

## NOTE

### SEPARATE, BUT EQUAL? VIRGINIA'S "INDEPENDENT" CITIES AND THE PURPORTED VIRTUES OF VOLUNTARY INTERLOCAL AGREEMENTS

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#### INTRODUCTION

THE spring of 2008 witnessed a scuffle between two Virginia localities that one might dismiss as trivial. It began when Henrico County, a mostly suburban jurisdiction adjoining the City of Richmond, petitioned the U.S. Postal Service to recognize "Henrico, VA" as a mailing address for certain zip codes in the county that were then listed as "Richmond, VA." Henrico claimed that the zip codes with a Richmond address misdirected around five million dollars of tax revenue to Richmond each year.<sup>1</sup> To resolve the issue, the Postal Service surveyed the residents in the zip codes. Over the next several months, Henrico spent over one hundred thousand dollars urging survey recipients to "Keep Your Tax Dollars in Henrico"<sup>2</sup> while the city pleaded, "If given an option, keep your address in Richmond."<sup>3</sup> Henrico eventually prevailed, garner-

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<sup>1</sup> Will Jones, Henrico Residents to Face Mail Decision, *Richmond Times-Dispatch*, Feb. 16, 2008, at B1. The alleged misdirection occurred because zip codes do not correspond to local boundaries in Virginia, causing some businesses to pay sales taxes to the wrong jurisdiction. See *id.*

<sup>2</sup> Will Jones, County May End 'Richmond' Address, *Richmond Times-Dispatch*, Feb. 24, 2008, at B4.

<sup>3</sup> Melodie N. Martin, Richmond Counters Henrico Effort, *Richmond Times-Dispatch*, May 3, 2008, at B1.

ing over sixty percent of the vote.<sup>4</sup> One is tempted to dismiss the event as isolated or insignificant outside the region, but it exposes deep-seated fissures between localities throughout Virginia. Professor John Moeser, a leading scholar on Virginia local government, captures its importance: “If we can’t agree as to whether we’re Richmond or not, then pray tell how in the world are we going to solve real problems.”<sup>5</sup> Indeed, the conflict is all too representative of interlocal relations in Virginia and is directly contrary to the predictions of some scholars, who assert that Virginia’s distinctive local government structure promotes voluntary bargaining between central cities and suburban counties.<sup>6</sup>

Rather than being insignificant, then, the Richmond-Henrico spat raises questions that go to the heart of scholarship of local government, with implications that reach far beyond a single dispute in one state. For one group of scholars, the dispute is emblematic of suburban exploitation of central cities.<sup>7</sup> In these scholars’ view, cities and suburbs compete for mobile residents and capital, yet this game is rigged in favor of suburbs, which benefit from affluent tax bases and proximity to central cities even as they externalize costs onto their urban neighbors. The solution, the argument goes, is to shift authority up, usually to some form of regional government.<sup>8</sup>

Responding to calls for regional government, a second group suggests instead that reforming existing structures is preferable.<sup>9</sup> Within this broad group is a wide range of perspectives. At one end

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<sup>4</sup> Melodie N. Martin, *Henrico Backs Address Change*, Richmond Times-Dispatch, May 30, 2008, at A1.

<sup>5</sup> *Id.*

<sup>6</sup> See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. Rev. 190, 234 n.157, 249 (2001).

<sup>7</sup> See, e.g., Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 1–5 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 Colum. L. Rev. 346, 351–55 (1990); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 Stan. L. Rev. 1115, 1132–37 (1996) [hereinafter Briffault, *Boundary Problem*]; Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 Geo. L.J. 1985, 1987–90 (2000).

<sup>8</sup> See David Rusk, *Cities without Suburbs* 101–04, 135 (3d ed. 2003); Briffault, *Boundary Problem*, supra note 7, at 1122.

<sup>9</sup> The literature often refers to this group as proponents of regional *governance*. See David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, 2270–71 (2003).

of the spectrum, some—influenced by public choice theory and led by Professor Clayton Gillette—argue that suburbs will realize that self-interest requires cooperation with, rather than exploitation of, cities.<sup>10</sup> On this view, suburbs will pursue agreements not only to create economies of scale, but also to engage in “burden sharing” to reduce interlocal inequalities.<sup>11</sup> Accordingly, local autonomy is preferable to regional government and only a few reforms are necessary. At the other end of the spectrum, Professor David Barron argues that self-interest alone will not result in burden sharing.<sup>12</sup> He critiques both centralization proponents and public choice theorists, concluding that local powers ought to be reoriented in a way that combats urban sprawl and reduces wealth disparities.<sup>13</sup>

Gillette does not represent the only public choice defense of decentralized local government. Professor William Fischel, building on Professor Charles Tiebout’s seminal article,<sup>14</sup> argues that decentralization promotes socially desirable competition among localities.<sup>15</sup> Because local government decisions are capitalized into home values,<sup>16</sup> which Fischel’s “homevoters” guard zealously, residents closely monitor the performance of local officials. Accordingly, officials tend to make wise—that is, property-value enhancing—decisions. As a consequence, affluent jurisdictions seek to preserve home values by using exclusionary zoning to screen out fiscally undesirable residents.<sup>17</sup> On Fischel’s account, local residents have paid for the superior “public” amenities in their neighborhoods, as reflected in the higher purchase prices of their homes.<sup>18</sup>

Virginia’s distinctive form of local government presents an ideal laboratory in which to examine these claims. In all other states, a city is a legal part of the county from which it was created. Yet in Virginia, cities are independent, with counties’ taxing and other

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<sup>10</sup> See Gillette, *supra* note 6, at 192–93.

<sup>11</sup> See *id.*

<sup>12</sup> See Barron, *supra* note 9, at 2271.

<sup>13</sup> See *id.* at 2384–86.

<sup>14</sup> See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 *J. Pol. Econ.* 416 (1956).

<sup>15</sup> See William Fischel, The Homevoter Hypothesis 4–7 (2001).

<sup>16</sup> See *id.* at 45–51.

<sup>17</sup> *Id.* at 51–57.

<sup>18</sup> *Id.* at 40–42.

powers ceasing at city boundaries.<sup>19</sup> In addition to city-county separation, until the 1980s Virginia employed a robust annexation system by which cities could file suit to gain county land, even absent consent of county residents.<sup>20</sup> Today, however, the General Assembly has halted cities' expansion by imposing a moratorium on all city-initiated annexation and permanently immunizing some counties from annexation. Nonetheless, many state laws purport to encourage interlocal cooperation, such as by permitting interlocal revenue or tax base sharing. Indeed, Gillette asserts that city-county separation is uniquely conducive to interlocal bargaining.<sup>21</sup> Similarly, Virginia's system should be particularly attractive to defenders of Tieboutian competition, with economic studies revealing that city-county separation increases interlocal competition for residents and capital.<sup>22</sup>

This Note will challenge public choice scholars' characterization of Virginia as a model to which other states might aspire. Gillette's account of interlocal bargaining is not well supported by Virginia's experience. Indeed, evidence suggests that city-county separation produces systematic *disincentives* to cooperation. Moreover, the assumptions upon which the bargaining thesis is based appear unrealistic, while the qualifications Gillette acknowledges occur quite frequently. Meanwhile, Virginia's glaring interlocal wealth and tax disparities bear witness to the undesirable consequences of heightened interlocal competition. Because the literature already contains an expansive critique of the competition Fischel defends,<sup>23</sup> this Note will examine Virginia's features to elucidate more thoroughly the shortcomings of the bargaining thesis and to identify reforms that would promote interlocal burden sharing. Fundamental

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<sup>19</sup> George Rogers Clark Stuart, *The Commission on City-County Relationships: A New Look at an Old Dilemma*, U. Va. News Letter, Nov. 1975.

<sup>20</sup> See Jack D. Edwards, *Neighbors and Sometimes Friends: Municipal Annexation in Modern Virginia 1-2* (1992).

<sup>21</sup> See Gillette, *supra* note 6, at 234 n.157, 249.

<sup>22</sup> See Geoffrey K. Turnbull & Michael T. Tasto, *Independent Cities and Counties in Virginia: Substitute Jurisdictions?*, 45 *Urb. Stud.* 53, 65-66 (2008).

<sup>23</sup> See, e.g., Gerald E. Frug, *City Making: Building Communities Without Building Walls* 169-73 (1999); William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 *Geo. L.J.* 201, 206 (1997); Lee Ann Fennell, *Homes Rule*, 112 *Yale L.J.* 617 (2002) (reviewing Fischel, *supra* note 15); Richard C. Schragger, *Consuming Government*, 101 *Mich. L. Rev.* 1824 (2003) (same).

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changes to the context in which localities interact must occur if bargaining is to mitigate interlocal inequities. Although the discussion sometimes focuses on features distinctive to Virginia, the principles have salience far beyond the Commonwealth.

Part I will provide necessary context, describing Virginia's system of local government and how it contributes to interlocal disparities. Part II will set forth the key tenets of the bargaining thesis and explain how Virginia's system creates a model environment in which to analyze the theory. Part III will employ Virginia's experience to expose the weaknesses of the bargaining thesis. Part IV will articulate an affirmative account, rejecting both regional government and voluntary interlocal bargaining. Even if insurmountable political opposition did not exist, regional government is undesirable on its merits. But advocates of voluntary bargaining have too hastily embraced the tax base sharing agreement between Charlottesville and Albemarle County, Virginia. To promote meaningful bargaining, cities must regain bargaining power against counties through renewed annexation powers. Additional reforms are necessary to reduce the hostilities previously accompanying annexation and to reorient counties' incentives so as to encourage interlocal burden sharing.

#### I. THE STRUCTURE AND EFFECTS OF LOCAL GOVERNMENT LAW IN VIRGINIA

Virginia's local governmental structure is rightly recognized as unique. Virginia's current Constitution expressly recognizes cities as separate entities and defines the terms "county," "city," and "town,"<sup>24</sup> resulting in a rather elaborate framework more easily explained by history and practice than by logic.<sup>25</sup> Various constitutional and statutory provisions authorize and, at least as a formal matter, encourage cooperation between localities. Such provisions vary in their purposes—some attempt to foster economic growth generally, while others provide for cooperation on specific types of projects and services. Yet many observers and scholars correctly

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<sup>24</sup> See Va. Const. art. VII, § 1.

<sup>25</sup> See Chester W. Bain, "A Body Incorporate": The Evolution of City-County Separation in Virginia 37–53, 99–105 (1967) [hereinafter Bain, A Body Incorporate].

attribute city-county separation to severe socioeconomic disparities between cities and counties throughout the state.

*A. "Independent" Cities and Local Boundary Changes*

Any description of local government law in Virginia must begin with the legal independence of its municipalities. Independent cities were clearly discernible as early as Reconstruction, but not formally recognized until the 1971 Constitution.<sup>26</sup> Under this system, towns remain integrated with counties, but cities do not. City-county separation was thought to confer several advantages for the then-rural state, such as avoiding duplicative services and increasing political accountability.<sup>27</sup> This structure has two important ramifications. First, counties and cities are functional equivalents. Although they diverge with respect to internal organization and the powers they possess, the urbanized character of many counties means the two entities provide identical sets of services.<sup>28</sup> Second, the structure produced divergent political economies between city- and town-initiated annexation proceedings against counties. Since a county lost land—and the accompanying residents and tax base—to an annexing city but not to an annexing town, counties had a much stronger interest in fighting city-initiated annexation.<sup>29</sup>

A brief history of the modern annexation system puts the contemporary debate in perspective. Virginia began the twentieth century with a relatively liberal annexation system but, put under pressure by urbanization, ended the century with local boundaries functionally frozen. The modern system of annexation traces its origins to the 1902 Constitution and subsequent statutes enabling cities to petition special courts to expand their boundaries.<sup>30</sup> The

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<sup>26</sup> Weldon Cooper, *Virginia Local Government, 1776–1976*, U. Va. News Letter, July 1976, at 41, 41–42.

<sup>27</sup> Edwards, *supra* note 20, at 29–30.

<sup>28</sup> *Virginia Government and Politics: Readings and Comments* 379–80 (Thomas R. Morris & Larry J. Sabato eds., 4th ed. 1998) (observing that the 1971 Constitution made cities and counties “coequal[s]”).

<sup>29</sup> Robert E. Spicer, Jr., Comment, *Annexation in Virginia: The 1979 Amendments Usher in a New Era in City-County Relations*, 17 U. Rich. L. Rev. 819, 820–22 (1983); see also Edward L. Morton, *Municipal Annexation in Virginia, 1960–1970*, U. Va. News Letter, May 15, 1972, at 33, 34–35.

<sup>30</sup> Carter Glass IV, *Governmental Boundary and Status Changes*, in *Handbook of Virginia Local Government Law* 15-1, 15-12 (Randi Hicks Rowe ed., 5th ed. 2008).

