Reimagining Localism

A Symposium

Fordham Law Moot Court Room

Friday 2/16
9:30AM - 5:00PM

The Homeless Matter

CLE Course Materials
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THE CHALLENGE OF THE NEW PREEMPTION

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I. Introduction

The past decade has witnessed the emergence and rapid spread of a new and aggressive form of state preemption of local government action. Traditionally, preemption consisted of a judicial determination of whether a new local law is inconsistent with pre-existing state law. Classic preemption analysis harmonized the efforts of different levels of government in areas in which both enjoy regulatory authority and determined the degree to which state policies could coexist with local additions or variations. Such “old preemption” disputes continue to arise, of course, but the real action today is the “new preemption” – new sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems.

The “new preemption” runs the gamut of legislative subjects, from hot-button social issues like firearms regulation, sanctuary cities, and the rights of transgender individuals; to workplace disputes over wages, leave policies, and scheduling, to ostensibly more prosaic subjects like plastic bags, menu labeling, residential sprinkler systems, and puppy mills. New preemption measures frequently displace local action without replacing it with substantive state requirements. Often propelled by trade association and business lobbying,¹ preemptive state laws are aimed not at coordinating state and local regulation but preventing any regulation at all.

Several state legislatures have gone further, adopting punitive preemption laws that do not merely nullify inconsistent local rules – the traditional effect of preemption – but impose harsh penalties on local officials or governments simply for having such measures on their books. Others have considered proposals that are tantamount to nuclear preemption, effectively blowing up the ability of local governments to regulate without affirmative state authorization.

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The rise of the new preemption is closely connected to the interacting polarizations of Republican and Democrat, conservative and liberal, and non-urban and urban. To be sure, Democratic states preempt Democratic cities; preemptive laws constrain small towns; and some measures impose progressive values on conservative communities. But the preponderance of deregulatory, punitive, and nuclear preemptive actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to – and are designed to block -- relatively progressive regulatory actions adopted by activist cities and counties. Since 2011, Republicans have dominated state governments. In 2013 Republicans controlled both houses of twenty-six state legislatures, and had trifectas – control of the legislature and the governorship – in twenty-four states. By the start of 2017, the number of Republican legislatures and trifectas had risen to thirty-two and twenty-six, respectively. This Republican dominance includes so-called purple states – such as Florida, Michigan, North Carolina, Ohio, and Wisconsin – where Democrats compete effectively in presidential or United States Senate contests but in the last decade have been swamped in state

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6 See Wikipedia, List of United States state legislatures, https://en.wikipedia.org/wiki/List_of_United_States_state_legislatures. This count does not include Nebraska’s unicameral and nominally nonpartisan legislature, which is dominated by Republican-affiliated members; Nebraska also has a Republican governor.
elections.\(^7\) Even as a majority of states are controlled by Republicans, most cities, particularly big cities, are led by Democrats. Thirty-two of the fifty largest cities have Democratic mayors; fifteen of those are in Republican trifecta states, including Houston, Dallas, and Austin in Texas; Jacksonville and Miami, Florida; Phoenix and Tucson in Arizona; Columbus, Ohio; Charlotte, North Carolina; Detroit, Michigan; Memphis and Nashville, Tennessee; Milwaukee, Wisconsin; Kansas City, Missouri; and Atlanta, Georgia.\(^8\) The not-so-irresistible force of cities pushing progressive agendas in environmental regulation, public health, anti-discrimination, and workplace equity increasingly runs onto the immovable object of conservative state resistance, manifested by aggressive preemption.\(^9\)

This Article examines the rise of the new preemption and the challenges it raises for lawyers and scholars.\(^{10}\) Part II provides an overview of the range of preemptive measures, focusing on a handful of the most sweeping and punitive state laws. Part III turns to the difficult challenge for local governments of developing legal defenses against preemption. Existing federal and state legal doctrines provide local governments with few protections against intentional state efforts to curtail their powers. Although I will point to some doctrinal arguments that can be raised against the most punitive and deregulatory forms of the new preemption, the legal defense against preemption will require state courts to assume a greater role in defending local autonomy than most have traditionally been willing to undertake.

\(^7\) See, e.g., Brief of International Municipal Lawyers Ass’n, et al, in Gill v. Whitford, U.S. S Ct., Np. 16-1161, Sept. 5, 2017. In 2017, four of those five states – all but North Carolina – were Republican trifecta states. North Carolina had been a Republican trifecta states in 2016, when it adopted HB 2, the so-called “Bathroom Bill,” a poster child of the new preemption.

\(^8\) See Wikipedia, List of mayors of the 50 largest cities in the United States, https://en.wikipedia.org/wiki/List_of_mayors_of_the_50_largest_cities_in_the_United_States. Adding the next fifty cities, 67 of the one hundred largest cities have Democratic mayors, including, in Republican trifecta states, Wichita, Kansas; Boise, Idaho; and Birmingham, Alabama. Professor Diller notes that 38 of the 51 cities with populations greater than 250,000 are more liberal than the national mean. See Paul Diller, Reorienting Home Rule, Part 1 – The Urban Disadvantage in National and State Lawmaking, 77 La. L. Rev. 287, 292-97 (2016).


Part IV makes the case for closer state court scrutiny of preemptive measures, grounded in the values of local self-government; the crucial role local governments play in practice in providing services, regulating behavior, and engaging with and responding to local publics; and in the widespread recognition of the value and practice of local autonomy in state constitutions. Attention to home rule provides a basis for challenging the more extreme new preemption measures that strike directly at the idea of local self-government, although most preemption measures may still pass muster.

Part V concludes by considering whether, in light of the new preemption, local autonomy should be seen as a value in itself, or merely as a means to other political ends. Much of the criticism of the new preemption has come from advocates of “progressive localism” and has focused on how conservative state lawmakers are using preemption to block progressive initiatives. Should local autonomy be protected irrespective of the purposes to which local power is being put? I will suggest a tentative, somewhat hedged, yes. In this highly polarized area, local autonomy can reduce conflict by permitting diverse communities to take different approaches to difficult problems, while also generating usable information about how debated public policies work in practice. Some superior state power is necessary to address the external effects of local action and the costs of varying local laws for the well-being of the state as a whole, and to assure that the scale of government action is consistent with the scope of economic and social problems. But our system ought to maintain some legal space for local self-determination concerning problems that arise at the local level.

II. The New Preemption

A. An Overview

The new preemption is broad in scope and wide-ranging in subject matter. Putting aside sanctuary city issues, which until very recently were more a matter of federal preemption, states have barred local actions in areas as diverse as, inter alia, firearms, workplace relations, 

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public health and the environment, anti-discrimination, Civil War monuments, the sharing economy, and puppy mills.

Forty-five states prohibit local governments from regulating firearms; most do so by statute but in New Mexico the ban is in the state constitution. Twelve states absolutely ban all local firearms regulation; others permit some restrictions, such as limiting the discharge of guns in public places or the carrying of firearms in government buildings. Many measures predate the past decade but states have continued to add new prohibitions.

Local workplace regulation may be the most significant target of the new preemption, triggered by the leadership role many local governments have taken in strengthening worker rights. More than forty cities and counties require at least some employers to pay wages higher than the federal or state minimum. Others require employers to provide paid sick leave or family leave, or to give notice concerning scheduling changes; some have passed “fair chance” laws regulating employer inquiries into the criminal records of prospective employees. The business community has turned to the state legislatures to push back hard against these measures. Twenty-five states now ban local minimum wage requirements above the federal or

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13 Id.
state floor, sixteen preempt local paid sick leave rules, with most preemptive measures adopted since 2013.\(^{21}\) Between 2015 and 2017, fifteen states preempted local predictive scheduling laws,\(^{22}\) and local ban-the-box laws are at risk as well.\(^{23}\) Some of these statutes are particularly sweeping. Michigan’s so-called Death Star law\(^{24}\) -- more formally, the Local Government Law Regulation Act of 2015\(^{25}\) -- bars local governments from adopting, enforcing or administering local laws or policies concerning employee background checks, minimum wage, fringe benefits, paid or unpaid leave, work stoppages, fair scheduling, apprenticeships, or remedies for workplace disputes.\(^{26}\)

States have homed in on local environmental and public health rules. Nine preempt local nutrition regulations, such as calorie counts and other menu labeling rules; restrictions on promotional incentives (toys) with fast-food meals; or efforts to address “food deserts” (poor neighborhoods with few stores selling fruits or vegetables).\(^{27}\) Mississippi, for example, prohibits any local regulation of the “provision or nonprovision of food nutrition information or consumer incentive items at food service operations” or of the sale of food and beverages approved for sale by federal or state agencies.\(^{28}\) This is known colloquially as the “anti-Bloomberg bill” in ironic

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\(^{22}\) Von Wilpert, supra.


\(^{25}\) M.C.L.A. §§ 123.1381-123.1396.

\(^{26}\) See id.


\(^{28}\) Miss. Code Ann. 75-29-901.
recognition of the public health efforts of New York City’s former mayor.\textsuperscript{29} Other preempted public health subjects include pesticides (local regulation preempted in 43 states);\textsuperscript{30} tobacco products (31 states bar a range of local measures concerning advertising, smoke-free indoor air, or youth access to vending machines;\textsuperscript{31} e-cigarettes (eight states);\textsuperscript{32} factory farms (thirteen states);\textsuperscript{33} and fire sprinkler installation in new homes (sixteen states).\textsuperscript{34}

Perhaps the most surprising flash point in the new preemption era has been plastic bags. Concerned about the aesthetic, environmental, and clean-up costs of plastic bags, at least a dozen major cities and counties have either banned or taxed their use.\textsuperscript{35} Some states, including California, Delaware, Illinois, Maine, and Rhode Island have also adopted measures to discourage use of plastic bags or promote their recycling, but more recently the state-level action has been in the opposite direction, with Arizona, Florida, Idaho, Indiana, Iowa, Minnesota, Missouri, and Wisconsin barring local plastic bag regulation. The American City Council Exchange (“ACCE”) -- the local government offshoot of the American Legislative Exchange (“ALEC”), which has provided the template for many preemption laws -- has strongly embraced state preemption of local plastic bag regulation in the name of “business and consumer choice.”\textsuperscript{36}

\textsuperscript{32} Grassroots Change Preemption Watch, https://grassrootschange.net/preemption-watch/#/category/e-cigarettes.
\textsuperscript{34} Grassroots Change, Preemption Watch, https://grassrootschange.net/preemption-watch/#/category/fire-prevention.
Arizona’s attorney general’s enforcement of that state’s plastic bag ban (yes, that’s two “bans”) against the tiny town of Bisbee caused a storm of controversy, with Bisbee ultimately yielding to the state’s force majeure without contesting it in court. Other state-local environmental conflicts include the hydraulic fracturing, or fracking, technology for extracting natural gas, with seven states now expressly banning local fracking regulation, and state preemption of local regulation of polystyrene products (Styrofoam).

Anti-discrimination laws are another arena for preemption. With at least 225 cities and counties in 34 states banning employment discrimination on the basis of sexual preference or gender identity, conservative state legislatures have begun to push back. In 2011, Tennessee became the first state to bar local laws extending anti-discrimination protections beyond those provided by state law, with Arkansas following in 2015, and North Carolina in 2016. The nationwide furor over North Carolina’s so-called Bathroom Bill -- enacted in response to a Charlotte ordinance that extended anti-discrimination protections to gay, lesbian and transgender people and allowed transgender people to select the bathroom consistent with their gender identity -- appears to have stalled efforts in other states for now, but the issue is far from


dead. In a similar vein, as urban protests over public memorials to the Confederate side in the Civil War have mushroomed, so, too, have state laws barring local government actions to remove monuments within their borders.

Rounding out this overview, seventeen states preempt municipal broadband services, preempt local regulation of ride-sharing platforms, three have displaced local regulation of home-sharing and short-term rentals; 26 bar local rent control ordinances, and eleven appear to have adopted measures intended to prevent local inclusionary zoning requirements for new housing developments. Some states now also prevent local efforts to address the plight of animals raised in “puppy mills” – “commercial dog breeders infamous for keeping animals in poor conditions” – by barring local pet shops from selling animals raised in puppy mills. Starting with Albuquerque, New Mexico in 2006, nearly two hundred cities and counties barred the sale of puppy mill-bred animals, thereby also encouraging the placement of rescue dogs. In 2016, however, Arizona and Ohio preempted such local regulation of pet sales.

48 Id. at 12-13.
50 NLC, supra, at 23
53 Puppy mill animals may have health issues that lead owners to abandon them, with increased costs for local animal control and shelter programs. See, e.g., (Proposed) Memorandum of Amicus Curiae City of Tempe, Puppies ‘N Love v. City of Phoenix, filed June 28, 2017, Case No. CV 14-00073-PHX-DGC (U.S. D. Ct. D. Az.), https://www.abetterbalance.org/resources/puppies-n-love-v-phoenix-amicus-brief-by-the-city-of-tempe/.
B. Punitive Preemption

Going beyond preemption’s traditional focus on simply negating local laws, some states now punish local officials or local governments for having preempted policies.

(1) Personal Liability. A half-dozen states reinforced preexisting firearms preemption laws by threatening local officials with fines, civil liability, or removal from office for enacting or enforcing firearms measures. In 2012, Kentucky created a private right of action for individuals and membership organizations affected by local gun ordinances to seek damages and litigation fees from local officials, and actually made it a crime – official misconduct in either the first or second degree, depending on the circumstances – for a local official to violate the state gun preemption law “or the spirit thereof.” Florida has not criminalized preemption violations but it imposes civil penalties on any person who violates its gun preemption law by “enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon [the state’s] exclusive occupation of the field.” The penalties for “knowing and willful violations include civil fines on individual officials up to $5000, and removal from office by the Governor. Individuals or groups “whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation” of the gun preemption law may also sue the local government for declaratory and injunctive relief and up to $100,000 in damages.

Florida’s law has twice been the subject of litigation. In Marcus v. Scott, a Florida court held that it would be unconstitutional to apply the removal provision to county commissioners because a specific provision of the Florida constitution authorizes the governor only to suspend


55 See, e.g., Ariz. Rev. Stat. §13-3108 (removal from office); Miss. Code Ann. § 45-9- 53(5) (local officials subject to civil liability, including money damages and attorneys’ fees; public funds may not be used to indemnify officials for legal costs or penalties); Okla. Stat. tit. 21, § 1289.24(D) (same). See also Tartakovksy, supra, at 7.
58 Fla. Stat. § 790.33(3)(c). As with other punitive measures, public officials sued under this provision may not have their legal costs or fines covered by public funds. Id. at § 790.33(d).
61 2014 WL 3797314 (Fl. Cir. Ct. June 2. 2014)
commissioners, with the removal power vested in the state senate.\textsuperscript{62} The court, however, was careful to limit its decision to the special case of the county officials mentioned in the constitution; it did not address the legislature’s authority to require the removal of other local officers who violate the preemption law. In \textit{Florida Carry, Inc. v. City of Tallahassee},\textsuperscript{63} gun rights organizations sued the city and individual members of the city commission, including the mayor for failing to repeal two unenforced city gun ordinances dating back to 1957 and 1984, dealing with the discharge of firearms in small lots and in city parks. The ordinances had been preempted by a 1987 state law, and the city’s police chief had specifically directed police personnel not to enforce them. The gun rights groups, however, wanted the ordinances formally stricken from the city’s books. The Tallahassee City Commission took up the matter but voted to indefinitely table discussion of repeal. The gun groups then sued under the punitive preemption statute. The court concluded that neither the tabling of the discussion of repeal nor the continued publication of the preempted ordinances in the city’s code constituted “promulgat[ion]” within the meaning of the preemption statute, and that, given the lack of enforcement of the measures, the city and city officials were entitled to summary judgement.\textsuperscript{64} The court, however, declined to rule on the city officials’ argument that punitive preemption violated principles of local legislative immunity and free speech, finding that as no penalties had been imposed there was no need to address the issue.\textsuperscript{65}

In 2017, Texas included punitive provisions in its anti-sanctuary city law, providing, \textit{inter alia}, for the removal from office of any local official who adopts, enforces, or endorses any local policy that prohibits or materially interferes with the enforcement of immigration laws.\textsuperscript{66} A pending Florida anti-sanctuary also bill provides for suspension or removal from office for any local official who “willfully or knowingly fails to report a known or probable violation” of the law’s requirements.\textsuperscript{67}

\textbf{2) Fiscal Sanctions Against Local Governments} Arizona’s firearm preemption law subjects non-compliant local governments to fines of up to $50,000 for knowing and willful

\begin{itemize}
  \item \textsuperscript{62} Id. at *3-*4.
  \item \textsuperscript{63} 212 So.3d 452 (Fla. App., Dist. 1, 2017)
  \item \textsuperscript{64} Id. at 459-465.
  \item \textsuperscript{65} Id. at 465-66.
  \item \textsuperscript{66} Tex. Gov’t Code § 752.0565.
  \item \textsuperscript{67} Fla. H.B. 9 (2018), at proposed new section 908.206.
\end{itemize}
violations. The Texas anti-sanctuary city law makes local governments civilly liable, with penalties of up to $1500 for a first violation and $25,500 for subsequent violations, with each day of a continuing violation constituting a separate violation. Texas Governor Abbott has withheld from sanctuary jurisdictions previously awarded and allocated grant funds for programs that were designed for victims of family violence, veterans and other at-risk communities, and has refused grant applications from Travis County (Austin), including those unrelated to immigration matters, because of its sanctuary policy. The proposed Florida anti-sanctuary city law would make non-compliant communities liable for fines of between $1000 and $5000 per day; ineligible for state grant funding for five years; and subject to a civil cause of action for injuries or wrongful death sustained by victims of crimes committed by undocumented aliens on a finding that a locality’s non-compliance with the law’s requirements gave the alien access to the victim.

The most punitive fiscal measure is surely Arizona’s SB 1487, which is not limited to a specific subject like firearms or sanctuary but authorizes the imposition of fiscal penalties across the board. The law provides that any state legislator may request the state attorney general -- who must act within thirty days -- to investigate and report a claim that a local official action violates state law. On finding a violation, the attorney general must notify the offending local government and, if it “fail[s] to resolve the violation” within thirty days, the attorney general must notify the state treasurer “who shall withhold and redistribute [to other localities] state shared monies” until the violation is resolved. If the attorney general concludes merely that the local measure “may violate” state law, the attorney general must immediately bring a special action in the state supreme court to determine the issue. However, in order to contest the action, the defendant local government must “post a bond” equal to the state shared revenue it received in the past six months – arguably a harsher penalty than the future loss or revenues, and one

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69 See Tex. Gov’t Code, § 752.056.
70 El Cenizo, district court opinion at 58.
71 See Fl. HB 9 (2018), supra.
72 Less dramatic but still coercive if not punitive are the California law -- adopted in the aftermath of a state supreme court decision exempting charter city construction contracts from the state’s prevailing wage law -- denying state construction funds to any charter city which, in the preceding two years, awarded a public works contract without requiring the contractor to comply with the state prevailing wage law, Cal. Lab. Code § 1782 (2); and the 2017 Michigan law cutting off from any local district that sues the state an amount of state aid equal to the district’s litigation expenses, see Mich. Comp. L. A. §388.1764g.
virtually none of the state’s localities would be able to meet.74 “State shared monies” constitute roughly one-third of local revenues in Arizona; moreover, the state revenue sharing system was adopted in the 1970s as part of a package in which the state constitution was amended to bar a local income tax. As a result the state funds affected by SB 1487 are crucial to local fiscal health, and withholding funds would be an effective means of bludgeoning a recalcitrant locality into submission.75

In the first eighteen months after its enactment, S.B. 1487 resulted in seven investigations into local practices or laws, concerning such subjects as firearms, medical marijuana, policing, truck regulation, and a plastic bag ban, with findings of violations in two cases (firearms and the plastic bag ban), and a “may violate” subsequently resolved by negotiation in a third.76 The most significant case involved Tucson’s ordinance, adopted in 2005, providing for the destruction of firearms the city had obtained through forfeiture or as unclaimed property. On the complaint of a state legislator from outside Tucson, the attorney general concluded the ordinance was preempted by a state law, enacted in 2013, directing that such firearms be sold. The city suspended enforcement but declined to amend or repeal its ordinance, contending disposal of firearms in police custody is a local matter and, instead, brought suit challenging both SB 1487’s procedures and the finding of preemption. In 2017, in State ex rel Brnovich v. City of Tucson,77 the state supreme court sustained the law and the attorney general’s finding. The court rejected arguments that by enabling a single legislator to require the attorney general to undertake an investigation, and by providing that the attorney general may determine that a local measure violates state law with consequent loss of state shared revenue, SB 1487 violated state separation of powers principles.78 The court criticized the requirement that cities contesting the attorney general’s determination must post bond, noting “that requirement, if enforced, would likely dissuade if not absolutely deter a city from disputing the Attorney General’s opinion,” which, “in turn would displace this Court from its constitutionally assigned role . . . of interpreting

74 Further discouraging any effort by a locality to challenge the attorney general’s determination, Arizona also makes a local government that loses a lawsuit it brings against the state liable for the state’s attorney’s fees. Ariz. Rev. Stat. § 12-348.01
77 399 P.3d 663 (Az. 2017).
78 Id. at 667-71.
Arizona’s constitution and laws.” 79 But as the state had not sought a bond from Tucson, the court declined to rule on the constitutionality of the provision. 80 On the merits, the court rejected the city’s arguments that it had state constitutional authority as a home rule city to dispose of its own property and that its local interest in local public safety was greater than the state’s in regulating firearms and police behavior. 81 Subsequently, the town of Bisbee declined to contest the attorney general’s SB 1487 determination that its plastic bag ban was preempted by state law, concluding it could not afford to litigate the issue.

C. Nuclear Preemption.

As one observer has noted, “the states aren’t merely overruling local laws; they’ve walled off whole new realms where local governments are not allowed to govern at all.” 82 Legislators in several states have raised the idea of completely eliminating local legislative power, either over entire fields of regulation or with respect to any subject in which the state has an interest. In 2016, the Oklahoma legislature considered but did not pass a measure providing that a municipality may not act with respect to any subject regulated under state law “unless expressly authorized by statute.” 83 In 2015, the Texas legislature considered but did not pass measures that would have preempted all local regulation of the use of private property, all local authority over any activity licensed by the state, and any local law setting higher standards than state law on the same subject. 84 Texas’s Governor Abbott has said that the state should adopt a “ban across the board on municipal regulations.” 85 And the Florida legislature had before it in 2017 bills, reintroduced for 2018, that would expressly prohibit all local regulation of “businesses, professions, and occupations,” unless expressly authorized by state law; 86 or would prohibit all

79 Id. at 672.
80 Id. A separate opinion, joined by three justices, would have voided the bond provision as “incomplete and unintelligible.” Id. at 683.
81 Id. at 676-79.
86 Fla H.B. 17 (2017).
local regulation of “commerce, trade, and labor.” The latter measure included a particularly insidious enforcement mechanism under which if one local government believes that another locality is violating the restriction it can complain to the state legislature, and if the legislature does not “ratify” the challenged local measure by the end of the regular legislative session the measure would be considered “nullified and repealed.” Although neither bill has become law, Florida’s House Speaker declared himself “certainly a big fan of the concept” of preempting local regulation of business.

These measures would effectively nuke local power and are an existential threat to local self-government. Although continued political support for local autonomy has so far prevented the enactment of these far-reaching proposals, the pressure on local governments remain strong. With conservative groups even at the local level celebrating the importance of state sovereignty and decrying “runaway local governments,” such nuclear preemption remains a real possibility.

