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Is There a Law of Regional Planning?

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IS THERE A LAW OF REGIONAL PLANNING?

BRIAN W. OHM, J.D.*

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INTRODUCTION

This Article examines the law through the lens of regional planning. The title of this symposium highlights two terms—“metropolis” and “urban”—that are central to the field of urban and regional planning. Globally, the twenty-first century has been called “the urban century,” with more people living in urban areas than in rural areas.¹ In the United States in particular, our urban areas are often not comprised of a single city. Rather, our urban areas are comprised of numerous local governments: cities, villages, towns, and counties. The modern metropolis connotes an agglomeration of adjacent and interconnected local governments (often cities) clustered around a major urban center (often an older central city).

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1. Greg Scruggs, *The Road to Quito*, 82 PLAN. 1, 1-2 (2016). (The article references the United Nations Conference on Housing and Sustainable Urban Development (Habitat III) to be held in Quito, Ecuador on October 17-20, 2016. The conference will focus on the implementation of a “New Urban Agenda” in recognition of the fact that most people in the world now live in urban areas.).

The law tends to focus on the jurisdiction, meaning the institution with power and authority to take action. Each of the local governments within the urban area is a distinct legal entity with certain legal authority to act in the interests of the citizens who live within its borders. While people may commonly refer to the cities and villages surrounding the central city using the descriptive term “suburbs,” the suburb as a legal concept is not fully developed.²

The City of Chicago, for example, encompasses 237 square miles³ and has a population of 2,695,598.⁴ For federal data collection purposes, the Chicago metropolitan statistical area⁵ includes 348 local units of government⁶ encompassing 10,856 square miles with a population of 9,461,105.⁷ As we move up the scale of “regional,” Chicago is also part of an emerging “mega-region” with a 2010 population of 55,525,296, which includes Minneapolis, Detroit, Pittsburg, Indianapolis, St. Louis, and Cleveland.⁸ Mega-regions introduce a very different legal dimension not fully explored in this paper.

The fragmented system of these conurbations has historically presented numerous planning challenges to coordinating public investment and influencing private actions. Contemporary planning issues of the modern metropolis center on quality of life issues related to the environment, housing, equity, transportation, public health, and community and economic development. Emerging issues, ranging from the globalization of the economy to changing consumer lifestyle preferences,

2. For a history of the suburbs in the United States, *see generally* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES. (Oxford Univ. Press 1985) and Mary Corbin Sies, *North American Suburbs, 1880-1950*, 27 J. URB. HIST. 313 (2001). For an exploration of the difficulties of using the term “suburb,” *see generally* Ann Forsyth, *Defining Suburbs*, 27 J. PLAN. LIT. 270 (2012).

3. *Facts & Statistics*, CITY OF CHICAGO, <http://www.cityofchicago.org/city/en/about/facts.html> (last visited Oct. 16, 2016).

4. *Quick Facts: Chicago Illinois*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/1714000> (last visited Oct. 16, 2016).

5. A metropolitan statistical area begins with a county with a population of at least 50,000. Multiple counties are included in a MSA if at least twenty-five percent of employed residents in the central county commute to work in one or more adjacent counties. 2010 Standards for Delineating Metro. and Micropolitan Statistical Areas, 75 Fed. Reg. 123, 37249-50 (June 28, 2010). For transportation planning purposes, an urbanized area is defined as “a geographic area with a population of 50,000 or more.” 23 U.S.C. § 134(b)(7) (2016). The boundaries of metropolitan areas are defined as “the existing urbanized area and the contiguous area expected to become urbanized within a 20-year forecast period for the transportation plan.” 23 U.S.C. § 134(e)(2)(A) (2016).

6. *Number of Governmental Units for the Ten Largest Metro Areas: 2003*, U.S. CENSUS BUREAU, https://www.census.gov/population/www/documentation/twps0082/Table_4b.pdf (last visited Mar. 27, 2017).

7. *Metro-County Geographic-Demographic Structure*, PROXIMITYONE, http://proximityone.com/metros_chicago.htm (last visited Oct. 16, 2016).

8. *Great Lakes*, AMERICA 2050, http://www.america2050.org/great_lakes.html (last visited Oct. 16, 2016).

influence what happens in the region. Public fiscal concerns and global climate change present challenges for local governments within our regions.

Despite its importance to addressing many contemporary issues, we do not tend to emphasize regional planning as a distinct body of law. The way we often study and think about public law in the United States focuses on the law related to the powers of the national government, state government, and local government (cities, villages, towns, and counties) with sometimes brief references to regional planning and regional governance. The American Bar Association has a section of State and Local Government Law.⁹ There are treatises on state and local government law¹⁰ and books for law school courses on local government law.¹¹ “Civics 101” courses in high school and college also often ignore any attempt to create a regional consciousness. Academic articles that discuss regional planning often leave one with the perspective that there is no regional governance in the United States.¹²

This Article will provide a brief overview of some of the laws related to regional planning for the modern metropolis to make the argument that there is a law of regional planning. The overview can help provide an important context for the topic of this symposium. Regional planning laws related to regional economic development, transportation, the environment, and housing present a distinct body of emerging regional planning law with enormous opportunities for sustaining and strengthening our cities. Reform is needed, however, in how we think about and use these laws.

I. WHAT DO WE MEAN BY REGIONAL PLANNING AND REGIONAL GOVERNANCE?

As we search for the law of regional planning in the context of the modern metropolis, it is helpful to define regional planning and regional governance. Regional planning can be defined as “planning that tackles

9. *Section of State and Local Government Law*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/state_local_government.html (last visited Oct. 16, 2016).

10. OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* (4th ed. 2015); MCQUILLIN’S *THE LAW OF MUNICIPAL CORPORATIONS* (3rd ed. 2016); DANIEL R. MANDELKER & JANICE C. GRIFFITH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* (6th ed. 2006).

11. GERALD E. FRUG ET AL., *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* (5th ed. 2010).

12. DONALD F. NORRIS, DON PHARES & TONYA ZIMMERMAN, *Metropolitan Government in the United States?: Not Now . . . Not Likely*, in *GOVERNING METROPOLITAN REGIONS IN THE 21ST CENTURY* 11 (Don Phares ed., 2009) (concluding there is a “lack of meaningful metropolitan governance” in the United States); ETHAN SELTZER & ARMANDO CARBONELL, *REGIONAL PLANNING IN AMERICA: PRACTICE AND PROSPECT* 3 (2011) (summarizing the work of Leora Waldner (2008) who argues that regional governance is “ineffective”).

issues that no single jurisdiction or implementing agency can address or manage effectively on its own.”¹³ Regional governance can be defined as “deliberate efforts at collective action in environments of multiple governmental jurisdictions.”¹⁴ These two terms are related. Regional planning focuses on the study of regional issues and regional governance focuses on institutional approaches to implement regional plans. Regional governance looks to intergovernmental approaches to solve issues that extend beyond the boundaries of a single city.

The impetus for regional planning and regional governance can arise at different scales, depending on the issue. On a small scale, it might involve two adjacent communities entering into a service sharing agreement to save money. Larger scale issues might prompt action by the state or federal government.

Political Scientist David Walker identified seventeen distinct types of intergovernmental approaches found in the United States.¹⁵ He arrays them on a spectrum from the easiest to accomplish to the hardest. At the easy end of the spectrum he lists the following: (1) informal cooperation; (2) inter-local service contracts; (3) joint powers agreements; (4) extraterritorial powers; (5) regional council/councils of governments; (6) federally encouraged single-purpose regional bodies; (7) state planning and development districts; (8) contracting with the private sector; (9) local special districts; (10) transfer of functions; (11) annexation; (12) regional special districts and authorities; (13) metro multipurpose districts; and (14) reformed urban counties. Among the most difficult to create (and hence rarest) forms of intergovernmental cooperation are: (15) one-tier (city-county) consolidations; (16) two-tier restructurings dividing local and regional functions with a reorganized county providing regional functions;¹⁶ and (17) three-tier reforms involving the creation of a new regional agency to deal with multi-county metropolitan areas.¹⁷ The final three are the most rare and most difficult to create forms of intergovernmental cooperation.

The Minneapolis-St. Paul Metropolitan Council and Portland (Oregon) Metro are the only two examples of three-tier reforms in the United States. The paucity of examples in this category is evidence of the difficulty of achieving this type of reform. Using this category as the metric to judge regional governance efforts in the United States adds support to the argument that the United States lacks effective regional institutions. However, that assessment shortchanges the many examples of regional governance. Using Walker’s categorization of intergovernmental

13. SELTZER & CARBONELL, *supra* note 12, at 9.

14. *Id.* at 10.

15. David B. Walker, *Snow White and the 17 Dwarfs: from Metro Cooperation to Governance*, 76 NAT’L. CIV. REV. 14 (1987).

