assessment>.

49. See Custer, *supra* note 37, at 3.

50. See *id.*

failed to become a dominant land use form.<sup>51</sup> Some argue that local municipalities' failure to implement new urbanism lies in market force manipulation like developer pressures or even individual suspicion and backlash from citizens.<sup>52</sup> Others argue that the failure lies in the local governments' inability to establish a policy framework that supports the underlying principles.<sup>53</sup> A third argument focuses on the patchwork implementation of new urbanism and lack of connection between new developments and surrounding areas.<sup>54</sup>

This Note asks whether our attachment to "localism" restricts new urbanism from satisfying its objectives. Localism is the concept of legal and political empowerment of autonomous municipalities, as a response to the idea that regional or state influences undermine that autonomy during their decision-making processes.<sup>55</sup> During the previous American migration from cities to the suburbs, individuals sought control over the development of their new communities,<sup>56</sup> and coupled with the evolution of state law towards easier municipal incorporation, the existence of local governments exploded.<sup>57</sup> The strength of the localism ideology is exemplified by the upward trend in municipal creation. In 1942, there were approximately 24,500 municipalities and special districts in the United States, and by 1992, that number had more than doubled to 50,834.<sup>58</sup> This growth resulted in an average of 113 local governments per metropolitan area.<sup>59</sup>

Given this autonomy, municipalities deal with many challenges. Some issues facing metropolitan areas—like general economic decline, sprawl, and social inequality—extend beyond the limits of individual municipal borders, so the logical assumption would be to address them through locality coordination.<sup>60</sup> "Certain challenges can be addressed more effectively at a regional scale because individual local governments lack the capacity or resources to address certain

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51. See Chris DeWolf, *Why New Urbanism Fails*, PLANETIZEN (Feb. 18, 2002, 12:00 AM), <http://www.planetizen.com/node/42>.

52. See Custer, *supra* note 37, at 3–4.

53. See Katz, *supra* note 48.

54. See DeWolf, *supra* note 51.

55. See Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 2 (2000) [hereinafter Briffault, *Localism and Regionalism*].

56. See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1992 (2000).

57. See *id.*

58. See *id.*

59. See *id.*

60. See CALTHORPE & FULTON, *supra* note 20, at 32.



issues without the cooperation of neighboring jurisdictions.”<sup>61</sup> However, as Professor Richard Briffault of Columbia Law School points out in such crucial areas as “growth management, exclusionary zoning, and tax base equity,” regional initiatives are absent.<sup>62</sup> Coordinating and consolidating local power into a regional form of governance can fill this need.<sup>63</sup>

Localities are acutely aware that they are semi-dependent and do participate in some intra-regional cooperation.<sup>64</sup> Examples of this include shared utility and water districts.<sup>65</sup> But Clayton Gillette, a professor at New York University School of Law, argues that localities only participate in these bargains if regional benefits are obvious, burdens are shared, and costs are monitored to prevent freeloading.<sup>66</sup> Additionally, the fear of redistributive consequences and the migration of mobile individuals to different regions limit intraregional deals.<sup>67</sup> Therefore, the self-interest of local governments and the risks involved in cooperation ultimately blinds these actors to the potential benefits of regional collaboration.<sup>68</sup>

Localism’s collective action problem creates a prisoner’s dilemma scenario in which neighboring localities fail to see the benefits of a healthy vibrant city center and focus instead on the burdens and costs associated with creating a regional system.<sup>69</sup> This ultimately creates a patchwork plan of improved development that is segregated from bordering preexisting styles with little infrastructure bridging the two areas.<sup>70</sup> To be successful, a region must be viewed as a single

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61. LINDA MCCARTHY, COMPETITIVE REGIONALISM: BEYOND INDIVIDUAL COMPETITION, 4 (2000), available at [http://localgov.fsu.edu/readings\\_papers/regional%20governance/McCarthy\\_competitive\\_regionalism.pdf?p3216634](http://localgov.fsu.edu/readings_papers/regional%20governance/McCarthy_competitive_regionalism.pdf?p3216634).

62. Briffault, *Localism and Regionalism*, *supra* note 55, at 26.

63. See Steinbrueck, *supra* note 25.

64. See Cashin, *supra* note 56, at 2030–31 (“Transportation, waste treatment and disposal, and signature facilities for recreation, culture, sports, or convention centers most likely engender interlocal cooperation because most citizens and localities perceive them as a benefit—or a necessity—that they can enjoy, with little threat of loss due to zero-sum competition.”).

65. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 431 (1990) [hereinafter Briffault, *Our Localism: Part II*].

66. See generally Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001).

67. See *id.* at 251.

68. See Cashin, *supra* note 56, at 2033.

69. See *id.* at 1988.

70. See DeWolf, *supra* note 51.

interconnected unit made up of many smaller communities, each playing an important role in the overall health of the region.<sup>71</sup>

The power of localism is evident in the failure of new urbanism. Most Americans spend each day moving throughout multiple localities within an invisible regional city system.<sup>72</sup> As Peter Calthorpe and William Fulton write, “We live in an aggregation of cities and suburbs: a metropolitan community that forms one economic, cultural, environmental, and civic entity.”<sup>73</sup> New urbanism depends on the successful interconnection of multiple localities to generate social and economic resource streams into and through the city center. Currently, independent local governments endeavor to create new urbanist communities, and although they may succeed in transforming a neighborhood, the ultimate goal of a thriving, widespread community is rarely achieved.<sup>74</sup> The fear of absorbing externalities, and dealing with the consequences of that scenario, creates a strong rationale for self-interest and seclusion.<sup>75</sup> This Note hypothesizes that the failure of new urbanism lies in its inability to break free from localism’s isolationist tendencies and integrate these new urbanist developments into the surrounding region.

One method for successfully implementing new urbanism is through regional governance structures, but state governments have often faced harsh criticism for interference in local autonomy,<sup>76</sup> even though as “state-created and state-empowered entities,” local municipalities derive their existence and power from state governments.<sup>77</sup> In today’s world of sprawling metropolitan landscapes, in which people often live and work in different localities, the only solution to stagnating inter-local competition is state interference.<sup>78</sup> “Jurisdictional fragmentation has made the post-modern metropolis far less governable than metropolitan regions 50 years ago.”<sup>79</sup> Highly exclusionary zoning and development policies

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71. See CALTHORPE & FULTON, *supra* note 20, at 10.

72. See Steinbrueck, *supra* note 25.

73. CALTHORPE & FULTON, *supra* note 20, at 6.

74. See DeWolf, *supra* note 51.

75. See Cashin, *supra* note 56, at 1993.

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

77. See Briffault, *Our Localism: Part II*, *supra* note 65, at 389.

78. See generally Briffault, *Localism and Regionalism*, *supra* note 55.

79. Stephen M. Wheeler, *The New Regionalism: Key Characteristics of an Emerging Movement*, 68 AM. PLAN. ASS’N J. 267, 271 (2002).

have emerged.<sup>80</sup> Entrenched local powers have designed communities that limit social and political change.<sup>81</sup> A less restrictive type of state interference in local autonomy, however, is the implementation of regional incentives to promote inter-local cooperation, known as “new regionalism.” New regionalism responds to the failure of local government to resolve inter-local disputes, promote regional equity, and foster collaboration across borders.<sup>82</sup>

Part I of this Note outlines new urbanism as a land use regime and explores reasons why it is such an important tool for twenty-first century planners. Part I includes an examination of sprawl’s consequences and contemporary urbanization trends as well as the suggestion that new urbanism is a potential solution to these challenges. Part II explores localism, including the theories of local governments’ power and its potential limitations. Part II also connects the disadvantages of localism to the inadequacies of new urbanism’s implementation. Part III argues that new regionalism provides the missing piece to the proper implementation of new urbanism. Part III discusses the structure and key features of successful new regionalist regimes and explores current federal incentives for its implementation. Finally, Part III analyzes the Delaware Valley Regional Planning Commissions’ 1999 plan to address sprawl using new regionalism. This Note concludes with a final discussion of localism as new urbanism’s greatest deterrent.

### I. NEW URBANISM AS A LAND USE ARCHETYPE

Part I details the concept of new urbanism, analyzes how new urbanist policies are deployed, outlines the various land use tools that planners have at their disposal, and examines sprawl and urbanization through the lens of new urbanism.

Land use is a broad topic and encompasses various forms of planning and design. New urbanism is one of many ways to implement a municipality’s land use vision. The first section of Part I discusses the theory and principles of new urbanism and argues that new urbanist regimes will play a significant role in the resolution to sprawl in the next century.

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80. See Cashin, *supra* note 56, at 1993.

81. See *id.*

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

### A. The Principles of New Urbanism

New urbanism is a practice in support of the following principles:

[N]eighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally accessible public spaces and community institutions; urban places should be framed by architecture and landscape design that celebrate local history, climate, ecology, and building practice.<sup>83</sup>

New urbanism attempts to manage development problems like sprawl using these principles.<sup>84</sup> Additionally, the public process included in new urbanism helps break down the “isolation inherent in modern cities” and convey to those participating that “they’ve had a real voice in expressing their desires and concerns.”<sup>85</sup>

New urbanism covers many different concepts of planning. One expert has identified four types of design frameworks.<sup>86</sup> The first and most common type is the traditional neighborhood development (TND). This type aggregates regional architectural techniques and overlays them above a traditional town layout.<sup>87</sup> TNDs utilize narrow streets that ensure safe passage for pedestrians.<sup>88</sup> By focusing on pedestrian-friendly designs, new urbanist communities, like TNDs, attempt to limit reliance on the automobile, which helps reduce traffic, conserve energy, and improve air and water quality.<sup>89</sup>

The second type of new urbanist community is the transit-oriented development,<sup>90</sup> which emphasizes complex public transit in addition to pedestrianism.<sup>91</sup> New urbanists under this approach make the transit systems “frequent and predictable . . . follow a route that is direct and logical . . . and have stops that are safe, dry, and dignified.”<sup>92</sup>

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83. *Charter of the New Urbanism*, *supra* note 39.

84. *See* Meredith, *supra* note 22, at 478.

85. Ray Gindroz, *City Life and New Urbanism*, 29 FORDHAM URB. L.J. 1419, 1428 (2001).

86. *See* Brian Ohm & Robert Sitkowski, *The Influence of New Urbanism on Local Ordinances: the Twilight of Zoning?*, 35 URB. LAW. 783, 784 (2003).

87. *See id.*

88. *See* Lewyn, *supra* note 17, at 259.

89. *See* Meredith, *supra* note 22, at 480.

90. *See* Ohm & Sitkowski, *supra* note 86, at 784.

91. *See id.*

92. Meredith, *supra* note 22, at 481.

The third type of new urbanist community is the “hamlet.”<sup>93</sup> Hamlets are traditional “New England style” towns built around a common “green” and surrounded by closely spaced single-family homes.<sup>94</sup> At the center of these neighborhoods, new urbanists add public civic spaces such as “government offices, post offices, libraries, and other community buildings.”<sup>95</sup> These structures are built to encourage public interaction and evoke pride in communal participation.<sup>96</sup>

The fourth type of new urbanist community is “infilling,” which focuses on the revitalization of existing towns.<sup>97</sup> Infilling highlights the unique local attributes of existing communities in an attempt to recreate memorable and identifiable places.<sup>98</sup> Infilling also seeks to integrate new technologies to make redevelopment compatible with the natural landscape and climate demands.<sup>99</sup>

Scale is very important to new urbanism. Planners utilize a variety of potential design scales. In order of descending size, the scales are: 1) the region, 2) the neighborhood, district, and corridor, and 3) the block, street, and building.<sup>100</sup> Regions are “finite places with geographic boundaries derived from topography, watersheds, coastlines, farmlands, regional parks, and river basins” and include the metropolis, city, and town.<sup>101</sup> New urbanist planners should regionally coordinate “economic development, pollution control, open-space preservation, housing, and transportation.”<sup>102</sup> New urbanists find that the region is a critical economic unit that is fundamental to the modern world, and that new development should not realign existing borders.<sup>103</sup> In other words, the physical layout of the region should not be redeveloped, and any new development should respect historic patterns and connect each neighborhood through a network of transportation alternatives.<sup>104</sup> Regional new urbanists call for “deconcentration of poverty, urban growth

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93. See Ohm & Sitkowski, *supra* note 86, at 784.

94. See *id.*

95. Meredith, *supra* note 22, at 481.

96. See *id.* at 482.

97. See Ohm & Sitkowski, *supra* note 86, at 784.

98. See Meredith, *supra* note 22, at 482.

99. See *id.*

100. See *Charter of the New Urbanism*, *supra* note 39.

101. *Id.*

102. Meredith, *supra* note 22, at 482.

103. See *Charter of the New Urbanism*, *supra* note 39.

104. See *id.*

boundaries, tax-base sharing and balanced education systems.”<sup>105</sup> At the regional level, new urbanists are concerned mostly with policy objectives.<sup>106</sup>

The neighborhood, district, and corridor are “essential elements of development and redevelopment in the metropolis.”<sup>107</sup> This level is chiefly concerned with urban planning doctrine.<sup>108</sup> Neighborhoods should be “compact, pedestrian friendly, and mixed-use.”<sup>109</sup> Districts should “emphasize a special single use.”<sup>110</sup> Corridors should be “regional connectors of neighborhoods and districts and range from boulevards and rail lines to rivers and parkways.”<sup>111</sup> This level includes the TNDs, transit-oriented developments, hamlets, and infills as discussed earlier in this Part.<sup>112</sup> At this level of design, new urbanists have articulated more precise building principles to ensure fulfillment of their objectives.<sup>113</sup>

The smallest scale of new urbanist concern consists of the block, street, and the building, where new urbanists attempt to “create community through designing public spaces that attract people.”<sup>114</sup> At this level of development, new urbanists predominantly focus on safety, comfort, and the interests of the pedestrian.<sup>115</sup> They aim to meet these goals through specific design suggestions, such as “lighting at ample and regular intervals, landscaping that does not block [street] views at eye level, and windows that allow for surveillance of the street below.”<sup>116</sup> They intend to encourage a “clear sense of location” and “reinforce community identity and the culture of democracy.”<sup>117</sup> Ray Gindroz, a prominent new urbanist, suggests that “[f]ocusing design efforts on public spaces with human-scale sensibilities helps restore a sense of comfort to urban environments . . . and [makes] them hospitable places to live, work, and play.”<sup>118</sup>

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105. Meredith, *supra* note 22, at 483.

