

Cities, Economic Development, and the Free Trade Constitution

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*The role of cities and local government generally has gone unexamined by legal scholars of the constitutional common market. Yet in a highly urbanized country in which cities and large metropolitan areas dominate the national economy, much of the cross-border movement of persons, goods, and capital inside the United States is more accurately characterized as inter-municipal rather than inter-state. This Article examines the constitutional rules that govern this cross-border movement from the perspective of the city. The Article argues that judges and commentators have misapprehended the jurisprudence of the American common market because they have been looking at its operation on the wrong scale. Examining how the doctrine operates at the municipal level exposes the gaps and contradictions in the jurisprudence, reveals connections between legal doctrines that heretofore had not been considered part of the free trade regime, and highlights the Supreme Court's implicit (and under-theorized) urban economic policy. The reframing of the economic and jurisprudential place of cities in the free trade constitution sheds light on a number of important recent cases, in particular *Kelo v. New London*, in which the Court upheld a city's use of eminent domain for economic development purposes under the Fifth Amendment's Takings Clause. The Article's city-centric approach also intervenes in a number of judicial and scholarly debates, including the appropriate reach and application of the "dormant" commerce clause, the appropriate judicial oversight of local land use regulations under the Takings Clause, and the role of courts in policing and shaping local economic development efforts more generally.*

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INTRODUCTION

Much has been made of the commercial genius of the American Constitution and the judicial decisions that have knitted the disparate colonies into one common market. Courts and commentators understand the successful integration of the colonies into a free trade block as one of the Founding generation's chief aims; judicial advancement of that aim has been relatively robust and oft celebrated.¹ The Court continues to endorse the view that the Commerce Clause and other constitutional limits on state economic parochialism have prevented the republic from splintering into state or regional competing markets.² The prosperity of the country is presented as the descriptive truth of this constitutional truism.³

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¹ See *H.P Hood & Sons v. Du Mond*, 336 U.S. 529, 539 (1939) ("The material success that has come to the inhabitants of the states which make up the federal free trade unit has been the most impressive in the history of commerce, but the established interdependence of the states only emphasizes the necessity of protecting interstate movement of goods against local burdens and repressions."); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523 (1935) (Our Constitution arose under "the theory that the peoples of the several states must sink or swim together, and that in the long run, prosperity and salvation are in union and not division"). See also Jim Chen, *Pax Mercatoria: Globalization as a Second Chance at "Peace for Our Time,"* 24 *FORDHAM INT'L L.J.* 217, 230-37 (2000); Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 *MICH L. REV.* 1091 (1986); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1057-58 (3d ed. 2000).

Of course, the canonical view, like much in constitutional law, is contested. See Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 *DUKE L.J.* 569, 599-601 (1987) (rejecting idea that constitutional principles such as free trade may be created when such principles are not textually supported); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 *WAYNE L. REV.* 885, 986-91 (1985) (arguing that there is no evidence that a major historic purpose for the Commerce Clause was to create a free-trade area among the states); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 430 (1982) (suggesting that Constitution made no attempt to deal extensively with free trade unlike later constitutions such as Australian constitution).

² Holmes's famous (and oft-quoted) statement about the need for judicial oversight of state and local commercial regulations captures this view. He declared: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would

The presumptive success of the constitutional common market has sometimes prevented close examination of its actual effects, however. Often obscured by the conventional story of (mostly) successful inter-state economic integration is that the prosperity of the nation has been uneven in place and over time. Regions and metropolitan areas experience significantly different levels of prosperity: some places are economically ascendant while others are in decline. Thus, in a relatively short time span we have seen the rise and fall of the urban industrial metropolis, the shift of jobs and industry from northern industrial cities to the south and west and the movement of capital and people out of older cities and into new urban forms—the suburb and the edge city.⁴

Constitutional doctrine tends understandably to focus on inter-state economic relationships (as do those who talk about constitutional doctrine). In doing so, however, the Court’s doctrine (and those who discuss the doctrine) often seem to miss the chief economic story of the twentieth century: the rise and fall of the great industrial cities. Indeed, the city has been all but invisible in the narrative and doctrine of the national common market.

This Article examines the “free trade constitution” from the perspective of the city.⁵ I argue that judges and commentators have misapprehended the

be imperiled if we could not make that declaration as to the laws of the several states. For one in my place sees how often a local policy prevails with those who are not trained to national views and how often action is taken that embodies what the Commerce Clause was meant to end.” OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 295-96 (1920). Despite some significant controversy among the current justices, the Court continues to review local and state laws for protectionist purposes or effects, declaring recently that the dormant commerce clause creates an “area of free trade among the several states.” See *Associated Indus. v. Lohman*, 511 U.S. 641, 650 (1994). But see *General Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J. concurring) (“[T]he so-called ‘negative’ Commerce Clause is an unjustified judicial invention”); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J. dissenting) (“That the expansion effected by today’s decision finds some support in the morass of our negative Commerce Clause caselaw only serves to highlight the need to abandon that failed jurisprudence and to consider restoring the original Import-Export Clause check on discriminatory state taxation to what appears to be its proper role.”).

³ See, e.g., *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 538 (1949); Chen, *supra* note ___, at 230-33; John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 514 (2000).

⁴ See Edward W. Glaeser and Matthew E. Kahn, *Decentralized Employment and the Transformation of the American City* (Nat’l Bureau of Econ. Research, Working Paper No. 8117, 2001) (discussing the trend of movement of people and labor into suburbs and edge cities); Michael J. Greenwood & Gary L. Hunt, *Migration and Interregional Employment Redistribution in the United States*, 74 AM. ECON. REV. 957 (1984); BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* (1982).

⁵ I use “city” here and throughout the paper to describe a range of municipalities—from smaller towns to large metropolises. This use of “city” is conceptual and emphasizes the legal and economic commonalities among local governments. Cf. Jerry Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980). Those commonalities have important limits, however. Cf. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990). When it is important to differentiate between suburbs, small towns, central cities, and edge cities, I do so explicitly.

jurisprudence of the American common market because they have been looking at its operation on the wrong scale. Examining how the doctrine operates at the municipal level exposes the gaps and contradictions in the jurisprudence, reveals connections between legal doctrines that heretofore had not been considered part of the free trade regime, and highlights the Supreme Court's implicit (and under-theorized) urban economic policy.

There are good reasons for making that policy explicit. Cities are vitally important agents of economic development—indeed, many argue that the city (and urban development more generally) is the most important agent of economic advancement in the history of civilization.⁶ Cities are the largest economic entities in their states and regions and in their nations. Phoenix generates 70% of Arizona's total economic output and 71% of the state's employment.⁷ Cleveland's metropolitan economy is bigger than Ireland's.⁸ Six American metropolitan areas—New York City, Los Angeles, Chicago, Washington, D.C., Dallas, Philadelphia—rank among the top thirty largest economies in the world.⁹ And though the United States began as an agricultural and rural nation, it is now indisputably an urban one. Thus, when one speaks about the free trade constitution, one is mostly speaking about inter- and intra-metropolitan trade;¹⁰ to talk about the national economy is to talk mostly about urban-based development and urban-based trade flows.¹¹

The constitutional-level rules that govern these flows are derived primarily from the Commerce Clause,¹² but also from the Privileges and Immunities Clause,¹³ sometimes the Equal Protection¹⁴ and Due Process Clauses,¹⁵ and indirectly through takings and antitrust doctrine. The effect of these bodies of doctrine on cities has not been understood systematically in part because the rules have never seemed very important. Constitutional doctrine rarely makes a distinction between cities and states; for example, the Court's "dormant" Commerce Clause doctrine treats local economic protectionism the same as state economic protectionism.¹⁶ Moreover, as an economic matter, law does not seem to

⁶ See, e.g., JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: THE PRINCIPLES OF ECONOMIC LIFE* (1984); *The World Goes to Town*, *ECONOMIST*, May 3, 2007, at 4 ("Cities' development is synonymous with human development.") .

⁷ GLOBAL INSIGHT, INC., *THE ROLE OF METRO AREAS IN THE U.S. ECONOMY* 6 (2006).

⁸ WILLIAM BOGART, *THE ECONOMIES OF CITIES AND SUBURBS* 4-5 (Prentice Hall 1998).

⁹ GLOBAL INSIGHT, INC., *supra* note 5, at 15.

¹⁰ BOGART, *supra* note __ at 4; JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: THE PRINCIPLES OF ECONOMIC LIFE* 32 (1984); PAUL KRUGMAN, *GEOGRAPHY AND TRADE* 3 (1991).

¹¹ JANE JACOBS, *THE ECONOMY OF CITIES* 262 (1970)

¹² TRIBE, *supra* note 1, 1080-85.

¹³ *Id.* at 1255-75.

¹⁴ Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 *MICH. L. REV.* 1091, 1277 (1986).

¹⁵ *Id.* at 1105-06

¹⁶ TRIBE, *supra* note __, 1061-62.

matter: the dominant economic accounts of cities tend to presume that cities are open economies, governed not so much by law but by the force of mobile capital, which dictates what cities can and cannot do as a matter of policy.¹⁷ Whether the “free trade” rules governing cities might be different than the rules governing states, or whether the rules might differently affect cities has rarely been explored.

An understanding of the constitutional-level rules that govern the inter-city flow of people, goods, and capital, however, is vital to answering a key question of urban policy and of national economic policy more generally: To what extent can and should cities seek to influence their economic fates? A city is an agglomeration of persons, goods, and capital. A chief task of the city is controlling the cross-border flow of these factors to its advantage. On the one hand, cities are apt to engage in protectionist policies that prevent entry or that raise the costs of entry for competitors or high-cost residents.¹⁸ Exclusionary zoning, exactions or development fees, and anti-big box store laws are examples of such behavior. On the other hand, cities are apt to engage in behavior that might be too solicitous of mobile capital, by forcing current residents to subsidize the entry of new or preferred arrivals.¹⁹ Subsidies for professional sports teams, infrastructure development that favors certain socio-economic classes, economic development takings, and locational subsidies for industry or retail are examples. To the extent that these kinds of activities raise constitutional concerns, cities can be both too protectionist and not protectionist enough.

This formulation of local government behavior highlights the cross-border nature of municipal economic efforts. Indeed, a great deal of constitutionally-relevant local government conduct can be usefully understood and recharacterized in cross-border terms.

Consider *Kelo v. City of New London*²⁰ and *DaimlerChrysler Corp. v. Cuno*.²¹ *Kelo*—which interpreted the public use requirement of the Fifth Amendment’s takings clause to permit the use of eminent domain for economic development—has received lots of scholarly criticism,²² though very little of it

¹⁷ See, e.g., PAUL PETERSON, CITY LIMITS 28 (1981).

¹⁸ See MARK SCHNEIDER, THE POLITICAL ECONOMY OF SUBURBIA 125-26 (1989).

¹⁹ ARTHUR O’SULLIVAN, URBAN ECONOMICS 84-85 (6th ed. 2007).

²⁰ 545 U.S. 469 (2005).

²¹ 126 S. Ct. 1854, 1859 (2006).

²² There is a voluminous literature on *Kelo*, much of it critical. See, e.g., Dean Allen Floyd II, *Irrational Basis: The Supreme Court, Inner Cities, And The New “Manifest Destiny,”* 23 HARV. BLACKLETTER L.J. 55 (2007); Orlando E. Delogu, *Kelo v. City of New London—Wrongly Decided and a Missed Opportunity for Principled Line Drawing with Respect to Eminent Domain Takings*, 58 Me. L. Rev. 17 (2006); Charles E. Cohen, *Eminent Domain After Kelo v. City of New London: An Argument for Banning Economic Development Takings* 29 Harv. J.L. & Pub. Pol’y 491 (2006); Timothy Sandefur, *The “Backlash” so far: Will Americans get Meaningful Eminent Domain Reform?*, 2006 MICH. ST. L. REV. 709 (2006); Eric Silkwood, *The Download on Kelo: How an Expansive Interpretation of the Public Use Clause has Opened the Floodgates for Eminent Domain Abuse*, 109 W. Va. L. Rev. 493 (2007); Laura Underkuffler, *Frank I. Michelman: Kelo’s Moral*

attempts to place the case in the context of the particular constitutional economic regime that I am describing. Indeed, takings doctrine is a poor vehicle for addressing the questions raised by the *Kelo* case. Though less visible, other doctrines—the Commerce Clause most prominently—are more directly in play when cities seek economic advancement through processes that either close or open the gates of the city to investment, labor, or residents. Thus, *DaimlerChrysler Corp. v. Cuno*, a case that has received relatively little attention, presented the propriety of economic development incentives (not unlike the ones at issue in *Kelo*) under the Commerce Clause.²³ Like *Kelo*, *Cuno* involved an economically depressed city—in that case, Toledo, Ohio. And also like *Kelo*, *Cuno* involved an economic incentive plan designed to attract and keep industry in the city.²⁴ Though the cases came to the Court under different doctrinal headings—the Takings Clause for *Kelo*, the Commerce Clause for *Cuno*—a central theme in both is the appropriate level of constitutional oversight when cities seek to attract and keep capital inside their borders.

There are scores of declining post-industrial cities like New London and Toledo in the United States, as well as ascending cities like Charlotte and Atlanta.²⁵ To what extent should constitutional law intervene when these cities engage in economic policies that open or close their borders to persons, investment, or goods? To answer this question, one needs to understand the interplay of the myriad constitutional level rules in the free trade constitution, and how those rules affect cities that are on their way up economically or on their way down. These rules constitute the Constitution's implicit urban and national economic policy.

Part I of this Article provides reasons for thinking about the US common market in inter-municipal terms. Granted, to the extent the U.S. Constitution embraces a theory of the common market, that market is formally a market of states. Nevertheless, there are good reasons to think about the rules governing the U.S. common market in municipal terms. Though they are mostly invisible to constitutional doctrine, cities are in many ways more economically relevant than states, and inter-city trade is more relevant economically than inter-state trade.

Failure, 15 WM. & MARY BILL OF RTS. J. 377 (2006). The popular reaction has been even more angry. See Timothy Sandefur, *Sen. Kyl Blasts Supreme Court 'Kelo' Decision at Judiciary Committee Hearing*, US FED NEWS, September 20, 2005; *Eminent-Domain Wars*, THE WASHINGTON TIMES, June 21, 2006, at A20; Jonathan V. Last, *The Kelo Backlash*, THE WEEKLY STANDARD Vol. 011 Issue 46, August 11, 2006; Carol Saviak, *Property Rights at Risk 2 Years after Kelo Ruling, Abuse of Power Continues*, ORLANDO SENTINENTAL, June 27, 2007, at A11; Greg Blankenship, *We Must Fight against the Tyranny of Kelo*, THE WALL STREET JOURNAL, July 6, 2006, at A1.

²³ 126 S. Ct. 1854, 1859 (2006).

²⁴ *Id.* at 1859.

²⁵ See The Brookings Institute, *Restoring Prosperity: The State Role in Revitalizing America's Older Industrial Cities* 69-76 (2007).

The dominant constitutional narrative concerning the importance of inter-state mobility is flawed if it ignores the third tier of American government.

Part II describes the current trade regime from the perspective of the city. The constitutional rules governing the inter-jurisdictional flow of people, goods, and capital are derived from a number of different constitutional provisions, each with its own doctrinal wake. Very few of these doctrines are free from ambiguity or controversy and, except in very narrow circumstances, the jurisprudence is almost entirely inattentive to the differences between local governments and states. That being said, the free trade Constitution looks quite different when viewed from the perspective of the municipality than when viewed from the perspective of the state. In large part this difference can be attributed to the Court's unwillingness to treat local land use regulations as potential mobility barriers. Land use regulation is the central mechanism by which local governments seek to control the flow of persons, goods, and capital across their borders. This explains why municipal politics is the politics of land use. But land use regulations tend to operate asymmetrically: land use is normally more useful in controlling the inflow of capital or residents than it is in controlling the outflow of capital and residents.

The inter-local common market that emerges from this relatively jumbled state of affairs does not make much sense. And why would it? The "shadow" free trade jurisprudence at the municipal level is unconscious, a function of gaps in the Court's doctrine. This "not-so free" trade regime encourages two kinds of inter-city trade wars: the first is a war to keep high-cost residents out; the second is a war to keep high-value capital in. The *Kelo* case is an example of this dynamic at work, though only New London's efforts to attract and keep capital were visible, and even then, the Court was only remotely cognizant of the context in which those efforts were taking place.

Part III reconsiders *Kelo* by placing it in the context of a number of local economic development cases that have reached the Supreme Court. I then consider some theories that might govern these cases going forward. To the extent that one believes that judicial intervention is sometimes necessary to control parochial municipal behavior, how does one identify such behavior? Current theories of local political behavior have two flaws: first, in ignoring the actual economic status of municipalities in a metropolitan region, they tend to over-generalize; second, by treating the current mobility rules as a given, they tend to miss how local behavior is already shaped by those rules. In Part IV, I argue that whether a local government acts parochially is highly context-specific. Under the current inter-local trade regime, a city's political behavior depends on its relationship to the metropolitan-area economy, its current economic health, and the degree of state interference in its economic affairs.

In the end I am somewhat agnostic as to the course that judges should take. As a policy matter, the manipulation of local fiscal health through the use of economic development incentives and land-use-based exclusion does not seem

particularly fruitful. That localities resort to these policies appears to be a collective action problem that could be solved with centralized regulation.²⁶ That being said, my primary interest here is conceptual: the purpose of this Article is to understand the actual rules of the American common market by looking at their operation on the local scale. Whether a jurisprudence that is attentive to scale is ultimately deferential to (or more skeptical of) local economic development efforts does not directly concern me.

As it currently stands, however, the jurisprudence of the common market is wildly inconsistent. Though the doctrine has the effect of differentiating between cities and states, it does not do so based on any conscious theory. And generalizations about local political behavior are impossible to separate from the constitutional rules that govern that behavior. Whether the Court can develop judicially manageable standards for crafting a consistent urban economic policy I put off to another day. For now, the knowledge that the Court is engaged in such an enterprise (and appears to be wholly unaware of it) is a start.

I. **The Wealth of Cities**

The constitutional common market—to the extent it exists—is formally a market of states. Nevertheless, to the extent that functional or purposive criteria govern the Court’s doctrine in this area, it makes sense to understand how the rules of the market operate at the local scale. I assume that the jurisprudence of the common market is concerned with two goals: maintaining the relatively free mobility of goods, persons, and capital across jurisdictions while permitting sub-federal governments a degree of latitude to regulate as they see fit.²⁷ With that background assumption in mind, there are two reasons to think about the U.S. common market in inter-city terms. First, urbanization is the salient fact of American demographic and economic life. Second, cities are economically more relevant than states as a conceptual matter.

