FEDERALISM, METROPOLITANISM, AND THE PROBLEM OF STATES

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The United States has long been an urban country, but it is fast becoming a metropolitan one. Population and economic activity are now concentrated in cities and their surrounding regions. The largest twenty of these city-regions account for almost fifty-two percent of total U.S. GDP. This "metropolitan revolution" represents a fundamental challenge to our current federalism. The old federalism assumed that capital and labor are fully mobile and that subnational governments—in this case, states—will engage in competitive efforts to attract desirable investment while the federal government will assume the bulk of redistributive spending. The new federalism rejects the notion that economic growth can be attributed to interstate competition or that only central governments can effectively engage in social welfare redistribution. As economic activity becomes concentrated in cities, those cities become capable of engaging in forms of regulation and redistribution that the standard model of fiscal federalism had deemed impossible.

Our current state-based federalism, however, fails to appropriately align capabilities with responsibilities. Instead of empowering cities, states are increasingly seeking to defund, defang, and delegitimize them. The mismatch between the prevailing sites of productive economic activity and the location of regulation and redistribution has subverted the values conventionally associated with federalism. State power is being deployed to undermine accountability, limit experimentation, and prevent the effective exercise of local self-government. One current consequence of the gap between state and city power is increased political polarization. A future consequence may be

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an institutional restructuring that better reflects the new geography of production and population.

INTRODUCTION

Since the New Deal, American-style state-based federalism has been informed by two important premises. The first premise is that in a common market, capital and labor do and should move relatively unencumbered across subnational jurisdictional boundaries.[1] The second premise is that in a world of capital mobility, redistributive policies cannot be effectively pursued at the subnational level.[2] These twin

[1] See, e.g., Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 650 (1994) (describing "area of free trade among the several States" (quoting Bos. Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 328 (1977))); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949) (referring to and celebrating the "federal free trade unit").

[2] See, e.g., Clayton P. Gillette, Local Redistribution and Local Democracy: Interest Groups and the Courts 7–9 (2011) [hereinafter Gillette, Local Redistribution]; Wallace E. Oates, Fiscal Federalism 131–40 (William J. Baumol ed., 1972) [hereinafter Oates, Fiscal Federalism]; Paul E. Peterson, City Limits 182–83 (1981) [hereinafter Peterson, City Limits]; Richard A. Musgrave, Fiscal Federalism, *in* Public Finance and Public Choice: Two

conjectures undergird a federal system in which the national government provides for the bulk of social welfare provision while subnational governments deploy developmental policies in a competitive effort to attract desirable capital and labor.[3] The ample literature on "fiscal" or "competitive" federalism reflects this standard view.

This federalism has always been imperfectly realized, even as its basic structure has remained mostly intact. Whatever one's theory of American federalism, it generally presumes a national common market and the free movement of capital and labor. That structure is a product and reflection of a particular twentieth-century history: the rapid nationalization of commercial activity as local barriers to entry were withdrawn or struck down,[4] the resultant rise of large-scale, cross-border corporate enterprises,[5] and the emergence of a national welfare state in response to economic shocks that overwhelmed the capabilities of subnational governments.[6] Those phenomena have not abated in the twenty-first century. Indeed, they have accelerated at a global scale.

Nevertheless, there are good reasons to question the continued relevance of twentieth-century federalism in a twenty-first-century political economy. The standard model is deficient in important ways,

Contrasting Visions of the State 155, 160–61 (James M. Buchanan & Richard A. Musgrave eds., 1999).

[3] See, e.g., Peterson, City Limits, supra note 2, at 69–71; Paul E. Peterson, The Price of Federalism 18 (1995); Jan K. Brueckner, Fiscal Federalism and Economic Growth, 90 J. Pub. Econ. 2107, 2107 (2006); Wallace E. Oates, Fiscal Decentralization and Economic Development, 46 Nat'l Tax J. 237, 237–38 (1993); Barry R. Weingast, The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development, 11 J.L. Econ. & Org. 1, 1–5 (1995) [hereinafter Weingast, The Economic Role of Political Institutions].

[4] See Charles W. McCurdy, American Law and the Marketing Structure of the Large Corporation, 1875–1890, 38 J. Econ. Hist. 631, 648 (1978); Donald H. Regan, The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause, 84 Mich. L. Rev. 1091, 1098–101 (1986); see also 1 Laurence H. Tribe, American Constitutional Law 1080–85 (3d ed. 2000) (analyzing the Supreme Court's history of striking down protectionist state legislation in order to facilitate interstate movement and commerce).

[5] See McCurdy, supra note 4, at 632, 649; Richard C. Schragger, The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940, 90 Iowa L. Rev. 1011, 1034–35 (2005). See generally Robert H. Wiebe, The Search for Order 1877–1920 (David Donald ed., 1967) (describing the sweeping economic changes occurring at the end of the nineteenth century, including the rise of large national corporations, industrial magnates, and financial institutions).

[6] See generally Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War (1995) (detailing the expansion of the welfare state under the New Deal); David M. Kennedy, Freedom from Fear: The American People in Depression and War, 1929–1945 (1999) (same).

starting with the assumptions that capital is or should be fully mobile across borders, that only national governments are capable of significant social welfare spending, and that subnational governments are and should be engaged in an inter-jurisdictional competition for economic development.

This Article challenges these assumptions in the course of describing an emerging federalism that better comports with our twenty-first-century political economy. It begins with the fact that productive economic activity is not evenly distributed across the nation but is rather increasingly concentrated in cities and in the metropolitan regions that surround them.[7] As economic activity becomes concentrated, those cities and regions have more capacity to redistribute than the standard model predicts, even if a particular state or the nation as a whole has less.[8] Moreover, the claim that interstate competition for development can explain economic growth has become less plausible.[9] The argument that U.S. states are engines of a salutary "competitive federalism"[10] looks odd in a world where the bulk of economic growth is occurring in rising cities.[11]

[7] On uneven economic development, see Pierre-Philippe Combes et al., Economic Geography: The Integration of Regions and Nations 365 (2008); World Bank, 2009 World Development Report: Reshaping Economic Geography 8 (2009) [hereinafter World Development Report]. On the urban resurgence, see Michael Storper & Michael Manville, Behaviour, Preferences and Cities: Urban Theory and Urban Resurgence, 43 Urb. Stud. 1247 (2006). On global cities, see generally Saskia Sassen, The Global City: New York, London, Tokyo (1991) [hereinafter Sassen, The Global City] (detailing the rise of spatially disparate yet economically integrated global cities in the later twentieth century); Michael E. Porter, Regions and the New Economics of Competition, *in* Global City-Regions: Trends, Theory, Policy 139, 145 (Allen J. Scott ed., 2001) [hereinafter Porter, Regions and the New Economics] (describing the phenomenon of geographic "clustering" of economic activity and its accompanying advantages).

[8] I have made this argument in Richard Schragger, City Power: Urban Governance in a Global Age chs. 5–6 (2016) [hereinafter Schragger, City Power].

[9] For an argument that interstate competition explains economic growth, see Weingast, The Economic Role of Political Institutions, supra note 3, at 1–5. On the relationship between growth and decentralization, see generally Lars P. Feld et al., Fiscal Federalism, Decentralization, and Economic Growth, *in* Public Economics and Public Choice 103 (Pio Baake & Rainald Borck eds., 2007) (exploring how competitive federalism might lead to economic growth).

[10] On "competitive federalism," see generally Michael S. Greve, The Upside-Down Constitution 87 (2012) (examining the development of a "fiercely competitive constitutional order").

[11] On the metropolitan revolution, see generally Alan Ehrenhalt, The Great Inversion and the Future of the American City (2012) (calling for a new perception of cities in light of recent metropolitan growth); Edward Glaeser, Triumph of the City: How Our Greatest Invention

Those cities and surrounding metropolitan regions are the central economic actors in their states and in the nation as a whole, yet they have no conceptual role in twentieth-century federalism, which assumes that local governments are convenient administrative arms of the state.[12] The increased economic prominence of cities has not been accompanied by increased regulatory power. State governments and the federal government have not ceded authority to cities and metropolitan regions. In fact, just the opposite—state governments in particular are increasingly defunding, defanging, and seeking to delegitimize cities.[13]

This mismatch between the prevailing sites of productive economic activity and the location of the regulation and redistribution of that economic output subverts one of federalism's stated aims. A common justification for a federal regime is that it closes the gap between responsibility and power by aligning decision-makers with the costs and benefits of their decisions. Political accountability is said to be enhanced by having locals make local decisions whenever it is feasible to do so.[14] Under our current state-based system, however, the most populous and productive jurisdictions in the country are heavily constrained in their ability to raise and spend their own resources or to regulate their own residents and businesses.

Centralization of functions could be defended if it were the case that interlocal jurisdictional competition was generating damaging races to the

Makes Us Richer, Smarter, Greener, Healthier, and Happier (2011) (examining what makes modern cities successful); Bruce Katz & Jennifer Bradley, The Metropolitan Revolution: How Cities and Metros Are Fixing Our Broken Politics and Fragile Economy (2013) (explaining how cities and metropolitan areas contribute to economic prosperity and social reform).

[12] See Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907). On why *Hunter* should not be the last word on cities' constitutional status, see Kathleen S. Morris, The Case for Local Constitutional Enforcement, 47 Harv. C.R.-C.L. L. Rev. 1 (2012).

[13] For a summary, see Richard C. Schragger, The Attack on American Cities, 96 Tex. L. Rev. 1163 (2018) [hereinafter Schragger, Attack on American Cities].

[14] For the standard view, see Gregory v. Ashcroft, 501 U.S. 452, 458 (1991). This constellation of ideas can also be described in terms of "subsidiarity." On the principle of subsidiarity, see Robert D. Cooter & Michael D. Gilbert, Constitutional Law and Economics, *in* Research Methods in Constitutional Law: A Handbook (Malcolm Langford & David S. Law eds.) (forthcoming). The terms "federalism," "subsidiarity," "decentralization," and "devolution" are importantly distinct. See Yishai Blank, Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance, 37 Fordham Urb. L.J. 509 (2010) (arguing against a state-based concept of federalism and in favor of a city-based concept of subsidiarity). As I deploy them in this Article, however, the justifications for U.S.-style, state-based federalism and the generic aims of a federal system often coincide with the justifications and aims that are advanced for these other concepts.

bottom.[15] But we are seeing the opposite. Cities are eager to raise revenue, engage in social welfare spending, and adopt environmental regulations, labor and employment rules, and anti-discrimination legislation, but state governments regularly override them.[16] Cities seeking to regulate or redistribute are regularly stymied by state legislatures pursuing deregulatory agendas. The predicted roles of centralized and decentralized governments have flipped. Central governments, including state governments, are racing to the bottom. Local governments are often racing to the top.[17]

This inversion arrives at a moment of increasing political polarization.[18] Federalism is supposed to play a role in dampening such polarization by providing citizens who lose at one level of government an opportunity to win at another or to exit a politically hostile jurisdiction for a more politically congenial one.[19] But U.S.-style, state-based federalism is mostly failing to ensure meaningful opportunities for local self-government. Critics have observed that state politics has become nationalized, suggesting that states are playing little role in providing an alternative to national politics.[20] And instead of experimenting with divergent policy approaches—as traditional accounts of federalism might

[15] The race-to-the-bottom problem is a standard worry with federal regimes. See, e.g., Alfred C. Aman, Jr., Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency, 73 Cornell L. Rev. 1101, 1194 (1988); Richard B. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L.J. 1196, 1212 (1977); see also United States v. Darby, 312 U.S. 100, 115 (1941) (describing the fear that interstate commerce could incentivize the substandard production of goods and result in competition "injurious to the commerce and to the states from and to which the commerce flows").

[16] See Schragger, Attack on American Cities, supra note 13, at 1165–66; see also infra Section II.A.

[17] Cf. Richard L. Revesz, The Race to the Bottom and Federal Environmental Regulation: A Response to Critics, 82 Minn. L. Rev. 535, 536 (1997) (arguing that national environmental regulation was not necessary to prevent races to the bottom).

[18] On political polarization, see Pew Research Center, Political Polarization in the American Public (June 12, 2014), http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/LJR3-ZMBZ].

[19] See Heather K. Gerken, Federalism as the New Nationalism: An Overview, 123 Yale L.J. 1889, 1898 (2014) [hereinafter Gerken, Federalism as the New Nationalism].

[20] See Daniel J. Hopkins, The Increasingly United States: How and Why American Political Behavior Nationalized 4–7 (2018); see also David Schleicher, Federalism and State Democracy, 95 Tex. L. Rev. 763, 765–67 (2017) [hereinafter Schleicher, Federalism and State Democracy] (describing how national partisanship has led to party-line voting at the local level).

predict—states are tending to converge on a uniform deregulatory agenda advanced by large-scale, cross-border corporate enterprises.[21]

This Article argues that a twenty-first-century political economy requires increased political autonomy at the sub-state level, in the cities and metropolitan regions that are economically ascendant. Part I challenges the twin ideas underlying our twentieth-century federalism—the assumption that capital is inevitably mobile and that cities cannot effectively engage in significant regulatory or redistributive tasks without inducing capital flight. It contrasts the "old" federalism with the "new"[22]—sketching an alternative federalism that does not assume the conventional wisdom about the appropriate division of labor between central and decentralized governments.

Part II observes the current-day mismatch between the location of economic activity in the United States and the site of its regulation. States are preempting city authority across a wide range of policy areas, mandating that cities provide services without also providing the funds to do so, and constricting cities' ability to access other sources of revenue for whatever purpose.[23] State power is being deployed to undermine jurisdictional diversity, to create a uniform deregulatory environment that favors cross-border corporate interests, and to limit cities' efforts to experiment with a variety of public policies. Federalism as currently practiced in the United States provides few of the benefits attributed to it. That is because it is operating on the wrong scale. Cities are more likely to advance federalism's stated aims. State restrictions on city power are undermining those same aims.

Part III considers the future of U.S.-style, state-based federalism. Recent legal scholarship on federalism has made two important contributions. First, scholars have recognized that states are not the exclusive instruments for advancing federalism's values. Other institutions, particularly local governments, also provide spaces for

[21] See Alexander Hertel-Fernandez, State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—and the Nation 64–66 (2019).

[22] Not to be confused with Richard Nixon's New Federalism. See Harry N. Scheiber, Redesigning the Architecture of Federalism—An American Tradition: Modern Devolution Policies in Perspective, 14 Yale L. & Pol'y Rev. (Symp. Issue) 227, 288 (1996).

[23] See infra Part II.

beneficial inter-governmental cooperation or conflict.[24] Second, scholars examining the actual politics of states have begun to question whether states are advancing federalism's oft-asserted benefits.[25] Commentators have become increasingly skeptical of the idealization of states in the rhetoric of judicial federalism—some have always been skeptical of federalism's central claims.[26]

A similar skepticism animates this Article, though not because devolutionary democracy is not possible or valuable, but rather because it has become distorted. The most salient political cleavage that has emerged in the twenty-first-century United States pits rural against urban, or more accurately, metropolitan against non-metropolitan voters.[27] This divide is driven in part by the new geography of productivity, specifically the concentration of wealth and population in metropolitan centers. Political anger is being directed toward the metropolis as wealth and population flow into already productive places and away from less productive ones.[28]

[24] See, e.g., Heather K. Gerken, Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4, 22 (2010); Richard C. Schragger, Cities as Constitutional Actors: The Case of Same-Sex Marriage, 21 J.L. & Pol. 147, 150–51 (2005).

[25] See, e.g., Schleicher, Federalism and State Democracy, supra note 20, at 767–68; Miriam Seifter, Further from the People? The Puzzle of State Administration, 93 N.Y.U. L. Rev. 107, 110–11 (2018).

[26] See, e.g., Frank B. Cross, The Folly of Federalism, 24 Cardozo L. Rev. 1 (2002); Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 UCLA L. Rev. 903, 907 (1994).

[27] For recent treatments of the subject, see Jonathan Rodden, Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide (2019); Katherine J. Cramer, The Politics of Resentment: Rural Consciousness in Wisconsin and the Rise of Scott Walker 53–54 (2016); see also Jose A. Delreal & Scott Clement, New Poll of Rural Americans Shows Deep Cultural Divide with Urban Centers, Denver Post (June 17, 2017, 5:51 PM), https://www.denverpost.com/2017/06/17/poll-rural-urban-america-culture/ [https://perma.cc/E3T6-WJX6] (highlighting "the growing political divisions between rural and urban Americans"). The rural/urban cleavage in the states has a long history, though revisionist historians have questioned the conventional wisdom that state legislatures, dominated by rural interests, were invariably hostile to cities. For a nuanced picture, see Jon C. Teaford, The Unheralded Triumph: City Government in America, 1870–1900 chs. 4–5 (1984); cf. Maureen E. Brady, The Damagings Clauses, 104 Va. L. Rev. 341, 370 (2018) (describing an urban/rural split over the use of eminent domain and railroad development at the turn of the twentieth century).

[28] See Michael Cox, The Rise of Populism and the Crisis of Globalisation: Brexit, Trump and Beyond, 28 Irish Stud. Int'l Aff. 9, 13–15 (2017) [hereinafter Cox, Rise of Populism]; Left in the Lurch: Globalisation Has Marginalised Many Regions in the Rich World, Economist (Oct. 21, 2017), https://www.economist.com/briefing/2017/10/21/globalisation-has-marginalised-many-regions-in-the-rich-world [https://perma.cc/B7K8-LZET].

State-based federalism, however, provides no political space for metropolitans and non-metropolitans to govern in their respective spheres. The rigidity of state jurisdictional lines and the rural bias in the U.S. Congress exacerbate the problem of political conflict instead of ameliorating it. If "[s]tate power . . . is a means to achieving a well-functioning national democracy,"[29] it is not working.

The Article concludes in Part IV with a prediction that the gap between state and city power will increase pressure for political restructuring. That restructuring may take the form of a revived home rule movement in the states or a more sustained attack on state gerrymandering.[30] Regardless, the future of federalism will be written by U.S. cities and their surrounding metropolitan areas, even as our current state-based federalism is increasingly hostile to both.

I. THE NEW METROPOLITAN POLITICAL ECONOMY

I begin by observing the disjuncture between state-based federalism and the increasing concentration of economic activity in cities and metropolitan areas. The urban resurgence of recent decades has coincided with a new appreciation for the location of economic development. Scholars and policymakers have become much more aware of the spatial determinants of economic growth, specifically the role that cities and urbanization more generally play in fostering innovation through the transmission of knowledge and other spillovers.[31]

Urbanization is a global phenomenon, of course. In the United States, population has been shifting into urban areas since the beginning of the twentieth century, when the great industrial cities witnessed population explosions that doubled and tripled city sizes in the span of a few

[29] Gerken, Federalism as the New Nationalism, supra note 19, at 1893 (emphasis omitted).

[30] That attack will have to take place in the states or via a constitutional amendment, as the Supreme Court recently decided that partisan gerrymandering is a non-justiciable political question. See Rucho v. Common Cause, 139 S. Ct. 2484, 2506–07 (2019).

[31] Jane Jacobs was an original proponent of a city-centered theory of national economic growth. See Jane Jacobs, Cities and the Wealth of Nations: Principles of Economic Life 42–44 (1984) [hereinafter Jacobs, Cities and the Wealth of Nations]; see also Mario Polèse, The Wealth and Poverty of Regions: Why Cities Matter 110 (2009) ("The more educated and skilled people a place attracts, the more productivity will rise."). Paul Krugman's Nobel Prize-winning work in economic geography is also a starting point. See, e.g., Paul Krugman, The Self-Organizing Economy 44–46 (1996) [hereinafter Krugman, Self-Organizing Economy]; see also World Development Report, supra note 7, at 8 ("As countries develop, people and economic activities become more concentrated.").

decades.[32] The turn of the twenty-first century has witnessed increasing urbanization and what could be called metropolitanization, especially along the coasts. The eastern corridor between Boston and Washington constitutes a massive metropolitan area of nearly fifty million people.[33] The population of the region spanning from Los Angeles to San Diego in California is approaching twenty million people.[34] The economic and urbanized region of Chicago and its environs arguably sprawls from Kenosha, Wisconsin, in the north, to Joliet, Illinois, in the south.[35] The Texas cities of Houston and Dallas and their regional areas constitute 53% of the state's population.[36] Denver and its massive metropolitan area constitute 63% of the state's population.[37] The Atlanta metropolitan statistical area also contributes 63% of the population of Georgia.[38]

Importantly, cities and their surrounding urban agglomerations generate the bulk of economic development in the United States. Consider that 52% of total U.S. gross domestic product ("GDP") is accounted for by twenty metropolitan areas.[39] The New York metropolitan area alone accounts for just under 10% of the *country's* total GDP.[40] Phoenix

[32] For a summary, see Alan Rabinowitz, Urban Economics and Land Use in America: The Transformation of Cities in the Twentieth Century (2004).