106. *See id.*

107. *Charter of the New Urbanism, supra* note 39.

108. *See* Meredith, *supra* note 22, at 483.

109. *Charter of the New Urbanism, supra* note 39.

110. *Id.*

111. *Id.*

112. *See* Ohm & Sitkowski, *supra* note 86, at 784.

113. *See* Meredith, *supra* note 22, at 484–85.

114. *Id.* at 486.

115. *See Charter of the New Urbanism, supra* note 39.

116. Meredith, *supra* note 22, at 486.

117. *Charter of the New Urbanism, supra* note 39.

118. Gindroz, *supra* note 85, at 1428.

New urbanism prioritizes diversity in both land use and socio-economic composition.<sup>119</sup> Diversity helps build community ties and limits the independence and subsequent isolation of individualism.<sup>120</sup> Employing mixed land use techniques allows planners to build self-sufficient communities within walking distance of those who utilize them.<sup>121</sup> Additionally, culturally diverse new urbanist communities promote “personal and civic bonds essential to an authentic community.”<sup>122</sup> Ultimately, the designs attempt to provide an “attractive and safe environment” for the portion of the population who utilizes sidewalks through mixed uses, narrow streets, and reasonable distances between commercial areas.<sup>123</sup>

### B. Tools for Implementing New Urbanism

To implement new urbanism, planners work within the established toolkit of local land use regimes. In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court upheld the power of states to enact zoning codes.<sup>124</sup> States then designated this power to municipalities through zoning enabling acts (ZEAs), which allow municipalities to engage in use and area zoning.<sup>125</sup> Use zoning divides municipalities into various districts via use restrictions.<sup>126</sup> Area zoning attempts to regulate the physical attributes of each lot via restrictions on size, heights of buildings, and set back requirements.<sup>127</sup> Each ZEA generally requires a municipality to establish a “comprehensive plan” for application over the whole municipality.<sup>128</sup> This comprehensive plan is then turned into a local zoning ordinance and a local planning commission generally prepares both documents.<sup>129</sup> Any changes to the zoning ordinance are required to comply with the original comprehensive plan, and if those modifications are challenged, courts will search for justification within the comprehensive plan.<sup>130</sup> Given

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119. See Meredith, *supra* note 22, at 478.

120. See *id.* at 479.

121. See *id.*

122. *Id.*

123. See Richard S. Geller, *The Legality of Form Based Zoning Codes*, 26 J. LAND USE & ENVTL. L. 35, 39 (2011).

124. See generally *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

125. See JOSEPH SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1028 (5th ed. 2010) [hereinafter SINGER, PROPERTY LAW].

126. See *id.*

127. See *id.*

128. See *id.*

129. See *id.* at 1028–29.

130. See *id.* at 1029.

this regimented structure of zoning and the unlikelihood of a complete overhaul of a comprehensive plan, land use planners face limited options for zoning manipulation.<sup>131</sup> Consequently, they are generally restricted to the use of three types of tools to modify any zoning ordinance: variances, special exceptions, and rezonings.<sup>132</sup>

Variances are “permissions to deviate from the zoning law when application of the ordinance to a particular parcel would (1) impose an unnecessary hardship, and (2) the proposed use would not be contrary to the public interest.”<sup>133</sup> Variances are granted for uses prohibited by the code but nonetheless allowed because of the consequences of restricting the variance.<sup>134</sup> Generally, variances are used to relax area zoning—not use zoning—and apply only to a single parcel.<sup>135</sup>

Special exceptions are usually articulated in the original zoning code, and allow complementary uses—such as schools, religious institutions, parks, or utility substations—to be built in otherwise restricted zones, as long as the exception has minimal negative impact for nearby homeowners.<sup>136</sup> In certain instances, special exceptions include a provision for larger areas, which are called planned unit developments (PUD).<sup>137</sup> Local planners work with developers to create a development that integrates mixed uses in a desirable way.<sup>138</sup> PUDs have recently become a very common way to circumvent traditional zoning regulations, and the Environmental Protection Agency estimates that upwards of forty percent of all residential development in the United States is approved under this system.<sup>139</sup>

It is also important to note that courts uphold challenges to special exceptions more frequently than challenges to variances.<sup>140</sup> Special exceptions are granted “as of right” with the theory of judicial deference being that the legislative body has predetermined this use

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131. See ROBERT ELLICKSON & VICKI BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 283 (2005).

132. See *id.*

133. JOSEPH SINGER, *INTRODUCTION TO PROPERTY* 609 (2001) [hereinafter SINGER, *INTRODUCTION*].

134. See *id.* at 609–10.

135. See *id.* at 610–11.

136. See *id.* at 601–02.

137. See SINGER, *PROPERTY LAW*, *supra* note 125, at 1030.

138. See *id.*

139. See EPA, *ESSENTIAL SMART GROWTH FIXES FOR URBAN AND SUBURBAN ZONING CODES* 11 (2009).

140. See ELLICKSON & BEEN, *supra* note 131, at 299.



within the district as long as special conditions are met.<sup>141</sup> Therefore, once those special conditions are met, land use boards lack discretion to deny the permits.<sup>142</sup>

Lastly, rezonings or “map amendments” are actions taken to reorganize particular sections of a municipal plan at the request of developers.<sup>143</sup> This type of action generally involves a “deal-making” strategy between the municipality and the developer because if the zoning is changed without cost, then the developer will receive a windfall, and the local government will miss out on an opportunity to extract value from the transaction.<sup>144</sup> These deals most often create conditions on the rezoning.<sup>145</sup> This process is called contract or conditional zoning, and the conditions may “involve anything from special limitations on uses, to specially tailored height or bulk restrictions, to requiring dedication of land to the city to widen abutting public streets.”<sup>146</sup> Contract zoning has been challenged in court as “(1) unauthorized by the zoning enabling act; (2) inconsistent with the comprehensive plan; or (3) illegal preferential ‘spot zoning.’”<sup>147</sup> Municipalities originally engaged in this process because traditional Euclidean principles proved too inflexible, but the current process does pose the danger of producing zoning decisions that are not in the public interest.<sup>148</sup>

Two other potential rezoning tools are floating zones and overlay zones.<sup>149</sup> Floating zones are predetermined zoning ordinances that include preexisting conditions and limitations, but are not specifically located.<sup>150</sup> If a developer desires to take advantage of the “floating” zone, he applies for a permit to connect with a sector of land and then builds within the predetermined specifications.<sup>151</sup> With an overlay zone, a unique use restriction is placed on top of part or all of an existing use area.<sup>152</sup>

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141. See SINGER, INTRODUCTION, *supra* note 133, at 602.

142. *See id.*

143. *See id.* at 603.

144. See ELLICKSON & BEEN, *supra* note 131, at 303.

145. See SINGER, PROPERTY LAW, *supra* note 125, at 1030.

146. *Id.*

147. SINGER, INTRODUCTION, *supra* note 133, at 603.

148. *See id.* at 604–05.

149. *See id.* at 606–07.

150. *See id.* at 606.

151. *See id.*

152. *See id.* at 607.

Another alternative tool for integrating new urbanism's principles is a relatively new type of zoning ordinance called the "smart code."<sup>153</sup> The smart code was developed by Andres Duany and is meant to co-exist as an overlay of an existing code.<sup>154</sup> The smart code identifies "a continuum of rural to urban habitats varying in level and intensity of urban character," and creates a zoning code reflecting the different categories.<sup>155</sup> The smart code also "regulates the relationship between buildings, streets, and pedestrians,"<sup>156</sup> and links "a building's character by the urban intensity of its zone."<sup>157</sup> Rather than regulating the size of individual lots, the smart code adjusts density as a whole in each zone.<sup>158</sup> Similarly, the smart code polices street width and block size through permissible size tables.<sup>159</sup> Unfortunately, this code is meant to be suggestive for developers, and as a result, developers often fail to take advantage of it.<sup>160</sup> Some advocate that it might be more effective if the code were mandatory.<sup>161</sup>

### C. Why Is New Urbanism an Important Planning Tool for the Twenty-First Century?

New urbanism offers a direct remedy to some of sprawl's downsides. Most modern sprawling municipalities share six characteristics.<sup>162</sup> First, sprawl is often low density; second, it consists of sporadic, "noncontiguous," developed areas, which are separated by underdeveloped areas; third, land uses are segregated; fourth, it emerges in previously fragile agricultural lands; fifth, people in sprawling locations must rely on the automobile; and sixth, there is a lack of integrated land use planning across the sprawling area.<sup>163</sup> Additionally, sprawling areas cost more to maintain and service than do densely populated areas because they either expand the reach of

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153. See Ohm & Sitkowski, *supra* note 86, at 790.

154. See Custer, *supra* note 37, at 4.

155. *Id.* The six areas are called "transects," and are distinguished as: T-1 Natural Zone, T-2 Rural Zone, T-3 Sub-Urban Zone, T-4 Urban Zone, T-5 Urban Center Zone, and T-6 Urban Core Zone. See Geller, *supra* note 123, at 44.

156. Geller, *supra* note 123, at 47.

157. Lewyn, *supra* note 17, at 269.

158. See *id.* at 276.

159. See *id.* at 287.

160. See Ohm & Sitkowski, *supra* note 86, at 791.

161. See Custer, *supra* note 37, at 4.

162. See Meredith, *supra* note 22, at 449.

163. See *id.*

existing municipal services or create a need for new utilities that limit efficiency.<sup>164</sup>

Opponents of suburban sprawl claim that it creates many victims.<sup>165</sup> They advocate that children, the elderly, and the middle class all suffer from sprawl's reliance on the automobile.<sup>166</sup> In sprawling communities children can only explore the nearest cul-de-sac, the elderly are mobile only if they have a driver's license, and working America spends multiple hours a week stuck in commuter traffic.<sup>167</sup> Traffic is a particularly harmful side effect as it can cause economic, environmental, and social harm.<sup>168</sup> According to the Texas Transportation Institute, traffic delays cost Americans nearly six billion gallons of fuel during the year 2000.<sup>169</sup>

One study shows that certain types of suburbs limit social mobility and "kill the American Dream."<sup>170</sup> In particular, some metropolitan areas below the Mason-Dixon line have a direct correlation between metro area density and social mobility.<sup>171</sup> Researchers found a relationship between this data and race.<sup>172</sup> Larger African-American populations in low-density areas result in lower mobility.<sup>173</sup> Poor minority populations have suffered disproportionately during sprawl's expansion and the subsequent decline of the inner city.<sup>174</sup>

Sprawl also limits a sense of local community.<sup>175</sup> Through the physical separation of individuals along with economic and racial divisions, sprawl confines the ability of people to understand one another.<sup>176</sup> Suburbs have little shared physical space where

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164. *See id.* at 453.

165. *See generally* ANDRES DUANY ET AL., *SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM* (2001).

166. *See id.*

167. *See id.*

168. *See* Meredith, *supra* note 22, at 464.

169. *See id.* at 466.

170. *See* O'Brien, *supra* note 1.

171. *See id.* O'Brien's article suggests that Atlanta, through its particular type of sprawl, represents one city below the Mason-Dixon line that has led to weaker "American dream" opportunities for minority populations. *See id.*

172. *See id.*

173. *See id.*

174. *See* Meredith, *supra* note 22, at 459. "The economic situation for many African Americans has now been further weakened because not only do they tend to reside in communities that have higher jobless rates and lower employment growth... but also they lack access to areas of higher employment growth." WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 9 (2009).

175. *See* Meredith, *supra* note 22, at 461.

176. *See id.* at 461-62.

individuals can interact with one another, and with even less forced interaction by way of proximity, they “retreat into the sanctuary of their family rooms.”<sup>177</sup> This reality prevents both social and physical connections.<sup>178</sup>

Finally, sprawl creates environmental victims beyond the displacement of undeveloped land.<sup>179</sup> Indirect environmental effects include air and water pollution, increased energy consumption, and soil erosion.<sup>180</sup> Intensive automobile use, a byproduct of the spatial expansion of sprawl, has been documented to negatively impact air and water quality.<sup>181</sup> Also, of all the housing types, the predominant suburban single-family home consumes the greatest amount of energy.<sup>182</sup>

As discussed in Part I.A, new urbanism is an attempt to reintegrate society by overlapping use districts, enhancing satisfaction through an increase in pedestrian safety, facilitating walkability, reducing the dependency on the automobile, creating a city center, and enhancing communal interaction by increasing public spaces.<sup>183</sup> These goals directly relate to each of the victims of sprawl as outlined earlier in this section. The hope is that through new urbanism’s diversification plans, a socially stratified community can coexist within the same space, thereby forcing interaction, and ultimately, understanding between the inhabitants.<sup>184</sup> New urbanism designs acknowledge the downsides of sprawl and directly work to combat them.<sup>185</sup> It is important that land use for the twenty-first century is utilized to build a cohesive society that can grow successfully into the future.