A. The Rise of Urbanity

Urbanity is the salient fact of American geography. The city has become and continues to be the chief agent of demographic and economic change in the

²⁶ See, e.g., SCHNEIDER, *supra* note __, at 210-211.

²⁷ Cf. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”) (citation omitted).

United States, as it has been in all developed countries since the industrial revolution.²⁸ The twentieth century has witnessed monumental shifts in Americans' work and living patterns, involving the great migration into the cities, a latter (and smaller) movement out of cities into the suburbs, and the development of increasingly large and dense metropolitan areas.²⁹ In 1860, less than twenty percent of the population lived in urban areas;³⁰ in 2000, close to eighty percent did.³¹ States have had a role to play in this development, of course, but the story of nineteenth and twentieth century economic development is not the story of states, but rather the story of the city and the great metropolitan regions that have accompanied its rise.³² Urbanity—with its characteristic density, division of labor, and social interaction—is the norm now, not the exception.³³

Of course, even when North America was mostly rural and the continent's economy was agriculturally-based, cities were the ports of entry and the chief sites of inter-state and inter-national trade.³⁴ Cities have been trading centers from the beginning of civilization; this was no different in early America, and it is no different now. American cities developed along the coasts or at the mouths of rivers for maximum access to trans-Atlantic trade.³⁵ Later, with the development of canals and the building of the railroads, trade moved into the center of the country and cities lived or died by their proximity to transportation networks.

For example, it was Chicago that drove the engine of mid-western agricultural and industrial development in the mid-1800s. As William Cronon shows in *Nature's Metropolis*—his now iconic story of Chicago's rise—the economies of scale that could be achieved in the city made it possible to produce and then to move resources—wheat, wood, cattle, pigs—out of the hinterlands.³⁶ The city literally created “commodities” (and in so doing unalterably shaped the

²⁸ The city is also the chief agent of demographic change in the developing world. See CITIES TRANSFORMED: DEMOGRAPHIC CHANGE AND ITS IMPLICATIONS IN THE DEVELOPING WORLD 17-25, 76-95 (Panel on Urban Population Dynamics, Mark R. Montgomery et al. eds., 2003).

²⁹ See ALAN RABINOWITZ, URBAN ECONOMICS AND LAND USE IN AMERICA: THE TRANSFORMATION OF CITIES IN THE TWENTIETH CENTURY (2004); Willem van Vliet, *The United States*, in SUSTAINABLE CITIES: URBANIZATION AND THE ENVIRONMENT IN INTERNATIONAL PERSPECTIVE 169-204 (Richard Stren et al. eds., 1992); RICHARD MOE & CARTER WILKIE, CHANGING PLACES: REBUILDING COMMUNITY IN THE AGE OF SPRAWL 36-74 (1997).

³⁰ U.S. Census Bureau, *Table 4. Population: 1790 to 1990*, <http://www.census.gov/population/censusdata/table-4.pdf> (last visited July 11, 2007).

³¹ U.S. Census Bureau, *United States – Urban/Rural and Inside/Outside Metropolitan Area*, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=GCT-P1&-ds_name=DEC_2000_SF1_U&-format=US-1 (last visited July 1, 2007).

³² See JON C. TEAFORD, *THE METROPOLITAN REVOLUTION: THE RISE OF POST-URBAN AMERICA* (2006); RABINOWITZ, *supra* note 29.

³³ See text accompany footnotes 30 and 31 (citing census statistics on move from a rural population to an urban population).

³⁴ See Carl Abbot, *Urbanization*, in 8 *DICTIONARY AM. HIST.* 288, 289 (Stanley I. Kutler ed., 2003).

³⁵ See *id.*

³⁶ WILLIAM CRONON, *NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST* 266-67 (Norton 1991).

rural and agricultural landscape) by making it possible to trade them in large amounts.³⁷ Trade and capital flows moved between the great cities, and between Chicago and the smaller cities of the mid-west. Resources and materiel moved into Chicago to be bundled; capital flowed back from the east.³⁸

The late 19th and early 20th centuries saw the rise of the industrial cities. Migrants flowed into cities like Detroit, Pittsburgh, and Buffalo to provide labor for the expanding industrial economy. Cities grew at an increasing pace: between 1900-1920, Detroit grew from 285,704 to 993,078; New York from 3,437,202 to 5,620,048; San Francisco from 342,782 to 506,676; Chicago from 1,698,575 to 2,701,705; Buffalo grew 43.8%; Pittsburgh grew 82.9%.³⁹ The great migration of African-Americans occurred between 1910 and 1930, when over 2 million African-Americans moved out of the south, most into the large cities of the west and northeast.⁴⁰ Meanwhile, immigrants from Europe were pouring into American cities. Between 1900 and 1920, close to 15 million immigrants entered the United States, many of whom settled in industrial cities.⁴¹

The Depression and wartime economy accelerated the migration to the cities, though at a time when the urban industrial age was already in decline. Industry and persons began to move out to the suburbs and to the urbanizing south and west. Central city populations began to experience population losses in the 1950s, and then more rapidly through the 60s and 70s and 80s.⁴² Since the mid-twentieth century, old, cold cities have lost ground to newer sun-belt cities, though urbanization itself has increased. The eastern corridor between Boston and Washington constitutes a massive metropolitan area of 55 million people.⁴³ The population of the region spanning from Los Angeles to San Diego in California is approaching 20 million people.⁴⁴ The economic and urbanized region of Chicago

³⁷ *Id.* at 120.

³⁸ *Id.* at 82-83; cf. DAVID M. SCOBAY, *EMPIRE CITY: THE MAKING AND MEANING OF THE NEW YORK CITY LANDSCAPE* 48 (2002) (“To mid-nineteenth century American ears, the word imperial went with city as naturally as it did nation. The energies that it names were thought to be lodged in urban centers, and those energies circulated according to developmental laws that made cities the engines of commercial and civilizational history.”).

³⁹ Campbell Gibson, *Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990*, Tables 13 & 20 (U.S. Census Bureau, Population Division Working Paper No.27,1998), available at <http://www.census.gov/population/www/documentation/twps0027.html>.

⁴⁰ NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* (1991).

⁴¹ U.S. Census Bureau, 2007 Statistical Abstract, Section 1, Table 5. *Immigration 1901 to 2005*, <http://www.census.gov/prod/2006pubs/07statab/pop.pdf> (last visited August 9, 2007).

⁴² Alexander von Hoffman & John Felkner, *The Historical Origins and Causes of Urban Decentralization in the United States*, The Joint Center for Housing Studies, Harvard University 17-18 (2002).

⁴³ U.S. Census Bureau, *Ranking Tables for Metropolitan Areas: Population in 2000 and Population Change from 1990 to 2000, Table 1*, <http://www.census.gov/population/www/cen2000/phc-t3.html> (last visited August 9, 2007).

⁴⁴ *Id.*

and its environs arguably sprawls from Kenosha, WI in the north, to Joliet, IL in the south. The Texas cities of Houston and Dallas and their regional areas constitute 47% of the state's population.⁴⁵ Denver and its massive metropolitan area constitutes 60% of the state's population.⁴⁶ The Atlanta metropolitan statistical area (MSA) contributes 50% of the population of Georgia.⁴⁷

The centrality of cities—and now the metropolitan areas that have developed around them—has accelerated in the twenty-first century. Urban areas generate the bulk of economic development in the United States. The gross metropolitan product of the top ten metropolitan areas in the country exceeds the total gross domestic product of thirty-four states and the District of Columbia combined.⁴⁸ New York's metropolitan-area economy is the tenth largest economy in the world.⁴⁹ The Los Angeles metropolitan-area economy is the eighteenth largest.⁵⁰

The flow of goods and services among metropolitan areas “is comparable to trade flows between nations.”⁵¹ Capital, goods, and services do not flow indiscriminately across state lines, they follow identifiable inter-metropolitan patterns—say, between New York and Chicago, or San Francisco and Boston. Moreover, the bulk of economic activity in the United States continues to be highly localized. According to Thomas Michael Power “[a]bout 60% percent of U.S. economic activity is local and provides residents with the goods and services that make their lives comfortable. Almost all local economies are dominated by residents taking in each other's wash.”⁵² Paul Krugman has observed that “a steadily rising share of the [city] workforce produces services that are sold only within that same metropolitan area.”⁵³ The U.S. economy is thus dominated by intra- and inter-metropolitan flows of resources and goods. The metropolitan area is the relevant economic and demographic unit.

B. The City as an Economic Concept⁵⁴

This urban reality should not be surprising. The city's central role in economic development is not just a byproduct of modern economic and

⁴⁵ *Id.*; U.S. Census Bureau, *State & County Quickfacts*, <http://quickfacts.census.gov/qfd/index.html> (last visited July 18, 2007).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Global Insight, Inc., *THE ROLE OF METRO AREAS IN THE U.S. ECONOMY* 40 (2006).

⁴⁹ *Id.* at 15. In addition, New York City's municipal budget is larger than all but three state budgets (CA, NY, TX). 2007 Statistical Abstract of the United States

⁵⁰ *Id.*

⁵¹ *Id.* at 6.

⁵² THOMAS MICHAEL POWER, *LOST LANDSCAPES AND FAILED ECONOMIES* 37 (1996).

⁵³ PAUL KRUGMAN, *POP INTERNATIONALISM* 211 (1996).

⁵⁴ With apologies to Jerry Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

technological innovation. Urban economic primacy is also a function of the nature of cities themselves. Conceptually, cities are more relevant economic units than states.

Unlike states and nations, cities are both political entities and economic geographies. Cities develop and thrive when propinquity generates economic gains. Cities are thus conceptually relevant to economic development in a way that states or nations—which are wholly political products—are not. Cities are the relevant conceptual scale for understanding human economic development, including the development of regions and nations.

Jane Jacobs, arguably the leading urbanist of the 20th century, has made this argument most vociferously. In *Cities and the Wealth of Nations*⁵⁵ and *The Economy of Cities*,⁵⁶ Jacobs challenges the macroeconomist's tradition of taking the nation-state as the relevant unit for economic policy. Cities are, she claims, the basal unit of economic geography. As she observes:

Nations are political and military entities, and so are blocs of nations. But it doesn't necessarily follow from this that they are also the basic, salient entities of economic life or that they are particularly useful for probing the mysteries of economic structure, the reasons for rise and decline of wealth. Once we . . . try looking at the real economic world in its own right rather than as a dependent artifact of politics, we can't avoid seeing that most nations are composed of collections or grab bags of very different economies, rich regions and poor regions within the same nation. We can't avoid seeing, too, that among the various types of economies, cities are unique in their abilities to shape and reshape the economies of other settlements, including those far removed from them geographically.⁵⁷

Jacobs goes on to argue that the wealth of nations is actually generated by particular places inside nations, namely cities.⁵⁸ Economic policy-makers go wrong when they make policy for the nation-state only to see it fail because their theories function at the wrong scale. City economies are the relevant subject of national economic policy.

Jacobs' claim—that cities, not nations, generate economic growth—is controversial, as is her claim that macro-economic policy should be made at the city scale. Urban economists continue to debate the role of cities in national economic development.⁵⁹ Nevertheless, a number of Jacobs' insights have been

⁵⁵ JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS: THE PRINCIPLES OF ECONOMIC LIFE* (1984).

⁵⁶ JANE JACOBS, *THE ECONOMY OF CITIES* (1970).

⁵⁷ JACOBS, *supra* note 30, at 31-32.

⁵⁸ *Id.* at 32.

⁵⁹ See, e.g., Mario Polèse, *Cities and National Economic Growth: A Reappraisal*, 42 *URB. STUD.* 1429 (2005); Peter J. Taylor, Comment: On a Non-appraisal of the 'Jacobs Hypothesis,' 43 *URB.*

embraced by economists and urban theorists, in particular, her claims about the relationship between cities, economic innovation, and trade.⁶⁰

First, much regional economic literature now recognizes that “cross-border economic processes—flows of capital, labor, goods, raw materials, travelers” are now dominated by cities and regions.⁶¹ Those “global cities” that dominate the international financial markets—New York, London, Tokyo—are particularly relevant, and have arguably eclipsed their respective nations’ in international influence. Theorists attribute this rise of influential cities and regions to the globalization of the economy, the lifting of inter-state trade restrictions, the rise of the trans-national business corporation, and the emergence of high-technology regions.⁶² The change from nation-state-dominated trade flows to city-dominated trade flows is understood as a significant shift in the global economy.

Second, and relatedly, a number of economists have embraced Jacobs’s view of the relationship between cities and economic innovation. Much recent work on agglomeration economies argues that economic development is largely a result of innovation and that innovation takes place most readily in cities. Theorists argue that relatively concentrated geographic areas characterized by high levels of competition and a diversity of industries generate ideas and knowledge that increase human productivity.⁶³ Jacobs was the first to identify these effects, which in the parlance of economists have come to be called “Jane Jacobs externalities”—the technological and creative spillovers that are generated by the density and physical proximity of productive persons and industries.⁶⁴ Jacobs-type externalities help explain the current rise and decline of post-industrial cities. Large, diverse cities like New York are experiencing economic renaissances; cities like Detroit that have been dependent on a single industry are not.⁶⁵

Moreover, agglomeration effects explain the salience of cities and other geographical agglomerations (like Silicon Valley) in a technological era that

STUD. 1625 (2006); Mario Polèse, *On the Non-city Foundations of Economic Growth and the Unverifiability of the 'Jacobs Hypothesis': A Reply to Peter Taylor's Comment*, 43 URB. STUD. 1631 (2006).

⁶⁰ JACOBS, *supra* note 30, at 193.

⁶¹ SASKIA SASSEN, *GLOBAL NETWORKS, LINKED CITIES 1* (2002).

⁶² SASKIA SASSEN, *THE GLOBAL CITY* (1991); A.J. SCOTT, *TECHNOPOLIS: HIGH-TECHNOLOGY INDUSTRY AND REGIONAL DEVELOPMENT IN SOUTHERN CALIFORNIA* (1993); PAUL L. KNOX, *WORLD CITIES IN A WORLD-SYSTEM* (1995); Jeffrey Kentor, *The Growth of Transnational Corporate Networks, 1962-1998*, 11 J. OF WORLD-SYS. RES. 263 (2005).

⁶³ See JACOBS, *supra* note __; RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS 1* (2005); see also Gerald A. Carlino, et al., *Urban Density and the Rate of Invention*, 61 J. URB. ECON. 389 (2006); Maryann P. Feldman & Richard Florida, *The Geographic Sources of Innovation: Technological Infrastructure and Product Innovation in the United States*, 84 ANNALS ASS’N AM. GEO. 210 (1994).

⁶⁴ See David Nowlan, *Jane Jacobs Among the Economists*, in *IDEAS THAT MATTER: THE WORLDS OF JANE JACOBS* 111-113 (1997).

⁶⁵ Global Insight, *supra* note __, 41-50.

seems—at first glance—to have overcome the costs of transportation and the need for physical proximity. Jacobs’ theories explain why cities become *more* important, not less, in a knowledge economy that depends on the development of human capital. A city is generated (and continues to prosper) when a village or a settlement “adds new work to old,”⁶⁶ a process that depends on “ample, volatile trade” with other cities.⁶⁷ Industrial expertise and increased specialization occurs most readily within cities; cities, in turn, trade with each other on that comparative advantage. A nation’s economy is thus the combined production and trade of a network of cities. Indeed, without cities and inter-city trade, there is very little economic production at all. Cities are cauldrons of creativity.⁶⁸ Urbanization is thus “a key element of innovation and productivity growth.”⁶⁹

That cities have the unique capacity to generate economic gains does not mean that they will. Some cities are in ascendance while others are in decline. At any given time, a system of cities will include some that are prospering and some that are not.⁷⁰ The cities that can weather these ups and downs will be those with an abundance of diverse and small-scale producers.

Because city economies live and die by technological and economic innovation, the government has a role in keeping “open the economic opportunities for new activities.”⁷¹ The central point for our purposes then is that cities are not analogous to little nations or little states. The constitutional preoccupation with inter-state trade flows and inter-state commercial relationships misses the fact that metropolitan-area economies are importantly different and arguably more important than state economies. The rules of the American common market are, in fact, the rules of intra-and inter-metropolitan trade. Those rules will influence the city’s internal political behavior quite differently and to greater effect.

PART II

The Free Trade Constitution from the Perspective of the City

This Part examines the constitutional rules that govern the inter-jurisdictional mobility of persons, goods, and capital from the perspective of the city. These rules are enforced by the Supreme Court through a number of different doctrines all of which have become quite baroque in operation. Moreover, the range of local regulations that potentially face constitutional challenge is quite

⁶⁶ JACOBS, *supra* note __, at 59. (eoc)

⁶⁷ JACOBS, *supra* note __, at 208. (cwn)

⁶⁸ See RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS 1* (2005).

⁶⁹ *Id.* at 6 (2005) (noting that Robert Lucas thought Jacobs should receive the Nobel Prize for her findings.).

⁷⁰ JACOBS, *supra* note __, 208-10.

⁷¹ JACOBS, *supra* note __, 249.

varied. For example, personal mobility is implicated by residency requirements, preferential government hiring policies, restrictive zoning rules, and restricted access to welfare programs.⁷² Inter-jurisdictional goods flows are affected by state or local agricultural grading standards, transportation regulations, government procurement policies, local and state licensing requirements, and state and local subsidies to local industry. Capital flows are altered by state corporations law, the tax treatment of in-state and out-of-state profits, and an array of tax incentives and industrial subsidies designed to encourage in-state investment.⁷³

There is no question that inter-city relations in the United States have the basic features of a free trade regime: cities (like states) do not exercise control over their own currency, they do not have formal immigration controls, and they cannot directly restrict the import of goods though the imposition of tariffs. These features are commonly understood as prerequisites for economic integration and are the basic building blocks of the American political union.

Nevertheless, the extent and degree of inter-municipal open-ness is importantly contingent on legal rules. And an examination of those rules introduces a number of qualifications to the conventional assumption of fluid city borders. Though the rules are formally applied to govern relations between states, they tend to operate differently or not at all at the local level. Moreover, the doctrinally different treatment of cities and states does not arise out of any consideration of the actual differences between cities and states, nor from a uniform vision of the common market.⁷⁴

Two points emerge from an examination of the inter-local free trade regime. First, local governments, unlike states, use land use regulations to control the flow of persons, goods, and capital across local lines. Second, despite their often protectionist purposes and effects, the Court tends to allow them to do so. Taken together, these two features constitute important qualifications to the presumption of inter-municipal open-ness. These features also generate an important asymmetry. Investment has to happen in place, thus the regulation of space through land use regimes is a means of regulating what comes into a local

⁷² See Tania Lee & Michael Trebilcock, *Economic Mobility and Constitutional Reform*, 37 U TORONTO L. J. 268, 278 (1987). Cf. PETERSON, *supra* note __, at 24-28.

