ARTICLE

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 intermunicipal rather than interstate. 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. City of 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*

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regulations under the Takings Clause, and the role of courts in policing and shaping local economic development efforts more generally.

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 cele-

brated.[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 competing state or regional markets.[2] The prosperity of the country is presented as the descriptive truth of this constitutional truism.[3]

[1] See H.P. Hood & Sons v. Du Mond, 336 U.S. 525, 538 (1949) ("The material success that has come to inhabitants of the states which make up this 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) (noting that 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 Laurence H. Tribe, 1 American Constitutional Law 1057–58 (3d ed. 2000); Jim Chen, Pax Mercatoria: Globalization as a Second Chance at "Peace for Our Time," 24 Fordham Int'l L.J. 217, 230–33 (2000); Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich L. Rev. 1091, 1098–1101 (1986). Of course, the canonical view, like much in constitutional law, is contested. See Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425, 430 (1982) (suggesting that the Constitution made no attempt to deal extensively with free trade); Martin H. Redish & Shane V. Nugent, The Dormant Commerce Clause and the Constitutional Balance of Federalism, 1987 Duke L.J. 569, 599–601 (rejecting the 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, 987 (1985) ("It is doubtful that there is any evidence to indicate that a major historic purpose for the commerce clause was to create a free trade area among the states . . . .").

[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 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 (1921). 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. of Mo. v. Lohman, 511 U.S. 641, 650 (1994); see also Granholm v. Heald, 544 U.S. 460, 472–73 (2005). But see 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 case law 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."); General Motors Corp. v. Tracy,

The presumptive success of the constitutional common market, however, has sometimes prevented close examination of its actual effects. Often obscured by the conventional story of (mostly) successful interstate economic integration is the fact that the prosperity of the nation has been uneven both 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 and those who talk about constitutional doctrine understandably tend to focus on interstate economic relationships. In doing so, however, courts and commentators 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 scholars have misapprehended the jurisprudence of the American common market be-

519 U.S. 278, 312 (1997) (Scalia, J., concurring) ("[T]he so-called 'negative' Commerce Clause is an unjustified judicial invention.").

[3] See, e.g., *H. P. Hood & Sons*, 336 U.S. at 538; Chen, supra note 1, at 230–33.

[4] See generally Barry Bluestone & Bennett Harrison, The Deindustrialization of America (1982); Michael J. Greenwood & Gary L. Hunt, Migration and Interregional Employment Redistribution in the United States, 74 Am. Econ. Rev. 957 (1984); Edward L. Glaeser & 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).

[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. See Gerald E. 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, 347–48 (1990) (arguing that Frug's definition of "city" includes communities that are neither complex nor heterogeneous—two qualities a community must possess to be a "city" under the social and political concepts of the term). When it is important to differentiate between suburbs, small towns, central cities, and edge cities, I do so explicitly.

cause 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 this 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, regions, and nations. Phoenix generates seventy percent of Arizona's total economic output and seventy-one percent 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, Dallas, and Philadelphia—rank among the 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 Protection[14] and Due Process Clauses,[15] and indirectly through takings and antitrust

[6] See, e.g., Jane Jacobs, Cities and the Wealth of Nations: Principles of Economic Life 32 (1984); The World Goes to Town, Economist, May 5, 2007, at 3 ("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 Thomas Bogart, The Economics of Cities and Suburbs 4–5 (1998).

[9] Global Insight, Inc., supra note 7, at 15.

[10] See Bogart, supra note 8, at 4; Jacobs, supra note 6, at 32; Paul Krugman, Geography and Trade 3 (1991).

[11] Jane Jacobs, The Economy of Cities 262 (1970).

[12] Tribe, supra note 1, at 1080–85.

[13] Id. at 1255–70.

[14] Regan, supra note 1, at 1277.

[15] Id. at 1186.

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 matter. The dominant economic accounts of cities presume that cities are open economies, governed not so much by law as 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 from 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 intercity 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 socioeconomic 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

[16] Tribe, supra note 1, at 1061–62.
[17] See, e.g., Paul E. Peterson, City Limits 28 (1981).
[18] See Mark Schneider, The Competitive City 125–26 (1989).
[19] Arthur O'Sullivan, Urban Economics 84–85 (6th ed. 2007).

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 much scholarly criticism,[22] though very little of it 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]

[20] 545 U.S. 469 (2005).

[21] 547 U.S. 332 (2006).

[22] There is voluminous literature on *Kelo*, much of it critical. See, e.g., 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); 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. 18 (2006); Dean Allen Floyd II, Irrational Basis: The Supreme Court, Inner Cities, and the New "Manifest Destiny," 23 Harv. BlackLetter L.J. 55 (2007); Timothy Sandefur, The "Backlash" So Far: Will Americans Get Meaningful Eminent Domain Reform?, 2006 Mich. St. L. Rev. 709; Eric L. Silkwood, The Downlow 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 S. Underkuffler, *Kelo*'s Moral Failure, 15 Wm. & Mary Bill Rts. J. 377 (2006). The popular reaction has been even more critical. See Greg Blankenship, Letter to the Editor, We Must Fight Against the Tyranny of Kelo, Wall St. J., July 6, 2006, at A15; Editorial, Eminent-domain Wars, Wash. Times, June 21, 2006, at A20; Jonathan V. Last, The *Kelo* Backlash, Wkly. Standard (Wash., D.C.), August 21, 2006, at 14; Carol Saviak, Property Rights at Risk 2 Years After *Kelo* Ruling, Abuse of Power Continues, Orlando Sentinel, June 27, 2007, at A11; Sen. Kyl Blasts Supreme Court 'Kelo' Decision at Judiciary Committee Hearing, U.S. Fed. News, September 20, 2005.

[23] 547 U.S. at 338.

[24] Id.

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 U.S. common market in intermunicipal terms. Granted, to the extent the 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. Although they are mostly invisible to constitutional doctrine, cities are in many ways more economically relevant than states, and intercity trade is more relevant economically than interstate trade. The dominant constitutional narrative concerning the importance of interstate 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 interjurisdictional 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.

Nevertheless, the free trade Constitution looks quite different when viewed from the perspective of the municipality than when

[25] See The Brookings Institution, Restoring Prosperity: The State Role in Revitalizing America's Older Industrial Cities 69–76 (2007).

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 law is normally more useful in controlling the inflow of capital or residents than it is in controlling the outflow of capital and residents.

Part III argues that the interlocal 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 intercity 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.

Finally, Part IV considers a range of possible judicial approaches to the problem of cross-border economic flows. 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 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.

[26] See, e.g., Schneider, supra note 18, at 210–11.

I. THE WEALTH OF CITIES

The constitutional common market—to the extent that 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 intercity terms. First, cities are relevant economic concepts in ways that states are not. Second, urbanization is the salient fact of American demographic and economic life.

A. The City as an Economic Concept[28]

The first point has been made by urban economists for some time now. The claim is that, unlike states and nations, cities are both political entities and economic geographies. Cities develop and thrive when propinquity generates economic gains. As Jane Jacobs observed:

> 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 ones within the same nation. . . .
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> . . . We can't avoid seeing, too, that among all the various types of economies, cities are unique in their abilities to shape and re-

[27] Cf. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (describing the balance between legitimate local government interests and the need to not burden interstate commerce).

[28] With apologies to Gerald E. Frug, The City as a Legal Concept, supra note 5.

> shape the economies of other settlements, including those far removed from them geographically.[29]

Jacobs goes on to argue that the wealth of nations is actually generated by particular places inside nations.[30] She then critiques economic policymakers for assuming that the nation-state is the appropriate scale for making economic policy.

Jacobs's claim—that cities, not nations, generate economic growth—is controversial, as is her claim that macroeconomic policy should be made at the city scale. Urban economists continue to debate the role of cities in national economic development.[31] Nevertheless, a number of Jacobs's insights have been embraced by economists and urban theorists, in particular, her claims about the relationship between cities, economic innovation, and trade.

First, much regional economic literature now recognizes that "cross-border economic processes"—flows of capital, labor, and goods—are now dominated by cities and regions.[32] 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 interstate trade restrictions, the rise of the transnational business corporation, and the emergence of high-technology regions.[33] 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 in-

[29] Jacobs, supra note 6, at 31–32.

[30] Id. at 32.

[31] 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. 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).

[32] Saskia Sassen, Introduction *to* Global Networks, Linked Cities 1, 1 (Saskia Sassen ed., 2002).

[33] Paul L. Knox, World Cities in a World-System, *in* World Cities in a World-System 3 (Paul L. Knox & Peter J. Taylor eds., 1995); Saskia Sassen, The Global City (1991); Allen J. Scott, Technopolis: High-Technology Industry and Regional Development in Southern California (1993); Jeffrey Kentor, The Growth of Transnational Corporate Networks: 1962–1998, 11 J. World-Sys. Res. 263 (2005).

novation. 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.[34] 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.[35] 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.[36]

Moreover, agglomeration effects explain the salience of cities and other geographical agglomerations (like Silicon Valley) in a technological era that seems—at first glance—to have overcome the costs of transportation and the need for physical proximity. Jacobs's 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 settlement adds "new work to old,"[37] a process that depends on "ample, volatile trade" with other cities.[38] 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 intercity trade, there is very little economic production at all. As Richard

[34] See Richard Florida, Cities and the Creative Class 1 (2005); Jacobs, supra note 6; see also Gerald A. Carlino et al., Urban Density and the Rate of Invention, 61 J. Urb. Econ. 389 (2007); 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).

[35] See David Nowlan, Jane Jacobs Among the Economists, *in* Ideas That Matter: The Worlds of Jane Jacobs 111–13 (Max Allen ed., 1997).

[36] Global Insight, supra note 7, app. at 41 tbl.6.

[37] Jacobs, supra note 11, at 59.

[38] Jacobs, supra note 6, at 208.

Florida notes, "cities are cauldrons of creativity."[39] Urbanization is "a key element of innovation and productivity growth."[40]

B. The Rise of Urbanity

It thus should not be a surprise that urbanization is the salient fact of American demographic and political life. The city has become and continues to be the chief agent of demographic and economic change in the United States, as it has been in all developed countries since the industrial revolution.[41] The twentieth century has witnessed monumental shifts in Americans' work and living patterns, including the great migration into the cities, a later (and smaller) movement out of cities into the suburbs, and the development of increasingly large and dense metropolitan areas.[42] In 1860, less than twenty percent of the population lived in urban areas;[43] in 2000, close to eighty percent did.[44] States have had a role to play in this development, but the story of economic development in the nineteenth and twentieth centuries is not the story of states, but rather the story of the city and the great metropolitan regions that have accompanied its rise.[45] Urbanity—with its characteristic density, division of labor, and social interaction—is the norm now, not the exception.[46]

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[39] Florida, supra note 34, at 1.