#### D. Incentives for Implementing New Urbanism

Some legislatures have created incentives in their state planning codes to encourage municipalities to implement new urbanism principles.<sup>186</sup> These state incentives attempt to influence local governments to utilize their land use powers for new urbanism.<sup>187</sup> In

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177. *Id.* at 462.

178. *See id.*

179. *See id.* at 463.

180. *See id.* at 464.

181. *See id.* at 465–66.

182. *See id.* at 466.

183. *See supra* Part I.A.

184. *See* DUANY ET AL., *supra* note 165, at 24–25.

185. *See* Meredith, *supra* note 22, at 478.

186. *See* Custer, *supra* note 37, at 6.

187. *See id.*

2000, the Pennsylvania Municipalities Planning Code was updated to promote smart growth.<sup>188</sup> This “top-down” approach<sup>189</sup> provides guidelines to the municipalities for “comprehensive plans, municipalities’ official maps, zoning ordinances, and other useful tools.”<sup>190</sup> The purpose of this change in the code was to “highlight TNDs as a viable alternative to building suburban single-family houses on one-acre lots.”<sup>191</sup> The 2000 amendments “provide enabling legislation for those local governments who choose to engage in sound land use practices.”<sup>192</sup> This has provided a predictable foundation for local governments to plan and control land use policies.<sup>193</sup>

Wisconsin is another example of preemptive measures used to promote TNDs.<sup>194</sup> In 2001, Wisconsin “mandate[ed] that ‘every city and village with a population of at least 12,500 adopt a traditional neighborhood development ordinance by January 1, 2002.’”<sup>195</sup>

This was an effort by the State to prevent municipalities from using conventional zoning and subdivision ordinances to discourage TNDs.<sup>196</sup> The State, therefore, produced a model ordinance that towns and villages could replicate.<sup>197</sup> Cities were given the option of treating the ordinance as a zoning district or as a modified approach to planned unit developments.<sup>198</sup> Unfortunately, there was no penalty associated with failing to adopt the ordinance and by 2007 only about one third of Wisconsin cities had adopted the model.<sup>199</sup>

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188. *See id.*

189. Robert J. Sitkowski & Brian W. Ohm, *Enabling the New Urbanism*, 34 URB. LAW. 935, 936 (2002).

190. Beata Bujalska, *The PA Municipal Planning Code and Zoning*, CROSSROADS BLOG (Jan. 21, 2010), <http://renewlv.wordpress.com/2010/01/21/the-pa-municipal-planning-code-and-zoning>.

191. Custer, *supra* note 37, at 6 (internal quotation marks removed).

192. Judith R. Chambers, *After the Planning’s Over: Multi-Municipal Comprehensive Plans in Pennsylvania* (May 2009) (unpublished M.S. thesis, Pennsylvania State University, College of Agricultural Sciences), *available at* <https://etda.libraries.psu.edu/paper/9464/4648>.

193. *See* CNTY. OF BERKS, DRAFT BERKS COUNTY COMPREHENSIVE PLAN 2030, at 4.

194. *See* Custer, *supra* note 37, at 6.

195. *Id.*

196. *See* Sitkowski & Ohm, *supra* note 189, at 941.

197. *See* BRIAN W. OHM, ET AL., A MODEL ORDINANCE FOR A TRADITIONAL NEIGHBORHOOD DEVELOPMENT 1 (2001), *available at* <http://urpl.wisc.edu/people/ohm/tndord.pdf>.

198. *See* Custer, *supra* note 37, at 6.

199. *See Wisconsin TND Law Achieves Mixed Results*, BETTER! CITIES & TOWNS (Oct. 1, 2007), <http://bettercities.net/article/wisconsin-tnd-law-achieves-mixed-results>.

Although these incentive programs have encouraged some municipalities, new urbanism is still a fringe concept. Attempts at implementation continue to stumble at the local level. The next part of this Note explores the restraints that new urbanists encounter while working within the local governance.

## II. LOCALISM

This Part showcases localism as a theory of municipal autonomy. Discussion focuses on the arguments for localism as well as its pitfalls. It further traces the connections between localism and new urbanism and outlines how localism mutes some of new urbanism's objectives.

### A. The Theory of Localism

Local government is sometimes referred to as a “sanctuary for people,” meaning that actions taken by local governments have the greatest impact on people's homes.<sup>200</sup> Similarly, local government has the greatest potential to protect its citizens' interests because local government is closest to the people it represents.<sup>201</sup> The next sections detail the theory of localism and reproduce arguments for and against granting autonomy to local municipalities.

#### 1. Localism as an Autonomy Argument.

Local governments are entities of the state.<sup>202</sup> As the Supreme Court reasoned in *Atkin v. Kansas*, “[Local governments] are the creatures—mere political subdivisions—of the state, for the purpose of exercising a part of its powers.”<sup>203</sup> They exist only by an act of the state, and as their creator, states enjoy complete authority to alter, expand, contract, or abolish any local government.<sup>204</sup> Local governments have no rights against their state.<sup>205</sup> Additionally, local governments act both as a delegate of the state, possessing only

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The study examined thirty-two TND ordinances, of which only thirteen had adopted the model ordinance. *See id.*

200. *See* Briffault, *Our Localism: Part II*, *supra* note 65, at 383.

201. *See id.*

202. *See id.* at 386.

203. *Atkin v. Kansas*, 191 U.S. 207, 220 (1903); *see also* JESSE J. RICHARDSON, JR. ET AL., *IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT* (2003).

204. Briffault, *Our Localism: Part I*, *supra* note 76, at 7.

205. *See id.*

powers granted to them by their state, and as an agent of the state, exercising limited local powers on behalf of the state.<sup>206</sup>

If states choose to delegate power to local governments, then the three sources of power that states utilize are state constitutions, legislation, and specific local charters.<sup>207</sup> When determining the scope of local delegation, reviewing courts prioritize these possible methods of delegation.<sup>208</sup> Generally, state constitutions receive the greatest deference, and if the authority is not found in the constitution, courts look next to legislation—both specific laws and municipal charters.<sup>209</sup> If the source of authority is still undetermined, courts then make their own determination, and this interpretation falls into two categories: strict and liberal.<sup>210</sup>

Strict interpretation examines the direct language of the statute and begins with the assumption that there is no local authority unless clearly granted.<sup>211</sup> This forms the basis of the statutory construction canon of Dillon's Rule.<sup>212</sup> Named for Judge John Dillon, an Iowa judge during the mid-nineteenth century,<sup>213</sup> Dillon's Rule, the most common method for determining the scope of local power,<sup>214</sup> requires that all local powers must find their original basis in an express delegation by the state.<sup>215</sup> "Under Dillon's Rule, local governments may exercise only those powers 'granted in express words,' or 'those necessarily or fairly implied in or incident to, the powers expressly granted,' or 'those essential to the declared objects and purposes of the [municipal] corporation—not simply convenient but indispensable.'" <sup>216</sup> To prevent local governments from over-catering to special interests, the judiciary deploys this rule so that equitable services are distributed to the entire constituency of the municipality.<sup>217</sup> Clayton Gillette calls Dillon's Rule a weapon against

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206. *See id.*

207. *See* RICHARDSON, JR. ET AL., *supra* note 203, at 3.

208. *See id.* at 4.

209. *See id.*

210. *See id.* at 6.

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.* at 17–18. Thirty-nine states employ Dillon's Rule and ten ignore it completely. *See id.*

215. *See* Briffault, *Our Localism: Part I*, *supra* note 76, at 8.

216. *Id.* at 8.

217. *See* Clayton Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHICAGO-KENT L. REV. 959, 960 (1991).

“fiscal overextension and its more vicious counterpart, municipal corruption.”<sup>218</sup>

In contrast, a liberal construction examines legislation for specific language that restricts the grant of power and starts with the assumption that the authority is present unless expressly denied.<sup>219</sup> This interpretation is known as home rule.<sup>220</sup> Home rule emerged as a reaction to the restrictive nature of Dillon’s Rule creating an insufficient amount of authority for local governments to deal with emerging issues.<sup>221</sup> Some courts believe that local government contains an “inherent right of local self-governance.”<sup>222</sup> Within home rule jurisdictions, local municipalities are almost treated as an “*imperium in imperio*, a state within a state.”<sup>223</sup> A study of home rule decisions during its earliest implementation resulted in the conclusion that these courts generally permit “a fairly wide latitude of action on the part of the city in its so-called capacity as an organization for the satisfaction of local needs.”<sup>224</sup>

On the surface it would seem that these two rules are contradictory, and although it is true that home rule has developed as a counter to Dillon’s Rule, the two rules are actually not mirror images and can coexist within the same jurisdiction.<sup>225</sup> For instance, some jurisdictions may have different standards based on the type of municipality—utilizing home rule for counties, but Dillon’s Rule for towns or villages.<sup>226</sup> Additionally, some municipalities in home rule states may have more restrictions than those in Dillon’s Rule jurisdictions.<sup>227</sup>

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218. *Id.* at 964.

219. *See* RICHARDSON, JR. ET AL., *supra* note 203, at 6.

220. *See id.*

221. *See id.* “[T]he concept of Home Rule vests general powers of authority with local governments except for certain government functions for which state government has previously deemed to be under the purview of state government, or has previously restricted from local government authority.” Ray Taylor, *Regionalism and the Dillon Rule: Does the Dillon Rule Help or Hinder Metropolitan Progress?* FUTURE HAMPTON ROADS, Jan. 2006, at 1, available at [http://fhrinc.org/Sections/Publications/RegionalistPapers/Docs/RegionalistPaperNo.14\\_RegionalismAndTheDillonRule.pdf](http://fhrinc.org/Sections/Publications/RegionalistPapers/Docs/RegionalistPaperNo.14_RegionalismAndTheDillonRule.pdf).

222. RICHARDSON, JR. ET AL., *supra* note 203, at 9.

223. Briffault, *Our Localism: Part I*, *supra* note 76, at 10.

224. *Id.* at 15 (internal quotation marks omitted).

225. *See* RICHARDSON, JR. ET AL., *supra* note 203, at 6.

226. *See id.*

227. *See* Taylor, *supra* note 221, at 2.



Critics of Dillon's Rule argue that strict interpretation limits local governments from achieving their goals.<sup>228</sup> Additionally, proponents of home rule suggest that the rule allows local governments to function and provide services efficiently and democratically.<sup>229</sup> Even as home rule has broadened its influence, some commentators suggest that the existence of Dillon's Rule within the zeitgeist of interpretation has limited local governments' ability to capitalize on home rule flexibility.<sup>230</sup> Regardless of the type of rule applied, fundamentally, both attempt to provide a structure of authority that ensures local governments properly supply necessary and desired services to their constituents.<sup>231</sup>

The social economist Charles Tiebout promoted the public choice theory—sometimes referred to as “feet voting”—which posits that local citizens will choose a locality that provides their preferred services and products over localities that do not.<sup>232</sup> For example, if a citizen is unhappy with the taxes and services of a particular locality, they will move.<sup>233</sup> They are not just citizens but “consumer-voters.”<sup>234</sup> As a result, localities will attract individuals who most resemble the existing majority in that locality and dissuade those who do not agree with local policies.<sup>235</sup> This behavior consequently facilitates preference homogeneity and justifies the proliferation of autonomous local governments as the most efficient way of providing state services.<sup>236</sup>

Clayton Gillette writes that “[g]iven the assumption that the primary function of localities is to provide local goods and services for constituents, those ideal circumstances would [be obtained] when the package of local public goods and services provided in each locality satisfies the preferences of local residents.”<sup>237</sup> This theory, coupled with Tiebout's public choice concept, suggests that decentralizing power and providing for greater local autonomy through home rule serve a state's best interest. Any potential need for control over the

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228. See RICHARDSON, JR. ET AL., *supra* note 203, at 6.

229. See *id.* at 7.

230. See Briffault, *Our Localism: Part I*, *supra* note 76, at 10.

231. See Taylor, *supra* note 221, at 1.

232. See Gillette, *supra* note 217, at 969.

233. See *id.*

234. See *id.*

235. See *id.* Briffault, *Our Localism: Part II*, *supra* note 65, at 403.

236. See *id.*

237. Gillette, *supra* note 217, at 968.

locality is balanced by the citizens' ability to choose and create a competitive marketplace for different types of local governance.<sup>238</sup>

Localism presents strong arguments for autonomy, and state law is generally accepting of the principle. Empowering local government through a grant of autonomy is the underlying philosophy of localism.<sup>239</sup> Once granted autonomy, local governments have the ability to make their own decisions in certain local areas.<sup>240</sup> Localism creates a sense of deference for local autonomy regarding "matters of zoning, land use, property taxation, and the provision of public services."<sup>241</sup> With this autonomy, local governments command a great responsibility and have the ability to structure American society.

## 2. *Proponents of Localism Suggest Efficiency, Democratic, and Motivational Benefits*

Proponents of localism argue that it promotes "allocational efficiency in the provision of public services, democratic citizenship, and self-determination by territorial communities."<sup>242</sup> Briffault articulates three reasons behind the efficiency argument. First, as mentioned in Part II.A.1, Tiebout's public choice theory advocates that people are free to relocate, which results in greater efficiency for service distribution.<sup>243</sup> The public choice theory also supports the idea that participation in local government is voluntary, and not coercive, which therefore gives it a more legitimate undertone.<sup>244</sup> Second, given the uniqueness of local needs, it would be difficult to properly apply services if distributed at the state level.<sup>245</sup> The centralized nature of state policymaking might overlook various local opinions and aggregate them under a single decision, thereby potentially excluding large amounts of people from receiving the benefits they desire.<sup>246</sup> Third, the availability of multiple localities provides for interlocal competition.<sup>247</sup> Interlocal competition, and a fear of losing

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238. *See id.* at 970.