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panels considered the “necessity” and “expediency” of a proposed annexation,<sup>31</sup> with the basis for annexation usually the need for municipal services.<sup>32</sup> The underlying rationale of proceedings was “the policy of placing urban areas under city government and keeping rural areas under county government,”<sup>33</sup> known as the Staples doctrine.<sup>34</sup>

This system provided for the relatively orderly expansion of cities until the 1940s, when increasing urbanization of counties had two deleterious effects. First, improved highway networks and wider ownership of automobiles spurred “spot development”—development taking place in part of a county not immediately abutting the central city.<sup>35</sup> Such non-concentric growth complicated annexation because city services could not easily be delivered to the areas and the city would necessarily have to annex significant open land to reach the growth. Second, urbanized counties began delivering services traditionally associated with municipal government, weakening both the traditional rationale of and popular support for annexation.<sup>36</sup> Meanwhile, suburbanization and white flight had left cities older, poorer, and blacker than the counties surrounding them.<sup>37</sup> The upshot was that cities had a narrower tax base to meet higher service demands, even as their legal rationale for expansion was weakening. Annexation, as a consequence, transformed into a tool for a city to maintain a sufficient tax base rather than to provide for services, the quality of which was often at least as high in the abutting county.<sup>38</sup>

The rise of urbanized counties increased the acrimony and cost of annexation disputes, eventually spawning a legislative response. Urbanized counties’ justifiable fear of annexation undermined attempts at interlocal cooperation and simultaneously provoked evasion efforts. Fears of annexation discouraged counties from pursu-

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<sup>31</sup> Va. Code Ann. § 15.2-3209 (2009).

<sup>32</sup> Cooper, *supra* note 26, at 43.

<sup>33</sup> *Norfolk County v. City of Portsmouth*, 45 S.E.2d 136, 141 (Va. 1947) (Staples, J.).

<sup>34</sup> Cooper, *supra* note 26, at 43.

<sup>35</sup> Virginia Government and Politics, *supra* note 28, at 394; see Comm’n on City-County Relationships, Report to the Governor and General Assembly, H. Doc. No. 27, at 25–26 (Va. 1975) [hereinafter Stuart Comm’n].

<sup>36</sup> Stuart Comm’n, *supra* note 35, at 25–26.

<sup>37</sup> Stuart, *supra* note 19.

<sup>38</sup> Stuart Comm’n, *supra* note 35, at 27–28.

ing interlocal agreements because they bolstered a city's claim that a "community of interest" existed between city and county residents, one factor in annexation inquiries.<sup>39</sup> Annexation also generated hostility and mistrust that complicated negotiations on unrelated matters.<sup>40</sup> At the same time, affluent jurisdictions were able to evade compelled burden sharing via "defensive incorporation."<sup>41</sup> Most notably, several counties in the Tidewater region incorporated or consolidated themselves as cities during this time to avoid annexation by Norfolk and Portsmouth.<sup>42</sup> Faced with these developments, the General Assembly suspended annexation and charged the Stuart Commission with evaluating possible reforms,<sup>43</sup> eventually passing a series of changes in 1979.<sup>44</sup> Among other things, the amendments created the Commission on Local Government, permitted cities to enter interlocal revenue-sharing agreements in exchange for relinquishing annexation rights, and shielded many urban counties by permanently immunizing them from annexation.<sup>45</sup> As the Supreme Court of Virginia soon recognized, the reforms represented a sharp break from the Staples doctrine.<sup>46</sup>

Local boundaries in contemporary Virginia are functionally frozen. The 1979 legislation initially was thought to have generated "[a] trend toward voluntary settlement" of disputes,<sup>47</sup> but bitter

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<sup>39</sup> Stuart, *supra* note 19. Cities also were wary of cooperative efforts, since providing services to county residents undermined a city's argument that the abutting county residents needed services. *Id.*; see also Bruce Ransom, *The Use of Interlocal Service Agreements in Virginia*, U. Va. News Letter, Mar. 1976, at 25, 25.

<sup>40</sup> See Edwards, *supra* note 20, at 193.

<sup>41</sup> See *Virginia Government and Politics*, *supra* note 28, at 394. For a discussion of defensive incorporation, see Briffault, *Our Localism: Part I*, *supra* note 7, at 81 & n.343.

<sup>42</sup> A detailed account of these events is found in David G. Temple, *Merger Politics: Local Government Consolidation in Tidewater Virginia* (1972).

<sup>43</sup> See 1971 Va. Acts 466-467; see also Spicer, *supra* note 29, at 822-23.

<sup>44</sup> See 1979 Va. Acts 85 (codified in part at Va. Code Ann. §§ 15.2-2900, -3300 to -3308, -3400 (2009)).

<sup>45</sup> The Stuart Commission's recommendation for immunity was based on urban counties' diminished need for services, the increased complexity of annexation proceedings, and the greater need for interlocal cooperation in such metropolitan areas that annexation was thought to undermine. See Stuart, *supra* note 19.

<sup>46</sup> See *County of Rockingham v. City of Harrisonburg*, 294 S.E.2d 825, 831-32 (Va. 1982).

<sup>47</sup> Spicer, *supra* note 29, at 830.



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conflicts soon returned.<sup>48</sup> The General Assembly quickly imposed another moratorium, the ostensible purpose of which was to conduct *even further* study of the problems of city-county separation.<sup>49</sup> The resulting Grayson Commission report recommended ending involuntary annexation; in place of annexation, it suggested that cities with fewer than 125,000 residents should be encouraged to revert to towns, among other things.<sup>50</sup> Yet these changes never came to pass. The General Assembly instead opted to renew the moratorium, widely expected to continue for the “indefinite future.”<sup>51</sup>

*B. The Voluntary Nature of Interlocal Cooperation*

Virginia local government law is oriented heavily in favor of purely voluntary interlocal cooperation. A recent report notes that the system confers a veto power on each jurisdiction, lamenting the enterprise as akin to “dancing with your sisters.”<sup>52</sup> Although Virginia is a close adherent to the Dillon Rule of strict construction of local authority,<sup>53</sup> localities possess significant statutory authority to enter into interlocal agreements. The Virginia Code contains a general provision permitting localities to enter into agreements for the joint exercise of powers<sup>54</sup> and also authorizes agreements on a wide range of “joint functional activities” such as jails, social services, and emergency services.<sup>55</sup> Despite this formal authority,

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<sup>48</sup> Virginia Government and Politics, *supra* note 28, at 396.

<sup>49</sup> Glass, *supra* note 30, at 15-3.

<sup>50</sup> Comm’n on Local Gov’t Structures and Relationships, Report to the Governor and General Assembly, H. Doc. No. 69, at 6-9 (Va. 1990) [hereinafter Grayson Comm’n].

<sup>51</sup> Glass, *supra* note 30, at 15-3.

<sup>52</sup> Econ. Forecasting Project, Old Dominion U., Regionalism and the Dillon Rule, *in* State of the Region 2001, 109 (2001) (quoting one local business leader’s view of interlocal relations), available at <http://bpa.odu.edu/forecasting/sor/2001/2001chapter6.pdf>.

<sup>53</sup> City of Richmond v. Confrere Club of Richmond, Inc., 387 S.E.2d 471, 473 (Va. 1990) (“The Dillon Rule provides that municipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable. . . . If there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body.”).

<sup>54</sup> Va. Code Ann. § 15.2-1300 (2009).

<sup>55</sup> See Va. Comm’n on Local Gov’t, Alternative Approaches to Interlocal Concerns 2-3 (2008) [hereinafter Comm’n on Local Gov’t, Alternatives].

however, significant barriers to its exercise remain, such as continued distrust, structural disincentives to cooperation, and the lack of resources and coordination between entities.<sup>56</sup>

Virginia law also allows localities to enter into revenue-sharing agreements for two primary purposes. First, a city can negotiate to receive some of the county's tax revenue in exchange for relinquishing annexation rights.<sup>57</sup> This provision facilitated the resolution of some disputes while annexation was active in the state, including a conflict between Charlottesville and Albemarle County.<sup>58</sup> The terms localities may include in these agreements have been described as "virtually unlimited," subject only to a court's determination of the parties' best interests and constitutional limitations.<sup>59</sup> In spite of this broad scope, the bargaining that occurs under this statute is quite limited in practice. With annexation no longer a credible threat, cities have little bargaining power. Additionally, counties' constitutional debt limitations have impaired localities' ability to contract. If a county's payments under an agreement constitute debt under the Virginia Constitution, then county voters must approve of the payments in a special election.<sup>60</sup> Despite localities' efforts to evade the requirement through creatively structured agreements, Attorney General opinions have usually concluded that referenda were required.<sup>61</sup> Two amendments that would have made the debt limits less of an obstacle to revenue sharing were defeated in 1998.<sup>62</sup>

The second revenue sharing statute, adopted in 1996, permits localities "to share in the benefits of the economic growth of their lo-

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<sup>56</sup> Advisory Comm'n on Intergovernmental Relations, Condition and Future of Virginia's Cities, S. Doc. No. 14, at 11-12 (2003) [hereinafter ACIR, Virginia's Cities].

<sup>57</sup> Va. Code Ann. § 15.2-3400(1)-(2) (2009).

<sup>58</sup> John S. West & Carter Glass IV, Revenue Sharing: An Important Economic Development Tool for Virginia Localities, Va. Law., Apr. 2000, at 18, 18; see also Board of Supervisors, Albemarle County, Va., Annexation and Revenue Sharing Agreement, Feb. 17, 1982 [hereinafter Charlottesville-Albemarle Agreement] (on file with the Virginia Law Review Association).

<sup>59</sup> West & Glass, *supra* note 58, at 18-19.

<sup>60</sup> *Id.* at 19; see Va. Code Ann. § 15.2-3401 (2009). For discussion of counties' constitutional limitations and what constitutes debt, see William J. Strickland & Michael W. Graff, Jr., Financing Virginia Local Governments, *in* Handbook of Virginia Local Government Law, *supra* note 30, at 12-1, 12-4 to -7.

<sup>61</sup> See West & Glass, *supra* note 58, at 19-20.

<sup>62</sup> *Id.* at 21-22.

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calities,” so long as the settlement of boundary disputes is not involved.<sup>63</sup> Agreements under this section may involve “any type of economic development project” and any form of revenue sharing.<sup>64</sup> These agreements are subject to less stringent review than settlement agreements, but counties remain subject to debt limits.<sup>65</sup>

Two final statutes authorize additional interlocal agreements and coordination. First, scattered provisions permit localities to establish a variety of special districts for purposes including public services, redevelopment and housing, transportation, airports, parks and public recreation, and jails.<sup>66</sup> Second, the Regional Cooperation Act divided the Commonwealth into twenty-two planning districts, each featuring a Planning District Commission of appointed citizens and local officials.<sup>67</sup> The purpose of the commissions is to “encourage and facilitate local government cooperation and state-local cooperation in addressing . . . problems of greater than local significance.”<sup>68</sup>

*C. Disparities Resulting from Virginia’s System*

Virginia localities—and by extension, metropolitan areas and the Commonwealth as a whole—face monumental challenges, yet a surprisingly rosy account of Virginia local government law has emerged from some quarters. In 2000, two local government law practitioners predicted that revenue-sharing agreements “are likely to increase in the future as other localities see the rewards reaped by” current participants.<sup>69</sup> Another observer claimed that planning districts’ potential to solve regional problems was “limited only by imagination and resources.”<sup>70</sup> Political scientists Thomas Morris and Larry Sabato note that “Virginia compares very favorably with its sister states” with respect to “fragmentation,” the division of a single metropolitan area into many “fragmented” localities.<sup>71</sup> Yet if

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<sup>63</sup> Va. Code Ann. § 15.2-1301 (2009).

<sup>64</sup> See *id.*

<sup>65</sup> See West & Glass IV, *supra* note 58, at 20.

<sup>66</sup> Comm’n on Local Gov’t, *Alternatives*, *supra* note 55, at 3–5.

<sup>67</sup> See 1968 Va. Acts 224.

<sup>68</sup> Va. Code Ann. § 15.2-4207 (2009).

<sup>69</sup> West & Glass, *supra* note 58, at 22.

<sup>70</sup> Nancy K. O’Brien, *Virginia’s Planning Districts: Past Achievements and Future Prospects*, U. Va. News Letter, June 1986, at 65, 70.

<sup>71</sup> *Virginia Government and Politics*, *supra* note 28, at 380.

city-county separation prevents fragmented local governance in name, it more than makes up the difference with respect to the negative effects normally associated with fragmentation.<sup>72</sup> Virginia's confluence of features is largely responsible for interlocal wealth disparities that continue to grow and contribute to a parochial attitude among residents.

A multitude of commissions and reports have recognized the disparities rampant in Virginia. Both the Hahn and Stuart Commissions acknowledged the higher service demands and shrinking tax bases of independent cities.<sup>73</sup> Subsequent studies expressly linked the problem to city-county separation.<sup>74</sup> Cities' conditions deteriorated throughout the 1980s with respect to developable land, employment, property values, and service demands.<sup>75</sup> A more recent report documents the extreme pressures facing Virginia's cities and laments city-county separation as a barrier to cooperation.<sup>76</sup> Specifically, cities face higher service costs in addressing poverty, ESL education, crime, and infrastructure maintenance, while the lion's share of recent job creation has taken place in counties.<sup>77</sup> These twin problems—a narrower tax base and higher service costs—cause cities in Virginia to have markedly higher

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<sup>72</sup> See Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 *Yale L.J. Pocket Part* 203, 206 (2006), available at <http://yalelawjournal.org/images/pdfs/91.pdf> (describing tax base disparities, exacerbated interlocal competition, and exclusionary tactics as effects of fragmented decisionmaking).

<sup>73</sup> See Stuart Comm'n, *supra* note 35, at 68–71; Virginia Metropolitan Areas Study Commission, Report, at 43 (1967) [hereinafter Hahn Comm'n] (discussing pressures on Richmond).