III. The Challenge of Defending Local Laws Against State Preemption

Existing legal doctrines provide local governments with few protections against state preemption. Federal constitutional law treats state-local relations as almost entirely a matter for the states. State constitutions, despite the widespread adoption of home rule provisions for at least some localities, typically allow their states to curtail the regulatory authority of their local governments. There are doctrinal tools that could protect local officials and perhaps local governments from some penal sanctions, but broader protections will require new legal approaches to local autonomy and state-local relations.

A. Federal Constitutional Arguments

The United States Constitution does not recognize local governments, and the Supreme Court has long treated local governments as essentially subdivisions of their states, no more protected from state regulation or displacement than the state’s department of motor vehicles.

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In effect, federalism trumps any claim of localism. Local governments have no constitutional rights against their states,\(^{91}\) and local residents have no federal constitutional claim to the rights, powers, boundaries, or even the very existence of their local governments.\(^{92}\) To be sure, state laws changing local boundaries or stripping local governments of powers can be invalidated if they evince an intent to violate the equal protection or due process rights of individuals,\(^{93}\) but most preemption measures – such as those dealing with environmental or public health regulation or employee benefits -- lack such substantive constitutional implications. State laws barring local anti-discrimination ordinances present a closer case, but recent preemption measures have left in place protections against the kinds of discrimination that the Supreme Court has recognized as unconstitutional. Moreover, unlike the sweeping Colorado constitutional amendment barring all legal protections for gays and lesbians which the Court struck down in *Romer v. Evans* as motivated by the “bare desire” to harm a group,\(^{94}\) the new anti-discrimination preemption statutes have been justified by the non-invidious value of having a uniform statewide standard for businesses that operate in more than one locality.\(^{95}\)

Some preemption measures have the effect of shifting decision-making authority from local governments with African-American or other minority group majorities to a white-dominated state government. Although the Supreme Court found an equal protection violation when a state took away a local power after the locality had exercised it to advance a racial minority’s interests,\(^{96}\) when the African-American-majority city of Birmingham’s raised that theory in challenging Alabama’s preemption of local minimum wage authority in the immediate aftermath of Birmingham’s adoption of a minimum wage,\(^{97}\) a federal district court rejected it, determining that the preemption law was racially neutral on its face and supported by the value of pursuing a “uniform economic policy throughout the state,” and that the plaintiffs failed to

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\(^{91}\) See, e.g., *City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36 (1933).

\(^{92}\) See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).


\(^{94}\) *Romer*, supra, 517 at 634-35.


\(^{96}\) *Washington v. Seattle Sch’l Dist.*, supra.

meet the high standard of proof of intentional discrimination required in the absence of a clear racial classification.\textsuperscript{98} And, of course, some preemption measures, such as those dealing with firearms, can be justified as vindicating federal Second Amendment rights.

A handful of lower federal courts have suggested local governments have First Amendment rights, which might provide a basis for challenging sanctions imposed when local governments pass, or decline to repeal, laws that express their views about firearms, immigration, or plastic bags.\textsuperscript{99} As Judge Posner put it, “[t]here is at least an argument that the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern.”\textsuperscript{100} Similarly, in words that have taken on new resonance in the aftermath of \textit{Citizens United}’s validation of corporate speech rights, Judge Jack Weinstein determined that “a municipal corporation, like any corporation, is protected under the First Amendment in the same manner as an individual.”\textsuperscript{101} Judge Posner also hinted at a freedom of association argument, suggesting that a local government is an association of its residents, “a megaphone amplifying voices that might not otherwise be audible,” so that “a curtailment of its right to speak might be thought a curtailment of the unquestioned First Amendment rights of those residents.”\textsuperscript{102} These cases, however, involved private challenges to local government litigation or lobbying, not local resistance to state restrictions. Moreover, in \textit{Ysursa v. Pocatello Educ. Ass’n}, the Supreme Court rejected the very idea that municipal corporations may be assimilated to business corporations for First Amendment purposes.\textsuperscript{103} Restating century-old black-letter law, the Court declared that unlike a private corporation, a “political subdivision . . . is a subordinate unit of government created by the State to carry out delegated governmental

\textsuperscript{98} Lewis v. Bentley, ___ F.Supp.3d ___ (N.D. Ala. 2017), 2017 WL 432464, at *13. \textit{Washington}’s “political process” theory of discrimination was undermined by Schuette v. Coalition to Defend Affirmative Action, 134 S.Ct. 1623 (2014), in which rejected strict scrutiny for state actions that make it more difficult for racial minorities than for other groups to achieve government policies that are in their interest, while still leaving open the possibility of an equal protection challenge to state laws that reduce local government powers for racially invidious reasons.


\textsuperscript{100} Creek, supra, 80 F.3d at 192.

\textsuperscript{101} County of Suffolk, supra, 710 F.Supp. at 1396.

\textsuperscript{102} Creek, supra, 80 F.3d at 192. See also Bendor, Municipal Constitutional Rights: A New Approach, 31 Yale L. & Pol. Rev. 389, 425-26 (2013) (making a similar freedom of association argument for municipal rights).

\textsuperscript{103} 555 U.S. 353, 362-64 (2009).
functions. A private corporation enjoys constitutional protection . . . but a political subdivision, ‘created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator.” 104 Ysursa sustained Idaho’s ability to regulate municipal labor relations and did not involve a measure punishing a locality for retaining an invalid law, but in strongly reiterating the “creature of the state” model of local government it did not leave much room for the locality-as-association-of-its-residents theory.105

The First Amendment could provide some protection for local officials. The First Amendment does not apply to a legislator’s vote,106 but it does protect the speech of local officials, even on preempted issues. As the Supreme Court has observed, “[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them.”107 In Spallone v. United States, the Court was particularly troubled when a federal district court, seeking to remedy a city’s ongoing civil rights violation, imposed fines on local legislators who failed to vote for the remedy the district court sought. Noting the fines were “designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their personal interest” in avoiding paying the fines, the Court found that would be a “perversion of the normal legislative process” and was far more troublesome that the imposition of sanctions on the city government.108 Spallone ultimately turned on the equitable powers of federal district courts rather than the First Amendment per se.109 Nonetheless, in El Cenizo v. State, the federal district court preliminarily enjoined on First Amendment grounds the provision of Texas’s anti-sanctuary law providing for the removal from office of local officials who “endorse” sanctuary policies. Moreover, the court enjoined all the penalties for “endorsement,” including the civil penalties for local governments.110 This is only one decision but it suggests that vague and overbroad language that goes beyond substantive

104 Id. (citations omitted)
105 Local government speech may implicate the First Amendment rights of local residents who oppose the government’s position. See, e.g., Page v. Lexington Co., Schi Dist. No. 1, 531 F.3d 274 (4th Cir. 2008).
109 Id. at 274.
preemption and penalizes local expressive activity may trigger a mix of judicially-enforceable
free speech and due process concerns.

B. State Law Arguments

(1) Legislative process and idiosyncratic state constitutional provisions. Local
governments are a bit, but only a bit, better off raising state law defenses. Many state
constitutions impose restrictions on state legislative processes which, while not necessarily
aimed at protecting local governments per se, can provide a basis for challenging preemptive
legislation. For example, many state constitutions require that each bill passed by the legislature
address only a single subject. The Pennsylvania Supreme Court embraced a single-subject-rule
argument in invalidating that state’s firearm preemption provisions which had been tucked into a
bill dealing with the theft of “secondary metals” used by utilities and transportation agencies.111
Similarly, the Missouri Supreme Court struck down the local minimum wage law that had been
tacked on to a bill whose “core, original purpose” was the governance and operation of
community improvement districts.112 So, too, many state constitutions prohibit “special acts” that
target one or a small number of localities for regulation, while exempting others presenting
similar issues.113 These limits on legislative process can provide local governments with
protection against poorly drafted measures, but, ultimately can be overcome if a legislative
majority is determined to do so. Other idiosyncratic state constitutional provisions provide
arguments against particular preemptive measures, such as the protection against the punitive
removal of county commissioners Marcus v. Scott found in the Florida constitutional section
regulating the suspension of commissioners  or the express authorization for local minimum
wage regulation that an Arizona court found in a voter-initiated constitutional amendment in that
state.114 However, as the Marcus court indicated, these measures may provide only limited

112 Cooperative Home Care, Inc. v. City of St. Louis, 514 S.W.3d 571, 580 (Mo. 2017). See also City of Cleveland v.
State, 989 N.E.2d 1072, 1083-87 (Ohio Ct. App. 2013) (labeling as “a classic instance of impermissible logrolling” a
state law preemption local law regulating foods containing transfats that had been tucked into another bill without
the usual committee review process).
113 See City of Normandy v. Greitens, 518 S.W.3d 183 (Mo. 2017).
pslatwork.files.wordpress.com/2017/09/082917-az-maricopa-county-decision-rogers-re-preemption-
m7977553.pdf.
protections for their local governments, which grow out of their very specific texts, and may lack broader generative force.\textsuperscript{115}

(2) Home rule. At the heart of the local challenge to state preemption is home rule, the idea, grounded in the constitutions of the vast majority of states, that local governments have state-constitutionally-protected law-making status.\textsuperscript{116} The problem is that in nearly all states for most local regulatory measures, home rule fails to protect against preemption. The states’ laws of state-local relations proceed from the same premises as the federal – that local governments are creatures of their states, possessing only those powers delegated to them by their states, and subject to plenary state authority to alter or abolish their powers, displace their actions, change their boundaries, or eliminate them altogether.\textsuperscript{117} State grants of authority to their localities were traditionally subject to the judicial canon of interpretation known as Dillon’s Rule, that is, the principle that local governments possess only those powers expressly granted, necessarily implied in the express grant, or essential for the accomplishment of their state-prescribed purposes.\textsuperscript{118} Starting in the latter part of the nineteenth century, states began to add home rule amendments to their constitutions, \textsuperscript{119} so that today in most states, all municipalities, or at least those above some low population threshold, enjoy home rule, and many states have extended home rule to their counties, too.\textsuperscript{120} But home rule has been far more effective in enabling local governments to take the initiative and adopt new measures without having to wait for specific or express authority from the state – in other words, undoing Dillon’s Rule of limited delegation of power – than in protecting those local actions from state displacement.

The limited effect of home rule is ironic given that the first home rule amendments sought to combine initiative with immunity on the theory that if a matter was local enough for municipal action it was also local enough to be shielded from state preemption. The Supreme

\textsuperscript{115}See, e.g., City of Miami Beach v. Florida Retail Fed., Inc., __ So.,3d __, 2017 WL 6346787 (D.Ct. App., 3d Dist., Dec. 17, 2017 (finding that voter-initiated amendment authorizing localities to adopt minimum wage above the federal or state minimum did not bar state legislation preempting local minimum wage regulation).

\textsuperscript{116}All but four states make some provision for home rule. See Krane, Riggs & Hull, Home Rule in America: A Fifty-State Handbook 476-478 (CQ Press 2001). Forty-five states provide for municipal home rule; Hawaii, which has county governments but not municipal governments, gives its counties home rule. Id. In forty-one states, home rule is provided for in the state constitution; in five states it is based solely on statute. Id.

\textsuperscript{117}See Briffault & Reynolds, supra, at 289-90.

\textsuperscript{118}Id. at 327.

\textsuperscript{119}In some states, a form of local home rule resulted from a judicial decision. See, e.g., State v. Hutchinson. 624 P.2d 1116 (Utah 1980).

\textsuperscript{120}See Krane, et al, supra.
Court referred to St. Louis’s protected status under Missouri’s pioneering constitutional home rule amendment as an “imperium in imperio;” 121 and the term “imperio” continues to be used to describe home rule that combines local initiative with immunity. Imperio home rule, however, largely failed to protect local laws from preemption. These amendments typically empowered local governments to pass laws concerning “local” or “municipal” matters, but then left the meaning of “local” or “municipal” undefined. The scope of home rule became a matter for the courts, which often read those terms relatively narrowly. Moreover, with the same language used to establish both local initiative and protection from state displacement, narrow judicial readings of “local” or “municipal” in preemption cases sometimes led to comparably narrow interpretations in initiative cases. 122 In many regulatory domains, local and state concerns overlap, and courts typically held that if some state concern was present state law would prevail over an inconsistent local law. 123 In some imperio states, the constitution provides more specific protections for local control over certain subjects, most commonly the structure of the local government; the relationship between the local government and its workforce; or local-government-owned property and public works. 124 But there is little textual protection from preemption for local power to regulate private behavior.

And that is in the imperio states. Reflecting the perception that the imperio model did not provide an adequate basis for local initiative, let alone immunity, in the mid-twentieth century home rule proponents developed a new template that protected initiative at the cost of giving up on immunity. Under this so-called “legislative” home rule approach, home rule governments enjoy all the initiative the state legislature could delegate to them, subject to the power of the legislature to deny or take away a power. Today more than half of state home rule amendments have embraced the “legislative” model. 125 In these states, Dillon’s Rule is still undone, but there is no textual protection from preemption. 126

121 St Louis v. Western Union Tel. Co., 149 U.S. 465, 468 (1893).
122 See Briffault & Reynolds, supra, at 347.
123 See, e.g., City of LaGrande v. Public Employees Retirement Board, 576 P.2d 1204 (Ore. 1978); Adler v. Deegan, 251 N.Y. 467 (1929).
125 Krane et al, supra, at 14.
126 See Briffault & Reynolds, supra, at 347-48.
To be sure, in many states courts read local powers generously and strive to avoid a finding of preemption where there is a plausible argument that the state has not sought to bar local action and that state and local laws can coexist. But where state law clearly articulates an intent to preempt, home rule typically provides little protection for local governments.

A handful of state supreme courts are somewhat more protective of local laws. The California Supreme Court has sought to harmonize state and local power by limiting preemption to situations where the state law addresses not only a matter of statewide concern but is “reasonably related” to the state concern and “narrowly tailored” to avoid unnecessary interference with local governance. However, even in this imperio state local governments have generally been able to prevail against clearly preemptive state laws only in cases involving local government political structure and elections, or local government employment and contracts, and not in cases involving private sector regulation. The Arizona Supreme Court in the Tucson SB 1487 case specifically rejected California’s approach and similar decisions from other states that involved an element of state-local balancing.

Potentially more promising is the Ohio Supreme Court’s requirement that a state law preemption local regulation cannot merely block local action but must include some substantive replacement regulation. Ohio, like many other states, provides that a local law may be preempted only by a “general” state law, but whereas most states treat “general” as meaning “broadly applicable” or “not narrowly targeting an arbitrarily small subset of local governments,” the Ohio courts have held that in the preemption context a “general” law must not only have uniform application throughout the state, but must also “prescribe a rule of conduct upon citizens generally,” that is, it must “set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth

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127 See, e.g., Watson v. City of Seattle, 401 P.3d 12 (Wash. 2017); Wallach v. Town of Dryden, 23 N.Y.3ed 728 (N.Y. 2014); City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc. 300 P.3d 494 (Cal. 2013).
132 See Brnovich, supra, 399 P.3d at 679.
133 Ohio Const., Art. XVIII, § 3 (“Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”).
police, sanitary, or similar regulations.”134 As a result, Ohio courts have rejected state laws purporting to preempt local regulation of foods containing transfats,135 local regulation of towing companies,136 or “local-hire” requirements on certain local construction contracts,137 and burdening local use of cameras to enforce traffic laws.138 In each case, the state law did not set forth a substantive rule of conduct but only regulated municipalities in the exercise of their home rule powers. As the appellate court found in upholding Cleveland’s longstanding Fannie Lewis aw, which directs that twenty percent of the work hours on large public construction projects be performed by city residents,139 the 2016 ban on local governments’ local-hire requirements regulated only the ability of local governments to set the terms of their public works contracts, and was “no[t] . . . directed toward employees or contractors.”140

Given the powerful deregulatory focus of much of the New Preemption, Ohio’s substantive approach to “general law” would provide a useful argument to local governments in other states fighting state displacement. To date, the doctrine appears to have had no impact outside of Ohio,141 possibly because its non-intuitive reading of “general law” is quite different from the way all other state courts have interpreted that phrase. Nonetheless, the Ohio court is clearly on to something. Stripping local governments of regulatory authority over a subject without adopting a substantive state rule for that subject is not only a denial of local immunity but inconsistent with the local initiative which is at the heart of home rule and with the idea home rule embodies that local governments are and ought to be a meaningful part of a state’s governance structure. In Part IV, I will suggest that even if other states do not adopt Ohio broad reading of “general law” they consider developing similar doctrines that will provide a more muscular protection for local action.

136 City of Cleveland v. State, 5 N.E.3d 644 (Ohio 2014)
139 The twenty percent requirement applies only to work hours performed by Ohio residents. There is no limit on the work of non-Ohio residents. In addition, four percent of the resident work hours must be performed by low-income people. Id. at *1.
140 Id. at *8. The court also rejected the argument that the state law was supported by the state constitutional provision authorizing the legislature to promote the welfare of employees, finding that the preemption measure was aimed at benefiting contractors, not employees. Id. at *5.
141 My January 2, 2018 Westlaw review of references to the foundational Canton decision found that all sixty court citations to the case came from Ohio courts; all six references in administrative filings were from Ohio; all 44 references in trial court documents and 137 of 138 references in appellate court documents were in Ohio cases.
(3) Protections against punitive preemption. Although with the limited exceptions just noted most states provide local governments with little protection from preemption, there are state-law arguments for invalidating punitive preemptive measures, particularly civil or criminal liability for local officials. The vast majority of state constitutions include a provision, analogous to the federal Speech or Debate Clause, immunizing state legislators from suit for their votes, statements made in legislative debate, or other actions in connection with their legislative work. These provisions do not by their terms apply to local legislators, but at least one state supreme court has so applied it. As the Washington Supreme Court explained, although the state constitution’s Speech or Debate Clause “on its face applies only to the state legislature . . . the necessity for free and vigorous debate in all legislative bodies is part of the essence of representative self-government” and, thus, extends to members of a city council. Other state courts have held that the common law legislative privilege that predated and inspired the Speech or Debate Clause applies to members of local legislative bodies. This privilege may extend to executive branch officials, such as mayors, who participate in the local legislative process or to local administrative bodies with executive powers.

The case for the extension of protection is clear. As the Arizona Supreme Court explained, no “good reason [has been] advanced for the proposition that city or town council members should be more inhibited in debate than state or federal legislators. Many local lawmakers . . . legislate on matters of more immediate importance to their electorate than state or

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142 See Steven F. Huefner, The Neglected Value of the Legislative Privilege in State Legislatures, 45 Wm. & Mary L. Rev. 221 (2003) (forty-three state constitutions include provisions analogous to the Speech or Debate Clause). Even the state constitutions without a general Speech or Debate Clause include some constitutional protection for legislators from arrest or civil process while the legislature is in session, which has been used to provide a broader privilege. See id. at 236-37 n. 54.

143 Matter of Recall of Moore v. Call, 749 P.2d 674, 677 (Wash. 1988). See also In re Kent Co. Adequate Public Facilities Ordinance Litigation, 2008 WL 859342, *2 (Del Ct. Chancery 2008) (county officials enjoy absolute legislative immunity following the “policies animating such protection” under the state speech or debate clause; but immunity does not create a testimonial privilege).

144 See Huefner, supra, at 230-35.


146 See, e.g., Humane Soc. of NY v. City of New York, 188 Misc.2d 735, 738 (Sup. Ct. N.Y. Co. 2001).
federal legislators. Such legislation should be based on all relevant information—both favorable and unfavorable—and subjected to the most vigorous debate possible.”

So, too, a Maryland court concluded that the state had conferred upon local legislative bodies “the same responsibilities for debating and setting public policy that are vested in legislative bodies generally. . . . .The need for legislative integrity and independence is thus as important in the local context, for the advantage of the citizens of the local community, as it is at the state level.”

The United States Supreme Court reasoned similarly in holding local legislators absolutely immune for their legislative activities from civil rights liability under 42 U.S.C. § 1983. As the Court put it in Bogan v. Scott-Harris, “[r]egardless of the level of government, the exercise of legislative discretion should not be inhibited or distorted by the fear or personal liability.”

To be sure, these case involved either private suits against local legislators or a prosecution in which there was no state law withdrawing common law legislative immunity. With the possible exception of the Washington Speech or Debate holding, these decisions turned on common law precedents or protective state statutes that could potentially be undone by an explicit state punitive preemption law. Nevertheless, they point the way to an argument that a respect for local democracy requires that local government officials be protected from punishment for their legislative acts.

The case for protection of local governments from punitive financial penalties, such as the loss of state shared revenue in Arizona, large fines, or civil liability to individuals or organizations for adhering to preempted laws, is more difficult. Certainly, states may reasonably want to tie state funds to compliance with conditions governing use of those funds, and to make local governments financially responsible for injuries their violations of state laws cause. Nonetheless, many of the new punitive provisions go well beyond protecting the state fisc or remedying private losses from local government misconduct and, instead, take advantage of limited local resources to bully local governments into submission. The Supreme Court’s invalidation of the federal government’s threat in the Patient Protection and Affordable Care Act

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147 Sanchez, supra, 854 P.2d at 130.
149 Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998). The Court noted that immunity also attaches to officials outside the legislative branch when they perform legislative functions. Id. at 55.
to cut off all Medicaid funding – including funding for pre-existing services -- from states that decline to expand their Medicaid programs is a compelling analogy. As the Court determined in *NFIB v. Sebelius*, although “Congress may use its spending power to create incentives for States to act in accordance with federal policies,” it could not coerce the states into compliance. The loss of some federal funding for not participating in a federal program was not impermissibly coercive but the cut-off of over ten percent of a state’s overall budget, as the Medicaid expansion would have imposed on recalcitrant states was “a gun to the head” that left the states “with no real option to acquiesce.” Surely, the threat built into Arizona’s SB 1487 to cut off one-third of local revenues is a gun to the head as well.

To date, only two state courts have considered the *NFIB* analogy in cases involving a threatened cut-off of state funds for localities. In *City of El Centro v. Lanier*, a California appellate court rejected the argument that a new state law denying state construction funds to any charter city that authorized its contractors not to comply with the state’s prevailing wage laws was an *NFIB*-type “gun to the head.” The California Supreme Court had recently held that, as a matter of home rule, charter cities could not be required to abide by the state’s prevailing wage laws; the new cut-off was plainly an effort to use a financial incentive to circumvent the supreme court decision. Although the dissenting judge in *El Centro* found the funding cut-off law would “diminish[] the vigor with which the home rule doctrine protects local prerogatives,” the majority determined that in the absence of evidence that municipalities were “dependen[t] on state funding or financial assistance for municipal projects,” the financial coercion argument failed on the facts. In similar circumstances, after an Ohio trial court found that a state statute regulating municipal use of photo-monitoring devices to enforce traffic laws violated the city of Toledo’s home rule authority and enjoined the state law’s enforcement, the state legislature enacted a budget that reduced payments to local governments that failed to abide by the enjoined state photo-monitoring law. An appellate court found that the “city would be required to

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151 Id. at 580-81.
153 Id. at 1516.
154 Id. at 1507.
155 *City of Toledo v. State of Ohio*, 72 N.E.2d 692 (Ohio Ct. App. 2017). State funding was reduced by an amount equal to the civil fines the local government had billed to drivers whose traffic violations were caught by the traffic cameras. Id. at 694.
choose between compliance with the constitutional statute or face a loss of state funding for its noncompliance.” The court, however, ultimately rested its decision not on whether such financial coercion violates home rule but on the determination that, as an “end-run around the trial court’s injunction,” the state budget unconstitutionally intruded on the prerogatives of the judicial branch.

These cases point to the seeds of arguments for broader local challenges to some forms of state preemption, particular the more punitive and sweeping measures and those that would displace local regulations without providing substantive state rules in its place. But these arguments point to the different challenge of persuading state courts why they build on these theories or order to defend local initiatives from the more egregious forms of state preemption. That is the focus of the next Part.