[40] Id. at 6.

[41] The city is also the chief agent of demographic change in the developing world. See Panel on Urban Population Dynamics, Nat'l Research Council, Cities Transformed: Demographic Change and Its Implications in the Developing World 17–25, 76–95 (Mark R. Montgomery et al. eds., 2003).

[42] See Richard Moe & Carter Wilkie, Changing Places: Rebuilding Community in the Age of Sprawl 36–74 (1997); 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, 172–73 (Richard Stren et al. eds., 1992).

[43] U.S. Census Bureau, United States Summary 5 tbl.4 (1993), http://www.census.gov/population/censusdata/table-4.pdf.

[44] U.S. Census Bureau, United States–Urban/Rural and Inside/Outside Metropolitan Area (2000), 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.

[45] See Rabinowitz, supra note 42; Jon C. Teaford, The Metropolitan Revolution: The Rise of Post-Urban America (2006).

[46] See text accompanying notes 43 and 44 (citing census statistics on move from a rural population to an urban population).

Of course, even when North America was mostly rural and the continent's economy was agriculture-based, cities were the ports of entry and the chief sites of interstate and international trade.[47] 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.[48] 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.[49] The city literally created "commodities" (and in so doing unalterably shaped the rural and agricultural landscape) by making it possible to trade them in large amounts.[50] 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.[51]

The late nineteenth and early twentieth 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 and 1920, Detroit grew from 285,704 citizens 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%.[52] The great migration of African-Americans oc-

[47] See Carl Abbot, Urbanization, *in* 8 Dictionary of American History 288, 289 (Stanley I. Kutler ed., 3d ed. 2003).

[48] See id.

[49] William Cronon, Nature's Metropolis: Chicago and the Great West 266–67 (1991).

[50] Id. at 120.

[51] Id. at 82–83.

[52] Campbell Gibson, U.S. Census Bureau, Population of the 100 Largest Cities and Other Urban Places in the United States: 1790 to 1990, tbls.13 & 15 (1998), http://www.census.gov/population/www/documentation/twps0027.html (under "Detailed Tables," follow "13" hyperlink and "15" hyperlink).

curred between 1910 and 1940, when over 1.5 million African-Americans moved out of the south, most into the large cities of the west and northeast.[53] Meanwhile, immigrants from Europe were pouring into American cities. Between 1900 and 1920, close to fifteen million immigrants entered the United States, many of whom settled in industrial cities.[54]

The Great 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 people 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, 70s, and 80s.[55] 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 fifty-five million people.[56] The population of the region spanning from Los Angeles to San Diego in California is approaching twenty million people.[57] The economic and urbanized region of Chicago and its environs arguably sprawls from Kenosha, Wisconsin in the north, to Joliet, Illinois in the south.[58] The Texas

[53] Nicholas Lemann, The Promised Land: The Great Black Migration and How it Changed America (1991).

[54] U.S. Census Bureau, Statistical Abstract of the United States: 2007, at 8 tbl.5 (2006), http://www.census.gov/prod/2006pubs/07statab/pop.pdf.

[55] Alexander von Hoffman & John Felkner, The Historical Origins and Causes of Urban Decentralization in the United States 17–18 (2002); Peter Mieszkowski & Edwin S. Mills, The Causes of Metropolitan Suburbanization, 7 J. Econ. Persp., Summer 1993, at 135, 135 ("In the 1950s, 57 percent of [Metropolitan Statistical Areas] residents and 70 percent of MSA jobs were located in central cities; in 1960, the percentages were 49 and 63; in 1970, they were 43 and 55; in 1980, they were 40 and 50; in 1990, they were about 37 and 45."); see also Brian J.L. Berry, Inner City Futures: An American Dilemma Revisited, 5 Transactions Inst. Brit. Geographers (n.s.) 1, 12–13 (1980); Allen C. Goodman, Central Cities and Housing Supply: Growth and Decline in US Cities, 14 J. Housing Econ. 315, 320–21 (2005).

[56] U.S. Census Bureau, Ranking Tables for Metropolitan Areas: 1990 and 2000, tbl.1 (2001), http://www.census.gov/population/cen2000/phc-t3/tab01.pdf [hereinafter Ranking Tables].

[57] Id.

[58] Chicago is part of the Chicago-Naperville-Joliet, IL-IN-WI Metropolitan Statistical Area, which includes Kenosha to the north and Joliet to the south. See Office of Mgmt. and Budget, Update of Statistical Area Definitions and Guidance on Their Uses, OMB Bulletin No. 07–01 app. at 28 (Dec. 18, 2006), available at http://www.whitehouse.gov/omb/bulletins/fy2007/b07–01.pdf.

cities of Houston and Dallas and their regional areas constitute forty-seven percent of the state's population.[59] Denver and its massive metropolitan area constitute sixty percent of the state's population.[60] The Atlanta metropolitan statistical area ("MSA") contributes fifty percent of the population of Georgia.[61]

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.[62] The economy of the New York metropolitan area is the tenth largest in the world.[63] The economy of the Los Angeles metropolitan area is the eighteenth largest.[64]

The flow of goods and services between metropolitan areas "is comparable to trade flows between nations."[65] Capital, goods, and services do not flow indiscriminately across state lines, they follow identifiable intermetropolitan 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. . . . [A]lmost all local economies are dominated by residents taking in each other's wash."[66] Paul Krugman has observed that "[a] steadily rising share of the [city] work force produces services that are sold only within that same metropolitan area."[67] The U.S. economy is thus

[59] Ranking Tables, supra note 56; U.S. Census Bureau, State & County Quickfacts: Texas, http://quickfacts.census.gov/qfd/states/48000.html (last visited July 1, 2008).

[60] Ranking Tables, supra note 56; U.S. Census Bureau, State & County QuickFacts: Colorado, http://quickfacts.census.gov/qfd/states/08000.html (last visited July 1, 2008).

[61] Ranking Tables, supra note 56; U.S. Census Bureau, State & County Quickfacts: Georgia, http://quickfacts.census.gov/qfd/states/13000.html (last visited July 1, 2008).

[62] Global Insight, Inc., supra note 7, app. at 40 tbl.5.

[63] Id. app. at 15 tbl.3. In addition, New York City's municipal budget is larger than all but three state budgets (California, New York, and Texas). U.S. Census Bureau, supra note 54, at 288–89 tbl.443, 295 tbl.447.

[64] Global Insight, Inc., supra note 7, app. at 15 tbl.3.

[65] Id. at 6.

[66] Thomas Michael Power, Lost Landscapes and Failed Economies 37 (1996).

[67] Paul Krugman, Pop Internationalism 211 (1996).

dominated by intra- and intermetropolitan flows of capital, people, and goods.

II. THE FREE TRADE CONSTITUTION FROM THE PERSPECTIVE OF THE CITY

In light of the importance of inter- and intrametropolitan trade flows, an account of the American common market that emphasizes interstate trade relationships can only be partial, both descriptively and normatively. The city is the more relevant scale for thinking about the constitutional rules that govern the interjurisdictional mobility of persons, goods, and capital.

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 varied. Personal mobility is implicated by residency requirements, preferential government hiring policies, restrictive zoning rules, and restricted access to welfare programs.[68] Interjurisdictional flows of goods 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 distorted 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.[69]

There is no question that intercity 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.

[68] See Tanya Lee & Michael J. Trebilcock, Economic Mobility and Constitutional Reform, 37 U. Toronto L.J. 268, 278 (1987); see also Peterson, supra note 17, at 25–27.

[69] Lee & Trebilcock, supra note 68, at 278–79. Of course, Congress also adopts rules that distort the common market (agricultural subsidies are but one example), but for my purposes, I assume that Congress has more authority than do states and cities, and so do not examine those policies here.

Significantly, however, the extent and degree of intermunicipal openness is contingent on legal rules. 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 does it arise from a uniform vision of the common market.[70]

Two points emerge from an examination of the interlocal 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 local governments to do so. Taken together, these two features constitute important qualifications to the presumption of intermunicipal openness. These features also generate an important asymmetry. Investment has to occur in a physical place, thus the regulation of space through land use regimes is a means of regulating what enters a local 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 desire 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, 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.

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 jurisdic-

[70] 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 1, at 1176. 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 subfederal governments. Indeed, it is an understatement to say that the current constitutional free trade regime is unsettled in significant ways.

tions, and to invest without geographical limitation. The structure of intermunicipal 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 using functional categories—persons, goods, and capital[71]—rather than doctrinal ones. 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 providers of 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 (for example, 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 intercity flow of migrants is thus always in the background; like other forms of international trade, which are controlled by Congress, the intercity 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.[72] Some cities have aggressively sought to market themselves to overseas communities, and big-city mayors have lobbied to prevent Congress

[71] Lee and Trebilcock also employ these categories. See Lee & Trebilcock, supra note 68, at 278–79. Trade scholars might be more familiar with a quad-partite division, which also 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.

[72] Sassen, supra note 33, at 19–21, 323–24.

from imposing draconian immigration limitations.[73] Of course, both cities and states can make themselves more or less attractive to immigrant communities by changing the mix of municipal services offered. Numerous cities are hostile to immigration, particularly the illegal variety.[74] 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.[75]

In contrast, intra-national migration is usually assumed to 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.[76]

This mobility, articulated by the Court as a "right to travel," found a voice as early as *Corfield v. Coryell*, in which Justice Bushrod Washington stated that a citizen may "pass through, or . . . reside in any other state, for purposes of trade, . . . or otherwise . . . ."[77] *Corfield* located the right to travel in the Privileges and Immunities Clause of Article IV.[78] 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.[79] In *Shapiro v. Thompson*, the Equal Protec-

[73] See Winnie Hu, Mayor Widens Privacy Rights For Immigrants, N.Y. Times, Sept. 18, 2003, at B1; Tony Favro, US Mayors Concerned about Collapse of Immigration Reform, July 16, 2007, http://www.citymayors.com/society/us-immigration.html.

[74] Compare Associated Press, Connecticut City Helps Illegal Immigrants Get IDs, St. Petersburg Times, July 25, 2007, at 2 (discussing New Haven, Conn.), Ken Maguire, City Is a Sanctuary for Illegal Immigrants—If Any Can Afford It, Associated Press Newswires, May 7, 2006 (Cambridge, Mass.), and City Embraces Illegal Immigration Instead of Fighting It, Associated Press Newswires, May 14, 2006 (Painesville, Ohio), with Michael Powell & Michelle Garcia, Pa. City Puts Illegal Immigrants on Notice, Wash. Post, Aug. 22, 2006, at A3 (Hazleton, Pa.), and Pat Broderick, Escondido Bans Apartment Rentals for Illegal Immigrants, San Diego Bus. J., Oct. 23, 2006, at 43 (Escondido, Cal.).