16. Metro Dade County (Miami-Dade) is an example.

17. The Minneapolis-St. Paul Metropolitan Council and Portland (Oregon) Metro are the only two examples in the U.S.

approaches, examples of regional planning and regional governance abound in the United States.

For example, many of the different types of intergovernmental cooperation are present in Wisconsin. Wisconsin cities and villages, the incorporated areas, have long held the authority to annex adjacent unincorporated territory located in towns.¹⁸ With the way the current state statutes are written, however, it is difficult for cities and villages to unilaterally annex territory.¹⁹ The owners of land in the unincorporated areas initiate almost all annexations by petitioning an adjacent city or village to annex their land.²⁰ Cities and villages also have long held certain extraterritorial authorities through which they can attempt to influence development in the adjacent unincorporated areas.²¹ These extraterritorial authorities include zoning, plat approval, and official mapping authorities.²² Extraterritorial plat approval and official mapping are unilateral authorities, though recent court decisions and legislation have significantly diminished city and village plat approval authority.²³ The exercise of extraterritorial zoning, however, requires the creation of a joint body with an equal number of representatives from the incorporated city or village and the adjacent unincorporated town.²⁴ Because cities, villages, and the adjacent town seldom agree with each other on the appropriate land uses, extraterritorial zoning is not widely used in Wisconsin.

Intergovernmental tensions between the incorporated areas and the unincorporated areas are often at the heart of most land use disputes in Wisconsin. To address issues related to annexation in 1994, the Wisconsin Legislature passed a law enabling the use of cooperative boundary agreements that allow a city or village to work jointly with an adjacent town to agree to appropriate land uses within the unincorporated area and phased boundary adjustments.²⁵ The City of Madison has entered into cooperative boundary agreements with most of the unincorporated towns

18. Robert D. Zeinemann, *Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-Depth Look at Wisconsin's Experience*, 39 URB. LAW. 257, 258 (2007); Nathan J. Zolik, *Comment: Suburbs, Separatism, and Segregation: The Story of Milwaukee's Boundary Through the Lens of Annexation Law*, 2001 WIS. L. REV. 501, 503 (2001).

19. Zeinemann, *supra* note 18, at 258; Zolik, *supra* note 18, at 503.

20. *Id.*

21. BRIAN W. OHM, WISCONSIN PLANNING & LAND USE LAW (2013).

22. *Id.*

23. Brian W. Ohm, *The Current Status of Extraterritorial Plat Approval Authority in Wisconsin*, 109 THE MUNICIPALITY 358 (Nov. 2014). Cities have had extraterritorial plat approval authority in Wisconsin since 1909.

24. WIS. STAT. ANN. § 62.23(7a) (West 2014).

25. WIS. STAT. ANN. § 66.0307 (West 2014).

surrounding the city, putting an end to fierce annexation battles and costly litigation.²⁶

In addition to cooperative boundary agreements, Wisconsin law also enables general intergovernmental agreements.²⁷ These agreements provide the flexibility to address a range of intergovernmental issues. They are frequently used in the sharing of local governmental services.

More traditional institutions of general-purpose government also can function as regional actors. The state itself provides a regional governing structure. State agencies can address issues of statewide or regional concern that cross local government boundaries. Within the state, all seventy-two counties can assume some regional functions related to land use,²⁸ economic development,²⁹ housing,³⁰ and transportation³¹ to name a few.³² Similarly, the larger cities in the state usually engage in neighborhood scale planning, which presents a non-intergovernmental context for regional planning. Neighborhoods in the cities of Madison and Milwaukee are more populous than most of the local governments in the state.³³ Tensions and issues can arise in neighborhoods that are similar to disputes between two local units of government elsewhere in the state.

In addition to general purpose units of government, the Wisconsin legislature, like in many states, has also enabled the creation of special purpose districts that are responsible for regional functions. Examples

26. *Intergovernmental Boundary Limits*, CITY OF MADISON, https://danedocs.countyofdane.com/PDF/capd/2010_postings/conference_presentations/InterGovAgree.pdf (last visited Oct. 16, 2016).

27. WIS. STAT. ANN. § 66.0301 (West 2014).

28. WIS. STAT. ANN. § 59.69 (West 2013); OHM, *supra* note 21, at 5-4 to 5-5.

29. WIS. STAT. ANN. § 59.57 (West 2013).

30. WIS. STAT. ANN. § 59.53(22) (West 2013).

31. WIS. STAT. ANN. § 59.58 (West 2013).

32. It is important to stress the critical regional function often played by counties across the United States. These will more likely be considered a local government. An important case from Tennessee is *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). The case introduced the ripeness requirement for regulatory takings cases brought in the federal court system. Here the regional planning commission had county-wide jurisdiction to review and approve plats. According to the Court's opinion, "Under Tennessee law, responsibility for land-use planning is divided between the legislative body of each of the State's counties and regional and municipal 'planning commissions.' The county legislative body is responsible for zoning ordinances to regulate the uses to which particular land and buildings may be put, and to control the density of population and the location and dimensions of buildings. Tenn. Code Ann. 13-7-101 (1980). The planning commissions are responsible for more specific regulations governing the subdivision of land within their region or municipality for residential development. [Tenn. Code Ann. §§] 13-3-403, 13-4-303. Enforcement of both the zoning ordinances and the subdivision regulations is accomplished in part through a requirement that the planning commission approve the plat of a subdivision before the plat may be recorded."

33. *See, e.g., The City of Madison's Neighborhood Plans*, THE CITY OF MADISON, <http://www.cityofmadison.com/planning/ndp/> (last visited Oct. 16, 2016).

include metropolitan wastewater treatment districts,³⁴ sanitary districts,³⁵ drainage districts,³⁶ baseball park districts,³⁷ professional football stadium districts,³⁸ public library systems,³⁹ and school districts.⁴⁰ Wisconsin also has regional planning commissions with primarily advisory authority.⁴¹ Not all the areas of the state fall within the jurisdiction of a regional planning authority.⁴²

The other fifty states also have similar examples of unique enabling laws specifying how the regional activity is organized and the authority over certain regional functions. There have been efforts in the past to study and categorize some of these authorities.⁴³ While it is beyond the scope of this paper to cover all of these unique laws, they combine into an important, albeit under-studied, area of regional planning law. The following sections focus on some of the more prominent national examples of regional planning law.

II. THE INSTITUTIONS OF REGIONAL GOVERNANCE: STATE AGENCY OR LOCAL GOVERNMENT?

Some regional agencies, like the Tennessee Valley Authority, are federal agencies that add to the challenge of articulating the law of regional planning. Most other regional planning efforts involve institutional arrangements created by the states. As discussed above, these regional planning efforts can take a variety of different approaches. As legal disputes involving regional governance efforts arise, so do questions about the legal status of institutions involved in regional planning. Local governments in the United States hold a different legal status than the states under both state and federal law. While cities have legal histories that predate the states, cities and other local government institutions are generally treated by

34. WIS. STAT. ANN. ch. 200 (West 2012).

35. WIS. STAT. ANN. ch. 60, subch. IX (West 2012).

36. WIS. STAT. ANN. ch. 88 (West 2012).

37. WIS. STAT. ANN. ch. 229, subch. III (West 2015).

38. WIS. STAT. ANN. ch. 229, subch. IV (West 2015).

39. WIS. STAT. ANN. ch. 43 (West 2015).

40. WIS. STAT. ANN. ch. 120 (West 2004).

41. WIS. STAT. ANN. § 66.0309 (West 2014).

42. ASS'N OF WIS. REGIONAL PLAN. COMMISSIONS, <http://www.awrpc.org> (last visited Oct. 16, 2016).

43. See, e.g., Frank S. Sengstock, *Annexation: A Solution to the Metropolitan Area Problem*, LEGIS. RES. CENTER, UNIV. OF MICH. LAW SCH. (1960); Rex L. Facer II, *Annexation Activity and State Law in the United States*, 41 URB. AFF. REV. 697 (2006); *Growing Smart Legislative Guidebook*, AM. PLAN. ASS'N, <https://www.planning.org/growingSMART/guidebook/> (last visited Oct. 16, 2016); *Federal, State, and Local Governments*, U.S. CENSUS BUREAU, <https://www.census.gov/govs/> (last visited Oct. 16, 2016).

the courts as political subdivisions of states with no inherent authority.⁴⁴ Local governments need to look to the state legislature or state constitution for grants of authority.⁴⁵ Federal law also distinguishes between state and local governments.⁴⁶ For example, federal courts have determined that federal antitrust law does not apply to the states,⁴⁷ but it can apply to local governments.⁴⁸

The different treatment of state and local governments under the law can raise issues related to whether the regional planning institution should have a legal status similar to a state agency or a local unit of government. State agencies are considered an instrumentality of the state, and states often have different laws for state agencies than for local governments regarding purchasing, personnel, open records, etc. The state enabling laws that create regional governing institutions will often specify whether a regional agency is subject to laws that apply to state agencies or to the laws that apply to local government.