IV. The New Preemption and the Legal Status of Local Governments

The rise of the New Preemption raises anew the place of local government in our legal system. Our governmental structure is in form a two-tier federal one, but in practice a three-tiered federal-state-local system. This is true normatively, practically, and legally. Many of the values associated with federalism are advanced as well, if not better, by local governments. Most of the governance functions of the states are actually carried out by a multitude of local governments. And the great majority of states, in response to and in support of this considerable practical local role, have provided for home rule in their constitutions or through general enabling legislation. Yet, as Part III found, local governments receive no federal constitutional mention, and relatively minimal state constitutional defense. This lack of effective legal protection might be acceptable in the context of relatively cooperative state-local relations, especially given the essential role the states must play in overseeing and managing the state-local system. But at a time when “legislatures seem fraught with open hostility in a way they haven’t been in the past,” the traditional legal laissez-faire approach risks jeopardizing the ability of local governments to play their key role in our system.

156 Id at 699.
157 Id.
I will suggest that the legal status of local governments can be bolstered and local governments provided greater protection against state preemption, and that this can be done without falling into the trap set by the *imperio* model of trying to determine what is “state” and what is “local.” With so many public policy arenas combining both state and local concerns, that approach, like its dual federalism analogue is bound to fail, as it largely has in nearly all states. Instead, I will suggest that the empowered local self-government which is at the core of home rule necessarily places some limits on state preemption in those states that provide for home rule. Laws that punish local officials or governments for exercising their home rule powers or that broadly sweep away local law-making over vast areas of local concern are fundamentally inconsistent with the home rule commitment to local initiative. So, too, state measures that displace local policies without replacing them with state ones or that unduly constrain local powers beyond what is needed to achieve the state’s goals are in deep tension with the value of local autonomy enshrined in state constitutions and laws by home rule provisions. Such an approach would take seriously the mix of values, practices, and laws that make local self-government a cornerstone of our political system while also acknowledging the state’s overarching authority to preempt when it sets state-wide policy or addresses the costs local actions impose on non-local residents or the state as a whole.

The case for greater protection for local self-government draws together the normative values associated with local self-determination, the significance of its widespread practice, and the wide recognition it has received in state constitutionalism. Certainly, the values of local autonomy are frequently celebrated in our system as they are the values of federalism. As the Supreme Court recently reiterated, “the federal structure allows local policies ‘more sensitive to the diverse needs of a heterogeneous society,’ permits ‘innovation and experimentation,’ enables greater citizen ‘involvement in democratic processes,’ and makes government ‘more responsive by putting the States in competition for a mobile citizenry.’ . . .” Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power.”

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notwithstanding the reference to “local policies,” the Court was talking about the states. But the Court’s federalism cases regularly conflate federalism with the value of “local” self-governance and local governmental accountability to local electorates, and many of the federalism cases directly involve local governments. 161 And the Court’s normative concerns with responsiveness to diverse needs in a heterogeneous society, innovation and experimentation, citizen involvement in democratic processes, competition for a mobile citizenry apply even more to local governments than states. 162 Ironically, it is the very responsiveness of local governments to citizen engagement, their attentiveness to distinctly local preferences and concerns, their use of local regulations to compete for a mobile citizenry, and their policy innovations intended to address local problems that have provoked the new preemption. As an aspect of state power, the new preemption is entirely consistent with federalism per se. But it is in deep tension with the values that the Court has invoked to give federalism normative force.

Local decision-making is not merely honored by judicial rhetoric but is, instead, widely practiced and has become central to our governmental structure. Most of the subnational governance that federalism protects actually occurs at the local level. As the Supreme Court explained in holding that local elections are required to comply with the one person, one vote principle, “the States universally leave much policy and decisionmaking to their governmental subdivisions. . . . What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decisionmaking at the local level by representatives elected by the people. . . . In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.” 163 Moreover, as the Court has repeatedly pointed out in cases dealing with the local role in education, “local control . . . affords citizens an opportunity to

participate in decision-making, permits the structuring of school programs to fit local needs, and encourages ‘experimentation, innovation, and a healthy competition.’”164 State supreme courts, too, have celebrated the importance of “effective local self-government, as an important constituent part of our system of government,” particularly when “the nature of those problems varies from county to county and city to city.”165

Thus, such critical public services as public safety and law enforcement, water supply, management of waste removal and disposal, public health and hospitals, maintenance of streets and roads, housing and community development, and land use regulation are primarily local matters. Virtually all fire fighters and the public servants dealing with water supply, solid waste, sewage, and housing and community development work for local governments, as do the vast majority of police officers and most government workers employed in the health and hospital sector. Indeed, of the 14.5 million state and local employees, nearly 75% work for local governments.166 The key role of local governments, particularly cities and counties run by locally accountable elected officials, in policing both underscores their place in our governance structure and points toward some of the policies that have drawn preemptive attack. Unlike the states, cities and counties can make no claim to being sovereigns, but their central role in policing, including the power to make arrests and use deadly force, suggests they are regularly accorded some of the attributes of sovereignty. 167 By the same token, their special role in maintaining public safety and their daily encounters with crime and disorder have made them more attentive to the connections between violence and the widespread availability of firearms, as well as the need to work with members of immigrant communities – two of the major sources of state-local tension.

More generally, as both democratically elected governments and service providers that regularly have to deal with the street-level problems that create the need for and affect how they

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deliver their services, local governments may feel a greater urgency to act than do the more distant state governments. With their major responsibility for public health and hospitals, especially for low income residents, cities and counties may be more aware of the need to address the public health costs of gun violence, obesity and food deserts, pesticide use, or lack of medical leave – other areas where local responsiveness to local responsibilities have triggered conflicts with states. Local responsibility for garbage pick-ups, street cleaning, and parks may have heightened city and county awareness of and need to address the costs of nonbiodegradeable products like plastic bags and styrofoam, much as their central role in land use planning, public health, maintenance of physical infrastructure and public spaces, and economic development has led many local governments – even conservative ones – to take a leadership role through the adoption of smart growth and resiliency initiatives in addressing the ostensibly non-local problem of climate change. The local firefighting role may make local governments more interested in mandating sprinklers, just as the local responsibility for stray animals may contribute to a concern with puppy mills.

Local dependence on local resources to pay for local programs also contributes both to the practice of local autonomy and to the policies local governments pursue, often in surprising ways. Expansive anti-discrimination laws, for example, may reflect not simply responsiveness to larger urban populations of LGBT residents, but the desire to attract “creative class” residents by signaling that the city values equality and diversity so that state preemption “laws make it

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171 Cf. Caruso, Associational Standing for Cities, 47 Conn. L. Rev. 59, 61 (2014) (“the myriad ways in which municipal governments interact with their residents each day give them an excellent vantage point for recognizing patterns of harm affecting their communities”).

harder for cities to succeed in a global economy that rewards diversity and a liberal approach to immigration.” 173 By the same token, the need to maintain a viable tax base provides local governments with a powerful incentive to carefully balance the costs and benefits of workplace measures that could reduce urban poverty but raise the risk of discouraging business. In short, many of the seemingly radical measures undertaken by local governments reflect the point made by one Madison, Wisconsin council member that “municipal governments are about getting stuff done.” 174

Of course, the values of local autonomy are far from uncontested, and the extent of local powers is at least formally contingent on state policies that are always subject to change. Local autonomy has costs, as local actions can have extra-local effects, and multiple and conflicting local rules can unfairly burden or surprise individuals or firms that are active in multiple localities, to the detriment of the state as a whole. As the explosion of attention to police violence in the aftermath of the deaths of African-American men in Ferguson, Missouri, Staten Island, New York, Baltimore, Maryland and elsewhere indicates, local governments can be abusive, if not oppressive, 175 and local responsiveness to local concerns can result in exclusionary zoning, segregation, and enhanced inter-local inequality. Moreover, the scope of local autonomy has long been formally a matter of state law, subject to an ongoing, largely state-controlled renegotiation of the state-local relationship. What ultimately moves local autonomy out of the domain of political values and practices and gives it legal significance is the widespread state constitutional authorization of home rule.

Home rule grew out of a pre-existing practice of local self-governance, 176 responded to both the expansion of local responsibilities in the late nineteenth century and threats to local autonomy in that era, 177 and provided a firmer legal foundation for local autonomy. As Professor Baker and Dean Rodriguez put it, “home rule made concrete, and legally salient, the notion that many basic police power functions – including the protection of health, safety, and general welfare – were well within the competence of, and even perhaps best effectuated by, municipal

173 Stahl, supra, at 154
174 See Grabar, Shackling, supra.
176 See Krane, et al, supra, at 8 (“the custom and practice of local self-governance was strong and pervasive” in the colonial and revolutionary eras).
177 See, e.g., Howard Lee McBain, American City Progress and the Law 1-4 (Columbia University Press 1918).
governments.” Indeed, “state constitutions typically contemplate that significant regulatory and administrative power would be exercised by municipal governments” – and in some states by county governments, too. As Dean Rodriguez has pointed out, this “is a deliberate strategy to create opportunities for local governments to employ their ‘local knowledge’ to make innovative policy.” As a result, local exercise of the police power, including the regulation of private behavior, to promote local health, safety, and welfare is of the essence of home rule.

To be sure, home rule does not create a state-local analogue to federalism. Unlike the states in the federal union, local governments are not “indestructible,” but are subject to boundary change and abolition. Local governments are not formally represented in the structure of state governments. Moreover, states have inherent and plenary law-making authority. Although state constitutions may limit particular forms of state law-making, they do not need the equivalent of a Commerce Clause, Spending Power, or Fourteenth Amendment enforcement section hook to justify their intrusions on or displacements of local power. Yet, in one fundamental sense, federalism and the constitutional localism created by home rule are similar: they operate less by guaranteeing the nominally lower level of government immunity from an otherwise constitutional action of the other (with some exceptions in imperio states for local control of local government structure and personnel), and more by assuring independent law-making capacity for that lower level. In other words, even without formal immunity protections from state preemption local home rule matters and local initiative is state-constitutionally grounded. By the same token, even if a state constitution does not grant formal immunity protections, a preemption measure should be held invalid if it interferes with the power to act in the first place which is the undisputed purpose of home rule and which is intimately connected with local government’s place in our political system.

This approach to preemption would turn not on whether a matter is “primarily state” or “primarily local” -- a question which has long resisted, and is likely to long continue to resist, consistent, principled, neutral decision-making – but instead on whether a state law unduly impinges on the local capacity for self-governance. It responds, and seems well-suited, to the
challenge presented by the new preemption. More concretely, it could be applied in the following ways:

First, and most clearly, it would require the invalidation of punitive preemption, including both the firearms and sanctuary city laws making local officials criminally or civilly liable for voting for or administering laws subject to preemption. As the state Speech or Debate Clause and common law immunity cases indicate, few actions can have a greater chilling effect on local government than threatening local officials with fines or the loss of office simply for supporting certain local measures whether or not subject to preemption, or for administering or enforcing them before they are held to be preempted. Preemption alone should be enough to vindicate the position of a state’s law, with penalties applied only, if at all, to officials who attempt to enforce local laws, notwithstanding judicial determinations of preemption. But to say that local legislators cannot propose or vote for preempted measures chills both local self-government and the debate that is appropriate for any subject of state-local conflict.\textsuperscript{182} A Palm Beach county official noted that the county had been exploring possible gun regulatory measures, but Florida’s statute providing for the removal of officials who approved preempted firearms laws, “stopped us in our tracks. . . . Once our jobs were at stake, we dropped the plan entirely.”\textsuperscript{183} Similarly, excessive financial penalties for local governments – like the withdrawal of state shared revenue and bond posting requirements of Arizona’s S.B. 1487, or the large civil fines for nominal harms resulting from preempted laws -- go beyond establishing state policy supremacy over certain subjects and undermine the ability, if not the willingness, of local governments to undertake the law-making vouchsafed to them by home rule. As the mayor of Bisbee, Arizona pointed out in explaining his town’s decision not to fight the state attorney general’s determination that its plastic bag ban was preempted, “[t]he state was ready to pass a death sentence on a city over a plastic bag . . . . This is a draconian measure when they can bankrupt you. We would have gone belly up.”\textsuperscript{184} It is one thing for cities to lose the legal battle over whether they have the authority to adopt certain regulations, but it is worse if financial

\textsuperscript{182} See also Howard Lee McBain, Law and the Practice of Municipal Home Rule 29-45 (Columbia University Press 1916) (noting that even before the adoption of home rule state constitutions had been amended to protect local selection of and control over local officials).

\textsuperscript{183} See Palazzolo, supra.

threats make them unable to defend their own measures or unwilling even to try to probe the line of what is legally permissible for them. To be sure, states should be free to tie funding for specific programs to compliance with otherwise legally permissible conditions. But financial penalties that go beyond any misuse of earmarked state funds or any actual harm from preempted local conduct penalize local law-making, and that is inconsistent with the local autonomy provided by home rule.

Second, what I have dubbed “nuclear preemption”—the wholesale denial of local law-making over broad fields like the regulation of businesses; or commerce, trade, or labor; or any field in which the state has also engaged in law-making; or requiring legislative consent for local action in these areas—would be subject to invalidation as inconsistent with home rule. These proposals would, in effect, eliminate local initiative by either returning enormous areas of local concern to the states or reinstating Dillon’s Rule of limited local delegation. They are, thus, inconsistent with the very idea of local exercise of the police power as a matter of home rule. To be sure, it may be difficult to determine when a preemptive measure becomes too broad. These are questions of degree that are likely to be disputed. But a certainly a preemption measure that makes local action dependent on state legislative approval or provides that any area touched by state law—which would likely reach every subject in the state—is outside the scope of local legislation would go too far.

Third, I think this approach would provide a basis for challenging state laws that create a regulatory vacuum by displacing local measures without replacing them with substantive state standards or requirement. Such measures are aimed not at determining which level of government—state or local—shall control a field, but simply with denying local power to act. That is inconsistent with the home rule model of authorizing local action unless inconsistent with state policy. This sense that displacement without replacement is less a traditional resolution of competing state and local concerns and more unambiguously anti-local underlies the Ohio doctrine that preemption laws that do not prescribe a substantive rule of conduct are not “general laws” and thus cannot supersede otherwise proper local laws. The problem with the Ohio doctrine is not its effect but its rationale. It is not clear why a law that regulates local governments but is general in the sense that it applies throughout the state—the traditional meaning of general law—is not a general law. But such a law does seem inconsistent with the
spirit and practice of home rule, even home rule narrowly defined as local initiative without a protection against substantive preemption. This approach could, arguably, be end-run by state laws that declare as a matter of substantive state policy that a matter or practice should not be regulated at all but left to private ordering, although that has apparently not so far been the response of the Ohio legislature to the Ohio courts. But even that would have the value of having the legislature go on record as declaring that a subject should not be regulated rather than employing the current subterfuge of having legislators say that the matter should be subject to a statewide rule rather than varying local ones, but then failing to adopt any such rule. Requiring the legislature to openly embrace deregulation rather than merely denigrate local regulation could have political consequences favorable to local concerns.

Finally, a greater respect for the constitutional commitment to local law-making capacity could lead state courts to adopt a version of the California Supreme Court’s requirement that preemptive laws be narrowly tailored to the scope of the state’s substantive concern and not interfere with local decision-making more than is necessary to achieve the state’s goals.\textsuperscript{185} Although labelled by the Arizona Supreme Court as “balancing,”\textsuperscript{186} this does not involve the weighing and comparing of the strengths of the competing substantive state and local concerns implied by balancing. Indeed, it accepts the superior state position but requires the state to take the value of local decision-making into account and tailor its laws to avoid unnecessary interference with local self-governance. It appropriately treats local autonomy as of constitutional significance, admittedly subordinate in most cases to the state’s superior law-making authority. The goal here, as with standards for preemption generally, is to be able to harmonize the state’s ability to set state-wide policies without unduly constraining local capacity for self-governance. This could lead courts to question, for example, whether the state needs to preempt local regulations that impose requirements or restrictions in addition to those set by the state. But if a state can demonstrate that limiting local authority is necessary to achieve the state’s substantive goals, then the state would still prevail.

Admittedly, these four proposals would not constrain the ultimate power of the states to preempt local regulations by replacing them with different substantive state laws, but that is a design feature of our state-local system, not a flaw. The states must be able address, inter alia.

\textsuperscript{185} See, e.g., California Fed. Sav. & Loan Ass’n v. City of Los Angeles, 812 P.2d 916 (Cal. 1991)
\textsuperscript{186} See Brnovich, supra, 399 P.3d at 670.
the extra-local consequences of local actions, the burdens that can result from multiple and
divergent local rules, and the scale in which economic, social, environmental and other problems
are handled. But these proposals, grounded in the values, political structure, and legal rules of
our system, would constrain the worst abuses of the new preemption. Beyond that, the scope of
local autonomy and the resolution of state-local conflicts over the substance of regulatory
policies would continue to be a matter for state politics. Indeed, historically, local governments,
have done relatively well in state legislatures although divisions in large urban delegations may
have rendered big cities less politically effective.  

V. Conclusion: Local Autonomy – Means or End?

A particularly salient feature of the new preemption has been the reversal of the
presumed association of liberals and Democrats with big government and conservatives and
Republicans with smaller government and local control. As one commentator noted, North
Carolina’s notorious Bathroom Bill is “a striking example of how North Carolina’s Republicans
have decided that culture-war issues ought to take precedence over traditional conservative
preference for local control.” So, too, in Texas, the Houston Chronicle remarked “on the
glaring contradiction of conservative champions of local control seeking to override municipal
ordinances they don’t like.” Indeed, the American City Council Exchange (“ACCE”), the local
government spin-off from the American Legislative Change (“ALEC”), consists of local officials
who have championed limits on local power and emphasized local subordination to the states.
Conservative state legislators have not been shy about asserting that “[w]hen we talk about local

187 See, e.g., Gamm & Kousser, No Strength in Numbers: The Failure of Big-City Bills in American State Legislatures,
188 See Diller, supra.
189 Graham, North Carolina Overturbs LGBT-Discrimination Bans, The Atlantic, March 24, 2016,
https://www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender-
bathrooms/475125/
190 See Mize, supra, 57 So. Tex. L. Rev. at 339.
191 See Riccardi, US conservatism expands to final frontier: City Hall, AP, July 27, 2017,
https://www.apnews.com/d0ce048058d343b28fc90382926636e2; ACCE White Paper, Federalism, Dillon Rule, and
control we mean state control," 192 and emphasizing that federalism is not a short-hand way of speaking of the values of decentralization, but is really only about the states. The Florida legislator who has been pushing nuclear preemption in the Sunshine State put it this way: “We are the United States of America. We are not the United Towns of Florida. We’re not the United Counties of Florida.” 193

Heather Gerken has observed that “federalism” (and presumably she would add localism) “has no political valence,” 194 but there is a considerable political valence as to who supports federalism – or localism – with respect to a specific issue or at a particular point in time. Indeed, as one Tennessee county commissioner who has had to deal with an aggressively preemptive legislature put it, “[p]eople like to talk about local control and they’re all for it unless they have a substantive policy preference they care more about and then local control gets thrown to the sidelines.” 195 So, are the concerns raised by the new preemption, particularly by progressives, really about local autonomy or is local autonomy really only a means to the end of advancing certain progressive policies? If, as Professor Stahl has argued, “it is unlikely that voters and legislators will see the question of local power as anything but a partisan issue,” 196 should these issues – of firearms, workplace equity, discrimination, immigration law enforcement, or public health – be argued on substantive policy lines rather than as matters of state vs local?

Certainly as the bemusement of some commentators concerning progressive localists and conservative anti-localists indicates, there is no necessary connection between local autonomy and progressive values. Local governments, or at least some of them, have been and continue to be associated with a range of non-progressive policies, including anti-immigrant, 197 anti-union, 198 anti-evolution, 199 anti-medical marijuana, 200 exclusionary zoning, 201 and abusive law

193 See Badger, supra.
196 Stahl, supra, 44 Ford. Urb.L.J. at 175.
197 See, e.g., Lozano v. City of Hazelton, 724 F.3d 297 (3rd Cir. 2013).
198 See Grabar, Shackling, supra (noting local adoption of right to work laws and limits on municipal collective bargaining).
200 City of Riverside, supra.
enforcement. Indeed, as Judge Barron has pointed out, there was an important conservative strand in the late nineteenth/early twentieth century home rule movement that saw home rule as a means of limiting the scope of local government action. And, of course, states are not ineluctably conservative. A sharp turn of the political wheel in a half-dozen “purple” states could change the “valence” of the preemption issue.

Nevertheless, I think there are reasons to support local autonomy apart from the defense of “progressive localism.” Without rehearsing all the usual claims for local decision-making, including the classics -- protection of liberty, the economic efficiency that may result from interlocal competition, and the enhanced opportunities for political participation -- two arguments for preserving some space for local autonomy are particularly salient in our current period of intense polarization.

First, local autonomy deals with polarization by devolving policy-making to different communities with different populations, conditions, preferences and concerns. Instead of having to resolve hotly contested issues involving firearms, immigrants, workplace equity, or even plastic bags or sugary drinks on a statewide basis, with the result that large numbers of people on the losing side will be aggrieved and subject to rules they oppose (or unable to implement policies with broad support in their communities), local autonomy permits different communities to have different rules. Polarization of viewpoints is accommodated rather than resolved by the contested victory of a narrow statewide majority over the rest.

Second, local autonomy permits the testing of different ways of addressing disputed issues and the development of some real world evidence of how new approaches work in practice. Would tighter firearms regulations promote or impair personal security? Do sanctuary laws assist or undermine the health, safety and welfare of communities with large numbers of immigrants? Do living wage, family leave and predictive scheduling laws burden or benefit the

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201 See, e.g., Briffault & Reynolds, supra, at 515-33.
202 See Chait, supra.
204 But see Diller, supra (arguing that due to the combination of the concentration of Democrats in big cities and partisan gerrymandering, conservative Republican control of state legislatures is likely to persist); Stahl, supra (making a similar argument, albeit focused primarily on gerrymandering).
205 Tocqueville, Democracy in America, chap 5.
local economy? Do plastic bag bans provide a real sanitation and environmental or are they an unnecessary nanny state burden on consumers? One way to find out the answers to these and other questions that are focal points of the new preemption is to let local governments try and see the results. Even in an era in which “alternative facts” sometimes are given the same weight as real facts, knowledge of how contested regulatory programs work could be useful in lowering the partisan temperature and de-polarizing certain issues. But for this to happen, local governments need to be given some space to try new programs.

To be sure, local autonomy has its limits. Measures that have significant extralocal effects, unduly burden intrastate mobility, threaten fundamental rights, or violate constitutional norms are necessarily beyond the scope of local action. But local regulations whose effects are largely absorbed within the regulating community and that don’t implicate fundamental rights or constitutional norms should be accepted as within the scope of local decision-making by progressives and conservatives alike. Opponents should fight these policies on the merits but not by undermining the capacity of local self-government.

To be sure, this is no doubt a naïve, if not utopian prescription. Structural values like federalism or localism regularly give way to desire to prevail on the political issue of the moment. But if the rise of the New Preemption and the controversy it has aroused has any value it is as a reminder of the importance of local governments in our political structure and of the need to protect their opportunities to be effective policy-makers.
Readings on Local Home Rule and the Presumption Against Preemption of Local Zoning

The readings in this packet consist of (1) excerpts from the New York and California Constitutions dealing with the powers of local governments; (2) an excerpt from Hydrofracking and Home Rule, an article discussing whether and to what extent the New York Constitution Article IX, section 3(c) suggests some sort of canon of construction disfavoring the preemption of a town’s zoning law banning hydraulic fracturing entirely from that town; and (3) an unpublished decision by the Santa Clara superior court in Eden Housing v. Town of Los Gatos, holding that the California Housing Accountability Act, Gov’t Code section 65589.5(j) does not preempt the Town’s powers to require discretionary review of a subdivision map pursuant to the grant of power to towns over subdivisions contained in California Gov’t Code section 66473.5.

