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DANIEL B. ROSENBAUM

The Local Lawmaking Loophole

ABSTRACT. Local governments contract with each other for a wide variety of purposes: to deliver services, administer grant money, coordinate emergency responses, and manage infrastructure projects. These interlocal agreements (ILAs) have been embraced by local officials keen to forge administrative efficiencies in an environment of limited resources. By contracting with neighboring and overlapping governments, a local entity can draw upon funding and technical skills that it does not otherwise possess alone, operating in theory to the ultimate benefit of residents across its region.

Yet, the growing prevalence of ILAs belies two underappreciated features of their use. First, when governments enter into ILAs, they do not only exchange basic services and pursue technocratic efficiencies; they also create new policies, announce substantive priorities, and establish new governance frameworks. ILAs are especially prominent in collaborative policing regimes. Acting through an ILA, local governments can expand and dissolve policing jurisdictions, create new cross-jurisdictional policing programs, increase and consolidate jail facilities, and provide rights to certain inmates while declining to extend those same rights to others. ILAs thus function as consequential lawmaking documents—even as they also operate outside the ordinary legislative channels that constrict formal exercises of local power.

Second, ILAs fundamentally suffer from a deficit of democratic accountability. Local legislatures are remarkably removed from the negotiations by which ILAs are executed, implemented, monitored, and modified. The very factors that make ILAs potent—vague and confidential terms, malleable ratification procedures, ironclad contract law fortifications—render them difficult for members of the public to scrutinize, let alone, at times, even access. And ILAs regularly give birth to brand-new local government entities, which then breed with each other, using subsequent ILAs to create subsequent local entities, a domino effect of local power and attenuated local accountability. The promise of ILAs as organs of regional lawmaking comes at the peril of public transparency.

This mismatch—between expansive power and limited transparency—is no legal accident, but rather can be traced directly to state statutory schemes. Nearly all states have adopted interlocal cooperation acts that broadly empower ILAs and often contain filing requirements to ensure their transparency. Yet public stakeholders systematically fail to take these requirements seriously. Local governments do not consistently follow them, state agencies do not consistently monitor them, and courts do not consistently enforce them. Their collective inactions enable a transparency void. As this Article explains, ILAs must—and can—be brought more firmly into the local governance spotlight without sacrificing their increasingly integral role in the legislative toolkit. In the process, the Article also paints a different picture of local institutions under a federal system: one where



local actors navigate state oversight as it is expressed through administrative silence, separate and distinct from manifestations of oversight expressed through political voice.

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ARTICLE CONTENTS

INTRODUCTION	2616
I. SITUATING INTERLOCAL AGREEMENTS	2625
A. ILAs in Local-Government Practice	2627
B. ILAs in Local-Government Scholarship	2631
II. THE FORMIDABLE REACH OF INTERLOCAL AGREEMENTS	2635
A. Tools of Regional Lawmaking	2636
B. Versatile Legal Instruments	2641
C. Case Study: ILA Policing Regimes	2643
III. INTERLOCAL AGREEMENTS AND DEMOCRATIC ACCOUNTABILITY	2647
A. The Theoretical View	2647
B. Local Legislatures	2651
C. Nested Interlocal Entities	2658
D. Longitudinal Implications	2663
E. Local Residents	2666
IV. INTERLOCAL AGREEMENTS UNDER STATE LAW	2675
A. Background: Interlocal Collaboration	2675
B. Interlocal-Cooperation Acts	2678
C. Transparency Requirements on Paper	2683
D. Transparency Requirements in Practice	2686
V. RECOMMENDATIONS	2693
A. Suggested Reforms	2693
B. Guiding Principles	2697
CONCLUSION	2698

INTRODUCTION

From its perch on the fourth floor of a nondescript office building in Tallahassee, just three blocks from the Florida state capitol, the obscurely named Blueprint Intergovernmental Agency oversees a surprisingly vast dominion. Its portfolio resembles that of a midsized city government: it manages major transportation projects, operates parks and other recreational facilities, oversees hundreds of millions of dollars of regional-infrastructure spending, and implements economic-development initiatives.¹ Like an ordinary local government, Blueprint is a wholly independent local entity funded by tax dollars and ostensibly governed by a body of elected officials.² Also like an ordinary local government, Blueprint makes weighty decisions about how to expend the public resources it manages—decisions that necessarily prioritize certain governance objectives over others, operating to the benefit of some residents of the community while perhaps leaving others behind.³

But Blueprint is no ordinary local government. Its management team is empowered to govern largely without the input of elected officials and beyond the prying eyes of local residents.⁴ It has not been subject to state sunshine laws and

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1. *About Blueprint*, BLUEPRINT INTERGOVERNMENTAL AGENCY, <https://blueprintia.org/about-blueprint> [https://perma.cc/A5Q5-P8MX]. With respect to infrastructure projects, see Karl Etters, *‘Blueprint Is Yours’: Scott Maddox Texts Reveal His Role as the Man Who Would Be Kingmaker*, TALLAHASSEE DEMOCRAT (Apr. 5, 2022, 12:48 PM ET), <https://www.tallahassee.com/story/news/2021/08/03/scott-maddox-text-messages-corruption-jt-burnette-trial-blueprint-paige-carter-smith-dia-ben-pingree/7817277002> [https://perma.cc/WRY4-LMAE]. Regarding economic initiatives, see *Annual Report*, BLUEPRINT INTERGOVERNMENTAL AGENCY 19, 21 (2022), https://blueprintia.org/wp-content/uploads/BP-Annual-Report-Version_2.pdf [https://perma.cc/3REG-5KT2]. See also Second Amended and Restated Interlocal Agreement Between Leon County, Florida and City of Tallahassee, Florida 10-15 (Dec 9, 2015) (on file with author) (setting forth Blueprint’s powers).
 2. See Interlocal Agreement Between City of Tallahassee, Florida and Leon County, Florida Concerning Establishing Joint Executive Director for Blueprint 2000 and Tallahassee-Leon County Planning Director, 1-3 (Aug. 11, 2011), https://blueprintia.org/wp-content/uploads/2011-Interlocal-Agreement_PLACE_Executed-6-20-11.pdf [https://perma.cc/3LGG-5P8G]; Second Amended and Restated Interlocal Agreement Between Leon County, Florida and City of Tallahassee, Florida, *supra* note 1, at 15-16, 26-28.
 3. See Karl Etters, *Blueprint Asks Judge to Settle ‘Hypothetical Controversy’ Alleged in Matlow Lawsuit*, TALLAHASSEE DEMOCRAT (Sept. 1, 2022, 10:32 AM ET), <https://www.tallahassee.com/story/news/2022/09/01/blueprint-seeking-judgement-sunshine-law-claim-commissioner-matlow/7958158001> [https://perma.cc/MA2Y-AAHN] (discussing Blueprint’s decision to “dedicate \$27 million in economic development tax dollars” to repair a college football stadium).
 4. See Karl Etters, *Blueprint Responds to Matlow’s Sunshine Suit: No ‘Justifiable Controversy,’* TALLAHASSEE DEMOCRAT (Aug. 11, 2022, 10:56 AM ET) <https://www.tallahassee.com/story>

can therefore make major decisions with minimal public attention.⁵ And it is overseen not by an elected executive, but rather by a separate local agency led by an unelected director.⁶

What explains Blueprint's unique institutional status? From what font of power does it derive its authority? Remarkably, Blueprint is not a creature of state statute or even of local ordinance, the traditional legislative enactments by which we might expect a formidable new local entity to be born. Instead, Blueprint was created by contract – specifically, by a series of interlocal contracts executed between two Florida local governments, the City of Tallahassee and Leon County.⁷ These contracts have played a constitutional role in Blueprint's lifecycle; they brought the agency to life, embedded it within a novel governance structure, and infused it with expansive powers.⁸ The contracts even granted Blueprint the authority to execute interlocal agreements of its own, including, dizzyingly, with other local entities themselves also created by interlocal agreement. Acting through these contracts, Blueprint could even create additional new local governments in its own image.⁹ A resident of Tallahassee could be forgiven for losing sight of Blueprint and other such spinoff public actors, led down a rabbit hole of cascading local authority.

/news/2022/08/11/blueprint-responds-jeremy-matlow-ben-pingree-sunshine-lawsuit-no-justifiable-controversy/10235865002 [https://perma.cc/EU47-33NQ] (explaining that Blueprint's argument in response to a sunshine lawsuit was that it was not "required to adhere to the state's open meeting and record laws").

5. See Etters, *supra* note 3.
6. Etters, *supra* note 1; Interlocal Agreement Between City of Tallahassee, Florida and Leon County, Florida, *supra* note 2, at 1-2.
7. See generally Interlocal Agreement (Sept. 6, 2000), https://blueprintia.org/wp-content/uploads/2000-Interlocal-Agreement_Executed-10-27-2000_11292022.pdf [https://perma.cc/D7LT-BLB6] (establishing Blueprint through an agreement between the City of Tallahassee and Leon County); Amended and Restated Interlocal Agreement (Feb. 1 2003), https://blueprintia.org/wp-content/uploads/2003-Interlocal-Agreement_Executed-2-1-2003.pdf [https://perma.cc/XU9L-HCRL] (modifying and amending the original contract establishing Blueprint); Interlocal Agreement Between City of Tallahassee, Florida and Leon County, Florida, *supra* note 2 (creating a new director position for Blueprint); Second Amended and Restated Interlocal Agreement Between Leon County, Florida and City of Tallahassee, Florida, *supra* note 1 (providing for additional powers to obtain necessary financing).
8. See generally Interlocal Agreement, *supra* note 7 (establishing Blueprint and imbuing the agency with power); Amended and Restated Interlocal Agreement, *supra* note 7 (reinstating Blueprint and delineating the agency's powers); Second Amended and Restated Interlocal Agreement Between Leon County, Florida and City of Tallahassee, Florida, *supra* note 1 (same); Interlocal Agreement Between City of Tallahassee, Florida and Leon County, Florida, *supra* note 2 (creating a new director position for Blueprint and delineating the position's powers).
9. See Second Amended and Restated Interlocal Agreement Between Leon County, Florida and City of Tallahassee, Florida, *supra* note 1, at 11.

Blueprint is no aberration. An interlocal agreement (ILA) – defined broadly in this Article as any binding agreement made between two or more units of local government¹⁰ – is traditionally envisioned as a humble mechanism for coordinating service delivery between local entities. ILAs are understood as a strictly technocratic way to pool limited resources and therefore make bread-and-butter municipal ventures such as water delivery, trash collection, and road maintenance more efficient.¹¹ Under this view, ILAs are distinguishable in both form and function from local ordinances and other formal lawmaking documents. Yet in Tallahassee and thousands of other local governments across the country, the line between an ILA and a legislative enactment has blurred in practice. Both can regulate conduct, allocate scarce resources, announce policy priorities, and serve broadly as the mechanism by which local power is exercised.¹² Both can impact residents within a jurisdiction and across jurisdictional lines.¹³ But despite the similarities in outcomes, crucial differences between ILAs and ordinances remain. This Article highlights a difference that cuts to the heart of local democracy: ILAs are routinely nontransparent and unaccountable instruments, uniquely negotiated and operated at a level that is removed from both local legislators and from the residents they represent.

10. This definition encompasses many documents stylized variously as memorandums of understanding, contracts, service agreements, and mutual-aid compacts. See Bridget A. Fahey, *Federalism by Contract*, 129 YALE L.J. 2326, 2337–38 (2020) (noting that the aforementioned terms and additional terms are “often used interchangeably”); Zachary Spicer, *Governance by Handshake? Assessing Informal Municipal Service Sharing Relationships*, 42 CANADIAN PUB. POL’Y 505, 506 (2016) (listing many of these as forms of “contractual arrangements [employed] to achieve local cooperation”); Simon A. Andrew, *Interlocal Agreements as an Urban Management Tool: Applicability of Network Analysis for Understanding Interlocal Cooperation* 5–6 (2005) (unpublished manuscript) (on file with author) (discussing the “varieties of interlocal contractual agreements”); Sarah Honosky, *Asheville Approves Jones Park Playground Rebuild; Push to Rename to Honor Candace Pickens*, ASHEVILLE CITIZEN TIMES (Sept. 28, 2022, 5:03 AM ET), <https://www.citizen-times.com/story/news/local/2022/09/28/asheville-city-council-approves-jones-park-playground-rebuild/69522891007> [<https://perma.cc/RF4A-PVWC>] (interchangeably describing an agreement as an “interlocal agreement” and a “memorandum of understanding”). However, the definition excludes those interlocal documents that purport to carry no legal force, such as joint press releases or policy statements. See Richard M. Cartier, *Mediating Local Intergovernmental Disputes—Reflections on the Process*, 13 SAN JOAQUIN AGRIC. L. REV. 1, 9–11 (2003) (discussing litigation between City of Fresno and County of Fresno regarding whether a joint resolution and a memorandum of understanding constituted enforceable contracts or policy agreements) (citing Master Settlement Agreement, Fresno County Superior Court Case No. 01 CE CG 03337).

11. See *infra* note 36 and accompanying text.

12. See *infra* Section II.A.

13. See *infra* Section II.A and note 47 and accompanying text.

These related values – transparency and accountability – are central to a republican institution of government.¹⁴ Democratic systems rest upon a fundamental premise: that citizens can hold government actors accountable – that is, that they can monitor, demand answers from, and ultimately control the policies of the officials they elect.¹⁵ Accountability is particularly fundamental in local democracy, which derives its legitimacy from the relatively small size of local jurisdictions, a scale that allows residents to access and directly participate in governance decisions.¹⁶ Local institutions are theorized as our quintessential vehicles of self-governance.¹⁷ If localities are not responsive to their residents, they lose their existential virtue.¹⁸

Transparency represents the other side of the accountability coin. While not the only feature of an accountable government, transparency has been recognized by commentators as accountability’s most essential prerequisite – the tool

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14. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1881 (2015) (“Transparency and democratic accountability are not optional. They are requisites of American governance.”). See generally HANNAH ARENDT, *ON REVOLUTION* (1963) (arguing that the American Revolution was a success in contrast to the French in part because of its commitment to transparency and public trust); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1783-88 (2002) (critiquing accountability and democratic deficits in special purpose local governments).
 15. See Friedman & Ponomarenko, *supra* note 14, at 1837 (“Accountability is primal to American democracy.”); Jack M. Beerman, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1507 (2001) (defining political accountability as “the amenability of a government policy or activity to monitoring through the political process”); Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1533 (defining accountability as the “ethical obligation of . . . governmental officials[] to answer for their actions, possible failings, and wrongdoings”).
 16. See Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 854 (1979) (“A fundamental advantage of local government is the opportunity it affords for this kind of communication [between officials and the people they govern]. Simply put, proximity increases accountability by increasing access.”). See generally Zachary D. Clopton & Nadav Shoked, *Suing Cities*, 133 YALE L.J. (forthcoming 2024) (manuscript at 32, 43) (on file with author) (discussing the value of municipal taxpayer standing).
 17. See National League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1329, 1341 (2022) (noting “the proposition that local governments are vital places of self-governance”); Kerry A. Burchill, *Madison’s Minimum-Wage Ordinance, Section 104.001, and the Future of Home Rule in Wisconsin*, 2007 WIS. L. REV. 151, 191 (explaining that a “unique characteristic[] of local government” is that it “is easily accessible to citizens and allows self-governance and the passage of laws with particular community importance”). See generally Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652 (2021) (tracing a right of self-governance under the Assembly Clause of the First Amendment to colonial-era local governments).
 18. Cf. National League of Cities, *supra* note 17, at 1372 (“At the heart of the concept of local democratic self-government is the accountability of local officials to the local community that results from local popular election of local lawmakers.”).

that accountability cannot survive without.¹⁹ Transparency, at its core, is a matter of visibility: it asks whether the public can see – and thereby understand – the actions of government officials.²⁰ Visibility enables the public to monitor and control government action.²¹ It also promotes the closely related values of public access and participation, tenets crucial to local democracy.²²

For the most part, government action is considered visible when information is made available to the public, such that observers can assess what decisions

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19. See, e.g., Friedman & Ponomarenko, *supra* note 14, at 1848 (“Transparency is critical to accountability – the people cannot supervise their officials unless they know what the officials are up to.”); Treasa Dunworth, *Accountability of International Organisations: The Potential Role of NGOs in the Work of Disarmament Bodies*, 14 N.Z. J. PUB. & INT’L L. 47, 50 (2016) (“Without transparency, there can be no accountability. In other words, transparency is an essential first step to achieving accountability.”); Jeffrey Kleeger, *Flexible Development Tools: Private Gain and Public Use*, 46 URB. LAW. 377, 399 (2014) (“[O]ut of transparency flows accountability and responsibility.”); Hannah Bloch-Wehba, *Visible Policing: Technology, Transparency, and Democratic Control*, 109 CALIF. L. REV. 917, 923 (2021) (“Indeed, transparency law is often now a critical advocacy tool for those seeking to hold law enforcement accountable . . .”); Andrew Guthrie Ferguson, *Policing Predictive Policing*, 94 WASH. U. L. REV. 1109, 1168 (2017) (“Improved transparency leads to increased accountability.”); Zarsky, *supra* note 15, at 1533–34 (“Transparency is an essential tool for facilitating accountability because it subjects politicians and bureaucrats to the public spotlight.”). Regarding other features of accountable governance, see Jan Aart Scholte, *IMF Interactions with Member Countries: The Civil Society Dimension*, INDEP. EVALUATION OFF. OF THE IMF 44 (2009), <https://ieo.imf.org/en/our-work/Evaluations/Completed/2010-0120-imf-interactions-with-member-countries> [<https://perma.cc/SVC6-MNH5>] (identifying “transparency, consultation, evaluation and correction” as the four dimensions of accountability).
20. See Dunworth, *supra* note 19, at 50 (“[T]ransparency[] means that the affected constituents (the public) must be able to see what the affecting actor . . . is doing.”).
21. Friedman & Ponomarenko, *supra* note 14, at 1838 (“The people must be able to see what their agents are doing so they can evaluate those actions and exercise control as necessary.”); see also David A. Harris, *Across the Hudson: Taking the Stop and Frisk Debate Beyond New York City*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 853, 878–79 (2013) (discussing benefits of making stop-and-frisk data available to the public).
22. Mark Fenster, *Populism and Transparency: The Political Core of an Administrative Norm*, 89 U. CIN. L. REV. 286, 308 (2021) [hereinafter Fenster, *Populism*] (“In addition, transparency promises to create and mobilize a popular will, guaranteeing a more direct, authentic, and populist relationship between the public and those who would represent and lead it.”). This is not to say that transparency is an unassailable value in local government. See Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 902–910 (2006) [hereinafter Fenster, *Opacity*]. Among other critiques, for example, transparent local processes have been associated with local participation schemes that favor the voices of certain factions – often homeowners – against the interests of the community at large. See, e.g., Grant Glovin, *Power and Democracy in Local Public Participation Law*, 51 URB. LAW. 43, 45–46 (2021).

were made and how officials are implementing them.²³ The flow of information is meaningful both on the front-end of government action – for example, when a law or practice is being considered – as well as on the back-end, when that law or practice, or a deviation therefrom, is carried out on the ground.²⁴ It follows that rules, regulations, policies, and other written instruments are primary sources of government transparency.²⁵

Against this theoretical backdrop, the transparency deficits of ILAs stand in stark contrast to other instruments of local governance. When it addresses ordinance and charter provisions – the archetypal agents of local legislative power – state law places a premium upon the value of transparency. Ordinances commonly must be published, filed, or maintained in a repository where the public can readily access them, in many cases even before a proposed enactment has been ratified by its governing body.²⁶ The same goes for charter provisions and amendments.²⁷ Moreover, far from constituting empty obligations that accumulate dust in a forgotten corner of the state code, these transparency requirements are taken seriously by courts and by state actors, both of whom recognize that public access to local laws is necessary to ensure the democratic accountability of local action.²⁸ Departures from publication and filing laws are viewed with

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23. See RALPH C. NASH JR., STEVE L. SCHOONER, KAREN R. O'BRIEN-DEBAKEY & VERNON J. EDWARDS, *THE GOVERNMENT CONTRACTS REFERENCE BOOK* 582 (3d ed. 2007) (tying transparency to a government “publishing information” and “otherwise making the information available”); Fenster, *Opacity*, *supra* note 22, at 900 (discussing how transparency “enables the free flow of information among public agencies and private individuals”); Fenster, *Populism*, *supra* note 22, at 306-07; Bloch-Wehba, *supra* note 19, at 926 (discussing “the flow of information from the government to the public”).
 24. Cf. Friedman & Ponomarenko, *supra* note 14, at 1877 (discussing front-end transparency in policing); Kathleen Kersh & Matthew N. Currie, *Working for Justice in an Unjust System; Moving Beyond the Legal System*, 55 UIC L. REV. 251, 268 (2022) (discussing reporting requirements as part of an ordinance’s implementation).
 25. See, e.g., Bloch-Wehba, *supra* note 19, at 922-23 (discussing transparency litigation, which is “litigation to compel the disclosure of governmental records”).
 26. See, e.g., MINN. STAT. § 375.51 (2022) (requiring publication of every ordinance enacted by a county board); 53 PA. CONS. STAT. § 66601 (2023) (requiring publication of township ordinances before passage); MICH. COMP. LAWS § 117.3(k) (2023) (requiring ordinances to be published and then “available for inspection by, and distribution to, the public at all times”).
 27. See, e.g., 53 PA. CONS. STAT. § 2921 (2023) (regarding publication, filing, and record-retention practices for charter commissions); W. VA. CODE § 8-4-8 (2023) (setting forth publication, hearing, and recording requirements); TEX. LOC. GOV'T CODE ANN. §§ 9.007-9.008 (West 2023) (setting forth filing and recording requirements); DEL. CODE ANN. tit. 22, § 836 (2023) (requiring state filing).
 28. See, e.g., *Schadler v. Zoning Hearing Bd.*, 850 A.2d 619, 626-27 (Pa. 2004) (ordinance was void ab initio for noncompliance with notice requirements); *id.* at 626 (describing the procedural defects as “egregious”); *State v. Torgerson*, 2021 WL 3716670, at *3 (Minn. Ct. App.

alarm—indeed, as a signal of fundamental weaknesses within a local institution itself.²⁹

ILAs simply do not receive the same treatment. In sharp contrast with ordinances and charter provisions, state laws designed to ensure the transparency of ILA documents, where they exist, tend to be ignored by local officials, state regulators, and state courts alike. Instead, these are the state statutes that accumulate dust in a forgotten corner of the legislative code. ILA transparency requirements act in practice as profoundly hollow obligations, a stark example of how states can enable local power through their silence just as they more famously do through their express permissive grants. Out of this void, ILAs emerge as alluring governance vehicles. Acting through an ILA, multiple governments can come together to create regional laws with fewer procedural impediments than if each had acted alone. The regional schemes they forge by ILA might reflect normatively desirable policies that benefit residents across their jurisdictions, but their impacts can be difficult to discern and their governance difficult to access. They are, in short, shrouded by an opacity that would not exist if the same actions were taken directly by ordinance. In this manner, as compared with a local government's formal legislative enactments, ILAs mold and inhabit a parallel universe.

Aug. 23, 2021) (invalidating an ordinance that was printed in a “binder” but not published in a “book or pamphlet” because “[t]he requirement that ordinances be published and kept in permanent book or pamphlet form has the obvious benefit of providing all citizens with actual notice of their municipality’s ordinances. This requirement also provides citizens an easy and reliable opportunity to obtain a copy of the ordinances so as to review them in complete form and to ensure compliance with them by all public officials.”); *City of Akeley v. Nelson*, 2003 WL 22787608, at *2 (Minn. Ct. App. Nov. 25, 2003) (“[U]nsigned, uncertified copies submitted by the city do not conclusively prove the validity of the ordinances”); *Pappas v. Ala. Power Co.*, 119 So. 2d 899, 908 (Ala. 1960) (“The law is that before an ordinance of a general or permanent nature can become effective or operative its publication is just as essential as its passage, for the mere existence of an ordinance is no evidence that it is effective.”); *Nockamixon Twp. v. Nockamixon Twp. Zoning Hearing Bd.*, 8 A.3d 434, 441 (Pa. Commw. Ct. 2010) (“The Pennsylvania Supreme Court has consistently declared that ‘statutory steps for enactment of ordinances are *mandatory and nonwaivable* . . . [and] *must be followed strictly in order for an ordinance to be valid.*’” (alteration in original) (quoting *Cranberry Park Assocs. ex rel. Viola v. Cranberry Twp. Zoning Hearing Bd.*, 751 A.2d 165, 168 (Pa. 2000))). The perspective of nonjudicial state actors can be gleaned from state audit reports, which look to a municipality’s compliance with ordinance-publishing requirements as an indicator of compliant internal controls. See, e.g., NICOLE GALLOWAY, CITY OF MONROE CITY REPORT NO. 2020-029, at 26 (June 2020), <https://auditor.mo.gov/AuditReport/ViewReport?report=2020029> [<https://perma.cc/UCD2-CM4B>] (“Because ordinances passed by the Board to govern the city and its residents have the force and effect of law, it is important ordinances be current and complete.”).

29. GALLOWAY, *supra* note 28, at iii, 26 (finding that the city “needs to significantly improve operations,” in part because it “does not maintain an up-to-date official ordinance book”).

The ramifications of this duality are significant. Public access to the instruments of government power is closely associated with democratic vitality.³⁰ In other disciplines—including in corporate, administrative, and international law—scholars have critiqued how contracts can serve as shadow governance mechanisms, capable of achieving the same policy outcomes as formal charters or laws without many of the procedural requirements that accompany them.³¹ These scholars have recognized that transparency is limited and public oversight is compromised when underregulated and often undisclosed contracts act as the vehicle by which consequential governance decisions are made.³² ILAs pose similar risks. Indeed, arguably, these risks are particularly pronounced when they manifest in local government, a sprawling and diffuse institution that derives its organizing legitimacy from the access it grants citizens to the mechanisms of power.³³ Yet legal scholars have confronted neither the tremendous lawmaking authority that local bodies can exercise through ILAs, nor the deficit of democratic accountability with which ILAs often operate. Nor have they examined the state legal regimes that enable both phenomena.

This Article begins the task of studying ILAs as operative governance documents in their own right, as instruments firmly on par with the formal lawmaking tools of local power. Drawing upon public-administration research, state-court opinions, and interlocal contracts themselves, it argues that notwithstanding their normative appeal, ILAs must be understood based upon how they operate in law and practice today, not based upon an anachronistic view of their utility in theory. ILAs today are created for reasons far beyond the promotion of service-delivery efficiencies and their interlocal impacts extend well beyond these core efficiency values. In painting this picture, the Article offers a more nuanced portrayal of the relationship between state and local actors at large. As

30. See *infra* notes 332-337 and accompanying text.

31. See Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L. REV. 913, 916 (2021) (“Perhaps most problematically, corporations appear to be using shareholder agreements, at least in part, to avoid mandatory elements of corporate law that would constrain analogous charter or bylaw provisions.”); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 541 (2011) (“[C]ontract procedure produces law in the shadow of bargaining without significant mechanisms to assure accountability or compliance with public norms.”); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 193 (2010) (“Sometimes [the Treasury Department] escapes its usual obligations by acting through contract, rather than regulation”); Heikki Marjosola, *Shadow Rulemaking: Governing Regulatory Innovation in the EU Financial Markets*, 23 GERMAN L.J. 186, 187-88 (2022); Michael P. Vandenberg, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2033-34 (2005); David A. Dana, *The New “Contractarian” Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 51-59.

32. See Fisch, *supra* note 31, at 946-49.

33. See *infra* note 76 and accompanying text.

states continue to squeeze the traditional powers of local governments, a trend that has drawn widespread attention,³⁴ they create escape valves through the parallel schemes that they do enable and by means of the local restrictions they do not enforce. ILAs are the increasingly pervasive outgrowths of this reconfiguration. Studying them, therefore, is essential to understanding the institutions of local power today.

The Article proceeds in five parts. Following this Introduction, Part I sets the stage. It defines ILAs in greater detail and explains why they have exploded in popularity in recent decades. Even so, despite the growing prevalence of ILAs, Part I proceeds to show how the on-the-ground governance schemes they create have largely escaped the attention of local-government and public-administration scholars. After canvassing this literature, Part I concludes by discussing two scholars whose work has begun to buck the trend, thus offering a jumping-off point to study the impact of ILAs upon local democratic bodies.

Having established this groundwork, Part II highlights the stakes at play by mapping the varied and substantive ways that local entities employ ILAs. From this review, Part II argues that ILAs operate functionally as regional lawmaking documents that command a special status in the toolkit of local government, simultaneously easy to implement while also proving substantively powerful in practice. It concludes with a focused study of interlocal agreements in the realms of policing and criminal justice, fields where ILAs are commonly employed and where the sheer breadth of their impact can be starkly demonstrated. Acting through ILAs, local governments can expand and dissolve policing jurisdictions, create new cross-jurisdictional policing policies, increase and consolidate jail facilities, and provide rights to certain inmates but not to others. Policing ILAs demonstrate the very real impact that these agreements can have on local residents, even as those same residents often cannot access or review them.

Building upon these issues of access and transparency, Part III turns to the democratic defects that lie at the heart of ILA regimes. It explains how ILAs are often executed and implemented outside the traditional framework of local lawmaking—a feature, not a bug, of the administrative world that they inhabit. First, this Part argues that local legislatures are remarkably removed from the lifecycle of ILAs, which are often ratified, amended, and governed without their involvement. Second, it posits that local residents struggle to participate in ILA decisions and even, in many cases, to access and read ILA documents. Both legislatures and residents are especially marginalized where spinoff local entities such as Blueprint are concerned. These entities created wholly by ILA—termed

34. See generally Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (examining the spread of state preemption of local-government action).

“nested interlocal entities” in this Article – are products of a cascading delegation of local power, a practice that raises particular public-accountability challenges.

Part IV argues that the mismatch described above – between expansive power and limited transparency – is no legal accident, but rather can be traced directly to state statutory schemes. Laws adopted in most states, known widely as interlocal-cooperation acts, have allowed ILAs to be both uniquely powerful and uniquely nontransparent. On the one hand, as this Part shows, interlocal-cooperation acts are liberally written and even more liberally construed in their grants of local power. On the other, although many of these acts contain filing requirements designed to ensure transparency, Part V finds that these requirements are not actually followed, monitored, or enforced in practice. Local governments do not consistently follow them, state agencies do not consistently monitor them, and courts do not consistently enforce them. Instead, with rare exceptions, filing requirements prove utterly illusory on the ground.

In light of the findings of Part IV, Part V provides recommendations for both policymakers and legal scholars. It encourages policymakers to consider ILAs as the governance documents that they truly are, as important tools of regional collaboration that must be anchored in systems of democratic legitimacy. Finally, it urges legal scholars to see ILAs and the statutes from which they stem as representative of a more nuanced relationship between state and local actors. Despite their well-publicized efforts to restrict local power, states are habitually inattentive to most matters of local governance.³⁵ When states limit local action in one manner, they direct power towards other, often under-the-radar schemes through which local entities can achieve similar objectives. Meanwhile, when states tacitly endorse a practice or underemphasize a local obligation, they help shape local governance norms, perhaps inadvertently reordering the tools by which local officials make policy. Silence can itself be the currency by which states fashion local institutions.

