

Toward A Federal Legal Theory of the City

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Volume 57, numéro 3, march 2012

URI : <https://id.erudit.org/iderudit/1009065ar>

DOI : <https://doi.org/10.7202/1009065ar>

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Éditeur(s)

McGill Law Journal / Revue de droit de McGill

ISSN

0024-9041 (imprimé)

1920-6356 (numérique)

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Citer cet article

Kong, H. (2012). Toward A Federal Legal Theory of the City. *McGill Law Journal / Revue de droit de McGill*, 57(3), 473–517. <https://doi.org/10.7202/1009065ar>

Résumé de l'article

Cet article présente une théorie juridique fédérale de la ville. Les débats sur le fédéralisme engendrent des questions d'efficacité économique, de coordination de la réglementation et de légitimité démocratique, qui apparaissent lorsque l'autorité politique est divisée, typiquement selon des aires géographiques qui se chevauchent. En plus, surtout dans le discours académique, les débats fédéralistes tendent à soulever des questions de conception institutionnelle, y inclus des questions de configuration des organismes législatifs ou administratifs. Cet article offre une théorie de la ville qui adresse ce genre de questions. La partie I examine les études juridiques sur le gouvernement local, présente les débats entre localistes et régionalistes et démontre que ces débats emploient le langage du fédéralisme. Les prétentions théoriques sous-jacentes des positions adoptées dans ces débats seront examinées de près. La partie II propose un certain type d'institution qui répond à la vaste gamme de préoccupations exprimées dans le débat entre les localistes et les régionalistes. La partie II soutient aussi que le système des districts régionaux de la Colombie Britannique résout nombre de questions contestées dans le débat localiste-régionaliste et que ce système peut être conçu à travers le prisme du fédéralisme.

TOWARD A FEDERAL LEGAL THEORY OF THE CITY

Hoi Kong *

This paper offers a federal legal theory of the city. Debates about federalism give rise to questions of economic efficiency, regulatory coordination, and democratic legitimacy that arise in circumstances where political authority is divided, typically along overlapping geographic lines. Furthermore, particularly in the legal academy, federalism debates tend to raise questions of institutional design, including some that involve the configurations of legislative or administrative bodies. This paper will offer an account of cities that addresses these kinds of questions. Part I will present debates in the local government law literature between localists and regionalists and show that they sound in the language of federalism. The underlying theoretical claims of the positions in those debates will be subject to close examination. Part II will argue for a particular kind of institution that accommodates and is responsive to the range of concerns expressed in the localist-regionalist debate. Part II will further argue that British Columbia's regional district system resolves many of the contested issues in the localist-regionalist debate and that that system can be conceived of in federalism terms.

Cet article présente une théorie juridique fédérale de la ville. Les débats sur le fédéralisme engendrent des questions d'efficacité économique, de coordination de la réglementation et de légitimité démocratique, qui apparaissent lorsque l'autorité politique est divisée, typiquement selon des aires géographiques qui se chevauchent. En plus, surtout dans le discours académique, les débats fédéralistes tendent à soulever des questions de conception institutionnelle, y inclus des questions de configuration des organismes législatifs ou administratifs. Cet article offre une théorie de la ville qui adresse ce genre de questions. La partie I examine les études juridiques sur le gouvernement local, présente les débats entre localistes et régionalistes et démontre que ces débats emploient le langage du fédéralisme. Les prétentions théoriques sous-jacentes des positions adoptées dans ces débats seront examinées de près. La partie II propose un certain type d'institution qui répond à la vaste gamme de préoccupations exprimées dans le débat entre les localistes et les régionalistes. La partie II soutient aussi que le système des districts régionaux de la Colombie Britannique résout nombre de questions contestées dans le débat localiste-régionaliste et que ce système peut être conçu à travers le prisme du fédéralisme.

* Assistant Professor of Law, McGill University. I thank the participants in the May 2011 Spatiality and Justice Workshop for their generous comments and challenging questions, the Social Science and Humanities Research Council for funding that workshop, and the Borden Ladner Gervais Research Fellowship for supporting the final stages of research for this article. In addition, I am grateful to Deb Curran and Douglas Harris, and two anonymous reviewers for their very helpful written comments. Finally, I owe a debt of gratitude to Richard Briffault, Marie-Claude Prémont, Chuck Sabel, and Bill Simon, for stimulating conversations; to Adela Maciejewski Scheer for excellent research assistance; and to Montano Cabezas and Tara Mjeren for their careful work on the references.

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Introduction

Political theorists have recently turned their attention to the city. Professor Daniel Weinstock, for example, has argued that we can profitably examine well-established issues in political theory in light of city-specific concerns. The city as an object of inquiry is distinct, argues Weinstock, because of its unique spatial circumstances. The city has a scale, and city dwellers live in a degree of proximity, that transforms sometimes abstract questions of political theory into more concrete and specific inquiries.¹ In this paper, I join this general project of theorizing the city but do so from the perspective of a public law scholar, and I believe that this perspective opens up lines of analysis that may not obviously present themselves to political theorists.

Two assumptions—that law and political theory are distinguishable and that legal arguments in public law raise institutional questions—inform the analysis undertaken in this paper.² I begin with the assumption that a legal theory of the city is not identical to a political theory of the city. The distinction arises because what the law is or can be in relation to a particular city is not identical to what is or can be consistent with the demands of a particular political theory. This distinction exists whether one conceives of cities as communities of interest or as specific jurisdictions defined by law. Scholars who argue for the first conception have proposed various measures, such as the census metropolitan area, to define a community of interest.³ But a city can also be understood as, and identified with, a municipality. For example, we might understand the city of Victoria to be that entity which has been legally defined as a municipality, with all the powers that have been delegated to it by the province of British Columbia. Whether one conceives of a city broadly as a community of interest, or more specifically, as a municipality, laws shape cities, and the relevant issues of law are distinct from those of political

¹ See Daniel M Weinstock, “Pour une philosophie politique de la ville” (2009) 63:1 Rue Descartes 63.

² The claim that legal reasoning is not co-extensive with political or moral reasoning is standard in recent public law writing. See Richard H Fallon Jr, *Implementing the Constitution* (Cambridge, Mass: Harvard University Press, 2001) at 26-36; Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2006) at 22-36; Lawrence G Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004); Mitchell N Berman, “Constitutional Decision Rules” (2004) 90:1 Va L Rev 1. See also Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, Mass: Harvard University Press, 2006) at 80-82 (for the claim that public law argument necessarily involves institutional questions).

³ See e.g. Andrew Sancton, *The Limits of Boundaries: Why City-Regions Cannot be Self-Governing* (Montreal: McGill-Queen’s University Press, 2008) ch 3 at 25.

theory. For instance, the question of what kinds of instruments and institutions should govern cities, when they are conceived of as communities of interest, is a central preoccupation of legal scholars, as we shall see in Part II, and this design preoccupation is distinctively legal in nature. The significance of law to cities is also striking when we consider cities, defined as municipalities.

As a matter of Canadian constitutional law, municipalities are creatures of the provinces, and therefore a province may create or destroy a city when a city is understood to be identical to its legal definition as a municipality.⁴ Of course, this fact does not preclude one from asking whether the cities that are created by law are just or fair, nor does it prevent one from prescribing conditions for cities that are different from those of actually existing cities. What this fact about the legal nature of cities does suggest is that if one wants to advance a criticism or analysis of cities, one should be cognizant of the legal institutional context within which they exist. To criticize a city for not being what it cannot possibly be (where law sets the limits of possibility) strikes me as a somewhat futile exercise. In addition, the fact that cities exist within a legal context suggests that prescriptions for changes to cities should exhibit awareness of this context. Because cities are creatures of law, there is limited utility, in my view, in offering prescriptions that are ignorant of what is legally possible.

These claims may seem self-evident, but authors in disciplines other than law have made arguments that either misrepresent the legal status of cities in Canada or offer prescriptions that go beyond the range of what is legally possible. For instance, nonlegal scholars have argued that Canadian cities should benefit from home-rule status because, they argue, such status would prevent the provinces from intervening in city affairs.⁵

⁴ See Manitoba, Regional Planning Advisory Committee, *A Partnership for the Future: Putting the Pieces Together in the Manitoba Capital Region* (2003), online: Government of Manitoba <<http://www.gov.mb.ca>> [*Partnership for the Future*]; Andrew Sancton, "Canadian Cities and the New Regionalism" (2001) 23:5 *Journal of Urban Affairs* 543 at 544 [Sancton, "Canadian Cities"]. In Ontario and Quebec, the capacity of provincial legislatures to unilaterally amalgamate or dissolve municipalities was upheld in, respectively, *East York (Borough) v Ontario (AG)* (1997), 36 OR (3d) 733, 43 MPLR (2d) 155 (CA); *Baie D'Urfé (Ville de) c Québec (PG)*, [2001] RJQ 1589, 27 MPLR (3d) 295 (CS). One might argue that cities exist apart from their legal definitions. For instance, a city that ceased to exist for legal purposes may still continue to exist in a physical, social, or economic sense. This point raises larger questions about the utility of frames of analysis that are indifferent to the legal structure of cities. In my view, these analyses can be valuable, but their value is lessened when they address—either directly or indirectly—the legal dimensions of cities.

⁵ See e.g. David M Cameron, "Provincial Responsibilities for Municipal Government" (1980) 23:2 *Canadian Public Administration* 222 at 230; Roger Keil & Douglas Young,

These scholars draw their conception of home rule from the American experience.⁶ This argument is flawed because it is mistaken as to what cities are and what they can be as a matter of law. The first thing to note is that these scholars do not understand what home rule is. Home rule, in its various forms, does not completely insulate cities from intervention; rather, it sets out a requirement that a higher-order government be explicit when it intervenes in the regulation of a municipality,⁷ or it delineates the conditions under which municipalities can exercise authority that is not explicitly delegated to them from a higher political order.⁸ Moreover, far from being radically different from home rule, legislation in Canada yields effects that are identical to those of home-rule provisions in the United

“A Charter for the People? A Research Note on the Debate About Municipal Autonomy in Toronto” (2003) 39:1 *Urban Affairs Review* 87 at 89-90.

⁶ Sancton, “Canadian Cities”, *supra* note 4 at 544; Andrew Sancton, *Merger Mania: The Assault on Local Government* (Montreal: McGill-Queen’s University Press, 2000) at 25, 39 [Sancton, *Merger Mania*]; *Partnership for the Future*, *supra* note 4, ch 6-7.

⁷ Under legislative home rule, local governments have control over those local matters that the state has not chosen to legislate. Note, however, that this form of home rule does not guarantee a sphere of local control. Rather, it only ensures that when the state intends to legislate in a local matter, it does so expressly. Home rule does not guarantee municipal freedom from state interference, and in legislative home-rule jurisdictions, such intervention is expressly provided for. Finally, even if the availability and scope of home-rule protections were broader, it would not alter the fact that the *existence* of local governments is subject to the control of the states. It is true that municipalities are under certain constraints that require consultation with relevant stakeholders when they alter their form, whether this involves boundary changes incorporating previously unincorporated areas or annexation of existing municipalities. See Richard Briffault, “The Local Government Boundary Problem in Metropolitan Areas” (1996) 48 *Stan L Rev* 1115 [Briffault, “Local Government”]. On the limits imposed by state constitutions, see *Lockport (Town of) v Citizens for Community Action at the Local Level*, 430 US 259 (1977). On those limits imposed by the federal constitution, see *Cipriano v Houma (City of)*, 395 US 701 (1969); *Phoenix (City of) v Kolodziejski*, 399 US 204 (1970); *Hill v Stone*, 421 US 289 (1975). However, it is uncontroversial that states have the legal capacity to unilaterally revoke municipal charters; see *Hunter v Pittsburgh (City of)*, 207 US 161 (1907).

⁸ In its *imperium* form, home rule in general terms provides that local matters fall within the control of local governments. The classic statement is pronounced in *St Louis v Western Union Telegraph*, 149 US 465 (1893). Despite its promise, in the vast majority of cases where there are conflicts between state legislation and local regulation, the former has been held to trump. See e.g. *Sonoma County Organization of Public Employees v Sonoma (County of)*, 23 Cal (3d) 296, 591 P (2d) 1 at 2 (1979). Moreover, as Frug and others have noted, courts have tended to reduce the scope of home-rule authority in *imperium* jurisdictions. See Gerald E Frug, “The City as a Legal Concept” (1980) 93:6 *Harv L Rev* 1057. On the history of home rule see *New Orleans (City of) v Orleans Levee (District of) Board of Commissioners*, 640 So (2d) 237 (La 1994). *Imperium* home rule is a porous and weak shield against state power.

States.⁹ Finally, the general aim of completely insulating cities from provincial control is constitutionally impossible because, as we have seen, cities are creatures of the provinces.

I should be clear about the limits and the potential of my claims. I do not mean to say that we cannot study cities from the perspective of disciplines other than law. Indeed, given the complex nature of cities, it is probably futile to attempt even a legal analysis that ignores the insights of other disciplines. I only mean to point out that any serious analysis of cities should be cognizant of the relevant legal constraints. Cities can be many things, but they are necessarily creations of the law. This fact suggests that if one is to offer prescriptions to change cities, one should be sensitive to the legal implications of such prescriptions, and this awareness requires, at a minimum, an understanding of what is legally possible. But sensitivity to legal considerations involves more than simple awareness of what the law permits; it also involves an understanding of the kinds of institutional concerns that are omnipresent in public law scholarship. Let me turn now to these concerns, as they will motivate the arguments that follow.