[33] U.S. Census Bureau, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018 [hereinafter Annual Estimates], https://www.census.gov/data/tables/time-series/-demo/popest/2010s-total-metro-and-micro-statistical-areas.html [https://perma.cc/JC53-NH-ZB].

[34] Id.

[35] Chicago is part of the Chicago-Joliet-Naperville, IL-IN-WI Metropolitan Statistical Area, which includes Kenosha to the north and Joliet to the south. See Office of Mgmt. & Budget, OMB Bull. No. 10-02, Update of Statistical Area Definitions and Guidance on Their Uses (2009), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/bulletins/2010/b10-02-.pdf [https://perma.cc/43PG-EWSV].

[36] See Annual Estimates, supra note 33.

[37] See id.

[38] See id.

[39] Jeff Desjardins, This Stunning 3D Map Shows U.S. Economic Contribution by City, Visual Capitalist (Nov. 5, 2015), http://www.visualcapitalist.com/this-stunning-3d-map-sho-ws-u-s-economic-contribution-by-city/ [https://perma.cc/N3ZJ-3736]; see also Jeff Des-jardins, Map: Economic Might by U.S. Metro Area, Visual Capitalist (Sept. 26, 2017), http://-www.visualcapitalist.com/map-economic-might-u-s-metro-area/ [https://perma.cc/QU2K-M-WND] (ranking metropolitan cities based on their estimated GDP); Jeff Desjardins, These 3 Maps Help to Visualize America's $18 Trillion Economy, Visual Capitalist (Oct. 12, 2016), http://www.visualcapitalist.com/3-maps-visualize-americas-18-trillion-economy/ [https://pe-rma.cc/7M6D-W2CC] (providing a visual depiction of economic output by geographic area).

[40] Global Insight, Inc., The Role of Metro Areas in the U.S. Economy app. 15, tbl. 3 (2006), http://legacy.usmayors.org/74thWinterMeeting/metroeconreport_January2006.pdf [https://-perma.cc/NCK4-FH3K].

generates 70% of Arizona's total economic output and 71% of the state's employment.[41] Cleveland's metropolitan economy is bigger than Ireland's.[42] 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.[43]

This is true globally as well. The top ten metropolitan regions in the world account for 2.6% of the global population but over 20% of global economic activity.[44] Six American metropolitan areas—New York City, Los Angeles, Chicago, Washington, D.C., Dallas, and Philadelphia—rank among the thirty largest economies in the world.[45] To talk about the U.S. economy is to talk mostly about urban-based development and urban-based trade flows.[46] When one speaks about the global economy, one is mostly speaking about inter- and intra-metropolitan trade.[47]

Cities are at the center of these global economic networks and have become increasingly dominant culturally and economically. After a period of decline, U.S. cities have seen their populations stabilize or increase and their real estate values rise. Not all U.S. cities have benefited from this trend; many smaller market cities experience ongoing fiscal distress.[48] Nevertheless, the global "urban resurgence" has resulted in gains across many U.S. cities.[49]

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[41] Id. at 6.

[42] William Thomas Bogart, The Economics of Cities and Suburbs 4–5 (1998).

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

[44] Richard Florida et al., Global Metropolis: The Role of Cities and Metropolitan Areas in the Global Economy 6 (Martin Prosperity Inst., Working Paper No. 2, 2009), https://-www.creativeclass.com/rfcgdb/articles/Global%20metropolis.pdf [https://perma.cc/8NGX-XS5K].

[45] New York's metropolitan-area economy is the tenth-largest economy in the world. The Los Angeles metropolitan-area economy is the eighteenth-largest. Global Insight, Inc., supra note 40, at app. 15, tbl. 3; see also Douglas I. Thompson, An Ill-Fitting Coat: Reforming US Political Boundaries for a Metropolitan Age, 81 J. Pol. 246, 247–48 (2019) (describing the United States as a "metropolitan country").

[46] See Jane Jacobs, The Economy of Cities 262 (1969) [hereinafter Jacobs, The Economy of Cities].

[47] See Bogart, supra note 42, at xiv; Jacobs, Cities and the Wealth of Nations, supra note 31, at 32; Paul Krugman, Geography and Trade 3 (1991).

[48] On local fiscal distress, see Michelle Wilde Anderson, The New Minimal Cities, 123 Yale L.J. 1118 (2014).

[49] For a discussion of the urban resurgence, see Michael Storper, Keys to the City: How Economics, Institutions, Social Interactions, and Politics Shape Development ch. 1 (2013) [hereinafter Storper, Keys to the City]. On cities' rising economic power, see Benjamin R. Barber, If Mayors Ruled the World: Dysfunctional Nations, Rising Cities ch. 1 (2013).

It is against this backdrop that we are due to rethink the assumed distribution of responsibilities between central and decentralized governments, and in particular, the relevance of state-based federalism. In an economy that is increasingly characterized by metropolitanism, federalism's twentieth-century structure is outdated. It is based on a set of premises that do not hold or at best hold only weakly.

A. Sorting vs. Agglomeration

Consider first a basic starting point for much of the conventional literature on twentieth-century federalism: the notion that business firms, workers, and families can and do sort themselves into the jurisdictions that are most congenial to their policy preferences. Conventional theory assumes that in a common market, capital and labor are highly mobile. Subnational governments therefore must do what they can to attract and retain those factors that will lead to a productive local economy.[50] This account implicitly assumes that subnational governments are somewhat similarly situated, that each competes on relatively equal terms, and that government officials can adopt policies that influence businesses' and residents' location decisions either negatively or positively.[51] Residents and businesses will "sort" into the jurisdiction that best fits their preferences.[52] As Charles Tiebout famously theorized, in a system with a substantial choice of subnational jurisdictions, residents and businesses

[50] See Oates, Fiscal Federalism, supra note 2, at 137–38; Barry R. Weingast, Second Generation Fiscal Federalism: The Implications of Fiscal Incentives, 65 J. Urb. Econ. 279, 281 (2009) [hereinafter Weingast, Second Generation Fiscal Federalism]; cf. Roderick M. Hills, Jr., Federalism and Public Choice, *in* Research Handbook on Public Choice and Public Law 207, 211 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (challenging the claim that "subnational political behavior . . . is constrained by citizen mobility"); John Joseph Wallis & Barry R. Weingast, Equilibrium Impotence: Why the States and Not the American National Government Financed Economic Development in the Antebellum Era (Nat'l Bureau of Econ. Research, Working Paper No. 11397, 2005) (discussing how state governments, not the national government, functioned as the chief promoters of development).

[51] For a model, see Wallace E. Oates & Robert M. Schwab, Economic Competition Among Jurisdictions: Efficiency Enhancing or Distortion Inducing?, 35 J. Pub. Econ. 333, 336 (1988).

[52] This is basically a restatement of the famous Tiebout hypothesis, which underlies many similar claims. See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416, 418 (1956) [hereinafter Tiebout, Pure Theory]; see also William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies 58 (2001) (summarizing the Tieboutian model); Oates, Fiscal Federalism, supra note 2, at 137–38 (relying on Tiebout's theory to identify potential drawbacks of decentralized taxes).

can operate as participants in a market for location.[53] They will sort themselves into different jurisdictions depending on the mix of tax and spending policies the jurisdictions adopt.[54]

This picture of salutary subnational, inter-jurisdictional competition, however, does not fit with what economists increasingly appreciate about economic development: that it is clustered in specific places and regions.[55] Economic activity is not evenly distributed across geographical space.[56] Instead, population growth and economic development tend to be path dependent[57]: productive activity and population flows follow existing productive activity and population. This means that even in markets with few jurisdictional barriers, the location of economic production will likely follow predetermined paths.[58] So too, government policies are not likely to either depress economic activity where it is already inclined to exist nor increase economic activity where it is not.[59]

Sorting can thus be contrasted with agglomeration. Agglomeration constitutes the set of forces that lead firms, residents, and workers to co-locate in physical proximity.[60] Economists have argued that economic growth in modern service and knowledge-based economies depends a great deal on proximity in space.[61] In an extractive or industrial economy,

[53] Tiebout, Pure Theory, supra note 52, at 418.
[54] Id. at 418–23.
[55] See Combes et al., supra note 7, at 12–18; Polèse, supra note 31, at 149; World Development Report, supra note 7, at 8.
[56] See Combes et al., supra note 7, at 12; Krugman, Self-Organizing Economy, supra note 31, at 76–77.
[57] See Krugman, Self-Organizing Economy, supra note 31, at 76–77.
[58] On path dependence, see Masahisa Fujita et al., The Spatial Economy: Cities, Regions, and International Trade 1–4 (1999) (describing urban economic landscapes as "the result not of inherent differences among locations but of some set of cumulative processes, necessarily involving some form of increasing returns, whereby geographic concentration can be self-reinforcing"); Masahisa Fujita & Paul Krugman, The New Economic Geography: Past, Present and the Future, 83 Papers Regional Sci. 139, 140–41 (2004).
[59] See Richard C. Schragger, Rethinking the Theory and Practice of Local Economic Development, 77 U. Chi. L. Rev. 311, 318–19 (2010).
[60] Randall W. Eberts & Daniel P. McMillen, Agglomeration Economies and Urban Public Infrastructure, *in* 3 Handbook of Regional and Urban Economies: Applied Urban Economics 1455, 1457, 1461–62 (Paul Cheshire & Edwin S. Mills eds., 1999); see also David Schleicher, The City as a Law and Economic Subject, 2010 U. Ill. L. Rev. 1507, 1509 [hereinafter Schleicher, The City as a Law and Economic Subject] (highlighting the development of agglomeration economics in recent decades).
[61] See, e.g., Michael E. Porter, Location, Competition, and Economic Development: Local Clusters in a Global Economy, 14 Econ. Dev. Q. 15, 21 (2000) [hereinafter Porter, Location, Competition, and Economic Development]; Porter, Regions and the New Economics, supra note 7, at 145.

the city grew up around transportation nodes, where labor, materials, and plants could co-locate. In a post-industrial economy, cities are places where specialized knowledge is transmitted easily within and across industries through face-to-face contact. Agglomeration effects explain the salience of cities and other industrial clusters 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.[62] Despite the twin revolutions in transportation and communications, co-location in space has become more important, not less. Firms and workers need to be in cities where they can benefit from intra- and cross-industry communication, deep labor pools, and other benefits of scale.[63]

The emergence of agglomeration as a central feature of economic growth argues for revisions to the standard account of federal systems. Under the standard model, in a market with few barriers to entry, firms, residents, and workers choose their location by "voting with their feet."[64]

Further, standard theories of federalism argue that the market in state and local governments encourages states and cities to invest in productive enterprises, in particular, by engaging in government spending that will attract profitable persons and firms and by avoiding spending that will repel those desirable persons and firms.[65] Subnational governments compete for investment and population and also provide unique policy bundles that might appeal to particular citizens and firms. Those citizens and firms exercise substantial choice in deciding where to locate.

Agglomeration economies operate differently.[66] Instead of emphasizing resident and business location choice, the agglomeration literature emphasizes the importance of proximity in space and locational

[62] See Porter, Regions and the New Economics, supra note 7, at 145. On the development of Silicon Valley, see AnnaLee Saxenian, Regional Advantage: Culture and Competition in Silicon Valley and Route 128 (1994); AnnaLee Saxenian, Inside-Out: Regional Networks and Industrial Adaptation in Silicon Valley and Route 128, 2 Cityscape 41, 42–45 (1996).

[63] On the benefits of deep labor pools and other features of agglomeration, see Schragger, City Power, supra note 8, at 21–25.

[64] Tiebout, Pure Theory, supra note 52, at 420. Tiebout did not use that phrase. See Fischel, supra note 52, at 73.

[65] See Weingast, Second Generation Fiscal Federalism, supra note 50, at 281 ("[I]nter-jurisdictional competition provides political officials with strong fiscal incentives to pursue policies that provide for a healthy local economy.").

[66] See Schleicher, The City as a Law and Economic Subject, supra note 60, at 1509–11; see also Schragger, City Power, supra note 8, at 20–29 (describing three different forms of agglomeration).

spillovers.[67] Firms and workers do not simply move around a neutral jurisdictional landscape, picking and choosing where to site productive enterprises. Like other network phenomena, their choice of location depends greatly on others' choices. Agglomeration effects suggest that firms and workers do not choose locations so much as locations choose them.[68]

We can draw a few conclusions from a revised account of locational decision-making. First, Tieboutian sorting is doing much less work than the standard accounts of competitive federalism have heretofore assumed. Critics of the Tiebout model have long argued that inter-jurisdictional mobility is idealized and often constrained, especially for the elderly and the poor.[69] The new emphasis on agglomeration also means that locational choice is constrained for groups that we think are the most highly mobile: business firms and skilled workers. These actors are simply not as "footloose" as is often assumed.

Second, to the extent there is competition for footloose capital, states are not particularly relevant. State-level jurisdictional sorting cannot explain the concentration of population and productivity into metropolitan regions. Indeed, interstate sorting seems beside the point. If firms and workers are making locational choices, they are making choices between different cities or metropolitan regions, not between different states.[70] Agglomeration effects do not operate at the scale of states, but

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[67] See Eberts & McMillen, supra note 60, at 1457; Porter, Location, Competition, and Economic Development, supra note 61, at 16–18; Porter, Regions and the New Economics, supra note 7, at 145.

[68] See Krugman, Self-Organizing Economy, supra note 31, at 33, 46, 49; Robert J. Sampson, Great American City: Chicago and the Enduring Neighborhood Effect 327 (2012).

[69] See Richard Schragger, Consuming Government, 101 Mich. L. Rev. 1824, 1826 (2003). On mobility generally, see Sampson, supra note 68, at 326–28 (discussing the effects of familiarity and social structure on the mobility of individuals between neighborhoods in Chicago); Keith Dowding & Richard Feiock, Intralocal Competition and Cooperation, *in* The Oxford Handbook of Urban Politics 29, 33–34 (Karen Mossberger et al. eds., 2012).

[70] On inter-regional sorting, see Nestor M. Davidson & Sheila R. Foster, The Mobility Case for Regionalism, 47 U.C. Davis L. Rev. 63, 119–20 (2013). On cities' role in the global economy, see Sassen, The Global City, supra note 7; Allen J. Scott, Technopolis: High-Technology Industry and Regional Development in Southern California (1993); 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); cf. Jeffrey Kentor, The Growth of Transnational Corporate Networks: 1962–1998, 11 J. World–Sys. Res. 263, 283 (2005) (arguing that due to the rise of transnational corporations, "[g]lobal dominance may no longer be within the domain of nation-states at all").

rather at the local or metropolitan scale. And metropolitan areas often do not respect state lines.

Third, to the extent there is state-based sorting of the Tieboutian kind, it might be detrimental to economic growth, not beneficial.[71] Federalism proponents celebrate the interstate and interlocal competition for development, arguing that it produces a more dynamic national economy.[72] But urban geographers have argued that sorting may in fact discourage economic growth by encouraging deconcentration or dispersal instead of agglomeration. Residents and businesses may seek to fulfill their preferences for jurisdiction-specific goods at the cost of overall regional productivity, undervaluing the spillover effects that are a feature of co-locating in space.[73] Consider the choice by a city dweller to move to the suburbs. The individual mover may gain better local government services at a lower tax cost but the regional economy will suffer decreased agglomeration benefits that occur when residents live in closer proximity to one another. In this way, subnational and subregional jurisdictional fragmentation undermines regional economic growth instead of enhancing it—the opposite of what is predicted by sorting's proponents.[74]

Again, states are the wrong scale. Economic geographers argue that local and regional developmental policies that seek to bring growth where it is not are unlikely to succeed. Declining rural towns cannot suddenly become tech hubs.[75] State officials, however, must be responsive to the state electorate, even if that means putting resources into underproductive areas.

State economic development policy is by definition directed toward dispersing economic growth, with each state pursuing its own industrial policy regardless of its spatial advantages or disadvantages. These

[71] See Schleicher, The City as a Law and Economic Subject, supra note 60, at 1512–13; World Development Report, supra note 7, at 20 ("The challenge for governments is to allow—even encourage—'unbalanced' economic growth, and yet ensure inclusive development. They can do this through economic integration—by bringing lagging and leading places closer in economic terms.").

[72] See, e.g., Weingast, Second Generation Fiscal Federalism, supra note 50, at 281.

[73] See Schleicher, The City as a Law and Economic Subject, supra note 60, at 1512–13; World Development Report, supra note 7, at 147, 167–68.

[74] It is notable that Tiebout himself never connected his theory of public goods to a theory of growth. He did discuss economic growth in other places. See Charles M. Tiebout, Exports and Regional Economic Growth, 64 J. Pol. Econ. 160, 161 (1956).

[75] See Eduardo Porter, The Hard Truths of Trying to 'Save' the Rural Economy, N.Y. Times (Dec. 14, 2018), https://www.nytimes.com/interactive/2018/12/14/opinion/rural-america-trump-decline.html [https://perma.cc/DET6-H3TG].

dispersal policies may be detrimental to overall growth. At best, state-based competition for productive enterprise leads to the dispersal of firms and residents, running counter to the economic tide of agglomeration. At worst, it wastes resources in a useless competition for capital.

B. Mobility vs. Immobility

That local agglomeration effects are so powerful in the new urban economy suggests another revision to the standard view. Conventional accounts of federalism assume that capital and labor are significantly mobile across borders.[76] According to these accounts, the assumed mobility of finance capital in particular requires subnational governments to adopt pro-capital policies.[77] The mobility assumption matters because it tells state and local governments that their policy decisions are constrained by the real threat of capital flight. That assumed threat induces subnational governments to engage in competitive races for mobile capital, adopting subsidies or deregulatory policies intended to attract desired capital and labor.

As already noted, theorists are increasingly questioning the mobility narrative. Much of the new economic geography understands economic development as occurring across systems in space.[78] While individuals and businesses experience themselves as mobile, they tend to act in accordance with system-wide trends. For example, economic regions grow and decline in predictable ways, and population flows seem to obey certain principles.[79] From a systems perspective, the individual economic actor has limited autonomy. Larger-scaled processes dictate individual locational choices. And subnational governments have limited capacity to influence those choices.

Mobility is less robust in more specific ways as well. Because industries increasingly depend on co-location, the range of options for any individual firm is limited. To be sure, lower transportation costs have

[76] See Kenneth A. Stahl, Mobility and Community in Urban Policy: An Essay on *Great American City* by Robert J. Sampson, 46 Urb. Law. 625, 625–27 (2014) (discussing competing views on the mobility of residents in cities).

[77] Increasing cross-national capital mobility means that national governments are also pushed to adopt pro-capital policies. See infra text accompanying note 210.

[78] See Krugman, Self-Organizing Economy, supra note 31, at 3–7.

[79] See id. at 3–6. Consider Zipf's law of city size, which observes that cities in a particular system exhibit a striking regularity: the population of a given city is inversely proportional to its rank. Xavier Gabaix, Zipf's Law for Cities: An Explanation, 114 Q.J. Econ. 739, 739–40 (1999).

made it less necessary to site production facilities near customers. But the demand for skilled labor in knowledge and other industries means that firms in those industries have to locate near their employees and potential employees. While certain kinds of production can easily be shifted to low-cost labor markets, a great deal of knowledge economy production has to remain tied to the desires of skilled employees, who tend to prefer to live in cities and particular metropolitan regions.[80]

Consider a global technology or financial services firm. Local agglomeration economies can assert a profound pull in certain economic sectors, especially those that depend substantially on the flow of information. Technology firms tend to locate in Silicon Valley or other equivalent, specialized economic regions. Finance firms tend to be located at the nodes of international finance and global capitalism—places like Tokyo, New York, or London.[81] Indeed, those firms are often located in particular neighborhoods in particular cities. These location "choices" make little sense against the backdrop of extremely low transportation and information costs unless the benefits of being near others—the benefits of agglomeration—are significant.[82]

Because of these benefits, capital is more place-dependent than the standard model assumes. "One of the paradoxes of the IT revolution," economic geographer Mario Polèse observes, is that firms and individuals still place high value on proximity to big cities.[83] "The more the world shrinks, the more *place* matters. In a completely flat world with no barriers to trade or interaction, what matters is access to the right places with the right people."[84]

In particular, service-based industries are relatively location bound. Hospitals, universities, hotels, nursing homes, and government offices tend to be tied to a particular place. But so are those industries that rely on the transfer of knowledge or that require skilled labor pools. Place-specific characteristics can strongly influence location decisions and thereafter hold particular firms, either because a specific location

[80] Cf. Schragger, City Power, supra note 8, at 170–72 (arguing that capital and labor are less mobile than generally thought).
[81] Sassen, The Global City, supra note 7, at 3–4; Knox, supra note 70, at 6–8.
[82] See Gerald A. Carlino et al., Urban Density and the Rate of Invention, 61 J. Urb. Econ. 389, 389–91 (2007); Eberts & McMillen, supra note 60, at 1461–63.
[83] Polèse, supra note 31, at 2–4.
[84] Id. at 209.

generates value for the firm, because labor is attracted to that place and the firm follows, or because the work and services are inherently local.[85]

Importantly, for our purposes, place dependence is highly local. It applies to particular cities, regions, and neighborhoods within particular cities. And, again, for our purposes, an important implication of place dependence is that it undermines the mobility assumption. The notion of inter-jurisdictional competition for capital and labor assumes that both are relatively mobile. As the mobility assumption is relaxed, the notion that jurisdictions compete for capital has to be revised.