[75] Recent scholarship has questioned the practical and structural basis for this constitutional exclusivity. See, e.g., Christina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 Mich. L. Rev. 567, 570–71 (2008) (arguing that the federal, state, and local governments "form part of an integrated regulatory structure").

[76] United States v. Guest, 383 U.S. 745, 757–58 (1966).

[77] 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

[78] Id.

[79] 314 U.S. 160, 174 (1941).

tion Clause was used to strike down a state welfare waiting period law that was motivated by a similar concern about indigent in-migration.[80] In *Saenz v. Roe*, the Court returned to the Privileges and Immunities Clause, using the Fourteenth Amendment's version, to strike down another welfare restriction aimed at discouraging the interstate migration of indigents.[81]

In these and other cases, the Court does not explicitly distinguish between interstate movement for work and for residence: *Corfield* articulated a mobility guarantee residing in part in a notion of free labor. 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.[82] This theme is repeated in *Shapiro* and *Saenz*, where the Court declares unequivocally that states cannot "inhibit[] migration by needy persons."[83] Interstate migration is seen as both a personal right of individuals as citizens of the United States and a necessity of the federal union and the common market.[84] Interstate internal migration controls are anathema.[85] Despite the Court's rhetoric, however, the Court's decisions

[80] 394 U.S. 618, 627 (1969); see also Hicklin v. Orbeck, 437 U.S. 518 (1978); Dunn v. Blumstein, 405 U.S. 330, 332–33 (1972).

[81] 526 U.S. 489, 503 (1999).

[82] 314 U.S. 160, 173 (1941); see also Crandall v. Nevada, 73 U.S. 35, 49 (1867) (striking down tax on every person leaving the state by common carrier).

[83] *Shapiro*, 394 U.S. at 629; see *Saenz*, 526 U.S. at 499.

[84] See, e.g., Zobel v. Williams, 457 U.S. 55, 68 (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").

[85] While there are still some interstate 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

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 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.[86] In *United Building & Construction Trades Council v. Camden*, the Court extended this non-discrimination rule to municipal governments.[87] The city of Camden, New Jersey, had adopted an ordinance requiring that at least forty percent of the employees of contractors or subcontractors working on municipal construction projects be Camden residents.[88] This type of residency requirement had been challenged under the Commerce Clause one year earlier in *White v. Massachusetts Council of Construction Employers*, but had been upheld pursuant to the market participant exception.[89]

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.[90] Camden argued (and Justice Blackmun, writing in dissent, agreed) that because there was an in-state political constituency that could represent the interests of out-of-

U.S. 656, 657 (1975) (striking down state tax on income earned by non-residents); cf. McCarthy v. Phila. Civil Serv. Comm'n, 424 U.S. 645, 646–47 (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, but it does require that states not raise outright barriers or significant disincentives to obtaining state citizenship. See, e.g., Vlandis v. Kline, 412 U.S. 441, 452 (1973) (upholding residency requirements for in-state college tuition breaks as long as a residency decision can be challenged).

[86] United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 219 (1984).

[87] Id. at 215–216.

[88] Id. at 211.

[89] White v. Mass. Council of Constr. Employers, 460 U.S. 204, 214–15 (1983). The market participant exception shields protectionist policies when the government is acting as a participant and not a regulator of the market.

[90] *Camden*, 465 U.S. at 217–18.

state residents, Camden's discrimination could be remedied by the political process without need for judicial intervention.[91] Intercity discrimination was thus different from interstate 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.[92] The *Camden* case thus extended the non-discrimination rule to cities and the Court sent the case back to the district court to determine whether Camden's statute was justified and narrowly tailored. The principle, however, was clear: 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 *Camden* is notably absent when it comes to residency.

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.[93] 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 Fourteenth Amendment. The Fourteenth Amendment in particular protects the right

[91] Id. at 231 (Blackmun, J., dissenting).
[92] Id. at 217 (quoting Toomer v. Witsell, 334 U.S. 385, 395 (1948)).
[93] *Saenz*, 526 U.S. at 504.

of the "newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State."[94]

Compare this treatment of interstate residence restrictions with the Court's treatment of interlocal residence restrictions. Since *Euclid v. Amber Realty*,[95] decided in 1926, and up through *Warth v. Seldin*[96] and other cases decided in the 1970s,[97] 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 could not show that a change in the ordinance would benefit them directly.[98]

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 *Village of Belle Terre v. Boraas*, a local zoning case.[99] Commentators too have noted that local governments differ from states in that local governments have the legal ability to "select" their residents by preventing the construction of certain types of housing.[100] This re-

[94] 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 intrastate 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, 66 Tul. L. Rev. 631, 651–53 (1992).

[95] 272 U.S. 365 (1926).

[96] 422 U.S. 490 (1975).

[97] See, e.g., Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977); City of Eastlake v. Forest City Enters., 426 U.S. 668 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); James v. Valtierra, 402 U.S. 137 (1971); see also Constr. Indus. Ass'n of Sonoma County 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).

[98] 422 U.S. at 504–06.

[99] 416 U.S. at 7. 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. 505 U.S. 1, 10–11 (1992) (holding that the petitioner did not have standing to assert a right to travel because she lived in California).

[100] William A. Fischel, The Homevoter Hypothesis 54 (2001) ("[T]he U.S. Constitution . . . does not permit states to restrict immigration from other states . . . [but l]ocal government regulations . . . get pretty much a free pass on the same issue."); John R.

striction on interlocal mobility has led some state courts—most prominently the New Jersey Supreme Court in the *Mount Laurel* decisions[101]—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,[102] as is the contribution of zoning to higher house prices.[103] 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.[104] This fiscal zoning—sometimes called exclusionary zoning—is one of the legal barriers to interlocal mobility: lower income individuals simply cannot afford to move into neighboring jurisdictions that have limited amounts of low- or moderate-income housing.

Indeed, local governments have been given a "free pass" to control, through land use regulations, the movement of newcomers across their borders.[105] In suburban jurisdictions, this internal immigration policy may take the form of exclusionary zoning or,

Logan & Harvey L. Molotch, Urban Fortunes: The Political Economy of Place 41 (2001) ("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. L. Rev. 697, 709 (2001) (observing that though it is illegal for municipalities to set a minimum house value, they can achieve the same goal through fiscal zoning); Roderick M. Hills, Jr., Poverty, Residency, and Federalism: States' Duty of Impartiality Toward Newcomers, 1999 Sup. Ct. Rev. 277, 277–78 (observing the disjuncture between the rhetoric in *Saenz* and the Court's tolerance of access controls at the local level).

[101] S. Burlington County NAACP v. Twp. of Mount Laurel, 456 A.2d 390, 418–19 (N.J. 1983); S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 724–25 (N.J. 1975).

[102] See, e.g., Bogart, supra note 8, at 241–43.

[103] See generally Keith R. Ihlanfeldt, The Effect of Land Use Regulation on Housing and Land Prices, 61 J. Urb. Econ. 420 (2007); Edward L. Glaeser & Joseph Gyourko, The Impact of Zoning on Housing Affordability (Harv. Inst. of Econ. Research, Discussion Paper No. 1948, 2002), available at http://economics.harvard.edu/pub/hier/2002/HIER1948.pdf.

[104] *S. Burlington County NAACP*, 336 A.2d at 723; see also Keith R. Ihlanfeldt, Introduction: Exclusionary Land Use Regulations, 41 Urb. Stud. 255, 256–57 (2004); Stewart E. Sterk, Competition Among Municipalities as a Constraint on Land Use Exactions, 45 Vand. L. Rev. 831, 839–41 (1992).

[105] See Fischel, supra note 100, at 54.

more generally, growth controls, both of which have the effect of reducing the housing supply and limiting the influx of newcomers. Prospering cities that want to limit their exposure to residents with high service needs can often control cross-border flows by controlling the housing supply.

Closing the border to lower-income residents (or all new residents) is a sensible fiscal strategy for those municipalities that can do so.[106] 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.[107] The Court rejected this protectionist strategy at the state level but has not applied the same reasoning to local land use regimes that accomplish the same goal.[108]

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

[106] 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 id. at 65–67; Bruce W. Hamilton, Zoning and Property Taxation in a System of Local Governments, 12 Urb. Stud. 205, 206 (1975).

[107] *Saenz*, 526 U.S. at 506; see also Joan M. Crouse, Precedents from the Past: The Evolution of Laws and Attitudes Pertinent to the "Welcome" Accorded to the Indigent Transient During the Great Depression, *in* An American Historian: Essays to Honor Selig Adler 191–203 (Milton Pleseur ed., 1980); 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, 165–66 (1993); Note, Depression Migrants and the States, 53 Harv. L. Rev. 1031, 1033–34 (1940). But see Hills, supra note 100, 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).

[108] Cf. Hills, supra note 100, at 311–12 (arguing 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).

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 taxpayers. That cities (or more specifically, suburbs) can limit in-migration (whether intra- or interstate) by restricting access to housing is a dramatic qualification of the usual assumption of relatively free interlocal 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 Congress regulates the international movement of goods and services through tariff regimes and free trade agreements.[109] 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 particularly relevant.

Intra-national trade, by contrast, is 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, the 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

[109] It should be noted that Congress has entered into trade agreements that impose limitations on state and local regulatory practices. For a discussion of how international trade agreements might limit a city's land use authority, see Gerald E. Frug & David J. Barron, International Local Government Law, 38 Urb. Law. 1, 39–52 (2006).

than the latter.[110] These kinds of statutes come closest to the types of trade barriers or tariffs that were troubling 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.[111] 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.[112]

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.[113] 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. So 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. Under the market participation exception, the Court upheld a mayoral order that required fifty percent of the workforce of city-employed contractors to be Boston residents.[114]

[110] Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 257 (15th ed. 2004).
[111] Erwin Chemerinsky, Constitutional Law 402–23 (2d ed. 2005).
[112] Regan, supra note 1, at 1240–41.
[113] Chemerinsky, supra note 111, at 426–31.
[114] White v. Mass. Council, 460 U.S. 204, 214–15 (1983). As I have already noted, the market participant exception does not apply to challenges under the Privileges and

The second exception to the dormant commerce clause is more specific to local governments: local governments may 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 the Court. In *Dean Milk Co. v. Madison*, 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.[115] Similarly, in *C & A Carbone v. Clarkstown*, the Court rejected a waste "flow-control" ordinance that required trash haulers to deliver municipal waste to a particular private processing facility.[116] In both cases, the creation of a local or state-wide territorial monopoly was understood to constitute an impermissible burden on interstate commerce.