The title of this paper refers to *a federal* legal theory of the city because I believe that cities have aspects that open themselves to a variety of legal arguments and theories. By a “legal argument”, I mean an argument that informed participants in legal discourse would recognize as valid, and by a “legal theory”, I mean any theory that supports such an argument.¹⁰ Public law scholars have noted that these arguments and theories tend to involve judgments about legal institutions and prescriptions

⁹ See *Community Charter*, SBC 2003, c 26, s 8; *Municipal Act, 2001*, SO 2001, c 25, ss 8-9; *Municipalities Act, 1999*, SNL 1999, c M-24, ss 34-35; *Municipal Powers Act*, RSQ c C-47.1, ss 4-6. Each of these legislative regimes provides municipalities with open-ended powers. The broad scope of these powers is further supported by the Supreme Court of Canada’s broad and purposive approach to interpreting statutes governing municipalities. See *Nanaimo (City) v Rascal Trucking Ltd*, 2000 SCC 13, [2000] 1 SCR 342; *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241. This open-ended grant of powers is distinguished from narrow grants, in which municipalities can only regulate with respect to matters that are explicitly delegated to them by provinces. See the discussion in Andrew Sancton, *Canadian Local Government: An Urban Perspective* (Oxford: Oxford University Press, 2011). Some American cities have also been governed by state statutes that only permit them to exercise specifically delegated powers. See Clayton P Gillette, “The Exercise of Trumps by Decentralized Governments” (1997) 83:7 Va L Rev 1347 at 1363 [Gillette, “Trumps”].

¹⁰ For this conception of constitutional argument and constitutional theory, see Philip Bobbitt, *Constitutional Interpretation* (Oxford: Basil Blackwell, 1991) at 3-5, 12-13.

for changing these.¹¹ There are a variety of possible legal arguments and theories that can be applied to cities. One might conceive of cities in property law terms. For instance, Professor William Fischel has argued that one key feature of regulation in cities—namely, zoning regulation—should be understood as a collectively held property right.¹² Specific kinds of theoretical claims support such an argument, and prescriptions that flow from the argument focus on the institutions of property law.¹³

One might also conceptualize cities in administrative law terms. In another paper, I have argued that municipal institutions should be examined in light of standard administrative law concerns.¹⁴ Administrative law scholars have long been concerned with how to ensure that public agencies are structured in ways that are democratically legitimate and in ways that are responsive to citizens who are regulated by those agencies.¹⁵ I have argued that municipal governments and their institutions—which as a matter of law are bodies exercising delegated authority—should be designed in ways that are responsive to citizens. The existing legal debate in administrative law provided me with the argument's terms and underlying theories, and the prescriptions I offered were resolutely institutional in nature. In this paper, I advance a different kind of legal argument about the design of public institutions and a different set of institutional proposals. I will claim that debates about cities and metropolitan regions can be and have been conceived in federalism terms, and I will offer insti-

¹¹ For representative works in the public law literature that focus on these kinds of institutional questions see Vermeule, *supra* note 2. See also Henry S Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Public Policy* (Oxford: Oxford University Press, 2002).

¹² See William A Fischel, "A Property Rights Approach to Municipal Zoning" (1978) 54:1 Land Economics 64 [Fischel, "Property Rights Approach"]. Fischel argues that zoning can be understood as an incomplete property right that belongs to a community: zoning is under the control of the community, but can only be selectively leased—in the form of fiscal zoning—and cannot be alienated.

¹³ See e.g. Michael Heller & Rick Hills, "Land Assembly Districts" (2008) 121:6 Harv L Rev 1465.

¹⁴ Hoi Kong, "The Deliberative City" (2010) 28:2 Windsor YB Access Just 411.

¹⁵ For an overview of this debate in the American context see Steven P Croley, "Theories of Regulation: Incorporating the Administrative Process" (1998) 98:1 Colum L Rev 1. In the Canadian context, see Geneviève Cartier, "Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?" (2003) 53:3 UTLJ 217 at 218. For a civic republican defence of the administrative state, which argues that administrative agencies, because of their expertise and delegated authority, are better positioned to engage in public reasoning than legislatures or courts, see Mark Seidenfeld, "A Civic Republican Justification for the Bureaucratic State" (1992) 105:7 Harv L Rev 1511 at 1542: "Administrative agencies, however, fall between the extremes of the politically over-responsive Congress and the over-insulated courts. Agencies are therefore prime candidates to institute a civic republican model of policymaking."

tutional design prescriptions that are responsive to the concerns that underlie these terms.

By a “federalism argument”, I do not mean an argument about the place of cities within a federation, although this is an interesting legal question that I will discuss in other work. Rather, I mean an argument that addresses issues typically raised in legal debates in the federalism context. Such debates turn on theoretical questions of economic efficiency, regulatory coordination, and democratic legitimacy, and they arise in circumstances where political authority is divided, typically along overlapping geographic lines.¹⁶ Furthermore, federalism debates often raise questions of institutional design, including some that involve the configurations of legislative or administrative bodies, and this paper will share that institutional focus. I am not alone in claiming that there is a conceptual relationship between debates about federalism and conceptions of the city. Indeed, law and economics scholars have regularly transposed theoretical insights that were originally generated through analyses of local governments to examinations of the relationships between states or provinces, and between those political orders and federal governments.¹⁷ In addition, political theorists and legal scholars have applied questions of institutional design and conceptions of political obligation that were originally articulated in theories applied to federal states to analyses of local governments.¹⁸

In Part I, we will see that debates in the local-government law literature between regionalists and localists involve disagreements that sound in the language of federalism disputes. The underlying theoretical claims of the positions in those debates will be subject to close examination. In Part II, I will argue for a particular kind of institution that accommodates

¹⁶ For articles covering these themes see Jacob T Levy, “Federalism, Liberalism, and the Separation of Loyalties” (2007) 101:3 *American Political Science Review* 459; Susan Rose-Ackerman, “Risk Taking and Reelection: Does Federalism Promote Innovation?” (1980) 9:3 *J Legal Stud* 593; Jonathan R Macey, “Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism” (1990) 76:2 *Va L Rev* 265; James M Buchanan, “Federalism as an Ideal Political Order and an Objective for Constitutional Reform” (1995) 25:2 *Publius: The Journal of Federalism* 19.

¹⁷ See the survey of the literature in Roderick M Hills Jr, “Federalism and Public Choice” in Daniel A Farber & Anne Joseph O’Connell, eds, *Research Handbook on Public Choice and Public Law* (Cheltenham: Edward Elgar, 2010) 207 at 207; Bruce H Kobayashi & Larry E Ribstein, *Economics of Federalism* (Cheltenham: Edward Elgar, 2007).

¹⁸ See e.g. Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990) at 173-191; Gillette, “Trumps”, *supra* note 9 at 1365. After analyzing circumstances in which local government regulations may prevail over state regulations in areas of concurrent jurisdiction, Gillette writes: “The relationship between states and the federal government in the United States is more familiar” (*ibid*).

and is responsive to the range of concerns expressed in the localist-regionalist debate. I will argue that British Columbia's regional district system resolves many of the contested issues in the localist-regionalist debate and that that system can be conceived of in federalism terms. The paper as a whole reflects the public law scholar's sensitivity to legal argument and to legal institutions. In order to set the stage for the analysis, I turn now to examine the motivating question and the terms of the localist-regionalist debate.

I. Localism vs. Regionalism

How can metropolitan regions be governed effectively, legitimately, and equitably? This question and its variants have long been the focus of the local-governance debate in Canada and the United States.¹⁹ Most previous responses have devalued either legitimacy or fairness norms while privileging the others, and the participants in the debate have offered competing definitions of effectiveness. The present paper departs from this trend by positing a theoretical and institutional framework that balances and affirms all three values and both conceptions of effectiveness.

The local-governance debate in Canada and the United States has, for the most part, coalesced around two poles. On one side are localists and on the other, regionalists. The former are proponents of multiple, autonomous local governments, while the latter advocate for metropolitan-wide or regional governments.²⁰ Localists stress the values of local-governance

¹⁹ See e.g. Roger B Parks & Ronald J Oakerson, "Metropolitan Organization and Governance: A Local Public Economy Approach" (1989) 25:1 *Urban Affairs Review* 18. The authors frame the question this way: "What patterns of public organization are more likely to be *responsive* to citizen preferences, *efficient* in the way services are produced, and *equitable* in the way services are financed and delivered?" (*ibid* at 18).

Some authors have distinguished "local governance" from "local government". The former, it is said, denotes the rules and means by which public goods are provided and produced at a local scale, while the latter has a narrower meaning and denotes general-purpose public institutions, such as municipalities (see *ibid* at 24-26). For a similar contrast between the implications of "governance" and "government" in the administrative law context, see Roderick A Macdonald, "The Acoustics of Accountability—Towards Well-Tempered Tribunals" in András Sajó, ed, *Judicial Integrity* (Leiden, The Netherlands: Martinus Nijhoff, 2004) 141 at 149-51. In this paper, I use local governance and local government interchangeably to cover legal rules and institutions that pertain to matters of subprovincial and substate scale. There is, in addition, a Foucault-influenced literature on governance, some of which addresses cities. I will not address that literature in this paper.

²⁰ By regional government, I mean elected institutions with extensive territorial jurisdictions that have either plenary or limited subject-matter competences. Excluded from my definition are advisory, administrative, or appointed regional bodies. For a global survey of institutional mechanisms that facilitate co-operation in metropolitan regions,

legitimacy, measured in terms of citizen participation in governance, and effectiveness, measured by the extent to which public-good provision matches consumer preferences.

Regionalists stress the values of distributive fairness and effectiveness, which is defined in terms of metropolitan regions' global competitiveness. The localists tend to underplay the significance of distributive concerns, while the regionalists tend to downplay legitimacy issues, and each side privileges its own conception of effectiveness. By contrast, the present paper advocates for an institutional framework in which governance bodies of various scales coordinate to deliver effective and fair distributions of social and material resources, as well as the participatory goods associated with participation in local governance. Let us turn now to examine with greater care the localists' arguments.

A. American Localism: Efficiency and Legitimacy

The starting point for the efficiency argument in the United States is Tiebout's seminal 1956 article "A Pure Theory of Local Expenditure."²¹ Tiebout's paper has been interpreted to support claims for local-government autonomy and was a response to Samuelson's claim that there is no rational, market-driven means of allocating public goods.²² According to Samuelson, because public goods are nonrival and nonexclusive, there is no way to allocate them to match consumer preferences.²³

Tiebout countered that through the mechanisms of exit and voice, individuals can express their preferences for public goods, and local governments can respond to these. This allocative system requires a plurality of governments that offer competing sets of goods. Individuals in such a

see Gerald Frug, "Designing Government" in Ricky Burdett & Deyan Sudjic, eds, *The Endless City: The Urban Age Project by the London School of Economics and Deutsche Bank's Alfred Herrhausen Society* (London: Phaidon Press, 2007) 298.

²¹ Charles M Tiebout, "A Pure Theory of Local Expenditures" (1956) 64:5 *The Journal of Political Economy* 416.

²² For an excellent summary of the Tiebout-Samuelson debate and subsequent localist developments, see William A Fischel, "Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation" (Paper delivered at the Economics and Law of Property Rights conference, Stanford, Cal, 15 May 2000), revised 7 August 2000, online: Dartmouth University <<http://www.dartmouth.edu/~wfischel/Papers/00-19.pdf>>. For a particularly influential development of the initial Tiebout insight, see Vincent Ostrom, Charles M Tiebout & Robert Warren, "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry" (1961) 55:4 *American Political Science Review* 831.

²³ See Paul A Samuelson, "The Pure Theory of Public Expenditure" (1954) 36:4 *Review of Economics and Statistics* 387. For an introduction to the idea of public goods and their two defining features, see Robert Cooter & Thomas Ulen, *Law and Economics*, 6th ed (Boston: Addison-Wesley, 2012) at 40-41.

system will gravitate toward those local governments that reflect their preferences and exit those that do not. In turn, individuals will voice their preferences through voting, and fashion polities that reflect and reinforce these preferences.²⁴ The net result is a collection of local governments that are internally homogeneous but that collectively express a diverse set of preferences. This argument resonates with arguments made in the federalism context that conceive of subfederal units as market actors and that valorize decentralization in order to ensure an efficient marketplace of government services and a matching of government services with citizen preferences.²⁵

Tiebout's arguments have been interpreted to support the claim that local-government systems characterized by strong local governmental autonomy are preferable to systems with regional-oversight institutions.²⁶

²⁴ For a clear exposition of how Hirschman's ideas of exit and voice work together in the local government context, see Carol M Rose, "Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy" (1983) 71 Cal L Rev 837 at 894-903; Ronald J Oakerson & Roger B Parks, "Citizen Voice and Public Entrepreneurship: The Organizational Dynamic of a Complex Metropolitan County" (1988) 18 *Publius: The Journal of Federalism* 91 at 91-96; Gary J Miller, *Cities by Contract: The Politics of Municipal Incorporation* (Cambridge, Mass: MIT Press, 1981) at 2-5; Lee Anne Fennell, "Beyond Exit and Voice: User Participation in the Production of Local Public Goods" (2001) 80:1 *Tex L Rev* 1 [Fennell, "Beyond Exit and Voice"].

²⁵ The United States Supreme Court jurisprudence on the dormant commerce clause expresses this efficiency-driven conception of federalism. See e.g. *West Lynn Creamery v Healy*, 512 US 186 (1994); *Prudential Insurance v Benjamin*, 328 US 408 at 423-24 (1946). For a nuanced, efficiency-driven explanation of the case law see Donald H Regan, "The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause" (1986) 84:6 *Mich L Rev* 1091 at 1110-25. For a critique, on efficiency grounds, of that case law, see Lisa Heinzerling, "The Commercial Constitution" [1995] *Sup Ct Rev* 217 at 234-51. An alternative lens for viewing the doctrine, grounded in concerns about national harmony, is presented by Richard B Collins, "Economic Union as a Constitutional Value" (1988) 63:1 *NYUL Rev* 43. For a critique of applications of the Tiebout hypothesis in legal academic writing about federalism, see William W Bratton & Joseph A McCahery, "The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World" (1997) 86:2 *Geo LJ* 201.

