
MOBILE CAPITAL, LOCAL ECONOMIC REGULATION, AND THE DEMOCRATIC CITY

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MOBILE CAPITAL, LOCAL ECONOMIC REGULATION, AND THE DEMOCRATIC CITY

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This Article examines local efforts to regulate mobile capital. Despite the conventional wisdom that subnational governments cannot effectively control or redistribute capital, cities have increasingly sought to do just that. This Article describes these efforts, which include putting conditions on the entry of development dollars through contract, excluding capital through anti-chain and anti-big box store laws, and redistributing from capital to labor through local minimum wage laws and other labor-friendly legislation. The Article describes the economic and political factors that have given rise to these local regulatory efforts and assesses the viability of local regulation of mobile capital. In the course of doing so, I argue that the mobility of capital drives a set of local political pathologies, all of which revolve around the governmental promotion of, participation in, and subsidization of private commercial enterprise. Geographically fixed cities are inclined both to give too much away in trying to attract mobile capital and to extract too much from capital once it has become fixed in place. These two political problems — giveaways and exploitation — explain the historical development of local government law as well as current approaches to the division of labor among city, state, and federal levels of government. The new “regulatory localism” challenges the proposition that industrial policy, redistribution, and other responses to global economic restructuring must be addressed at the national level. It also challenges the proposition that local economic development policies must necessarily be biased in favor of corporate capital.

INTRODUCTION

This Article examines municipal efforts to control, regulate, and redistribute mobile capital. The conventional economic story is that it is quite difficult (and counterproductive) for subnational governments to attempt to control capital flows or engage in redistribution.¹ Local governments are said to be particularly disabled because they are relatively small and cannot easily control migration across their borders. Because of interjurisdictional competition, local governments have a

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¹ See Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U. L. REV. 1057, 1058 (2007) (discussing literature on the prevailing orthodoxy). See generally WALLACE E. OATES, *FISCAL FEDERALISM* (1972); PAUL E. PETERSON, *CITY LIMITS* (1981); PAUL E. PETERSON, *THE PRICE OF FEDERALISM* (1995).

relatively limited set of policy choices. Mobile capital will flee aggressive efforts to regulate it. Thus, urban politics must invariably be biased in favor of mobile capital — cities must be “business friendly” — while robust economic regulation must necessarily take place at a higher level of government. More importantly, territorially limited local jurisdictions can only weakly counter large-scale processes like deindustrialization, suburbanization, and globalization. While potentially painful, plant closings, the movement of manufacturing to the South or overseas, the movement of persons out of old, cold cities to new, warm ones, or out of cities into suburbs, are unavoidable consequences of relatively open economic markets.²

Cities nonetheless have long sought to entice mobile capital. They have also attempted to constrain or redistribute capital once in place. The latter is my focus here, as cities have recently engaged in a flurry of efforts to redistribute capital, place conditions on it, or limit its entry. These efforts include municipal minimum and living wage ordinances, local labor laws, and anti-chain and anti-big box store zoning ordinances. Moreover, local nonprofits — often in conjunction with organized labor or national antipoverty groups — have begun to negotiate community benefits agreements that require developers to comply with neighborhood demands or face political opposition. Local groups have also prevented the entry of large, national retailers altogether. These “site-fights” have attracted a great deal of attention in no small part because Wal-Mart — the largest private employer in the world — has been a chief target.³

These initiatives and movements are small but notable because they tend to cut against the conventional economic and political wisdom. Indeed, despite the standard view that economic regulation cannot take place at the local level, cities are the main innovators. This fact should not be entirely surprising. Cities have always played a more significant regulatory role than most commentators appreciate,⁴ though this role has been muted in the last century as federal and state governments have expanded and the great industrial cities have declined.

Despite these trends (which show no signs of abating), the new “regulatory localism” indicates that cities might be able to pursue poli-

² I discuss the extent to which local economic markets actually are open in a previous article. See Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091 (2008) (describing how localities seek to control the flow of persons, goods, and capital across borders).

³ See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1087–93 (2005).

⁴ See WILLIAM NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996) (analyzing the regulatory role of local governments in nineteenth-century America).

cies that are less biased toward mobile capital. This potential is encouraging, for it suggests that locals may be able to adopt policies that are responsive to values other than economic growth, that cities may be able to regulate capital in order to reduce their vulnerability to economic booms and busts, and that those citizens who are normally marginalized by a politics of capital attraction can still assert influence over economic policy, even in an increasingly globalized economic environment.

That local redistributive activities are taking place does not mean that the conventional wisdom is wholly wrong, however. Mobile capital, with its propensity to flee regulation, undoubtedly shapes the political economy of local government. Indeed, this Article argues that many features of local government law (and federalism more generally) are best understood as responses to this problem. I argue that the current legal limits on city power and the division of authority between cities and states are best understood as a reaction to the political pathologies that arise from the city-business relationship. Those who write about the division of authority among levels of government often miss this central insight; when lawyers debate the vertical distribution of powers, they often do not see that distribution as a proxy for regulating the relationship between private capital and public power.

That is not to say that urban reformers have not addressed or have not viewed this relationship as a central concern. The history of the development of the modern city and the law's attempts to regulate it show a fairly clear-eyed understanding that business and the city are interdependent — that capital uses the city to promote private agendas and that the city uses capital to promote public ones. The result has been doctrinal vacillation: a legal structure that privileges private economic ordering but that is ambivalent about how public power should be used to promote, develop, and otherwise attract economic resources. The conventional economic wisdom is thus correct insofar as it places private capital at the heart of the city's political economy; it is wrong insofar as it assumes that the law is not particularly relevant. The lawyers, in contrast, sometimes misstate the purpose of the distribution of power among levels of government, justifying it in terms of efficiency or local self-government, when much of what federalism or localism is attempting to do is address (often unsuccessfully) the problem of city-business relations.

This Article is divided into four parts. Part I identifies the economic and political problem of mobile capital and how it has influenced the law and politics of local government. Geographically fixed cities are inclined both to give too much away in trying to attract mobile capital and to extract too much from capital once it has become fixed in place. These two political pathologies — giveaways and exploitation — arise from the city's particular economic and spatial predicament. Cities cannot move, and their ability to adjust to new economic

conditions is limited by existing infrastructure and the embedded nature of the built environment. What cities do have is land and location: economic development has to happen “in place” — and “place” (land plus location) is an asset that is relatively fixed.⁵ Much about the development of the municipal corporation as a public institution distinct from private corporations, the limitations on local power and the counter-development of home rule in the late nineteenth and early twentieth centuries, and the dominance of the property tax as a means for funding local services can be attributed to this economic and spatial reality.

Part II examines and describes recent local efforts to control mobile capital. As I have already observed, these efforts are notable because they are taking place at the municipal level. The Article looks at three kinds of local efforts: (1) efforts to put conditions on capital entering the city (often through contracts); (2) efforts to adopt local laws that favor labor over capital (such as minimum wage laws); and (3) efforts to prevent capital from entering altogether (such as anti-chain store laws). No doubt, city-specific economic and political concerns are driving these efforts; individual municipalities’ attempts to regulate capital are by definition parochial. But these efforts are also connected politically and pragmatically by an overarching urban economic reform project. Local economic reform efforts seek to leverage the economic advantages of particular geographic places and use those advantages to resist incursions by mobile capital or extract concessions from it. These efforts — often occurring outside the traditional political process — represent attempts to make local claims on transnational corporate actors and assert some control over them. These efforts thus evoke a deep anticorporate tradition in American law and politics; that tradition sees a direct link between democracy and economy, and it fears the corrosive effects of certain forms of corporate capital on the local democratic process.⁶

Part III identifies three forms of leverage available to locals as they challenge business’s traditional primacy: sticky capital, translocal networks, and an ideology of economic localism. The stickiness of capital — its limited mobility under certain circumstances — explains how municipal efforts that seek to control, regulate, or redistribute capital might succeed despite the conventional economic wisdom. Translocal networks refers to the ways in which national and local nonprofit organizations have inserted themselves into the local economic develop-

⁵ See JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 17–49 (1987); Audrey G. McFarlane, *Race, Space, and Place: The Geography of Economic Development*, 36 *SAN DIEGO L. REV.* 295 (1999).

⁶ These effects are often described in terms of “democracy deficits.” ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT* 3 (2004).

ment calculus, normally dominated by city-business alliances. And an emergent discourse of economic localism provides some justification and ideological support linking the otherwise disparate strands of this political and legal movement.

Finally, Part IV considers the development of the localist political economy described in Parts II and III in the context of wider debates about the efficacy or desirability of decentralization.⁷ Not only the economic discourse, but also the current legal discourse tends to be skeptical of the exercise of municipal power. Limiting local power is seen as a means of protecting vulnerable property owners; cities are properly constrained by legal doctrines intended to prevent their officers from overcommitting resources to corporate capital or redistributing resources from one group to another. A competing (but minority) view, by contrast, understands the threat to individual rights and democratic norms not as originating with a corrupt local government, but rather with the power and strength of capital itself. Mobile capital distorts local decisionmaking. On this view, the local democratic public is the vulnerable party.

The political pathologies of the city-capital relationship are and should be front and center in these debates. Though often invisible to the legal scholarship on federalism, the relationship between capital flows and democratic governance has been a longstanding preoccupation of urban political theorists. Urban scholars tend to understand local political power through the lens of the city's relationship to private asset holders; the law and politics of local government can be understood as an ongoing effort to define and regulate the relationship between city and business.⁸ On this account, the question of how

⁷ See, e.g., Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter Briffault, *Localism: Part II*]; Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991); Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542 (2006) (explaining the causes and consequences of the persistent weakness of the mayoralty in American cities); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000) (book review).

⁸ See generally STEPHEN L. ELKIN, *CITY AND REGIME IN THE AMERICAN REPUBLIC* (1987); SUSAN S. FAINSTEIN ET AL., *RESTRUCTURING THE CITY* (1983); BARBARA FERMAN, *CHALLENGING THE GROWTH MACHINE* (1996); LOGAN & MOLOTCH, *supra* note 5; PETERSON, *CITY LIMITS*, *supra* note 1; *THE POLITICS OF URBAN DEVELOPMENT* (Clarence N. Stone & Heywood T. Sanders eds., 1987); DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* (2003); H.V. SAVITCH & PAUL KANTOR, *CITIES IN THE INTERNATIONAL MARKETPLACE* (2002); CLARENCE N. STONE, *REGIME POLITICS* (1989). Marxian urban theorists have long argued that the city is a product of the struggle between capital and labor, placing the reproduction of capitalist social relations at the center of urban politics. See, e.g., DAVID HARVEY, *THE*

power is allocated among levels of government (a question that tends to be the central preoccupation of legal scholars) is secondary to the question of how government power is allocated vis-à-vis capital — in particular, vis-à-vis large-scale, mobile capital.

The post-New Deal consensus — both economic and legal — is that industrial policy, redistribution, and other responses to economic restructuring are primarily national concerns, and that local efforts are necessarily limited and likely to fail. Meanwhile, critics of conventional urban economic development policy argue that these policies primarily advance the interests of corporate capital (often at the expense of labor or the poor) and that the legal and political regimes that underlie economic development — based as they are in the protection of private property and the fostering of markets — mask this redistributive bias.

Local reformist regulatory orders challenge both of these propositions. No doubt, local economic policy is limited by the imperatives of the private enterprise system. And the national government — and to a lesser extent, states — are still the main sites for economic regulation and income redistribution. Nevertheless, the potential contours of local economic policy are less constrained than usually thought. This Article explains why. In so doing it also begins to answer a central question of democratic theory: to what extent local, territorially based governments can govern in an age of global capital flows.

I. MOBILE CAPITAL AND LOCAL GOVERNMENT LAW

The problem of mobile capital, as it is conventionally understood, is the problem of capital flight. Governments in a capitalist system depend on private economic activity to generate prosperity and well-being for their citizens, but they appear to have limited capacity to influence capital flows. In a free market system, capital cannot be commanded by government — it must be cajoled. Moreover, labor and wage markets tend to overwhelm government policies intended to develop and preserve local sources of economic development. And finally, interjurisdictional competition for mobile capital may limit any given government's ability to regulate capital or engage in redistribution.

Mobile capital drives the law and politics of local government.⁹ First, the basal fact of capital mobility underlies the currently domi-

LIMITS TO CAPITAL 417–19 (Verso 2006) (1982). For classic discussions of urban economy, see JANE JACOBS, CITIES AND THE WEALTH OF NATIONS (1984); and JANE JACOBS, THE ECONOMY OF CITIES (Vintage Books 1970) (1969).

⁹ See ELKIN, *supra* note 8, at 33 (“Understanding contemporary city politics is largely an exercise in grasping the implications of the structural factors that define (1) the powers of cities, (2) the prerogatives of asset holders, and (3) the relations between them.”); see also ALAN ALTSHU-

nant account of city power — the view that cities are comparatively weak political institutions, limited in their policy options by the need to attract and retain private investment. Second, and related, the mobility of capital drives a set of local political pathologies, all of which revolve around the governmental promotion of, participation in, and subsidization of private commercial enterprise. Cities are inclined to give away too much to attract mobile capital or, to a lesser extent, to extract too much from place-dependent capital. The historical development (and current state) of local government law can be understood as a series of reformist responses to these problems of government-business relations. This is not to say that the political pathologies of government-business relations are unique to cities — only that they are most sharply drawn in this context.

The first two sections of this Part describe the conceptual relationship between mobile capital and the city. The second two sections place that relationship in its historical context. The historical claims are admittedly broad-brush — I do not attempt a thorough review of the history of the relations between capital and democracy at the local level. That history has been treated in depth elsewhere.¹⁰ But to the extent that we are inheritors of a nineteenth- and early-twentieth-century conception of city-business relations, an understanding of those origins — however schematic — is helpful.

A. *The Limited City*

For many urban theorists the city's dependence on mobile capital is its defining feature.¹¹ In Paul Peterson's original account of the "limited city" — which still dominates the literature on urban power — urban politics is constrained by the city's overriding need to attract capital and labor.¹² The city has a limited set of regulatory tools it can use to do so. Unlike nation-states, cities cannot control capital and labor flows directly, so they must try to do so indirectly, and always in competition with other cities. Local politics occurs on a relatively nar-

LER & DAVID LUBEROFF, MEGA-PROJECTS 1 (2003) ("[L]ocal politics has always been an aspect of business — a way of bringing government power to bear in support of private investment opportunities.").

¹⁰ See, e.g., GERALD E. FRUG, CITY MAKING (1999); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER (1983); JON C. TEAFORD, THE MUNICIPAL REVOLUTION IN AMERICA (1975) [hereinafter TEAFORD, MUNICIPAL REVOLUTION]; JON C. TEAFORD, THE RISE OF THE STATES 21 (2002); JON C. TEAFORD, THE UNHERALDED TRIUMPH (1984); SAM BASS WARNER, JR., THE PRIVATE CITY (2d ed. 1987).

¹¹ See K.R. Cox, *The Local and the Global in the New Urban Politics: A Critical View*, 11 ENV'T & PLAN. D: SOC'Y & SPACE 433, 437–41 (1993) (describing this literature); William J. Grimshaw, *Revisiting the Urban Classics: Political Order, Economic Development, and Social Justice*, 24 POL'Y STUD. J. 230, 233–34 (1996) (same).

¹² See PETERSON, CITY LIMITS, *supra* note 1, at 15.

row stage: cities have no choice but to privilege developmental — that is, growth-oriented — policies over redistributive ones. To do otherwise is to precipitate the flight of mobile taxpayers to other jurisdictions. Decisionmaking in the city is thus relatively constrained — “policy choices” are “limited to those few which can plausibly be shown to be conducive to the community’s economic prosperity” — that is, those conducive to retaining or enhancing the position of capital.¹³ The city is in a relatively weak position vis-à-vis other political and economic institutions; its policy options are a function of economic circumstances, many of which are out of the city’s immediate control.

The weak or limited city is an ongoing trope of urban and local government law theorists. Gerald Frug’s seminal article on city powerlessness¹⁴ — written around the same time Peterson was developing his idea of the limited city — is the most well known. Frug too claims that cities are relatively weak because they cannot control their economic destiny, observing along with Peterson that the city’s health and welfare depends on “the willingness of taxpayers to locate or do business within city boundaries.”¹⁵ In contrast to Peterson, however, who emphasizes the economic constraints on city power, Frug attributes the city’s inability to control its future development to the legal and political limitations imposed on it by the state and federal governments.¹⁶ State and federal law controls much of what cities can do: cities are told when, how, and under what circumstances they can raise money through taxation; how much debt they can incur; what enterprises they can and cannot run; and often, what laws they can adopt. These limits on city power, Frug argues, are the product of a liberal ideology that equates local power with “corruption, patronage, and even foolishness.”¹⁷

Though significantly different in emphasis, Peterson’s and Frug’s stories of city weakness share a common foil — mobile capital, specifically business or corporate capital. The city-business relationship is thus central to understanding local power. For Peterson, city governance requires operating within an existing economic system that is powered by private commercial activity — economic development therefore is and must be the preoccupation of city leaders.¹⁸ For Frug, by contrast, the fact that private capital can dictate terms to the city is galling. In his telling, the city was neutered by a conceptual distinc-

¹³ GAR ALPEROVITZ, *AMERICA BEYOND CAPITALISM* 48 (2005) (quoting PETERSON, *CITY LIMITS*, *supra* note 1, at 30).