239. *See* Briffault, *Localism and Regionalism*, *supra* note 55, at 1.

240. *See id.*

241. Cashin, *supra* note 56, at 1996.

242. Briffault, *Localism and Regionalism*, *supra* note 55, at 15.

243. *See id.*

244. *See* Briffault, *Our Localism: Part II*, *supra* note 65, at 404.

245. *See* Briffault, *Localism and Regionalism*, *supra* note 55, at 15.

246. *See id.*

247. *See id.* at 16.

constituents, motivates a resistance to local inefficiencies, particularly in areas of taxation, spending, and general policy administration.<sup>248</sup>

Participation in the political process is critical for a strong democracy.<sup>249</sup> Local governments provide a more manageable and easily accessible form of government.<sup>250</sup> Within a smaller form of government, an individual's voice is presumably stronger, and his ability to be heard and achieve meaningful results is therefore much greater.<sup>251</sup> But this idea only works when local government is perceived to be autonomous, because people will not bother to participate if their local government has no real power over issues with which they are concerned.<sup>252</sup>

Local autonomy creates a stronger sense of community because those participating in local government share concerns and values.<sup>253</sup> People have a unique connection to where they live, and the overlay of governance to this place creates a stronger bond for individuals.<sup>254</sup> Participation in an autonomous local system allows people to develop a community and create a historical identity that binds them to each other.<sup>255</sup> Localism allows citizens to create a governmental structure within which they want to live.<sup>256</sup>

Localists also argue that externalities can be better managed through a process of interlocal bargaining where multiple localities make accommodations and compromises with each other to create joint ventures or special-purpose districts.<sup>257</sup> Economies of scale can be achieved through a joint program of providing services, and thus the inefficiencies of administrative and infrastructure costs can be eliminated, while negative externalities can be negotiated around and compensation measures can be set between localities.<sup>258</sup> Essentially, autonomous localities have incentives to cooperate with their neighbors.<sup>259</sup>

Although there seems to be many benefits to localism, the process can also have negative effects. Opponents offer numerous strong

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248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.*

252. *See id.* at 17.

253. *See id.*

254. *See id.*

255. *See id.*

256. *See* Cashin, *supra* note 56, at 2001.

257. *See* Briffault, *Our Localism: Part II*, *supra* note 65, at 430.

258. *See id.*

259. *See* Gillette, *supra* note 66, at 192.

arguments that suggest localism may be restrictive and potentially detracting.<sup>260</sup>

### 3. *Localism's Arguments Dissected for Flaws*

Proponents of localism argue that it provides for greater economic efficiency, political empowerment, and community education of civic life.<sup>261</sup> But arguments for localism collapse when examining the regional consequences of local government action.<sup>262</sup> Localism opponents argue that any marginal benefits of localism generated for local participants are outweighed by the collective harm at the greater region.<sup>263</sup> In fact, as Briffault mentions, and this Note contends in Part III, these arguments suggest a need for a version of regional government, rather than local autonomy.<sup>264</sup> Localism's critics suggest that localism creates "isolated, self-interested entities that ignore or exploit the plight of their neighbors, particularly central cities."<sup>265</sup> One reason for this exploitation might be what Cheryl Cashin labels as "the tyranny of the favored quarter."<sup>266</sup> Those with resources create externalities that are then shifted to those without resources.<sup>267</sup> Weaker neighbors are burdened by their more powerful neighbors' ability to capture valuable assets and push out waste or unwelcome types of people and entities.

As a result of the mobility of modern society and the ability to independently produce sufficient amounts of revenue,<sup>268</sup> high-growth, developing suburbs further isolate themselves from the minority poor.<sup>269</sup> If you cannot afford to live in the suburbs, then you cannot afford to work in the suburbs, much less absorb the costs of driving back and forth to the suburbs for employment each day.<sup>270</sup> The less fortunate are left with no other option but to occupy the poverty ridden, inner city locations.<sup>271</sup> William Julius Wilson comments that "[a]s the world of corporate employment has relocated to America's

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260. See *infra* Part II.A.3.

261. See Briffault, *Our Localism: Part I*, *supra* note 76, at 1.

262. See Briffault, *Localism and Regionalism*, *supra* note 55, at 18.

263. See Cashin, *supra* note 56, at 1997.

264. See Briffault, *Localism and Regionalism*, *supra* note 55, at 18.

265. Gillette, *supra* note 66, at 190.

266. Cashin, *supra* note 56, at 1987.

267. See *id.*

268. See Briffault, *Our Localism: Part II*, *supra* note 65, at 352.

269. See Cashin, *supra* note 56, at 1987.

270. See Briffault, *Our Localism: Part I*, *supra* note 76, at 22.

271. See Cashin, *supra* note 56, at 1987.

suburban communities . . . many of the residents of our inner-city ghettos have become physically isolated from places of employment . . . [and] the commute . . . becomes a Herculean effort.”<sup>272</sup> Therefore, in contrast to suburbs, many inner cities are burdened with social and infrastructure externalities, which create greater economic demands on local resources.<sup>273</sup> Inner cities are forced to provide a bigger safety net for their poor constituents while receiving less revenue from their tax base.<sup>274</sup> These areas must, therefore, “look beyond the city limits to outside public and private actions,” to support their needs.<sup>275</sup> Dependency on outsiders limits the cities’ autonomy and subjects them to state influence.<sup>276</sup>

The reality of this dichotomy and fear of becoming responsible for these burdensome populations entrenches the isolation of smaller localities and creates intense interlocal political and economic conflicts.<sup>277</sup> Due to localism’s legal prowess, local entities perpetuate economic advantages through exclusionary zoning systems or by providing incentives to attract commerce and boost tax bases.<sup>278</sup> Lisa Alexander writes, “The decisions of a particular locality to exclude or include certain land uses, or to provide public subsidies for housing construction or economic development, will inevitably generate externalities or have spillover effects on neighboring localities.”<sup>279</sup> This competitive practice ensures that no locality is actually isolated because what happens in one area has a direct effect on its neighbors.

The Tieboutian efficiency argument for localism is also challenged because it is premised on a world with no spillover effects, or externalities, between the localities.<sup>280</sup> In reality, localities affect one another through policy decisions and actions.<sup>281</sup> Pollution is a clear example of an externality that transcends the artificial borders of a municipality.<sup>282</sup> In modern metropolitan areas, externalities are nearly guaranteed given the proximity of jurisdictional borders as well

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272. WILSON, *supra* note 174, at 9–10.

273. See Briffault, *Our Localism: Part II*, *supra* note 65, at 424.

274. See *id.* at 408–10.

275. *Id.* at 350.

276. See *id.*

277. See Briffault, *Our Localism: Part I*, *supra* note 76, at 2.

278. See *id.*

279. Lisa T. Alexander, *The Promise and Perils of “New Regionalist” Approaches to Sustainable Communities*, 38 FORDHAM URB. L.J. 629, 637 (2011).

280. See Briffault, *Localism and Regionalism*, *supra* note 55, at 18.

281. See Gillette, *supra* note 217, at 971.

282. See *id.*

as the overlapping routines of the citizens in different jurisdictions.<sup>283</sup> Briffault further elaborates, “As the example of sprawl indicates, [externalities] may not involve simply the impact of one particular locality on its neighbor, but may instead be the consequence of the aggregate of local policies across the region.”<sup>284</sup> According to Briffault’s reasoning, the efficiency argument is best served through the lens of regional cooperation, rather than localism.<sup>285</sup>

Additionally, the Tieboutian theory operates within a vacuum of cost and relies on the equal ability of each citizen to move between localities.<sup>286</sup> But, not every participant is equally mobile, and exit costs may be prohibitive for certain classes of citizens.<sup>287</sup> There are out of pocket costs associated with mobility, people can only live where they have access to employment, and people must be able to afford the costs of living in a locality.<sup>288</sup> Poorer members of the community may have fewer options of mobility and, therefore, bear a disproportionate amount of the cost associated with this theory.<sup>289</sup> These inhibitors suggest that Tiebout’s theory is only applicable to the affluent.<sup>290</sup>

Tiebout’s public choice theory also fails to consider interlocal inequalities, which further undermine localism’s democratic and community-based arguments.<sup>291</sup> The theory assumes that the differences between localities are a product of taste rather than the result of external decisions that the locality has little control over.<sup>292</sup> A premise of the theory is that local governments have complete control over how they provide services, to whom they provide the services, and how much each service costs.<sup>293</sup> In reality, localities make policy decisions based on their fiscal capacity to implement those decisions.<sup>294</sup>

Another reason people may not move is because they are emotionally and sentimentally attached to their locality, despite their

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283. See Briffault, *Localism and Regionalism*, *supra* note 55, at 18.

284. *Id.*

285. See *id.* at 19–20.

286. See Briffault, *Our Localism: Part II*, *supra* note 65, at 420.

287. See *id.*

288. See *id.*

289. See Briffault, *Localism and Regionalism*, *supra* note 55, at 25.

290. See Briffault, *Our Localism: Part II*, *supra* note 65, at 420.

291. See *generally id.*

292. See *id.* at 422.

293. See Cashin, *supra* note 56, at 2001.

294. See Briffault, *Our Localism: Part II*, *supra* note 65, at 422 (noting that wealthy communities spend much more per capita on their schools).

disapproval of municipal policies.<sup>295</sup> One's community provides a stable environment filled with interpersonal support and physical security.<sup>296</sup> Movement to another location would result in the loss of these benefits and the severing of sentimental attachments.<sup>297</sup> Uprooting this support structure has potential psychological costs that many people are unwilling to bear.<sup>298</sup>

Effective democracy requires equal political voice.<sup>299</sup> Proponents of localism argue that the nature of localism's form generates greater democratic participation, but Briffault reasons that the inability of localities to actually address interlocal issues undermines this benefit.<sup>300</sup> The political voice is muted by the fact that issues may have unsatisfactory resolutions in the local perspective.<sup>301</sup> Briffault suggests that given the reality of an existence of inequality between localities, political powers concern themselves chiefly with expanding their tax base.<sup>302</sup> This prioritization manifests as pandering to constituents with greater economic prowess—primarily corporations and the affluent—instead of small businesses and the poor.<sup>303</sup> Finally, in the contemporary metropolitan area, where commuters spend significant time in multiple localities, the decisions of each locality are likely to neglect commuters' concerns because they have no local voice in the political processes.<sup>304</sup> Therefore, in the context of the metropolis, the argument concerning democratic benefits requires that there be a regional avenue to voice political concerns.<sup>305</sup>

Localism's community argument hinges on the fact that people share a single common space and live their daily lives interacting with one another.<sup>306</sup> But in the metropolis people spend their days in many different locations and communities.<sup>307</sup> Additionally, contemporary metropolitan areas lack a distinct city center as a gathering place for citizens.<sup>308</sup> Harvard University Professor Gerald Frug explained that

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295. *See id.* at 421.

296. *See id.*

297. *See id.*

298. *See* Briffault, *Localism and Regionalism*, *supra* note 55, at 25.

299. *See id.* at 20.

300. *See id.* at 21.

301. *See id.*

302. *See* Briffault, *Our Localism: Part II*, *supra* note 65, at 424–25.

303. *See id.*

304. *See id.* at 426.

305. *See* Briffault, *Localism and Regionalism*, *supra* note 55, at 22.

306. *See id.*

307. *See id.* at 22–23.

308. *See id.* at 23.

city life is “the being together of strangers.”<sup>309</sup> In contrast, localities emerging as a result of sprawling suburbs usually are communities of similar individuals, and, as a result, segregate communities based on social, economic, and racial stratifications.<sup>310</sup> Homogeneity limits interactions with other types of people, and individuals retreat from forming diverse relationships.<sup>311</sup> This system creates a cycle, as “[a] child growing up in such a homogenous environment is less likely to develop a sense of empathy for people from other walks of life and is ill prepared to live in a diverse society.”<sup>312</sup> In other words, “fragmented local autonomy tends to encourage a highly parochial perspective among citizens.”<sup>313</sup> Therefore, localism seems to create isolated communities weary of other people and other municipalities.

### B. Localism’s Connection to New Urbanism

The failures of new urbanism can be associated with the pitfalls of localism that this Note discussed in Part II.A.3. Local efforts to exclude low-income populations, competition between localities, the tyranny of the favored quarter, and isolationist tendencies are all disincentives for local governments to incorporate new urbanist principles in their land use plans.<sup>314</sup> The next section of this Note explores many of new urbanism’s weaknesses and their symmetry with localism. For instance, outskirt development and the high costs of housing in new urbanist communities create a mobility problem for populations lacking financial means and further isolates and homogenizes localities.<sup>315</sup> Also, localism’s contempt of externalities discourages local governments from creating a regional system of corridors through which commerce and people could move and participate in new urbanist communities.<sup>316</sup>

#### 1. *Local Land Use Autonomy Leads to a Void in Comprehensive Approaches*

One of the major impediments to new urbanism communities is that traditional zoning regulations are rigid and do not provide the

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309. Meredith, *supra* note 22, at 461.