²⁶ See e.g. William A Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (Cambridge, Mass: Harvard University Press, 2001) [Fischel, *The Homevoter Hypothesis*]; Edward A Zelinsky, "Metropolitanism, Progressivism, and Race", Book Review of *Cities Without Suburbs* by David Rusk, *Citistates: How Urban America Can Prosper in a Competitive World* by Neal R Peirce, Curtis W Johnson & John Stuart Hall, and *Our Town: Race, Housing and the Soul of Suburbia* by David L Kirp, John P Dwyer & Larry A Rosenthal, (1998) 98:3 *Colum L Rev* 665. And for a summary of the literature see Kathryn A Foster, *The Political Economy of Special-Purpose Government* (Washington, DC: Georgetown University Press, 1997) at 35-37 [Foster, *Special-Purpose Government*]. For a set of arguments against oversight of zoning practices, which argues that inclusionary zoning will inefficiently decrease the amount of affordable housing stock, see Robert C

Tiebout-influenced localists argue that competition among local governments maximizes efficiency as it permits the largest number of preferences to be expressed and satisfied. In the United States, this efficiency argument has sometimes been joined by normative claims about the inherent democratic value of local government. Such claims flow from a political tradition that values local control over, and participation in, government institutions.²⁷ And arguments in this tradition have often been framed in organic terms: some normative localists claim that moral communities, which pre-exist the drawing of jurisdictional boundaries, should be protected against centralizing forces.²⁸ Similar arguments about the virtues of self-government have been forcefully articulated in the American writing on federalism.²⁹

Ellickson, "The Irony of 'Inclusionary' Zoning" (1981) 54:6 S Cal L Rev 1167 at 1199-202.

²⁷ The classic citation for this position is Alexis de Tocqueville, *Democracy in America*, JP Mayer, ed, translated by George Lawrence (New York: HarperCollins, 1969). A second, less influential form of the argument about the inherent value of local government draws from post-structuralist theory, in which diversity is valued as an end in itself and especially insofar as it counters the "totalizing" tendencies of modern thought. This second stream of argumentation typically has been allied with arguments affirming the value of "difference" against homogenizing majority culture. See Gerald E Frug, *City Making: Building Communities Without Building Walls* (Princeton, NJ: Princeton University Press, 1999). This argument, which has been prominently articulated by Frug, is largely pitched at an abstract, epistemic level. The argument assumes that the concrete problems that attend existing governmental configurations will be resolved either by discussion among interested parties, or by collective recognition of the failures of modernity. In either case, argues Frug, the drive toward centralization via regional institutions is to be avoided because it detracts from the diversity-enhancing effects of multiple and autonomous local governments. For critiques of Frug's position, and particularly its failure to engage empirical evidence, see Roderick M Hills Jr, "Romancing the Town: Why We (Still) Need a Democratic Defense of City Power", Book Review of *City Making: Building Communities Without Building Walls* by Gerald E Frug, (2000) 113:8 Harv L Rev 2009; Robert C Ellickson, "Cities and Homeowners Associations" (1982) 130:6 U Pa L Rev 1519.

²⁸ See Richard T Ford, "Law's Territory (A History of Jurisdiction)" (1999) 97:4 Mich L Rev 843 at 859-61, 916-21. See also Gerald E Frug, "Against Centralization" (2000) 48:1 Buff L Rev 31. This understanding of locality underwrites some of the writing on urban Aboriginal governance in Canada. See Aboriginal Justice Directorate, *Seen but Not Heard: Native People in the Inner City* by Carol La Prairie (Ottawa: Department of Justice of Canada, 1995) at 90-91. For communitarian models of local governance, see Richard C Schragger, "The Limits of Localism" (2001) 100:2 Mich L Rev 371 at 393-97. For a critique of such conceptions of community in the Aboriginal context, see Craig Proulx, "Urban Aboriginal Justice: A Past and Certain Futures" (2004) 38 Newsletter of the Commission of Folk Law and Legal Pluralism 69. See generally Nicholas K Blomley, *Law, Space, and the Geographies of Power* (New York: Guilford Press, 1994) at 51-58; Schragger, "The Limits of Localism", *supra* note 28 at 430-43.

²⁹ For a survey of this writing and the claim that that these kinds of federalism arguments are better suited to the local government context, see Richard Briffault, "What

Perhaps the most convincing articulation of a position that marries efficiency and legitimacy claims comes from Fischel. According to Fischel, American homeowners are passionately engaged in local government because they seek, through zoning regulations, “insurance” for their homes. Home values depend on their surroundings, and it is difficult, if not impossible, to purchase private insurance to protect against neighbourhood change. As a consequence, local government becomes the vehicle through which homeowners control their surroundings in order to protect home value.³⁰ Under Fischel’s account, legitimacy and efficiency concerns converge as citizen participation becomes an efficient market mechanism.³¹

Professor Edward A. Zelinsky adds to this defence of localism an affirmative case against regionalism. According to Zelinsky, if regional government were truly efficient, regional institutions in the United States would already exist due to citizens’ preferences, and regionalist policies would already have been put in place by states.³² Zelinsky also argues that although the idea of regional governments finds favour among intellectual elites, it achieves no purchase among the populace, and is therefore antidemocratic.³³ Moreover, Zelinsky challenges the empirical studies that have been used to support regionalism and argues that there is no factual basis for the claim that regional governments reduce inequities within a metropolitan region.³⁴ Finally, he argues that even if regional governments were to come into being, they would be dominated by elites who are distant from local populations and, as a consequence, would be both less responsive and less legitimate than local governments.³⁵ This final concern about the possibility of special-interest capture also finds expression in public-choice-inflected theories of federalism. Scholars in that theoretical context examine the incentives that influence official decision making at the state and federal levels of government.³⁶

About the “Ism?” Normative and Formal Concerns in Contemporary Federalism” (1994) 47:5 Vand L Rev 1303.

³⁰ Fischel, *The Homevoter Hypothesis*, *supra* note 26 at 8-10.

³¹ For this conflation, see *ibid* at 18. For an account of how considerations of efficiency and political community should be considered together in the design of local governmental institutions, see Ostrom, Tiebout & Warren, *supra* note 22 at 836-37.

³² *Supra* note 26 at 667-68.

³³ *Ibid* at 676-78.

³⁴ *Ibid* at 672-76.

³⁵ *Ibid* at 675.

³⁶ See e.g. Rose-Ackerman, *supra* note 16; Macey, *supra* note 16; Roderick M Hills Jr, “Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism” in William A Fischel, ed, *The Tiebout Model at Fifty: Essays*

B. Canadian Localism: Efficiency and Legitimacy

Canadian localists echo the arguments of their American counterparts. The Canadian resemblance to American efficiency localism is perhaps most evident in the work of Professors Andrew Sancton and Robert Bish. Sancton suggests that market competition among localities disciplines local government bureaucracies and justifies a multiplicity of local governments; he therefore counsels against the adoption of single-tier, regional governments.³⁷ Bish similarly rejects regional governments on efficiency grounds. He accepts the premise that competition among localities and the choices of local populations will yield more efficient governance outcomes than regional governments but is careful to note that the extent of the efficiencies gained depends on the kinds of services and decisions at issue. Bish argues that some services require regional co-operation, but he favours loose, interlocal, co-operative measures and rejects regional governments.³⁸ This approach to intergovernmental relations resonates with some public-choice-influenced writing in Canadian federalism.³⁹

As in the United States, arguments in favour of local governments, based on democratic grounds, have been made within the Canadian political tradition. A tradition of thought strongly supporting local governmental autonomy has long thrived in the Canadian context and was evident in the earliest moments of Canadian national history.⁴⁰ New England loyalists fleeing the American Revolution were deeply familiar with the tradition of local governance exemplified by the town hall, and they sought to import that tradition into their new surroundings.⁴¹ The canonical source for this tradition is *Lord Durham's Report*, which advocated for the creation of a strong municipal level of government for the colony in British

in Public Economics in Honor of Wallace Oates (Cambridge, Mass: Lincoln Institute of Land Policy, 2006) 239.

³⁷ Sancton, *Merger Mania*, *supra* note 6 at 74-75, 91-92, 167.

³⁸ See e.g. Robert L Bish, "Local Government Amalgamations: Discredited Nineteenth-Century Ideals Alive in the Twenty-First", *CD Howe Institute Commentary* 150 (March 2001) [Bish, "Local Government Amalgamations"] (see Part II, below, for this understanding of the variability of scales, a central feature of the new regionalist position).

³⁹ See e.g. Thomas J Courchene, "Reflections on the Federal Spending Power: Practices, Principles, Perspectives" (2008) 34:1 *Queen's LJ* 75; Marc-Antoine Adam, "The Spending Power, Co-operative Federalism and Section 94" (2008) 34:1 *Queen's LJ* 175.

⁴⁰ See C Richard Tindal & Susan Nobes Tindal, *Local Government in Canada*, 6th ed (Scarborough: Nelson, 2004) at ch 2. For a critical survey of the historical scholarship on the origins of Canadian municipalities, see Engin F Isin, "Rethinking the Origins of Canadian Municipal Government" (1995) 4:1 *Canadian Journal of Urban Research* 73.

⁴¹ Tindal & Tindal, *supra* note 40.

North America and extolled the democratic virtues of local government.⁴² For the authors of *Lord Durham's Report*, as for de Tocqueville, a municipality was the level of government that most closely expressed the democratic will of the governed and functioned best as the training ground for democratic participation. Through participation in local governance, citizens could learn about democratic processes and could apply those lessons to larger political institutions. These kinds of arguments in favour of provincial autonomy resonate to this day.⁴³

C. *The Regionalist Response*

The arguments against localism and in favour of regionalism have functionalist and equality variants. The functionalist regionalist argues that metropolitan regions require coordinating levels of government, the extent of whose authority is defined by those regions' boundaries, and that the governance challenges facing metropolitan regions are co-extensive with those boundaries.⁴⁴ Once again, these arguments resonate with those made in the federalism context. In the federalism literature, federal interventions are sometimes justified as a means of ensuring policy coordination where only federal regulation can achieve such coordination.⁴⁵ In the local government context, these challenges include environ-

⁴² Sir CP Lucas, ed, *Lord Durham's Report on the Affairs of British North America*, vol 3 (Oxford: Clarendon Press, 1912) at 139 [*Lord Durham's Report*].

⁴³ For a summary and development of one contemporary version of this position, see Eugénie Brouillet, *La négation de la nation: l'identité culturelle québécoise et le fédéralisme canadien* (Sillery: Septentrion, 2005). For an historical account of the position, see Al Silver, *The French-Canadian Idea of Confederation: 1864-1900*, 2d ed (Toronto: University of Toronto Press, 1982) ch 1. I should be clear that I refer to *Lord Durham's Report* solely for its argument that municipal governments should be given significant autonomy. As my references in this note suggest, I consider this argument about jurisdictional autonomy to be applicable to other subfederal units, including Quebec. I categorically reject the racist and assimilationist sentiments expressed in *Lord Durham's Report*.

⁴⁴ See e.g. Organization for Economic Co-operation and Development, Policy Brief, "OECD Territorial Review of Montreal" (January 2004) online: OECD Observer <<http://www.oecd.org/dataoecd/35/11/26010229.pdf>>. See also *infra* note 48.

⁴⁵ The provincial inability element of the peace, order, and good government doctrine's national concern test serves this coordinating function, as does the "distinctness" step of that test. For the national concern test, see *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161. For an analysis of the provincial inability test, see Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52:3 UTLJ 163 at 236-43. In addition, that branch of the property and civil rights doctrine which aims to define and regulate intraprovincial trade has the effect of minimizing the capacity of provinces to regulate directly commercial activity outside of their borders. As a consequence, provinces are barred from engaging in protectionism: see *Manitoba (AG) v Manitoba Egg and Poultry Association*, [1971] SCR

mental protection from the effects of urban sprawl⁴⁶ and coordinated economic development.⁴⁷ The latter is especially important, it is claimed, because metropolitan regions have surpassed states, provinces, and national governments as focal points of economic activity. Metropolitan regions require coordinated regional governance, the regionalist argues, to compete with their global peers.⁴⁸ At least to the extent necessary to meet these functional challenges, the public-choice model of multiple local governments surveyed above is rejected.

A second set of arguments in favour of regionalism is framed primarily in equality terms. Authors setting out this variant of the regionalist argument argue that regional mechanisms should effect redistribution or at

689, 19 DLR (3d) 169. The provinces are also barred from directly regulating interprovincial trade and commerce: see *Canadian Industrial Gas & Oil Ltd v Saskatchewan*, [1978] 2 SCR 545, 80 DLR (3d) 449. See also *Central Canada Potash Co Ltd v Saskatchewan*, [1979] 1 SCR 42, 88 DLR (3d) 609. For an analysis of these doctrines, see George Vegh, “The Characterization of Barriers to Interprovincial Trade under the Canadian Constitution” (1996) 34:2 Osgoode Hall LJ 355.

⁴⁶ For excellent American analyses of the environmental stakes, consider the debates around Portland’s growth boundary: see Eric Damian Kelly, *Managing Community Growth* (Westport: Praeger, 2004); Robert E Lang & Steven P Hornburg, “Planning Portland Style: Pitfalls and Possibilities” (1997) 8:1 Housing Policy Debate 1; Christopher Swope, “Rendezvous with Density”, *Governing* (March 2001) 32, online: [Governing <http://www.governing.com>](http://www.governing.com). On the potential for conflict between environmental and fair-share objectives, see Andrew Jacobs, “New Jersey’s Housing Law Works Too Well, Some Say”, *New York Times* (3 March 2001) online: [New York Times <http://www.nytimes.com>](http://www.nytimes.com). Environmental concerns and minority interests are not necessarily opposed, see Robert L Liberty, “Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates” (2002-2003) 30:3 BC Envtl Aff L Rev 581. For Canadian writing on sprawl, see Raphaël Fischler, “The Problem, or Not, of Urban Sprawl”, *Policy Options* (February 2004) 45. See also Canadian Institute of Planners, *The Planning City* (Vancouver: Canadian Institute of Planners, 2005), online: [Local Government Department <http://www.cd.gov.bc.ca>](http://www.cd.gov.bc.ca).

⁴⁷ See Igor Vojnovic, “Municipal Consolidation, Regional Planning and Fiscal Accountability: The Recent Experience in Two Maritime Provinces” (2000) 23:1 Canadian Journal of Regional Science 49.