Similarly, state and federal courts distinguish between state agencies and local governments for purposes of applying sovereign immunity concepts. The basic notion of sovereign immunity protects the sovereign (states) from lawsuits unless the states consent.⁴⁹ The Eleventh Amendment to the United States Constitution prohibits citizens from one state bringing a lawsuit in federal court against another state.⁵⁰ In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court of the United States held that the Tahoe Regional Planning Agency (“TRPA”) should be treated as a political subdivision of the state, rather than an instrumentality of the state, for purposes of Eleventh Amendment immunity.⁵¹

In *Lake Country Estates*, property owners in the Lake Tahoe region on the California-Nevada border sued the TRPA, alleging that the regional land use planning program adopted by the TRPA had “taken” the value of their property in violation of the Fifth and Fourteenth Amendment guarantees of due process of law and just compensation.⁵² TRPA claimed that it was immune from the lawsuit under the Eleventh Amendment.⁵³

44. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999). Washington, D.C., is the unique exception. Washington, D.C., which resembles a city-state, receives its authority from the federal government.

45. *Id.*

46. *Id.*

47. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943).

48. *Comty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 52 (1982).

49. *Hans v. Louisiana*, 134 U.S. 1, 13 (1890).

50. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

51. *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 394 (1979).

52. The TRPA is notable in that it has been the defendant in several significant Supreme Court of the United States cases challenging the land use planning effort of the

In 1968, the States of California and Nevada entered into an interstate compact to create a single agency to coordinate and regulate development in the Lake Tahoe Basin resort area and to conserve its natural resources.⁵⁴ In 1969, Congress consented to the compact and the TRPA was organized.⁵⁵ As a bi-state administrative agency, the TRPA argued that it should be entitled to the same sovereign immunity as the states that created it.⁵⁶ The Supreme Court of the United States, however, was unwilling to adopt a blanket rule that interstate compact agencies are immune from lawsuits under the Eleventh Amendment. Based on the language of the compact, the enabling legislation of the two states, and Congress's consent, the Supreme Court of the United States held that the TRPA was not entitled to the states' cloak of sovereign immunity under the Eleventh Amendment.⁵⁷ The states, however, may be able to extend the Eleventh Amendment immunity they enjoy to multi-state regional planning entities based on the enabling legislation language.⁵⁸

The *Lake Country Estates* case and the TRPA highlight a unique and growing body of regional planning law related to interstate compacts. Many regional issues transcend state borders given the fact that many major metropolitan areas are located near state borders. There is an increasing number of regional authorities created by interstate compact.⁵⁹ Interstate compacts are contracts between two or more states. Interstate compacts are often initiated by the states in an effort to resolve some regional issue.⁶⁰ The United States Constitution, however, prohibits states from entering into

TRPA as a "takings." See *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (finding that a challenge to whether the TRPA's TDR program meets the constitutional requirement of just compensation for a taking is ripe for adjudication even though Suitum has not attempted to sell the development rights she has or is eligible to receive); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002) (upholding a moratorium).

53. *Lake Country Estates*, 440 U.S. at 391.

54. *Id.*

55. *Id.* at 394.

56. *Id.* at 400.

57. *Id.* at 400-02 (1979). The property owners also sued the employees of the TRPA. The Supreme Court of the United States held that the employees were immune from the lawsuit because they were "acting in a capacity comparable to that of members of a state legislature."

58. See, e.g., *Council of Commuter Orgs. v. Metro. Transp. Auth.*, 683 F.2d 663 (2d Cir. 1982). The case involved a lawsuit brought in federal court against the Tri-State Regional Planning Commission ("Tri-State"). Tri-State is an interstate agency created by interstate compact that is responsible for planning transportation improvements in the New York City metropolitan area. The statutes of the three compacting states (New York, New Jersey, and Connecticut) provide that Tri-State shall "enjoy the sovereign immunity of the party states and may not be sued in any court or tribunal whatsoever." The Court in *Council of Commuter Organizations* acknowledged that these statutes gave Tri-State an immunity coextensive with the Eleventh Amendment. *Id.* at 672.

59. See THE NAT'L CENTER FOR INTERSTATE COMPACTS, <http://www.csg.org/NCIC/about.aspx> (last visited October 30, 2016).

60. *Id.*

interstate compacts without the approval of Congress. Article I, Section 10 of the United States Constitution provides that “No state shall, without the Consent of congress . . . enter into any agreement of Compact with another State.”⁶¹ Creating interstate compacts therefore creates the seemingly herculean task of persuading multiple states to approve a regional cooperative effort, plus obtaining the consent of Congress.⁶² The Port Authority of New York, established in 1921 by New York and New Jersey, is viewed as the first regional governing entity created by an interstate compact.⁶³

Legal scholars have noted the need to revisit the legal status of cities to empower them to better address contemporary urban issues.⁶⁴ While it is a bit more amorphous, a related issue would be the need to also examine the role of regional planning institutions. Should regional planning organizations share the same legal status as cities?

III. SUBSTANTIVE AREAS OF REGIONAL PLANNING LAW

The following sections highlight four areas of regional planning law that are important to the modern metropolis and urban areas: economic development, the environment, transportation, and housing. This is not an exhaustive list of the substantive areas of law involving regional planning.⁶⁵ The following sections are intended to provide an overview of regional planning activities in these areas, the important role that regional planning institutions play in addressing contemporary issues in urban areas, and the potential for future collaborative adventures. One theme that is consistent throughout these four areas is the role of the federal government in supporting regional efforts and the influence of federal programs on the modern metropolis. The federal government has played a key role through the years in promoting regional governance and planning.

A. Regional Economic Development Law

One of the boldest examples of regional governance promoted by the federal government was the creation of the Tennessee Valley Authority

61. Not all agreements between states require the consent of Congress. In *Virginia v. Tennessee*, 148 U.S. 503 (1893), the United States Supreme Court determined that consent was required only for those agreements that would infringe on the rights of the federal government.

62. Despite the paucity of books on the law of regional planning, books on the law of interstate compacts are available. See FREDERICK L. ZIMMERMANN & MITCHELL WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* (1976).

63. See Felix Frankfurter & James Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L. J.* 685, 749-54 (1928).

64. See GERALD E. FRUG & DAVID BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008); FRUG, *supra* note 44.

65. Other regional governing entities include regional arts boards and area agencies on aging.

(“TVA”) by Congress in 1933 as part of President Franklin Roosevelt’s New Deal.⁶⁶ The TVA was created as a federally-owned corporation to provide electricity generation, flood control, and economic development in the Tennessee River Valley, which covers parts of seven southeastern states.⁶⁷ The Great Depression had a particularly harsh impact on this region.

The Supreme Court of the United States upheld the constitutionality of the act creating the TVA in 1939 in *Tennessee Electric Power Co. v. Tennessee Valley Authority*.⁶⁸ The challenge came from private power companies that were concerned about the competition from the cheaper energy available through the TVA, a corporation owned and operated by the federal government.⁶⁹ The Court held that the production of hydroelectric power was directly related to navigation and flood control; that the power program was operated with primary concern for navigation and flood control, as directed by the Act; and that the production and sale of power was in harmony with the constitutional provisions concerning property, commerce, and national defense.⁷⁰

In addition to creating regional entities like the TVA that are charged with regional economic development,⁷¹ the decisions of federal agencies can influence regional economic development.⁷² The Supreme Court of the United States acknowledged the role that decisions of federal agencies play in regional economic development in a case challenging the merger of the Pennsylvania Railroad Company and the New York Central Railroad Company (into what would become the Penn-Central Railroad).⁷³

66. TENN. VALLEY AUTHORITY, *Our History*, <https://www.tva.com/About-TVA/Our-History> (last visited Mar. 28, 2017).

67. The seven states are Alabama, Georgia, Kentucky, Mississippi, North Carolina, Tennessee, and Virginia. TENN. VALLEY AUTHORITY, <http://www.tva.gov> (last visited October 30, 2016).

68. *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118 (1939).

69. *Id.* at 149.

70. Three years earlier the Supreme Court, in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), ruled that the TVA had the authority to generate power and sell and distribute the electricity. While this case also raised the issue of the constitutionality of the act creating the TVA, the Court did not address the issue. This case is famous for Justice Brandeis’s concurrence in which he articulated the “avoidance doctrine,” providing rules for courts to use to refrain from deciding certain constitutional questions in deference to the other branches of government.

71. Another prominent economic development effort by the federal government is the partnership created with the states in the Appalachian Regional Commission. APPALACHIAN REGIONAL COMM’N, <https://www.arc.gov/about/index.asp> (last visited October 30, 2016). For a discussion of the impact of the Appalachian Regional Commission on economic development see Andrew Isseman & Terance Rephann, *The Economic Effects of the Appalachian Regional Commission: An Empirical Assessment of 26 Years of Regional Development Planning*, 61 J. AM. PLAN. ASS’N 345 (1995).