Indeed, economists are quite skeptical that competitive races for development or general "pro-business" policies generate economic growth.[86] Competitive races are more likely to result in wasted effort, as development in the knowledge economy tends to flow into already-productive areas. Location subsidies, for example, often do not succeed in altering the location decisions of firms at all.[87] Yet, states and localities continue to offer them, despite significant evidence that they are a bad idea.[88]

[85] For further discussion, see Schragger, City Power, supra note 8, at 170–72; Joseph J. Persky et al., Export Orientation and the Limits to Local Sovereignty, 46 Urb. Stud. 519, 520–21 (2009) (arguing that as metropolitan economies have become more local in orientation, local governments have been able to exercise more regulatory leverage); Ted Rutland & Sean O'Hagan, The Growing Localness of the Canadian City, or, On the Continued (Ir)relevance of Economic Base Theory, 22 Loc. Econ. 163, 167 (2007); see also Ann Markusen & Greg Schrock, Consumption-Driven Urban Development, 30 Urb. Geography 344 (2009) (arguing that locally consumed services and goods can be a source of regional growth and stability).

[86] Bogart, supra note 42, at 238; Edward W. De Barbieri, Lawmakers as Jobs Buyers, 88 Fordham L. Rev. 15, 33–35 (2019); Peter D. Enrich, Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business, 110 Harv. L. Rev. 377, 397–401 (1996).

[87] See 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, 97–99 (2001); Yoonsoo Lee, Geographic Redistribution of US Manufacturing and the Role of State Development Policy, 64 J. Urb. Econ. 436, 436–37, 445 (2008).

[88] For sources, see Enrich, supra note 86, at 398 & nn.108–10; see also Bruce D. McDonald, III et al., You Don't Always Get What You Want: The Effect of Financial Incentives on State Fiscal Health 2, 4, 15, 20–21 (Apr. 23, 2019) (unpublished manuscript) (on file with author) (finding that financial incentives have a negative relationship to state fiscal health). A prominent recent example involved a highly public competition orchestrated by Amazon to locate a second headquarters. Amazon essentially solicited bids from state and local governments. Cities and states offered billions of dollars in subsidies. But despite the subsidy race and the efforts of cities and regions struggling for investment, Amazon ultimately chose to locate in two already-productive metropolitan areas: New York City and Washington, D.C. See Karen Weise & J. David Goodman, Amazon Plans to Split HQ2 Between Long Island City, N.Y., and Arlington, Va., N.Y. Times (Nov. 5, 2018), https://www.nytimes.com/-

Pro-business deregulatory policies or efforts to attract college-educated and other skilled workers are also unlikely to succeed. Stadium subsidies, arts and entertainment districts, municipal wi-fi, and similar efforts are said to make the city attractive to a certain subset of workers and residents. This amenity chasing[89] is unlikely to bear fruit when all localities are engaged in it, and certainly will not lead low productivity places to suddenly become high productivity places. What we know about the urban resurgence of the last two decades is that it happened almost everywhere, regardless of the policies particular cities undertook to make themselves more attractive.[90] Nevertheless, states and localities continue to act as if providing certain goods will improve their relative competitive position in the race for mobile firms and residents. There is no evidence that this is true, except for "just-so" stories of city development that attribute increased prosperity to some local policy intervention that came before.[91]

Twentieth-century federalism assumes that the jurisdictional winners in the competition to attract and retain mobile factors have done something right and that the losers have done something wrong. While policymakers can certainly adopt foolhardy policies, it is not at all clear

2018/11/05/technology/amazon-second-headquarters-split.html [https://perma.cc/GHS5-8K-9V]. Political opposition in New York City, however, resulted in Amazon pulling out of that location. See J. David Goodman, Amazon Pulls Out of Planned New York City Headquarters, N.Y. Times (Feb. 14, 2019) [hereinafter Goodman, Amazon Pulls Out of Planned New York City Headquarters], https://www.nytimes.com/2019/02/14/nyregion/amazon-hq2-queens–.html [https://perma.cc/5ARQ-C5XP].

[89] See Richard Deitz & Jaison R. Abel, Have Amenities Become Relatively More Important than Firm Productivity Advantages in Metropolitan Areas?, 2008 Fed. Res. Bank of N.Y Staff Rep. 344, at 17–18, https://www.newyorkfed.org/medialibrary/media/research/staff_reports/-sr344.pdf [https://perma.cc/QX45-VEBH]; Storper & Manville, supra note 7, at 1252.

[90] See Storper & Manville, supra note 7, at 1253.

[91] Despite the asserted certainties about what causes economic growth or decline in particular places, our powers of prediction are woefully inadequate. Detroit's fall was not foreseeable in 1954, when its population peaked. New York's meteoric rise was not predicted in 1972 when it went into the equivalent of receivership. Economic growth appears to occur across systems of cities, with some populations rising and some falling. Causation, however, is elusive. Schragger, City Power, supra note 8, at 4. See generally Kenneth W. Dam, The Law-Growth Nexus: The Rule of Law and Economic Development 38–39, 56 (2006) (expressing skepticism about causal stories); Storper, Keys to the City, supra note 49, at 1 (noting that few in 1960 would have predicted the rapid decline of Detroit or the rapid rise of Houston).

that those policies have any effect on spatial economic cycles.[92] Common explanations for the rise and fall of economic regions tend to emphasize technological developments over which governments exercise little control, such as the rise of the automobile, the discovery of gold in the West, or the development of air conditioning in the South.[93] One can be skeptical whether these are good explanations for economic growth.[94] What is important is that they have nothing to do with a jurisdiction's tax and spending policies.

Importantly, if capital and labor are less mobile than conventional accounts assume, the risk of capital flight is also less. This means that cities—and again, cities are the relevant scale for these effects—have more room to engage in redistributive policies without fear that firms, skilled workers, and other taxpayers will exit the jurisdiction. The conventional view has been that territorially bounded local governments cannot engage in significant redistribution. Mobile factors will flee efforts to tax them. But if the mobility assumption is incorrect, then this view may be incorrect too.

C. Exit vs. Voice

The increasing importance of place in the modern urban economy suggests a third revision to the standard model. In a federal system in which subnational governments compete for mobile capital and residents, the choice to stay or leave is the dominant means by which firms and residents communicate their preferences about government policy. Tiebout's model is an exit model: mobile consumer-voters choose their preferred bundle of government policies through their location choices.[95] This is what it means to "vote with your feet."

The standard model often attributes much if not most local or state political behavior to exit dynamics, assuming that the threat of capital flight is the dominant motivation for local and state policy. Fans of

[92] Cf. Harold Wolman, What Cities Do: How Much Does Urban Policy Matter?, *in* The Oxford Handbook of Urban Politics, supra note 69, at 415, 436 (concluding that "we know very little" about the impact of urban policy on economic growth).

[93] See, e.g., Douglas W. Rae, City: Urbanism and Its End 11 (2003) (attributing the rise and fall of the industrial city to technological innovations and immigration).

[94] Jane Jacobs certainly was. See Jacobs, The Economy of Cities, supra note 46, at 140–42.

[95] Tiebout, Pure Theory, supra note 52, at 418.

federalism cheer the "disciplining" function of exit.[96] They argue that the availability of multiple competing jurisdictions prevents subnational governments from exploiting the local citizenry.[97] By the same token, they bemoan any reduction or limitation on exit on the theory that exit is a central check on the exercise of arbitrary or capricious power. This aspect of twentieth-century federalism seems especially attractive at the municipal level, where there seems to be an outsized fear of capricious city halls.[98]

The emphasis on exit (or the loss of exit), however, obscures the conventional mechanism for exercising political power: voice. In Albert Hirschman's schema, voice is the usual way that citizens express their policy preferences—whether by voting, lobbying, or organizing.[99] Indeed, voice is preferable. Exit is a blunt tool for communicating preferences, and a difficult one on which to base government decision-making. Exit privileges mobile firms and residents, leading to skewed policies directed almost exclusively to attracting and retaining "desirable" residents and businesses. Each jurisdiction seeks to influence the location choices of the same cohort of mobile residents and firms. And instead of conceiving of citizens as deliberative, self-governing actors—as members of a polity—they are conceived of as "consumer-voters" seeking the best deal in the market for government services.[100]

Moreover, exit's discipline can lead to inefficient government investments. The interlocal competition to attract desirable firms can induce cities to overinvest in infrastructure and other amenities intended to attract mobile firms and residents.[101] Or the threat of exit can induce cities to underinvest because they have no guarantee that any firm-

[96] On exit discipline, see Weingast, Second Generation Fiscal Federalism, supra note 50, at 282 ("Market-preserving federalism limits the exercise of corruption, predation, and rent-seeking by all levels of government."); see also Hanoch Dagan & Michael A. Heller, The Liberal Commons, 110 Yale L.J. 549, 568 (2001) ("The threat of exit is often one of the prominent mechanisms for disciplining social organizations . . . .").

[97] See, e.g., Weingast, Second Generation Fiscal Federalism, supra note 50, at 282.

[98] See, e.g., Richard C. Schragger, Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System, 115 Yale L.J. 2542 (2006).

[99] Albert O. Hirschman, Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States 37–43 (1970) ("[I]n some situations, exit will therefore be a reaction of *last resort* after voice has failed.").

[100] Tiebout, Pure Theory, supra note 52, at 418; see Ilya Somin, Foot Voting, Decentralization, and Development, 102 Minn. L. Rev. 1649, 1658 (2018).

[101] See Daniel Treisman, The Architecture of Government: Rethinking Political Decentralization 93 (2007) (explaining that some regions "cannot hope to win the contest for mobile capital").

specific investment will pay off in the long term. Industries, firms, and residents can always leave, so why sink money into an initial effort to bring them in?[102]

Exit dynamics are far from salutary. That does not mean that voice is free from its own pathologies. Despite having made significant location-specific immobile investments in the upper Midwest, the steel and automobile industries continued to exercise arguably inordinate political influence over the region.[103] The lobbying power of particular industries—voice—explains their dominance.

The important point is that the conventional emphasis on exit has obscured the exercise of voice in these places. For a generation of theorists, local politics has been considered uninteresting because theory says that it looks about the same everywhere. The conventional view has been that local governments and regions are limited to pursuing developmental policies intended to ward off capital flight.[104] Subnational governments' regulatory capacity is limited because they have no choice but to operate in the shadow of the threat of exit.

Geographic concentration upends these assumptions about the power of exit and shifts our attention back to the influence of voice. That does not mean that powerful interest groups will not seek and obtain certain policy results. It does mean that those results are not predetermined by the presumed necessity for local governments to chase and retain mobile capital.

D. Convergence vs. Divergence

The new approach to mobility and exit suggests a further revision to the range of possible policy outcomes in subnational governments, and particularly in cities. In a sorting model that assumes capital mobility and a strong exit constraint, local policymaking across jurisdictions is likely to converge. Tiebout's model posited a diversity of citizen preferences resulting in a diversity of local jurisdictional revenue and expenditure

[102] See Hongbin Cai & Daniel Treisman, Does Competition for Capital Discipline Governments? Decentralization, Globalization, and Public Policy, 95 Am. Econ. Rev. 817, 818 (2005).

[103] Indeed, the argument is that state legislators were captured by large-scale immobile industries, especially in the case of Michigan. See William K. Tabb, If Detroit Is Dead, Some Things Need to Be Said at the Funeral, 37 J. Urb. Aff. 1, 6 (2015).

[104] See Peterson, City Limits, supra note 2, at 69, 71, 77.

packages.[105] But Tiebout was not concerned with the state or local tax base. He posited consumer-voters unconstrained by employment opportunities and state and local governments unconstrained by taxing limitations except insofar as those were a function of citizen preferences.[106]

But, of course, subnational governments need a tax base. Thus, we might predict that every state and city will converge on similar business-friendly policies. And that is often the case. Bandwagon policies are common. Every state and locality seems to offer location subsidies for relocating firms, amenities designed to attract educated workers, and a business-friendly regulatory environment.[107] The recent subsidy competition for the new Amazon headquarters is only the most high-profile example.[108]

As capital mobility decreases and exit becomes less important, however, divergence in subnational policies becomes increasingly possible. Where capital flight is not the dominant mechanism for disciplining subnational governments, politics becomes more important. Local electorates may adopt policies that are not predicted under the conventional account. Again, this applies more readily to cities than to states.

Indeed, cities are increasingly seeking to address economic inequality through regulatory and redistributive activities that would be rejected under conventional twentieth-century federalism. In other words, cities appear to be more inclined and more capable of engaging in social welfare

[105] Tiebout, Pure Theory, supra note 52, at 418.

[106] Id. at 418–20. For an addendum to Tiebout that does include more realistic assumptions about local fiscal policy, see Fischel, supra note 52, at ch. 4.

[107] See Lee, supra note 87, at 436, 443–44; Patrick McGeehan, After Reversal of Fortunes, City Takes a New Look at Wall Street, N.Y. Times (Feb. 22, 2009), https://www.nytimes.com/2009/02/23/nyregion/23wall.html [https://perma.cc/VFF4-P8SK]; David Sirota, The Myth of the Progressive City, Salon (Nov. 7, 2011, 11:00 PM), http://www.salon.com/2011/11/07/the_myth_of_the_progressive_city/ [https://perma.cc/82HD-TQEV]; Rob Wile, Miami Lost Amazon's HQ2. Still, the Area Looks More Attractive than Ever, Experts Say, Miami Herald (Jan. 30, 2019, 7:00 AM), https://www.miamiherald.com/news/business/article225229445.html.

[108] On the competition for Amazon, see Nick Wingfield, Amazon Chooses 20 Finalists for Second Headquarters, N.Y. Times (Jan. 18, 2018), https://www.nytimes.com/2018/01/18/technology/amazon-finalists-headquarters.html [https://perma.cc/G8ZL-CZJW]. For other initiatives, see Nat'l League of Cities, Cities Answer NLC's Call to Action to Support Entrepreneurship, STEM Education and Innovation in Communities Across America (Nov. 9, 2018), https://www.nlc.org/resource/cities-answer-nlcs-call-to-action-to-support-entrepreneurship-stem-education-and [https://perma.cc/82UQ-AMBP].

redistribution than the standard model has allowed.[109] For example, American cities have been at the forefront of adopting minimum wage requirements well above state and federal floors.[110] On the conventional analysis, those wage hikes should lead to rapid disinvestment from high-cost cities. We have not seen that kind of disinvestment, in part because of the locational leverage that certain cities and metropolitan areas can exercise.[111]

Minimum wage laws are only one example. Observers have noted a range of local redistributive policies, contrary to conventional accounts, accompanied by an emerging progressive politics that emphasizes residents' social welfare demands.[112] That politics has resulted in a spate of redistributive policy adoptions across diverse cities as citizens increasingly agitate for labor and employment, anti-discrimination, healthcare, and housing protections at the local level.[113] The players in this new politics include labor and anti-poverty groups and progressive mayors and city councils.

To be sure, these new regulatory policies coexist with conventional pro-growth, pro-business, developmental policies. What is notable is the movement away from an almost exclusive developmental regime to one that can be responsive to social welfarist concerns. Scholars have noted this shift; they are finding that, when permitted to do so, cities will resist developmental demands and pursue divergent policies, including social welfarist ones, across a range of issues.[114] As Chris Tausanovitch and

[109] Michael Craw, Deciding to Provide: Local Decisions on Providing Social Welfare, 54 Am. J. Pol. Sci. 906, 918 (2010) [hereinafter Craw, Deciding to Provide].

[110] See David Reynolds, Living Wage Campaigns as Social Movements: Experiences from Nine Cities, 26 Lab. Stud. J. 31, 31 (2001); Heidi Swarts & Ion Bogdan Vasi, Which U.S. Cities Adopt Living Wage Ordinances? Predictors of Adoption of a New Labor Tactic, 1994–2006, 47 Urb. Aff. Rev. 743, 743–44, 748–49 (2011).

[111] See Schragger, City Power, supra note 8, at 144–47; T. William Lester, Labor Standards and Local Economic Development: Do Living Wage Provisions Harm Economic Growth?, 32 J. Plan. Educ. & Res. 331, 331, 342 (2012); Mark D. Brenner, The Economic Impact of Living Wage Ordinances 4–5 (Pol. Econ. Res. Inst., Working Paper No. 80, 2004), https://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_51-100/WP80.pdf [https://perma.cc/KN9H-TD9U].

[112] See Gillette, Local Redistribution, supra note 2, at 80–81; Craw, Deciding to Provide, supra note 109, at 906–07; Michael Craw, Overcoming City Limits: Vertical and Horizontal Models of Local Redistributive Policy Making, 87 Soc. Sci. Q. 361 (2006); Chris Tausanovitch & Christopher Warshaw, Representation in Municipal Government, 108 Am. Pol. Sci. Rev. 605, 605–06, 612 (2014).

[113] For a description, see Schragger, City Power, supra note 8, at ch. 5.

[114] Craw, Deciding to Provide, supra note 109, at 918.

Christopher Warshaw have argued, "In contrast to previous work that emphasizes the constraints on city elected officials, we find that city governments are responsive to the views of their citizens across a wide range of policy areas."[115]

This expanded policy space applies with special force at the city level. That is because economic growth in these places does not depend in the main on capital-friendly government policies, but rather on the agglomeration advantages these places provide.[116] Firms will choose highly regulated and expensive locations as long as those locations provide productivity advantages. Government incentives or regulatory forbearance do not seem to be the main drivers of productivity growth in cities—the cities themselves provide the value. If that is so, those cities will be able to contemplate a wider range of policy options. States, by contrast, do not enjoy agglomeration advantages as states, so we would predict that state-level officials will continue to converge on similar developmental agendas. In this way, state-based federalism tends to result in convergent state policies, a problem if one of the asserted benefits of a federal system is experimentation and innovation.

E. Economic Limits vs. Political Limits

Finally, and consistent with the real possibility of policy divergence, the new urban economics suggests a revised account of local politics. The old federalism assumed that the primary constraint on subnational policymaking was economic. In a world of mobile capital, the attract-and-retain strategy seemed economically inevitable. Subnational governments, whether states or cities, had no choice but to compete with other jurisdictions for capital inflows and to restrain capital outflows.

Indeed, since Paul Peterson's work in the 1980s, the standard model of federalism did not merely assert that social welfare redistribution will have negative effects on local economic growth, but also that local politics will generally not allow it—that local politics is invariably dominated by the forces of development.[117] On this account, local politics has a narrow scope because local elected officials' policy options are by necessity limited by the threat of capital flight. And because local

[115] Tausanovitch & Warshaw, supra note 112, at 605.
[116] See supra Section I.A.
[117] Peterson, City Limits, supra note 2, at 22.

governments are so reliant on private-side investment, their politics will be dominated by business and other growth-pursuing coalitions.