⁴⁸ In the American context, see Neal R Peirce, *Citistates: How Urban America Can Prosper in a Competitive World* (Santa Ana: Seven Locks, 1993). In the Canadian context, see Derek Burleton, *A Choice Between Investing in Canada’s Cities or Disinvesting in Canada’s Future*, TD Economics Special Report (Toronto: TD Economics, 2002) at 9-15, online: [Canada’s Cities <http://www.canadascities.ca>](http://www.canadascities.ca). See also Thomas J Courchene, “Citistates and the State of Cities: Political Economy and Fiscal-Federalism Dimensions”, *IRPP Working Paper Series* 2005-03 (2005), online: [Institute for Research on Public Policy <http://www.irpp.org>](http://www.irpp.org). For a general discussion of the idea that some cities have gained in economic significance relative to nation states see Saskia Sassen, “The Global City: Introducing a Concept” (2005) 11:2 The Brown Journal of World Affairs 27.

least reduce coordination problems.⁴⁹ The federalism echoes are particularly striking here: in the federalism context, authors similarly argue for economic redistribution to redress inequalities among subfederal units.⁵⁰ In the metropolitan context, the equality regionalist argues that a system comprised of multiple, autonomous local governments leads to two kinds of inequalities. The first has primarily an economic dimension and results directly from legal regulation. This species of inequality has similar effects in the United States and Canada. In both jurisdictions, wealthier municipalities enact land-use policies that exclude lower-income families and individuals through the regulation of the density of uses.⁵¹ Such policies have multiple negative effects. Poverty is typically concentrated in urban or older or “inner” suburban municipalities.⁵² These municipalities have higher demands for social services than their wealthier suburban counterparts, and since local governments in some American jurisdictions assume at least part of the burden of providing these services, higher

⁴⁹ See e.g. Myron Orfield, *Metropolitics: A Regional Agenda for Community and Stability* (Washington, DC, Cambridge, Mass; Brookings Institution, Lincoln Institute of Land Policy, 1997); David Rusk, *Cities Without Suburbs* (Washington, DC: Woodrow Wilson Center, 1993); Richard Briffault, “Our Localism: Part I—The Structure of Local Government Law” (1990) 90:1 Colum L Rev 1; Sheryll D Cashin, “Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism” (2000) 88:7 Geo LJ 1985 [Cashin, “Localism”]; Audrey G McFarlane, “Race, Space, and Place: The Geography of Economic Development” (1999) 36:7 San Diego L Rev 295; Laurie Reynolds, “Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism” (2003) 78:1 Wash L Rev 93 [Reynolds, “Intergovernmental Cooperation”]; Scott A Bollens, “Concentrated Poverty and Metropolitan Equity Strategies” (1997) 8:2 Stan L & Pol’y Rev 11.

⁵⁰ See Robin Boadway, “Recent Developments in the Economics of Federalism” in Harvey Lazar, ed, *Canada: The State of the Federation 1999/2000: Toward a New Mission Statement for Canadian Fiscal Federalism* (Montreal: McGill-Queen’s University Press, 2000) 41 at 72; Robin Boadway, “The Vertical Fiscal Gap: Conceptions and Misconceptions” in Harvey Lazar, ed, *Canadian Fiscal Arrangements: What Works, What Might Work Better* (Montreal: McGill-Queen’s University Press, 2005) 51 at 56. For the classic citation in the federalism literature supporting the proposition that a federal government should play a redistributive role in a federation, see James M Buchanan, “Federalism and Fiscal Equity” (1950) 40:4 Am Econ Rev 583 [Buchanan, “Fiscal Equity”].

⁵¹ For a work noting these disparities in the Canadian context, see Marie-Claude Prémont, “La fiscalité locale au Québec : de la cohabitation au refuge fiscal” (2001) 46:3 McGill LJ 713. For the American situation, see e.g. David L Kirp, John P Dwyer & Larry A Rosenthal, *Our Town: Race, Housing, and the Soul of Suburbia* (Piscataway, NJ: Rutgers University Press, 1997); Georgette C Poindexter, “Towards a Legal Framework for Regional Redistribution of Poverty-Related Expenses” (1995) 47 Wash UJ Urb & Contemp L 3.

⁵² See e.g. Orfield, *supra* note 49 at 13-14. For an analysis of Canadian patterns of suburban demographic sorting, see R Alan Walks, “Homelessness, Housing Affordability, and the New Poverty” in Trudi Bunting & Pierre Filion, eds, *Canadian Cities in Transition: Local Through Global Perspectives*, 3d ed (Oxford: Oxford University Press, 2006) 419 at 434-37.

costs are imposed on them.⁵³ However, because their residents have low incomes, these municipalities require higher tax rates to meet these costs.⁵⁴ As a consequence, lower-income individuals bear a higher burden than their wealthier counterparts, and lower-income municipalities are unable to attract higher-income residents, who are deterred by these higher tax rates.⁵⁵ In addition, since school districts can cross municipal boundaries and school-district taxes tend to be constant across the district, the effect of such taxes on lower-income families is regressive.⁵⁶ In Canada, an analogous policy concern is to ensure that differential tax rates among municipalities do not result in burdens that are concentrated in one municipality or several municipalities when considerations of fairness may require that the burdens be shared across a region.⁵⁷

Further, because in the United States lower-income localities have greater need of tax revenues and employment opportunities than do their wealthier counterparts, they are more likely to give incentives to manufacturing industries to establish plants in their neighbourhoods and engage in destructive interlocal competition to attract them.⁵⁸ And even

⁵³ Orfield, *supra* note 49. In Canada, the extent to which municipalities bear a significant burden of social service expenditure varies: see Harry Kitchen, "Financing Canadian Cities in the Future?" (Paper delivered at the City Futures Conference, Chicago, 8 July 2004), [unpublished] at 4.

⁵⁴ Orfield, *supra* note 49. In Canada, residents of apartment buildings also typically bear a higher tax burden than single-family home dwellers: see "Fair Taxes for Tenants", Editorial, *Toronto Star* (23 October 2001) A22; John Spears, "Councillors Confronted by Great Tax Divide: No Middle Ground on New Assessment Plans", *Toronto Star* (7 July 1998) B3; Kerry Gillespie, "Toronto Tenants Get Less but Pay More", *Toronto Star* (21 October 2001) A01. For an explanation of how Quebec reforms avoided the problem of school district inequity, see Québec, Commission nationale sur les finances et la fiscalité locales, *Pacte 2000* (Québec: Publications du Québec, 1999) at 206 [*Pacte 2000*].

⁵⁵ Orfield, *supra* note 49.

⁵⁶ See Prémont, *supra* note 51 at 770-73 (for the situation in a Canadian city). The level of spending by Canadian municipalities varies by province (Kitchen, *supra* note 53 at 3-5). On the inequities created by financing school districts through the property tax and judicial and legislative responses to these imbalances, see Richard Briffault & Laurie Reynolds, *Cases and Materials on State and Local Government Law*, 7th ed (St Paul, Minn: West, 2009) at 486-524.

⁵⁷ See Harry M Kitchen & Enid Slack, "Special Study: New Finance Options for Municipal Governments" (2003) 51:6 Can Tax J 2215 at 2234. For an analysis of the debate in Toronto, see Frances Frisken, *The Public Metropolis: The Political Dynamics of Urban Expansion in the Toronto Region, 1924-2003* (Toronto: Canadian Scholars' Press, 2007) at 313-15.

⁵⁸ This insight is evident in American community economic development literature: see e.g. Scott L Cummings, "Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice" (2001) 54 Stan L Rev 399 at 457-58. See also John Foster-Bey, "Bridging Communities: Making the Link Between Re-

without such competition, these plants are disproportionately sited in lower-income localities, which have less political power than their wealthier neighbours to resist them. As a consequence, lower-income residents suffer disproportionately from resulting environmental and health harms.⁵⁹ In Canada, authors have argued that government coordination has reduced the risk of this kind of interlocal competition.⁶⁰

A second, racial or ethnic-identity dimension to intermunicipal inequality results indirectly from judicial and legislative endorsement of unconstrained local autonomy. Since class distinctions in the United States have a tendency to map onto racial and geographic ones, typically it is minority populations who bear the burden of wealthier locales' exclusionary policies.⁶¹ Judicial remedies for this form of inequality are limited. Given that the United States Supreme Court's equal-protection jurisprudence requires a finding of governmental intention to discriminate for there to be a breach of the Fourteenth Amendment, there is no remedy under the federal Constitution for the effective segregation that results from exclusionary zoning laws.⁶² The Court has held that zoning laws that aim to create agreeable neighbourhood environments for predominantly

gional Economies and Local Community Development" (1997) 8:2 *Stan L & Pol'y Rev* 25 at 25-26, 32-34.

- ⁵⁹ This claim is often made by those seeking environmental justice. For a nuanced, critical view of the claim and an excellent summary of the literature, see Vicki Been & Francis Gupta, "Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims" (1997) 24:1 *Ecology LQ* 1.
- ⁶⁰ See Neil Bradford, *Cities and Communities that Work: Innovative Practices, Enabling Policies* (Ottawa: Canadian Policy Research Networks, 2003) at 39-42, online: Canadian Policy Research Networks <<http://www.cprn.org>>.
- ⁶¹ See William Julius Wilson, *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago Press, 1987). See also Douglas S Massey & Nancy A Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge, Mass: Harvard University Press, 1993). This fact also drives much Title VIII litigation: see e.g. *United States v Black Jack (City of)*, 508 F (2d) 1179, 1974 US App LEXIS 5472 (8th Cir 1974); *Metropolitan Housing Development Corp v Arlington Heights (Village of)*, 558 F (2d) 1283, 1977 US App LEXIS 12544 (7th Cir 1977); *United States v Parma (City of)*, 661 F (2d) 562, 1981 US App LEXIS 16900 (6th Cir 1981).
- ⁶² *Arlington Heights (Village of) v Metropolitan Housing Development Corp*, 429 US 252 (1977) [*Arlington Heights*]. The general rejection of disparate impacts under the Constitution in *Arlington Heights* and *Washington (DC) v Davis*, 426 US 229 (1976) is intensified by the even more stringent intention requirement of *Massachusetts (Personnel Administrator) v Feeney*, 442 US 256 (1979). For strong critiques of these cases, see e.g. Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" (1997) 49 *Stan L Rev* 1111 at 1135-41; David A Strauss, "Discriminatory Intent and the Taming of *Brown*" (1989) 56:3 *U Chicago L Rev* 935 at 951-56; Daniel R Ortiz, "The Myth of Intent in Equal Protection" (1989) 41:5 *Stan L Rev* 1105 at 1113-19.

white, middle-class families do not evidence an intention to discriminate against nonwhites, and therefore do not violate equal protection. By contrast, state constitutional “general-welfare” provisions and federal fair-housing legislation have been the basis of challenges to unequal distribution of low-income housing and have incidentally aimed at remedying racial inequality.⁶³ The extent and success of such litigation has, however, been mixed.⁶⁴

The Canadian context, born of a different history, gives rise to a different picture of minority interests in the context of urban disadvantage. Some have argued that Canadian provincial governments have been comparatively open to regional governance mechanisms because the racial divisions in Canada are less severe and do not typically manifest in concentrations of disadvantaged minority populations in urban centers.⁶⁵ In particular, authors point to differences between the United States and Canada in the history of race relations to explain the relatively less segregated Canadian urban landscape. And in a less economically and racially segregated environment, it is argued, there are fewer incentives for exclusionary zoning, and concomitantly, less resistance to regionalist institutions. This descriptive claim about the lack of spatial segregation should be nuanced, as empirical studies have shown that urban Canadian Aboriginal

⁶³ For the Mount Laurel litigation history, see Charles M Haar, *Suburbs Under Siege: Race, Space, and Audacious Judges* (Princeton: Princeton University Press, 1996). On the federal regime’s limited successes, see Peter E Mahoney, “The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle” (1998) 47:2 *Emory LJ* 409; Charles E Daye, “Whither ‘Fair’ Housing: Meditations on Wrong Paradigms, Ambivalent Answers, and a Legislative Proposal” (2000) 3 *Wash UJL & Pol’y* 241.

⁶⁴ For instance, a report on the effects of the Mount Laurel initiatives found that although housing opportunities for low and moderate income households increased, poor urban residents were not provided opportunities to move into suburban locales from which they had been excluded by exclusionary zoning policies, and racial segregation by residency persisted. See Naomi Bailin Wish & Stephen Eisdorfer, “The Impact of *Mount Laurel* Initiatives: An Analysis of the Characteristics of Applicants and Occupants” (1997) 27:4 *Seton Hall L Rev* 1268 at 1301-305.

⁶⁵ For a comparative study of the relative levels of segregation among African Americans and African Canadian populations, which finds the levels to be lower in Canada, see Eric Fong, “A Comparative Perspective on Racial Residential Segregation: American and Canadian Experiences” (1996) 37:2 *The Sociological Quarterly* 199. For the general claim that racial segregation is less significant in the Canadian cities, see Zoltan L Hajnal, “The Nature of Concentrated Urban Poverty in Canada and the United States” (1995) 20:4 *The Canadian Journal of Sociology* 497 at 521. For the specific comparison of regional governments in Canada and the United States, see Andrew Sancton, “Policymaking for Urban Development in American and Canadian Metropolitan Regions” in Donald N Rothblatt & Andrew Sancton, eds, *Metropolitan Governance: American/Canadian Intergovernmental Perspectives* (Kingston, Ont: Institute of Intergovernmental Relations, 1993) 1 at 8-9.

populations have experiences similar to those of minority populations in the United States.⁶⁶ Much like disadvantaged urban minority communities in the United States, urban Aboriginal communities in Canada suffer from a history of severe disadvantage and from the consequences of exclusive land-use policies. In urban Aboriginal neighbourhoods, particularly in some western Canadian cities, low-income housing is concentrated. Some scholars have, however, argued that regional governments have been introduced in Canada primarily because provincial governments have sought to attain cost-savings,⁶⁷ a motivation that is unrelated to racial and economic segregation. Whether one accepts the explanation grounded in racial and class segregation, or the arguments about provincial cost-saving motivations, the relative openness of Canadian metropolitan centres to regionalism is accurate. Now that we have surveyed the terrain of the localist-regionalist debate in North America, we are in a position to assess that debate.