72. *Id.*

73. *Balt. & Ohio R.R. Co. v. United States*, 386 U.S. 372, 445–46 (1967) (Douglas, J., dissenting in part).

In a dissenting opinion, Justice William O. Douglas criticized the Interstate Commerce Commission's approval of the merger, because the record developed by the Commission failed to include information about the impact of the merger on communities served by the two railroads.⁷⁴ Justice Douglas stated, "Rail mergers are only one form of regional planning. And whatever the attitude of the Commission may have been, it cannot . . . fail to relate to the standard of the 'public interest' the impact of the merger on the various communities served by these lines."⁷⁵ In his dissenting opinion, Justice Douglas asked:

What will the effect of this merger be on these communities? Will industry locate elsewhere because of inadequate rail transportation? Will the firms located in the region cease to expand or move to other areas? Will decreased employment opportunities mean that the residents of these towns must move elsewhere, thus creating more of the ghost towns which we already see along many of the trunklines? None of these questions is even considered by the Commission. . . . This merger, like the ones preceding it, apparently is a manipulation by financiers and not a part of regional planning which is the ultimate function of the Interstate Commerce Commission.⁷⁶

A more pervasive example of the influence of the federal government in promoting regional economic development planning is the Economic Development Administration ("EDA") within the United States Department of Commerce.⁷⁷ For many years, the EDA has required that regions prepare economic development plans as a prerequisite to qualifying for various economic development assistance funds administered by the EDA.⁷⁸ Regions must update the plans—now referred to as a "Comprehensive Economic Development Strategy" ("CEDS")—at least every five years.⁷⁹ The task of preparing the regional plan often falls to a state-created regional planning agency⁸⁰ or a county.⁸¹

74. *Id.* at 445.

75. *Id.*

76. *Id.* at 451–52.

77. See U.S. ECON. DEV. ADMIN, <https://www.eda.gov/ceds/> (last visited October 30, 2016).

78. *Id.*

79. *Id.*

80. See, e.g., *South Florida Comprehensive Economic Development Strategy, 2012-2017* (2012), SOUTH FLORIDA REGIONAL PLANNING COUNCIL, available at <http://www.sfrpc.com/CEDS/SouthFloridaCEDS2012-17.pdf>; *Comprehensive Economic Development Strategy* (2012), EASTERN CAROLINA COUNCIL, available at <http://www.eccog.org/economic-development/economic-development-administration/comprehensive-economic-development-strategy/>.

B. Regional Environmental Law

Regional planning law related to the environment is rather extensive, due in large part to the fact that many of our natural resources are not confined to the boundaries of one unit of government.⁸² Over the years, various federal laws, such as the Clean Water Act, the Clean Air Act, and the Coastal Zone Management Act, have shaped regional efforts.⁸³ Some of the laws, such as the Clean Water Act and the Clean Air Act, recognize different approaches for urban areas versus rural areas.⁸⁴ These laws impact the modern metropolis.⁸⁵ In addition, many of the states have created a number of place-based regional planning institutions with the express purpose of addressing unique ecological systems, such as the TRPA.⁸⁶ These institutions were created by unique enabling laws and were often influenced by the environmental resource the institution was designed to protect.⁸⁷ Many of these regional institutions are located outside major metropolitan areas, so they do not directly address the issues of the modern metropolis.⁸⁸

Perhaps one of the most significant developments for the modern metropolis has been the effort to link the federal transportation planning process with the federal Clean Air Act. This linkage is discussed in more detail in the section below on the law related to regional transportation planning.⁸⁹

Another federal law that influenced regional planning activities was the Clean Water Act.⁹⁰ Section 208 of the Clean Water Act (“Section 208”) required states to prepare area-wide water quality management plans.⁹¹

81. See, e.g., HUDSON COUNTY DIVISION OF PLANNING, *Comprehensive Economic Development Strategy* (2010), available at <http://www.hudsoncountynj.org/comprehensive-economic-development-strategy-ceds/>; SAN BERNARDINO COUNTY, CALIFORNIA, *Comprehensive Economic Development Strategy* (2015), available at <http://www.sbcountyadvantage.com/SanBernardino/media/San-Bernardino/CEDS%20Update%202014-15/CEDS-2015-Update.pdf?ext=.pdf>.

82. See, e.g., Daniel R. Mandelker & Susan B. Rothschild, *The Role of Land-Use Controls in Combating Air Pollution under the Clean Air Act of 1970*, 3 *ECOLOGY L.Q.* (1973).

83. *Id.*

84. *Id.*

85. *Id.*

86. Other examples include the Adirondack Park Agency (New York), the Pinelands Commission (New Jersey), the Cape Cod Commission (Massachusetts). *Growing Smart Legislative Guidebook*, *supra* note 43, at 6-19.

87. *Id.*

88. *Id.*

89. See *infra* note 158 and accompanying text.

90. See Clean Water Act, 33 U.S.C. §§ 1251-1387 (2012).

91. 208 (Wastewater) *Water Quality Management Plans*, S.C. DEP'T OF HEALTH AND ENVTL. CONTROL, <http://www.scdhec.gov/HomeAndEnvironment/Water/208WaterQualityManagement/> (last visited Nov. 12, 2016).

These plans included programs for the improvement of wastewater treatment systems (point source pollution) and storm water runoff (non-point source pollution).⁹² Many states delegated the responsibility for preparing area-wide water quality plans to regional planning entities covering the metropolitan areas of the state, while wastewater treatment systems often covered multiple units of local government.⁹³ These plans often designated sewer service areas and future expansions of those areas.⁹⁴ The federal government awarded construction grants for improvements to water treatment systems based on the consistency of the improvement with the plans.⁹⁵ The Section 208 area-wide water quality planning process varied from state to state.⁹⁶ Some states recognized that controlling the amount of the sewer area could control growth and used the Section 208 water quality planning process to give regional planning bodies the authority to use the sewer service area planning process as a growth management mechanism.⁹⁷ More recent efforts to promote green infrastructure by regional planning institutions are a natural evolution of the Section 208 water quality planning process.⁹⁸

In addition to the issue of water quality addressed in the Clean Water Act, the issue of water supply has been the subject of recent litigation raising regional environmental issues.⁹⁹ The pending original action before the Supreme Court of the United States in *Mississippi v. Tennessee*¹⁰⁰ may influence regional approaches to the use of groundwater. The case involves the pumping of ground water from the Memphis Sands Aquifer (the “Aquifer”) by the City of Memphis.¹⁰¹ The Aquifer extends into the State of Mississippi.¹⁰² Mississippi is claiming that the City of Memphis is taking its water.¹⁰³ Many interstate compacts, such as the one that created the TRPA,

92. Robert W. Adler, *Water and Wastewater Infrastructure in the United States: The Clean Water-Energy- Climate Nexus*, 4 J. ENERGY & ENVTL. L. 1, 12 (2013).

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *See, e.g.,* City of Lake Elmo v. Metro. Council, 685 N.W.2d 1 (Minn. 2004); Doerr v. Racine Cty., No. 92-0034, 1992 WL 459584, at *1 (Wis. Ct. App Dec. 9, 1992).

98. *See, e.g.,* CENT. MIDLANDS COUNCIL OF GOV'T, *Improving Water Quality with Green Infrastructure* (2011), http://centralmidlands.org/Envplan/GI_Final_Document.pdf.

99. *See* Mingo Logan Coal Co. v. EPA, 829 F.3d 710 (D.C. Cir. 2016); MPM Silicones, LLC v. Union Carbide Corp., No. 11CV1542BKSATB, 2016 WL 3962630 (N.D.N.Y. July 7, 2016); Peterborough Oil Co., LLC v. Dep't of Env'tl. Prot., 50 N.E.3d 827 (2016).

100. *Mississippi v. Tennessee*, Docket No. 220143 ORG (U.S. June 10, 2014).
Lawsuits can originate in the Supreme Court of the United States when one state sues another state.

101. Brief of the City of Memphis in Opposition to the State of Mississippi's Motion for Leave to File Bill of Complaint in Original Action at *12, *Mississippi v. Tennessee*, 136 S. Ct. 499 (2014) (No. 143), 2014 WL 5463360, at *1.

