

September 2014

State Border Towns and Resiliency: Barriers to Interstate Intergovernmental Cooperation

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Jeffrey B. Litwak, *State Border Towns and Resiliency: Barriers to Interstate Intergovernmental Cooperation*, 50 IDAHO L. REV. 193 (2014).
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STATE BORDER TOWNS AND RESILIENCY: BARRIERS TO INTERSTATE INTERGOVERNMENTAL COOPERATION

JEFFREY B. LITWAK*

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I. INTRODUCTION

Countless books, articles, web sites, and blogs discuss resiliency; most major scientific and industry non-governmental organizations have produced resiliency reports;¹ and many universities have held resiliency symposia. One 2013 report identified nearly fifty different definitions of resilience dating back to the early 1970s.² From this rich liter-

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1. *See, e.g.*, COMMITTEE ON INCREASING NATIONAL RESILIENCE TO HAZARDS AND DISASTERS, COMMITTEE ON SCIENCE, ENGINEERING, AND PUBLIC POLICY, POLICY AND GLOBAL AFFAIRS, THE NATIONAL ACADEMIES, *Disaster Resilience: A National Imperative* (Nat'l Acad. Press 2012); LARSEN L. RAJKOVICH ET AL., GREEN BUILDING AND CLIMATE RESILIENCE: UNDERSTANDING IMPACTS AND PREPARING FOR CHANGING CONDITIONS (2011); ABHAS K. JHA ET AL., BUILDING URBAN RESILIENCE: PRINCIPLES, TOOLS, AND PRACTICE (2013).

2. CMTY. & REG'L RESILIENCE INST., DEFINITIONS OF COMMUNITY RESILIENCE: AN ANALYSIS 2-9 (2013).

ature, terms such as “ecosystem resiliency,”³ “social resiliency,”⁴ “system resiliency,”⁵ and “economic resilience”⁶ have become commonplace. These and other resilience terms typically present varying themes of reducing risk of various shocks or disasters; reducing effects of climate change; or the need to build, strengthen, and enhance capacity to rapidly and readily recover from disaster.

Also from this literature, we know that resilience is an interdisciplinary issue involving fields such as engineering,⁷ energy delivery,⁸ emergency services,⁹ food and water security,¹⁰ and law enforcement and domestic security.¹¹ Creating resilient communities also “requires combinations of apparent opposites, including redundancy and efficiency, diversity and interdependence, strength and flexibility, autonomy and collaboration, and planning and adaptability.”¹² Resilience literature is, however, comparatively slim on discussing the most basic underlying premise: that communities already have some base level of services and infrastructure, or rather, communities have something to make resilient.

Small towns with low tax bases have difficulty providing services and infrastructure for day-to-day use.¹³ Without functional services and infrastructure, these towns obviously cannot provide those services or use that infrastructure during emergencies. Such small towns, like

3. A. Bryan Endres & Jody M. Endres, *Homeland Security Planning: What Victory Gardens and Fidel Castro Can Teach Us in Preparing for Food Crises in the United States*, 64 FOOD & DRUG L.J. 405, 419 (2009) (“ecosystem resiliency” describes “buffering capacity (i.e., the ability to absorb shocks without structural change).”).

4. *Id.* (“social resiliency” describes the ability of “communities to withstand external shocks to their social infrastructure.”).

5. Patrice H. Kunesh, *Constant Governments: Tribal Resilience and Regeneration in Changing Times*, 19 KAN. J.L. & PUB. POL’Y 8, 13 (2009) (“system resiliency” describes the “capacity of a system to tolerate change, to persist, and to adapt in an unpredictable and variable environment.”).

6. *See, e.g.*, Edward Hill et al., *Economic Shocks and Regional Economic Resilience* 1 (MacArthur Found. Research Network on Bldg. Resilient Regions, Working Paper 2011-03, 2011).

7. *See, e.g.*, THOMAS FISHER, *DESIGNING TO AVOID DISASTER: THE NATURE OF FRACTURE-CRITICAL DESIGN* (Routledge 2012).

8. RAJKOVICH ET AL., *supra* note 1, at 22.

9. *E.g.*, Portland State University offers a Professional Certificate in Emergency Leadership and Community Resilience. *See Emergency Leadership & Community Resilience*, PORTLAND ST. U., <http://www.pdx.edu/cps/emergency-leadership-community-resilience> (last visited May 21, 2014).

10. *E.g.*, Jeremy Allouche, *The Sustainability and Resilience of Global Water and Food Systems: Political Analysis of the Interplay Between Security, Resource Scarcity, Political Systems and Global Trade*, 36 FOOD POL’Y 1, S3–S8 (2011).

11. *See e.g.*, U.S. DEP’T OF HOMELAND SEC., *IMPLEMENTING 9/11 COMMISSION RECOMMENDATIONS: PROGRESS REPORT 2011 30* (2011), *available at* <http://www.dhs.gov/xlibrary/assets/implementing-9-11-commission-report-progress-2011.pdf>.

12. David R. Godschalk, *Urban Hazard Mitigation: Creating Resilient Cities*, 4 NAT. HAZARDS REV. 136, 139 (2003).

13. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 374 n.126 (1990); Ronald Kaiser, *A Problem in Search of a Solution*, 67 TEX. B.J. 188, 191 (2004).

towns of any size and affluence, frequently turn to intergovernmental agreements with neighboring towns or county governments to jointly construct and maintain physical infrastructure and jointly purchase or share human services¹⁴—they are, in resilience terms, “interdependent.” But not all towns are equally able to use such agreements.

The forty-eight contiguous states and the District of Columbia collectively create 109 state border pairs.¹⁵ Many towns and areas on these borders are isolated intrastate, but have neighbors in adjoining states, and thus have few options for joint and cooperative action except with towns and areas in the adjacent state.¹⁶ To engage these cross-border neighbors, these communities must contend with intergovernmental cooperation statutes that contain different authorities for cooperative arrangements, require additional burdens on cross-border agreements, and statutes and regulations that contain differing or conflicting requirements for services and infrastructure.¹⁷ These additional complexities of creating interstate, intergovernmental agreements across state borders, that is, creating interdependence, may reduce the number of such agreements and thus the resiliency of border areas.

Section II of this article briefly discusses how multi-governmental action (interdependence) provides efficient and stable urban services and infrastructure and is thus a necessary component of resiliency. Section III describes the range of authority for interstate intergovernmental cooperation. Section IV discusses two common fundamental differences between the states’ statutes authorizing intergovernmental agreements across state lines that complicate such agreements. Finally, section V provides two examples of joint, shared, and coordinated action in relatively remote Oregon-Washington border communities despite those fundamental problems. I use this border in part because it is my home territory and in part because comparing two states is more manageable than discussing all 109 permutations of interstate intergovernmental agreements; but more importantly because Oregon and Washington’s statutes are quite different and thus illustrate¹⁸ the complex legal questions and political concerns that may discourage interstate intergovernmental agreements.

14. See, e.g., Briffault, *supra* note 13, at 378; Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 99 (2003).

15. This includes the Four Corners states as sharing a border with the states they oppose. See Thomas J. Holmes, *The Effect of State Policies on the Location of Manufacturing: Evidence from State Borders*, 106 J. POL. ECON. 667, 697 (1998).

16. See, e.g., *infra* Part V.A.

17. See, e.g., *infra* Part V.A.

18. I use the term “illustrate” purposefully. I do not suggest that the differences between Oregon and Washington’s statutes are representative of all of the 109 permutations of the states’ intergovernmental agreement statutes.

II. INTERGOVERNMENTAL AGREEMENTS ARE A NECESSARY COMPONENT OF RESILIENCY.

Multi-jurisdictional agreements for emergency response and aid at all levels of government are a common tool for creating resilient communities. A number of interstate compacts focus specifically on cross-border responses. The most comprehensive of the lot is the Emergency Management Assistance Compact (EMAC) between all fifty states, the District of Columbia, and three territories, which allows cross-border assistance when there is a governor-declared state of emergency.¹⁹ Other interstate emergency response compacts specifically involve civil defense, forest fire suppression, earthquake assistance, and deployment of the National Guard.²⁰ Nearly all of the states bordering Canada and Canadian provinces bordering the United States have emergency assistance agreements with each other for firefighting,²¹ and many have agreements for other emergency assistance.²² Governments at all levels commonly have intergovernmental agreements with other governments to provide emergency response,²³ frequently pursuant to specific statutory authorization for mutual aid.²⁴

However, in addition to reducing risk of disaster and increasing capacity to recover from disaster, resiliency should also be measured by a community's ability to provide basic services and infrastructure prior to

19. Emergency Management Assistance Compact, (congressional consent given at Pub. L. No. 104-321, 110 Stat. 3877 (1996)).

20. There are more than a dozen such compacts. The National Center for Interstate Compacts at the Council of State Governments maintains a searchable database of nearly all interstate compacts. *Compact Name Search*, NAT'L CTR. FOR INTERSTATE COMPACTS, <http://apps.csg.org/ncic/> (last visited May 21, 2014).