310. See Cashin, *supra* note 56, at 2002.

311. See Meredith, *supra* note 22, at 462.

312. DUANY ET AL., *supra* note 165, at 44–45.

313. Cashin, *supra* note 56, at 2020.

314. See *supra* Part II.

315. See *supra* Part II.A.3.

316. See *id.*



flexibility or scope for utilizing new urbanism's design principles.<sup>317</sup> Deciphering a way to work within these restrictive systems demands creative thinking.<sup>318</sup> Variances are too small of a tool given their typical use on individual lots. Similarly, special exceptions help build one slice of new urbanism, but neglect the regional aspect of new urbanism.

In the past, many new urbanist developments have utilized PUDs as their foundation.<sup>319</sup> But new urbanist developers have struggled to use this tool to persuade local planning boards to deviate from "conventional standards of street width, lot size and type of dwelling permitted."<sup>320</sup> Therefore, locally adopted PUDs incorporate traditional zoning standards that are inconsistent with new urbanist principles.<sup>321</sup>

Any zoning amendment must be consistent with the comprehensive plan.<sup>322</sup> Thus, some communities have attempted to amend zoning ordinances to reflect new urbanist principles, but this too has faced difficulties.<sup>323</sup> The flexibility of TND ordinances has left the window open for arbitrary interpretations by local zoning boards.<sup>324</sup> New urbanist ordinances promote "good urban form," and developers are consequently put off by the uncertainty of exactly what these ordinances allow.<sup>325</sup> In the extreme, some cities have attempted to rewrite entire zoning ordinances, but even after a successful conversion, many preexisting uses exist and stifle wholesale conversions.<sup>326</sup>

Two categories of communities have attempted this approach: larger, older cities, and smaller, newer cities.<sup>327</sup> Large cities, like Milwaukee, St. Paul, Chicago, and Denver, generally have codes that were rewritten in the 1950s to reflect the growth of suburbanization, and now they are rewriting their codes again to recapture the

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317. See Custer, *supra* note 37, at 3.

318. See *id.*

319. See Ohm & Sitkowski, *supra* note 86, at 786.

320. *Id.*

321. See Sitkowski & Ohm, *supra* note 189, at 943.

322. See Geller, *supra* note 123, at 82–84.

323. See Custer, *supra* note 37, at 3.

324. See *id.* at 3–4.

325. See Ohm & Sitkowski, *supra* note 86, at 786.

326. See Custer, *supra* note 37, at 4.

327. See Ohm & Sitkowski, *supra* note 86, at 788–89. It is important to highlight that many of the smaller cities that have attempted to revise their codes are located near or within the metropolitan limits of larger cities, yet still act independently of their larger neighbors. See *id.* at 789.

fundamental character of the urban space.<sup>328</sup> Smaller cities, on the other hand, are generally less defined, and their borders are still expanding.<sup>329</sup> Smaller cities have recently redesigned their codes to shape new growth in the same vein as the old character.<sup>330</sup> Two examples of this type of smaller city located near Charlotte, North Carolina include the City of Belmont (population near 9000) and the Town of Huntersville (population near 30,000).<sup>331</sup>

Some critics believe that the failure of new urbanism lies in planners' inability to create a policy framework that embraces all of its principles.<sup>332</sup> The structures in which new urbanists work favor sprawl, and ordinances are used to regulate individual sites rather than whole places.<sup>333</sup> New urbanists have meticulous requirements for the development of the neighborhood and block, but only vague guidelines for policy decisions at the regional level.<sup>334</sup> Even improved smart code ordinances tend to focus on "a few development hot spots."<sup>335</sup> New urbanists have identified the need for a regionalist plan yet fail to deliver on the process.<sup>336</sup> This may partially explain why the vision of new urbanism has failed in practice.<sup>337</sup>

## 2. *Municipal Self-Interest Disincentives Interlocal Bargaining*

The process of interlocal bargaining can assist new urbanism's regional goal. Interlocal bargains can provide a single public good to multiple localities by achieving economies of scale.<sup>338</sup> Arrangements like municipal waste treatment plants or regional ambulatory services are examples of this type of bargain.<sup>339</sup> Some interlocal bargains target socio-economic disparities, and, through burden sharing and

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328. *See id.* at 788–89.

329. *See Custer, supra* note 37, at 4.

330. *See id.*

331. *See Ohm & Sitkowski, supra* note 86, at 789. Other small cities have attempted to add new urbanism as another "menu" for land use planners. *See id.* For example Knoxville, Tennessee and Suffolk, Virginia integrated the principles through a neighborhood development district, Gainesville, Florida and Concord, North Carolina approached the integration through the use of a floating zone, and the Cities of North August, South Carolina and River Falls, Wisconsin utilized an overlay zone. *See id.* at 790 nn.30–32.

332. *See Katz, supra* note 48.

333. *See id.*

334. *See Meredith, supra* note 22, at 487.

335. *Katz, supra* note 48.

336. *See Meredith, supra* note 22, at 488.

337. *See id.* at 490.

338. *See Gillette, supra* note 66, at 194.

339. *See id.*

sacrifice, municipalities address issues like pollution control, redistributional zoning, and economic subsidies that attract business.<sup>340</sup>

But many local governments, once involved in the process, may “have difficulty agreeing because they cannot readily verify each other’s expressed preferences over bargaining outcomes, they may be served by imperfect agents, they may face significant enforcement costs, and they may have difficulty agreeing on a division of the bargaining surplus.”<sup>341</sup> Local governments can choose which projects they want to participate in, and if they see a greater downside than upside, they hide behind local boundaries.<sup>342</sup> The self-interest byproduct of local autonomy may inhibit the process of interlocal bargaining, and thus restrict municipal cooperation around new urbanism.

A concept that may explain the limitations of this type of cooperation is the “exploitation theory.”<sup>343</sup> Exploitation theory suggests that “localities self-interestedly attempt to exploit each other in ways that foreclose volitional burden sharing.”<sup>344</sup> For instance, one municipality may piggyback on the police presence provided by a neighboring municipality without paying any compensatory dues.<sup>345</sup> Others refer to this dilemma as a “free-riding” problem.<sup>346</sup> Inner city governments invest in improvements to infrastructure to spur job growth and improve the quality of life for their residents, while wealthier suburban localities reap the rewards of these improvements without bearing any burdens.<sup>347</sup> Similarly, inner cities tend to build regional assets, such as downtown shopping districts, museums, sports stadiums, parks, and hospitals, that subsequently transfer free spillover benefits beyond the city limits.<sup>348</sup>

Another twist on this theory is Briffault’s prisoner’s dilemma explanation, called “limited rationality” of interlocal competition, where cooperation is stifled because localities’ inability to bind each

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340. *See id.* at 232.

341. *Id.* at 213.

342. *See* Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 99 (2003).

343. *See* Gillette, *supra* note 66, at 246.

344. *Id.* at 236.

345. *See id.*

346. *See* Matthew J. Parlow, *Equitable Fiscal Regionalism*, 85 TEMP. L. REV. 49, 51 (2012).

347. *See id.*

348. *See id.* at 61.

other around a deal inevitably leads to no deal being made.<sup>349</sup> Localities may have a strong incentive to wait out their neighbors and not expend resources on a particular service because another locality may have a greater need to provide that service.<sup>350</sup> Once the service is provided, the original localities' citizens can benefit from its creation without having contributed to its creation. Conversely, if two localities have the opportunity to build a resource-generating asset, like a mall, rather than cooperating to share the costs, they will both build it to offset any potential losses incurred if the other location is built.<sup>351</sup> Thus, localities will fail to make optimal decisions because their self-interest blinds them from seeing the benefits of cooperation.<sup>352</sup>

Other critics point to the fact that regional promoters have neither a strong ability to influence local demand nor the ability to convince local legislatures to adopt regional policies.<sup>353</sup> Consequently, public opposition to plans has stifled many local efforts because “[t]hey’re fearful of losing local character of cities and towns.”<sup>354</sup> Local citizens are particularly skeptical of changes towards multi-family housing and smaller lots.<sup>355</sup> Additionally, neighbors may challenge rezoning based on the concept of not in my backyard (NIMBY).<sup>356</sup>

This xenophobic behavior has perpetuated other scenarios of imbalanced power. For example, the “tyranny of the favored quarter” phenomenon is a percentage of the population that captures a disproportionate amount of public infrastructure resources through the use of overwhelming political influence.<sup>357</sup> The favored quarter has three distinguishing characteristics. First, it receives a greater-than-proportionate amount of public infrastructure investments.<sup>358</sup> Second, it has the largest tax base and highest rate of job growth.<sup>359</sup> Third, it retains local powers and uses this power to isolate itself from

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349. See Gillette, *supra* note 66, at 247.

350. See *id.*

351. See *id.*

352. See *id.* at 246.

353. See Custer, *supra* note 37, at 6.

354. Angela Hart, *Cities Resist Regional Plan to Limit Sprawl*, S.F. PUBLIC PRESS (June 13, 2012, 1:44 PM), <http://sfpublicpress.org/news/2012-06/cities-resist-regional-plan-to-limit-sprawl>.

355. See Custer, *supra* note 37, at 4.

356. See *id.* at 4–5. NIMBYism is defined by an effort of local resistance to undesirable land uses in an attempt to make them difficult to site. See ELLICKSON & BEEN, *supra* note 131, at 740.

357. See Cashin, *supra* note 56, at 2003.

358. See *id.* at 2004.

359. See *id.*

non-affluent regional workers.<sup>360</sup> Cashin suggests that this social phenomenon is not a product of market forces but may instead be shaped by policy.<sup>361</sup> The strong local power of areas comprising the favored quarter—the suburbs—allows decision makers to exclude certain undesirables and avoid accepting regional burdens.<sup>362</sup> Negotiating with the favored quarter for purposes of implementing new urbanism through policies of coordination and connection between municipalities may, therefore, be very difficult.

Given the self-interested nature of local governance and the natural disincentives to work together, localities shun regional cooperation and participation in land use projects.<sup>363</sup> This lack of cooperation stifles new urbanism's first tier regionalism goals.<sup>364</sup> Local planners only have influence over local regulations, and their reach is restricted to within their borders.<sup>365</sup> This limitation may restrict new urbanism planners from coordinating or integrating their designs with neighboring localities.

### 3. *Isolationist Tendencies Create a Patchwork of Suburban Implementation*

Critics suggest that most new urbanism development has occurred on the outskirts of metropolitan areas. As a result, those areas are quintessentially suburban,<sup>366</sup> isolated from other developments, and dependent on the automobile.<sup>367</sup> To date, new urbanism has “helped to produce more subdivisions than towns,” which lack integration with their surroundings.<sup>368</sup> This reverses the natural progression from

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360. *See id.*

361. *See id.* at 2005–06.

362. *See id.* at 2012.

363. *See* Alexander, *supra* note 279, at 641. “As an example, a survey of Pennsylvania municipal officials in 2000 showed that only 11% of municipalities with subdivision and land development ordinances send development plans to neighboring municipalities for review, and only 7% of planning commissioners meet with their counterparts in neighboring municipalities even on an informal basis.” Chambers, *supra* note 192, at 11.

364. *See Charter of the New Urbanism, supra* note 39.

365. *See* Emily Talen, *Beyond the Front Porch: Regionalist Ideals in the New Urbanist Movement*, 7 J. PLAN. HIST. 20, 36 (2008).

366. *See* Martha A. Lees, *Review Essay: Expanding Metropolitan Solutions Through Interdisciplinary City Making: Building Communities Without Building Walls*, 26 N.Y.U. REV. L. & SOC. CHANGE 347, 385–86 (2001).

367. *See* Alan Ehrenhalt, *Suburbs With a Healthy Dose of Fantasy*, N.Y. TIMES, July 09, 2000, <http://www.nytimes.com/2000/07/09/opinion/suburbs-with-a-healthy-dose-of-fantasy.html>.

368. Meredith, *supra* note 22, at 490.

dense urban development to less dense surrounding areas that new urbanists hope to capture in their designs.<sup>369</sup> Since municipalities lack the political capital to demolish large areas for redevelopment, the only available space is on the undeveloped edges.<sup>370</sup>

Some argue that infill projects should be prioritized before land on the edges is developed.<sup>371</sup> Critics, however, claim that this process has actually resulted in scattered new development among older development and thus violates the very challenge new urbanism attempts to eliminate: segregation of uses.<sup>372</sup> The patchwork result stifles normal, organic growth patterns and prevents the “fluid blend of multiple uses” that defines a successful urban landscape.<sup>373</sup> The lesson is “to refrain from being seduced by the beauty contest that [n]ew [u]rbanists proclaim, and instead integrate all the key deeper social values such as safety, security, sacred places, and employment together.”<sup>374</sup> This reality perpetuates the criticism that new urbanist developments are segregated into separate zones from existing urban places.<sup>375</sup>

An example of this type of development is Orenco Station, Oregon, which is often referred to as one of the most promising examples of new urbanist development.<sup>376</sup> This new urbanist community was planned and developed just thirty miles outside of Portland on land that was previously agricultural.<sup>377</sup> The town commercial center was built about three blocks away from the train and on the main arterial road, giving the center a strong customer base of commuters.<sup>378</sup> In Orenco, a study recently found that despite some opportunities for mass transit, residents still predominantly

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369. See Nicole Stelle Garnett, *Redeeming Transect Zoning?*, 78 BROOKLYN L. REV. 571, 583 (2013).

370. See Lees, *supra* note 366, at 385.

371. See, e.g., PETER KATZ, *THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY* (1993).

372. See DeWolf, *supra* note 51.

373. See *id.*

374. Richard Reep, *New Urbanism's Economic Achilles Heel*, NEWGEOGRAPHY (Oct. 30, 2008), <http://www.newgeography.com/content/00370-new-urbanism%E2%80%99s-economic-achilles-heel>.