Under the recently decided *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority*, however, a state or local government can favor a *publicly owned* monopoly provider of goods or services over all other private providers.[117] *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," but that "[l]aws favoring local government, by contrast, may be directed toward any number of legitimate goals unrelated to protectionism."[118] 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.'"[119] It then repeated a variant of this latter phrase, first as a way to distin-

Immunities Clause. See United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208, 219–20 (1984).

[115] Dean Milk Co. v. Madison, 340 U.S. 349, 356–57 (1951).

[116] C & A Carbone v. Town of Clarkstown, 511 U.S. 383, 386 (1994).

[117] 127 S. Ct. 1786 (2007).

[118] Id. at 1795–96.

[119] Id. at 1796 (citing United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 261 F.3d 245, 264 (2001) (Calabresi, J., concurring)).

guish legitimate publicly owned monopolies from illegitimate ones,[120] and then by way of concluding that the exercise of the local police power in this instance was legitimate.[121]

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: state and local governments can direct purchasing toward their own industries and residents, and can provide goods and services through government-owned industries that are protected from competition with the private sector altogether.[122]

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.

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[120] Id. at 1797 n.7 ("[L]ocal government may facilitate a customary and traditional government function such as waste disposal . . . .").

[121] Id. at 1798 (finding that waste control is a "typical and traditional concern of local government").

[122] 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, 131–32 (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); Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res., 504 U.S. 353 (1992); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

Consider land itself as a good. Cities may, and do, adopt restrictive zoning laws that severely limit the supply of land, increase land values for those who already own land in the jurisdiction, exclude certain kinds of land uses altogether, demand 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.[123] As under the Privileges and Immunities Clause, the rule that government must avoid regulating in ways that unduly burden interstate commerce does not appear to apply to the intermunicipal market in land.

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. As numerous scholars have observed, in many places entry into the local housing market will be dictated less by supply and demand than it is by local regulations.[124] 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.[125]

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.[126] As William Bogart has observed, land is a factor in production;[127] restrictions on the supply of land raise the cost of goods and services by forcing location decisions that do not comport with the ac-

[123] See Robert C. Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385, 390–92 (1977); William A. Fischel, An Economic History of Zoning and a Cure for its Exclusionary Effects, 41 Urb. Stud. 317, 317–18 (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, 16–19 (2006).

[124] See Glaeser & Gyourko, supra note 103, at 5; see also Edward L. Glaeser & Bryce A. Ward, The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston 1–2 (Harv. Inst. Econ. Research, Discussion Paper No. 2124, 2006), available at http://economics.harvard.edu/pub/hier/2006/HIER2124.pdf (noting that land use regulations, and not a shortage of land, have made it more difficult to construct new housing).

[125] Ellickson, supra note 123, at 404–07; see also Jonathan Levine, Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use (2006).

[126] Bogart, supra note 100, at 715; see also Bogart, supra note 8, at 212–14.

[127] Bogart, supra note 8, at 85.

tual costs of transport.[128] Classic Euclidean zoning literally shapes the geographic-economic landscape by foreclosing business and residence location decisions that would otherwise be economically advantageous.[129]

Granted, local zoning laws do not often discriminate between inlocality and out-of-locality residents. Thus, under the Court's dormant commerce clause jurisprudence, the Court would have to weigh the burden on interstate commerce against the legitimate interests of the locality. To the extent the Court de-emphasizes the principle of free cross-border mobility in favor of a principle of antidiscrimination, facially neutral but burdensome local regulations—especially local zoning laws—will tend to 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 antichain ordinance explicitly admits to that motive.[130] These local anticompetitive efforts are beginning to attract the interest of litigators and scholars.[131]

[128] Cf. Paul Krugman, Development, Geography, and Economic Theory 52–55 (1995) (discussing Von Thünen's land use and land rent ideas).

[129] Bogart, supra note 8, at 229; Bogart, supra note 100, at 716–18; see also Euclid v. Ambler Realty, 272 U.S. 365, 385 (1926) (noting the appellant's argument "that the ordinance constitutes a cloud upon the land, reduces and destroys its value, and has the effect of diverting the normal industrial, commercial and residential development thereof to other and less favorable locations").

[130] 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. One of the eight Priority Policies of the City's General Plan resolves that 'existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced.'").

[131] 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." Baker & Konar-Steenberg, supra note 123, at 2–3. 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, 908 (2005); 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); Justin Shoemake, Note, The Smalling of America?: Growth Management Statutes and the Dormant Commerce

The absence of scrutiny for anticompetitive land use regulations under the dormant 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 anticompetitive effects, though the latter must involve some form of cross-border discrimination.[132] There tends to be little overlap between the two doctrines, however, because states enjoy immunity from antitrust liability pursuant to *Parker v. Brown*.[133] Thus, challenges to anticompetitive state regulations tend to be brought pursuant to the dormant commerce clause.[134]

Unlike states, however, municipalities are not immune from antitrust liability. In *Community Communications Co. v. City of Boulder*, the Court held that municipalities do not share the states' sovereign status.[135] According to the Court, Congress was aware of "'the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's eco-

Clause, 48 Duke L.J. 891, 894 (1999); Suellen M. Wolfe, Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the "Silver Bullet"?, 26 Stetson L. Rev. 727, 757 (1997). So far, the legal landscape is hostile to dormant commerce clause challenges. See, e.g., Wal-Mart Stores v. Turlock, 483 F. Supp. 2d 987, 1020 (E.D. Cal. 2006) (granting summary judgment for the defendants on grounds that city retail size ordinance did not violate the Commerce Clause); Coronadans Organized for Retail Enhancement v. City of Coronado, No. D040293, 2003 WL 21363665 (Cal. Ct. App. June 13, 2003) (holding that an ordinance which placed restrictions on certain types of retail businesses did not violate the Commerce Clause). But see, e.g., Colo. Manufactured Hous. Ass'n. v. Pueblo County, 857 P.2d 507 (Colo. Ct. App. 1993) (holding that a 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); Island Silver & Spice, Inc. v. Islamorada, Village of Islands, 475 F. Supp. 2d 1281 (S.D. Fla. 2007) (holding that a village ordinance banning retail establishments such as drug stores violated the Commerce Clause); Frug & Barron, supra note 109, at 36–52 (describing how international trade agreements have been used in a few instances to challenge local land use decisions).

[132] Daniel J. Gifford, Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy, 44 Emory L.J. 1227, 1228–29, 1233–35 (1995); see also Jim Rossi, Political Bargaining and Judicial Intervention in Constitutional and Antitrust Federalism, 83 Wash. U. L.Q. 521, 524–26 (2005) (recognizing the connections between the two doctrines and arguing that they both share a common concern with political (and not just market) failure).

[133] 317 U.S. 341, 352 (1943).

[134] Daniel J. Gifford, Antitrust and Its Intellectual Milieu, 42 Antitrust Bull. 333, 360–63 (1997).

[135] 455 U.S. 40, 57 (1982).

nomic goals.'"[136] "Ours is a '*dual* system of government,'" declared the Court, "which has no place for sovereign cities."[137]

Despite this formal difference between cities and states for purposes of the Sherman Act,[138] however, the Court has avoided antitrust scrutiny of anticompetitive and protectionist land use policies. Indeed, the Court's decisions "almost totally protect[] government land use actions from antitrust liability."[139] Thus, in *Fisher v. City of Berkeley*, the Court rejected an antitrust challenge to a city's rent control ordinance—which was essentially price fixing. This prompted Justice Brennan (who had authored the *Boulder* opinion) to declare in dissent that the Court had effectively "exclude[d] a broad range of local government anti-competitive activities from the reach of the antitrust laws."[140]

Four years later in *City of Columbia v. Omni Outdoor Advertising*, the Court acknowledged that "[t]he very purpose of zoning regulation 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."[141] 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) *Boulder*. 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.[142]

[136] Id. at 51 (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 412–13 (1978)).

[137] Id. at 53 (quoting Parker v. Brown, 317 U.S. 341, 351 (1943)). *Boulder* did not involve a 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*.

[138] 15 U.S.C. §§ 1–7 (1990).

[139] Daniel R. Mandelker et al., State and Local Government in a Federal System 603 (6th ed. 2006); see also City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 384 (1991); Fisher v. City of Berkeley, 475 U.S. 260, 270 (1986).

[140] *Fisher*, 475 U.S. at 278 (Brennan, J., dissenting).

[141] 499 U.S. at 373; see Robert C. Ellickson & Vicki L. Been, Land Use Controls: Cases and Materials 124 (3d ed. 2005); Mandelker et. al., supra note 139, 603; E. Thomas 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).

[142] See *Omni Outdoor Adver.*, 499 U.S. at 384; *Fisher*, 475 U.S. at 265–67; Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985); Rossi, supra note 132, at 549–50. It is likely that the transfer station monopoly at issue in *Oneida-Herkimer* was author-

One can reasonably ask how all this can be rationalized. Under the Sherman Act, municipalities are formally liable for anticompetitive policies that would otherwise be immune if adopted by the states.[143] Nevertheless, local governments have received almost no scrutiny for anticompetitive land use regulations. Under the Commerce Clause, by contrast, municipalities and states are doctrinally indistinguishable—protectionist policies are supposed to be treated the same at either level of government. Local land use regulations, however, have eluded dormant commerce clause scrutiny despite their often protectionist purposes and effects. That these doctrines do not speak to one another is an important point. More important still is how they create an intermunicipal trade regime that permits fairly significant anticompetitive and protectionist local policies.

This anticompetitive regime persists despite the Court's ongoing review of local land use regulations under the Takings Clause. Recall that in *Kelo v. City of New London*, four Justices would have voted to override a local government's determination that the exercise of eminent domain served a public purpose.[144] *Kelo* is only the latest case in a long-running debate about the degree of deference localities should receive when property rights are at stake. This judicial attention is not driven by concerns with land use regulations' anticompetitive or protectionist purposes or effects. Indeed, the Court's preoccupation with local takings seems quite anomalous in light of the Court's otherwise deferential attitude toward local anticompetitive policies generally.

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

ized 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) (limiting remedies against local governments for antitrust violations to injunctive relief).

[143] Whether this distinction makes sense is not my concern here. Cf. Merrick B. Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale. L.J. 486, 494–98 (1987) (arguing that the distinction does not make sense).

[144] 545 U.S. 469, 494 (2005).

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.[145]

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 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 interstate and regional markets.