<sup>74</sup> See Grayson Comm'n, *supra* note 50, at 2 (acknowledging that “[r]edrawing the map of Virginia might be justified on purely technical grounds”); *id.* at 16 (statement of Mr. Cole Hendrix); Governor's Comm'n on Virginia's Future, *Toward a New Dominion: Choices for Virginians*, Report, at 9–11, 37 (1984).

<sup>75</sup> See Larry McMillan, *Virginia's Localities: A Decade of Change & Disparity*, *U. Va. News Letter*, Sept.–Oct. 1994, at 1, 3, 6–7.

<sup>76</sup> See Urban Policy Task Force, Office of the Governor, Commonwealth of Virginia: Urban Policy Report 6–7, 20–22 (2007) [hereinafter Urban Policy Task Force, Report].

<sup>77</sup> *Id.* at 8–12, 16.

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property taxes than their abutting counties,<sup>78</sup> which fuels further flight from cities.<sup>79</sup>

Specific evidence of the effect of city-county separation can be found in the most recent Commission on Local Government's report on the revenue capacity, revenue effort, and "fiscal stress" of Virginia's localities.<sup>80</sup> This report found significant cleavages between jurisdictional classes, with cities performing worse than counties on all three metrics regardless of geographic location, population size, and demographic growth.<sup>81</sup> Over 75 percent of the 21 localities with "high" fiscal stress were cities, while counties comprised 85 percent of the 20 "low stress" jurisdictions.<sup>82</sup> The Commission also broke down the data into sets of adjoining localities, revealing that cities showed more fiscal strain than neighboring counties in over 90 percent of cases, often with significantly higher degrees of strain.<sup>83</sup>

To be sure, the extent to which city-county separation is to blame is not entirely clear. Correlation is not causation. Moreover, since the fiscal stress data are not comparative, it is difficult to show that city-suburb disparities are greater in Virginia than in other states. At least some comparative evidence, however, strongly suggests that city-county separation exacerbates interlocal disparities. North Carolina adheres to its stronger analog to the Staples doctrine, preferring the expansion of existing municipalities through unilateral, rather than court-determined, annexation.<sup>84</sup> Coupled with its liberal annexation regime are strict limits on the

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<sup>78</sup> Va. Comm'n on Local Gov't, Final Report on the Comparative Revenue Capacity, Revenue Effort, and Fiscal Stress of Virginia's Counties and Cities 2005/2006, at 14–16, 84–85 tbl.3.3, 86–87 tbl.3.4 (2008) [hereinafter Comm'n on Local Gov't, Fiscal Stress 2006].

<sup>79</sup> Briffault, Boundary Problem, *supra* note 7, at 1136–37.

<sup>80</sup> See Comm'n on Local Gov't, Fiscal Stress 2006, *supra* note 78. To determine a locality's fiscal stress, the Commission creates an index of the locality's revenue capacity per capita, degree of revenue effort, and median adjusted gross income of individuals and married couples. *Id.* at 20.

<sup>81</sup> *Id.* at 22.

<sup>82</sup> *Id.* at 23.

<sup>83</sup> *Id.* at 23, 128–29 tbl.6.4, 130–31 tbl.6.5.

<sup>84</sup> Sean Hildebrand & James H. Svara, Conflict or Cooperation?: Local Governments, Intergovernmental Relations, and Federalism in North Carolina, *in* The New Politics of North Carolina 204, 219 (Christopher A. Cooper & H. Gibbs Knotts eds., 2008). For an explanation of the Staples Doctrine, see *supra* text accompanying note 34.

incorporation of new localities, which are enshrined in the North Carolina Constitution.<sup>85</sup> Virginia cities have performed poorly relative to cities in North Carolina with respect to population and income, partly as a result of North Carolina's robust system of unilateral annexation and limits on incorporation.<sup>86</sup> Between 1980 and 1990, most cities in North Carolina gained population at the same time as many Virginia cities lost population.<sup>87</sup> Moreover, the few cities in Virginia that gained population were either suburban in character or had gained population through annexation.<sup>88</sup> Of course, local government structure and boundary change rules are not the sole factors explaining discrepancies in city-suburb disparities between Virginia and North Carolina. Cities in North Carolina tend to be less dense, increasing opportunities for new single-family residences within cities, and they also enjoy greater funding from the state with respect to education, highways, and social welfare.<sup>89</sup> Nonetheless, the role of annexation cannot be ignored. Even observers who acknowledge the effects of other factors conclude that annexation and limits on incorporation are "powerful tool[s]" North Carolina's cities wield.<sup>90</sup>

At the same time cities in Virginia lost fiscal resources, they also lost political clout. During the 1990s, suburban jurisdictions became host to over half of the state's residents, resulting in decreased attention to partisan affiliation and increased emphasis on issues such as education, roads, and taxes.<sup>91</sup> Professor Larry Sabato forecasts continued suburban growth, particularly in Northern Virginia.<sup>92</sup> The increasing population of suburban areas, along with political parties' perception that suburbanites' votes are up for grabs, is likely to fuel what another political scientist calls the suburban

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<sup>85</sup> See N.C. Const. art. VII, § 1.

<sup>86</sup> William H. Lucy & David L. Phillips, *Confronting Suburban Decline: Strategic Planning for Metropolitan Renewal* 135, 138 (2000) [hereinafter Lucy & Phillips, *Suburban Decline*].

<sup>87</sup> *Id.* at 135.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 135, 138.

<sup>90</sup> *Id.* at 138.

<sup>91</sup> Craig Timberg, *Suburbs Shape Va. Issues*, *Wash. Post*, Sept. 12, 1999, at A1.

<sup>92</sup> Center for Politics, U. Va., *Larry Sabato's Political Maps* (2002), [http://www.centerforpolitics.org/pubs/pm\\_va2.htm](http://www.centerforpolitics.org/pubs/pm_va2.htm).

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“dominat[ion]” of Virginia politics.<sup>93</sup> To be sure, though, the characterization of counties as affluent suburbs and cities as facing seemingly imminent collapse is artificial. Many suburbs in Virginia now face problems traditionally associated with cities. Indeed, some contend that old-ring suburbs face greater challenges than cities and are less-equipped to revitalize themselves.<sup>94</sup> Many inner-ring suburbs in Virginia are presently experiencing private and public disinvestment, degradation of infrastructure, and economic decline.<sup>95</sup>

Apart from its effects on the demographic and economic condition of localities, the structure of Virginia’s local government exacerbates a uniquely insular mindset in its citizens and local officials.<sup>96</sup> Consider one outspoken resident’s view:

To some sophisticated urban planner, it might appear that Poquoson should be consolidated with York County or Hampton. But the fact is that we like our own school system, we like our own police force, we like our own library, and—above all—we like our own independence. Furthermore, we are willing to pay for it. Anyone who wants to take this independence away from us will have to fight his way from one end of Little Florida Avenue to the other.<sup>97</sup>

This parochial attitude has important political implications. Suburban residents generally tend to be more conservative, politically and ideologically.<sup>98</sup> Virginia’s suburbanites have remained eco-

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<sup>93</sup> Timberg, *supra* note 91 (quoting Robert Holsworth, a political science professor at Virginia Commonwealth University).

<sup>94</sup> William H. Lucy & David L. Phillips, *Tomorrow’s Cities, Tomorrow’s Suburbs* 22, 123, 301 (2006) [hereinafter Lucy & Phillips, *Tomorrow’s Cities*].

<sup>95</sup> See Urban Policy Task Force, Report, *supra* note 76, at 18.

<sup>96</sup> Bain, *A Body Incorporate*, *supra* note 25, at 98. One former city manager describes the effects of the system: “We Virginians lack a shared vision for the state and for the purposes and responsibilities of the various levels of governments. . . . Because of the independent city system our local governments are established in isolation and often produce policies and programs that don’t consider realities beyond their boundaries.” Jim Oliver, *Virginians Need to Take a Bold Look at Their Governance*, U. Va. News Letter, Sept. 1999, at 2.

<sup>97</sup> Grayson Comm’n, *supra* note 50, at 3.

<sup>98</sup> Thad Williamson, *Sprawl, Spatial Location, and Politics: How Ideological Identification Tracks the Built Environment*, 36 *Am. Pol. Res.* 903, 904–05 (2008).

nomically conservative even as the influx of younger residents has moderated stances on civil rights and improved race relations.<sup>99</sup>

Professor Richard Briffault describes two features of local government law that contribute to this sense of political isolation, the effects of which are more acutely felt in Virginia than in other states. First, boundaries between localities undermine metropolitan residents' perceptions of shared community, obscuring localities' interdependence and creating a "psychological separation" between residents.<sup>100</sup> Since city-county separation hardens local boundaries, residents' identities are even more likely to be bound up with an individual locality in Virginia.<sup>101</sup> Second, suburban sprawl attenuates the connection between suburbs and central cities, and hides the regional economic damage that results from interlocal disparities.<sup>102</sup> To the extent that city-county separation pushes growth away from the urban core,<sup>103</sup> this effect is likewise greater in Virginia.

## II. THE INTERLOCAL BARGAINING DEFENSE OF DECENTRALIZED LOCAL GOVERNMENT

The public choice defense of decentralized local government consists of two distinct arguments purporting to justify the contemporary fragmented system of localities. One group claims that localities within a region will recognize the benefits of cooperating on a wide-ranging set of issues, including not only capital-intensive projects that are facially mutually beneficial but also redistributive "burden sharing" to address intraregional inequities.<sup>104</sup> A second school asserts that competitive pressures between localities is pref-

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<sup>99</sup> Frank B. Atkinson, *Virginia in the Vanguard* 88 (2006).

<sup>100</sup> Briffault, *Boundary Problem*, supra note 7, at 1143-44.

<sup>101</sup> ACIR, *Virginia's Cities*, supra note 56, at 12.

<sup>102</sup> Briffault, *Boundary Problem*, supra note 7, at 1149-50.

<sup>103</sup> See John V. Moeser, *Virginia's Great Challenge: Rediscovering the Central City*, U. Va. News Letter, May 1998, at 3, 5-6. Of course, city-county separation is not wholly responsible for sprawl. Transportation policy in Virginia also contributes to sprawling development patterns. Patrick M. McSweeney, *The Regional Sales Tax Referendum: A Flawed Approach*, U. Va. News Letter, Oct. 2002, at 2. In addition, Virginia tends to be much more reluctant to regulate local land-use decisions than other states. Hank Savitch, *Dreams and Realities: Coping with Urban Sprawl*, 19 Va. Env'tl. L.J. 333, 334-40 (2000).

<sup>104</sup> See Gillette, supra note 6, at 192-94.



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erable, since such competition will result in efficient service delivery and allow mobile residents and capital to select their preferred tax-service bundles.<sup>105</sup> Many scholars have properly criticized the latter justification, observing that it pressures homeowners to cater to prejudices of potential buyers,<sup>106</sup> results in distributive injustices<sup>107</sup> and efficiency losses,<sup>108</sup> does not permit many residents—especially the poor—to satisfy their preferences,<sup>109</sup> and creates a privatized conception of local public goods that discourages interlocal burden sharing.<sup>110</sup> Others have questioned whether many assumptions in the Fischel-Tiebout model are plausible.<sup>111</sup> Because the critique of interlocal competition is very well developed, the bargaining defense of decentralization merits closer scrutiny. This Part begins the task by describing the premises of the bargaining thesis and explaining how Virginia’s local governmental features provide an ideal laboratory in which to examine it.

*A. The Claim that Decentralization Facilitates Interlocal Bargaining*

Professor Gillette argues that suburban localities, at least under certain conditions and barring rampant irrationality, will recognize that self-interest requires them to enter into agreements with central cities. As he puts it, many times “autonomous localities have incentives to be attentive to the interests of neighbors, including intraregional inequities.”<sup>112</sup> Gillette thus seeks to “posit a more sanguine relationship among localities”<sup>113</sup> than the conventional wisdom permits. Two premises underlie the bargaining thesis: “[t]aken together,” he states, the advantages of decentralized government and intraregional economic interdependence “suggest that metro-

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<sup>105</sup> See Fischel, *supra* note 15, at 4–7.

<sup>106</sup> Fennell, *supra* note 23, at 646–49.

<sup>107</sup> Frug, *supra* note 23, at 169–73.

<sup>108</sup> Thad Williamson et al., *Making a Place for Community: Local Democracy in a Global Era* 52–70 (2002).

<sup>109</sup> Schragger, *supra* note 23, at 1840–42.

<sup>110</sup> *Id.* at 1847–48.

<sup>111</sup> See Bratton & McCahery, *supra* note 23, at 212–13; Schragger, *supra* note 23, at 1826–34.

<sup>112</sup> Gillette, *supra* note 6, at 192.

<sup>113</sup> *Id.*

politan problems are amenable to cooperative solutions without further government centralization.”<sup>114</sup>

First, Gillette recounts several attacks against regional government. He argues that centralization will not solve interlocal conflicts—rather, it will result in suburban domination of regional institutions.<sup>115</sup> He proceeds to claim that a higher level of citizen participation is possible at the local level and that centralization denies citizens the ability to satisfy their preferences.<sup>116</sup> Next, Gillette cites studies concluding that decentralization helps control bureaucratic budgets and is even responsible for the recent revival of some central cities.<sup>117</sup> Finally, he raises the spectre that affluent residents, if placed under the control of a regional government, will elect to privatize certain services rather than subsidize those services for poor areas of the jurisdiction.<sup>118</sup>

The other pillar of the bargaining thesis holds that the economic interdependence of localities promotes cooperation. According to Gillette, economic interdependence “suggests that suburbs should be willing to assist the central city to a significant extent, if not out of altruism, then out of a desire to protect their own financial well-being.”<sup>119</sup> This assertion is hardly unique to the bargaining thesis. Indeed, many “New Regionalist” scholars, some of whom call for regional government, cite evidence of interlocal interdependence.<sup>120</sup>

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<sup>114</sup> *Id.* at 269.