II. Resolving the Debate: New Regionalism and Regional Districts

At the core of the localist-regionalist debate is a set of incommensurable normative terms. As we have seen, the localist asserts the value of an efficient marketplace of local governments and claims the normative significance of local participation, whereas the regionalist asserts the value of effective regional co-operation and claims the normative significance of inequality in the metropolitan centres. Some counter-arguments are sent across the divide. For instance, Professor Lee Anne Fennell argues that the Tiebout model and its adherents downplay the social and economic costs of externalities generated by exclusionary zoning policies;⁶⁸ Zelinsky argues that the empirical evidence upon which the regionalist case for

⁶⁶ See Joe T Darden & Sameh M Kamel, "Differences in Homeownership Rates Between Aboriginal Peoples and White Canadians in the Toronto Census Metropolitan Area: Does Race Matter?" (2001) 14:1 *Native Studies Review* 55 at 59-60, 72; Calvin Hanselmann, *Urban Aboriginal People in Western Canada: Realities and Policies* (Calgary: Canada West Foundation, 2001), online: Canada West Foundation <<http://cwf.ca/pdf-docs/publications/September2001-Urban-Aboriginal-People-in-Western-Canada-Realities-and-Policies.pdf>>; Human Resources Development Canada, *Concentrations of Poverty and Distressed Neighbourhoods in Canada* (Working Paper W-97-1E) by Michael Hatfield (Hull, Que: Applied Research Branch, 1998). See also Evelyn Peters, "Aboriginal People in Urban Areas" in David Long & Olive Patricia Dickason, eds, *Visions of the Heart: Canadian Aboriginal Issues*, 2d ed (Toronto: Harcourt Canada, 2000) 237 at 238-47.

⁶⁷ See Andrew Sancton, "The Governance of Metropolitan Areas in Canada" (2005) 25:4 *Public Administration and Development* 317 at 323 [Sancton, "Metropolitan Governance"].

⁶⁸ "Beyond Exit and Voice", *supra* note 24.

equality rests is weak;⁶⁹ and Bish argues that there is no basis for the claim that regional governments are necessary for effective regional coordination.⁷⁰

Moreover, the regionalist arguments about the economic importance of regional coordination can be articulated in localist terms. If we accept the premise that improvements to a region will benefit “favoured quarter” municipalities, it may be that although the favoured quarters, as well as the entire region, will benefit from regionalist measures, the favoured quarters face a prisoner’s dilemma. For any particular favoured quarter municipality, under this scenario, the benefit to be gained from free-riding is greater than that to be gained through co-operation, and the loss to be suffered from participating and bearing the costs of others’ free-riding outweighs the cost of nonparticipation.⁷¹ Alternatively, it may be that collectively, the less-favoured quarters have more to gain from co-operation than the favoured quarters do from opposition but that individually, each less-favoured quarter has less to gain by participating than each favoured quarter has to gain from defection.⁷² In either case, the incentives for the favoured quarters point to non-co-operation and in both cases, the outcome of non-co-operation is inefficient as this leads to outcomes that are sub-optimal, in the sense that municipalities are blocked from achieving preferred outcomes.

These kinds of arguments, which bridge the localist-regionalist divide are plausible. There is, however, a deeper disagreement that is sometimes made evident in the exchanges between localists and regionalists. After making his affirmative case, the localist adopts the stance of the public-choice realist: even if regionalist proposals are normatively desirable, they are antidemocratic because the polity does not, in fact, desire them.⁷³ As a concession to the normative force of regionalist arguments, some localists

⁶⁹ Zelinsky, *supra* note 26 at 672-76.

⁷⁰ Bish, “Local Government Amalgamations”, *supra* note 38.

⁷¹ For a game-theoretical approach to the production of local public goods, see Fennell, “Beyond Exit and Voice”, *supra* note 24. For an analysis of the inefficiencies generated by exclusionary zoning, see Lee Anne Fennell, “Homes Rule”, Book Review of *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* by William A Fischel, (2002) 112:3 Yale LJ 617 at 650-54.

⁷² See Denis J Brion, “An Essay on LULU, NIMBY, and the Problem of Distributive Justice” (1988) 15:3-4 BC Env’tl Aff L Rev 437 at 444-45.

⁷³ Public choice theorists adopt what Professors Dorf and Sabel call a “face the facts” stance. But as Dorf and Sabel note, such a stance falls far short of a normative theory. It tells us how things are done but does not open policy choices to evaluation. See Michael C Dorf & Charles F Sabel, “A Constitution of Democratic Experimentalism” (1998) 98:2 Colum L Rev 267 at 273.

offer weak other-regarding palliatives.⁷⁴ After making her affirmative case, the regionalist adopts the stance of the moral idealist: even if regionalist proposals are not practicable given the polity's resistance to them, the ends sought are "the right thing to do."⁷⁵ And as a concession to the accuracy of the localist description, some authors prescribe weak regionalist medicine that concedes much to localist impulses.⁷⁶

A. *Beneath the Impasse*

Underlying the debate between the regionalist and the localist is a disagreement over the nature of democratic legitimacy. On the one hand, democratic choices are imagined to be legitimate only when parties take a disinterested stance, abstracting themselves from their narrow self-interests. Professor Richard Thompson Ford has called this view "civic republicanism". On the other hand, democratic choices are imagined to be just precisely when they give the fullest expression to parties' or groups'

⁷⁴ See Richard Schragger, "Consuming Government" (2003) 101:6 Mich L Rev 1824 at 1838. Schragger notes the lack of analytic rigour that attends Fischel's attempt to deal with the conditions of segregation that exclusionary zoning gives rise to. Fischel claims that diversity is desirable from a market point of view and that zoning regulations will therefore reflect this market demand. Schragger notes that in contrast to the detailed empirical work that accompanies many of his other arguments, Fischel provides no evidence for this claim. Similarly, Zelinsky proposes "an alternative spatialist agenda" (*supra* note 26 at 692) which includes "school choice programs, reverse commuting projects and central city moratoria on social service facilities" (*ibid* at 693). Zelinsky supports such measures because he believes they will allow those who oppose residential segregation in metropolitan centres to enter into coalitions with middle class voters who oppose residential integration, but support "educational choice" (*ibid* at 692). But if claims in the sociological literature about the concentration effects of urban poverty are accurate, then, barring massive investment, such measures will be inadequate to overcome the negative influence of such environments. Since the premise of Zelinsky's argument is that there is widespread opposition to residential integration and its costs, it is doubtful that such funding will be available. His agenda is at best a feeble alternative since it does not address a primary problem that the regionalist agenda aims to solve.

⁷⁵ Reynolds, "Intergovernmental Cooperation", *supra* note 49 at 116, citing Paul D Gottlieb, "The Effects of Poverty on Metropolitan Area Economic Performance" in Rosalind Greenstein & Wim Wiewel, eds, *Urban-Suburban Interdependencies* (Cambridge, Mass: Lincoln Institute of Land Policy, 2000) at 43. See also Laurie Reynolds, "Taxes, Fees, Assessments, Dues, and the 'Get What You Pay For' Model of Local Government" (2004) 56:2 Fla L Rev 373 at 444 (also discussing Gottlieb).

⁷⁶ See Gerald E Frug, "Beyond Regional Government" (2002) 115:7 Harv L Rev 1763 at 1786-88; David J Barron, "Reclaiming Home Rule" (2003) 116:8 Harv L Rev 2255 at 2270-76. See also Briffault, "Local Government", *supra* note 7 at 1160-61 (Briffault has noted that the likely effects of such measures will be suburban coalition voting that defeats the progressive aims sought by their architects).

self-interested desires. Ford has called this view “interest-group pluralism”.⁷⁷

The first, civic republican position emerges in the regionalist literature as authors appeal to institutional forms as means of shaping and realizing the deep commonalities that parties in an urban region share and as they appeal to equality norms, even though they acknowledge that there is no popular support for their proposals.⁷⁸ The localist vision of municipal governance is easily accommodated under the interest-group pluralist conception of democratic legitimacy: not only is it efficient for local governments to pursue their self-interest, it is just to do so.⁷⁹

The problems with each of these positions are significant. The first position presupposes the existence of normative commitments that are shared among members of a metropolitan region and assumes that regional institutional forms can give concrete expression to these commitments.⁸⁰ These assumptions are subject to two lines of criticism. First, deep fissures typically run through norms that are characterized as communal.⁸¹ Moral pluralism cannot be done away with by asserting the im-

⁷⁷ For a fuller exploration of this dichotomy, see Oliver Gerstenberg & Charles F Sabel, “Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?” in Christian Joerges & Renaud Dehousse, eds, *Good Governance in Europe’s Integrated Market* (Oxford: Oxford University Press, 2002) 289 at 290-91. See also Dorf & Sabel, *supra* note 73 at 275-76; Richard Thompson Ford, “The Boundaries of Race: Political Geography in Legal Analysis” (1994) 107:8 Harv L Rev 1841 at 1887-89 [Ford, “Boundaries of Race”].

⁷⁸ See e.g. Briffault, “Local Government”, *supra* note 7 at 1122: “It may be a paradox of metropolitan governance that structures that now exist or are likely to be adopted will not actually work to solve regional problems, and those with a better chance of working will not be adopted.” See also Cashin, “Localism”, *supra* note 49 at 1989.

⁷⁹ For this conflation of description and prescription, see Fischel, *The Homevoter Hypothesis*, *supra* note 26. In the Canadian context, see Lawrence A Poitras, *La défusion municipale au Québec* (Montreal: Borden Ladner Gervais, 2003), online: Assemblée nationale du Québec <<http://www.bibliotheque.assnat.qc.ca>>.

⁸⁰ Perhaps the clearest articulation of such a shared normative baseline, framed as a pure procedural norm, is Jürgen Habermas, *Moral Consciousness and Communicative Action*, translated by Christian Lenhardt and Shierry Weber Nicholsen (Cambridge, Mass: MIT Press, 1990). See also Jerry Frug, “The Geography of Community” (1996) 48:5 Stan L Rev 1047 at 1051 (Frug makes a similar rhetorical move when he argues for diversity as both a norm and an unrealized social good).

⁸¹ The problem of intragroup diversity has come to the fore in intersectionality analyses. See Nitya Iyer, “Categorical Denials: Equality Rights and the Shaping of Social Identity” (1993) 19:1 Queen’s LJ 179 at 193-94. See also Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43:6 Stan L Rev 1241 at 1257. Intragroup diversity also characterizes minority opinion in local government debates. For a regionalist approach that stresses integration, see above (part I, section A). For the argument that the appropriate response is rather to strengthen local minority control of municipalities, see Sheryll D Cashin, “Middle-Class Black Suburbs and the State of Integration: A Post-Integrationist Vision for

portance of norms or by simply positing institutional forms that assume a shared normative commitment.⁸² The failure of such an approach to urban governance is evident in American regionalists' resignation to the irrelevance of their arguments in the design and functioning of contemporary metropolitan organizations.⁸³

A second, institutional set of criticisms can be directed against the regionalist position and against the regionalist struggles to engage the critique on its own terms. In the face of metropolitan fragmentation, the regionalist proposes regional governments, which can be either single tier or two tier in form.⁸⁴ The single-tier form of metropolitan government is most vulnerable to the legitimacy critique and to the charge of inefficiency.⁸⁵ Faced with single-tier government, especially where this precludes other smaller-scaled bodies, citizens are deprived of the opportunity to participate in de Tocqueville-style local democracy and to shop in the marketplace of local government service providers.

The proponent of two-tier forms of government can respond to this critique but is rendered vulnerable to another one. Two-tier governmental schemes allocate regional competences to a higher, regional level of government, and allocate local functions to lower levels of government. The two-tier regionalist can plausibly argue that such institutional forms are appropriately scaled to the size of metropolitan residents' citizenship and

Metropolitan America" (2001) 86:4 Cornell L Rev 729. In addition, see Schragger, "The Limits of Localism", *supra* note 28. As Professor Schragger notes, any argument for a metropolitan community runs up against the counterargument that there are many forms of community within a metropolitan region, drawn along different lines; the metropolitan boundary may serve as only one possible configuration of community.

⁸² See Vicki Been, "Comment on Professor Jerry Frug's *The Geography of Community*" (1996) 48:5 Stan L Rev 1109. For a more general critique along similar lines that charges communitarian theories with assuming, rather than arguing for, community boundaries, see e.g. Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" in Will Kymlicka, ed, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 93.

⁸³ See Briffault, "Local Government", *supra* note 7.

⁸⁴ For single-tier forms, see Rusk, *supra* note 49. For two-tier forms, see Orfield, *supra* note 49. For a typology of these forms of government, see Andrew Sancton, *Governing Canada's City-Regions: Adapting Form to Function* (Montreal: Institute for Research on Public Policy, 1994) ch 1.

⁸⁵ The case of Winnipeg illustrates the weakness of the single-tier model. Despite early attempts to create institutions that would permit local participation in the metropolitan government, there has been an increasing trend toward centralization and a commensurate loss in legitimacy, because representatives are distant from their constituents, and homogeneity, as the variation provided by a system of autonomous local governments is lost. See Philip H Wichern, "Metropolitan Governance in Canada: The 1990s" in Donald Phares, ed, *Metropolitan Governance without Metropolitan Government?* (Aldershot, UK: Ashgate Publishing, 2004) 34 at 45.

consumer capacities. To the extent that a metropolitan resident is faced with regional-scale governance issues, she is a member of a regional community and the only appropriate set of government services to be consumed are those that have a regional scale. For all other issues the lower level of government promotes her roles as local government citizen and local government consumer.⁸⁶ Two-tier metropolitan governments are therefore not as vulnerable as are their single-tier brethren to the localist's legitimacy and efficiency attacks. They are, however, open to indirect attack. Bish has noted that it is often difficult to demarcate clearly the lines between regional and local subject matters and, as a result, the levels of government are engaged in constant conflicts over jurisdiction. He notes that in cases where two-tier governments have been put in place in the United States and Canada, they have moved inexorably toward a single-tier form.⁸⁷ Bish concludes that two-tier governments are an unstable form of government that set metropolitan regions on the slippery slope toward single-tier forms, complete with the legitimacy and efficiency problems that these forms give rise to.⁸⁸

The localist position and its vision of democratic legitimacy is similarly open to normative and institutional criticisms. If the regionalist model too easily explains away disagreement, the localist approach presumptively valorizes disagreement, and supports practices and outcomes that are widely thought to be objectionable. Any theory that asserts the value of self-interested rent seeking, undertaken to the detriment of vulnerable parties, ignores common moral intuitions.⁸⁹ Moreover, it is a serious task to propose institutional frameworks in which it is possible for those affected by existing institutional arrangements to question whether they desire them and their consequences, and even if they do desire existing arrangements, to determine whether that desire is normatively defensible.⁹⁰ If the regionalist cannot wave away moral disagreement, neither can the localist ignore morally problematic outcomes.