21. See U.S. DEP'T OF HOMELAND SECURITY & PUBLIC SAFETY CANADA, COMPENDIUM OF U.S. - CANADA EMERGENCY MANAGEMENT ASSISTANCE MECHANISMS (2012), available at <http://www.dhs.gov/xlibrary/assets/policy/btb-compendium-of-us-canada-emergency-management-assistance-mechanisms.pdf>; International Emergency Management Assistance Compact (Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut and the Provinces of Québec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland) (congressional consent given by Pub. L. No. 110-171, 121 Stat. 2467 (2007)); State and Province Emergency Management Assistance Compact (Illinois, Indiana, Ohio, Michigan, Minnesota, Montana, North Dakota, Pennsylvania, New York, and Wisconsin, and the Canadian Provinces of Alberta, Manitoba, Ontario, and Saskatchewan), congressional consent given by Pub. L. 112-282, 126 Stat. 2486 (2013)).

22. See, e.g., Michael C. McDaniel, *Beyond 'Beyond the Border': A Proposal for Implementation of the Action Plan's Recommendation on Cross-Border Critical Infrastructure*, 37 CAN.-U.S. L.J. 433, 435 (2012).

23. See, e.g., Mutual Aid Agreement Between Wasco, Hood River and Sherman Fire Defense Districts and Klickitat and Skamania County Fire Protection Agencies, Final Draft 6-14-13 (on file with author); U.S. DEP'T OF THE INTERIOR, MASTER COOPERATIVE FIRE PROTECTION AGREEMENT 2012, NORTHWEST OPERATING PLAN, OREGON STATEWIDE OPERATING PLAN, WASHINGTON STATEWIDE OPERATING PLAN (May 16, 2012) (involving three federal agencies and two state agencies, and discussing mobilization of local fire service) (on file with author).

24. See, e.g., WASH. REV. CODE § 38.52.091 (West, Westlaw current with 2014 Legis. effective through March 31, 2014).

any shock, disaster, or change. In the same way that emergency assistance agreements stabilize communities in times of crises, non-emergency intergovernmental agreements stabilize communities by enabling them to maintain or expand their services and infrastructure so that communities have services to provide or share through mutual aid in times of emergencies. These agreements are not written for the purpose of creating resiliency, but they are important (and sometimes necessary) tools for creating resilient communities.

For example, redundancy, an indicator of resilience,²⁵ may be impossible for small towns to achieve acting alone. Towns that can afford only two or three maintenance workers have no redundancy because most tasks require a crew of two or more to complete repair and maintenance tasks and ensure worker safety. One crew may be able to handle most maintenance tasks most of the time, but those workers cannot take vacations, cannot stay home sick, or cannot respond to two events. However, neighboring towns, each with two or three workers, can create two or three shared crews.²⁶ Intergovernmental agreements formalize natural interdependencies by allowing communities to right size their operations in ways that communities could not accomplish acting alone. Indeed, this is the stated purpose of several states' intergovernmental cooperation statutes. For example, the declaration of purpose in Washington State's Interlocal Cooperation Act states,

It is the purpose of this chapter to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.²⁷

Partnerships between governments, universities, businesses, non-governmental organizations, and foundations are common themes in resilience analyses.²⁸ Intergovernmental agreements are one such partnership. However, other than mutual aid agreements, they unfortunately get little attention in resilience literature.

25. Godschalk, *supra* note 12, at 139; *see also* JOHN D. MOTEFF & CONG. RESEARCH SERV., CRITICAL INFRASTRUCTURE RESILIENCE: THE EVOLUTION OF POLICY AND PROGRAMS AND ISSUES FOR CONGRESS 5 (2012) (defining redundant as: "[A] number of functionally different components so that the entire system does not fail when one component fails.>").

26. Interview with Don Stevens, Mayor, North Bonneville., in White Salmon, Wash. (Nov. 5, 2013). Mayor Stevens uses this for an example when giving public talks about the "Three Cities Initiative" discussed in Section V, below.

27. WASH. REV. CODE § 39.34.010 (West, Westlaw current with 2014 Legis. effective through March 31, 2014).

28. *See, e.g.*, Hill et al., *supra* note 6, at 57–58.

III. STATE STATUTORY AND REGULATORY AUTHORITY FOR INTERSTATE INTERGOVERNMENTAL AGREEMENTS.²⁹

All states authorize intergovernmental agreements in one or more ways. First, nearly all states have a statute that broadly authorizes intergovernmental agreements, using terms such as interlocal cooperation, intergovernmental agreements, joint exercise of powers, or no particular term.³⁰ These generally applicable statutes also contain require-

29. Although much of this article focuses on Oregon and Washington, there is little law concerning authority for, or use of, intergovernmental agreements in any one state. Therefore, general principles of law discussed in this section cite sources nationally.

30. ALA. CODE § 11-102-1 (West, Westlaw current through Act 2014-68 of the 2014 Regular Session); ARIZ. REV. STAT. ANN. § 11-952 (West, Westlaw current through the First Regular and First Special Sessions of the Fifty-first Legislature); ARK. CODE ANN. 25-20-101 (West, Westlaw current through end of 2013 Regular and First Ex. Sessions, including changes made by Ark. Code Rev. Comm. received through 1/1/2014, and emerg. eff. Acts from 2014 Fiscal Sess.); CAL. GOV'T CODE § 6500 (West, Westlaw current with urgency legislation through Ch. 9 of 2014 Reg. Sess. and all propositions on the 6/3/2014 ballot); COLO. REV. STAT. ANN. § 29-1-203 (West, Westlaw current with Chapters 1-3 and 5-7 of the Second Regular Session of the 69th General Assembly); CONN. GEN. STAT. ANN. § 7-339a (West, Westlaw current through the 2014 Supplement to the General Statutes of Connecticut, Revision of 1958); FLA. STAT. ANN. § 163.01 (West, Westlaw current with Chapters in effect from the 2014 2nd Reg. Sess. of the 23rd Legislature through March 31, 2014); GA. CODE ANN. § 36-69A-1 (West, Westlaw current through Act 351 of the 2014 Reg. Sess.); IDAHO CODE ANN. §§ 67-2326 to 2333 (2006); 5 Ill. Comp. Stat. Ann. 220 § 1 (West, Westlaw current through P.A. 98-627 of the 2014 Reg. Sess.); IND. CODE ANN. § 36-1-7-1 (West, Westlaw current through P.L. 29 of the Second Reg. Sess. of the 118th General Assembly with effective dates through March 13, 2014); IOWA CODE ANN. § 28E.1 (West, Westlaw current with immediately eff. Legis. signed as of 4/4/2014 from the 2014 Reg. Sess.); KAN. STAT. ANN. § 12-2901 (West, Westlaw current through 2013 Reg. and Spec. Sess.); KY. REV. STAT. ANN. § 65.210 (West, Westlaw current through the end of the 2013 Reg. Sess. and the 2013 extraordinary session); LA. REV. STAT. ANN. § 33:1324 (West, Westlaw current through the 2013 Reg. Sess.); ME. REV. STAT. ANN. TIT. 30-A, § 2203 (West, Westlaw current with emergency Legis. through Chapter 492 of the 2013 Second Reg. Sess. of the 126th Leg.); MD. CODE ANN. LOCAL GOV'T § 1-901 (West, Westlaw current through chapter 1 of the 2014 Reg. Sess. of the General Assembly); MASS. GEN. LAWS ANN. CH. 40, § 4A (West, Westlaw current through Chapter 61 of the 2014 2nd Annual Session); MICH. COMP. LAWS ANN. § 124.502 (West, Westlaw current through P.A.2014, No. 63, of the Reg. Sess., 97th Legislature); MINN. STAT. ANN. § 471.59 (West, Westlaw current through Chapter 147 of the 2014 Reg. Sess.); MISS. CODE ANN. § 17-13-1 (West, Westlaw current through end of 2013 Reg. Sess. and 1st & 2nd Ex. Sess.); MO. ANN. STAT. § 70.220 (West, Westlaw current with emergency legis. approved through Feb. 19, 2014, of the 2014 Second Reg. Sess. of the 97th General Assembly); MONT. CODE ANN. § 7-11-101 (West, Westlaw current through the 2013 Session, and the 2012 general election); NEB. REV. STAT. ANN. § 13-801 (West, Westlaw current through End of 2013 Reg. Sess.); NEV. REV. STAT. ANN. § 277.080 (West, Westlaw current through the 2013 77th Reg. Sess. and the 27th Spec. Sess. of the Nevada Leg.); N.H. REV. STAT. ANN. § 53-A:3 (Current through Chapter 2 of the 2014 Reg. Sess.); N.J. STAT. ANN. § 40A:65-1 (West, Westlaw current with laws effective through L.2014, J.R. No. 1); N.M. STAT. ANN. §§ 11-1-1 (West, Westlaw current through all 2013 legislation, and including Ch. 6, 11, 24, 25, 28, 31, 32, 37, 40, 58, 70, 71, 79-81, of the Second Reg. Sess. of the 51st Legislature (2014)); N.Y. GEN. MUN. LAW § 119-o (McKinney current through L.2014, chapters 1 to 17); N.C. GEN. STAT. ANN. § 160A-460 (West, Westlaw current through the end of the 2013 Reg. Sess. of the General Assembly); N.D. CENT. CODE ANN. § 54-40-01 (West, Westlaw current through the 2013 Reg. Sess. of the 63rd Legis. Assembly); OHIO REV. CODE ANN. §§ 715.02, 307.15 (West, Westlaw current through Files 1 to 76, and 78 of the 130th; OKLA. STAT. ANN.