<sup>115</sup> See *id.* at 196, 203–04. This concern is hardly unfounded. Indeed, fear of minority vote dilution led many minorities in Richmond to oppose its quest to annex a portion of Chesterfield County in the 1960s, an effort resulting in a protracted court battle that reached the U.S. Supreme Court. See Matthew D. Lassiter, *The Silent Majority: Suburban Politics in the Sunbelt South* 281–84 (2006); see also *City of Richmond v. United States*, 422 U.S. 358, 362–67 (1975). See generally John V. Moeser & Rutledge M. Dennis, *The Politics of Annexation: Oligarchic Power in a Southern City* (1982) (discussing the political rationale and the actors in Richmond’s annexation of Chesterfield County). Even supporters of regional government acknowledge the problem as a reason city officials may be hostile toward regional governments. See Paul Boudreaux, *E Pluribus Unum Urbs: An Exploration of the Potential Benefits of Metropolitan Government on Efforts to Assist Poor Persons*, 5 *Va. J. Soc. Pol’y & L.* 471, 534–37 (1998).

<sup>116</sup> Gillette, *supra* note 6, at 200.

<sup>117</sup> See *id.* at 240 & n.186.

<sup>118</sup> See *id.* at 204.

<sup>119</sup> *Id.* at 246.

<sup>120</sup> See Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 *Wash. L. Rev.* 93, 117–18 (2003) [hereinafter Reynolds, *Metropolitan Equity*] (describing the label as a “wide doctrinal umbrella,” under

Gillette views suburbs as the residential base for residents who are attracted to a city, finding significant interdependence even when suburbs possess “a robust commercial base.”<sup>121</sup> Suburbs depend on cities for the higher wages associated with city employment. Cities also produce agglomeration effects by increasing the rate of human capital production and easing communication barriers between firms. The economic fates of cities and suburbs, moreover, are intertwined in many respects.<sup>122</sup>

Several scholars have identified increasing suburban heterogeneity as another motivation for interlocal burden sharing.<sup>123</sup> Although Gillette does not expressly embrace this argument, its prominence in the literature justifies its mention here. Certainly, the problems of inner suburbs are widespread and growing; indeed, some contend that declining suburbs have even dimmer prospects of recovery than central cities.<sup>124</sup> Proponents of this view also cite recent election data, asserting that “where suburbs are experiencing decline, suburbanites are more likely to vote like urban dwellers.”<sup>125</sup> Thus “the potential for [city-suburban] coalitions is greater than others foresee . . . because a much smaller proportion of suburbanites and suburbs will be well placed and separated from traditional central city problems.”<sup>126</sup>

The next step for Gillette is to show that the incentives that exist to enter facially mutually beneficial agreements also exist for bur-

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which both “localists” and “regionalists” rely on interdependence for their prescriptions).

<sup>121</sup> See Gillette, *supra* note 6, at 241–45.

<sup>122</sup> Gillette cites to studies that city and suburban economic growth are closely linked; that urban economic growth is positively correlated with suburban home values; and that metropolitan regions tend to be less successful at attracting firms when urban core residents have low levels of education. See *id.* at 244–45.

<sup>123</sup> See, e.g., William H. Hudnut III, *Halfway to Everywhere: A Portrait of America's First-Tier Suburbs* xii–xiii, 259–61 (2003); Myron Orfield, *Metropolitics* 108–09, 171–72 (2002) (suggesting strategies for building coalitions between cities and older suburbs); Boudreaux, *supra* note 115, at 490 (“[T]he old assumptions about suburban homogeneity and common hostility to the central city are no longer valid in many areas and will continue to lose validity as suburbs age and grow apart.”).

<sup>124</sup> See Hudnut, *supra* note 123, at xiii (“The challenges [first-tier suburbs] face differ from either central cities or newer suburbs farther out primarily because they lack the tax base and fiscal capacity of their neighbors.”).

<sup>125</sup> Peter Dreier, John Mollenkopf & Todd Swanstrom, *Place Matters: Metropolitics for the Twenty-First Century* 232 (2001).

<sup>126</sup> Lucy & Phillips, *Tomorrow's Cities*, *supra* note 94, at 36.

den-sharing agreements. He does not deny the challenge of this task: "If problems of strategic behavior or legal doctrine can disrupt mutually wealth-enhancing coordination, they should have even greater effect where at least one party must sacrifice for the larger regional welfare and each party has incentives to minimize its share of the sacrifice."<sup>127</sup> Yet for several reasons he remains optimistic that bargaining can redress inequities. First, interdependence makes it rational for suburbs to engage in burden sharing. Second, constituents of suburban jurisdictions will anticipate benefits from burden sharing because they work and engage in social and cultural activities in the city.<sup>128</sup> Third, agency asymmetries work in favor of burden sharing because suburban taxpayers experience only small marginal costs from their individual transfers, while the city gains a great deal by obtaining the aggregate sum.<sup>129</sup> Fourth, suburban officials' political goals may make them more amenable to redistribution than their constituents' views would suggest.<sup>130</sup> Finally, the "geographical fixity" of localities creates a bilateral monopoly in which "[r]epeat play" between the jurisdictions builds trust and discourages either from alienating their sole potential partner.<sup>131</sup>

Gillette's prescriptions reflect his faith in market mechanisms to address regional problems. He concedes that interlocal bargains are underutilized, yet he maintains that the source of this failure is not suburban exploitation but rather contracting costs.<sup>132</sup> Accordingly, the solution is to reduce these costs rather than to create a new layer of government. Localities, according to Gillette, also should rely upon informal bargains to achieve coordination, with repeat play and "credible threat[s] to punish" noncooperation serving as checks against opportunistic behavior.<sup>133</sup> Similarly, since it is often expensive for suburban jurisdictions to monitor city expendi-

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<sup>127</sup> Gillette, *supra* note 6, at 232.

<sup>128</sup> *Id.* at 252–53.

<sup>129</sup> *Id.* at 253.

<sup>130</sup> Local officials' goals may include advancement within a political party or election to statewide office, both of which might convince suburban officials to embrace a view more sympathetic to cities' interests. *Id.* at 253–54.

<sup>131</sup> *Id.* at 216, 247–48.

<sup>132</sup> *Id.* at 263.

<sup>133</sup> *Id.* at 263–65.

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tures from tax base sharing, such agreements ought to involve “relatively narrow, specific obligations.”<sup>134</sup>

As described, the bargaining thesis appears to make quite broad claims. Yet Gillette clarifies that his argument “is not that local incentives to cooperate through implicit bargains provide a panacea or displace all legal interventions to correct intraregional disparities.”<sup>135</sup> In particular, he introduces three qualifications.<sup>136</sup> First, the bargains struck may not be ideal because of residual contracting and agency costs, intertemporal externalities, and informational asymmetries. Second, background legal rules influence the bargaining positions of the parties against one another. Liberal annexation rights improve a city’s ability to extract concessions, while lax incorporation standards weaken the city’s position, since residents subject to annexation threats can defensively incorporate.<sup>137</sup> Third, class- and race-based animus will tend to impede bargaining.

Curiously, although Gillette acknowledges that annexation and incorporation rights affect cities’ bargaining power, he expresses skepticism that setting these rules in favor of cities will improve regional welfare. He treats the rights as similar to default rules in contract law, analogizing them to information-forcing “penalty defaults.”<sup>138</sup> Gillette argues that shifting initial entitlements to cities will not necessarily produce better outcomes than granting them to suburbs.<sup>139</sup>

*B. Virginia’s Features as Ideal for Examining the Bargaining Thesis*

Two aspects of local government in Virginia make it an ideal setting in which to consider public choice defenses of decentralization: first, city-county separation, and second, the frozen character of local boundaries. Gillette asserts that city-county separation makes Virginia “a nice laboratory for this experiment” because it suppos-

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<sup>134</sup> Id. at 262, 265.

<sup>135</sup> Id. at 270–71.

<sup>136</sup> Id. at 195–96.

<sup>137</sup> Annexation and incorporation laws have vested significant powers in suburban jurisdictions. See Briffault, *Our Localism: Part I*, supra note 7, at 72–81.

<sup>138</sup> See Gillette, supra note 6, at 261 (citing Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *Yale L.J.* 87, 91, 97 (1989)).

<sup>139</sup> Gillette, supra note 6, at 262.

edly facilitates bargaining.<sup>140</sup> His basis for the claim is that negotiations take place between only two entities, since most cities are entirely encapsulated within individual counties. The bilateral nature of negotiations purportedly facilitates bargaining in two ways. First, it eliminates the coordination and monitoring problems present with multiple parties.<sup>141</sup> Second, drawing on an idea from tort law, in a bilateral monopoly there are no “multiple potential ‘rescuers’” that might diffuse responsibility; the single neighboring county thus is not discouraged from assisting the city it surrounds.<sup>142</sup>

At the same time that Virginia’s local government structure purportedly facilitates bargaining, it also enhances Tieboutian competition.<sup>143</sup> This is true despite the rather ironic pronouncement of the Supreme Court of Virginia that “the state favors cooperation, rather than competition, among local governments.”<sup>144</sup> First, city-county separation decreases exit costs, since residents and firms need move a much shorter distance than necessary in metropolitan areas with overlapping localities to escape an undesirable tax-service bundle. Such heightened mobility is “the crucial feature” for Tieboutian competition.<sup>145</sup> Second, city-county separation eliminates the “vertical demand relationships . . . that make fiscal behaviour at the two levels interdependent”<sup>146</sup> in jurisdictions with overlapping localities. That is, because cities in Virginia ordinarily receive no funds from county coffers, a city’s tax and service decisions are not tied to an overlapping county’s decisions. Third, city-county separation tends to trap the poor in cities,<sup>147</sup> augmenting suburbs’ ability to exclude fiscally undesirable residents. The ability to exclude such residents is another key tenet of Fischel’s model of interlocal competition.<sup>148</sup>

In addition to the structural features of Virginia’s local governments, the characteristics of many cities in Virginia demonstrate

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<sup>140</sup> Id. at 234 n.157, 249.

<sup>141</sup> Id. at 218–19.

<sup>142</sup> Id. at 249–50.

<sup>143</sup> See Turnbull & Tasto, *supra* note 22, at 64–65.

<sup>144</sup> *County of Rockingham v. City of Harrisonburg*, 294 S.E.2d 825, 830 (Va. 1982).

<sup>145</sup> Turnbull & Tasto, *supra* note 22, at 54.

<sup>146</sup> Id. at 53.

<sup>147</sup> Highway-oriented transit funding also contributes to this trapping effect. See Urban Policy Task Force, Report, *supra* note 76, at 20–22.

<sup>148</sup> See Fischel, *supra* note 15, at 65–67; Schragger, *supra* note 23, at 1836.

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the extent of interlocal competition. Large metropolitan regions such as Northern Virginia and the Tidewater region face heightened competitive pressures because of the multiplicity of jurisdictions therein,<sup>149</sup> while “‘mid-size’ cities” in Central Virginia experience increased competition because of their smaller geographic sizes and populations.<sup>150</sup> Smaller populations constrain mid-size cities’ ability to adapt to dynamic market conditions and to generate “entrepreneurial volume,” while their small physical size limits such cities to “specialized economic functions.”<sup>151</sup> Small physical size also reduces transportation costs for commuters, thereby enhancing resident mobility. Finally, small physical size exacerbates the effects of the “polycentric urban form,” whereby suburbs have become full-service jurisdictions,<sup>152</sup> with robust social, political, and commercial venues of their own. With suburbs providing such opportunities, mid-size cities are less able to provide viable downtown entertainment or political districts.

### III. EVALUATING THE BARGAINING THESIS

The bargaining thesis seems quite persuasive, at least at first glance. After all, decentralization may seem to promote the efficient delivery of services, with competition serving as a check on bureaucracy and administrative costs. Meanwhile, voluntary bargaining could mitigate interlocal inequalities. Yet the burden-sharing agreements Professor Gillette describes are glaringly absent from Virginia, apart from the Charlottesville-Albemarle tax base sharing settlement.<sup>153</sup> Moreover, the degree of burden sharing in the Charlottesville agreement is quite exaggerated.<sup>154</sup> Even Gil-

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<sup>149</sup> Tiebout, *supra* note 14, at 418 (observing that consumer-voters have a greater ability to maximize their preferences when many varied jurisdictions exist).

<sup>150</sup> Sam Staley, *Solutions for Mid-Size Cities May Come in Small Packages*, *Richmond Times-Dispatch*, Feb. 25, 1999, at A15.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> The Charlottesville agreement is the closest example of a “voluntary” burden-sharing agreement in the state. The diminished bargaining power of cities under current background rules, however, suggests other Virginia cities will be unable to bargain for similar revenue-sharing agreements. See Reynolds, *Metropolitan Equity*, *supra* note 120, at 152 n.216 (noting that “[t]he revenue sharing agreement between Albemarle County and Charlottesville . . . was a bargain struck against an unusual set of background legal rules”).