With respect to these readings, I will pose four questions:

1) Does the idea of “home rule” under either the New York or California Constitutions suggest any presumption against preemption of local law by state law?

2) If “home rule” does imply such a presumption, then is there any principled way to apply that presumption to New York’s Oil, Gas, and Surface Mining Law but not to California’s Housing Accountability Act?

3) Does any such principled distinction have to focus on the sufficiency of local voters’ incentives to consider the regional burdens imposed by their zoning on the housing supply? (For a brief discussion of those costs, see Chang Tai-Hsieh & Enrico Moretti, How Local Housing Regulations Smother the U.S. Economy, New York Times, Sep’t 6th, 2017, available at https://www.nytimes.com/2017/09/06/opinion/housing-regulations-us-economy.html ).

4) Is it appropriate or practically possible for a court in a judicial opinion to evaluate the sufficiency of local voters’ political incentives?
New York Constitution, Article IX, section 3(c):

Section 1. Effective local self-government and intergovernmental cooperation are purposes of the people of the state. In furtherance thereof, local governments shall have the following rights, powers, privileges and immunities in addition to those granted by other provisions of this constitution:

Section 2(c)…. In addition to powers granted in the statute of local governments or any other law, (i) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government and, (ii) every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects, whether or not they relate to the property, affairs or government of such local government, except to the extent that the legislature shall restrict the adoption of such a local law relating to other than the property, affairs or government of such local government: … (10) The government, protection, order, conduct, safety, health and well-being of persons or property therein.

Section 3(c): Rights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.

California Constitution, Article XI, sections 5(a) & 7:

Section 5(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

(Sec. 5 added June 2, 1970, by Prop. 2. Res.Ch. 331, 1969.)

Section 7 A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

(Sec. 7 added June 2, 1970, by Prop. 2. Res.Ch. 331, 1969.)
HYDROFRACKING AND HOME RULE:  
DEFENDING AND DEFINING AN ANTI-PREEMPTION CANON OF 
STATUTORY CONSTRUCTION IN NEW YORK  

Roderick M. Hills, Jr.*

[Editor's note: This article discusses whether the supersession clause of New York's Oil, Gas, and Solution Mining Law ("OGSML") preempts towns' zoning laws banning extraction of natural gas through hydraulic fracturing. The first section of the article examined the specific text of the OGSML's supersession clause as it had been construed by New York Court of Appeal precedents. The sections below focus on the more general question of whether and when courts ought to adopt any presumptions against preemption when construing ambiguous statutory text].

* This article is in substantial part drawn from, and frequently borrows verbatim language from, an amicus brief written by the author, signed by nine other law professors, and filed by Susan Kraham as Counsel of Record in the Third Department of the Appellate Division on behalf of ten law professors in the Dryden and Middlefield litigation. Brief of Vicki Been et al. as Amici Curiae Supporting Respondents, Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714 (App. Div. 3d Dep't 2013) (No. 515227). Rather than quote or cite to the amicus brief, a practice that would lead to ungainly block quotes, the author simply drew from the text of the amici's brief, leaving it to the intrepid reader to figure out which parts are verbatim quotations from the brief and which, later supplementary additions. The author thanks the nine other amici—Vicki Been, Richard Briffault, Nestor Davidson, Clayton Gillette, John Nollon, Ashira Ostrow, Patricia Salkin, Christopher Serkin, and Stewart Sterk—for their comments on the brief that are also ipso facto comments on the parts of this article relying on that brief. The author also thanks Susan Kraham for her review of and comments on the amici's brief, and for her generosity in agreeing to act as Counsel of Record. Finally, the author acknowledges his gratitude to Heather Lewis, NYU Law Class of 2012, for outstanding research assistance.
II. THE “LIBERAL CONSTRUCTION” CLAUSE OF ARTICLE IX, SECTION 3(C) AS A MANDATE FOR A PRESUMPTION AGAINST PREEMPTION

The text of the New York Constitution provides an answer to the problem of ambiguous preemption clauses. Article IX, section 3(c) of the New York Constitution provides that “[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed.” This constitutional requirement has also been codified by section 51 of the Municipal Home Rule Law, which provides that home rule powers “shall be liberally construed.” These requirements of liberal construction apply to towns’ powers to enact zoning laws, which are derived not only from specific delegations of power contained in the Town Law but also the Municipal Home Rule Law.

Article IX, section 3(e) can be understood as a repeal of the New York courts’ adherence to “Dillon’s Rule,” a canon of statutory construction invented by Judge John Forrest Dillon, an Iowa jurist, during the nineteenth century and invoked by New York courts in

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23 N.Y. CONST. art. IX, § 3(c).
24 N.Y. MUN. HOME RULE LAW § 51 (McKinney 2013).
26 Justice John Forrest Dillon announced his famous rule when sitting on the Iowa Supreme Court in Clark v. City of Des Moines, 19 Iowa 199 (1865), holding that Clark,
the early twentieth century to construe municipal powers with stringent narrowness. The canon of liberal construction, however, goes beyond merely abolishing Dillon’s Rule. The canon also implies that the state statutes’ preemption clauses, where ambiguous, be narrowly construed. Local governments’ rights, powers, privileges and immunities are defined by those state laws that abrogate such powers just as much as by state laws delegating such powers. As a matter of plain logic, the court cannot liberally construe local power without narrowly construing limits on that power.

While there is little relevant New York precedent construing Article IX, section 3(c), precedents from other states construing analogous liberal construction clauses follow the common-sensical reading of the clause as containing a presumption against preemption. In *Neri Bros. Const. v. Village of Evergreen Park,*28 for although a bona fide holder in due course, could not recover on bonds issued by Des Moines, because the bonds were issued *ultra vires.* Id. at 212–16. In finding that the Des Moines city council lacked power to issue negotiable instruments, Justice Dillon noted that the general power to borrow money did not expressly include such a power. Id. at 214. He offered his famous canon for construing the powers of municipal corporations as a way of justifying the inference that a power to issue negotiable instruments should not be inferred from a mere power to borrow money because

\[ \text{it is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.} \]

People ex rel. Terbush & Powell, Inc. v. Dibble, 189 N.Y.S. 29, 30 (Sup. Ct. Schenectady County 1921) (quoting JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237, at 448–50 (5th ed. 1911)); Clark, 19 Iowa at 212. Clark’s canon was included in Justice Dillon’s 1873 treatise, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS, and the canon was widely adopted as “Dillon’s Rule” by state courts throughout the late 19th century. See Briffault, supra note 9, at 8–11.

27 Invoking Dillon’s Rule, courts in New York routinely construed statutes extraordinarily narrowly, holding (for instance) that the state legislative grant of the power to pay wages to city employees did not include the power to pay for such employees’ life insurance, *Dibble,* 189 N.Y.S. at 30 (barring the City of Schenectady from purchasing life insurance for city employees), the grant of power to approve or disapprove a streetcar franchise did not include the power to require the streetcar company to relocate train tracks from the center of the street, *People ex rel. Olean v. W. N.Y. & Pa. Traction Co.,* 108 N.E. 847, 848 (N.Y. 1915), and the grant of power to acquire a garbage dump within village limits did not include any power to acquire such a dump outside the village, *Gibson v. Village of Massena,* 178 N.Y.S. 850, 851 (Sup. Ct. St. Lawrence County 1919).

instance, the court held that a village’s power to impose liability on persons who released hazardous natural gas as a result of damaging a utility line was not preempted by an Illinois statute making the prevention of damage to utility lines a matter of exclusive state-wide concern. The Illinois statute contained a lengthy preemption clause providing that “[t]he regulation of underground utility facilities . . . damage prevention . . . is an exclusive power and function of the State” and that “[a] home rule unit may not regulate underground utility facilities . . . damage prevention . . . .”

Despite this explicit language, the *Neri Bros.* court held that the village’s ordinance imposing the cost of cleaning up discharge of natural gas on a subcontractor who broke a gas line was not preempted by state law, because the village’s law was aimed at a goal different from the purpose of state law—recouping remediation expenses rather than preventing negligent damage to utility lines.

In rejecting preemption of local law, *Neri Bros.* relied on Article VII, section 6(m) of the Illinois Constitution’s clause, which provided that the “[p]owers and functions of home rule units shall be construed liberally,” a provision that, according to *Neri Bros.*, required that “any limitation on the power of home rule units by the General Assembly must be specific, clear, and unambiguous.”

The New York courts have not so plainly adopted a presumption against preemption as did the *Neri* court, despite occasional rhetoric about the importance of local control under New York law. Such a presumption is, however, completely consistent with state court precedent. In particular, the presumption against preemption does not present any barrier whatsoever to the state legislature deliberately asserting the supremacy of state law over local law: where a state statute unambiguously preempts local law the latter must give way to the former. The presumption against

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29 Id. at 153.
30 Id. at 151 (quoting 220 ILL. COMP. STAT. 50/14 (2014)).
31 Neri Bros. Constr., 841 N.E.2d at 152–53.
32 ILL. CONST. art. VII, § 6(m).
33 Neri Bros. Constr., 841 N.E.2d at 152.
35 Town of Islip v. Cuomo, 473 N.E.2d 756, 759 (N.Y. 1984) (explaining Article IX, section 3(e)’s “liberal construction” provision has no application to a state statute unambiguously
preemption merely prevents ambiguous statutory phrases from being transformed into a veto on local policies that the state legislature may never have even considered, let alone disapproved. To this extent, the presumption is consistent with—perhaps even required by—the well-established principle that New York courts will not infer preemption from mere legislative silence.\footnote{36}

The presumption against preemption implied by Article IX, section 3(c) can also be understood and defended as a constitutionalized and more specific version of the more familiar canon against implied repeal. Especially to the extent that state law purports to preempt well-established forms of local legislation, preemption does not merely eliminate local law but also implicitly repeals \textit{state} statutes that delegate regulatory power to local governments. Local zoning laws that are otherwise valid, for instance, are exercises of power delegated by some state statute such as the Town Law or Home Rule Law.\footnote{37} Preemption of such local laws, therefore, are logically also repeals \textit{pro tanto} of the state statutes authorizing such local legislation. It is, however, a well-established canon of statutory construction that “[r]epeals of earlier statutes by implication are not favored and a statute is not deemed repealed by a later one unless the two are in such conflict that both cannot be given effect.”\footnote{38} Under this canon, the implied repeal of a state statutory delegation of zoning power should be disfavored unless plainly required by the text or unwritten purpose of the allegedly preemptive state law.\footnote{39} In fact, New York courts have invoked the idea that repeals by implication are presumptively disfavored to protect local governments’ power from implied limiting “disposal of solid waste by landfill”).

\footnote{36} See People v. Cook, 312 N.E.2d 452, 457 (N.Y. 1974) (refusing to find that state statutory standard is a ceiling on further local regulation on the ground that, if mere silence in a state statute constituted a veto over local laws, then “the power of local governments to regulate would be illusory,” destroying “the essence of home rule”).

\footnote{37} See 1 SALKIN, supra note 18, § 2:8; 1 PATRICIA E. SALKIN, NEW YORK ZONING LAW AND PRACTICE §§ 2:08, 2:12 (4th ed. 2013).

\footnote{38} N.Y. STAT. LAW § 391 (McKinney 2013); see also 97 N.Y. JUR. 2D Statutes § 78 (2013) (“The implied repeal of statutes is distinctly not favored in the law, and in the absence of an express repeal by the Legislature, there is a presumption that no such repeal was intended.”).

\footnote{39} See Emerson College v. City of Boston, 471 N.E.2d 336, 338 (Mass. 1984); Fammler v. Bd. of Zoning Appeals, 4 N.Y.S.2d 760, 761–62 (App. Div. 2d Dep’t 1938) (“Where statutory construction in seeking the intent of the Legislature will have such far-reaching effect as would be the case here, the repeal of workable statutes by implication is not favored.”); 4 SALKIN, supra note 18, § 41:13.
preemption.\textsuperscript{40} The canon against implied repeal has not won universal acclaim.\textsuperscript{41} In particular, critics complain that courts should not discourage later legislatures from updating earlier legislation.\textsuperscript{42} One can, however, defend the canon (and its constitutionalized version in Article IX, section 3(c)) as a way to prevent the state legislature from deregulating a risk in a fit of absent-mindedness. If a risk has normally been comprehensively controlled by local governments for a very long time, then local citizens may come to rely on such regulation to plan their investments. Local zoning powers in New York are precisely the sorts of deeply entrenched powers that one would expect the state legislature not to repeal lightly. Towns have exercised such zoning power for over eight decades, since the New York legislature delegated zoning authority to them in 1926.\textsuperscript{43}

The tenacious character of towns’ zoning authority is not an accident: It is the result of the popularity of local control with local voters who seek power over matters immediately affecting their vital interests—in particular, power over changes in the character of their neighborhood that could affect the value of owner-occupied homes.\textsuperscript{44} State preemption of local control constitutes a radical deregulation of land use and poses the danger of a correspondingly radical disruption of local residents’ normal investment-backed expectations. Courts might reasonably pause before inferring that a state legislature intended such a disruptive intervention into local law.


\textsuperscript{41} See Richard A. Posner, \textit{Statutory Interpretation— in the Classroom and in the Courtroom}, 50 U. Chi. L. Rev. 800, 812–13 (1983), for a criticism of the canon as imposing unrealistic expectations on legislatures to review their past legislation.

\textsuperscript{42} See Karen Petroski, Comment, \textit{Retheorizing the Presumption Against Implied Repeals}, 92 Calif. L. Rev. 487 (2004), for a general and critical assessment of the canon with suggestions for its refinement.

\textsuperscript{43} See Act of Apr. 30, 1926, ch. 714, 1926 N.Y. Laws 1280 (amending Town Law to authorize towns to create zoning districts).

Aside from protecting expectations of homeowners, the presumption against preemption also preserves the system of home rule from inadvertent preemption resulting from loose language. Home rule produces systemic benefits for the people of New York, enabling them to make policy locally where they confront intractable statewide disagreements. These systemic benefits, however, are not immediately apparent to legislators preoccupied by the immediate concerns of their constituents. Rather than allow such structural arrangements to be accidentally abolished in the hurry of legislative business, Article IX, section 3(c) requires courts to presume that the state legislature intended to retain the benefits of local democracy unless the legislature plainly deliberated about and qualified home rule powers. Such a “plain statement” rule is used by the federal courts to preserve the benefits of federalism from the inattention of Congress,\(^\text{45}\) and an analogous canon of construction serves a similar function in preserving the structural value of home rule.

III. REBUTTING THE PRESUMPTION AGAINST PREEMPTION BY PROOF OF EXTERNALITIES OR INTERNALITIES

The strength and meaning of any presumption depends on the means by which it is rebutted. Both New York law and sensible policy suggest two ways in which a presumption against preemption should be rebuttable. First, if some local regulation is likely to impose external costs on non-residents, then the usual presumption against preemption would be inappropriate: Even if the state legislature did not say in so many words that the local law ought to be set aside, a court might reasonably infer that the local law constituted the type of burden on non-residents that the state legislature would likely want to discourage.\(^\text{46}\) Second, if a local law itself disrupts the investment-backed expectations of a local resident, then a court might reasonably infer that the disruption of overturning the local law would be outweighed by the need to protect local residents from oppressive local legislation.\(^\text{47}\)


As a convenient shorthand, one can use the term “externalities” to refer to burdens on non-residents by a local law. Less conventionally, I will use the term “internalities” to refer to local law’s disruption of insiders’ reasonable investment-backed expectations. It is important to understand, however, that these terms do not forbid local laws from having any extra-territorial effects on non-residents or any effect on residents living within the regulating municipality. A local law’s extra-territorial costs that are also experienced by the residents of the municipality enacting the law are not a cause for concern: Presumably, the local jurisdiction has sufficient incentive to control the cost in question without judicial oversight. Likewise, a change in local law may disrupt some residents’ expectations (for instance, to develop their land in the future) but also preserve other residents’ expectations (for instance, to preserve the character of their neighborhood): If there were no discriminatory treatment resulting from the change—for instance, if all residents were subject to the same zoning classification—then one would not normally characterize the law that preserved the status quo as a disruption of anyone’s reasonable expectations and, therefore, such a law would not qualify as an internality.

The case of hydraulic fracturing provides a useful illustration of how these two limits on externalities and internalities can be evaluated in a specific context. Unlike local zoning that excludes affordable housing, local prohibitions on hydraulic fracturing impose no substantial external costs. Unlike laws that single out landowners for discriminatory zoning or interfere with some established use, such prohibitions also disrupt no settled expectations. The illustration is not, of course, conclusive. It does suggest, however, that the evaluation of whether external burdens or internal abuses exist is not beyond the ken of the judiciary.

A. Does Preemption of Local Bans on Hydraulic Fracturing Protect Non-Residents from External Costs?

Consider, first, the problem of externalities: Why should they qualify the “liberal construction” clause of Article IX, section 3(c)? And why do local laws banning hydraulic fracturing impose no substantial external costs?

Using the idea of external costs to limit the presumption against preemption is required by well-established doctrine in New York: any blanket or irrebuttable presumption against preemption is
indefensible in light of the many cases construing local governments’ powers in specific circumstances.\textsuperscript{48} The “liberal construction” clause of Article IX, section 3(c) certainly eliminated Dillon’s Rule from New York law.\textsuperscript{49} “Mini-Dillon’s Rules,” however, persist, calling for a narrow construction of local government power in selected areas. For instance, New York’s courts require the state legislature to specify in excruciating detail the rules for local taxation in the text of the state enabling act.\textsuperscript{50} Likewise, state courts have adopted a canon disfavoring local authority to impede free vehicular movement on roads, on the theory that the right to travel is a constitutional prerogative.\textsuperscript{51} Both canons are consistent with the idea that local laws posing special risks of expropriation of residents (i.e., local taxation) or special burdens on outsiders (i.e., burdens on inter-local movement) should be carefully monitored by the state legislature.\textsuperscript{52} More generally, state courts have long given the fish eye to local zoning that imposes burdens on the region as a whole by excluding affordable housing for which there is a regional need.\textsuperscript{53} As Professor Paul Diller has noted, this limit on

\textsuperscript{48} See infra notes 50–53 and accompanying text.

\textsuperscript{49} See supra Part II.

\textsuperscript{50} See, e.g., Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 618 N.E.2d 127, 130–31 (N.Y. 1993) (narrowly construing power of library district to raise revenue); Albany Area Builders Ass’n v. Town of Guilderland, 534 N.Y.S.2d 791, 794 (App. Div. 3d Dep’t 1988) (barring tax increment financing without state authorization); County Sec., Inc. v. Seacord, 15 N.E.2d 179, 180 (N.Y. 1938) (“The power of taxation, being a State function, the delegation of any part of that power to a subdivision of the State must be made in express terms. It cannot be inferred.”).

\textsuperscript{51} People v. Grant, 117 N.E.2d 542, 543 (N.Y. 1954) (“[S]treets are subject exclusively to regulation and control by the State as sovereign, except to the extent that the Legislature delegates power over them to political subdivisions and municipal corporations. In this context, local governing boards are vested only with such powers as are conferred upon them by statute.” (citing Wells v. Town of Salina, 119 N.Y. 280, 292 (1890)).

\textsuperscript{52} See generally Berenson v. Town of New Castle, 341 N.E.2d 236, 242 (N.Y. 1975) (recognizing a balancing of local and regional interests and needs when considering a zoning ordinance).

\textsuperscript{53} Because “zoning often has a substantial impact beyond the boundaries of the municipality,” the court in examining an ordinance, should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities. \textit{Id.} at 242. “[A] community may not use its police power to maintain the \textit{status quo} by preventing members of lower and middle socioeconomic groups from establishing residency in the municipality.” Gernatt Asphalt Prods., Inc. v. Town of Sardinia, 664 N.E.2d 1226, 1235 (N.Y. 1996). A zoning ordinance will be invalidated “if it was enacted with an exclusionary purpose, or it ignores regional needs and has an unjustifiably exclusionary effect.” Robert E. Kurzius, Inc. v. Village of Upper Brookville, 414 N.E.2d 680, 682 (N.Y. 1980). The total exclusion of multi-family housing in the face of a proven regional need for such housing, therefore, is presumptively prohibited.
“exclusionary zoning” is best understood as a broader limit on all “parochial or exclusionary ordinances” that “impose substantial and tangible social costs on other communities without any sacrifice by the city benefiting from the ordinance.”

One cannot, in short, fit the abstract command of liberal construction contained in Article IX, section 3(c) without allowing for the rebuttal of this presumption upon some showing that a challenged local law falls outside the normal zone of deference protected by Article IX. Put in terms of implicit legislative intent, it makes sense to presume that, in the ordinary case, the state legislature would want to preserve local power. This presumption makes less sense, however, when local governments overreach by inflicting burdens on their neighbors for the sake of their residents.

Do local prohibitions on hydraulic fracturing impose costs on non-residents of the sort sufficient to rebut the presumption against preemption? In the most obvious sense, such prohibitions leave neighboring jurisdictions’ powers completely intact: one town’s prohibition on hydraulic fracturing preserves every other town’s power to encourage the practice. In this sense, local prohibitions on hydraulic fracturing are distinguishable from the sorts of local bans on drilling that courts have found to be implicitly preempted by state law.

One might argue that local prohibitions burden non-residents by impeding their power to enter into commercial relationships with the residents of the regulating local governments. A non-resident driller will be unable to extract and sell natural gas lying


54 Diller, supra note 46, at 1160.

55 In Voss v. Lundvall Bros., for instance, the Colorado Supreme Court held that Colorado’s regulations of oil and gas drilling preempted the City of Greeley’s total prohibition of oil and gas drilling within city limits based on the specific opinion of the Colorado Oil and Gas Conservation Commission, which urged in an amicus brief, that, because “an irregular drilling pattern” could impede extraction of oil or gas from pools underlying Greeley but extending beyond city limits, the City of Greeley’s prohibition would impose a burden on non-residents’ capacity to extract gas and oil from land outside Greeley’s jurisdiction. Voss v. Lundvall Bros., 830 P.2d 1061, 1067, 1069 (Colo. 1992). Given the municipal zoning law’s specific extra-territorial effect on non-residents, the court held the municipal law frustrated the state law’s purpose. Id. at 1067–68. The Colorado Oil and Gas Commission’s amicus brief identified how municipal law would have effects “extend[ing] beyond the city to land where production is not prohibited by a total drilling ban” and found preemption based on the “extraterritorial effect of the Greeley ordinances” and the state purpose of preserving “Oil and Gas Conservation Commission’s express authority” to protect mineral rights “owners and producers in the common source or pool” extending beyond city limits. See id. at 1067, 1069.
underneath a town that prohibits hydraulic fracturing: Why doesn’t this burden count as an externality?

The inability of a non-resident driller to lease land or buy gas from a resident landowner is not an externality precisely because the resident landowner is also burdened: the equality of the burden internalizes the cost. Because the prohibiting jurisdiction’s own residents forego the opportunity to profit from their own gas, one might argue that this burden is perfectly internalized: the interest of non-residents in buying the right to extract gas is balanced by the interest of residents in selling mineral rights. The latter insures that the former will be protected through the local political process.