¹⁴ See Frug, *supra* note 7.

¹⁵ *Id.* at 1064.

¹⁶ See *id.* at 1062–63.

¹⁷ *Id.* at 1067.

¹⁸ See PETERSON, *CITY LIMITS*, *supra* note 1, at 15.

tion between public and private that accompanied the rise of the liberal state. In an economic and political system directed toward the protection of private property, the business corporation gained power and the municipal corporation lost it.¹⁹

I will say a little more about the development of the public/private distinction later. For now, I want to emphasize two general points. First, as the debate suggests, the extent to which law plays a role in creating powerless cities is disputed. For some urban scholars, like Peterson, economic limitations dominate. For others, like Frug, the legal and conceptual constraints are much more determinative. What they share, however, is the view that local democratic decisionmaking is importantly constrained.²⁰

My second point is that these constraints are a result of the bifurcation of state and market in the context of an economy that now operates on a global scale. The perceived inability of cities to govern has been a central feature of the post-industrial American city; discontent with transnational corporate power has continued apace. As the transformation of the American economy accelerates, we continue to witness the seeming inability of local political institutions to maneuver in a field dominated by powerful (or at least footloose) economic ones.

B. Giveaways and Exploitation

That footlooseness drives a set of local political pathologies related to the governmental promotion of, participation in, and subsidization of private commercial enterprise. The political problems of giveaways and exploitation are a function of the city's dependence on incoming and ongoing investment. The city's ability to adjust to economic circumstances is limited by its fixed nature. Nevertheless, economic investment and development has to happen *somewhere* — on land and in a particular location. "Place" is an asset that is relatively fixed.²¹

The cajoling of capital to the city was (and continues to be) an essential feature of urban politics. Urban "boosters," who came of age in the early nineteenth century, built American cities out of greed and optimism — the certain belief that local investment would reap rewards.

¹⁹ See Frug, *supra* note 7, at 1099–1102.

²⁰ See *id.* at 1062; see also David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 J.L. & POL. 261, 261 (2005) (arguing that "[t]he form of local power most cities and towns possess grants them only limited authority"). But see Briffault, *Localism: Part II*, *supra* note 7, at 1355 (arguing that while large cities are severely limited in their actions, suburban municipalities are sometimes able to exercise autonomy).

²¹ Susan E. Clarke, *'Precious' Place: The Local Growth Machine in an Era of Global Restructuring*, 11 URB. GEOGRAPHY 185, 185 (1990). Professors John Logan and Harvey Molotch discuss the multiple aspects of place in LOGAN & MOLOTCH, *supra* note 5, at 17–49. They describe urban politics as an ongoing conflict between those in the city who seek to maximize land's "use" value and those who seek to maximize land's "exchange" value. *Id.* at 35.

“Boosters sought to make their visions come true by conveying just this certainty to investors and merchants who might set up shop in the place being promoted.”²² The idea was to take land and turn it into money through proximity — to natural resources, goods, and most of all, to other people and firms. As early boosters knew very well, the city is a self-fulfilling prophecy: there was sometimes no particular reason that a given small settlement developed into a great metropolis when other small settlements did not. Natural advantages made a difference in urban growth. Proximity to trade routes and the availability of transportation lines also did — sometimes definitively.²³ But so did the simple belief that the city would prosper and the resultant self-reinforcing economic effects of in-migration and settlement.²⁴

The booster is the forerunner of the sophisticated politics of capital attraction and retention that is embodied in Harvey Molotch’s image of the “city as growth machine.”²⁵ The growth machine thesis holds that “[c]oalitions of land-based elites . . . drive urban politics in their quest to expand the local economy and accumulate wealth.”²⁶ As Stephen Elkin writes:

Given the manner in which officials get elected, the prerogatives of private controllers of assets, the limits on a city’s ability to affect and exercise property rights, and the need for cities to raise money in private credit markets, city officials will naturally gravitate toward an alliance with businessmen, particularly land interests, and such an alliance will naturally be devoted to creating institutional arrangements that will facilitate investment in the city.²⁷

The modern political players are heirs to the original city boosters: land developers and speculators, real estate agents, local lawyers, the local building trades, newspaper editors, merchants, and local chambers of commerce. Growth politics dominates local government; land-based urban development is a defining feature of the municipal political economy.²⁸

Thus, giveaways, which are efforts to attract mobile capital through direct or indirect subsidization, have been of historical and

²² WILLIAM CRONON, *NATURE’S METROPOLIS* 35 (1991).

²³ *Id.*; see Edward L. Glaeser, *Urban Colossus: Why is New York America’s Largest City?*, FED. RES. BANK N.Y. ECON. POL’Y REV., Dec. 2005, at 7, 7, available at <http://www.newyorkfed.org/research/epr/05v11n2/0512glae.pdf> (arguing that New York City’s dominance is due in large part to its geography).

²⁴ CRONON, *supra* note 22, at 34–35.

²⁵ Harvey Molotch, *The City as a Growth Machine*, 82 AM. J. SOC. 309, 309 (1976); see also LOGAN & MOLOTCH, *supra* note 5, at 50.

²⁶ Andrew E.G. Jonas & David Wilson, *The City as a Growth Machine: Critical Reflections, Two Decades Later*, in *THE URBAN GROWTH MACHINE* 3, 3 (Andrew E.G. Jonas & David Wilson eds., 1999) (citing Molotch, *supra* note 25).

²⁷ ELKIN, *supra* note 8, at 42.

²⁸ See sources cited *supra* note 8; see also Schragger, *supra* note 2, at 1133.

continuing concern. Particularly in the mid- to late 1800s, burgeoning towns and cities sought to attract outside investment — primarily in the form of railroad construction — and rushed to commit public monies to entice it to their respective jurisdictions. The municipal bond default crisis that followed saw cities unable to pay off their debts when the promised investment did not materialize or when it failed to bring the promised benefits. Public monies were also committed to a raft of public works projects, often to the benefit of business interests and again often with poor returns to the general public. No doubt the nineteenth-century city brought significant public improvements as city services expanded to meet the needs of a growing populace.²⁹ Nevertheless, the municipal defaults of the late 1800s led many to believe that local governments could not be trusted with their finances.

The modern equivalents of the nineteenth-century giveaways to railroads and public utilities are public subsidies to retail and industry. The growth machine is at work in the deployment of tax subsidies to speed Wal-Mart's entry into a community, in the building or improving of stadiums to attract or retain a professional sports franchise, in the use of relocation subsidies and tax breaks to attract a new manufacturing plant, in the competition among local governments for major shopping malls, and in the use of public monies to underwrite mixed-use residential and commercial developments.

Exploitation is the flip side of the problem of giveaways. Cities depend heavily for revenue on fixed assets, that is, assets that are unlikely to flee. This is the reason that local governments rely on the property tax for the bulk of their local revenue — land cannot move across the city line. But this means that cities have a tendency to take advantage of place-dependent capital. Cities are inclined to extract as much as possible from less mobile capital while courting more mobile capital. Thus, the property tax can be a mechanism for cities to extract too much from relatively nonmobile taxpayers, particularly if politicians have short-term economic time horizons. In the context of a politics of capital attraction and retention through land-based development, the exploitation of place-dependent capital can be as much of a problem as giveaways to more mobile capital.

Cities face limits on their ability to exploit — as Vicki Been has observed, existing residents and firms can ultimately flee if the city is taking advantage of them.³⁰ Nevertheless, the siting of relatively permanent structures — homes, businesses, plants — entails risk. Local

²⁹ See TEAFORD, *THE UNHERALDED TRIUMPH*, *supra* note 10, at 103.

³⁰ Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 506–11 (1991); see also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

dependence — the need for spatial stability — is unavoidable,³¹ the more so for those who are or will become attached to a particular location out of commercial necessity, emotional or familial connections, or lack of alternatives.³² Place-dependent investors are more vulnerable than less restricted investors.³³ Undiversified owners of real property — the bulk of American homeowners — thus tend to worry a great deal about the tax and spending habits of municipal governments.³⁴ Relatively place-dependent residents and firms have strong incentives to exercise influence in the local political process. They also have strong incentives to limit the city's ability to exploit them once they have located there.³⁵

The mobile/immobile distinction can be fluid. Capital is highly mobile before it is transformed into a site-specific asset. After buildings, plants, or houses are constructed or individuals settle into a jurisdiction, however, capital may become relatively less mobile. That being said, when I refer to mobile capital, I am talking about a category of individuals or firms who are relatively unconstrained geographically because transport costs and trade barriers are minimal, relocation costs are low relative to wealth, or skills are highly portable. Capital mobility is a function of the elimination of geographic barriers to the movement of assets around the globe, whether or not those assets are currently fixed. Even when invested in site-specific assets, capital is mobile to the extent it can still credibly raise the threat of exit and to the extent that it will and is able to exit if it is economically advantageous to do so.

Why should capital mobility be a problem? The free flow of resources across political boundaries is conventionally thought to enhance efficiency, at least if that flow is not distorted by government policies. But even the government subsidization of private enterprise might be beneficial on balance — subsidies are always defended on the ground that they will contribute to the city's overall welfare. The efficacy of giveaways, however, is not my primary focus here. First, whether subsidies are good or bad from a policy perspective, the redistribution of monies from taxpayers to private enterprise — even if private enterprise produces positive externalities — can itself be prob-

³¹ See Cox, *supra* note 11, at 437; see also Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 859–63 (1992) (arguing that firms are less mobile than theory provides).

³² See generally WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* (2001) (arguing that homeowners are especially affected by and able to affect local government policy as a result of their special stake in the value of their homes).

³³ See *id.* at 10–12; see also Paul Krugman, Op-Ed., *Home Not-So-Sweet Home*, N.Y. TIMES, June 23, 2008, at A21.

³⁴ See FISCHER, *supra* note 32, at 4–6.

³⁵ *Id.*

lematic. The entire history of the public purpose doctrine in local government law is a debate about the legitimacy of public monies being used to fund private business.³⁶

Second, though it is an empirical question whether current-day subsidies are welfare-enhancing (and the studies are decidedly mixed),³⁷ what we know from the history of local government is that they have often turned out poorly. Public officials tend to have short time horizons. Even if they are acting honorably, they may engage in giveaways because economically they have little choice or because politically they need to be seen as doing something to enhance local competitiveness. And whether subsidies are welfare-enhancing in the short term does not solve the main problem — the boom and bust cycle. Once mobile capital is attracted it can then leave; this volatility has substantial negative effects given that the city is fixed in place and residents' ability to relocate lags or is limited.

One could argue — relying on Charles Tiebout³⁸ — that competition among cities for firms should generate efficient outcomes. If cities are operating in a market in which subsidies and taxes are the currency, then cities get exactly the amount of development they desire and will neither give away nor extract too much. But market flaws may be rampant. For giveaways, the flaw might be a race to the bottom or the externality generated by fiscal competition.³⁹ A city may seek to subsidize a firm not because the firm's presence adds to the local tax base, but rather because the firm will otherwise locate in a neighboring city, thus siphoning off consumers and workers and causing a decrease in the first city's tax base. Local decisions generate pervasive spillovers, both negative and positive.

Moreover, the market analogy is misleading. The city is not a preexistent entity that sells location services, but rather a result of cumulative location decisions.⁴⁰ Unlike in a Tieboutian regime, in which cities offer services and residents "purchase" them in the local govern-

³⁶ See, e.g., *Kelo v. City of New London*, 545 U.S. 469 (2005). For a discussion of the rise and fall of the public purpose requirement, see RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 639–48 (2009).

³⁷ See BRIFFAULT & REYNOLDS, *supra* note 36, at 647–48.

³⁸ See generally Tiebout, *supra* note 30.

³⁹ There is ample debate about whether local governments are locked in a race to the bottom or a race to the top. The conventional view is that they are locked in a race to the bottom, though this is disputed by William Fischel, see FISCHEL, *supra* note 32, at 3, and others, see, e.g., Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

⁴⁰ See Hans Jarle Kind et al., *Competing for Capital in a 'Lumpy' World*, 78 J. PUB. ECON. 253, 254–55 (2000); Paul Krugman, *The Role of Geography in Development*, 22 INT'L REGIONAL SCI. REV. 142, 143–45 (1999). For an argument that cities are an economic process, see Richard Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. (forthcoming 2010) (on file with the Harvard Law School Library).

ment marketplace by moving there, cities in the real world are a product of — and exist only because of — the presence of economy-producing firms and the residents who choose to live there. That does not mean that competition is not occurring — local governments *are* competing within a very narrow range. But even when cities do “compete,” they do not do so in a vacuum.⁴¹ In contrast to Tiebout’s idealized world, where there is no cost to a local jurisdiction if it attracts only a small number of firms or residents, in the real world there are huge costs to local governments if they “lose” the interlocal competition for job-producing firms.⁴² Moreover — and again in contrast with Tiebout’s model — firms as well as residents are unequally mobile, so cities can arguably benefit by redistributing from less mobile residents and firms to more mobile residents and firms — thus, the problem of giveaways and exploitation.

Two recent Supreme Court decisions illustrate these latter dynamics. In *DaimlerChrysler Corp. v. Cuno*,⁴³ the Court held that Toledo residents did not have standing under the dormant commerce clause to challenge the location subsidies the city granted DaimlerChrysler to keep a Jeep plant in the city.⁴⁴ And in *Kelo v. City of New London*,⁴⁵ the Court declared that a city could condemn a nonblighted neighborhood and transfer the land to a private developer as long as the city had a legitimate economic development purpose.⁴⁶ In light of the dynamics of capital mobility, it is no surprise that a declining city like Toledo would tax its existing residents to subsidize the retention of a

⁴¹ See generally Masahisa Fujita & Paul Krugman, *The New Economic Geography: Past, Present, and the Future*, 83 PAPERS REGIONAL SCI. 139 (2004); Krugman, *supra* note 40 (discussing the “new economic geography,” *id.* at 143).

⁴² That cities *do* make tradeoffs — between a preference for redistribution to the poor and the need to attract mobile capital, for example — does not constitute a “market” in location. The structure of that tradeoff is contingent on the public/private distinction — private firms operate independently from public “location providers,” but these “location providers” are dependent on the jobs and tax revenue that private firms provide. This structure is not necessary, however. The location decisions of private firms do not necessarily have to dictate the funds available for local public goods — that provision could be independent of where private firms choose to locate in geographical space. Compare *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that differentials in spending per pupil that were a result of differentials in local governments’ tax bases did not violate the Equal Protection Clause), with *Robinson v. Cahill*, 287 A.2d 187 (N.J. Super. Ct. Law Div.) (holding that differential spending based on local property tax bases violated state educational guarantees), supplemented, 289 A.2d 569 (N.J. Super. Ct. Law Div. 1972), modified, 303 A.2d 273 (N.J. 1973). Indeed, in Tiebout’s stylized world, the competition among governments for residents does not reduce the ability of localities to provide particular amenities. There is no cost to a Tieboutian jurisdiction if it attracts only a small number of firms or residents; the only consequence is that the jurisdiction is smaller, which would be understood as a benefit by its residents.

⁴³ 547 U.S. 332 (2006).

⁴⁴ *Id.* at 338.

⁴⁵ 545 U.S. 469 (2005).

⁴⁶ *Id.* at 483–90.

manufacturing plant and that New London would use eminent domain to assemble land to attract a large-scale residential-commercial development. Whether or not these are good policies, they are rational responses to those respective cities' fiscal positions.⁴⁷ The political dynamic, however, is one that pits relatively mobile against relatively immobile capital. Giveaways must be financed, and they are often financed by existing property taxpayers. Indeed, I have argued elsewhere that contrary to standard political expectations, local jurisdictions often foist benefits on nonvoting outsiders and impose costs on voting insiders.⁴⁸ Over-attentiveness to mobile capital explains this counterintuitive public choice result.

Following Peterson, urban theorists often speak of developmental versus redistributional spending.⁴⁹ According to conventional wisdom, developmental spending does not precipitate capital flight, for it constitutes an investment in the city, while redistributional spending does. The problem with these categories, however, is that they do not tell us anything about city spending or the characteristics of the assets being pursued by the city. Redistribution is normally associated with social welfarist or income redistributive policies — the movement of money from rich to poor. But cities engage in large-scale activities that shift money from one taxpayer to another, often in the other direction. Economic development takings of the kind used in *Kelo* and relocation incentives of the kind used in *Cuno* redistribute from current property owners to future businesses, for example. The trick is figuring out which forms of redistribution contribute to the city's welfare and which do not — the "city's welfare" itself being an abstraction defined by the inward or outward flow of capital.⁵⁰

The political and economic problem is not redistribution per se. Instead, the political and economic concern should be with how cities interact with particular kinds of resident and nonresident assets. Giveaways and exploitation are defined in relation to the relative mobility of the affected actor, thus highlighting the political relationship between mobile and immobile residents and firms. The urban political dynamic involves attracting, retaining, and exploiting economic resources — attraction and retention apply to relatively mobile capital; exploitation is what happens to relatively place-dependent capital.

⁴⁷ I have argued elsewhere that *Kelo* was correctly decided, at least in the context of the Court's eminent domain jurisprudence. See Schragger, *supra* note 2, at 1143.