C. Capital

As with persons and goods, the Supreme Court is an active "umpire" of the interstate market in capital.[146] In the latter half of the nineteenth century, judicial decisions struck down absentee ownership laws and other state regulations discouraging multistate business operations or discriminating against out-of-state corporations.[147] Combined with the interstate 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 can, and do, 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.[148]

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 interstate 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 in-

[145] But see Gifford, supra note 132, at 359–60 (discussing local taxicab cartels).

[146] Charles W. McCurdy, American Law and the Marketing Structure of the Large Corporation, 1875–1890, 38 J. Econ. Hist. 631, 648 (1978).

[147] Id. at 638–43.

[148] Regan, supra note 1, at 1275.

centives 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.[149]

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 in which only transport costs are taken into account, though those distortions are arguably quite minor.[150]

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. 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"[151] and will undoubtedly tip the market to the benefit of the local producer (and thus to the detriment of the non-local producer).

The formal line that the Court has drawn, and which has come under significant criticism, is the line between subsidies and taxes, or between "[d]irect subsidization of domestic industry" (which is permitted) and "discriminatory taxation of out-of-state manufacturers" (which is not).[152] In *West Lynn Creamery v. Healy*, however, the Court fudged that line significantly, striking down a nondiscriminatory tax levied on milk dealers that was funneled back to Massachusetts milk producers in the form of a subsidy.[153] 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.[154] Since *Healy*, the status of

[149] See Walter Hellerstein & Dan T. Coenen, Commerce Clause Restraints on State Business Development Incentives, 81 Cornell L. Rev. 789, 790 (1996).
[150] Krugman, supra note 128, at 52–55.
[151] West Lynn Creamery v. Healy, 512 U.S. 186, 193 (1994).
[152] New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988).
[153] 512 U.S. at 188.
[154] Id. at 194.

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.[155]

DaimlerChrysler Corp. v. Cuno,[156] decided in 2006, gave the Court an opportunity to clarify the doctrine. The Court avoided the substantive issues, however, holding instead that the city taxpayers did not have standing to contest the tax incentives.[157] The case is nevertheless important both for what the Sixth Circuit did and what the Supreme Court did not do.

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. DaimlerChrysler argued that the Ohio tax abatement and credit were permissible subsidies,[158] 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 taxes[159] and recognized that states and localities are permitted to encourage the intrastate development of commerce and industry.[160] 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

[155] See Hellerstein & Coenen, supra note 149, at 790–92; Daniel Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 931–32 (1992).

[156] 547 U.S. 332 (2006).

[157] Id. at 338.

[158] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 746 (6th Cir. 2004); see also Edward A. Zelinsky, *Cuno*: The Property Tax Issue, 4 Geo. J.L. & Pub. Pol'y 119, 131 (2006) ("The economic result Ohio achieved by granting property tax exemption to DaimlerChrysler could alternatively have been accomplished by comparable direct expenditures, whether in the form of grants, loans or in-kind services to DaimlerChrysler.").

[159] *Cuno*, 386 F.3d at 746.

[160] Id. at 742.

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] existing tax liability by locating significant" capital investments within the state, but not if they invested outside the state.[161] The tax was a cross-border (or interstate) 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 investment tax credit, 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 interstate competition for corporate investment is actually intercity competition. Toledo was competing with a neighboring Michigan city only fifteen miles away,[162] and the particular circumstances of Toledo's declining economy obviously animated the push to keep the Jeep plant there. Location incentives are a commonly employed tool 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 will be felt there. Certainly, states are interested in the tax revenue that will flow into state coffers from local investment, but

[161] Id. at 743.

[162] Robyn Meredith, Chrysler Wins Incentives from Toledo, N.Y. Times, Aug. 12, 1997, at D3.

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 place-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.

At the municipal level, the locational incentives competition is a component of the larger city economic development project. Tax incentives of the kind at issue in *Cuno* are only one of the many tools that cities employ.

The favorable tax treatment given to municipal bonds is another tool. It is a common practice for states to exempt in-state municipal bond interest from taxation, while taxing interest on out-of-state bonds. This practice seems on its face to violate the dormant Commerce Clause's antidiscrimination principle[163]—the very purpose of the tax exemption is to give in-state residents an incentive to purchase in-state bonds and thereby direct capital to in-state government bond issuers, many of which are cities. Nevertheless, this past Term, the Court upheld the discriminatory tax in *Department of Revenue v. Davis*, reversing a contrary decision of the Kentucky Court of Appeals.[164]

This outcome was significant but not unexpected. The *Davis* majority relied extensively on *Oneida-Herkimer*, decided a year earlier.[165] Recall that in *Oneida-Herkimer*, the Court held that state and local governments may favor their own industries or services over private providers on the ground that state and local governments are charged with legitimate health and welfare objectives "distinct from the simple economic protectionism the [Commerce] Clause abhors."[166] Like the waste disposal at issue in *Oneida-Herkimer*, the issuance of municipal bonds to pay for public projects is "a quintessentially public function," the Court observed.[167]

[163] See Ethan Yale & Brian Galle, Muni Bonds and the Commerce Clause After *United Haulers*, 44 State Tax Notes 877, 879 (2007).

[164] No. 06-666 (U.S. May 19, 2008).

[165] 127 S. Ct. 1786 (2007); see text accompanying notes 117–22.

[166] *Davis*, slip op. at 11.

[167] Id. at 12.

Though freely acknowledging that the purpose of the favorable tax treatment was to direct in-state investments toward in-state projects, the Court held that as a public entity the state is permitted to discriminate in its own favor, as long as it does not discriminate between private bond issuers.[168] This municipal debt advantage represents 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.[169] 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.[170]

A final 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.[171] Acting through these organs, local government plays a central role in determining the shape of capital investment in the jurisdiction by 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.

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.[172] Exclusionary zoning, for example, is predominantly a fiscal strategy, designed to alter or preserve the municipality's tax/spending ratio. Such zoning is only tangentially related to land use; its purpose is often budgetary.[173] In

[168] Id.

[169] Lynn A. Baker & Clayton P. Gillette, Local Government Law: Cases and Materials 394–95 (3d ed. 2004).

[170] See Yale & Galle, supra note 163, at 878.

[171] See Schneider, supra note 18, at 125–26.

[172] See Edwin S. Mills & Wallace E. Oates, The Theory of Local Public Services and Finance: Its Relevance to Urban Fiscal and Zoning Behavior, *in* Fiscal Zoning and Land Use Controls: The Economic Issues 1, 6–11 (Edwin S. Mills & Wallace E. Oates eds., 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, 199–200, 201–04 (1997).

[173] See, e.g., S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 723 (N.J. 1975); see also William T. Bogart, "What Big Teeth You Have!": Identifying

California, for example, car dealerships are popular with municipalities because dealerships tend to generate significant local sales tax revenue.[174]

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 interlocal 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.[175] 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.[176]

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 intercity competition to offer location incentives that we see in *Cuno* and *Kelo*. In this way, the intercity mobility of capital is similar in structure to the intercity mobility of persons and goods—out-flows are more difficult to control than in-flows.

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the Motivations for Exclusionary Zoning, 30 Urb. Stud. 1669, 1670–72 (1993) (discussing four motivations for exclusionary zoning, none of which has to do with environmental or land use design or planning).

[174] See, e.g., Fred Dodsworth, Berkeley Looks to Stop Loss of Car Dealerships, Contra Costa Times, Jan. 12, 2006, at F4; Peter Fullam, Car-Sales Taxes a Meaty Source of Revenue for Some Valley Cities, Desert Sun (Palm Springs, Cal.), Oct. 24, 1999, at 4B.

[175] See Ellickson & Been, supra note 141, at 823.

[176] Cf. David A. Dana, Reframing Eminent Domain: Unsupported Advocacy, Ambiguous Economics, and the Case for a New Public Use Test, 32 Vt. L. Rev. 129, 131–132 (2007) (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).

* * *

What thus 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. That municipalities are actively engaged in doing both 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."[177] 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 vulnerable to liability 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.[178] Nevertheless, to the extent that the Court's dormant commerce clause doctrine is primarily concerned with interjurisdictional discrimination as opposed to interjurisdictional mobility, local land use regulations (which are almost always facially neutral) will be mostly 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,[179] whether in the suburbs, where zoning is used to control for the characteristics of in-migrants,[180] or

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

[178] But cf. Bogart, supra note 100 (examining zoning in the context of intra- and intermetropolitan trade); Ellickson, supra note 123, at 392–402 (exploring the economic aspects of "growth controls" such as zoning regulations).

[179] Peterson, supra note 17, at 24–25.

[180] Fischel, supra note 100, at 229.

in large cities, where land-based elites battle over the nature and direction of urban growth.[181]

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 piece.[182] 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 its core, however, municipal developmental politics (either pro- or anti-growth) is the politics of land use.[183] State economic development policy (and politics) is not so similarly obsessed.

III. REVISITING *KELO*, *CUNO*, *CAMDEN* (AND *SAENZ*)

With the parameters of the intercity 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 favors certain socioeconomic classes, economic development tak-

[181] Harvey Molotch, The City as a Growth Machine: Toward a Political Economy of Place, 82 Am. J. Soc. 309, 309 (1976).

[182] 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).

[183] Molotch, supra note 181, at 309–10.

ings, and locational subsidies are examples of the latter. One can characterize all these activities as situated on a cross-border continuum—at one end, cities might engage in too much protectionism; at the other end, they might engage in too little.

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*, 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.[184] In *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.[185] And in *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.[186] This Part argues that these cases should be understood together. Regardless of their doctrinal classification, each case poses the same question: assuming some degree of judicial deference to economic legislation (as bifurcated judicial review requires), when should constitutional doctrine prevent local fiscal strategies that open or close local borders to persons, goods, or labor?

A. 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 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 out-ward 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

[184] 545 U.S. 469, 472 (2005).
[185] 547 U.S. 332, 337–38 (2006).
[186] 465 U.S. 208, 210 (1984).

plausible strategy for attracting economic development, it would be irresponsible for a city not to use it.[187]

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.[188] Critics of *Kelo* worry about the money: 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 constitutional 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.

That cities cannot be trusted to resist the siren songs of mobile capital has been a long-running concern. This worry animated the restrictive interpretation of municipal power by state legislatures and courts in the mid-nineteenth century. 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 interlocal competition for track location.[189] Reformers were concerned with the patronage-based awarding of municipal franchises, the irresponsible promotion of municipal bonds, and the subsequent repudiation 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.[190]

[187] Cf. Clayton P. Gillette, *Kelo* and the Local Political Process, 34 Hofstra L. Rev. 13, 14–16 (2005) (arguing that the eminent domain power is necessary to solve another political problem—that of individual landowners who hold out against the majority will).