A second criticism can be directed against the factual assumptions of the localist position. The localist describes residents as consumers and

⁸⁶ Briffault, "Local Government", *supra* note 7 at 1126-28.

⁸⁷ See Robert L Bish, *Regional District Review—1999: Issues and Interjurisdictional Comparisons* (Victoria, BC: University of Victoria Local Government Institute, 1999).

⁸⁸ This is not the only explanation available of municipal amalgamations. For an alternative that notes that the explicit rationale for amalgamation in Ontario was cost-savings, see Sancton, "Metropolitan Governance", *supra* note 67 at 323.

⁸⁹ On this point, see Dorf & Sabel, *supra* note 73 at 282.

⁹⁰ For an argument, in the local governance context, that preferences should be subject to normative evaluation and not merely deferred to, see Jeremy Waldron, "Homelessness and Community" (2000) 50:4 UTLJ 371.

communities as market providers of service and benefits packages.⁹¹ But communities are constituted by legal regimes: consumer communities and, by extension, consumer residents do not pre-exist legal regulation. Although legal regimes do permit some public goods to be provided as if priced in the market, there is no reason that the law should do any such thing. Legal regimes can also provide that such public goods be provided on an equal basis.⁹² Legal regimes constitute consumers, but they can also constitute good local government Samaritans. To the extent that the localist model rests on a description of residents as consumers, it occludes this constitutive function of law and falsely presents a normative claim as a descriptive one.⁹³

But if neither the localist nor the regionalist account is completely satisfactory, what can take their place? The response to this question has particular descriptive and general normative aspects. The particular descriptive aspect of the response states that the question of how to engage in effective metropolitan governance is a classic example of a “wicked problem”.⁹⁴ Its resolution requires the participation of affected parties and the coordination of various and diverse centres of governance. That is, the particular *facts* of metropolitan challenges, including those related to spatially defined inequities, seem to call for an approach that eschews an appeal either to civic republicanism, with its attendant assumption of deep cohesion, or to public-choice inflected interest group pluralism, with its presumptive valuing of self-interested bargaining. Instead, what seems to be called for is a pragmatic recognition of diversity among participants, of the need for co-operation among disparate jurisdictions, and of the value of the participation of those affected by any institutional configuration.

⁹¹ In its strongest form the localist argument understands zoning regulation to be a form of property, albeit an incomplete one, and describes communities as owners of this property form. See Fischel, “Property Rights Approach”, *supra* note 12.

⁹² See e.g. *Pacte 2000*, *supra* note 54 at 206 (the recommendation that funding for education be transferred to the province to achieve this equity effect).

⁹³ On this insight about the constructed nature of local boundaries, see Ford, “Boundaries of Race”, *supra* note 77 at 1858-60.

⁹⁴ See Charles Sabel & Rory O'Donnell, “Democratic Experimentalism: What to Do About Wicked Problems After Whitehall” in *Devolution and Globalisation: Implications for Local Decision-Makers* (Paris: OECD, 2001) 67. As examples, the authors provide reforms of schools or provision of treatment to drug users; they define “wicked problems” as those “that both draw on the local knowledge of service providers and service users and require co-ordination of service provision across a wide range of formal jurisdictions” (*ibid* at 76). For the general claim that metropolitan governance typically presents wicked problems, see Neil Bradford, *Place Matters and Multi-level Governance: Perspectives on a New Urban Policy Paradigm* (11 February 2004), online: Canadian Policy Research Networks <http://cprn.org/documents/26856_en.pdf> at 3.

The more general theoretical response is that an adequate normative grounding for metropolitan governance should avoid the conundrums of the two positions set out above.⁹⁵ Professor Iris Marion Young articulated just such a theory of metropolitan governance. She argued for a conception of “regional federalism” that is to be governed by an ideal of “differentiated solidarity”.⁹⁶ This ideal seeks to reconcile two normative claims. First, the idea of solidarity claims that those who live “together in complex causal relationships in metropolitan regions” have obligations toward one another and, specifically, obligations “to constitute and support institutions of collective actions organized to bring about relations of justice among persons.”⁹⁷ Second, the idea of differentiation “affirms a freedom to cluster, both in urban space and in religious, cultural, and other affinity group associations.”⁹⁸ These groupings, argued Young, allow members to express their “affinity attraction” toward one another;⁹⁹ the idea of differentiation implies that groups should enjoy a measure of self-determination.

However, this idea does not permit members to disregard the interests of those individuals who are outside of the group, but who participate in the complex causal relationships that arise by virtue of living together in a metropolitan region. Toward these others, Young argued, group members are under an obligation of “openness to listening ... and engaging with them in shared public spaces.”¹⁰⁰ Young included among prohibited acts of exclusion segregationist policies that inflict a variety of wrongs upon those with whom one shares a metropolitan region. For present purposes, the most significant wrong is that of impeding political communication. Policies that separate populations by locality will, in general, prevent residents of disparate localities from entering into political discussions with one another and preclude the sharing of political decision-making power.¹⁰¹

⁹⁵ This drive to address normative concerns through debates about institutional design is characteristic of the “New Legal Process”. See Edward L. Rubin, “The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions”, *Commentary*, (1996) 109:6 *Harv L Rev* 1393.

⁹⁶ Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) at 198, 221 [Young, *Inclusion*]. For a criticism Young’s conception of federalism, see Jacob T. Levy, “Self-Determination, Non-domination, and Federalism” (2008) 23:3 *Hypatia* 60.

⁹⁷ Young, *Inclusion*, *supra* note 96 at 224.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid* at 225.

¹⁰¹ See *ibid* at 210.

These ideas of differentiation and solidarity, which together constitute the ideal of differentiated solidarity, seem to enter into direct conflict when one considers how to give them institutional form in metropolitan regions. According to Young:

On the one hand, self-determination, cultural specificity, participation, and accountability seem best realized in relatively small political units. On the other hand, values of taking into account the needs and interests of differently situated others with whom local affinity groups dwell are best realized in political units wide in scope, comprising at least broad metropolitan regions.¹⁰²

Professors David Barron and Gerald Frug have argued for institutional proposals that can respond to these apparently conflicting demands. The former argues that the opposition between home rule and regional equality unduly simplifies a complex legal doctrine,¹⁰³ while the latter points to European institutions to argue that the contrast between local autonomy and regional institutions ignores the extent to which careful design can ensure that regional institutions affirm local autonomy.¹⁰⁴

Young drew on the work of Frug to propose a governance regime that is comprised of two kinds of institutions. First, the proposed governance regime would consist of local governments that are sufficiently small to facilitate interactions robust enough to give effect to the goal of differentiation. Residents can exercise through these local governments a measure of self-determination. Second, this regime would create a regional institution that would facilitate interactions among representatives of residents who live in different localities in a metropolitan region, but who nonetheless share “complex causal relationships” and therefore are under a duty to consider one another’s interests. Such a regional institution, argued Young, should facilitate negotiations among local governments, and should not subordinate these governments to the will of the regional government.¹⁰⁵

The literature of new regionalism has similarly come to recognize that the polar positions within the localist-regionalist debate are untenable, and advocates for voluntary agreements among localities to reduce coor-

¹⁰² *Ibid* at 230.

¹⁰³ Barron, *supra* note 76 at 2276-77. Barron’s historical analysis, which recounts the shifting functions of home-rule doctrine, finds resonance in the history of Canadian municipal institutions. On the latter, see Tindal & Tindal, *supra* note 40 at 1-50.

¹⁰⁴ Frug, “Beyond Regional Government”, *supra* note 76 at 1766.

¹⁰⁵ See Young, *Inclusion*, *supra* note 96 at 231-32.

dination problems.¹⁰⁶ In the Canadian context, Bish has argued for the proposition that a variety of scales of government institutions is necessary to respond to particular local populations' service needs: an ex ante privileging of either localist or regionalist forms of governance is, according to Bish, undesirable as a functional matter. In what follows, I will set out the new regionalist arguments and detail how Bish's arguments play out in the context of a specific institutional form in British Columbia.¹⁰⁷ We shall see that that province's regional district system accomplishes some of the objectives that motivate new regionalism, while responding to some objections to institutions for which new regionalist authors have advocated. We will further see that the regional district system instantiates Young's federalist ideal of differentiated solidarity.

B. New Regionalism: Foundations and Criticisms

New regionalism rests on three insights. First, new regionalist scholars build on Ostrom, Tiebout, and Warren's claim that the provision and production of local government services can be separated—that is, local governments can provide the resources and regulations necessary to ensure that a set of services is produced without the local governments themselves doing the production.¹⁰⁸ Services can be provided by either local governments or private actors. Once a local government has decided that it should provide a service, the government then decides how to raise and distribute revenues, and how to monitor the production process. And after the local government has chosen to provide the resources and regulation necessary for a service, it has various choices about how the good or service should be produced: it can choose to undertake production itself by creating an in-house production unit; it can contract with a private or public actor for production; or it can regulate private activity to achieve public ends.¹⁰⁹

¹⁰⁶ See HV Savitch & Ronald K Vogel, "Paths to New Regionalism" (2000) 32:3 *State and Local Government Review* 158.

¹⁰⁷ See Robert L Bish, "Amalgamation: Is It the Solution?" (Paper delivered at the Coming Revolution in Local Government conference, 27-29 March 1996), [unpublished]. The regional district system in British Columbia most closely approximates Bish's ideal of a loose system of voluntary regional associations charged with regulating services that have greater than municipal scale. For a description of the regional districts system, see Government of British Columbia, Ministry of Community Services, *Primer on Regional Districts in British Columbia* (2006), online: Capital Regional District <<http://www.crd.bc.ca>> [Government of British Columbia, *Primer*].

¹⁰⁸ See Ostrom, Tiebout & Warren, *supra* note 22 at 838.

¹⁰⁹ See Ronald J Oakerson, *Governing Local Public Economies: Creating the Civic Metropolis* (Oakland, Cal: ICS Press, 1999) at 8. The instrument choice literature similarly discusses this range of means by which public policy can be put into effect; see Lester M

Underlying and flowing from this picture of the provision and production of local goods and services are a normative and a descriptive claim. These are, respectively, the second and third insights that underlie the new regionalist model. New regionalists reject command and control measures on normative grounds. They reject regional governments and their bureaucracies, advocating instead for regional institutions that are created by agreements among the relevant parties. For the new regionalist, such institutions permit citizens to act as political agents. By contrast, argues the new regionalist, centralized regional governments alienate citizens from the political process.¹¹⁰ This rejection of regional governments, however, does not mean that the new regionalist denies the importance of addressing concerns that extend beyond the boundaries of a municipality. Indeed, the new regionalist places a premium on mechanisms that regulate issues of varying geographic scales.

New regionalists note that because provision and production are not necessarily coterminous, governments can facilitate the production of services for needs that are either broader or narrower than an existing local government's territorial boundaries. New regionalists derive from this description of the metropolitan landscape institutional recommendations that emphasize flexibility. For instance, the new regionalist praises the increasing presence of sublocal units of governments, such as residential community associations (RCAs) and business improvement districts (BIDs).¹¹¹ These sublocal units, argues the new regionalist, provide a close match between property owners' preferences and payments. But critics have argued that these institutions are antidemocratic. BIDs subject non-property-owning residents to their regulations without giving them a role in determining the content of those regulations.¹¹² Furthermore, it seems that instead of promoting true democratic participation, RCAs foster in residents a perversely privatized vision of democracy.¹¹³

Salamon, ed, *The Tools of Government: A Guide to the New Governance* (Oxford: Oxford University Press, 2002).

¹¹⁰ See Roger B Parks & Ronald J Oakerson, "Regionalism, Localism, and Metropolitan Governance: Suggestions from the Research Program on Local Public Economies" (2000) 32:3 *State and Local Government Review* 169 at 173-74.

¹¹¹ Oakerson, *supra* note 109 at 45-50. For an assessment of the potential inequities generated by BIDs and a statement of qualified support for BIDs, see Richard Briffault, "A Government for Our Time? Business Improvement Districts and Urban Governance" (1999) 99:2 *Colum L Rev* 365 at 462-77.

¹¹² See David J Kennedy, "Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership", Note, (1996) 15:1 *Yale L & Pol'y Rev* 283 at 294-99.

¹¹³ See Gregory S Alexander, "Dilemmas of Group Autonomy: Residential Associations and Community" (1989) 75:1 *Cornell L Rev* 1 at 43-47; Sheryll D Cashin, "Privatized Com-

In addition to favouring these sublocal institutions, new regionalist writers view as a positive development the proliferation of special districts. Special districts can have three geographic scales, and can be constituted by a variety of means. The first type of special district is smaller than the local government boundary in which it is located. The second is coterminous with an existing local boundary. The third type of special district crosses existing boundaries.¹¹⁴ Special districts can be created through a local initiative, through state enabling legislation, or through an agreement between general purpose local government units.¹¹⁵ The new regionalist approves of each of these institutional forms and all these means of institution formation, for three reasons.

First, the New regionalist argues that because these local government institutions arise out of the choices of those who benefit from them, there is fiscal equivalence: the set of end payers matches that of end users.¹¹⁶ Second, not only does this matching of service needs and services reduce waste, but it creates an efficient market of services. There is competition among a greater number of units that offer a more diverse set of services than is the case in situations where the market only or predominately consists of general purpose local governments.¹¹⁷ Third, the new regionalist argues that special districts are created by those who benefit from them. They are therefore subject to close democratic oversight and inculcate democratic values in the relevant populace.¹¹⁸

Professor Kathryn Foster has subjected each of these claims about the advantages of special districts in the American context to vigorous criticism. Empirical studies, she notes, belie the new regionalist's efficiency claims. The motivations for creating special districts are diverse, and not reducible to a desire for an efficient matching of preferences with services.¹¹⁹ If special districts were actually designed to match service needs, their boundaries would be defined with reference to those service needs,

munities and the 'Secession of the Successful': Democracy and Fairness Beyond the Gate" (2001) 28:5 Fordham Urb LJ 1675.