375. See DeWolf, *supra* note 51.

376. See Eric Jaffe, *The Limits of New Urbanism in Portland's Orenco Station*, ATLANTIC (Oct. 10, 2011), <http://www.theatlanticcities.com/commute/2011/10/has-new-urbanism-failed-portland/275>.

377. See Ehrenhalt, *supra* note 367.

378. See *Orenco Station*, BETTER! CITIES & TOWNS, <http://bettercities.net/places/placesnewurbandedvelopment/orengo-station> (last visited Feb. 18, 2014).

relied on their “single-occupancy vehicles” for transportation.<sup>379</sup> This type of choice for site development actually displaces more land and has indirect environmental effects.<sup>380</sup> As one city councilwoman in a new urbanist community explained, “It’s so far out that everything you save on heating your house is going to be burned in your gas tank.”<sup>381</sup>

Unfortunately, this tendency to develop new urbanist communities outside of the existing metropolitan limits can be traced to an underlying trait of localism. The theory of municipal independence suggests that the original motivation for movement out of the metropolitan areas is rooted in a longing for a new, separate lifestyle. Thus, suburban residents no longer feel obligated or connected to residents of the central cities.<sup>382</sup> Recent studies of the contemporary “full-service” suburbs, filled with corporate branches, local employment opportunities, and consumer mega hubs, suggest that residents residing in these areas have less need to travel into the cities for any of their daily needs.<sup>383</sup> Further, once this system is in place, suburban residents may even feel empowered to compete and draw resources from the central cities to support their own labor and tax bases.<sup>384</sup> Lisa Alexander explains that “local government law, therefore, normalizes and entrenches citizens’ private, market-based, racial, and economic preferences, which exacerbates spatial and social inequality.”<sup>385</sup>

It seems that new urbanist communities may not actually be as integrated as their philosophy demands. Celebration, Florida, a 5000-acre compound designed by the Disney Corporation,<sup>386</sup> and a well-known example of new urbanist design,<sup>387</sup> is touted as an example of how a new urbanist community should look.<sup>388</sup> Unfortunately, this

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379. *See id.*

380. *See* Meredith, *supra* note 22, at 493.

381. *Id.* This city councilwoman represented Kentlands, Maryland and issued this statement while voting against issuing a permit for designs that incorporated environmentally-friendly components. *See id.*

382. *See* Gillette, *supra* note 66, at 237.

383. *See id.* at 239.

384. *See id.* at 237.

385. Alexander, *supra* note 279, at 639.

386. *See* Jules Wagman, *Living in Disney’s Brave New Town*, JACKSONVILLE.COM (Sept. 12, 1999), [http://jacksonville.com/tu-online/stories/091299/dss\\_0912nonf.html](http://jacksonville.com/tu-online/stories/091299/dss_0912nonf.html).

387. *See* Michael Vanderbeek & Clara Irazabal, *New Urbanism as a New Modernist Movement: A Comparative Look at Modernism and New Urbanism*, TRADITIONAL TRADE & SETTLEMENTS REV., Fall 2007, at 41, 50.

388. *See* Reep, *supra* note 374. Celebration, Florida was opened in 1996 outside of Walt Disney World and immediately became a symbol of new urbanism, spawning

community, as others like it, lacks the availability of jobs upon which a successful new urbanist community depends.<sup>389</sup> “None of these communities have employment opportunities—jobs—down the street from the residences. The dwellers of all these communities get in their cars and drive to their jobs off-campus. New [u]rbanism thus becomes an after-6pm-and-weekend lifestyle choice, not a new way of life.”<sup>390</sup>

The independence of suburban municipalities is a hidden driver in new urbanism development. An examination of the implementation of existing new urbanism communities displays this underlying bias of localism. It is clear that even some of new urbanism’s most well regarded projects failed to address the suburban psychology of independence.

#### 4. *Inequalities Between Municipalities Produce Exclusionary Regimes*

One major goal of new urbanism is the diversification of the community and the integration of multiple social classes within the project.<sup>391</sup> Local government law generally creates inequalities between municipalities. Allowing discrete local bodies to control “economically and socially interdependent territories...leads to fragmented local land use decisions, systemic exclusion, and distributional inequalities.”<sup>392</sup> Local governments are structured to undervalue extralocal effects of their decisions because they do not feel the burdens, and without regional or state intervention, they will continue to neglect these externalities.<sup>393</sup> As discussed in Part II.A.3, the “tyranny of the favored quarter,” displays how outer suburbs reap the benefits of development but “externalize development’s costs and burdens.”<sup>394</sup>

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many replica towns across Florida, including Baldwin Park and Avalon Park, both located outside of Orlando. *See id.* At its inception, Celebration satisfied a detailed checklist of new urbanist principles, and had more new urbanist components than any other community at that time. *See id.* Controversy has surrounded Celebration and the town has inspired two full-length books and numerous articles. *See, e.g.,* Andres Duany, *The Celebration Controversies*, NEW URBANISM (2004), <http://www.webenet.com/celebration-duany.htm>.

389. *See* Reep, *supra* note 374.

390. Tim Halbur, *The Fatal Flaw of Celebration, FL*, PLANETIZEN (Oct. 30, 2008, 2:00 PM), <http://www.planetizen.com/node/35829>.

391. *See Charter of the New Urbanism, supra* note 39.

392. Alexander, *supra* note 279, at 638.

393. *See* Briffault, *Our Localism: Part II, supra* note 65, at 434.

394. Alexander, *supra* note 279, at 639.



These interlocal inequalities are not a byproduct of choice by the local government but rather a byproduct of consequence.<sup>395</sup> Briffault states that “economic localism prefers the interests of business and investors over those of individuals and families, those of the affluent over those of the poor and those of localities with healthy tax bases over those localities with limited fiscal capacity.”<sup>396</sup> The preference to increase resources while limiting expenditures undermines both democratic participation and community by reducing local governments’ ability to create meaningful solutions.<sup>397</sup> This system promotes interlocal competition and further reduces the ability of localities within a metropolitan area to recognize shared interests and build a community.<sup>398</sup>

Local land use decisions showcase this power in action. Through exclusionary practices, powerful localities use their local authority of zoning to protect the “quality” of residents.<sup>399</sup> Additionally, zoning has been utilized to limit growth in affluent communities so social costs remain at a manageable level.<sup>400</sup> Exclusionary zoning also has extralocal consequences by shifting burdens away from those localities implementing the policy and towards their neighbors.<sup>401</sup>

Recently courts have begun to assess the regional implications of zoning practices.<sup>402</sup> Many courts have rejected the view that the zoning decisions of municipalities should only be judged by their effect within the locality.<sup>403</sup> Some opponents to this shift away from local autonomy argue that these cases deny localities “the ability to decide the future by themselves.”<sup>404</sup> A few commentators have suggested that these cases represent a quiet shift towards greater oversight and invasion of traditionally local responsibilities.<sup>405</sup> But the

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395. See Briffault, *Our Localism: Part II*, *supra* note 65, at 423.

396. *Id.* at 425.

397. See Cashin, *supra* note 56, at 2002. “Since property tax yields depend mainly on the value of development within a jurisdiction and school costs related to the density of residential settlement, the economic pressures to limit population while controlling development to pay the bills are overwhelming.” *Id.* at 1992–93.

398. See Briffault, *Localism and Regionalism*, *supra* note 55, at 23–24.

399. See Cashin, *supra* note 56, at 2019.

400. See Gillette, *supra* note 66, at 236; see also generally *MHANY Mgmt. Inc. v. Inc. Vill. of Garden City*, No. 05–CV–2301 (ADS)(WDW), 2013 WL 1821113 (E.D.N.Y. Apr. 29, 2013).

401. See Briffault, *Our Localism: Part I*, *supra* note 76, at 41.

402. See *id.*

403. See *id.*

404. *Id.* at 42.

405. See *id.*

level of state intrusion has been overly exaggerated.<sup>406</sup> In fact, only four state supreme courts have examined exclusionary zoning practices, and only one, New Jersey,<sup>407</sup> has required oversight by the state.<sup>408</sup> Other state courts have scolded municipalities for taking exclusionary action, but without declaring their actions illegal per se, they have instead urged lower courts to examine the extralocal effects of policies as part of a balancing test to examine the legitimacy.<sup>409</sup> Courts have, however, continued to affirm decisions of local zoning boards as a result of a “desire to maintain the status quo within the community.”<sup>410</sup>

##### 5. *High Property Prices and the Need to Increase the Tax Base Limits Diversity*

In Seaside, Florida, another new urbanism development, property prices originally reflected affordability at \$17,000 per lot, but as the town grew in popularity the affluent moved in and consequently the price of lots rose twenty-five percent annually.<sup>411</sup> These high housing costs have resulted in the exclusion of many minorities, creating a single homogenous enclave.<sup>412</sup> There is a lack of “social diversity, affordable housing . . . [and] racial diversity” making Seaside a

406. *See id.*

407. The *Mount Laurel* cases in New Jersey are famous for requiring municipalities to provide affordable housing.

The first *Mount Laurel* decision, *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 67 N.J. 151 (1975) (*Mount Laurel I*), attacked the system of land use regulation in place in the Township of Mount Laurel on the ground that low and moderate income families were unlawfully excluded from the municipality. The second *Mount Laurel* decision, *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel*, 92 N.J. 158 (1983) (*Mount Laurel II*) was handed down eight years later . . . [and] helped to resolve many of these questions and put teeth in the original doctrine by creating a fair share formula to measure each municipality’s obligation to provide affordable housing.

*History of Mt. Laurel*, N.J. DIGITAL LEGAL LIBR., <http://njlegallib.rutgers.edu/mtlaurel/aboutmtlaurel.php> (last visited Mar. 15, 2014).

408. *See* Briffault, *Our Localism: Part I*, *supra* note 76, at 43.

409. *See id.* at 44–45.

410. *See id.* at 44.

411. *See* Charles C. Bohl, *New Urbanism and the City: Potential Applications and Implications for Distressed Inner City Neighborhoods*, 11 HOUSING POL’Y DEBATE 761, 782 (2000). Gentrification of the neighborhood started immediately, and based on a study by the Lincoln Institute of Land Policy, these patterns created substantial increases in annual housing prices. *See id.*

412. *See* ELKE LEIJZER & KAI MONAST, IS CELEBRATION AN EXAMPLE OF SMART GROWTH? 24 (2001), *available at* [http://www.unc.edu/~hmonast/Celebration1\\_Monast.pdf](http://www.unc.edu/~hmonast/Celebration1_Monast.pdf).

“conventional suburban subdivision.”<sup>413</sup> The ornamentation of new urbanist designs has also been criticized for increasing building costs, and thereby raising the eventual cost for future residents.<sup>414</sup> Studies of the new urbanist community in Kentlands, Maryland reveal that future residents were willing to pay a twelve-percent premium for the new development.<sup>415</sup> Left to market devices, these new developments will surely price lower income residents out while attracting only the affluent.<sup>416</sup> It is a challenge for new urbanism to ensure availability of housing to all income groups.<sup>417</sup>

While new urbanism has been accused of “making housing less, not more affordable,” it also faces criticism for having a deteriorating effect on existing social structures.<sup>418</sup> Martha Lees explains, “Where advocates have attempted to build lower income housing on [n]ew [u]rbanist principles, they have done so in ways that raise the twin specters of gentrification and displacement.”<sup>419</sup> The intentions of new urbanism are to integrate multiple classes of people together because mixing the wealthy and poor will have beneficial effects for both classes.<sup>420</sup> Poverty deconcentration is intended to bridge the “social capital gap.”<sup>421</sup> But studies have determined that these deconcentration programs fail to “take into account that poor people live in networks and that they are materially attached to their communities.”<sup>422</sup> Rather, new urbanism has been dismissed as providing “only a façade of social improvement, promoting instead quaint architecture and a ‘yuppie infantalist fantasy’ for the upper-middle class.”<sup>423</sup>

New urbanist communities are rooted in middle class suburban assumptions.<sup>424</sup> Consequently, plans actually reduce the amount of available housing by eliminating super-dense high-rise buildings to accommodate for multi-family townhouses.<sup>425</sup> Reducing the density

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413. See Vanderbeek & Irazabal, *supra* note 387, at 52.

414. See Bohl, *supra* note 411, at 783.

415. See Custer, *supra* note 37, at 5.

416. See Bohl, *supra* note 411, at 782.

417. See JO ANNE P. STUBBLEFIELD, EMBRACING NEW URBANISM: REPRESENTING DEVELOPERS IN A CHANGING DEVELOPMENT CLIMATE 6 (2002).

418. See Foster, *supra* note 24, at 563.

419. Lees, *supra* note 366, at 386.

420. See Foster, *supra* note 24, at 564.

421. See *id.* at 565.

422. *Id.* at 565–66.