I. SITUATING INTERLOCAL AGREEMENTS

ILAs are traditionally envisioned as stolid administrative contracts executed for the provision of bread-and-butter municipal services – for example, for one

35. Richard Briffault, “What About the ‘Ism’?” *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1318 (1994) (“In most states, local governments operate in major policy areas without significant external legislative, administrative, or judicial supervision.”); see also Daniel B. Rosenbaum, *A Legal Map of New Local Parkland*, 105 MARQ. L. REV. 721, 743, 749–50 (2022) [hereinafter Rosenbaum, *A Legal Map*] (discussing how parkland acquisition “fall[s] outside the scrutiny of state legislatures”); Daniel B. Rosenbaum, *Interlocal Power Roulette*, 99 IND. L.J. 417, 451–53 (2024) [hereinafter Rosenbaum, *Interlocal Power Roulette*] (discussing redundant local power).

government to maintain a road on behalf of a partner locality or for multiple governments to maintain that road together.³⁶ While ILAs might have once been limited to such purposes, their reach is much broader today. Today, in addition to using ILAs for the provision of municipal services, local governments now also employ them to share technology, operate public-health programs, design awareness campaigns, exchange assets, reconfigure jurisdictional boundaries, devise land-use strategies, and much more.³⁷ The list goes on and on. Modern-day ILAs are also incredibly diverse in form and structure. The only unifying strains across ILAs are that they are, by their very nature, the end product of multiple local governments forging a shared plan or practice and that their terms, at least to some degree, are envisioned by their drafters as legally binding.

Building upon this modern reality, this Part situates ILAs first within the world of local government, where they have become widely adopted, and then within the body of academic literature that studies local institutions.

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36. See Robert E. Lee & Sarah Hannah-Spurlock, *Bridging Academic and Practitioner Interests on Interlocal Collaboration: Seasoned Managers Share Their Experiences in Florida*, 47 STATE & LOC. GOV'T REV. 127, 128 (2015) (defining "local government collaboration" as "service arrangements where two or more public agencies come together and each contribute money, staff, or use of a facility to provide a local government service"); *City of Medina v. Primm*, 157 P.3d 379, 387 (Wash. 2007) (Sanders, J., dissenting) (voicing the position that "manag[ing] solid waste" and "maintaining roads" are the sort of interlocal services contemplated by ILA legislation); see also Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 194 (2001) (naming "metropolitan waste disposal agencies" and "regional ambulance services" as examples of ILAs); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1144-45 (1996) ("[L]ocal governments can purchase services from each other, enter into joint agreements for planning, financing, and delivery of services, and create or seek state creation of special limited-purpose districts to supply capital-intensive services on a regional basis."); Daniel B. Rosenbaum, *Confronting the Local Land Checkerboard*, 56 U. RICH. L. REV. 665, 694 (2022) ("[I]nterlocal agreements to provide or share services . . . are relatively common . . ."); Amnon Lehari, *Intergovernmental Liability Rules*, 92 VA. L. REV. 929, 944 (2006) ("Interlocal agreements are prevalent for . . . joint provision of services . . ."); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 378 (1990) ("Interlocal contracting provides a . . . method of solving suburban service delivery problems without forfeiting political independence.").
37. See Beth Walter Honadle, *Alternative Service Delivery Strategies and Improvement of Local Government Productivity*, 8 PUB. PRODUCTIVITY REV. 301, 305-06 (1984) (discussing technology-sharing and mental-health programs); Ark. Att'y Gen., Opinion Letter No. 2002-284 (Nov. 18, 2002) (regarding awareness campaigns); Fahey, *supra* note 10, at 2348-49 (2020) (regarding land transfers); *City of Medina*, 157 P.3d at 385 (regarding reconfigurations of court jurisdiction); Sara C. Galvan, *Wrestling with MUDs to Pin Down the Truth About Special Districts*, 75 FORDHAM L. REV. 3041, 3078-79 (2007) (regarding land use); see also *infra* Section II.A (describing ILA programs implementing a broad range of goals).

A. ILAs in Local-Government Practice

Because ILAs are a flexible way to implement policy, it comes as little surprise that they are used extensively by local governments across the country. The few studies that have attempted to quantify the number of operational ILAs in a given region attest to their widespread adoption, both among smaller localities in rural areas and among large cities in metropolitan centers. One study counted 712 ILAs in a six-county area of east-central Florida.³⁸ Another concluded that, as of 2020, there were 260 active ILAs among departments and agencies of the City of Austin.³⁹ Moreover, the popularity of ILAs shows no signs of abating. In fact, public-administration scholars seem to broadly agree that their use has only accelerated in recent years.⁴⁰

Several interconnected factors help explain the explosion of ILAs across the local-government landscape. All stem from a basic reality: across the board, local governments are highly fragmented political bodies that operate in a dizzyingly fragmented governance space.⁴¹ There is roughly one local government for every 3,700 Americans, which amasses to over 90,000 local-government entities across

38. Andrew, *supra* note 10, at 9.

39. Off. of the City Auditor, *Interlocal Agreements Audit*, CITY OF AUSTIN 10 (Aug. 2021) (draft working paper), <https://services.austintexas.gov/edims/document.cfm?id=365821> [<https://perma.cc/XZ8R-JM6K>].

40. Spicer, *supra* note 10, at 506 (explaining that “[t]he growing use of formal, written interlocal service sharing has been addressed elsewhere at length”); *see also* Eric S. Zeemering, *The Problem of Democratic Anchorage for Interlocal Agreements*, 42 AM. REV. PUB. ADMIN. 87, 87 (2012) [hereinafter Zeemering, *Democratic Anchorage*] (observing that ILAs “are growing in popularity”); Daryl J. Delabbio & Eric S. Zeemering, *Public Entrepreneurship and Interlocal Cooperation in County Government*, 45 STATE & LOC. GOV’T REV. 255, 255 (2013) (noting that local governments now contract more with other governments than with private-sector entities). One oft-cited reason for the prevalence of ILAs is that, according to public-administration research, governments that have engaged in interlocal collaboration in the past are more prone to engaging in additional collaborations in the future, thus snowballing the use of ILAs over time. *See* David K. Roberts, *Separate, But Equal? Virginia’s “Independent” Cities and the Purported Virtues of Voluntary Interlocal Agreements*, 95 VA. L. REV. 1551, 1586–87 (2009); Honosky, *supra* note 10; Sung-Wook Kwon & Richard C. Feiock, *Overcoming the Barriers to Cooperation: Intergovernmental Service Agreements*, 70 PUB. ADMIN. REV. 876, 881 (2010); Eric Zeemering, *Assessing Local Elected Officials’ Concerns About Interlocal Agreements*, 53 URB. STUD. 2347, 2349 (2016) [hereinafter Zeemering, *Assessing Local Elected Officials’ Concerns*]; Bruce J. Perlman, *Trust and Timing: The Importance of Relationship and Opportunity for Interlocal Collaboration and Agreements*, 47 STATE & LOC. GOV’T REV. 116, 119 (2015).

41. Rosenbaum, *supra* note 36, at 678; *see also* Kelly LeRoux, Paul W. Brandenburger & Sanjay K. Pandey, *Interlocal Service Cooperation in U.S. Cities: A Social Network Explanation*, 70 PUB. ADMIN. REV. 268, 268 (2010) (“Jurisdictional fragmentation complicates the management of boundary-spanning public infrastructure, environmental pollution, crime, regional economies, and other problems that spill over the borders of one city into the next.”).

the United States.⁴² With rare exceptions, therefore, localities tend to be quite small—both in rural and in urban areas—and also geographically entangled, such that the majority of “Americans reside within the jurisdictional boundaries of multiple local entities.”⁴³ In this environment, local decisions can cause significant externalities in neighboring communities, a source of both interlocal competition (e.g., where both communities seek to attract a tax-rich commercial development⁴⁴) and interlocal impositions (e.g., where both communities place undesired land uses along their neighbor’s border).⁴⁵ ILAs help manage these spillover effects by giving municipal partners a mechanism to coordinate and cooperate.⁴⁶ Local signatories to an ILA can precommit to a framework for resolving their disputes, for sharing rather than fighting over cross-boundary resources, and for communicating with each other about future plans.⁴⁷

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42. As of 2017, there were 90,126 local government units in the country. Am. Counts Staff, *From Municipalities to Special Districts, Official Count of Every Type of Local Government in 2017 Census of Governments*, U.S. CENSUS BUREAU (Oct. 29, 2019), https://www.census.gov/content/dam/Census/library/visualizations/2019/econ/from_municipalities_to_special_districts_america_counts_october_2019.pdf [<https://perma.cc/A3SH-7H9N>]. Meanwhile, the population of the United States is 331,449,281. Brynn Epstein & Daphne Lofquist, *U.S. Census Bureau Today Delivers State Population Totals for Congressional Apportionment*, U.S. CENSUS BUREAU (Apr. 26, 2021), <https://www.census.gov/library/stories/2021/04/2020-census-data-release.html> [<https://perma.cc/9Q4N-37YP>].
 43. Rosenbaum, *Interlocal Power Roulette*, *supra* note 35, at 422; see Amel Toukabri & Lauren Medina, *Latest City and Town Population Estimates of the Decade Show Three-Fourths of the Nation's Incorporated Places Have Fewer Than 5,000 People*, U.S. CENSUS BUREAU (May 21, 2020), <https://www.census.gov/library/stories/2020/05/america-a-nation-of-small-towns.html> [<https://perma.cc/BR6E-4C8P>].
 44. Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U. CHI. L. REV. 65, 90 (2010) (discussing the “ongoing interlocal bidding war for business investment”).
 45. See generally Sarah L. Swan, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831 (2022) (describing land use’s intersection with constitutionally divisive issues).
 46. See Kelly LeRoux, *Nonprofit Community Conferences: The Role of Alternative Regional Institutions in Interlocal Service Delivery*, 40 STATE & LOC. GOV'T REV. 160, 160 (2008); Minor Myers III, *Obstacles to Bargaining Between Local Governments: The Case of West Haven and Orange, Connecticut*, 37 URB. LAW. 853, 855 (2005); see also *Report on the City of Covington – County of Alleghany Voluntary Economic Growth-Sharing Agreement*, VA. COMM'N ON LOC. GOV'T 17 (2017), <https://www.dhcd.virginia.gov/sites/default/files/Docx/clg/previous-commission-reports/city-of-covington-county-of-alleghany-voluntary-economic-growth-sharing-agreement-may-2017.pdf> [<https://perma.cc/65XL-E7SW>] [hereinafter *Report on the City of Covington*] (discussing the value of promoting coordination where municipalities might otherwise compete with each other).
 47. Local governments sometimes are explicit in setting these goals. See, e.g., *City of Olathe v. City of Spring Hill*, 512 P.3d 723, 724 (Kan. 2022) (describing an agreement between the cities of Spring Hill and Olathe); see also Brice Wallace, *Peace with SLC Important for Port's Future*,

These coordination frameworks are incentivized by another reality of local government: local officials often operate with very limited resources. Across the country, local governments are fiscally constrained, squeezed by decades of stagnant tax revenues and eroding state funding contributions.⁴⁸ To continue providing the same level of services to their residents, municipal governments employ ILAs to deliver those services collectively, in the process realizing efficiencies of scale while avoiding a mutually costly duplication of resources.⁴⁹ Relatedly, localities are also administratively constrained, often unable to employ and retain the skilled staff needed to manage their budgets, enforce their laws, and comply with complex state and federal requirements.⁵⁰ Here, ILAs can help pool technical know-how between local governments – for example, as is common, when requesting and administering federal grants – and for the more basic purpose of sharing in-demand skilled employees.⁵¹ An ILA in California, for

ENTER.: UTAH'S BUS. J. (Oct. 31, 2022), <https://slenterprise.com/images/pdf/2022/10.31.2022-Enterprise.pdf> [[https://perma.cc/G2N\]-VJLU](https://perma.cc/G2N]-VJLU)] (quoting a local official describing a recently executed ILA: “This gives us something to anchor to, it gives us something to enforce around, it gives us something that allows us to say, in black and white, ‘This is what our protections are’”). A significant cross-jurisdictional resource exchanged by ILAs is data and information, particularly in the emergency-management context. See Kiki Caruson & Susan A. MacManus, *Interlocal Emergency Management Collaboration: Vertical and Horizontal Roadblocks*, 42 *PUBLIUS* 162, 168 (2012).

48. See Christopher J. Tyson, *The Impact of Municipal Fiscal Crisis on Equitable Development*, 48 *FORDHAM URB. L.J.* 883, 887 n.8 (2021); see also Clayton P. Gillette, *Fiscal Home Rule*, 86 *DENV. U. L. REV.* 1241, 1241 (2009) (discussing the fiscal distress of cities); Clayton P. Gillette, *Dictatorships for Democracy: Takeovers of Financially Failed Cities*, 114 *COLUM. L. REV.* 1373, 1462 (2014) (discussing “takeover boards” used by state governments to supervise the budgets of localities in financial distress); Erin Scharff, *Cities on Their Own: Local Revenue When Federalism Fails*, 48 *FORDHAM URB. L.J.* 919, 919-921 (2021) (describing the fiscal challenges cities faced as a result of the COVID-19 pandemic and relating it to a larger challenge of federalism); Michelle Wilde Anderson, *The New Minimal Cities*, 123 *YALE L.J.* 1118, 1129 (2014) (examining insolvent cities).
49. See Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 *J.L. & POL.* 365, 365-66 (2005) (discussing scale and efficiency); Zeemering, *Democratic Anchorage*, *supra* note 40, at 87 (same), LeRoux, Brandenburger & Pandey, *supra* note 41, at 268 (same); Spicer, *supra* note 10, at 506 (discussing scale, efficiency, and cost savings); LeRoux, *supra* note 46, at 160 (same); Kwon & Feiock, *supra* note 40, at 877 (discussing efficiency and cost savings, which are cited in one survey as the primary motivators for entering into service delivery ILAs).
50. See Richard C. Schragger, *Reclaiming the Canvassing Board: Bush v. Gore and the Political Currency of Local Government*, 50 *BUFF. L. REV.* 393, 404 (2002) (explaining why local governments are regarded as attracting less-skilled employees).
51. See *City of Falls City v. Neb. Mun. Power Pool*, 777 N.W.2d 327, 331 (Neb. 2010) (discussing shared staff); Perlman, *supra* note 40, at 117 (sharing expertise); Honosky, *supra* note 10 (examining an ILA where each local entity brought different technical skills to the collaboration). With respect to federal grants, see generally Kenneth N. Bickers & Robert M. Stein, *Interlocal Cooperation and the Distribution of Federal Grant Awards*, 66 *J. POL.* 800 (2004) (finding that interlocal cooperation impacts federal grant awards).

instance, was executed solely to share a single employee between two local entities that each sought to draw upon his expertise in airport management and land-use planning.⁵²

The economic and administrative headwinds facing local governments have only intensified in recent years, as localities face creeping fiscal pressures against a backdrop of accelerated staff turnover and transient, often unpredictable state and federal funding.⁵³ In this climate, ILAs offer local officials and residents an arguable win-win proposition. Through collaboration, their communities can realize the benefits of interlocal consolidation—that is, they can achieve the efficiencies and mitigate the externalities that would theoretically result if their overlapped entities were to merge into larger government bodies⁵⁴—yet, in the process, they do not have to cede their separate political identities, nor their respective legal autonomy.⁵⁵ The ability to collaborate without consolidating is meaningful and attractive to local stakeholders. Even as efforts to consolidate localities remain unpopular, nodes of interlocal collaboration continue to emerge and prosper, a governance network that manifests through ILA documents and no doubt explains much of their growing popularity.⁵⁶ Increasingly, officials

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52. See *Agreement between the San Diego County Regional Airport Authority and the City of San Diego for Executive Loan of Services of Airport Authority Employee Theodore (“Ted”) C. Sexton* (Mar. 31, 2007), <https://voiceofsandiego.org/wp-content/uploads/app/pdf/tedsxtoncontract.pdf> [<https://perma.cc/CV5P-74PN>].
 53. See Richard G. Hatcher, *Towards A New Form of Local Government: The Urban Common Market*, 7 DEPAUL BUS. L.J. 253, 270 (1995) (describing interlocal collaboration against a backdrop of waning federal and state grants); Meagan M. Jordan, Terina Chapin Brooms, Juita-Elena Yusuf & Kaitrin T. Mahar, *An Illustrated Conceptual Model of Key Factors Impacting Perceived Interlocal Agreement Outcomes*, 39 PUB. PERFORMANCE & MGMT. REV. 116, 117 (2016) (discussing fiscal pressures); Andy Castillo, *Report: Local and State Governments Are Facing a Retention Crisis; the Worst Could Be Yet to Come*, AM. CITY & CNTY. (June 24, 2022), <https://www.americancityandcounty.com/2022/06/24/report-local-and-state-governments-are-facing-a-retention-crisis-the-worst-could-be-yet-to-come> [<https://perma.cc/9VDD-YLH8>] (regarding staff turnover).
 54. See LeRoux, Brandenburger & Pandey, *supra* note 41, at 268 (discussing how collective action in a fragmented space can “minimize negative externalities[] and maximize economies of scale”). These benefits might also operate on a regional level, as collaboration between self-interested localities may help reduce regional inequalities. See Roberts, *supra* note 40, at 1567-71 (citing Gillette, *supra* note 36).
 55. See Kwon & Feiock, *supra* note 40, at 877; Jordan et al., *supra* note 53, at 117; Zeemering, *Assessing Local Elected Officials’ Concerns*, *supra* note 40, at 2354.
 56. See Daniel Chase Fishbein, *300 Governments: Understanding Intermunicipal Collaboration in Nassau County, NY and Policies of “Forced Efficiency” in New York State*, 32 TOURO L. REV. 535, 543 (2016) (discussing the political viability of collaboration as compared with consolidation and other regional-management forms); Eric S. Zeemering, *Governing Interlocal Cooperation: City Council Interests and the Implications for Public Management*, 68 PUB. ADMIN. REV. 731, 732

enact interlocal policy through agreements negotiated wholly locally, absent any federal or state involvement.⁵⁷ ILAs are a natural byproduct of this trend.

This Article acknowledges that ILAs are appealing local instruments that can carry normative value. Indeed, it takes as a given that ILAs are integral, inexorable, and often essential tools in the local-government toolkit. But having accepted them as fixtures of the landscape, this Article goes one step further and recognizes ILAs as lawmaking institutions in their own right – as documents that create new regulatory schemes; that transfer, expand, and limit local power; and that have real consequences for people who live under their jurisdictional force.⁵⁸ The appeal and normative value of ILAs must be considered against their often very salient normative flaws.

B. *ILAs in Local-Government Scholarship*

What role do ILAs play within the larger choreography of local democracy? In principle, local government derives its legitimacy from its proximity to local residents, who are able to access, participate in, and influence decisions that affect their community in a way that does not translate to the national level.⁵⁹ If ILAs are here to stay, how accountable are the governance regimes that they create? What legal framework enables and undergirds their democratic legitimacy?

Academic research on these questions is slim. ILAs have received belated scholarly attention in recent years, particularly in the field of public administration, where researchers have explored the political conditions that enable ILAs, their normative role in collaborative governance networks, and the experience of officials who administer them.⁶⁰ Yet few public-administration studies assess

(2008) (same); Julie Cencula Olberding, *From Fragmentation to Collaboration: The Evolution of Interlocal Relations in Northern Kentucky*, in KENTUCKY GOVERNMENT, POLITICS, AND PUBLIC POLICY 237, 239 (James C. Clinger & Michael W. Hail eds., 2013) (“Regional governance seems to be increasing, while regional government seems to be on the decline, according to scholars.”); *id.* at 253 (“[S]cholars have observed that merger and consolidation proposals are being replaced by voluntary partnerships among governments, nonprofit organizations, and the private sector.”); see also Christian Iaione & Elena De Nictolis, *Urban Pooling*, 44 FORDHAM URB. L.J. 665, 667 n.7 (2017) (noting a recent shift towards co-governance networks).

57. See Kwon & Feiock, *supra* note 40, at 876 (comparing ILAs against other regional legal schemes).

58. See *infra* Part II.

59. See Rosenbaum, *Interlocal Power Roulette*, *supra* note 35, at 433-34.

60. See, e.g., Simon A. Andrew, *Recent Developments in the Study of Interjurisdictional Agreements: An Overview and Assessment*, 41 STATE & LOC. GOV. REV. 133 (2009) (summarizing the academic landscape as of 2009); Yu-Che Chen & Kurt Thurmaier, *Interlocal Agreements as*

how ILAs perform after they are executed.⁶¹ Fewer still aim to understand how ILAs perform externally, from the perspective of local residents, rather than internally from the perspective of local officials.⁶² And rarely does public-administration scholarship turn its focus beyond the traditional definition of ILAs — as contracts designed primarily for service-delivery efficiencies — to examine the full breadth of local action facilitated by ILAs today.⁶³ Notably absent from these strands, as public-administration scholar Professor Zachary Spicer has observed, is attention to the accountability and transparency of ILA documents.⁶⁴ In a 2017 study, Spicer conducted an empirical review of ILAs executed between municipal governments in Ontario, Canada, scoring each agreement against criteria designed to assess its degree of public access, internal governance, and accountability.⁶⁵ The study found very low scores across each category, from which it

Collaborations: An Empirical Investigation of Impetuses, Norms, and Success, 39 AM. REV. PUB. ADMIN. 536, 536 (2009) (noting that “the academic community has been lax in studying ILAs” in a study also published in 2009). Increased research on ILAs appears to have coincided with the Great Recession and the financial crises that brought renewed attention to local-government institutions. Regarding the subjects of public-administration research in the field, see, for example, Zeemering, *Democratic Anchorage*, *supra* note 40; Victor G. Hugg, *Public Service-Function Types and Interlocal Agreement Network Structure: A Longitudinal Study of Iowa*, 56 URB. AFFS. REV. 1293, 1294 (2019) (noting that interlocal service delivery was a prominent focus of academic study in the field); Kwon & Feiock, *supra* note 40; LeRoux, Brandenburger & Pandey, *supra* note 41; Spicer, *supra* note 10; Delabbio & Zeemering, *supra* note 40; Caruson & MacManus, *supra* note 47; Lee & Hannah-Spurlock, *supra* note 36; Zeemering, *supra* note 56; LeRoux, *supra* note 46.

61. See Zeemering, *Democratic Anchorage*, *supra* note 40, at 89 (citing Chen & Thurmaier, *supra* note 60, as “one of the few studies assessing ILA performance”).
62. The vast majority of public administration studies cited in this Article draw their findings from surveys and interviews. See Kwon & Feiock, *supra* note 40, at 879-80; LeRoux, Brandenburger & Pandey, *supra* note 41, at 271-73; Spicer, *supra* note 10, at 507; Delabbio & Zeemering, *supra* note 40, at 255; Caruson & MacManus, *supra* note 47, at 162; Zeemering, *Assessing Local Elected Officials’ Concerns*, *supra* note 40, at 2352; Lee & Hannah-Spurlock, *supra* note 36, at 127; Zeemering, *supra* note 56, at 731; LeRoux, *supra* note 46, at 164; see also Hugg, *supra* note 60, at 1295 (citing flaws in this overemphasis on surveys, including that such surveys “ignore nongovernmental organizations and isolates, which may fail to capture the complete composition of a network”).
63. Public-administration research remains squarely focused on service-delivery ILAs. See Kwon & Feiock, *supra* note 40, at 876; LeRoux, Brandenburger & Pandey, *supra* note 41, at 268; Spicer, *supra* note 10, at 505; Delabbio & Zeemering, *supra* note 40, at 255; Zeemering, *Assessing Local Elected Officials’ Concerns*, *supra* note 40, at 2349; LeRoux, *supra* note 46, at 161.
64. Zachary Spicer, *Bridging the Accountability and Transparency Gap in Inter-Municipal Collaboration*, 43 LOC. GOV’T STUD. 388, 390 (2017) (describing accountability and transparency as an “unexplored area”).
65. See *id.* at 394-99. As in the United States, local governments in Canada operate in fractured ecosystems where they play crucial governance roles despite lacking a defined constitutional

concluded that “many citizens . . . are in the dark” about the services they receive through ILAs, and thus “inter-municipal arrangements could be vastly improved” to ensure their democratic credibility.⁶⁶

Legal research into ILAs has traversed a similar path. Rather than studying the impact of ILAs upon local institutions, legal scholarship – and, in particular, local-government scholarship – has focused predominantly on the normative value of ILAs in regional-governance schemes.⁶⁷ In the view of some commentators, in the vein discussed above, ILAs provide an appealing if imperfect remedy to the jurisdictional fracture of local government, a politically palatable way to create regional networks short of complete consolidation.⁶⁸ In the view of others, however, ILAs are undesirable for this very reason: they allow local entities to engage in “selective regionalism” by only sharing powers and services with other local entities of their choice, a patchwork of inequitable cooperation that leaves many of the least-resourced governments in a region behind.⁶⁹ This debate over the optimal structure of regional government is a fundamental one. Yet while it implicates questions of democratic accountability, its focus is on existential questions to which ILAs are mere role players – questions such as whether decentralization, regionalism, or a “new regionalism” hybrid best promote the

status. See, e.g., Gabriel Eidelman, *Failure When Fragmented: Public Land Ownership and Waterfront Redevelopment in Chicago, Vancouver, and Toronto*, 54 URB. AFF. REV. 697 (2018) (highlighting fragmentation in Toronto); Alexandra Flynn, *Un-Democratizing the City? Unwritten Constitutional Principles and Ontario's Strong Mayor Powers*, SUP. CT. L. REV. (forthcoming 2024) (regarding the role and status of Canadian local governments). It follows that Canadian localities also turn to contract to perform and navigate functions and powers in their regions. Yet the number of local governments in Ontario – 444, according to one count, see *Provincial and Municipal Statistics*, PROVINCIAL-TERRITORIAL OFF. COMM. ON LOC. GOV'T (2017), https://www.muniscope.ca/research/municipal_facts/Provincial_Municipal_Statistics [<https://perma.cc/ZX49-FESU>] – still pales in comparison to U.S. states, where the universe of ILAs is presumably more complex and no less challenging to access, govern, and hold accountable.

66. Spicer, *supra* note 64, at 397, 399–400.

67. See, e.g., Galvan, *supra* note 37, at 3078–79; Keith Aoki, *All the King's Horses and All the King's Men: Hurdles to Putting the Fragmented Metropolis Back Together Again? Statewide Land Use Planning, Portland Metro and Oregon's Measure 37*, 21 J.L. & POL. 397, 397–98 (2005).

68. See *supra* notes 46–56 and accompanying text; see also Jason Moreira, *Regionalism, Federalism, and the Paradox of Local Democracy: Reclaiming State Power in Pursuit of Regional Equity*, 67 RUTGERS U. L. REV. 501, 532–36 (2015) (discussing the theory of “New Regionalism,” which embraces ILAs and voluntary collaboration as an alternative to regional government).

69. See, e.g., Roberts, *supra* note 40, at 1575–76 (citing Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 150–56 (2003)) (advancing the selective-regionalism critique); Gillette, *supra* note 36, at 193–94 (citing Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 43–44 (1998); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 294–303, 328–34 (1993)).

aims of local democracy.⁷⁰ The debate does not address the on-the-ground democratic impacts of the ILAs in force today, which create regional-governance schemes in practice notwithstanding their regional value in theory.

A departure from this body of literature comes in the work of Professor Bridget A. Fahey, an administrative-law scholar who has explored intergovernmental agreements in their own right, as documents that structure governance regimes between and within public entities.⁷¹ In *Federalism by Contract*, Fahey argues that intergovernmental agreements between federal and state agencies function as domestic treaties — “as both contract-like instruments and public lawmaking instruments” — with important ramifications for government transparency.⁷² In *Data Federalism*, Fahey applies this theme to the market for intergovernmental data, where federal and state intergovernmental agreements, she argues, perform a legislative function in making the law and policy by which this market operates.⁷³

Professor Fahey’s groundbreaking work reveals only the tip of the iceberg. Her emphasis on vertical relationships between federal and state actors leaves unaddressed a more crowded understory: the horizontal relationships forged between local entities and memorialized through local contracts.⁷⁴ At the local

70. See, e.g., Moreira, *supra* note 68, at 511; Aoki, *supra* note 67, at 409-10.

71. See Fahey, *supra* note 10, at 2329; Bridget A. Fahey, *Data Federalism*, 135 HARV. L. REV. 1007, 1014 (2022).

72. Fahey, *supra* note 10, at 2330-31, 2335.

73. Fahey, *Data Federalism*, *supra* note 71, at 1042.

74. See Fahey, *supra* note 10, at 2329 n.1 (noting that the article “exclude[s] intrastate agreements—between states and their localities, and among localities within states”). In addition to vertical intergovernmental agreements, state and local entities also frequently enter into intergovernmental agreements with tribal authorities. As with ILAs, the use of such agreements is widespread and extends across substantive fields of governance. See Justin B. Barnard, *Responding to Public Health Emergencies on Tribal Lands: Jurisdictional Challenges and Practical Solutions*, 15 YALE J. HEALTH POL’Y, L. & ETHICS 251, 279 (2015) (regarding the “widespread” use of these agreements); Seth Davis, *The Constitution of Our Tribal Republic*, 65 UCLA L. REV. 1460, 1470 (2018) (noting that tribes are “[i]ncreasingly” entering into agreements with states and localities); Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 842-43 (2014) (“Intergovernmental agreements between tribes and other tribal, local, state, and federal governments exist in nearly every area of governance . . .”). Moreover, as with ILAs, Indian Law scholars have debated the normative value of these intergovernmental agreements. See, e.g., Alex Tallchief Skibine, *Formalism and Judicial Supremacy in Federal Indian Law*, 32 AM. INDIAN L. REV. 391, 427 (2008); Ezra Rosser, *Caution, Cooperative Agreements, and the Actual State of Things: A Reply to Professor Fletcher*, 42 TULSA L. REV. 57, 58 (2006). Scholars have recently turned attention to how tribal intergovernmental agreements actually operate, including, specifically, in the tribal-local context. See, e.g., Rebecca Webster, *Tribal and Local Government Agreements: Negotiating Mutually Beneficial Terms for Consideration of Services*, 44 AM. INDIAN Q. 302 (2020). Despite these commonalities with ILAs, tribal intergovernmental agreements

level, ILAs are not simply pervasive but dominant; they operate across governance fields that higher planes of power both regulate and ignore.⁷⁵ And because the levers of government are so accessible yet unstructured at the local level—indeed, a hallmark of local democracy is that officials are more responsive to their constituents because they operate within informal systems⁷⁶—ILA regimes assume an added urgency when that accessibility might be compromised. Simply put, local governments are unique, yet the lawmaking consequences of their ILAs have escaped study. So too has another unique facet of local governance: the state legal regimes under which they inescapably operate, and where, sometimes, the proliferation of poorly accountable local practices can be traced directly to deficits in state law.

This Article fills these gaps. It builds upon Professor Spicer’s research in public administration and Professor Fahey’s excavation of vertical intergovernmental contracts, taking inspiration from each work to shed light upon ILAs as governance documents with problematic democratic deficits. First, however, by way of explaining why readers should care about these under-the-radar agreements, the next Part turns to the far-reaching powers that local governments can wield through them.