ments for, and restrictions on use of, intergovernmental agreements.³¹ Most of these general statutes have their roots in two past efforts to promote scholarship and use of intergovernmental agreements. First, in 1956, the Council of Governments³² drafted a suggested “Interlocal Cooperation Act.”³³ Second, in 1967, the U.S. Advisory Commission on Intergovernmental Relations³⁴ made some revisions to the Council of State Governments’ suggested act and adopted its own suggested legisla-

TIT. 74, § 1001 (West, Westlaw current through Chapter 23 (End) of the First Extraordinary Sess. of the 54th Leg.); OR. REV. STAT. ANN. § 190.003 (West, Westlaw current with emergency legis. through Ch. 80 of the 2014 Reg. Sess.); 53 PA. CONS. STAT. §§ 2301–2317 (West, Westlaw current through Reg. Sess. Act 2014-21); R.I. GEN. LAWS ANN. § 45-40.1–2 (West, Westlaw current with amendments through chapter 534 of the 2013 Reg. Sess.); S.C. CODE ANN. §§ 5-7-60, 6-1-20 (current through end of 2013 Reg. Sess.); S.D. CODIFIED LAWS §§ 6-17-1 to 6-17-15 (Current through the 2013 Reg. Sess. and Supreme Court Rule 13-17); TENN. CODE ANN. §§ 12-9-101, 5-1-113, 5-1-114 (West, Westlaw current with laws from the 2014 Second Reg. Sess., eff. through Feb. 28, 2014); TEX. GOV’T CODE ANN. § 791.002 (West, Westlaw current through the end of the 2013 Third Called Sess. of the 83rd Leg.); UTAH CODE ANN. § 11-13-101 (West, Westlaw current through 2013 Second Spec. Sess.); VT. STAT. ANN. TIT. 24, § 4901 (West, Westlaw current through the laws of the First Sess. of the 2013-2014 Vermont General Assembly); VA. CODE ANN. § 15.2-1300 (West, Westlaw current through End of the 2013 Reg. Sess. and the End of 2013 Sp. S. I and includes 2014 Reg. Sess. cc. 1, 2 and 8); WASH. REV. CODE ANN. § 39.34.010 (West, Westlaw current with 2014 Legis. effective through March 31, 2014); W. VA. CODE ANN. § 8-23-3 (West, Westlaw current with laws of the 2014 Reg. Sess. S.B. 444); WIS. STAT. ANN. § 66.0301 (West, Westlaw current through 2013 Act 146, published 3/28/2014); WYO. STAT. ANN. § 16-1-101 (West, Westlaw current through the 2013 General Sess.). Alaska, Delaware, the District of Columbia, and Hawaii do not have general intergovernmental agreement statutes.

31. *E.g.*, ALA. CODE § 11-102-2 (West, Westlaw through Act 2014-191 of 2014 Reg. Sess. 2014) (restricting joint powers contracts to three-year terms); FLA. STAT. ANN. § 163.01(7)(c) (West, Westlaw through 2014 2nd Reg. Sess.) (prohibiting a separate legal intergovernmental entity from levying any type of tax or issue bonds in its own name).

32. N.C. GEN. STAT. ANN. § 143-186 (West, Westlaw current through 2013 Reg. Sess.). The Council of State Governments (CSG) is a research and policy organization serving state governments. *About CSG Regional Offices*, COUNCIL OF STATE GOV’TS, <http://www.csg.org/about/default.aspx> (last visited May 21, 2014). All fifty states are members. *Id.*

33. COMM. OF STATE OFFICIALS ON SUGGESTED STATE LEGISLATION, THE COUNCIL OF STATE GOV’TS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1957 93–97 (1956) [hereinafter COMM. OF STATE OFFICIALS].

34. The United States Advisory Commission on Intergovernmental Relations (ACIR), a research agency similar to the Administrative Conference of the United States, existed between 1959 and 1996. Pub. L. No. 86-380, 73 Stat. 703 (1959), created ACIR. The Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, 109 Stat. 468, 480 (1995), terminated ACIR. The ACIR statutes remain in the U.S. Code. *See* 42 U.S.C.A. §§ 4271–4279 (2012) (42 U.S.C.A. ch. 53 Advisory Commission on Intergovernmental Relations). For a recent symposium on the history, accomplishments, and vision for a reconstituted Advisory Commission, see John Kincaid & Carl W. Stenberg, *Introduction to the Symposium on Intergovernmental Management and ACIR Beyond 50: Implications for Institutional Development Research*, 71 PUB. ADMIN. REV. 158 (2011) and other symposium articles.

tion.”³⁵ Many of the states’ generally applicable intergovernmental agreement statutes still contain elements of these suggested acts.

This article focuses on these general statutes; however, there are other sources of authority. All states, including those without a general statute, have statutes that reference, authorize, or mandate requirements for intergovernmental agreements for specific purposes.³⁶ Different types of municipalities may also be subject to different statutory and regulatory requirements for providing the same service.³⁷ One quarter of the states also have provisions in their constitutions that authorize intergovernmental cooperation.³⁸ Finally, common law may be another source of authority. For example, some courts have upheld intergovernmental agreements pursuant to a municipality’s general contracting authority or other pre-existing authority, even where the agreement would not be permissible under statutory authority for intergovernmental agreements.³⁹

Most generally applicable intergovernmental agreement statutes expressly authorize agreements that cross state borders. The Council of

35. ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, A HANDBOOK FOR INTERLOCAL AGREEMENTS AND CONTRACTS 24–28 (1967), *available at* <http://www.library.unt.edu/gpo/acir/Reports/information/m-29.pdf> [hereinafter ADVISORY COMM’N].

36. For example, more than 200 distinct statutory sections in Arizona refer to or authorize intergovernmental agreements for a specific purpose. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 11-952, 9-461.11, 15-1470, 36-2925 (2013). *See also* McNeill v. Harnett County, 398 S.E.2d 475, 479 (N.C. 1990) (affirming charges pursuant to intergovernmental agreement authorized by statutes specifically allowing agreements between counties and water and sewer districts).

37. *See, e.g.*, Durango v. Durango Transp., Inc., 807 P.2d 1152 (Colo. 1991) (reversing a court of appeals decision concluding that a city could provide mass transit free from the jurisdiction of the Public Utilities Commission, but a county was subject to PUC jurisdiction).

38. ALASKA CONST. art. X, § 13 (West, Westlaw through the legislation effective March 26, 2014, passed during the 2014 2nd Reg. Sess. of the 28th Legislature); COLO. CONST. art. XIV, § 18 (West, Westlaw current with amendments adopted through the Nov. 5, 2013 General Election); FLA. CONST. art. VIII, § 4 (West, Westlaw current through Nov. 6, 2012, General Election); GA. CONST. art. IX, § III ¶ I(A) (West, Westlaw current through Act 351 of the 2014 Reg. Sess.); HAW. CONST. art. XVI, § 5; (West, Westlaw current with amendments through Act 4 [End] of the 2013 2nd Special Sess.); ILL. CONST. art. VII, § 10 (West, Westlaw through 4/1/2014); LA. CONST. art. VI, § 20 (West, Westlaw current through the 2013 Reg. Sess.); MICH. CONST. art. III, § 5; MO. CONST. art. VI, § 16 (West, Westlaw current through emergency legis. approved February 19, 2014, of the 2014 Second Reg. Sess. of the 97th General Assembly); MONT. CONST. art. XI, § 7 (West, Westlaw current through the 2012 general election); NEB. CONST. art. XV, § 18 (West, Westlaw current through the End of 2013 Reg. Sess.); N.Y. CONST. art. IX, § 1(C) (West, Westlaw current through L.2014, chapters 1 to 17); PA. CONST. art. IX, § 5 (West, Westlaw current through Reg. Sess. Act 2014-21); S.C. CONST. art. VII, § 13; S.D. CONST. art. IX, § 3 (West, Westlaw current through the 2013 Reg. Sess. and Supreme Court Rule 13-17).

39. *See, e.g.*, Utah Cnty v. Ivie, 137 P.3d 797 (Utah 2006) (holding that the county and city had independent authority to undertake actions in an agreement for the county to condemn property for a road and for the city to pay the expenses of condemnation, installation, and maintenance of the road, thus the agreement was valid even though the intergovernmental cooperation act did not authorize agreement).