At the municipal level, this conventional view is best captured by Harvey Molotch's famous account of the "city as a growth machine."[118] The growth machine thesis holds that "[c]oalitions of land-based elites, tied to the economic possibilities of places, drive urban politics in their quest to expand the local economy and accumulate wealth."[119] Structural reasons explain the dominance of business interests; cities are relatively weak institutional actors in relation to mobile firms and finance capital. City officials will thus "naturally gravitate toward an alliance with businessmen, particularly land interests, and such an alliance will naturally be devoted to creating institutional arrangements that will facilitate investment in the city."[120]

No doubt city politics often exhibits the characteristics of the growth machine. But the assumed "naturalness" of such a regime requires revision, for two reasons. The first has already been stated: cities are not constrained by some economic imperative to engage in developmental spending only. Indeed, in a world of agglomeration, such spending is unlikely to achieve its stated goals. The conventional assumptions of state-based federalism—that central governments redistribute, that state and local governments are engaged in a salutary developmental competition, and that central government regulation is necessary to prevent local governments from racing to the bottom—require revision.[121]

Second, cities are in fact engaging in a different kind of politics. Thus, as already observed, we see cities engaged in labor-friendly redistribution and capital regulation, often to a degree surprising to theorists who have assumed that cities would or could not do so.

To be sure, developmental politics is still dominant in many cities. So too, the federal government continues to perform the bulk of redistributive

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

[119] Andrew E.G. Jonas & David Wilson, The City as a Growth Machine: Critical Reflections Two Decades Later, *in* The Urban Growth Machine: Critical Perspectives, Two Decades Later 3, 3 (Andrew E.G. Jonas & David Wilson eds., 1999).

[120] Stephen L. Elkin, City and Regime in the American Republic 42 (1987).

[121] Consider a recent analysis of fiscal federalism in Switzerland in which the authors conclude that "[l]ocal governments . . . play a significant role when ensuring an equitable income distribution" and that "the traditional theory of federalism that redistribution is the sole responsibility of the central government ha[s] to be questioned." Lars P. Feld et al., Fiscal Federalism and Income Inequality: An Empirical Analysis for Switzerland 48 (CESifo, Working Paper No. 7407, 2018).

spending. Nevertheless, the political-economic changes wrought by a post-industrial knowledge economy that is increasingly urban- and metropolitan-oriented require revisions to conventional theories of fiscal federalism. The spatial concentration of economic activity and the effects of clustering have important implications for cities' actual and potential capacities.

This shift in the location of redistributive politics is notable and augurs a conceptual shift. The conventional view has been that cities are "limited"[122] by economic forces, and that central governments need to regulate cross-border activities. In the new urban economy, however, those economic forces are less determinative, thus inviting cities to adopt a wider range of public policies. Agglomeration economies are more susceptible to policy because firms are less mobile. Local policymaking is not dominated by voters sorting in Tiebout fashion. The normal democratic processes reassert themselves. For this reason, local policies, which would have previously converged on a conventional business-friendly, anti-redistributive program, can diverge. Whether they do so is not a question of economics but rather of politics.

II. STATE BARRIERS TO A NEW FEDERALISM

This Part turns to that politics. In a functioning federal system, one would expect that the exercise of local power would follow from local competence and that decision-makers would be aligned with the costs and benefits of their decisions. Urban economic and population growth should be accompanied by increased metropolitan responsibility.

U.S.-style, state-based federalism, however, has not yet accommodated the new metropolitan economics. The urban resurgence, the growth of metropolitan areas, and the economic concentration caused by the shift from industrial to knowledge-based production has not resulted in more local power. Cities' increased population and productivity has not been accompanied by increased authority and responsibility.[123] Instead, the

[122] Peterson, City Limits, supra note 2, at 30.

[123] See Alan Ehrenhalt, The Great Inversion and the Future of the American City 9–14 (2012) (describing the increasing preference for urban living among the newest cohort of young adults); Andy Beckett, From Trump to Brexit, Power Has Leaked from Cities to the Countryside, The Guardian (Dec. 12, 2016, 2:07 PM), https://www.theguardian.com/commentisfree/2016/dec/12/trump-brexit-cities-countryside-rural-voters [https://perma.cc/S2VA-TSJ5] (describing cities' declining power as compared to rural areas in the United States and European Union).

concentration of economic productivity has generated significant intergovernmental conflict, both between cities and the federal government and between cities and their states.[124]

This Part focuses on the city-state relationship, which the legal literature on federalism often overlooks. In assessing the current state of U.S. federalism, however, the conflicts between states and cities are more relevant than those between the federal government and the states. Because states exercise plenary power over their political subdivisions, states are most implicated by exercises of city power. More importantly, evaluating states' claim to special solicitude as instruments of devolved or decentralized government requires asking whether states are actually doing the work of federalism.

The answer is: they aren't, at least not very well.[125] Proponents of state-based federalism have long warned of the federal Leviathan and urged its constitutional containment.[126] But advocates of robust state autonomy have not appreciated how states have become complicit in a centralizing project. Instead of unshackling the cities, states are resisting their exercise of power. This resistance has in turn widened the gap between the prevailing sites of productive economic activity and the location of its

[124] See, e.g., N.C. Gen. Stat. § 143-422.11 (2016) (repealed 2017) (prohibiting local North Carolina municipalities from passing their own anti-discrimination ordinances); City of El Cenizo v. Texas, 264 F. Supp. 3d 744, 760–61, 769–70 (W.D. Tex. 2017) (highlighting the cities' contentions that SB 4 is preempted because it "generally upsets the careful balance . . . struck between encouraging local assistance and preserving local discretion," invades "the federal government's exclusive control of immigration," hinders the creation of uniform training and enforcement policies, and conflicts with federal law).

[125] See Thompson, supra note 45, at 248–52 (highlighting the problems of a system in which "territorial representation is formally dominated by the states").

[126] See, e.g., Ernest A. Young, Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror, 69 Brook. L. Rev. 1277, 1288–91, 1295–1301 (2004); Akhil Reed Amar, A State's Right, a Government's Wrong, Wash. Post (Mar. 19, 2000), https://-www.washingtonpost.com/archive/opinions/2000/03/19/a-states-right-a-governments-wron-g/7686b80e-22d6-4489-adeb-8298ec797ced/?noredirect=on&utm_term=.1202f224319f [ht-tps://perma.cc/F7SM-UJSA] ("States . . . must be free to speak out [against the federal government]. This vital point was established early in American history, when the Virginia and Kentucky legislatures famously spoke out in 1798 against federal policies penalizing France."); see also Geoffrey Brennan & James M. Buchanan, The Power to Tax: Analytical Foundations of a Fiscal Constitution 175–76 (1980) (explicitly referring to the federal government as "Leviathan" and suggesting that individuals will desire to constitutionally restrict its taxing power); Jessica Bulman-Pozen, Federalism All the Way Up: State Standing and "The New Process Federalism," 105 Calif. L. Rev. 1739, 1748 (2017) ("[T]he states' most important role going forward will be to bring challenges from within federal schemes instead of insisting on governing separate and apart.").

regulation and redistribution. The gap between metropolitan residents' political preferences and state policy is growing, as is the political rift between urban and rural that is characteristic of early twenty-first-century U.S. political polarization.[127]

At the very moment that cities are again economically ascendant, states are asserting their institutional primacy.[128] In this Part, I discuss three phenomena. First, states are aggressively preempting cities' policy efforts across a wide swath of areas—mostly in a deregulatory direction. Second, states are restricting local revenue-raising capacity, imposing a general anti-tax and anti-spend agenda on even those cities that want to tax themselves. And third, states are dumping expenditure responsibilities for state programs onto municipal governments, shifting funding requirements onto cities without added decision-making authority. Combined, these exercises of state authority create a distorted vertical division of labor, in which authority is misaligned with effects and responsibility does not track competence.

A. Preemption

Consider first the epidemic of state law preemption. As an increasing number of commentators have noticed, state legislatures across the country are aggressively overriding whole swaths of local regulation, to such an extent that they threaten to constrict municipal authority to a barely discernible sphere.[129] As a formal constitutional matter, states exercise plenary power over their political subdivisions.[130] As a political

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[127] This divide seems to be manifest in other western nations as well. Rick Noack, The Urban-Rural Divide that Bolstered Trump Isn't Just an American Thing; It's Prevalent in Europe, Too, Wash. Post (Nov. 27, 2016, 8:00 AM), https://www.washingtonpost.com/news/-worldviews/wp/2016/11/27/the-urban-rural-divide-isnt-just-evident-in-american-politics-its-prevalent-in-europe-too/?noredirect=on&utm_term=.8a98f800cf69 [https://perma.cc/Z27W-652X]. On state-city conflict, see, e.g., Katherine Levine Einstein & David M. Glick, Cities in American Federalism: Evidence on State-Local Government Conflict from a Survey of Mayors, 47 Publius 599 (2017). On the structural reasons for urban-rural conflict, see generally Rodden, supra note 27, at 3 (arguing that the cause of the underrepresentation of Democrats is concentration in cities).

[128] See Joseph F. Zimmerman, State-Local Governmental Interactions 9 (2012).

[129] Richard Briffault, The Challenge of the New Preemption, 70 Stan. L. Rev. 1995, 1997 (2018) [hereinafter Briffault, New Preemption]; Erin Adele Scharff, Hyper Preemption: A Reordering of the State-Local Relationship?, 106 Geo. L.J. 1469, 1495 (2018); Schragger, Attack on American Cities, supra note 13, at 1164; Kenneth A. Stahl, Preemption, Federalism, and Local Democracy, 44 Fordham Urb. L.J. 133, 134 (2017).

[130] Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907).

matter, the states' exercise of that power has been increasingly unrestrained. This preemption explosion has a number of features.

First, while state law preemption can either be regulatory or deregulatory, much of the new preemption is deregulatory.[131] This new preemption is often the result of concerted industry-specific efforts paired with a national pro-corporate, deregulatory political agenda. In particular, the American Legislative Exchange Council ("ALEC"), a corporate, pro-business interest group, has been very effective at targeting state legislators, providing model language for preemptive state laws, and lobbying on behalf of its pro-business, low-tax, deregulatory (and in many cases, libertarian) interests.[132] ALEC's model statutory language shows up across the country.[133] These legislative efforts represent a national campaign being waged statehouse-by-statehouse.

The most straightforward examples of the new state law preemption involve municipal efforts to regulate particular industries. Municipal soda taxes are a good example. Consider recent events in California. In a public health effort to reduce soda consumption, local governments in California had begun to adopt sugary beverage taxes. After the beverage industry threatened to push a ballot measure that would have required a supermajority vote for *any* local tax increase, the California legislature adopted a preemptive soda tax ban. Wary of the effects of the threatened "super-preemption" law, the state legislature and the governor reluctantly agreed to a twelve-year moratorium on local soda taxes.[134]

Other examples include state overrides of municipal plastic bag bans, Styrofoam restrictions, fracking limitations, pesticide use, local regulation of transportation network companies, and local provision of

[131] Briffault, New Preemption, supra note 129, at 2014.
[132] See Hertel-Fernandez, supra note 21, at 65, 72, 81–82.
[133] See, e.g., State Pesticide Preemption Act (Am. Legislative Exch. Council (amended 2013)), https://www.alec.org/model-policy/state-pesticide-preemption-act/ [https://perma.cc-/PFT7-T347]; The Next Generation Charter Schools Act (Am. Legislative Exch. Council 2016), https://www.alec.org/model-policy/amendments-and-addendum-the-next-generation-charter-schools-act/ [https://perma.cc/W7UD-FSAY]; see also Rob O'Dell & Nick Penzenstadler, Copy, Paste, Legislate: You Elected Them to Write New Laws. They're Letting Corporations Do It Instead, USA Today (June 19, 2019, 6:56 PM), https://www.usa-today.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002/ [https://perma.-cc/WY9P-AS4L].
[134] Anahad O'Connor & Margot Sanger-Katz, California, of All Places, Has Banned Soda Taxes. How a New Industry Strategy Is Succeeding, N.Y. Times (June 27, 2018), https://-www.nytimes.com/2018/06/27/upshot/california-banning-soda-taxes-a-new-industry-strat-egy-is-stunning-some-lawmakers.html [https://perma.cc/J5QQ-N62V].

municipal broadband.[135] Uber has been a frequent successful lobbyist in state capitals, as have the oil and gas industries, the beverage industry, telecommunications providers, and others.[136] The firearms and tobacco industries have also been highly successful in limiting cities' authority to regulate.[137]

These industry-specific preemptive laws have been accompanied by much broader constraints on local control, especially as pertains to the municipal regulation of the employment relationship. Municipal minimum wage laws have been a particular target and have been preempted in states across the country.[138] States are also preempting

[135] See generally Fla. Stat. § 500.90 (2018) (preempting local regulation of polystyrene products); Tenn. Code Ann. § 65-15-302 (2015 & Supp. 2018) (effective May 20, 2015) (prohibiting local regulation of "transportation network companies"); State ex rel. Morrison v. Beck Energy Corp., 143 Ohio St. 3d 271, 2015-Ohio-485, 37 N.E.3d 128, at ¶ 34 (upholding R.C. Chapter 1509, which prohibits local regulation of fracking); James Baller, State Restrictions on Community Broadband Services or Other Public Communications Initiatives, Baller Stokes & Lide (July 1, 2019), http://www.baller.com/wp-content/uploads/Baller-StokesLideStateBarriers7-1-19.pdf [https://perma.cc/226C-QBV4] (cataloging barriers to broadband initiatives in several states); Billy Corriher, Big-Money Courts Decide Fate of Local Fracking Rules, Ctr. Am. Progress (Jan. 9, 2017, 9:04 AM), https://www.american-progress.org/issues/courts/reports/2017/01/09/296113/big-money-courts-decide-fate-of-localfracking-rules/ [https://perma.cc/7UVL-Z7T5] (documenting state-city tensions over fracking); Henry Grabar, Andrew Cuomo's Bizarre Logic for Killing New York City's Plastic Bag Fee, Slate (Feb. 15, 2017, 2:24 PM), http://www.slate.com/blogs/moneybox/2017/02/15/-new_york_gov_andrew_cuomo_is_a_plastic_bag.html [https://perma.cc/ZYJ8-DZPR] (reporting that lobbyist pressure kept plastic bags legal in New York); State Pesticide Preemption Act (Am. Legis. Exch. Council 2013), https://www.alec.org/model-policy/state-pesticide-preemption-act/ [https://perma.cc/GXF3-4995] (suggesting that local regulation of pesticides does not achieve public health benefits).

[136] See Miss. Code Ann. § 75-29-901(3) (2016) (effective Mar. 18, 2013) (restricting local regulation of food and beverage); Okla. Stat. tit. 52, § 137.1 (Supp. 2018) (effective Aug. 21, 2015) (prohibiting local regulation of oil and gas beyond the limited areas mentioned in the statute); Tenn. Code Ann. § 65-15-302 (2015 & Supp. 2018) (effective May 20, 2015) (prohibiting local regulation of "transportation network companies"); Telecommunications Deregulation Policy Statement (Am. Legislative Exch. Council 2014), https://www.alec.org/model-policy/telecommunications-deregulation-policy-statement/ [https://perma.cc/L4C3-W8TH].

[137] See Map of Preemption on Advertising, Licensure, Smokefree Indoor Air, and Youth Access, Ctrs. for Disease Control & Prevention, https://www.cdc.gov/statesystem/preemption.html (last updated July 15, 2019); Preemption of Local Laws, Giffords Law Center to Prevent Gun Violence, https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws/ [https://perma.cc/QCY5-PS4S] (discussing preemptive laws prohibiting local governments from passing gun regulations).

[138] Ala. Code § 25-7-41 (LexisNexis 2016 & Supp. 2018) (effective Feb. 25, 2016); Fla. Stat. § 218.077 (2018); Ga. Code Ann. § 34-4-3.1 (2017 & Supp. 2019) (effective May 13, 2004); Ind. Code § 22-2-16-3 (2018) (effective July 1, 2013); Kan. Stat. Ann. § 12-16,130 (Supp. 2018) (effective July 1, 2013).

municipal family leave policies and other local employer-mandated benefits.[139] States have regularly overridden labor-favoring legislation at the local level with statewide right-to-work laws.[140] Bills to preempt municipal LGBT anti-discrimination laws have also been proposed in a number of states.[141] Blanket preemption laws that prevent any local ordinances related to the regulation of the employment relationship or of business generally have also been adopted or proposed in a number of states.[142]

These blanket laws point to a second feature of the new preemption—the broad scope of state legislation and the aggressive targeting of recalcitrant local governments. The majority of states currently enshrine some form of "home rule"—either constitutionally or statutorily—that is intended to provide local governments with a degree of independent authority.[143] While not formally repealing these general grants of authority, the new preemption is often close to achieving the equivalent

[139] See Ala. Code § 25-7-41 (LexisNexis Supp. 2018) (effective Feb. 25, 2016); Nat'l League of Cities, Ctr. for City Sols., City Rights in an Era of Preemption: A State-By-State Analysis 8 (2018) [hereinafter State-by-State Analysis], https://www.nlc.org/sites/default/-files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf [https://perma.cc/-TBG2-Q9SJ]; Nat'l P'ship for Women & Families, Paid Sick Days Preemption Bills (Current Session) (May 2017), http://www.nationalpartnership.org/our-work/workplace/preemption-map.html [https://perma.cc/9V6H-TCQ3].

[140] See Ala. Const. art. I, § 36.05; Ark. Code Ann. § 11-3-301 (Supp. 2017) (effective 1947); Ky. Rev. Stat. Ann. § 65.015 (LexisNexis 2018) (effective Jan. 9, 2017); La. Stat. Ann. §§ 23:981–987 (2019) (effective 1976); Mich. Comp. Laws Serv. § 123.1392 (LexisNexis 2019) (effective June 30, 2015); Wis. Stat. § 111.04 (2018) (effective Mar. 11, 2015) (no express mention of preemption, however); Wyo. Stat. Ann. §§ 27-7-108 to -115 (2019) (effective 1963).

[141] See N.C. Gen. Stat. § 143-422.11 (repealed 2017); see also State-By-State Analysis, supra note 139, at 11 (discussing the passage of HB2 as a "direct response" to Charlotte's anti-discrimination ordinance); Joellen Kralik, "Bathroom Bill" Legislative Tracking, Nat'l Conference of State Legislatures (July 28, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/463S-MNHB].

[142] H.B. 17, 2017 Leg. (Fla. 2017) (bill rejected); see also Briffault, New Preemption, supra note 129, at 2007 (referring to blanket preemption as "nuclear preemption," and discussing its popularity among state legislatures); Lori Riverstone-Newell, The Rise of State Preemption Laws in Response to Local Policy Innovation, 47 Publius 403, 417–18 (2017) (noting the trend in preemption laws being interpreted as encompassing all state laws, rather than discrete policy areas); Jeff Weiner, Local Governments Decry Bill that Would Limit Regulations, Orlando Sentinel (Mar. 17, 2017), http://www.orlandosentinel.com/news/politics/os-legislature-ban-local-regulations-20170307-story.html [https://perma.cc/92F2-YFWD] (raising issues with the overbreadth of H.B. 17).

[143] See Paul A. Diller, Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism, 77 La. L. Rev. 1045, 1065–66 (2017) [hereinafter Diller, Reorienting Home Rule: Part 2].

by eliminating the exercise of local authority across entire policy areas.[144] The new preemption has also impinged on local governments' proprietary functions, limiting local authority to contract, raise revenue, or manage local governments' own employees.

In addition, the new preemption is sometimes punitive, with laws increasingly incorporating terms that provide citizens with private rights of action, permit damages to be imposed on local governments and their officials, allow for removal of local officials who advocate or adopt preempted ordinances, or provide that state legislatures can withhold funds from local governments that do not comply with state demands.[145] Various iterations of punitive preemption have appeared in state firearms laws, in laws restricting the local removal of Confederate monuments, in anti-sanctuary-city statutes, and in blanket preemption statutes.[146] The threat of broader preemptive statutes has also been used politically to discourage localities from adopting specific disfavored ordinances, as in the case of the soda tax in California.[147]

These threats point to a final feature of the new state law preemption: the targets of legislatures' preemptive ire are generally the states' cities, and in particular their larger and more progressive ones.[148] In North Carolina, the state's well-known "bathroom bill" was adopted in response to a Charlotte ordinance that allowed transgender people to use the public bathroom that corresponded with their gender identity.[149] In Texas, the city of Austin is a common target for preemptive legislation. The state's

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[144] Riverstone-Newell, supra note 142, at 417.

[145] See A Better Balance, Legal Strategies to Counter State Preemption and Protect Progressive Localism: A Summary of the Findings of the Legal Effort to Address Preemption (LEAP) Project (Aug. 9, 2017), https://www.abetterbalance.org/resources/legal-strategies-to-counter-state-preemption-and-protect-progressive-localism-a-summary-of-the-findings-of-the-legal-effort-to-address-preemption-leap-project/ [https://perma.cc/SL3U-KAT8] (naming states that have adopted punitive preemption since 2011); see also Schragger, Attack on American Cities, supra note 13, at 1181–82 (describing three general categories of punitive preemption laws).