Moreover, one must not merely examine the external costs imposed by local law but also compare those costs with the externalities inflicted by preemption: only if a local law’s external burdens plausibly exceed the external costs inflicted by preemption does it make sense to say that the former imposes (net) externalities on non-residents. The difficulty with preemption of local zoning is that it eliminates one externality by creating another one that is even more difficult to internalize. Absent local zoning restrictions, the non-resident driller can impose costs on neighbors that the driller has no adequate incentive to take into account. Proximity to a drilling operation can obviously reduce the market value of a residence that zoning restrictions are intended to prevent. Non-zoning remedies for such losses like the common law of nuisance are plainly insufficient to make homeowners whole, at least as such remedies exist in current law. Even if one reformed the measure of damages traditionally used in nuisance to take into account purely aesthetic losses, one would have to contend with the unwieldiness of the nuisance remedy, which requires large numbers of neighbors to overcome collective action problems in covering the costs of a private nuisance suit. The inadequacies of nuisance law

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56 Nuisance, for instance, traditionally does not protect landowners from aesthetic harms like loss of a neighborhood’s character or loss of light and air. See, e.g., Blair v. 305–313 East 47th St. Associates, 474 N.Y.S.2d 353, 355 (Sup. Ct. New York County 1983) (nuisance law provides no easements for light and air); Dugway, Ltd. v. Fizzinoglia, 563 N.Y.S.2d 175, 176 (App. Div. 3d Dept. 1990) (holding that “assorted debris and an uninhabitable trailer” that constituted “an eyesore,” were an insufficient basis for a claim of private nuisance); 81 N.Y. Jur. 2d Nuisances § 17 (2014) (“Things merely disagreeable, however, which simply displease the eye or offend the taste, or shock an oversensitive or fastidious nature, no matter how irritating or unpleasant, are not nuisances.”).
are, indeed, in large part why zoning was adopted.57

Outside of nuisance law, the OGSML provides no substitute for zoning’s protection of neighbors’ quiet enjoyment.58 In place of the usual array of restrictions on the siting of industrial uses in residential or other areas sensitive to noise, traffic, high population densities, or aesthetic incompatibility, the OGSML merely has a spacing requirement barring wells from being drilled closer than 100 feet to any “inhabited structure” (i.e., a home) or 150 feet from a “public building.”59

These spacing requirements are patently insufficient for the protection of the character of the community from traffic, noise, glare, odor, or aesthetic incompatibility, or other threats to community character against which zoning law traditionally protects. Indeed, the OGSML on its face is not concerned with community character at all: The purpose of the spacing requirements is manifestly the personal safety, not the quiet enjoyment, of pre-existing structures’ inhabitants. One hundred and fifty feet may protect inhabitants from cracked foundations and collapsing equipment, but such minimal distance will not create any meaningful buffer against noise, glare, blocked views, and general aesthetic incompatibility from siting a towering drill and accompanying truck traffic, waste pits, compressor stations, and the like next door to a quaint bed-and-breakfast in a rural hamlet or single-family home in a quiet residential suburb.

By contrast with the imperfect state common-law and non-existent state statutory remedies available for insuring that drillers take into account the burdens that they impose on neighbors, local government law provides a multitude of mechanisms for insuring that neighbors will take into account the interests of non-resident

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57 See, e.g., Alfred Bettman, Constitutionality of Zoning, 37 Harv. L. Rev. 834, 841 (1924) (“The need for zoning arises from the utter inadequacy of the law of nuisances to cope with the problems of municipal growth.”).
58 Anschutz Exploration Corp. v. Town of Dryden, 940 N.Y.S.2d 458, 470 (Sup. Ct. Tompkins County 2012), aff’d sub nom. Norse Energy Corp. USA v. Town of Dryden, 964 N.Y.S.2d 714 (App. Div. 3d Dept 2013), leave to appeal granted, 995 N.E.2d 851 (N.Y. 2013) (“None of the provisions of the OGSML address traditional land use concerns, such as traffic, noise or industry suitability for a particular community or neighborhood.”).
drillers in extracting such gas. Unlike low- and moderate-income housing, industrial uses generally generate economic benefits for the residents of a local government, including fiscal benefits from increased property tax yields, royalties and lease payments for local landowners, indirect economic benefits for local retailers from sales to oil and gas workers, and jobs for local residents. Moreover, the zoning process allows industrial enterprises to offer assurances and conditions safeguarding local property values from burdens on quiet enjoyment, thereby muting local opposition to the proposed industrial use. If the market value of the gas extracted exceeds the costs of mitigating the damage to neighboring property values from the extraction process, then the oil and gas enterprises will presumably be able to pay for conditions mitigating such damage and thereby reducing neighbors’ opposition—for instance, exclusion from districts containing sensitive land uses, larger setbacks, berms, noise limits, traffic limits, and other conditions on special permits or variances designed to advance traditional zoning concerns. If the gas drilling enterprise is unable to pay its way by offering such nuisance-mitigating conditions, then this inability is itself an indication that the value of the gas is exceeded by the real costs of extracting it.

These economic incentives insure that local governments will not...
uniformly and single-mindedly exclude an industrial use for which there is a regional need, because that regional need will be reflected in the amount that the industrial user will bestow on local voters in the form of lease payments, royalties, wages, and property taxes in exchange for the right to drill. By excluding an industrial use, local officials and their constituents forego these considerable economic benefits, surrendering them to competing local governments that are less sensitive to the environmental impacts or more eager for local economic development. Unsurprisingly, over forty municipalities in the heart of the Marcellus Shale have adopted resolutions favorable to the development of natural gas through hydraulic fracturing.

The incentive of local governments to host industrial uses distinguishes the exclusion of such uses from the exclusion of low-income housing. Each local government has incentives to exclude low-income multi-family structures to avoid the fiscal costs of hosting land uses that generate higher expenditures than revenues, but the net effect of such ‘NIMBYism’ can be a regional shortfall in housing. By contrast, local governments have material incentives to welcome industrial uses that they can balance against the local costs of such uses. Perhaps intuiting this basic distinction, state courts have never been as suspicious of the exclusion of industrial uses as they have been of exclusion of affordable housing. The

64 Current High Volume Horizontal Hydraulic Fracturing Drilling Bans and Moratoria in NY State, supra note 1.
66 See Bd. of Cnty. Comm’rs v. Bowen/Edwards Assocs., 830 P.2d 1045, 1058, 1060–61 (Colo. 1992) (“The state’s interest in oil and gas activities is not so patently dominant over a county’s interest in land-use control, nor are the respective interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes.”); Gernatt Asphalt Prods. v. Town of Sardinia, 664 N.E.2d 1226, 1235 (N.Y. 1996) (“A municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole.”).
former does not present the risk of external costs giving rise to collective action problems among municipalities posed by the latter. In short, if avoidance of external costs is a goal plausibly attributed to state law, then it makes little sense to suspend the presumption against preemption where local prohibition of hydraulic fracturing is concerned.

B. Does Preemption Protect a State Interest in Respecting Reasonable Investment-Backed Expectations?

Consider protection of settled expectations as another reason to preserve the presumption against preemption. Why should courts regard such protection as a reason to suspend the presumption against preemption? And why do local bans on hydraulic fracturing impose little risk to such expectations?

One of the most deeply rooted traditions in American politics is suspicion of local governments’ expropriating investments made in reliance on implicit or express assurances that such investments would be respected. The risk of such expropriation is most famously expounded by James Madison in Federalist No. 10, when he argues that smaller jurisdictions with more homogenous populations are more prone to what he calls “faction,” meaning “a number of citizens . . . united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.” Majority “factions” are more likely in smaller jurisdictions simply because it is easier to assemble a majority on any issue, just or unjust, when the group is smaller and therefore is more likely to share “[a] common passion or interest.” The chief advantage of municipal home rule is, in short, also a disadvantage when the majority directs its attention to expropriation of a minority’s property.

New York courts’ efforts to limit municipal home rule powers

68 THE FEDERALIST No. 10 (James Madison).
69 Id.
have, from the very beginning of municipal home rule, been focused on protecting investors’ expectations against municipal innovations that are effectively expropriations. Until 1923, the New York Constitution contained no guarantee that New York’s municipalities would enjoy any power to initiate new policies without specific prior state legislative permission.\(^{70}\) The political movement to promote such home rule was generated by reformers seeking to promote municipal ownership of privately owned urban utilities like gas and electrical plants, telephone services, and streetcars.\(^{71}\) Despite success in electing John Francis Hylan on a ticket for municipal control of public transit,\(^{72}\) supporters of municipal ownership were stymied by the courts’ narrow construction of New York City’s statutory home rule powers. Regardless of the apparently generous grant of power conferred on the City by the 1913 Municipal Home Rule Law,\(^{73}\) both the trial court and the appellate division held that

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\(^{70}\) See N.Y. CONST. art. XII, § 2 (1894) (illustrating that the state constitution’s first protection of “home rule” took the form of an 1894 provision giving mayors a “suspensory veto” over state laws that singled out the “property, affairs, or government” of their particular city for discriminatory treatment). But see 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1896–87 (1916) (arguing that the veto was an exceptionally weak protection for “home rule,” as it could be overruled by the state legislature’s enacting a special law in two separate legislative sessions); 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, MAY 8, 1894 TO SEPT. 29, 1894, at 232 (1900) (discussing how home rule was ineffective in preventing New York City’s 1898 annexation of Brooklyn). In any case, such a veto, although styled as a form of “home rule,” actually gave municipalities no power whatsoever to initiate policies of their own. The 1894 amendment, therefore, left Dillon’s Rule firmly in place.

\(^{71}\) See ROBERT F. WESSER, CHARLES EVANS HUGHES: POLITICS AND REFORM IN NEW YORK 1905–1910, at 77–90 (1967) (describing the Hearst-Hughes campaign for Governor and centrality of municipal ownership to that campaign: led by newspaper magnate William Randolph Hearst, the Municipal Ownership League called for immediate public ownership of all natural monopolies, with Hearst coming close to winning the gubernatorial election of 1906 and the mayoral elections for New York City (1905 and 1909) on a platform of municipal ownership).

\(^{72}\) With Hearst’s and Tammany Hall’s joint support (an unusual alliance at the time), Mayor John Francis Hylan was elected in 1918 on a platform of tightly controlling New York City’s private subway franchises—in particular, guaranteeing the 5-cent fare for subway service. See MICHAEL W. BROOKS, SUBWAY CITY: RIDING THE TRAINS, READING NEW YORK 90–105 (1997) (describing Hylan’s alliance with Hearst in favor the 5-cent fare); BRIAN J. CUDAHY, UNDER THE SIDEWALKS OF NEW YORK: THE STORY OF THE GREATEST SUBWAY SYSTEM IN THE WORLD 85–86, 91–92 (1988) (illustrating Hylan’s alliance with Hearst and his attacks on the Rapid Transit Company and Brooklyn Rapid transit).

\(^{73}\) Section 19 of the Home Rule Law provided that:

Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power, or to exclude other powers comprehended within this general grant.
it did not authorize New York City to run a municipally owned bus service. Even after the New York Constitution was amended in 1924 to provide for an arguably broader level of home rule authority, a unanimous Court of Appeals denied the City the power to run a bus service in *Browne v. City of New York*.

Behind these early limits on municipal home rule lurked the idea that, if the City could operate a public bus or subway line, then the City would undermine the investments of private franchisees that had entered into franchise agreements with the City to provide such services. Fears of undermining those investments were at the heart of opposition to Hylan’s campaign to create a city-owned subway, and they were echoed in the appellate division’s assertion that the Home Rule Law had to be read with a gloss limiting power to compete with private businesses: “[N]o implication can be drawn of a grant of power to cities in the state,” stated the court, “to assume those activities which according to our conception of government founded on the principle of individualism, is left to private enterprise.” Judge Cardozo, writing for a unanimous court in *Browne*, was more circumspect about the benefits of “individualism,” but he was no less emphatic that a special canon of narrow construction was appropriate when municipalities claimed novel powers: “A wide gap intervenes between the power of a municipality to determine the extent to which others may do

Act of April 10, 1913, ch. 247, §19, 1913 N.Y. Laws 436, 436. Section 20 of the statute supplemented this general grant with twenty-three specific types of power to supplement this general grant, ranging from the very general power “[t]o maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto.” *Id.* § 20(13). To the more specific power “[t]o create a municipal civil service.” *Id.* § 20(18). But section 19 expressly stated that the “enumeration of powers in this or any other law” should not be construed “to restrict the meaning of this general grant of power” in section 19. *Id.* § 19.


75 *Browne v. City of New York*, 149 N.E. 211, 220 (N.Y. 1925) (Cardozo, J.).

76 New York City had entered into a franchise agreement—the so-called “dual contracts”—with private subway lines in 1913. *See Mayor Hylan Held Responsible for New York's Subway Ills, 65 ELECTRIC RAILWAY J. 253, 253 (1925).* The City’s running parallel lines for lower fares would obviously undermine the value of the investment. *Id.* Hylan’s and Hearst’s political enemies accused them of conspiring to destroy the private lines in part through competition from a city-owned line. *Id.* Governor Al Smith, Hylan’s bitter enemy, appointed Justice McAvoy to chair a commission charged with investigating the City’s treatment of the private subway lines. *Id.*

77 *Whalen, 182 N.Y.S. at 286* (emphasis added).
business in its streets,” he stated, “and the power, hitherto ungranted, to do business for itself.”

In sum, New York courts have narrowly construed early home rule powers at their inception by citing the special dangers posed by novel exercises of home rule power to investments by private enterprise. In particular, Judge Cardozo emphasized the novelty of the power claimed by New York City: “In this State, even if not elsewhere, municipal transportation upon a scale so extensive without supervision or restriction is a notable innovation,” he observed, noting that “[t]he colorless words chosen [in the 1924 Home Rule Amendment] were singularly inept if they were intended to express approval of a departure so momentous.

Do local bans on hydraulic fracturing constitute such a novel invasion of the private sphere, threatening to entrepreneurs’ investment-backed expectations? The question invites an exploration of the doctrine of regulatory takings that is beyond the scope of this article. A superficial consideration of the takings question, however, suggests that the landowner or lessee might show that a ban on hydraulic fracturing “took” property without just compensation if they demonstrated that the natural gas lying below the land constituted a distinct property interest the economically beneficial use of which could not be destroyed by a zoning law.

Such a “Lucas claim” does not look promising in light of courts’ general unwillingness conceptually to sever pieces of a physically contiguous parcel and treat each piece as a distinct denominator against which a total takings should be measured. The landowner or lessee might also show that state or local law created a reasonable investment-backed expectation that they would be able to realize some return from their investment in land for the extraction of natural gas. Again, the claim seems implausible where the landowner or lessee was not entitled under state law to

78 Browne, 149 N.E. at 220.
79 See, e.g., Whalen, 182 N.Y.S. at 286.
80 Browne, 149 N.E. at 219.
82 Named, of course, for Lucas v. South Carolina Costal Counsel, 505 U.S. 1003 (1992).
receive a permit to extract the natural gas at the time that they made their investment: even in those states that do not require any substantial investment in reliance on existing law in order to obtain a vested right, state due process doctrine universally requires the landowner to apply for a building permit in reliance on the law in force at the time of the application.\textsuperscript{84} It seems improbable that the U.S. Supreme Court’s \textit{Penn Central} test requires anything less: if neither state nor local law ever gave any assurance that a landowner would be able to extract a mineral from a piece of land, then it is difficult to see why investment in such extraction constitutes an “expectation” rather than hopeful speculation.

Even if one assumes that landowners and lessees have some legitimate interest in realizing a return on natural gas, such an interest must be balanced against the neighbors’ rival interest in protecting their investment in homes and businesses free from the effects of a nearby drilling operation. It is a truism that no individual landowner has any vested right to the continuation of zoning that courts will protect as a matter of constitutional law.\textsuperscript{85} But it is an equal and opposite truism of the doctrine against so-called “spot zoning” that the arbitrary elimination of zoning restrictions for the exclusive benefit of some landowners can deprive other neighboring landowners of property without due process of law.\textsuperscript{86} One court has gone so far as to hold that the selective elimination of zoning through a state-wide law barring the local prohibition on the extraction of gas constituted a deprivation of right to quiet enjoyment of property without due process of law.\textsuperscript{87}

One need not go so far as to conclude that the preemption of local prohibitions on hydraulic fracturing would constitute a form of “spot zoning” or otherwise deprive neighbors of due process of law. Like the rival claim that the local prohibition itself deprives landowners of a distinct investment-backed property interest, such arguments are likely a stretch. The critical question is whether, for the purposes of statutory interpretation, courts should regard local prohibitions on hydraulic fracturing as such a novel invasion of a

\textsuperscript{84} See, e.g., Valley View Indus. Park v. Redmond, 733 P.2d 182, 191–92 (Wash. 1987) (en banc).


\textsuperscript{86} See, e.g., Rodgers v. Tarrytown, 96 N.E.2d 731, 734 (N.Y. 1951).

settled expectation that the usual presumption against preemption should be suspended. Given the existence of legitimate expectations to property on either side of this question, such a conclusion seems far-fetched. Because local zoning is such an entrenched political practice, the expectations associated with zoning tend to be particularly strong. Landowners purchase their housing with the expectation that their existing uses will be protected from new uses that could undermine the value of the former. In Professor William Fischel’s words, “even though resident homeowners have no vested right to zoning, they appear to have a reliable political entitlement to the status quo in land use.” Preemption eliminates that expectation, while protecting a rival expectation. Absent any principled argument that one expectation to be free from new zoning laws is more reasonable than the rival expectation to preserve the status quo character of the neighborhood, it is difficult to see why settled expectations present good reason not to adhere to the default presumption against preemption.

IV. CONCLUSION

The point of the foregoing analysis is not merely to defend the idea that local bans on hydraulic fracturing ought not to be preempted. The point is also to think about preemption more generally, using principles that cut across different statutes, in order to promote serious legislative deliberation about the powers of local government in New York. The question of preemption always requires an examination of a specific statute’s particular words. In this sense, there is nothing general to be said about the question: the answer to the question of preemption will vary with the different wording of each statute. In a second sense, however, Article IX, section 3(c) of the New York Constitution requires courts to think about preemption in a more general way, by asking whether a statute’s text is sufficiently plain to indicate genuine state legislative deliberation about whether to displace local law. This constitutionally required presumption against preemption requires an understanding of ambiguity sufficient to trigger the presumption and an understanding of the sorts of considerations sufficient to rebut that presumption once ambiguity is found.

88 FISCHEL, supra note 61, at 36.
These general issues cannot be answered by minute parsing of a specific statute’s particular words: once those words have been determined to be ambiguous, the court must, of necessity, look outside the text to more general principles about how New York ought to be governed. Those principles include the ideas that (1) local constituencies should enjoy broad powers of self-government where the state legislature cannot reach a consensus about an issue but that (2) such powers can be suspended where used to burden non-residents’ interests or residents’ reasonable, settled expectations. These are abstract ideas, but, as general as they are, the example of hydraulic fracturing suggests that, at least some of the time, they have sufficient resolving power to decide particular cases.
This matter was heard in Department 16 on March 29, 2017. Petitioners, Eden Housing, Inc., Summerhill Homes, LLC and Grosvenor USA Limited, appeared through their attorneys, Arthur J. Friedman, Sheppard, Mullin, Richter & Hampton, LLP, and Andrew L. Faber, Berliner Cohen, LLP. Respondent, Town of Los Gatos, appeared through its attorneys, Robert Schultz, Town Attorney, Town of Los Gatos, and Whitney G. McDonald, Richards, Watson & Gershon, APC.

Hearing was for Petitioners' petition for writ of mandate. Petitioners' opening brief in support of the petition was filed January 13, 2017; Respondent's opposition to Petitioner's opening brief was filed February 24, 2017; and Petitioners' reply brief was filed March 17, 2017.
The petition for writ of mandate concerns Town of Los Gatos Resolution 2016-046. The Resolution, entered by the Town Council on September 6, 2016, denied Petitioners’ applications for approval of proposed Vesting Tentative Map and Architecture and Site. The Resolution was signed on September 13, 2016\(^1\), and sets forth findings for the decision.

The matter having been submitted, and after consideration of the evidence in the administrative record, oral and documentary, and application of law, including consideration of burden of proof and argument of counsel, THE COURT ENTERS THE FOLLOWING DECISION AND JUDGMENT:

**Preliminary rulings.**

The Petition for writ of mandate is filed in the time and manner required by law.

Review of the local agency action falls under administrative mandamus under Code of Civil Procedure §1094.5.

**Writ of Mandamus.**

The applications for proposed Tentative Map and Architecture and Site are to allow Petitioners’ proposed subdivision and development of the North 40 site in Los Gatos, CA (“Project”). The site is identified for development by the Town of Los Gatos (“Town”) in its Housing Element. The Town adopted the North 40 Specific Plan which sets forth objective and subjective factors and goals for development (“Specific Plan”).

The principal controverted issues are: (a) whether the Town proceeded as required by law in applying the correct legal standards and criteria in its decision to deny Petitioners’ applications; (b) whether the findings support the decision; and (c) whether substantial evidence supports the findings.

**Standards and criteria to be considered by the local agency.** Petitioners contend that the Town’s decision to disapprove the Project violates the Housing Element Law, the Town’s Housing Element, the Housing Accountability Act, and the Density Bonus Law. Petitioners seek a writ of mandate to set aside the Town’s decision and to direct the Town to approve the

\(^1\) The official transcript of the hearing of September 6, 2016 indicates the Resolution passed by 3-2 vote of the Town Council; however, the written Resolution memorializing the action indicates the Resolution is passed and adopted unanimously.
Project. Petitioners contend that the provisions of the cited Acts and laws mandate the Town to approve the Project if it complies with objective criteria of the Town’s Housing Element and objective standards of applicable planning and zoning, unless the Town makes findings supported by substantial evidence that the Project would cause specific adverse impacts. The provisions of the Acts and law are intertwined and overlap in their application to the present matter. The decision and judgment that follows is intended to address the Acts and law collectively.

The pertinent statute of the Housing Accountability Act (“HAA”) is Government Code §65589.5 (j) which states:

“(j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exists:

(1) The housing development project would have a specific, adverse impact upon the public health and safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a “specific adverse impact” means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies or conditions as they existed on the date the application was deemed complete.

(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.”

Under the HAA and Housing Element Law (“HEL”), discretionary determinations of subjective factors in the General Plan or Specific Plan cannot be the basis for disapproval of a project. The Legislative purpose of the HAA and HEL (and Density Bonus Law (“DBL”)) is to alleviate housing shortage and prevent denial of housing projects based on discretion,

2 Government Code §65589.5 (j) of the HAA; the Project is within the statute’s definition of a housing development project (Government Code §65589.5 (h)(2)).
subjectivity or local opposition. Petitioners contend that “by-right” approval under the HAA applies to all projects within the Act, including projects that require local agency approval of a tentative subdivision map and proposed land use.

Petitioners maintain that the Town has a mandatory duty to approve the Project because it is consistent with the objective criteria of the Specific Plan, and because the Town did not and cannot substantiate a finding by substantial evidence that the Project would have a specific adverse impact as defined by the statute. The Resolution has no findings of compliance or lack of compliance with objective standards under the Town’s Housing Element or the HAA, and recites only findings of subjective criteria. Petitioners assert that the Town abused its discretion in proceeding in violation of the HAA, HEL and DBL.

Review of the Town’s action is complicated by the fact that the applications are considered and enforced by the Town under Government Code § 66473.5 of the Subdivision Map Act (“MA”). This code section directs that no local agency shall approve a tentative map unless it finds that the proposed subdivision, together with its design and improvement, is consistent with the general plan or any adopted specific plan. A proposed subdivision is consistent only if the proposed subdivision or land use is compatible with the objectives, policies, general land uses and programs specified in the general plan or adopted specific plan.