⁴⁸ See *id.* at 1144–46.

⁴⁹ See PETERSON, CITY LIMITS, *supra* note 1, at 131–49, 167–83. Peterson's third (and largest) category is allocational spending, which essentially refers to all developmental spending that is politically contested. See *id.* at 150–66.

⁵⁰ See generally Kevin R. Cox, *Globalisation, Competition and the Politics of Local Economic Development*, 32 URB. STUD. 213 (1995) (providing an overview of the New Urban Politics); Gillette, *supra* note 1 (analyzing and evaluating mechanisms of local redistribution).

*C. Reformist Responses to the Problems
of Giveaways and Exploitation*

The development of local government law and politics has been in part a response to this dual problem of giveaways and exploitation. More generally, the history of local government law has been an ongoing attempt to redefine the relationship between the city and private enterprise. As Gerald Frug has observed, for nineteenth-century reformers witnessing the birth of the modern city and the development of modern local government law, "What corruption meant was the mingling of the private sector's profit motive with the business of the state."⁵¹ Defining the appropriate spheres for government and business was an overriding concern of municipal reformers. This concern was consistent with classical legal thought generally, which sought to police the line between private and public by limiting legislative interference in the market.⁵²

That public/private distinction, it is well known, did not exist in the medieval or early colonial city. The city originally *was* the corporation — an assembler, promoter, regulator, and developer of capital itself. The early Anglo-American municipal corporation controlled almost all aspects of the market: it determined who could be admitted into the various trades of the city, what prices those tradesmen could demand for their goods or commodities, which goods and commodities met certain quality standards, and where, when, and under what circumstances those goods and commodities could be sold. The privilege of operating a trade in the city was the privilege of the freeman.⁵³ Admission was controlled by a closed corporation governed by self-appointed aldermen, who "sought to apportion vocational opportunity, guarantee equitable dealing, and maintain commercial facilities with the hope of ensuring present solvency and future prosperity."⁵⁴ As Jon Teaford writes, "Commerce, not residence, defined membership in the commercial community, and thus a man acted his political role not where he ate or slept but where he produced and traded."⁵⁵

The chartered city's power and authority to control the local economy were a medieval, and later, colonial political phenomenon — these were the privileges of the merchant class protected and defended against royal invasion.⁵⁶ But the eighteenth and nineteenth centuries witnessed a new bifurcation of commercial life and political life, mar-

⁵¹ Frug, *supra* note 7, at 1118.

⁵² See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* 35, 54–60 (1993); Schragger, *supra* note 3, at 1031.

⁵³ See TEAFORD, *MUNICIPAL REVOLUTION*, *supra* note 10, at 16–24.

⁵⁴ *Id.* at 25. See generally FRUG, *supra* note 10.

⁵⁵ TEAFORD, *MUNICIPAL REVOLUTION*, *supra* note 10, at 30. But cf. *id.* at 35–44.

⁵⁶ See *id.* at 14–15.

ket and state. First, facing both political and economic resistance, the city began to lose its commercial monopoly, slowly withdrawing from its regulation of vocations, its control of city markets, its oversight of quality, and eventually its regulation of prices. Second, the city began to rely less on fees, licenses, and property ownership for income, and increasingly on taxes. Third, the city became more democratic, moving away from a closed, autocratic oligopoly and toward universal manhood suffrage. And fourth, the municipal corporation began to provide new public services, increasingly turning its attention to the provision of sewers, clean water, paved and lighted streets, fire protection, policing, parks, and other urban infrastructure. Over the course of a century, the municipal corporation changed from a territorially based trading corporation designed to protect the member merchants' and tradesmen's prerogatives to a political jurisdiction charged with protecting and advancing the health, safety, and welfare of its populace.⁵⁷

Once the city got out of the business of controlling the capital that sustained it through its direct monopoly on trade, vocations, and the selling and buying of goods, it had to establish a new relationship with commercial activity. The bulk of that work was done by classical jurists and reformers concerned about the relationship between legislatures and economic favoritism more broadly.⁵⁸ Classical late-

⁵⁷ Scholars have told a number of different stories about this dramatic shift. Republican ideology played a role — the medieval and early colonial municipal corporation was vulnerable to the same political winds that produced the American Revolution. See generally TEAFORD, *THE RISE OF THE STATES*, *supra* note 10. The city, like other hierarchical, aristocratic, and non-democratic institutions, was not immune to republican challenge. The new economic thinking of Adam Smith and the developing notion of free markets also influenced the change, as did the far longer historical movement from status to contract and the rise of the liberal legal order. The shift away from collectivism and toward individual autonomy, with its language of human rights, required a reconfiguring of those institutions that were neither state nor individual. There was also the simple fact of urbanism itself. It was not possible for a limited government to control the economic enterprise of the increasing numbers of city dwellers. Technological change and the pace of urbanization had generated a more sophisticated and complex society. The economic chokepoints of the city could not be maintained. See TEAFORD, *MUNICIPAL REVOLUTION*, *supra* note 10, at 29–34, 57–59. For one of the most important accounts of this transformation, with particular emphasis on New York City, see HARTOG, *supra* note 10; for a more general account, see FRUG, *supra* note 10.

⁵⁸ Relatively early on, legal thinkers began bifurcating the corporation into public and private — the former corresponding to the state and thus subject to democratic control, the latter corresponding to the market and thus relatively immune from it. See FRUG, *supra* note 10, at 39–45. The distinction between the municipal corporation (a public, democratic institution) and the private corporation (a private and privately governed institution) was born. This bifurcation was unsurprising, as the municipal corporation had shed its primarily commercial character and democratic institutions were replacing corporatist ones. *Id.* at 39–40. The distinction was more useful to the newly empowered private corporations (of which there were very few in the early nineteenth century) than it was detrimental to the municipal corporation. The private corporation — like the private property owner — was now protected in its property and contracts from govern-

nineteenth-century legal thinkers worried that legislatures were inclined to favor certain groups in the marketplace over others. Judicial oversight was thought necessary to ensure that legislation was in the public interest. Limits on legislative power were also thought necessary to protect the fundamental rights of all free persons to enter into markets and participate in vocations on an equal basis.⁵⁹

In the arena of municipal law, cities were actively engaged in what classical legal thinkers saw as economic favoritism — the distribution of exclusive franchises and monopolies and the use of public power to promote private gain.⁶⁰ Thus, John Dillon, writing in the 1870s, argued forcefully for an interpretation of city power that limited the ability of the city to overinvest in private enterprise, to privilege certain private enterprises over others, or to distribute franchises or monopolies to particular insider commercial interests.⁶¹ Debt limitations, restrictions on local taxing authority, and especially judicial oversight of local regulation became mechanisms to prevent the use of city monies for private gain. Under Dillon's Rule, judges would construe the city's powers narrowly to include only those powers "granted in express words," "necessarily or fairly implied" by the express powers, or essential — "not simply convenient, but indispensable" — to the city's core purposes.⁶² For Dillon, like many classical jurists concerned about particularist economic legislation, the city's powers had to be read narrowly to ensure that the city regulated in the public interest and operated as a neutral framework for private economic activity.⁶³

Perceived urban corruption also led early-twentieth-century Progressive Era reformers to adopt rules of good government intended to prevent public authority from being used as the tool of private inter-

mental interference. The municipal corporation — which looked to the state to affirm its authority — had already been shorn of its oligarchic economic character. *See id.* at 42–45.

⁵⁹ *See* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 47–48 (1998); GILLMAN, *supra* note 52, at 35, 54–60; *see also* Schragger, *supra* note 3, at 1031.

⁶⁰ GILLMAN, *supra* note 52, at 54–60.

⁶¹ *See* 1 JOHN F. DILLON, *COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS* 448–51 (5th ed. 1911) (1st ed. 1872). On the heels of the *Crédit Mobilier* scandal in 1873, E.L. Godkin of the *Nation* declared, "The remedy is simple. The Government must get out of the 'protective' business and the 'subsidy' business and the 'improvement' and the 'development' business. It must let trade, and commerce, and manufactures, and steamboats, and railroads, and telegraphs alone. It cannot touch them without breeding corruption." Richard L. McCormick, *The Discovery that Business Corrupts Politics: A Reappraisal of the Origins of Progressivism*, 86 AM. HIST. REV. 247, 255 (1981) (internal quotations marks omitted).

⁶² DILLON, *supra* note 61, at 449 (emphasis omitted).

⁶³ *See* FRUG, *supra* note 10, at 45–48. *See generally* GILLMAN, *supra* note 52, at 48–55. Thomas Cooley, another jurist of the classical period, blamed state legislatures for corporate giveaways and thus argued for an inherent right of local self-government, intended to insulate municipalities from avaricious state legislators. *See* Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 145–49.

ests.⁶⁴ There were many reform proposals and efforts, but two should be highlighted: (1) home rule charters, and (2) expert state administration. The former were intended to protect the city from the state legislature, which had shown itself to be even more susceptible than the local city council to the siren call of private gain. Throughout the nineteenth and first part of the twentieth centuries, the city was governed through the state legislature — city politics was state legislative politics. The state legislature, often at the behest of cities' legislative delegations, compelled cities to raise and spend money on state-mandated economic development projects, granted franchises and monopolies, adopted reams of special local laws, or simply took power away from city officials who were of an uncongenial political party. Reformers believed that these repeated interventions into the city's business were the cause of the city's inability to place its politics and finances on a secure footing. Home rule was believed to be a structure that would prevent the city's legislative delegation and the state legislature as a whole from responding so readily to "every costly demand of the urban constituency,"⁶⁵ or, put more directly, from repeatedly raiding the city treasury.⁶⁶

In another effort to prevent runs on the city budget, some reformers demanded more expert-led state oversight. The turn of the century witnessed the rise of state boards of health, water, and sewage, and of state school boards — the beginnings of state administrative law. These reforms were of a piece with the Progressive Era emphasis on technical and expert administration, data collection, and efficiency. A new corps of inspectors, auditors, and engineers, governed by independent professional norms, began to oversee municipal work. Moreover, by the end of the first quarter of the twentieth century, numerous states had adopted state utility and ratemaking commissions in response to the corrupt awarding of municipal contracts for gas, electric, streetcar, and telephone services.⁶⁷

Angered by giveaways of municipal contracts and the poor service provided by irresponsible utilities, turn-of-the-century reformers also advocated municipal ownership of public utilities, which some cities implemented. The utility companies preferred state regulation to municipal control, however, as did many good-government reformers who were skeptical of local ability or inclination to regulate the utility magnates. State commissions ultimately prevailed.⁶⁸

⁶⁴ McCormick, *supra* note 61, at 249.

⁶⁵ TEAFORD, *THE UNHERALDED TRIUMPH*, *supra* note 10, at 104.

⁶⁶ For a general treatment of home rule, see David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257 (2003).

⁶⁷ See TEAFORD, *THE RISE OF THE STATES*, *supra* note 10, at 20–23.

⁶⁸ See *id.* at 20–25.

As utilities regulation illustrates, some of the support for reforming municipal government came from pro-business conservatives who opposed the expanded role of municipal government more generally.⁶⁹ For those who believed that the ethnic rulers of the turn-of-the-century city were incompetent and irresponsible, that redistribution to the poor was not a task for government, or that any kind of governmental regulation of industry and business was improper, public works and the taxes needed to fund those works were anathema.⁷⁰ The rush to adopt expert boards or limit altogether the authority of elected officials (whether state or local) was animated in part by a more general anti-government (and perhaps, anti-city) sentiment; it was animated less by love for the city and its reformist capability than by a concern that municipal government was overreaching.⁷¹

Nevertheless, both Dillon's approach and many of the Progressive interventions that came later (and which we still have) were efforts to free municipal government from the nefarious influence of corporate greed and the shady dealings of individual city and state officials.⁷² Dillon's Rule and home rule — as much as they reflected the ideologies of their times — were efforts to carve out a space for good government at the municipal level. Shifting the location of power — from city to state and back to city again — was a way to reset the relationship between public power and private gain.⁷³ So was the Progressives' effort to replace private ownership of city services with public ownership. Public ownership had the same purpose as the public/private distinction more generally — to decouple private gain from public power, to eliminate the private-side scramble for municipal contracts. The problem was the same: the mingling of private interest and public power.

D. The Post-Industrial City and Mobile Capital

The problematic relationship between private interest and public power — capital and city — was (and is) part of the much larger problem of economic boom and bust. Modern urban government developed during a time of rapid urban expansion accompanied by frequent and disruptive economic swings. The municipal corporation was not the only corporation that faced economic distress in the downturns of

⁶⁹ See Barron, *supra* note 66, at 2292–96.

⁷⁰ See *id.*

⁷¹ See TEAFORD, *THE UNHERALDED TRIUMPH*, *supra* note 10, at 103–05.

⁷² See, e.g., FREDERIC C. HOWE, *THE CITY: THE HOPE OF DEMOCRACY*, at vii–viii (1905).

⁷³ See Williams, *supra* note 63, at 87–88, 100.

the late nineteenth century⁷⁴ or in subsequent economic downturns. But even by the turn of the century, cities had been transformed into providers of a vast array of public services. The prosperity of any given city and its residents owed itself to the wise management of local economic resources in light of always present economic shifts.

The city's vulnerability to boom and bust accelerated in the second half of the twentieth century. Increasing wealth in the postwar period coupled with government policies opened the suburbs to large-scale development. The availability of the automobile, the massive federal investment in highways, and government subsidization of single-family homes in suburban locations contributed to the suburban boom. The flight from the cities to lower-tax suburban jurisdictions was also made possible by advances in municipal services. Formerly, annexation to the city was desirable because it provided outlying areas with access to adequate water, electric, sewer, and transportation services. As municipal services could be obtained through contract or through state or regional authorities, the suburbs could go it alone. Meanwhile, deindustrialization was leading to rapid disinvestment in old-line cities. Industries that depended on proximity to fixed resources or to large, relatively fixed labor pools no longer dominated the U.S. economy. Residents and corporations that had once been relatively fixed in place became mobile.

This shift began in earnest in the postwar period and continues apace in many Rust Belt, midwestern, and northeastern cities. The response to this decline has been various forms of federally sponsored economic development policy. Since the Depression, the urban redevelopment process has been designed to attract, encourage, and foster private investment in declining cities. This process has been comprised of urban renewal programs intended to restore downtown business districts, an amalgam of federal grant programs intended to build housing or spur economic development in blighted neighborhoods, and most recently, empowerment zones designed to target specific geographical areas by encouraging job creation and business development.⁷⁵ Despite these efforts, a number of cities continue to experience

⁷⁴ *Financial Panics*, in 3 *DICTIONARY OF AMERICAN HISTORY* 365, 366 (Stanley I. Kutler ed., 3d ed. 2003) (Panic of 1873).

⁷⁵ For a brief history, see William Ho, *Community Benefits Agreements: An Evolution in Public Benefits Negotiation Processes*, 17 *J. AFFORDABLE HOUSING & COMMUNITY DEV. L.* 7, 11–19 (2007/2008); and Audrey G. McFarlane, *Local Economic Development Incentives in an Era of Globalization: The Exploitation of Decentralization and Mobility*, 35 *URB. LAW.* 305 (2003). There were also efforts to directly and indirectly subsidize business development through tax breaks and direct subsidies, infrastructure improvements, and massive road building. And finally, there was the straightforward effort to provide social services, welfare payments, and housing to poor people regardless of the investment effects.

significant rates of depopulation.⁷⁶ The fiscal spiral — an initial loss of population that leads to higher taxes on those who remain, which in turn leads to additional loss of population — took hold in the 1950s and never stopped in places like Detroit, Buffalo, and Richmond.⁷⁷ This decline has occurred despite the relatively significant federal investment in cities in the aftermath of the Depression and during the Great Society programs of the 1960s. Since then, the decline has continued with relatively minimal state or federal attention or intervention.⁷⁸

The suburbs, by contrast, have sought to defend their fiscal interests through low-tax, low-spending policies geared toward protecting home and family.⁷⁹ Suburbs engage in very little redistributive spending and have sought to limit development to that which will pay for itself. In other words, suburbs adhere to a growth strategy that often takes the form of tax base preservation rather than tax base expansion. This strategy too, however, increasingly looks destined to fail. Suburbs' use of exclusionary or selective land use rules and other mechanisms to control for fiscal outcomes appears not to be working. Even in the suburbs, fiscal outcomes continue to depend on larger-scale economic forces⁸⁰ and some suburbs are increasingly finding themselves faced with the same disinvestment afflicting old-line cities.⁸¹

At the same time that some formerly industrial cities and inner-ring suburbs are in a long-term decline, however, other cities have seen their fortunes rise. Sunbelt cities have expanded dramatically over the course of the twentieth century. More recently, some old-line cities have benefited from an urban resurgence, as baby boomers return to the city for aesthetic or economic reasons, and younger migrants seek out more urban environments. The explanations for this resurgence vary,⁸² but two large-scale trends are apparent. First, some cities have more successfully transitioned from an industrial to a knowledge- and service-based economy.⁸³ Second, the extreme mobility of capital

⁷⁶ Sam Roberts & Sean D. Hamill, *As Deaths Outpace Births, Cities Adjust*, N.Y. TIMES, May 18, 2008, at A18.