[188] See sources cited supra note 22; see also Tresa Baldas, States Ride Post-'Kelo' Wave of Legislation, Nat'l L.J., Aug. 2, 2005, at P1, available at http://www.law.com/jsp/article.jsp?id=1122899714395# (describing movements in several states to prevent the use of eminent domain for private development).

[189] See Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. Am. Hist. 970, 970–76 (1975).

[190] Clayton Gillette, In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?, 67 Chi.-Kent L. Rev. 959, 964–65 (1991); McCurdy, supra note 189, at 970–76. The Progressive Era home rule movement that followed came at this problem from a different angle. Some home rulers saw state legislative

The debate in *Kelo* can be understood as a continuation of this historical skepticism of local political processes. What is notable, however, is that the constitutional skepticism of local political processes appears not to extend to the structure of interlocal economic competition itself. No one blames mobile capital for abandoning New London in the first place.[191] And few regard city efforts to reverse economic out-flows 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.

Recall that *Cuno* involved a similarly economically depressed city (Toledo, Ohio) 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.[192]

Indeed, to the extent one is worried about giveaways to mobile capital, the *Cuno* plaintiffs had a better argument. As a matter of public policy, economists have been fairly skeptical about the use of economic development incentives of the type used in *Cuno*.

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. David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255, 2292–95 (2003). 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. See, e.g., Barron, supra, at 2289–2334 (describing the historical evolution of home rule as a package of grants to and limits on local power); Robert C. Brooks, Metropolitan Free Cities: A Thoroughgoing Municipal Home Rule Policy, 30 Pol. Sci. Q. 222 (1915) (describing problems of corruption and tension between state and local authorities, and proposing home rule as a potential solution by expanding the functions that a municipality can exercise without state interference); 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).

[191] But see Joseph William Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611, 657–59 (1988) (arguing that mobile capital owes duties to local communities that can be vindicated through property law).

[192] *Cuno*, 547 U.S. 332, 338–39 (2006).

Most appear to cost cities money without changing the actual locational choices of the corporations that demand them.[193] Land assembly commitments, like the one used in *Kelo*, might have more of an effect on corporate decisionmaking.

Moreover, the data suggest that the costs of attracting new industry or business through tax incentives are often not offset by local economic benefits.[194] 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.[195]

More importantly from a constitutional perspective is that tax incentives raise political process concerns that may be more salient than those raised by the local 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).[196] Takings also have to be paid for; condemnation funds are a local budget item (to the extent they are not 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 large redistribution from taxpayers to corporations, are much less visible because they do not constitute a direct charge to local budg-

[193] Bogart, supra note 8, 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, 453–55 (1997); Roderick M. Hills, Jr., Compared to What? Tiebout and the Comparative Merits of Congress and the States in Constitutional Federalism, *in* The Tiebout Model at Fifty 239, 260 (William Fischel ed., 2006).

[194] See, e.g., Terry F. Buss, The Effect of State Tax Incentives on Economic Growth and Firm Location Decisions: An Overview of the Literature, 15 Econ. Dev. Q. 90 (2001); Carlos F. Liard-Muriente, US and EU Experiences of Tax Incentives, 39 Area 186, 189–90 (2007) (reviewing literature).

[195] Enrich, supra note 193, at 398; see also Bogart, supra note 8, at 238–39. Some cities and states have sought to enter into voluntary "anti-poaching" compacts but these have generally been unsuccessful. Thad Williamson et al., Making a Place for Community: Local Democracy in a Global Era 140–42 (2002). Congress has on occasion considered legislation that would address this competition, but continually fails to adopt it. See, e.g., Distorting Subsidies Limitation Act of 1997, H.R. 3044, 105th Cong. (1997).

[196] See Dana, supra note 176, at 48.

ets and are often "paid for" by future generations through municipal bonds.[197]

It also bears noting that mobile 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.[198] 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.

Thus, if one worries about the power of mobile capital in the local political process, one should be at least as concerned with *Cuno*-style redistributions as with *Kelo*-style redistributions—perhaps more so, because the latter are generally compensated while the former are not. *Kelo* and *Cuno* should rise and fall together. Both cases are about local governments' capacity to corral mobile capital. And in both cases the Court ultimately defers to the local political process to sort out good from bad local redistributions.[199]

How cities will corral mobile capital is structured by legal rules. 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.[200] 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.[201] New London and Toledo will employ the mecha-

[197] Enrich, supra note 193, at 394 (pointing out that the burdens of tax incentives are "indirect and widely dispersed"); Gillette, supra note 193, at 470 (arguing that voters may favor projects financed with debt that will be imposed only on future generations); cf. Hills, supra note 100, at 260 (arguing that congressional lawmaking is equally susceptible to accountability problems).

[198] 547 U.S. 332, 338–39 (2006).

[199] 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, 101 Nw. U. L. Rev. 1057 (2007).

[200] See Dana, supra note 176, at 28.

[201] Thanks to Lee Fennell for this point.

nisms 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.

B. Camden *(and* Saenz*)*

The *Camden* case is also a case about redistributions to mobile capital, though it does not look like it at first. Recall that in *Camden* local economic regulations intended to assist an ailing post-industrial economy were at issue. But unlike in *Kelo* and *Cuno*, in *Camden*, the Court came out the other way: it held that a regulation requiring that contractors with the city employ at least forty percent Camden residents was suspect under the Privileges and Immunities Clause.[202]

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 for two reasons. First, *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.[203] Second, although 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 (that is, property owners) to local workers or local corporations—which it is. But, that is the same concern raised

[202] *Camden*, 65 U.S. at 221–22.
[203] Cuno v. DaimlerChrysler, Inc., 386 F.3d 738, 745–46 (6th Cir. 2004).

by the *Kelo* and *Cuno* cases. All three cases raise the appropriateness of certain kinds of local redistributions.[204]

Camden is thus, like *Cuno* and *Kelo*, about local rules that restrain or encourage the flow of resources and persons across borders. A consistent rationale for which rules are permissible, however, is hard to discern. As I have already observed in Part II, the *Camden* Court's rejection of labor-based residential restrictions sits uneasily alongside the Court's general tolerance for much more severe suburban land-use-based residential restrictions. And the Court's tolerance for suburban-based land use restrictions sits even more uneasily alongside the holding and rhetoric of *Saenz v. Roe*—the case that struck down California's durational residency requirement on right to travel grounds.[205] When one puts these cases together, it is difficult to discern any particular judicial theory of interjurisdictional mobility.

This disjuncture is all the more notable because, as a policy matter, the restraints on mobility imposed by suburban jurisdictions are intimately related to Camden's own decision to adopt resident-favoring economic policies. One consequence of suburban restrictions on interlocal mobility has been that, as employment has moved out of the central city and into the suburbs, residents of central cities have had difficulty 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 and 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 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 de-

[204] See generally Gillette, supra note 199 (discussing the various political forces that might induce localities to engage in certain redistribution projects).

[205] 526 U.S. 489, 506 (1999) ("[T]he 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.'").

pressed areas of the central city.[206] Camden's attempt to funnel work to city residents through its contracting rules must be understood in this context.

How should we understand efforts by declining cities to restrict entry of mobile labor or adopt policies that encourage the entry of mobile capital—both of which constitute a redistribution from local taxpayers to local (or local-becoming) businesses? 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 the notion that economic legislation should generally receive less judicial scrutiny.

On the other hand, in all cases, there might be a concern that judicial involvement is necessary to counter interlocal 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 or residential 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. The Court permits fiscal zoning while disallowing Camden's local hiring preference in large part because facial discriminations are more amenable to judicial oversight under the dormant commerce clause. Whether dormant commerce clause jurisprudence should be emphasizing equal treatment over free mobility is a question that the Court has not explicitly answered. Nevertheless, as noted previously, a byproduct of the jurisprudential emphasis on nondiscrimination is that a great deal of local conduct goes unregulated despite the burdens on interjurisdictional mobility.[207]

[206] Michael H. 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, 44 Urb. Stud. 2401, 2403–04 (2007); John F. Kain, A Pioneer's Perspective on the Spatial Mismatch Literature, 41 Urb. Stud. 7, 20–24 (2004).

[207] See supra text accompanying notes 129–30. For an argument that the antidiscrimination standard is both unpredictable and arbitrary, see Shaviro, supra note 155, at 936.

Meanwhile, the Court is sometimes willing 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 appropriate judicial oversight of municipal land use regulation.[208] Takings doctrine, however, does not address the mobility question at all; it tends to be preoccupied with internal political process failures, either majoritarian or minoritarian bias.[209] Those internal political process failures are also present in the context of dormant commerce clause and privileges and immunities challenges to local regulations, but there is little consistency in approach across the doctrinal categories.

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, nor does fiscal zoning. Though the Court declines "invitations to rigorously scrutinize economic legislation passed under the auspices of the police power"[210] under the dormant commerce clause, it sometimes appears eager to oversee local economic legislation pursuant to 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.

IV. CONTROLLING CROSS-BORDER FLOWS

The problem is that courts do not have a theory of the American common market that is attuned to the appropriate scale. Thus, the leading substantive justifications for a robust interjurisdictional mobility jurisprudence—antiprotectionism and antidiscrimina-

[208] See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 383–86 (1994); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122 (1978).

[209] See, e.g., Neil K. Komasar, Law's Limits: The Rule of Law and the Supply and Demand of Rights 60–61 (2001).

[210] United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 127 S. Ct. 1786, 1798 (2007). But cf. *Kelo*, 545 U.S. at 494–523 (O'Connor, J., dissenting; Thomas, J., dissenting) (arguing that there must be a "judicial check" on how the public use requirement is interpreted).

tion[211]—are inconsistently applied at the local level. And despite the Court's antiprotectionist rhetoric, significant areas of local border regulation—namely those involving land use—have never been conceived of as border regulation at all. The Court appears to have no conscious account of municipal political behavior that can rationalize the doctrine or illuminate a way forward.

Scholars, by contrast, have constructed potentially fruitful accounts 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 interjurisdictional competition, and the third emphasizes the values of localism. Unfortunately, as I discuss below, these theories generate conflicting guidance. In part, this is because theories of local political behavior are unavoidably general. As I argue in the second half of this Part, it is difficult to generalize about municipal political behavior without some idea of where particular local governments stand in the context of the metropolitan-area economic hierarchy. How localities behave is contingent on their economic status, the degree of state interference in their economic affairs, and how the Court's current mobility rules shape their fiscal behavior. After canvassing the general accounts of local political behavior, I offer some more contextual observations about local behavior under current conditions, and end with some preliminary observations about the future direction of legal doctrine.