As applied to the proposed Project, the statute directs the Town to consider objective and subjective factors in the Town’s General Plan or Specific Plan. This includes the exercise of discretion in determining whether or not the proposed subdivision and land use are consistent with the policies of the General Plan Housing Element or Specific Plan. Respondent argues that this state law requires local agencies to exercise discretion in reviewing the Project and precludes approval “by-right”, notwithstanding the HAA.

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3 There is substantial evidence in the record to support Petitioners’ contention that the Project is consistent with objective standards - had the Town made such a finding.

4 Government Code §66473.5 of the MA provides in pertinent part that “No local agency shall approve a tentative map ... unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan ... or any specific plan adopted.... A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed division or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan.”
Government Code §65589.5 of the HAA and Government Code §66473.5 of the MA address the same subject - the proposed land use of the Project, and both appear applicable for a comprehensive approval or denial of the Project. However, the standards and criteria under each statute are different, and the mandamus petition, in part, seeks a ruling reconciling the apparent conflict and determining the applicable standards and criteria for the Project.

Petitioners contend that the interpretation that is consistent with the Legislative purposes of the HAA and HEL (and DBL) is to find that the local agency shall enforce objective criteria of the MA on subdivision issues only, and apply "by right" objective standards of the HAA and HEL on land use issues. There would be no local agency discretion to consider subjective criteria in the General Plan or Specific Plan for any project under the HAA, notwithstanding provisions of the MA that may apply to a project. It is argued that any other interpretation undermines the purposes of the Legislature in enacting the HAA and HEL (and DBL) of removing barriers to development and facilitating housing.

Respondent cites Woodland Hills Residents Assn., Inc. v. City Council (1979) 23 Cal.3d 917 wherein the California Supreme Court found that the Legislative history and mandate of the MA reflects acute awareness that subdivisions which are inconsistent with a locality's general plan subvert the integrity of the local planning process. Respondent also points out that not all housing projects under the HAA require subdivision map approval, \(^5\) and approval of such projects is "by-right" under the HAA and HEL. However, if a project requires a tentative subdivision map, additional policies and considerations under the Map Act must be enforced by the local agency and met by the proposed subdivision and land use. Hence, all housing projects under the HAA must comply with the criteria of the HAA and HEL, and projects that require subdivision map approval must also comply with the criteria of the MA. Here, the Town determined that the proposed subdivision map and land use did not meet the criteria of the MA and denied the applications. The Town contends this is an appropriate discretionary decision, supported by findings, and the findings are supported by substantial evidence.

\(^5\) An assertion not challenged by Petitioners.
Petitioners argue forcefully that the Town’s position is an affront to State Housing Laws
enacted to prevent local agencies from creating barriers to housing development, and that
effectively, there will be no by-right development of the North 40 site. Petitioners anticipate on
remand that the Town will ignore its responsibilities for housing under the HAA and its Housing
Element, and will succumb to local opposition to development. Petitioners expect the Town
will use the MA to effectively block by-right housing development.

The California Supreme Court case Tuolumne Jobs & Small Business Alliance v. Superior
Court (2014) 59 Cal.4th 1029 is instructive in interpretation of statutes that may be in conflict.
The primary task is determining Legislative intent to give effect to the law’s purpose. Words of
the statute are the most reliable indicator of legislative intent. Courts should harmonize
statutes to the extent possible, and interpretations that lead to absurd results or render words
surplusage are to be avoided. Similarly, an interpretation that renders statutory language a
nullity is to be avoided.

Here, there is no reference in either statute to the other, and no indication that the
Legislature intended either statute to control the other in any particular circumstance. As
noted in Tuolumne Jobs & Small Business Alliance, the Legislature is presumed to be aware of
all laws in existence when it passes or amends a statute. If the Legislature had intended
Government Code §65589.5 of the HAA to prevail over Government Code §66473.5 of the MA,
it could have stated so, but did not. Although Government Code §65589.5 is the later enacted
statute and contains language more specific to housing development and land use, Petitioners’
reconciliation of the statutes impliedly repeals provisions of GC §66473.5 that require the local
agency to determine if the subdivision is consistent with the general plan or adopted specific
plan.

Tuolumne Jobs & Small Business Alliance indicates that absent an express declaration of
legislative intent, implied repeal should be found “only when there is no rational basis for
harmonizing the two potentially conflicting statutes, and the statutes are “irreconcilable, clearly
repugnant, and so inconsistent that the two cannot have concurrent operation.” “Implied
repeal should not be found unless the later provision gives undeniable evidence of an intent
to supersede the earlier."\textsuperscript{6}

The reconciliation of the statutes suggested by the Town gives effect to both statutes
and does not impliedly repeal either. It retains application of "by-right" approval standards of
Government Code §65589.5(j) for all projects under the HAA, and if the project requires
approval of a subdivision map, the Project is also subject to the provisions of the Map Act.\textsuperscript{7}

Determination that Government Code §65589.5(j) is not the exclusive standard for all projects
under the HAA is not an implied repeal of the section. This constitutes a rational basis of
harmonizing the two potentially conflicting statutes. Notwithstanding Petitioners' dire
prediction that this will enable the Town to shirk its mandated responsibilities in the face of
local pressure, the statutes are not "clearly repugnant, and so inconsistent that the two cannot
have concurrent operation." The reconciliation proposed by Respondent is adopted.

The concerns of Petitioners warrant consideration, and are addressed to some extent
later in this ruling. However, considering the present status of the statutes, debate appears
best reserved for the legislative branch for legislative action, if any. Here, the Court's task is to
reconcile the statutes in their present form, pursuant to guidelines under law.

\textbf{Did the Town fail to proceed as required by law?} Although the Town was required by
law to apply the criteria under the MA, the MA does not relieve or preclude the Town from the
provisions of Government Code §65589.5(j) of the HAA; specifically, to determine whether or
not the Project complies with applicable, objective general plan and zoning standards and
criteria. The failure to consider the provisions of Government Code §65589.5(j) is a failure to
proceed in the manner required by law.\textsuperscript{8} Respondent will therefore be mandated to set aside
its decision.

\textsuperscript{6} Tuolumne Jobs & Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1039.

\textsuperscript{7} The record does not indicate the proportion of projects that require subdivision map approval to those that do not.

\textsuperscript{8} See, Honchariw v. County of Stanislaus (2011) 200 Cal.App.4th 1066
During the course of reconsideration of the applications, if the Town finds that the
Project is in compliance with such objective standards and criteria, and again denies the
Project, the Town must provide written findings supported by substantial evidence that the
project would have a specific, adverse impact upon the public health or safety unless the
project is disapproved, and there is no feasible method to satisfactorily mitigate or avoid the
adverse impact other than the disapproval of the project.  

Is the Town’s decision supported by the findings? The Town’s decision fails to
determine whether or not the Project complies with applicable, objective general plan and
zoning standards and criteria , and if determined in compliance, whether the Project is
conditionally approved or denied with written findings supported by substantial evidence under
Government Code § 65589.5(j) of the HAA. The Town’s decision is therefore incomplete and
not supported by all necessary findings. Respondent will therefore be mandated to set aside its
decision and issue a decision that includes this determination and if applicable, written findings
pursuant to Government Code §65589.5(j).

Are the findings supported by substantial evidence? The Town determined that the
proposed Vesting Tentative Map and Architecture and Site are inconsistent with the Specific
Plan and General Plan based on eight findings. Each finding is set forth below in italics and
addressed by the Court as follows:

"a. The proposed project overly concentrates all of the residential units that can be built
pursuant to the North 40 Specific Plan and the General Plan Housing Element on the
southern portion of the North 40 Specific Plan area and is therefore inconsistent with
Specific Plan Section 2.5; Standard 2.7.3; Policy 5.8.2 and Residential Unit Size Mix and
Table set forth on page 6-14. This negatively affects the site layout and
disproportionately hurts the chances of better site design in the future."

The Specific Plan divides the site into three land use districts, the Lark District, the
Transition District and the Northern District. The Specific Plan sets a development capacity for
the North 40 site at 270 residential units. Each district has a distinct character, and specific
uses and development standards. Each district permits residential development. The Specific

9 Government Code §65589.5(j)

10 Plus 50 density bonus units under the Density Bonus Law (49 very low income senior units and 1 moderate
income manager unit)
Plan contains subjective goals and policies, and objective standards for implementation. The Lark District is envisioned as a mix of lower intensity residential use and limited retail/office use, with open space considerations. Envisioned land use includes limited retail, office and restaurants along Los Gatos Boulevard.

The Transition District is located in the central portion of the site as a buffer between low intensity, primarily residential character of the Lark District and active retail and entertainment character of the Northern District. The Transition District contemplates a range of uses, including residential.

The Northern District is intended primarily for retail and entertainment uses, but also envisions residential use.

Plaintiffs' proposed Project provides 193 residential units in the Lark District and 127 units in the Transition District. This equates to 60% of the residential units being situated in the Lark District. The Town finds the allocation excessively disproportionate and inconsistent with the Specific Plan for lower intensity residential development of this district, but provides no specifics or guidance. There is no specific allocation requirement in the Specific Plan. This is a discretionary determination of the Town of a subjective policy.

In reviewing factual determinations by the governmental agency, where, as here, a fundamental or vested right is not involved, the standard of review is whether substantial evidence supports the finding. The Court must view disputed facts in a light most favorable to the local agency, giving it every reasonable inference and resolving conflicts in favor of the local agency.

Under this standard of review, the record supports that the discretionary finding of the Town is based on substantial evidence.

"b. The proposed project is inconsistent with the North 40 Specific Plan Section 2.3.1 and its requirements for lower intensity residential uses in the Lark District."

The finding involves the land use policy for the district and is substantially similar to "a" above. The finding is a discretionary determination of a subjective policy in the Specific Plan which is supported by substantial evidence.
“c. The proposed project buildings 18 through 27 are inconsistent with North 40 Specific Plan policy that the Lark District consist of lower intensity residential development with office, retail, personal services, and restaurants along Los Gatos Boulevard.”

The residential uses envisioned for the Lark District set forth in the Specific Plan include condominium, cottage cluster/garden cluster housing, row houses and townhomes. The description does not include live-work flats (reserved to the Transition and Northern Districts) or residential above commercial (reserved to the Northern District). The record indicates that buildings 18 through 27 are residential above commercial which is technically inconsistent with the identified uses in the Specific Plan for the Lark District. For purposes of the substantial evidence standard, the Town’s finding is supported by substantial evidence.

The Town also finds that the proposed location of the buildings is inconsistent with the Specific Plan for location of commercial use buildings on Los Gatos Boulevard closer to the Lark Avenue intersection. The Specific Plan envisions, but does not require, development of commercial uses along Los Gatos Boulevard. This is a discretionary determination of inconsistency with a subjective policy which the record indicates is supported by substantial evidence.

“d. The proposed project buildings 24 and 25 are inconsistent with North 40 Specific Plan Section 4-2 as it eliminates a “fourth access point off of Los Gatos Boulevard closer to the Lark Avenue intersection; are inconsistent with North 40 Specific Plan page 3-1, Section 3.1 Architectural and Site Character Goals and Policies, Policy DG5 Residential Sitting that requires residential development to be located to minimize traffic, noise, and air quality impacts; and are inconsistent with the Commercial Design Guidelines beginning on page 3-2 which guide site plan development.”

The record indicates that the Specific Plan requires three access points on Los Gatos Boulevard, and states that there is a possible fourth access point. The fourth access point is not a requirement. The Environmental Impact Report for the Specific Plan considered three access points along Los Gatos Boulevard. The record does not indicate, and Respondent does not identify, an objective factor or subjective goal or vision which a fourth access is material. Rather, the record indicates engineering issues in adding a fourth access point, including congestion, turn lane access issues and grade differences, and the Town’s planning staff
recommended against a fourth access point. It is unclear from the record what information the
Town relied on in support of this finding. The finding is not supported by substantial evidence.

e. The proposed project is inconsistent with North 40 Specific Plan Policy Section 2.4 and
Appendix C of the Specific Plan as it does not address unmet housing needs for seniors
and “Gen Y.”

Section 2.4 states in pertinent part that “(R)eidential development is focused on multi-
family housing types and shall be designed to attract the unmet housing needs of the
community.” Appendix C – Young Adult, Senior, and Empty Nester Design Summary describes
what members of “Gen Y” desire in living spaces and neighborhoods and what “Baby Boomers”
want in retirement housing. There is substantial evidence to support Respondent’s finding that
the residential housing component of the proposed plan is inconsistent with the Specific Plan
goals and policies as expressed in section 2.4 and appendix C. This is a discretionary
determination of a subjective policy which the record indicates is supported by substantial
evidence.

f. the proposed project is inconsistent with the Residential Unit Size Mix and Table set
forth on page 6-14 of the Specific Plan and the Residential Unit Size Mix should have
smaller units to come closer to the income distribution of affordable housing identified in
the Town’s certified General Plan Housing Element for 156 very low, 84 low and 30
moderate income units.”

The table is neither a requirement nor objective standard, but rather, an example how
the North 40 site could assist the Town to meet affordable housing needs of the community.
The Town’s Housing Element, Section 2.4 of the North 40 Specific Plan and appendix C add
context to the table. The record identifies North 40 as the largest remaining site in Los Gatos
for development. The record indicates that the Project provides for 49 residential units at very
low income, one unit at moderate income and 270 units at fair market values well above
moderate income.11

The Town’s General Plan Housing Element suggests that the North 40 site have 156 very
low, 84 low, and 30 moderate income units, a total of 270. The Town determined that the
Project should have smaller units to increase the number of units that meet these very low, low

11 Estimated fair market values of $900,000 to $1,500,000.
and moderate income levels. The finding provides no guidance or specifics of what mix of affordable units among income levels is considered consistent. However, under the substantial evidence standard, the facts in the record are sufficient as substantial evidence to support the Town’s finding:

“g. The proposed project, specifically buildings 18 through 27, would result in an anomaly of residential uses within an existing commercial land use context.”

This finding appears to restate the Town’s finding in “c” above. Apparently, the anomaly is that the residential above commercial building is a specified residential use envisioned for the Northern District in the Specific Plan, but not for the Lark District. While there is an objective element, it is primarily a subjective policy. There is substantial evidence in the record to support the finding.

“h. The only promised Below Market Rate housing is 49 units above Market Hall and the remainder would have home values estimated at $900,000 to $1,500,000 requiring a 20 percent down payment and income of approximately $130,000 to $200,000 per year.”

This finding is substantially the same as the Town’s findings in “e” and “f” above.

Respondent adopted its Housing Element in 2015, in part to meet its allocable share of existing and projected housing needs, including very low, low and moderate income households. The housing element identifies the North 40 as the primary site for construction of affordable housing units, with an allocation of 156 units to very low income, 84 units to low income and 30 units to moderate income; a total of 270 units. The record indicates that this is not an objective requirement, but a subjective goal. Petitioners’ Project provides for 49 very low income residential units, one moderate income unit, and the balance of 270 units above moderate income level. The 49 very low income units account for a modest percentage of the affordable units identified in the Housing Element. The record indicates that if the Town is unable to meet its share of housing need on the sites identified in its Housing Element, the Town is required to provide proposed actions for additional sites. Because North 40 is the largest site remaining for development in Los Gatos, the Town contends that approval of the

12 201 very low, 112 low, and 132 moderate income units are allocable to the Town in its housing element.

13 Table H-2 Summary of Community Strategies.
Project with its current allotment of affordable housing will make it difficult to meet the allocation for low-income housing. This finding is supported by substantial evidence.

Accordingly, the Court enters the following decision and judgment:

A. A writ of mandamus shall issue directing Respondent, Town of Los Gatos, to:

1. Set aside Town of Los Gatos Resolution 2016-046 denying the applications for Vesting Tentative Map and Architecture and Site;

2. Reconsider Petitioners' applications and the Project under the additional provisions of Government Code §65589.5, and specifically subsection (j);

3. If, in the course of reconsideration, Respondent determines to again deny the applications and Project, Respondent shall determine whether the Project complies with applicable, objective general plan and zoning standards and criteria.

   a. If Respondent determines that the Project does not so comply, Respondent shall specify the applicable, objective criteria which the Project failed to comply.

   b. If Respondent determines that the Project does so comply, then Respondent shall make written findings, supported by substantial evidence on the record, that (1) the project would have a specific, adverse impact upon the public health or safety unless the project is disapproved, and (2) there is no feasible method to satisfactorily mitigate or avoid that specifically identified adverse impact other than the disapproval of Petitioners' applications.

B. The Town's findings in "1. a" to "c" and "1. e" to "h" of Resolution 2016-046 are supported by substantial evidence.14

C. Approval of the proposed project shall require compliance with the applicable provisions of the Map Act and Housing Affordability Act.

Dated: June 9, 2017

[Signature]

Judge of the Superior Court

14 The Town is encouraged to supplement such findings with objective criteria to enable Petitioners to remedy the inconsistencies identified in the findings.
June 12, 2017

RE: Eden housing, Inc., Summerhill homes, LLC vs Town of Los Gatos, and Does 1 to V
Case Number: 16CV300733

PROOF OF SERVICE

DECISION AND JUDGMENT GRANTING WRIT OF MANDAMUS was delivered to the parties listed below the above entitled case as set forth in the sworn declaration below.

If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator’s office at (408) 882-2700, or use the Court’s TDD line (408) 882-2690 or the Voice/TDD California Relay Service (800) 735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown below, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on June 12, 2017. CLERK OF THE COURT, by Julie Lara, Deputy.

cc: Robert William Schultz, Town Attorney, Town of Los Gatos, Civic Center 110 E. Main St. Los Gatos CA 95030
Whitney Grace McDonald, Richards Watson & Gershon 847 Monterey St Suite 201 San Luis Obispo CA 93401
Arthur Jay Friedman, Sheppard Mullin, Richter & Hamilton, LLP 4 Embarcadero Ctr 17th Floor San Francisco CA 94111-4106
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The Rise of State Preemption Laws in Response to Local Policy Innovation

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This article analyzes the increasing use of state preemption law by conservative state leaders as a tool to rein in progressive local governments. The scope and special qualities of recent state preemption laws are explored by examining legislation preempting local fracking bans, preventing minimum wage ordinances, targeting sanctuary city policies, overturning LGBT rights ordinances, and enacting blanket preemption measures. Reasons for the recent surge of state preemption laws are suggested, and the overall effectiveness of these laws is discussed. I conclude that rising conservative dominance of state legislatures has provided the opportunity to thwart progressive local policies, and these efforts have been aided by various industry and conservative organized groups. State preemption laws are not always successful in their aims. In some cases, state supreme courts have sided with local officials’ claims of state overreach. In others, local officials have simply refused to comply. In any case, the threat of preemption may have a chilling effect on local policy innovation.

Central to the study of federalism is the state-national balance of power, and much attention has been paid to its continuous renegotiation and resulting conflicts. Less attention has been paid to the hostilities and power negotiations that occur between states and localities, which remain quite fluid despite John F. Dillon’s legal determination that localities are subordinate to states. Certainly, the role of localities in the federal system has fluctuated over time, leading states and localities to “bargain ... lobby, confront, ignore, threaten, circumvent, and sue one another” (Sbragia 1996, 8). Over the past several decades, however, the tone of state and local conflicts has grown increasingly tense.

The reasons for this tension between state and local governments have been discussed elsewhere and at length. A short list would include the devolution of federal and state program responsibility to localities, often without sufficient resources to accomplish program goals (Bowman and Kearney 2011, 563–585). Federal and state mandates have grown, often expanding local functions while limiting local autonomy (Krane et al. 2004, 515). Gridlock at the state and federal levels has frequently left localities to solve their own problems (Schragger 2010, 39).
which has promoted local innovation, self-sufficiency, and professionalism (Hodos 2009, 58), while also providing state leaders with ample opportunities to take credit for local achievements when things go well and to shift blame to localities when they do not (Nicholson-Crotty and Theobald 2011, 248).

Rather than passively waiting for their fortunes to change, many local officials have jumped into the policy vacuum left by state and federal inaction, resulting in “a flowering of progressive policy developments” (Schragger 2009, 39). Progressive policy experimentation contributes to the visibility and prestige of the locality, as well as to the local policy entrepreneur who may have ambitions beyond local office. In these instances, state and local conflict can serve as a vehicle to spotlight the vibrancy of a locality or a local leader’s willingness to go to battle, possibilities not lost on a growing number of local leaders (Riverstone-Newell 2013a). However, this same local aggression and increased visibility has also made targets of progressive local policies and the leaders who support them.

To rein in unruly localities, states may deploy one or more of a variety of strategies ranging from ignoring the infraction, to issuing informal warnings, threatening and/or pursuing legal action, or threatening and/or withholding state funding. In the past few years, however, a growing number of state officials have sponsored and supported preemption legislation with the intent to weaken local authority and to thwart local progressive policies. The purpose of this article is to examine the recent proliferation of preemption legislation. First, I document and illustrate the scope and special intensity of recent state preemption laws by exploring several areas of preemption activity. Second, the reasons for the recent surge of state preemption laws are explored, emphasizing the importance of the increasing alignment of a partisan-regional/spatial divide. Finally, I assess the overall effectiveness of recent state preemption laws. While some preemption attempts have been successful in thwarting local innovation, success is by no means assured. In some cases, state supreme courts have sided with local officials’ claims of state overreach. In others, local officials have simply refused to comply.

This article contributes to federalism scholarship in several ways. Most important, while previous scholarship has focused on the surge of local progressive policy innovation and acts of local defiance, little has been said about how the states have responded to these acts, responses which include recent state preemption laws (Riverstone-Newell 2013a; Schragger 2010; 2016). This article addresses this gap in scholarship. In addition, through a detailed analysis of laws passed in several key policy areas, this article demonstrates how recent preemption laws differ in important ways from prior state preemption laws. Finally, this article shows that the partisan polarization that has lately affected state-national relations in well-documented ways is also having significant effects on state-local interactions and in ways that call for similar documentation.
Explanations for Recent State Preemption Activity

While preemption laws have long been used to set minimum standards on local activity by setting a floor on local responsibilities and regulations, recent preemption laws are different in that they are meant to strip authority from localities altogether. These “maximum preemption” laws are not intended to merely shape local behavior in keeping with minimum state goals. Rather, they prohibit localities from passing any laws or regulations in specific policy areas, many of which reflect the progressive social values that are concentrated in cities or are of critical importance to local economies, environmental and public health, and community safety.

Recent preemption efforts can be understood, at one level, as part of longstanding campaigns waged by industry groups hoping to stop or limit progressive local policies in order to create a friendlier business environment for themselves. Industry groups and trade associations first began pressuring state legislatures to rein in their cities in the late 1980s. The American Prospect reported that R.J. Reynolds pressed states to enact preemption laws in the 1980s as a central strategy to overcome local smoking restrictions and bans (Rapoport 2016). State preemption of local tobacco controls peaked in the mid-1990s and “leveled off after 1996” (Mowery et al. 2012). Since then, a number of tobacco-related state preemption laws have been repealed or weakened in the courts; however, thirteen states continue to preempt local tobacco controls altogether, or disallow local smoking bans in specific places, such as government or private workplaces, or in restaurants (Grassroots Change 2017a). Taking a page from R.J. Reynolds’ playbook, the National Rifle Association (NRA) launched its campaign for state preemption of local gun regulation in the 1990s. The NRA’s campaign was successful and with lasting effect: “43 states now have some form of maximum preemption preventing localities from passing additional gun regulations on top of state law” (Rapoport 2016).