⁷⁷ For a list of cities with the largest percentage population decline in more recent years, see City-Data.com, Top 101 Cities with Largest Percentage Population Decreases in the 1990s (Population 50,000+), <http://www.city-data.com/top2/c24.html> (last visited Oct. 31, 2009).

⁷⁸ For a case study tracking the decline of the modern city, see RAE, *supra* note 8, at 361–92.

⁷⁹ See Briffault, *Localism: Part II*, *supra* note 7, at 352.

⁸⁰ See MARK SCHNEIDER, *THE COMPETITIVE CITY: THE POLITICAL ECONOMY OF SUBURBIA* (1989).

⁸¹ WILLIAM H. LUCY & DAVID L. PHILLIPS, *TOMORROW'S CITIES, TOMORROW'S SUBURBS* 23–24 (2006).

⁸² See, e.g., Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275 (2006); Michael Storper & Michael Manville, *Behaviour, Preferences and Cities: Urban Theory and Urban Resurgence*, 43 URB. STUD. 1247 (2006).

⁸³ See SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (1991).

coupled with concerted efforts to liberalize trade have made larger economic units — namely the nation-state — somewhat less relevant while increasing the relevance of particular economic regions and certain global cities.⁸⁴

* * *

I will say more about both of these trends below. For now, it is enough to observe that the local quest for investment is now global in scope. Because a locality's fiscal health is determined by the private generators of wealth in the jurisdiction, attracting high-value residents and firms and deflecting high-cost residents and firms are the municipality's goals.

The result is an economic system that requires competition for mobile investment and a political system that attempts to limit or eliminate the pathologies of that competition through doctrines that divide up powers between states and localities. That division is intended in large part to prevent or limit giveaways and exploitation. Local power is limited by debt and taxation limitations, state-level commissions and boards that oversee particular government services, and judicial doctrines — such as Dillon's Rule and preemption — that read local authority quite narrowly. State power is limited — though not very much, it should be noted — by home rule doctrines that prevent the state from adopting special or local laws⁸⁵ or that reserve particular, well-defined powers to local governments. These shifts in scale are driven by the political pathologies of mobile capital but ultimately are only weakly responsive to it. Despite a century of political reforms, capital continues to exert significant political and economic influence: debt limitations are avoided, subsidies are granted, economic development takings are encouraged.⁸⁶ The problem of mobile capital for ter-

⁸⁴ See *id.*; Saskia Sassen, *Globalization or Denationalization?*, 10 REV. INT'L POL. ECON. 1 (2003).

⁸⁵ The prohibition against special or local legislation was designed to prevent states from doling out favors to, or on the other hand, piling burdens upon, a city singled out for special treatment. See, e.g., ILL. CONST. art. IV, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable."); *Chi. Nat'l League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245 (Ill. 1985) (upholding a statute against an Illinois special legislation challenge under a rational basis test). See generally Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 642–57 (1994) (explaining concept and analyzing potential pathologies of special and local legislation).

⁸⁶ For other examples of incentives to attract business to a particular location, see Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 378, 382–89 (1996); and Joshua P. Rubin, Note, *Take the Money and Stay: Industrial Location Incentives and Relational Contracting*, 70 N.Y.U. L. REV. 1277, 1282–85, 1300–04 (1995).

ritorially based local governments has seemingly become only more acute.⁸⁷

This is not to say that only the interests of capital cause political distortions that might conflict with the public interest. Other interest groups, including neighborhood groups, also exercise influence in the local political process. Nevertheless, municipal government has often been characterized by a growth politics in which large-scale, property-based elites exercise outsized political influence.⁸⁸ And, as I have shown, local government law can usefully be understood as a series of institutional efforts to constrain that influence in one way or another. One can certainly cite examples in which development interests have not won the day and neighborhood groups have stymied projects that might have been beneficial to the community as a whole. Those examples do not meaningfully alter my account of the nature of the problem of mobile capital for territorially based local governments. Nor do such examples undermine my claim that local regulations of capital that run counter to the interests of land-based elites are not likely to be the norm and thus require explanation.

II. EFFORTS TO REGULATE MOBILE CAPITAL

Local efforts to control, regulate, and redistribute mobile capital occur in the context of the economically limited city, the division of authority among the federal, state, and local governments, and a legal regime that seeks to address the pathologies of the city-business relationship. I look at three kinds of local efforts here: (1) efforts to put conditions on mobile capital entering the city (often through contracts); (2) efforts to adopt local laws that redistribute from capital to labor (such as minimum wage laws); and (3) efforts to prevent mobile capital from entering altogether (such as anti-chain store laws). These efforts are intrinsically local. Nevertheless, they are increasingly connected by an explicitly (and rhetorically) localist economic project — to assert community control over global capital.⁸⁹ Spearheaded by grassroots and national community organizations as well as national labor unions, these efforts are often consciously pursued and justified as a means of invigorating urban democracy.

Conditions, redistribution, and exclusion do not exhaust the possible local government responses to mobile capital. There are a number

⁸⁷ See, e.g., Rubin, *supra* note 86, at 1282–88 (detailing several ineffective campaigns to prevent industrial relocation).

⁸⁸ See Molotch, *supra* note 25, at 309–32.

⁸⁹ See, e.g., ALPEROVITZ, *supra* note 13; MICHAEL H. SHUMAN, *GOING LOCAL: CREATING SELF-RELIANT COMMUNITIES IN A GLOBAL AGE* (1998); Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 414 (2001).

of other responses and strategies, which I note here but put aside for purposes of this Article. For example, as I have already mentioned, turn-of-the-century progressives favored municipal ownership of city services — so do some modern-day progressives.⁹⁰ Recently, those who champion entrepreneurial government have advocated municipal ownership of more traditional moneymaking ventures, services, and businesses.⁹¹

In a somewhat related vein, the community economic development (CED) literature has emphasized local economic self-sufficiency through worker- and neighborhood-owned enterprises, community credit unions, housing cooperatives, community land trusts, local procurement and purchasing cooperatives, and local currencies.⁹² A distinctive feature of these kinds of institutions is the presence of transfer and accumulation restraints intended to keep capital and persons bound to a geographically defined community.⁹³ The CED movement has sought to revitalize mainly poor, urban neighborhoods through community ownership of local assets, either by encouraging partnerships with outside capital or by encouraging the production and/or ownership of assets by neighborhood groups themselves.⁹⁴

Limiting reliance on outside capital by producing it in-house is the most radical mechanism for restructuring capital-local relations. But while important conceptually, municipal ownership, city entrepreneurialism, and neighborhood-based capital formation are still very limited in size and impact. Large-scale public or community ownership of the means of production is unlikely to make much serious headway within a capitalist economic system so predicated on private property.⁹⁵ I thus put aside these efforts.

Though obviously important, I also put aside the more conventional approaches to attracting private capital: direct incentives, local infrastructure improvements, or the deployment of local amenities. The first two categories are quite familiar. In the third category are city efforts to attract capital by offering amenities that will appeal to the so-called “creative class”⁹⁶ or to wealthier incomers. These efforts may

⁹⁰ See, e.g., Frug, *supra* note 7, at 1128.

⁹¹ See generally DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992).

⁹² See, e.g., SHUMAN, *supra* note 89.

⁹³ See generally WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* (2001).

⁹⁴ See *id.*; David J. Barron, *The Community Economic Development Movement: A Metropolitan Perspective*, 56 STAN. L. REV. 701 (2003); Cummings, *supra* note 89, at 413–16.

⁹⁵ See JAMES DEFILIPPIS, *UNMAKING GOLIATH: COMMUNITY CONTROL IN THE FACE OF GLOBAL CAPITAL* (2004).

⁹⁶ See generally RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* 27–45 (2005).

entail becoming a “green” or a “wired” city,⁹⁷ or using redistribution itself as an amenity.⁹⁸

The emphasis on conditions, redistribution, and exclusion is purposeful; I want to focus on those efforts that seem to cut against the growth machine and the traditional dispensing of incentives to attract investment, whether firm-driven or amenity-driven. What I am interested in are those efforts that are different from the usual attraction, displacement, and retention strategies, but which fall short of government or collective ownership of productive assets. This Part focuses on efforts that are within this middle range. Such efforts seek to guarantee accountability from mobile capital, to redefine the relationship between capital and labor, or to exclude particular kinds of investments altogether.

A. Conditions on Mobile Capital

The movement to place conditions on mobile capital is a byproduct of interlocal competition. Despite evidence that government incentives do not significantly affect corporate location decisions, municipalities have found it increasingly difficult to avoid providing ever more generous corporate subsidies to attract new businesses.⁹⁹ The effort to assert controls over subsidized capital after it arrives has led to the development of accountability mechanisms in the form of clawback provisions or community benefits agreements.

The former are not a new concept. Clawback provisions are “used with almost every form of industrial subsidy in . . . European nations, including Italy, the Netherlands, Northern Ireland, Great Britain, France, Germany, Denmark, Luxembourg, and Belgium.”¹⁰⁰ One of the first of the modern American clawback provisions was adopted by New Haven over twenty years ago.¹⁰¹ Now at least nineteen states and over one hundred cities have clawback provisions.¹⁰² These pro-

⁹⁷ See, e.g., Chris Satullo, Op-Ed., *Philadelphia's Future Looking 'Greener,' but Battle's Not Over*, PHILA. INQUIRER, Oct. 23, 2007, at A15.

⁹⁸ Gillette, *supra* note 1, at 1073–74.

⁹⁹ Rubin, *supra* note 86, at 1311–13; cf. Enrich, *supra* note 86, at 383–84 (claiming that states have overwhelmingly enacted location incentives).

¹⁰⁰ GREG LEROY WITH RICHARD HEALEY ET AL., GOOD JOBS FIRST, NO MORE CANDY STORE: STATES AND CITIES MAKING JOB SUBSIDIES ACCOUNTABLE 34 (1997) (omission in original) (quoting Larry C. Ledebur & Douglas Woodward, *Adding a Stick to the Carrot: Location Incentives with Clawbacks, Recisions, and Recalibrations*, 4 ECON. DEV. Q. 221, 226 (1990)) (internal quotation mark omitted), available at <http://www.goodjobsfirst.org/pdf/nmcs.pdf>.

¹⁰¹ See NEW HAVEN, CONN., CODE OF ORDINANCES § 21-39 (2009), available at <http://www.municode.com/Resources/gateway.asp?pid=14668&sid=7>.

¹⁰² GREG LEROY & SARA HINKLEY WITH PHIL MATTERA ET AL., GOOD JOBS FIRST, NO MORE SECRET CANDY STORE: A GRASSROOTS GUIDE TO INVESTIGATING DEVELOPMENT SUBSIDIES ch. 10, at 5 (2002), available at <http://www.goodjobsfirst.org/pdf/nmcs.pdf>; see also Good Jobs First, Accountable Development Key Reform #2: Clawbacks or Money-Back

visions vary in their scope, triggers, and penalties, but generally require subsidized firms to provide a specified public benefit.¹⁰³ Often the primary requirement is that the firm remain in the community for a particular period of time or forfeit the subsidy. Clawback provisions are cousins to plant closing statutes. Those statutes require certain businesses to provide notice to local communities before ceasing operations and, in some cases, require businesses to make specified payments to affected employees or into a community assistance fund.¹⁰⁴

Community benefits agreements (CBAs) are of a more recent vintage — the first full-fledged CBA appeared in 2001.¹⁰⁵ CBAs are agreements negotiated between prospective developers and community groups over the terms of specific development projects. In exchange for community political support, the developer may agree to limit displacement of current residents and provide resettlement support or specified units of low-income housing. CBAs can also involve agreements for developers to provide certain neighborhood services such as parks, recreation, or child care facilities, and they often involve developer commitments to pay a living wage, adopt local-favoring hiring preferences, embrace labor peace agreements, or provide for environmentally friendly or sustainable building or development practices. There is no requirement that a CBA be connected to a project receiving public subsidies, but that has usually been the case. Community bargaining leverage is at its strongest when developers are seeking government subsidies or project approvals.¹⁰⁶ Communities can create roadblocks in the zoning process to cause costly delays for developers.¹⁰⁷

At their best, clawbacks and CBAs are efforts to ensure that public investments in private enterprise generate a concomitant public benefit and that the costs of the project do not unduly burden particular neighborhoods.¹⁰⁸ Both can be understood in the context of the post-

Guarantees, http://www.goodjobsfirst.org/accountable_development/reform2.cfm (last visited Oct. 31, 2009) (providing examples of state clawback provisions in a chart located at http://www.goodjobsfirst.org/pdf/clawbacks_chart.pdf).

¹⁰³ Good Jobs First, *supra* note 102.

¹⁰⁴ See, e.g., New York State Worker Adjustment and Retraining Notification Act, N.Y. LAB. LAW §§ 860 to 860-i (McKinney 2009).

¹⁰⁵ See Ho, *supra* note 75, at 20.

¹⁰⁶ Patricia E. Salkin & Amy Lavine, *Understanding Community Benefits Agreements*, PRAC. REAL EST. LAW., July 2008, at 19, 30.

¹⁰⁷ See, e.g., Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS 302, 319–21 (Austin Sarat & Stuart A. Scheingold eds., 2006) (discussing how potential obstruction of Los Angeles's land use approval process provided community leverage over developers).

¹⁰⁸ See Virginia Parks & Dorian Warren, *The Politics and Practice of Economic Justice: Community Benefits Agreements as Tactic of the New Accountable Development Movement*, 17 J. COMMUNITY PRAC. 88, 90–95 (2009).

war history of urban redevelopment initiatives, most of which have been considered failures.¹⁰⁹ A thorough history of these programs is beyond this Article, but the litany of criticisms is familiar: urban redevelopment has relied too heavily on private-side investment; it has emphasized displacement and gentrification over reinvestment; it has lacked citizen participation or neighborhood input; and it has been riddled with patronage, incompetence, and distribution to clientelistic groups.¹¹⁰ To be fair, there have been successful redevelopment efforts, and many of the federal programs of the 1960s and 70s laid the groundwork for recent, more promising urban initiatives.¹¹¹ Nevertheless, public redevelopment funds have often benefited developers, downtown business interests, the construction trades, and other interest groups without demonstrably improving the condition of depressed urban neighborhoods and sometimes making the residents of those neighborhoods markedly worse off.

CBAs are both a response to these failures of urban policy and a function of the significant cutbacks in federal and state support for urban initiatives. Since the 1980s and the pullback in federal funds, urban redevelopment has been a thoroughly private-public enterprise; there simply is not sufficient government will or money to fund even traditional municipal infrastructure — like housing, stadiums, convention centers, roads, or parks — absent private investment. In this environment, the traditional public routes for influencing local infrastructure development are diminished. Thus, CBAs have become both a necessary and a favored tool of social justice, antipoverty, environmental, and labor groups. In part this is related to the urban resurgence; as the growth rate in a number of major cities has turned from negative to positive, developers are seeing new opportunities in formerly undesirable neighborhoods. Large-scale urban projects have become attractive to cities and private investors. A number of CBAs have been related to the development of stadium-retail complexes, like the Staples Center in Los Angeles and the Atlantic Yards project in Brooklyn, or mixed-use commercial-residential districts, like in Denver.¹¹² The CBA process is in part a function of increased urban political leverage and developer confidence that the costs of compliance can be passed on to future residents or commercial tenants.

¹⁰⁹ See SIMON, *supra* note 93, at 8–9.

¹¹⁰ See McFarlane, *supra* note 75, at 314–15; McFarlane, *supra* note 5, at 317–18.

¹¹¹ See SIMON, *supra* note 93, at 10–11.

¹¹² Patricia E. Salkin & Amy Lavine, *Negotiating for Social Justice and the Promise of Community Benefits Agreements: Case Studies of Current and Developing Agreements*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 113, 116, 121, 126 (2008).

Moreover, because it is a site-specific, private agreement, the CBA can bypass municipal officials or traditional housing or redevelopment agencies. This feature is attractive to community groups for a number of reasons. First, city council members, directors of the local housing authority, or the mayor's office may not adequately represent the interests of the immediate neighborhood residents, may be inclined to use the CBA process to extract politically favorable concessions, or may use the CBA process as cover for too favorable treatment of developer interests. Second, changes in city administration can result in inadequate enforcement of the agreement over time. Third, the private nature of the agreement insulates the bargain from constitutional takings or equal protection challenges. Developer concessions to a private group do not constitute exactions subject to federal constitutional limitations.¹¹³ CBA groups are not state actors; they do not wield any formal authority over the development process. They can merely threaten political pressure.

That political pressure can be brought to bear on the land use and site development process is an artifact of the planning process itself.¹¹⁴ To the formalist's chagrin, the give and take of the local land use process is full of ad hoc agreements, behind-the-scenes dealmaking, and site-specific concessions. The local land use regulatory process is often criticized as unprincipled and extralegal.¹¹⁵ Land use variances and other regulatory approvals are often contingent on developer acquiescence to government demands, whether or not those demands are explicitly articulated or permitted by law. There are limits — judicial review ensures some regularity in the planning and development process — but litigation is costly. The CBA takes advantage of this ad hoc process and gives community groups that otherwise would have a limited say in the development process a significant regulatory role.