II. THE FORMIDABLE REACH OF INTERLOCAL AGREEMENTS

As the use of ILAs has expanded over time, so too has the role played by these documents in the local-governance ecosystem. This Part highlights the prominent position ILAs hold and the durable policies they exact upon local communities. First, this Part considers the role of ILAs within local-government networks, where they serve as versatile instruments for the exercise of regional-level power. It then canvasses how ILAs are approached by state courts, which have unintentionally granted them an enviable dual role as unremarkable

are not *interlocal* agreements; rather, they are contracts between sovereigns grounded in a history of federal treaty-making and erasure that lacks a local government analog. Therefore, while outside the scope of this Article, tribal-local contracting is also a significant area of governance that could benefit from further study.

75. See, e.g., *infra* note 89 and accompanying text (discussing land use as a realm left to local control).
76. Local-government-law scholars have commented at length on the unique role of informality in local governance and its interplay with public access and accountability. See Nestor M. Davidson, *Localist Administrative Law*, 126 *YALE L.J.* 564, 604-07 (2017); Casey Adams, *Home Rules: The Case for Local Administrative Procedure*, 87 *FORDHAM L. REV.* 629, 656-61 (2018); Patience A. Crowder, “Ain’t No Sunshine”: *Examining Informality and State Open Meetings Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making*, 74 *TENN. L. REV.* 623, 637 (2007); Nestor M. Davidson & David Fagundes, *Law and Neighborhood Names*, 72 *VAND. L. REV.* 757, 814 (2019).

administrative contracts and also as expansive legislative acts. Taken together, the wide use of ILAs for regional-lawmaking schemes, coupled with the wide latitude courts afford them, elevates these documents from the backburner to the epicenter of local power. The Part closes with a survey of the powerful role ILAs play in policing and criminal justice, where they are go-to mechanisms for regional public regulation – a far cry from their ostensibly private contractual origins.

The broad reach of ILAs heightens their accountability stakes. No doubt, even when ILAs are narrowly conceived as vehicles for efficient service delivery, local-democratic theory still demands that residents can hold local governments accountable for the agreements they execute. Even a basic service-delivery agreement entails policy tradeoffs in an environment of constrained resources. For example, when providing ambulance services via an ILA, officials may need to decide whether to invest in the speed of the ambulance itself or the amount of advanced training provided to its operators.⁷⁷ Local residents might care about – and hope to opine on – these decisions.

But as the scope of an ILA expands, so too does its democratic import. As a regional-lawmaking document, an ILA can come into contact with residents in varied and meaningful ways. It can establish and alter their structures of government, regulate their conduct, guide their vision for growth and development, and subject them to penalty or arrest by exercise of a regionalized police power. In this manner, an expansive understanding of ILAs counsels closer examination of an agreement's underlying purpose. No longer can observers assume that efficiency – a relatively benign, technocratic aim – is the sole or primary goal of an agreement. Rather, now, local governments might be pursuing a host of other purposes in executing ILAs, purposes that may or may not align with the values and priorities of their residents. Whether democratic oversight is real or illusory becomes a critical question in these contexts. In this manner, as this Part concludes, the transparency of ILA documents grows increasingly central to our story.

A. *Tools of Regional Lawmaking*

Local governments use ILAs to further a variety of strategic goals. They employ ILAs to codify shared governance strategies and adopt joint rules for approaching important policy issues.⁷⁸ They use ILAs to exchange and sometimes

77. Zeemering, *Democratic Anchorage*, *supra* note 40, at 94-95.

78. See Zeemering, *Assessing Local Elected Officials' Concerns*, *supra* note 40, at 2350 (citing Yu-Che Chen & Kurt Thurmaier, *Interlocal Agreements as Collaborations: An Empirical Investigation of*

reconfigure jurisdiction and power between two or more entities, often with a real regulatory impact on residents within their local communities.⁷⁹ By virtue of an ILA, for example, a resident can be fired from a teaching position (where she had previously enjoyed for-cause protections),⁸⁰ subject to arrest by a police officer from a different jurisdiction (where she does not vote),⁸¹ and forced to attend a courthouse miles away from (and far outside of) her own municipality.⁸²

Impetuses, Norms, and Success, 39 AM. REV. PUB. ADMIN. 536 (2009)); Arild Gjertsen, *Legitimacy in Interlocal Partnerships*, 51 URB. STUD. 1926 (2014)) (“Local governments may adopt interlocal agreements to achieve a range of governance goals unrelated to economic efficiency or cost savings in service delivery.”); see also Zeemering, *supra* note 56, at 734 (noting that “[h]orizontal intergovernmental activities include a variety of tasks associated with policy making and strategy”); Galvan, *supra* note 37, at 3078 (describing certain ILAs as “strategic partnerships” between local governments).

79. See *SEIU Health Care v. Snyder*, 875 F. Supp. 2d 710, 721 (E.D. Mich. 2012) (interpreting state law to permit using ILAs to “transfer rights and duties” between local governments); see also *Sells v. Unified Sch. Dist. No. 429*, 644 P.2d 379, 380 (1982) (transferring responsibility for state-mandated special education programs); *Smith v. Town of Cramerton*, No. 18-CV-631, 2019 WL 4233614, at *5-*6 (W.D.N.C. Sept. 5, 2019) (recognizing plaintiff’s right to sue for employment benefits pursuant to an ILA transferring provision of police services). *But see Race v. Bradford Cnty.*, No. 18-cv-153-J-39, 2019 WL 7482235 (M.D. Fla. Aug. 20, 2019), *report and recommendation adopted as modified*, 2019 WL 7482213 (M.D. Fla. Sept. 26, 2019) (denying summary judgment because the judge was unsure whether a county could transfer responsibility for a jail via an ILA).
80. *Sells*, 644 P.2d at 380-81.
81. See, e.g., *State v. Ohlrich*, 817 N.W.2d 797, 804 (Neb. Ct. App. 2012) (noting that an ILA “may authorize” extraterritorial arrests); see also discussion *infra* Section II.C.
82. See, e.g., *City of Medina v. Primm*, 157 P.3d 379, 385 (Wash. 2007). In *City of Medina*, a number of municipalities in Washington—“at least 18 cities and towns,” according to the majority opinion—entered into ILAs with the City of Kirkland to “share” their respective municipal courts with the Kirkland Municipal Court and appoint Kirkland’s judge to preside over the court of each contracting jurisdiction. See *id.* at 380. In accordance with one of these ILAs, the named petitioner in the consolidated case was arrested and charged with a crime in the City of Medina, yet she was nevertheless obligated to appear before the judge of the Kirkland Municipal Court, which heard her case. See *id.* Sitting en banc, a majority of the Washington Supreme Court found that the state’s interlocal-cooperation act was envisioned and written broadly enough to authorize interlocal court-sharing arrangements, *id.* at 384, although in reaching this conclusion, the majority emphasized that it was agnostic to whether such agreements constituted good public policy, *id.* at 385. A concurring opinion, penned by Chief Justice Alexander, agreed with the majority’s interpretation of state law but expressed alarm, as a matter of public policy, that the municipalities’ ILA scheme “has the capacity to cause considerable inconvenience to the public” by forcing people to travel potentially great distances to defend themselves against criminal charges. *Id.* at 385-86. Writing in dissent, Justice Sanders argued that no state law permitted cities to create extraterritorial courts—or to contract to hear another municipality’s cases. *Id.* at 387 (Sanders, J., dissenting). In his view, the municipalities were using interlocal contracts to “create” a municipal court by fiat. *Id.*

The wide array of decisions prescribed by ILAs show their powerful lawmaking function. Governments rely upon ILAs when deciding where to locate a new school,⁸³ how to select the route of a rail system,⁸⁴ when to share or assign tax revenues,⁸⁵ and where to develop civic amenities such as parks and sports arenas.⁸⁶ Each of these underlying ILAs was designed to carry real legal weight and to mandate a particular course of action between governmental partners, not merely to suggest an outcome or a collaborative approach for reaching it. In Utah, for example, a commuter-rail corridor was almost entirely planned through an ILA, which defined (and prescribed) the regulatory, zoning, and planning power of thirty-five municipalities and five counties across an expansive metropolitan area.⁸⁷ The final agreement granted a special local authority the power to construct, own, and operate a transit system along a particular corridor, notwithstanding local zoning and without obtaining any local permits or paying any local fees.⁸⁸ This agreement effectively removed the project from the purview of land-use control, perhaps the most quintessential function of local power.⁸⁹

In many regions, therefore, ILAs are a primary source of instruction for the weightiest fields of local power; they direct and sometimes dictate policies regarding land-use planning, affordable housing, economic and community development, and environmental mitigation.⁹⁰ If intralocal lawmaking arises out of a classical political negotiation, one where local residents, councilmembers, mayors, and administrators together forge an intralocal policy, interlocal lawmaking is frequently, and with increasing regularity,⁹¹ negotiated instead

83. See, e.g., *Lutz Lake Fern Rd. Neighborhood Grps., Inc. v. Hillsborough Cnty.*, 779 So. 2d 380, 382 (Fla. Dist. Ct. App. 2000).

84. See, e.g., *Citizens for Responsible Transp. v. Draper City*, 190 P.3d 1245, 1246-47 (Utah 2008); Kathryn Pett & Denise Drago, *Transportation Corridor Planning and Preservation in an Urban Environment*, 21 NAT. RES. & ENV'T 45, 47-48 (2006).

85. See, e.g., *Report on the City of Covington*, *supra* note 46, at 1; *City of Magnolia v. Milligan*, 584 S.W.3d 716, 717 (Ark. Ct. App. 2019).

86. See, e.g., *Reese v. City of Charlotte*, 676 S.E.2d 493, 495 (N.C. Ct. App. 2009).

87. Pett & Drago, *supra* note 84, at 47.

88. *Citizens for Responsible Transp.*, 190 P.3d at 1246-47.

89. See Rosenbaum, *Interlocal Power Roulette*, *supra* note 35, at 749.

90. See *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 293-95 (Neb. 2003) (discussing the use of an ILA for community development, transportation, and flood prevention); *Sullins v. Cent. Ark. Water*, 454 S.W.3d 727, 732 (Ark. 2015) (discussing an ILA in the context of land use); *supra* note 1 and accompanying text (discussing the use of ILA for economic development); *Wallace*, *supra* note 47, at 1 (discussing the use of an ILA for land use planning, affordable housing, and environmental and community mitigation); Pett & Drago, *supra* note 84, at 47 (discussing the use of an ILA for transportation and land use).

91. See *supra* Section I.A.

through ILAs.⁹² ILAs are thus best situated on a regional scale – as shared conduits of authority, policymaking, and law.

The regional nature of ILAs alone makes them potent in an ecosystem where local power is often a zero-sum proposition.⁹³ When the dust of a regional negotiation settles, the terms of a given ILA may serve to enhance the power of a particular local entity to a degree well in excess of that entity’s original purpose.⁹⁴ Likewise, as in Utah, an ILA may also serve to constrain a municipality’s power, even power the municipality has traditionally possessed and long exercised.⁹⁵

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92. See, e.g., Roger Richman, *Formal Mediation in Intergovernmental Disputes: Municipal Annexation Negotiations in Virginia*, 45 PUB. ADMIN. REV. 510, 511 (1985) (describing an ILA formed out of an extensive negotiation process between a town and a county).
93. Cf. Rick Su, *Have Cities Abandoned Home Rule?*, 44 FORDHAM URB. L.J. 181, 213 (2017) (“The problem is that cities and other local communities tend to see themselves enmeshed in a zero-sum game. They compete for residents and development opportunities. They jostle for businesses and the tax revenues that they bring. They are jealous of one another and, when collaborative opportunities present themselves, fear exploitation at each other’s hands.”).
94. ILAs can expand local power in a number of ways. Most traditionally, an ILA can expand a locality’s jurisdiction, permitting it to perform a service or function outside of its chartered geographic boundaries that it would otherwise be authorized to perform within them. See Reynolds, *supra* note 69, at 124-25 (discussing *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48 (Colo. App. 1991)). In addition, however, ILAs can also independently create powers that a local entity would not otherwise possess even *within* their chartered geographic boundaries. See Sullins, 454 S.W.3d at 731-32 (explaining that, despite not being authorized to operate a wastewater system, a local authority by ILA can be delegated a role administering a wastewater system). And then there are myriad examples of local governments using ILAs to create programs that they lacked a legal basis to perform. See, e.g., *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 53 P.3d 1028, 1032 (Wash. Ct. App. 2002) (arguing that a “community relief” payment made pursuant to an ILA was an invalid exercise of a local entity’s statutory power); FLORIDA AUDITOR GENERAL, HILLSBOROUGH COUNTY AVIATION AUTHORITY: TAMPA INTERNATIONAL AIRPORT 2012 MASTER PLAN CAPITAL PROJECTS PRIOR AUDIT FOLLOW-UP, No. 2020-128, at 3 (2020) (finding in an audit that an airport authority did not demonstrate a statutory basis for funding and operating an arts program).
95. See, e.g., *Hutchinson v. City of Madison*, 987 N.E.2d 539, 541 (Ind. Ct. App. 2013) (upholding an ILA where a county’s only role is to permit a city to exercise its powers). Among other examples, local governments have agreed via ILA to cede or limit land use planning authority, discretion over tax revenues, and even control over their employees. See Michelle Tafoya, Comment, *Reframing the Framework: Direct Democracy, State Constitutional Interpretation, and the Legislative-Administrative Question in Montana*, 77 MONT. L. REV. 151, 165-66 (2016); *City of Magnolia v. Milligan*, 584 S.W.3d 716, 719 (Ark. Ct. App. 2019); *Pitrolo v. Cnty. of Buncombe*, No. 06CV199, 2009 WL 1872247, at *3 (W.D.N.C. June 29, 2009); see also *City of Whitefish v. Bd. of Cnty. Comm’rs of Flathead Cnty. ex rel. Brenneman*, 199 P.3d 201, 204 (Mont. 2008) (reversing a district court finding that an ILA was invalid because it “would prohibit [a county] from exercising [the] authority reserved to it by the legislature”). Governments regularly cede power in exchange for negotiated promises by interlocal partners. In one common example, a town promised not to exercise its power to annex a street, provided

Interlocal power can be the very currency being exchanged in these contracts. When neighboring cities agree to limit their respective powers, they are limiting the externalities that their neighbor may impose upon them and shoring up their individual spheres of autonomy.⁹⁶ As consideration for benefits they receive from an ILA project or scheme, localities sometimes pay in pure political currency: they promise to support the grant applications of another entity,⁹⁷ endorse ILAs that a different government might execute in the future,⁹⁸ and agree to share state-legislative strategies.⁹⁹ As set forth in one ILA from Chicago, localities also agree to “commit [] federal and state lobbying resources” on behalf of an interlocal partner.¹⁰⁰ A recent ILA in Wisconsin even empowered one local government to take over the property, governing body, and territory of another government at some future juncture, a course of action it could take unilaterally by simply adopting a “triggering ordinance.”¹⁰¹ As these examples demonstrate, ILAs do not merely create regional laws; they can bind parties to regional alliances and reorder underlying regional networks.

that its neighboring city agreed to maintain it. *City of Carmel v. Steele*, 865 N.E.2d 612, 620 (Ind. 2007).

96. See *City of Olathe v. City of Spring Hill*, 512 P.3d 723, 724 (Kan. 2022) (mutually agreeing not to annex property on opposite sides of a boundary line); Cartier, *Mediating Local Intergovernmental Disputes – Reflections on the Process*, *supra* note 10, at 10–11 (2003) (analyzing agreement that required the other party’s consent before seeking an expanded land use “sphere of influence”). Local officials therefore see value in relinquishing power strategically to other governments – a decision, however, that can serve to limit their locality’s authority for years into the future. See Jordan et al., *supra* note 53, at 122; see also *Race v. Bradford Cnty*, No. 18-cv-153-J-39, 2019 WL 7482235, at *26 (M.D. Fla. Aug. 20, 2019) (asking whether a county can “contract away [its] responsibility through [an] interlocal agreement”); *infra* Section III.D (describing the longitudinal implications of legislators’ ability to bind their successors).
97. Amended and Restated Memorandum of Understanding by and Between California High-Speed Rail Authority, Southern California Association of Governments, San Diego Association of Governments, San Bernardino Associated Governments, Riverside County Transportation Commission & San Diego County Regional Airport Authority 4 (2009) (on file with author) (agreeing to “participate and support” a transportation authority’s efforts to obtain state and federal funding).
98. Interlocal Agreement Between Port of Seattle and City of Seattle for Widening of the Spokane Viaduct 3 (2010) (“The Port agrees to support the City to the extent practical in the City’s pursuit of [] interagency agreements and/or permits.”).
99. Interlocal Agreement Between Port of Seattle and City of SeaTac 9 (2018) (on file with author).
100. Compact Between the City of Chicago and the City of Gary Relating to the Establishment of the Chicago-Gary Regional Airport Authority 46 (1995) (on file with author).
101. *City of Mayville v. Vill. of Kekoskee*, No. 2022AP1467, 2023 WL 4630163, at *2 (Wis. Ct. App. July 20, 2023) (providing that upon the village adopting a “triggering ordinance,” “all real, personal, and intangible property of the Town, and all its assets and liabilities, become those of the Village” and “a process [is initiated] for the Town’s governing body to transition into the governing body of the Village”).

B. Versatile Legal Instruments

Courts have further bolstered ILAs by giving them dual and contradictory identities: while ILAs are primarily framed as mere administrative agreements, they are periodically also understood as substantive legislative acts. Ordinarily, courts distinguish between the two by asking whether a governmental action “creates new law,” which would make the action legislative in function, or “merely executes or implements existing law,” in which case the function is solely administrative.¹⁰² Courts routinely emphasize the core administrative elements of ILAs. They stress, for instance, that an ILA focuses on the “implementation and enforcement” of new programs, even if it can also delegate new avenues of policymaking,¹⁰³ and that its powers derive from existing statutes, even if an ILA can also create and expand spheres of local power.¹⁰⁴

This categorization insulates ILAs from a host of procedural obligations. When an ILA is deemed administrative in nature, it is considered distinct from a local ordinance, and, therefore, from any state law that dictates how local actors using ordinances must govern. Using a purportedly administrative ILA, a city can implement far-reaching transportation, economic-development, and flood-control projects without the procedural hoops that would accompany those same projects if an ordinance enacted them.¹⁰⁵ Similarly, an interlocal body created by an ILA can skirt public-bidding requirements, even if the city and county that ratified the ILA would be subject to those requirements if they had instead acted by legislation.¹⁰⁶ Local officials deliberately exploit such loopholes.¹⁰⁷

102. *Citizens for Responsible Transp. v. Draper City*, 190 P.3d 1245, 1248 (Utah 2008); *see also* *McKenzie v. City of Omaha*, 708 N.W.2d 286, 293 (Neb. Ct. App. 2006) (asking whether “the action taken was one making a law, or executing or administering a law already in existence” (quoting *Kelley v. John*, 75 N.W.2d 713, 715 (Neb. 1956))); *Sullins v. Cent. Ark. Water*, 454 S.W.3d 727, 732 (Ark. 2015) (stating that the “enforcement of an already-established ordinance is an exercise of administrative authority” (citing *City of Ft. Smith v. McCutchen*, 279 S.W.3d 78, 82 (Ark. 2008))); *Warren Cnty. Bd. of Health v. Warren Cnty. Bd. of Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002) (distinguishing ministerial and administrative functions from discretionary powers).

103. *See, e.g., Sullins*, 454 S.W.3d at 733.

104. *See Kubicek v. City of Lincoln*, 658 N.W.2d 291, 298 (Neb. 2003) (describing the ILA as “an effort to manage existing statutory authority under one organizing body”). Regarding the expansion of spheres of local power, *see supra* note 94 and accompanying text.

105. *See Kubicek*, 658 N.W.2d at 300.

106. *See, e.g., EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 782 (Iowa 2002) (holding that the bidding statute did not apply).

107. *See id.* at 787-88 (Streit, J., concurring specially) (warning that “[w]e cannot permit entities engaged in the construction of public improvements to evade the public bidding requirements

Governments operating through ILAs have succeeded in dodging a host of statutory obligations: they have avoided public-hearing obligations,¹⁰⁸ appointed fire-department directors outside a mandated statutory process,¹⁰⁹ made major changes to local boundaries without a public referendum,¹¹⁰ and created new city agencies without holding a vote otherwise required by charter.¹¹¹ In each of these cases, the mere fact that local action occurred through an interlocal contract skirted a procedural edict of state law, effectively neutralizing the hurdles that would have applied if just one government had acted alone.

On occasion, however, even as ILAs are dismissed as mere administrative instruments, courts will sometimes be confronted with—and implicitly recognize—the gulf that they have created, a cleavage between how ILAs are categorized and how they are capable of operating. When germane to the legal question at hand, an ILA that functions like a legislative enactment is also implicitly regarded as one. In Texas, for example, multiple courts have treated ostensibly administrative ILAs as governmental policies.¹¹² The Kansas Supreme Court analyzed and harmonized the language of an ILA against two conflicting statutory provisions, effectively placing all three on equal footing.¹¹³ And, in Florida, courts have held that police officers can reasonably rely on a grant of jurisdiction made by an ILA, brushing aside two definitional hurdles: first, the Florida

simply by forming a[n interlocal] corporation”); *Worthington v. WestNET*, 320 P.3d 721, 723 (Wash. Ct. App. 2014), *rev'd*, 341 P.3d 995 (Wash. 2015) (reversing the lower court’s decision that a task force created via ILA was not subject to suit or to the state public-records law and noting that the ILA was intentionally designed to shield the task force from public input, although this factor was not determinative in the reversal).

108. *See, e.g., City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 53 P.3d 1028, 1033 (Wash. Ct. App. 2002).
109. *Providing Fire and Other Services Under an Interlocal Agreement*, Tenn. Att’y Gen. Op. No. 09-107, 2009 WL 1644055, at *1 (June 8, 2009) (opining that, despite Tennessee law otherwise specifying an appointment process, “[a]ppointment of the director of the joint entity [created by the ILA] would be governed by the interlocal agreement between the two governments”).
110. *See, e.g., City of Kaukauna v. Vill. of Harrison*, 870 N.W.2d 680, 684 (Wis. Ct. App. 2015).
111. *See, e.g., Kubicek v. City of Lincoln*, 658 N.W.2d 291, 299 (Neb. 2003); *see also Fahey, supra* note 10, at 2403 (discussing intergovernmental agreements being used to “skirt[]” regulations, with an emphasis on policing agreements in general and asset-forfeiture laws in particular).
112. *Doe v. City of Springtown*, 2019 WL 5685369, at *5 (N.D. Tex. Aug. 26, 2019), *report and recommendation adopted*, 2019 WL 5684492 (N.D. Tex. Nov. 1, 2019) (“Plaintiff sufficiently alleges that the Interlocal Agreement . . . constitutes a[] [school district] hiring policy.”); *see also McGee v. Carrillo*, 297 F. App’x 319, 322 n.3 (5th Cir. 2008) (noting that, at oral argument, plaintiff’s counsel suggested that an Interlocal Agreement could have provided defendant sheriff with reasonable belief that he had the authority to hold the plaintiff as a prisoner).
113. *Delaware Twp. v. City of Lansing*, 512 P.3d 1154, 1158–61 (Kan. 2022).

Constitution's requirement that municipalities exercise extrajurisdictional power only by "general or special law," and second, case law that shields officers who "acted in objectively reasonable reliance upon a statute."¹¹⁴ None of these decisions have directly questioned the appropriate status of ILAs in the local legal landscape. Rather, they have given ILAs the imprimatur of formal law almost accidentally, an unconscious indication of the substantive roles such agreements play in local-governance regimes today.

C. Case Study: ILA Policing Regimes

To understand the central role that ILAs play in modern local governance, we can consider perhaps their most consequential use: local-policing regimes. ILAs are a primary codifier of cooperative-policing programs, defined broadly as any collaborative initiative pursued jointly by two or more law-enforcement agencies for the purpose of sharing jurisdictions, data, facilities, or other policing resources.¹¹⁵ Through ILAs, police agencies agree to expand their territorial reach,¹¹⁶ create and implement new cross-jurisdictional policies,¹¹⁷ and build—and then subsequently determine respective responsibilities for—local detention facilities.¹¹⁸

Over time, interlocal contracts have become the mechanism of choice for these cooperative-policing efforts.¹¹⁹ Policing ILAs were first encouraged by federal law as part of a push to institutionalize mutual-aid agreements during the

114. *Jarrett v. State*, 926 So. 2d 429, 431 (Fla. Dist. Ct. App. 2006) (emphasis added).

115. See Emma Kaufman, *Territoriality in American Criminal Law*, 121 MICH. L. REV. 353, 384 (2022).

116. See *Jarrett*, 926 So. 2d at 432 (finding that an officer patrolling outside his jurisdiction could reasonably rely upon an ILA); *State v. Ohlrich*, 817 N.W.2d 797, 804 (Neb. Ct. App. 2012) (finding that an ILA *could* confer extrajurisdictional authority but remanding because the state failed to provide sufficient evidence of the ILA's terms).

117. See *McGee*, 297 F. App'x at 321 (referring to an ILA for the housing and release of prisoners by one entity on behalf of another); see also *City of Springtown*, 2020 WL 1861682, at *3 (examining whether an ILA constitutes a hiring policy for a city's police department).

118. Jordan et al., *supra* note 53, at 124-25 (noting that an ILA empowers sheriffs to operate detention centers on behalf of other governments); *Race v. Bradford Cnty.*, 2019 WL 7482235, at *26 (M.D. Fla. Aug. 20, 2019) (examining an ILA where a county purportedly conveys responsibility for a jail); *Appanoose Cnty. v. S. Iowa Area Det. Serv. Agency*, 838 N.W.2d 868 (Table), 2013 WL 4009671, at *1 (Iowa Ct. App. 2013) (evaluating an ILA for the joint management of juvenile-detention facilities and programs).

119. See Kaufman, *supra* note 115, at 383-84 (noting mutual-aid agreements and memoranda of understanding as examples of the "essentially private contracts between police departments" that guide their collaboration).

mid-1900s.¹²⁰ States then passed laws encouraging local-police coordination in response to the civil unrest of the 1960s and 1970s.¹²¹ More recently, the federal government poured funds into interlocal-policing programs following the September 11, 2001 terrorist attacks.¹²² Prodded in this manner by state laws and federal grants, local officials discovered that policing ILAs were both exceptionally easy to implement—for example, a document as simple as a letter from one police chief to another could carry legal force¹²³—and particularly effective in expanding, amassing, and dissolving police power. With the stroke of a police chief’s pen, a community’s force could expand its geographic coverage by leaps and bounds, allowing its officers to conduct searches in other municipalities.¹²⁴ But with a different stroke of a pen, the chief could transfer the department’s policing jurisdiction to another community, effectively dissolving the police force overnight.¹²⁵

It is not difficult to understand the appeal of these arrangements. In a field where governments exercise significant discretionary powers and where localities may seek to relinquish control over a costly or politically volatile asset,¹²⁶ ILAs offer an appealingly mutable conduit for the ever-evolving desires of local officials. An ILA can expand jurisdiction or constrict it, create a new detention facility or transfer its responsibility to another entity.¹²⁷ Policing ILAs provide a convenient means to accomplish these disparate ends.

120. *Id.* at 384.

121. *Id.*; see also ALASKA STAT. ANN. § 26.23.180 (West 2023) (encouraging cooperative policing); Ferrell v. City of Charlotte, 2015 WL 13604391, at *6 (W.D.N.C. Mar. 31, 2015) (citing N.C. GEN. STAT. ANN. § 153A-212 (West 2023)) (discussing North Carolina law); State v. Plaggenmeier, 969 P.2d 519, 525 (Wash. Ct. App. 1999) (examining a statutory scheme in Washington that enables cooperative-policing ILAs without the procedural formalities generally required of an enforceable ILA); *supra* Section II.B (discussing such muddles).

122. Kaufman, *supra* note 115, at 385-86.

123. Pond v. Bd. of Trs., 2003 WL 23220730, at *2 (S.D. Ind. Nov. 25, 2003) (finding that a letter from a city police chief to a university police department can confer jurisdiction); see also Andrew, *supra* note 10, at 10-11 (discussing ILAs signed only by a county sheriff).

124. See Pond, 2003 WL 23220730, at *2; Brutsche v. City of Kent, 134 Wash. App. 1002, at *4 (2006) (evaluating an ILA creating a cross-jurisdictional special-response team, allowing officers to participate in searches outside their jurisdictions).

125. See, e.g., Smith v. Town of Cramerton, 2019 WL 4233614, at *1 (W.D.N.C. Sept. 5, 2019).

126. See, e.g., Kaufman, *supra* note 115, at 388; Noah M. Kazis, *Special Districts, Sovereignty, and the Structure of Local Police Services*, 48 URB. L. 417, 455-56 (2016) (locating policing power at the core of local sovereignty). Regarding the desire to relinquish power, see Jordan et al., *supra* note 53, at 122.

127. See *supra* notes 94-96 and accompanying text; Race v. Bradford Cnty., 2019 WL 7482235, at *26 (M.D. Fla. Aug. 20, 2019); see also Appanoose Cnty. v. S. Iowa Area Det. Serv. Agency, 838 N.W.2d 868 (Table), 2013 WL 4009671, at *1 (Iowa Ct. App. 2013) (evaluating the shared

Yet as much as they appeal to local law-enforcement officials, policing ILAs, for similar reasons, pose accountability concerns for local residents. By means of a purportedly administrative document that they might never see and challenge in court,¹²⁸ residents may be subject to search, arrest, and detention within their own communities at the hands of officers they cannot influence through the electoral process. Policing ILAs can extend a locality's substantive criminal laws when they extend its jurisdiction. By virtue of an ILA, a resident could be charged with violating a different municipality's criminal ordinance, one that his or her elected council never independently passed.¹²⁹

An ILA can also establish and limit the rights of people who encounter law enforcement. An ILA from Seattle, for example, expressly sets forth the rights held by prisoners who are housed and transferred by a local corrections agency.¹³⁰ Yet the same ILA defers to the agency's policies in determining prisoner discipline and in deciding whether to assign inmates to a work program.¹³¹ A separate ILA, meanwhile, indicates that while some inmates in the county jail have access to work and alternative-rehabilitation programs, inmates held on behalf of the local port authority may not.¹³² As a result, two inmates held in the same jail facility might receive different treatment based entirely upon policy decisions made and delegated within an ILA.¹³³ These ILAs cannot be discounted

management of detention facilities via an ILA and the shifting approaches taken to signatory governments in the enterprise).