⁷³ Lee & Trebilcock, *supra* note __, at 278-79. Of course, Congress also adopts rules that distort the common market (agricultural subsidies are but one example) but I take it as a given (though its not) that Congress has more authority than states and cities to do so, and so do not examine those policies here.

⁷⁴ Whether it is good policy for Congress, states or municipalities to raise impediments to the inter-jurisdictional mobility of persons and economic resources is not my primary focus here. Nevertheless, to the extent the Court has a theory of the American common market, that theory is an anti-protectionist one. Regan, *supra* note __, at 1176-77. The doctrine, however, is beset by tensions—as would any set of rules that seeks to maintain open markets while respecting the regulatory and taxing authority of sub-federal governments. Indeed, it is an understatement to say that the current constitutional free trade regime is unsettled in significant ways.

jurisdiction. Cities that want to close their borders to outside investment, persons, or goods can do so, in some dramatic and in some more limited ways. Cities that want to prevent the flight of investment, persons, or goods out, however, normally cannot. Cities are preoccupied with controlling the cross-border flow of resources and persons. They cannot use tariffs or engage in currency manipulations or adopt restrictive immigration policies, but they can and do use land use as a means of regulating their borders and, to a lesser or greater extent, their internal economies.

The structure of inter-municipal cross-border flows is shaped by constitutional-level rules. Understanding these constitutional rules as elements of a larger “free trade” regime is the reason that I have organized this Part in terms of functional categories—persons, goods, and capital⁷⁵—rather than in terms of doctrinal categories. Whether the national market is integrated—or, more precisely, to what degree it is integrated—is a function of the ability for persons and corporations to cross jurisdictional lines for work and residence, to sell goods and services on equal terms in all jurisdictions, and to invest without geographical limitation. Whether the constitutional rules as applied to cities make any doctrinal or practical sense will be considered in Part III.

A. Persons

Persons are important to cities in two ways, as labor and as residents. Labor is a necessary basis for local economic development at least in those places that do not have wholly parasitic economies (i.e., bedroom suburbs). Residents (whether they engage in productive labor or not) are important because they pay for and consume city services. Because municipal services are normally paid through local property taxes, the number and types of persons using and paying for local services are very important to the economic health of cities. Controlling the characteristics of in-migrants and out-migrants (skilled vs. unskilled labor, high-cost residents vs. low-cost residents) is a central preoccupation for cities.

Cities do not control international migration; the Constitution makes that a federal responsibility. This limitation on the inter-city flow of migrants is thus always in the background: like other forms of international trade, which are controlled by Congress, the inter-city flow of persons is limited by national borders and dependent on federal immigration policy. Nevertheless, it is important to note at the outset that large U.S. cities have always depended on robust international migration to sustain their economies.⁷⁶ Some cities have aggressively sought to market themselves to overseas communities, and big-city mayors have lobbied to

⁷⁵ Lee & Trebilcock, *supra* note __, at 278-79, also employ these categories. Trade scholars might be more familiar with a quadripartite division, which includes services. For example, the European Union guarantees four freedoms: free movement of goods, services, capital, and labor. I treat goods and services together here; the differences are not significant enough for my purposes.

⁷⁶ SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed. 2001).

prevent Congress from imposing draconian immigration limitations.⁷⁷ Of course, both cities and states can make themselves more or less attractive to immigrant communities, by changing the mix of municipal services offered. And numerous cities are hostile to immigration, particularly the illegal variety.⁷⁸ At the end of the day, however, cities have no formal control over international migration, and movement into the United States (and thus into domestic cities) is controlled by the federal government.

In contrast, intra-national migration should be quite open as a constitutional matter. The Constitution arguably contemplates the free mobility of persons across state lines—indeed, the Court has stated that the ideal of a national polity depends upon it.⁷⁹

This mobility, articulated by the Court as a “right to travel,” found voice as early as *Corfield v. Coryell*, in which the Court stated that a citizen “may pass through or reside in any other state, for purposes of trade . . . or otherwise.”⁸⁰ *Corfield* located the right to travel in the Privileges and Immunities Clause of Article 2.⁸¹ In *Edwards v. California*, the Court grounded this mobility guarantee in the Commerce Clause, invalidating a state law that criminalized the bringing of indigent persons into the state.⁸² In *Shapiro v. Thompson*, the Equal Protection Clause was used to strike down a state welfare waiting period law that was

⁷⁷ See Tony Favro, *US Mayors Concerned about Collapse of Immigration Reform*, July 16, 2007, at <http://www.citymayors.com/society/usimmigration.html> (last visited Aug. 10, 2007); Winnie Hu, *Mayor Widens Privacy Rights For Immigrants*, NEW YORK TIMES, Sept. 18, 2003, at B1; Charles Hurt, *Small-town, N.Y. Mayors Differ on Illegal Aliens*, WASHINGTON TIMES, July 6, 2006, at A3; James Pinkerton, *Border Mayors Fear Tough Laws will Hurt Trade: Officials reject link between terror and immigration*, HOUSTON CHRONICLE, Aug. 17, 2006 at 5.

⁷⁸ Compare Ken Maguire, *City is a Sanctuary for Illegal Immigrants—If Any Can Afford It*, ASSOCIATED PRESS, May 7, 2006 (Cambridge, Mass.); *City Embraces Illegal Immigration Instead of Fighting It*, ASSOCIATED PRESS, May 14, 2006 (Painesville, Ohio); Associated Press, *Connecticut City Helps Illegal Immigrants Get IDs*, ST. PETERSBURG TIMES, July 25, 2007, at 2 (New Haven, Conn.), with Michael Powell and Michelle Garcia, *Pa. City Puts Illegal Immigrants on Notice; 'They Must Leave,' Mayor of Hazleton Says After Signing Tough New Law*, WASHINGTON POST, Aug. 22, 2006, at A3; Pat Broderick, *Escondido Bans Apartment Rentals for Illegal Immigrants*, SAN DIEGO BUSINESS JOURNAL, Oct. 23, 2006, at 43; Nick Miroff, *Culpeper Officials Targeting Illegal Immigrants: Enforcement of Zoning Rules on Housing Limits Is Town Council's First Step*, WASHINGTON POST, Sept. 21, 2006, at LZ10.

⁷⁹ *United States v. Guest*, 383 U.S. 745, 757–58 (1966) (“The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”).

⁸⁰ 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

⁸¹ *Id.*

⁸² 314 U.S. 160, 174 (1941).

motivated by a similar concern about indigent in-migration.⁸³ In *Saenz v. Roe*, the Court returned to the Privileges and Immunities Clause, though this time, using the 14th Amendment's version, to strike down another welfare restriction aimed at discouraging the inter-state migration of indigents.⁸⁴

In these and other cases, the Court does not consciously distinguish between inter-state movement for work or for residence: *Corfield* articulated a mobility guarantee residing in part in a notion of free labor. And, of course, the right to pursue a common calling on equal terms as others was an aspect of personal liberty that the *Lochner*-era courts revived as substantive due process, but which continues as a function of the dormant commerce clause. In either case, the Court's rhetoric is anti-protectionist, insisting that states cannot close their borders to persons in an effort to defend in-state economic interests, either by limiting out-of-state labor competition or by protecting local tax rolls from high-cost outsiders. In *Edwards*, the Court observed that no state could attempt to "isolate itself from difficulties common to all of them by restraining the transportation of persons and property" across state lines.⁸⁵ This language is repeated in *Shapiro* and *Saenz*, where the Court declares unequivocally that states cannot "[inhibit] migration by needy persons."⁸⁶ Inter-state migration is both seen as a personal right of individuals as citizens of the United States and a necessity of the federal union and the common market.⁸⁷ Inter-state internal migration controls are anathema.⁸⁸

Despite the Court's strong rhetoric, however, the Court's decisions have had the effect of distinguishing between labor and residential mobility at the municipal level. The former is more aggressively protected than the latter.

Consider labor mobility. The general rule is that individuals have a right to enter a state and engage in trade on equal terms as others in that state. The

⁸³ *Shapiro v. Thompson*, 394 U.S. 618 (1969); *see also* *Dunn v. Blumstein*, 405 U.S. 330 (1972).

⁸⁴ 526 U.S. 489, 503 (1999).

⁸⁵ 314 U.S. 160, 173 (1941); *see also* *Crandall v. Nevada*, 73 U.S. 35 (1868) (striking down tax on every person leaving the state by common carrier).

⁸⁶ *Shapiro*, 394 U.S. at 629; *Saenz*, 526 U.S. at 499.

⁸⁷ *See, e.g., Zobel v. Williams*, 457 U.S. 55 (1982) (observing that if a state is able to limit or discourage inter-state migration, "the mobility so essential to the economic progress of our Nation, and so commonly accepted as a fundamental aspect of our social order, would not long survive").

⁸⁸ While there are still some inter-state restrictions on labor mobility that have anti-competitive effects, rules that explicitly seek to prevent out-of-staters from working in-state by requiring residency as a prerequisite for employment or statutes that discriminate against in-state employees who live out of state have repeatedly been struck down on Commerce Clause grounds. *See, e.g., Austin v. New Hampshire*, 420 U.S. 656 (1975) (state bar residency requirement); *but cf. McCarthy v. Philadelphia Civil Service Com* 424 US 645 (1976) (upholding a continual residency requirement for municipally employed fire fighters). Moreover, states cannot discriminate against out-of-staters if the purpose appears to be protectionist in nature. This doctrine does not prevent states from requiring that a person become a resident in order to access some non-fundamental benefits of state citizenship (such as welfare benefits), e.g. *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (upholding residency requirements for in-state college tuition breaks as long as the residency can be challenged), but it does require that states not raise outright barriers or significant disincentives to that becoming.

pursuit of a common calling, the Court has stated, is “one of the most fundamental privileges protected by” the privileges and immunities clause of Article IV.⁸⁹ In *United Building & Construction Trades Council of Camden County v. Camden*,⁹⁰ the Court extended this non-discrimination rule to municipal governments. The city of Camden, New Jersey, had adopted an ordinance requiring that at least 40% of the employees of contractors or subcontractors working on municipal construction projects be Camden residents. This type of residency requirement had been challenged under the commerce clause one year earlier in *White v. Massachusetts Council*, but had been upheld pursuant to the market participant exception.⁹¹ The market participant exception shields protectionist policies when the government is acting as a participant and not a regulator of the market.

In *Camden*, the Court addressed the question of whether a contractor residency requirement violates the Privileges and Immunities Clause—a claim that had not been addressed in *White*. On those grounds, the Court held that Camden’s provision was suspect, even though Camden was discriminating against both in-state and out-of-state residents.⁹² Camden had argued (and Justice Blackmun, writing in dissent, agreed)⁹³ that because there was an in-state political constituency that could represent the interests of out-of-state residents, Camden’s discrimination could be remedied by the political process without need for judicial intervention. Inter-city discrimination was thus different from inter-state discrimination because the former supplied a political remedy that was unavailable to the latter. The Court rejected that argument, however, and held that state and municipal labor residency requirements should be treated the same; the protection afforded by the in-state political processes to out-of-state residents was too “uncertain” to be relied upon.⁹⁴ The *Camden* case thus extended the non-discrimination rule to cities; absent compelling justification and narrow tailoring, one has a right to pursue a common calling not just in the state, but also in the city of one’s choice.

Contrast this expansive view of labor mobility with the Court’s treatment of residential mobility. Though the Court has declared that a citizen of the United States has an individual right to become a resident of any state, it has not declared that a citizen of the United States has an individual right to become a resident of any particular city. While there may be a right to work in a particular local jurisdiction, there does not appear to be an equivalent right to live in a particular local jurisdiction. The parallel treatment of states and localities in the *Camden* case is notably absent when it comes to residency.

⁸⁹ *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208, 219 (1984)

⁹⁰ *Id.*

⁹¹ *White v. Mass. Council of Constr. Employers*, 460 U.S. 204 (1983).

⁹² *Camden*, 465 U.S. at 217.

⁹³ *Id.* at 231 (Blackmun, J., dissenting).

⁹⁴ *Id.* at 217.

Indeed, the contrast between the right to state residency and the absence of a right to local residency is striking. As to the former, the Court ruled in *Saenz v. Roe* that California cannot limit new residents, for the first year that they live in the state, to the welfare benefits they would have received in their state of origin.⁹⁵ That welfare limitation, held the Court, violates the right to travel protected by both the privileges and immunities clause of Article IV, and the privileges or immunities clause of the 14th Amendment. The 14th Amendment in particular protects the right of the “newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state.”⁹⁶

Compare this treatment of inter-state residence restrictions with the Court’s treatment of inter-local residence restrictions. Since *Euclid v. Amber Realty*,⁹⁷ decided in 1926, and up through *Warth v. Seldin*⁹⁸ and other cases decided in the 1970s,⁹⁹ the Court has upheld local zoning laws that prevent entire socio-economic classes from moving into and residing in particular towns and cities. In *Warth*, for instance, the Court held that low and moderate income persons who desired and intended to seek housing in an exclusive suburb had no standing to challenge the suburb’s zoning ordinance because they did not own property there.¹⁰⁰

The absence of a right to local residency has not gone unnoticed by litigators or commentators. In the 1970s, litigators brought right to travel challenges to restrictive zoning ordinances, but abandoned them in the face of *Warth* and other unfavorable decisions. The Supreme Court explicitly rejected a right to travel claim in *Belle Terre v. Boraas*, a local zoning case.¹⁰¹ Commentators too have noted that local governments differ from states in that municipalities have the legal ability to “select” their residents by preventing the

⁹⁵ *Saenz*, 526 U.S. at 503.

⁹⁶ *Id.* at 502. In-state residents cannot bring challenges under the Privileges and Immunities Clause, and the Court has yet to determine if there is a right to intra-state travel. Nevertheless, some courts have found such a right. See Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, at 1992 and notes 131-142.

⁹⁷ 272 U.S. 365 (1926).

⁹⁸ 422 U.S. 490 (1975).

⁹⁹ See, e.g., *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977); *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976); *Belle Terre v. Boraas*, 416 U.S. 1 (1974); *James v. Valtierra*, 402 U.S. 137 (1971); see also *Construction Indus. Ass. V. City of Petaluma*, 522 F.2d 897, 904 (9th Cir. 1975) (rejecting challenge to local growth control ordinances based on a right to travel).

¹⁰⁰ 422 U.S. at 504-05.

¹⁰¹ 416 U.S. 1 (1974). The Court sidestepped a right to travel claim in *Nordlinger v. Hahn*, a case that upheld a California property tax scheme that favored long-time homeowners over more recent ones. See 505 U.S. 1 (1992) (holding that the petitioner did not have standing to assert a right to travel because she lived in California).

construction of certain types of housing.¹⁰² This restriction on inter-local mobility has led some state courts—most prominently the New Jersey Supreme Court in the *Mount Laurel* decisions¹⁰³—to hold that the exercise of the zoning power to select certain kinds of residents and bar others from the local jurisdiction violates their respective state constitutions.

The use of zoning laws to restrict entry is a common phenomenon—the relative dearth of affordable housing in many suburbs is well-documented,¹⁰⁴ as is the contribution of zoning to higher house prices.¹⁰⁵ As the New Jersey Supreme Court observed, local governments use zoning to control for the economic characteristics of in-comers, to ensure that only those who contribute to the local tax base can afford a house in the jurisdiction.¹⁰⁶ This fiscal zoning—sometimes called exclusionary zoning—is one of the legal barriers to inter-local mobility; lower income individuals simply cannot afford to move into neighboring jurisdictions that have limited amounts of low or moderate income housing.

One consequence of this restriction on inter-local mobility has been that as employment has moved out of the central city and into the suburbs residents of central cities have a more difficult time finding and commuting to work. To the extent labor follows employment, the deconcentration of industrial employment from the city center to the periphery should have been followed by the deconcentration of labor/residents. And indeed, this has happened: there has been a significant movement of employment and persons out of the central city and into the suburbs. But many lower income residents of the city have not been able to

¹⁰² WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS* 54 (2001) ([T]he U.S. Constitution . . . does not permit states to restrict immigration from other states [but] local government regulations . . . get pretty much a free pass on the same issue”); JOHN LOGAN & HARVEY MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 41 (1987) (whereas the courts have frequently overturned local legislation that interferes with “interstate commerce,” they have “allowed many constraints on residential migration to stand”); see also William T. Bogart, “*Trading Places*”: *The Role of Zoning in Promoting and Discouraging Intrametropolitan Trade*, 51 CASE W. RES. 697, 709 (2001) (describing how local land use does not excite constitutional concern); Roderick Hills, *Poverty, Residency, and Federalism: States’ Duty of Impartiality Toward Newcomers*, 1999 Sup. Ct. Rev. 277 (1999) (observing the disjuncture between the rhetoric in *Saenz* and the Court’s tolerance of access controls at the local level).

¹⁰³ *S. Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel*, 67 N.J. 151 (1975); *S. Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel*, 92 N.J. 158 (1983).

¹⁰⁴ See, e.g., WILLIAM BOGART, *THE ECONOMICS OF CITIES AND SUBURBS* 241-43 (1998).

¹⁰⁵ See generally Edward L. Glaeser and Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Harvard Inst. of Econ. Research, Discussion Paper No. 1948, 2002), available at <http://post.economics.harvard.edu/hier/2002papers/HIER1948.pdf> (last visited July 31, 2007); Keith R. Ihlanfeldt, *The Effect of Land Use Regulation on Housing and Land Prices*, 61 J. URB. ECON. 420 (2007).