<sup>154</sup> See *infra* Subsection IV.A.2.

lette concedes that the interlocal agreements present in Virginia may provide only “weak evidence” of suburban jurisdictions’ willingness to help shoulder the burdens located primarily in central cities.<sup>155</sup>

This Part argues that the predictions and prescriptions of voluntary bargaining proponents are far too optimistic. They neglect the prevalence of several features that undermine bargaining, and, more fundamentally, they overlook systemic disincentives to bargaining that result from decentralization. This Part first documents shortcomings of the bargaining thesis that, although they apply generally, are especially pronounced in Virginia. It then explains why Virginia’s peculiar features uniquely discourage interlocal bargaining. Since Virginia’s laboratory is in many ways a model for bargaining proponents’ desired form of government, the deficiencies found in Virginia give reason to question the bargaining thesis more generally.

#### *A. Pervasive Barriers to Interlocal Bargaining*

Some of the descriptive inaccuracies of the bargaining thesis already are well known. Several scholars have called into question whether interlocal agreements—even those that, by creating economies of scale, are facially beneficial to both localities—will arise at all, arguing that the prerequisites to bargaining rarely materialize. These scholars also have disputed whether such agreements, should they arise, will include the burden-sharing elements Gillette predicts. Evidence suggests that both of these criticisms explain the lack of interlocal bargaining in Virginia.

The first line of attack against the bargaining thesis is that many conditions and premises are necessary before agreements can arise, yet such conditions are rarely present. Because these agreements are based on a purely self-interested model of behavior, localities are not likely to enter agreements when “several localities scattered across a metropolitan region” must coordinate with one another to achieve any benefit.<sup>156</sup> Nor are agreements likely on subjects requiring suburban officials and residents to agree to bear large costs up front in hopes of achieving a seemingly elusive, dif-

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<sup>155</sup> Gillette, *supra* note 6, at 249.

<sup>156</sup> Briffault, *Boundary Problem*, *supra* note 7, at 1121–22.



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fuse benefit.<sup>157</sup> More important, the city-suburb interdependence upon which Gillette relies may be overstated. Recent analyses suggest a weaker degree of economic interdependence between cities and suburbs,<sup>158</sup> including those in Virginia.<sup>159</sup> With polycentric development in Virginia decreasing the uniqueness and viability of urban downtowns,<sup>160</sup> as well as increased inter-suburban commuting,<sup>161</sup> suburban perceptions of economic interdependence often are too weak to result in voluntary burden sharing. Even to the degree that suburbs perceive themselves to share a linked fate with their central cities, they may be “incapable of extricating themselves from a short-term focus that obscures the substantial long-term benefits of voluntary regional redistribution.”<sup>162</sup>

Second, even if localities enter into agreements, such agreements are not likely to address interlocal disparities. Professor Briffault writes that “[a]s long as cooperation is voluntary, no locality will cooperate with another unless it sees that it will benefit from such cooperation.”<sup>163</sup> Suburbs are not likely to perceive benefits from burden sharing, given their lack of perceived interdependence and tendency to discount diffuse benefits. Rather, interlocal competition creates a private notion of local public goods, fostering an attitude among suburban residents that they are entitled to better services.<sup>164</sup> Thus, as Professor Laurie Reynolds contends, suburbs will tend to engage in “selective regionalism,” cooperating with cities on capital-intensive infrastructure projects from which suburbs

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<sup>157</sup> *Id.*

<sup>158</sup> Laurie Reynolds, *Local Governments and Regional Governance*, 39 *Urb. Law* 483, 493 & n.47 (2007) [hereinafter Reynolds, *Regional Governance*] (citing sources questioning the causal relationship between city and suburban prosperity).

<sup>159</sup> Xiaobing Shuai, *Are Center Cities the Engines of Growth for Their Suburbs? A Re-Evaluation of the Economic Relationship Using Evidence from Virginia’s Metropolitan Areas*, *Bus. Econ.*, Oct. 2005, at 22, 26–29.

<sup>160</sup> Staley, *supra* note 150. But see Lucy & Phillips, *Tomorrow’s Cities*, *supra* note 94, at 315–17 (acknowledging polycentric development patterns but citing the Charlottesville downtown mall to illustrate the potential of downtown revival). Professors Lucy and Phillips make a fair point, but replicating the Charlottesville downtown in other locations seems difficult, given the existing spatial development patterns and worse conditions in other central cities.

<sup>161</sup> Moeser, *supra* note 103, at 4; McSweeney, *supra* note 103, at 2.

<sup>162</sup> Reynolds, *Regional Governance*, *supra* note 158, at 497–98.

<sup>163</sup> Briffault, *Boundary Problem*, *supra* note 7, at 1149.

<sup>164</sup> Schragger, *supra* note 23, at 1847–48, 1851–52.

benefit, even as they declare that “it’s your problem” when it comes to city-suburb wealth disparities.<sup>165</sup>

Evidence bears out this criticism of the bargaining thesis. Gillette’s response—that critics underestimate the frequency of bargaining because localities avoid contracting costs by pursuing agreements informally<sup>166</sup>—is not persuasive. After all, localities have successfully pursued formal agreements with respect to non-redistributive services and could create burden-sharing agreements under the same statutory authority, yet have not done so. As Reynolds points out, “formal legal requirements do not appear to impose insurmountable barriers” to agreements when suburbs stand to benefit.<sup>167</sup> Such selective cooperation is likely occurring in Virginia: it is telling that even bargaining proponents can point only to a few examples of burden sharing in the state, despite the plethora of authority to enter into both burden-sharing and capital-intensive agreements.

### *B. Impediments Endemic to Virginia*

The obstacles to interlocal bargaining in Virginia do not end with the general problems other scholars have identified—although they do have particular force in the state. Rather, structural and political features of Virginia undermine core premises of the bargaining thesis. First, and perhaps most obviously, two sets of background legal rules frustrate meaningful bargaining. The first set of rules, which governs boundary changes, is oriented in a way that is detrimental to burden sharing. The annexation moratorium and many counties’ immunity from annexation reduce cities’ ability to extract equitable concessions from counties. Since the city cannot threaten the county’s tax base, the county feels little compulsion to share its wealth, notwithstanding the city’s role in creating it. Since burden-sharing agreements have tended to occur only when cities have possessed these entitlements, Gillette’s argument against municipal annexation rights is unconvincing.<sup>168</sup>

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<sup>165</sup> Reynolds, *Metropolitan Equity*, supra note 120, at 155–56.

<sup>166</sup> Gillette, supra note 6, at 263–69.

<sup>167</sup> Reynolds, *Metropolitan Equity*, supra note 120, at 150–51.

<sup>168</sup> *Id.* at 152 & n.216 (“[I]t appears that voluntary burden sharing typically occurs only when the state redefines the background legal rules to create an incentive for

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A second set of rules impairs bargaining even when a county has decided to pursue some degree of burden sharing. Constitutional provisions limit counties' ability to take on debt by requiring county voters' approval of the debt in a special referendum. This requirement confers a veto right upon a simple majority of county residents who, given their localism-inclined perspective,<sup>169</sup> are less likely to support burden sharing than suburban officials and elites. Thus, even if Gillette is correct that agency asymmetries in suburbs militate in favor of interlocal burden sharing, such agreements are not likely to form in Virginia. The referendum requirement, one can now see, is but one example of state limits on local initiative that reflect distrust and "configure[] local power in substantive ways" to the detriment of burden sharing.<sup>170</sup>

Flawed as well is the bargaining proponents' characterization of interlocal relations in Virginia as consisting of bilateral monopolies. Gillette asserts that city-county separation will facilitate bargaining because the one-on-one process builds trust, reduces monitoring costs, and eliminates the "multiple rescuers" problem. Contrary to his operative assumption, however, a great deal of bargaining in Virginia is not bilateral. The Virginia Beach-Norfolk-Newport News metropolitan statistical area (MSA), for example, encompasses seven counties and nine cities.<sup>171</sup> In 2001, the area had over one hundred governmental units when including school systems and service districts.<sup>172</sup> The Richmond MSA alone includes sixteen counties and four cities.<sup>173</sup> Indeed, Richmond itself does not conform to Gillette's description of one city entirely enveloped within a county, since Henrico abuts Richmond to the north and Chesterfield to the south. Finally, the Washington, D.C. MSA contains nine counties and seven cities in Virginia alone.<sup>174</sup> Thus, while

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burden sharing that generally does not exist. . . . [I]t is difficult to understand the strength of the case for preservation of the status quo.").

<sup>169</sup> See *supra* text accompanying notes 96–103.

<sup>170</sup> Barron, *supra* note 9, at 2345–47; see *id.* at 2357 (discussing a similar referendum requirement in the California Constitution).

<sup>171</sup> U.S. Census Bureau, Population Div., Metropolitan and Micropolitan Statistical Areas and Components, November 2007 (2008), available at <http://www.census.gov/population/www/metroareas/lists/2007/List1.txt>.

<sup>172</sup> Econ. Forecasting Project, Old Dominion U., *supra* note 52, at 108.

<sup>173</sup> U.S. Census Bureau, Population Div., *supra* note 171.

<sup>174</sup> *Id.*

Gillette's description may characterize interactions in parts of the state, such is not the case for the localities in which the bulk of Virginians reside. The impediments to bargaining that Gillette correctly identifies are sure to follow from the multiplicity of jurisdictions within these regions. Indeed, a recent report identified "the scale and complexity of problems involved in many regional issues" and "the diversity of interests affected" as among the most significant barriers to interlocal cooperation in Virginia.<sup>175</sup>

Even if Gillette's description of interlocal interactions were accurate, the bilateral nature of negotiations is hardly sufficient to result in successful bargaining; in fact, bilateral interactions may make bargains less likely. Gillette neglects Virginia's history of interlocal hostility and its tradition of strong local government and identity. Two connected forces have contributed to interlocal hostility in Virginia: annexation and race. The annexation system resulted in long, expensive litigation that disrupted local governance and produced distrust between localities.<sup>176</sup> Distrust between localities predates annexation and has outlived the system, continuing to undermine interlocal cooperation to this day.<sup>177</sup> Persisting racial tensions have also undermined cooperation,<sup>178</sup> with residents and leaders of majority-black cities fearful that joint ventures threaten what power they have and suburban residents suspicious of increased socioeconomic—and racial—heterogeneity.<sup>179</sup> Racial tensions remain particularly acute in Virginia, the former home to the Confederacy and a front of massive resistance to school integration. The Richmond annexation and school busing sagas in the 1960s and 1970s produced especially bitter conflicts, both of which were tinged by race.<sup>180</sup> Aside from historical distrust, the sense of separateness resulting from city-county separation also discourages

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<sup>175</sup> See ACIR, *Virginia's Cities*, supra note 56, at 12.

<sup>176</sup> Edwards, supra note 20, at 193.

<sup>177</sup> ACIR, *Virginia's Cities*, supra note 56, at 12. Evidence suggests many of the wounds of annexation have healed, with residual conflict explained by exogenous factors like local pride. See Edwards, supra note 20, at 195–96.

<sup>178</sup> ACIR, *Virginia's Cities*, supra note 56, at 12.

<sup>179</sup> Cashin, supra note 7, at 2019–21. For discussion of city resident's fears, see supra note 115 and accompanying text.

<sup>180</sup> Lassiter, supra note 115, at 280–94.

bargaining, since localities participating in agreements must sacrifice exclusive control over individual projects.<sup>181</sup>

The fundamental weakness of the bargaining thesis, however, does not stem from its unrealistic premises. Rather, bargaining proponents neglect structural disincentives to bargaining that result from city-county separation. Observers have properly noted some of the system's deleterious effects, including the sense of separateness it inculcates<sup>182</sup> and barriers to information flow that prevent recognition of mutual interests.<sup>183</sup> In addition to these problems, city-county separation produces at least three unique barriers to cooperation. First, separation distorts local leaders' incentives to the detriment of burden sharing. Separation alters the political economy of suburban officials, encouraging them to attribute disproportionate weight to the interests of their jurisdiction instead of the metropolitan region as a whole.<sup>184</sup> Separation also increases the time and patience officials must expend to negotiate.<sup>185</sup> Second, separation stifles interest groups' power to pressure officials to cooperate and compromise. Conventional, overlapping local governments create "a common set of constituents who can have some influence on each government," resulting in an "overlap of influence" that promotes bargaining.<sup>186</sup> Such features are lacking in Virginia's separated localities. Third, separation exacerbates rivalries between localities' respective tax bases and discourages coordinated efforts to attract firms to a region. Virginia's tax structure does not direct any tax revenue from a firm to localities other than the one in which the firm is situated, even if neighboring localities helped recruit the firm through agglomeration effects or regional marketing, or incurred negative externalities from the firm's location decision.<sup>187</sup>

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<sup>181</sup> Edwards, *supra* note 20, at 31.

<sup>182</sup> See *supra* text accompanying notes 96–103.

<sup>183</sup> Most economic and demographic information is collected, reported, and analyzed by locality in Virginia. ACIR, *Virginia's Cities*, *supra* note 56, at 12. Locality-based reporting undermines efforts at regional problem-solving. See Cashin, *supra* note 7, at 2021–22.