128. See *McGee v. Carrillo*, 297 F. App'x 319, 322 n.3 (5th Cir. 2008) (noting that a prisoner's counsel had not even seen the ILA upon which a person was detained). Regarding the difficulty of challenging ILAs in court, see *infra* Section III.E. ILAs regularly contain provisions that expressly disclaim any third-party rights, including ILAs that establish cooperative-policing and criminal-justice regimes. See, e.g., Agreement for Inmate Housing, Port of Seattle (2012), at § 33 (on file with author) (disclaiming third-party rights regarding inmate transfers and housing); Interlocal Agreement Between King County and the Port of Seattle for Jail Services (Jan. 1, 2013), at 11 (on file with author) (disclaiming third-party rights regarding the use of a county jail).
129. See, e.g., *Town of Milton v. Jackson*, 2023 WL 3644595 (Wis. Ct. App. May 25, 2023) (finding that “under the language of the [ILA], the Town of Milton police officer had authority to issue [the defendant] a citation for speeding in the Town of Lima pursuant to a Town of Milton ordinance”).
130. See Agreement for Inmate Housing, *supra* note 128, at §§ 11-17.
131. See *id.* at § 11 (“SCORE may assign Port Inmates to work programs such as inside and outside work crews, kitchen and facility duties, and other appropriate duties pursuant to SCORE's policies and procedures and within the sole discretion and judgment of SCORE.”), 13 (providing that “SCORE shall discipline Port Inmates according to SCORE policies and procedures”).
132. See Interlocal Agreement Between King County and the Port of Seattle for Jail Services, *supra* note 128, at 5-6.
133. See *id.* at 5 (“[T]he County reserves the right to operate specific programs and/or facilities exclusively for County Inmates.”).

as mere interlocal contracts for efficient service delivery. They impact residents' fundamental rights and could yield disparate outcomes between two inmates at a single facility, which only heightens the risk that a given inmate receives inequitable treatment. It also calls into question the inequity of the detention scheme as a whole. Accordingly, these detention ILAs starkly demonstrate the accountability stakes at play. We expect that local residents can hold their leaders accountable for decisions that cut to the heart of how people are treated in their community. What we might not expect is that an interlocal contract is the vehicle by which these decisions are made.

Notwithstanding these accountability concerns, one might assume that residents can still access, review, and monitor policing ILAs. As noted above, transparency is theorized as accountability's most essential prerequisite. If policing ILAs are transparent documents, executed and implemented in transparent ways, residents are given opportunities throughout the negotiation, ratification, and implementation process to raise their collective voice and encourage elected officials to negotiate different interlocal-policing agreements—or to abstain from executing such agreements in the first place.

But the ordinary path from residents to elected officials to community policy choices is not always straightforward where policing ILAs are concerned. As an initial matter, as indicated above, policing ILAs are routinely negotiated and executed by police chiefs, absent express authorization by the local legislature at a meeting open to the public.¹³⁴ And even where a local legislative council directly approves a policing ILA, the agreement can subsequently take on a governance life of its own. Stakeholders that do not report to the council—such as unelected officials from other communities, task forces, and appointed boards—may operate joint programs and facilities created under the ILA without regular involvement of the government entities that first executed the agreement.¹³⁵

As a result, residents may simply lack sufficient information to monitor a policing ILA in their community. Their elected officials might fare no better; city councils and county commissions can also struggle to obtain relevant data and measure an ILA's performance over time.¹³⁶ Accordingly, policy decisions effectuated through a policing ILA can be insulated from the participatory democratic process. In this environment, local legislatures cede a measure of day-to-day

134. See *Pond v. Bd. of Trs.*, No. 03-CV-00755, 2003 WL 23220730, at *2 (S.D. Ind. Nov. 25, 2003); Andrew, *supra* note 10, at 10-11.

135. See Jordan et al., *supra* note 53, at 124-25 (regarding operation of an ILA without involvement of its constituent governments); see also *Chester v. Nw. Iowa Youth Emergency Servs. Ctr.*, 869 F. Supp. 700, 718 (N.D. Iowa 1994) (regarding an ILA operated by a board); *Brutsche v. City of Kent*, No. 56620-2-1, 2006 WL 1980216, at *1 (2006) (regarding an ILA that gives on-the-ground authority to a special response team).

136. Jordan et al., *supra* note 53, at 126-27.

policymaking, while local residents, who might have never seen the ILA presented in a public setting, are left further outside the process and potentially in the dark.

Law-enforcement ILAs offer a stark example of a larger trend. As much as ILAs can be powerful and therefore appealing tools of local governance, they regularly arise and operate under a deficit of democratic accountability. As the next Part illustrates in more detail, both local legislatures and residents routinely wield only an indirect role in determining the substance of an ILA and overseeing its implementation.

III. INTERLOCAL AGREEMENTS AND DEMOCRATIC ACCOUNTABILITY

As demonstrated in the discussion of collaborative-policing ILAs, a legal discordance emerges when considering the role of ILAs in local governance. As a matter of substance, ILAs are formidable tools for creating, expanding, ceding, and exchanging local power. At the same time, as a matter of structure, ILAs are commonly executed and implemented in an ecosystem where local residents and officials hold surprisingly attenuated reins over the process, a scheme that calls classical tenets of participatory democracy into question. The problem is endemic across ILAs of all forms and types. This Part illustrates how ILAs pose fundamental impediments to democratic participation, a problem underexplored by existing literature.¹³⁷ It explains why ILAs uniquely operate removed from public oversight, first from the local legislatures and second from local residents who theoretically lend them democratic legitimacy.

A. *The Theoretical View*

An ILA's legal origins can be simply stated. Typically, setting aside those ILAs negotiated and executed solely by a police chief or other administrative officer, most ILAs are approved by a local legislature in a formal setting – by a city council or county commission in an open public meeting.¹³⁸ State statute even

137. See Spicer, *supra* note 64, at 390 (“[A]n unexplored area of these types of [interlocal] agreements is accountability and transparency”).

138. Kwon & Feiock, *supra* note 40, at 879 (“[C]ity council approval is typically necessary . . .”); Zeemering, *supra* note 56, at 732 (noting that local legislatures “often” vote upon formal interlocal collaborations). This is setting aside agreements that exist at the most informal end of the spectrum, those negotiated, finalized, and implemented purely verbally between unelected officials working across jurisdictional lines. See Spicer, *supra* note 10, at 508; see also, e.g., *Supplemental Compliance Report of Howard County Recycling District*, IND. ST. BD. OF ACCTS. (July 2018), <https://www.in.gov/sboa/WebReports/B50511.pdf> [<https://perma.cc/GQ28-MHZZ>] (discussing a “verbal agreement” entered into between local entities).

mandates formal legislative approval in some jurisdictions.¹³⁹ In these cases, one might assume that ILAs operate with a substantive democratic check; if they are generally subject to a legislative vote, they are also subject to the direct scrutiny of those legislators.¹⁴⁰ In theory, the very process of legislative approval lends transparency and thus democratic accountability to an ILA.¹⁴¹ If an agreement's terms create new law or policy or meaningfully alter interlocal power dynamics, elected officials and the stakeholders who influence them are positioned to opine and intervene.

This theoretical story of local democracy sometimes plays out in practice. In the Florida Panhandle, for example, a regional library collaborative operates through an ILA first executed in 1980 between the City of Pensacola and Escambia County. The original ILA provided for shared staff and resources, a joint funding arrangement, and a regional advisory board to manage the Pensacola and Escambia libraries.¹⁴² The local community was closely involved in the ILA and the governance system it created from its beginnings. Public support was essential to the ILA's execution.¹⁴³ By the terms of the agreement, moreover, its governance decisions included and were visible to members of the public.¹⁴⁴ In the late 1990s, while nearby libraries struggled in the face of declining state aid and operational challenges, the Pensacola-Escambia system was hailed as a success, a consequence in part of its participatory community character.¹⁴⁵

It can be easy to extol the transparency of a well-functioning institution. Yet significantly, the ILA's transparent ethos proved resilient over the following decades, even as the partnership between Pensacola and Escambia County went through periods of upheaval and acrimony. The library system found itself plagued in the 2000s by declining quality and pressing capital-investment needs.¹⁴⁶ The two governments quarreled in other areas of their shared

139. See, e.g., N.C. GEN. STAT. ANN. § 160A-461 (ILAs in North Carolina must be “ratified by a resolution of the governing board”).

140. Zeemering, *Democratic Anchorage*, *supra* note 40, at 90 (summarizing the argument that “elected politicians can lend democratic legitimacy to governance networks”) (quoting Eva Sørensen & Jacob Torfing, *The Democratic Anchorage of Governance Networks*, 28 SCANDINAVIAN POL. STUD. 195, 202 (2005)).

141. See *id.* (“The elected officials may have a role in deciding to enter the ILA, may monitor and offer feedback on the relationship over time, and may pressure their jurisdiction to change the terms of participation or exit the agreement.”).

142. Richard Springfield, *Getting Off the Shelf*, NW. FLA. DAILY NEWS (June 15, 1997), at 1A.

143. See *id.* (discussing “[c]ohesive, widespread public support”).

144. See *id.* (discussing the joint advisory council).

145. *Id.*

146. See Sheila Ingram, *Library Task Force Sees Need for Improvement Firsthand*, PENSACOLA NEWS J., Feb. 3, 2004, at C3.

jurisdiction, spats that spilled into disagreements over library funding and repeatedly threatened to terminate the ILA or trigger service reductions at library branches.¹⁴⁷ In 2000, and then again in 2007 and 2012, the agreement and the interlocal partnership it enabled appeared to be on life support.¹⁴⁸

In the face of these challenges, Pensacola and Escambia County could have responded in a number of nontransparent ways. They could have let the ILA wither by beginning to ignore or act in contravention of its written terms. They could have hashed out their differences in closed-door negotiations or otherwise made informal changes to the agreement outside of the public spotlight.¹⁴⁹ To a degree, any of these responses would have prevented the public from monitoring how their shared libraries were being governed and impeded their ability to hold local officials accountable for decisions made within that governance scheme.

Yet Pensacola and Escambia County took an alternate route: they negotiated their differences through transparent fora. In the subsequent years, during periods of particularly heated conflict, councilmembers and commissioners aired their respective grievances openly, at meetings open to the public and documented by local media.¹⁵⁰ They even employed the public arena to debate legal compliance with the ILA's terms.¹⁵¹ During other periods, when their differences were less tinged with hostility, the city and county held joint public workshops to discuss shared issues, including issues that arose under the ILA.¹⁵²

147. See William Reynolds, *Library War Continues Between 'Dysfunctional' City and 'Extortionist' County*, NORTHESCAMBIA.COM (Oct. 12, 2012), <http://www.northescambia.com/2012/10/library-war-continues-between-dysfunctional-city-and-extortionist-county> [https://perma.cc/W7T2-2XDC].

148. See Minutes of the Regular Meeting of the County Commissioners, Board Chambers, Third Floor, Escambia County Courthouse, 223 Palafox Place, Pensacola, Florida 7-8, 66 (Aug. 3, 2000); Jamie Page, *Library Funding in Peril*, PENSACOLA NEWS J., Aug. 15, 2007, at A1; William Reynolds, *County Votes to Withhold Library Funding from City, Looks to Terminate Agreement*, NORTHESCAMBIA.COM (Oct. 19, 2012), <http://www.northescambia.com/2012/10/county-votes-to-withhold-library-funding-from-city-looks-to-terminate-agreement> [https://perma.cc/279D-DDZY].

149. Cf. *infra* note 182 and accompanying text (regarding informal evolution); *infra* notes 246-248 and accompanying text (regarding closed-door mediation).

150. See, e.g., Reynolds, *supra* note 147; Nate Monroe, *Escambia Floats Idea of Getting Out of Local Library Agreement*, PENSACOLA NEWS J., Oct. 11, 2012 [hereinafter Monroe, *Idea of Getting Out*]; Nate Monroe, *Escambia Commissioners Discuss Leaving Library System*, PENSACOLA NEWS J., Oct. 12, 2012 [hereinafter Monroe, *Commissioners Discuss Leaving*].

151. See Nate Monroe, *Words Fly Between City, County over Library Hours*, PENSACOLA NEWS J., Oct. 10, 2012 (citing arguments by Pensacola officials that Escambia County was not providing its full contribution to the library system).

152. See, e.g., City of Pensacola City Council & Escambia County Board of County Commissioners Joint Workshop Minutes (May 17, 2021), <https://pensacola.legistar.com/View.ashx?M>

Community voices have been actively involved all the while, through channels both formal and informal in nature.¹⁵³

Pensacola's experience speaks to the deep-rooted nature of effective local transparency. Even had they tried, Pensacola and Escambia County would likely have struggled to govern the ILA behind closed doors. Because local residents had been engaged with the agreement from its inception, the public was able to command a permanent seat at the governance table and meaningfully shape the ILA as it evolved over time.¹⁵⁴ The public's participatory role ensured Pensacola and Escambia County's continued commitment to their library-governance regime, a commitment that has survived intact to the present day despite considerable tumult.¹⁵⁵ It has survived various amendments and renegotiations of the agreement; indignant charges of extortion, gamesmanship, and villainization; a 2013 transfer of operational responsibility between the two localities; and experimentation with evolving and oft-contentious funding formulas.¹⁵⁶

=M&ID=859876&GUID=4277376E-16FC-4B1C-8B11-CEF6E8B85AB1 [https://perma.cc/UG6S-J9Q2].

153. See, e.g., Memorandum from Erika L. Burnett, City Clerk to City Council (Jan. 12, 2023), <https://www.cityofpensacola.com/DocumentCenter/View/24005/Nomination-Memo> [https://perma.cc/QKR4-J7WL] (discussing the West Florida Public Library Board of Governance); West Florida Public Library Board of Governance Bylaws art. 5, § 7, <https://mywfpl.com/docs/default-source/board-of-governance/wfpl-bog-by-laws.pdf> [https://perma.cc/9QFD-M6SR] (requiring “compliance with the Sunshine Laws of Florida and the Florida Public Records Act”); *Volunteer Wanted for West Florida Public Library Board of Governance*, TARGETED NEWS SERV., Nov. 17, 2017 (actively seeking local residents to volunteer on the Board of Governance); *Volunteers Wanted for West Florida Public Library Board of Governance*, TARGETED NEWS SERV., July 6, 2016 (same); Ingram, *supra* note 146 (discussing a citizen task force created by elected officials to study library challenges); Page, *supra* note 148 (discussing citizen activism regarding library funding issues).
154. See, e.g., Nate Monroe, *Library Funding Advances*, PENSACOLA NEWS J., Dec. 7, 2012 (discussing an overhaul that “library supporters have pushed for years”); Louis Cooper, *Pensacola Beach Residents Now Can Use Santa Rosa Libraries for Free*, PENSACOLA NEWS J., Mar. 28, 2013 (mentioning the transfer of operational responsibility from Pensacola to Escambia County). It appears that this transfer was initially recommended by a ten-person citizen task force. See Alvin Peabody, *Escambia County in Talks to Assume Operations of System*, PENSACOLA NEWS J., Aug. 21, 2006, at A5.
155. See Monroe, *supra* note 151 (discussing how “the possibility of [the County] dropping out of the library agreement with the city entirely . . . met strong opposition from county residents and was ultimately dropped”).
156. With respect to the transfer of operational responsibilities, see Cooper, *supra* note 154. With respect to various charges levied between the two governments, see Jamie Page, *City Feels Thrown Under the Bus*, PENSACOLA NEWS J., Aug. 18, 2007, at A1 (gamesmanship); Monroe, *Idea of Getting Out*, *supra* note 150 (extortion); and Monroe, *Commissioners Discuss Leaving*, *supra* note 150 (villainization). With respect to the ILA's evolution over time, compare Page, *supra* note 148, which describes the ILA's funding and administration scheme as of 2007, with

None of this is to argue that Pensacola and Escambia County’s libraries are optimally governed or that an ILA is the optimal vehicle for joint management of a library system. Rather, regardless of its normative value, the Pensacola-Escambia ILA fits with a theoretical view of local democracy, one where a local government’s actions and instruments are transparent to the public and therefore accountable to public oversight. Residents of the region know where to look when appraising governance decisions about their library system – whether to the ILA document itself or to the workshops and meetings where its terms have been discussed over the past three decades – and they are informed that a joint contract governs the library system in the first place, which indicates who the public can approach with concerns about it. Fulsome transparency enables accountability. If residents of the Pensacola region decide that their libraries should be governed in a different manner, history suggests that their collective voice will carry weight.

B. Local Legislatures

Pensacola’s case does not appear common. As it turns out, our tidy story of local democracy is far more complicated in practice, a departure from theory that must begin with city councils, county commissions, and other such bodies – the legislative actors of local democracy. Most ILAs are formally ratified by a local legislature, as mentioned above, which raises two key questions. First, given that legislatures typically take formal action in a meeting open to the general public, how can it be said that ILAs are routinely nontransparent instruments? Second, given that legislatures are beholden to voters through the electoral process, on what basis can we argue that ILAs often lack accountability?

An initial answer: Even if not representative of most execution processes, many ILAs are not actually ratified in an open meeting by a legislative body. In some instances, local officials – including unelected officials – are empowered to

Interlocal Agreement Between Escambia County and the City of Pensacola Relating to the West Florida Public Library System 2-4 (July 11, 2013), <https://pensacola.legistar.com/View.ashx?M=F&ID=9384591&GUID=2C28F2CC-FE3C-4140-87C7-388ACE3B3B82> [<https://perma.cc/S4M9-MFHG>], which describes how Escambia County took on the entirety of funding and operational responsibilities in 2013, drawing from a taxing district that included Pensacola, and Amendment to Interlocal Agreement Between Escambia County and the City of Pensacola Relating to the West Florida Public Library System 2 (June 22, 2022), <https://pensacola.legistar.com/View.ashx?M=F&ID=11565253&GUID=A526E68D-F454-4ED4-A67F-17D6A62FA254> [<https://perma.cc/U6DB-BZDR>], which describes how beginning in 2023, Escambia County annually transfers some of the tax revenues back to Pensacola for purposes of capital improvements on libraries within city boundaries.

execute an ILA absent any legislative involvement.¹⁵⁷ In other instances, courts are willing to validate an ILA that did not receive formal legislative approval—doing so even in jurisdictions where such approval is expressly required by statute. State courts in Washington have been particularly dismissive of ILA-ratification challenges. In one case, an appellate court enforced an ILA over the plaintiffs’ objections that the local city council had never ratified it, reasoning that the plaintiffs waived the argument by not raising it during an earlier administrative hearing.¹⁵⁸ In another case, an appeals court concluded that regardless of whether the ILA was ever ratified by legislative authority, it was still “duly executed by authorized officials” from both governments.¹⁵⁹ The decision offered local officials a convenient strategy for sidestepping legislative-ratification requirements: officials with signatory power to execute procurement contracts can employ that same power to execute a potentially far-reaching ILA as well.

These procedural fault lines are not the end of the story. Even when a local legislature ratifies an ILA, city councils and county commissions often play a diminished role in the approval process they ostensibly oversee. ILAs brought before local legislatures appear to be rarely debated and routinely pass with no dissenting votes.¹⁶⁰ Some contain substantive terms that are not mentioned in—or indeed, even conflict with—the summary presented to the legislative body.¹⁶¹

157. See, e.g., *supra* notes 124-125 and accompanying text (regarding policing ILAs); see also 1999 TEX. SESS. LAW SERV. 2616-17 (West) (stipulating that certain ILAs don’t require legislative approval); MASS. GEN. LAWS ANN. ch. 40, § 4A (West 2021) (stipulating that ILAs can be executed by an “officer authorized by law to execute a contract in the name of a governmental unit”); UTAH CODE ANN. § 11-13-202.5 (West 2023) (stipulating that legislative approval is not required for certain ILAs). Utah’s provision was actually amended in 2003 to *remove* the prior requirement that “the governing body of each public agency” must “adopt[] a resolution approving the agreement.” 2003 Utah Laws Ch. 38 (S.B. 74), § 1(2).

158. *Exendine v. City of Sammamish*, 113 P.3d 494, 500 (Wash. Ct. App. 2005).

159. *State v. Russell*, 161 Wash. App. 1002, at *10 (2011), *aff’d*, 357 P.3d 38 (Wash. 2015).

160. Of the ILAs obtained via public records requests and reviewed for this Article, only one received a dissenting vote. See Memorandum of Understanding Between the City of Erie and the Cnty. of Erie and the Erie Mun. Airport Auth. (Apr. 8, 2008) (on file with author) (reporting the resolution to authorize the ILA passed by a 6-1 vote).

161. See, e.g., Tim Evans, *County to Again Get Waste Fee Payments: District Directors Vote to Resume the Previous Way of Distributing Money Paid by Landfill Users*, INDIANAPOLIS STAR, Aug. 21, 1997, at W1 (discussing differences between an ILA and the resolution adopted by the county board, where the ILA “called for all of the tipping fee money to be spent on solid waste issues, while the resolution stated the county’s share could be used for any legal purpose”). Complicating the risk for disconnect between ILAs and any enabling vehicle is the willingness of state law—and as well, state courts—to permit legislative enactments to incorporate lengthy relevant documents by reference, even instruments that carry independent force of law and may evolve over time, thus possibly rendering them a moving target for legislatures and other stakeholders. See, e.g., CAL. GOV’T CODE § 50022.9 (West 2023) (regarding localities

And some ILAs are even ratified in template form, with key language and future counterparties left blank for others to fill in later.¹⁶² To elected officials unaccustomed to hearing constituent complaints about ILAs,¹⁶³ these agreements can be brushed off as inherently bureaucratic documents, fundamentally divorced from policy decisions that regulate people in their communities.¹⁶⁴ Alternatively, elected officials may instead view an agreement in bare political terms, as something desired by officials in a partner local jurisdiction and therefore a low-stakes opportunity to curry interlocal favor.¹⁶⁵ Pressure from a powerful partner government can overshadow internal reservations and help precipitate an ILA's passage.¹⁶⁶

Elected local officials, simply put, are liable to disengage functionally from the process of ILA ratification. Local politicians often lack the capacity and resources to fully contend with substantive issues across the governance spectrum.¹⁶⁷ Yet as public-administration research demonstrates, local legislative disengagement from ILA ratification is especially pronounced. Elected officials concertedly guard their communities' autonomy as a means of projecting political strength and to protect the revenues, employees, and identity interests of the

adopting ordinances by reference); KAN. STAT. ANN. § 72-2228 (West 2023) (regarding school boards adopting contracts by reference); *see also* Mullin v. Ringle, 142 A.2d 216, 220 (N.J. 1958) (“The report was over 200 printed pages long and manifestly would have been difficult, cumbersome and expensive to recite in and to publish with the ordinance.”); Diaz v. Grill Concepts Servs., Inc., 23 Cal. Rptr. 3d 524, 534 (Ct. App. 2018) (rejecting the argument “that the ordinance requires hoteliers to look to a bulletin ‘to be published *somewhere* at *some time* by *some city agency*’”).

162. *See, e.g.*, Agreement for I.T. Services Between Oakland Cnty. and Wayne Cnty. Airport Auth. (Mar. 15, 2017) (on file with author) (approving a template ILA that could be entered into with “any Michigan public body”).
163. *See infra* notes 234-237 and accompanying text.
164. *See supra* notes 11, 36 and accompanying text (setting forth the traditional conception of ILAs as “stolid administrative contracts executed for the provision of bread-and-butter municipal services”).
165. In one example, residents challenging a property transfer from a school board to a local county alleged that the board approved the underlying ILA “hastily,” without debate or research, due to pressure from the county. Reese v. Charlotte-Mecklenburg Bd. of Educ., 676 S.E.2d 481, 487-88 (N.C. Ct. App. 2009).
166. *See id.*; *cf.* Kwon & Feiock, *supra* note 40, at 879 (discussing the role of the “relative political strengths of actors” and “disparities in bargaining power”); Caruson & MacManus, *supra* note 47, at 169-71 (regarding the relative power held by larger jurisdictions over smaller ones in ILA governance).
167. *See* Kellen Zale, *Part-Time Government*, 80 OHIO ST. L.J. 987, 988, 1024-30 (2019) (discussing constraints on the “resources, legislative capacity, and political capital” held in particular by part-time local legislatures, which represent the dominant model of institutional design among U.S. municipalities).

locality.¹⁶⁸ This mindset prioritizes autonomy at the expense of interlocal collaboration.¹⁶⁹ In contrast, empirical studies demonstrate that city managers and career staff are more receptive to working with colleagues across jurisdictional lines, even at the expense of local autonomy, in part because they know and trust these colleagues from existing professional networks.¹⁷⁰ Unlike elected officials, who are focused on the next election, appointed managers and career staff operate with longer time horizons; they have more opportunities to build networks of trust and see the payoffs those relationships produce.¹⁷¹ Furthermore, unlike elected officials who tie their public tenures to the will of local voters, unelected officials might work for multiple communities over the course of their careers. Their capacity to engage with cross-border stakeholders only helps bolster their professional value across a broader region.¹⁷²

As a consequence of these dissimilar professional perspectives, city managers and career staff are the primary drivers of interlocal collaboration in general and of ILAs in particular.¹⁷³ Research shows that local governments are more likely to share functions when they have a council-manager form of government—

168. See Zeemering, *Assessing Local Elected Officials' Concerns*, *supra* note 40, at 2348-49 (citing public-administration literature).

169. *Id.* at 2349.

170. See Zeemering, *supra* note 56, at 732 (arguing that unelected officials consider issues beyond jurisdictional boundaries); LeRoux, Brandenburger & Pandey, *supra* note 41, at 269, 273 (finding that professional networks are strongly correlated with ILAs); Delabbio & Zeemering, *supra* note 40, at 258 (“Appointed public managers are more likely to support interlocal cooperation than elected officials due to their professional training and social networks with other public managers.”).

171. See Hugg, *supra* note 60, at 1294; LeRoux, Brandenburger & Pandey *supra* note 41, at 269 (regarding the “staying power of civil servants”); *id.* at 271 (explaining why unelected officials are more likely to collaborate across jurisdictional lines).

172. See Skip Krueger & Ethan M. Bernick, *State Rules and Local Governance Choices*, 40 *PUBLIUS* 697, 704 (2010). Conversely, where unelected officials fear that a joint coordination scheme will limit their positions or duties, they are incentivized to resist the adoption of ILAs. See Kwon & Feiock, *supra* note 40, at 878.

173. See, e.g., Lee & Hannah-Spurlock, *supra* note 36, at 131 (observing that in most cases, “collaboration was initiated and implemented at the staff level”). An extensive literature has found that interpersonal networks based upon trust and reciprocity, which are more commonly forged by unelected bureaucrats than by local politicians, contribute significantly to ILA adoption. See Zeemering, *Democratic Anchorage*, *supra* note 40, at 89; Kwon & Feiock, *supra* note 40, at 879; LeRoux, Brandenburger & Pandey, *supra* note 41, at 269-70; Caruson & MacManus, *supra* note 47, at 169; Perlman, *supra* note 40, at 119, 121; LeRoux, *supra* note 46, at 163; Michael Abels, *Managing Through Collaborative Networks: A Twenty-First Century Mandate for Local Government*, 44 *STATE & LOC. GOV'T REV.* 29S, 40S (2012); Jordan et al., *supra* note 53, at 121. Conversely, the absence of networks of trust between local officials creates impediments to ILA adoption. Cartier, *supra* note 10, at 13; Caruson & MacManus, *supra* note 47, at 166.

when their chief executive officials are unelected administrators rather than elected politicians.¹⁷⁴ Unsurprisingly, these same governments are also more likely to enter into ILAs.¹⁷⁵ Even where agreements are formally ratified by an elected council, the majority of interlocal projects – about sixty-five percent, per one study – are placed on the legislative agenda by an unelected official.¹⁷⁶ Elected councils still hold the final voice in the process. But despite their prominent role in the local-government politic, they are secondary actors in ILA creation.¹⁷⁷

After an ILA's creation and passage, its implementation often raises similar democratic concerns. By the very terms of an ILA, the framework it creates, or the subject matter it addresses, an agreement between local governments is often intentionally flexible, highly dynamic, and capable of considerable evolution over time.¹⁷⁸ An ILA's ability to evolve is part and parcel of its governance appeal.¹⁷⁹ But at the same time, it presents yet another challenge to our classical view of accountable local democracy: even where a legislature is involved with an ILA's execution, it might play only an attenuated role, or no role at all, in subsequent decisions of significance to local constituents.¹⁸⁰

174. Krueger & Bernick, *supra* note 172, at 699.

175. Jordan et al., *supra* note 53, at 121.

176. Zeemering, *supra* note 56, at 735.

177. See Zeemering, *Democratic Anchorage*, *supra* note 40, at 90 (discussing how ILAs “attenuate[] the control of the elected officials”).

178. Employing vague terms can make ILAs more politically palatable to their constituent governments, which explains the ambiguity often found in these documents. See Gillette, *supra* note 36, at 256 (“Rather than trying to define long-term obligations in detail, they employ aspirational language and general formulae, perhaps on the assumption that the details of the relationship will be worked out and adjusted as the relationship is implemented.”); Jordan et al., *supra* note 53, at 126 (noting the “substantial discretion” contained in some service-provision ILAs); Zeemering, *Democratic Anchorage*, *supra* note 40, at 97 (discussing the tradeoff between upfront transaction costs and backend commitment and clarity); Fahey, *Data Federalism*, *supra* note 71, at 1043-44 (describing a “perilously informal” program created by intergovernmental agreement). Accordingly, in situations where state actors constructively review the content of ILAs, they commonly remark upon the indeterminate nature of an agreement’s terms. See, e.g., ARK. OP. ATT’Y GEN. NO. 2002-284, 3 (Nov. 18, 2002) (criticizing an ILA provision as “unacceptably confusing”); *Report on the City of Covington – County of Alleghany Voluntary Economic Growth-Sharing Agreement*, *supra* note 46, at 17-18 (noting that a key term, “Tax Increment,” is not clearly defined).

179. See Spicer, *supra* note 10, at 511 (discussing informal and unwritten changes made to previously executed ILAs, due in part to the high transactions costs that formally amending or renegotiating the agreement would entail).

180. See Zeemering, *Democratic Anchorage*, *supra* note 40, at 92 (arguing that city councils may view the “implementation” and “management” of an ILA as under the purview of the city manager).

Local legislative oversight is clouded by both formal and informal modes of evolution. Formally, in their capacity as contracts between multiple governments, ILAs evolve through amendment and novation.¹⁸¹ Informally, in their capacity as intergovernmental legal regimes, ILAs evolve through the sedimentation of discretionary policy decisions made by a host of actors – administrative staff, other local entities, ad hoc boards, and spinoff governmental entities – who are empowered to implement its terms. Local legislative oversight is clouded by both forms of evolution, each of which will be examined in turn.

With respect to formal amendments, some ILAs expressly permit administrative amendments, whereby the terms of an agreement can be modified without formal input from any legislative body.¹⁸² While these provisions do not appear widespread, all ILAs operate under the shadow of an existential question: what happens when one government attempts to reduce its obligations, effectively amending and perhaps imperiling the ILA in doing so? Can a government exit an agreement unilaterally? Stakeholders at the local level struggle to answer these questions, sometimes electing to give parties unilateral termination power but sometimes prohibiting them from amending the ILA without consent of their other partners.¹⁸³ In one example from Florida, an ILA executed between four counties to manage solid-waste disposal contained an express amendment provision, which stated that “[n]o amendment shall occur unless it is agreed upon by three-quarters (3/4) of all of the Counties.”¹⁸⁴ With this language, the ILA permitted three counties to fundamentally alter the substance of their agreement over the opposition of the fourth. It also, conversely, hypothetically enabled three of the counties to prevent an attempt at oversight, termination, or

181. In the context of federal and state intergovernmental agreements, see Fahey, *supra* note 10, at 2332-33, 2360-61.

182. See, e.g., Contract 208617 OS Between San Diego County Regional Airport Authority and City of San Diego for Automatic External Defibrillator Inspection and Maintenance Services (2009) (on file with author) (formally requesting an extension by email); Use of Trikke Enforcement Vehicles at San Diego International Airport (Mar. 30, 2016) (on file with author) (creating an agreement by letter); Interlocal Agreement Between King County and the Port of Seattle for Jail Services (2013), at 14 (on file with author) (regarding an “administrative agreement”).