¹¹⁴ See Foster, *Special-Purpose Government*, *supra* note 26 at 13-14.

¹¹⁵ See *ibid* at 11.

¹¹⁶ Oakerson, *supra* note 109 at 40-45. Oakerson nuances the general new regionalist stance in favour of special purpose governments when he argues that the value of such governments varies from situation to situation.

¹¹⁷ *Ibid* at 43-45.

¹¹⁸ *Ibid* at 42-43.

¹¹⁹ *Ibid* at 13-14. See also United States of America, Advisory Commission on Intergovernmental Relations, *The Organization of Local Public Economies* (20575 A-109) (Washington, DC: Advisory Commission on Intergovernmental Relations, 1987) at 55-56.

but these boundaries are more often coterminous with municipal boundaries.¹²⁰ This suggests that their creation is not efficiency motivated and, moreover, that their design does not efficiently match the service to the relevant need.

Equally serious criticisms are directed against the democratic arguments for special districts. Critics note that it is rare for local populations to be intensely involved in the formation of special districts. More typically, special districts are created in response to the demands of local elites.¹²¹ In addition, special districts and their activities are invisible. There is little public participation in either their formation or in the selection of their members, and therefore they do not inculcate in citizens democratic values.¹²² Taken together, the efficiency and normative arguments against special districts yield a final criticism. Because special districts are typically outside the purview of normal democratic processes, they can impede efficient and democratically desired policy choices. Special districts are not subject to the normal give and take of democratic debate about programs. Special districts rather pursue their objectives outside the parameters of that debate and often have service monopolies. Because the fiscal capacities of the relevant polity are limited, general purpose local governments have to account for special district charges in the formation of their policies.¹²³ General purpose local governments, in which market preferences are expressed and prioritized through democratic debate, are therefore constrained by undemocratic and unresponsive special districts. Critics argue that new regionalist horizontal institutions frustrate Tiebout-style preference satisfaction.¹²⁴

C. Regional Districts as New Regionalist and Federalist Institutions

The regional district system in British Columbia offers an institutional resolution of the localist-regionalist debate that draws on new regionalist insights, and offers a response to the various criticisms of new regionalism. Bish and Clemens have noted that regional districts perform three distinct functions. First, they are the general purpose governments for areas of the province that have no municipal corporations. Second, they provide a forum for co-operation among municipalities and unincorporated

¹²⁰ Foster, *Special-Purpose Government*, *supra* note 26 at 39-40.

¹²¹ *Ibid* at 19-20.

¹²² See *ibid* at 41. See also Nancy Burns, *The Formation of American Local Governments: Private Values in Public Institutions* (New York: Oxford University Press, 1994) at 11-13.

¹²³ Reynolds, "Intergovernmental Cooperation", *supra* note 49 at 144-46.

¹²⁴ See e.g. *ibid* at 140 and citations therein.

areas that facilitates agreements for the provision of services, with cost recovery, among municipalities. Third, they function as regional governments for region-wide voluntary and mandatory services.¹²⁵ It is the second and third functions of regional districts that are most directly relevant to this paper, and to explain these, it is perhaps helpful to lay out the history of the regional district system, and to delineate their structure and powers. Let me begin by briefly setting out the history of that system, which I hope will in part vindicate this essay's decision to conceive of metropolitan governance in federalism terms.

Authors have argued that with the rapid population growth of the post-World War II era, inadequacies in British Columbia's municipal organizations became evident. According to James E. Brown: "[i]n the metropolitan regions, the dividing line between adjacent municipalities was becoming completely obliterated."¹²⁶ Informal means of regulating relationships among these municipalities were "too slow and too uncertain" to be relied upon, and it became clear that the proliferation of single purpose districts to address intermunicipal regulatory problems was "going to inhibit any proper co-ordination of activities at the metro level and preclude the establishment of priorities as among functions."¹²⁷ In nonmetropolitan regions, with the exception of school board districts, there were no significant local government organizations.¹²⁸ In an article written shortly after the coming into force of the regional district system, Professor Paul Tennant and David Zirnhelt argue that the system was a response to these absences in the province's local government institutional structure.¹²⁹ The authors argue that, beginning in 1964, provincial officials were the primary drivers behind the effective coming into being of this system.¹³⁰ What is of particular interest to this paper is that the accounts of Tennant and Zirnhelt, and Brown, which were all contemporaneous with the creation of the regional district system, describe it in federalism terms. Tennant and Zirnhelt write of the regional district that governed Greater Vancouver, "[i]n structure the new government follows the local federation model pioneered on this continent in Toronto and later introduced in Winni-

¹²⁵ Robert L Bish & Eric G Clemens, *Local Government in British Columbia*, 4th ed (Richmond, BC: Union of British Columbia Municipalities, 2008) at 5.

¹²⁶ James E Brown, "Regional Districts in British Columbia" (1968) 41 *Municipal Finance* 82 at 83.

¹²⁷ *Ibid.*

¹²⁸ See *ibid.*

¹²⁹ See Paul Tennant & David Zirnhelt, "Metropolitan Government in Vancouver: The Strategy of Gentle Imposition" (1973) 16 *Can Pub Ad* 124.

¹³⁰ See *ibid* at 127, 138.

peg.”¹³¹ This language is echoed by Brown: “Essentially regional districts are a federation of a number of member areas.”¹³² These commentators conceive of the regional district system as a kind of federation.

In what follows, I will (1) show how the system responds to some of the criticisms of new regionalist institutions; and (2) rebut some potential localist and regionalist critiques of the regional district system. In concluding this part, I will argue that the regional district system is justifiably characterized in federalism terms and that Young’s conception of regional federalism provides a particularly apt characterization.

1. The Regional Districts as New Regionalist Institutions

There are twenty-seven regional districts in British Columbia; all areas of the province, except for an area in the northwest, fall within the jurisdiction of these regional districts. Each regional district is a corporation whose governing body is its board, and the powers of the board are limited to the jurisdictional boundaries of the district, unless otherwise expressly provided for by legislation.¹³³ The members of the board are either directly elected from electoral (or unincorporated) areas, or they are municipal officials who are appointed to the board by their municipal councils.¹³⁴ Each political unit (electoral area or municipality) is represented by at least one member on the board, and the number of votes and members accorded to each political unit is proportional to that unit’s population.¹³⁵ There are different voting rules for different kinds of issues:¹³⁶ on issues that affect the entire region, each member of the board has one vote;¹³⁷ for matters that affect a sub-area of the region, only members from political units in the affected sub-areas vote and the voting is weighted; and for some financial matters, all members of the board can vote, and the voting is again weighted.¹³⁸ Moreover, a board may, through a referendum, seek the opinion of affected electors concerning a service that is or may be operated by the regional district.¹³⁹ Bylaws establishing most services in a regional district require the approval of the participating area, which can

¹³¹ *Ibid* at 125.

¹³² Brown, *supra* note 126 at 84.

¹³³ *Local Government Act*, RSBC 1996, c 323, ss 173-75.

¹³⁴ *Ibid*, s 210.

¹³⁵ *Ibid*, s 783.

¹³⁶ Bish & Clemens, *supra* note 125 at 54.

¹³⁷ *Local Government Act*, *supra* note 133, s 791(2)-(3).

¹³⁸ *Ibid*, s 791(4)-(7).

¹³⁹ *Ibid*, s 797.3(1) (electors’ approval requirements that are imposed on regional districts).

be obtained through a variety of means, including the assent of electors or, if the participating area is an entire municipality, the relevant municipal council.¹⁴⁰

Regional districts are granted broad powers.¹⁴¹ Indeed, the legislation provides that “[s]ubject to the specific limitations and conditions established by or under this or another Act, a regional district may operate any service that the board considers necessary or desirable for all or part of the regional district.”¹⁴² In order to provide a service, a board must pass a bylaw that describes the service and the boundaries of the service area, identifies all the municipalities and electoral areas within the service area, and establishes the cost recovery method for the service.¹⁴³ The bylaw governing the service may itself set out the cost-apportionment formula; otherwise, the costs are shared according to the property-tax base of the participating areas.¹⁴⁴ Examples of regional services that are provided to the entire region include regional parks, regional planning, water supply, sewage treatment and disposal, and emergency 911 services. Recreation centres and parks are examples of services governed by agreement that are provided to some but not all political units.¹⁴⁵

British Columbia’s regional district system meets some of the aims of new regionalism and answers some of new regionalism’s critics. The system’s mechanisms for intraregional agreements facilitate the matching of citizen preferences with government services, and therefore achieve the new regionalist aim of fiscal equivalence. Citizens of political units within the system in general only receive and pay for those services to which they, through their representatives, have consented.¹⁴⁶ In addition, through the mechanisms of political representation and intraregional negotiation and agreements, the regional district system avoids the risk of

¹⁴⁰ *Ibid.*, ss 800(1), 801(1)-(2). For services that are exempt from the requirement of an establishing by-law, see *ibid.*, s 800(2).

¹⁴¹ Bish & Clemens, *supra* note 125 at 56. According to the authors, the only mandatory regulatory functions are (i) preparing comprehensive plans for solid-waste management, and (ii) emergency planning for rural areas (*ibid.* at 49).

¹⁴² *Local Government Act*, *supra* note 133, s 796(1).

¹⁴³ *Ibid.*, s 800.1.

¹⁴⁴ *Ibid.*, s 804. See also Bish & Clemens, *supra* note 125 at 53, n 10 (costs can be allocated according to (i) the “converted value of land and improvements,” which assigns different weights to residential and nonresidential properties in the political unit; or (ii) the total assessed value of all the properties in the unit).

¹⁴⁵ Government of British Columbia, *Primer*, *supra* note 107 at 6.

¹⁴⁶ *Ibid.* at 9 (initially, the province tightly limited the number of region-wide services that a regional district had to provide; more recently, additional “responsibilities have been mandated through provincial statute”).

top-down regulation by a regional government that is distant from citizens. The system also provides for a degree of intraregional equity, since the general cost allocation formula makes reference to the relevant political units' property-tax bases, and because the weighting of votes and representation on the boards is determined by population.

The system further evades the most damaging critiques of new regionalist institutions' susceptibility to special-interest capture and lack of democratic accountability. Unlike special districts, regional districts are not established at the behest of special interests. They are, rather, pre-existing political entities whose board members are themselves elected officials who are therefore subject to democratic controls.¹⁴⁷ Finally, in addition to the direct accountability mechanism of the referendum, the regional district system provides for a range of consultative processes, regular reporting, public hearings and meetings, newsletters, televised board proceedings and advisory committees and commissions, and regional planning processes that require extensive interactions with municipal governments.¹⁴⁸ The regional district system therefore captures the main benefits of the new regionalist position while avoiding the costs of other new regionalist institutions, such as special districts, and offers a compelling institutional resolution of the localist-regionalist debate.

The regional district system does not, of course, resolve all disagreements. Conflict among political units is a real possibility that is foreseen in the legislative provisions governing dispute resolution.¹⁴⁹ In addition, a regionalist might argue that because of the consensual nature of the agreements, there is a real risk that inequalities in bargaining power among political units may yield unequal allocations of services within a given region. Indeed, for regional fiscal equity mechanisms, such as affordable housing, the municipalities in a regional district must overcome collective action problems. An example of such a co-operative effort is the Regional Housing Trust Fund, to which municipalities in the Capital Regional District contribute voluntarily. Most, but not all of the member municipalities (that is, twelve of the sixteen) in the regional district con-

¹⁴⁷ The degree of democratic control is not optimal because members are not directly elected, but the democratic control is greater than for special districts, whose membership is appointed, rather than elected. For criticisms of representation on special district boards, see Richard Briffault, "Our Localism: Part II—Localism and Legal Theory" (1990) 90:2 Colum L Rev 346 at 375-78.

¹⁴⁸ Government of British Columbia, *Primer*, *supra* note 107 at 12.

¹⁴⁹ *Local Government Act*, *supra* note 133, ss 813-813.19. For an analysis of these mechanisms in operation, see Michelle Boyle, Robert B Gibson & Deborah Curran, "If Not Here, Then Perhaps Not Anywhere: Urban Growth Management as a Tool for Sustainability Planning in British Columbia's Capital Regional District" (2004) 9:1 Local Environment 21 at 26.

tribute to the fund.¹⁵⁰ It is perhaps important to recognize that the province retains its power to regulate, and can exercise this power with respect to politically sensitive matters such as the siting of affordable housing.¹⁵¹ Moreover, the province can mandate that regional districts perform some region-wide functions.¹⁵² In the end, although the regional system provides for some measure of redistribution and can address some inequalities, the provincial government acts as the ultimate redistributive backstop.¹⁵³

2. Responses to Localist and Regionalist Concerns About the Regional District System

This regionalist concern for the capacity of the regional district system to achieve redistributive ends gives rise to issues that are analogous to those raised by some contemporary legal scholars in their analyses of redistributive policies that are undertaken by municipalities, generally. Professor Clayton Gillette has focused the discussion both by offering a concise definition of redistribution in the local government context, and by providing an account for when local redistribution is malign. Gillette describes as “redistributive” any policy that “confers on a subgroup of residents benefits that are substantially disproportionate to the related local costs that the same subgroup bears.”¹⁵⁴ Under this definition, homeless shelters are the result of redistributive policies, because they concentrate costs that are not paid for by the beneficiaries of the shelters, while well-maintained roads, which spread benefits equally among the population who in general contribute equally to their maintenance, do not result from redistributive policies. In addition, Gillette defines as malign those redistributive measures that are the result of interest group pressures, and which do not reflect the views of the majority (where those views could be ascertained through a well-functioning political market).¹⁵⁵ For Gillette,

¹⁵⁰ See Capital Regional District, *Regional Housing Trust Fund (RHTF)*, online: Capital Regional District <<http://www.crd.bc.ca>>.

¹⁵¹ The province’s affordable housing program is operated by a provincial administrative agency, the British Columbia Housing Management Commission. For the governance structure, see BC Housing, *Governance*, online: BC Housing <<http://www.bchousing.org>>.