State Governments explained that it drafted the 1957 suggested act with the intent that it could be used “between or among communities whether or not they are located within a single state.”⁴⁰ Most general statutes require the attorney general or another state official to review and approve (or not object to) cross-border agreements. For example, in Oregon, the attorney general must approve agreements in which Oregon public agencies seek to enter into with public agencies of other states.⁴¹ In Washington, the state official with constitutional or statutory authority, or jurisdiction over providing the service or facility that is the subject of the cross-border agreement, must approve the agreement.⁴²

Despite this apparent authority for interstate intergovernmental agreements, there are two reasons these generally applicable intergovernmental cooperation statutes are not optimal for encouraging interstate intergovernmental agreements. The first reason is that specific provisions in many of the states’ intergovernmental cooperation statutes may have the effect of prohibiting or discouraging interstate intergovernmental agreements. This article focuses on two of the fundamental, and perhaps the most potentially disabling, provisions: declaring an interstate intergovernmental agreement to be an interstate compact and the differing powers required of each party to enter into an intergovernmental agreement. I purposefully say, “potentially disabling.” There are many interstate intergovernmental agreements; most ignore the compact question. There are no reported cases in any state challenging the validity of an interstate intergovernmental agreement based on a compact provision, and few cases address the powers question. Nevertheless, the possibility for challenge remains. The second reason is that intergovernmental cooperation statutes do not abrogate any of the requirements and restrictions in the states’ substantive authorities, so interstate intergovernmental agreements may be subject to two (or more) sets of legislative and regulatory standards. Communities that wish to engage intergovernmental arrangements where the states’ statutes conflict or lack reciprocal authority must plan for time and expense to craft complex workarounds.

IV. BARRIERS TO INTERSTATE INTERGOVERNMENTAL AGREEMENTS.

A. Interstate Intergovernmental Agreements as Interstate Compacts

Eleven states have intergovernmental cooperation statutes that contain a provision declaring agreements between a public entity (broadly defined to include the full suite of local and state government)

40. COMM. OF STATE OFFICIALS, *supra* note 33, at 94.

41. OR. REV. STAT. ANN. § 190.420 (West, Westlaw through Ch. 80 2014 Reg. Sess.).

42. WASH. REV. CODE ANN. § 39.34.050 (West, Westlaw current with 2014 Legis. effective through March 31, 2014).

in that state and an agency in another state to, “have the status of an interstate compact.”⁴³ This compact provision originated in the Council of State Governments’ 1957 suggested Interlocal Cooperation Act,⁴⁴ and the Advisory Commission on Intergovernmental Relations preserved it in its 1967 suggested legislation.⁴⁵ Neither suggested act explained the need for this provision. The Council of State Governments simply noted, “It is clear that [relationships with neighboring subdivisions on the other side of the state boundary] are possible when cast in the form of interstate compacts.”⁴⁶ Similarly, the Advisory Commission stated, “Normally, intergovernmental contracts or agreements which are interstate need only be authorized by statute in both of the States and, if necessary, by constitutional provision.”⁴⁷

Embedded in both suggested acts is a legal presumption, which I believe is incorrect, that an interstate intergovernmental agreement is the equivalent to an interstate compact. An interstate compact is an agreement between states as states, that is, an agreement between the sovereigns.⁴⁸ One hallmark (although not a universal rule) of an interstate compact is that each party state’s legislature enacts the compact,⁴⁹ followed by the necessary governor’s action. Alternatively, the text of a legislatively enacted compact may authorize administrative officials to join that specific compact.⁵⁰ In either situation, a compact is between the

43. ARK. CODE ANN. § 25-20-105 (West, Westlaw current through end of 2013 Reg. and First Ex. Sess., including changes made by Ark. Code Rev. Comm. received through 1/1/2014, and emerg. eff. acts from 2014 Fiscal Sess.: 210); IND. CODE ANN. § 36-1-7-8 (West, Westlaw current through 2014 Second Reg. Sess. of the 118th General Assembly); IOWA CODE ANN. § 28E.9 (West, Westlaw current with legis. from the 2014 Reg. Sess.); KAN. STAT. ANN. § 12-2905 (West, Westlaw current through 2013 Reg. and special Sess.); KY. REV. STAT. ANN. § 65.290 (West, Westlaw current through the end of the 2013 Reg. Sess. and the 2013 extraordinary session); NEV. REV. STAT. ANN. § 277.160 (West, Westlaw current through the 2013 77th Reg. Sess. and the 27th Spec. Sess. of the Nevada Leg.); OKLA. STAT. ANN. tit. 74, § 1005 (West, Westlaw current through Chapter 23 (End) of the First Extraordinary Sess. of the 54th Legislature (2013)); R.I. GEN. LAWS ANN. § 45-40.1-5 (West, Westlaw current with amendments through chapter 534 of the 2013 Reg. Sess.); TENN. CODE ANN. § 12-9-105 (West, Westlaw current through Feb. 28, 2014 of the 2014 Second Reg. Sess.); WASH. REV. CODE § 39.34.040 (West, Westlaw current with 2014 Legis. effective through March 31, 2014); WIS. STAT. ANN. § 66.0303(4) (West, Westlaw current through 2013 Act 146, published 3/28/2014).

44. COMM. OF STATE OFFICIALS, *supra* note 33, at 93 (suggested act at § 5).

45. ADVISORY COMM’N, *supra* note 35, at 27 (suggested act at § 5).

46. COMM. OF STATE OFFICIALS, *supra* note 33, at 94 (suggested act at § 7).

47. ADVISORY COMM’N, *supra* note 35, at 27–28 (suggested act at § 7).

48. *See Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 42 (1994) (“An interstate compact, by its very nature, shifts a part of a state’s authority to another state or states, or to the agency the several states jointly create to run the compact.”) (quoting MARIAN E. RIDGEWAY, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* 300 (1971)).

49. *See, e.g., Sullivan v. Dep’t of Transp.*, 708 A.2d 481 (Pa. 1998) (where compact text requires states enact the compact into law, a statute authorizing the state secretary of transportation to enter into the compact was not an effective enactment).

50. *See, e.g., Interstate Library Compact*, NCIC, <http://apps.csg.org/ncic/Compact.aspx?id=89> (last visited May 21, 2014).

states as states.⁵¹ In contrast, legislatures do not enact, ratify, or review interstate intergovernmental agreements. In the states where review of such agreements is required, it is the attorney general or another state official that does so.⁵² For this reason alone, a state's broadly applicable intergovernmental cooperation statute cannot, by operation of law, elevate an intergovernmental agreement (i.e., an agreement between subdivisions of the states) or in some cases, home rule entities, to the status of an agreement between states as states.

Another legal problem with this compact provision exists when only one of the states has a compact provision in its intergovernmental cooperation statutes. The eleven states with a compact provision make up forty-five state borders, only six of which are between states where both states have a compact provision.⁵³ Three of the states with a compact provision do not share any border with a state that has a compact provision.⁵⁴

Even assuming that an intergovernmental agreement statute can, as a matter of law, elevate an agreement to the status of an interstate compact, an interstate compact cannot exist unless all of the party states intend to create a compact.⁵⁵ That mutuality does not exist unless all party states have declared an interstate intergovernmental agreement to be an interstate compact. That mutuality does not exist on thirty-nine of the forty-five borders of the states with compact provisions. Additionally, nearly all of the states' intergovernmental agreement statutes specify that an interstate intergovernmental agreement must meet the other state's legal requirements.⁵⁶ Thus the general statutes in states without a compact provision would prohibit an agreement because the agreement could not comply with the compact provision in the first state. Neither the Council of State Governments nor the Advisory Commission's suggested acts addressed the lack of mutuality when only one state declares an interstate intergovernmental agreement to have the status of an interstate compact.⁵⁷

51. For more on interstate compacts generally, see CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND CHANGING ROLE OF INTERSTATE COMPACTS, A PRACTITIONER'S GUIDE* (ABA Publ'g 2006); JEFFREY B. LITWAK, *INTERSTATE COMPACT LAW: CASES & MATERIALS* (2012); JOSEPH F. ZIMMERMAN, *INTERSTATE COOPERATION: COMPACTS AND ADMINISTRATIVE AGREEMENTS* (2d ed. 2012).

52. See *supra* text accompanying notes 44.

53. The borders where both states have a compact provision are Arkansas-Tennessee, Arkansas-Oklahoma, Indiana-Kentucky, Iowa-Wisconsin, Kansas-Oklahoma, and Kentucky-Tennessee.

54. *Id.* The states with a compact provision that do not border any state that also has a compact provision are Nevada, Washington, and Rhode Island.

55. BROUN ET AL., *supra* note 51, at 21 (describing compacting process as offer, acceptance and consideration).

56. See, e.g., OR. REV. STAT. § 190.420(1) (West, Westlaw current with emergency legis. through Ch. 80 of the 2014 Reg. Sess.).