¹⁰⁶ *S. Burlington Co. N.A.A.C.P. v. Twp. of Mt. Laurel*, 67 N.J. 151, 171 (N.J. 1975); see also Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831 (1992); Keith R. Ihlanfeldt, *Introduction: Exclusionary Land Use Regulations*, 41 URB. STUD. 255 (2004).

relocate in part because of the legal restrictions on residential mobility. Lower income residents, hampered by physical distance and the costs of commuting, are thus at a significant disadvantage in the regional labor market. Urban economists have blamed this “spatial mismatch” between jobs and residents for the low employment prospects of those who continue to live in depressed areas of the central city.¹⁰⁷

Indeed, inter-local barriers to mobility can have devastating effects on declining municipalities if they are overwhelmed by high-cost users of local services. A city’s “death spiral” occurs when the out-migration of high-taxpaying, productive residents leaves a city with an imbalance of low-taxpaying and tax-needy residents, who are unable to migrate to suburbanized jobs. Cities that fail have a surfeit of needy residents and a declining tax base; the need for revenue causes increases in local taxes; these increases in turn lead to further out-migration of high-paying taxpayers and to the inevitable decline in city services.¹⁰⁸ This spiral characterized New York City in the 1970s; it is what has happened to cities like New Haven, New London, Camden, Buffalo, and Detroit over the last 25 years.¹⁰⁹

Closing the border to lower-income residents is a sensible fiscal strategy for those municipalities that can do so.¹¹⁰ Avoiding low-taxpaying residents with high service needs and attracting high-taxpaying residents with low service needs is the municipalities’ holy grail. It is also the holy grail of states: The purpose of the California law struck down in *Saenz* was to prevent lower-income residents from flowing into California for generous welfare benefits.¹¹¹ The Court rejected

¹⁰⁷ Michael Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT. L. REV. 795, 799-804 (1991). See also Laurent Gobillon, et al., *The Mechanisms of Spatial Mismatch*, Paper No. 5346, Centre for Economic Policy Research (November 2005); John F. Kain, *A Pioneer’s Perspective on the Spatial Mismatch Literature*, 41 URB. STUD. 7 (2004).

¹⁰⁸ Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1839 (2003) (reviewing WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES* (2001)).

¹⁰⁹ KATHARINE L. BRADBURY & KENNETH A. SMALL, *URBAN DECLINE AND THE FUTURE OF AMERICAN CITIES* 63 (1982) (Camden, Buffalo); DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* (2003) (New Haven); Michael A. Stegman & Margery Austin Turner, *The Future of Urban America in the Global Economy*, 62.2 J. OF THE AM. PLANNING ASSOC. 157 (1996) (Detroit); Iver Peterson, *As Land Goes To Cities, There Go The Neighbors*, NEW YORK TIMES, Jan. 30, 2005, at 29 (New London).

¹¹⁰ Indeed, some economists have argued that fiscal zoning is efficient insofar as it prevents lower-income newcomers from free-riding on the public service expenditures of current residents. Zoning ensures that new development will “pay its own way,” by indirectly mandating a minimum property value, thus ensuring that all residents will pay roughly the same amount in property taxes for services received. See Bruce Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 Urb. Stud. 205 (1975); see also FISCHER, *supra* note ___, at 65-67.

¹¹¹ *Saenz*, 526 U.S. at 506; see also Stephen Loffredo, “If You Ain’t Got the Do, Re, Mi”: *The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL’Y REV. 147 (1993); Note, *Depression Migrants and the States*, 53 HARV. L. REV. 1031 (1940); Joan M. Crouse, *Precedents From The Past: The Evolution Of Laws And Attitudes Pertinent To The “Welcome”*

this protectionist strategy at the state level but has not applied the same reasoning to local land use regimes that accomplish the same goal.¹¹²

For cities, the legal rules governing the mobility of labor are symmetrical: one cannot constitutionally prevent the entry or exit of labor, without a very good reason. The rules governing residents, however, are effectively one-way. Except in those states that have barred exclusionary zoning (and most have not), municipalities cannot prevent exit but they can prevent entrance. Though they do so indirectly through their land use policies, they nevertheless do so quite effectively. The power to exclude is particularly useful to economically robust municipalities, especially high-income suburbs, which can assert some control over their fiscal health by restricting in-migration. Cities like Camden, which are trying to stem the out-flow of residents, have more limited options, however. Indeed, the purpose of the residency requirement struck down in the *Camden* case was to stem that out-flow by funneling work to city residents, thus encouraging them both to stay in the city and become productive tax-payers. That cities can limit in-migration (whether intra or inter-state) by restricting access to housing is a dramatic qualification of our usually reflexive assumption of relatively free inter-city mobility.

B. Goods

Like the free movement of persons, the free movement of goods and services between cities is also importantly shaped and constrained by legal rules. In this area, we also see the Court aggressively striking down barriers to entry except when those barriers take the form of local land use regulations. Cities cannot erect tariffs or other obvious restraints of trade, but they can and do suppress competition in the local market in other ways.

We should again begin by noting that the international movement of goods and services is controlled by Congress. To the extent that cities are highly dependent on international trade or excessively hurt by it, the judicially-crafted rules of the free trade constitution are not relevant.

Intra-national trade is, by contrast, highly regulated by the judiciary. And though the Court's doctrines in this area are often confusing, conflicting, and controversial, the major outlines of a free trade regime are easily discernable. Under the Court's familiar dormant commerce clause analysis, for example, the

Accorded To The Indigent Transient During The Great Depression, in AN AMERICAN HISTORIAN: ESSAYS TO HONOR SELIG ADLER 191-203 (1980). But see Hills, supra note __, at 325 (arguing that California's fiscal motives were secondary to its concern that new migrants would change the social, cultural, and political nature of the state).

¹¹² Cf. Hills, supra note __, at 311, who argues that the Court could distinguish local from state restrictions on mobility on the ground that such restrictions might be appropriate for those communities tied together by bonds of mutual affection or trust, like neighborhoods, but not appropriate for larger communities, like states.

Court will almost always strike down state and local statutes that differentiate between in-state and out-of-state goods by treating the former more favorably than the latter.¹¹³ These kinds of statutes come closest to the types of trade barriers or tariffs that were anathema to the revisers of the Articles of Confederation. Moreover, even state and local laws that are not facially discriminatory but impose an undue burden on interstate commerce will be struck down if those burdens exceed the benefits to the jurisdiction and the state could have achieved its ends in a less burdensome way.¹¹⁴ This line of undue burden “balancing” cases is more controversial than the trade barriers cases, though some commentators have observed that the former can be understood as a variant of the latter. On this account, the Court is predominantly concerned with explicit protectionism or protectionism disguised; the balancing of interests is merely a mechanism for ferreting out an invalid purpose and effect.¹¹⁵

1. Market Participant and Publicly-Owned Monopoly

Protectionist effects have been countenanced by the Court, however, when they come in certain forms. First, when the government acts as a market participant and not a regulator—when it acts in its “proprietary” capacity and not in its “regulatory” capacity—the Court has held that the dormant commerce clause does not apply.¹¹⁶ States are permitted to take into account any of the myriad characteristics of a good or service (including where it is produced) when they act as participants in the private market. As long as the government is not regulating or taxing the good or service, they can favor their own industries (and discriminate against non-local goods or services) by “buying locally.” This rule applies to municipalities as well. To the extent that a municipal government is the primary purchaser of particular classes of goods, local purchasing regimes are seen as a way to benefit local economies. A mayoral order requiring that contractors working for the city of Boston have a work force composed of 50% Boston residents was upheld under the market participant exception in *White v. Massachusetts Council*.¹¹⁷

The second exception to the dormant commerce clause is more specific to local governments—the power to operate a public monopoly in a traditional area of municipal concern. Generally, efforts to protect a local industry or hoard a local resource by keeping it within city limits have been treated with great suspicion by

¹¹³ KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 257 (5th ed. 2004).

¹¹⁴ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 402-23 (2nd ed. 2005).

¹¹⁵ Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091, 1240 (1986).

¹¹⁶ CHEMERINSKY, *supra* note __, at 426-31.

¹¹⁷ *White v. Mass. Council of Constr. Employers*, 460 U.S. 204 (1983). As I have already noted, the market participant exception does not apply to challenges under the Privileges and Immunities Clause. See *United Building & Constr. Trades Council v. Camden*, 465 U.S. 208 (1984).

the Court. In *Dean Milk Co. v. Madison*,¹¹⁸ for example, the Court struck down a Madison, Wisconsin ordinance that forbade the sale of milk in the city unless it was pasteurized in an approved plant within five miles of the city. Similarly, in *C.A. Carbone v. Clarkstown*,¹¹⁹ the Court rejected a waste “flow-control” ordinance that required trash haulers to deliver municipal waste to a particular private processing facility. In both cases, the creation of a local or state-wide territorial monopoly was understood to constitute an impermissible burden on inter-state commerce.

Under the recently decided *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*,¹²⁰ however, a state or local government can favor a publicly-owned monopoly provider of goods or services over all other private providers. *Oneida-Herkimer* involved a flow control ordinance virtually identical to the one at issue in *Carbone*, but it required garbage haulers to process their trash at a municipal-owned-and-operated processing facility. The processing facility charged “tipping fees” sufficient to cover its costs, though presumably higher than what other private facilities charged. The Court distinguished *Carbone* on the grounds that laws favoring in-state or local businesses were often the product of “simple economic protectionism,”¹²¹ but that “laws favoring local government, by contrast, may be directed to any number of legitimate goals unrelated to protectionism.”¹²² The Court then upheld the ordinance, reasoning that revenue generation was a legitimate interest of local governments and that “waste disposal is both typically and traditionally a local government function.”¹²³ It then repeated a variant of this latter phrase, first as a way to distinguish legitimate publicly-owned monopolies from illegitimate ones (“local government may facilitate a customary and traditional government function such as waste disposal”¹²⁴) and then by way of concluding that the exercise of the local police power was legitimate (waste control is a “typical and traditional concern of local government”¹²⁵).

That states and localities can invoke their “private” personas when making “non-regulatory” purchasing decisions and their “public” personas when operating their own industries still leaves them constrained by the dormant commerce clause when they seek to regulate private industry in ways that tend to favor local producers. Nevertheless, the market-participant and the publicly-owned monopoly exceptions are relatively robust encroachments on the free movement of goods across state lines: states and local governments can direct purchasing towards their

¹¹⁸ *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

¹¹⁹ *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994).

¹²⁰ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786 (2007).

¹²¹ *Id.* at 1796.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1797, n.7.

¹²⁵ *Id.* at 1798.

own, and can provide goods and services through government-owned industries that are protected from competition with the private sector altogether.¹²⁶

2. Land Use and Trade Flows

The most significant form of local protectionism, however, comes in the form of land use. When protectionist or anti-competitive efforts are mediated through local land use statutes, the Court tends to tolerate them. Thus, the Court has avoided dormant commerce clause scrutiny of one of local government's central and most important regulatory functions—its regulation of the market in land.

Indeed, the rule that government must avoid regulating in ways that unduly burden inter-state commerce does not appear to apply to the inter-municipal market in land. Cities may and do engage in restrictive zoning laws that severely limits the supply of land, increase land values for those who already own land in the jurisdiction, exclude certain kinds of land uses altogether, extract exactions or impact fees from new entrants thus raising their costs relative to existing residents or businesses, and effectively set minimum prices of entry for those who would become residents.¹²⁷ As under the privileges and immunities clause, land use regulations are not targeted when the Court is enforcing the principle of inter-state open markets.

Granted, local zoning laws do not often discriminate between in-locality and out-of-locality residents. Thus, under the Court's dormant commerce clause jurisprudence, the Court would have to weigh the burden on inter-state commerce against the legitimate interests of the locality. To the extent the Court de-

¹²⁶ The market participant and publicly-owned monopoly rules depend on distinctions—public/private, regulatory/proprietary, local/national—that have been regularly criticized for lacking a conceptual or functional basis. See, e.g., Glen O. Robinson, *The Sherman Act as a Home Rule Charter: Community Communications Co. v. City of Boulder*, 2 SUP. CT. ECON. REV. 131 (1983). Indeed, the potential emergence of a public/private distinction that turns on a “traditional municipal functions” category in dormant commerce clause cases is somewhat surprising, especially in the context of waste disposal. Much dormant commerce clause doctrine has been made in cases involving efforts by states or localities to bar the entry of out-of-area waste. Richard A. Epstein, *Waste & the Dormant Commerce Clause*, 3 GREEN BAG 2d 29, 34-35 (1999). The Court has been fairly rigorous in treating municipal waste like any other good in the stream of commerce; facial bans on out-of-state importation of waste have been struck down even if their ostensible purpose was to preserve landfill space or control pollution externalities, as opposed to protect in-state economic interests. See, e.g., *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Res.*, 504 U.S. 353 (1992).

¹²⁷ See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317 (2004); John M. Baker & Mehmet K. Konar-Steenberg, “*Drawn From Local Knowledge . . . And Conformed To Local Wants*”: *Zoning And Incremental Reform Of Dormant Commerce Clause Doctrine*, 38 LOY. U. CHI. L.J. 1 (2006).

emphasizes the principle of free cross-border mobility in favor of a principle of anti-discrimination, facially neutral but burdensome local regulations—especially local zoning laws—will avoid judicial scrutiny.

This is so despite the fact that land use regulations often have a protectionist purpose and effect. For example, anti-big box store and other land use restrictions that limit particular types of businesses are often designed to protect local retailers from outside competition, especially from national chains. San Francisco’s anti-chain ordinance explicitly admits to that motive.¹²⁸ This apparent gap in the doctrine is just beginning to attract the interest of litigators and scholars. Some scholars have predicted that recent municipal efforts to limit development may generate a “flood” of land use cases “in which the dormant commerce clause plays a significant role.”¹²⁹

That land use has heretofore received a constitutional free pass is somewhat surprising considering that the cumulative impact of local zoning ordinances generates significant distortions in the regional and national market for land. Land does not cross state lines, which perhaps explains the Court’s inability to assimilate it under the commerce clause. Nevertheless, to contend that land markets are not national would be foolhardy; the housing market is a cross-border market with a non-mobile factor. Housing is an exceptional product/good in this regard: its cross-border provision can be tightly regulated. In certain places, entry

¹²⁸ S.F., CAL., PLANNING CODE art. 7, §703.3(a)(2) (2004) (“San Francisco needs to protect its vibrant small business sector and create a supportive environment for new small business innovations... ‘existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced.’”).

¹²⁹ John M. Baker & Mehmet K. Konar-Steenberg, *Drawn from Local Knowledge...And Conformed to Local Wants: Zoning and Incremental Reform of Dormant Commerce Clause Doctrine*, 38 Loy. U. Chi. L.J. 1 (2006). So far, the legal landscape is hostile to dormant commerce clause challenges. See, e.g., *Coronadans Organized for Retail Enhancement v. City of Coronado*, No. D040293, 2003 Cal. App. LEXIS 5769 (Cal. Ct. App. June 13, 2003) (holding that ordinance which placed restrictions on certain types of retail businesses did not violate the Commerce Clause); *Wal-Mart Stores, Inc. v. City of Turlock*, No. 1:04-CV-05278, 2006 U.S. Dist. LEXIS 47924 (D. Cal. July 3, 2006) (granting summary judgment for the Defendants on grounds that city retail size ordinance did not violate the Commerce Clause). But see, e.g., *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281 (2007) (holding that Village Ordinance banning retail establishments such as drug stores violated the Commerce Clause); *Colorado Manufactured Housing Assn. v. Pueblo County*, 825 P.2d 507 (1993) (holding that the builder and dealer of manufactured houses had standing to challenge the validity of a local zoning ordinance on the grounds that the ordinance violated the Commerce Clause). For further commentary, see Brannon P. Denning & Rachel M. Lary, *Retail Store Size-Capping Ordinances and the Dormant Commerce Clause Doctrine*, 37 Urb. Law. 907 (2006); Justin Shoemaker, Note, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 Duke L.J. 891 (1999); 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 (2006); Dwight H. Merriam, Esq., *Nonplussed about Nonpareil: Wal-Mart as a Land Use Phenomenon*, 27 Zoning and Planning Law Report; Suellen M. Wolfe, *Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the “Silver Bullet”?*, 26 Stetson L. Rev. 727 (1996-1997).

into the local housing market will be dictated less by supply and demand than it is by local regulations.¹³⁰

Moreover, because zoning laws inform the siting choices of every business and residence in a jurisdiction, those rules invariably alter the provision of goods and services in a given metropolitan area.¹³¹ As William Bogart has observed, land is a factor in production;¹³² restrictions on the supply of land raise the cost of goods and services by forcing location decisions that do not comport with the actual costs of transport.¹³³ Classic Euclidean zoning literally shapes the geographic-economic landscape by foreclosing business and residence location decisions that would otherwise be economically advantageous.¹³⁴ Thus, in virtually every city in the country, the “free market” in land is only provisionally so: as commentators have long observed, local zoning regimes often operate as cartels.¹³⁵

The unarticulated exception for anticompetitive land use regulations under the commerce clause is further underlined by the Court’s antitrust doctrine. Antitrust and the dormant commerce clause are analytical relations: both are concerned with protectionist economic policies that have anti-competitive effects, though the latter must involve some form of cross-border discrimination. There tends to be little overlap between the two doctrines, however, because states enjoy immunity from antitrust liability pursuant to *Parker v. Brown*.¹³⁶ Thus, challenges to state anticompetitive regulations tend to be brought pursuant to the dormant commerce clause.¹³⁷

Municipalities, however, are technically not immune from antitrust liability pursuant to *Community Communications Co. v. City of Boulder*.¹³⁸ Indeed, in *City of Boulder*, Justice Brennan wrote forcefully about the need for antitrust scrutiny of municipal policies. Congress was aware of the “serious economic dislocation which could result if cities were free to place their own

¹³⁰ See Glaeser, *supra* note __; see also Edward L. Glaeser & Bryce A. Ward., *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston* 1-37 (Harv. Inst. Econ. Research, Discussion Paper No. 2124, 2006).

¹³¹ Bogart, *supra* note __, at 715; see also BOGART, *supra* note __, at 212-214.

¹³² BOGART, *supra* note __, at 85.

¹³³ Cf. PAUL KRUGMAN, DEVELOPMENT, GEOGRAPHY, AND ECONOMIC THEORY 52-55 (1995) (discussing Von Thunen’s land use and land rent ideas).

¹³⁴ BOGART, *supra* note __, at 229; Bogart, *supra* note __, at 716-18; see also *Euclid v. Ambler Realty*, 272 U.S. 365, (1926) (“Thus the areas available for the expanding industrial needs of the metropolitan city will be restricted, the value of such land as is left available artificially enhanced, and industry driven to less advantageous sites.”).

¹³⁵ Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977). See also JONATHAN LEVINE, ZONED OUT: REGULATION, MARKETS, AND CHOICES IN TRANSPORTATION AND METROPOLITAN LAW USE (2006).

¹³⁶ 317 U.S. 341, 352 (1943).

¹³⁷ Daniel J. Gifford, *Antritrust and its Intellectual Milieu*, 42 ANTITRUST BULLETIN 333, 360-63 (1997).