102. *Id.*

103. *Id.*

address multi-state regional water supply issues.¹⁰⁴ As water supply becomes an increasingly important issue for the modern metropolis, interstate compacts are playing an increasingly prominent role.¹⁰⁵

The Supreme Court of the United States recently addressed a number of lawsuits involving surface waters governed by interstate compacts.¹⁰⁶ An example is *Tarrant Regional Water District v. Herrmann*.¹⁰⁷ *Tarrant*, decided unanimously, resolved a dispute between a Texas regional water authority and the State of Oklahoma over the efforts of the Texas water authority to acquire water from Oklahoma.¹⁰⁸ The dispute involved the Red River Compact, a multi-state compact approved by Congress that allocates water rights among the States within the Red River Basin as it winds through Texas, Oklahoma, Arkansas, and Louisiana.¹⁰⁹ Rapid population growth in the Dallas and Fort Worth region has strained regional water supplies.¹¹⁰ The Tarrant Regional Water District wanted to divert water from Oklahoma but knew that Oklahoma would likely deny a permit due to Oklahoma laws that prevent out-of-state diversions of water.¹¹¹ The Tarrant Regional Water District claimed that it was entitled to acquire water under the Compact from within Oklahoma and that, therefore, the Compact pre-empted several Oklahoma statutes that restrict out-of-state diversions of water.¹¹² The Supreme Court, in a decision written by Justice Sotomayor, sided with the State of Oklahoma.¹¹³

The case centered on the interpretation of the Compact under principles of contract law.¹¹⁴ The Tarrant Regional Water District argued that the provisions of the Compact that gave each state equal rights to the allocation of water within certain limits created “a borderless common in which each of the four signatory States may cross each other’s boundaries to access a shared pool of water,” and argued that the Compact pre-empted Oklahoma’s water statutes.¹¹⁵

104. *Id.*

105. Another prominent example is the Great Lakes Compact, a regional planning effort involving all the states and Canadian Provinces bordering the Great Lakes. GREAT LAKES COMPACT COUNCIL, <http://www.glscompactcouncil.org> (last visited on October 30, 2016). Cities bordering the Great Lakes also recognize the importance of the water resources to the future vitality of the modern metropolis. Many of the large cities are part of the Great Lakes and St. Lawrence Cities Initiative. *Great Lakes and St. Lawrence Cities Initiative*, <http://glsccities.org> (last visited Nov. 12, 2016).

106. *See, e.g.*, *Dept. of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008); *Arizona v. California*, 547 U.S. 150 (2006).

107. *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120 (2013).

108. *Id.* at 2125.

109. *Id.*

110. *Id.* at 2128.

111. *Id.* at 2128.

112. *Id.* at 2129.

113. *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2137 (2013).

114. *Id.* at 2130.

115. *Id.* at 2129.

The Supreme Court of the United States disagreed.¹¹⁶ The Court noted that:

[w]hile the Compact allocates water rights among its signatories, it also provides that it should not “be deemed to . . . [i]nterfere with or impair the right or power of any Signatory State to regulate within its boundaries the appropriate use and control of water, or quality of water, not inconsistent with its obligations under this Compact.”¹¹⁷

Recognizing that the States hold an absolute right to all navigable waters and the soils under them as an essential attribute of sovereignty, the Court was unwilling to interpret the Compact to mean that Oklahoma had contracted away its sovereign right to control water within its boundaries.¹¹⁸ The Court did not find that the Compact provided Texas with any cross-border rights to Oklahoma’s water.¹¹⁹ As a contract, the wording of the Compact is important.¹²⁰

C. Regional Transportation Law

Regional transportation law is largely shaped by the institutional framework established in federal law and by requirements that states create “metropolitan planning organizations” (“MPOs”).¹²¹ In light of how transportation systems have helped shape the modern metropolis, it is perhaps the most prominent area of regional planning law.¹²²

The history of MPOs is summarized in an early case, *County of Los Angeles v. Coleman*,¹²³ in which the United States District Court for the District of Columbia upheld the United States Department of Transportation (“DOT”) Rules related to MPOs. The following summary is taken from that case:

The Federal-Aid Highway Act of 1956, as amended by [subsequent Highway Acts], establishes procedures by which the Federal Government cooperates with the states and their political subdivisions to fund each state’s program of highway improvement projects. Under its “trust fund”

116. *Id.* at 2131.

117. *Id.* at 2127.

118. *Id.* at 2132.

119. *Tarrant Reg’l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013).

120. *Id.* at 2130.

121. Brian D. Taylor & Lisa Schweitzer, *Assessing the Experience of Mandated Collaborative Inter-jurisdictional Transport Planning in the United States*, 12 *TRANSP. POL’Y* 500 (2005).

122. *Id.*

123. *County of Los Angeles v. Coleman*, 423 F. Supp. 496 (D.C. Cir. 1976).

concept, a specified percentage of certain highway use taxes are received into the United States Treasury and then apportioned to the states by the Secretary¹²⁴

The Supreme Court of the United States went on to say that, “[t]he Highway Act of 1962 originated what became known as the ‘3-C planning process’ (‘continuing, comprehensive and cooperative process’). . . .”¹²⁵ As part of this process, the Highway Act of 1970 added language that stated federal funds would not be approved for highway or mass transit projects in any “urban area of more than fifty thousand population unless . . . the projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities.”¹²⁶ To get local input in the urban areas with populations of at least 50,000 people, the Highway Act of 1973 outlined a regional planning process, carried out by authorities “referred to by Congress as ‘metropolitan planning organizations’ to be designated by the states.”¹²⁷

Under federal law, the governor of each state, in agreement with local officials, must designate an MPO for each urban area with more than 50,000 people.¹²⁸ The MPO will plan for the transportation needs of that area.¹²⁹ The MPO will also develop a long-range transportation plan that specifies the facilities, services, financing techniques, and management policies that will comprise the area’s transportation system over a twenty-year period,¹³⁰ as well as a short-term transportation improvement program (“TIP”) that identifies and prioritizes the specific transportation projects to be carried out over the next four years.¹³¹ These plans and programs identify transportation “projects” that the MPO wants to implement.¹³²

While these regional transportation plans are critical components of metropolitan transportation planning, the plans have resulted in a relatively small number of lawsuits challenging the plans.¹³³ Many people are not

124. *Id.* at 497.

125. *Id.*

126. *Id.* at 498.

127. *Id.*

128. 23 U.S.C. § 134(d) (2012); 49 U.S.C. § 5303(c)(1) (2012).

129. *See* 23 U.S.C. § 134 (2012); 49 U.S.C. § 5303 (2012).

130. 23 U.S.C. § 134(I) (2012); *see also* 49 U.S.C. § 5303(f) (2012).

131. 23 U.S.C. § 134(j) (2012); *see also* 49 U.S.C. § 5304(b) (2012).

132. *See generally* 23 U.S.C. §§ 101-70 (2012); 49 U.S.C. §§ 5301-40 (2012).

133. *See, e.g.,* *Minn. Ctr. for Env'tl. Advocacy v. Metro. Council*, 587 N.W.2d 838 (Minn. 1999) (The Minnesota Supreme Court denied a certiorari challenge to the MPO’s plans because the court approval of the plans was a quasi-legislative action, not a quasi-judicial action.); *Allendale Neighborhood Assoc. v. Austin Transp. Study Policy Advisory Comm.*, 840 F.2d 258 (5th Cir. 1988) (alleging the MPO’s plan failed to consider social, economic, and environmental goals in violation of federal law); *City of Des Moines v. Puget Sound Reg'l Council*, 988 P.2d 993 (Wash. Ct. App. 1999) (holding that where there is a conflict between regional and local plans and where a coordinated planning process has occurred as in the case of the MPO transportation planning process, the regional plan prevails).

aware of the role that MPOs play in the transportation planning process for metropolitan regions.¹³⁴ This unawareness is reflected in a recent decision of the Oregon Supreme Court reviewing the adequacy of a ballot prepared as an initiative for electors to vote on eliminating the planning authority of metropolitan service districts in Oregon.¹³⁵ The ballot did not inform voters that it would impact the MPO functions of metropolitan service districts, thereby jeopardizing federal transportation funding.¹³⁶ Also, disputes can sometimes arise over differing viewpoints between the individual appointed to serve on an MPO and the entity responsible for appointing the person to serve on the MPO.¹³⁷

The Federal Highway Administration and the Federal Transit Administration recently published the final rule guiding regional planning processes.¹³⁸ The rule reflects the passage of the Moving Ahead for Progress in the 21st Century Act (“MAP-21”)¹³⁹ and the Fixing America’s Surface Transportation Act (“FAST”).¹⁴⁰

Other federal transportation laws also build off of regional planning efforts.¹⁴¹ For example, the Federal Airport and Airway Improvement Act (“AAIA”) provides that the Federal Aviation Administration (“FAA”) may only approve an airport project if it is “consistent with plans of public agencies authorized by the State in which the airport is located to plan for the development of the area surrounding the airport.”¹⁴² The recent case of *Tinicum Township v. United States Department of Transportation*¹⁴³ involved a dispute over airport expansion plans for the Philadelphia International Airport and which agency plans apply for the consistency determination—the local government where the airport is located or the MPO.