57. COMM. OF STATE OFFICIALS, *supra* note 33, at 93–97; ADVISORY COMM'N, *supra* note 35, at 24–28.

The compact provision also raises political concerns. Since the 1950s and 1960s, the law of interstate compacts has evolved such that the Council of State Governments and the Advisory Commission probably did not anticipate the complexities of declaring an interstate intergovernmental agreement to be an interstate compact. One such complexity is the U.S. Constitution's requirement for congressional consent for interstate compacts.⁵⁸ Although the text of the Constitution specifies the requirement for consent without restriction, the U.S. Supreme Court has interpreted the compact clause to require consent in two situations: (1) when the compact enhances the power of the states to the detriment of federal supremacy,⁵⁹ or (2) when the compact enhances the power of the compacting states to the detriment of non-compacting states.⁶⁰ There is ample room for debate and litigation over whether consent is actually required.⁶¹ The Council of State Governments and the Advisory Commission dismissed this concern by asserting that interstate intergovernmental agreements "lie squarely within State jurisdiction and therefore raise no question of the balance of the federal system."⁶² This statement was probably too broad back in the 1950s and 1960s because consent is dependent on the subject matter of each agreement.⁶³ The Council of State Governments and the Advisory Commission may be correct most of the time, but at least one interstate intergovernmental agreement has received consent.⁶⁴ This illustrates that parties to an interstate intergovernmental agreement cannot hastily dismiss the possibility of needing congressional consent for their agreement.

Second, the possibility of congressional consent for interstate intergovernmental agreements raises another issue, one that neither the Council of State Governments nor the Advisory Commission addressed: that consent transforms an interstate compact into federal law. Although the Supreme Court's clearest statement to this effect long postdated the model acts,⁶⁵ the underpinnings of the transformation of a

58. U.S. CONST. art. I, § 10, CL. 3. The compact clause states, "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State." *Id.*

59. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460 (1978).

60. *Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 472 U.S. 159, 175-76 (1985).

61. One example of protracted litigation involves the Multistate Tax Compact. *See* U.S. Steel Corp., 434 U.S. at 452. There is current debate about whether the National Popular Vote bill, an interstate compact, might require consent. *See Myths about Interstate Compacts and Congressional Intent*, NAT'L POPULAR VOTE, <http://www.nationalpopularvote.com/pages/answers/section.php?s=16> (last visited May 21, 2014).

62. ADVISORY COMM'N, *supra* note 35, at 7.

63. BROUN ET AL., *supra* note 51, at 37.

64. *See, e.g.*, H.R.J. Res. 166, 104th Cong. 2d Sess. (1996) ("[g]ranting the consent of Congress to the A Mutual Aid Agreement between the city of Bristol, Virginia, and the city of Bristol, Tennessee.")

65. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) (stating, "But where Congress has authorized the States to enter into a cooperative agreement and the subject matter of that

compact into federal law predated the model acts.⁶⁶ Additionally, in the decades since the Council of State Governments and the Advisory Commission published their suggested acts, courts have concluded that compact entities do not enjoy the states' immunity from suit in federal court;⁶⁷ the compact preempts or supersedes conflicting state law and state constitutions under federalism and contract principles;⁶⁸ compacts have equal footing as congressionally enacted federal statutes in a conflict-of-laws analysis;⁶⁹ courts apply federal law standards when con-

agreement is an appropriate subject for congressional legislation, Congress' consent transforms the States' agreement into federal law under the Compact Clause.”)

66. *Id.* at 438 n.7 (citing *Del. River Joint Toll Bridge Comm'n. v. Colburn*, 310 U.S. 419, 427 (1940)).

67. *See, e.g., Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 56 (1994) (O'Connor, J., dissenting) (Justice O'Connor lamented, “Despite several invitations, this Court has not as yet had occasion to find an interstate entity shielded by the Eleventh Amendment from suit in federal court.”).

68. *See, e.g., Seattle Master Builders Ass'n v. Pac. Nw. Electric Power & Cons. Planning Council*, 786 F.2d 1359, 1371 (1986) (stating, “A state can impose state law on a compact organization only if the compact specifically reserves its right to do so.”); *Wash. Metro. Area Transit Auth. v. One Parcel of Land in Montgomery Cnty., Md.*, 706 F.2d 1312, 1318–19 (4th Cir. 1983) (Maryland may confer on an interstate agency federal quick-take condemnation powers that are not available to state agencies under Maryland's Constitution); *Stephans v. Tahoe Reg'l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988) (the Tahoe Regional Planning Agency's regional plan preempts state law and state constitutional provisions, and dismissed a takings claim based on the Nevada Constitution); *Alcorn v. Wolfe*, 827 F. Supp. 47, 53 (D.D.C. 1993) (Metropolitan Washington Airports Authority's compact provision specifying that appointments to the authority are made for a specific term superseded the Virginia Constitution under which political appointees are removable-at-will); *Alamosa-La Jara Water Users Prot. Ass'n v. Gould*, 674 P.2d 914, 922–23 (Colo. 1984) (state constitutional and statutory laws apply only to water that has not been committed to other states by an interstate compact or a United States Supreme Court decree); *Frontier Ditch Co. v. Se. Colo. Water Conservancy Dist.*, 761 P.2d 1117, 1124 (Colo. 1998) (concluding, “Thus, to the extent that there might be some arguable conflict between [the compact's] Article VI B's grant of exclusive jurisdiction to Kansas and the Colorado water court's jurisdiction [granted in that state's constitution], Article VI B is the supreme law of the land and governs the rights of the parties in this case.”).

69. *See, e.g., NYSA–ILA Vacation & Holiday Fund v. Waterfront Comm'n of N.Y. Harbor*, 732 F.2d 292, 298 (2d Cir. 1984) (compact that had received congressional consent was not preempted or superseded by federal ERISA statute); *Am. Sugar Refining Co. v. Waterfront Comm'n of N.Y. Harbor*, 432 N.E. 2d 578, 586–87 (N.Y. 1982) (holding that since a compact provision is “federal law,” conflicts between compact provisions and federal statutes cannot be resolved by “preemption” analysis, but by an analysis of whether one “impliedly repeals” another); *Lake Tahoe Watercraft Recreation Ass'n v. Tahoe Reg'l Planning Agency*, 24 F. Supp. 2d 1062, 1073 (E.D. Cal. 1998) (“To the extent the two federal schemes [*i.e.*, the Clean Water Act and the Tahoe Compact] conflict, the Compact should be given effect because it is a congressional enactment passed later in time and, is more specific than the [Clean Water Act] as it is limited to a very narrow geographical area.”); *City of S. Lake Tahoe v. Tahoe Reg'l Planning Agency*, 664 F. Supp. 1375, 1378 (E.D. Cal. 1987) (“The only common ground of the [Compact and the Airline Deregulation Act] is geographic and perhaps incidental but is not substantive. As for this geographic overlap, the Compact is clearly more specific and enacted later in time.”).

struing a compact;⁷⁰ and a compact entity's rules and actions are federal law⁷¹ or have some federal character.⁷² Even compacts that do not require consent have some "supra-state"⁷³ characteristics.⁷⁴

Finally, the Council of State Governments and the Advisory Commission observed that declaring an intergovernmental agreement to be an interstate compact raises the question whether the states, rather than the signatory local government parties, might be liable for actions under the agreement.⁷⁵ The Council of State Governments explained,

[T]he usual interstate compact is an instrument to which states are party. Since the contemplated [intergovernmental] agreements should be the primary creation and responsibility of the local communities, the [suggested] act makes them the real parties in interest for legal purposes and places the state more in the position of guarantor. Since this means that the obligation is enforceable against the state if necessary, the [intergovernmental] agreement will have all the necessary attributes of a compact. However, the state in turn is protected by the requirement of prior approval of the agreement by state authorities and by

70. See, e.g., *N.Y. State Dairy Foods, Inc. v. Ne. Dairy Compact Comm'n*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998) (applying the federal *Chevron* method for review of the compact agency's interpretation of its federal consent statute); *Friends of the Columbia Gorge v. Columbia River Gorge Comm'n*, 213 P.3d 1164, 1174 (Or. 2009) (same).

71. See, e.g., *Stephans v. Tahoe Reg'l Planning Agency*, 697 F. Supp. 1149, 1152 (D. Nev. 1988), (expressly stating that the Tahoe Regional Planning Agency's regional land use plan is federal law); *R.I. Fishermen's Alliance v. R.I. Dep't of Env'tl. Mgmt.*, 585 F.3d 42, 49 (1st Cir. 2009) (satisfying the well-pleaded complaint requirement because the Atlantic States Marine Fisheries Commission management plan is federal law).

72. See, e.g., *League to Save Lake Tahoe v. B.J.K. Corp.*, 547 F.2d 1072, 1073 (9th Cir. 1976) (stating, "Questions arising under the TRPA Land Use Ordinance enacted pursuant to the Compact do not automatically give rise to Section 1331(a) jurisdiction, because the Compact is not an ordinary federal statute and the Ordinance is not directly analogous to the Code of Federal Regulations. Interstate compacts occupy a unique position in our federal system."); *Friends of the Columbia Gorge, Inc. v. Columbia River Gorge Comm'n*, 171 P.3d 942, 969–70 (Or. Ct. App. 2007), *aff'd in relevant part*, 213 P.3d 1164, 1189 (Or. 2009) (applying federal deferential review under *Auer v. Robbins*, 519 U.S. 452 (1997), to the Columbia River Gorge Commission's interpretation of its own regulations); *Klickitat Cnty. v. State of Wash.*, 862 P.2d 629, 634 (Wash. Ct. App. 1993) (stating, "The [Columbia River Gorge] Commission's land management plan and the [federal] act's provisions relative to the plan are federally mandated, and do not constitute a state program.>").