¹³⁸ *Cnty. Communications Co. v. Boulder*, 455 U.S. 40 (U.S. 1982)

parochial interests above the Nation's economic goals"¹³⁹ and thus did not include a municipal exemption from antitrust liability.¹⁴⁰ "Ours is a dual system of government," declared the Court, "which has no place for sovereign cities."¹⁴¹

Despite this formal difference between cities and states for purposes of the Sherman Act,¹⁴² however, the Court has avoided antitrust scrutiny of anti-competitive and protectionist land use policies. Indeed, the Court's decisions "almost totally protect[] government land use decisions from antitrust liability."¹⁴³ Thus, in *Fisher v. Berkely*, the Court rejected an anti-trust challenge to a city's rent control ordinance (essentially a price fixing ordinance), prompting Justice Brennan to declare in dissent that the Court had effectively excluded "a broad range of local government anti-competitive activities from the reach of the antitrust laws."¹⁴⁴ Four years later in *City of Columbia v. Omni Outdoor Advertising*, the Court acknowledged that "the very purpose of zoning is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants."¹⁴⁵ Nevertheless, the Court granted the city immunity in that case, vindicating the local police power in its conflict with competition policy despite (or in spite of) *City of Boulder*. Indeed, since *Boulder*, the Court has found ways to clothe localities with the state's sovereign authority or has read city statutes not to conflict with the Sherman Act as an initial matter.¹⁴⁶

To be sure, the Court has at times indicated some discomfort with local land use regulations, pursuant to its takings jurisprudence. Thus, the Court's exactions jurisprudence requires that when a municipality conditions a zoning benefit on the landowners' provision of money or land to the municipality, the condition must meet a "nexus" and "rough proportionality" test or be deemed a

¹³⁹ *Id.* at 51.

¹⁴⁰ *But cf.* Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34–36 (1988).

¹⁴¹ *Boulder*, 455 U.S. at 53. *Boulder* involved no discussion of traditional municipal functions or the relevant differences between public and private anticompetitive activities. Indeed, the Court explicitly rejected the proprietary/regulatory distinction that it used to uphold the flow control ordinance in *Oneida-Herkimer*.

¹⁴² 15 U.S.C. §§ 1–7 (2000).

¹⁴³ DANIEL R. MANDELKER, *LAND USE LAW* 603 (5th ed. 2003); see also *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991); *Fisher v. Berkeley*, 475 U.S. 260 (1986).

¹⁴⁴ *Id.* at 278.

¹⁴⁵ *Omni*, 499 U.S. at 373; see E. Tomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph over Competition, the Last Fifty Years*, 3 WASH. U. J.L. & POL'Y 473, 480 (2000); Mandelker, *supra* note 117, at § 5.53; ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 124 (3rd ed. 2005).

¹⁴⁶ See *Fisher*, 475 U.S. at 267; *Omni*, 499 U.S. at 384; *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985). It is likely that the transfer station monopoly at issue in *Oneida* was authorized by the state and thus would be immune from Sherman Act challenge as well. See *id.* After *Boulder*, Congress adopted the Local Government Antitrust Act to limit municipal exposure to liability. See Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34–36 (1988).

taking.¹⁴⁷ The Court worries that conditions extracted in exchange for discretionary zoning approvals will otherwise be coercive. In the regulatory takings area, the Court has also looked closely at certain kinds of local takings to ensure that they do not “go too far,” often expressing some skepticism of local regulations as land grabs. And finally, in the *Kelo* case, a divided Court wrestled with the relative deference that should be accorded municipalities when they exercise their eminent domain powers, with four (and a half) members willing to override local determinations of “public use” in particular circumstances.¹⁴⁸

One can reasonably ask how all this can be rationalized. Under the Sherman Act, municipalities are supposed to be more liable than states for anti-competitive policies. Nevertheless, local governments have mostly received a free-pass for anticompetitive land use regulations. Under the commerce clause, by contrast, municipalities and states are supposed to be indistinguishable—protectionist policies are supposed to be treated the same at either level of government. Nevertheless, local land use regulations have elided dormant commerce clause scrutiny despite their often protectionist purpose and effects.

Meanwhile, in the takings context, the Court has been involved in a long-running battle concerning the level of deference municipalities should receive, with some justices advocating less judicial oversight and some much, much more. This judicial attention is not driven by concerns with local land use regulations’ anti-competitive or protectionist purposes or effects, however. Indeed, in *Kelo*, five of the Justices were concerned that municipalities were not being *protectionist enough*—that is, they worried that local governments were *too eager* to attract outside investment, not that they were closing their doors to it.

That these doctrines do not speak to one another is an important point. More important is how they create an inter-municipal trade regime that permits fairly significant anticompetitive and protectionist local policies. Of course, one should be careful not to overstate local governments’ protectionist capabilities. In a large metropolitan area, the exclusion of certain competitors from a particular jurisdiction might have little effect; those competitors can simply set up shop in the neighboring jurisdiction. Successful efforts by downtown retailers to prevent a new Wal Mart from entering the jurisdiction, for example, will likely only result in the relocation of the Wal Mart to a neighboring town. There are too many municipalities and most are too small to be effective protectionists.¹⁴⁹

Nevertheless, controversies over the siting of residential, commercial and productive facilities (especially retail facilities) are a staple of local politics, often pitting developers against established local businesses or residents. Land use regulation is used defensively to protect homeowners’ property values, to protect

¹⁴⁷ See *Nollan v. Calif. Coastal Comm’n.*, 483 U.S. 825, 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

¹⁴⁸ *Kelo*, 545 U.S. 469 (2005).

¹⁴⁹ But see Gifford, *supra* note ___, at 359-60 (discussing local taxicab cartels).

local commercial interests or to promote the commercial interests of one local jurisdiction over another. All of these are forms of goods protectionism, as they affect a range of inter-state and regional markets, particularly the housing market. Regional competition among neighboring localities generates a brake on some kinds of local protectionist impulses but encourages others.

C. Capital

As with persons and goods, the Supreme Court is an active umpire of the inter-state market in capital.¹⁵⁰ The nineteenth and early twentieth centuries saw the development and expansion of the inter-state corporation. In the latter half of the 19th century, judicial decisions struck down absentee ownership laws and other state regulations discouraging multi-state business operations or discriminating against out-of-state corporations.¹⁵¹ Combined with the inter-state competition for, and standardization of, corporate charters, the corporation soon gained the ability to operate relatively free of local interference throughout the nation. The chartering and regulation of corporations is still a state responsibility—states do and can set the conditions for entry. But the commerce clause prevents states from protecting locals from encroachment by out-of-state capital through obviously discriminatory mechanisms.¹⁵²

In fact, the current concern in the literature is not that states and cities will exclude out-of-state capital but that they will be too eager to seek it. One of the most controversial and unsettled aspects of the inter-state common market is the extent to which states and localities can provide economic development incentives to attract or, more pointedly, to keep capital in-state. These development incentives are common, and include tax abatements or credits or outright cash subsidies for industries that relocate into or choose to remain in a particular jurisdiction.¹⁵³

That states feel the need to compete for highly mobile capital may indicate that capital flows are relatively open across borders. Indeed, competition for capital is inherent in any federal regime in which sub-federal governments can differently invest in infrastructure or adopt differential tax rates or regulatory rules. States or cities can be “business-friendly” or not. General economic regulation might cause some distortion in the locational decisions of firms beyond a baseline

¹⁵⁰ Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation*, 38 J. OF ECON. HIST. 631 (1978)

¹⁵¹ *Id.* at 638–43.

¹⁵² Regan, *supra* note ___, at 1275.

¹⁵³ See Walter Hellerstein, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L. REV. 789, 790-91 (1996).

in which only transport costs are taken into account, though those distortions are arguably quite minor.¹⁵⁴

But while the incentives to “come” in themselves may not raise protectionist concerns, the incentives to “stay” often do, and the two are difficult to disentangle.¹⁵⁵ Tax or subsidy-based favoritism of local industry of whatever kind (including relocation incentives) will have the economic effect of influencing the “geography of production”¹⁵⁶ and will undoubtedly tip the market to the benefit of the local producer (and thus to the detriment of the non-local producer). But while efforts to invite capital “in” may indicate the existence of a relatively open market, efforts to make capital “stay” raise the distinct possibility that cross-border capital flows are or could become relatively closed.

The formal line that the Court has drawn, and which has come under significant criticism, is the line between subsidies and taxes, or between “direct subsidies of domestic industry” (which are permitted) and “discriminatory taxes of out-of-state manufacturers” (which are not).¹⁵⁷ In *West Lynn Creamery v. Healy*,¹⁵⁸ however, the Court fudged that line significantly, striking down a non-discriminatory tax levied on milk dealers that was funneled back to Massachusetts milk producers in the form of a subsidy. The combined tax and subsidy favored in-state dairy farmers over out-of-state dairy farmers, thus distorting the market in milk. Because it burdened out-of-state producers, the subsidy scheme was unconstitutional under the commerce clause.¹⁵⁹ In *Healy*, the Court also dropped a footnote stating that “we have never squarely confronted the constitutionality of subsidies and we need not do so now.”¹⁶⁰

Since *Healy*, the status of locational subsidies and economic development incentives has been unsettled—the tax/subsidy distinction and the distinction between discriminatory and non-discriminatory taxes are both unclear. Last year, *Daimler-Chrysler Corp. v. Cuno*¹⁶¹ gave the Court an opportunity to clarify the doctrine, but the Court dismissed the suit on standing grounds. *Cuno* involved a lawsuit brought by city and state taxpayers challenging a package of tax incentives offered by Toledo and Ohio officials to DaimlerChrysler to induce the company to keep a Jeep assembly plant in Toledo rather than move it across the border to Michigan. The locational incentives included a local property tax abatement and an investment tax credit—both commonly used tools for subsidizing industries in return for them remaining and investing in a particular jurisdiction.

¹⁵⁴ PAUL KRUGMAN, DEVELOPMENT, GEOGRAPHY, AND ECONOMIC THEORY 52-55 (1995).

¹⁵⁵ Cf. ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

¹⁵⁶ *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994).

¹⁵⁷ *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988).

¹⁵⁸ 512 U.S. 186 (1994).

¹⁵⁹ *Id.* at 194.

¹⁶⁰ *Id.* at 199, n.15.

¹⁶¹ 126 S. Ct. 1854 (2006).

DaimlerChrysler argued that the Ohio tax abatement and credit were permissible subsidies,¹⁶² and in economic terms they, of course, were—both forms of tax relief could have easily been replicated with outright cash payments.

The Sixth Circuit acknowledged the difference between subsidies and discriminatory taxes¹⁶³ and recognized that states and localities are permitted to encourage the intrastate development of commerce and industry.¹⁶⁴ Nevertheless, it struck down the investment tax credit (it left the property tax abatement standing), citing a line of Supreme Court cases that had invalidated state statutes that gave in-state business activity a tax advantage not shared by out-of-state business activity. Ohio's investment tax credit put a burden on the cross-border movement of capital by putting a thumb on the tax scale. Businesses subject to the Ohio franchise tax could reduce their existent tax liability by making significant capital investments within the state, but not if they invested outside the state.¹⁶⁵ The tax was a cross-border (or inter-state) regulation of commerce in that it sought to displace business activity from one state to another, and it provided a direct commercial advantage to local or local-investing businesses as compared with non-local investing businesses. Though limited to the ITC, the Sixth Circuit's decision seemed to call into question numerous tax incentives that states and localities had presumed to be constitutional, but which some commentators had argued were vulnerable if the Court took its own doctrine seriously.

That *Cuno* involved an effort to keep a large employer in Toledo was not incidental to the case. Much of the inter-state competition for corporate investment is actually inter-city competition. Toledo was competing with a neighboring Michigan city only fifteen miles away,¹⁶⁶ and the particular circumstances of Toledo's declining economy obviously animated the push to keep the Jeep plant there. Locational incentives are one of the most commonly employed tools of local economic development—few cities believe that they can forego giving significant tax breaks to industries that have some locational mobility. The *Kelo* case involved similar incentives—the condemnation at issue in that case was just one element in the package of incentives designed to encourage large-scale redevelopment in New London. Like Toledo, New London also faced economically dire circumstances caused by the exit of capital.

As with the mobility of goods, the dormant commerce clause does not make a distinction between municipalities and states when it comes to the mobility of capital. But it is important to note that locational incentives are, in an important sense, inherently local. Though states may encourage such subsidies, their immediate purpose is to aid a particular municipality and their most direct effects

¹⁶² *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 742.

¹⁶⁵ *Id.* at 743.

¹⁶⁶ Robyn Meredith, *Chrysler Wins Incentives from Toledo*, N.Y. TIMES, Aug. 12, 1997, at D3.

will be felt there. Certainly, states are interested in the tax revenue that will flow into state coffers from local investment, but locational incentives are almost always more geographically targeted. Unlike, for example, state-wide campaigns to attract investment (wherever it might go in the state) economic development incentives are largely placed-based strategies. *Cuno* is thus only the most recent example of what could be considered the development of a market in “preferential trade areas” at the municipal level. These include geographically-specific tax-free or empowerment zones and business enterprise districts.¹⁶⁷

At the municipal level, the locational incentives competition is a component of the larger city economic development project. The favorable tax treatment given to municipal bonds is one tool employed by states in furtherance of this project. It is a common practice for a state to exempt in-state municipal bond interest from taxation, while taxing interest on out-of-state bonds. The Court will take this practice up next Term in *Department of Revenue of the Commonwealth of Kentucky v. Davis*,¹⁶⁸ but it is hard to see how it is not unconstitutional under the Court’s stated commerce clause doctrine.¹⁶⁹ The very purpose of the tax exemption is to discriminate so as to give state residents an incentive to purchase in-state bonds, that is, to direct in-state capital to in-state bond issuers, many of which are cities. Indeed, municipal debt advantages represent a significant distortion in the capital markets: cities can borrow money more cheaply than their private counterparts because the government can give “public” investments more beneficial tax treatment.¹⁷⁰ Municipal bonds pay for local infrastructure; these bonds often help to underwrite the improvements necessary to bring an industry or plant to the city. In fact, city borrowing is often part of a locational incentive package.¹⁷¹

Another tool employed by cities is, once again, land use regulation. City development agencies are essentially regulators of land use; in places without development agencies, the zoning and planning boards are essentially development agencies.¹⁷² Acting through these organs, local government plays a central role in determining the shape of capital investment in the jurisdiction, which involves deciding the appropriate use of land in the jurisdiction, lining up economic investment with appropriate infrastructure, and controlling for capital investments (housing, small businesses, industry or offices) that will generate more fiscal benefits than costs.

¹⁶⁷ Cf. Richard Briffault, *A Government For Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

¹⁶⁸ 197 S.W.3d 557 (Ky. Ct. App. 2006), *cert. granted*, 127 S. Ct. 2451 (2007).

¹⁶⁹ See Ethan Yale and Brian Galle, *Muni Bonds and the Commerce Clause after United Haulers*, 44 STATE TAX NOTES 877 (2007).

¹⁷⁰ LYNN BAKER AND CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 194-95 (3rd ed. 2004).

¹⁷¹ See Yale & Galle, *supra* note ___, at ___.

¹⁷² See SCHNEIDER, THE COMPETITIVE CITY, *supra* note ___.

Scholars have long observed the “fiscalization” of land use—the use of zoning to deflect or attract development in order to improve the overall fiscal health of the jurisdiction.¹⁷³ Exclusionary zoning, for example, is predominantly a fiscal strategy, designed to alter or preserve the municipalities’ tax/spending ratio. Such zoning is only tangentially related to land use; its purpose is often budgetary.¹⁷⁴ A more specific example of the influence of fiscal considerations on land use comes from California. Because state law has limited municipalities’ ability to generate revenue through the property tax, car dealerships are popular with California municipalities because dealerships tend to generate significant local sales tax revenue.¹⁷⁵

That local governments use land use regulations to manipulate or influence the form or type of investment in the jurisdiction is unsurprising, but does suggest a qualification to the usual presumption of free inter-local capital mobility. Though capital can usually find a place in a particular state, Not-in-My-Backyard (NIMBY) attitudes can and do derail the siting of what would be otherwise efficient capital investments at the local level. Indeed, land assembly for large infrastructure or manufacturing plants is often a challenge in built-up urban areas. The assembly problem is the chief reason that cities employ eminent domain on behalf of large-scale corporate infrastructure projects.¹⁷⁶ When seen from the perspective of free mobility, eminent domain could be understood as helping to unwind existing land use patterns that would otherwise distort a firm’s locational decision.¹⁷⁷

The point is that localities can more easily prevent unwanted capital from coming into the jurisdiction than they can prevent wanted capital from leaving. Wealthier jurisdictions can displace industrial and other intensive uses; development can be easily deflected by those local governments that want to do so. At the same time, urban disinvestment is a common problem in post-industrial cities and older suburbs. That disinvestment has led to the inter-city competition to offer location incentives that we see in *Cuno* and *Kelo*. In this way, the inter-

¹⁷³ See EDWIN S. MILLS & WALLACE E. OATES, *FISCAL ZONING AND LAND USE CONTROLS* (1975); see also Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 199 (1997).

¹⁷⁴ See, e.g., *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975); see also William Bogart, “What Big Teeth You Have!”: Identifying the Motivations for Exclusionary Zoning,” 30 Urb. Stud. 1669 (1993) (discussing four motivations for exclusionary zoning, none of which have to do with environmental or land use design or planning).

¹⁷⁵ *Id.*

¹⁷⁶ See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 823 (3rd ed. 2005).

¹⁷⁷ Cf. David Dana, *Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test*, draft on file with author (arguing that the use of eminent domain in urban areas might offset government distortions of the land market that encourage development in exurban and rural land markets).

city mobility of capital is similar in structure to the inter-city mobility of persons and goods—out-flows are harder to control than in-flows.

* * *

What emerges is a picture of the American common market that appears to be more forgiving of local than state restrictions on the mobility of persons, goods, and capital. Though states are active participants in the locational incentives games, they cannot select residents by legally restricting entry and they are not normally active participants in controlling the market in land. This city/state difference is somewhat at odds with conventional understanding. The stated commercial relationship between states holds “that the peoples of the several states must sink or swim together, and that in the long run, prosperity and salvation are in union and not division.”¹⁷⁸ That principle seems less robust at the local level, even though municipalities and states are formally indistinguishable under the commerce clause and municipalities are formally more susceptible to liability than states under the Sherman Act.

The practical difference between the constitutional regulation of cities and states turns on the Court’s unwillingness to treat land use regulations as potential mobility barriers. This unwillingness does not appear to be a conscious doctrinal choice. Indeed, though legal scholars have recognized the anticompetitive aspects of zoning, they tend not to view land use through the prism of local economic development or, more broadly, through the lens of the national common market.¹⁷⁹ Nevertheless, to the extent that the Court’s dormant commerce clause doctrine is primarily concerned with inter-jurisdictional discrimination as opposed to inter-jurisdictional mobility, local land use regulations (which are almost always facially neutral) will be immune from judicial scrutiny.