The FAA reviewed the plans of the Delaware Valley Regional Planning Commission (“DVRPC”), the state-authorized MPO, and comprehensive land use planning agency for the Delaware Valley region, finding that the airport expansion project was reasonably consistent with public agency development plans for the area.¹⁴⁴ Tinicum Township contended that the FAA failed to comply with the requirements of the

134. MICHAEL D. MEYER, TRANSPORTATION PLANNING HANDBOOK 1120 (4th ed. 2016).

135. *Schoenheit v. Rosenblum*, 345 P.3d 436 (Or. 2015).

136. *Id.*

137. *See, e.g., Rash-Aldridge v. Ramirez*, 96 F.3d 117 (5th Cir. 1996).

138. *Statewide and Nonmetropolitan Transportation Planning, Metropolitan Transportation Planning*, 81 Fed. Reg. 34049 (June 27, 2016) (to be codified at 23 C.F.R. pt. 450).

139. H.R. Res. 4348, 112th Cong. (2012) (enacted),

<https://www.gpo.gov/fdsys/pkg/BILLS-112hr4348enr/pdf/BILLS-112hr4348enr.pdf>.

140. H.R. 22, 114th Cong. (2015) (enacted), <https://www.gpo.gov/fdsys/pkg/PLAW-114publ94/pdf/PLAW-114publ94.pdf>.

141. *See infra* note 158.

142. 49 U.S.C. § 47106(a)(1) (2012).

143. *Tinicum Twp. v. U.S. Dep’t of Transp.*, 685 F.3d 288 (3rd Cir. 2012).

144. *Id.* at 288.

AAIA because it argued Tincicum Township and Delaware County are the relevant public agencies for the consistency determination.¹⁴⁵

The United States Court of Appeals for the Third Circuit, however, rejected that contention.¹⁴⁶ The court noted that the DVRPC was created in 1965 by the Delaware Valley Urban Area Compact.¹⁴⁷ This compact designated the DVRPC as an “instrumentality of the Commonwealth of Pennsylvania and the State of New Jersey exercising a government function.”¹⁴⁸ The court found that the DVRPC qualifies as a public agency under the AAIA.¹⁴⁹ The court noted that DVRPC’s plans are particularly relevant to the FAA’s consistency determination because of its role in conducting transportation planning for the region surrounding the Philadelphia International Airport.¹⁵⁰ In the compact, Pennsylvania and New Jersey granted the DVRPC authority “to organize and conduct a continuing, comprehensive, coordinated regional planning program for the area, including but not limited to transportation planning for the interests and purposes . . . of the agencies of Pennsylvania and New Jersey . . . as well as for the purposes of the local governments and their planning agencies.”¹⁵¹ The court then concluded that the FAA reasonably looked to the DVRPC’s plans in making its consistency determination.¹⁵²

The MPO planning process is critical for promoting a multi-modal transportation system for the modern metropolis. Besides planning for the automobile, MPOs are also involved in planning for transit, bicycles, and pedestrians.¹⁵³

D. Linking regional transportation to environmental issues

The automobile is a major component of the transportation system and a significant contributor to one of the major environmental issues confronting the modern metropolis—air pollution. While the regional transportation plans and TIPs prepared by MPOs are specifically excluded from the National Environmental Policy Act (“NEPA”),¹⁵⁴ as a result of language added in 2006 by the Transportation Equality Act,¹⁵⁵ these plans are tied to the Federal Clean Air Act. For many years, the federal

145. *Id.* at 299.

146. *Id.*

147. *Id.*

148. *Id.* at 299 (citing Art. VI, § 1 of the compact).

149. *Tincicum Twp. v. U.S. Dep’t of Transp.*, 685 F.3d 288, 299 n.18 (3rd Cir. 2012).

150. *Id.* at 299.

151. *Id.*

152. *Id.* at 299-300.

153. Susan Handy & Barbara McCann, *The Regional Response to Federal Funding for Bicycle and Pedestrian Projects*, 77 J. AM. PLAN. ASS’N 23, 24 (2010).

154. 42 U.S.C. §§ 4321-4370 (2012).

155. 23 U.S.C. § 134(o) (2012); 23 U.S.C.A. §§ 134(p), 135(j) (Supp. 2007); *see also* Atlanta Coal. on the Transp. Crisis, Inc. v. Atlanta Reg’l Comm’n, 599 F.2d 1333 (5th Cir. 1979).

government has attempted to integrate the federal transportation planning process guided by MPOs with the requirements of the Clean Air Act because of concern over pollution arising from automobile emissions. The efforts are summarized by the United States Court of Appeals for the District of Columbia in *Environmental Defense Fund v. Environmental Protection Agency*:

The Clean Air Act establishes a joint state and federal program for regulating the nation's air quality. The Act requires EPA to establish National Ambient Air Quality Standards ("NAAQS") for various pollutants. It also requires each state to adopt a State Implementation Plan (known as a "SIP") that "provides for implementation, maintenance, and enforcement of [NAAQS] in each air quality control region (or portion thereof) within such State." SIPs must include "enforceable emission limitations and other control measures, means, or techniques . . . as well as schedules and timetables for compliance, as may be necessary or appropriate" to meet the NAAQS. "After reasonable notice and public hearings," each state must submit a SIP with such pollution control strategies to EPA. EPA typically approves SIPs pursuant to notice-and-comment rulemaking.

In 1977, Congress amended the Clean Air Act to ensure that transportation planning at the local level conforms to pollution controls contained in approved SIPs. To accomplish this, the 1977 amendments prohibit federal agencies from assisting, approving, or supporting "any [transportation] activity which does not conform to [an applicable SIP]."

Because Congress "offered little guidance" on the 1977 conformity requirement, and because federal agencies "largely . . . ignored" it, Congress amended the Act again in 1990 to expand the content and scope of this requirement. . . .

. . .

[T]he 1990 amendments integrate the attainment and maintenance of air quality standards with the specific transportation planning process prescribed by [federal transportation statutes]. As the Clean Air Conference Report put it, "the purpose of the new 'conformity'

requirement is to ensure that the transportation systems choices made by the community and incorporated into the regional transportation plan required by [federal transportation statutes] are consistent with achieving the allowable emission targets for each pollutant assigned to mobile sources in the SIP.” . . .The heart of the Clean Air Act’s 1990 conformity requirements consists of the following restrictions on approval and funding of transportation plans, programs, and projects:

...

...No Federal agency may approve, accept or fund any transportation plan, program or project unless such plan, program or project has been found to conform to any applicable implementation plan in effect under this chapter.¹⁵⁶

The Clean Air Act’s 1990 conformity requirements elevated the role of MPOs in carrying out SIPs. No MPO can give its approval to any project, program, or plan that does not conform to the SIP.¹⁵⁷ MPOs make the conformity decision following criteria and procedures promulgated in rules by the Environmental Protection Agency.¹⁵⁸ Emissions expected from implementation of such plans and programs must be consistent with estimates of emissions from motor vehicles and necessary emissions reductions contained in the applicable SIP.¹⁵⁹ The provisions apply only to “nonattainment” areas (i.e., areas that have not met an air quality standard for a particular pollutant) and to “maintenance” areas (i.e., former nonattainment areas that have met the appropriate standard).¹⁶⁰ While one might expect that the conformity determination by MPOs would lead to

156. *Envtl. Def. Fund v. Env'tl. Prot. Agency*, 167 F.3d 641, 643-44 (1999) (internal citations omitted).

157. *See* 42 U.S.C. § 7506(c)(1) (2012).

158. *See* 42 U.S.C. § 7506(c)(2)-(3) (2012). The EPA rules have been subject to several court challenges. *See, e.g.*, *Env'tl. Def. Fund v. Env'tl. Prot. Agency*, 509 F.3d 553 (D.C. Cir. 2007); *Env'tl. Def. v. Env'tl. Prot. Agency*, 467 F.3d 1329 (D.C. Cir. 2006); *Sierra Club v. Env'tl. Prot. Agency*, 129 F.3d 137 (D.C. Cir. 1997) (invalidating one-year exemption from statutory conformity requirements for transportation activities in nonattainment areas); *Env'tl. Def. Fund, Inc. v. Env'tl. Prot. Agency*, 82 F.3d 451 (D.C. Cir. 1996) (upholding various regulations as reasonable interpretations of the statute).

159. *See* 42 U.S.C. § 7506(c)(2)(A) (2012); *see also Env'tl. Def. Fund*, 167 F.3d at 643-44.