[146] Va. Code Ann. § 15.2-1812 (2018) (Confederate monuments); Riverstone-Newell, supra note 142, at 418 (blanket preemption); Madlin Mekelburg, Local Officials Fear State Retaliation over 'Sanctuary Cities' Lawsuits, El Paso Times (July 6, 2017), http://www.elpasotimes.com/story/news/politics/texlege/2017/07/06/local-officials-fear-state-retaliation-oversanctuary-cities-lawsuits/444215001/ [https://perma.cc/9NEU-UKJ8] (describing Texas localities' concern that Governor Abbott would retaliate against them for filing suit over the new sanctuary city law); Preemption of Local Laws, supra note 137 (firearm laws).

[147] See O'Connor & Sanger-Katz, supra note 134.

[148] Briffault, New Preemption, supra note 129, at 1997–98.

[149] See sources cited supra note 141.

anti-sanctuary-city statute was explicitly meant to counter Austin's immigrant-friendly policing practices.[150] Dallas and Houston were also affected by the state law. In Alabama, the state responded directly to Birmingham's adoption of a living wage law by preempting all municipal wage floors.[151] In Ohio, the state legislature sought to overturn Cleveland's local hiring ordinance.[152]

The new state law preemption is not indifferent to the site of local regulation; it is aggressively anti-city. State legislatures are targeting large population centers that are often demographically and politically different from the state as a whole. This is not entirely surprising; historically, state legislatures have been eager to intervene in city policymaking, especially in larger and richer cities. State legislatures—especially when dominated by rural interests—have historically been hostile to their cities.[153]

Nevertheless, the new preemption has broken new ground. The efficiency with which cross-border corporations have infiltrated and influenced state legislatures, the systematic rejection of home rule principles intended to prevent state interference with local governance, and the punitive nature of state preemption targeting specific cities and cities in general distinguish the new preemption from conventional shifts in the scale of regulation. Despite cities' more recent population and economic gains, state legislatures are consolidating power. This consolidation reflects a concerted political strategy intended to undermine local regulatory diversity and replace it with state, and in many cases national, uniformity.

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[150] See City of El Cenizo v. Texas, 890 F.3d 164, 173 (5th Cir. 2018); Maggie Astor, Texas' Ban on 'Sanctuary Cities' Can Begin, Appeals Court Rules, N.Y. Times (Mar. 13, 2018), https://www.nytimes.com/2018/03/13/us/texas-immigration-law-sb4.html?login=email&auth=login-email [https://perma.cc/6ZG2-P7GD]; Tom Dart, Austin Takes Central Role in Clash over 'Sanctuary Cities' After Sheriff's Pledge, Guardian (Jan. 27, 2017, 1:52 PM), https://www.theguardian.com/us-news/2017/jan/27/sanctuary-cities-austin-texas-sheriff-sally-hernandez [https://perma.cc/5KMR-GAZ8].

[151] See Ala. Code § 25-7-41(9)(b) (LexisNexis 2018) (effective Feb. 25, 2016); Editorial, The Minimum-Wage Battle in Alabama, Anniston Star (Aug. 22, 2018), https://www.annistonstar.com/opinion/editorials/editorial-the-minimum-wage-battle-in-alabama/article_25-f5b5c0-a647-11e8-9229-17dad5628c4e.html [https://perma.cc/77T8-3AVX].

[152] See City of Bexley v. State, 92 N.E.3d 397 (Ohio Ct. C.P. Franklin 2017); Robert Higgs, National Coalition Joins Cleveland Fight to Save Fannie Lewis Law, Cleveland.com (June 15, 2017), https://www.cleveland.com/cityhall/2017/06/national_coalition_joins_cleve.html [https://perma.cc/RB65-7YMR].

[153] Riverstone-Newell, supra note 142, at 406–07.

B. Revenue Constraints

State consolidation has been accompanied by a longer-term trend toward restricting local governments' revenue-raising capacity.[154] This feature of state-local relations seems also to have an inverse relationship to cities' rising economic strength. Like preemption, revenue restrictions are part of a nationwide anti-regulatory agenda that seems to target cities, even as those cities seek to raise and spend locally sourced tax dollars.

There is a historical and a current-day explanation for state regulation of local finance. The historical account emphasizes the role that debt played in the fiscal crises of the nineteenth century. The boom and bust cycle combined with state and municipal giveaways to railroad interests and other forms of infrastructure overspending led to state and municipal defaults. In response, progressive reformers sought to limit the capacity of governments to take on debt by entrenching debt limitations into state constitutions.[155]

Local property tax limitations are of more recent vintage, prompted by anti-tax sentiment beginning in the 1970s with Proposition 13 in California, which froze property tax rates and greatly limited local revenue-raising capacity in that state.[156] Tax and expenditure limitations ("TELs") have followed across the country. TELs limit local property and

[154] See Lincoln Inst. of Land Policy & Minn. Ctr. for Fiscal Excellence, 50-State Property Tax Comparison Study: For Taxes Paid in 2017, at 4 (2018) [hereinafter Property Tax Study], https://www.lincolninst.edu/sites/default/files/pubfiles/50-state-property-tax-comparison-for-2017-full_1.pdf [https://perma.cc/FM35-22M9] ("Since the late 1970s, an increasing number of states have adopted property tax limits, including constraints on tax rates, tax levies, and assessed values."); see also Gerald E. Frug & David J. Barron, City Bound: How States Stifle Urban Innovation 80–82 (2008) (providing examples of cities with restricted capacity to raise revenue); Daniel R. Mullins & Kimberley A. Cox, Advisory Comm'n on Intergovernmental Relations, Tax and Expenditure Limits on Local Governments, at iii (1995) (noting that tax and expenditure limitations are imposed on governmental bodies in forty-six states).

[155] Clayton P. Gillette, In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?, 67 Chi.-Kent L. Rev. 959, 964–65, 990 n.96 (1991); see also Schragger, City Power, supra note 8, at 220 ("[C]onstitutionalized fiscal policy is a product of a nineteenth-century reaction to state and municipal debt and a twentieth-century movement to restrict taxation. These two movements have led to state constitutional constraints designed to limit local fiscal flexibility.").

[156] See Property Tax Study, supra note 154, at 40 ("Property tax limitations have become an increasingly important feature of the local government finance landscape since the late 1970s, when rapid property value growth provoked Californians to adopt the now-iconic Proposition 13."); 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, 184–86 (1997) (discussing "voter perceptions that led to the 1978 tax revolt").

other tax rates or erect procedural barriers to the imposition of new taxes or higher tax rates—often requiring local majorities or supermajorities to approve new tax hikes.[157] Local governments have sought to avoid debt and taxing limitations in a number of ways, by resorting to unconventional financing facilities or debt instruments that do not count as debt under state constitutions or by raising monies through licensing and fees, including impact fees.[158]

Scholars have observed that the tax limitations of the 1970s and 1980s were often accompanied by increased state funding (i.e., increased levels of state revenue centralization).[159] More recently, however, restrictive TELs have not been accompanied by revenue centralization—meaning that revenue-constrained local governments are not receiving increased state assistance.[160]

These state restrictions on local revenue raising are a function of two important features of the states' political economy. First, suburban anti-tax sentiment has been a feature of state politics since the redistricting reforms of the early 1960s.[161] The Supreme Court adopted the one-person, one-vote requirement[162] for state legislative elections at the moment that population was shifting out of the cities and into the suburbs, which were, by design, relatively low-tax jurisdictions. The shift in electoral power toward the suburbs, the mid-century flight from the cities, and the demand

[157] See Richard Briffault & Laurie Reynolds, Cases and Materials on State and Local Government Law 700 (7th ed. 2009); Bert Waisanen, State Tax and Expenditure Limits—2010, Nat'l Conference of State Legislatures (2010), http://www.ncsl.org/research/fiscal-policy/state-tax-and-expenditure-limits-2010.aspx [https://perma.cc/F4SM-TLRT].

[158] Briffault & Reynolds, supra note 157, at 790, 872–77 (discussing "the many legal techniques state and local governments have developed to avoid those limitations").

[159] See Yunji Kim & Mildred E. Warner, Shrinking Local Autonomy: Corporate Coalitions and the Subnational State, 11 Cambridge J. Regions, Econ. & Soc'y 427, 433 (2018) (citing Daniel R. Mullins & Philip G. Joyce, Tax and Expenditure Limitations and State and Local Fiscal Structure: An Empirical Assessment, Pub. Budgeting & Fin., Spring 1996, at 75).

[160] Id. at 433–34.

[161] See Gary J. Miller, Cities by Contract: The Politics of Municipal Incorporation 81–82 (1981) ("[T]he most basic and pervasive common denominator for incorporation was the avoidance of high property taxation.").

[162] See Reynolds v. Sims, 377 U.S. 533, 558, 568 (1964) (applying "one person, one vote" to state legislatures); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

for low-tax local governments generated a suburban anti-tax politics that found its ultimate expression in the Reaganism of the 1980s.[163]

Second, and a more recent phenomenon, is the nationalization of state politics. Candidates for state office are increasingly taking positions that align with national party policies or ideologies. And state voter behavior is increasingly reflective of national priorities and aligned with the agendas of national parties.[164]

There are many reasons for this shift in voting behavior. Political polarization has engendered two national political parties that are increasingly isolated from one another geographically. Party homogeneity at every level of government from school districts to states is increasing.[165] Americans are tending to live among politically similar neighbors; the rural/urban divide is a more general statement of this political-demographic sorting.[166] This homogeneity is reflected in legislative and congressional delegations. State legislatures and congressional delegations are increasingly dominated by a single party.[167]

In addition, interest groups and wealthy individuals who might have ignored local and state races now target them. The national political donor class is primarily pursuing national agendas. The bulk of monies that fund

[163] For a discussion, see Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics (1991); Isaac William Martin, The Permanent Tax Revolt: How the Property Tax Transformed American Politics (2008).

[164] See Schleicher, Federalism and State Democracy, supra note 20, at 792 ("Following the nationalizing of party organizations in the 1870s and the realigning election of 1896, national parties developed clearer stances on national issues, and state legislative elections became increasingly second order."). See generally Hopkins, supra note 20 (reviewing the decreasing salience of state issues in state elections paired with voters' growing reliance on party affiliation).

[165] Craig Fehrman, All Politics Is National, FiveThirtyEight (Nov. 7, 2016), https://fivethirtyeight.com/features/all-politics-is-national/ [https://perma.cc/WYB5-FXRQ] (discussing the polarization of local-level politics following the national political scene).

[166] See, e.g., Bill Bishop & Robert G. Cushing, The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart 5–15 (2009); Paul Taylor, The Demographic Trends Shaping American Politics in 2016 and Beyond, Pew Research Ctr. (Jan. 27, 2016), http://www.pewresearch.org/fact-tank/2016/01/27/the-demographic-trends-shaping-american-politics-in-2016-and-beyond/ [https://perma.cc/TGJ6-6H37].

[167] Ballotpedia, State Government Trifectas, https://ballotpedia.org/State_government_trifectas [https://perma.cc/9BQ7-9GW2]; see also Carter Sherman, 48 State Legislatures Are Now Under Single-Party Control. That Hasn't Happened Since 1914., Vice News (Dec. 12, 2018, 11:54 AM), https://news.vice.com/en_us/article/vbaxnb/48-state-legislatures-are-now-under-single-party-control-that-hasnt-happened-since-1914 [https://perma.cc/NA38-7MUF] ("In every state except one, the same political party will rule the legislature's upper and lower chambers. . . . The last time state legislatures were so unified, it was 1914. And it's a signal that state politics are only becoming more homogenous.").

campaigns now comes from outside any given local district or jurisdiction.[168] So too, an increasingly nationalized media and the reduction in state- and local-specific news coverage contributes to the nationalization of state and local politics.[169]

On the political right, ideological anti-tax and anti-government sentiment is driving state politics. State officials cannot be seen to depart from a commitment to tax cutting and fiscal restraint if they want a future in the Republican Party. On the Democratic side, state officials are likely to adhere to an opposite orthodoxy. In both cases, the national party program or the popularity of the President or the governing party in Congress drives state races. State party platforms increasingly mirror national issues and priorities.[170]

Political nationalization has been accompanied by an "austerity politics" that emerged with force after the 2008 Great Recession.[171] In

[168] See David Fontana, The Geography of Campaign Finance Law, 90 S. Cal. L. Rev. 1247, 1249 (2017) ("As one even more recent study found, '[t]he average member of the House received just 11% of all campaign funds from donors inside the district,' with a handful of metropolitan areas dominating the list of donors." (quoting Anne Baker, The More Outside Money Politicians Take, the Less Well They Represent Their Constituents, Wash. Post (Aug. 17, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/17/members-of-congress-follow-the-money-not-the-voters-heres-the-evidence/ [https://perma.cc/YTD3-NGG8])); Harry Stevens & Alexi McCammond, Most Campaign Contributions Come from Outside Candidates' Districts, Axios (Aug. 28, 2018), https://www.axios.com/house-campaign-contributions-outside-money-f776be9e-f74b-4834-8ff4-ae30df1f7c61.html [https-://perma.cc/P9MZ-TATX]; see also Thompson v. Hebdon, 909 F.3d 1027, 1043 (9th Cir. 2018) (holding that "Alaska's aggregate nonresident [campaign] contribution limit violate[d] the First Amendment").

[169] See Seifter, supra note 25, at 141–42; Pew Research Ctr., State of the News Media 17–18 (Mar. 26, 2014), http://assets.pewresearch.org/wp-content/uploads/sites/13/2017/05/3014-2556/state-of-the-news-media-report-2014-final.pdf [https://perma.cc/2M75-GD5U]; see also Paul Farhi, Charting the Years-Long Decline of Local News Reporting, Wash. Post (Mar. 26, 2014), https://www.washingtonpost.com/lifestyle/style/charting-the-years-long-decline-of-l-ocal-news-reporting/2014/03/26/977bf088-b457-11e3-b899-20667de76985_story.html?utm-_term=.8298aeb5fbd0 [https://perma.cc/C2XA-7H9D] (describing the decline of local news reporting).

[170] Hopkins, supra note 20, at 36–40; see also Schleicher, Federalism and State Democracy, supra note 20, at 767–68 (arguing that "[b]eliefs about political parties are almost entirely based on the performance and promises of national politicians").

[171] On austerity urbanism, see Betsy Donald et al., Austerity in the City: Economic Crisis and Urban Service Decline?, 7 Cambridge J. Regions, Econ. & Soc'y 3 (2014); Jamie Peck, Pushing Austerity: State Failure, Municipal Bankruptcy and the Crises of Fiscal Federalism in the USA, 7 Cambridge J. Regions, Econ. & Soc'y 17 (2014); see also Jackie Calmes & Carl Hulse, As the Federal Government Hits Its Debt Limit, Lawmakers Spar over Solution, N.Y. Times (May 16, 2011), http://www.nytimes.com/2011/05/17/us/politics/17budget.html [https://perma.cc/WVK9-WK4E] (illustrating austerity politics after 2008 recession); Anthee

many cases, the belt-tightening that followed declining tax revenues at the local level has not been reversed with increased receipts. The teachers' strikes in West Virginia, Arizona, and California are notable in this respect.[172] The starving of secondary and primary schools has elicited a political response,[173] though the background politics of tax cutting and limited spending continues to dominate in many states.

To be sure, state officials have always sought to take credit for "tax relief"—often embracing property or personal property tax restrictions or cuts that adversely affect local government budgets.[174] State officials are also almost uniformly sensitive to their state's "economic climate" on the assumption that the state is engaged in a competition with other states for economic development. The fear of capital flight often leads governors and legislatures to override local revenue-raising efforts. The New York governor's refusal to support a millionaire tax advocated by the mayor of New York City is an example.[175]

It is unsurprising that state officials would be concerned about the fiscal choices of their most productive cities and metropolitan regions. States rely on the tax receipts generated in those places. And as economic productivity becomes more concentrated, the impulse for state officials to

Carassava, Greek Farmers Clash with Riot Police, N.Y. Times (Feb. 2, 2009), https://-www.nytimes.com/2009/02/03/world/europe/03greece.html [https://perma.cc/55LA-MFRZ] (illustrating growing social unrest from austerity politics in Greece).

[172] See Stan Karp & Adam Sanchez, The 2018 Wave of Teachers Strikes: A Turning Point for Our Schools?, Rethinking Schools, Summer 2018, https://www.rethinkingschools.org/-articles/the-2018-wave-of-teacher-strikes [https://perma.cc/G5PW-CHKH]; see also Alia Wong, America's Teachers Are Furious, Atlantic (Jan. 22, 2019), https://www.theatlan-tic.com/education/archive/2019/01/teachers-are-launching-a-rebellion/580975/ [https://per-ma.cc/3Z3R-K5HE] (describing the recent wave of teacher protests).

[173] See Wong, supra note 172.

[174] Compare Russell Berman, 'You Better Learn Our Lesson,' Atlantic (Oct. 11, 2017), https://www.theatlantic.com/politics/archive/2017/10/tax-trump-kansas/542532/ [https://per-ma.cc/58D6-Q8HM] ("The regretful Republicans of Kansas have a message for the tax-cutting Republicans of Congress: Don't follow our lead."), with Brad Cooper, Brownback Signs Big Tax Cut in Kansas, Kan. City Star (May 23, 2012, 12:00 AM), https://www.kansas-city.com/latest-news/article303137/Brownback-signs-big-tax-cut-in-Kansas.html (then-governor Brownback taking credit for the significant tax cuts, stating, "The best thing we can do for individuals in this state, and particularly for somebody that's struggling, is to provide jobs and job opportunities . . . . That's what this does.").

[175] See Emma G. Fitzsimmons, Bill de Blasio Will Push for Tax on Wealthy to Fix Subway, N.Y. Times (Aug. 6, 2017), https://www.nytimes.com/2017/08/06/nyregion/bill-de-blasio-w-ill-push-for-tax-on-wealthy-to-fix-subway.html [https://perma.cc/5KHH-944E]; David Lom-bardo, Cuomo Says Fate of 'Millionaire's Tax' Uncertain, Times Union (Sept. 25, 2018), https://www.timesunion.com/news/article/Fate-of-millionaire-s-tax-uncertain-13256395.php [https://perma.cc/TR6B-XUMG].

intervene in local fiscal decision-making increases. A regular feature of state politics involves state officials trumpeting their success in attracting outside investment and taking credit for bringing jobs to the state.[176] State restraints on the fiscal choices of local governments are justified as preserving a statewide business-friendly environment.[177]

As a result, state limitations on local revenue raising are ubiquitous.[178] Animated by an anti-tax, anti-spending ideology and a pro-business, growth mindset, states are starving their local governments of revenue opportunities. The result is that local fiscal autonomy in some of the largest, most productive places in the country is undermined. Indeed, state revenue restrictions are intended to reduce tax and spending diversity—exactly the opposite of what a functioning system of subnational governments should be doing.

C. Scalar Dumping

As already noted, state revenue restrictions have not been accompanied by increased state funding for locally necessary services. In fact, just the opposite has occurred. States are not only preempting local governments and restricting their revenue options, but they are also increasingly off-loading fiscal responsibilities for social welfare provision that had been state responsibilities. Commentators have drawn attention to a process of "state rescaling" in which the "subnational state uses the federalist structure to dump fiscal responsibilities to lower levels."[179]

In the state-local context, this dumping takes the familiar form of unfunded mandates coupled with reduced state aid. The National Association of Counties reports that nearly three-quarters of states have increased the cost or number of mandates in recent years.[180]

[176] See Timothy Bartik & Randall Eberts, The Roles of Tax Incentives and Other Business Incentives in Local Economic Development, *in* The Oxford Handbook of Urban Economics and Planning 634, 648 (Nancy Brooks et al. eds., 2012).

[177] On the alleged importance of fashioning a pro-growth (deregulatory, low-tax) local agenda, see, e.g., Robert P. Inman, Finances: Financing City Services, *in* Making Cities Work: Prospects and Policies for Urban America 328, 349–52 (Robert P. Inman ed., 2009); Edward L. Glaeser, Growth: The Death and Life of Cities, *in* Making Cities Work, supra, at 22, 50.

[178] Christine Wen et al., Starving Counties, Squeezing Cities: Tax and Expenditure Limits in the US, 2018 J. Econ. Pol'y Reform 1, 5, https://www.tandfonline.com/doi/full/10.1080/-17487870.2018.1509711 [https://perma.cc/F34C-KG7L] ("Moreover, today localities in all but four states in the US are under some sort of TEL.").