Land, however, is the driving developmental force and constraint in local government. Urban theorists have long recognized that land-based urban development is the defining feature of a municipality’s political economy,¹⁸⁰ whether in the suburbs, where zoning is used to control for the characteristics of in-migrants,¹⁸¹ or in large cities, where land-based elites battle over the nature and direction of urban growth.¹⁸²

This is no surprise. The histories of American cities often begin with the port, the railroad, the canal, or the highway. But the shape of the city is driven by land: infrastructure investment, land speculation, and city growth are all of a

¹⁷⁸ Baldwin v. G. A. F. Seelig, Inc., 294 U.S. 511, 523 (1935).

¹⁷⁹ But cf. BOGART, *supra* note __, at 698.; Ellickson, *supra* note __, at 392-402.

¹⁸⁰ PETERSON, *supra* note __, at 24-25.

¹⁸¹ FISCHER, *supra* note __, at 229. {Homevoter}

¹⁸² Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. OF SOCIOLOGY 309, 309 (1976).

piece.¹⁸³ The changing landscape of the city represents its economic rise, fall, and future; the built environment is inseparable from its economic welfare. That some individuals or groups in a particular jurisdiction may resist development, as in certain suburbs or “no-growth” jurisdictions, simply reaffirms the central role of land use in municipal economics. Those homeowners or small business owners who resist the influx of new investment do so out of a concern for their own economic welfare; at core, however, municipal developmental politics (either pro or anti-growth) is the politics of land use.¹⁸⁴ State economic development policy (and politics) is not so similarly obsessed.

That local politics is the politics of land use is in part a function of the nature of the legal tools available to municipalities. Though a crude tool, land use provides local governments with one of the few legal mechanisms to control the cross-border flow of persons, goods, and capital.

PART III **Controlling Cross-Border Flows**

With the parameters of the inter-city free trade regime sketched-out, we can begin to see relationships between cases that would otherwise fall under separate doctrinal headings and receive vastly different judicial treatment. What is common about much constitutionally-relevant municipal conduct is that it involves the policing of local borders in an effort to influence economic outcomes. On the one hand, cities engage in protectionist policies that prevent entry or that raise the costs of entry. Exclusionary zoning, exactions or development fees, and anti-big box store laws are examples of the former. On the other hand, cities engage in behavior that might be too solicitous of mobile capital, by forcing current residents to subsidize the entry of new or preferred arrivals. Subsidies for professional sports teams, infrastructure development that favor certain socio-economic classes, economic development takings, and locational subsidies are examples of the latter. One can characterize all these activities as situated on a cross-border continuum—on the one hand, cities might engage in too much protectionism; on the other hand, they might engage in too little.

Of course, a city’s capacity to control its economic fate is not as simple as controlling for the right persons and investments. In fact, urban economists disagree on some of the most fundamental questions. How and why do cities come to be in a particular location and what makes them prosper or fail?¹⁸⁵ Should cities

¹⁸³ *Id.*; WILLIAM FULTON, *THE RELUCTANT METROPOLIS: THE POLITICS OF URBAN GROWTH IN LOS ANGELES* (2001); PHILIP KIVELL, *LAND AND THE CITY: PATTERNS AND PROCESSES OF URBAN CHANGE* (1993).

¹⁸⁴ Molotoch, *supra* note __, at 309–10.

¹⁸⁵ BOGART, *supra* note __, at 25 (arguing that cities formed where there was a food surplus); JACOBS, *supra* note __, at 1-48 (EOC) (disputing the agricultural theory); Edward L. Glaeser, *Urban*

seek to attract residents, after which jobs will follow, or do residents follow jobs?¹⁸⁶ Is a city's advantage its capacity to generate innovation or provide amenities? A city's urban policy will be very different depending on its answers to these kinds of questions. A city's urban policy will be very different depending on its answers to these kinds of questions. Of relevance for our purposes is how legal rules shape the city's potential economic development efforts.

This Part revisits three cases that have already made an appearance in Part II—starting with *Kelo v. New London*. The rules of the free trade Constitution are both a response to and shape the political and economic behavior of cities. What theory should the court use to assess that behavior? Assuming some degree of judicial deference to economic legislation (as bifurcated judicial review requires), to what degree should constitutional doctrine permit local fiscal strategies that both redistribute internal resources and impose external costs?

A. Revisiting *Kelo*, *Cuno*, *Camden* (and *Saenz*)

Consider again the *Kelo*, *Cuno*, and *Camden* cases—all of which involve economically distressed, post-industrial cities seeking to attract and keep capital or labor within city limits. In *Kelo v. City of New London*, the Court was asked to interpret the “public use” requirement of the Fifth Amendment’s taking clause to bar the use of eminent domain for the purpose of local economic development.¹⁸⁷ In *DaimlerChrysler Corp. v. Cuno*, the Court was asked to interpret the Commerce Clause to bar state and local tax incentives intended to encourage and favor local economic development.¹⁸⁸ And in *United Building & Construction Trade Council v. Mayor of Camden*, the Court was asked to interpret the privileges and immunities clause to prevent municipal resident-favoring contracting rules intended to encourage the employment and economic welfare of local residents.¹⁸⁹

1. Kelo and Cuno

The *Kelo* case has elicited the most attention, but perhaps for the wrong reasons. Though normally understood within the legal and ideological framework of property rights, *Kelo* is better understood as a case about the structured choices

Colossus: Why is New York America's Largest City?, Harvard Institute of Economic Research, Discussion Paper Number 2073, 2-3 (2005) (asserting that New York's port led to its growth as a city); Paul Krugman, *Increasing Returns and Economic Geography*, 99 *Journal of Political Economy* 483 (1991).

¹⁸⁶ Cf. Glaeser, *supra* note __, at 2 (“At the dawn of the 21st century, jobs have followed workers.”) (decentralized employment paper); Edward L. Glaeser, et al., *Consumer City* 1-28 (Nat'l Bureau of Econ. Research, Working Paper No. 7790, 2000).

¹⁸⁷ 545 U.S. 469, 472 (2005).

¹⁸⁸ 126 S. Ct. 1854, 1859 (2006).

¹⁸⁹ 465 U.S. 208, 210 (1984).

that cities encounter in attempting to alter and affect their economic circumstances. Economically distressed cities have few tools for attracting capital and jobs; the relatively free flow of capital puts built-out, old-line cities at a disadvantage. The use of eminent domain to solve land assembly problems in order to reverse the outward flow of capital should fall within even a relatively narrow understanding of “public use.” Indeed, to the extent such a use of eminent domain is a plausible strategy for attracting economic development, it would be irresponsible for a city not to use it.¹⁹⁰

The Court’s holding that “public use” encompasses takings for economic development is consistent with this view. The decision was by a very slim majority, however, and it has generated significant criticism.¹⁹¹ Critics of *Kelo* worry about the money. That is, they worry that mobile capital will always win in the local political process. Judicial oversight of local economic legislation is thus necessary to prevent cities from giving too much away. On this account, the Fifth Amendment’s requirement of compensation is not sufficient. An additional “public use” restriction serves as a check on the imposition of costs on an internal minority—the landowners whose property is being taken.¹⁹²

That cities cannot be trusted to resist the siren songs of mobile capital has been a long-running concern. Indeed, this concern animates the restrictive interpretation of municipal power by state legislatures and courts, known collectively as Dillon’s Rule, which has exercised significant influence over state-local relations since the mid-19th century.¹⁹³ Restraints on city power were thought necessary in large part because state and local political processes had become infected by the railroads, which could play one municipality off another in the inter-local competition for track location.¹⁹⁴ Reformers were concerned with the patronage-based awarding of municipal franchises and the irresponsible assumption of municipal debt. Ceilings on local debt, voting requirements for bond issues, and restrictive judicial interpretations of local authority were part of an institutional effort to rein-in local rent-seeking.¹⁹⁵

¹⁹⁰ Cf. Clayton P. Gillette, *KELO and the Local Political Process*, 34 HOFSTRA L. REV. 13 (2005).

¹⁹¹ See sources cited in note ___, supra. See also Tresa Baldas, *States Ride Post-'Kelo' Wave of Legislation*, NAT’L L.J., Aug. 1, 2005, at 7 (describing movements in several states to prevent the use of eminent domain for private development).

¹⁹² Ashley J. Fuhrmeister, *In the Name of Economic Development: Reviving “Public Use” as a Limitation on the Eminent Domain Power in the Wake of Kelo v. City of New London*, 54 Drake L. Rev. 171, 231 (2005).

¹⁹³ See Jesse J. Richardson et al., *Is Home Rule the Answer? Classifying the Influence of Dillon’s Rule on Growth Management*, The Brookings Inst. on Urban & Metro. Pol’y, Jan. 2003, at 7, available at <http://www.brookings.edu/es/urban/publications/dillonsrule.pdf>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*; Clayton Gillette, *In Partial Praise of Dillon’s Rule, Or, Can Public Choice Theory Justify Local Government Law?* 67 Chi.-Kent. L. Rev. 959, 964 (1991).

The Progressive Era “home rule” movement that followed came at this problem from a different angle.¹⁹⁶ Some home rulers saw state legislative intervention on behalf of corporate money as the real source of local rent seeking. State legislators were seen to be using municipal contracts as sources of political graft.¹⁹⁷ Only by protecting city politics from state interference could cities turn to the business of real municipal reform. Reformers sought to prevent state legislatures from interfering in local political processes by giving cities a sphere of authority protected from the corrupt influence of state legislative bosses.¹⁹⁸

Whatever the source of potential political process failures, the skepticism of local political processes appears not to extend to the structure of inter-local economic competition itself. No one blames mobile capital for abandoning New London in the first place.¹⁹⁹ And few regard city efforts to reverse economic outflows by spending significant tax dollars to attract corporations to be as problematic as isolated uses of eminent domain.

Thus, despite its similarities to the *Kelo* case, *Cuno* has not generated anything near the same level of popular or scholarly criticism.²⁰⁰ Recall that *Cuno* involved a similarly economically depressed city (Toledo) and a similar redistribution to mobile capital. Moreover, the Toledo and Ohio taxpaying plaintiffs’ challenge in that case raised similar political process concerns. Like in *Kelo*, local taxpayers were worried about the money—the redistribution from resident property-owners to corporate capital. They argued that judicial oversight of local economic development incentives is required to prevent government from giving too much away.²⁰¹

Indeed, the *Cuno* plaintiffs had a better argument. As a matter of policy, economists have been fairly skeptical about the use of economic development incentives of the type used in *Cuno*. Most appear to cost cities money without changing the actual locational choices of the corporations that demand them.²⁰² Land assembly commitments, like the one used in *Kelo*, might have more of an

¹⁹⁶ David J. Barron, *Reclaiming Home Rule*, 116 Harv. L. Rev. 2255, (2003).

¹⁹⁷ *Id.* at 2286.

¹⁹⁸ See, e.g., Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2565-66 (2006); Barron, *supra* note ___, at 2289-2334; Robert C. Brooks, *Metropolitan Free Cities: A Thoroughgoing Municipal Home Rule Policy*, 30 Pol. Sci. Q. 222 (1915).

¹⁹⁹ But see Joseph Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611 (1988) (arguing that mobile capital owes duties to local communities that can be vindicated through property law).

²⁰⁰ I have seen only one very brief essay that puts the two cases together analytically. Alan C. Marco & Jonathan C. Rork, *Kelo, Cuno, and the Broken Window* (2006) (unpublished manuscript on file with author).

²⁰¹ 126 S. Ct. 1854 (2006).

²⁰² BOGART, *supra* note __ (book), at 236; Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 Harv. L. Rev. 377, 391-92 (1996); but see Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447 (1997).

effect on corporate decision-making. Moreover, the data suggests that the costs of attracting new industry or business through tax incentives are often not offset by local economic benefits.²⁰³ And commentators generally agree that locational incentives do not contribute to national prosperity because they are zero-sum. Toledo gains at the expense of the cities where the plants would otherwise have located.²⁰⁴

Moreover, at least from a public choice perspective, tax incentives are much more dangerous than the exercise of eminent domain. Takings for economic development are highly visible and arguably generate opposition from a well-motivated constituency (those whose property is being taken).²⁰⁵ Takings also have to be paid for; condemnation funds are a local budget item (to the extent they aren't paid for using state money) and have to be accounted for by local political officials. Local and state tax incentives, even if they amount to a huge redistribution from taxpayers to corporations, are much less visible because they affect large numbers of people in small ways, are less transparent, do not constitute a direct charge to local budgets, and are often "paid for" by future generations through municipal bonds.²⁰⁶

It certainly bears noting that capital does not appear to be concerned—in *Cuno*, the plaintiffs were the city and state taxpayers, not corporations seeking an even playing field on which to compete with Jeep.²⁰⁷ Corporations are more concerned about restrictions that limit their mobility, not incentives that assist it. Thus, the holding in the *Cuno* case—that city and state taxpayers do not have standing to challenge local and state locational tax incentives—means that those individuals or groups most inclined to bring such challenges cannot.

Cuno and *Kelo* thus both defer to the local political process to sort out good from bad redistributions.²⁰⁸ As is generally true of judicial oversight of economic legislation, the Court will not intervene when political processes appear available to do so.²⁰⁹ If *Kelo* is wrongly decided than it seems that *Cuno* is too.

The important point—whatever one's view of the outcomes—is that both cases are about local governments' capacity to corral mobile capital. How cities

²⁰³ Enrich, *supra* note __, at 39-94.

²⁰⁴ Enrich, *supra* note __, at 398. See also BOGART, *supra* note __ (book), at 238. Cities can avoid the prisoner's dilemma through rules that give veto power over a local tax abatement to the city that currently has the firm (Michigan, controlling intra-state moves).

²⁰⁵ See David Dana, *supra* note __, at 48.

²⁰⁶ Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 Minn. L. Rev. 447, 470 (1997) (arguing that voters may favor projects financed with debt that will be imposed only on future generations); Enrich, *supra* note __, at 394 (pointing out that the burdens of tax incentives are "indirect and widely dispersed").

²⁰⁷ *Cuno*, 126 S. Ct. 1854 (2006).

²⁰⁸ For an excellent discussion of "benign" and "malign" redistributions at the local level and the capacity for courts to distinguish one from the other, see Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention* (unpublished manuscript on file with author).

²⁰⁹ Cf. Gillette, *KELO*, *supra* note __, at __.

do so will be structured by legal rules. Indeed, as David Dana has observed, if eminent domain were taken off the table, cities would resort to other (currently) legal mechanisms to subsidize new development, including *Cuno*-style tax breaks, direct cash outlays, donations of public property, zoning exemptions, and infrastructure subsidies.²¹⁰ Before engaging in eminent domain reform, one would want to think systematically about the desirability of encouraging local governments to rely even more heavily on these tools.²¹¹ New London and Toledo will employ the mechanisms available to them; their legal/economic options are limited. Both cities did what struggling local economies often do—redistribute monies from some group of local property owners to mobile capital.

2. *Camden (and Saenz)*

The legal tools to corral mobile capital available to the city of Camden are also quite limited. Recall that *Camden* is another case involving local economic regulations intended to assist an ailing post-industrial economy. But unlike in *Kelo* and *Cuno*, in *Camden*, the Court comes out the other way: it holds that a regulation requiring that contractors with the city employ at least 50% Camden residents is suspect under the privileges and immunities clause.²¹²

At first glance, the conceptual structure of *Camden* looks somewhat different than *Kelo* or *Cuno*. Camden's regulation appears to be more protectionist, that is, it appears to impose direct costs on outsiders, whereas *Kelo* and *Cuno* appear to involve government activities that impose costs on insiders. This characterization is not quite right, of course. *Cuno* and *Kelo* both involved the imposition of costs on outsiders; though less visible, locational incentives result in redistributing capital investment away from other cities. Indeed, the *Cuno* plaintiffs' dormant commerce clause theory, which was accepted by the Sixth Circuit, was that the local-investment-favoring tax incentives discriminate against non-local investment.²¹³

Moreover, though Camden's ordinance appears to impose costs on outsiders, those costs are mainly borne by city taxpayers. The city's rule may restrict potential bidders for city projects, thus raising the costs of those projects to city taxpayers. The Court's concern in *Camden* with out-of-locality and out-of-state labor interests is thus somewhat misplaced, especially if city taxpayers are willing to bear those costs. A different concern might be that the Camden city council is redistributing monies from municipal taxpayers (i.e., property owners) to local workers or local corporations—which it is. But that is the same concern

²¹⁰ See Dana, *supra* note ___, at 28.

²¹¹ Thanks to Lee Fennell for this point, who further observes that there might be a difference between "cash" and "in-kind" subsidies.

²¹² *Camden*, 65 U.S. at 221-22.

²¹³ *Cuno v. Daimler Chrysler, Inc.*, 386 F.3d 738, 746 (6th Cir. 2004).

raised by the *Kelo* and *Cuno* cases. All three cases raise the appropriateness of certain kinds of local redistributions.²¹⁴

Camden is thus, like *Cuno* and *Kelo*, about local rules that restrain or encourage the flow of resources and persons across borders by redistributing internal economic resources. A consistent rationale for which rules are permissible, however, is hard to discern. City political process failures might be a rationale, though Camden, like Toledo and New London, can be restrained by its state legislature if those political process problems are severe. Judicial intervention in any of the cases seems problematic if one respects bifurcated judicial review—the notion that economic legislation should generally receive less judicial scrutiny.

On the other hand, in all three cases, there might be a concern that judicial involvement is necessary to counter inter-local races-to-the-bottom. On this account, constitutional rules are required to prevent internecine protectionist wars—a rash of local economic development takings, tax incentives, and local labor protectionism, dividing the country into competing local economic fiefdoms. This latter concern might counsel suspicion of all local efforts to restrict or influence the flow of goods, persons, or capital across borders.

Current doctrine is committed to neither approach. Under the Court’s doctrine, Camden’s labor favoritism is problematic but suburban land-use-based restrictions on residential mobility are not—despite *Saenz v. Roe*, which reaffirmed the central importance of inter-state residential mobility.²¹⁵ The distinction seems formalistic. The Court does not permit exclusionary zoning while disallowing Camden’s in-locality hiring preference because the former is less burdensome on mobility than the latter.²¹⁶ And it is not because one form of regulation limits the mobility of in-staters and the other form limits the mobility of in-staters and out-of-staters—note that *all* municipal regulations have intra- as well as inter-state effects. Rather, it is because facial discriminations are more amenable to judicial oversight. Whether dormant commerce clause jurisprudence should be emphasizing equal treatment over free mobility is a question that the Court has not explicitly answered. Nevertheless, a byproduct of the jurisprudential emphasis on non-discrimination is that a great deal of local conduct goes unregulated despite the burdens on inter-jurisdictional mobility.