160. *See* 40 C.F.R. §§ 93.101, 93.102(b) (2016).

significant litigation, the requirements have only generated a few lawsuits challenging MPO conformity decisions.¹⁶¹

Some states, particularly California, expand on the federal requirements and incorporate and promote additional planning requirements for MPOs. In 1997, the California State Legislature enacted a law adding state statutory requirements for regional transportation plans designed to achieve a coordinated and balanced regional transportation system.¹⁶² In 2008, the Legislature enacted Senate Bill 375, requiring each MPO, as part of its regional transportation plan, to adopt a “sustainable communities strategy.”¹⁶³ In this sustainable communities strategy, each MPO must adopt regional land use and transportation strategies designed to meet, if feasible, regional greenhouse gas emissions reduction targets for 2020 and 2035 established by the California Air Resources Board.¹⁶⁴ Recent court decisions have been supportive of aggressive approaches by MPOs to reduce greenhouse gas emissions.¹⁶⁵

The push to have MPOs address greenhouse gas emissions, however, remains dependent on state legislation. A similar case from the State of Washington concluded that the relevant statutes did not require regional transportation plans to achieve greenhouse gas emissions reduction requirements established by the state.¹⁶⁶

Another effort to link regional transportation planning to the environment relates to the role of the MPO transportation planning process in environmental justice. President Bill Clinton’s Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” requires each federal agency to “make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”¹⁶⁷ The adverse impact of certain transportation projects in the past on disadvantaged communities is well documented.¹⁶⁸ In an effort to address those impacts in the transportation planning process, the DOT developed the following principles to guide its actions:

161. *See, e.g.*, *Sierra Club v. Atlanta Reg’l Comm’n*, 255 F. Supp. 2d 1319 (N.D. Ga. 2002); *Sierra Club v. Atlanta Reg’l Comm’n*, 171 F. Supp. 2d 1349 (N.D. Ga. 2001); *Env’tl. Council of Sacramento v. Slater*, 184 F. Supp. 2d 1016 (E.D. Cal. 2000).

162. CAL. GOV’T § 65080(a) (1997).

163. 2008 CAL. LEGIS. SERV. ch. 728 (S.B. 375).

164. *Id.*

165. *See Bay Area Citizens v. Ass’n of Bay Area Gov’ts*, 248 Cal. App. 4th 966, 1014 (Cal. Ct. App. 2016).

166. *See Cascade Bicycle Club v. Puget Sound Reg’l Council*, 306 P.3d 1031, 1041 (Wash. Ct. App. 2013).

167. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

168. VOICES OF RONDO: ORAL HISTORIES OF SAINT PAUL’S HISTORIC BLACK COMMUNITY (Kate Cavett ed., 2005).

- (1) To avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations;
- (2) To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process; and
- (3) To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.¹⁶⁹

As part of the federally-funded transportation process, transportation plans and approvals of projects by MPOs are supposed to follow these principles.¹⁷⁰ The DOT recently began to explore the relationship of climate change to environmental justice concerns in the context of transportation projects.¹⁷¹

The regional transportation planning process provides a forum for groups to raise larger social justice legal issues confronting the modern metropolis. For several years in the Milwaukee metropolitan area, for example, civil rights and environmental organizations have voiced their concerns to the federal government in the process to recertify Southeastern Wisconsin Regional Planning Commission (“SEWRPC”) as the MPO for the Milwaukee metropolitan area.¹⁷² The concerns outline how the transportation plans and decisions by SEWRPC disproportionately benefit whites and adversely impact racial minorities.¹⁷³ The Milwaukee metropolitan area is one of the most segregated metropolitan areas in the United States.¹⁷⁴ Raising the awareness of this issue as part of the regional

169. DEPARTMENT OF JUSTICE ENVTL. STRATEGY, http://www.fhwa.dot.gov/environment/environmental_justice/ej_at_dot/dot_ej_strategy/index.cfm (last updated May 4, 2016).

170. *Id.*

171. *Climate Change and Environmental Considerations for Transportation Decision-Making*, DEPARTMENT OF TRANSPORTATION, http://www.fhwa.dot.gov/environment/environmental_justice/publications/ej_and_climate/index.cfm (last updated July 6, 2016).

172. Karyn L. Rotker, *ACLU Comments Re: Recertification of SEWRPC* (July 16, 2012), http://midwestadvocates.org/assets/news/SEWRPC/7-16-12_SEWRPC_Recertification_Review_Comments_-_with_all_attachments.pdf. National studies have shown similar issues. See Arthur C. Nelson, Thomas W. Sanchez, James F. Wolf & Mary Beth Farquhar, *Metropolitan Planning Organization Voting Structure and Transit Investment Bias: Preliminary Analysis with Social Equity Implications*, TRANSPORT. RES. REC. 1 (2004).

173. *Id.*

174. Kevin Tidmarsh, *Milwaukee: The Most Segregated and Polarized Place in America* (Sept. 2014), <http://www.governing.com/topics/politics/gov-milwaukee-most-segregated-polarized-place.html>.

planning process has resulted in SEWRPC creating an Environmental Justice Task Force and preparing a regional housing plan.¹⁷⁵

IV. REGIONAL HOUSING LAW

Following decades of population loss as residents moved to suburban cities, new residential development in older cities increased over the past decade.¹⁷⁶ Much of the new development in older cities is fueled by a growth in rental housing.¹⁷⁷ According to a recent report by Harvard University's Joint Center for Housing Studies, the number of renter households grew by almost nine million, the largest increase during any ten-year period on record.¹⁷⁸

With this activity, there is a continued focus on the need for affordable housing. As with the other substantive areas of law discussed above, it is possible to point to a distinct body of regional planning law developed over the past four decades in reaction to the exclusionary zoning practices of certain local governments in metropolitan regions.¹⁷⁹ Most notably, the New Jersey Supreme Court's *Mt. Laurel* cases beginning in the 1970s drew significant attention due to the court's articulation of the "regional general welfare" and the notion that each community should allow for its regional fair share of affordable housing.¹⁸⁰ The court created a builder's remedy for challenging local exclusionary zoning practices. New Jersey's efforts to promote regional fair share housing, however, have been

175. *SEWRPC Transportation Planning Certification Review Summary Report*, FEDERAL HIGHWAY ADMINISTRATION & FEDERAL TRANSIT ADMINISTRATION (May 2014), <http://www.sewrpc.org/SEWRPCFiles/Transportation/Files/2012SEWRPCCRFinalReport.pdf>; *SEWRPC Environmental Justice Task Force*, SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION, <http://www.sewrpc.org/SEWRPC/Transportation/EnvironmentalJusticeTaskForce.htm> (last visited Nov. 1, 2016); *SEWRPC Regional Housing Plan*, SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION, <http://www.sewrpc.org/SEWRPC/Housing.htm> (last visited Nov. 1, 2016).

176. *America's Rental Housing: Expanding Options for Diverse and Growing Demand (2015)*, JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, http://www.jchs.harvard.edu/sites/jchs.harvard.edu/files/americas_rental_housing_2015_web.pdf.

177. *Id.*

178. *Id.*

179. Exclusionary zoning is zoning for large lot sizes, minimum square footage requirements, etc., that increase the cost of housing and as a result excludes individuals who cannot afford expensive housing. The problem of exclusionary zoning was studied by the National Commission on Urban Problems (Douglas Commission) report entitled *Building the American City* (1968) and the American Bar Associations' Advisory Commission on Housing and Urban Growth report entitled *Housing for All Under Law: New Directions for Housing, Land Use, and Planning Law* (1978). See NAT'L COMM'N ON URBAN PROBLEMS, *BUILDING THE AMERICAN CITY* 211-17 (1969).

180. *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975) ("Mount Laurel I"); *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983) ("Mount Laurel II").

plagued by a political unwillingness to meaningfully address the issue and an on-going series of lawsuits.¹⁸¹ The *Mt. Laurel* cases have influenced how many fair housing advocates think about regional housing policy in other states, with court cases or laws in a handful of states focused on regional housing needs.

In addition to regional planning law attempting to remedy local exclusionary zoning practices, there is also a body of law related to the placement of public housing. During the 1950s and 1960s, many public housing projects were constructed by public housing authorities in the older central cities, which led to problems and concern over the concentration of poverty in certain areas of the central cities. In the 1976 case *Hills v. Gautreaux*,¹⁸² the Supreme Court of the United States fashioned a metropolitan-wide remedy for the dispersal of public housing in the Chicago metropolitan area.¹⁸³ Studies showed that the outcome of the case improved the lives of many of the people living in public housing.¹⁸⁴ The case influenced national efforts to promote a regional approach to the siting of federally financed public housing.

Two recent legal developments may reinvigorate the need to address housing issues at a regional level. The first is the 2015 Supreme Court of the United States decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,¹⁸⁵ and the second is the 2015 rule promulgated by the United States Department of Housing and Urban Development (“HUD”) on affirmatively furthering fair housing.¹⁸⁶ These developments opened avenues for challenging exclusionary zoning practices and the expenditure of federal funds for housing and community development.