[179] Kim & Warner, supra note 159, at 428.

[180] Joel Griffith et al., Doing More with Less: State Revenue Limitations & Mandates on County Finances, 5 NACo Pol'y Res. Paper Series 1, 14 (2016), http://www.NACo.org/re-

Devolutionary processes begun in the 1980s already had shifted costs from the national to the state governments. In the aftermath of 2008, state governments increased the pressure on local governments to take on spending that would otherwise have come from higher levels. Meanwhile, state appropriations for locally provided, state-mandated services have been flat or decreasing for years.[181]

Yunji Kim and Mildred Warner argue that the combination of revenue restrictions, increased expenditure responsibility, and constrained policy authority requires a rethinking of conventional accounts of a working state-local system.[182] First, they argue that state rescaling undermines a basic tenet of fiscal federalism: that such systems will generally allocate redistributive and developmental functions rationally, with central governments taking on redistributive functions while local governments engage in developmental spending.[183]

The off-loading of social welfare responsibilities that originate with the state and federal governments suggests a different account of fiscal federalism in which higher-level governments presumptively push down costs to lower-level governments. Indeed, recent evidence suggests that U.S.-style, state-based federalism may actually impose such heavy redistributive costs downward that those costs will "crowd out" developmental spending at the local level.[184]

Second, Kim and Warner question the efficiency of a multi-tiered governmental system in which responsibility does not follow authority.[185] The phenomenon of "scalar dumping"[186] distorts the basic operations of a theoretical competitive inter-jurisdictional system. If cities do not enjoy fiscal and policymaking authority, but are forced to incur costs, then they cannot possibly act like efficient Tiebout jurisdictions, competing on the basis of their respective tax and spending bundles. The uncoupling of state

sources/doing-more-less-state-revenue-limitations-and-mandates-county-finances [https://perma.cc/JW3T-A3FA].

[181] Kim & Warner, supra note 159, at 434–35.

[182] Id. at 438–39.

[183] Id. at 429.

[184] Yuanshuo Xu & Mildred E. Warner, Does Devolution Crowd Out Development? A Spatial Analysis of US Local Government Fiscal Effort, 48 Env't & Plan. A 871 (2016); see also Wen et al., supra note 178, at 10 (arguing that devolution of fiscal responsibilities reduces the developmental nature of local governments).

[185] Kim & Warner, supra note 159, at 438–39.

[186] Yunji Kim, Limits of Fiscal Federalism: How Narratives of Local Government Inefficiency Facilitate Scalar Dumping in New York State, 51 Env't & Plan. A: Econ. & Space 636, 637 (2019).

policymaking from state responsibility undermines the devolutionary mechanism that is supposed to produce efficient tax and spending outcomes.

The resistance to "bailing-out" fiscally distressed cities is an example. The conventional view is that cities must take responsibility for their fiscal choices. Providing state or federal funds when cities experience fiscal crises will undermine the incentive for local officials to act in a fiscally prudent manner.[187] The debate surrounding Detroit's 2013 bankruptcy filing reflected these concerns; the opposition to providing state and federal funds stemmed from the belief that Detroit's fiscal woes were self-imposed[188] and that an efficient inter-governmental system requires that there be no state or federal backstops.[189]

This no-bailout view implicitly assumes that higher-level governments have little to no responsibility for local fiscal difficulties. But in addition to shifting expenditure burdens downward with unfunded mandates and tax cuts, the federal government encourages municipalities to take on debt by providing a tax exemption for municipal bond interest.[190] So too, states encourage debt by exempting debt service from state tax rate limits.

In other words, the no-bailout position assumes significant local fiscal autonomy, when the opposite is usually the case. If we treat local governments as fiscally autonomous in order to force them to make hard choices, other political actors in the system will be inclined to shift as many of those choices onto them as they can. State and federal officials have little incentive not to impose funding obligations on lower-level governments unless they have to take responsibility on the backend for the fiscal stresses they cause. Indeed, we now know that certain cities are

[187] See Clayton P. Gillette, Dictatorships for Democracy: Takeovers of Financially Failed Cities, 114 Colum. L. Rev. 1373, 1448 (2014) [hereinafter Gillette, Dictatorships for Democracy].

[188] See, e.g., Tabb, supra note 103, at 5 (Detroit's fiscal manager describing the city as "dumb, lazy, happy and rich"); see also Ashley Woods, Detroit Is Bankrupt, but Receives Less Federal Government Aid than Colombia, Huffington Post (July 31, 2013, 4:17 PM), https://www.huffingtonpost.com/2013/07/31/detroit-bankrupt-federal-aid-colombia_n_3683740.html [https://perma.cc/6H3N-QRXX] ("The Obama Administration has made no moves suggesting a federal bailout of Detroit is a possibility."). Detroit would eventually receive $300 million in federal and private aid. Jackie Calmes, $300 Million in Detroit Aid, but No Bailout, N.Y. Times (Sept. 26, 2013), https://www.nytimes.com/2013/09/27/us/300-million-in-detroit-aid-but-no-bailout.html [https://perma.cc/AUX4-WHJV].

[189] Gillette, Dictatorships for Democracy, supra note 187, at 1414–16 (discussing moral hazard concerns).

[190] See 26 U.S.C. § 103(a) (2012) (providing for a tax exemption on state and local bonds).

capable of higher levels of social welfare redistribution than conventional accounts of fiscal federalism predict.[191] Scalar dumping can thus be understood as a phenomenon whereby fiscally strapped states take advantage of relatively fiscally stable cities.

The effects of such dumping, whether onto fiscally capable or fiscally constrained cities, are profound. State and federal governments are engaged in a steady withdrawal from the provision of basic social welfare. That process has been occurring over the course of the latter half of the twentieth century, beginning with the Reagan administration, but proceeding through subsequent presidential administrations, whether Democratic or Republican.[192] This federal withdrawal has not been accompanied by granting localities increased autonomy, but rather by granting them less.

This combination of state preemptive laws, revenue restrictions, and scalar dumping distorts state-based federalism. First, as noted, state rescaling has undermined the basic assumptions of fiscal federalism, a result that in retrospect might be unsurprising. It may have been predictable that a middle tier of government would aggrandize power and offload responsibilities to economically resurgent cities.[193] In a three-tiered governmental system, elected officials have incentives to impose political and fiscal externalities downward. State officials seek support from above or below, but in either case will tend to externalize political costs and internalize political benefits. The conventional fiscal federalism of the New Deal variety appears to be in tatters.

Second, state rescaling has advanced a largely nationalizing project. Cross-border corporations are the chief advocates and beneficiaries of uniform, deregulatory, and anti-tax state laws.[194] These corporations are not interested in federalism. They seek political advantage at the

[191] See supra Section I.E.

[192] See James H. Svara, The Embattled Mayors and Local Executives, *in* American State and Local Politics: Directions for the 21st Century 139, 140–42 (Ronald E. Weber & Paul Brace eds., 1999); see also Lisa A. Morris & Luisa S. Deprez, The Faltering Safety Net in a Reluctant Nation: Women's Economic Security at Risk in America, 47 Women's Stud. Int'l F. 255, 255 (2014) ("Aside from temporary expansions to some programs in response to the recession, over the past several decades many safety net programs in the U.S. have either been downsized or eliminated or are being threatened with such. Most of the changes have been to programs serving the poor, but calls for reform are beginning to reach even the once untouchable Social Security programs.").

[193] Cf. Cross, supra note 26, at 2, 34–45 (arguing that state-based federal systems are more centralized than non-federal ones).

[194] See Hertel-Fernandez, supra note 21, at chs. 1–4.

jurisdictional scale that is available to them. So too both political parties are pursuing national policies in the states. As a result, state legislatures are actively engaged in practices that undermine inter-jurisdictional diversity, decrease accountability, and threaten local fiscal independence.

III. FEDERALISM'S FUTURE

That the urban resurgence coincides with state aggrandizement and off-loading may be unsurprising. Inter-governmental conflict may be a sign of transition. The New Deal revolution in federal-state relations was politically wrenching and is still being contested.[195] Over the last seventy-five years, various formulations of state-based federalism have been proffered, embraced, rejected, and reformulated.[196]

Like the New Deal revolution, the "metropolitan revolution"[197] is straining our existing federalism. While the nineteenth-century U.S. economy was dominated by westward expansion and the twentieth-century U.S. economy was dominated by Sunbelt and suburban development, the twenty-first century economy is characterized by metropolitanism. The advent of significant changes in the twenty-first century economy coupled with the underrepresentation of economically productive and populous places is contributing to inter-governmental tensions.

These conflicts are occurring against a larger backdrop. Commentators have observed that power in the developed West is shifting simultaneously upward and downward.[198] The scale of global capitalism appears to require global governance regimes as the nation-state becomes just another player in the competitive hunt for resources. As borders become increasingly porous, the nation-state seems to be less capable of

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[195] David Brian Robertson, Federalism and the Making of America 189–204 (2d ed. 2018) (describing the debates over federal-state relations and social welfare that remain entrenched in today's politics).

[196] See id. at chs. 7–9.

[197] Katz & Bradley, supra note 11, at 1 ("A revolution is stirring in America. Like all revolutions, this one starts with a simple but profound truth: Cities and metropolitan areas are the engines of economic prosperity and social transformation in the United States.").

[198] On state rescaling, see, e.g., Neil Brenner, New State Spaces: Urban Governance and the Rescaling of Statehood (2004); Bob Jessop, The Future of the Capitalist State (2002); Saskia Sassen, Globalization or Denationalization?, 10 Rev. Int'l Pol. Econ. 1, 1–2 (2003) [hereinafter Sassen, Globalization or Denationalization?]; see also Barber, supra note 49, at 10–11 (arguing that states will not permit cities to escape their sovereignty).

regulating mobile capital.[199] Meanwhile, the centralized social welfare state is under enormous fiscal pressure.[200] These global processes are occurring at the very moment when cities are resurging and becoming newly relevant sites for addressing citizens' regulatory and social welfare needs as other levels of government retreat.[201]

What is federalism's future in a political economy that is simultaneously global and local?[202] At least one commentator has called for the elimination of states and the reconstituting of the federal system around metropolitan boundary lines.[203] This is an obviously implausible option, though it resurrects similar calls for "metropolitan free cities" made in the early part of the twentieth century, when the great industrial cities were first chafing under state control.[204] And though constitutional doctrine can be read to recognize cities as independent rights-bearers,[205] a doctrine that provides them with substantial claims against their states is not currently on the horizon.

That being said, federalism in the United States has historically taken different forms in response to large-scale economic and political restructurings. In this Part, I suggest how a new federalism may emerge based on a revised assessment of the economic and political capabilities of the nation-state, the states, and cities.

[199] See Judith Clifton, Beyond Hollowing Out: Straitjacketing the State, 85 Pol. Q. 437, 444 (2014) (discussing free trade regimes' effects on state power).

[200] See Christian Joppke, The Crisis of the Welfare State, Collective Consumption, and the Rise of New Social Actors, 32 Berkeley J. Soc. 237, 237–38 (1987).

[201] See Tassilo Herrschel, Metropolitanization of the State: Towards Inequality in Democratic "Voice"?, 45 Fordham Urb. L.J. 1197, 1200–01 (2018) (describing mismatch between nation-states and metropolitan growth); see also Blank, supra note 14, at 513–15 (describing increased identification with global and local communities rather than the nation-state).

[202] On "glocalization," see Jason Hackworth, The Neoliberal City: Governance, Ideology, and Development in American Urbanism ch. 3 (2007); Victor Roudometof, Glocalization: A Critical Introduction (2016).

[203] See, e.g., Thompson, supra note 45, at 246–48, 253–54.

[204] See, e.g., Robert C. Brooks, Metropolitan Free Cities: A Thoroughgoing Municipal Home Rule Policy, 30 Pol. Sci. Q. 222, 230 (1915) (arguing for city independence from overweening states).

[205] See Morris, supra note 12; see also Richard C. Schragger, When White Supremacists Invade a City, 104 Va. L. Rev. Online 58, 73 (2018) ("The law could treat [a city] as a substantive rights-holder; it could recognize the existence of municipal powers derived from the locally-governed.").

A. Nation-States

Federalism can solve problems of scale, but only if it aligns appropriate functions with responsibilities. In the new global urban economy, the nation-state appears to be mis-scaled along some important dimensions.

For some time, democratic theorists have argued that the nation-state is both too large and too small. It is too large for effective democratic participation. Yet it appears to be too small to cope with the global scale of current-day problems.[206] A defining political anxiety of our time is the real or perceived mismatch between our political institutions, geographically bounded as they are, and the scope of our policy problems—and further, the gap between democratic participation and policy effectiveness.[207]

This "democracy deficit"[208] is related to the pace and scale of global capital flows. Theorists argue that nation-states have been eclipsed by transnational corporations, which can effectively base their operations almost anywhere.[209] And indeed, it has been regularly observed that with the rise of global free trade regimes, national boundaries are mostly irrelevant to corporations and investors. The declining capacity of the nation-state to corral and regulate mobile capital is a central theme of twenty-first-century political theory and practice.[210]

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[206] On globalization's challenge to the nation-state, see Herrschel, supra note 201, at 1198 ("The 2008 financial crisis highlighted the limited power individual state actors have in influencing internationalized capitalist developments, and, consequently, the limited sovereignty states possess vis-à-vis globalized finance.").

[207] For the classic statement of this gap, see Robert A. Dahl, The City in the Future of Democracy, 61 Am. Pol. Sci. Rev. 953, 964–65 (1967).

[208] See generally Alfred C. Aman, Jr., The Democracy Deficit: Taming Globalization Through Law Reform (2004) (describing the adverse effects of globalization on democracy).

[209] See Mica Panić, Transnational Corporations and the Nation State, *in* Transnational Corporations and the Global Economy 244, 244 (Richard Kozul-Wright & Robert Rowthorn eds., 1998) (explaining that some transnational corporations "have achieved such a command over global resources, and with it such an impact on the international economy, as to raise serious doubts about the long-term survival of the nation state"); William I. Robinson, Beyond Nation-State Paradigms: Globalization, Sociology, and the Challenge of Transnational Studies, 13 Soc. F. 561, 573–74 (1998) (suggesting that globalization means that the nation-state concept must be rethought because, among other reasons, "[i]n reality, the trade deficit has nothing to do with nation-state exchanges but is a consequence of the operation of fully mobile transnational capital between the ever-more porous borders of nation-states across the globe and through the institutional form of a competitive oligopolist cluster of global corporations").

[210] These concerns are expressed in debates about globalization, see, e.g., Cox, Rise of Populism, supra note 28, at 9–17, and in critiques of neoliberalism. See also Micaela di Leonardo, Introduction: New Global and American Landscapes of Inequality, *in* New

In light of the increasing power of transnational corporations, can the nation-state sustain its post-New Deal role? I am certainly not advocating the denationalization of social welfare programs. But further devolution—both welcome and unwelcome—seems likely going forward, for three reasons.

First, there is enormous political pressure to privatize, devolve, or abandon key aspects of the New Deal state.[211] In the first two decades of the twenty-first century, one of the two major U.S. political parties has proven hostile to federal welfare and entitlement programs.[212] The process of defunding those programs, with some exceptions, has been occurring since the 1980s in both Democratic and Republican presidential administrations.[213]

Second, as discussed previously, central governments are already off-loading spending responsibilities while cutting government funding. This is unwelcome devolution: a reduction in central responsibilities unaccompanied by local regulatory or revenue-raising power. This downward shift in responsibilities does not reflect a considered judgement about the capabilities of subnational or local governments, but rather an effort to constrain and reduce federal or state spending.

Landscapes of Inequality: Neoliberalism and the Erosion of Democracy in America 3, 3–4 (Jane L. Collins et al. eds., 2008) (explaining the rise of globalization as a defining "political-economic" process in the post-9/11 world); supra note 199 and accompanying text.

[211] See, e.g., Jon Michaels, Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform, 34 Seton Hall L. Rev. 573, 586–87 (2004) (describing how calls for devolution and privatization were part of a 1990s political "backlash against guaranteed welfare provisions and federal entitlements under the New Deal and Great Society"); Frank Munger, Dependency by Law: Poverty, Identity, and Welfare Privatization, 13 Ind. J. Global Legal Stud. 391, 393 (2006) (describing how 1996 welfare reform was the result of "decades-long ideological struggles over devolution to the state and privatization of government services"); Barry P. Bosworth & Gary Burtless, Privatizing Social Security: The Troubling Trade-Offs, Brookings (Mar. 1, 1997), https://-www.brookings.edu/research/privatizing-social-security-the-troubling-trade-offs/ [https://-perma.cc/B6AP-5BNN]; James Conca, It's a Horrible Idea to Privatize the Tennessee Valley Authority and Other Public Energy Assets, Forbes (Mar. 8, 2018, 6:00 AM), https://www.-forbes.com/sites/jamesconca/2018/03/08/feds-consider-privatizing-public-energy-agencies-bpa-and-tva/#4b0c1887733f [https://perma.cc/376F-2ZSY].

[212] See David Welna, GOP's History of Resistance to Social Welfare Programs, NPR (Oct. 7, 2013, 4:00 AM), https://www.npr.org/2013/10/07/230023627/gops-history-of-resistance-to-social-welfare-programs [https://perma.cc/K2PS-UDZS]; see also Republican Platform, Preserving Medicare and Medicaid, GOP, https://gop.com/platform/reforming-government/ [https://perma.cc/8D2K-VB62] ("[Medicaid] is simply too big and too flawed to be administered from Washington.").

[213] See Michaels, supra note 211, at 586.

Third, cities' capacity for redistribution has increased, as wealth has flowed back into places that had been fiscally stressed during the last third of the twentieth century. The urban resurgence of the last few decades has not lifted all city boats, but it has lifted many, and some quite substantially.[214]

The standard view has been that the welfare state has to be centrally funded, otherwise subnational governments will race to the bottom, adopting capital-favoring policies and avoiding any responsibilities for social welfare redistribution.[215] Locals, it is said, will only fund spending if residents and businesses are receiving benefits roughly commensurate with their payouts. But, as I have been arguing, that is not true. Cities can and do redistribute in significant ways and the locational leverage that they exert can be translated into real regulation of large-scale mobile capital.[216]

Cities' locational leverage has important implications for revenue raising and regulation. The increasing localness of information- and service-based economies suggests that cities are sometimes more relevant than their nation-states for the purposes of business location. For firms in finance, technology, fashion, advertising, accounting, and entertainment—among others—their municipal address is what makes the firm more valuable and what makes them susceptible to regulation. That a firm is also located in the United States or a particular state is somewhat incidental. In this way the administrative state is turned on its head: the fact that a nation can tax a resident firm is parasitic on the fact that the city can tax it.

One might argue that only national governments have the resources to engage in massive redistributive programs. One feature of our federalism makes that undoubtedly true: the ability of the federal government to engage in deficit spending. A national central bank that can adjust the money supply is obviously an advantage of the nation-state over subnational governments.

Nevertheless, it is notable that taken by themselves, the redistributive capabilities of those U.S. metropolitan areas that have larger economies

[214] See, e.g., Edward L. Glaeser & Joshua D. Gottlieb, Urban Resurgence and the Consumer City, 43 Urb. Stud. 1275, 1275–76 (2006); Storper & Manville, supra note 7, at 1248.

[215] Peterson, City Limits, supra note 2, at 106; see also Mark Schneider, The Competitive City: The Political Economy of Suburbia, at xi (1989) (arguing that consumer choice and competition limit government taxation and spending powers).

[216] See supra Sections I.D, I.E.

than most nation-states are significant. National redistribution is necessary because of the vast areas of the country that are under-productive.[217] Those areas have generally benefited from programs that have taxed rich urban areas for the benefit of poorer rural ones.[218] Those policies might be desirable or admirable, but to assume from them that redistribution can only occur at the federal level either because cities are too small or because of races to the bottom is incorrect.

B. States

If nation-states are mis-scaled for the global economy, states seem even less appropriate. Consider two of the primary goals that states are said to advance. The first is inducing economic growth by providing a structure for the salutary inter-jurisdictional competition for capital. The second is serving as a check on the exercise of centralized power and thereby promoting accountability, democratic participation, and policy diversity.