A. Theories of Local Political Behavior

1. Political Externalities

Consider political process first. The conventional political process theory of the dormant commerce clause asserts that all subfederal 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 re-

[211] Charles L. Black, Jr., Perspectives on the American Common Market, *in* Regulation, Federalism, and Interstate Commerce 65 (A. Dan Tarlock ed., 1981); Julian N. Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425, 446–55 (1982); Regan, supra note 1, at 1165, 1204.

lied 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.[212]

This story becomes complicated rather quickly, however, in two ways. First, the process theory has to assume away often relatively robust internal constituencies. 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.[213] 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.[214]

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. Although 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. In the *Camden* case, for example, the Court observed that the New Jersey legislature's ability to override Camden's in-city hiring preference was too attenuated to protect out-of-state interests.

Second, because the political process account assumes that internal constituencies can take care of themselves, it entirely ignores the possibility of internal political failures. Losing voters—that is, citizens of a jurisdiction who come up on the wrong side of the political process—do not generally garner judicial concern even if

[212] See Mark Tushnet, Rethinking the Dormant Commerce Clause, 1979 Wis. L. Rev. 125, 130–33 (1979).

[213] See Gillette, supra note 193, at 469–76; see also Hills, supra note 100, at 313 n.101.

[214] See, e.g., Shaviro, supra note 155, at 931–32.

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 to Jeep as a substantive constitutional matter because those taxpayers are residents of the legislating jurisdictions. Giveaways to mobile capital are not readily cognizable under dormant commerce clause doctrine 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.[215] Indeed, the founding assumption of process theory—that insiders will foist costs on nonvoting outsiders—while superficially true, soon collapses under the weight of local political realities. Local jurisdictions just as often foist benefits on nonvoting outsiders and impose costs on insiders.

Because the political process theory is concerned with negative political 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. A doctrinal emphasis on protecting political outsiders will miss this important problem.

2. Interlocal Competition

A different account of local political behavior 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 intercity competition

[215] The concern about railroad power that animated the Dillon's Rule reforms of the nineteenth century is an example. See Teaford, supra note 45, at 9–10.

prevents a great deal of municipal behavior that might otherwise need to be regulated by the courts.[216]

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*.[217] Tiebout's narrow goal was to formulate a theory of how the appropriate level of public goods could be generated without resort to politics.[218] In a Tieboutian regime, interjurisdictional 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 to regulate in ways that might otherwise elicit constitutional concern.[219] The exit account, however, also has some significant limitations as an explanation for interjurisdictional behavior.

First, like the conventional political process account, the exit account might not reflect the actual 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

[216] See, e.g., 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 104, at 833–34 (challenging the exit account).

[217] Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956).

[218] Peterson, supra note 17, at 18–19.

[219] Been, supra note 216, at 511; see also Christopher Serkin, Big Difference for Small Governments: Local Governments and the Takings Clause, 81 N.Y.U. L. Rev. 1624, 1661–62 (2006); cf. Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-To-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1233–35 (1992) (arguing that decentralized environmental regulation need not result in a "race to the bottom").

residents in order to distribute monies to the poor or in order to subsidize a particular local industry.[220]

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, or to a subsidized industry. 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 is problematic for 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.[221]

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. Exit does not constrain local governments when they seek to foist costs on outsiders unless there are some insiders to speak for them. As already discussed above, 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.[222]

Indeed, interlocal 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

[220] Peterson, supra note 17, at 36–38, 41–44.

[221] This puzzle has led Clayton Gillette to offer a number of explanatory theories. See Gillette, supra note 199, at 1067–88.

[222] See also Hills, supra note 193, at 244–47 (observing three causes of externalizing costs); cf. Fischel, supra note 100, at 272–75 (noting that even judicial regulation cannot effectively prevent exclusion).

people will leave those persons or firms that are undesirable from a tax and spending perspective out in the cold. Some mechanism might be necessary to force local governments to accommodate these undesirable persons or firms.[223]

Finally, the exit account is difficult to square with local policies that have protectionist effects. How does interjurisdictional competition work if local governments are closing their borders to persons, goods, or capital? Recall that Tiebout himself set forth rules for his model that can be analogized to the constitutional-level rules of interjurisdictional mobility. Tiebout assumed 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.[224]

Each one of Tiebout's assumptions is idealized. Nevertheless, they suggest something important about the nature of the legal rules that govern interlocal 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, however, is explicitly anticompetitive and antimobility. Competitive models of local political behavior tend to treat border-closing rules as a local amenity over which jurisdictions compete.[225] 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, favors a robust judicially enforced Takings Clause.[226] 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

[223] See S. Burlington County NAACP v. Twp. of Mount Laurel, 67 N.J. 151 (1975); cf. Richard Schragger, Consuming Government, 101 Mich. L. Rev. 1824, 1854–55 (2003) (reviewing Fischel, supra note 100) (arguing that increased state and regional authority is necessary to protect undesirable residents).

[224] Tiebout, supra note 217, at 419. 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.

[225] See, e.g., Christopher Serkin, Local Property Law: Adjusting the Scale of Property Protection, 107 Colum. L. Rev. 883, 885–86 (2007).

[226] Fischel, supra note 100, at 283–85.

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.[227]

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.[228] Interlocal competition for development will generate the right amount of local protectionism; cities will be unable to impose costs on outsiders because they will be eager to attract development, not turn it away.[229]

That two theorists can generate such different judicial rules from the basal fact of intermunicipal 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 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.

3. Protectionism and Localism

The substantive values of antiprotectionism and antidiscrimination 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.[230] Fiscal 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 re-

[227] Id. at 283.

[228] Been, supra note 216, at 545.

[229] See Been, supra note 216, at 478; cf. Hills, supra note 193, at 57–59 (arguing that interjurisdictional competition will prevent excessive subsidies).

[230] Cf. Hills, supra note 100, at 310–15 (drawing a distinction between localities and states on the grounds that the former are more likely to be "affective communities" than the latter).

jecting forms of development that are inconsistent with those values.[231]

Relatedly, 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 interstate antidiscrimination or economic union. One could claim that because municipal regulation is often more limited in scope than state regulation, the risk that a local regulation might lead to the dissolution of the political union or the introduction of serious inefficiencies is farfetched.

These localism arguments are attractive; certainly the scale of government regulation is relevant to the regulation's ultimate effects. Nevertheless, they have some weaknesses. First, 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. Second, the likelihood of a retaliatory local government response seems relatively high. Few localities would be able to forego adopting their own protectionist ordinances once one locality did—fiscal zoning in the suburbs is a good example of this collective action problem.[232] The spread of such policies throughout a state would, in practical terms, mean that the state itself had adopted the discriminatory policy.

Finally, one could counter the romanticism of localism with the reality of local prejudice. The Madisonian view that smaller-scale polities are more susceptible to faction has been frequently in-

[231] See, e.g., Nantucket, Mass., Code art. 3, § 139-12(H)(2) ("The purpose and intent of the Formula Business Exclusion District . . . 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."), available at http://www.generalcode.com/webcode2.html (follow "Massachusetts" hyperlink; then follow "Nantucket" hyperlink; then search "Code Search Form" for "139"; then follow "Chapter 139: Zoning" hyperlink); see also Island Silver & Spice, Inc. v. Islamorada, 475 F. Supp. 2d 1281, 1291 (S.D. Fla. 2007) ("In general, preserving a small town community is a legitimate purpose [of local government regulation.]"); Loreto Dev. Co. v. Village of Chardon, 119 Ohio App. 3d 524, 529 (1996) (holding that a town had a legitimate interest in protecting its small town character by restricting the size of stores).

[232] Cf. C & A Carbone v. 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.").

voked to justify concern with local government behavior. To the extent that localities are systematically 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.[233]

All this leaves us once again with competing accounts of local government behavior. 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 subfederal governments will be likely to engage in protectionism at all.[234] The assumption that they will, if given the chance, depends on a claim about local political processes, not a claim about the values of antidiscrimination and antiprotectionism. We may agree on those values, but not agree as to how likely any given polity will be to contravene them. 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.

B. Determinants of Local Political Behavior

With these qualifications in mind, we can still make some claims about municipal political behavior. These claims will not be derived from some essential characteristic of local government, how-

[233] 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."); see also Rossi, supra note 132, at 560 (defending municipal-state antitrust immunity distinction on grounds that local political processes are more susceptible to interest-group capture). I am less convinced that regulatory decentralization to small-scale local governments will systematically lead to majoritarian oppression, at least in the context of the local regulation of religion. See Richard C. Schragger, The Role of the Local in the Doctrine and Discourse of Religious Liberty, 117 Harv. L. Rev. 1810, 1811–20 (2004).

[234] 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, supra note 216, at 543–45 (arguing that interlocal competition will prevent localities from over-regulating or over-charging). But see Fischel, supra note 100, at 260 (arguing that localities are more likely than states to over-exclude).

ever. There is nothing inherent in the nature of municipalities or of intermunicipal competition that leads to any particular political behaviors. Local government conduct does not follow from a particular attribute of scale, but rather from the economic context in which a particular locality finds itself.

In other words, a municipality's behavior depends in significant part on its orientation to 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.[235] Those jurisdictions have differing economic relationships with each other and with jurisdictions outside the metropolitan area. The starting point is the actual economic and geographic circumstances of a particular city or municipality.

1. Intrametropolitan Relationships

Intrametropolitan relationships are characterized by jurisdictional fragmentation and interlocal tax competition.[236] It is therefore in the context of the metropolitan-area economy that we see the most concerted efforts to use anticompetitive 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 in some cases come to equal or surpass central cities in importance in the development and growth of regional economies.[237]

[235] Myron Orfield, American MetroPolitics: The New Suburban Reality 2–3 (2002).
[236] Id. at 16–17.
[237] Id. at 44–48. See generally Joel Garreau, Edge City: Life on the New Frontier (1991).

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.[238]

This form of "defensive localism"—as Professors Frug and Barron call it[239]—often operates in its purest form in suburban jurisdictions, where political power tends to reside with homeowners. Homeowner-dominated suburbs, as William Fischel has argued, are highly attuned to the costs of new development, especially infrastructure and education costs.[240] Those jurisdictions thus tend to operate defensively, fearing any kind of new local development, whether it is ultimately beneficial from a tax perspective or not.[241]

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

[238] Enrich, supra note 193, 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, 1987 (2000) (discussing the metropolitan-area competition for investment and arguing that predominantly black suburbs often lose).

[239] David J. Barron & Gerald E. Frug, Defensive Localism: A View of the Field from the Field, 21 J.L. & Pol. 261, 261–62 (2005) (arguing that suburbs exercise a form of "defensive localism" rather than a form of "local autonomy"). Richard Briffault has also written eloquently and extensively about the defensive and privatized politics of the suburbs. Briffault, supra note 5, at 382–93, 435–47.