²¹⁴ Cf. Gillette, *Local Redistribution*, supra note ____.

²¹⁵ *Saenz v. Roe*, 526 U.S. 489, 506 (1999) (“The Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: ‘That Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.’”)

²¹⁶ As I have already observed, in a functioning mobile economy, the urban labor force would follow jobs out to the suburbs. Restrictive local zoning laws might prevent that movement, leaving poor, non-mobile, inner-city residents without work or the means to get to work. Indeed, Camden’s effort to direct work to its in-city labor force was animated by a local economy struggling in part as a result of restrictive zoning laws adopted by the suburban jurisdictions surrounding the city. Cf. Schill, supra note ____, at 67 (discussing the problem of spatial mismatch).

It is not as if the Court is unwilling to oversee local land use regulations through its regulatory takings and exactions jurisprudence—*Kelo* is only the latest case in an ongoing judicial discussion about the appropriateness of municipal land use regulation.²¹⁷ Takings theory, however, tends to be preoccupied with internal political process failures, either majoritarian or minoritarian bias.²¹⁸ It is not animated by concerns with local land use regulations’ anti-competitive or protectionist purposes or effects.

The Court thus toggles back and forth between deference and scrutiny of local border-closing or –opening activities. Exactions excite the Court’s interest, as do takings for economic development, but cash subsidies of the kind in *Cuno* do not. Though the Court declines “invitations to rigorously scrutinize economic legislation passed under the auspices of the police power”²¹⁹ under the dormant commerce clause, it sometimes appears eager to oversee local economic legislation under the takings clause. Again, these concerns are unevenly and inconsistently articulated. Judicial deference to local regulations seeking to control local economic flows (whether land-use-based or not) is fine, if consistent. But the current rules are a hodge-podge, tend to work at cross-purposes, and are woefully under-theorized.

B. Theories of Local Political Behavior

The problem is that neither courts nor scholars have a theory of the American common market that is attuned to the appropriate scale. As already observed in Part II, the leading substantive justifications for a robust inter-jurisdictional mobility jurisprudence—anti-protectionism and anti-discrimination²²⁰—are underenforced at the local level or inconsistently applied. Despite the Court’s anti-protectionist rhetoric, significant areas of local border regulation—namely those involving land use—have never been conceived as border regulation at all. Understandably, the Court has offered no account of

²¹⁷ See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

²¹⁸ See, e.g., NEIL KOMASAR, *LAW’S LIMITS* 61 (2001).

²¹⁹ *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 127 S. Ct. 1786, 1798 (2007); *But cf. Kelo*, 545 U.S. 469, 493-523 (O’Connor, J. dissenting; Thomas, J., dissenting) (arguing that there must be a “judicial check” on how the public use requirement is interpreted).

²²⁰ Anti-protectionism asserts that “the states may not single out foreigners for disadvantageous treatment just because they are foreignness.” Regan, *supra* note __, at 1165. Anti-discrimination is closely related to anti-protectionism, but is more explicitly embodied in the privilege & immunities clause which requires that citizens of each of the states shall be entitled to all the privileges and immunities of citizens “in the several states.” *Id* at 1204; Black, *Perspectives on the American Common Market*, in *REGULATION, FEDERALISM, AND INTERSTATE COMMERCE* 65 (A. Tarlock ed. 1981); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 *YALE L.J.* 425, 446-55 (1982). Like anti-protectionism, the anti-discrimination principle is also grounded in the concept of union.

municipal political behavior that can rationalize the doctrine or illuminate a way forward.

There are, of course, scholarly accounts or theories of local political behavior that the Court could adopt. I look at three here. The first emphasizes the problem of political externalities, the second emphasizes the benefits of inter-jurisdictional competition, and the third emphasizes the substantive dangers of protectionism. I discuss some of the drawbacks of these accounts before suggesting a different approach in Part IV.

1. Political Process

The conventional political process theory of the dormant commerce clause asserts that all sub-federal jurisdictions (whether state or municipal) are similarly inclined to foist costs onto those who cannot vote. On this account, representation is generally regarded as sufficient to prevent most egregious economic discriminations, but the reality of separate political jurisdictions means that representation cannot always be relied upon. This theory explains why the judiciary has to be available to prevent state and local protectionist activities—the normal political process is unavailable to do so.²²¹

Of course, this story becomes complicated rather quickly. Often, local or state policies that impose costs on non-voters will also impose costs on voters. The exclusion of a Wal Mart from a jurisdiction imposes costs on Wal Mart, but also imposes costs on the consumers inside the jurisdiction. Protectionist zoning policies injure those outsiders who would otherwise seek housing in the jurisdiction, but those policies also injure large landowners in the jurisdiction, who would otherwise seek to subdivide their land. Few issues do not have both external and internal political constituencies, both for and against.²²² Indeed, each and every type of protectionist legislation that favors in-jurisdiction producers over out-of-jurisdiction producers will hurt an in-state interest (usually consumers) as well as an out-of-state interest.

This dynamic can be accommodated by the political process story, but only by adding some consideration of degree: the more out-of-jurisdiction interests are adversely affected, the more likely it is that the in-jurisdiction political process is flawed. Generally, though, the fact of internal representation has to be suppressed by the political process theory, especially when it comes to facial inter-jurisdictional discriminations. Though there may be some in-state or in-locality interests that can serve as proxies for out-of-state or out-of-locality interests, those in-state or in-locality interests will normally be considered insufficient.

²²¹ See Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125.

²²² See Gillette, *supra*, at ___. See also Hills, *supra* note ___, at 313, note 101.

The Court has implied such a strong view. In *Camden*, which involved a law favoring municipal residents over all others (whether in-state or out-of-state) the Court acknowledged that non-Camden in-state voters could arguably protect out-of-state residents by representing their interests in the New Jersey legislature. The Court dismissed this argument out-of-hand, however. This form of “virtual” representation was too thin a reed to protect out-of-state residents.²²³ The Court did not even consider that city taxpayers share an interest with out-of-locality contractors because the true costs of the city labor preference would arguably be borne by those taxpayers in the form of higher bids for city contracts.

With most forms of regulation, there exist some internal and external interest groups; internal groups do not just “virtually” represent outsiders, they “actually” represent their own interests. The political process theory is concerned with only two categories of persons, however: non-voters and voters. Losing voters—that is, citizens of a jurisdiction who come up on the wrong side of the political process—do not generally rate judicial concern even if flaws in the political process mean those voters would otherwise be in the majority.

Consider *Cuno*. It is certainly plausible that a majority of Toledo voters would oppose subsidizing a new Jeep plant in the city. But, as public choice theory tells us, vocal, concentrated and energized minority interests often overwhelm a diffuse and thin majority opposition. On a political process theory of the dormant commerce clause, however, city and state taxpayers cannot readily contest the subsidies granted Jeep as a substantive constitutional matter because those taxpayers are residents of the legislating jurisdictions. Giveaways to mobile capital are not readily cognizable under the dormant Commerce Clause because the political process theory is not concerned with internal public choice dynamics.

This story can be repeated in relation to most forms of protectionist legislation—often the real story is how certain industries have captured the political process to the detriment of consumers or the public at large.²²⁴ Indeed, the founding assumption of process theory—that insiders will foist costs on non-voting outsiders—while superficially true, soon collapses under the weight of the public choice realities. Depending on the circumstances, jurisdictions will foist costs *and* benefits on outsiders *and* insiders. Indeed, because the political process theory is concerned with negative externalities, it assumes that a local jurisdiction can never be *too attentive* to outsiders. But over-attentiveness to mobile capital might be at the heart of the political process flaw that requires judicial remedy.

²²³ *United Bldg. & Constr. Trades Council v. Camden*, 465 U.S. 208(1984); *but cf. Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981).

²²⁴ The concern about railroad power that animated the Dillon’s Rule reforms of the 19th century is an example. See Teaford, *supra* note ___, at ___.

2. Inter-Local Competition

A different account might emphasize the benefits of competition over the problem of political externalization. An exit model of local political behavior surmises that if a city attempts to engage in too much undesirable redistribution, businesses and residents will flee to jurisdictions that will not engage in such redistribution. The basal fact of inter-city competition prevents a great deal of municipal behavior that might otherwise need to be regulated by the courts.²²⁵

The notion of “exit” as an explanation for and constraint on local government behavior has attracted considerable support in the literature. Perhaps this is a function of the influence of Tiebout’s *A Pure Theory of Local Expenditures*.²²⁶ Tiebout’s narrow goal was to formulate a theory of how the appropriate level of public goods could be generated without resort to politics. The Tiebout hypothesis holds that citizens can “vote with their feet” by exiting non-performing jurisdictions.²²⁷ In a Tieboutian regime, inter-jurisdictional competition, at least at the city level, generates a market in municipalities that restrains them from overtaxing or overspending (or undertaxing and underspending). Local governments that are not responsive will decline relative to local governments that are responsive. The easy option to exit a local jurisdiction by choosing a municipality that reflects one’s preferences ensures that local governments are attentive to their constituents.

The theory that mobile taxpayers (whether residential or commercial) will exert a constraint on overregulation or overtaxing by local government has led to a number of arguments for giving localities more constitutional leeway when it comes to regulating in ways that might otherwise elicit constitutional concern.²²⁸ The exit account, however, also has some significant limitations as an explanation for inter-jurisdictional behavior.

First, like the conventional political process account, the exit account might not reflect the actual public choice dynamics of local political behavior. For example, the exit account predicts that cities will not be able to engage in significant redistributive activities unless those activities redound to the benefit of a clear majority of the residents of the jurisdiction. The theory predicts that cities will precipitate the flight of residents and businesses if the city raises taxes on all residents in order to distribute monies to the poor or in order to subsidize a particular local industry.²²⁹

²²⁵ Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum. L. Rev. 473, 543-45 (1991); but see Sterk, *supra* note __, at __ (challenging the exit account).

²²⁶ 64 J. Pol. Econ. 416 (1956).

²²⁷ PETERSON, *supra* note __, at 18-19.

²²⁸ Been, *supra* note __, 511; see also Serkin, Big Difference for Little Governments, --*NYU L. Rev.* -

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²²⁹ PETERSON, *supra* note __, at 36-38, 41-44.

Contrary to the theory, however, the evidence shows that many cities do engage in significant redistribution from the majority of taxpayers (or from otherwise mobile capital generally) to “special interest groups”—whether to the poor as a class, to workers (see living wage ordinances) or to a subsidized industry (i.e., construction). This fact is unsurprising to local politicians: like state and national politics, municipal politics also has its special interests and “pork barrel” projects. Nevertheless, local redistribution tends to puzzle theorists of the exit school. It is difficult to explain the current and continuing level of local redistribution if the exit model really exerts a disciplining pressure.²³⁰

Second, the exit theory, while predicting that cities will be wary of engaging in behavior that offends insiders, countenances local behaviors that offend outsiders. In a Tieboutian world, there are no externalities, but in the real world cities can impose costs on outsiders with relative impunity, as long as current residents of the local jurisdiction benefit. Indeed, externalizing costs is always a good way to improve one’s own fiscal house, as the prevalence of fiscal zoning in the suburbs attests.²³¹ Exit does not constrain local governments when they seek to foist costs on outsiders unless there are some insiders to speak for them. Such proxies often exist. But if those proxies are in the minority, there is nothing in the exit account that constrains the tendency of local governments to externalize costs when an internal majority will benefit.²³²

Indeed, inter-local competition generates incentives for local governments to be more solicitous of insiders by excluding those who would impose costs on them. To the extent residents of local governments are all seeking the same thing—an appropriate balance between taxes paid and services received—they will tend to seek out the same high-taxpaying and low-tax-cost businesses, industries, and residents. The competition for ratables and wealthy people will leave some groups—those that are undesirable from a tax and spending perspective—always out in the cold. Some mechanism might be necessary to force local governments to accommodate those groups. Here, the conventional political process theory is necessary to provide a justification for restraining local acts that impose costs on undesirable groups, whether that group is an insider or outsider to the jurisdiction.²³³

Finally, the exit account is difficult to square with local policies that have protectionist effects. How does inter-jurisdictional competition work if local governments are closing their borders to persons, goods, or capital? Recall that

²³⁰ This puzzle has led Clay Gillette to offer a number of explanatory theories. See Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, supra note ___ (unpublished manuscript).

²³¹ Norwood, supra note ___, at 353-54.

²³² cf. Fischel, supra note ___, at 272-85.

²³³ See *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 67 N.J. 151 (1975); Richard Schragger, *Consuming Government*, 101 Mich. L. Rev. 1824 (2003) (reviewing FISCHEL, *THE HOMEVOTER HYPOTHESIS*, supra note ___).

Tiebout himself sets forth rules for his model that can be analogized to the constitutional-level rules of inter-jurisdictional mobility. Tiebout assumes that there are numerous local governments, that new local governments can be founded rather easily, that there are no externalities, and that individuals have unlimited resources with which to move.²³⁴

Each one of Tiebout's assumptions is, of course, idealized. Nevertheless, they suggest something important about the nature of the legal rules that govern inter-local competition. Any competitive model of local government behavior must assume relatively open borders, or, at least, a wide variety of open and closed border regimes. The thrust of protectionist local activity is explicitly anti-competitive and anti-mobility, however. Competitive models of local political behavior tend to treat border-closing rules as a local amenity over which jurisdictions compete.²³⁵ In fact, border-closing rules shape the nature of the competition itself.

Changing the rules might change the city's political behavior or one's assessment of that behavior. For example, William Fischel, who adopts a competitive account of local government behavior closely modeled on Tiebout, argues that courts should be fairly rigorous in enforcing the takings clause against local governments.²³⁶ He argues that smaller localities dominated by homeowners will be too risk averse concerning new development, and that they will deny developers access to local land markets and impose costs (in the form of exclusionary zoning) on outsiders. A robust takings clause serves to prevent this form of protectionism, giving those in the housing market some protection from local majorities that would exclude them.²³⁷

In contrast, legal scholar Vicki Been, who also derives her model of local political behavior from Tiebout, argues that the judiciary need *not* rigorously oversee local land use decisions.²³⁸ Inter-local competition for development will generate the right amount of local protectionism; cities will be unable to impose costs on insiders or outsiders because they will be eager to attract development, not turn it away.²³⁹

That two theorists can generate such different judicial rules from the basal fact of inter-municipal competition highlights the difficulty of generalization. There is no question that competitive pressures encourage certain kinds of municipal behavior. There is also no question that a city is apt to foist costs on

²³⁴ Tiebout, *supra* note __. Note also that Tieboutian local governments have no internal economies. Because they are jobless places with unlimited revenue, they have no concern for local economic development per se.

²³⁵ See, e.g., Serkin, *supra* note __, at __.

²³⁶ FISCHEL, *supra* note __, at 282-85.

²³⁷ *Id.* at 272-85

²³⁸ Been, *supra* note __, at 545; see also Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 885-91 (2007).

²³⁹ See Been, *supra* note __, at __.

outsiders if it is in its fiscal interests to do so. But neither the conventional political process account nor the exit account each standing alone can generate a general model of local government behavior. Depending on the circumstances, cities will foist costs *and* benefits on outsiders *and* insiders; indeed, the distinction between costs/benefits and insiders/outsiders breaks down in the face of public choice theory and local political realities.

3. *Protectionism and Localism*

The substantive values of anti-protectionism and anti-discrimination might be more promising as a way forward. Certainly, those values can take into account the competing value of localism. For example, we might be willing to allow smaller, local communities more leeway to engage in border closings that are intended to preserve a particular kind of lifestyle or that are responsive to local values.²⁴⁰ Exclusionary zoning is often defended on the grounds of preserving a suburban or pastoral environment for local citizens. Anti-big box store or anti-chain store laws are also often defended on grounds that local citizens have a right to preserve a particular economic or aesthetic lifestyle, or express particular values by rejecting those forms of development that are inconsistent.²⁴¹ One could argue that as long as state borders are relatively open, local borders can be relatively less so, thus vindicating the values of diversity and localism without sacrificing the overarching goal of inter-state anti-discrimination or economic union. Because municipal regulation is often more limited in compass than state regulation, the risk that a local regulation might lead to the dissolution of the political union or serious inefficiencies seems more farfetched.

Certainly the scale of government regulation is relevant to the regulation's ultimate effects. Nevertheless, it is difficult to generalize: municipalities come in all sizes and shapes, and decisions by some would have more economic and political impact than decisions by others. Moreover, the likelihood of a retaliatory local government response seems relatively high; few localities would be able to

²⁴⁰ Cf. Hills, *supra* note __, at __ (drawing a distinction between localities and states on the grounds that the former are more likely to be "affective communities" than the latter).

²⁴¹ See, e.g., NANTUCKET, MA., CODE art. 3, § 139-12 (H2) ("The purpose and intent of the Formula Business Exclusion District (FBED) is to address the adverse impact of nationwide, standardized businesses on Nantucket's historic downtown area. The proliferation of formula businesses will have a negative impact on the island's economy, historical relevance, and unique character and economic vitality."); See also, *Loreto Dev. Co. v. Village of Chardon*, 119 Ohio App. 3d 524 (Ohio Ct. App. 1996) (holding that a town had a legitimate interest in protecting its small town character by restricting the size of stores); *Island Silver & Spice, Inc. v. Islamorada*, 475 F. Supp. 2d 1281, 1291 (D. Fla. 2007) ("In general, preserving a small town community is a legitimate purpose of local government regulation").

forego adopting their own protectionist ordinances once one locality did.²⁴² The spread of such policies throughout a state would, in practical terms, mean that the state itself had essentially adopted the discriminatory policy.

One could also counter the romanticism of localism with the reality of local prejudice. To the extent that localities are sometimes captured by majoritarian factions that can effectuate outsider-excluding policies, constitutional doctrine might want to be more rigorous—not less—when reviewing local legislation for its protectionist tendencies.²⁴³ The lesson of fiscal zoning in the suburbs is that municipalities are inclined to exclude undesirables if they can.²⁴⁴

In large part, then, whether the substantive justifications for judicial mobility rules lead to differential enforcement against localities depends on whether one believes that certain levels of government are going to be more or less likely to engage in bad behavior. Edmund Kitch, for example, has disputed the claim that sub-federal governments will be likely to engage in protectionism at all.²⁴⁵ The assumption that they will, if given the chance, and that protectionist legislation will thereafter spread, depends on a claim about local political processes, not a claim about the values of anti-discrimination and anti-protectionism. We may agree on those principles, but not agree as to how likely contraventions of those principles will occur in any given polity at any given time. That local governments are generally smaller and sometimes more intimate than states is not—standing alone—sufficient to generalize about their economic and political behavior. Something more is required.