Other conservative interest and ideological groups joined tobacco companies and the NRA in lobbying state leaders to enact preemption laws with an eye to defeating local, progressive policies. These other groups include think-tanks and membership groups such as the American Legislative Exchange Council (ALEC), among other powerful industry groups and trade associations such as the National Restaurant Association. ALEC, a nonprofit organization and self-proclaimed “premier free-market organization that provides elected officials the resources they need to make sound policy” (About ALEC 2017), has been particularly active in supporting many state-level preemption campaigns, going so far as to offer “model legislation” and assistance with strategic planning. According to the group’s 2016 strategic plan, its membership now includes “25 percent of all legislative members and over 200 corporate and nonprofit members ... 20 percent of Congress, eight
sitting governors and more than 300 local elected officials” (ALEC Strategic Plan 2016). The model legislation offered by ALEC currently includes several local preemption bills intended to foster “statewide stability and prosperity” through uniform, business-friendly policies (Russell and Bostrom 2016). Another important service provided by ALEC is an annual convention targeted to state lawmakers, industry leaders, and lobbyists, which serves the dual purpose of introducing and educating legislators on issues of import to ALEC while providing lawmakers with the opportunity to make the acquaintance of “industry experts and policy analysts,” who are also potential campaign donors (Kuby 2015).

If the surge of preemption legislation in recent years has been fueled in part by efforts of industry groups and conservative organizations to rein in cities, it can also be attributed to the growing Republican control of state legislatures, especially after the tide turned in Republicans’ favor during the 2010 elections (Greenblatt 2016b). Every year since 2011 has seen more preemption activity than the last, and with the effect of increasing tensions in state-local relations (Dewan 2015; Greenblatt 2016b; Einstein and Glick 2017). The Center for Media and Democracy reported that 2015 saw “more efforts to undermine local control on more issues than any other year in history” (Fischer 2016).

The 2016 elections continued this trend of recent gains in conservative control of state legislatures and statehouses generally. Before the 2016 election, Republicans controlled both legislative chambers in thirty states, twenty-two of which also had a Republican governor. Democrats were in control of both chambers in twelve states, eight of which also had a Democratic governor (Storey 2016). As a result of the 2016 election, Republicans gained control of both legislative chambers in an additional two states, bringing their number to thirty-two. Democrats now have control of both chambers in fourteen states, and power is split between the parties in three states—the lowest number in seventy years (Storey 2016). Of the Southern states, all thirty chambers are now under Republican control. In terms of unified control of the legislature and governorship, Republicans now control both the legislature and governor’s office in twenty-five states, while six states are under unified Democratic control (Storey 2016).

Partisan control affects cities. Republican state leaders are geographically and ideologically distant from city interests. They are elected by constituents who are removed from the types of challenges that cities face, challenges that accompany economic and social diversity and concentrated populations. They have little reason to support anything uniquely “city,” and are likely to be ideologically opposed to the progressive social policies favored by most who live there. Indeed, there is a long-standing difference between the political and social agendas of medium and large cities and the rest of their states. The conservative, rural dominance of state legislatures that lasted until the late 1960s posed challenges for cities, but they muddled along, winning favorable policies through compromise,
logrolling, and, of course, federal programs. However, the suburban dominance of state legislative seats that occurred after the nation’s forced redistricting following *Reynolds v. Sims*, 377 U.S. 533 (1964), and a rising conservative sentiment and growing hostility toward taxes and government spending throughout the 1970s, changed the political game in ways that are instructive today.

Particularly instructive is how shifts in partisan power, then and now, correspond with a regional, spatial divide. Indeed, the current spatial divisions featuring conservative versus liberal regional differences “almost perfectly align with partisan divisions,” writes Greenblatt (2016b). Urban and inner-suburban areas are predominantly liberal; everywhere else tends to lean conservative. What results are spatially defined teams, us versus them, a zero-sum game. Add hyper-partisanship, the heightened tension and hostility that has characterized recent national and state politics, and even the most centrist, compromise-oriented elected leader will shy away from the very appearance of inter-party cooperation. As one scholar recently put it: “… compromise has become a dirty word. If you make one move in the direction of your opponents, that’s treason” (Greenblatt 2015b).

The scope of recent preemption laws is vast. States have lately prohibited localities from requiring fire sprinkler systems in new homes; banning fracking or imposing other gas and oil regulations; imposing local nutrition and food policies, such as soda taxes, bans on toys in unhealthy meals, and requirements to display calorie counts in local restaurants; passing firearm regulations; requiring mandatory paid sick days and minimum wage increases; decriminalizing small amounts of marijuana; banning marijuana use (in the face of state legalization); banning plastic shopping bags; passing discrimination protections for LGBT workers; regulating e-cigarettes; regulating tobacco use in public, restaurants, and by minors and young adults; imposing regulations concerning land use; passing undocumented immigrant protections; regulating factory farms; banning police drones; regulating local airports; initiating municipal broadband services; creating anti-GMO policies; and offering various other civil rights protections.

Of the dozens of policy areas recently targeted by state preemption laws, several stand out as being the subject of intense and continuing activity. Grassroots Change, a nonprofit organization that curates and reports on state preemption laws, predicted that preemption activity in 2016 would center on broadband access, food and nutrition issues, fracking, gun violence, paid sick days and minimum wages, residential fire sprinklers, tobacco (including e-cigarettes), and several additional policy areas (Grassroots Change 2017a). Predictions for 2017 add several targets to the list: agriculture, local licensure and permitting, fire and building codes, chemical safety, environmental justice, predatory lending, disposable containers, climate change, immigration policies, and “blanket preemption,” as discussed below. The National League of Cities confirms rising preemption activity
and battles that have “pitted rural- and suburban-dominated state legislatures against cities with large populations of low wage earners and ethnic minorities,” bringing into question “the role of government and cities’ place within it” (DuPuis et al. 2017, 3). In early 2017, the organization reported that twenty-four states now have minimum wage preemption laws; seventeen states have preempted local laws regarding paid leave; three states have passed anti-discrimination preemption laws; thirty-seven states have preempted local ride sharing regulation; seventeen have preempted municipal broadband regulation; at least five states have preempted local plastic shopping bag bans; and eight states now preempt a variety of local nutrition-related regulations (DuPuis et al. 2017).

With the intent of analyzing recent state preemption activity and assessing the outcome of the ensuing battles between state and local governments, the remainder of this article focuses on state preemption of local fracking bans, minimum wage ordinances, sanctuary city policies, LGBT rights ordinances, and the rising use of “blanket preemption.” Although preemption laws have targeted additional policies, these cases were chosen because of their prominence and because these policy areas have been the subject of preemption campaigns across multiple states.

**Preempting Local Fracking Bans**

Over the past few years, a growing number of states have considered and enacted laws overturning and preempting local regulations related to oil and gas development, particularly bans on hydraulic fracturing (fracking). Local leaders in more than 530 localities across twenty-six states have acted to prohibit fracking within their jurisdictions, citing potential health, quality of life, economic, and environmental harms. The oil and gas industry has responded in two ways: by petitioning state courts with claims that local bans are preempted by existing law, and by pressuring state leaders to enact new laws preempting local regulation of the oil and gas industry. Both approaches have proven effective: State courts have generally overturned local bans in favor of state preemption, and conservative state leaders have introduced preemption legislation in nearly every state where local bans have been enacted.

Among the growing number of localities that have banned fracking, the most cited reason for acting is to protect against possible harms to local water quality. The process of fracking involves injecting millions of gallons of water and a variety of chemicals into natural or drilled crevices within rock formations in order to access oil and natural gas that is inaccessible using traditional oil extraction methods. Wastewater from fracking operations is stored in deep wells, or impoundments, which may leak and cause groundwater and well contamination. In addition to water quality concerns, local leaders point to possible harms to property values, increased seismic activity, and the disruptive effects of the rapid
population growth that accompanies fracking operations, including disruptions to education systems, insufficient emergency services, housing shortages, rapid commercial and residential development, increased traffic, and other inevitable lifestyle and quality of life changes (Bartik et al. 2016, 8). Given these stakes, many local officials believe that they are best positioned to determine local needs and preferences, and that it is their responsibility and duty to protect the health and safety of their communities.

The means by which localities attempt to control fracking include land-use plans and zoning ordinances, ballot measures that regulate or ban fracking outright, resolutions calling for state-wide bans, and temporary or long-term moratoria. As of April 2017, nearly 550 localities had passed one or more of these measures in twenty-six states. Of the twenty-six states involved, four have their own state-wide fracking bans: New York, Maryland, Massachusetts, and Vermont. However, Massachusetts and Vermont have no shale plays, so their bans are clearly symbolic. Meanwhile, Maryland’s moratorium is scheduled to expire in 2017. Localities in six states have symbolically passed bans (involving Connecticut, Hawaii, Maine, Minnesota, New Jersey, and Wisconsin). These local measures are symbolic because there are no viable shale plays in their states. The remaining localities with fracking bans are situated in thirteen states where fracking is currently active, and another three states which will likely soon be active (Hirji and Song 2016).

Denton, Texas is ground zero for the current state backlash against local fracking bans. Denton was not the first city to ban fracking in the United States. Pittsburgh was the first to do so in 2010 (Fernandez 2012). But Denton’s ballot initiative that passed in 2014 sparked a flurry of similar ballot initiatives and local legislation across the nation. In Denton’s case, Texas’s response to the local ban was a departure from business as usual in that state. Despite being an “oil state,” Texas has allowed its localities to regulate the oil and gas industry in keeping with state regulations since the 1980s, when the Texas Court of Appeals in Fort Worth found that municipalities have the power to regulate drilling, and to prohibit drilling without a permit (Unger v. State of Texas, 629 S.W. 2d 811, 812 [Tex. Ct. App. 1982]). Although the case was argued on the basis of local zoning authority, the court based its decision on municipal police power, whereby cities can act “for the protection of their citizens and the property within their limits, looking to the preservation of good government, peace, and order therein” (Unger v. State of Texas, citing Klepak v. Humble Oil & Refining Co., 177 S. W. 2d 215, 218 [Tex. Ct. App. 1944]). Texas municipalities subsequently passed numerous ordinances regulating, among other matters, “noise levels, drilling of fresh water wells, compressor stations, landscaping and screening, drilling within a floodplain, saltwater disposal, measures for controlling water quality, road repairs, and ...
allowable distance(s) from existing structures that wells may be drilled” (Smith 2011, 142).

Denton upset the status quo when it banned fracking outright. The city acted in response to the grandfathering in of old, conventional oil wells that predated local attempts to establish fracking setbacks, and other land use controls. Fracking, it turns out, makes old oil wells potentially viable again through a process called “secondary capture.” Locals feared that secondary capture would “lead to fracking in the city’s heart,” as development of the city had, over time, brought residential areas and other buildings close to the conventional wells that were thought to be permanently closed (van de Biezenbos 2017, 22). The local fracking-ban initiative passed easily in August 2014, despite being massively outspent in a head-to-head campaign against the Texas Oil and Gas Association, which mobilized in response to the grassroots effort, Frack Free Denton. The Texas Oil and Gas Association immediately filed an injunction and pivoted its efforts to the state legislature. Within a few months, the state passed a law, H.B. 40, expressly preempting local regulation of oil and gas, defending the bill as necessary to protect private property rights (van de Biezenbos 2017). House Bill 40, coauthored by ALEC’s national chair, Texas Representative Phil King, allows local governments to exercise some regulation of aboveground activity involving “fire and emergency response, traffic, lights, or noise, or imposing notice or reasonable setback requirements.” The caveat, however, is that such regulations must be “commercially reasonable,” a condition that clearly favors the oil and gas industry (H.B. 40, Tex. 84th Leg. Sess. 2015). Following Texas’s lead, Oklahoma and North Carolina passed fracking preemption laws in 2015. Bills were also introduced in Florida and Indiana.

In Colorado and Louisiana, the states fought local action by asserting that existing law grants them preemption authority, and their courts affirmed this position. In May 2016, the Colorado Supreme Court determined that regulation of the natural gas industry is not purely local, as it has an economic impact on the state. This would be particularly problematic if other localities followed suit, resulting in a “de facto statewide ban” (Trego 2016). A grassroots drive to place two constitutional amendments on the November 2016 ballot—one to allow for local fracking bans and another to buffer fracking efforts by at least a half mile from homes and schools—failed to meet signature requirements, causing some to allege sabotage (Light 2016). At the same time, the oil and gas industry successfully sponsored Amendment 71, raising nearly $6 million for the effort. Amendment 71 made future initiative-based constitutional changes “nearly impossible” as two percent of registered voters in each of the state’s thirty-five Senate districts would have to sign a constitutional-initiative petition before it could be placed on the ballot; moreover, constitutional amendments will now have to be approved by 55 percent of voters rather than a simple majority (Denver Post 2016). The effort, called “Raise the Bar,” was made to appear grassroots, an attempt to protect the
state’s constitution from special interests, but its largest donor was Protect Colorado, which contributed $3 million to the effort (Ballotpedia 2016). Protect Colorado’s mission is “to make sure Colorado continues to be a leader in responsible energy development, and ... oppose any efforts that would destroy energy production in our state, including any ban or restrictions on fracking” (Protect Colorado 2017).

In Pennsylvania, localities were granted some room to regulate fracking after the state supreme court held that the state’s preemption law was unconstitutional (Robinson Township v. Commonwealth of Pennsylvania, 83 A.3d 901 [Pa. 2013]). Rather than asserting local land use or police powers, the grounds used for protesting state preemption, the court cited the state constitution’s Environmental Rights Amendment, which holds the state and localities as trustees for “clean air and pure water,” a function that necessitates local control over zoning and land use planning. Since the court’s original opinion, efforts to revisit the case have been promoted by the oil and gas industry in hopes of winning statewide preemption. The most recent effort was struck down by the Pennsylvania Supreme Court in September 2016.

In assessing the impact of state preemption activity in this policy area, the outcome leans heavily in favor of state control. Recall that there are thirteen states where fracking is currently allowed, and another three states that will soon join them, that have also experienced local fracking bans. Of these sixteen states, eight have successfully preempted local bans (Colorado, Louisiana, North Carolina, Ohio, Oklahoma, New Mexico, Texas, and West Virginia). Another two states passed preemption laws that were overturned by state courts. Pennsylvania’s preemption law was struck down by the Pennsylvania Supreme Court in 2013 and New York’s law was overturned in 2014 (with a state-wide ban enacted in 2015). At this time, Florida is considering a state-wide ban, following years of controversy and the enactment of seventy-six local bans (Spillman 2017; Grant 2016). The remaining six states—California, Indiana, Michigan, North Dakota, Virginia, and Wyoming—have variously ignored the local bans in their states, been unable to pass preemption legislation, been distracted by federal fracking regulations, and/or have been largely quiet on the matter.

**Limiting Minimum Wage Increases**

Grassroots efforts to increase the minimum wage have been ongoing since the early 2000s. Recent efforts have concentrated at the state and local levels after having had only limited success at the federal level. As the push for a living wage gained support among citizens, culminating in a flurry of state and local wage hikes in 2016, an equal measure of resistance has come from pro-business legislators and groups, such as ALEC, and industry groups including the National Restaurant.
Association and the American Hotel and Lodging Association (Grabar 2016). Thus, as the National League of Cities put it, 2016 was “the year of the minimum wage increase” as well as “the year of minimum wage preemption” (DuPuis et al. 2017, 6).

Successful wage increase campaigns at the state and local levels are credited to activist groups, such as “Fight for $15,” as well as progressive local leaders and voters who, confronted with the day-to-day impact of inadequate wages, saw the need and responded. By November 2016, the number had grown to nearly forty cities and counties (UC Berkeley Labor Center 2016). The increased local wages, ranging from $8.50 to $15.75 per hour, are found in Arizona, California, Florida, Illinois, New Mexico, Maryland, Maine, Washington, and Washington, D.C. (UC Berkeley Labor Center 2016).

State responses to local minimum wage laws vary. Some states have joined in, passing their own statewide increases. Twenty-nine states now set minimum wages higher than the federal minimum, with state-wide ballot initiatives bringing about increases in Arizona, Colorado, Maine, and Washington in 2016 alone and other states increasing their minimum wage through legislation (Economic Policy Institute 2017). In contrast, other states have preempted local wage regulation (and oftentimes other labor-related regulations), arguing, as in the case of fracking bans, that a “patchwork” of wages will confuse the business environment, risking harm to the state’s economy. This position is supported by ALEC and other pro-business organizations.

As noted above, 2016 was a busy year for state preemption of local minimum wage laws. Several cases illustrate the political dynamics of these preemption acts as well as the occasional efforts by localities to push back against them. In Ohio, Republican Governor John Kasich in December 2016 signed into law a preemption bill that prevents the state’s localities from setting their minimum wage above the state rate, which is currently $8.10 per hour. This law was written in “direct response” to Cleveland’s ballot initiative that was to be put before voters in May 2017, which would have gradually raised the city’s rate to $15 per hour (Covert 2016).

Alabama’s 2016 preemption law came in response to Birmingham’s city council approving a measure that would raise the local minimum wage to $10.10 per hour. The city council president responded, “People can not pull themselves up by the bootstraps if they can’t afford to buy boots” [sic] (Lyman 2016). After hearing that the Alabama House of Representatives had passed the preemption bill and, thus, it was moving forward, the city council quickly met and voted to implement their ordinance. Despite the rush, the preemption came days before their implementation plan went into effect (Lyman 2016).

Missouri’s 2015 preemption law was vetoed by Democratic Governor Jay Nixon, but that veto was handily overridden by the Republican legislature. The bill, HB 722, includes additional preemptions: Localities cannot “require employee benefits that exceed federal or state requirements. The bill also prohibits political
subdivisions of the state from banning or imposing a fee for the use of paper or plastic bags” (Barr 2015). Interestingly, a clause included in HB 722 stated that local wage ordinances passed before August 28, 2015, the day HB 722 passed, would not be preempted. As HB 722 was being debated, St. Louis rushed to pass its ordinance and managed to beat the clock. In February 2017, the Missouri Supreme Court found that St. Louis had acted “within its charter authority” when it passed the ordinance, allowing the city to move forward with its plans to raise its minimum wage to $11 per hour by 2018 (Bott 2017).

A 2017 Iowa law goes further than others in that it has a retroactive effect. Four Iowa counties passed minimum wage increases in 2015, and two of those counties’ wage hikes took effect in January 2017. In March 2017, however, the Iowa legislature voted to roll back those wage increases to the federal wage, $7.25 per hour. The law took immediate effect and preempted any future local wage laws that exceed Iowa’s minimum. According to Christine Owens of the National Employment Law Project, Iowa’s law “marks the first time anywhere in the U.S. that state lawmakers have actually taken away raises from workers who already received them” (Covert 2017).

Of the twenty-five states that now have local minimum-wage preemption measures in place, twelve passed their laws since 2013 (National Employment Law Project 2017, 5). In 2016, fourteen states introduced preemption bills and three states enacted such laws: Alabama, Idaho, and North Carolina (Casuga and Rose 2016). At least five states are considering minimum-wage preemption bills in 2017 (National Conference of State Legislatures 2017). All told, since 2011, legislators in thirty-one states have introduced 105 wage preemption bills, sixty-seven of which were sponsored by legislators affiliated with ALEC (National Employment Law Project 2013).

In terms of legal challenges involving these minimum-wage preemption laws, supporters of minimum-wage increases have enjoyed mixed success. As already noted, the Missouri Supreme Court sided with St Louis in the city’s effort to sustain a local minimum-wage increase enacted just as a state preemption law was taking effect. But other legal challenges have been unsuccessful. The NAACP and other supporters of Birmingham’s minimum-wage ordinance filed a federal lawsuit charging that Alabama’s 2016 preemption law violates the Equal Protection clause of the U.S. Constitution and the federal Voting Rights Act in so far as the state act limits the ability of a majority-African American city to regulate its own affairs. A federal district judge dismissed the suit; but the case has been appealed to the U.S. Court of Appeals for the Eleventh Circuit (Poe 2017).

**Banning Sanctuary Cities**

While most persons have only recently heard of “sanctuary cities,” the phenomenon dates to the efforts of over 400 religious congregations and twenty-nine localities in
the U.S. that provided safe harbor to Guatemalan and Salvadoran refugees in the 1980s (Riverstone-Newell 2013a). The federal government’s response to the sanctuary cities and states of the 1980s was, at least for a time, to ignore them. A more formal response came toward the end of the 1980s and 1990s sanctuary movement when Congress passed the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which forbade states and local governments from refusing to cooperate with federal immigration laws and enforcement. Because it was near the end of movement, and because the federal government has never attempted to enforce it, the law had little effect (McCormick 2016, 170). Of those cities offering sanctuary at the time, the common response was to ignore the law.

Today’s sanctuary cities seek to assure law-abiding, undocumented immigrants that local officials will not comply with federal detention requests, and that one’s undocumented status will not be reported to federal authorities. These cities claim that without the assurance of refuge, undocumented immigrants’ fear of being deported might prevent them from “reporting crimes, seeking healthcare and enrolling in schools . . .” (The Economist 2016). Other localities, acting in response to the recent escalation of deportation and harsh policing policies, offer sanctuary to prevent their immigrant population from fleeing. This may be for purely humanitarian reasons, a liberal protest strategy, or to shore up a local economy that depends upon immigrant labor. Whatever the motivation, today’s sanctuary movement is rapidly growing.

As the number of local sanctuaries increased during the 2010s, this generated a response from both state and federal officials. In 2010, the number of local sanctuaries in the United States was 162 (Riverstone-Newell 2013a, 188). Today, there are about 330 sanctuary cities, counties, and townships (Funkhouser 2017). This diffusion caught the attention of conservative state leaders (as well as national leaders), many of whom moved to introduce preemption legislation, particularly after sanctuary cities came under scrutiny during the 2016 campaign season. As a presidential candidate, Donald Trump added sanctuary cities to his target list after the July 2015 murder of a San Francisco woman, allegedly by an undocumented man who had been released from custody by a sanctuary city, San Francisco. As president, he pledged to “cancel” federal funding from any city that harbors undocumented immigrants, a threat reinforced recently by warning letters sent from the Department of Justice to several sanctuary cities (Tanfani 2017). In January 2017, the “Stop Dangerous Sanctuary Cities Act” was introduced in Congress and is expected to pass. In response to Trump’s threats, “at least 37 cities . . . have doubled down . . . and at least four cities have newly declared themselves sanctuary cities since Trump’s election” (Arrieta-Kenna 2016). Trump signed an executive order on January 25, 2017, to “strip federal grant money” from sanctuary cities. But it remains unclear what effect this order will actually have. A number of
localities are vowing to resist federal intervention, including by challenging this executive order in federal court (Reston 2017), and with some success in enjoining its enforcement in an April 2017 ruling in the U.S. District Court for the Northern District of California (County of Santa Clara v. Trump, 17-cv-00574 [N.D. Cal]). For conservative state officials operating in the current environment of heightened hostility toward undocumented immigrants, attacking sanctuary localities within their own states is top of list.

In 2015, at least eight states introduced preemption bills addressing local sanctuary. North Carolina’s preemption law was signed in October 2015. Arizona joined in a few months later with SB 1070, which not only prohibited local noncooperation policies but “encouraged racial profiling by requiring police [to] inquire into the immigration status of anybody they ‘suspect’ is undocumented” (Fischer 2016). Alabama and Virginia followed. Virginia’s law requires sanctuary cities to pay for property damages caused by undocumented immigrants. In 2016, an additional eighteen states considered passing sanctuary preemption laws, with mixed success (Morse 2016). The National Council of State Legislatures reports that, in 2017, twenty-nine states are considering sanctuary preemption legislation (Morse et al. 2017). Mississippi’s S 2710 has passed, prohibiting state and local jurisdictions and colleges from noncooperation with federal agencies regarding immigration status verification or reporting. An additional 100 bills are still in play as of spring 2017 (Morse et al. 2017).