183. For examples of ILAs that permit unilateral termination, see, for example, *Delaware Twp. v. City of Lansing*, 512 P.3d 1154, 1160 (Kan. 2022); and *Bos. Mountain Reg'l Solid Waste Mgmt. Dist. v. Benton Cnty. Reg'l Solid Waste Mgmt. Dist.*, 2014 Ark. App. 733, at *2 (Ark. Ct. App. 2014). For examples of ILAs that did not permit unilateral termination, see, Tafoya, *supra* note 95, at 165-66; *Appanoose Cnty. v. S. Iowa Area Det. Serv. Agency*, 838 N.W.2d 868 (Table), 2013 WL 4009671, at *1-2 (Iowa Ct. App. Aug. 7, 2013); and *Aucilla Area Solid Waste Admin. v. Madison Cnty.*, 890 So. 2d 415, 416 (Fla. Dist. Ct. App. 2004). See also *Landowners v. S. Cent. Reg'l Airport Agency*, 977 N.W.2d 486, 490, 501 (Iowa 2022) (finding that a constituent government may withdraw from an ILA, despite the agreement expressly prohibiting it).

184. See *Aucilla Area Solid Waste Admin.*, 890 So. 2d at 416.

modification by the fourth county's legislative body. Under either scenario, an elected local council or commission – and the local constituents who hold them accountable – could face the real prospect of being party to a governance scheme that they cannot control.¹⁸⁵ This is in sharp contrast with other legislative exercises of local power, where councils are generally granted power, whether express or implied, to alter or repeal the laws that they pass.¹⁸⁶

Short of a formal amendment, other significant governance decisions made under an ILA are equally susceptible to the exercise of extralegislative power. Social-science research has found that after ratifying an ILA, elected officials find their attention diverted by issues within their own jurisdictions and rely upon staff employees to implement and operate the agreement.¹⁸⁷ Even if the terms of an ILA contemplate periodic meetings of its constituent elected officials, such meetings might ultimately occur only sporadically, if at all.¹⁸⁸ Unelected staff employees exercise considerable power within this vacuum of oversight. These employees, operating informally or through a board created by the agreement, make a wide range of normative decisions: they determine job duties of other personnel who operate the ILA,¹⁸⁹ decide when to dispose of assets managed under the ILA,¹⁹⁰ resolve disputes that arise between their respective

185. See *id.* While the court in *Aucilla* ultimately determined that the amendment provision did not control on the facts of the dispute, it reached this conclusion on the reasoning that a more specific provision of the ILA dictated a different outcome, not on the basis that such an amendment provision was categorically unenforceable. *Id.* at 417.

186. See, e.g., N.M. STAT. ANN. § 4-37-6 (West 2023) (“A proposed county ordinance shall be passed only by a majority vote of all the members of the board of county commissioners, and an existing county ordinance shall be amended or repealed in the same manner.”); *Vesenmeir v. City of Aurora*, 115 N.E.2d 734, 737 (Ind. 1953) (“As a general rule a municipality which has been given the power to enact ordinances has, as a necessary incident thereto and without any express authorization in the statute, the power to modify or repeal such ordinances unless the power so to do is restricted in the law conferring it.”).

187. See Spicer, *supra* note 64, at 395 (discussing chief officials being preoccupied with intralocal matters and thus “defer[ring] to staff” to operate ILAs).

188. See Jordan et al., *supra* note 53, at 125 (citing a case study of fire-protection ILAs in Iowa); *id.* at 125-26 (surveying the frequency of ILA participant meetings).

189. See *Chester v. Nw. Iowa Youth Emergency Servs. Ctr.*, 869 F. Supp. 700, 706 (N.D. Iowa 1994).

190. See *Appanoose Cnty. v. S. Iowa Area Det. Serv. Agency*, 838 N.W.2d 868 (Table), 2013 WL 4009671, at *1 (Iowa Ct. App. Aug. 7, 2013).

governments,¹⁹¹ and weigh how to prioritize shared projects carried out under the agreement's auspices.¹⁹²

An expanded and diluted governance hierarchy amplifies these employees' voices. Given that unelected staff members from other participating governments are likewise also delegated management power over the ILA, a natural exchange emerges: rather than navigating challenges internally through the ordinary hierarchy of a singular municipal regime, administrative staff begin to manage the ILA among and between their counterparts at other entities, absent regular oversight from (and accountability toward) elected officials.¹⁹³ This administrative exchange can acquire a distinctly legislative tone.¹⁹⁴ Less constrained by direct political oversight, unelected officials are given an opportunity to govern more nimbly, respond adroitly to shifting developments on the ground, and draw upon their institutional expertise and shared technocratic values in doing so.¹⁹⁵ They are, in other words, given a chance to govern free of pesky political impediments. These unelected officials are therefore incentivized to create and expand upon their own sphere of governance power, one that is possibly divorced from the interests of their city councils.¹⁹⁶ In this manner, a lack of political impediments might also represent a deficit of local legislative accountability.

C. *Nested Interlocal Entities*

Unelected officials are especially empowered under an ILA – and local legislators, by contrast, are especially disempowered – when the agreement goes one step further in its delegation of local policymaking and by forming a new legal

191. See Jordan Hansen, *Missoula, Missoula County Nearing Interlocal Agreement on Federal Building*, MISSOULIAN (Feb. 9, 2022) (on file with author) (“Project managers are allowed to resolve disagreements for expenses less than \$25,000 and anything more than that will be discussed by the project’s oversight team.”).

192. See Etters, *supra* note 4.

193. See *id.* (discussing the accountability ramifications); Fahey, *Data Federalism*, *supra* note 71, at 1034 (describing, in the context of agreements between federal and state governments, the situation where “some unelected person at the FBI talks to some unelected person at the state level” when making decisions under the agreement); Zeemering, *Democratic Anchorage*, *supra* note 40, at 90 (“[T]he multiorganizational context of the ILA . . . attenuates the control of the elected officials.”).

194. See Fahey, *Data Federalism*, *supra* note 71, at 1042 (discussing the legislative functions played by intergovernmental agreements).

195. See Zeemering, *supra* note 56, at 732–33 (describing how unelected officials bargain, negotiate, and interpret standards when collaborating interlocally).

196. See Fahey, *Data Federalism*, *supra* note 71, at 1078 (discussing the perverse incentives that can arise in this space).

entity. Rather than merely creating a governance vacuum that unelected stakeholders are incentivized to fill, many ILAs create a new governance framework that gives birth to a brand-new local entity. These new entities are far more than stray committees or task forces brought to life by an ILA.¹⁹⁷ They are, instead, full-throated special-purpose local governments in their own right, capable of standalone governance, of suing and being sued in their own name.¹⁹⁸ Recall the Blueprint Intergovernmental Agency in Tallahassee with which this Article began. As in the case of Blueprint, an ILA creating one of these new entities also serves as its constitutional organic document.¹⁹⁹ But it does not render the entity wholly subservient to its creator. New entities make policy decisions that expand upon (or depart from) their constitutional tethers, at times with the effect of binding the governments that birthed them.²⁰⁰ And strikingly, these new entities might even come together, via a new ILA, to create additional new governments themselves.

In one acronym-laden example from Texas, a group of counties executed an ILA to create the WTRCA (West Texas Rural Counties Association), a new entity designed to pool their insurance risks.²⁰¹ Meanwhile, a separate county entered into a second ILA with a special-purpose local government to create the MCSIP (Matagorda County Self Insurance Pool), another new entity.²⁰² The WTRCA and MCSIP then entered into their own ILA to create yet a third new entity: the RPA (Regional Pool Alliance).²⁰³ Because all of these new entities owed their existence to a cascading delegation of local power, this Article will

197. See, e.g., Jordan et al., *supra* note 53, at 125-26 (examining an ILA governed by a board and “technical committee”); Franklin v. N. Cent. Narcotics Task Force, No. 15-cv-120, 2016 WL 3676666, at *1 n.2 (S.D. Miss. July 7, 2016) (noting that a “[t]ask [f]orce” created by an ILA is not itself a legal entity).

198. See, e.g., Kubicek v. City of Lincoln, 658 N.W.2d 291, 295 (Neb. 2003) (setting forth the enumerated powers of one such entity). These powers are sometimes broadly enabled by statute. See, e.g., ARK. CODE ANN. § 25-20-104(c)(2) (West 2023) (“Any agreement . . . shall specify . . . [t]he precise organization, composition, and nature of any separate legal or administrative entity created thereby, together with the powers delegated to it . . .”); KAN. STAT. ANN. § 12-2904(d)(2) (West 2023) (same); OKLA. STAT. ANN. tit. 74, § 1004(C)(2) (West 2023) (same); NEB. REV. STAT. ANN. § 13-804(3)(b) (West 2023) (same).

199. See Fahey, *Data Federalism*, *supra* note 71, at 1046-51 (setting forth characteristics of these entities in federal intergovernmental agreements); City of Falls City v. Neb. Mun. Power Pool, 777 N.W.2d 327, 335 (Neb. 2010) (looking to an ILA’s language to determine the constituent governments’ extent of control over the new entity).

200. See Fahey, *Data Federalism*, *supra* note 71, at 1048-49.

201. Reg’l Pool All. v. NorthStar Recovery Servs., Inc., No. 13-21-00045-CV, 2022 WL 1412362, at *1 (Tex. App. May 5, 2022).

202. *Id.*

203. *Id.*

refer to all of them as “nested interlocal entities”—creatures of ILAs, birthed wholly independently from the state legislature.²⁰⁴

A nested interlocal entity can wield tremendous regional power. It can own and condemn property,²⁰⁵ manage major infrastructure projects,²⁰⁶ issue bonds to purchase utilities and construct large-scale developments,²⁰⁷ and govern across disciplines ordinarily reserved for municipal actors, including in the fields of land-use planning, environmental protection, criminal justice, and more.²⁰⁸ Nested interlocal entities can even exceed the power of the governments that

204. Professor Bridget A. Fahey labels such entities at the state and federal level as examples of “cross-governmental bureaucracies.” See Fahey, *Data Federalism*, *supra* note 71, at 1014. This Article uses a different term for two reasons: first, to highlight the distinction between formal and informal governance systems created by ILAs, and, second, to stress the unique nature of these entities as creatures of existing local governments, formed without the direct involvement of the state. In addition, due to limited and shared staffing arrangements, see *supra* Section I.A, new entities at the local level lack much of the bureaucratic breadth seen in state and federal government.
205. See, e.g., *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 295 (Neb. 2003); *Estermann v. Bose*, 892 N.W.2d 857, 869 (Neb. 2017); *Compact Between the City of Chi. & the City of Gary Relating to the Establishment of the Chi.-Gary Reg’l Airport Auth.* 20 (Apr. 15, 1995) (on file with author) (granting significant and expansive property power, including eminent domain powers).
206. See, e.g., *Kubicek*, 658 N.W.2d at 295; Addendum to and Restatement of Interlocal Cooperation Agreement Establishing the Seven County Infrastructure Coal. 2 (Dec. 1, 2016) (on file with author) (regarding an independent entity created by ILA with authority for “planning, development, management, ownership, operation and administration of infrastructure” over a seven-county region in Utah); *id.* at 11 (setting forth broad powers to “own, control, acquire, construct, build, develop, operate, maintain, repair, manage, administer, control, or to cause to be constructed, built, developed, operated, maintained, repaired, managed, administered or controlled such Projects and activities as shall be necessary or desirable for the purposes of the Coalition”).
207. See, e.g., *City of Falls City v. Neb. Mun. Power Pool*, 777 N.W.2d 327, 331 (Neb. 2010); *In re S. Okla. Dev. Tr.*, 470 P.2d 572, 574-75 (Okla. 1970) (holding that a trust created via ILA can issue bonds for construction projects); *Interlocal Agreement Between the City of Grand Rapids and the City of Livonia Creating the Mich. Municipal Services Authority* §§ 5.02, 5.04 (Aug. 24, 2012), http://cms1files.revize.com/michiganmunicipalservices/Interlocal_Agreement.pdf [<https://perma.cc/5WN6-FPWR>] (regarding bonding power, including for broadly-defined infrastructure developments).
208. See, e.g., *Pease v. Bd. of Cnty. Comm’rs*, 550 P.2d 565, 566 (Okla. 1976) (“[The nested interlocal entity’s] activities are directed primarily to areas of planning and coordination in attempting to solve area wide problems, and toward strengthening of local governmental processes in the areas of criminal justice, environment, physical planning and others.”). For examples of broad statutory grants to nested interlocal entities, see, for example, UTAH CODE ANN. § 11-13-204(1)(a) (West 2023) (granting nested interlocal entities broad powers, with the notable exception that they “may not levy, assess, or collect ad valorem property taxes”); and KY. REV. STAT. ANN. § 65.243(2)-(5) (West 2023) (granting similarly broad powers, with the exception that nested interlocal entities cannot levy taxes).

formed them.²⁰⁹ Yet in many cases, whether as a matter of law or practice, a nested interlocal entity is not subject to baseline transparency requirements that have become expected of city and county governments, like holding open meetings, reporting on activities, and subjecting records to sunshine-law requests.²¹⁰

Moreover, the independence of a nested interlocal entity insulates it further from local legislative oversight. Unlike an ILA that establishes only informal governance structures – that is, one managed by unelected career staff who still factually report to the locality’s elected council or commission – a nested interlocal entity acts at a functional and formal distance from elected officials in a community. It is governed by a board, committee, or other similarly designed body whose members might be appointed with minimal input by a local legislature.²¹¹

209. See, e.g., Etters, *supra* note 4 (noting that the management committee of an entity can approve contracts up to \$500,000, possibly without being subject to freedom-of-information laws that would otherwise apply to the governments that formed it); *EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 783-84 (Iowa 2002) (holding that a nested interlocal entity is not subject to public-bidding requirements); *Providing Fire and Other Services Under an Interlocal Agreement*, Tenn. Att’y Gen. Op. No. 09-107, 2009 WL 1644055, at *1 (June 8, 2009) (finding that a nested interlocal entity holds appointment and governance powers set by the ILA, even though they might exceed similar powers conferred upon the local governments that formed it). *But see* Op. 99-37, 29 Okla. Ops. Att’y Gen. 184, 186-87 (1999) (declaring that a nested interlocal entity is held to the same open-meetings obligations of the ILA’s constituent governments); *Authority of an “Acquisition Agency” Established Pursuant to the Nebraska Public Safety Wireless Communication System Act to Exercise Eminent Domain Power*, Neb. Op. Att’y Gen. No. 03026, 2003 WL 22896499, at *3-4 (Dec. 5, 2003) (finding that eminent domain power held by constituent governments does not transfer to a nested interlocal entity); *Rollow v. West*, 479 P.2d 962, 963 (Okla. 1971) (same).

210. See, e.g., *Interlocal Agreement 6* (Dec. 5, 2022), https://www.muncie.in.gov/egov/documents/1672343093_73338.pdf [<https://perma.cc/49QJ-3FT6>] (describing a nested interlocal entity whose operations board meetings are not subject to open-meetings requirements, although the board’s records are subject to the state sunshine law); Angelique McNaughton, *Summit County Agrees to Settlement in Mountain Accord Lawsuit*, PARKRECORD.COM (Mar. 15, 2019), <https://www.parkrecord.com/news/summit-county/summit-county-agrees-to-settlement-in-mountain-accord-lawsuit> [<https://perma.cc/D6CM-BYQL>] (discussing the settlement of a case that involved, in part, a dispute over whether an alleged nested interlocal entity was subject to open-meetings laws); see also *State ex rel. Herro v. Vill. of McFarland*, 737 N.W.2d 55, 60 (Wis. Ct. App. 2007) (finding that even if a joint committee established by ILA had violated the state’s open-meetings law, state law encourages interlocal collaboration, and therefore a court could conclude that the public interest in upholding the agreement outweighed the open-meetings violation).

211. Complicating matters, however, the line between a nested interlocal entity and an informal governance scheme can be a fine one. See Reynolds, *supra* note 69, at 132 (“[T]he distinction between a joint services agreement and the creation of a new entity may blur.”). In deciding whether an ILA has indeed created a nested interlocal entity, courts in some states look to the intent of the governments that executed the agreement, asking whether those constituent

As just one example of the myriad ways these bodies are appointed, a nested interlocal entity in Broward County, Florida – the Broward Solid Waste Disposal District – was formed out of an ILA between the County and twenty-three local municipalities.²¹² Yet despite the diverse number of constituent governments involved, the Disposal District’s nine-member governing body was defined and created by the County acting alone.²¹³ As another example, each member municipality to an ILA in Nebraska could appoint a representative to the management board of a nested interlocal entity, created by the agreement for purposes of researching and administering energy sources in the region.²¹⁴ Yet the municipalities lacked direct oversight over a subsequent nested interlocal entity, which was later created by the first entity via a separate ILA to specifically purchase and deliver natural gas.

These convoluted governance schemes can mask two crucial risks. First, when ILAs bring new local governments to life, they can dilute and diffuse the power traditionally held by cities and counties in the same geographic space.²¹⁵ Second, when disputes arise within this messy ecosystem, local legislatures may discover that they can only assert control over second-degree nested entities

parties *intended* to create a new local entity. See, e.g., *Allis-Chalmers Corp. v. Emmet Cnty. Council of Gov’ts*, 355 N.W.2d 586, 590 (Iowa 1984) (“The agreement in this case calls [the nested interlocal entity] ‘a public body corporate and politic and separate legal entity.’ This language sufficiently evinces an intent of the parties that [this entity] be a public corporation.”). In other states, courts look to the function of an ILA’s governance scheme: they examine the “actual operations” of the purported entity at issue, assessing whether its structure and conduct functionally mirrors the structure and conduct of a formally chartered local government. See *Worthington v. WestNET*, 341 P.3d 995, 1001 (Wash. 2015) (reversing the lower court’s decision, which had looked to the intent of the constituent governments). And statutes in several states expressly lay out the baseline characteristics that a nested local entity must possess, which lends legislative imprimatur to their formation and also helps courts when tasked with defining the existence of one. See, e.g., James R. Viventi, *Interlocal Agreements and Economic Development in Michigan*, 47 WAYNE L. REV. 307, 314-15 (2001) (discussing Michigan law, which enables local governments to create a “separate legal or administrative entity” via ILA and sets forth some guiding characteristics).

212. *BFI Waste Sys. of N. Am., Inc. v. Broward Cnty.*, 265 F. Supp. 2d 1332, 1333-34 (S.D. Fla. 2003).

213. *Id.* at 1334.

214. *City of Falls City v. Neb. Mun. Power Pool*, 777 N.W.2d 327, 335 (Neb. 2010).

215. Cf. *supra* note 93 and accompanying text (discussing interlocal power being a zero-sum proposition); *Zale, supra* note 167, at 1034-41 (examining how and where diminished local legislative power is redistributed to other institutions). The diffusion of power can impede community efforts to access and monitor different channels of policymaking. See, e.g., Shelley Jones, *Porter County Considering Shifting Special Education Staff to Local Districts*, CHI. TRIB. (Nov. 17, 2022, 5:34 AM), <https://www.chicagotribune.com/suburbs/post-tribune/ct-ptb-pces-meeting-st-1118-20221117-lzsimcjznrchvmi65wec7hmvna-story.html> [https://perma.cc/AL5K-X2KB] (discussing a nested interlocal entity created by four school districts and noting “confusion among parents, who often don’t know if an issue they have is one to take up with [the nested interlocal entity] or the local school where their children attend”).

through litigation, if at all.²¹⁶ Both prospects underscore how the structural insulation of nested interlocal entities impedes local accountability. While empirical research in the United States appears sparse, a recent study of municipal governments in Finland and Norway found that the segregated nature of nested interlocal entities, which offers them free rein over day-to-day policymaking, restricts municipal power and thereby impedes democratic governance.²¹⁷ Such conclusions do not come as a surprise. In practice, nested interlocal entities can act wholly untethered from any elected government body, leading to the criticism that they are “not . . . responsible through elected officials to voters.”²¹⁸

D. Longitudinal Implications

Nested interlocal entities lay bare the paradoxical relationship between local legislatures and the ILAs they execute. Viewed in a vacuum, a legislature’s power to create a new governmental entity is a tremendous one. But viewed

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216. *City of Falls City*, 777 N.W.2d at 337 (finding that a constituent government cannot bring a lawsuit regarding business contracts entered into by the nested interlocal entity). For examples of a local legislature struggling to understand and control the actions of a nested interlocal entity that it created, see Mary Ramsey, *Charlotte Didn’t Follow Their Vote. Now, County, Mayors Want Changes to CATS Agreement*, CHARLOTTE OBSERVER (Sept. 29, 2023, 12:13 PM), <https://www.charlotteobserver.com/news/politics-government/article279780014.html> [<https://perma.cc/ECM7-XY8N>]; and Michael Praats, *Charlotte Mayor: CATS ‘Shortcomings’ Were Unknown to City Council*, WBTV NEWS (Mar. 21, 2023, 5:04 PM EDT), <https://www.wbtv.com/2023/03/21/charlotte-mayor-cats-shortcomings-were-unknown-city-council> [<https://perma.cc/9LHY-GRRX>].
217. Pekka Valkama, Harald Torsteinsen & Pekka Kettunen, *Impacts of Joint Municipal Agencification on the Democratic Governance of Waste Management*, 35 INT’L. J. PUB. SECTOR MGMT. 533, 542 (2022).
218. *Cooper v. Whatcom Cnty.*, 650 F. Supp. 3d 1144, 1157 (W.D. Wash. 2023). In this vein, the nondelegation doctrine is frequently invoked in cases challenging the actions of a nested interlocal entity. See, e.g., *Lutz Lake Fern Rd. Neighborhood Grps., Inc. v. Hillsborough Cnty.*, 779 So. 2d 380, 382 (Fla. Dist. Ct. App. 2000); *Doe v. City of Springtown*, No. 19-cv-00166-P, 2020 WL 1861682, at *2 (N.D. Tex. Apr. 14, 2020). As applied in local government law, the nondelegation doctrine stands for the proposition that a local legislature cannot delegate or contract away its police powers. See Gillette, *supra* note 36, at 224-27, 229; Myers, *supra* note 46, at 899; Hatcher, *supra* note 53, at 271. Where state courts interpret it to prevent legislatures from delegating rulemaking and policymaking powers, the nondelegation doctrine would seem to fatally imperil many nested interlocal entities. Commonly, however, courts recognize the inherent tension between a robust nondelegation doctrine and an ecosystem of interlocal collaboration. As one court observed, an ILA “necessarily involves a delegation of authority.” *City of Falls City*, 777 N.W.2d at 334. Courts similarly sidestep nondelegation doctrine challenges where a nested interlocal entity is created, reasoning that state statutes authorizing interlocal collaboration have endorsed these delegations, notwithstanding the doctrine’s purported constitutional underpinning. See *Allis-Chalmers Corp. v. Emmet Cnty. Council of Gov’ts*, 355 N.W.2d 586, 590 (Iowa 1984).

longitudinally – when considering the interests of legislatures past, present, and future – creating such an entity and instilling it with broad power is a legislative choice that could bind future elected officials for years to come. This prospect coexists uneasily with the longstanding principle of legislative entrenchment – that “one legislature may not bind the legislative authority of its successors.”²¹⁹ Rooted in the notion that a democratic government must be able to alter its policies to reflect the electorate’s will, the principle maintains that if voters dislike their legislators’ choices, they should be able to elect new legislators who are, in turn, empowered to change those decisions.²²⁰ The elected officials from one moment in time should not be able to bind their successors and hold hostage their voters.

In reliance on this principle, courts have occasionally found that an ILA with longitudinal force could not be held binding upon its constituent governments. For example, in the recent case *City of Olathe v. City of Spring Hill*, the Kansas Supreme Court examined an ILA whereby two cities drew a boundary line to demarcate the future growth of their respective communities.²²¹ One city agreed not to annex property south of the line, whereas the other agreed not to annex north of the line, an agreement designed to bind the two governments unless and until they mutually agreed to terminate it.²²² The court concluded that the ILA was not enforceable. Because it constrained the policymaking power of future elected officials in each city, the court held, the ILA foreclosed, perhaps indefinitely, the authority of both cities’ elected bodies to make unilateral land-use planning decisions in the future.²²³

If replicated elsewhere, a decision like *City of Olathe* could have broad implications for ILAs and the officials who exercise power over them. Yet *City of Olathe* appears rare. Courts in other jurisdictions have upheld ILAs that bind future legislatures, brushing aside claims that such agreements could restrict unilateral

219. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1665 (2002) (quoting *United States v. Winstar Corp.*, 518 U.S. 839, 872 (1996) (plurality opinion)). See generally Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879 (2011) (discussing applications in the local government context).

220. See *City of Olathe v. City of Spring Hill*, 512 P.3d 723, 725 (Kan. 2022) (“The doctrine here at issue has its roots in our fundamental notions of democratic government ‘To allow an elected body to perpetuate its policies beyond its term of office would frustrate the ability of the citizenry to exercise its will at the ballot box.’” (quoting *Lobolito, Inc. v. N. Pocono Sch. Dist.*, 722 A.2d 249, 252 (Pa. Commw. Ct. 1998))).

221. *Id.* at 724.

222. *Id.*

223. *Id.* at 727; see also *Landowners v. S. Cent. Reg’l Airport Agency*, 977 N.W.2d 486, 497 (Iowa 2022) (finding invalid an agreement that purported to bind future legislatures absent the opportunity of unilateral termination).

local action “until the end of time.”²²⁴ Accordingly, local governments can – and do – enter into long-lasting agreements that meaningfully restrict the policy-making power of their successors. Through ILAs, governments agree to bind their successors to future action (for example, by agreeing to pass specific waste-disposal ordinances in the future²²⁵) and future inaction (for example, by promising to refrain from exercising specific powers that each entity statutorily holds, such as the power to appoint a county director of emergency services²²⁶). In sharp contrast with *City of Olathe*, other states like Indiana utilize ILAs that bind successor legislatures to identical promises to refrain from annexing properties in the future.²²⁷ The Kansas Supreme Court has itself offered mixed signals, hesitating to apply the principle of legislative entrenchment to invalidate the plain terms of an ILA in other cases.²²⁸

ILAs can therefore bind future legislators for a long time. The lifespan of an ILA runs a wide gamut, ranging from those that automatically terminate after only several months to those designed to exist for decades.²²⁹ There appears to be no upper limit on the length of an ILA in practice. Many lack a sunset date altogether and could conceivably operate “indefinitely.”²³⁰ Others do sunset, but only at remote dates in the future, such as one ILA from Iowa that does not terminate until 2110.²³¹

As a consequence, local legislators are prone to play diminished roles across the ILA lifecycle. On the front end, when the ILA is being negotiated and

224. *City of Whitefish v. Bd. of Cnty. Comm’rs of Flathead Cnty. ex rel. Brenneman*, 199 P.3d 201, 208 (Mont. 2008) (Warner, J., dissenting).

225. *See BFI Waste Sys. of N. Am., Inc. v. Broward County*, 265 F. Supp. 2d 1332, 1335 (S.D. Fla. 2003).

226. *See Providing Fire and Other Services Under an Interlocal Agreement*, Tenn. Att’y Gen. Op. No. 09-107, 2009 WL 1644055, at *1 (June 8, 2009).

227. *See City of Carmel v. Steele*, 865 N.E.2d 612, 620 (Ind. 2007).

228. *See Del. Twp. v. City of Lansing*, 512 P.3d 1154, 1161 (Kan. 2022) (balancing the freedom to contract, a “paramount public policy,” against the risk that parties will remain “locked” in an ILA).

229. *See Andrew*, *supra* note 10, at 11 (examining a dataset of agreements, with termination dates ranging from 1974 to 2024, some of which had automatic renewal provisions whereas others did not).

230. *Report on the City of Covington – County of Allegheny Voluntary Economic Growth-Sharing Agreement*, *supra* note 46, at 18; *see also* TEX. GOV’T CODE ANN. § 791.011 (West 2023) (“[A]n interlocal contract *may* have a specified term of years.”) (emphasis added); 2002 W. Va. Acts 1872, ch. 226 (amending West Virginia law to provide that “[a]ny separate legal or administrative entity established [under an ILA] is a public corporation and may exist for the length of time set forth in the intergovernmental agreement”).

231. *Real Estate Lease and Asset Transfer Agreement Between the City of Des Moines, Iowa and the Des Moines Airport Auth.* 2 (Nov. 1, 2011) (on file with author).

executed, local elected officials are often disengaged, removed from substantive discussions about its terms and willing to let unelected managers and staff carry the torch. On the back end, once an ILA is ratified, unelected officials tend to formally (via a nested interlocal entity) or informally (via horizontal administrative networks) oversee the ILA and make governance decisions that inform how their collaborative project evolves over time. And finally, in the event that a local council—speaking presumably for its voters—decides that it does want to exercise its legislative powers to change or terminate its community’s role in the ILA, it may find itself handcuffed, unable to take action that departs from the ILA’s operative governance scheme. The result is a fraying of the theoretical connection between local residents, local officials, and the policy outputs of a local government. Democratic accountability is necessarily hindered where instruments of power are only obliquely controlled by elected stakeholders.²³²

E. Local Residents

As much as local legislatures are disempowered by the norms of interlocal collaboration, local residents are even further removed from the policy decisions that create and guide ILAs. At baseline, given that ILAs tend to operate outside the direct purview of local legislatures, they also necessarily operate outside the direct electoral oversight of voters in a community. When unelected staff members make decisions about an ILA and coordinate horizontally with their counterparts at other municipalities, their negotiations occur via administrative meetings, emails, and phone calls—not in meetings formally open to the public.²³³

232. As before, transparency defects are in part to blame. When an ILA extends across time and binds legislatures into the future, efforts to change the agreement’s original terms (or simply to honor and enforce them) can run into confusion and trigger interlocal dispute as to what exactly was intended in the original negotiations, a question more challenging in the ILA context where these discussions tend to occur informally and outside a documented record. See, e.g., METRO. TRANSIT COMM’N, MEETING SUMMARY 2-3 (2023) (on file with author) (demonstrating confusion as to the content and context of a 2005 ILA amendment between a city and county); see also *id.* (reporting the city mayor’s comments that “[h]istory wasn’t defined as well as we would like it to be”).

233. Cf. Zeemering, *Democratic Anchorage*, *supra* note 40, at 89 (discussing how ILAs and other local governance networks “remove some policymaking, implementation, and oversight activities from their traditional homes in formal government jurisdictions and . . . are said to lack the procedural norms of policymaking found in traditional government bodies”); *id.* at 88 (questioning the accountability of these “complex governance arrangements”); Zeemering, *supra* note 56, at 733 (noting that unelected officials “interpret[] . . . standards” through “intergovernmental management” of ILAs, outside the formal involvement of local councils); Perlman, *supra* note 40, at 120 (describing that ILAs in a survey of local officials lacked formal evaluation and monitoring rules and that officials speculated that informal reviews between managers occur regularly); Delabbio & Zeemering, *supra* note 40, at 264 (finding that unelected officials are less supportive of engaging the public).