¹⁵² See *Local Government Act*, *supra* note 133, s 782.1.

¹⁵³ For an overview of ways in which jurisdictions in the United States fail to generate regional institutions that can address regional governance problems, and for a comparison with Canadian regional institutions, see Kathryn A Foster, “Challenges Ahead for US Regional Planning Governance” (2010) 81:5 *Town Planning Review* 485.

¹⁵⁴ Clayton P Gillette, *Local Redistribution and Local Democracy: Interest Groups and the Courts* (New Haven: Yale University Press, 2011) at 57.

¹⁵⁵ *Ibid* at 50-51.

non-malign or benign redistribution can and does occur. He argues, for instance, “that some localities expressly embrace a reputation for being more redistributive than others and that potential residents use that variable in selecting among jurisdictions.”¹⁵⁶

Gillette considers various reasons advanced in the literature in favour of such redistribution, and three seem, on their face, to be plausible explanations for redistributive policies undertaken by regional districts. First, local governments (as opposed to higher levels of government) may redistribute because residents enjoy a sense of well-being that results from taking care of fellow residents, where the intensity of this sense dissipates across geographical space.¹⁵⁷ Second, citizens in localities that choose redistributive policies may have a strong sense of camaraderie with their fellow residents despite disparities in their respective economic status.¹⁵⁸ Third, localities may undertake redistribution to avoid social and economic costs associated with the poor. In this scenario, local redistribution functions as “a form of ‘bribe’ to the local poor to maintain a certain level of social peace that the relatively wealthy may otherwise believe will be threatened.”¹⁵⁹

Although each of these explanations is subject to critique, Gillette argues, they can nonetheless offer plausible explanations for local redistribution, under two conditions: (1) if there is an institution through which decisions are made “in which all affected parties are effectively represented,”¹⁶⁰ and (2) if redistributive decisions made by this institution are visible to groups who monitor it. In the absence of these two conditions, the “benign” explanations for redistribution suggested above are less plausible, and special interest group capture arguments gain in plausibility.¹⁶¹ Arguably, regional districts satisfy these two conditions. As we have seen above, regional districts create political forums in which representatives of affected citizens in a region make politically visible decisions. Moreover, the structure of the regional district system can reduce the incidence of the standard conditions that give rise to the risk of malign local redistribution. One such condition arises when politically powerless local minori-

¹⁵⁶ *Ibid* at 42.

¹⁵⁷ *Ibid* at 83-85.

¹⁵⁸ *Ibid* at 86.

¹⁵⁹ *Ibid* at 89.

¹⁶⁰ *Ibid* at 104.

¹⁶¹ *Ibid* at 152-54 (Gillette distinguishes on-budget from off-budget expenditures to illustrate how political visibility affects the ability of special interest groups to capture local government processes).

ties disproportionately bear the costs of local regulation.¹⁶² The fact that intraregional agreements allow for geographic tailoring of redistributive measures minimizes the risk that costs will be imposed on a municipality that is politically powerless. This fact does not, of course, remove the risk of intramunicipal exploitation, but it does reduce the risk that costs will be concentrated in a municipality that is politically powerless and that, in the absence of the regional district system, would have no means of advancing its interests.¹⁶³

If the regionalist is concerned about the capacity of the regional district system to be attentive to issues of distributive justice, the localist might criticize the system for failing to adequately respond to the preferences of citizens. The localist might be concerned that because the regional system relies on existing boundaries to demarcate service provision areas, it is insufficiently responsive to preferences that exist at a submunicipal level. Yet the provincial legislative regime provides for the creation of improvement districts that can provide services to these kinds of areas, when a majority of landowners in an area being considered for incorporation vote in favour of forming a district and the Lieutenant Governor in Council incorporates the improvement district.¹⁶⁴ Moreover, regional districts are empowered by governing legislation to enter into agreements for services¹⁶⁵ and therefore enjoy a measure of the flexibility for which new regionalists advocate, and which they believe yields efficiencies in the delivery of services.

In short, the regional district system is supplemented by regulatory regimes whose application is either larger or smaller than the jurisdiction of regional districts, and the governing legislation builds in a degree of flexibility for how services can be delivered. These mechanisms of provin-

¹⁶² *Ibid* at 163.

¹⁶³ There may be circumstances in which, for instance, voting blocks of urban municipalities impose costs on rural municipalities through mandatory regional district regulations. Regional districts are perhaps particularly vulnerable to this form of unequal regulation, but they do offset the risks of the other forms of unequal regulation identified in the text.

¹⁶⁴ For the majority requirement, see Government of British Columbia, Ministry of Community Services, *Improvement District Manual* (2006), online: Ministry of Community, Sport and Cultural Development <<http://www.cscd.gov.bc.ca>> at 9. The Lieutenant Governor-in-Council will only incorporate an area “with objects that appear advisable and with powers considered necessary to carry out those objects” (*Local Government Act*, *supra* note 133, s 731(1)). Provincial policy statements suggest that improvement districts will only be created “where there is an overriding provincial interest and no other alternative exists” (Government of British Columbia, Ministry of Community Services, *Improvement District Governance: Policy Statement* (2006), online: Ministry of Community, Sport and Cultural Development <<http://www.cscd.gov.bc.ca>> at 11).

¹⁶⁵ *Local Government Act*, *supra* note 133, s 176(1)(a)-(b).

cial oversight, sublocal regulation, and flexible service delivery suggest a final point about the nature of legal institutional design in the urban context. Given the regulatory complexity of that context, it is unlikely that any single institutional design intervention will adequately respond to any given set of normative concerns, including regionalist and localist ones. The regional district system is one promising institutional form that offers a plausible response to the debate between regionalists and localists. Yet the effectiveness of the design intervention hinges on the larger institutional context within which it operates, and any prescription offered should be sensitive to the complexity of that context.

3. The Regional District System as a Federalist Institution

In this section, I have argued that the regional district system in British Columbia offers a plausible institutional response to the concerns underlying the localist-regionalist debate. Moreover, I have argued that the system shares some of the advantages claimed for institutions that authors have characterized as new regionalist, while avoiding some of the sharpest criticisms that have been directed against those institutions. Finally, I have defended the system against potential localist and regionalist objections. I conclude this section by attempting to vindicate authors who, at the time of the regional district system's coming into being, described the system as federal in nature. In particular, I claim that the system conforms to Young's conception of "regional federalism".

Recall that Young argued for an ideal of "differentiated solidarity" that would govern relationships among residents of metropolitan regions. According to this ideal, residents of localities in metropolitan regions can, through involvement in their local governments, express their affinity for those who live in closest physical proximity to them. We have seen that the regional district system aims to provide a range of local institutions, including municipalities, through which residents of relatively small jurisdictions can engage in self-governance. Yet, the idea of differentiated solidarity does not permit these residents to disregard the interests of others, who live in localities elsewhere, in a shared metropolitan region. Instead, according to this idea, these other residents are owed an obligation to have their interests heard. The regional district system also responds to this demand of the idea of differentiated solidarity. The regional districts enable representatives of municipalities in metropolitan regions to enter into negotiations with one another and to address issues of common concern that arise by virtue of those municipalities existing in a network of complex causal relationships. Finally, we have seen that the province of British Columbia functions as a central government that can provide for redistribution within a particular regional district, if processes of negotiation ultimately fail to arrive at effective and just redistributive policies.

One might ask whether this possibility of provincial intervention potentially places municipalities and regional districts in a position of subordination vis-à-vis the province. Such a concern is significant for any attempt to apply Young's theory of regional federalism because, as we saw above, this theory requires that a regional federation be governed by negotiations among political units and does not permit some political units to be subordinate to others. My response to this concern is a qualified one. The regional district system enables representatives of municipalities to decide amongst themselves what the relevant geographical contours of governance challenges in a regional district are, and to determine the appropriate responses to these challenges. The system, *in general*, is governed by Young's norm of negotiation. Yet if the participants in a particular regional district system fail to respond to some legitimate redistributive claims, the province can act on these claims. I have argued elsewhere that provinces have a plausible claim to being able to overcome failures of deliberation in and among municipalities.¹⁶⁶ Municipalities and a regional district may be subordinate to a province when it acts in this supervisory capacity, but this condition of subordination arises because the province is in general in a position to consider interests that representatives of municipalities, deliberating amongst themselves, may neglect. This departure from Young's regional federalist norm of nonsubordination is therefore justified for reasons that are standard in the federalism literature.

Conclusion

This paper has situated itself within a particular legal debate about cities and has offered a resolution of that debate that prescribes a specific institutional form. I have claimed that the approach taken in this paper is a distinctively legal one, and I have argued for the necessity of such an approach. In my view, because cities are necessarily creatures of the law, if one is to make claims about cities, one must be cognizant of the relevant legal context, and if one is to offer prescriptions, one must have facility with the relevant legal materials. These claims are, I believe, uncontroversial. Perhaps more controversial is this article's approach to public law.

¹⁶⁶ For the standard arguments in favour of central government policies of redistribution, see Buchanan, "Fiscal Equity", *supra* note 50. In another article, I have argued that the province of Ontario is in a privileged position to overcome deliberative failures within Ontario municipalities. See Hoi Kong, "Something to Talk About: Regulation and Justification in Canadian Municipal Law" (2010) 48:3-4 *Osgoode Hall LJ* 499 at 527-36. The general structural arguments apply to all the provinces, including British Columbia. As I argued in that article, it is possible that a province may act for reasons unrelated to its superior deliberative position and engage in dominating behaviour. Nonetheless, the superior position enables the province to overcome deliberative failures in and among municipalities that municipalities themselves cannot overcome.

In this paper, I have taken seriously a particular genre of arguments that authors in law have made about cities, namely, federalism arguments. Moreover, I have focused my arguments on the institutional claims advanced by participants in that debate and I have proposed specific institutional responses to them. A critic might contend that I have erred in at least one of two ways. A critic might first charge that I have accepted without good reasons the terms of the debate, and second, charge that my claim about the institutional nature of public law arguments is mistaken. I close this paper with a response to these criticisms and with some thoughts about directions for future research.

Consider first the critic's claim about my acceptance of the federalism terms of the debate. As a preliminary matter, I should note that I do not take the terms of the localist-regionalist debate to be the *only* terms under which the discussion of cities can be undertaken. Indeed, as I noted in the introduction, there are a variety of ways in which one can characterize the legal nature of cities: one can conceive of cities in terms of property law or administrative law and other legal characterizations are possible. What these characterizations enable one to do, however, is to have a discussion that takes seriously the legal nature of cities. It may, of course, be the case that a particular instance of legal characterization is misguided, but in my view, the plausibility of a characterization is best tested in the process of making arguments about it. This paper has tested the plausibility of a federalism characterization of the city by engaging seriously arguments that have been advanced in federalism terms. Given the fact that in Canada, legal and political authority in major urban centres is divided along overlapping geographic boundaries, the federalism characterization that drives the localist-regionalist debate does not strike me as implausible, and therefore I see no reason to reject it.

Consider next a challenge to my claim that public law arguments necessarily implicate institutional concerns. One might articulate this challenge by claiming that when we address issues in public law, we should advance arguments that directly and exclusively address questions of political philosophy. One might, for instance, argue that the only relevant question is whether cities, as currently constituted, are just or unjust: once one has appealed to and defended a particular theory of justice and applied it to cities, one's work is done.¹⁶⁷ My response to this challenge relies on a particular pragmatic understanding of legal reasoning.

¹⁶⁷ See Cass R Sunstein & Adrian Vermeule, "Interpretation and Institutions" (2003) 101:4 Mich L Rev 885 at 902-04 (although in another context, Sunstein and Vermeule charge scholars, such as Ronald Dworkin, with ignoring institutional considerations when developing theories of interpretation).

Legal pragmatists argue that legal ends and means exist in a relationship of iterative interdependence. According to pragmatists, normative principles and social objectives are inevitably subjected to questioning when legal means are chosen to implement them.¹⁶⁸ In turn, the institutional means chosen will themselves be open to examination and recasting in light of shifts in understandings of principles and objectives that arise once specific institutional choices are made.¹⁶⁹ In this pragmatic conception of legal reasoning, theories are inevitably tested when they are implemented through institutional design choices, and do not stand apart from such choices. In this pragmatic conception, legal reasoning necessarily raises institutional questions because law, in all of its manifestations, is an institution that is persistently open to critiques in light of experience. I believe that this pragmatic view accurately describes law and legal institutions, and I do not think that there are convincing counterexamples to challenge it. This view of law yields one conclusion and suggests future lines of inquiry.

In the introduction, I claimed that arguments about cities require some knowledge of the legal contexts of cities, because cities are creations of law. I make a similar claim to conclude this paper: any theory of public law must address institutional questions. In this light, the ambition for this paper has been relatively modest. I hope to have advanced an argument with respect to a theory of cities that has satisfied this minimum requirement of public law theory. A future research program might be less modest. If cities are, as I have claimed, legal institutions that invite continuing reflection and contestation, the challenge for future institutional design projects is to propose and create forums in which these kinds of deliberative activities can be productively undertaken. Scholars from outside of law schools have examined institutions that facilitate these kinds of activities.¹⁷⁰ The challenge for legal scholars is to draw on these nonlegal scholars' insights to devise institutional frameworks that will enable

¹⁶⁸ See e.g. Lon L Fuller, "Means and Ends" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart, 2001) 61 at 68; Dorf & Sabel, *supra* note 73 at 284-85. In this paper I specifically reject that version of pragmatism which conceives of legal reasoning as a species of consequentialism and understands the ends against which legal acts are measured to be fixed in advance. For the distinction, see Brandon L Garrett & James S Liebman, "Experimentalist Equal Protection" (2004) 22:2 Yale L & Pol'y Rev 261 at 280-81.

¹⁶⁹ Fuller, *supra* note 168 at 68-69.

¹⁷⁰ See e.g. Archon Fung, "Deliberative Democracy, Chicago Style: Grass-roots Governance in Policing and Public Education" in Archon Fung & Erik Olin Wright, eds, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (London, UK: Verso, 2003) 111.

such deliberation, and that will be sensitive to the wider legal context of the city.