[240] Fischel, supra note 100, at 184–89.

[241] See id. at 8–10 (stating that homeowners' intolerance for risk drives them to keep out development, even if the risk of harm to them is slight).

shown, today's prospering suburbs are likely to be at-risk tomorrow.[242]

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 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 both 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.[243] 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, as well as between those cities that have high concentrations of corporate management professionals and those that do not.

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.[244] 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. Admittedly, some of these cities have experienced a mild resurgence recently, and the metropolitan areas

[242] William H. Lucy, Tomorrow's Cities, Tomorrow's Suburbs (Planner's Press 2006); Orfield, supra note 235, at 162–72.

[243] Sassen, supra note 33, at 3–4.

[244] Jon Blackwell, 1911: 'Trenton Makes' History, http://www.capitalcentury.com/1911.html (last visited July 1, 2008).

surrounding these cities are still quite economically important. Nevertheless, as a general matter, these older industrial centers 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—neither losing nor gaining population, neither experiencing decreases nor increases in its gross domestic product—is difficult to find. Cities are continually experiencing transition in one direction or another.

Urban 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.[245] To the extent a city is a complex economic organism, it will undergo arguably volatile transformations throughout its economic life.[246] What this means is that in 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.[247]

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.[248] Because central cities are still significant generators of regional wealth and 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

[245] See Paul Krugman, The Self-Organizing Economy 4–5 (1996).
[246] Id.; see Jacobs, supra note 11.
[247] Krugman, supra note 245, at 4–5.
[248] Orfield, supra note 235, at 23–28.

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 with the wider national and international economic community; the second trend limited the industrial city's relationships with the wider metropolitan-area economy.[249] 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.[250] 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.[251] 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.

3. Local Behavior and State Influence

Whether defensive suburbs, declining central cities, edge cities, or global cities, how localities will behave depends in large part on the degree of state interference in their economic affairs. The state's political interests do not always—or even usually—coincide with the interests of particular cities, and 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

[249] Douglas W. Rae, City: Urbanism and Its End 361–63 (2003).
[250] Garreau, supra note 237, at 4–9.
[251] David Rusk, Cities Without Suburbs 20 (2d ed. 1995).

Rule in the nineteenth century, followed by the home rule movement of the Progressive Era. Those debates continue.[252]

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 or a local minimum wage, or by pursuing a city development project that implicates state financing—the legislature is going to intervene aggressively.[253]

Second, states influence local decisionmaking 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.[254] *Cuno*, too, involved significant state tax incentives. These development deals are often locally targeted but state-generated—the political players are state officials, and their decisions are not necessarily responsive to the local electorate, 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 decisionmaking will thus always be somewhat distorted by the availability and direction of state money.[255] And to the extent certain political interests can influence

[252] See generally Barron, supra note 190 (analyzing the history of the state-city power struggle and advocating a new understanding of home rule as a constraint on urban sprawl).

[253] Baker & Gillette, supra note 169, at 201–336.

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

[255] 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

state legislatures more readily than local ones, "true" local preferences might be overridden.

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 or investment; defending against the in-flow of high-cost newcomers. Attentiveness to this dynamic will often explain local political behavior.

C. Some Preliminary Implications for Doctrine

That local economic conditions and state political interference heavily influence local political behavior should come as 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 anticompetitive fiscal strategies when possible, or, when those strategies do not work, to engage in costly interlocal subsidy 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 the judiciary should intervene to disrupt these wars depends on the courts' capacity to look beyond particular municipal actions to the fiscal incentives that animate those actions. As a policy matter, I am sympathetic to those who believe that the manipulation of local fiscal health through the use of economic development subsidies and land-use-based exclusion tends to be unproductive.[256] That localities resort to these policies appears to be a collective action problem that could be solved through centralized regulation. Where local governments are engaged in such

of Public Use in *Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain, 2004 Mich. St. L. Rev. 929, 943 (cataloging the distorting effect of federal money on eminent domain actions in Detroit).

[256] See, e.g., Schneider, supra note 18, at 210–11; see also Bogart, supra note 8, at 220–23, 237–38; Enrich, supra note 193, at 380.

conduct, courts can play a role in containing the economic balkanization of the metropolitan region.

Current jurisprudence, however, does little to challenge the primacy of mobile capital, even when local efforts to constrain it trench on individual property rights. The *Kelo* case is an illustration. New London's resort to economic development takings is a rational strategy when understood in the context of a regime that otherwise permits significant restrictions on interlocal mobility, encourages interlocal competition for mobile capital, and eliminates those local forms of favoritism that would otherwise aid declining cities. The mobility rules that constitute the Court's current urban economic policy do nothing to undermine the structure of regulatory capitalism, with its celebration of the "redemptive power of private capital."[257]

A more energetic takings clause doctrine might blunt the worst excesses of that regime—at least that is how advocates of a more stringent "public use" requirement see it. But, the current judicial obsession with takings (and especially exactions, an area in which the Court has intervened most aggressively) is somewhat misplaced. Local land use manipulations are mechanisms for controlling cross-border flows. A jurisprudence that is serious about the threat that cross-border capital poses to local democratic processes would address the full range of local fiscal policies, including locational subsidies and restrictive zoning.

A constitutional policy that limits local governments' incentives to skew the economic playing field in favor of mobile capital is rhetorically attractive. A generally applicable "public purpose" limitation is one way to achieve this goal, but there are reasons to be cautious. The last thoroughgoing public purpose doctrine was articulated by classical jurists in the postbellum period. Key features of laissez faire constitutionalism had their origins in the municipal debt crises of the 1860s and 1870s, when, in a rush of boosterism, states and localities overcommitted public monies to

[257] Nicholas Blomley, *Kelo*, Contradiction, and Capitalism, 28 Urb. Geography 198, 200 (2007); see also Sam Bass Warner, The Private City: Philadelphia in Three Periods of Growth x–xi (1968) (recognizing the centrality of private enterprise in the success of cities); Audrey G. McFarlane, Local Economic Development Incentives in an Era of Globalization: The Exploitation of Decentralization and Mobility, 35 Urb. Law. 305, 312–14 (2003) (describing the influence of private capital).

private enterprise and otherwise "'devis[ed] techniques to abet their own self-exploitation.'"[258] Justice Stephen Field—the putative founder of laissez faire—consistently railed against, what one commentator has termed, the "baneful effects of the private quest for special privileges."[259] His jurisprudence was as skeptical of the local use of eminent domain on behalf of railroads as it was of public subsidies for mill owners—Justice Field arguably would have dissented from both *Kelo* and *Cuno*. By ensuring a strict separation between public and private, Justice Field would have seen the Court police all public subsidies, exclusive privileges, and exercises of eminent domain to ensure that they were not products of a distorted legislative process.

That we have not gotten far from Justice Field's concern about the use of public money for private purposes illustrates both the timelessness of the economic development project itself and the limits of judicial intervention.[260] Those limits are as apparent today as they were when the jurisprudential divide between private and public collapsed in the wake of the modern regulatory state. As Clayton Gillette has recently observed, one should approach judicial intervention to prevent local redistributive schemes with a great deal of caution.[261] Courts have little institutional capacity to engage in coordinated policymaking, and while they can do justice in a given case, they have great difficulty determining the wider effects of their rulings. Moreover, because courts reason from general principles to specific outcomes, ensuring some form of cross-doctrinal consistency is difficult. The accretion of legal doctrines, each separately addressed to a particular narrow question, easily obscures the larger picture.

Unless the Court is willing to challenge broad swaths of local economic policy, its limited forays will only skew local economic incentives further. Preventing Camden from funneling work to city residents while permitting the suburbs around Camden to exclude

[258] Charles McCurdy, Justice Field and the Jurisprudence of Business-Government Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. Am. Hist. 970, 982 (1975) (quoting Gene M. Gressley, West by East: The American West in the Gilded Age 12 (1972)).

[259] Id. at 989.

[260] Id.

[261] Gillette, supra note 199, at 1067.

those workers altogether does little to alter Camden's economic or political incentives. Preventing New London's exercise of eminent domain for economic development purposes without addressing the subsidies that Toledo can offer DaimlerChrysler merely changes the form of intermunicipal competition without addressing its underlying nature. The Court's current aggressive oversight of exactions and (somewhat less) aggressive oversight of local regulatory takings privileges certain kinds of local economic development processes over others. But if one is concerned that mobile capital is distorting the legislative process, then one should adopt a broad-based public purpose doctrine that challenges the entire panoply of protectionist local policies. Such a jurisprudence would target all mobility incentives and limitations, not just those that deal with real property or exactions.

I am not prepared to adopt such a thoroughgoing jurisprudence, or, at least, would not want to try to articulate it fully here. Suffice it to say that the judicial rhetoric of the common market, of free cross-border mobility, and of level playing fields has a long pedigree, employed by judicial progressives and judicial conservatives alike. The challenge for the Court is to avoid using those principles selectively and inconsistently. A hard judicial look at particular kinds of takings or local labor favoritism does little to alter an economic environment that encourages interlocal competition for mobile capital while limiting interlocal mobility in other important ways. A consideration of the economic and political forces that shape local government decisionmaking should inform those inquiries; so should a consideration of how the Court's current rules affect 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 interstate 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 com-

mitments—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.[262]

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 interstate mobility doctrines tend to operate without cognizance or consideration of their effects on local actors. The result is some level of mismatch between those effects and the stated goal of preserving a common political and economic market. At the very least, there is an inconsistently articulated view of the relationship between the values of interjurisdictional mobility and localism.

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.[263] 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.

[262] Cf. Richard C. Schragger, Reclaiming the Canvassing Board: *Bush v. Gore* and the Political Currency of Local Government, 50 Buff. L. Rev. 393, 395–96, 407–11 (2002) (discussing the Court's "doctrine" and "shadow doctrine" of local government status).

[263] But cf. Jacobs, supra note 6, at 149 ("Tariffs are of course means by which backward economies have often helped give their manufacturers a start . . . ."); id. at 168 ("Tariffs, necessary though they are in nations with undeveloped or long-stagnated cities and appreciable international trade in resources or rural products, are far from an ideal remedy for faulty and deadening feedback to cities."); Krugman, supra note 10, at 89–90 (arguing that temporary tariffs might be useful to developing economies).

The city's capacity to weather economic change turns on the relative fluidity of interlocal 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—to better or worse effect.

Thinking about cities in these terms helps clarify when judicial intervention is required to correct local political process problems, but it also sheds light on the free trade regime more generally. 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.