Moreover, when a nested interlocal entity takes binding action over the opposition or indifference of its local legislature, the voice of the community's residents is necessarily dulled too. Local legislatures and local residents are two sides of the same democratic coin. An enfeebled city council dilutes the interlocal governance power of its electorate.

Separate from the democratic problem of distanced legislative power, local residents face unique hurdles when trying to access and influence interlocal agreements. First, when an ILA is ratified by a local council, residents may not realize the agreement's substantive force. ILAs are often blandly titled—"An Agreement between City A and City B," for example—and generically presented, described to observers as a structure for collaboration without explaining what that collaboration might entail.²³⁴ While residents may hold strong opinions about a council decision to condemn private land, for example, a contract to coordinate with a partner community is less likely to generate opposition, even if that contract creates a nested interlocal entity that can independently take the exact same action.²³⁵ The substantive consequences of an ILA can be obscured by its neutral, administrative clothing when presented at a public meeting for approval.²³⁶ In large part a consequence of this dissonance, researchers have found members of the public to be conspicuously absent from ILA-ratification discussions.²³⁷

There are notable exceptions to this norm of public nonparticipation, however. At times, local constituents express spirited opinions about a proposed ILA, and occasionally these opinions are instrumental in the ILA's ultimate ratification

234. Many of the ILAs reviewed for this Article employ this generic nomenclature. See, e.g., Inter-governmental Agreement Between the City of Portland and the Port of Portland, (Nov. 8, 2016) (on file with author); Memorandum of Understanding Between the City of Santa Barbara, the San Diego Cnty. Reg'l Airport, and the San Diego Unified Port Dist. (June 11, 2007) (on file with author); Memorandum of Agreement between Vancouver Fraser Port Auth. and Port of Seattle (June 24, 2014) (on file with author); Interlocal Agreement Between Port of Seattle and King Cnty. (Mar. 9, 2011) (on file with author); Interlocal Agreement between the Port of Seattle and the City of Seatac (2018) (on file with author).

235. Cf. Kwon & Feiock, *supra* note 40, at 878 (observing that unless and until an ILA itself becomes controversial, "[c]itizens have little to say in the creation of an agreement").

236. See, e.g., *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 53 P.3d 1028, 1030, 1033 (Wash. Ct. App. 2002) (arguing that an ILA resulting from "negotiations that were not open to the public" later teed up and "influenced" decisions made at a subsequent public hearing); cf. Lee & Hannah-Spurlock, *supra* note 36, at 130 (discussing the often informal and ad hoc process that drives ILA negotiation); Perlman, *supra* note 40, at 122 (same).

237. See Zeemering, *supra* note 56, at 737 (finding that 41% of interlocal projects in a study received no public input).

or failure.²³⁸ But members of the public are far from the only stakeholders with a voice in the ratification process. Legislators may instead defer to the advice of unelected staff who drafted an ILA or to the desires of interlocal partners who have pushed for its approval. ILAs can even be ratified over the opposition of local residents when outside stakeholders speak in an agreement's favor.²³⁹ In Montana, for instance, a proposed ILA between the City of Whitefish and Flat-head County faced "substantial objection from almost all of the [residents] who spoke" when the ILA was considered by the Whitefish City Council.²⁴⁰ The Council nevertheless ratified the ILA in order to resolve a dispute with the County and out of deference to the committee of officials who had negotiated it.²⁴¹

Second, following an ILA's ratification, members of the public face difficulties when trying to access the document to understand the governance scheme it has created. Unlike a city-council resolution or ordinance, some ILAs are expressly kept confidential by their constituent governments.²⁴² Indeed, some ILAs are executed for the very purpose of shielding an interlocal conversation from public attention or skirting public-referendum or sunshine-law requirements.²⁴³ Residents of a city may discover that while their city charter allows a public referendum on certain governmental actions, those same actions, when taken by a

238. See, e.g., *Site A Landowners v. S. Cent. Reg'l Airport Agency*, 977 N.W.2d 486, 491 (Iowa 2022) ("[T]he County's participation in the [nested interlocal entity] proved controversial among members of the public."); Kwon & Feiock, *supra* note 40, at 878 (observing that public opposition can erupt when "there is a perception that the agreement is a bad deal for the city"). Public-administration scholarship has explored how public opinion can influence certain types of ILAs. See Hugg, *supra* note 60, at 1303 (regarding "lifestyle" ILAs); Zeemering, *supra* note 56, at 733 (regarding service-delivery ILAs).

239. See Tafoya, *supra* note 95, at 166 (recounting how, despite facing overwhelming public opposition, an ILA was approved so that the city council could settle an intergovernmental dispute with the local county).

240. *Id.*

241. *Id.*

242. See Fahey, *supra* note 10, at 2401; see also, e.g., *Agreement for Aircraft Rescue and Fire Fighting Servs. at San Diego International Airport Between the San Diego Cnty. Reg'l Airport Auth. and the City of San Diego* 7 (2012) (on file with author) (city is "prohibited from making any representations regarding the relationship between [the City] and [the San Diego Airport Authority] without the other's written consent"); *Lower Duwamish Waterway Group Memorandum of Agreement* 11 (2000) (on file with author) ("The Members intend by this section to protect from disclosure all information and documents . . . to the greatest extent permitted by law.").

243. See *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 53 P.3d 1028, 1030 (Wash. Ct. App. 2002) (discussing an "Agreement for Confidentiality in Settlement Negotiations"); *Worthington v. WestNET*, 341 P.3d 995, 997 (Wash. 2015) (examining an ILA that provides that a nested interlocal entity it creates "does and must operate confidentially and without public input").

nested interlocal entity, are not subject to a public vote.²⁴⁴ Residents may also realize that while their city is subject to public-records requests, the actions of a committee created by an ILA are not.²⁴⁵ And increasingly, when a dispute arises between the governmental parties to an ILA, officials turn to closed-door mediation to resolve their differences.²⁴⁶ By design, interlocal mediation is less adversarial and therefore more effective because discussions are kept confidential from the public. Officials are able to negotiate more efficiently, freed from the temptation of political grandstanding.²⁴⁷ Yet they sacrifice a large measure of transparency in doing so.²⁴⁸

A more basic impediment also confronts members of the public. Even when not expressly kept confidential, an ILA, unlike vast troves of local ordinances and

244. See *Citizens for Responsible Transp. v. Draper City*, 190 P.3d 1245, 1249 (Utah 2008) (holding that a resolution passed in accordance with ILA is not a legislative action subject to a referendum); *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 299 (Neb. 2003) (holding that voter approval is not required for actions under an ILA scheme where the city charter broadly permitted the execution of ILAs).

245. See *supra* note 4 and accompanying text (discussing Blueprint Intergovernmental Agency); *Worthington v. WestNET*, No. 43689-2-II, 2014 WL 314680, at *1 (Wash. Ct. App. Jan. 28, 2014) (finding that a task force created by an ILA was not subject to the state public-records law); *Worthington*, 341 P.3d at 1000-01 (holding that the task force in question *was* subject to the public-records law, but agreeing that an ILA could create an entity shielded from such laws).

246. See, e.g., *Cartier*, *supra* note 10, at 3 n.7 (describing the confidentiality agreement governing one such mediation). The increase in interlocal mediation is partially a result of state laws that mandate the use of alternative dispute resolution in governmental disputes. See Jonathan M. Davidson & Susan L. Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW. 705, 709-10 (2001) (discussing cases upholding these mandates).

247. See Aric J. Garza, *Resolving Public Policy Disputes in Texas Without Litigation: The Case for Use of Alternative Dispute Resolution by Governmental Entities*, 31 ST. MARY'S L.J. 987, 1009 (2000) (“The promise of confidentiality encourages opposing parties to speak freely during the proceeding, thus promoting a candid exchange that is considered desirable for settlement.”); see also Davidson & Trevarthen, *supra* note 246, at 708 (providing an example of a successful intergovernmental mediation).

248. See *Cartier*, *supra* note 10, at 15 (“[S]ome suggest that mediation allows for backroom dealing.”); cf. Richman, *supra* note 92, at 515 (“Because the parties in interjurisdictional disputes are the elected boards of communities, and because negotiated settlements inevitably affect private rights and obligations, settlements made in confidential negotiations must be reviewable by the public.”). In Virginia, the statutory mediation process is exempt from public-records laws, and generally the mediator – not the governmental parties – make all statements to external parties. See Richman, *supra* note 92, at 512-13. Similarly, short of disputes, governments often monitor and evaluate ILAs informally, leaving no paper trail for outside stakeholders to follow. See Richman, *supra* note 92, at 510 (discussing “loosely structured” negotiations); Perlman, *supra* note 40, at 120 (discussing “informal reviews”); Lee & Hannah-Spurlock, *supra* note 36, at 131-32 (discussing ad hoc evaluations).

resolutions, is not ordinarily made public or available online.²⁴⁹ Rather, in many communities, intrepid residents face an uphill battle when seeking to read a particular ILA or to identify what ILAs their government has joined. Stated otherwise, an ILA can be a uniquely difficult and frustrating document for members of the public to obtain. Residents do have a few options when looking to confirm an ILAs' existence or to understand its terms. They can search state-level databases that compile local ILAs, request ILAs directly from their constituent local governments, or most forwardly, try to uncover an ILA through litigation. Yet each of these approaches are flawed and present often insurmountable hurdles, such that an ILA not expressly kept confidential can still remain an elusive, non-transparent instrument.

First, residents can turn to ILA databases maintained at the state level (often by the attorney general's office) or at the local level (often by a county clerk or recorder of deeds).²⁵⁰ But with the notable exception of Iowa's database, they are scarcely monitored and substantially incomplete.²⁵¹ ILAs are not consistently filed even when mandated by state law, as Section IV.C will explore in greater detail.²⁵²

249. Cf. Fahey, *Data Federalism*, *supra* note 71, at 1044 (noting that state and federal intergovernmental agreements "are not ordinarily made public"). Municipal ordinances are widely (though not universally) available online, often through national compiler organizations that publish and maintain code registries, the most notable being Municode and the American Legal Publishing Code Library. See Jesse Bowman, *Locating Local Laws*, 105 ILL. BAR J. 44, 44 (2017) (describing these resources as starting points); Michael Whitlow, *Municipal Resources*, 50 COLO. LAW. 18, 19-22 (July 2021) (outlining resources to research Colorado municipal documents); Tom Gaylord, *Update: Finding Illinois Municipal Ordinances Online (and Free!) A Lot Has Happened in the Six Years That Have Passed Since We Last Looked at Municipal Codes Online*, 101 ILL. BAR J. 46, 46 (2013) (outlining resources to research Illinois municipal documents). Occasionally, a local government will post its ILAs online. See, e.g., *Interlocal Agreements*, LEE CNTY., <https://www.leegov.com/interlocals/agreements> [<https://perma.cc/739B-6YXX>] (providing ILAs executed by Lee County, Florida since the 1970s). This practice appears to be very rare.

250. See *infra* Section IV.C.

251. See Interview with Jeff Schreier, Audit Manager, Neb. Auditor of Pub. Accts. (Feb. 16, 2023) (notes on file with author) (explaining that Nebraska's database is not monitored, but rather relies upon local submission and self-enforcement); Off. of the City Auditor, *supra* note 39, at 5 ("During this audit, we noted that the City removed the list of interlocal agreements on the City website as the list was not reliable."). The exception is Iowa. See Hugg, *supra* note 60, at 1301 ("Unlike most states, the Iowa Code requires that all formal interlocal agreements be filed with the state government before it can be entered into force and that each agreement specifies its duration, purpose, collaboration financing manner, methods to be employed for partial or complete termination, and organizational composition if a new entity is being created by the agreement. The Iowa Secretary of State maintains an interlocal agreement filing repository that can be accessed online.").

252. See *infra* Section IV.C.

As a second option, seeking a more authoritative source, residents can request ILAs directly from the constituent governments themselves. ILAs are generally subject to disclosure under state freedom of information laws (FOILs).²⁵³ Yet FOILs can prove a surprisingly ineffective tool of public accountability. Understaffed local governments have faced criticism for responding slowly or incompletely to FOIL requests, as well as for ignoring them entirely,²⁵⁴ a problem only exacerbated by the COVID-19 pandemic.²⁵⁵ Requests for ILAs are no exception. Residents seeking ILAs in their community might have their requests rejected as overbroad or be asked to pay a hefty deposit before any agreements will be produced.²⁵⁶ It is possible that local governments intentionally place these hurdles before members of the public to further insulate ILAs from public scrutiny. More probable, however, is that many local officials do not themselves know the full breadth of ILAs to which their government is a party. Local entities maintain limited internal documentation about ILAs, and institutional knowledge is fractured and diffused across individual officials and municipal

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253. ILAs are not discretely subject to disclosure, of course, but they generally fall within liberally defined FOIL statutes and are not protected by strictly construed disclosure exemptions. See *King v. Nease*, 757 S.E.2d 782, 786 (W. Va. 2014) (alterations in original) (quoting *Hechler v. Casey*, 333 S.E.2d 799 (W. Va. 1985)) (echoing the common maxim that “[t]he disclosure provisions of this State’s Freedom of Information Act . . . are to be liberally construed, and the exemptions to such Act are to be strictly construed”). For this reason, FOILs often contain provisions to prevent competitors of public vendors from viewing contractual language that would provide them a commercial advantage. See, e.g., ARK. CODE ANN. § 25-19-105(b)(9)(A) (2023).
254. See Mick Dumke, *Citizens Count on the Illinois Freedom of Information Act but Keep Getting Shut Out*, PROPUBLICA (Oct. 11, 2018, 5:00 AM CDT), <https://www.propublica.org/article/illinois-foia-public-records-open-meetings-laws-attorney-general-lisa-madigan> [https://perma.cc/9JM8-RYHD].
255. See Nate Jones, *Public Records Requests Fall Victim to the Coronavirus Pandemic*, WASH. POST (Oct. 1, 2020, 9:01 AM EDT), https://www.washingtonpost.com/investigations/public-records-requests-fall-victim-to-the-coronavirus-pandemic/2020/10/01/cba2500c-b7a5-11ea-a8da-693df3d7674a_story.html [https://perma.cc/5L9A-XW4B].
256. See, e.g., Email from Nathan Collins, Assoc. Dir. of the L. Libr., Belmont Univ. Coll. of L., to Daniel Rosenbaum, Assistant Professor, Mich. State Univ. Coll. of L. (June 24, 2022, 9:50 AM) (on file with author) (quoting a response to a public records request to the Metropolitan Government of Nashville and Davidson County, which said that “the request for ‘any’ [ILA] is too broad and vague. Please provide a list of the governmental entities you believe [the municipality] has a written agreement [] with”); Email from Kristine Protacio, Records Analyst, Port of Portland, to Emily Elmer, Univ. of Detroit Mercy Sch. of L. (Apr. 13, 2022, 1:49 PM) (on file with author) (quoting a cost of \$26,810 to produce all active ILAs of the entity).

agencies.²⁵⁷ When residents request information about ILAs, officials might simply not know where to look.²⁵⁸

As a third option, residents can try to uncover ILAs through litigation. But the shroud enveloping ILAs is such that even litigation struggles to lift it. In cases where a legal claim or defense relies on the language of an ILA, the agreement itself is often elusive, conspicuously missing from the parties' briefings and never ultimately seen by the judge or the opposing counsel. In one case, for example, a purported ILA was not filed with the court or presented to deponents.²⁵⁹ In another, the defendant was detained and convicted under an ILA that ostensibly conferred the requisite jurisdictional power – but the document was never submitted to the trial court.²⁶⁰ And in another case, where a county sheriff relied upon an ILA to justify his actions in a Section 1983 complaint, the arrestee's lawyer protested that the ILA had never been shared with him.²⁶¹ "I have not seen a piece of paper," the lawyer said. "I haven't even seen the Interlocal Agreement. I have not seen a single document."²⁶²

Even if the lawyer had received the document, it might not have mattered. There is a final impediment to public accountability: a resident who overcomes the gateway hurdle of obtaining an ILA document may find, upon reading it, that the document affords the public no right to enforce or contest its terms. In other contexts, enabled in part by the liberal doctrine of municipal taxpayer standing, residents in many states are afforded a broad opportunity to litigate the legality of a local government's actions.²⁶³ This option disappears when those same actions are taken through an ILA, however. Operating on the premise that an ILA is a contract between governmental entities, courts apply the private-law

257. See Office of the City Auditor, *supra* note 39, at 4 ("The City does not know what interlocal agreements it has and departments use different approaches to manage them."); Spicer, *supra* note 64, at 394 (discussing similar lack of formal documentation and knowledge within Canadian municipal governments).

258. See Email from Christa Stinnett, Exec. Assistant, Tulsa Cnty. Clerk's Off., to Daniel Rosenbaum, Assistant Professor, Mich. State Univ. Coll. of L. (Feb. 17, 2023, 9:38 AM) (on file with author) (indicating the office lacks the ability to isolate and locate ILAs); Telephone Interview with Christa Stinnett, Exec. Assistant, Tulsa Cnty. Clerk's Off. (Feb. 15, 2023).

259. See *Alvarez v. Bldg. & Land Tech. Corp.*, No. FSTCV136017699S, 2018 WL 1277526, at *8 (Conn. Super. Ct. Feb. 7, 2018) ("The interlocal agreement was not before attorney Waters at his deposition. The interlocal agreement was not presented to this court.").

260. See *State v. Ohlrich*, 817 N.W.2d 797, 804 (Neb. Ct. App. 2012); cf. *Wolverton v. Young*, No. 24117-3-III, 2006 WL 165734, at *9 (Wash. Ct. App. Jan. 24, 2006) ("It is impossible to resolve the jurisdiction issue without copies of the relevant agreements, including the interlocal agreement . . .").

261. *McGee v. Carrillo*, 297 F. App'x 319, 322 n.3 (5th Cir. 2008).

262. *Id.*

263. See Clopton & Shoked, *supra* note 16, at 9-10.

principle that non-signatories to the agreement cannot challenge or enforce its terms unless they were intended as third-party beneficiaries thereunder; if a person is not an “intended beneficiary” to a contract, as manifest directly and objectively from the contract’s language, American courts have traditionally found no standing for the party to sue.²⁶⁴ A similar standard applies when a private party raises claims based upon a government contract, where courts have historically asked whether an “intention appears [in the contract] that the promisor is to be answerable to individual members of the public.”²⁶⁵

In some cases, there is little doubt that members of the public are indeed intended beneficiaries of a governmental agreement. Where an agreement creates a private right of action, for example,²⁶⁶ courts have no difficulty finding that certain classes can enforce or challenge its terms. Third-party standing is equally noncontroversial where the government signatories expressly agree “that the purpose of [their ILA] . . . was to benefit [a private party].”²⁶⁷ Courts have also found standing where an external legal authority permits a lawsuit on the underlying facts at issue. For instance, where taxpayers can bring a lawsuit arguing that public money is being unconstitutionally spent, they have standing to challenge an ILA that serves as the conduit for these alleged unconstitutional actions.²⁶⁸

Beyond these easy cases, however, courts have crafted a third-party-beneficiary doctrine that places a high and often insurmountable bar before litigants. On the concern that all government contracts could be interpreted as intended for the benefit of the public at large, with potentially expansive ramifications for governmental liability, courts have approached these contracts with a presumption against finding third-party-beneficiary rights, departing from this baseline only where the contracting entities “intended to allow . . . [a] particular member

264. See Fahey, *supra* note 10, at 2381; *Fraser v. Lake Erie Transp. Comm’n*, No. 242330, 2003 WL 22928836, at *2 (Mich. Ct. App. Dec. 11, 2003) (“The contract itself must objectively manifest that the promising party knowingly undertook an obligation to give or to do or to refrain from doing something *directly* to or for the putative third-party beneficiary.” (internal quotation marks omitted)).

265. Gabe Chess, Note, *Third-Party Beneficiaries of Government Contracts: Imagining an Equitable Approach and Applying It to Broken Promises in Detroit*, 121 MICH. L. REV. 291, 294-97 (2022) (discussing *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928)).

266. See Fahey, *supra* note 10, at 2382.

267. *Smith v. Town of Cramerton*, No. 18-CV-631, 2019 WL 4233614, at *6 (W.D.N.C. Sept. 5, 2019).

268. See, e.g., *Fearrington v. City of Greenville*, 871 S.E.2d 366, 374 (N.C. Ct. App. 2022) (“[W]e cannot say that Plaintiffs have failed to demonstrate any injury resulting from the [ILA] If Plaintiffs are correct in arguing that the proceeds of the fines are unconstitutionally appropriated . . . they have demonstrated an injury to their rights under the State Constitution.”).

of the public” a right of action under the agreement.²⁶⁹ For this reason, for example, in *Fraser v. Lake Erie Transportation Commission*, the Michigan Court of Appeals found that an ILA to provide public transit between two local governments did not confer third-party-beneficiary status upon the plaintiff.²⁷⁰ Notwithstanding that the joint transit agency created by the ILA had a primary purpose of serving “elderly and/or handicapped citizens,” a class to which the plaintiff claimed to belong,²⁷¹ the court examined the language of the ILA and found no express promise made directly to the plaintiff herself or to any class of which she was a member.²⁷² Courts in other jurisdictions have reached similar conclusions. In the all-but-guaranteed event that an ILA does not mention them specifically by name, plaintiffs must convince a court that they belong to a limited class that the ILA, by its plain terms, expressly and directly intended to benefit.²⁷³ The task is particularly daunting when an ILA expressly proclaims it is not intended to create any third-party beneficiaries.²⁷⁴ Many litigants cannot surmount this threshold procedural hurdle, a setback that extends a chilling effect across an ILA’s lifecycle.

When an ILA is negotiated behind closed doors, ratified inattentively, managed by unelected officials, and shielded by deficient sunshine laws, the agreement has assumed the character of a private contract, one in which the public plays no role notwithstanding the agreement’s potentially very public impact upon the community. Actually accessing and engaging with an ILA may prove an exhausting task for residents, especially for residents who historically lack

269. Chess, *supra* note 265, at 296.

270. See 2003 WL 22928836, at *1 (Mich. Ct. App. Dec. 11, 2003).

271. *Id.* at *2 (noting that the plaintiff identifies as handicapped).

272. *Id.* at *3.

273. See, e.g., *Btsh v. City of Maitland*, No. 10-cv-71-Orl-19, 2011 WL 3269647, at *41 (M.D. Fla. July 29, 2011) (“Because the [ILA] does not specifically name [plaintiff] as an intended beneficiary, [plaintiff] may only be considered a third-party beneficiary if he is a member of a limited class which was intended to benefit from the contract Membership in a class tantamount to the general public is not sufficiently limited to vest a person with the status of an intended, as opposed to incidental beneficiary, of a public contract.” (internal quotation marks omitted)); see also *Wolverton v. Young*, No. 24117-3-III, 2006 WL 165734, at *7 (Wash. Ct. App. Jan. 24, 2006) (“[P]laintiffs cannot be viewed as third party beneficiaries under the [ILA] because the promisor did not assume a direct obligation to them . . .”).

274. These clauses seem common in policing ILAs. See, e.g., *Agreement Concerning Reuse Recommendations for Camp Nimitz between City of San Diego and San Diego Unified Port Dist.* 4 (1996) (on file with author); *Settlement Agreement between City of Coronado and San Diego Cnty. Reg’l Airport Auth.* 8 (2021) (on file with author); *Agreement for Inmate Housing between S. Corr. Entity and Port of Seattle* § 33 (2012) (on file with author).

access to the levers of local government power.²⁷⁵ Underpinning this maze is a judicial system that struggles to pull back the private veil of an ILA and extract its public core. The result is a regime that – while not absolutely insulating ILAs from public scrutiny – fails to promote meaningful public accountability.

IV. INTERLOCAL AGREEMENTS UNDER STATE LAW

Taken together, the prior two Parts of this Article paint an uncomfortable picture: ILAs are consequential lawmaking documents, no less powerful than ordinances, yet they routinely, almost inherently, lack the hallmarks of democratic accountability. This status quo is no legal accident. Turning now to state law – the overarching specter in any conversation about local authority – this Part examines why state legal schemes have encouraged local governments to create ILAs but have only obliquely, and ineffectively, promoted their back-end transparency.

A. *Background: Interlocal Collaboration*

As creatures of state law, local governments derive their existential power from state constitutions or state statutes.²⁷⁶ State legislatures hold tremendous power to mandate, limit, and define the contours of interlocal collaborative schemes.²⁷⁷ Legislatures occasionally exercise these powers. The most prominent example is the Virginia Commission on Local Government, a state agency

275. See Rosenbaum, *Interlocal Power Roulette*, *supra* note 35, at 437 (“[C]onstituencies traditionally marginalized by local government actors – notably racial, ethnic, and socioeconomic minorities – face strong headwinds when trying to access and participate in formal channels of local democracy. Marginalized groups suffer participation deficits when trying to approach *one* government body through expressly *open* channels. The headwinds only stand to intensify in the context of interlocal governance, where multiple public actors now sit at the table and navigate power between themselves in informal, sometimes inscrutable ways.” (footnotes omitted)).

276. See Rosenbaum, *A Legal Map*, *supra* note 35, at 744.

277. See Daniel P. Fernandez, *Collaborative Rulemaking in the World of Water Management: A Viable Alternative to the Command-and-Control Model?*, 34 J. LAND USE & ENV'T L. 151, 165-66 (2018) (discussing how Florida legislators turned an informal collaborative scheme into a mandatory one); Davidson & Trevarthen, *supra* note 246, at 709-11 (citing cases upholding state-mandated alternative-dispute-resolution processes); see also Bd. of Educ. of Unified Sch. Dist. No. 443 v. Kan. State Bd. of Educ., 966 P.2d 68, 79 (Kan. 1998) (“[T]he school districts knew . . . that statutory provisions for interlocal agreements were subject to legislative change or termination.”). Of course, state legislative power over local governments and ILAs is not absolute, limited in any case by state and federal constitutions. See, e.g., *Clean Water Coal. v. M Resort, LLC*, 255 P.3d 247, 262 (Nev. 2011) (finding a state law unconstitutional that sought to divert assets of a nested interlocal entity).

that mediates interlocal disputes and advises on interlocal issues.²⁷⁸ Before certain types of ILAs are finalized, they can be submitted to the Commission, which conducts a review of the proposed agreement and its impacts upon residents of the local communities.²⁷⁹ For some ILAs it also holds a public hearing, a rare situation where members of the public are offered more transparency than an ordinary local ordinance would entail.²⁸⁰ Subsequently, after an ILA is executed and a dispute later arises, the Commission might be asked to employ mediators to help the local parties narrow their differences, a role that has yielded a number of successful settlements to date.²⁸¹

States have also intervened directly in existing local agreements. In southwestern Kansas, for example, a group of school districts executed an ILA in 1986, which by its express terms permitted unilateral withdrawal by any district and was set to expire three years later, in 1989.²⁸² But the Kansas legislature passed a bill in 1987 to make such ILAs “perpetual” and “termina[ble] only by approval of the State Board of Education.”²⁸³ The legislature reasoned that special-education programs managed under the ILA could otherwise be upended unpredictably, with districts able to leave the agreement for noneducational reasons and saddle the others with added costs.²⁸⁴ A dispute later erupted when one of the school districts attempted to do just that—to withdraw from the ILA following a conflict that began over office space and rent.²⁸⁵ Ultimately, the legislature’s intervention was upheld by the Kansas Supreme Court, which found that the state had a rational basis for concluding that perpetual ILAs best served the interests of the school districts and the state as a whole.²⁸⁶

Viewing this ILA as a contract between governments, the state’s choice to modify and then indefinitely bind parties to its terms may appear a concerning

278. See Richman, *supra* note 92, at 510.

279. See, e.g., *Report on the City of Covington—County of Allegheny Voluntary Economic Growth-Sharing Agreement*, *supra* note 46, at 2 (citing VA. CODE ANN. § 15.2-2903 (2023)) (setting forth the Commission’s scope of review); *id.* at 3 (discussing the Commission’s purpose and the applicable standard of review).

280. See *id.* at 2.

281. See Richman, *supra* note 92, at 512.

282. See *Bd. of Educ. of Unified Sch. Dist. No. 443*, 966 P.2d at 74.

283. *Id.*

284. *Id.*

285. *Id.* at 74-75.

286. *Id.* at 80. For a notable recent example of direct state intervention, see Leia Larson, *Salt Lake City and the Port Authority Have Forged a Deal for the Northwest Quadrant*, SALT LAKE TRIB. (Oct. 15, 2022, 8:00 AM), <https://www.sltrib.com/news/environment/2022/10/15/salt-lake-city-port-authority> [<https://perma.cc/S7VZ-3JZK>] (discussing a tentative ILA reached after the state “mandated the two parties reach an agreement by the end of the year”).

usurpation of local decision-making. The broader notion at play, however – that state law should play some role in guiding if not structuring ILAs – has received support across the local government and public administration literatures.²⁸⁷ States can act as mediators when ILA relationships go awry, thus offering local governments a backstop forum for arbitrating their differences.²⁸⁸ States can create and share guidance documents with localities on how to successfully navigate an ILA and maximize its value.²⁸⁹ And because local governments collaborate and compete in a contested, often inequitable regional environment that state law has enabled, local coordination inextricably implicates state powers and concerns.²⁹⁰ If ILAs produce regional-governance schemes, state actors should arguably have a seat at the table.

Yet for the most part, when considering the sheer volume of ILAs in use today, state law approaches these agreements and their underlying collaboration schemes with a remarkably light touch. States indirectly influence ILAs through various efforts to nudge interlocal cooperation. Most notably, following the lead of the federal government, they award grants to encourage interlocal collaboration in infrastructure planning, emergency preparedness, and policing, which in turn prompts local officials to execute ILAs to demonstrate their compliance with grant requirements.²⁹¹ But these state interventions are program-specific and

287. See Fishbein, *supra* note 56, at 591 (arguing that local collaboration requires “sufficient oversight and evaluation”); Fahey, *Data Federalism*, *supra* note 71, at 1078 (“Federal or state statutes can impose meaningful restraints on cooperative federalism efforts. Without those constraints, though, the normative judgments that must be made . . . are rarely being made by an accountable political body . . .”) (discussing the state and federal context); Myers, *supra* note 46, at 855, 890 (arguing that states should enhance and clarify processes regarding resolution of interlocal disputes); Moreira, *supra* note 68, at 536 (advocating for a “strong state” to “facilitate[] the resolution of interlocal harms”); Richman, *supra* note 92, at 512 (discussing with approval the role played by the Virginia Commission on Local Government).

288. See *supra* text accompanying notes 277-278 (discussing the Virginia Commission on Local Government); Davidson & Trevarthen, *supra* note 246, at 709 (describing a state-mediated dispute resolution in California); LeRoux, *supra* note 46, at 161-62 (noting the value of a “neutral facilitator” operating at the regional level); Myers, *supra* note 46, at 855 (arguing that interlocal bargaining is “too indeterminate” in absence of state involvement); cf. Spicer, *supra* note 10, at 509 (noting that various “interlocal bodies may be able to aid in resolution” of disputes among Canadian municipalities).