In *Texas Department of Housing and Community Affairs*, the Supreme Court of the United States held that the federal Fair Housing Act (“FHA”) permits disparate impact claims.¹⁸⁷ In a disparate-impact claim, a plaintiff may establish liability without proof of intentional discrimination.¹⁸⁸ Disparate impact analysis originated in *Griggs v. Duke Power Co.*, which involved a provision of the Civil Rights Act of 1964 prohibiting employment discrimination.¹⁸⁹ The Court held that plaintiffs

181. Salvador Rizzo, *Affordable Housing Ruling Brings Sigh of Relief in Suburban N.J. Towns*, NORTHJERSEY.COM (July 12, 2016, 9:31 AM), <http://www.northjersey.com/story/news/new-jersey/2016/07/11/affordable-housing-ruling-brings-sigh-of-relief-in-suburban-nj-towns/94911802/>.

182. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

183. *Id.* at 306.

184. LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, *CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA* 1-2 (2000).

185. *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

186. 80 Fed. Reg. 136 (July 16, 2015).

187. *Tex. Dept. of Hous. and Cmty. Affairs*, 135 S. Ct. at 2518.

188. *Id.* at 2513.

189. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

could make employment discrimination claims without proving intent to discriminate.¹⁹⁰

The FHA prohibits *intentional* discrimination (disparate treatment) by making it unlawful to “refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.”¹⁹¹ However, the question whether the FHA encompasses disparate impact liability had never been addressed by the Supreme Court of the United States until *Texas Department of Housing and Community Affairs* was decided.

The Inclusive Communities Project (“ICP”) sued the Texas Department of Housing and Community Affairs over how the Department distributes tax credits for low-income housing under the Low-Income Housing Tax Credit Program (“LIHTC”).¹⁹² ICP claimed that the Department’s policy unintentionally resulted in granting too many credits for housing in predominantly black inner-city areas and too few in predominantly white suburban neighborhoods.¹⁹³ The ICP contended that the Department needed to modify its selection criteria in order to encourage the construction of low-income housing in suburban communities.¹⁹⁴

A five–four majority of the Court agreed with ICP, finding that disparate-impact claims are cognizable under the FHA.¹⁹⁵ Writing for the majority, Justice Kennedy emphasized the fundamental nature of the issues raised in the lawsuit: “[t]he underlying dispute in this case concerns where housing for low-income persons should be constructed in Dallas, Texas, that is, whether the housing should be built in the inner city or in the suburbs.”¹⁹⁶ Kennedy then summarized the history of the various civil rights laws of the 1960s to find the disparate-impact claims consistent with the central purpose of the FHA:

The FHA . . . was enacted to eradicate discriminatory practices within a sector of our nation’s economy. . . .

These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability. . . . The availability of disparate impact liability, furthermore, has

190. *Id.* at 432.

191. 42 U.S.C. § 3604(a) (2012).

192. *Tex. Dept. of Hous. and Cmty. Affairs*, 135 S. Ct. at 2514.

193. *Id.* at 2514, 2526.

194. *Id.*

195. *Id.* at 2512.

196. *Id.* at 2513.

allowed private developers to vindicate the FHA's objectives and to protect their property rights by stopping municipalities from enforcing arbitrary and, in practice, discriminatory ordinances barring the construction of certain types of housing units.¹⁹⁷

Justice Kennedy's opinion, however, recognizes limits to disparate-impact liability and highlights the need for a "robust causality requirement."¹⁹⁸ According to the opinion, "a disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."¹⁹⁹ Housing authorities have "leeway to state and explain the valid interest served by their policies."²⁰⁰ "Disparate-impact liability mandates the 'removal of artificial, arbitrary, and unnecessary barriers,' not the displacement of valid governmental policies."²⁰¹ Justice Kennedy concludes that "even when courts do find liability under a disparate-impact theory," remedial orders must "concentrate on the elimination of the offending practice" through "race-neutral means."²⁰²

Justices Ginsburg, Breyer, Sotomayor, and Kagan joined in Justice Kennedy's opinion.²⁰³ Justice Alito dissented, joined by Chief Justice Roberts and Justices Scalia and Thomas.²⁰⁴ Justice Thomas wrote a separate dissent.²⁰⁵

The case points out the need for state agencies and local communities to seriously consider the impact of their policies and programs on the availability of low-income housing as they conduct their planning processes. The regional context will be critical in many cases for evaluating the causality requirement.

Shortly after the Supreme Court's decision in *Texas Department of Housing and Community Affairs*, HUD published its final rule explaining what is meant by the term "affirmatively further fair housing" in the FHA.²⁰⁶ Since its passage in 1968, the FHA has required recipients of certain HUD funding programs to reduce barriers to fair housing. The FHA directs HUD program participants to affirmatively further the Act's goals of promoting fair housing and equal opportunity. HUD adopted the new rule

197. *Id.* at 2521-22.

198. *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2523 (2015).

199. *Id.* at 2523.

200. *Id.* at 2522.

201. *Id.*

202. *Id.* at 2524.

203. *Id.* at 2512.

204. *Tex. Dept. of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2512 (2015).

205. *Id.*

206. 80 Fed. Reg. 136 (July 16, 2015).

to provide guidance about what is meant by “affirmatively further fair housing” in response to litigation against communities who were not taking sufficient efforts to promote fair housing.²⁰⁷ The rule defines the phrase as:

...[T]aking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.²⁰⁸

Local governments seeking HUD funding need to prepare an assessment of fair housing. The assessment is intended to help communities understand and identify local barriers to fair housing choice and outline approaches for overcoming those barriers to promote fair housing. While individual units of local government will prepare many of the assessments, HUD recognizes that many fair housing priorities transcend a grantee’s boundaries and that regional efforts may be necessary to promote fair housing priorities. As a result, the rule encourages grantees to collaborate on regional fair housing assessments.²⁰⁹

While it is too early to assess the impact of the Supreme Court’s decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* and the Affirmatively Furthering Fair Housing Rule on promoting a regional approach to addressing housing issues, these recent developments further the need to focus on regional planning law.

CONCLUSION: REGIONAL PLANNING LAW

Regional planning is part of the modern metropolis. This Article has attempted to lay a framework for thinking about regional planning and governance as a distinct area of the law. It is an important context for

207. *See, e.g.,* *United States v. Westchester County*, 495 F. Supp. 2d 375 (S.D.N.Y. 2007).

208. 24 C.F.R. § 5.152 (2016).

209. *Id.*

understanding some of the contemporary issues in urban communities. However, one of the contemporary *legal* issues confronting the modern metropolis is the overlapping nature of many of the issues and the need for coordination among all the various regional planning activities.

Regional planning often involves building connections on issues of regional importance. Opportunities are there for communities to come together to address the contemporary issues of the modern metropolis. The federal government continues to play an important role. In addition to the programs discussed above, there have been new initiatives like the Partnership for Sustainable Communities (the “Partnership”).²¹⁰ The Partnership includes three federal agencies with overlapping programs: the Environmental Protection Agency, the Department of Housing and Urban Development, and the Department of Transportation.²¹¹ While not focused exclusively on metropolitan efforts, the Partnership is a symbolic step in coordinating programs of important federal agencies toward a common goal that can potentially benefit the modern metropolis.²¹²

As noted by political scientist David Walker, three-tier reforms involving the creation of new regional agencies are rare in the United States.²¹³ The Minneapolis-St. Paul Metropolitan Council—one of the few such agencies—has the authority to address all four substantive areas of regional planning law discussed above. Similar efforts at reform elsewhere in the United States fail to succeed because of a political unwillingness to address the complex nature of regional issues. An alternative to creating *new* regional institutions, however, may not be necessary given the many regional efforts at work in the modern metropolis. What might be needed is to embrace and empower current regional planning institutions so they can address contemporary issues. We need to encourage regional innovation. Examples of where this is happening include California’s efforts to address climate change and new efforts to address affordable housing needs.

As the need to address issues at the regional level continues to mature in the absence of political leadership, we may see more regional planning issues in the courts. As Alexis de Tocqueville observed in 1835, “Scarcely any political question arises in the United States that is not

210. On June 16, 2009, the EPA, HUD, and the U.S. DOT entered into a partnership agreement to help improve community access to affordable housing, create more transportation options, and protect the environment. This unprecedented collaboration between federal agencies acknowledges the interrelated challenges facing U.S. communities and allows the three to efficiently coordinate their programs. *Partnership for Sustainable Communities Briefing Report*, SMART GROWTH AMERICA (Feb. 21, 2012), <https://smartgrowthamerica.org/partnership-for-sustainable-communities-2012-briefing-materials-now-available/>.

211. *Id.*

212. *Id.*

213. Walker, *supra* note 15.

resolved, sooner or later, into a judicial question.”²¹⁴ However, we cannot rely exclusively on the courts to address the regional planning needs of the modern metropolis.

214. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley ed., Henry Reeve trans., 1945).