This role raises some obvious concerns. The most important issues are the representativeness of the CBA bargaining groups, their relative insulation from or susceptibility to political capture, and the redistributive effects of particular deals as between poverty, labor, and resident groups, as between neighborhoods within the city, and as between current residents and future residents.¹¹⁶ Private-side dealmaking in the shadow of political mobilization can easily take on the character of ex-

¹¹³ Julian Gross, *Community Benefits Agreements: Definitions, Values, and Legal Enforceability*, 17 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 35, 47–48 (2008).

¹¹⁴ See Cummings, *supra* note 107, at 319–20.

¹¹⁵ See ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 304, 308–09 (3d ed. 2005).

¹¹⁶ See Vicki Been, *Community Benefit Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. (forthcoming 2010) (on file with the Harvard Law School Library).

tortion or a payoff, whether initiated by community groups, local public officials, or developers. Developers have an interest in tamping down opposition to a project as early as possible and may use the CBA process to do so. Indeed, a number of CBAs connected to redevelopment projects in New York City have been criticized on the grounds that the CBA process has been co-opted by the developers themselves. The existence of a CBA in itself tells us nothing about the quality or purposes of the deal that was struck.¹¹⁷ One has to rely on the interests and motives of community groups and the transparency of the process. At its worst, the CBA process is merely a different mechanism by which developers' interests are advanced.

Nevertheless, the older clawbacks and the newer CBA movement are a response to past promises made and not kept — private-side development that did not deliver economic benefits or that distributed economic burdens and benefits unfairly. That those promises were not kept might have been a product of a lack of foresight by government officials or a function of their outright collusion with mobile capital — both are in evidence in the history of urban renewal.¹¹⁸ The effort by nonprofit and community-based organizations to assert a more defined role in that process reveals a skepticism of both the public and the private sector. It also reflects the legal and political limitations inherent in that relationship. On the legal side are procedural and substantive limits on the ability of local government to demand concessions from developers, even those it is subsidizing. On the political side are the twin pathologies of giveaways and exploitation, both of which are at their height in the urban redevelopment game.

B. Labor-Friendly Redistribution

Many of the same groups seeking to impose conditions on capital entering the city through CBAs have also encouraged municipalities to adopt local minimum wage ordinances, and a significant number of municipalities have done so.¹¹⁹ The vast majority of these ordinances are “living wage” laws, which regulate the wages of those businesses that contract with the city or the wages of city employees themselves.¹²⁰ A handful of cities have adopted ordinances that apply to all

¹¹⁷ See Salkin & Lavine, *supra* note 112, at 121–22 (discussing problems with New York City CBAs); see also Bettina Damiani, Project Dir., Good Jobs N.Y., Comments at the Public Hearing of the New York City Council Committee on Economic Development on the Proposed Brooklyn Atlantic Yards Project (May 26, 2005), http://www.goodjobsny.org/testimony_bay_5_05.htm (criticizing the Brooklyn Atlantic Yards CBA).

¹¹⁸ See Cummings, *supra* note 89, at 455.

¹¹⁹ See Gillette, *supra* note 1, at 1057.

¹²⁰ Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J.L. & SOC. PROBS. 93, 94 (2005).

businesses within the municipality, exempting small businesses;¹²¹ a few cities have adopted ordinances that apply only to big box stores.¹²² The first local living wage campaign began in Baltimore in 1994; 122 cities have now adopted some version of a living wage or local minimum wage ordinance.¹²³

These wage laws are components of a more comprehensive campaign to redefine the relationship between labor and capital at the municipal level. The labor movement's decline has paralleled the industrial city's decline. As the U.S. economy has moved away from heavy industry, both labor unions and the cities that relied for their prosperity on union members have experienced the same fate. Moreover, as labor power has dissipated, the shared interests of labor and urban politicians have dissipated as well. In the 1950s and 60s, big-city Democratic mayors supported the unionizing efforts of municipal workers. By the mid-1970s, however, this New Deal city-labor coalition had fractured as fiscally strapped cities faced escalating and increasingly militant public sector work actions.¹²⁴ Since then, the relationship between cities and municipal unions has been strained. Though municipal unions continue to play a significant role in urban politics, labor's power over cities has eroded.

Outside the context of municipal unions, the new, smaller labor movement has found it productive to work for the adoption of labor-friendly legislation at the municipal level. And, to a significant degree, sympathetic local officials have responded. The living wage and CBA campaigns are examples of urban-based community-labor coalitions using the channels of municipal lawmaking to gain labor rights that would otherwise be political nonstarters at the federal level. Community-labor coalitions have used local contracting and land use law to promote labor-friendly urban policy agendas, in many cases placing labor side agreements directly into site-specific CBAs. Those groups have also sought to align with progressive mayors to adopt other local legislation favorable to employees, such as health care mandates in San Francisco,¹²⁵ anti-sweatshop procurement ordinances in Los An-

¹²¹ *Id.*

¹²² See George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 841–47 (2006).

¹²³ Living Wage Res. Ctr., The Living Wage Movement, <http://www.livingwagecampaign.org/index.php?id=2071> (last visited Oct. 31, 2009).

¹²⁴ See Joseph A. McCartin, "A Wagner Act for Public Employees": *Labor's Deferred Dream and the Rise of Conservatism, 1970–1976*, 95 J. AM. HIST. 123, 137 (2008).

¹²⁵ See *Golden Gate Rest. Ass'n v. City & County of S.F.*, 546 F.3d 639 (9th Cir. 2008) (upholding San Francisco's universal health care coverage ordinance against an ERISA preemption challenge); see also Healthy S.F., Employers: Health Care Security Ordinance (HCSO) Compliance, http://www.healthysanfrancisco.org/employers/HCSO_Compliance.aspx (last visited Oct. 31, 2009).

geles,¹²⁶ and labor neutrality legislation in Milwaukee.¹²⁷ Municipalities have become fertile sites for labor and employment policy.¹²⁸

Benjamin Sachs has written about this decentralization of labor law.¹²⁹ Sachs argues that organizing and wage campaigns at state and municipal points of entry are replacing the monolithic centralized labor relations system embodied in the National Labor Relations Act.¹³⁰ This decentralized approach is a function of the declining influence of — and hostility toward — labor on the federal level, the possibility of alliances with progressive mayors and city councils, and labor's new emphasis on organizing the low-wage service sector, which is heavily concentrated in large urban areas. As Scott Cummings has noted, "Big cities . . . have become important sites for contesting low-wage service employment,"¹³¹ in places like Houston (office janitors), New York (low-wage garment workers), and Los Angeles (home care workers and hotel employees).¹³² Partially, the new emphasis on the low-wage service sector stems from the fact that service workers are relatively "immune from the threat of export that is used to discipline workers in the manufacturing context."¹³³ Service industries must be provided "in place" — they are tied to local and regional economies.¹³⁴

Moreover, labor's effort to unionize and support low-wage service workers aligns with the city's interests. The working poor make up a significant percentage of central city populations. The services they provide in retail, hospitality, domestic service, cleaning, and security, however, are heavily consumed by nonresidents — visitors who use the city's hotels, restaurants, hospitals, universities, and other locally based and dependent amenities; highly paid office workers who commute into the city; and suburbanites, who often purchase services from low-

(detailing employer health care expenditure rates required for compliance with the San Francisco Health Care Security Ordinance).

¹²⁶ See Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, U. CHI. LEGAL F. (forthcoming Oct. 2009) (manuscript at 5, on file with the Harvard Law School Library).

¹²⁷ Susan J. McGolrick, *Judge Upholds Milwaukee County Law Requiring Certain Contractors To Stay Neutral*, DAILY LAB. REP. (Wash., D.C.), Mar. 11, 2005, at A-1 (citing Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 359 F. Supp. 2d 749 (E.D. Wis.), *rev'd*, 431 F.3d 277 (7th Cir. 2005)).

¹²⁸ Los Angeles, in particular, has pursued a wide range of low-wage worker initiatives. See Cummings & Boutcher, *supra* note 126 (manuscript at 1–35).

¹²⁹ See, e.g., Benjamin I. Sachs, *Labor Law Renewal*, 1 HARV. L. & POL'Y REV. 375 (2007); see also Miriam J. Wells, *When Urban Policy Becomes Labor Policy: State Structures, Local Initiatives, and Union Representation at the Turn of the Century*, 31 THEORY & SOC'Y 115 (2002).

¹³⁰ 29 U.S.C. §§ 151–169 (2006); Sachs, *supra* note 129, at 375–77, 382–89.

¹³¹ Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1943 (2007).

¹³² See Sachs, *supra* note 129, at 378–80, 382–85, 391.

¹³³ Cummings, *supra* note 131, at 1943.

¹³⁴ See *id.*

wage workers who reside in the city. Cities shoulder the burden of the large numbers of working poor who service the regional economy; cities can assist them by shifting costs onto their employers, and in part, onto nonresidents.

Thus, Los Angeles has adopted an ordinance requiring that large hotels in the immediate vicinity of Los Angeles International Airport (LAX) pay a living wage.¹³⁵ The ordinance was passed after coordination between the city and UNITE-HERE, a union that represents many hotel and service sector employees.¹³⁶ The city's stated justification for the ordinance is that the hotels "not only derive significant and unique business benefits from their close proximity to LAX, a major public and City asset that produces numerous patrons of these hotels on a daily basis, but from the City's designation of the Corridor as an Airport Hospitality Enhancement Zone," with the added municipal services that come with that designation.¹³⁷ The fixed nature of LAX and the potential for shifting costs to outsiders make such a law economically and politically attractive. Hotels have little choice but to locate near the airport if they wish to gain access to its customer base; those customers may be the ultimate bearers of the cost of the ordinance.

Who ultimately pays the costs of local minimum wage laws (and other locally mandated employee benefits) is relevant to the larger question of their efficacy. Studies have reached competing conclusions regarding whether local wage ordinances affect the locational decisions of firms, retard employment growth, or shift labor costs onto consumers or — in the case of government contractors — onto taxpayers.¹³⁸

¹³⁵ See L.A., CAL., MUN. CODE ch. X, art. 4, § 104.106 (2008).

¹³⁶ The efforts of UNITE-HERE in Los Angeles are part of a national campaign that it calls "Hotel Workers Rising." See Hotel Workers Rising, <http://hotelworkersrising.org> (last visited Oct. 31, 2009).

¹³⁷ L.A., CAL., MUN. CODE ch. X, art. 4, § 104.101.

¹³⁸ Compare AARON S. YELOWITZ, SANTA FE'S LIVING WAGE ORDINANCE AND THE LABOR MARKET 7 (2005), available at http://epionline.org/studies/yelowitz_09-2005.pdf (reporting that a Santa Fe living wage ordinance increased the unemployment rate and reduced the work hours of a certain subsection of less-skilled workers), with Mark D. Brenner, *The Economic Impact of Living Wage Ordinances* 29–30 (Political Econ. Research Inst. Working Paper Series, Paper No. 80, 2004), available at http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_51-100/WP80.pdf (citing evidence that firms will not simply cut employment in response to minimum wage laws but will respond in other ways, namely, by raising prices, increasing productivity, or redistributing income throughout the firm). Any given firm's "ability to pass along higher costs will ultimately be governed by their demand elasticities." *Id.* at 25. Modest increases in the minimum wage do not appear to have an impact on bid prices for government contracts, for example. See *id.* at 18–20. Firms' responses to higher labor costs will turn on the relative mobility of the industry, the geographical location of the employees, the location of customers, and the competitiveness of the market. Given that firms do not rush to raise prices, the key consideration is what other means of offsetting the increased costs of wages are at their disposal. The two most significant ways are increases in productivity and internal cost-shifting.

If firms do not respond to an increase in local wages with internal cost-shifting or productivity gains, they may shift those costs onto local consumers or taxpayers, or simply not locate in the jurisdiction.

The latter has been the main concern for local policymakers. In Chicago, for example, Mayor Richard M. Daley used his veto for the first time in seventeen years to block a city ordinance that would have required the payment of a living wage by all retail establishments over 90,000 square feet with revenue greater than one billion dollars.¹³⁹ The ordinance targeted big box stores and specifically Wal-Mart. Daley worried that the ordinance would “drive jobs and businesses from [the] city, penalizing neighborhoods that need additional economic activity the most.”¹⁴⁰ He did not, however, accede to Wal-Mart’s earlier demand that the city provide location subsidies to the chain.¹⁴¹ And, indeed, Wal-Mart subsequently dropped that demand.¹⁴²

As with all the regulatory deals made between the city and business, the city’s ability to extract wage concessions without hurting local consumers, taxpayers, or job seekers turns on the city’s relative economic power or its ability to shift costs onto nonresidents. (The latter is a variant of the former to the extent that outsiders will only continue paying so long as they desire access to the city.) If tourists or business travelers continue to find Los Angeles attractive or if Wal-Mart wants access to Chicago’s economically robust consumer base, they will have to play by the cities’ economic rules. Until recently, however, cities have not appeared to have much ability to dictate terms or shift costs to nonresidents. Indeed, as Mayor Daley’s concern

There is both theoretical and empirical evidence that improving wages increases the efficiency of workers. For theoretical analysis, see Edward P. Lazear & Robert L. Moore, *Incentives, Ability, and Income Distribution*, in *EFFICIENCY WAGE MODELS OF THE LABOR MARKET* 135 (George A. Akerlof & Janet L. Yellin eds., 1986); and Joseph E. Stiglitz, *The Causes and Consequences of the Dependence of Quality on Price*, 25 J. ECON. LITERATURE 1 (1987). For empirical data, see Carl M. Campbell III, *Do Firms Pay Efficiency Wages? Evidence with Data at the Firm Level*, 11 J. LAB. ECON. 422 (1993); Peter Cappelli & Keith Chauvin, *An Interplant Test of the Efficiency Wage Hypothesis*, 106 Q.J. ECON. 769 (1991); and David I. Levine, *Can Wage Increases Pay for Themselves? Tests with a Production Function*, 102 ECON. J. 1102 (1992). Recent studies of localities in which living wage ordinances have been enacted show stark declines in turnover. See Michael Reich et al., *Living Wage Policies at San Francisco Airport: Impacts on Workers and Businesses*, 44 INDUS. REL. 106, 125–36 (2005) (showing a significant decline in turnover in low wage jobs at the San Francisco Airport after a living wage was put into effect); see also Candace Howes, *The Impact of a Large Wage Increase on the Workforce Stability of IHSS Home Care Workers in San Francisco County 2* (Nov. 2002) (unpublished manuscript), available at <http://laborcenter.berkeley.edu/homecare/Howes.pdf> (showing a twenty percent decline in turnover for home healthcare workers covered by a San Francisco ordinance). As a result, firms will save money in hiring and recruiting costs, which will help to offset wage increases.

¹³⁹ Fran Spielman, *Daley’s Big-Box Veto Holds Up*, CHI. SUN-TIMES, Sept. 14, 2006, at 8.

¹⁴⁰ Fran Spielman, *Aldermen: Big-Box Veto Will Stand*, CHI. SUN-TIMES, Sept. 12, 2006, at 6.

¹⁴¹ Fran Spielman & David Roeder, *City Scoffs at Wal-Mart Subsidy Request*, CHI. SUN-TIMES, Feb. 27, 2002, at 57.

¹⁴² *Id.*

illustrates, there continue to be significant economic constraints on the city — namely the ability for firms like Wal-Mart to locate right across the border in neighboring jurisdictions. There are also the political constraints that follow from the city's overall dependence on incoming capital.

In addition, legal doctrines may prevent cities from capitalizing on their newfound economic muscle. Local wage and labor laws have been challenged as falling outside of the authority of home-rule jurisdictions.¹⁴³ The Supreme Court of Louisiana struck down the New Orleans wage ordinance on these grounds.¹⁴⁴ In New Mexico, however, a state court upheld the authority of localities (in that case Santa Fe) to institute a minimum wage.¹⁴⁵ The Ninth Circuit has specifically held that local minimum wage ordinances are permitted in California and are not preempted by federal labor legislation.¹⁴⁶ The Ninth Circuit has also upheld San Francisco's employer-mandated health care ordinance against an ERISA preemption challenge, though local business groups are appealing that decision.¹⁴⁷

As labor-community groups find success at the municipal level, employers can shift scales. Even if they lose their preemption arguments based on existing law, employers can ask state or federal legislatures to adopt new preemptive legislation. The influence of labor-community groups at the local level and their efficacy depend not only on local political processes, but also on the degree to which local law-making is immune from contrary state or federal intervention. In most cases, state legislatures can easily override local laws if the political desire exists.

C. *Exclusion of Mobile Capital*

A third way to assert local control over mobile capital is to exclude certain forms of capital from the jurisdiction altogether. We see these efforts with local anti-chain or anti-big box store ordinances. Numerous cities have adopted such ordinances, which may limit the square footage of particular retail outlets, may impose specific conditions on large stores (as did the proposed Chicago ordinance), or may exclude

¹⁴³ See Dalmat, *supra* note 120, at 112–26.

¹⁴⁴ New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002).

¹⁴⁵ New Mexicans for Free Enter. v. City of Santa Fe, 126 P.3d 1149 (N.M. Ct. App. 2005).

¹⁴⁶ RUI One Corp. v. City of Berkeley, 371 F.3d 1137 (9th Cir. 2004). A lawsuit brought by the LAX Hilton challenging the LAX living wage ordinance was also dismissed. See Fortuna Enters. v. City of L.A., No. CV 08-4373 SVW (C.D. Cal. Oct. 6, 2008) (granting defendants' motion to dismiss).