73. For a description of an interstate compact as "supra-state, sub federal," see BROWN ET AL., *supra* note 51, at 1.

74. See, e.g., *Green v. Biddle*, 21 U.S. 1, 89 (1823). In this case, the first compact case at the U.S. Supreme Court, Kentucky had enacted laws that conflicted with its compact with Virginia. Using a contracts analysis and without any reference to consent, the Court questioned, "Can the government of Kentucky fly from this agreement, acceded to by the people in their sovereign capacity, because it involves a principle which might be inconvenient, or even pernicious to the State, in some other respect? The Court cannot perceive how this proposition could be maintained." The Court also concluded that Kentucky's enactments violated the Contracts Clause of the U.S. Constitution. *Id.* at 92–93.

75. COMM. OF STATE OFFICIALS, *supra* note 33, at 94.

the provisions of Section 5 preserving the state's right of recourse against a non-performing locality.⁷⁶

The Advisory Commission adopted this explanation almost verbatim.⁷⁷ To address this concern, section 5 of both suggested acts specifies that the parties to the agreement are the “real parties in interest and [that] the state may maintain an action to recoup or otherwise make itself whole for . . . damages or liability [that] it may incur by reason of being joined.”⁷⁸ All of the states that still have a compact provision contain this liability provision.⁷⁹

A question to ponder is whether a state official would be willing to approve an interstate intergovernmental agreement if he or she understood that approving the agreement would raise the following issues: 1) whether the agreement is actually an interstate compact, 2) whether the agreement requires congressional consent, 3) the potential “supra-state” nature of the agreement, 4) approving the agreement might open the state to liability, and 5) the possibility of litigation to recoup damages or liability the state might incur in an action involving the agreement.⁸⁰

A compact provision is unnecessary to create effective and binding interstate intergovernmental agreements. More importantly, a compact provision is a legal barrier to interstate intergovernmental cooperation along most of the borders of the states that have such a provision. And on the remaining borders, the parties may not want to invoke the established principles of compact law for their agreement. For these reasons, a compact provision may discourage interstate intergovernmental cooperation; the states that have a compact provision should simply repeal that provision.

76. *Id.*

77. ADVISORY COMM'N, *supra* note 35, at 25.

78. *Id.* at 27 (suggested act at § 5); COMM. OF STATE OFFICIALS, *supra* note 33, at 96 (suggested act at § 5).

79. ARK. CODE ANN. §25-20-105(b)(1)–(2) (West, Westlaw through Reg. and First Ex. Sess. 2013); IND. CODE ANN. § 36-1-7-8 (West, Westlaw through P.L.29 of Second Reg. Sess. 2014); IOWA CODE ANN. § 28E.9 (West, Westlaw through 2014 Reg. Sess.) KAN. STAT. ANN. § 12-2905 (West, Westlaw through 2013 Reg. and Sp. Sess.); KY. REV. STAT. ANN. § 65.290 (West, Westlaw through 2013 Reg. Sess.); NEV. REV. STAT. ANN. § 277.160 (2013); OKLA. STAT. ANN. tit. 74, § 1005 (West, Westlaw through Ch. 23 (End) of First Ex. Sess. Of 54th Legis. 2013); R.I. GEN. LAWS ANN. § 45-40.1-5 (West, Westlaw through Ch. 534 of 2013 Reg. Sess.); TENN. CODE ANN. §§ 12-9-105 (West, Westlaw through 2014 Second Reg. Sess.); WASH. REV. CODE ANN. § 39.34.040 (West, Westlaw current with 2014 Legis. effective through March 31, 2014); WIS. STAT. ANN. § 66.0303(4) (West, Westlaw through 2013 Act. 146).

80. For a description of the paucity of scholarly and political literature and low level of familiarity about compact by lawyers, legislators, and others, *see* BROUN ET AL., *supra* note 51, at xvii; LITWAK, *supra* note 51, at i.

B. Powers Needed for an Intergovernmental Agreement

The compact provision affects interstate intergovernmental agreements in about 40% of the states' borders;⁸¹ however, the issue of authority could affect interstate intergovernmental agreements at all borders.⁸² Intergovernmental cooperation statutes follow one of two approaches for specifying the powers parties must possess to undertake an intergovernmental agreement. Like the compact provision, the distinction between these two approaches has its history in the Council of State Governments and Advisory Commission's suggested acts. The Council of State Governments' 1957 suggested act authorized municipalities to enter into an agreement if at least one of the parties had such power.⁸³ The Advisory Commission's 1967 suggested act modified this authority to allow states to elect to use the original 1957 language or use language that restricted intergovernmental agreements to situations where only all municipalities to the agreement independently had authority to undertake the action.⁸⁴ This more restrictive approach does not require independent authority to perform the subject activity in each of the other contracting municipalities' jurisdictions; it means simply that each municipality has the authority to perform the subject activity within its own jurisdiction.⁸⁵ State intergovernmental cooperation statutes that do not directly descend from the suggested acts or that

81. *See supra* text accompanying notes 15.

82. This issue could affect all of the state borders because many specific statutory authorities for intergovernmental agreements specify the parties' necessary powers, some of which differ from a state's generally applicable intergovernmental cooperation statute, and some of which supersede those general statutes. *See, e.g.*, MICH. COMP. LAWS § 124.503 (West Westlaw through P.A.2014, No. 36, of the 2014 Reg. Sess.) (generally applicable statute specifying that a conflicting specific statute would control); N.J. STAT. ANN. § 18A:17-24.9 (West, Westlaw 2014 L.2013, c. 284 (End) and J.R. No. 18) (specific statute specifying that it would control over generally applicable statute).

83. COMM. OF STATE OFFICIALS, *supra* note 33, at 95 (suggested act at § 4, stating, "Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state . . .").

84. ADVISORY COMM'N, *supra* note 35, at 26 ("Any power or powers, privileges or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state [having the power or powers, privilege or authority] . . ."). The bracketed text is the optional language that would limit municipal powers.

85. *E.g.*, MINN. STAT. ANN. § 471.59(1) (West, Westlaw through Reg. Legis. Sess. 2014) (authorizing agreements where the powers "are the same except for the territorial limits within which they may be exercised"); *City of Medina v. Primm*, 157 P.3d 379, 383 (Wash. 2007) ("[T]he question under RCW 39.34.080 is whether the city is authorized to perform the *type* of governmental activity that is the subject of the agreement." (emphasis in original)); *Durango Transp., Inc. v. City of Durango*, 824 P.2d 48, 49-53 (Colo. Ct. App. 1991) (citing several cases in accord); *W. Wash. Univ. v. Wash. Fed'n of State Emps.*, 793 P.2d 989, 992 (Wash. Ct. App. 1990) (stating the "[u]niversity's power to enter into interlocal cooperation agreements is expressly subject to the university's obligations and responsibilities under the [State] Higher Education Personnel Law").

were amended so that the suggested act's language is no longer recognizable typically use language that suggests one of these approaches.⁸⁶

Oregon follows the less restrictive approach originally suggested by the Council of State Governments, so that all parties to an intergovernmental agreement in Oregon may exercise powers in an intergovernmental agreement if at least one of the parties has such powers.⁸⁷ In contrast, Washington elected to use the latter, more restrictive approach.⁸⁸ Oregon's approach allows a greater breadth of intergovernmental cooperative arrangements. This fundamental difference between the Oregon and Washington intergovernmental cooperation statutes means that border towns in Oregon that could broadly use intergovernmental agreements with other state and local entities in Oregon do not have all of the same opportunities to do so with Washington entities.

What is not clear is the extent that statutes restrict the opportunities for Oregon communities to enter into agreements with Washington communities. The Washington Attorney General's opinion is that the parties to an agreement must have only the general authority in question.⁸⁹ But this opinion does not explain the extent that express differences in the states' substantive statutes may prevent performance of nominally similar tasks. For example, the law governing Washington's housing authorities contains unit number and interior space percentage requirements that Oregon law does not.⁹⁰ Would an Oregon housing authority thus be unable to perform services in Washington pursuant to an agreement with a Washington housing authority? Few court decisions have invalidated an intergovernmental agreement for lack of mutual powers and there is no consensus about how mutual the parties' powers must be.⁹¹

86. See Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 122 (2003) (discussing the difference between the states in terms of "the debate between the 'mutuality of powers' approach and the 'power of one unit' approach").

87. OR. REV. STAT. ANN. § 190.010 (West, Westlaw through Ch. 80 2014 Reg. Sess.).

88. WASH. REV. CODE § 39.34.030(5) (West, Westlaw current with 2014 Legis. effective through March 31, 2014).

89. Training Indian Tribal Police Officers, 1978 No. 18 Op. Att'y Gen. of the State of Wash. (June 1, 1978), available at <http://www.atg.wa.gov/AGOOpinions/opinion.aspx?section=archive&id=15228#Uv6vHU2Ybcs> (stating that Washington State Criminal Justice Training Commission could provide training to tribal police officers through an interlocal agreement even though the Commission did not have express authority to train tribal police).