<sup>184</sup> ACIR, *Virginia's Cities*, *supra* note 56, at 11–12.

<sup>185</sup> Edwards, *supra* note 20, at 30–31.

<sup>186</sup> *Id.* at 31.

<sup>187</sup> See ACIR, *Virginia's Cities*, *supra* note 56, at 14; Moeser, *supra* note 103, at 5.

It is doubtful that older, more heterogeneous suburbs in Virginia will form alliances with central cities. Although increasing racial heterogeneity and the expansion of “city” problems into older suburbs constitute plausible bases for increased cooperation, reasons already discussed caution against excessive optimism. Locality-based data reporting often obscures the scope and interconnectedness of regional problems, while the tradition of strong local government identity and historical distrust between cities and counties increase barriers to the formation of alliances. The recent Richmond-Henrico address dispute is illustrative of these barriers, since Henrico’s increased heterogeneity has not brought about increased cooperation. Henrico has become more racially diverse, with blacks representing about a quarter of the population in 2000.<sup>188</sup> The county’s median income also has begun to fall, a trend that started in the 1980s. Consequently, residents have become less able and willing to reinvest in the aging housing stock, hurting commercial strips and schools alike—all of which has put more fiscal pressure on the county.<sup>189</sup> Yet the shared problems of Richmond and Henrico have hardly spurred an alliance; rather, the localities have battled one another for shares of existing revenue, such as from the newly-recognized Henrico mailing address.<sup>190</sup> While one can hope that Virginia suburbs—traditionally reluctant to cooperate with cities—will one day be hastened to act by a sense of interdependence, by all accounts this point has not yet arrived.

#### IV. IMPLICATIONS FOR LOCAL GOVERNMENT LAW

Virginia’s experience reveals the deficiencies of public choice defenses of decentralization. It demonstrates how the bargaining thesis fails to capture the incentives and effects produced by city-county separation. Moreover, it exposes the bargaining account as highly stylized: the unique political and social conditions it assumes are not likely to emerge, especially in Virginia. In any case, it is questionable that any agreements that form will involve significant burden sharing. Meanwhile, interlocal competition, rather than creating a race to the top in public services, perpetuates and exac-

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<sup>188</sup> Lucy & Phillips, *Tomorrow’s Cities*, supra note 94, at 309.

<sup>189</sup> *Id.* at 310.

<sup>190</sup> See supra text accompanying notes 1–5.

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erbrates wealth disparities between jurisdictions playing on an unequal field. Given these weaknesses of decentralization, then, should socially conscious reformers of local government seek to create new regional institutions? Many scholars advocate such a shift in power, whether through “elastic” cities that annex new growth<sup>191</sup> or regional governing bodies.<sup>192</sup> To this end, many in Virginia have recently called to modify or end city-county separation.<sup>193</sup>

Regional governance proponents, convinced that political opposition to regional governments is insurmountable,<sup>194</sup> instead seek to “alter the current mix of state law grants and limits that gives [sic] substance to local legal power” as a means of combating sprawl and interlocal disparities.<sup>195</sup> For example, Barron suggests granting annexation rights to central cities, imposing fair-share housing mandates, and conveying additional authority to suburban jurisdictions that participate in burden-sharing programs.<sup>196</sup> Annexation is valuable for him not because cities will actually expand their boundaries, but because it is an effective instrument to force suburban jurisdictions to the bargaining table. Many in this group argue that such equitable reforms can be made politically palatable to affluent suburbs<sup>197</sup> and that cities can build coalitions with older suburbs to advance their agenda.<sup>198</sup> One oft-endorsed remedy among proponents is regional tax base sharing, in which a suburban jurisdiction transfers a portion of its tax revenue to the adjoin-

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<sup>191</sup> See Rusk, *supra* note 8, at 9–10.

<sup>192</sup> See Briffault, *Boundary Problem*, *supra* note 7, at 1122; Cashin, *supra* note 7, at 2042–47.

<sup>193</sup> See, e.g., Editorial, *Richmond Times-Dispatch*, May 30, 2008, at A12; Tayloe Negus, *Who Needs 134 Archaic Cities and Counties?*, *Richmond Times-Dispatch*, Oct. 19, 2008, at E6.

<sup>194</sup> See, e.g., Anthony Downs, *New Visions for Metropolitan America* 170 (1994) (“[A]lmost no one favors metropolitan area government except a few political scientists and intellectuals. Proposals to replace suburban governments completely are therefore doomed.”).

<sup>195</sup> Barron, *supra* note 9, at 2263, 2385.

<sup>196</sup> See David J. Barron et al., *Dispelling the Myth of Home Rule* 84–89 (2004); Barron, *supra* note 9, at 2367–84.

<sup>197</sup> See Note, *Old Regionalism, New Regionalism, and Envision Utah: Making Regionalism Work*, 118 *Harv. L. Rev.* 2291, 2310 (2005).

<sup>198</sup> See *supra* text accompanying notes 123–126.

ing central city.<sup>199</sup> Revenue sharing, proponents believe, diminishes resource disparities, weakens interlocal competition for firms and residents, and is easier to administer than state or federal aid programs.<sup>200</sup>

Virginia's laboratory offers unique insights for regional government and governance. Substantive weaknesses as well as political realities counsel against centralizing local government; thus, reformers are better served by working within existing governmental structures. Yet regional governance reforms run into political and substantive obstacles of their own. Politically, affluent suburbs will still object to burden sharing; substantively, attempts at revenue sharing in Virginia have had only limited success in reducing disparities. Nonetheless, both the political and substantive challenges of reorienting local power are likely to be less acute and more easily resolved than centralization schemes. This Part first identifies the problems that would arise from either centralizing Virginia's localities or restoring cities' annexation rights. It then examines the Charlottesville-Albemarle revenue sharing agreement to demonstrate that significant reforms to the bargaining environment must take place to enhance the degree of burden sharing. Finally, this Part suggests several policies and principles that will promote more interlocal burden sharing, including a reinvigorated but reformed annexation system and incentives for counties to engage in greater burden sharing.

### *A. Regional Government or Governance?*

#### *1. Disadvantages of Centralization and Annexation*

Several substantive reasons caution against turning to centralized institutions to redress Virginia's interlocal disparities. Whereas decentralized's advantages include policy innovation and enhanced participation, centralized control will hardly resolve interlocal conflicts—and may in fact become dominated by suburban interests or result in privatized local services, as Professor Gillette points out.<sup>201</sup> Determining the scope of authority of regional gov-

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<sup>199</sup> See Myron Orfield, *American Metropolitcs* 106–07 (2002) [hereinafter Orfield, *American Metropolitcs*].

<sup>200</sup> See *id.* at 105–08.

<sup>201</sup> See *supra* text accompanying notes 115–118.



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ernments is likely to be quite challenging as well, given the conceptual difficulties of distinguishing “regional” from “local” issues. Moreover, although city-county separation is no longer defensible as a matter of logic, upsetting current governmental structures would pose immense financial and organizational challenges, disrupt governance, and be difficult for firms and residents to predict.<sup>202</sup> Finally—and contrary to the conventional wisdom—local governments are not entirely impotent in redistributive efforts.<sup>203</sup>

Political opposition poses an even more immense obstacle to centralization. Evidence suggests that resistance would be particularly strong in Virginia. First, the current system has enabled suburbs to externalize costs to cities quite effectively; therefore, suburban residents are unlikely to concede such an advantage readily. Second, city-county separation inculcates suburban residents and officials with a strong sense of local identity. Resistance would almost certainly come from central cities as well, since African-American-majority cities fear losing what power they currently enjoy.

Virginia’s history reveals that a robust annexation system faces problems as well. To begin, the possibility of annexation hinders the long-term planning of both private actors and counties. Imminent or anticipated annexation discourages firms from locating or expanding in disputed areas<sup>204</sup> and disrupts county land use planning.<sup>205</sup> Annexation also promotes increased land consumption away from the disputed area: since spot development away from the city boundary is more difficult to annex, counties—anxious to hold on to commercial retail revenue and low-cost residents—promote inefficient development patterns.

Another set of problems involves the system’s immense costs. The many commissions studying annexation in Virginia are nearly unanimous in decrying the immense financial cost of annexation

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<sup>202</sup> Edwards, *supra* note 20, at 31–33, 213.

<sup>203</sup> Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 *Nw. U. L. Rev.* 1057, 1057–62 (2007); Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 *Harv. L. Rev.* (forthcoming Dec. 2009).

<sup>204</sup> Grayson Comm’n, *supra* note 50, at 2.

<sup>205</sup> Edwards, *supra* note 20, at 22.

disputes,<sup>206</sup> a function of the adversarial nature of proceedings and the vague balancing inquiry. For this reason, Barron suggests that municipalities should and will use annexation powers instrumentally—that is, to bargain for concessions from suburbs rather than actually to annex them.<sup>207</sup> Moreover, annexation often results in foregone economies of scale. Virginia's previous annexation system undermined cooperation on unrelated joint projects and created structural disincentives to cooperation for both cities and counties alike. Since counties feared bolstering cities' assertions of a "community of interest" and cities feared service agreements would undercut the need for annexation, both eschewed such agreements, even foregoing some mutually beneficial economies of scale in the process.<sup>208</sup>

Even assuming municipalities use annexation only instrumentally, a problem persists: the localities must determine the duration of the agreement. A locality often is unable to identify its long-term self-interest and, even if it does, may discount it in favor of short-term gains.<sup>209</sup> Thus, cities may enter into permanent revenue-sharing agreements that address their immediate financial shortfalls but neglect long-term needs.<sup>210</sup> Unable to renegotiate the agreement because they bargained away their sole threat, cities may find themselves worse off than if they had pursued annexation in the first place. To address this problem, Barron suggests limiting the duration of agreements, even though he concedes such limits may reduce a county's incentive to bargain.<sup>211</sup>

In some circumstances, Barron's prediction that counties will be less inclined to enter temporary agreements surely holds true, but in the majority of cases it is quite possible that limits on agreements' duration reduce incentives of the *city* to bargain. A city rationally may wish to forego annexation rights permanently because

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<sup>206</sup> See Grayson Comm'n, *supra* note 50, at 2; Stuart Comm'n, *supra* note 35, at 27–28; Hahn Comm'n, *supra* note 73, at 30.

<sup>207</sup> See Barron, *supra* note 9, at 2372.

<sup>208</sup> Ransom, *supra* note 39, at 25–26.

<sup>209</sup> Reynolds, *Metropolitan Equity*, *supra* note 120, at 151.

<sup>210</sup> Barron, *supra* note 9, at 2372 n.475. The Charlottesville-Albemarle agreement is illustrative of cities' tendency to bargain away too much. See *infra* Subsection IV.A.2.

<sup>211</sup> Barron, *supra* note 9, at 2372 n.475. The Commission on Local Government has expressed similar reluctance toward long-term waivers of annexation rights. Edwards, *supra* note 20, at 167.

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it fears the legislature might alter boundary change rules in the future, depriving the city of the right to annex county land when the agreement ends. Thus if statutes limit the duration of agreements, the city would be more inclined to pursue outright annexation, since a subsequent limitation on annexation would give the county little reason to renew the agreement. This occurred in Charlottesville, when the General Assembly enacted the annexation moratorium a few years after the localities formed the agreement. Indeed, Charlottesville feared precisely this possibility and conceded to a cap on the revenue it received from the agreement in exchange for a provision requiring mutual consent to alter it.<sup>212</sup> Had Charlottesville failed to secure the mutual consent provision, it would have been in a quite weak position when the agreement expired.

## *2. A Less Sanguine View of the Charlottesville-Albemarle Agreement*

A variety of decentralization proponents cite interlocal revenue sharing as at least a partial remedy to fiscal disparities. These scholars' views diverge in important respects—such as the background rules necessary for burden sharing and the extent to which revenue sharing will redress disparities—but they share a preference for mitigating problems without creating an additional layer of government. Some scholars take a quite optimistic view. Gillette, for example, cites the Charlottesville-Albemarle agreement as an example of localities realizing their interdependence and extols its short length (a mere nine pages) as a success of informal relational contracting.<sup>213</sup> Another observer, writing shortly after the adoption of the agreement, described it as a “windfall” that put the city “in a greatly improved position” to address its infrastructure and social service needs.<sup>214</sup> But even enthusiastic proponents acknowledge, as Gillette does, that such agreements are not a pana-

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<sup>212</sup> See William W. Johnston, *The Use of Interlocal Revenue-Sharing Agreements as an Alternative to Annexation: A Case Study of Charlottesville, Virginia* 54–55 (Jan. 1995) (unpublished M.P. thesis, University of Virginia) (on file with Alderman Library, University of Virginia).

<sup>213</sup> Gillette, *supra* note 6, at 234–35, 249, 256.

<sup>214</sup> Gary T. Johnson, *Tax-Sharing as an Alternative to Annexation: A Virginia Case Study*, 7 *Urb. L. & Pol'y* 243, 250 (1985).

cea.<sup>215</sup> Other scholars emphasize the importance of background rules, positing revenue sharing as markedly enhancing metropolitan equity without the disadvantages of centralization and state aid programs.<sup>216</sup>

To be sure, revenue sharing does decrease central cities' fiscal stress while avoiding many of the costs of centralization.<sup>217</sup> Moreover, revenue sharing may be one of the only politically viable manners by which to address such disparities. Proponents, however, overstate the benefits central cities accrue through revenue sharing. The Charlottesville agreement has rightly garnered praise for its unique way of addressing interlocal disparities,<sup>218</sup> but serious qualifications must be added even to Gillette's concession that such agreements are not a panacea. The circumstances precipitating the agreement, defects in the agreement itself, and increasing county hostility to the agreement suggest that even burden-sharing efforts formed in the context of more favorable background conditions nonetheless do not result in sufficient burden sharing.