¹⁴⁷ See Golden Gate Rest. Ass'n v. City & County of S.F., 546 F.3d 639 (9th Cir. 2008); see also Richard Schragger, The Progressive City 8 (2009) (unpublished manuscript, on file with the Harvard Law School Library).

chain stores from particular areas of the city altogether. Some local jurisdictions have required that incoming big box developers apply for a conditional use permit or engage in a market impact study before proceeding.¹⁴⁸

Anti-chain regulations can simply represent another manifestation of not-in-my-backyard (NIMBY) syndrome. In some cases — such as in an affluent town or suburb — anti-chain sentiment is driven by aesthetics, class bias, or by neighborhood concern with traffic congestion. Anti-chain ordinances in these settings serve the same purposes as other exclusionary land use regulations: preservation of neighborhood land values or an existing lifestyle. More interesting are the big box site fights that occur in less affluent and more urban areas. These fights seem to be driven by a more complex set of concerns.

The anti-big box store campaigns in these settings have two main groups of supporters. The first is organized labor. As with CBAs and living wage laws, labor has been a key constituency in promoting anti-big box store legislation at the municipal level. For labor, anti-chain store laws are mostly a means to an end. Labor has made repeated efforts to unionize large-scale retail and has targeted Wal-Mart in particular. By erecting barriers to entry into valuable markets, labor-community groups hope to force Wal-Mart (and other retailers) to pay higher wages, offer better health benefits, and most significantly, succumb to unionization.¹⁴⁹ Their bet — not shared by Mayor Daley — is that urban markets are promising enough to leverage reforms in retailer employment practices.

The second constituency is local small business owners who fear competition from large-scale chains. Small business anti-chain activism has a long history. That activism was at its height in the 1930s, when the “chain store menace” was a topic of significant public interest and states rushed to adopt anti-chain store taxes.¹⁵⁰ Between 1920 and 1940, a loose confederation of local merchants, independent merchant associations, agrarians, populists, and progressives sought to stem the chain expansion. They argued that the chain stores destroyed local businesses, took money out of the community, held down wages, turned tradesmen into clerks, and concentrated wealth in a few hands.¹⁵¹

Anti-chain sentiments are much more muted today, but the rhetoric and ideology of antimonopolism, with its emphasis on the relationship between economic deconcentration and democratic independence, still

¹⁴⁸ Lefcoe, *supra* note 122, at 841–47; *see also* Cummings & Boutcher, *supra* note 126 (manuscript at 23–29).

¹⁴⁹ Lefcoe, *supra* note 122, at 835–37.

¹⁵⁰ *See* Schragger, *supra* note 3, at 1025.

¹⁵¹ *See id.*

resonates. As in the context of CBAs, minimum wage laws, and claw-back provisions, activists worry about the vulnerability of the local economy to corporate control. Preserving space for local, independent merchants is a means of securing the community's economic stability and the community's capacity to assert local economic and political values.

As with CBAs, the city's primary tool for limiting the entry of mobile capital is land use regulation. This is unsurprising. I have argued elsewhere that land use regulation is the chief way in which local governments control the flow of people, goods, and capital across their borders.¹⁵² Cities and suburbs zone and plan for commercial, retail, residential, and industrial facilities and can influence their economies to some degree by making choices about what to allow in the jurisdiction. The local land development process is both the instrument of and the political route for influencing city-capital relations.

Thus far, courts have been almost uniformly deferential to chain store bans and other local barriers to the entry of capital or persons (as they have been to zoning generally), despite the often protectionist motivations or effects of these regulations.¹⁵³ Exclusionary but facially neutral local land use policies do not normally excite dormant commerce clause or equal protection scrutiny. As the California Supreme Court has stated: "[R]ecent decisions have upheld zoning actions even when regulation of economic competition reasonably could be viewed as a direct and intended effect of a challenged zoning action, so long as the primary purpose of the zoning action . . . is to achieve a valid public purpose."¹⁵⁴ By utilizing the planning and zoning process, labor-community groups — operating through the instrument of local government — can exercise some influence over the forms of capital that enter the jurisdiction.

Of course, exclusion of particular forms of capital is only possible if local residents are willing to bear the costs, in taxes foregone or in reduced access to consumer goods or jobs. The effects of exclusion will be felt very differently in a declining city — in which taxes are already high and consumer goods are difficult for locals to access — than in a wealthy suburb — in which property taxes are relatively low and residents can easily gain access to consumer goods located in a neighboring jurisdiction. Indeed, it is important to remember that suburban jurisdictions have been variously adept at using exclusionary land use laws to manage their local tax base — mostly by excluding newcomers

¹⁵² See Schragger, *supra* note 2, at 1099.

¹⁵³ See, e.g., *Wal-Mart Stores, Inc. v. City of Turlock*, 483 F. Supp. 2d 987 (E.D. Cal. 2006). But see, e.g., *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281 (S.D. Fla. 2007), *affd*, 542 F.3d 844 (11th Cir. 2008).

¹⁵⁴ *Hernandez v. City of Hanford*, 159 P.3d 33, 42 (Cal. 2007) (emphasis omitted).

who would create a drain on local fiscal resources. By contrast, the capacity of larger, post-industrial cities to forego certain types of capital has emerged only recently.

III. A LOCALIST REGULATORY ORDER

That cities have recently sought to influence capital in ways that cut against the usual business attraction and retention strategies does not mean that it is possible to do so successfully. Whether and to what extent local actors can make demands on mobile capital has been an ongoing debate in the urban policy literature since Peterson's limited city thesis. That question is a variant of a larger "convergence" debate — the degree to which interjurisdictional competition for capital leads to the elimination of local regulatory and policy heterogeneity.¹⁵⁵ The interlocal subsidy competition and the ongoing intermunicipal competition to become the most "business friendly" city are strong evidence of convergence. The local adoption of minimum wage laws, anti-chain store laws, and CBAs, however, seem to point in the opposite direction.

What explains cities' newfound regulatory aggressiveness — their willingness to resist or strike better deals with incoming capital or to engage in labor-friendly redistribution? This Part highlights three characteristics of the emerging localist regulatory order: first, that order seeks to leverage the economics of place-dependence by taking advantage of the relative immobility of certain kinds of capital; second, it tends to bypass the traditional routes of city-business power, creating a third player — national and local nonprofits and community groups — in the local political economy; and third, it is animated in part by a longstanding but more recently emergent discourse of economic localism. These three — the stickiness of capital, translocal networks, and a republican-infused ideology of economic independence — are sources of leverage for locals as they challenge existing city-business relationships.

A. Leveraging Sticky Capital

The factor most directly related to local redistributive regulations is the stickiness of capital. The fiscal federalism literature is fairly uniform in asserting that mobile actors will flee local redistribution, but as

¹⁵⁵ See, e.g., Hongbin Cai & Daniel Treisman, *Does Competition for Capital Discipline Governments? Decentralization, Globalization, and Public Policy*, 95 AM. ECON. REV. 817 (2005); cf. Been, *supra* note 30, at 543–44 (arguing that competition will limit local government's exploitation of residents).

Clayton Gillette has recently pointed out, that literature cannot explain why so much local redistribution is still taking place.¹⁵⁶

If localities are redistributing, why are they able to do so? One possibility is that residents have a preference for redistribution¹⁵⁷ — though this explanation does not get us very far. As commentators have pointed out, individuals can easily enjoy local amenities but still avoid being taxed for them by moving to a neighboring jurisdiction, which means that a preference for redistribution would have to be fairly high in the hierarchy of resident preferences. Moreover, resident preferences for redistribution are unlikely to be the political drivers of an urban policy geared toward the retention of business capital — it would be surprising if many business owners opted for redistribution as a local amenity.

Constraints on the exit of capital are a more likely explanation. A firm might benefit from geographical advantages that cannot be replicated elsewhere, such as proximity to a deep-water port. A firm might also benefit from agglomeration economies that are only available in particular locations — the benefits of being located in close proximity to other firms and industries that engage in similar or satellite activities. The clustering of high-tech firms in Silicon Valley and the similar clustering of finance-related firms in New York City are examples of agglomeration economies that cannot be readily replicated elsewhere.¹⁵⁸

Indeed, a central point to emphasize is that industries are differently mobile.¹⁵⁹ It is no surprise that local minimum wage and labor organizing movements have targeted relatively place-dependent service industries. Hospitals, hotels, universities, nursing homes, and government offices are relatively location-bound. Organizing local labor markets is an advisable strategy because it can take advantage of this spatial dependence, particularly in large metropolitan areas. Service-based economies are heavily local and increasingly dominant; a steadily rising share of the urban workforce produces goods and services that are sold and consumed within the same metropolitan area.¹⁶⁰ The increasing “localness” of metropolitan area economies provides space

¹⁵⁶ See Gillette, *supra* note 1, at 1071–72.

¹⁵⁷ *Id.* at 1065, 1081. People may opt for a highly redistributive city because they gain personal satisfaction from assisting the poor or because they value socioeconomic diversity for its own sake. They may also opt for redistribution because it will reduce the disamenities associated with the poor — such as homelessness — or because local socioeconomic diversity is necessary for economic development more generally.

¹⁵⁸ See *id.* at 1083.

¹⁵⁹ SAVITCH & KANTOR, *supra* note 8, at 34.

¹⁶⁰ See PAUL KRUGMAN, POP INTERNATIONALISM 211 (1996).

for local regulation.¹⁶¹ Geographically dependent goods and services cannot easily flee.

The stickiness of capital is not new — infrastructure investment in the industrial era was spatially constrained. Cities that were positioned at the intersection of raw materials, transportation nodes, and consumers captured economic growth, and one could argue that the modern metropolis — with its extensive infrastructure, public education systems, subways, and parks — was a result. A standard assumption, however, has been that the shift from an industrial economy to a service- and knowledge-based economy has eliminated most gains from location.

This assumption is not entirely true. To be sure, capital investment is no longer limited by the kinds of spatial requirements that dominated in the past — railroad termini, canals, and proximity to raw materials. But the fact that location no longer serves as an entrée to raw materials or transportation does not mean that it does not matter. In fact, scholars have argued that the urban resurgence of the last twenty years is in part a product of economic advantages that favor urban places.

Not all cities have location-specific advantages, just like not all cities found themselves at the termini of railroads in the nineteenth century. Yet in a knowledge economy, cities generally (and certain cities more specifically) might have location benefits that cannot be replicated elsewhere. The evidence tends to show that the development of human capital — educational attainment, skills, training, knowledge — is higher in cities, where labor markets are more robust, highly specialized workers are more likely to gather and share ideas, and labor is more highly educated.¹⁶² The clustering of knowledge-based firms is explainable both in terms of access to relevant labor markets and in terms of face-to-face interactions among related industries and workers. That interaction is essential to the cross-fertilization that generates innovation. Knowledge workers need other knowledge workers — those agglomeration effects are strongest in cities.¹⁶³ Certain cities may therefore have advantages in particular labor markets,¹⁶⁴ and ci-

¹⁶¹ See generally Joseph Persky et al., *Export Orientation and the Limits to Local Sovereignty*, 46 URB. STUD. 519 (2009) (arguing that as metropolitan economies have become more local in orientation, local governments have been able to exercise more regulatory leverage); Ted Rutland & Sean O'Hagan, *The Growing Localness of the Canadian City, or, On the Continued (Ir)relevance of Economic Base Theory*, 22 LOC. ECON. 163 (2007).

¹⁶² See Storper & Manville, *supra* note 82, at 1251–54; cf. Glaeser & Gottlieb, *supra* note 82, at 1275 (“[T]he biggest, densest cities appear to have a comparative advantage in facilitating the flow of knowledge.”).

¹⁶³ See generally JACOBS, CITIES AND THE WEALTH OF NATIONS, *supra* note 8.

¹⁶⁴ See Cox, *supra* note 11, at 439. This point is worth amplifying. The impetus for the mobility of capital in many industries is the relative cost of labor — as Kevin Cox points out, the claim

ties with some base in knowledge industries where the development of human capital is most important will do best.

An additional reason for the potential localization of industrial policy is that labor (particularly laborers in information and knowledge industries) is often mobile as well. Firm location depends a great deal on where the people are, and where the people are turns on their quality of life, their relative educational attainments, and their desire for specific amenities or an architectural aesthetic. There is some evidence that local economic development is related to a jurisdiction's relative openness to immigration or its relative level of political and social toleration, amenability to ideas, and tolerance of nontraditional lifestyles.¹⁶⁵ This is an old story: the economic success of the Netherlands in the seventeenth century has been attributed to its tradition of religious toleration.¹⁶⁶ The same could be said for the young United States.¹⁶⁷

Place-specific characteristics can thus influence location decisions and thereafter hold particular firms, either because a specific location generates value for the firm, because labor is attracted to that place and the firm follows, or because the work and services are inherently local.¹⁶⁸ Capital mobility does not eliminate the location choice or make it irrelevant; firms' choices may be somewhat more expansive, but not any less important.¹⁶⁹ At the same time, this reassertion of place is occurring against a backdrop in which governments generally, and nation-states in particular, seem to have less influence over capital flows. Corporations are now transnational — that fact, combined with

that capital is hypermobile is really a claim about access to new labor markets. Cox also suggests a distinction, however, between weak and strong competition. *Id.* at 439 (citing MICHAEL STORPER & RICHARD WALKER, *THE CAPITALIST IMPERATIVE: TERRITORY, TECHNOLOGY, AND INDUSTRIAL GROWTH* (1989)). Weak competition represents gains to be had by "cheapening" a product by shifting production elsewhere. Strong competition is the advantage gained by locality-specific divisions of labor, development of new production processes, or other local benefits that allow a company to produce a product better or more efficiently without cheapening it. For certain firms, locational decisions will undoubtedly be a means for cheapening the product — advantage can be had by moving from a high-cost labor market to a lower-cost labor market. For other firms, however, the gains to be had from locating in innovation-rich settings will be more significant than the higher labor costs. Old-line industrial firms often fall into the former category, while knowledge-based firms and industries often fall into the latter. *Id.* at 438–39.

¹⁶⁵ See FLORIDA, *supra* note 96, at 137–39.

¹⁶⁶ Gerard Marlet & Clemens van Woerkens, *Tolerance, Aesthetics, Amenities or Jobs? Dutch City Attraction to the Creative Class 5* (Tjalling C. Koopmans Research Inst. Discussion Paper Series, Paper No. 05-33, 2005), available at http://www.uu.nl/uupublish/content/05-33_1.pdf.

¹⁶⁷ See FLORIDA, *supra* note 96, at 130.

¹⁶⁸ See Ann Markusen & Greg Schrock, *Consumption-Driven Urban Development*, 30 URB. GEOGRAPHY 344, 345 (2009) (arguing that locally consumed services and goods can be a source of regional growth and stability); Persky et al., *supra* note 161, at 527.

¹⁶⁹ See Glenn Ellison & Edward L. Glaeser, *The Geographic Concentration of Industry: Does Natural Advantage Explain Agglomeration?*, 89 AM. ECON. REV. 311, 311–12 (1999).

the rise of large-scale free trade regimes, means that national boundaries are much less relevant for corporations, investors, and to some extent, labor. This denationalization coincides with the rise of the region (Silicon Valley) and the global city (London, Paris, New York) as an important economic unit.¹⁷⁰ Commentators have argued that the locus of economic power has shifted both upward and downward; the economy has become both global and local.¹⁷¹

The mobility thesis must therefore be approached with some caution. Certainly capital can often call the shots — and does so. And only some cities have been able to take advantage of their beneficial geography, while numerous others continue to flounder badly. Nevertheless, once we begin cutting back on our assumption that capital is inherently mobile, the city's capacity to regulate becomes more robust.¹⁷² Sticky capital creates some leverage for local capital control strategies.

What are the political implications of this shift in relative leverage? The possibility of a robust local regulatory presence will hearten some and worry others. As mobility decreases, we might worry less about giveaways and more about exploitation. When examining specific government policies, however, it is often difficult to say when and whether either of these things is taking place. New York City, for instance, both actively distributes subsidies to attract mobile capital *and* actively distributes money to poor people. It may be that the money for both is coming from elsewhere — from federal or state funds or through taxes on nonresidents. Maybe these policies are possible because what firms receive on the front end through subsidies, they give back on the back end through taxes (or vice versa).¹⁷³ Or maybe these seemingly contradictory impulses are simply a reflection of the give and take endemic to interest group politics.

That being said, one still needs to address the mobility concern: the view that competition for capital — that is, a high level of capital mobility — has a salutary effect on local governments by forcing them to eliminate inefficiency, waste, and corruption. For those scholars

¹⁷⁰ See Storper & Manville, *supra* note 82, at 1250, 1254.

¹⁷¹ See Sassen, *supra* note 84, at 1–2.