90. Compare OR. REV. STAT. ANN. § 456.120 (West, Westlaw through Ch. 80 of the 2014 Reg. Sess.), with WASH. REV. CODE ANN. § 35.82.070 (West, Westlaw through 2014 Legis. effective through March 31, 2014).

91. See Reynolds, *supra* note 86, at 135–36 (comparing *In re Condemnation of 30.60 Acres of Land*, 572 A.2d 242 (Pa. Commw. Ct. 1990) (upholding an agreement between a township and a school district to construct a school and park because both entities had condemnation authority, although the township could only condemn land for park purposes and the school could only condemn land for use as a public school), with *Gallagher v. City of Omaha*, 204 N.W.2d 157 (Neb. 1973) (invalidating an agreement between a university and

Unlike a compact provision that is legally unnecessary, prohibitive of most agreements, and may stun officials who understand the nature and law of interstate compacts, the states' variations on the required powers of the parties to an agreement reflect political value, judgment, and history. One approach enhances the powers of the parties to the agreement; the other approach only maintains the existing powers of the parties.⁹² I do not suggest that one approach is better than the other for intrastate intergovernmental agreements; however, states with border towns that have few opportunities to cooperate intrastate need broad authority and flexibility to cooperate with towns in the adjacent state to facilitate the town's interdependent and interdisciplinary potential (i.e., resiliency). In other words, states might consider the former, more expansive approach for interstate intergovernmental agreements, even if they would follow the the latter, more limited approach for solely intrastate agreements.

V. OVERCOMING BARRIERS TO CROSS-BORDER INTERGOVERNMENTAL COOPERATION

Two remote border areas illustrate innovative ways that Oregon and Washington communities are overcoming legal barriers between the states.

A. Leveraging Federal Authority in the National Scenic Area

Cascade Locks in Oregon and Stevenson and North Bonneville in Washington are close in distance to each other, but remote relative to other intrastate neighbors.⁹³ Cascade Locks is 20 miles west of Hood River, Oregon and 25 miles east of the Portland metropolitan area.⁹⁴ To the north, it is adjacent to the Columbia River (and thus the state line

the city "to construct and use parking facilities on city park land" because neither entity "had the power to engage in all of the activities" of the agreement)).

92. *Compare* United Water Res., Inc. v. N.J. Dist. Water Supply Comm'n, 685 A.2d 24, 31 (N.J. Super. Ct. App. Div. 1996) (concluding that the intergovernmental cooperation act "was not intended as a vehicle to enhance the enumerated powers granted to local units"), *aff'd*, 701 A.2d 434 (N.J. 1997), *and* Dahl v. City of Grafton, 286 N.W.2d 774, 780 (N.D. 1979) ("Cooperation agreements still must be limited to the performance of functions falling within the framework of the powers already possessed by the municipality under other statutes."), *and* CP Nat'l Corp. v. Pub. Serv. Comm'n of Utah, 638 P.2d 519, 521 (Utah 1981) (citing Utah Code § 11-13-14, which states that municipalities may contract with one another "to perform any governmental service, activity, or undertaking which each public agency . . . is authorized by law to perform," and concluding "the intent of the [ICA] appears to be to allow the municipalities collectively to exercise powers which they already possess individually."), *with* Cnty. of Wabash v. Partee, 608 N.E.2d 674, 679 (Ill. App. Ct. 1993) ("The agreement is valid so long as either the city or the county has the right to undertake the task required under the agreement The very purpose of section 10 of article VII of the 1970 Constitution is to allow a local government to do indirectly that which it cannot do directly, as long as it is otherwise lawful.")

93. *See* RAND MCNALLY, THE 2013 ROAD ATLAS 108 (2013).

94. *See id.*

with Washington); to the south is Mt. Hood National Forest.⁹⁵ Stevenson and North Bonneville are 25 miles west of White Salmon, Washington and 25 miles east of Camas, Washington.⁹⁶ To their south is the Columbia River (and thus the state line with Oregon);⁹⁷ to their north is a combination of state and national forest land.⁹⁸ The Bridge of the Gods over the Columbia River connects the cities and all three cities are located within the federally designated Columbia River Gorge National Scenic Area.⁹⁹ In 2013, these three cities developed a joint “White Paper” describing their interest to identify and develop initiatives, priorities, and shared roles; experiment with new and innovative ways to provide services to people and communities; and develop more effective and efficient methods of serving people.¹⁰⁰ Specifically, the communities identified three priorities for cooperation—wastewater treatment, emergency response services, and education and schools¹⁰¹—and each city enacted a resolution committing to those identified areas of cooperation.¹⁰² The White Paper and each resolution referred to the unique legal structure of the National Scenic Area as authority for their interstate intergovernmental cooperation.¹⁰³

The federal Columbia River Gorge National Scenic Area Act created the National Scenic Area and authorized Oregon and Washington to enact an interstate compact (the Columbia River Gorge Compact) to create a bi-state Columbia River Gorge Commission for the purpose of regional land use planning.¹⁰⁴ The National Scenic Area Act has two purposes: first, “to protect and provide for enhancement of” Gorge resources, and second “to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and” to allow economic development consistent with the first purpose.¹⁰⁵ Within the National Scenic Area, there are thirteen urban are-

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

99. *See id.*; see generally *Bridge of the Gods: Port of Cascade Locks, Oregon*, PORT OF CASCADE LOCKS, OREGON, <http://portofcascadelocks.org/bridge-of-the-gods/> (last visited May 21, 2014).

100. White Paper Outlining the Three Cities’ Initiatives in Partnership with the Columbia River Gorge Commission (Mar. 22, 2013) [hereinafter *Three Cities’ Initiatives*] (on file with author).

101. *Id.*

102. CASCADE LOCKS, Or., Res. 1265 (2013); North Bonneville, Wash., Res. 456 (2012); Stevenson, Wash., Res. 2013-256 (2013).

103. CASCADE LOCKS, Or., Res. 1265 (2013); North Bonneville, Wash., Res. 456 (2012); Stevenson, Wash., Res. 2013-256 (2013); *Three Cities’ Initiatives*, *supra* note 100.

104. 16 U.S.C. § 544b (2012). The Columbia River Gorge Compact is codified at OR. REV. STAT. ANN. § 196.150 (through end of the 2013 Reg. and Sp. Sessions) and WASH. REV. CODE § 43.97.015 (through all 2013 legislation).

105. 16 U.S.C. § 544a (2012).

as,¹⁰⁶ which have urban boundaries that the Commission may revise if the communities have met specified standards.¹⁰⁷ The urban areas are nominally exempt from the land use regulations under the National Scenic Area;¹⁰⁸ however, to qualify for an urban area boundary revision, the urban areas must demonstrate that the revision would be consistent with the purposes of and land use regulations for the National Scenic Area and that the revision “would result in maximum efficiency of land uses within and on the fringe of existing urban areas.”¹⁰⁹ These standards thus make the Scenic Area authorities indirectly applicable to urban areas.

Cascade Locks, North Bonneville, and Stevenson have specifically asserted that these authorities for the National Scenic Area authorize interstate intergovernmental cooperation necessary for the town’s economic development independent of state law restrictions.¹¹⁰ These cities are thus asserting a form of localism, that is, obtaining authority directly from federal law, which would preempt conflicting state law.

Localism is not new; however, it has received recent scholarly attention¹¹¹ following (but not all related to) the U.S. Supreme Court’s 2004 decision in *Nixon v. Missouri Municipal League*,¹¹² in which the Court concluded that the federal Telecommunications Act, which broadly preempts state and local laws that prohibit the ability of any entity to provide telecommunication services, did not preempt a Missouri state law that prohibited political subdivisions from providing telecommunication services.¹¹³ The Court started its analysis in *Nixon* with its well-trod preemption jurisprudence, stating that a federal act preempts state law when it contains an “unmistakably clear” statement to that effect.¹¹⁴ However, the Court did not apply this standard further.¹¹⁵ Instead, the Court’s analysis turned to other factors.¹¹⁶ Relevant to the *Three Cities’ White Paper*, the Court reasoned, in part that if the FCC did preempt the state restriction, “[t]he municipality would be free of the statute, but freedom is not authority, and in the absence of some further, authorizing legislation the municipality would still be powerless to enter the tel-

106. *Id.* § 544b(e).

107. *Id.* § 544b(f).

108. *Id.* § 544d(c)(5)(B).

109. *Id.* § 544b(f)(2)(B)–(C).

110. *Three Cities’ Initiatives*, *supra* note 100.

111. *See, e.g.*, Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); Colloquium, *Why the Local Matters: Federalism, Localism, and Public Interest Advocacy*, Papers from the Eleventh Annual Liman Colloquium at Yale Law School (2008), available at http://www.law.yale.edu/why_the_local_matters_final_122109.pdf; Laurie Reynolds, *A Role for Local Government Law in Federal-State-Local Disputes*, 43 URB. LAW. 977 (2011).

112. *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004).

113. *Id.* at 128.

114. *Id.* at 130 (citing *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991)).

115. *See id.* at 131–35.