289. Fishbein, *supra* note 56, at 600 (discussing such an effort in New York).

290. Cf. Moreira, *supra* note 68, at 536 (“A strong state is one which reserves for itself ultimate authority over the actions of its subdivisions, and which does not countenance blatant inequalities within its borders . . . [T]he choice between regional government and regional governance is a false one: without the state itself acting as a regional government, there can be no ‘pure governance’ solutions to interlocal dilemmas.”).

291. See Caruson & MacManus, *supra* note 47, at 165 (discussing federal collaboration grants and mandates); *id.* at 167 (“On the heels of 9/11 and Hurricane Katrina, many efforts by the federal

diffuse; local officials report that they are siloed from the day-to-day world of collaboration to which state actors are routinely inattentive.²⁹² Even Virginia's Commission on Local Government, the preeminent example of hands-on state engagement in the ILA ecosystem, is focused predominantly on annexation disputes.²⁹³

B. *Interlocal-Cooperation Acts*

What, then, is the prevailing statutory backdrop against which ILAs arise? To answer this question, we must turn our attention to interlocal-cooperation acts, the global term used to describe state statutes that empower local collaboration and ILAs.²⁹⁴ As much as state legal regimes can vary widely across the United States, interlocal-cooperation acts are relatively consistent among jurisdictions, a product of two pieces of model legislation drafted in the mid-twentieth century. The first model act was drafted in 1956 by the Council of State Governments,²⁹⁵ while the second, which closely built upon this first effort, was published a decade later by the U.S. Advisory Commission on Intergovernmental Relations.²⁹⁶ Both model acts arose during an era of rapid urban change, characterized by population growth, suburban development, racial unrest, and white flight.²⁹⁷ Within this context, drafters sought to infuse cities and booming

and state governments have focused on creating situations where local officials *must* interact with each other"); Fishbein, *supra* note 56, at 599-601 (discussing New York's Local Government Efficiency Grants program).

292. See Perlman, *supra* note 40, at 117, 120-21; see also Lee & Hannah-Spurlock, *supra* note 36, at 130 ("These [state] mandates did not affect [municipal managers'] decisions to collaborate on local services."). Indeed, in a different study, local officials reported that state and federal mandates were among the most substantial *barriers* to interlocal collaboration. Caruson & MacManus, *supra* note 47, at 175.
293. See VA. CODE ANN. § 15.2-2907 (West 2023).
294. See Jason E. Doucette, *Wading in the Pool: Interlocal Cooperation in Municipal Insurance and the State Regulation of Public Entity Risk Sharing Pools—A Survey*, 8 CONN. INS. L.J. 533, 542 (2002) (discussing "what is referred to by many states as an Interlocal Cooperation Act"). In some states, ILAs are additionally empowered by a constitutional provision. See, e.g., FLA. CONST. art. VIII, § 4; MO. CONST. art. VI, § 16.
295. The Council of State Gov'ts, *Proposals Accompanied by Draft Legislation*, in SUGGESTED STATE LEGIS. PROGRAM FOR 1957 15, 93-97 (1956).
296. Advisory Comm'n on Intergovernmental Rels., *A Handbook for Interlocal Agreements and Contracts*, ADVISORY COMM'N ON INTERGOVERNMENTAL RELS. 24-28 (Spring 1967), <https://library.unt.edu/gpo/acir/Reports/information/m-29.pdf> [<https://perma.cc/JB5M-EX9C>].
297. See *id.* at 1 (discussing the need for changes in governmental jurisdictional boundaries because of metropolitan growth); see generally KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1987) (describing the factors leading to the

suburbs with flexibility and a clear grant of authority to jointly navigate their suddenly fractured regional space.²⁹⁸ They enabled municipalities to ward off more intensive efforts at regional consolidation, leaving communities free to benefit from collaboration while also drawing jurisdictions tightly along racial lines.²⁹⁹

The legislation spawned by these model acts – which, in some form, has been adopted in almost every state³⁰⁰ – tends to be broad in scope and permissive in its grant of local power. Generally, whenever a local government holds independent power to take a particular action (and sometimes, even when it does not),³⁰¹ it may contract with another locality to take that action jointly through an ILA.³⁰²

growth of suburbs); KEVIN M. KRUSE, *WHITE FLIGHT: ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2007) (describing “white flight” in Atlanta in the 1960s and 1970s and identifying its role in the development of a new conservative movement).

298. See Advisory Comm’n on Intergovernmental Rels., *supra* note 296, at 3 (“The agreement or contract approach permits greater flexibility and local adaption to meet particular problems.”); *id.* at 4 (seeking to provide a “broad general authorization” for ILAs); *id.* at 6 (speaking favorably of an approach that maintained “flexibility” but still provided “a clear basis of authority”); *id.* at 7–8 (“[I]f intergovernmental contracts and agreements are to realize their full potential . . . attention must be directed to enabling legislation to assure that unintended and unnecessary impediments are not placed in the way of their use.”).
299. See *id.* at 18 (“[ILAs] stress consolidation of services, rather than consolidation of governments.”); Reynolds, *supra* note 69, at 156 (“[T]he voluntary intergovernmental cooperation approach to regionalism is likely to leave untouched the root sources of the very disparity it seeks to remedy.”); Laurie Reynolds, *Local Governments and Regional Governance*, 39 *URB. L.* 483, 487 (2007) (“So long as residents and governments in the affluent segments of the region are able to practice a selective regionalism, . . . the fundamental inequality and maldistribution of metropolitan area resources, services, and opportunities are likely to remain.”).
300. See Jeffrey B. Litwak, *State Border Towns and Resiliency: Barriers to Interstate Intergovernmental Cooperation*, 50 *IDAHO L. REV.* 193, 198 (2014); Hatcher, *supra* note 53, at 270–71. Figures from 1985 estimated that three-quarters of states have broad ILA statutes. See *id.* at 276. According to another count, as of 2001, forty-two states broadly permit local governments to execute agreements with each other. Gillette, *supra* note 36, at 221.
301. See, e.g., *Sullins v. Cent. Ark. Water*, 454 S.W.3d 727, 733 (Ark. 2015) (“[W]e reject appellants’ argument that the Interlocal Agreement Act requires [the local entity] to possess the independent legal authority to perform the services under the contract.”); *SEIU Health Care Mich. v. Snyder*, 875 F. Supp. 2d 710, 720–21 (E.D. Mich. 2012) (finding that a locality may transfer its independent power to another via an ILA, despite the statute limiting joint action to powers that “each might exercise separately”).
302. See Hatcher, *supra* note 53, at 270–71; see also *Reese v. Charlotte-Mecklenburg Bd. of Educ.*, 676 S.E.2d 481, 497 (N.C. Ct. App. 2009) (describing North Carolina’s statutory language as “very broad”). For the most part, the decision to enter into an ILA is voluntary and wholly within the discretion of the local government signatories. See, e.g., *Town of Plainfield v. Town of Avon*, 757 N.E.2d 705, 713 (Ind. Ct. App. 2001) (“We do not believe that [Indiana law] grants a trial court the authority to compel a municipality to enter into an interlocal cooperation agreement with a neighboring municipality against its express wishes.”). In rare cases,

Few statutory hurdles stand in their way. Municipalities are rarely constrained in the terms they choose to include in an agreement or the form the final document must take.³⁰³ Rather, the language of many interlocal-cooperation acts is explicit in its broad, nearly unchecked grant of authority. Texas's statute begins by stating its purpose of "authorizing [local governments] to contract, to the greatest possible extent, with one another and with agencies of the state."³⁰⁴ In Nebraska, meanwhile, interlocal cooperation acts are expressly intended "to provide an additional, alternative, and complete method" of local action that is "supplemental and additional to . . . powers conferred upon [local governments] by law."³⁰⁵ Courts have predictably latched onto such language. Pointing to statutes' permissive and independent grant of power, state supreme courts have erred on the side of deferring to local authority when interpreting interlocal-cooperation acts.³⁰⁶ Likewise, state attorneys general have relied on the broad language of these acts to bless novel exercises of interlocal power.³⁰⁷

The permissive nature of most interlocal-cooperation acts does not mean that all such statutes are completely unlimited in their grants of local power. The statutes commonly contain a list of modest framework provisions an ILA must include, such as provisions setting forth the ILA's purpose, duration, and manner of financing.³⁰⁸ Yet these requirements can ordinarily be satisfied by drafters through boilerplate preamble language. To comply with purpose-setting requirements, for example, an ILA might simply state that its objective is "to authorize and to define the terms under which [one entity] will provide certain

however, state law will mandate that localities execute ILAs. *See, e.g.*, Wallace, *supra* note 47, at 1 (regarding an ILA mandated in Utah).

303. *See* Roberts, *supra* note 40, at 1560 ("The terms localities may include in these agreements has been described as 'virtually unlimited.'" (quoting John S. West & Carter Glass, *Revenue Sharing: An Important Economic Development Tool for Virginia Localities*, VA. LAW. 18, 18 (2000))). Indeed, an interlocal-cooperation act might not even require the agreement be in writing. *See* Fishbein, *supra* note 56, at 571.

304. TEX. GOV'T CODE ANN. § 791.001 (West 1991).

305. NEB. REV. STAT. ANN. § 13-825 (West 2023).

306. *See, e.g.*, *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 295 (Neb. 2003) (leaning on the "permissive" nature of Nebraska's interlocal-cooperation act in upholding a city's actions taken in apparent contravention of its charter); *Reese*, 676 S.E.2d at 497 (rejecting a challenge to an ILA scheme as based on a "too narrow" read of the interlocal-cooperation act).

307. *See, e.g.*, *Providing Fire and Other Services Under an Interlocal Agreement*, Tenn. Att'y Gen. Op. No. 09-107, 2009 WL 1644055, at *1 (June 8, 2009) ("In light of the broad authority under . . . the Interlocal Cooperation Act, we think it can be argued that a city and a county may create a separate, joint entity to provide fire and emergency medical services under this statute.").

308. *See, e.g.*, IOWA CODE ANN. § 28E.5 (West 2008); IND. CODE ANN. § 36-1-7-3 (West 2023).

services to [another] as further delineated herein.”³⁰⁹ To comply with duration-defining requirements, moreover, an ILA might provide that it “shall remain in full force and effect until [the nested interlocal entity] is dissolved.”³¹⁰ These are generic provisions. They need not necessarily change from one ILA to another, let alone affect the substance of a given agreement.³¹¹

A more significant limitation, found in several state schemes, restricts interlocal cooperation to certain categories of action – for example, to the provision of “facilities and services” – which necessarily might exclude the power to contract for other purposes, such as for the provision of materials and supplies.³¹² But here, too, even where an interlocal-cooperation act might seem at first glance to constrain the ILAs a government can execute, courts continue to construe them with remarkable breadth, at times even upholding joint actions that would not otherwise be authorized by a standalone statute.³¹³

As a consequence, interlocal-cooperation acts can assume the role of super-statute, elevated above other statutory grants of local power through their uniquely expansive language. In one case from Iowa, a county succinctly summarized the risk by arguing that an ILA executed under the state’s interlocal-cooperation act “must be tethered to, and bound by, an underlying substantive statute” because otherwise, the act would constitute a “blank check” that “permit[s] municipalities to ignore underlying statutory restrictions on their powers.”³¹⁴ The Iowa Supreme Court was unmoved by this alarm. In the court’s view, Iowa precedents had already closed the loophole; the court had already distinguished between valid ILAs where each municipality held independent authority

309. Interlocal Agreement, City of Bellingham – City of Blaine, Vector Waste Facility Use § 1 (Dec. 9, 2013), <https://iframe.cob.org/gov/council/archive/Lists/materials/Attachments/582/2013-12-09-1-AB20238.pdf> [<https://perma.cc/4AX7-XDS9>].

310. The Oklahoma Supreme Court has found that the requirement that ILAs specify their “duration” under the Oklahoma Interlocal Cooperation Act can be satisfied by this language. *Pease v. Bd. of Cnty. Comm’rs*, 550 P.2d 565, 567 (Okla. 1976).

311. *Cf. Delaware Twp. v. City of Lansing*, 512 P.3d 1154, 1159 (2022) (“[Kansas law] requires that interlocal agreements contain a termination provision that also details the disposition of property. The specific terms of this contract provision are left to the parties to negotiate.”).

312. *Hatcher*, *supra* note 53, at 272 (citing *Sinclair Ref. Co. v. Cnty. of Bergen*, 247 A.2d 484, 487 (N.J. Super. Ct. App. Div. 1968)). Broad interlocal-cooperation acts can also be limited by constitutional restrictions. *See, e.g., Fearington v. City of Greenville*, 871 S.E.2d 366, 380 (N.C. Ct. App. 2022).

313. *See, e.g., Kubicek v. City of Lincoln*, 658 N.W.2d 291, 295 (Neb. 2003) (holding that, despite the city charter requiring a vote of the electorate when a new authority is established, the city could create a new authority by ILA without such a vote).

314. *Landowners v. S. Cent. Reg’l Airport Agency*, 977 N.W.2d 486, 496 (Iowa 2022).

to carry out the agreement and invalid ILAs where one entity had attempted to “delegate” its powers to another.³¹⁵

But courts in other states have blurred this distinction. In Michigan, for instance, the state’s interlocal-cooperation act provides that contracting localities may exercise any power that they “share in common and that each might exercise separately.”³¹⁶ This provision was broadly interpreted in a notable case, *SEIU Health Care Michigan v. Snyder*, to permit horizontal exchanges of local power through an ILA—to enable the “transfer [of] rights and duties” between local governments.³¹⁷ A municipality acting in reliance on this provision can transfer power horizontally to a partner local government, even in the absence of any vertical grant of that power under state law. Likewise, in *Sullins v. Central Arkansas Water*, the Arkansas Supreme Court interpreted the state’s interlocal-cooperation act to permit the “delegation” of certain powers from one local government to another, brushing aside the argument that other enabling laws did not authorize the delegation at issue.³¹⁸ Instead, just as in *SEIU Health Care*, the Arkansas Supreme Court presented its holding as a straightforward construction of legislative intent: per the court’s analysis, the Arkansas legislature plainly intended its interlocal-cooperation act to carry such an expansive scope.³¹⁹

The sweeping language of Arkansas’ interlocal-cooperation act has thus created a new source of local power. Traditionally, as agencies of the state with no inherent sovereignty, local governments obtain their powers through direct vertical grants, whether from the state legislature or the state constitution.³²⁰ Interlocal-cooperation acts reflect one such vertical grant. In states such as Michigan and Arkansas, however, the act also operates on a second dimension: it permits derivative, horizontal exchanges of power, determined purely by local actors at the local level and absent any state involvement. Interlocal-cooperation acts

315. *Id.* at 496–97. A delegation of power from one locality to another would seem to violate a core tenet of local government law: that local entities do not hold sovereign power to exchange among themselves but rather obtain their powers only vertically from state constitutions and state laws. See Rosenbaum, *A Legal Map*, *supra* note 35, at 744.

316. MICH. COMP. LAWS ANN. § 124.504 (West 2002).

317. *SEIU Health Care Mich. v. Snyder*, 875 F. Supp. 2d 710, 720–21 (E.D. Mich. 2012) (“While it is true that [one local entity] alone had the power to conduct payroll, [this entity] was allowed to transfer that responsibility to [a second entity] under the Urban Cooperation Agreement.”).

318. *Sullins v. Cent. Ark. Water*, 454 S.W.3d 727, 732–33 (Ark. 2015).

319. See *SEIU Health Care Mich.*, 875 F. Supp. 2d at 721 (discussing the statute’s “inten[t]”); *Sullins*, 454 S.W.3d at 733 (discussing the “plain language” of the statute).

320. The most famous invocation of this subordinate status is provided in *Hunter v. City of Pittsburgh*, 207 U.S. 161, 177–80 (1907).

assume superstatute status when they loosen traditional governance hierarchies in this manner.

C. Transparency Requirements on Paper

The broad power conveyed by interlocal-cooperation acts is only minimally matched by a commitment to local transparency. In the interest of ensuring that ILAs are accountable and publicly accessible documents, several states require that localities file their ILAs with a third-party governmental entity, a concept that also dates back to the model legislation of the 1950s and 1960s.³²¹ In some states, ILAs must be submitted to a state-level agency, usually the attorney general's or secretary of state's office, which—in a few of these jurisdictions—holds oversight power to review an ILA before it takes effect.³²² In other states, ILAs must be filed with a local governmental agency, usually a county clerk.³²³ And a few states require both state- and local-level submission. In Oklahoma, for example, most ILAs must be filed locally with the county clerk, submitted to the Attorney General, and also filed with the Secretary of State.³²⁴

These requirements are designed in large part to mitigate the problem illustrated in Parts II and III above: local governments can exercise tremendous governance power through ILAs while simultaneously avoiding many of the trappings of democratic accountability that accompany local ordinances and resolutions. In Nebraska, for instance, ILAs became particularly powerful in the late 1990s when budgeting laws prohibited local governments from raising property taxes, yet provided several exceptions to this prohibition, including in cases where additional tax revenue was required to carry out an ILA.³²⁵ Several years later, acting on worries and rumors that localities were using ILAs as a

321. See Advisory Comm'n on Intergovernmental Rels., *supra* note 296, at 4 (“A filing procedure is also set forth.”).

322. See, e.g., KY. REV. STAT. ANN. § 65.260(3) (West 2020); ARK. CODE ANN. § 25-20-104(f) (West 2009); KAN. STAT. ANN. § 12-2904(g) (West 2017); IOWA CODE ANN. § 28E.8 (West 2008); IND. CODE ANN. § 36-1-7-4 (West 2020); NEB. REV. STAT. ANN. § 13-513 (West 2022).

323. See, e.g., WASH. REV. CODE ANN. § 39.34.040 (West 2006); OKLA. STAT. ANN. tit. 74, § 1005 (West 1965); IND. CODE ANN. § 36-1-7-6 (West 2023).

324. OKLA. STAT. ANN. tit. 74, § 1004 (West 2018) (discussing submission to the Attorney General); OKLA. STAT. ANN. tit. 74, § 1005 (West 1965) (“Prior to its entry into force, an agreement made pursuant to this act shall be filed with the county clerk and with the Secretary of State.”); see also Hatcher, *supra* note 53, at 277 (describing the process in Indiana, where ILAs must be registered with the local county recorder and also filed with the state board of accounts).

325. Interview with Jeff Schreier, *supra* note 251 (summarizing the history of NEB. REV. STAT. § 13-513 (2022)).

loophole for circumventing the cap on tax increases, the Nebraska legislature took a simple, yet potentially effective step towards shining more light on these agreements: it mandated that they be filed with the state auditor upon execution.³²⁶

Legislatures in other states took different paths to arrive at a similar requirement. Take Florida, for example. There, local governments were subject for several decades to a concurrency obligation in land-use planning: they were required to ensure new residential development was accompanied by adequate public facilities to account for population growth.³²⁷ Acting on the belief that they would promote a more collaborative scheme, the Florida legislature turned to ILAs as the vehicle by which counties, cities, and school districts would craft their concurrency plans.³²⁸ Through ILAs, local governments could agree how to manage population growth, where to locate new schools, and how to expand necessary public infrastructure.³²⁹ Yet the Florida legislature soon realized that the ILA scheme needed more teeth.³³⁰ In 1998, to ensure that local officials negotiated their agreements in good faith and produced accountable documents, it adopted a number of amendments to the concurrency law, among them a requirement that localities submit their ILAs to the Florida Department of Community Affairs upon finalizing them.³³¹

Despite their differing origins, the ILA filing requirements in both Nebraska and Florida rested on shared normative assumptions. In theory, when an ILA is filed with an external public entity, stakeholders of all stripes—including state regulators, other localities, private contractors, and members of the public—can access and view the document. Filing should give stakeholders an opportunity to appraise the ILA as they would a formal law: to understand what policies it creates, what political priorities it reflects, and who is benefited or impacted by

326. *Id.*

327. David L. Powell, *Back to Basics on School Concurrency*, 26 FLA. ST. U. L. REV. 451, 452 (1999) (“Concurrency is land use regulation which controls the timing of property development and population growth. Its purpose is to ensure that certain types of public facilities and services needed to serve new residents are constructed and made available contemporaneously with the impact of new development.” (quoting H. Glen Boggs, II & Robert C. Apgar, *Concurrency and Growth Management: A Lawyer’s Primer*, 7 J. LAND USE & ENV’T L. 1, 1 (1991))).

328. *Id.* at 467.

329. *Id.* at 464.

330. See Cari L. Roth & Laura J. Feagin, *2002 Reforms to Growth Management*, FLA. BAR J. 57, 57 (July/Aug. 2002) (on file with author).

331. See Powell, *supra* note 327, at 471 (“The 1998 legislation marks a noteworthy change in policy by requiring the interlocal agreement to be submitted to the DCA pursuant to section 163.3184, *Florida Statutes*, for a compliance review.”).

it.³³² Residents who can access ILAs are also able to gauge their legal rights under the agreement, including whether they might hold third-party-beneficiary rights, possibly saving the cost and time of employing the litigation process to adjudicate them.³³³ Just as with a formal law, moreover, the mere act of placing an ILA into the public domain might encourage more deliberative local decision-making; it might caution local officials against taking an action by an ILA that they would hesitate to take by an ordinance or resolution.³³⁴

Research across the spectrum of law and public administration has demonstrated the value of public-filing requirements, which advance the underlying normative aim of making information accessible to public stakeholders.³³⁵ State laws that require the publication or filing of local ordinances are cut from the same cloth.³³⁶ At their core, these procedural edicts rest upon an influential theory: that the ability to access governmental information is “vital to the proper operation of a democracy.”³³⁷

ILA filing requirements therefore advance a potential win-win proposition. They offer a modicum of transparency, which promises to promote

332. When discussing ILAs that have been filed with external government offices, courts often emphasize that these documents constitute public records. *See, e.g., Cooper v. Whatcom Cnty.*, 650 F. Supp. 3d 1144, 1156 (W.D. Wash. 2023) (“[T]he Court will take judicial notice of the [ILA], which is a public record maintained by the Washington Secretary of State’s office.”); *Webb v. City of Carmel*, 101 N.E.3d 850, 860 (Ind. Ct. App. 2018) (agreeing with the findings of the trial court, which “held that the Interlocal Agreement is a public record”). Moreover, public-administration research has found that the issue of forum – that is, which government to approach when engaging with an ILA scheme – is a source of transparency deficits in ILA governance. *See Spicer, supra* note 64, at 400-01. The requirement to file ILAs with one particular stakeholder creates an organizational locus for others who wish to access an agreement in the future.

333. *See supra* notes 263-273 and accompanying text.

334. *Cf. Robert Knowles, National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 894-99 (2014) (surveying the value of public participation in notice-and-comment rulemaking in the administrative-law context).

335. *See Spicer, supra* note 64, at 391 (“[A]ccountability is meant to promote democratic control . . . Holding agents to account requires a supply of information about their actions.”); *Fisch, supra* note 31, at 948 (“[T]ransparency . . . protects the public by providing a level of oversight over a corporation and its practices.”); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 556 (2011) (citing research on the proposition that “information disclosure remedies . . . foster accountability and . . . ensure legitimacy of [a] privatized function”).

336. *See supra* note 28 and accompanying text.

337. Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L.J. 1361, 1368 (2016) (quoting S. Rep. No. 88-1219, at 8 (1964)). Indeed, to some extent, the public holds a common law right to access governmental records. *See Christina Koningisor, Public Undersight*, 106 MINN. L. REV. 2221, 2233-34 (2022).

accountability and mitigate against potential local abuses – yet crucially, without disincentivizing ILAs and the interlocal collaboration that they can enable.³³⁸

D. Transparency Requirements in Practice

Yet whatever their value on paper, filing requirements in practice are ineffective guarantors of democratic transparency. Simply stated, public stakeholders systematically fail to take filing requirements seriously, notwithstanding the mandatory language of their underlying statutes. Local governments do not consistently follow them, state agencies do not consistently monitor them, and courts do not consistently enforce them. Each of these institutional failures is summarized below. With rare exceptions, therefore, filing requirements prove utterly illusory on the ground.³³⁹ The consequence is that, far from being publicly filed and thus publicly accessible documents, ILAs often prove daunting for local residents to actually obtain and read.

First, local governments do not consistently follow ILA filing requirements. In states where they are statutorily required to file or submit their ILAs to a state or local office, local governments do not ignore this obligation entirely; many of them indeed file at least some of the ILAs they execute.³⁴⁰ Yet whether deliberately or unwittingly, local officials frequently ignore ILA filing requirements, with the consequence that their agreements are routinely not recorded or submitted to any outside entity.³⁴¹ In Oklahoma, for example, local

338. For an example of the most minimal of such requirements, see WASH. REV. CODE ANN. § 39.34.040, which allows local governments to list ILAs by subject on its website as an alternative to filing them. See also *supra* Section I.A (regarding the normative value of ILAs).

339. The prominent exception, again, is Iowa. See Hugg, *supra* note 60, at 1301 (“Unlike most states, the Iowa Code requires that all formal interlocal agreements be filed with the state government before it can be entered into force . . .”); *id.* (“The Iowa Secretary of State maintains an interlocal agreement filing repository that can be accessed online.”).

340. See, e.g., *Webb v. City of Carmel*, 101 N.E.3d 850, 860 (Ind. Ct. App. 2018) (examining an ILA filed with the county recorder); *Cooper v. Whatcom Cnty.*, 650 F. Supp. 3d 1144, 1156 (W.D. Wash. 2023) (reviewing an ILA filed with the secretary of state’s office).

341. See, e.g., *Appanoose Cnty. v. S. Iowa Area Det. Serv. Agency*, 838 N.W.2d 868 (Table), at *2 (Iowa Ct. App. 2013) (analyzing an ILA amendment that was not filed or recorded); *State v. Russell*, No. 26789-0-III, 2011 WL 1238303, at *10 (Wash. Ct. App. Apr. 5, 2011) (same); *Brutsche v. City of Kent*, No. 56620-2-1, 2006 WL 1980216, at *4 (Wash. Ct. App. July 17, 2006) (noting that an ILA was not filed with county auditor); *Jarrett v. State*, 926 So. 2d 429, 431 (Fla. Dist. Ct. App. 2006) (noting that an ILA was not filed with the clerk of the local circuit court); *Exendine v. City of Sammamish*, 113 P.3d 494, 499-500 (Wash. Ct. App. 2005) (assessing plaintiffs’ argument that an ILA was invalid because it was not filed with the county auditor); *Warren Cnty. Bd. of Health v. Warren Cnty. Bd. of Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002) (suggesting that while an agreement was not properly filed and recorded, it

governments must file ILAs with both the secretary of state's office and the local county clerk.³⁴² Yet despite apparently entering into a wide variety of ILAs, the City of Tulsa has filed only one ILA with the county clerk in the past ten years: a "Jail Services Agreement" with a local authority that operates regional jail facilities.³⁴³ Meanwhile, since 1966, the City has filed only two ILAs with the Oklahoma Secretary of State—neither of which were the Jail Services Agreement.³⁴⁴ Residents ultimately cannot rely on either filing practice with confidence. Tulsa's noncompliance is no anomaly, moreover. An assessment of ILAs in other states reveals a similar disconnect: ILAs executed on the ground do not make their way into the databases and registries where state law mandates that they appear.³⁴⁵

Second, state agencies do not consistently monitor ILA filing requirements. As an initial observation, in jurisdictions where ILAs must be submitted to the attorney general for approval, it appears that a number of these submitted agreements receive at least a perfunctory review by an attorney in the office, demonstrating that states are not categorically disengaged from the filing

was nevertheless valid under a separate statutory scheme); *State v. Plaggemeier*, 969 P.2d 519, 521 (Wash. Ct. App. 1999) (same); *cf. Pond v. Bd. of Trustees*, No. 3-755, 2003 WL 23220730, at *5 (S.D. Ind. Nov. 25, 2003) (criticizing the plaintiff's argument that an ILA did not comply with Indiana's recording statute).

342. See OKLA. STAT. tit. 74, § 1005 (1965).

343. See *Jail Services Agreement*, CITY OF TULSA, OKLA. (Aug. 16, 2017) (on file with author).

344. See Oklahoma Secretary of State, *Document Log—Records Filed in Accordance with 74OS, §§1001-1008* (Jan. 25, 2023) (on file with author).

345. Compare, e.g., Nebraska 2016 Interlocal Summary, NEB. AUDITOR OF PUB. ACCTS. (2016) (on file with author) (documenting ILAs filed in Nebraska in 2016), with *Interlocal Agreement Between the Cnty. of Lincoln, Nebraska and the Cnty. of Keith, Nebraska* (June 2016) (on file with author) (evinced that an ILA executed in 2016 between two Nebraska counties was not filed with the state). Like Oklahoma, Indiana law also contemplates ILAs being filed at both local and state levels, with the county recorder and state board of accounts, respectively. IND. CODE ANN. § 36-1-7-6. A search of the record system for Marion County—Indiana's largest by population—reveals that local governments do, at times, file their ILAs with the county recorder. See, e.g., Document No. A201300046875, accessed at MARION COUNTY RECORDER, <https://inmarion.fidlar.com/INMarion/DirectSearch/#/searchresults> [<https://perma.cc/W6Q8-LY5M>]. But a number of other ILAs executed by municipalities within Marion County do not appear in the record system. See, e.g., *An Interlocal Agreement Between the Consolidated City of Indianapolis and the City of Beech Grove for Fire Prevention and Prot. Servs.* (Aug. 2021) (on file with author); *Interlocal Cooperation Agreement by and Between the Indianapolis Pub. Trans. Corp. and the Consolidated City of Indianapolis, Marion County* (2018) (on file with author); *Interlocal Agreement* (2007) (on file with author) (ILA between the Consolidated City of Indianapolis, Indiana and the Town of Plainfield, Indiana); *Interlocal Agreement* (2014) (on file with author) (ILA between the Consolidated City of Indianapolis, Indiana and the Town of Fishers, Indiana).

process.³⁴⁶ Nevertheless, a regulatory void presents itself at an earlier, integral juncture of the process: state agencies do not dedicate resources to ensure ILAs are actually submitted in the first place. Recall the experience of Nebraska, discussed above, where filing requirements were implemented as a direct effort to shed more light upon ILAs.³⁴⁷ Despite the Nebraska Legislature's conscious effort to improve visibility through a reporting system,³⁴⁸ the responsible state agency—the Nebraska Auditor of Public Accounts—does not appraise the ILAs it receives or have any mechanism to ensure localities are indeed submitting the ILAs that they execute.³⁴⁹ The agency instead plays primarily a clerical function by simply compiling the agreements that governments do decide to submit.³⁵⁰

Indiana follows a similar tack. Although local governments are required to file their ILAs with the State Board of Accounts,³⁵¹ this agency does not conduct any enforcement of the requirement, and as such, the agreements it collects are solely “based upon [a locality’s] willingness to report.”³⁵² The cursory approach taken in both Nebraska and Indiana reflects a choice, perhaps an eminently understandable one, to allocate limited time and scarce resources elsewhere.³⁵³ But because it leaves local governments complete discretion in deciding whether to submit their ILAs, the process envisioned by state law rests for all intents and

346. Arkansas has the most robust review process—or, at minimum, has created the most robust public record thereof. *See, e.g.*, Ark. Op. Att’y Gen. No. 2020-053, 2020 WL 7862443 (2020); Ark. Op. Att’y Gen. No. 2020-018, 2020 WL 2508012 (2020). While most of these ILAs are approved using template language, the Arkansas Attorney General does decline to approve ILAs from time to time, indicating that a degree of meaningful review accompanies their submission. *See, e.g.*, Ark. Op. Att’y Gen. No. 94-055, 1994 WL 118340 (1994); Ark. Op. Att’y Gen. No. 2002-284, 2002 WL 31743019 (2002).