The environment leading up to the agreement was speckled with unique legal rules and political forces. The judicially-determined annexation system enabled Charlottesville to force Albemarle to the bargaining table, extracting revenue sharing as a concession in lieu of outright annexation. Additionally, the 1979 amendments to the annexation system permitted localities to settle disputes by agreeing to share revenues. Several political forces also militated in favor of the agreement. Both Charlottesville and Albemarle were interested in "preserving the spirit of cooperation" historically present between them.<sup>219</sup> Since they had collaborated on mutually beneficial projects such as an airport, a landfill, and several urban services,<sup>220</sup> neither desired to lose a valuable partner, as Gillette might predict. Such an atmosphere of interlocal collegiality was

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<sup>215</sup> Gillette, *supra* note 6, at 270–71.

<sup>216</sup> See Orfield, *American Metropolitcs*, *supra* note 199, at 105–08; Note, *supra* note 197, at 2310.

<sup>217</sup> Edwards, *supra* note 20, at 208–09 (concluding revenue sharing is more effective at alleviating fiscal disparities than annexation); Lucy & Phillips, *Suburban Decline*, *supra* note 86, at 286 (proposing tax sharing to promote efficient location choices, combat sprawl, and reduce interlocal competition and wealth disparities).

<sup>218</sup> See Edwards, *supra* note 20, at 109, 208–09.

<sup>219</sup> Johnston, *supra* note 112, at 57.

<sup>220</sup> *Id.* at 57–58.

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hardly common in Virginia, however, especially after school desegregation and busing battles in the state. Indeed, the prospect of metropolitan busing in the Richmond area prompted a massive outcry, with one Henrico official exclaiming, “Richmond can rot in hell.”<sup>221</sup> In contrast, Charlottesville lacked the same degree of racial tensions. For instance, when public schools were shuttered upon orders to desegregate, several affluent whites in Charlottesville established temporary schools to forestall a permanent conversion to private education.<sup>222</sup> With a favorable bargaining environment, several previous successes under their belts, and without the same degree of racial tensions as in other parts of the state, then, Charlottesville and Albemarle faced fewer impediments to bargaining.

The Charlottesville agreement also contains many deficiencies. First, annual transfers to the city are subject to a low ceiling of 0.1 percent of the county’s assessed value of taxable real estate.<sup>223</sup> In negotiating the agreement, city officials opposed a termination date out of (the justified) fear that the General Assembly would subsequently prohibit annexation, thus depriving Charlottesville of its bargaining chip.<sup>224</sup> This fear permitted the county to bargain to limit transfers via the cap. Second, the agreement considered the raw populations of the two localities with no adjustment for the respective populations’ service needs.<sup>225</sup> Third, the agreement was based on economic and demographic predictions that underestimated transfers to the city.<sup>226</sup> As a result of these features, the cap has been triggered almost every year since the agreement has been in place.<sup>227</sup> Fourth, the agreement did not even purport to address interlocal land use conflicts, which continued to encourage location decisions away from Charlottesville in the years following the agreement.<sup>228</sup> Significantly, had Charlottesville been successful in annexing the portion of county land it desired, it would likely have received tax revenues well in excess of what it has received under

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<sup>221</sup> Lassiter, *supra* note 115, at 289–90.

<sup>222</sup> *Id.* at 33.

<sup>223</sup> Charlottesville-Albemarle Agreement, *supra* note 58, § 2(E).

<sup>224</sup> Johnston, *supra* note 212, at 54–55.

<sup>225</sup> *Id.* at 87.

<sup>226</sup> *Id.* at 74–77, 85.

<sup>227</sup> Edwards, *supra* note 20, at 105; Johnston, *supra* note 212, at 67 exhibit 5-1, 86.

<sup>228</sup> Johnston, *supra* note 212, at 160.

the agreement, even after accounting for the costs of annexation such as litigation costs and compensation to the county.<sup>229</sup>

Meanwhile, the agreement has failed to prevent tax and wealth disparities from increasing. Even as Albemarle is expected to transfer \$18 million to Charlottesville in 2010,<sup>230</sup> Charlottesville's tax rate on real property is \$0.99 per \$100 of assessed value while Albemarle's rate is a mere \$0.68.<sup>231</sup> Charlottesville's most recent fiscal stress classification is "above average stress" while Albemarle is considered "low stress."<sup>232</sup> The disparity in poverty continued to increase from 1980 to 1990, and Charlottesville is likely to suffer continued deterioration.<sup>233</sup> In fact, in the 1990s, residents of Charlottesville brought suit to revert the city to town status so as to address the growing disparities, although the City Council rejected the proposal.<sup>234</sup>

Support for the agreement in Albemarle has waned significantly with the absence of the background legal rules that helped create it. One organization in Albemarle recently described the agreement as giving "free money" to Charlottesville and called for its renegotiation.<sup>235</sup> Such hostility is hardly limited to a few vocal citizens. Indeed, the chair of the Albemarle Board of Supervisors also has called for renegotiation of the agreement and has publicly questioned its legality.<sup>236</sup> More recently, he called the agreement a "windfall profit" for Charlottesville and argued its funds should be used mainly for "regional projects."<sup>237</sup> Opposition to such agree-

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<sup>229</sup> Id. at 121.

<sup>230</sup> Brandon Shulleeta, Report: Albemarle County Spending Soars, Daily Progress (Charlottesville, Va.), Jan. 17, 2009, at A1.

<sup>231</sup> John L. Knapp, William M. Shobe, and Stephen C. Kulp, Virginia Local Tax Rates, 2007, at 10 tbl.2.1 (26th ed. 2007).

<sup>232</sup> Comm'n on Local Gov't, Fiscal Stress 2006, supra note 78, at 125–27 tbl.6.3.

<sup>233</sup> Lucy & Phillips, Suburban Decline, supra note 86, at 220–23.

<sup>234</sup> Bid for Charlottesville to Revert to a Town Fails, Richmond Times-Dispatch, Dec. 22, 1999, at B4.

<sup>235</sup> Neil Williamson, Revenue Sharing Questions, Free Enterprise Forum Blog, Mar. 6, 2008, <http://freeenterpriseforum.wordpress.com/2008/03/06/revenue-sharing-questions/>.

<sup>236</sup> Kenneth C. Boyd, Chairman, Albemarle County Bd. of Supervisors, Meeting Minutes of the Bd. of Supervisors 33–35 (Mar. 5, 2008), available at [http://www.albemarle.org/upload/images/Forms\\_Center/Departments/Board\\_of\\_Supervisors/Forms/Minutes/20080305minutes.pdf](http://www.albemarle.org/upload/images/Forms_Center/Departments/Board_of_Supervisors/Forms/Minutes/20080305minutes.pdf).

<sup>237</sup> Rachana Dixit, Albemarle Scrutinizes Joint-Project Funding, Daily Progress (Charlottesville, Va.), Jan. 1, 2009, at A1.

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ments extends beyond the region, with one Augusta County official recently likening revenue sharing to “taxation without representation.”<sup>238</sup> Threats to the agreement also emanate from the General Assembly, which, in its 2009 session, contemplated language that Charlottesville believed could nullify the agreement.<sup>239</sup>

### *B. Reforms Promoting Burden-Sharing Agreements*

Current scholarship on interlocal agreements has progressed significantly but has not yet sufficiently integrated the lessons of Virginia’s experience. Gillette relies too heavily on the ability of voluntary agreements to address inequities. Barron advances quite useful reforms, but his analysis does not sufficiently account for the problems raised by the duration of such agreements or the interlocal hostility likely to result from renewed annexation powers. And although the formation of regional governments is neither desirable nor feasible, city-county separation is hopelessly obsolete. Superior and more realistic equitable reforms to Virginia local government law must be based on harmonizing several principles, all of which are quite ambitious in their own right.

First, and most crucially, background rules must allocate annexation rights to cities before optimum levels of burden sharing can occur.<sup>240</sup> As long as suburbs maintain veto power over annexation, cities cannot make credible threats against counties refusing to share the benefits of their spatial location and tax base. Annexation powers must also be paired with restrictions on the incorporation of new cities, lest suburban counties replicate the defensive incorporations of Tidewater “cities” like Virginia Beach and Chesapeake.<sup>241</sup> One might counter that annexation powers will result in the same interlocal hostility found in the old system, but this prediction is not a foregone conclusion. First, lingering ill will often

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<sup>238</sup> Tim Harrington, *County Gets Quick Primer on Reversion*, News Leader (Staunton, Va.), Sept. 11, 2001, at 1A.

<sup>239</sup> Henry Graff, *Revenue Sharing Agreement in Danger?*, NBC 29, Mar. 2, 2009, <http://www.nbc29.com/global/story.asp?s=9853669>.

<sup>240</sup> See Barron, *supra* note 9, at 2371–73; Reynolds, *Metropolitan Equity*, *supra* note 120, at 151–52.

<sup>241</sup> See Briffault, *Our Localism: Part I*, *supra* note 7, at 81 (“[T]he law of annexation is an incentive to incorporation. Since an incorporated entity may not be annexed or consolidated without its consent, the best way to avoid an undesirable political connection is to incorporate.”).

is attributable to a “long and stormy” history of conflict predating annexation; conflicts from annexation disputes tend to dissipate.<sup>242</sup> Second, in many cases the Commission on Local Government has reduced annexation-related conflict in its capacity as a mediator.<sup>243</sup> Third, statutes promoting settlement via revenue sharing offer an alternative to litigation—and its attendant uncertainty and expense—that both cities and counties hope to avoid.<sup>244</sup> Finally, modifying evidentiary rules in annexation proceedings can lessen structural disincentives to cooperation.<sup>245</sup>

The second principle guiding reform requires reining in opportunism by newly-empowered cities. Virginia’s annexation system generally succeeded in this regard. Annexation was not an entirely unilateral right, but rather was reviewed by an expert agency and ultimately resolved by an independent judicial panel.<sup>246</sup> Although judicial determination of annexation is hardly unproblematic,<sup>247</sup> vesting an independent body with authority confers legitimacy on the process, provides flexibility for individual cases, and can encourage settlement.<sup>248</sup> In the Charlottesville agreement, for instance, the prospect of a protracted and costly feud—against a sophisticated opponent, no less—with uncertain gains pushed the city to the bargaining table.<sup>249</sup> Other factors also limited city opportunism. Terms of annexation, such as one-time payments to the sacrificing county and assumption of county debt, tempered at least some of a city’s appetite for land.<sup>250</sup> Moreover, Virginia’s limits on the frequency of annexation provided control over municipal ex-

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<sup>242</sup> Edwards, *supra* note 20, at 195; see *id.* at 87–88 (discussing the long-running conflict between Harrisonburg and Rockingham County).

<sup>243</sup> *Id.* at 194–95. At least in the past, however, the Commission has been reluctant to serve a mediating function. See *id.*

<sup>244</sup> *Id.* at 106–07, 208–09.

<sup>245</sup> See *infra* text accompanying notes 264–270.

<sup>246</sup> See Chester W. Bain, *Annexation in Virginia: The Use of the Judicial Process for Readjusting City-County Boundaries* 224–26 (1966) (describing the advantages of an independent determination); Edwards, *supra* note 20, at 208.

<sup>247</sup> Edwards, *supra* note 20, at 26–27, 189.

<sup>248</sup> *Id.* at 22–23, 188–89 (questioning, however, whether judicial processes alone could efficiently address emerging development patterns).

<sup>249</sup> *Id.* at 106.

<sup>250</sup> See, e.g., *id.* at 44–46 (discussing Richmond’s decision to decline an annexation award from Henrico County because of the “remarkable” size of compensation the city would have had to pay).



pansion. In addition to these restrictions, one might place caps on the quantity of land that a city may seek to annex.

Additional reforms must address other background rules and conditions that impede burden sharing. Counties' debt limitations stifle agreements even when suburban leaders would agree to share parts of their tax bases. Since local voters—who are likely to be more hostile to burden-sharing agreements than their elected representatives—hold veto power over such compromises, burden sharing is currently quite unlikely. Eliminating or weakening the referendum requirement from the state constitution would remove significant hurdles to agreements.<sup>251</sup> Moreover, changing the formula by which the state returns tax dollars to localities can reduce interlocal competition in recruiting businesses. Recall that the present system sets up a zero-sum game in which the prevailing locality reaps all the direct benefits of a firm's location decision.<sup>252</sup> Alternative distribution schemes could make localities stakeholders in one another's well-being by, for example, returning a percentage of state income tax receipts to localities. Such a formula, according to Governor Tim Kaine, would "give everybody a motive to help everybody else be successful."<sup>253</sup>

Other reforms would mitigate the hostility historically accompanying annexation. For instance, statutes could confer additional powers upon counties that engage in burden sharing. Current taxation powers of Virginia cities and counties suggest that such a plan has significant potential. Counties' revenue-raising powers are limited in several respects.<sup>254</sup> First, charters often vest cities with taxing and other powers apart from and beyond statutory authority, which counties generally lack.<sup>255</sup> Second, state laws expressly confer

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<sup>251</sup> West & Glass, *supra* note 58, at 21–22. The relaxation of debt limits might also be conditioned on a county's participation in a threshold degree of burden sharing, so as to encourage equitable bargaining.