423. Talen, *supra* note 365, at 21.

424. See Lees, *supra* note 366, at 387.

425. See *id.*

of the development creates a problem of overflow.<sup>426</sup> Lower income residents are inconvenienced and displaced to other areas.<sup>427</sup> This displacement creates a new problem in which poorer people have difficulty finding housing outside of the “poorest, racially segregated communities.”<sup>428</sup> The displacement has the reverse effect of reconcentrating poverty within a smaller location than originally existed, resulting in these populations lacking the support network upon which they previously relied.<sup>429</sup> New urbanist efforts to improve diversity in inner city neighborhoods must be cautious not to upset the existing social fabric.<sup>430</sup>

The segregation of new urbanist communities has also limited lower income residents from accessing these new developments.<sup>431</sup> “New [u]rbanism has largely failed to live up to its own goals for diversity, and attracts mostly white, affluent residents.”<sup>432</sup> Additionally, the distance from the inner city prevents low-income residents from reaching the new development areas and taking advantage of potential jobs there.<sup>433</sup> The unavailability of new urbanist development is also criticized as part of the concept’s failure to cure segregation.<sup>434</sup>

Deterring social mobility of lower income populations creates a weaker tax base for those areas where the poor congregate. Differing local needs determine the fiscal ability of a municipality to deal with its responsibilities.<sup>435</sup> Cities with older, poorer, and more crowded populations demand more resources than newer, smaller, more affluent developments.<sup>436</sup> Communities with larger tax bases have more purchasing power to handle these needs and vice versa.<sup>437</sup>

An example of this discrepancy is reflected in a series of school finance cases where poorer communities must be taxed at higher rates to provide a substandard product compared with communities with

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426. *See id.*

427. *See id.*

428. Foster, *supra* note 24, at 566.

429. *See id.*

430. *See* Bohl, *supra* note 411, at 780.

431. *See* Lees, *supra* note 366, at 386.

432. Ramya Rajajagadeesan Aroul, *New Urbanism: Not Just an American Dream!*, REAE (Oct. 7, 2008, 5:18 PM), <http://realestateprogram.blogspot.com/2008/10/new-urbanism-not-just-american-dream.html>.

433. *See* Meredith, *supra* note 22, at 494.

434. *See id.* at 492.

435. *See* Briffault, *Our Localism: Part II*, *supra* note 65, at 423.

436. *See id.* at 424.

437. *See id.* at 423.

higher tax bases.<sup>438</sup> One such example is *Robinson v. Cahill*, where the New Jersey Supreme Court examined school finance reform in a home rule jurisdiction and determined that a system of allowing the locality to fund schooling through local taxation would violate the state constitution if not supplemented by state sources.<sup>439</sup> The local taxation system had led to great disparities in school funding between localities.<sup>440</sup> The court explained, “How much will be done by local government may, of course, depend upon the size of its tax base, which, as to local government, is substantially the value of its real property.”<sup>441</sup> Disparities, therefore, are a recognized byproduct of local autonomy.<sup>442</sup>

Localism’s spatial separation has led to a sense of “private ownership over public services and the local tax base,” which undermines interests in protecting the less fortunate.<sup>443</sup> New urbanists favor market-based solutions, and as such may compromise regional solutions.<sup>444</sup> Eschewing administratively based solutions, new urbanists want to encourage ways of promoting cooperative agreements within the existing system while retaining profit motives.<sup>445</sup> But traditional market-based solutions have resulted in conditions to which new urbanists would object, including “superblocks, low interconnectivity, dendritic street systems, and automobile dependence.”<sup>446</sup> The market has delivered vehicles that serve to further segregate populations and isolate new urbanist communities from the region.

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438. See *id.* at 422. See also *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Lujan v. Colorado St. Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975); *People ex rel. Jones v. Adams*, 350 N.E.2d 767 (Ill. Ct. App. 1976); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Fair Sch. Fin. Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 554 P.2d 139 (Or. 1976); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *Richland Cnty. v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 476 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989); *Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976).

439. See 303 A.2d 273, 281 (N.J. 1973).

440. See *id.* at 500.

441. *Id.* at 493–94.

442. See Briffault, *Our Localism: Part II*, *supra* note 65, at 423.

443. Mildred E. Warner, *Inter-Municipal Cooperation in the U.S.: A Regional Governance Solution?*, URB. PUB. ECON. REV., no. 6, 2006, at 225.

444. See Talen, *supra* note 365, at 40.

445. See *id.* at 40–41.

446. *Id.* at 41.

### III. NEW REGIONALISM AND NEW URBANISM WORKING TOGETHER

Part III fills some of the gaps previously detailed in Part II that localism creates for new urbanism's success. Part III focuses on the potential for regional plans that incentivize interlocal cooperation and build communities that are not only integrated but move forward together as a cohesive unit.

Martha Lees wrote that “the average American has ties to any number of locations in addition to those in which she currently resides, including the places she used to live, the place she works, the places she shops, and the place she vacations, among others.”<sup>447</sup> Regardless of the precise reason, new urbanism has failed to achieve its goal of creating an integrated regional plan, and as a result, its communities have, at best, been implemented sporadically across the American landscape.<sup>448</sup> This has been described as “[n]ew [u]rbanist islands in a sea of sprawl.”<sup>449</sup> To achieve total success, new urbanism must realize the need to connect to the broader region and become part of a cohesive plan.<sup>450</sup> This change might help address some of the social, economic, and environmental concerns that new urbanism's critics discuss.<sup>451</sup>

A regionalist approach is the only true way to combat the pitfalls of localism and allow new urbanist communities to fully develop. The promotion of new urbanism must be accomplished by the coordination of many actors, and overcoming localism's drag on cooperation can only be achieved by sidestepping localist tendencies altogether. This Note does not promote political consolidation of localities into a single regional entity, but it argues for strong incentives around regional cooperation—otherwise known as “new regionalism.” Part III identifies new regionalism, discusses its weaknesses and strengths, and explores a few localism challenges to the deployment of new regionalism. Finally, it links new regionalism to new urbanism and offers possible resolutions to some of new urbanism's weaknesses.

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447. Lees, *supra* note 366, at 358.

448. See Meredith, *supra* note 22, at 495.

449. Lewyn, *supra* note 17, at 268.

450. See Meredith, *supra* note 22, at 495.

451. See *id.*

### A. New Regionalism Defined as an Interlocal Cooperation

New regionalism has been defined as “any attempt to develop regional governance structures or interlocal cooperative agreements that better distribute regional benefits and burdens.”<sup>452</sup> New regionalists attempt to restrict local governments from pursuing local interests and, if possible, shift some authority away from them.<sup>453</sup> New regionalism is a response to local governments’ failures to “(1) resolve cross-border, multi-issue challenges[,] (2) promote regional equity amongst interdependent localities[,] and (3) foster participation and collaboration across local boundaries.”<sup>454</sup> Some would argue, however, that, given the contemporary metropolitan design of our society, new regionalism is the logical next step to localism.<sup>455</sup>

There are several types of interlocal cooperation on the regional level.<sup>456</sup> At the most formal levels, cooperation becomes separate government, or consolidation, and at an informal level, it is a series of interlocal agreements, or cooperation.<sup>457</sup> Policy proposals do not require the creation of institutions and can be achieved through private groups or individuals working together within local borders or from collections of individuals working across local borders.<sup>458</sup> Cooperation is favored, as it allows local governments to retain local identity and control.<sup>459</sup> Regional cooperative approaches have been used, among other objectives, to manage gentrification,<sup>460</sup> as well as in the reduction of greenhouse gases.<sup>461</sup>

New regionalism’s greatest benefit is its direct response to failures in local law. As metropolitan areas have grown, interdependence of municipalities within these areas has also grown. This interdependence has had a secondary effect of increasing cross-

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452. Alexander, *supra* note 279, at 632.

453. See generally Briffault, *Localism and Regionalism*, *supra* note 55.

454. Alexander, *supra* note 279, at 633.

455. See, e.g., Briffault, *Localism and Regionalism*, *supra* note 55, at 1–2.

456. See Juliet F. Gainsborough, *Bridging the City-Suburb Divide: States and the Politics of Regional Cooperation*, 23 J. URB. AFF. 497, 499 (2001).

457. See Warner, *supra* note 443, at 234.

458. See Briffault, *Localism and Regionalism*, *supra* note 55, at 6.

459. See Warner, *supra* note 443, at 222.

460. See, e.g., David J. Maurrassee & Jaclyn B. Bliss, *Comprehensive Approaches to Urban Development: Gentrification, Community, and Business in Harlem, New York*, 1 NW. J. L. & SOC. POL’Y 127 (2006).

461. See, e.g., Michael Rawson & Mona Tawatao, *Opportunity and Risk in State and Regional Climate-Planning Efforts: Some Lessons from the Field*, 44 CLEARINGHOUSE REV. 293 (2010).

border consequences of actions taken within each municipality.<sup>462</sup> The collective well-being of the region has been neglected by localism's aggregate spillover effect.<sup>463</sup> Regional regulation may be the only way to resolve problems associated with this cross-border spoliation.<sup>464</sup>

There are many benefits to cooperative regionalism, including efficiency, equity, and responsiveness.<sup>465</sup> There are 22,000 local governments that have less than 2500 inhabitants.<sup>466</sup> Cooperation permits local governments to obtain economies of scale by pooling their buying power without losing local autonomy.<sup>467</sup> By obtaining economies of scale, each local government can devote more resources to other priorities, which thereby increases their efficiency.<sup>468</sup> Sharing responsibilities and burdens leads to greater equity among localities, and some studies even suggest that communities with greater poverty are more likely to cooperate.<sup>469</sup> Burdens are shared through subsidies from one locality to another in order to offset inequality.<sup>470</sup>

Cooperation generally occurs around projects of intense capital investment, such as "roads, sewers, water supply, waste disposal, and fire-fighting equipment," which increases the entire region's general well-being.<sup>471</sup> Finally, municipalities that cooperate with one another have higher rates of monitoring, professional management capacity, and political voice, which increase the overall responsiveness of the local government.<sup>472</sup> If a municipality is willing to work with other municipalities, it is generally substantially more responsive to the needs of its own citizens as well as its partners.

### B. The Obstacles to New Regionalism

On the other hand, new regionalism faces many hurdles. One major challenge to new regionalism is the uphill battle supporters will

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462. See Alexander, *supra* note 279, at 637.

463. See Cashin, *supra* note 56, at 2030–31.

464. See Alexander, *supra* note 279, at 637.

465. See Warner, *supra* note 443, at 230–32.

466. See *id.* at 222.

467. See *id.* at 222–23.

468. See *id.* at 230.

469. See *id.* at 234.

470. See Gillette, *supra* note 66, at 194.

471. Briffault, *Our Localism: Part II*, *supra* note 65, at 431.

472. See Warner, *supra* note 443, at 230–31.



face against “self-interest.”<sup>473</sup> Local officials, land developers, corporations, and residents from high tax base localities most often represent the segment of the population acting with self-interest.<sup>474</sup> Matthew Parlow articulates this sentiment as he explains that “affluent localities would likely view contributing their tax dollars to address regional concerns, like poverty in the central city, as taking money from them without gaining any benefit in return.”<sup>475</sup> These powerful constituents have previously led a successful effort to combat regional cooperation, and some earlier regionalists accepted a level of futility when seeking consolidated governments.<sup>476</sup> Therefore, the “fate of regionalism will turn on whether regionalists will be able to persuade people that their interests are sufficiently tied in with those of the residents or other communities within the region.”<sup>477</sup>

Overcoming stakeholder collaboration dilemmas that arise in a system of participation between unequal groups presents another potential hurdle to new regionalism.<sup>478</sup> These dilemmas can be separated into two groups: representative dilemmas and power dilemmas.<sup>479</sup> Representative dilemmas include: (1) demographic representation, where proper representation is sacrificed for the symbolism of a traditionally marginalized group having representation; (2) representative opportunism, when a representative forsakes the interests of her constituents for her own self-interest; and (3) representative acquiescence, when a representative unknowingly consents to a dominant narrative which ultimately disempowers her constituents.<sup>480</sup> Power dilemmas include: (1) the exercise of power, where a power stakeholder dominates a weaker one; (2) the exclusion of power, when powerful stakeholders suppress certain reform goals; and (3) the acquiescence of power, when the dominant stakeholder uses narratives and psychological processes to manipulate the weaker.<sup>481</sup>

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473. See Briffault, *Localism and Regionalism*, *supra* note 55, at 27. Self-interest is the entrenchment of those who benefit from the current localism system and want to preserve the status quo. *See id.*

474. *See id.*

475. Parlow, *supra* note 346, at 72.

476. See Alexander, *supra* note 279, at 643.

477. Briffault, *Localism and Regionalism*, *supra* note 55, at 29.

478. See Alexander, *supra* note 279, at 643.

479. *See id.* at 643–44.

480. *See id.* at 644–45.

481. *See id.* at 646–47.

Both types of dilemma lead to a problem of regulatory capture that must be addressed.<sup>482</sup> For example, poor communities might “find their limited tax base exploited to finance improvements that primarily benefit better-off citizens.”<sup>483</sup> Accountability measures are necessary to overcome some of the consequences of these dilemmas.<sup>484</sup> Some new regionalists suggest that maximized participation and direct, transparent monitoring are two potential safeguards against capture.<sup>485</sup> Others suggest local constitutional changes that may include “nested” provisions.<sup>486</sup> By providing a broad set of rules that define alternatives for organizing and operating the cooperation of local governance, these provisions create a foundation for local governments to take advantage of regional cooperation’s benefits.<sup>487</sup>

It has been suggested that the single greatest contributor to regional cooperation is the presence of regional leadership.<sup>488</sup> Regional leadership can come in many different forms, including federal programs,<sup>489</sup> state oversight,<sup>490</sup> or simply leaders from within the region.<sup>491</sup> Each of these leaders recognizes either that localism has failed to address some obvious concerns or that attempting to address these same concerns individually is ineffective.<sup>492</sup>

Utilizing a network of agencies and programs, the federal government can be far reaching.<sup>493</sup> Proponents argue that federal programs can ensure that investment is likely to produce regional returns.<sup>494</sup> In particular, the federal government is well suited to address issues of transportation, environmental policy, credit financing for housing, and the revitalization of communities.<sup>495</sup> An

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482. *See id.* at 648.