PART IV

How Relative Economic Development Determines Local Political Behavior

With these caveats in mind, we can still make some claims about municipal political behavior. These claims will be highly contextual, however, because a municipality's behavior depends in significant part on its orientation to

²⁴² See *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (“The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”).

²⁴³ Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 962 (2007) (“Local governments often give life to the Madisonian fear of the tyranny of local majorities: they sometimes reinforce racial, ethnic, and economic segregation; exclude outsiders; and generate significant externalities for neighboring communities.”)

²⁴⁴ Bernard K. Ham, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 578-79 (1997).

²⁴⁵ Edmund W. Kitch, *Regulation and the American Common Market*, in REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 7, 13-14 (A. Dan Tarlock ed., 1981); see also Been, “Exit” as a Constraint, supra note ___, at 543-45 (arguing that inter-local competition will prevent localities from over-excluding). But see FISCHER, supra note ___ (arguing that localities are more likely than states to over-exclude).

the larger spatial economy. Metropolitan areas are made up of literally hundreds of local jurisdictions; in a traditional typology those jurisdictions will range from an older central city to a newly developing exurb.²⁴⁶ Those jurisdictions have different economic relationships with other jurisdictions inside the metropolitan area as well as different economic relationships with jurisdictions outside the metropolitan area. The starting point is the actual economic and geographic circumstances of a particular city or municipality.

There is not room here to develop a full-fledged typology of local governments and their behavior, but I can offer three brief observations. First, municipalities economically oriented toward their immediate metropolitan area often take a defensive posture in their competition with other municipalities for local tax-base. That is, they are likely to use land use in a defensive manner to protect their fiscal interests. Second, job-generating, economically robust cities that are oriented to the wider national or international economy depend on a continuous in-flow of persons and investment; when that flow stops, cities decline. Cities that have had the ability to grow by annexing territory (thus making room for persons and investment) have had more economic success than cities that are territorially-bound. Third, state involvement and intervention in city economic development efforts is ubiquitous. It is thus important to disentangle state economic interests from municipal economic interests when making claims about local political behavior.

1. Intra-Metropolitan Relationships

Intra-metropolitan relationships are characterized by jurisdictional fragmentation and inter-local tax competition.²⁴⁷ It is therefore in the context of the metropolitan-area economy that we see the most concerted efforts to use anti-competitive land use laws to influence local fiscal health. That trend began with the migration to the suburbs. As economic resources began to exit the central city, fleeing residents sought to insulate themselves from costly service users through restrictive land use regimes. In the past twenty five years, suburban jurisdictions have themselves become economically fractured. Many older, low density, or segregated suburbs have shown marked economic declines, while other suburbs, namely those on the suburban fringe, continue to develop as bedroom communities. Moreover, edge cities in the suburbs, characterized by their enormous concentration of office space, have overtaken many central cities in regional job creation and provision.²⁴⁸

²⁴⁶ MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* 33 (Brookings Institute 2002).

²⁴⁷ *Id.* at 16-17.

²⁴⁸ *Id.* at 44-48.

Most metropolitan-area jurisdictions will have relatively parochial economic interests—that is, they will seek advantage within the metropolitan-area political economy. Land use-based development policies are directed toward excluding unwanted and undesirable industries, businesses, and persons while encouraging beneficial and relatively inexpensive growth (from a municipal perspective). Regional coordination or coercive mechanisms are scarce, so each municipality competes for desirable regional investment, of which there is a finite amount. These battles are often zero sum.²⁴⁹

This form of “defensive localism”—as Jerry Frug and David Barron call it²⁵⁰—often operates in its purest form in suburban jurisdictions, where political power tends to reside with homeowners. Homeowner-dominated suburbs, as Bill Fischel has argued, are highly attuned to the costs of new development, especially infrastructure and education costs.²⁵¹ Those jurisdictions thus tend to operate defensively, fearing any kind of new local development, whether it is beneficial from a tax perspective or not.²⁵²

In developing suburbs, political power is often divided between homeowners and large land owners or developers. The result, most often, is relatively low-density development, though increasingly no-growth movements are establishing themselves in those places. Indeed, homeowner-influenced jurisdictions, whether established or developing, are highly protectionist until they begin to decline. The development of the suburban periphery means that a protectionist posture is not a long term strategy. As recent research has shown, today’s prospering suburbs are likely to be at-risk tomorrow.²⁵³

2. *Up Cities and Down Cities*

Central city economies are somewhat different from suburban economies because they are more likely to be directed outside the immediate metropolitan area towards the larger national or international marketplace. This does not mean that metropolitan-area relationships are not important to central cities. Quite the

²⁴⁹ Enrich, *supra* note __, at 398; see also Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *Geo. L.J.* 1985 (2000) (discussing the metropolitan-area competition for investment and arguing that predominantly black suburbs often lose).

²⁵⁰ David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field from the Field*, 21 *J.L. & POL.* 261 (2005) (arguing that suburbs exercise a form of “defensive localism” rather than a form of “local autonomy”). See also Richard Briffault, *supra* note __. Briffault has written eloquently and extensively about the defensive and privatized politics of the suburbs.

²⁵¹ FISCHEL, *supra* note __, at 186-87.

²⁵² FISCHEL, *supra* note __, at 8-10.

²⁵³ BILL LUCY, *TOMORROW’S CITIES, TOMORROW’S SUBURBS* (Planner’s Press 2006); Orfield, *supra* note __, at 162-72.

contrary: the relationship between central cities and their suburbs is an ongoing source of tension as they compete for growth and tax base.

Nevertheless, central city economic development is different from suburban economic development in nature and scope. Indeed, as previously discussed in Part I, scholars have identified an elite cadre of “global cities” that provide the financial, legal, and corporate management professionals who service the global market. These cities are characterized by a high concentration of experts in the management and distribution of capital and in the organization of large cross-border enterprises.²⁵⁴ These cities also generate the high-end amenities demanded by high-income-earning individuals. The enormous wealth that flows through global cities has generated significant inequality within those cities and between those cities with high concentrations of corporate management professionals and those cities without them.

The industrial-era central cities were also national and international in orientation, though they were industrial rather than professional centers. Even medium and small cities generated a significant export economy at one time. The New Jersey city that declared in 1911: “Trenton Makes, the World Takes” – was emblematic of the urban industrial attitude.²⁵⁵ Trenton’s motto is now mostly mocking, as Trenton produces little that the world takes. The same can be said of New Haven, Buffalo, Toledo, New London, and Camden. Some of these cities have experienced a mild resurgence recently. And the metropolitan areas surrounding these cities are still quite economically important. Nevertheless, as a general matter, these older industrial places have had to adjust their economic expectations downward quite dramatically.

Job-generating, economically robust cities depend on a continuous in-flow of persons and investment and out-flow of goods or services; when that flow stops or slows down, cities tend to decline. The “stable” job-creating city—that is, one that is neither losing nor gaining population, neither experiencing decreases nor increases in its gross domestic product—is difficult to locate. Cities always seem to be in transition in one direction or another.

In fact, some economists understand cities as spatial manifestations of the economy more generally, with all the cyclical characteristics of economies, including booms and busts, expansions and contractions, growth and recessions.²⁵⁶ To the extent a city is a complex economic organism, it will undergo arguably volatile transformations throughout its economic life.²⁵⁷ What this means is that in

²⁵⁴ SASKIA SASSEN, *THE GLOBAL CITY* (1991); A.J. SCOTT, *TECHNOPOLIS: HIGH-TECHNOLOGY INDUSTRY AND REGIONAL DEVELOPMENT IN SOUTHERN CALIFORNIA* (1993); PAUL L. KNOX, *WORLD CITIES IN A WORLD-SYSTEM* (1995); Jeffrey Kentor, *the Growth of Transnational Corporate Networks, 1962-1998*, 11 *J. of World-Sys. Res.*

²⁵⁵ Jon Blackwell, *1911: 'Trenton Makes' history*, <http://www.capitalcentury.com/1911.html>

²⁵⁶ See PAUL KRUGMAN, *THE SELF-ORGANIZING ECONOMY* 4 (Blackwell 1996) (comparing city economies to embryos).

²⁵⁷ *Id.*; see JANE JACOBS, *supra* note ___, at .

any collection of cities, some will be expanding and some will be contracting, some will be up and some will be down. More importantly, as is evidenced by the rapid expansion of sun belt and edge cities, urban economic development will often come in a rush. Ascendant cities—Phoenix and Las Vegas, for example—are literally “booming”; these spatial economic “booms” are a result of the self-reinforcing effects of economic development.²⁵⁸

Prospering central cities are thus unlikely to act defensively; those cities continue to seek the in-migration of residents, labor, and investment. Moreover, whether they are prospering or declining, central cities still normally contain the bulk of poor residents, and continue to experience the greatest need for municipal and redistributive services.²⁵⁹ Because central cities are still significant generators of regional wealth and also continue to have significant infrastructure and welfare needs, central cities cannot be particularly selective.

Declining central cities, in particular, (and now a number of declining suburbs) are desperate for investment and residents. Their current economic state is defined by the two great trends of the latter half of the twentieth century: deindustrialization and suburbanization. The first trend limited the industrial city’s relationship to the wider national and international economic community; the second trend limited the industrial city’s relationships with the wider metropolitan-area economy.²⁶⁰ Cities with a declining economic base can seek to attract investment, though once a city is isolated from regional or national economic relationships, those relationships are often difficult to reestablish.

Of course, there are also newly developing and expanding post-industrial cities, (many in the sun belt) as well as edge cities—increasingly dense centers of office space, retail, and housing in formerly suburban locales.²⁶¹ These developing cities and edge cities are growth oriented, relying on land-based economic development strategies to enhance their economic position. Indeed, many sun-belt cities—in contrast to older industrial cities—continue to have the capacity to expand by annexing or adding land, thus heading off the creation of suburban jurisdictions that would otherwise compete for tax base or impose externalities on the city. David Rusk has argued that these “elastic cities” are able to “capture” suburbanizing growth through territorial expansion.²⁶² Cities that are “hemmed-in” by a ring of suburban municipalities—especially those that are already built out—have much less capacity to expand, physically or economically.

²⁵⁸ KRUGMAN, *supra* note __, at 4-5 (self-organizing economy).

²⁵⁹ ORFIELD, *supra* note __, at 23-28.

²⁶⁰ DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* 361-407 (Yale University Press 2003).

²⁶¹ JOEL GARRUEAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 4-9 (Anchor Books 1991).

²⁶² DAVID RUSK, *CITIES WITHOUT SUBURBS* 20 (2nd ed., 1995).

3. Local Behavior and State Influence

Because so much wealth is generated in urban areas, states have an economic interest in encouraging the economic health of individual cities and metropolitan areas. The state's political interests, however, do not always—or even usually—coincide with the interests of particular cities. State intervention and interference in the affairs of local government has been an ongoing trope of American politics. As I have already observed, concern about the relative control of cities by states has generated municipal political reform movements throughout the nineteenth and twentieth centuries, starting with the wide adoption of Dillon's Rule in the 19th century and followed by the home rule movement of the Progressive Era. Those debates continue.²⁶³

Two forms of state influence are relevant for our purposes here. The first is the simple constraint of the state constitutional structure. Even in home rule jurisdictions, state legislatures often must approve local policies that fall outside traditional categories. States also tend to have almost absolute authority to override local policies with which they disagree. Local authority is highly constrained. To the extent that a municipality acts to alter the status quo—for example, by adopting a commuter tax, a local minimum wage or by pursuing a city development project that implicates state financing—the legislature is going to intervene aggressively.²⁶⁴

Second, states influence local decision-making through forms of “aid” that encourage cities toward certain outcomes. Indeed, economic development incentives for local investment often consist of state funds or state tax incentives. State aid was an essential component of the development deal in *Kelo*; without it, New London could not have afforded the project.²⁶⁵ *Cuno*, too, involved significant state tax incentives. The political process that generates these incentives and their application often takes place at the level of state government, not exclusively or even predominantly at the level of municipal government, where the costs and benefits of a particular development decision will be felt most directly.

State contributions can thus distort the city's cost/benefit analysis; indeed, state money can exercise a coercive force in cases where it is earmarked for certain local projects. State legislators can use locally-directed funding programs to funnel monies to particular interest groups within the city, such as municipal unions, the construction trades, particular neighborhoods within the city, or developers. A municipality's decision-making will thus always be somewhat

²⁶³ See generally Barron, *supra* note __.

²⁶⁴ BAKER & GILLETTE, *supra* note __, at 201-336.

²⁶⁵ See Philip Langdon, *When Government Takes Too Much: Supreme Court Hears New London Land Battle*, Hartford Courant, Mar. 29, 2005, at C5.

distorted by the availability and direction of state money.²⁶⁶ And to the extent certain political interests can influence state legislatures more readily than local ones, “true” local preferences might be overridden.

Third, and relatedly, states are more likely than cities to protect their own extractive, agricultural, or specialized industries. Supporters of these industries are unlikely to seek municipal protection; indeed, the municipal market is often too small for effective goods protectionism. When municipalities engage in protectionism, it will usually be defensive: stemming the flight of labor (*Camden*) or investment (*Kelo* and *Cuno*); defending against the in-flight of high-cost newcomers. Attentiveness to this dynamic will often explain local political behavior.

* * *

That local political economic conditions and state political interference heavily influence local political behavior should be no surprise. In this context, the existing constitutional mobility rules will have some predictable effects. Those rules encourage local governments to engage in land-use-based anti-competitive fiscal strategies when they can, or, when those strategies do not work, to engage in costly inter-local battles for mobile capital. Two trade wars have emerged at the municipal level: the war to keep high-cost users out and the war to keep high-value capital in. The dominant strategy adopted by any given municipality will turn on the municipality’s economic health and its relationship to the wider metropolitan-area economy.

Whether courts should intervene to disrupt these wars is a question I beg for now. As a policy matter, I am sympathetic to those who believe that the inter-local competition for mobile capital and land-use-based exclusion tends to be unproductive.²⁶⁷ Whether judges should adopt these policy preferences is a different question.

Nevertheless, there are a number of possible judicial avenues. The Court could take seriously its rhetoric of the common market and begin to examine closely local land use regulations that burden the inter-jurisdictional movement of persons, goods, and capital. Such a doctrinal shift would entail breathing new life into the undue burden test under the dormant commerce clause and require the court to apply that test to a whole host of local land use regulations.

Alternatively, the Court could articulate a theory as to why local governments should receive less scrutiny than states for protectionist regulations. That theory might turn on some essential characteristic of local government

²⁶⁶ See *id.* (describing pressure on city council to approve redevelopment in order to access federal and state monies); see also William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929, 933 (2004).

²⁶⁷ See, e.g., SCHNEIDER, *supra* note ___, at 210-211; [see also Bogart/Molotch/Mt. Laurel?]

(though I am skeptical such a characteristic exists).²⁶⁸ Or it might turn on a formalist reading of the Constitution. As Justice Blackmun argued in his *Camden* dissent, because municipal mobility barriers involve both intra- and inter-state discrimination, they do not fall within the ambit of the constitutional provisions regulating inter-state mobility. That the Court is traditionally deferential to local economic legislation may be a reason to resort to such formalism.

If courts are being deferential to municipal economic regulations, however, they should be deferential across the board: an aggressive takings doctrine is inconsistent with this stance. Currently, the Court privileges certain kinds of local economic development processes over others. But why does *Kelo* elicit dismay when *Cuno* does not? Why is *Camden* problematic if localities are otherwise free to exclude residents in other more significant ways? Regulatory takings doctrine needs to take into account both internal political processes and cross-border economic ones. We cannot understand takings jurisprudence without recognizing that local land use regulation is predominantly a border control mechanism.

The question is not whether the judiciary is engaged in economic policy-making, but rather the form that policy-making takes. To what degree does and should the Court's mobility rules constrain local governments? How much deference is owed to local economic regulations? A consideration of the economic and political forces that shape local government decision-making should inform those inquiries. So should a consideration of how the Court's current rules effect cities and their incentives.

CONCLUSION

Whatever the Court's judicial inclination, it should be attentive both to the scale of government action and the border-regulating nature of municipal behavior. The constitutional doctrine of the common market has been preoccupied with inter-state protectionism, and for good reason—the Constitution was arguably intended to forge an economic union of states. In an economy dominated by cities and the metropolitan areas that have grown up around them, however, judicial inattention to municipal borders has generated a set of inconsistent and oftentimes incoherent constitutional commitments—a kind of shadow “(not so) free trade” regime operating at the local level. There is no particular theory at work here; the city is mostly invisible to the doctrine. It emerges in the gaps between the rules.

In an urbanized national economy in which the status of municipalities is an ongoing economic preoccupation, however, those gaps are quite important. Currently, the Court's inter-state mobility doctrines tend to operate without cognizance or consideration of their effects on local actors. The result is some

²⁶⁸ But see Hills, *supra* note ___, at ___.

level of mismatch between those effects and the stated goal of preserving a common political and economic market.

Of course, there is no requirement that the Court pursue a free trade theory of local regulation to the exclusion of other constitutional values. The Court always has to balance the tradeoff between national uniformity and local diversity. But the rules as a whole should not, either explicitly or implicitly, ignore the context of local economic development efforts or shape those efforts to the detriment of certain cities.

A widely shared view is that an economy as a whole does best when the free flow of goods, persons, and capital is assured. Border-closing, discriminatory, or protectionist policies are, on this view, counter-productive and likely to reduce overall economic gains.²⁶⁹ Nevertheless, the local economic dislocations caused by rapid changes in the location of production can be severe—economically up cities in one era may become the economically down cities in the next. That municipal economic development is uneven and volatile appears to be a feature of modern economies.

The city's capacity to weather economic change turns on the relative fluidity of inter-local borders. Cities are trading economies with certain limited legal tools with which they can attempt to control the flow of goods, persons, and capital across their borders. Cities cannot control their currency, adopt formal immigration controls, or impose tariffs. But they can and do use land use regulation to influence their internal economies. Land use regulation is most often a defensive and crude tool, however.

The question of when judicial intervention is required to correct local political process problems is made somewhat clearer when one thinks about cities in these terms. The judicial response to local economic policies—including land use regulation—constitutes the Constitution's implicit urban policy. How the Constitution's free trade rules operate at the municipal level is essential to understanding that policy and to understanding the American common market as a whole.

²⁶⁹ But cf. JACOBS, *supra* note __, at 149, 162-170 (CAWON) (“Tariffs are of course means by which backward economies have often helped give their manufacturers a start”); PAUL KRUGMAN, *GEORGRAPHY AND TRADE* 89-90 (MIT Press 1991) (arguing that temporary tariffs might be useful to developing economies).