1. Economic Development

As to the former, a common argument for state-based federalism is that it induces inter-jurisdictional competition for development, which enhances overall economic growth.[219] In the nineteenth and early-twentieth centuries, state developmental policy focused on canals, railroads, and other infrastructure investments directed toward moving raw materials and labor from the hinterlands into the city.[220] As America became more urban, many regions of the country continued to be

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[217] See Bourree Lam, The Geography of U.S. Productivity, Atlantic (Mar. 30, 2017), https://www.theatlantic.com/business/archive/2017/03/regional-productivity/521376/ [https://perma.cc/W6AX-PPJN] ("[T]he largest U.S. cities tend to be the most productive areas, along with areas in the energy belt that specialize in oil, gas, and mining. The low end of the productivity spectrum consisted of smaller cities in the southern and southwestern U.S.").

[218] See Morgan Scarboro, Which States Rely the Most on Federal Aid?, Tax Found. (Jan. 11, 2017), https://taxfoundation.org/states-rely-most-federal-aid/ [https://perma.cc/5JY9-YRRW]; Bruce J. Schulman, Blue States Already Subsidize Red States. Now Red States Want Even More., Wash. Post (Oct. 30, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/10/30/blue-states-already-subsidize-red-states-now-red-states-want-even-more/ [https://perma.cc/GMD7-7HLP].

[219] See Greve, supra note 10, at 6–7; Paul E. Peterson & Daniel Nadler, Freedom to Fail: The Keystone of American Federalism, 79 U. Chi. L. Rev. 251, 254 (2012) ("Historically, competitive federalism helped to generate the extraordinary growth of the world's largest economic power."); Weingast, The Economic Role of Political Institutions, supra note 3, at 5–6.

[220] Wallis & Weingast, supra note 50, at 1.

characterized by their extractive and agricultural economies, even if in support of an increasingly industrialized economy. In such economies, developmental policy may have been appropriately scaled at the state level.[221] Canals and railroads operate on state, regional, or national scales; so too does the national highway system. These investments transcend metropolitan boundaries.

As the geography of population and production has continued to urbanize, however, the nature of state and national economies has changed. In particular, we have witnessed a global shift from extractive and industrial economies to information and service ones.[222] States do not build canals or railroads anymore. Cities have become more relevant sites for knowledge and service production, with little emphasis on bringing raw materials from the hinterlands into the center.

State-based development policies are mismatched to this new geography of production. First, as already noted, state officials are often concerned about the economically weaker regions in the state. As a result, legislatures demand tradeoffs between metropolitan areas and rural regions, and often shift monies from the former to the latter. Up-state/down-state tensions can and do result in constricting the power of the state's most productive cities.[223]

Second, as a national strategy, state-based development encourages wasteful dispersal instead of productive agglomeration. Each state, no matter how remote from existing economic activity, seeks to develop its own capacity—to create its own tech corridor or finance hub or to attract large-scale corporate investment.

[221] The use of "may" here is purposeful. Whether state-based federalism promoted overall economic growth at any stage of U.S. history is unproven. Cf. Richard C. Schragger, Decentralization and Development, 96 Va. L. Rev. 1837, 1874–79 (2010) [hereinafter Schragger, Decentralization and Development] (contesting claims that inter-jurisdictional competition was a driver of economic development in the industrial age).

[222] Bureau of Labor Statistics, U.S. Dep't of Labor, Largest Industries by State, 1990–2013 (July 28, 2014), https://www.bls.gov/opub/ted/2014/ted_20140728.htm [https://perma.cc/8V-WW-M6U5] (depicting the shift from an economy based on manufacturing in the 1990s to one based on services in 2013).

[223] See Nathan Arnosti & Amy Liu, Why Rural America Needs Cities, Brookings (Nov. 30, 2018), https://www.brookings.edu/research/why-rural-america-needs-cities/ [https://perma.-cc/TWF9-4659].

I have already mentioned the recent inter-jurisdictional competition for Amazon's new headquarters.[224] The competition between states and between cities for Amazon's headquarters did not enlarge the national economic pie in any way. That competition simply redistributed what already existed or was going to exist. Amazon was always going to locate in the United States, and it was always going to draw its employees from a national labor market. The race for Amazon did not produce any new economic growth.

Moreover, Amazon's decision to locate in New York and Washington, D.C.—two metropolitan regions that are already economically productive—was overdetermined. As I have noted, economic development tends to be path dependent. Productive enterprises tend to co-locate with other productive enterprises. Firms need deep labor pools. Skilled workers need a large number of employers or have a preference for urban amenities; both can be found in economically robust city-regions. Because of these requirements, it would have been foolhardy for Amazon to site its headquarters in any of the low-productivity locations competing for its favor regardless of the subsidy offered.

The Amazon subsidy race relates to a final point that is worth repeating: if state subsidies *do* influence and alter the location choices of firms by encouraging them to distribute themselves more evenly across the geographic landscape, those subsidies may very well be suppressing economic development by undercutting valuable agglomeration economies. The central problem with state developmental policies is that they tend to converge on a subsidize-and-distribute program, which does not contribute to national economic health.[225]

2. Checking Central Power

If developmental goals are not being met by state-based federalism, then perhaps states are still doing the work of checking the federal government. For many proponents of federalism, the primary purpose of states is to prevent the concentration of power.[226] Judicial conservatives

[224] Adam Clark Estes, The Competition to Host Amazon's Second Headquarters Is On, Gizmodo (Sept. 7, 2017, 10:19 AM), https://gizmodo.com/the-competition-to-host-amazons-second-american-headqua-1801796530 [https://perma.cc/KX4Q-75X8].

[225] See supra Section I.D.

[226] See, e.g., Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("Perhaps the principal benefit of the federalist system is a check on abuses of government power."); Melanie Cassel Liebsack, The States' *Printz* in Shining Armor?: *Printz v. United States*—A Model Anti-

have long argued for a more robust federalism jurisprudence.[227] Recently, progressives have also advocated for a federalism of "redundancy, administrative overlap, joint regulation, and mutual dependence," with some commentators emphasizing the benefits to good policymaking of encouraging "uncooperative federalism."[228] In these accounts, state resistance to federal policymaking and hesitance in administering federal law serves to test the efficacy of the law and/or induces the salutary expression of local policy preferences.[229]

These kinds of claims assume that the benefits of a federal system will automatically flow from the existence of states and the exercise of state power. But of course, the mere existence of states is not a guarantor of the benefits of federalism. A working federalism requires that subnational polities have the will and capacity to adopt public policies that differ from national ones and that they in fact adopt such policies. So too, the asserted benefits of federalism are not likely to be realized if subnational units do not correspond at least roughly with some cultural, ethnic, economic, or political identity or at least reflect a cleavage between salient political interests.

Critics of federalism have raised questions about the efficacy of states along all of these dimensions.[230] Consider first the commonplace claim that states are laboratories of innovation.[231] As Susan Rose-Ackerman has shown, the evidence for experimentation is weak.[232] State policymakers

Federal Review Decision, 44 S.D. L. Rev. 714, 727–28 (1999) ("The Framers established the doctrine of dual sovereignty as a way to prevent a concentration of power at the federal or state level that could lead to oppression and abuse.").

[227] See, e.g., Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 Mich. L. Rev. 752, 779 (1995) ("[T]he decentralized federalism of the horse-and-buggy era is better suited to the needs of our information economy than is the overly centralized, outmoded nationalism of the New Deal.").

[228] Gerken, Federalism as the New Nationalism, supra note 19, at 1902–03.

[229] Id. at 1903.

[230] See Cross, supra note 26, at 1; Rubin & Feeley, supra note 26, at 907.

[231] See New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (extolling the virtues of states as laboratories of democracy).

[232] See, e.g., Susan Rose-Ackerman, Risk Taking and Reelection: Does Federalism Promote Innovation?, 9 J. Legal Stud. 593 (1980) (analyzing politicians' reluctance to take risks and its chilling effect on state experimentation); see also Brian Galle & Joseph Leahy, Laboratories of Democracy? Policy Innovation in Decentralized Governments, 58 Emory L.J. 1333, 1370, 1398 (2009) ("Localities are likely to innovate at a level below the social optimum when it is relatively inexpensive for others to acquire information about, and to adopt, others' experiments."); Hannah J. Wiseman & Dave Owen, Federal Laboratories of Democracy, 52 U.C. Davis L. Rev. 1119, 1121–22 (2018) ("[A] variety of characteristics of state and local governments make it unlikely that they will experiment nearly as often as traditional

have no reason to be first-movers. They are on much safer ground if they wait and see what other policymakers do, or simply follow federal models.

Policy convergence—not innovation—is a predictable result if states are competing for transnational corporate dollars. And, in fact, state economic development policy—except in a very narrow range of cases—does not seem to depart substantially from national development policy, which has been pointed in a deregulatory, pro-business direction for some time. States are unlikely to innovate to the extent of alienating mobile capital.

A different argument in favor of states sounds in democratic legitimacy. The devolution of power to states is appropriate if states are "closer to the people."[233] Examination of internal state political processes, however, reveals the limits of this claim. Miriam Seifter's recent work, for example, provides ample evidence that state administrative processes are highly susceptible to capture. The absence of interest-group pressure and general lack of transparency at the state level means that state agency decision-making is easily coopted by cross-border corporations or other national-oriented interest groups seeking national outcomes through a state-by-state legislative strategy.[234] In light of the severe lack of public oversight of state agencies, Seifter is skeptical "of claims that federalism or devolution enhances majoritarian administration."[235]

Another type of claim made on behalf of states is that they embody important local or regional political or cultural identities. This claim is difficult to sustain, as Malcolm Feeley and Edward Rubin have argued.[236] State boundary lines are generally not coextensive with any particular ethnic, racial, or other social grouping. With the rise of metropolitanism, state boundaries do not roughly cohere with unique policy interests

federalism theory would assume."); cf. Michael A. Livermore, The Perils of Experimentation, 126 Yale L.J. 636 (2017) (cautioning that policy experimentation is not always beneficial).

[233] See, e.g., Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 41 (2013) (Alito, J., dissenting) ("Because the States are closer to the people, the Framers thought that state regulation of federal elections would 'in ordinary cases . . . be both more convenient and more satisfactory.'" (quoting The Federalist No. 59, at 363 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

[234] See Hertel-Fernandez, supra note 21, at chs. 1–4; Kim & Warner, supra note 159, at 428–29.

[235] Seifter, supra note 25, at 146–50.

[236] See Malcolm M. Feeley & Edward Rubin, Federalism: Political Identity and Tragic Compromise 42–43, 151–52 (2008).

either.[237] In the twenty-first century, the most salient political cleavage appears to be internal to states, pitting rural or non-metropolitan against urban or metropolitan voters. Meanwhile, as I have noted, state political parties generally seem to reflect the goals and ambitions of national political parties, and voter behavior seems to track their national preferences. The mantra "all politics is local" as applied to states appears to be demonstrably wrong.

Indeed, despite being promoted as instruments of effective decentralization, states may inhibit it. Frank Cross, for instance, has argued that federal political systems tend to be more centralized than unitary ones.[238] That is because states and provinces make decisions that in a unitary system would likely be made by local governments. States take up the policy space that would otherwise be occupied by cities in a unitary system.[239]

In addition, while cities in a state system are subordinate, they are also formally politically independent from their states. Meanwhile, state officials also represent "local" constituencies. I have argued elsewhere that this combination of formal independence and political redundancy in the United States leads state officials to engage in "selective localism,"[240] intervening in local affairs when it is politically expedient but deflecting responsibility for underlying conditions. Cities *qua* cities are not represented in state legislatures. State and congressional legislators

[237] Thompson, supra note 45, at 246.

[238] See Cross, supra note 26, at 1 ("[F]ederalism seriously undermines the very virtues of decentralization for which it is primarily promoted."); see also Rubin & Feeley, supra note 26, at 907 (arguing that "federalism in America achieves none of the beneficial goals that the Court claims for it," including benefits of decentralization); Pradeep Chhibber & E. Somanathan, Are Federal Nations Decentralized? Provincial Governments and the Devolution of Authority to Local Government (May 28, 2002) (unpublished manuscript), https://web.stanford.edu/class/polisci313/papers/ChhibberJune03.pdf [https://perma.cc/ZFS3-TNK2] (concluding that federalism can limit the availability of local resources). But see Roderick M. Hills Jr., Is Federalism Good for Localism? The Localist Case for Federal Regimes, 21 J.L. & Pol. 187, 215 (2005) (arguing that federalism benefits localism).

[239] See Cross, supra note 26, at 36 ("Local government has discretion only insofar as it does not contravene state substantive policy, which may not allow much space to exercise the benefits of decentralization . . . ."); cf. Treisman, supra note 101, at 74–76 (challenging the general assumption that political decentralization "induce[s] . . . beneficial . . . competition between subnational governments").

[240] See Richard C. Schragger, The Political Economy of City Power, 44 Fordham Urb. L.J. 91, 102–03 (2017); Schragger, Decentralization and Development, supra note 221, at 1874–79.

represent "local" districts that overlap but are not coextensive with city lines.[241]

This redundancy means that state and federal elected officials are in political competition with local elected officials. Because local governments are generally responsible for local conditions, states can pick and choose when and under what circumstances to intervene. This form of departmentalism often means that cities have responsibilities but not the power to fulfill them. The combination of formal local independence and political redundancy disguises accountability.

In other words, states are a structural barrier to the meaningful realization of political and economic decentralization.[242] States are misaligned with productive economies; they pursue ineffectual and oftentimes detrimental development policies; and their politics tend to mirror national political agendas, whether on the political left or the political right. States are obviously constitutionally salient. But they are otherwise only weakly responsive to the values of federalism.[243]

C. Cities

My argument has been that the city is more favorably scaled. In asserting this claim, I echo Robert Dahl's assertion—made just over fifty years ago—that cities are the appropriate solution to the tension between participation and efficacy. The city is the "optimum unit for democracy in the 21st Century," Dahl declared, because it is both small enough to

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[241] Justin Levitt, All About Redistricting, Loyola Law School, http://redistricting.lls.edu/-where-state.php [https://perma.cc/CY8E-HNGN] ("Most often, state law concerning political boundaries leaves a fair amount of flexibility in the mandate—one common instruction is to keep to political boundaries 'to the extent practicable.'").

[242] It should also be observed that U.S.-style, state-based federalism entrenches a rural or small-state bias. Rural states are vastly overrepresented in the U.S. Senate, a structural impediment to aligning policies with voters' preferences. Further, state-level political gerrymandering tends to favor rural over urban districts, diluting urban votes or packing them into homogeneous districts. As a result, statewide electoral majorities are not reflected in actual representation in state legislatures or in congressional delegations. See Rodden, supra note 27, at ch. 6; Lynn A. Baker, Federalism: The Argument from Article V, 13 Ga. St. U. L. Rev. 923, 926–27 (1997) (describing the small-state bias inherent in U.S-style federalism); Paul A. Diller, Reorienting Home Rule: Part 1—The Urban Disadvantage in National and State Lawmaking, 77 La. L. Rev. 287, 336–42 (2016) [hereinafter Diller, Reorienting Home Rule: Part 1]; Diller, Reorienting Home Rule: Part 2, supra note 143, at 1047; Thompson, supra note 45, at 248–52.

[243] Cf. Richard Briffault, "What About the 'Ism'?" Normative and Formal Concerns in Contemporary Federalism, 47 Vand. L. Rev. 1303, 1305 (1994) (suggesting that the values advanced by federalism "may be served better by local governments than by states").

engage the citizenry but important enough to matter.[244] The city is where all of the basic tasks of the modern social welfare state are joined: education, public order, housing, poverty, healthcare, economic development, racial justice, and equality. For Dahl, writing in the mid-1960s, these were the chief challenges of governance, and they were and continue to be the central challenges of the city.[245]

Two important caveats are in order. First, Dahl fully appreciated that cities would operate within a federal structure; his ambition was a "democratic city within the democratic nation-state."[246] He did not, it should be noted, think states were particularly relevant units of government. Second, his ideal city size was smaller than the largest cities in the country and certainly smaller than most metropolitan areas.

As to this latter point, it is obvious that even moderate-sized or small American cities are larger than the largest Greek city-states. U.S. cities are not sites for some idealized form of Athenian democracy. Many cities and certainly many metropolitan areas are just as populous or more populous than many states or nations. At that scale the democratic and participatory claims on behalf of city power lose some of their force.

The argument for the superiority of the city as a unit of decentralized self-government depends less on its size than on its economic, cultural, and political centrality, however. Indeed, the timing is more favorable to the city than when Dahl was writing. I have already noted that the centralized welfare state is under enormous pressure. Large-scale firms and large-scale investments operate on the global scale where capital seems mostly unhindered by national borders. But as noted, economies are also highly geographically localized, with specialized industries or firms increasingly concentrated in particular cities and metropolitan areas.[247] From the perspective of democratic theory, the city's economic if not regulatory influence is notable.

[244] Dahl, supra note 207, at 964–65.

[245] Id. at 965.

[246] Id. at 964.

[247] Sassen, Globalization or Denationalization?, supra note 198, at 1–3; see Kevin R. Cox, Globalization and the Politics of Local and Regional Development: The Question of Convergence, 29 Transactions Inst. Brit. Geographers 179 (2004); K.R. Cox, The Local and the Global in the New Urban Politics: A Critical View, 11 Env't & Plan. D: Soc'y & Space 433, 433–34 (1993). See generally Roudometof, supra note 202 (detailing the interaction between global and local factors); Sassen, The Global City, supra note 7, at 3 (describing a "spatially dispersed, yet globally integrated organization of economic activity").

But what about objections? Consider first the claim that the enormous welfare needs of the populace still have to be met by a national welfare state. To be sure, those needs at mid-century and beyond required a national response. Urban development was in part a national project, even as the urban renewal of the second half of the twentieth century was often a failure.[248] Cities still receive significant funding from the national and state governments, and the national government remains the redistributive backstop for the elderly and the poor.[249] Many cities continue to experience fiscal distress, which requires assistance from higher-level governments.

The growth of the national welfare state and state administration has nevertheless masked the possibilities for real local regulation and redistribution. As those governments have retreated, cities have sought to adopt policies that we would have assumed must be national in scope. I have already mentioned municipal minimum wage ordinances. Another more recent example is municipal-provided universal health care.[250] Dahl's argument that the city scale is more amenable to self-government has become more true over time, not less.[251]

A different objection is that cities are more likely than states or the national government to suffer from significant political pathologies. Skeptics of local government often worry about the ease with which majority or minority factions can assert their strength in smaller places,

[248] Steven Conn, Americans Against the City: Anti-Urbanism in the Twentieth Century 166 (2014) ("[U]rban renewal failed because it was anti-urban."); see Rae, supra note 93, at ch. 10 (discussing urban renewal with respect to New Haven, Connecticut).

[249] See Rubin & Feeley, supra note 26, at 916 ("As an empirical matter, support for urban planning generally, or for specific city functions such as schools or police, has often come from the federal government, not from the states.").

[250] See, e.g., Healthy San Francisco, https://healthysanfrancisco.org/ [https://perma.cc/-L66V-VMRE] (a "program designed to make health care services available and affordable to uninsured San Francisco residents"); see also Gina Cherelus, New York City Launches $100 Million Universal Health Insurance Program, Reuters (Jan. 8, 2019, 1:03 PM), https://-www.reuters.com/article/us-new-york-healthcare/new-york-city-launches-100-million-univ-ersal-health-insurance-program-idUSKCN1P21WF [https://perma.cc/Y9Y4-QFBP] (discuss-ing the creation of a city-funded plan to provide health coverage to 600,000 residents of New York City).

[251] Cf. Katz & Bradley, supra note 11, at 2 ("Cities and metropolitan areas are becoming the leaders in the nation: experimenting, taking risk, making hard choices, and asking forgiveness, not permission."); Bruce Katz & Jeremy Nowak, The New Localism: How Cities Can Thrive in the Age of Populism 3 (2017) ("[V]anguard cities are catalyzing growth through forms of governance that align the distinctive perspectives of government, business, philanthropy, universities, and the broader community.").

relying on *Federalist 10*'s celebration of the extended sphere. Madison theorized that a larger republic would be less susceptible to such factions.[252]

That view has been challenged, however, by public choice scholars who argue that larger, more complicated, and more distant governments are more susceptible to anti-majoritarian forces.[253] That industry interests have had such success in influencing state legislatures to adopt targeted preemptive legislation seems to support this view.[254] In short, it is not at all clear that cities are more susceptible to political process failures than are states.