483. Roger B. Parks & Ronald J. Oakerson, *Regionalism, Localism, and Metropolitan Governance: Suggestions from the Research Program on Local Public Economies*, 32 STATE & LOCAL GOV'T REV. 169, 174 (2000).

484. *See* Alexander, *supra* note 279, at 648–49.

485. *See id.* at 649.

486. *See* Parks & Oakerson, *supra* note 483, at 175. Nestedness is a structural framework that allows local governments to build consensus. *See id.*

487. *See id.*

488. *See* DALE A. BRILL, REGIONALISM: A CHASM AND TWO BRIDGES 4 (2013), available at [thinkspot.co/wp-content/uploads/Regionalism\\_WhitePaper.pdf](http://thinkspot.co/wp-content/uploads/Regionalism_WhitePaper.pdf).

489. *See* CALTHORPE & FULTON, *supra* note 20, at 88.

490. *See* Gainsborough, *supra* note 456, at 497.

491. *See* BRILL, *supra* note 488, at 4–5.

492. *See id.* at 5.

493. *See* Calthorpe & Fulton, *supra* note 20, at 88.

494. *See id.*

495. *See id.* at 88–89.

example of this type of federal involvement is the Obama Administration's Sustainable Communities Regional Planning Grant Program (the Grant Program), which was developed by the Department of Housing and Urban Development (HUD) to incentivize regional cooperation through grant funding.<sup>496</sup> To receive funding, the program requires voluntary "commitment to broad multijurisdictional stakeholder participation . . . [the development of] comprehensive solutions to interrelated problems . . . [and obligations] . . . to conduct effective and informed monitoring."<sup>497</sup> The program was specifically designed to help localities overcome deficiencies in their own legal structures.<sup>498</sup>

Similarly, states can incentivize local governments to cooperate regionally by providing "carrots or sticks."<sup>499</sup> For example, the state can promise a "carrot" of additional funds on any regional plans.<sup>500</sup> Conversely, the "stick" approach might require compliance with regionalist ideals prior to receiving state funding.<sup>501</sup> Additionally, states can help set predictable rules for regional cooperation, thus infusing stability to the process.<sup>502</sup> As detailed in Part I.D, Pennsylvania and Wisconsin are both examples of state-led attempts to incentivize locality compliance with new urbanism's principles.<sup>503</sup>

Lastly, while leadership comes in many forms on the local level, each form generally displays three common characteristics.<sup>504</sup> First, the leaders represent a "convener" with the power to facilitate integration of the stakeholders.<sup>505</sup> Second, these leaders are action-oriented, and through their passion for "doing," they establish performance measures against objectives.<sup>506</sup> Finally, these leaders display qualities of longevity and responsiveness to change that help perpetuate cooperation in the long term.<sup>507</sup>

Whatever the source, there is a consensus that some sort of leadership is necessary for successful cooperation.<sup>508</sup> Determining the

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496. See Alexander, *supra* note 279, at 649.

497. *Id.* at 650.

498. See *id.* at 655.

499. Gainsborough, *supra* note 456, at 501.

500. See *id.*

501. See *id.*

502. See *id.*

503. See *supra* Part III.A.

504. See BRILL, *supra* note 488, at 5.

505. See *id.*

506. See *id.*

507. See *id.*

508. See *id.*

proper level of leadership—whether federal, state, or local—along with determining the best regional structure can make or break the endeavor. Striking a balance between the needs of local autonomy and the needs of regional oversight is critically important to a successful regional plan.

### C. Filling the Gaps of New Urbanism by Overlaying New Regionalism

A major benefit of regional cooperation is the reduction of competitive consequences resulting from the phenomenon of mobile citizens.<sup>509</sup> As mentioned in Part II.A.1, Tiebout theorizes that people are mobile-consumers and will move to localities that present them with a desirable environment.<sup>510</sup> If local differences are reduced through the application of regional cooperation, then Tiebout's mobile citizens will settle down.<sup>511</sup> Less mobility will reduce interlocal competition around attracting these citizens, and thereby decrease disincentives to cooperate as well as minimize the socio-economic, racial, and ethnic segregation that occurs.<sup>512</sup> Both the regional cooperation and diversity that might occur would have direct links to new urbanism's objectives and potential success.<sup>513</sup> For example, if minority populations are viewed less as burdens to be shifted and more as the normal fabric of each community, then exclusionary zoning practices and concerns about increasing tax bases should fade. Localities might look to encourage diversity in their tax base to satisfy constituents' desires to have an eclectic community, rather than be concerned about economic detractors.

New regionalism will also encourage political collaboration across borders, which would directly satisfy new urbanism's need to plan regional streams of commerce.<sup>514</sup> A flaw of localism is its capacity to blind local municipalities from seeing "how other more equitable possibilities are in the region's collective self-interest."<sup>515</sup> Regional cooperation offers new "territorial, regulatory, and political frameworks" for local governing bodies to discuss possible benefits

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509. See Nestor Davidson & Sheila Foster, *The Mobility Case for Regionalism*, 47 U.C. DAVIS L. REV. 63, 67 (2013).

510. See Gillette, *supra* note 217, at 968.

511. See Davidson & Foster, *supra* note 509, at 75–76.

512. See *id.* at 74.

513. See *supra* Part I.

514. See *supra* Part I.

515. Alexander, *supra* note 279, at 640.

and resolve problems of self-interest.<sup>516</sup> Localities within a region “tend to rise and fall together,”<sup>517</sup> and new urbanism’s incorporation of mixed uses and commerce requires negotiations between neighboring localities to survive.<sup>518</sup>

It is important to find the proper form of regional cooperation, depending on the activity that needs to be conducted.<sup>519</sup> In terms of new urbanism, planners look to regional cooperation to provide decisions with authoritarian weight that can help quell the localities’ concerns with competition, as explained in Part II.A.2.<sup>520</sup> Scott A. Bollens has described some possibilities for regional approaches: functionally specific regional agencies,<sup>521</sup> federally inspired regional agencies,<sup>522</sup> regional councils of government,<sup>523</sup> public-private alliances,<sup>524</sup> regionalism through state oversight/regulation,<sup>525</sup> and comprehensive metropolitan government.<sup>526</sup> New urbanism would require a balance that provides some state oversight yet preserves local autonomy. The ideal type of regional framework would encourage localities to initiate the development of new urbanist communities without causing them to fear the loss of their independence. It would also provide a platform for localities to meet and coordinate regional designs. Additionally, new urbanism could benefit from public-private alliances that help bring commerce to the city centers and ensure a healthy flow of economic traffic.

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516. *Id.* at 641.

517. *Id.* at 640 (internal quotation marks omitted).

518. *See supra* Part I.

519. *See* Dennis Heffley, Professor of Econ., Univ. of Conn., Presentation: Seeking Common Ground: Weighing the Costs and Benefits of Regionalism in CT (Apr. 16, 2009), available at [http://www.hartfordinfo.org/issues/wsd/Region/Regionalism\\_Heffley.pdf](http://www.hartfordinfo.org/issues/wsd/Region/Regionalism_Heffley.pdf).

520. *See supra* Part II.

521. *See* Scott A. Bollens, *Fragments of Regionalism: The Limits of Southern California Governance*, 19 J. URB. AFF. 105, 107 (1997) (noting that functionally specific regional agencies are either state or voluntarily created and tend to focus on specific physical infrastructure needs).

522. *See id.* at 107 (explaining that federally inspired regional agencies are created in response to federal regulations like air quality or transportation standards and help the region meet the standards).

523. *See id.* (describing regional councils of government as voluntary and multipurpose but limited in independence and statutory power).

524. *See id.* at 107–08 (defining public-private alliances as coalitions of different sectors that join around a common purpose and plan a strategy of action for the region).

525. *See id.* at 108 (explaining that regionalism through state oversight/regulation implements regional governance through structural changes to local government).

526. *See id.* (noting that comprehensive metropolitan government is a regional body designed to accomplish tasks that require a centralized authority.).

Yet another approach categorizes three phases of regional cooperation.<sup>527</sup> The first phase “stresse[s] structural solutions such as city-county consolidations, while the second phase focuse[s] on procedural reforms designed to improve program coordination and comprehensive planning.”<sup>528</sup> The third phase is “led by coalitions of interest groups which are often cross-sectoral . . . focus on areas of substantive strategic concern . . . and . . . employ facilitated processes to develop a shared vision.”<sup>529</sup> One commonality shared by each of these categories is the importance of state facilitation, whereby states set rules and shape the context for cooperation.<sup>530</sup>

#### D. Regional Cooperation Proves Successful in the Delaware Valley

One successful example of regional cooperation is the Delaware Valley Regional Planning Commission (DVRPC). Formed in 1967, the DVRPC is an interstate attempt by Pennsylvania and New Jersey to service the greater Philadelphia metropolitan area.<sup>531</sup> The DVRPC has addressed regional issues through reports on transportation, food systems, and smart growth.<sup>532</sup> This Section will focus on the DVRPC’s report, *New Regionalism: Building Livable Communities Across the Delaware Valley*.<sup>533</sup>

The purpose of the report is to explain key strategies and provide detailed guidance for the development of well-planned communities.<sup>534</sup> Recognizing the risk of new urbanist communities being inappropriately built as fringe communities, the report seeks to address this pitfall through well-reasoned plans.<sup>535</sup> The DVRPC attempts to encourage development to take advantage of existing infrastructure and avoid disruption of sensitive rural areas.<sup>536</sup> The plan discusses all of the major tenets of new urbanism, such as land use planning, building specifics, transportation alternatives, social

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527. See Gainsborough, *supra* note 456, at 500.

528. *Id.* (internal quotations marks omitted).

529. *Id.* (internal quotations marks omitted).

530. See *id.*

531. See *About Us*, DEL. VALLEY REGIONAL PLAN. COMMISSION, <http://www.dvrpc.org/about> (last visited Mar. 15, 2014).

532. See *id.*

533. See DEL. VALLEY REG’L PLANNING COMM’N, *NEW REGIONALISM: BUILDING LIVABLE COMMUNITIES ACROSS DELAWARE VALLEY* (1999), available at <http://www.dvrpc.org/reports/99008.pdf>.

534. See *id.* at 5.

535. See *id.* at 6–7.

536. See *id.* at 7.

integration, infill development, and environmental consequences.<sup>537</sup> Most importantly, the plan articulates regional strategies that it recognizes as critical to prevent local efforts from becoming overwhelmed.<sup>538</sup> Simultaneously, the report prepares arguments for why these strategies are best for individual localities, and thus confronts the problem of self-interest that regional plans often face.<sup>539</sup>

The DVRPC is an example of new regionalism at its best. The DVRPC was developed using state authority, but does not trample on local autonomy. The reports that the DVRPC issues are suggestive and not mandatory, yet they persuade localities by examining the problems from their perspective. The DVRPC has had success utilizing this strategy, and as a result, the greater Philadelphia metropolitan area has been able to maintain logical and sustainable development.<sup>540</sup> For example, Chester County has created a comprehensive plan that ninety-three percent of its municipalities have agreed upon.<sup>541</sup> Additionally, West Philadelphia now has safer and cleaner streets and is proving to be a more attractive district to residents and business.<sup>542</sup> In Lower Merion Township, the policies have reduced vacancies on Main Street and created a more diverse mix of businesses.<sup>543</sup> Finally, access to public transit has reduced traffic across the region, and those increases in access are most notable in the City of Chester and King of Prussia.<sup>544</sup> The DVRPC has prioritized listening to the communities' needs, which has resulted in individualized solutions that are successfully growing the entire region.<sup>545</sup>

### CONCLUSION

Americans are increasingly living in areas classified as "metropolitan." The development patterns that parallel this migration have led to sprawling communities. These communities have demanded local autonomy to make their own economic, political, social, and environmental decisions. Unfortunately, local autonomy, also known as localism, has had negative repercussions on

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537. *See id.* at 35–56.

538. *See id.* at 57.

539. *See id.* at 60.

540. *See id.*

541. *See id.*

542. *See id.*

543. *See id.* at 61.

544. *See id.*

545. *See id.* at 60–62.

the metropolitan area. Given some of the concerns regarding localism's externality-shifting, the tyranny of the favored quarter, and social inequalities, land use planners have looked to alternatives for new development to combat the effects of sprawl.

New urbanism has emerged as a viable alternative for planners. New urbanist communities encourage pedestrian-friendly city centers that integrate mixed uses and promote diverse communities. Arguably, these changes raise the standard of living. Unfortunately, new urbanism's success depends on regional implementation, which has been stunted by localism's natural self-interest and isolation.

To combat the limitations of new urbanism, new regionalist solutions are powerful tools that localities can employ. Encouraging incentives for cooperation between stakeholders seems to be a logical strategy for new urbanism implementation. Incentives can come from many sources of leadership, such as federal, state, or local actors. Importantly though, new regionalist solutions must balance the need for local autonomy and the requirement that localities recognize their interdependence. New urbanism's fate relies on regional programs and their ability to create cooperation. Thomas Jefferson might have dreamt of an agrarian republic in which each landowner was self-sufficient, but he would probably agree that a unified, sustainable society in which landowners share in a cooperative experience is acceptable. New urbanism provides a potential vehicle for some of America's growing challenges. Since Jefferson was, above all else, a believer in a healthy Republic, we might even say that his contemporary dreams would be filled with mixed uses, narrow streets, and diverse sets of pedestrians walking to work and sitting on front stoops.