¹⁷² I argue elsewhere that we cannot say in any given case whether redistribution from rich to poor will cause capital flight. Much will turn on the nature of the city's economy. See Schragger, *supra* note 40 (manuscript at 9). The effect of redistribution on mobile taxpayers is at the center of the debate over the imposition of a “millionaire tax” in New York. Compare Nicholas Confessore, *Taxing Rich Won't Necessarily Make Them Flee, Experts Say*, N.Y. TIMES, Mar. 19, 2009, at A26 (finding no significant correlation between taxing the rich and cities' losing residents), with Posting of Edward L. Glaeser to Economix Blog, <http://economix.blogs.nytimes.com/2009/04/27/will-a-millionaire-tax-cause-an-exodus-of-talent> (Apr. 27, 2009, 12:32) (arguing that higher tax rates lead to an exodus of skilled workers).

¹⁷³ See Gillette, *supra* note 1, at 1084.

who favor interlocal competition because it appears to discipline local governments, the stickiness of capital might be worrisome. Without the potential for capital flight, local governments seemingly have little incentive to protect relatively immobile taxpayers or ensure that local policies do not favor one interest group over the majority of taxpayers.¹⁷⁴

This concern is overstated; indeed, its premise might be incorrect. The mobility thesis assumes that local, capital-friendly policies are a product of the threat of capital exit.¹⁷⁵ Some theorists, however, have argued that under certain circumstances the opposite might be true: for those local governments that are already at a significant disadvantage in the capital race, the threat of exit might induce them to give up altogether on the belief that they are unlikely to catch up.¹⁷⁶ In a regime of unlimited mobility, initial local business-friendly investments are unlikely to pay off because capital will flee to those jurisdictions that are much further ahead.¹⁷⁷ By contrast, in a regime of relative capital immobility, local governments have an incentive to protect and foster their local industries, as they share in future profits.¹⁷⁸ In other words, cities behind in the capital race may refuse to adopt capital-favorable policies without some guarantee that the capital will be there for the long term. And cities ahead in the capital race may adopt capital-favorable policies even when capital is relatively immobile.¹⁷⁹

The disciplining view might be incorrect for another reason as well. It assumes that the threat of exit from the jurisdiction is the primary mechanism for influencing local policy. But, of course, there is the more traditional route to influencing local policy: voice.¹⁸⁰ The view that the traditional political process is insufficient assumes that, absent the threat of capital flight, cities will engage in predation. But that seems unlikely considering the historical and traditional exercise of po-

¹⁷⁴ See, e.g., Tiebout, *supra* note 30, at 418; Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1, 5–6 (1995). But see Jonathan Rodden & Susan Rose-Ackerman, *Does Federalism Preserve Markets?*, 83 VA. L. REV. 1521, 1531–36 (1997); Daniel L. Rubinfeld, *On Federalism and Economic Development*, 83 VA. L. REV. 1581, 1584 (1997).

¹⁷⁵ See SAVITCH & KANTOR, *supra* note 8, at 34.

¹⁷⁶ Cai & Treisman, *supra* note 155, at 818.

¹⁷⁷ *Id.* at 821; see also Matthew J. Spence, *How Does Capital Mobility Impact Policy?* 5–7 (Mar. 2008) (unpublished manuscript), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/2/6/8/2/o/pages268208/p268208-1.php.

¹⁷⁸ Cai & Treisman, *supra* note 155, at 821.

¹⁷⁹ Compare *id.* (finding that under capital immobility the units that are better endowed with capital make more capital investments), with SAVITCH & KANTOR, *supra* note 8, at 151 (questioning the thesis that economically favored cities will support more ambitious social agendas and give less attention to market-centered policies).

¹⁸⁰ Cf. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 37 (1970) (explaining that voice functions as an alternative to exiting for consumers).

litical influence by downtown business, corporate, and propertied interests. Capital — especially large-scale capital — exercises power whether or not it can flee. Any potential limits on capital mobility only provide leverage if locals can translate that leverage into policy through a municipal politics often dominated by business interests.

Of course, all of this puts aside for the moment whether we *desire* the discipline that mobile capital provides. It is important to remember that the flip side of discipline is the possibility of races to the bottom. Capital hypermobility is bemoaned by those who argue that local governments' fear of capital outflows results in underenforcement of social, economic, and environmental policy.¹⁸¹ I do not take a position on whether localities are racing to the bottom or racing to the top — I think both effects are in evidence when one examines the political economy of local government. What is important is that capital mobility does not necessarily generate predictable government behavior.¹⁸² To the extent that capital is differently mobile, locals can leverage more place-dependent capital to promote redistributionist agendas under certain circumstances.

B. Leveraging Translocal Networks

That it may be economically feasible to regulate in the presence of capital mobility does not mean that it is politically feasible. To the extent that city politics is dominated by business interests, a community's effort to resist mobile or even relatively fixed capital will be limited. For this reason, reform efforts that seek to channel or regulate mobile capital are often dependent on alliances with progressive mayors. Alternatively, those efforts can seek to operate outside the traditional channels of local government altogether. The CBA process is emblematic of the latter. The purpose of CBAs is to bypass the traditional avenues of municipal decisionmaking and give neighborhood groups and national antipoverty and labor groups some regulatory authority over incoming development.¹⁸³ Local groups are plugged into national political and labor networks — those networks provide leverage in local conflicts with incoming capital.¹⁸⁴

Community and neighborhood groups, as well as organized labor, have always been involved in influencing city policy, often in competition with local business leaders, though sometimes — as with construction unions that support redevelopment efforts — in alliance

¹⁸¹ Cf. AMAN, *supra* note 6, at 3; Cai & Treisman, *supra* note 155, at 817.

¹⁸² Cf. Rodden & Rose-Ackerman, *supra* note 174, at 1528–29.

¹⁸³ See Salkin & Lavine, *supra* note 112, at 114–15.

¹⁸⁴ Cf. Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 718–21 (2008) (arguing that local networks are able to provide leverage in international environmental efforts).

with them. Certainly labor unions have always operated at the local level — contesting a plant closing in Detroit, for example, or organizing particular workers in the garment industry in New York or Los Angeles. But organized labor has not heretofore been explicitly interested in municipal land use or municipal regulation as a means of bringing pressure to bear on national firms. Unions tended to pursue national strategies; municipal political efforts were not part of their toolkit.

CBAs, local minimum wage campaigns, and land use site fights are thus illustrative of the complicated relationship between the city and its constituents, the private and the public, the national and the local. The CBA process, for example, disaggregates the city explicitly — not only do local groups seek to influence policy through lobbying or political resistance, they also make policy through private regulatory side deals. In this way, as William Ho points out, business interests, city government, and “the community” are the three sides of urban development politics.¹⁸⁵ The privatizing of the regulatory function is purposeful: community groups negotiate directly with the developer partially in order to sideline state and municipal officials. Animated in part by a distrust of local elected officials, the CBA process seeks to localize the development process — the deals are site-specific — in order to maximize the neighborhood’s political leverage. Progressive mayors, who may also find their influence limited by local business interests, may appreciate these efforts; the private character of the CBA deal means that the mayor need not expend political capital seeking concessions from developers herself.

These side deals are often negotiated by grassroots organizations, but increasingly with the aid or direct involvement of national organizations, including labor unions. Thus, though site-specific deals are in some ways essentially “local,” the involvement of large-scale, translocal antipoverty or labor networks situates them in the context of a national economic reform movement.¹⁸⁶ Highly local land use battles involving Wal-Mart, for instance, are obviously and explicitly part of the nationwide fight against the chain, instigated by labor and antipoverty groups.¹⁸⁷ Local minimum and living wage movements are also part and parcel of a nationwide economic reform movement.

¹⁸⁵ See Ho, *supra* note 75, at 8.

¹⁸⁶ Cf. Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44–46 (2007) (explaining how translocal organizations are shaping doctrine and working to increase the locality’s economic opportunities).

¹⁸⁷ See WakeUp Wal-Mart, <http://wakeupwalmart.com> (last visited Oct. 31, 2009); Wal-Mart Watch, <http://www.walmartwatch.com> (last visited Oct. 31, 2009); see also Cummings, *supra* note 131, at 1933.

The political power being asserted by translocal antipoverty or labor networks at the neighborhood and municipal levels provides leverage to otherwise locally marginalized groups, but it also complicates our assumptions about the scale of political activity in the city.¹⁸⁸ Local economic development politics is only geographically local; it otherwise occurs in the context of larger political and economic markets.¹⁸⁹ This has, of course, always been true. As I have observed, city politics in the nineteenth century was state legislative politics — the city's legislative delegation made urban policy and dispensed political favors from the state capital.¹⁹⁰ Local redevelopment politics in the New Deal and urban renewal eras was a product of federal policy and reflected national political priorities — even if those priorities were to some degree decentralizing.¹⁹¹ Federal and state monies — mostly in the form of tax breaks — currently distort local decision-making; economic development funds, enterprise zones, and other federal and state economic development incentives are targeted locally but can only be understood in the context of national and state politics. Federal, state, and local officials all tend to respond to fairly parochial interests; those interests are defined by electoral jurisdictions, most of which do not correspond to an identifiable “city” as a political entity.¹⁹²

The question of the “local” public good is thus complicated along two dimensions. Within the city, the question of who benefits from and who is burdened by economic development is always being contested — it is here that business interests tend to exercise significant influence. There are also vertical conflicts, however, between national, state, and local actors. What is good for local businesses may be bad for national businesses; what is good for the national labor movement may not be consistent with the economic fortunes of local workers;

¹⁸⁸ Unions are not only looking across city and state boundaries. Recently there has been a transnational effort designed to force multinational corporations to sign International Framework Agreements (IFAs), which regulate working conditions for all of their employees. As of January 2007, fifty-five corporations had signed such agreements and their use is accelerating. See Dimitris Stevis & Terry Boswell, *International Framework Agreements: Opportunities and Challenges for Global Unionism*, in GLOBAL UNIONS 174, 174 (Kate Bronfenbrenner ed., 2007). These agreements often affect subcontractors of the corporations that sign them. For example, two subcontractors in Turkey and Costa Rica were forced to recognize unions after the World Works Council of Daimler Chrysler threatened to cancel their contracts if they did not respect labor rights guaranteed in Chrysler's IFA. See Reynald Bourque, *International Framework Agreements and the Future of Collective Bargaining in Multinational Companies*, 12 JUST LABOUR: CANADIAN J. WORK & SOC'Y 30, 39 (2008).

¹⁸⁹ For an explanation of how the antiglobalization movement has itself “gone global,” see Robert Howse, *The End of the Globalization Debate: A Review Essay*, 121 HARV. L. REV. 1528, 1530 (2008) (book review).

¹⁹⁰ See TEAFORD, *THE UNHERALDED TRIUMPH*, *supra* note 10, at 83–102.

¹⁹¹ See Cummings, *supra* note 89, at 414–15.

¹⁹² See Schragger, *supra* note 7, at 2566.

what the mayor desires may not be consistent with what the state legislator from a particular urban district desires.

A local Wal-Mart site fight, for instance, might be understood by national labor and antipoverty groups as a component of their larger project to unionize the chain. For local and neighborhood residents, however, the conflict is much less abstract: mom-and-pop retailers might be concerned about competition, neighbors might be worried about noise, economic development officials might be worried about tax base, and residents might want both the jobs (whatever their terms) and the cheap goods that Wal-Mart provides. City-business relations are thus being negotiated within the context of pluralistic state and national politics.

The ability of local actors to leverage larger-scale networks in order to compete with mobile capital and its resources is significant, however. Wal-Mart site fights, local living wage campaigns, and CBAs illustrate how locals seek support from state and national networks and how national economic reform movements seek out opportunities at the local level.

C. Leveraging Economic Localism

As we have seen, the current crop of reformist efforts draws on a number of movements and rhetorics: antipoverty, labor rights, and economic localism are the most dominant. The antipoverty approach focuses on the redistributive opportunities of urban economic development while taking a skeptical stance toward its effects on the poor. This approach seeks to ensure that the city's economic gains are widely distributed throughout the urban population, that costs of municipal improvement do not fall on the least well off, and that attraction strategies do not lead to gentrification and displacement. A labor-based approach sees an opportunity to advance workers' rights and the labor movement more generally through urban-based organizing. New labor takes the post-industrial landscape and the concomitant mobility of capital as a given, but shares with old labor the idea that workers' collective action is the means for furthering workers' rights and economic advancement.¹⁹³

The local focus of the antipoverty and labor movements is strategic. Nationwide urban antipoverty efforts have largely dissipated over the last twenty-five years, and particularly since the early 1990s and the left-right consensus on welfare reform. Antipoverty efforts have thus become, by necessity, a city-by-city and project-by-project strategy. Urban-based labor organizing is a national movement operating at the local scale. As with the antipoverty movement, the decentralized

¹⁹³ See Sachs, *supra* note 129, at 394–97.

nature of the labor movement is a product of the movement's decline at the federal level; it is not the result of an inherently localist agenda.¹⁹⁴ That post-New Deal welfare and labor efforts centered on Washington may in fact have precluded a robust economic localism. It may be that the dissipation of such efforts makes local strategies more feasible.

In contrast to labor and poverty movements, economic localism addresses directly the relationship between city and capital. In this way, it serves as a relatively potent source of ideological and rhetorical leverage for local advocates of community control. Clawback provisions, plant closing laws, anti-chain store movements, CBAs, and — to a lesser extent — minimum wage laws have been animated by both welfare and redistributive concerns, but also by the rhetoric and ideology of local democracy: the notion that individuals and communities should have a greater role in controlling their economic fates. The efforts to contain, regulate, and redistribute mobile capital are understood as democracy-reinforcing, both at the grassroots level where activists seek worker and neighborhood empowerment, and more broadly in the city as a whole, as citizens seek to assert control over their local economies.¹⁹⁵

The economic localist's response to the threat of mobile capital is to reconstruct the economic order at a local and less vulnerable scale. This response draws on a familiar intellectual antecedent: republican political theory has long been skeptical of concentrated capital because of its ability to exercise power and authority over individuals and communities independently of political and constitutional constraints.¹⁹⁶ Those concerns are apparent in the anticorporatism of the classical jurists; the antimonopolism of the Jacksonians, trust-busters, progressives, and agrarians; the Brandeisian celebration of the independent businessman; and — as already noted above — the anti-chain store movements of the 1920s and 30s.¹⁹⁷

American history is replete with decentralist movements advocating the deconcentration of economic resources as well as the decentralization of political power. Today, deconcentration has fallen out of favor, though decentralization still exerts a strong pull.¹⁹⁸ For many theorists, however, these two ideas have been and continue to be

¹⁹⁴ *Id.* at 376–77.

¹⁹⁵ See, e.g., DEFILIPPIS, *supra* note 95; MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 201–49 (1996).

¹⁹⁶ See, e.g., McCormick, *supra* note 61, at 252–53.

¹⁹⁷ See *id.*; see also William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 37–40 (1999). See generally Schragger, *supra* note 3; *supra* p. 518.

¹⁹⁸ For a novel and important account of decentralized democratic government, see Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

linked. As Louis Brandeis and other decentralist intellectuals argued, large-scale private enterprise necessitates large-scale government regulation, and the combination of the two constitutes a threat to liberty, as that term is fully understood in its economic and political sense.¹⁹⁹ The view that local economic independence is a prerequisite for an independent citizenry is a staple of progressive decentralist thought²⁰⁰ that has been taken up by contemporary communitarians and civic republicans.²⁰¹

Of course, we no longer live in a Brandeisian world of small-scale producers. Nevertheless, the ideal of local economic independence continues to serve as an ideological resource. There are three reasons for this. First, the localist economic order is not hostile to private property, wealth, or commercial enterprise generally. Business-friendly local policies are therefore perfectly justified — in fact, favored — as long as they represent investments in small-scale, local businesses or relatively place-dependent or place-committed industries.

The important distinction for economic localists is not between capital and labor or property owners and the poor. Rather, the important distinction is between relatively mobile and relatively immobile capital.²⁰² The ideology of local economic self-sufficiency is hostile to the political dominance that accompanies concentrated wealth and the increasing mobility of capital. Thus, though local anti-Wal-Mart campaigns are spearheaded by labor groups seeking leverage in their unionization campaigns, those fights often take advantage of the republican rhetoric of economic independence. In this, they benefit from an alliance with small retailers, who argue that protectionist legislation is necessary to defend their livelihoods, to secure good jobs for local workers, and to counter local economic and political dependence.

Second, economic localism explicitly embraces decentralization; it looks to local political communities as the chief instruments of democracy, not to national political parties, labor groups, or other large-scale institutions. Again, this view has antecedents in Progressive Era political thought. As Frederic Howe wrote in 1905, the city is the “hope of democracy” — it is both the appropriate size for democratic participation and the relevant site for negotiating the relationship between poli-

¹⁹⁹ See LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* (Osmond K. Fraenkl ed., 1934); E.E. Steiner, *A Progressive Creed: The Experimental Federalism of Justice Brandeis*, 2 YALE L. & POL'Y REV. 1 (1983).

²⁰⁰ Schragger, *supra* note 3, at 1046; Edward S. Shapiro, *Decentralist Intellectuals and the New Deal*, 58 J. AM. HIST. 938, 939 (1972).

²⁰¹ See, e.g., SANDEL, *supra* note 195, at 123–250; see also ALPEROVITZ, *supra* note 13; DEFILIPPIS, *supra* note 95; SHUMAN, *supra* note 89; THAD WILLIAMSON ET AL., *MAKING A PLACE FOR COMMUNITY: LOCAL DEMOCRACY IN A GLOBAL ERA* (2002).