A related objection might be that even if cities are economically capable of regulating cross-border capital, they are likely to be captured by the same political forces that have exercised undue influence in the states. If corporate capital is powerful at the state level, it may be even more powerful in the city. Cities regularly adopt the same attract-and-retain strategies directed to mobile firms and skilled workers that state leaders favor.[255]

That being said, local residents are beginning to raise questions about the power of corporate interests. And city leaders are increasingly coming to the conclusion that pro-business policies are ineffective. Cities have begun to resist development deals that do not appear to benefit local

[252] The Federalist No. 10 (James Madison). On the concern about local parochialism, see Nestor M. Davidson, The Dilemma of Localism in an Era of Polarization, 128 Yale L.J. 954, 975–78 (2019).

[253] See Frank H. Easterbrook, The State of Madison's Vision of the State: A Public Choice Perspective, 107 Harv. L. Rev. 1328, 1333–39 (1994); Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 Sup. Ct. Rev. 341, 386 ("[T]he federal government may be a more likely subject of capture by a set of special minoritarian interests, precisely because the majority interest of the national constituency is so large, diffuse, and enormously difficult to organize."); Michael H. Schill, Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets, 64 S. Cal. L. Rev. 1261, 1315–17 (1991); Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 48–49 (1985). In later writings, Madison himself seems to have recognized that special interests might exercise undue influence in an extended republic. See Consolidation, James Madison (Dec. 5, 1791), *in* 6 The Writings of James Madison 67, 67–69 (Gaillard Hunt ed., G.P. Putnam's Sons 1906) (arguing that abolition of state governments in favor of a unitary national government would result in a legislature responsive to "neither the voice nor the sense" of the people and a government on a "self directed course" (emphasis omitted)). Thanks to Richard Primus for this point.

[254] See Hertel-Fernandez, supra note 21, at chs. 1–4; Seifter, supra note 25, at 135–40.

[255] See supra text accompanying notes 118–120.

residents.[256] Amazon, for example, pulled out of its commitment to relocate to Long Island City after a torrent of local opposition.[257] The successful opposition to the Amazon deal suggests that local residents can push back against conventional "growth machine" politics, even as state leaders continue to pursue it.

A final objection to city power is that metropolitan regions and cities are not synonymous.[258] True regional government in the United States is a rarity, and cities and their surrounding regions often have disparate interests.[259] State legislatures, it could be argued, are better positioned to reflect the needs and desires of all metropolitan-area citizens, especially in those cases when municipal regulation affects non-residents. Recent state law preemption has often been justified on the grounds that it protects residents from the decisions of radical city officials.[260]

This objection to city power is a version of a standard argument for extending the territorial boundaries of any given governing unit. Those units inevitably give way to ever-larger units as the effects of local policy are felt outside the jurisdiction.[261] As Dahl pointed out, spillover effects are endemic; jurisdictional lines never quite align with the scale of any given policy problem. One always seems to be led to larger and larger political units.[262] As units become larger, democracy deficits also increase.

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[256] See, e.g., Scott L. Cummings, Mobilization Lawyering: Community Economic Development in the Figueroa Corridor, *in* Cause Lawyers and Social Movements 302, 319 (Austin Sarat & Stuart A. Scheingold eds., 2006); Catherine L. Fisk & Michael M. Oswalt, Preemption and Civic Democracy in the Battle Over Wal-Mart, 92 Minn. L. Rev. 1502, 1521–23 (2008); cf. Benjamin I. Sachs, Despite Preemption: Making Labor Law in Cities and States, 124 Harv. L. Rev. 1153, 1155–56 (2011) (describing a system of "tripartite lawmaking" in which local governments adopt pro-business policies in exchange for contractual agreements favorable to local citizenry).

[257] See Goodman, Amazon Pulls Out of Planned New York Headquarters, supra note 88.

[258] Cf. Davidson & Foster, supra note 70, at 82 (applying Tiebout to inter-regional mobility on grounds that regions are more relevant economic units than municipalities).

[259] See, e.g., Donald F. Norris, Metropolitan Governance in America 123 (2015) ("[I]n the decentralized metro area where interests among local governments often diverge, achieving cooperation or collective action can be difficult."); Nate Berg, The Only Elected Regional Government in the U.S., CityLab (Mar. 1, 2012), https://www.citylab.com/equity/2012/03/-only-elected-regional-government-us/1371/ [https://perma.cc/PJ74-B4RT].

[260] Sharon Jayson, In the Lone Star State, Cities Feel the Heat, U.S. News (Dec. 27, 2018), https://www.usnews.com/news/best-states/articles/2018-12-27/cities-versus-state-a-battle-for-control-in-the-texas-legislature [https://perma.cc/QFQ9-BN8M].

[261] Dahl, supra note 207, at 958–59.

[262] Id.

To be sure, regional government has been a goal of good government reformers for some time, and nothing I have said should be taken as a criticism of efforts to more tightly connect city and suburban residents.[263] But the claim that state legislatures are better at advancing metropolitan-wide interests and do so best by restricting city power seems questionable. The preemption explosion in the states is not being driven by metropolitan-area residents who need protection from city spillovers, but rather by statewide and national interest groups pursuing uniform statewide policies.

It is important to emphasize that the argument for city power is a comparative one, and here it is offered as a corrective to state aggrandizement, not as a replacement for states altogether. To summarize the preceding claims: First, in a metropolitan economy, cities are more economically relevant jurisdictional units than are states; second, cities are fully capable of adopting redistributive and regulatory policies and do not need as a matter of course to be prevented from engaging in damaging races to the bottom; third, states, by contrast, are increasingly converging on a uniform national agenda often advanced by transnational corporate interests; and fourth, state development policies, which tend to favor dispersal instead of concentration, are likely inimical to national economic growth. In short, cities are more likely to advance many of federalism's stated aims. State restrictions on city power are undermining those same aims.

IV. JUDICIAL FEDERALISM AND POLITICAL REFORM

The urban resurgence and the metropolitanization of the economy represent a structural demographic and economic shift. The U.S. Constitution, however, is premised on the permanence and inviolability of states. It says nothing about cities or metropolitan areas.

Interesting questions arise for courts when existing political institutions are misaligned with a changing political economy. I would not expect judges to be directly responsive to such changes in the short term, even if other political institutions might be. Again, the example of the New Deal

[263] For a discussion of regionalism, see generally Reflections on Regionalism (Bruce Katz ed., 2000).

suggests that courts do not lead but will follow an institutional realignment.[264]

In the meantime, two sources of legal doctrine are available to cities seeking to protect local prerogatives. The first is the Supreme Court's federalism jurisprudence, which can be deployed to limit federal coercion and commandeering of local officials.[265] The multiple challenges to the federal government's threat to withdraw funding from sanctuary cities are examples.[266] The second is state-specific home rule jurisprudence, which in some cases might provide cities with defenses against state aggrandizement. A number of state constitutions provide that preemptive legislation must be general in nature, for example.[267]

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[264] See generally G. Edward White, The Constitution and the New Deal (2000) (challenging the conventional narrative that constitutional jurisprudence in the early twentieth century inevitably culminated in a constitutional revolution during the New Deal era). Regardless of whether "the switch in time that saved nine" resulted from President Roosevelt's strong-arming with his court-packing plan, or from an evolution in the jurisprudence of individual justices, the story exemplifies the Court's reluctance to accept institutional changes in the welfare state. For a discussion, see Samuel R. Olken, Historical Revisionism and Constitutional Change: Understanding the New Deal Court, 88 Va. L. Rev. 265 (2002) (reviewing White, supra); see also Daniel J. Hulsebosch, The New Deal Court: Emergence of a New Reason, 90 Colum. L. Rev. 1973, 1979–80 (1990) ("That legislatures would experiment with regulation previously deemed either impermissible or unheard of was ineluctable. That the courts would have to bow to this pressure was inevitable. The difficult task was to devise new constitutional doctrine to allow the institution of some economic reform, while preserving the Constitution as a charter for American government." (footnote omitted)); Timothy Sandefur, The Right to Earn a Living, 6 Chap. L. Rev. 207, 244 (2003) ("[T]he Court finally gave in to New Deal pressures in the famous 'Switch in Time That Saved Nine'. . . .").

[265] See NFIB v. Sebelius, 567 U.S. 519, 585 (2012); Printz v. United States, 521 U.S. 898, 925 (1997); New York v. United States, 505 U.S. 144, 174–75 (1992). The Supreme Court does not distinguish between state and municipal governments for purposes of its commandeering and coercion precedent.

[266] See Vikram Amar, Opinion, Trump's Plan to Release Detained Immigrants in 'Sanctuary Cities' Won't Stand. Here's Why, L.A. Times (Apr. 15, 2019, 11:43 AM), https://www.latimes.com/opinion/op-ed/la-oe-amar-immigrants-sanctuary-cities-20190415-story.html [https://perma.cc/JC4H-K4NX]; Alexa Corse, Legal Challenges Leave Sanctuary Immigration Policies in Limbo, Wall St. J. (July 20, 2018, 7:00 AM), https://www.wsj.com/articles/legal-challenges-leave-sanctuary-immigration-policies-in-limbo-1532084400 [https://perma.cc/B-74V-7ZDX]; Jennifer Medina & Jess Bidgood, Cities Vow to Fight Trump on Immigration, Even if They Lose Millions, N.Y. Times (Nov. 27, 2016), https://www.nytimes.com/-2016/11/27/us/cities-vow-to-fight-trump-on-immigration-even-if-they-lose-millions.html [https://perma.cc/SAN5-GS4E].

[267] See, e.g., City of Canton v. State, 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 21 ("[G]eneral law[s under] . . . home-rule analysis . . . must (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than

The drawback of the Court's federalism jurisprudence is that while it might protect some local officials from federal overreaching, it simultaneously reinforces the states' plenary power over those same officials. Constitutional anti-coercion and anti-commandeering principles do not protect local officials from *state* coercion or commandeering.[268] State constitutional home rule doctrines can do more to protect cities from state overrides, but the protections are fairly thin at this point. Ohio has some of the more protective legal doctrine,[269] but even there, the state still exercises significant preemptive power. Cities generally lose state law preemption fights in their courts.[270]

The possibilities for political or institutional reform seem more likely. In previous eras, the mismatch between cities and their representatives produced national counter-movements. In the late nineteenth and early twentieth centuries, state legislators regularly stripped power from municipal officials, seeking the political and economic spoils available in growing industrial cities.[271] These "ripper" bills were aggressive, intended to hobble local politics and make state legislatures "spasmodic city councils."[272] The National Municipal League was founded in 1894, in part as a response to this overreaching.[273] The municipal home rule movement that followed was a nationwide movement.[274] More than half

purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.").

[268] See S.B. 4, 85th Leg., Reg. Sess. (Tex. 2017); see also Priscilla Alvarez, Will Texas's Crackdown on Sanctuary Cities Hurt Law Enforcement?, Atlantic (June 6, 2017), https://www.theatlantic.com/politics/archive/2017/06/texas-sb4-immigration-enforcement/5-29194/ [https://perma.cc/69CY-VBC5] (discussing the effects of S.B. 4).

[269] See Diller, Reorienting Home Rule: Part 2, supra note 143, at 1073.

[270] See Briffault & Reynolds, supra note 157, at 422.

[271] Richard Briffault, Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination, 92 Colum. L. Rev. 775, 805–06 (1992); Lyle Kossis, Note, Examining the Conflict Between Municipal Receivership and Local Autonomy, 98 Va. L. Rev. 1109, 1125–26 (2012).

[272] David R. Berman, Local Government and the States: Autonomy, Politics, and Policy 57–61 (2003) (quoting Rodney L. Mott, Home Rule for America's Cities 7 (1949)).

[273] See History of the National Civic League, Nat'l Civic League (Nov. 11, 2014), https://www.nationalcivicleague.org/history-of-the-national-civic-league/ [https://perma.cc/-9PXZ-W4YS] (originally known as the National Municipal League); cf. Brooks, supra note 204, at 222 (describing relations between states and cities as "a history of repeated injuries").

[274] Berman, supra note 272, at 62 ("By the late nineteenth century, urban reformers linked together through associations such as the National Municipal League set off in quest of local home rule and a form of local government insulated from state government that would enable cities to cope with the pressures of industrialization and urbanization.").

of the states adopted some form of home rule reform in response to complaints that state legislatures were usurping local authority.[275]

Another institutional response to the disconnect between cities and states occurred at mid-twentieth century and culminated in the Supreme Court's one-person, one-vote precedents.[276] As population moved into cities and surrounding suburbs, the overrepresentation of rural interests in state legislatures became too glaring.[277] Metropolitan-area growth required more equal representation in state legislatures and in Congress. The constitutional principle of one-person, one-vote eventually followed, though it favored suburban over urban interests.[278]

The present urban/rural divide may yet invite another institutional response. Neither home rule nor the constitutional requirement of one-person, one-vote sufficiently protects city power. State constitutional home rule provisions generally do not prevent state legislatures from overriding any local law deemed offensive, except occasionally when a state law pertains to internal governance.[279] One-person, one-vote does not prevent gerrymandering strategies that pack urban residents into a limited number of districts, thus restricting their overall influence in the state legislature even as they might constitute a statewide majority.[280] As the gap between metropolitan-area desires and state policy grows, one might predict a new home rule movement or a political groundswell in

[275] See Diller, Reorienting Home Rule: Part 2, supra note 143, at 1105–14.

[276] Reynolds v. Sims, 377 U.S. 533, 558, 568 (1964) (applying "one person, one vote" to state legislatures); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (applying "one person, one vote" to U.S. congressional districts); Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").

[277] See Diller, Reorienting Home Rule: Part 1, supra note 242, at 290–91 (highlighting modern examples of rural bias).

[278] See Schragger, Attack on American Cities, supra note 13, at 1190, 1210.

[279] See Diller, Reorienting Home Rule: Part 2, supra note 143, at 1105–14; see also Schragger, Attack on American Cities, supra note 13, at 1170 ("At its simplest, state constitutions or enabling acts provide cities with the general authority to legislate for the health, safety, and welfare of the local populace, though almost always subject to override by state law.").

[280] Diller, Reorienting Home Rule: Part 1, supra note 242, at 291; see, e.g., Nate Cohn, Debate Is Over: Gerrymandering Is Crucial to G.O.P.'s Hold on House, N.Y. Times (Aug. 2, 2017), https://www.nytimes.com/2017/08/02/upshot/its-time-to-end-the-old-debate-over-gerrymandering.html?smprod=nytcore-ipad&smid=nytcore-ipad-share&_r=0 [https://perma.cc/-WTT8-UYRN].

favor of non-partisan districting.[281] Proportional representation, which seems to result in less urban underrepresentation in those countries that have adopted it, is a favorite of electoral reformers,[282] but is likely a non-starter in the United States.

Any type of institutional reform effort requires U.S cities to recognize their common interests. Currently, the standard model of inter-jurisdiction competition assumes that cities compete with each other for development and population. But, as I have argued already, this model does not fit comfortably with the new economic geography, which emphasizes contingency, path dependence, and agglomeration effects.[283] Firms and persons seem to follow patterns that have very little to do with any particular local government policy. Competitive subsidy races based on an attract-and-retain strategy are destined to be wasteful.

Instead of competition, the highly contingent nature of local growth and decline should induce cross-city solidarity. In a world of productivity clustering, certain cities and regions will always be ahead—their spatial dominance is fairly sticky.[284] That does not mean that particular regions will grow for all time, however. Populations and economies shift, though for reasons that might be quite obscure. As with boom and bust economic cycles, it is likely that cities will experience inflows and outflows of productive enterprise and persons even over a relatively short time period.[285]

That being the case, cities and regions are at some points in their economic life cycles going to require some assistance with the basic provision of public goods. Under our current fiscal structure, the federal government, with its capacity to engage in deficit spending, has the means and capacity to do so. So too states can provide cities with the tools to raise revenue and distribute costs across metropolitan regions more fairly.

Under these circumstances, local leaders would do well to seek alliances, both across cities and across local governments in a metropolitan region. State-based federalism operates similarly to disempower all cities, regardless of their respective economic

[281] The Supreme Court has blocked the constitutional litigation route for districting reform. See Rucho v. Common Cause, 139 S. Ct. 2484, 2498–501 (2019) (holding that constitutional challenges to partisan gerrymandering are non-justiciable political questions).

[282] See Rodden, supra note 27, at 227–28, 265.

[283] See supra Part I.

[284] See Krugman, Self-Organizing Economy, supra note 31, at 53, 61–73.

[285] See Jacobs, The Economy of Cities, supra note 46, at 140–42; Schragger, City Power, supra note 8, at 34–42.

circumstances. The politics of the new metropolitanism is characterized less by regional divides—north versus south, coasts versus interior, industrial Midwest versus Sunbelt—than by the rural/urban divide in all regions.

That divide is a reflection of the dramatic geographical shifts occurring in the United States at the start of the twenty-first century. The old federalism of state power is going to be replaced by a new federalism of metropolitan power. But that transition will be marked by significant political conflict.

CONCLUSION

The twentieth century witnessed the exponential growth of the federal government. Those who bemoan the rise of Leviathan urge devolution to the states, arguing for constitutional doctrine that embraces limited federal power and expanded state authority.[286] Others argue that the states cannot address large-scale economic dislocations, like the Great Recession, and that only the federal government can effectively engage in the type of cross-border regulation and redistribution on the mass scale required for a functioning social welfare state.[287]

These debates reflect an outdated federalism. The old federalism assumed that territorially limited subnational governments must generally pursue developmental goals, as they are in competition with each other for highly mobile capital and labor. In such a competitive environment, subnational governments need to be careful not to engage in aggressive regulation or redistribution. They must be business-friendly or risk the flight of valuable productive enterprises and persons. State development

[286] See, e.g., Calabresi, supra note 227, at 779 ("[T]he decentralized federalism of the horse-and-buggy era is better suited to the needs of our information economy than is the overly centralized, outmoded nationalism of the New Deal."); Richard A. Epstein, Constitutional Faith and the Commerce Clause, 71 Notre Dame L. Rev. 167, 169, 189–91 (1996) (making "a brief plea for a prompt return to the pre-1937 view of the Commerce Clause by arguing that no reliance interest—and no appeal to the doctrine of changed social circumstances—justify the continuation of the near-omnicompetent federal government that remains in place even after [*United States v. Lopez*, 514 U.S. 549 (1995)]").

[287] See Brian Galle & Mark Seidenfeld, Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power, 57 Duke L.J. 1933, 1987 (2008) (making arguments in favor of expansive power for federal agencies, including that agencies are better able to balance cross-border spillovers between states); Andrew Hammond, Welfare and Federalism's Peril, 92 Wash. L. Rev. 1721, 1748–63 (2017) (arguing that the fiscal structure of the Temporary Assistance for Needy Families program, which devolved control to states, failed in the large-scale crises of the Great Recession and Hurricane Katrina).

policy is focused on providing the infrastructure and background conditions for cross-border firms to succeed. The national government, in turn, provides for social welfare on a national scale—a backstop when local and regional economies fail and a mechanism for ameliorating the worst harms of economic restructuring brought about by technological change.

The new federalism challenges many of the assumptions of this twentieth-century model. This new world of urban advantage holds that capital and labor is less mobile than often assumed. That is because cities and metropolitan regions offer agglomeration benefits that cannot be easily reproduced elsewhere. Because of those benefits, cities have more room to undertake regulatory and redistributive schemes. State development policy in such a world is not particularly relevant; indeed, it is mostly harmful. Inter-jurisdictional competition is unlikely to alter the accumulated agglomeration advantages of the largest metropolitan areas. And interstate competition does not produce innovative policies, but rather a race to the bottom for mobile capital. The result is convergent state policies driven by national interest groups and reflecting national political priorities.

Real policy innovation is occurring at the sub-state level, in cities and metropolitan areas across the country. States are predictably reacting to this new federalism by aggrandizing power and off-loading responsibilities. Even so, cities have proven themselves to be both capable and amenable to a wider range of policies than our conventional models of fiscal federalism have predicted. This suggests that the limits on cities are not economic but political.

To be sure, state-based federalism is a significant barrier to political reform. But federalism changes over time. In the New Deal state, power and resources coalesced at the center, with the latter half of the twentieth century witnessing reactions and counter-reactions to that phenomenon. With the rise of transnational corporations and global governance regimes, the felt democracy deficits of the nation-state have been exacerbated. At the same time, metropolitan regions have come to dominate the global economy, and cities have once again taken their place at the center of national economies.

The new federalism reflects this dual reality. It proceeds on the assumption that the vertical division of government power can foster accountability, experimentation, democratic responsiveness, diversity, and the diffusion of power. In the first half of the twenty-first century, those values are not being well met by U.S. states. But those values can be advanced by U.S. cities.