<sup>252</sup> See *supra* note 187 and accompanying text.

<sup>253</sup> Ray Reed, Kaine: 'Annexation isn't coming back', *News & Advance* (Lynchburg, Va.), Mar. 23, 2008, at C4 (quoting Governor Kaine).

<sup>254</sup> See Ellen R. Davenport, *Tax Restructuring in Virginia's Counties: The Time Has Come*, *Va. Issues & Answers*, Dec. 2002, at 28, 28–30. For a useful summary of taxing powers of jurisdictional classes and individual jurisdictions, see *Comm'n on Local Gov't, Taxing Powers Granted to Virginia Counties, Cities, and Towns* (2008), <http://dhcd.virginia.gov/CommissiononLocalGovernment/PDFs/taxpow.pdf>.

<sup>255</sup> Jesse J. Richardson, Jr., *Sprawl in Virginia: Is Dillon the Villain?*, *Va. Issues & Answers*, June 2000, at 19, 20.

some taxing powers exclusively to cities. Cities may tax cigarettes so long as they had the authority to do so prior to 1977, while only Fairfax and Arlington counties have such power.<sup>256</sup> More significantly, all cities, but only select counties, may levy an admissions tax on events.<sup>257</sup> Third, counties are subject to caps with respect to other taxing powers. A county may tax foods and beverages at no more than four percent and may do so only after the tax is approved by referendum.<sup>258</sup> Similarly, county taxes on transient occupancy generally may not exceed two percent.<sup>259</sup> These limitations on counties are substantial; indeed, Fairfax County officials recently have considered seeking independent city status to gain additional taxing powers and control over road maintenance.<sup>260</sup> Because counties have sought to end these outdated distinctions in taxation powers,<sup>261</sup> conditioning equalized taxation powers on burden sharing with cities seems to be an entirely palatable way to decrease city-suburb disparities. And cities would be quite amenable to such a change, as evidenced by the outright support for taxing power equalization coming from Virginia cities' lobbying organization, the Virginia Municipal League.<sup>262</sup>

Such a carrot-based approach has many virtues. Chief among them, it is perhaps the best chance to mollify suburban opposition to burden sharing. Yet one must remain cautious when realigning suburban incentives in this way for at least two reasons. First, offering too many benefits to counties risks undermining the redistributive aims of the enterprise as a whole. Second, to the extent that additional county taxing powers reduce counties' dependence on real property taxes, new sources of revenue put downward pressure on property taxes, potentially widening the gap in rates between cities and suburbs. Nonetheless, neither of these concerns

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<sup>256</sup> Va. Code Ann. §§ 58.1-3830 to -3831 (2009).

<sup>257</sup> Id. §§ 58.1-3818, -3840. The counties with this authority may not impose taxes exceeding ten percent of the admissions charge. Id. § 58.1-3818.

<sup>258</sup> Id. §§ 58.1-3833, -3840, -3842.

<sup>259</sup> Id. §§ 58.1-3819, -3822 to -3825, -3840.

<sup>260</sup> Sandhya Somashekhar, Fairfax Executive Suggests Dropping 'County,' Wash. Post, July 1, 2009, at B8.

<sup>261</sup> See Comm'n on Virginia's State and Local Tax Structure for the 21st Century, Report, H. Doc. 22, at 7-8, 33 (2001).

<sup>262</sup> See Va. Mun. League, 2009 General Laws Policy Statement 15 (2009), available at <http://www.vml.org/LEG/09PolicyStatements/09GLStatement.pdf>.

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will likely prove problematic in practice. After all, since entering into a revenue-sharing agreement often necessitates a significant increase in county property taxes,<sup>263</sup> conferring new revenue-raising powers on counties is not likely to raise significant distributive concerns. Rather, the additional revenue simply offsets some of the money lost in transfers to the city.

Another necessary addition to a revitalized annexation system is eliminating the structural disincentives to cooperation that Virginia's system previously produced. Recall that because of the factors guiding the annexation inquiry, Virginia counties sought to avoid creating an apparent "community of interest" with city residents, while cities feared that extending service to county residents would hamper their ability to claim that annexation was necessary.<sup>264</sup> The pre-moratorium annexation system had made significant progress in this regard, permitting annexation courts to hold an "arbitrary" refusal to cooperate against a locality and forbidding courts from drawing an "adverse inference" from prior cooperative agreements.<sup>265</sup> This law, enacted as part of the 1979 amendments, was based on the Stuart Commission's seemingly simple proposal to exclude evidence of prior agreements in annexation inquiries.<sup>266</sup> This rule was designed to operate similarly to specialized relevance rules in evidence, which are based on the premise that admitting certain pieces of evidence tends to produce undesirable incentives.<sup>267</sup>

Nonetheless, doctrinal complications remain after the 1979 amendments sought to exclude evidence of past agreements in annexation proceedings. The Supreme Court of Virginia has held that that noncooperative "[a]ctions prompted by a reasonable perception of legitimate self-interest are not arbitrary."<sup>268</sup> Such precedent is not likely to be helpful in resolving interlocal disputes or promoting burden sharing, since suburban self-interest is the very source of the problem to be addressed. If self-interest is a sufficient basis

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<sup>263</sup> Albemarle County, for instance, immediately hiked property taxes by fifteen percent as a result of the Charlottesville agreement. Edwards, *supra* note 20, at 107.

<sup>264</sup> See *supra* note 39 and accompanying text.

<sup>265</sup> See Va. Code Ann. § 15.2-3209(5) (2009).

<sup>266</sup> Stuart, *supra* note 19, at 3.

<sup>267</sup> See, e.g., Fed. R. Evid. 407 advisory committee note (prohibiting evidence of subsequent remedial measures to avoid discouraging safety improvements).

<sup>268</sup> County of Rockingham v. City of Harrisonburg, 294 S.E.2d 825, 835 (Va. 1982).

not to cooperate, and if counties tend to benefit—or, indeed, merely “reasonably perceive” that they benefit—from the status quo arrangement, then counties’ refusals to form burden-sharing agreements will rarely be held against them in annexation proceedings. Without such evidence, cities are in a much weaker bargaining position, absent strict judicial policing of what constitutes “legitimate” self-interest. Current doctrine would therefore hamper cities’ ability to extract equitable concessions from counties even under a revitalized annexation system. Statutory revisions probably would be necessary to address this impediment. Fortunately, other judicial pronouncements regarding the 1979 amendments are more conducive to burden sharing. The court has expressly recognized as legitimate two interests of cities in annexation proceedings: expansion of the municipal tax base and acquisition of developable lands.<sup>269</sup> Perhaps more important, the court has acknowledged the legitimacy of the “growback theory” in annexation inquiries, permitting courts to consider whether a county has “considerable potential for future development” after annexation.<sup>270</sup>

Policymakers must also determine whether to restrict the duration of settlement agreements. On the one hand, Barron rightly highlights that a city may too easily bargain away its primary bargaining chip if permitted to permanently forego annexation. On the other hand, the possibility of subsequent limits on annexation justifies cities’ desire to use this instrument before they lose it and extending agreements as long as possible. Charlottesville’s experience lends credence to cities’ fears. Fortunately, the outcomes under either regime are not likely to be starkly different. If permitted to relinquish annexation rights permanently, at least some cities in Virginia have another bargaining chip. A city with fewer than 50,000 people may petition for reversion to town status,<sup>271</sup> functionally consolidating the former city and the county. Indeed, reversion

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<sup>269</sup> *Id.* at 832–34.

<sup>270</sup> *Id.* at 836 & n.12. Under this approach, courts would look favorably upon annexation when evidence suggested that the tax base lost to annexation would “grow back” through subsequent development in the county.

<sup>271</sup> See Va. Code Ann. §§ 15.2-4100 to -4120 (2009). The Grayson Commission recommended encouraging cities with fewer than 125,000 people to reintegrate with their encompassing counties. See Grayson Comm’n, *supra* note 50, at 7–8. Incentives for reversion would be stronger if cities did not lose sales and use tax powers upon reverting to towns. See Va. Code Ann. §§ 58.1-605 to -606 (2009).

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has reduced the property tax burden of South Boston, a former city in southern Virginia.<sup>272</sup> Since economically rational counties will seek to avoid taking on responsibility for all the city residents, a city's possible reversion poses a credible threat to uncooperative counties. Admittedly, though, city residents' local pride may pose a barrier to the town reversion-threat strategy.<sup>273</sup> If the duration of agreements is limited, statutes might provide—or the city might negotiate—for liquidated damages, should the county attempt to take advantage of a more favorable bargaining environment present when the agreement expires.

Determining how to address several counties' permanent immunity from annexation is not a simple task. Even assuming that repealing immunity was politically possible, this is not a satisfactory solution. First, repeal would be ineffective in promoting bargaining, since currently-immune counties have developed the resources, services, and political clout to defend themselves from annexation.<sup>274</sup> Second, development patterns mean that the areas most subject to annexation would be inner-ring suburbs that lack the tax base advantages cities seek. An admittedly imperfect solution to the immunity problem might be found in state or federal aid to cities,<sup>275</sup> as well as grants of power to immune counties if they engage in burden sharing.

#### CONCLUSION

Bargaining proponents such as Professor Gillette, influenced by public choice accounts of local government, neglect the fact that the prerequisites to meaningful burden sharing are all too elusive; they also have erred in asserting that Virginia's local governmental structure encourages interlocal bargaining. Nevertheless, they are

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<sup>272</sup> Patrick Lackey, *Former Virginia Cities Find Hope and Lower Tax Rates After Becoming Towns*, *Virginian-Pilot*, Mar. 16, 2001, at B11.

<sup>273</sup> One treatise on city-county separation makes this point with respect to hostility toward annexation and consolidation: "[t]he basic reason for the resistance to consolidation with or annexation by a larger city seems to be one of pride . . . and the desire for units of local government small enough to be controlled by a homogenous people." Bain, *A Body Incorporate*, *supra* note 25, at 98.

<sup>274</sup> Edwards, *supra* note 20, at 191.

<sup>275</sup> See *id.* at 232–33 (proposing a program of need-based state aid to localities).

correct to claim that the remedy to interlocal disparities does not lie in vesting authority in a new level of government. In order to encourage bargaining, several reforms to suburban incentives are needed. But even if suburban incentives are realigned to promote cooperation, interlocal revenue sharing is certainly no cure-all remedy. Revenue sharing may result in some efficiency losses<sup>276</sup> and, in any case, cannot wholly eliminate the chase for mobile residents and capital.<sup>277</sup> More fundamentally, revenue sharing is not a complete solution because the forces creating concentrated urban poverty and sprawl run deeper than city-county separation. Tax base inequalities surely play a part in concentrating poverty, but the placement of boundaries is not solely to blame. State funding formulas, transportation policies, and other culprits also encourage suburbanization and worsen interlocal disparities.<sup>278</sup> Accordingly, state and federal aid to cities should accompany any attempts to promote burden sharing.<sup>279</sup>

The reforms outlined in this Note are admittedly ambitious. The annexation moratorium, after all, has been in place since 1987 and has been renewed on multiple occasions. Similarly, it appears plausible that counties could obtain near-equal taxing powers to cities without agreeing to burden sharing, given suburban political power in the state and the Virginia Municipal League's lack of opposition to—and indeed, *support for*—the move. Opportunities for increased burden sharing may yet open, however. As Virginia continues to lag behind its neighboring states in economic performance, counties may be moved to cooperate out of the sense of interdependence that Gillette suggests. Increasingly visible problems tend to create opportunities for change.<sup>280</sup> Regardless, any of

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<sup>276</sup> Gillette, *supra* note 6, at 262–63.

<sup>277</sup> Williamson et al., *supra* note 108, at 144–45.

<sup>278</sup> Urban Policy Task Force, Report, *supra* note 76, at 19–22.

<sup>279</sup> Lucy & Phillips, Suburban Decline, *supra* note 86, at 286.

<sup>280</sup> For a discussion of the intersection of policy proposals, perceived problems, and political windows for reform, see John W. Kingdon, *Agendas, Alternatives, and Public Policies* 172 (2d. ed. 1995) (“[S]olutions float around in and near government, searching for problems to which to become attached or political events that increase their likelihood of adoption. These proposals are constantly in the policy stream, but then suddenly they become elevated on the governmental agenda because they can be seen as solutions to a pressing problem . . .”).

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the changes outlined above would likely improve upon the status quo.

Although the reforms identified above are set within Virginia, the salience of the principles upon which they are based extends far beyond the borders of the Commonwealth. The problems of urban sprawl and interlocal wealth disparities are hardly unique to Virginia, although Virginia's dubiously distinct local governmental structure intensifies the effects of broader demographic trends. Reinvigorated annexation rights constitute a fundamental component of any strategy to reduce city-suburb disparities in many areas. And even in the areas where physical annexation might be inappropriate—perhaps such as the urbanized counties the Stuart Commission concluded should not be subject to annexation<sup>281</sup>—other reforms that incentivize burden sharing and reorient local power in ways that promote greater equity will play a core part of metropolitan reform, in Virginia and across the nation.

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<sup>281</sup> See Stuart, *supra* note 19.