116. *See id.*

ecomunications business.”¹¹⁷ The Court continued, “[t]here is, after all, no argument that the Telecommunications Act of 1996 is itself a source of federal authority granting municipalities local power that state law does not.”¹¹⁸ Preemption has always been more complicated than the presence or absence of an “unmistakably clear” statement; it has always depended on the interrelationship between the federal and state statutes at issue.¹¹⁹ Following *Nixon*, preemption may now also depend on the presence of other federal or state authority.¹²⁰

Cascade Locks’s, North Bonneville’s, and Stevenson’s initiatives are still in their infancy.¹²¹ There are too many unknown or undecided variables in those initiatives for this article to discuss whether the National Scenic Area Act is itself a source of authority for interstate intergovernmental cooperation such that it would preempt the different powers issue, other statutory differences between Oregon and Washington’s intergovernmental cooperation statutes,¹²² and specific state laws otherwise applicable to the cities’ initiatives. Nevertheless the initiative’s progress is worth watching because regardless of the preemption issue, the cities’ assertion that their cooperation implements the second purpose of the National Scenic Area Act, and thus the Columbia River Gorge Compact,¹²³ may overcome the problem of only Washington having a compact provision. In other words, the cities are suggesting that their agreements, which implement an existing compact, satisfy the purpose of the compact provision in Washington’s intergovernmental cooperation statute without needing to declare that each individual agreement is itself a compact.¹²⁴ This novel argument also overcomes the consent problem discussed above because the Gorge Compact already has the consent of Congress.¹²⁵ There should be no surprise that the agreement might have a “supra-state” effect because the Washington and Oregon courts have already acknowledged this in past jurisprudence relating to the National Scenic Area.¹²⁶

117. *Id.* at 135.

118. *Id.*

119. *See* *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

120. *See Nixon*, 541 U.S. at 135.

121. *See Three Cities’ Initiatives*, *supra* note 100.

122. For example, Oregon authorizes intergovernmental entities to issue revenue bonds. OR. REV. STAT. ANN. § 190.080(1)(a) (West, Westlaw through Ch. 80 of the 2014 Reg. Sess.). But Washington statutes contain no such authority.

123. *See supra* text accompanying notes 103, 104.

124. *See generally Three Cities’ Initiatives*, *supra* note 100.

125. *See supra* text accompanying note 104.

126. *E.g.*, *Columbia River Gorge Comm’n v. Hood River Cnty.*, 152 P.3d 997, 1003–04 (Or. Ct. App. 2007) (holding that Oregon’s 2004 Ballot Measure 37 does not apply in the National Scenic Area because the land use regulations in the National Scenic Area are required by federal law); *Klickitat Cnty. v. State*, 862 P.2d 629, 634 (Wash. Ct. App. 1993) (since the Gorge Compact was an instrument of federal law, “[t]he Commission’s land management plan and the act’s provisions relative to the plan are federally mandated.”).

Few border areas have an existing compact relating to land use planning that could serve as authority for interstate intergovernmental cooperation.¹²⁷ Thus, the cities' White Paper and resolutions to cooperate under the authority of the Columbia River Gorge National Scenic Area Act constitutes one example of the innovative thinking necessary for small towns to cooperate across state lines.

B. State Agreements and a Variance to Provide Emergency Services to Mill Creek Road

Northeastern Umatilla County, Oregon is rural—very rural.¹²⁸ The only reliable year-round access to its Mill Creek Road is from Walla Walla, Washington. In 2002, the Mill Creek Road area (officially Ambulance Service Area #6 (“ASA”)) generated approximately 4 calls per year.¹²⁹ Response time within the ASA from Milton-Freewater, Oregon is a minimum of 45 minutes; response from Walla Walla, Washington reduces that time to 20 minutes.¹³⁰

Providing faster emergency services to Mill Creek Road presented a statutory and regulatory problem for Umatilla County. Oregon statutes require a license from the Oregon Health Authority,¹³¹ and the cost of that license was approximately \$3,000 per year.¹³² Oregon Health Authority regulations do not require an out-of-state EMS provider to be licensed in Oregon when merely transporting a patient through the state (i.e., the patient does not originate in Oregon and is not being transported to a facility in Oregon), when transporting a patient from a facility in Oregon to a facility in another state, or when transporting a patient originating outside Oregon to a facility in Oregon.¹³³ None of those exceptions applied to the Mill Creek Road situation because the transportation of a patient from Mill Creek Road, Oregon to Walla Walla, Washington involved an out-of state EMS provider transporting a patient originating in Oregon to an out of state facility.

The road to cross-border emergency services illustrates the complexity of working in an area with conflicting state laws. In 1989, the

127. See, e.g., Tahoe Regional Planning Compact, codified at CAL. GOV'T CODE § 66800 (West 2013) and NEV. REV. STAT. § 277.200, consent granted by Pub. L. No. 96-551, 94 Stat. 3233, 3253 (1980); Delaware Valley Regional Planning Compact, codified at N.J. Stat. Ann. §§ 32:27-1 to 32:27-30 and 73 Pa. Cons. Stat. § 701, consent granted by Pub. L. No. 87-70, 75 Stat. 170 (1961).

128. *State & County QuickFacts Umatilla County, Oregon*, U.S. CENSUS BUREAU (Jan. 6, 2014, 17:37:09 EST), <http://quickfacts.census.gov/qfd/states/41/41059.html> (stating that Umatilla's population density was only 23.6 people per square mile in 2010).

129. Letter from Thomas W. Johnson, Dir., Ctr. for Env't and Health Sys., State of Or. Dep't of Human Servs. Health Div., to William S. Hansell, Chairperson, Umatilla Cnty. Bd. of Comm'rs, 2 (June 16, 2000) (on file with author).

130. *Id.*

131. OR. REV. STAT. ANN. §§ 682.045, 682.047 (West, Westlaw through Ch. 80 of the 2014 Reg. Sess.).

132. Letter from Thomas W. Johnson, *supra* note 129.

133. Or. Admin. R. 333-265-0070 (2012).

Washington Department of Social and Health Services and the Oregon Department of Health (now Oregon Health Authority) entered into an agreement authorizing “ambulance services from either state [to ...] transport a patient from that state into the other state, or they can transport a patient from the other state into their state.”¹³⁴ However, this agreement was ambiguous concerning the practice of emergency medical response and the handling of complaints registered against a transporting agency.¹³⁵ In 2000, when Umatilla County approached Walla Walla to provide services to the Mill Creek Road area, Walla Walla would not rely on the agreement. In 2002, Umatilla County thus sought a variance from the Oregon Health Authority to allow Walla Walla EMS personnel to serve that portion of Umatilla County, which the Oregon Health Authority approved.¹³⁶ That variance did not contain assurances concerning medical practice, risk, and authority that satisfied Walla Walla.¹³⁷ Subsequently, the states clarified the 1989 Agreement,¹³⁸ which satisfied Walla Walla’s concerns. Only then did Umatilla County and Walla Walla finalize their agreement for Walla Walla to provide ambulance services to the Mill Creek Area of Umatilla County.¹³⁹

Unlike the three cities considering how to preempt state law, Walla Walla, Umatilla County, and the states’ health agencies worked together on an innovative outside-the-box solution within existing state statutes and regulations. To the extent state agencies can broadly interpret their authorities or grant case-by-case variances, they can facilitate common-sense outcomes and overcome conflicting state laws. However, state agencies must be alert to do so comprehensively, clearly, and in a timely manner.

VI. CONCLUSION

A resilient community has redundancies and is interdependent on other communities. Yet, not all communities have the same opportunities to use intergovernmental agreements to create resiliency. Border communities that have no intrastate neighbors must rely on shared ser-

134. Agreement between State of Wash. Dep’t of Soc. & Health Servs. Emergency Med. Servs. and State of Or. Dep’t of Health Emergency Med. Servs. (Mar. 8, 1989) [hereinafter Agreement] (on file with author). This agreement is a type of interstate intergovernmental agreement. There is no mention of the agreement being considered an interstate compact as Wash. Rev. Code Ann. § 39.34.040 (West 2013) requires.

135. See Bd. of Comm’rs of Umatilla Cnty., Order No. BCC2002-38 (Oct. 16, 2002) (on file with author).

136. Letter from Thomas W. Johnson, *supra* note 129.

137. City of Walla Walla, Agenda Item History Sheet (Nov. 20, 2002) (on file with author).

138. Memorandum from Elizabeth E. Morgan, Program Representative, NREMT-P, to Grant Higginson, Acting Adm’r, OPHS, et al. (Oct. 7, 2002) (on file with author).

139. Agreement, *supra* note 134.

vices and joint infrastructure with communities in the adjoining state; however, the differences in the states' authorities for interstate intergovernmental agreements and conflicting state statutes and regulations limit opportunities for cross-border cooperation.

Statutory authorities for mutual aid agreements and assistance are broad and overcome many of the hurdles posed by statutory and regulatory differences in times of emergency, but these statutes presume that communities have the basic services and infrastructure that they can use to provide that emergency aid. Interstate intergovernmental agreements are a critical component to ensuring that basic level of services and infrastructure. As part of creating resilient communities, states must review their internal law to eliminate barriers to interstate cooperation or be willing to help or step out of the way of communities working for themselves.