347. *See supra* notes 326–326 and accompanying text.

348. Interview with Jeff Schreier, *supra* note 251.

349. *See id.* (explaining that the office does “basically nothing” with the ILAs that it receives).

350. *See id.* (explaining that the office compiles the ILAs it receives and posts them to its website). Harkening back to the original impetus for the reporting requirement, which arose out of concerns that local governments would lean heavily on the ILA exception for raising property taxes, the agency does ask if localities are claiming to impose taxes pursuant to this exception, and if they are, it checks to confirm that the government has indeed submitted ILAs. *See id.*

351. IND. CODE ANN. § 36-1-7-6 (West 2023).

352. Email from Kendra Leatherman, Gen. Couns., Ind. State Bd. of Accts. to Daniel Rosenbaum, Assistant Professor, Mich. State Univ. Coll. of L. (June 6, 2023, 1:22PM) (on file with author).

353. *See* Interview with Jeff Schreier, *supra* note 251 (noting that ILA oversight is not a priority for the office).

purposes upon local self-enforcement, proving fatal to the notion that the state plays a meaningful oversight role in ILA transparency.³⁵⁴

Nebraska and Indiana's paper oversight schemes might nevertheless nudge local action at the margins; they could encourage local actors to submit ILAs that would otherwise have not seen the light of day. In contrast, the other state highlighted above, Florida, has recently pursued a less subtle approach by discarding even the veneer of a filing requirement. In 2011, upon passage of the Community Planning Act, Florida reversed course on the mandate it had adopted for concurrency planning in 1998.³⁵⁵ A host of local planning regulations were eliminated and the provision requiring local governments to submit their ILAs was excised from the state code.³⁵⁶ Coming just over a decade after the legislature had embraced these requirements, Florida's about-face was motivated by a deregulatory platform that had featured centrally in the campaign of newly elected Governor Rick Scott: that the state government had grown too involved in local planning and was impeding economic development.³⁵⁷ The state's short-lived ILA reporting requirement got swept up in—and therefore, became a casualty of—a larger political debate over the role of state power and the value of regulation.³⁵⁸ In other states, as well, recent efforts to rollback filing

354. As the present case illustrates, agency agenda setting may have substantive policymaking repercussions. See generally Cary Coglianese & Daniel E. Walters, *Agenda-Setting in the Regulatory State: Theory and Evidence*, 68 ADMIN. L. REV. 93 (2016) (analyzing agency agenda-setting as a stage of the regulatory process).

355. See Linda Loomis Shelley & Karen Brodeen, *Home Rule Redux: The Community Planning Act of 2011*, 85 FLA. BAR J. 49, 50 (2011).

356. See H.B. 7207, 2011 Leg., 113th Reg. Sess. (Fla. 2011) (removing the language that “interlocal agreements shall be submitted to the state land planning agency and the Office of Educational Facilities”).

357. See Shelley & Brodeen, *supra* note 355, at 49; Aaron Deslatte, *House Unveils Plan to Gut Growth Management*, ORLANDO SENTINEL (Aug. 6, 2021, 9:26 A.M.), <https://www.orlandosentinel.com/2011/03/17/house-unveils-bill-to-gut-growth-management-laws> [<https://perma.cc/VP9-TZY8>]; see also Zachary Jellson, *The Community Planning Act: Market over Planning*, 23 U. FLA. J.L. & PUB. POL’Y 193, 198 (2012) (“One of the biggest switches with the [Community Planning Act] is that it shifts from state oversight to local government control of the planning and growth management process. Instead of the previous top-down planning, where the state had strong control, the [Act] looks to reform the system with diminished state involvement and increased local and smaller groups taking over.” (internal quotations omitted)).

358. See Shelley & Brodeen, *supra* note 355, at 49 (discussing that the elimination of the Department of Community Affairs and associated regulations was a campaign position of recently elected Governor Rick Scott).

requirements have arisen against a similar political backdrop.³⁵⁹ Nebraska and Florida thus represent two sides of the same coin: whether by means of quiet bureaucratic agenda setting or a vocal, antiregulatory political drive, state governments are removing themselves from the ILA oversight business.

Finally, as a third institutional failure, courts do not consistently enforce ILA filing requirements. A review of litigation in five states found only one case—*State v. Plaggemeier*, a 1999 opinion penned by the Washington Court of Appeals—where a court invalidated an ILA because it was not filed or recorded in accordance with state law.³⁶⁰ Otherwise, in cases where parties challenging ILAs have raised such arguments, courts have sometimes ignored the issue entirely and sometimes leaned upon procedural technicalities or tools of statutory construction to brush them aside. Litigants have been variously told that they waived the argument by failing to raise it earlier,³⁶¹ that their claim is “conclusory” and bears no further review,³⁶² that they lack a private right of action to challenge the ILA, regardless of its procedural validity,³⁶³ and that they have failed to explain why the agreement is subject to the state’s interlocal-cooperation act in the first place.³⁶⁴ As a second approach, courts have returned to the same permissive language that has made interlocal-cooperation acts so powerful—that is, that they “provide an additional, alternative, and complete method” of local action³⁶⁵—to conclude that procedural formalities are not

359. See, e.g., Sen. Pete Miller & Rep. Tony Cook, Fiscal Impact Statement, S.B. 500, IND. LEGIS. SERVS. AGENCY, OFF. OF FISCAL & MGMT. ANALYSIS (Mar. 30, 2015) (on file with author) (explaining the purpose of a bill removing certain ILA reporting requirements in Indiana as “repeal[ing] various obsolete provisions and provisions that limit local control of schools”).

360. 969 P.2d 519, 524 (Wash. Ct. App. 1999) (“Here, as the State concedes, there was neither ratification nor filing of the Agreement. Consequently, the Agreement as a whole is invalid under the Interlocal Cooperation Act . . .”). The five states examined were Washington, Iowa, Florida, Indiana, and Kansas. Other states with express statutory filing requirements are Kentucky, Arkansas, Oklahoma, and Nebraska. See KY. REV. STAT. ANN. § 65.260(3) (West 2020); ARK. CODE ANN. § 25-20-104(f) (West 2009); OKLA. STAT. ANN. tit. 74, § 1005 (West 1965); NEB. REV. STAT. ANN. § 13-513 (West 2022). Oklahoma and Nebraska’s provisions have not been examined by any published cases, whereas only one case discussed each of Arkansas and Kentucky’s provisions. The sole Arkansas case has been examined elsewhere in this Article. See *Sullins v. Cent. Ark. Water*, 454 S.W.3d. 727 (Ark. 2015). The Kentucky case cited the provision only in passing and did not examine it in any detail. See *Harris v. Goins*, 156 F. Supp. 3d 857, 868-69 (E.D. Ky. 2015).

361. *Exendine v. City of Sammamish*, 113 P.3d 494, 500 (Wash. Ct. App. 2005).

362. *State v. Russell*, No. 26789-0-III, 2011 WL 1238303, at *10 (Wash. Ct. App. Apr. 5, 2011).

363. *N. Warehousing v. State*, No. 260598, 2006 WL 2419189, at *2 (Mich. Ct. App. Aug. 22, 2006).

364. *Pond v. Bd. of Trs.*, No. 03-CV-755, 2003 WL 23220730, at *5 (S.D. Ind. Nov. 25, 2003).

365. *Kubicek v. City of Lincoln*, 658 N.W.2d 291, 296 (Neb. 2003) (quoting NEB. REV. STAT. ANN. § 13-825 (West 1991)).

necessarily exclusive. Rather, where the actions taken under an ILA can be authorized outside the framework of an interlocal-cooperation act, and therefore, as well, absent any filing or recording requirements, courts can point to this alternative source of authority in dismissing claims of procedural noncompliance.³⁶⁶ Courts also employ circular logic. Because an alleged ILA has not complied with the procedural requirements set forth in statute, courts have reasoned, the interlocal instrument at issue is not in fact an ILA and therefore not subject to these very procedural requirements in the first place.³⁶⁷

Viewed from their perspective, it is perhaps understandable that courts hesitate to invalidate ILAs when localities fail to file or record them. Litigants challenge ILAs not because they oppose interlocal collaboration, but rather as an indirect way to contest an exercise of government power authorized under its terms. Accordingly, by the time an ILA's validity is challenged in litigation, the agreement has likely already been negotiated, executed, and implemented. A court that invalidates an ILA for the seemingly minor administrative oversight of failing to record the document would risk dismantling an entire apparatus of cooperative governance.³⁶⁸ Significantly, in many cases, it would risk dismantling the policing and criminal-justice regimes often created by ILAs,³⁶⁹

366. See, e.g., *Appanoose Cnty. v. S. Iowa Area Det. Serv. Agency*, 838 N.W.2d 868 (Table), 2013 WL 4009671, at *2 (Iowa Ct. App. Aug. 7, 2013); *Warren Cnty. Bd. of Health v. Warren Cnty. Bd. of Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002); *Pond*, 2003 WL 23220730, at *5; *Delaware Twp. v. City of Lansing*, 512 P.3d 1154, 1158-59 (Kan. 2022); *Brutsche v. City of Kent*, No. 56620-2-1, 2006 WL 1980216, at *4 (Wash. Ct. App. July 17, 2006); *Ky. Op. Att’y Gen. No. 85-98*, 1985 WL 193325 (June 27, 1985). In *Pond*, for example, an agreement between a local police department and a university was challenged as an invalid ILA, yet the court relied upon a state statute that it believed conferred the necessary substantive power at issue—to grant additional jurisdiction to university police officers. See IND. CODE ANN. § 20-12-3.5-2 (West 2007) (repealed 2007). Similarly, in *Delaware Township*, where the parties were disputing whether a fire district created by ILA could or had been dissolved, the court avoided resolving the issue under the interlocal-cooperation act by instead relying upon a statute that spoke to the substance of fire-district dissolution. See KAN. STAT. ANN. § 19-3604 (West 1953).

367. See, e.g., *Sand v. An Unnamed Loc. Gov’t Risk Pool*, 988 N.W.2d 705, 709-10 (Iowa 2023). The plaintiff in this case, the Iowa State Auditor, had argued the point strenuously in his briefing, noting the absurdity of the argument that an entity can skirt ILA requirements simply by skirting ILA requirements. See Brief for Appellant at 21, *Sand*, 988 N.W.2d 705 (No. 21-1745) (“If it walks like a duck and it quacks like a duck, it’s a duck and not a chicken.”); see also Order Approving an Amended Operation and Maintenance Agreement Between the Town of Pratt and the Chelyan Public Service District Pursuant to the Provisions of West Virginia Code §§ 24-2-12(a), 16-13A-18, No. 09-2002-S-PSD-PC, 2010 WL 10862982, at *4 (Oct. 6, 2010) (concluding that a fifty-year agreement to operate a sewer was not an ILA as defined by West Virginia law, which limits ILAs to one-year terms).

368. In a recent example from Iowa, a nested interlocal entity created by the challenged ILA had been in existence for nearly forty years and counted almost 800 governmental entities as members. See *Sand*, 988 N.W.2d at 707.

369. See *supra* Section II.C.

potentially throwing a large number of detentions and convictions into doubt.³⁷⁰ Some ILA governance schemes might simply be too big to fail. Perhaps for this reason, even as it invalidated the ILA at issue in *State v. Plaggemeier*, the Washington Court of Appeals still upheld the exercise of local power that was the true cause of the dispute: the arrest of a driver by a police officer acting outside his city's borders.³⁷¹ A case from Florida with similar facts did not go so far as to explicitly find the ILA invalid, but it took pains to stress that "the agreement confers at least de facto status on the police officer who stopped [the defendant] notwithstanding any alleged procedural infirmity in the agreement" itself.³⁷²

Taken together, the pervasive failures of government institutions to follow, monitor, and enforce ILA filing requirements – as demonstrated by the actions and inaction of local, state, and judicial parties – build upon and reinforce each other, ultimately contributing to an ecosystem in which these requirements offer no assurance of ILA transparency. Given that state agencies do not monitor ILAs and courts hesitate to invalidate them, local officials have little incentive to comply with statutory formalities. Instead, due to the underenforcement of these provisions, some local officials might not even realize their obligation to file the ILAs they execute. Others might be aware of the obligation, yet still choose not to file certain ILAs because they are politically sensitive, might raise unwanted questions, or simply because the time it takes to file the ILA, however minimal, is not worth the hollow requirement to do so.

Underenforcement also sends a broader signal to local governments. It signals not only that courts and state agencies are unmoved by statutory filing requirements in a vacuum, disinterested in whether public actors evince fidelity towards them, but also that they are unconcerned about the transparency of ILA documents more globally. Their lack of concern leaves decisions about the transparency of ILA documents almost entirely in local hands. As a result, just as they are empowered to govern through ILAs, local actors are equally empowered to implement them with minimal visibility.

370. See, e.g., *Brutsche*, 2006 WL 1980216 at *4 (law enforcement response team created by ILA); *State v. Plaggemeier*, 969 P.2d 519, 521 (Wash. Ct. App. 1999) (law enforcement task force created by ILA); *Exendine v. City of Sammamish*, 113 P.3d 494, 499 (Wash Ct. App. 2005) (court services provided per ILA); *Jarrett v. State*, 926 So. 2d 429, 430 (Fla. Dist. Ct. App. 2006) (policing jurisdiction expanded by ILA); *Pond*, 2003 WL 23220730, at *5 (same); *Appanoose Cnty.*, 2003 WL 4009671, at *1 (juvenile detention facilities and programs operated by nested interlocal entity created by ILA).

371. *Plaggemeier*, 969 P.2d at 520.

372. *Jarrett*, 926 So. 2d at 432; see also *Reese v. Charlotte-Mecklenburg Bd. of Educ.*, 676 S.E.2d 481, 488 (N.C. Ct. App. 2009) (granting the local government's decision to execute an ILA a "presumption of legality and correctness").

This imbalance between the power and transparency of ILAs has real consequences for democratic local governance. Given that transparency is a critical prerequisite to accountability, ILA governance schemes risk accountability defects solely as a product of the instruments that created them. The risk might also present itself in reverse. If an official wishes to create a scheme that is less accountable to local residents, an ILA might offer a loophole around the transparency norms that would otherwise promote accountability in other legislative contexts. ILAs have tremendous value and potential as tools of regional lawmaking. Yet currently, they come with an institutional flaw that calls into question their appropriate place in local governance.

V. RECOMMENDATIONS

While an expansive proposal for reform is beyond the scope of this Article, this Part aims to provide initial suggestions and guiding principles to improve the democratic legitimacy of ILAs. It begins with suggestions that seek to rebalance the role of ILAs within the legislative toolbox of local government. It then draws upon these suggestions to offer guiding principles, both for stakeholders looking to reengage with existing ILA schemes and for students of local government more generally, given that lessons from ILA governance speak to broader underexplored dynamics in the vertical relationship between states and their localities.

A. *Suggested Reforms*

Due to the contextual role played by ILAs as one of several lawmaking mechanisms in the ecosystem of local power, any reforms designed to ensure their transparency must be considered in relative terms too. A rigorous effort to correct the imbalance between ILA documents and traditional vehicles of local lawmaking should be designed to elevate the former to operate with the same democratic safeguards as the latter. That is, reforms should seek to make ILAs more transparent and accountable such that local lawmakers' decisions to use these tools of interlocal cooperation do not come at the expense of citizens' ability to participate democratically in the local lawmaking process.

Some updates could be nominal. To reset the playing field, policymakers can consider a number of statutory tweaks to interlocal-cooperation acts and other laws that speak to the transparency of local lawmaking. The following policy proposals reflect changes that policymakers could undertake to make ILAs more transparent and therefore more accountable in the near term, although scholars and local lawmakers should continue to evaluate broader, structural reforms to

enhance ILAs' democratic value while retaining their efficacy as unique tools of regional governance.

First, policymakers should closely reevaluate the provisions of interlocal-cooperation acts, which are due for a refresh on their organic 1960s templates. A number of states have made only marginal changes—or no changes—to these acts over the intervening years,³⁷³ which indicates the inattention of state actors to nodes of interlocal power and suggests that a broader, more holistic review might be in order. But a few possible adjustments stand out. For instance, interlocal-cooperation acts can more clearly define ILAs as instruments that may be legislative in function—not simply as “contracts” or “agreements” that invoke a private-law framework, but also specifically as “interlocal law.”³⁷⁴ Such a tweak would acknowledge and therefore affirm local power to engage in regional lawmaking schemes, even as it also cautions local officials and courts that ILAs are not wholly separate from formal legislative enactments. Interlocal-cooperation acts could further provide that localities must designate an internal point person tasked with responding to ILA-related requests—akin to a records coordinator or liaison under many state sunshine laws³⁷⁵—and that when requested under a sunshine law, ILA documents must be provided free of charge, thus signaling that these instruments are inherently public even if couched in private terms. Local officials would be challenged to negotiate and govern ILAs with internal accountability and public scrutiny foremost in mind. Other governmental stakeholders—including courts and state auditors—may begin to care when a locality fails to catalog its active ILAs, just as they would care if the locality could not produce an up-to-date book of ordinances. And members of the public would receive a very different message from their state legislatures: that ILAs are more than technocratic documents that can reasonably operate below the radar and shielded from their view.

373. See, e.g., ARK. CODE ANN. § 25-20-108 (2023) (no apparent amendments since 1967); OKLA. STAT. ANN. tit. 74, § 1004 (West 2023) (as amended by 2018 Okla. Sess. Law Serv. ch. 114 (West), 2009 Okla. Sess. Law Serv. ch. 309 (West), and 2000 Okla. Sess. Law Serv. ch. 180 (West)); WASH. REV. CODE ANN. § 39.34.030 (West 2023) (as amended by 2023 Wash. Legis. Serv. ch. 43 (West), 2021 Wash. Legis. Serv. ch. 176 (West), 2019 Wash. Legis. Serv. ch. 91 (West), and 2015 Wash. Legis. Serv. ch. 232 (West)).

374. See, e.g., FLA. STAT. § 163.01(3)(a) (2023) (“‘Interlocal agreement’ means an agreement entered into pursuant to this section.”); MICH. COMP. LAWS § 124.502(a) (2023) (“‘Interlocal agreement’ means an agreement entered into under this act.”).

375. See, e.g., MICH. COMP. LAWS § 15.236 (defining and describing the role of “FOIA coordinator” under Michigan law). A mandate to establish an ILA coordinator or liaison could also help localities structure internal chains of responsibility. Cf. Off. of the City Auditor, *supra* note 39, at 5 (“Purchasing Office staff said that . . . their authority over the interlocal agreement process is not clearly defined. They said that without authority over the process, they cannot introduce a mechanism requiring departments to provide them with interlocal agreement documentation and follow Citywide procedures.”).

Second, policymakers should look beyond interlocal-cooperation acts and consider updates to ensure ILAs are covered by other statutes that promote the transparency and accountability of local power. For example, under current Alabama law, municipalities are held to a host of transparency requirements—public notice, publication, ratification at an open meeting, and post-ratification recording—when they revise their local “code or codes,” a term defined in the statutory scheme to encompass “ordinances, bylaws, and permanent resolutions.”³⁷⁶ Likewise, towns in Massachusetts must navigate similar transparency requirements when they enact “ordinances” and “by-laws.”³⁷⁷ Both Alabama and Massachusetts have therefore created a seemingly robust transparency regime that gives residents and courts access to the instruments of local power.³⁷⁸

But a crucial instrument is missing from the two states’ catalog of local legislation: interlocal contracts, which are empowered and described elsewhere in Alabama’s code as “joint contract[s]” and under Massachusetts’ general law as “joint powers agreements”—not in either state as ordinances, bylaws, resolutions, or the like.³⁷⁹ These absences create loopholes such that ILAs may not be required to comply with the procedural requirements of the statutory schemes. In Massachusetts, accordingly, a town can execute a joint powers agreement without passing an ordinance or bylaw and therefore without triggering their attendant transparency protections.³⁸⁰ The Massachusetts Legislature could aim to close this loophole by referencing joint powers agreements in statutory provisions that today list only “ordinances” and “bylaws.” Alabama could pursue a similar reform. On paper, it should be noted that Alabama’s transparency regime differs from Massachusetts’ in a key way: here, ILAs have already been pulled indirectly into the regime by a provision requiring municipalities to pass an ordinance prior to an ILA’s execution.³⁸¹ But as with Massachusetts, because local governments do not always seem to grasp

376. ALA. CODE § 11-44C-30 (2023). *See also* ALA. CODE § 11-45-8 (2023) (regarding publication and recording of ordinances); ALA. CODE § 11-44E-51 (2023) (regarding open meetings and recording). As in many states, Alabama’s statutory scheme differentiates between classes of municipalities, and therefore these particular requirements are not universal across all classes.

377. *See* MASS. GEN. LAWS ANN. ch. 40, § 32 (West 2023); MASS. GEN. LAWS ANN. ch. 40, § 32A (West 2023); MASS. GEN. LAWS ANN. ch. 40, § 49 (West 2023). *See also* Fortin v. City of Chicopee, 17 N.E.2d 441, 443 (Mass. 1938) (comparing and equating the enactment requirements of ordinances and bylaws).

378. *Cf.* ALA. CODE § 11-45-11 (2023) (directing state courts to take judicial notice of certain municipal ordinances).

379. *Id.* § 11-102-1 (2023); MASS. GEN. LAWS ANN. ch. 40, § 4A (West 2023).

380. *See* MASS. GEN. LAWS ANN. ch. 40, § 4A (permitting an “officer authorized by law to execute a contract” to enter into an ILA).

381. *See* ALA. CODE § 11-102-3 (2023).

this requirement,³⁸² the Alabama Legislature could make its scheme more direct and intelligible by similarly inserting reference to “joint contracts” alongside existing references to “ordinances, bylaws, and permanent resolutions” in provisions that already promote transparent local action. An amendment along these lines would expressly pull ILAs into a robust transparency regime that has already been established and help close the structural gap between interlocal contracts and other legislative instruments.

Third, as a final suggestion, state policymakers could take steps to bolster the transparency of nested interlocal entities, which operate at a degree removed from local legislatures and therefore present particular transparency and accountability challenges. A couple obvious interventions present themselves. For example, state open meetings and sunshine laws could be amended to expressly apply to the meetings and records, respectively, of a nested interlocal entity.³⁸³ As a more assertive intervention, moreover, state law could require that major decisions of a nested interlocal entity must receive independent approval from the constituent local governments that originally executed its organic ILA. Texas law offers a possible model. In Texas, certain actions taken under an operational ILA must nevertheless come before each county legislature that first signed the agreement.³⁸⁴ These county legislatures – which are subject to open-meetings laws and presumably attract more public attention than the board of a nested interlocal entity – must then grant its “specific written approval” in an expressly standalone manner: “in a document other than the interlocal contract.”³⁸⁵ The requirement applies even where the ILA has created a nested interlocal entity.³⁸⁶ And it seems to hold salience among county legislatures in Texas, suggesting the potential for broader replicability.³⁸⁷ A procedural reform that draws upon this model could address some of the unique accountability challenges posed by nested interlocal entities. By making public the meetings

382. See, e.g., *United States v. Shepherd*, No. 22-cr-00471, 2023 WL 6612466, at *4 (N.D. Ala. Oct. 10, 2023) (“While the government claims that ‘all governing heads signed’ the contract, no evidence has been submitted indicating that the Demopolis city council adopted an ordinance giving the ‘governing heads’ the authority to enter into this multi-jurisdictional contract.”).

383. See *supra* note 210 and accompanying text.

384. TEX. GOV’T CODE ANN. § 791.014(a) (West 2023).

385. *Id.*

386. See TEX. GOV’T CODE ANN. § 791.013 (West 2023).

387. Resolution of the Hays County Commissioners Court, State of Texas (Jan. 19, 2010) (citing the requirement in providing independent approval for a project being carried out under an ILA); City Council, *City Council Meeting Agenda*, CITY OF DAYTON, TEX. 156 (Aug. 21, 2023), <https://d3n9y02raazwpg.cloudfront.net/cityofdaytontx/aca865a5-7bec-11ed-9024-0050569183fa-e834d70a-af9e-449e-b45f-f22723d39591-1692377478.pdf> [https://perma.cc/FE8N-KSU8] (setting forth a proposed ILA that features this requirement among its express terms).

and records of nested interlocal entities, reforms can improve transparency, and in turn promote accountability, by ensuring that citizens have access to information about these entities' activities. Requiring independent approval from a democratically elected local government can further increase the accountability of nested interlocal entities. Rather than operating without clear governmental oversight and in the shadows of seemingly private agreements, nested interlocal entities could become a visible arm of local government whose activities are checked by electorally responsive state, city, and county legislatures.

These recommendations offer just a few possible ways to improve the transparency and accountability of ILA instruments. There are undoubtedly a number of other pathways for reforming this area of local governance, and the optimal approach to reform might differ between and within jurisdictions. Yet considering that interlocal cooperation acts have far more points of commonality than divergence, stakeholders seeking to reform ILA regimes need not necessarily recreate the wheel within their separate states; rather, they can draw upon shared pathways forward.

B. Guiding Principles

The recommendations set forth in this Part are grounded in a few guiding principles that might serve as a jumping-off point for stakeholders and scholars seeking to update the existing ecosystem of interlocal agreements. More broadly, however, these principles also speak to underexplored dynamics in local government that operate beyond the world of ILAs. In this manner, they might help frame other areas of dissonance between local practice and state power.

A first guiding principle is that state legislative silence has a meaningful impact on local governance and does not necessarily indicate the state's deliberate endorsement of the status quo. Instead, where states are absentee on local issues, or where they do not exercise enumerated oversight powers, their passive decisions might suggest a sub-federal blind spot, one that might yield incongruous institutional outcomes. Interlocal-cooperation acts are a case in point. In many states, interlocal-cooperation acts are decades old, were lifted nearly wholesale from template legislation, and have rarely been amended in the intervening years. These statutes are worth revisiting; they do not necessarily capture the purpose of ILAs today or the broader state statutory schemes in which they operate. In revisiting interlocal-cooperation acts, stakeholders can explore the disconnect between the statute as written, the statute as envisioned, and the practice of ILA execution and implementation in the jurisdiction today. What is the goal of interlocal cooperation? Is the statute promoting it? How are ILAs actually operating in practice? These are valuable questions that are not presently being asked.

A second guiding principle is that relatively small tweaks to existing statutory schemes can have practical impact. The simple act of expressly listing ILAs alongside ordinances, resolutions, charter provisions, and other local lawmaking instruments can tie together unintentionally discordant procedural frameworks, strengthening the transparency of ILAs without having to construct a redundant oversight apparatus. Small tweaks also promise practical palatability. In making them, political actors are not asked to legislate the impossible, nor are local officials asked to comply with an entirely new regulatory regime for which they are given no resources.

Finally, a third guiding principle is that action (and inaction) in state statutory schemes carries symbolic value. So do changes to these schemes. When states fail to require or enforce transparency guideposts for ILAs, they signal that transparency and accountability are not important normative values. Likewise, however, by changing the statutory scheme to stress transparency in an ILA's execution and governance, a state legislature has suddenly made a statement—that ILA transparency and accountability matter. In an ecosystem of constrained resources and fluid state-local relationships, we cannot reasonably expect that formal transparency and oversight requirements will always be followed perfectly by public officials and then enforced exactly by state courts. Nor might we even wish such an inflexible approach to governance. But by signaling and articulating normative transparency and accountability values, state laws can nevertheless nudge local political culture in this direction.

Taken together, these guiding principles suggest tremendous opportunity for examining ILAs in a clear-eyed fashion: one that is realistic about how the institution can be changed while cognizant that reforming ILA schemes need not eviscerate their regional value.

CONCLUSION

Interlocal agreements can be controversial tools of governance. As conduits of collaboration, ILAs might offer a regional solution to fractured local jurisdictions. Or conversely, they might only coagulate the fragmentation that plagues local government today.³⁸⁸ As instruments of local policy, ILAs might help implement vital programs that benefit their local communities—or they might not. Viewed normatively, ILAs can be difficult to pin down; they are, after all, contracts that vary tremendously in form and function, frameworks by which local actors can accomplish a wide array of objectives.

But even though ILAs vary widely in subject matter, structure, and substance, they share a few global commonalities. In most states they are broadly

388. *See supra* Part I.

empowered by statute. They often create new governance schemes out of whole cloth and serve consequential lawmaking functions in their jurisdictions. They have grown in prevalence and popularity over time. And compared with local legislative instruments such as ordinances and charters, ILAs are routinely nontransparent and inaccessible documents, a product of the environment in which they germinate and of the state statutory schemes that enable them. As this Article has shown, ILAs uniquely operate at a distance from local legislatures and residents, with the consequence that laws are effectively created and enforced with only a thin tether to basic accountability anchors that are so fundamental to local democratic legitimacy. This status quo places a thumb on the scales of local power. Given that states have taken a scalpel to certain areas of local power but left intact broadly permissive interlocal collaboration acts, it follows that ILAs will gain prominence in the toolkit of local officials. Likewise, given that ILAs can be implemented without the hurdles demanded of ordinances and amended without formal process, it should come as no surprise that ILAs grow relatively more appealing to local legislatures as contrasted with traditional mechanisms of local lawmaking.

It is the relative nature of ILA oversight that bears emphasis here. Local governments, of course, do not operate in a vacuum. While a skeptic might dismiss all local action as insufficiently transparent, the issue – and risk – is that ILA governance necessarily comes at the expense of other, seemingly more transparent conduits of power. When a local legislature enacts policy through an ILA, residents are deprived of the more transparent procedures required for mechanisms like ordinances and charters. And while courts and state regulators might elsewhere hesitate to hold governments to technical requirements of law, those requirements they take seriously are necessarily given tacit weight over the ones they sweep aside. Stated otherwise, the problem is not the use or treatment of ILAs alone, but rather the relative force and accountability of ILAs within the larger local government ecosystem. A systematic deemphasis on ILAs can create an operative norm: it signals to local stakeholders and residents that they are unremarkable documents, capable of coasting safely below the public radar. Members of the public might be unconcerned about ILA accountability simply because no level of government has ever indicated otherwise.

None of the three suggestions explored in the prior Part should threaten to undermine or dramatically reshape the existing ecosystem of interlocal collaboration. Instead, by way of these modest revisions and others along similar lines, states can change the narrative they send through interlocal-cooperation acts and related local statutes, turning a tacit deemphasis on ILAs into an express acknowledgment – and approval – of the important role they play in regional governance schemes. This approval can be coupled with strategies to ensure that ILAs retain democratic legitimacy by increasing their public visibility and

ensuring oversight by politically accountable governance bodies. This sort of administrative reform suggests parallel opportunities across the local government spectrum. What other governance schemes are ignored or marginalized by state actors? How do these patches of silence impact local power? And how do they modulate intergovernmental relationships—both horizontally, among and between local officials, and vertically between localities and states? These questions urge stakeholders and scholars of local government to look past the headlines in their study of local institutions, tapping instead the rich vein of formal and informal public law that quietly shapes the landscape today.