²⁰² William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1342–50 (1991).

ty and economy.²⁰³ Progressive decentralists have always made claims about the appropriate size for democracy; they assert that the national polity is too large and that questions of macroeconomic policy are too diffuse and abstract to engage the democratic public. Local economic policy, in contrast, is tangible, concrete, and accessible. As one commentator has written, “The question of the commercial public interest gets posed *locally*.”²⁰⁴ A community-wide debate over the living wage or an incoming Wal-Mart forces the community to assess and articulate the polity’s commercial interests. “In their struggle to give content to the public interest of the city, citizens . . . face the question of how to achieve reasonable prosperity — and . . . whether any sort of economic performance and any way of achieving it are appropriate.”²⁰⁵

Third, economic localism crosses a number of political streams. It has a left-leaning valence insofar as it champions a local regulatory role and favors communities over corporations. It is conservative, however, in that it emphasizes the importance of place, local practices, and economic self-sufficiency over cross-border markets, cosmopolitanism, and national or global governance. The anticorporatist strand in American thought is evident in the opposition to free trade on the right and left, employee ownership movements, and local opposition to big box stores. And it can be seen in the CBA and clawbacks projects, in which communities demand something in exchange for government subsidization.

The rhetoric of economic self-sufficiency and corporate responsibility has a nonpartisan appeal. Consider the negative reaction to the Court’s decision in *Kelo v. City of New London* — a reaction that was remarkably consistent across the political spectrum. *Kelo*’s seeming endorsement of economic development takings is quite in line with the dominant redevelopment ideology; the use of eminent domain for economic development has been and continues to be standard operating procedure in an environment of intense interlocal competition. The critics who previously challenged that dominant strategy often represented marginalized groups — particularly African Americans in poor communities displaced by urban renewal. *Kelo*, however, met resistance from the white middle class and from small business owners, who might otherwise favor economic development more generally. Economic localism helps explain that public reaction. *Kelo* elicited (using Robert Johnston’s terminology) a reaction from the democratic, anticapitalist middle class — the petit bourgeoisie protecting their livelihoods against large-scale global capital.²⁰⁶

²⁰³ HOWE, *supra* note 72.

²⁰⁴ ELKIN, *supra* note 8, at 157.

²⁰⁵ *Id.*

²⁰⁶ See ROBERT D. JOHNSTON, THE RADICAL MIDDLE CLASS 74–89 (2003).

What is interesting about *Kelo* and the issue of economic development takings is that it provided a point of entry into the anxiety associated with the increasing mobility of capital and the seeming threat it poses to local and individual economic stability. *Kelo* revealed a set of submerged but deeply held concerns about the current practice of corporate liberalism, with its emphasis on large-scale enterprise, free markets, and interlocal competition. These concerns have been in evidence since the plant closings of the 1970s and 80s; the anxiety has only accelerated with the rapid pace of economic restructuring and the continued decline of post-industrial towns and cities. A localist economic order represents some resistance to these trends. Its capacity to cross political bounds is what makes it somewhat potent.

IV. CITY-BUSINESS RELATIONS IN THE COMMERCIAL REPUBLIC

Economic localization is being driven by a decentralized labor movement, urban antipoverty organizations, opportunities in municipal law, political alliances with progressive city mayors, a localist economic ideology, and the urban resurgence. These efforts are emphatically post-industrial; in this atmosphere it may be possible for cities to regulate in ways that nations and states cannot — to leverage place-dependent value to constrain or redistribute capital. This nascent localization of economic policy coincides with the rise of the region as an important economic unit and the relative decline of the nation-state as a central regulator of economic life.²⁰⁷ Even if there were the political will to generate a new relationship between capital and democracy, it is far from clear that the nation can or is in a better position than cities to deliver. Indeed, a progressive economic localism is one possible answer to the dislocations that accompany globalization.

In light of these phenomena, we need to reframe our approach to city power. The conventional approach to the allocation of powers between the federal, state, and local governments involves assessing those governments' relative competencies and the political effects of particular allocations. These debates occur, however, with little consideration of the allocation of power as between government and capital. Debates about decentralization make little sense without reference to the private-side exercise of economic power as well as the public-side exercise of regulatory power. The relevant question is: how is the city's power exercised vis-à-vis capital — in particular, vis-à-vis large-

²⁰⁷ See Kevin R. Cox, *Globalization and the Politics of Local and Regional Development: The Question of Convergence*, 29 *TRANSACTIONS INST. BRIT. GEOGRAPHERS* 179, 179–80 (2004); Cox, *supra* note 11, at 434. See generally SASSEN, *supra* note 83.

scale, mobile capital? That question should inform how we conceive of local power and how we think about local economic policy.

A. Local Autonomy

We should start by complicating our understanding of the relative vulnerabilities of city and capital. The disciplining view of capital mobility is skeptical of the exercise of local power — it assumes that government power will often be deployed to exploit unless there are some constraints. Liberty, on this account, is the exercise of rights against — and the operation of markets free from — direct government intervention or interference. One implication of this view is that where exit does not provide sufficient discipline, legal limits on city power are appropriate to prevent exploitation of property owners, corruption, and other political process flaws of local urban democracy. Courts and legislatures should step in to prevent local oppression of the vulnerable; local authority is thus appropriately limited.

When one turns away from the dominant conception of rights and markets, however, a different idea of vulnerability emerges. A competing political tradition tells us that governments are also vulnerable to markets, though this vulnerability tends to be less visible. Indeed, the vulnerability of the city to mobile capital is often interpreted as the reverse — the vulnerability of capital to local government.

Kelo is a nice example: mobile capital dictates the terms of New London's economic strategy, but the salient and legally cognizable act was the government's invasion of the homeowners' property rights. The liberal economic order has the necessary tools to prevent the public sphere from invading a protected private sphere — the language of rights does most of this work.²⁰⁸ But we have more trouble understanding when the private sphere is invading the sphere of the public — that is, we have more trouble preventing the distortion of public decisionmaking for private ends. Explicit corruption or capture of public processes can be guarded against, but the form of corruption that worries those concerned with capital's political power — the narrowing of the public sphere, the loss of political and economic independence, government policy driven by unaccountable and unelected economic actors — is more difficult to articulate.²⁰⁹ The sense that government has lost the power to control the chief determinants of citizens' well-being — sometimes described in terms of "democracy deficits" — drives local economic reform efforts like the minimum wage and CBAs.

²⁰⁸ See ELKIN, *supra* note 8, at 127.

²⁰⁹ See *id.*

Our difficulty in articulating this concern reflects the pervasiveness of the negative conception of rights as trumps to be asserted against government invasions. That difficulty also stems from the fact that we have come to discount the notion of the common good itself; the “public” no longer exists but is an amalgam of private interests. Indeed, our current theories of democratic process — dominated as they are by public choice — tend to undermine the idea of an identifiable democratic public at all. The democratic public either does not exist or has no interests that can be invaded by private-side rights-bearers.

But this one-sidedness masks the central problem, which is that the political pathologies of local government are, in significant part, a function of local government’s relationship to capital. Indeed, both concerns — the public invasion of rights and the private corruption of the public good — have been and continue to be dominant problems in the city-business relationship. Recall that the original nineteenth-century limitations on city power were a means of restraining giveaways to mobile capital; the counter-movement to limit state authority was motivated by similar concerns that business-dominated interests were corrupting good municipal government.²¹⁰ Limiting municipal power to intervene in the private marketplace by enforcing a rigid public/private distinction and adjusting the city’s powers vis-à-vis higher-level governments have been the two primary ways of dealing with the pathologies of the city-business relationship. These conceptual narratives continue to dominate the current law of local government.

Those efforts are quite imperfect, however. More importantly, they appear unable to cabin effectively the politics of capital attraction, retention, and exploitation. That is because the relationship between the legal regulation of the city and mobile capital is not a linear one. The city develops in tandem with private investment, commercial activity, and capital formation — city power cannot be disentangled from the power of private economic activity. Mobile capital operates through the instruments of local government; the rules that bind the latter might well be for the purpose of binding the former. Reformers legitimately worry that public power will be used as an instrument for private gain, but private gain is the city’s lifeblood.

The notion of city power is thus more complicated than it appears. Cataloguing the powers or limitations of municipal government does not tell us very much. Rather, one needs to ask how lodging authority to make certain kinds of decisions at a particular level of government — federal, state, or local — affects the city-business relationship.²¹¹

²¹⁰ See generally HOWE, *supra* note 72.

²¹¹ See ELKIN, *supra* note 8, at 157.

Indeed, the city power debate — to the extent it looks only at the legal powers of cities vis-à-vis other levels of government — is somewhat beside the point. Local “autonomy” is not an available option: first, because the city and private investment are inextricably linked; and second, because different allocations of legal authority among the city, state, and federal governments will have different (and not always predictable) consequences for the city’s vulnerability to private-side control and manipulation.²¹²

We thus return to Peterson’s limited city — where we began. The city’s “limits” (using Peterson’s term) are very real: local governments have to operate within the existing economic order. This economic order, however, is a creature of a legal structure that (1) privileges private (over public) economic ordering and (2) is ambivalent about how cities should promote, develop, and otherwise attract economic resources. Constraining the city legally has often been viewed as a means for neutralizing the effects of private capital on the local political process.²¹³ Once the city is understood as a neutral framework for private economic activity, the two — state and market — should operate in relatively separate spheres. But they do not. The city’s neutrality has to be constantly reaffirmed and maintained through legal rules.

B. Local Economic Policy

In the end, the public/private distinction and the shifting of power up or down the scale of government cannot substitute for articulating a substantive account of the appropriate relationship between capital and democracy, business and the city. The dominant approach involves a preference for market-based solutions and a view of the state as creating the background conditions for private investment. The current discourse of economic development celebrates — in Nicholas Blomley’s words — the “redemptive power of private capital.”²¹⁴ This translates into a strategy of local capital attraction against a backdrop of national economic policymaking and redistribution.

The critics of this approach have argued that urban redevelopment policies “are not devised with [the] local public good in mind, but for elusive outsiders who will miraculously be attracted, at public expense, to the ‘competitive’ city.”²¹⁵ Critics wonder why cities are competing

²¹² For a somewhat different account of how local “autonomy” is neither a desirable nor achievable aim, see Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

²¹³ See Gerald E. Frug, *Property and Power: Harlog on the Legal History of New York City*, 9 AM. B. FOUND. RES. J. 673, 681–82 (1984) (book review).

²¹⁴ Nicholas Blomley, Kelo, *Contradiction, and Capitalism*, 28 URB. GEOGRAPHY 198, 200 (2007).

²¹⁵ Richard Shearmur, Editorial, *Of Urban Competitiveness and Business Homelessness*, 29 URB. GEOGRAPHY 613, 614 (2008).

and who that competition benefits.²¹⁶ The first question is difficult to answer, as there is little consensus on the purposes of the city, an entity that describes a multiplicity of economic, political, social, and cultural ends. The answer to the second question is often — as I have argued — “local elites (e.g., property owners, politicians, business leaders . . .) who have chosen to instrumentalize the city for their particular aims.”²¹⁷

As a matter of strategy, there is little doubt that cities are currently dependent upon large-scale, transnational capital to survive. How can cities become counterweights to private economic power if they are dependent upon it? A decentralist regulatory order offers one possibility. But it applies only to those cities that have the economic and political wherewithal to make choices about the form and timing of local investment. For the declining cities of the Rust Belt and elsewhere, the ability to dictate terms is fairly limited. Without a great deal of intergovernmental support, those cities are generally confined to market-based attraction strategies; they have few alternatives.

This lack of alternatives counsels a central role for local government in economic regulation, but one that is accompanied by state or federal intervention to mute the competition for resources that gives rise to the pathologies of the city-business relationship. The latter has been long proposed. Revenue sharing, city-county consolidation or other regional efforts, and federal aid to cities are examples of policies designed to give cities more room to maneuver. Limiting location subsidies and interlocal capital competition through federal or state law is another option. These efforts, however, are unlikely to find traction in the current political environment.

Cities therefore need at the least to strike better deals with mobile capital. If local governments are unwilling to take an active role in economic development or if they are captured by propertied interests, then organizations and institutions that have an independent political base can act to ensure some balance. The backing of a progressive mayor or redevelopment agency chief, the support of labor unions, or the deployment of translocal networks can fill that political void, as the CBA process — when it is working — illustrates.

Another approach would be to adjust the relationship between relatively mobile, large-scale capital and relatively immobile, small-scale capital by privileging the latter over the former. We cannot return to the small-scale political economy that characterized the producerist economic order.²¹⁸ Nevertheless, local policymakers can focus their ef-

²¹⁶ See *id.* at 613–14.

²¹⁷ *Id.* (footnote omitted).

²¹⁸ See Schragger, *supra* note 3, at 1081–82.

forts on promoting small-scale enterprise, even in a global economy. As I have already observed, the recent localization of economic policy coincides with the rise of the region as an important economic unit. Commentators have noted that globalization and localization are not incompatible and that they may in fact be versions of the same phenomenon.²¹⁹

This strategy is arguably more consistent with the city's long-run economic stability. Cities do not currently have an effective response to the boom-and-bust cycle. The problem is that mobile capital once attracted can then leave, generating substantial negative effects given that many residents and the city itself are fixed in place. It thus makes sense for a city to try to reduce the volatility of capital flows, even if that means that its residents experience a lower level of economic well-being in the short term.²²⁰ Local government reformers would do well to consider a legal and political structure that is more responsive to long-term, immobile capital rather than one that incentivizes the chase for highly mobile capital.

Of course, there is always the question of ends. What should be the goal of local economic development efforts? If it is to help cities and their residents "productively fit[] into the global economy,"²²¹ one might adopt a particular set of strategies: redistribution at the national level to even out the dislocations caused by large-scale economic restructuring, job training, assistance in internal migration, regionalism, policies encouraging urban entrepreneurialism, and market-based economic development. But the goal might be larger. Recall that the rejection of the corporatist medieval and early colonial city represented the end of monopoly, mercantilism, and autocracy in favor of open markets, democracy, and individual economic freedom. One may wish to reassert these same goals in the face of the power and authority of large, hierarchical corporate entities. The goal of the city would be to become less a passive recipient of global capital than a shaper of local capital in a direction more conducive to freedom.

Ultimately, reform of the relationship between mobile capital and the city operates on two levels. On one level are efforts to improve the way localities operate within the constraints of private capital. On another level are attempts to restructure those constraints altogether.²²²

²¹⁹ See Sassen, *supra* note 84.

²²⁰ Thanks to Bob Scott for this helpful insight.

²²¹ DEFILIPPIS, *supra* note 95, at 24.

²²² The debate about market-based CED can be understood in these terms. See, e.g., Cummings, *supra* note 89, at 408 ("[P]overty lawyers must move away from the current emphasis on injecting capital into geographically discrete, racially homogenous communities, and instead embrace a politically engaged conception of CED that . . . create[s] greater equity for vulnerable workers.").

These themes — operation within the constraints of private capital or attempts to restructure those constraints — are the dominant trope in local government law.

CONCLUSION

The newly emergent regulatory localism is a product of the urban resurgence and the local leveraging of sticky capital, translocal networks, and an emerging decentralist ideology. It has also been encouraged, perhaps surprisingly, by the globalization of capital flows. That globalization has narrowed the options available to nation-states, providing some political and economic room for smaller-scale governments to regulate.

This is not to say that capital no longer dictates terms at the municipal level. The disciplining view of mobile capital (for better or for worse) is not wrong — the fact of mobile capital undoubtedly influences the local political process and limits local policy choices. We should, however, recognize that: (1) there are countertrends that limit convergence; (2) capital might not be as powerful as commonly assumed, or at least, that power might not be exercised primarily through the threat of exit; and (3) one needs a substantive account of the relationship between capital and democracy in order to make claims about city power and powerlessness.

Cities and capital are inextricably intertwined. The city is the physical manifestation of economic development; it exists and thrives when propinquity generates economic gains. The public/private distinction and the allocation of powers between states and localities are thus best understood as two related efforts to address the city-business relationship and the political pathologies that accompany the governmental promotion of, participation in, and subsidization of private commercial enterprise. Those pathologies are not solvable; they are endemic to an economic system in which capital is mobile and cities are not. The relationship between democracy and capital has thus been an abiding concern for scholars and reformers of municipal government.

The conventional view has been that local responses to economic restructuring are limited and likely to fail and that redistribution is primarily a national concern. At the same time, critics of current local economic development policies argue that these policies mask a redistributive bias toward corporate capital and land-based elites.

Local progressive or reformist regulatory efforts challenge both of these propositions. No doubt, local economic policy is highly constrained. The reemergence of a progressive decentralist strand in our political economy nonetheless represents a renegotiation of the terms of capital dependence. That it may undermine and destabilize the con-

ventional wisdom — the view that local efforts are always destined to fail — is itself useful.

How robust this movement is or will become is an open question, however. Regulatory localism might be a feature of globalization — that is the optimistic story for those who worry about the loss of local democratic control. The pessimists, by contrast, take the increasing mobility of capital to mean that cities have little control over their economic fates. I choose the former story here — but only cautiously. In reasserting the public's right and ability to control those large-scale corporate entities whose presence in the community is both a necessity and a threat, decentralized economic regulation suggests that local governance is still possible in an age of global capital.