The latest trend in sanctuary preemption bills is to assign penalties to the jurisdiction and/or officials who refuse to comply with federal immigration policies. For example, Texas Republican Governor Greg Abbott pledged in January 2017 to sign SB 4, the state’s sanctuary preemption bill. SB 4 is what legal theorists call a “super-preemption bill” because it stipulates penalties for noncomplying localities, including the withholding of state grant funding, and the removal of any noncompliant officials (Ward 2017). In the meantime, Governor Abbot blocked $1.8 million in grant funding from Travis County due to its sanctuary policy. The Florida legislature is considering a bill that would impose a $5,000 per-day fine on sanctuary cities. A proposal under consideration in the North Carolina General Assembly in its 2017 session “would withhold tax revenues from national gas, telecommunications and beer and wine sales from any locality that maintains a sanctuary policy” (Wilson 2017b).

Preempting LGBT Rights Protections

Progressive localities across the nation have long sought to protect the rights of their LGBT citizens with a variety of measures including same-sex partner registries (predating the nationwide legalization of same-sex marriage by a decade), requirements for contractors with the city to provide equal benefits to registered
domestic partners, and San Francisco’s issuance of marriage licenses to same-sex couples, among others. According to the Movement Advancement Project (2017), over 225 localities have some sort of protection in place to prohibit discrimination based on sexual orientation or gender identity.

These local ordinances have in turn generated various state and federal government responses (Riverstone-Newell 2013a). The history of state preemption measures regarding LGBT rights dates to the 1990s, when Colorado voters approved a 1992 ballot initiative, Amendment 2, which prohibited local antidiscrimination laws. This state constitutional amendment was challenged in federal court and overturned by the U.S. Supreme Court in *Romer v. Evans*, 517 U.S. 620 (1996). After several decades passed, in the 2010s three states enacted laws preempting local antidiscrimination ordinances. Tennessee passed such a law in 2011 and Arkansas followed in 2015, with both states acting in direct response to the consideration or actual extension of local protections to the LGBT community (Graham 2016). However, neither of these of laws attracted as much attention as North Carolina’s HB2, enacted in March 2016 in response to a Charlotte “bathroom” ordinance passed one month earlier. The publicity around HB 2 sparked a strong response among those both supporting and opposing specific protections for those in the LGBT community.

Charlotte’s ordinance extended its existing nondiscrimination protections to include “sexual orientation, gender identity, and gender expression,” thereby allowing transgender people to use public bathrooms that aligned with their gender identity, among other protections. North Carolina’s response was to enact a preemption law. HB 2, which passed both legislative chambers and was signed into law in a single-day special session, not only requires people to use public bathrooms consistent with the sex on their birth certificate but also holds that the “state’s nondiscrimination policy, which doesn’t include sexual orientation or gender identity, and state labor laws, including minimum wage regulations, “supersede and preempt’ local policies” (Yee 2016).

After North Carolina’s preemption law passed, and despite considerable backlash and financial impact, which “cost the state millions of dollars, hundreds of jobs, numerous entertainment and sporting events and, arguably, one Republican governor” (Margolin 2016), other states have considered similar action. Texas legislators for example, introduced their own “bathroom bill,” SB 6, as well as SB 92, “which would overturn local ordinances protecting LGBT people from workplace and housing discrimination . . . ” (Milburn 2017). The passage of SB 6 would overturn local laws already in place, preempting those cities from providing bathroom protections to transgender people (Milburn 2017).

Over forty anti-LGBT bills across sixteen states have already been introduced in 2017. As of April 2017, similar preemption “bathroom bills” remain in play in thirteen states (Grassroots Change 2017b). While these states debated the pros and
cons of preemption, in March 2017 North Carolina’s Republican-controlled legislature and newly elected Democratic Governor Roy Cooper finally reached a compromise to replace HB 2 with a revised law, HB 142. However, critics have dubbed the new law “HB 2.0” because the only real change to the preemption portion of the original law is to impose a moratorium on local anti-discrimination ordinances until 2020, rather than preempting them outright.

Although North Carolina’s preemption bill was revised in response to pressure from the public and from athletic associations, corporations, and entertainers who removed business and events from the state, critics of these state preemption laws have enjoyed less success in court. After Arkansas passed a 2015 preemption law, Fayetteville nevertheless enacted an antidiscrimination ordinance protecting LGBT rights. When this ordinance was challenged on the ground that it was inconsistent with state law, a circuit judge initially ruled in favor of the city. But this judgment was reversed by the Arkansas Supreme Court in a February 2017 decision holding that the local ordinance was in fact preempted by state law (Protect Fayetteville v. City of Fayetteville, 2017 Ark. 49 [Ark. 2017]).

“Super-Preemption,” “Blanket Preemption,” and Local Autonomy

Targeted preemption laws, such as those discussed above, are but one strategy conservative state leaders are using to control local governments. Other types of preemption are becoming more common as well, including “super-preemption” and “blanket preemption.” Super-preemption laws hold the locality and/or participating officials liable for local regulation or ordinances pertaining to specific policy areas, such as local firearm regulation. Florida’s 2016 firearms statute, for example, exposes “local government officials to lawsuits, penalties, fees, and even removal from office for even attempting to pass a bill contravening state law” (Capps 2017). Tallahassee Mayor Andrew Gillum is currently navigating a lawsuit brought by two gun-rights organizations, and without the benefit of the city’s legal department, because Florida’s preemption law prohibits the use of public funds in defending gun ordinance cases. The charges against Mayor Gillum center on his (and other local officials’) negligence in repealing local gun regulations after the state passed its preemption law. Local officials argued that removal was not required as the state law rendered them null and void. A state circuit court found in favor of the mayor, but the decision was appealed and continues before Florida’s First District Court of Appeal in early 2017 (Capps 2017).

Texas’s anti-sanctuary bill, SB 4, would allow for financial penalties and removal of officials, as well. The governor pledged to sign the bill, which is expected to pass in early 2017. Several states, including Pennsylvania, Tennessee, Wyoming, North Carolina, and Nevada, now have super-preemption laws related to gun control, most having a “private right of action” clause that allows “individuals or groups
the right to sue local governments and, in some cases, individual local officials, if they believe they are enforcing local firearms laws” (Fischer 2016). Similar bills have been introduced in Arizona, Iowa, Texas, and Michigan. In fact, Arizona’s SB 1487, “the mother of all local preemption bills” (Daigneau 2017) passed in 2016, allowing the state to withhold funds from localities that pass regulations or ordinances that contradict state law.

Blanket preemption laws are generally written with the intent to bar localities from enforcing any type of local regulation or legislation that does not exactly conform to state law. In other words, the state is “commanding the field.” The interesting feature of recent state-level blanket preemption laws is that “the field” is being interpreted as encompassing all state laws, rather than a single policy area, such as pensions or gun control. For example, Arizona’s Republican Governor Doug Ducey approved a law in early 2016 which allows for the denial of state funding to localities that pass any law that the state attorney general determines is in violation or conflict with a state law. In response, Executive Director of Arizona Cities and Towns, Ken Strobeck, said, “We’re spending an awful lot of time at the state government chasing cities for I’m not sure what kind of problem. We certainly do not like having shared revenue thrown around as a punishment” (Wingett and Rau 2016).

Other measures have been introduced but have not been enacted. Oklahoma’s SB 1289 was introduced in 2016 but pulled before a vote. SB 1289 would have prevented localities from enacting rules that do not conform to state laws or, as one observer put it, “doing almost anything that isn’t specifically authorized by the state legislature” (Fischer 2016). In 2015, Texas legislators introduced a bill that would have prohibited local legislation without state approval. It was rejected, but a bill preempting local fracking bans did pass leading one organization to surmise, “The blanket preemption strategy evidently is to start with a bill that would preempt everything, and then to reach a ‘compromise’ to preempt only some issues – like smokefree laws” (Americans for Nonsmokers’ Rights 2016).

Conclusion

When state and federal leaders fail to act on important social and economic issues, local governments often step into the breach, passing legislation that reflects local conditions, needs, and desires. This has certainly been the case over the last two decades, with progressive local governments adopting living-wage requirements, smoke-free ordinances, local gun regulations, LGBT rights and protections, undocumented immigrant sanctuary policies, local healthcare requirements, and much more. Localities have been policy laboratories, aggressively seeking solutions to needs and problems that concentrate in cities, but are often overlooked or left unattended by higher levels of government (Schragger 2010). Unsurprisingly,
Democrats and progressive interest groups have appreciated local innovation and experimentation, whether by ballot initiative or local legislation, particularly as Congress and state legislatures face gridlock and conservative majorities (Greenblatt 2016b).

In filling the gaps in policy leadership, localities have demonstrated their agility—their nimbleness—a quality in short supply at higher levels of government. Further, a policy that does well in one locality often diffuses to other local governments (Greenblatt 2015a), sometimes even to the states (Riverstone-Newell 2013b), allowing others to learn from the successes or failures of smaller scale policy experiments. In the past, conservatives have argued for local innovation and experimentation to offset the trend toward higher government bloat. For today’s conservatives, however, local innovation and the potential for policy learning and diffusion, especially progressive innovation and diffusion, is exactly the problem. Thus, the current conservative fight for decentralization extends only as far as the states. Ohio Republican state senator Keith Faber sums it up this way: “[W]hen we talk about local control, we mean state control” (Wilson 2017a).

The rise in state preemption legislation as a means to undo progressive local policies is a departure from preemption’s traditional use, that is, to establish a floor for local responsibilities and activities. The standards set by state preemption laws have often left to localities the choice to do more than their states require. Localities, for instance, often provide an array of services above and beyond the state-required “essential services.” This ability to do more is where local preferences are manifest, where the qualities of a population that are unique to a locality find expression - or not. Today’s preemption legislation seeks to prevent those expressions, particularly those that take the form of progressive policies. Using their growing presence in state legislatures and gubernatorial offices, and prompted, educated, and supported by industry and conservative groups, Republican state leaders have set their sights on progressive cities, taking aim at local autonomy and control.

The outcome of this push for state preemption is, as has been discussed, mixed. While some state preemption laws have accomplished their intended goals, as in the case of laws barring local fracking bans in Texas, Oklahoma, and North Carolina, measures preempting local wage ordinances in Alabama and Ohio, and the preemption of local gun regulations in several states, other attempts have been challenged by interested groups or localities in the courts. Pennsylvania, for instance, lost its bid to preempt local fracking bans when the state Supreme Court issued a ruling grounded not in the virtues of local control but rather in a state constitutional environmental-protection guarantee.

Cities have taken strong stances against preemption legislation, leading to somewhat of a standoff with their states (and the federal government), as in the case of sanctuary cities. Cleveland fought back against Ohio’s preemption of
local-hire laws, which preempted Cleveland’s requirement that contractors with the city hire local, and the court granted an injunction citing the state’s Home Rule Amendment, which grants its localities the “brodest possible powers of self-government . . .” The law is still under appeal. Therefore, preemption legislation is far from a sure thing in terms of accomplishing its aims. However, the threat of preemption may keep some localities from acting on issues that are likely to garner state attention. If personal penalties are attached, as is the case with “super-preemption,” a further chilling effect is likely.

Donald Trump’s election to the presidency, combined with Republican gains in state legislatures in 2016, stimulated a renewed push to enact state preemption laws (Wilson 2017a). Alan Greenblatt writes, “. . . in a lot of states, Republicans will be able to proceed in pretty much any front where they can find agreement amongst themselves” (2016a). Predictions are just that, but if the pattern that has developed over the past several years holds, local governments can expect to lose even more power, to have their decisions undone, to face legal challenges, and to face personal and jurisdiction penalties for actions the state determines to be “overreach.” In short, the surge of state preemption activity during the last several years shows no signs of waning and is, if anything, increasing in scope and intensity.

The increasing prominence and change in character of state preemption laws, along with the threats they pose to local policy innovation, call for additional scholarly analysis. Much attention has been given to battles between federal and state officials regarding the extent of federal power vis-à-vis state autonomy. However, recent disputes between state and local officials’ rival federal-state battles in their intensity, and in a way that would benefit from additional investigation of the sort provided in this article focusing on the causes and consequences of state preemption laws in several prominent policy areas.

Note

I would like to thank Christopher Giller for research assistance. Also, thanks to John Dinan for excellent direction, and to the article’s four anonymous reviewers for helpful suggestions and comments.

References


POWERFUL CITIES?: LIMITS ON
MUNICIPAL TAXING AUTHORITY AND
WHAT TO DO ABOUT THEM

ERIN ADELE SCHARFF*

Cities are once again on the rise and have become the site of major public debates, from income inequality and immigration policy to where and how Americans should live. While municipal leaders are often eager to fill the void in political leadership left by Congress and state elected officials, they are often hamstrung by state home rule laws, which define the powers states grant to municipalities. These laws limit, among other things, municipal taxing authority. Recently, local government scholars have wrestled with whether and how to grant municipalities more fiscal authority, but such scholarship has not provided a unified theory of municipal taxing authority.

This Article considers in detail whether and how to expand city taxing authority. It argues that state law should grant municipal governments “presumptive taxing authority.” This presumptive taxing authority would parallel municipal regulatory authority and be similarly subject to state preemption law. Such reform would open the door to more municipal revenue innovation, while ensuring that the state can vindicate its weighty policy interests.

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INTRODUCTION

Cities are once again on the rise and have become the site of major public debates, from income inequality and immigration policy to where and how Americans should live.¹ Municipal leaders are often

¹ On income inequality, see, for example, Eugene J. McCann, Inequality and Politics in the Creative City-Region: Questions of Livability and State Strategy, 31 INT’L J. URB. & REGIONAL RES. 188, 194–95 (2007), for a discussion of local concerns about gentrification and livability and suggesting particular urban solutions; Alan Berube, How Mayors Can Grapple with Inequality, BROOKINGS INST. (Dec. 5, 2013), http://www.brookings.edu/blogs/the-avenue/posts/2013/12/05-mayors-inequality-berube, for the suggestion that mayors can engage strategically to reduce systemic inequality within their cities; Annie Lowrey, Cities Advance Their Fight Against Rising Inequality, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/business/economy/cities-advancing-inequality-fight.html, for a discussion of Seattle’s proposed minimum wage increase in the context of local action to reduce income inequality. On immigration, see, for example, Monica W. Varsanyi, Immigration Policy Activism in U.S. States and Cities: Interdisciplinary Perspectives, in Taking Local Control: Immigration Policy Activism in U.S. Cities and States 1, 3–6 (Monica W. Varsanyi ed., 2010), noting that “[i]mmigration policy activism has . . . increased exponentially in cities across the United States”; Jennifer M. Chacón, Managing Migration Through Crime, 109 COLUM. L. REV. SIDEBAR 135, 138 (2009), for a discussion on the recent trend among states and localities to enact laws designed to enable criminal prosecutions of unauthorized migrants at the local level; Cristina M. Rodríguez, The Significance of the Local in Immigration Regulation, 106 MICH. L. REV. 567, 576–79 (2008), for a discussion on the proimmigrant character of many major cosmopolitan cities and contrasting it with newer, less traditional immigration destinations in which the local needs and responses are more varied; Juliet P. Stumpf, States of Confusion: The Rise of State and Local Power Over Immigration, 86 N.C. L. REV. 1557, 1596–600 (2008), for a description of local immigration policies in North Carolina; Rick Su, A Localist Reading of Local Immigration Regulations, 86 N.C. L. REV. 1619, 1655–78 (2008), for a description of local government action in regulation, but suggesting this response is not all related to national immigration politics. On public health, see, for example, Paul A. Diller, Why Do Cities Innovate in Public Health? Implications of Scale and Structure, 91 WASH. U. L. REV. 1219, 1220–24 (2014), for a description of local regulation to combat smoking and obesity and an argument that cities are uniquely positioned to innovate in the realm of public health; Paul A. Diller, Local Health Agencies, the Bloomberg Soda Rule, and the Ghost of Woodrow Wilson, 40 FORDHAM URB. L.J. 1859, 1862–67 (2013), for an examination of local
eager to fill the void in political leadership left by Congress and state-elected officials.2

At the same time, rapidly rising rents in metropolitan centers like New York, San Francisco, and Washington, D.C. have highlighted America’s renewed interest in big-city living.3 And urbanization is not just a coastal phenomenon. Between 2010 and 2011, nearly one-half of the country’s largest metropolitan areas saw greater population growth in core cities than in suburbs, including the metropolitan areas of Denver, Columbus, Memphis, and Phoenix.4

Cities are increasingly centers of regional economic development and wealth, changes driven in part by changing preferences for shorter commutes and proximity to the amenities of the city core (shopping, entertainment, restaurants, etc.).5 Such urban revitalization has prompted new thinking about the role of municipal government in fostering development in cities and delivering municipal services.6

government regulations that take on significant health problems—particularly obesity and smoking; Lainie Rutkow et al., Local Governments and the Food System: Innovative Approaches to Public Health Law and Policy, 22 ANNALS HEALTH L. 335, 367–71 (2013), for an argument for innovative health regulation at the local level.


3 The New York Times, for example, reported that real estate developers were shifting to “smaller, more modestly priced units,” which it described as being in the $8 million to $10 million range. Julie Satow, Luxury Condos: Dialing It Down, N.Y. TIMES (Oct. 3, 2014), http://www.nytimes.com/2014/10/05/realestate/luxury-condos-dialing-it-down.html; see also Growing Pains, ECONOMIST (Dec. 7, 2013), http://www.economist.com/news/united-states/21591187-californias-new-technological-heartland-struggling-its-success-growing-pains (describing record number of evictions in San Francisco as rents rise and increasing numbers of those working in tech sector move into city).


5 But see Zachary Liscow, Are Court Orders Responsible for the “Return to the Central City”? The Consequence of School Finance Litigation 3–6 (Dec. 1, 2013) (unpublished manuscript), http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1025&context=student_legal_history_papers (suggesting that increased state-level funding explains about one-third of the growth in central cities and noting variety of other proffered explanations of this growth).

6 See, e.g., Rachel Dovey, NYC, San Francisco on Different Paths to Pedestrian Safety, NEXT CITY (Jan. 23, 2015), http://nextcity.org/daily/entry/vision-zero-new-york-san-francisco-pedestrian-safety (demonstrating role of local governments in solving local issues and comparing methods these governments employ, specifically in regards to pedestrian...
Of course, municipal success is not a universal trend. Detroit is the most obvious outlier, but other, mostly older, industrial cities continue to lose population relative to their metropolitan areas. Cities like Baltimore, St. Louis, and Indianapolis have yet to experience a turnaround. While many of the problems of cities like Baltimore differ substantially from those of cities like San Francisco, the leaders of most cities share one challenge: municipalities are creatures of state law. As a consequence, their powers are limited to those enumerated in their state’s constitution and laws. A city’s power to regulate behavior within its borders and to tax and borrow funds to support these regulatory activities and spending programs are all circumscribed by state law.


9 See Frank J. Goodnow, Municipal Home Rule, 10 Pol. Sci. Q. 1, 1 (1895) (describing “absolute power” state legislatures have over municipal affairs); Lyle E. Schaller, Home Rule—A Critical Appraisal, 706 Pol. Sci. Q. 402, 414 (1961) (“Possibly the biggest failure of the home rule concept is in the financing of municipal government. . . . [Local governments] have been granted a partial monopoly of an inadequate tax. All too often local governments have more home rule authority than they can finance through ‘home rule’ tax resources.”). Other scholars have suggested expanding home rule authority more broadly. See also Gerald E. Frug & David J. Barron, City Bound: How States Stifl Urban Innovation 98 (2008) (decrying limited municipal power). This Article does not make such a sweeping claim, but rather focuses on tax authority.


11 See, e.g., Hawthorne v. Vill. of Olympia Fields, 790 N.E.2d 832, 840–44 (Ill. 2003) (“Because it is a non-home-rule unit, Olympia Fields cannot adopt ordinances under a general grant of power that infringe upon the spirit of state law or are repugnant to the general policy of the state.”); Town of Conover v. Jolly, 177 S.E.2d 879, 881–82 (N.C. 1970) (rejecting ordinance that sought to prohibit mobile homes within town because State only conferred “upon cities and towns the power to prevent and abate nuisances, but a mobile home is not a nuisance per se”). For a more expansive view of municipal authority, see Inganamort v. Borough of Fort Lee, 303 A.2d 298, 305–06 (N.J. 1973) (noting that New Jersey courts had interpreted municipality’s ability to “legislate for the general welfare” to grant source of independent authority to cities).

Traditionally, states have granted local governments very limited revenue-generating authority, even as compared to other home rule powers. Moreover, as the tax literature has frequently observed, state laws of general applicability, like California’s Proposition 13 and Colorado’s Taxpayer Bill of Rights (TABOR), also limit local taxing authority.

As a result, cities often lack the legal authority to enact meaningful tax reform, including to the most important local tax, the property tax. In New Orleans, elected officials had to win statewide approval for a constitutional amendment simply to allow its residents to take their own vote on property tax increases, and in Texas, mayors worry that proposed state-level cuts to their property tax rates will hinder their ability to provide municipal services.

Cities are but one of many forms of local government. See Mandelker, supra note 10, at 32–41. Counties, towns, special districts, and school districts are all affected by similar limits on local power. Id. at 41. This Article’s focus on cities is not to suggest these other limits pose no normative or practical problems. School districts, after all, provide perhaps the most important of local public goods. Rather, I have chosen to think about municipalities separately from these other forms of government for several reasons. First, the variation in state municipal home rule is already significant, and adding additional variation by considering other forms of local government adds greatly to the scope of the project. Second, the legal issues, revenue options, and normatively correct solutions of these different forms of government differ from those of municipalities. Counties are both local governments and administrative agents of the state, a dual status that suggests potentially different revenue authority. Id. at 33–34 (“Counties are ‘first of all local units for state purposes.’ . . . Counties provide a number of state-related services at the local level.” (internal citations omitted)). The literature on school finance is already legion in political science, economics, and law, while scholars have paid less attention to municipal revenue sources. Special districts rely on fairly different funding mechanisms more closely tied to the benefits they provide than municipalities, which are general-purpose governments. Id. at 34–35. I hope to consider other forms of local government in future work. Cities, however, seem a good place to start thinking about these problems.


But property taxation is not the only area where state authority has blocked municipal tax reform. The New York State Legislature blocked both of New York City Mayor Michael Bloomberg’s efforts to establish a congestion pricing system and stalled Mayor Bill de Blasio’s proposed municipal income tax reforms.\(^\text{17}\) (Under New York law, the City can’t even raise dog licensing fees without state approval.)\(^\text{18}\) Until recently, state legislation also blocked California municipalities from imposing bag fees, despite their interest in doing so.\(^\text{19}\) When Brookfield, Illinois tried to impose a tax on amusement activities, the Brookfield Zoo lobbied the state legislature to prohibit the tax.\(^\text{20}\) And in Connecticut, local officials have complained that the legislature continues to foist increased costs on local governments without giving them the revenue sources to pay those costs.\(^\text{21}\) As more Americans seek to move back to inner cities, they will place increasing demands on public infrastructure, and municipalities will face new challenges, such as reviving public transportation, many of which will inevitably cost money to solve.

Traditionally, scholars have assumed that such limits on municipal power are good. Concerns about the administrative costs of municipal tax control coupled with concerns about municipal fiscal mismanagement justified these limitations on municipal fiscal authority.\(^\text{22}\)


Recently, local government scholars have wrestled with whether and how to grant municipalities more taxing authority, but this scholarship has not provided a unified theory of municipal taxing authority. This Article argues that state law should grant municipal governments “presumptive taxing authority.” This presumptive taxing authority would parallel municipal regulatory authority and be similarly subject to state preemption law. Under a presumptive authority approach, a city would be free to establish a tax or regulation as long as the tax or regulation did not conflict with state law. Such reform would open the door to more municipal revenue innovation, while ensuring that the state can vindicate its weighty policy interests.

In arguing for more municipal authority over revenue, this proposal pushes back against the current conventional wisdom on local tax policy and especially local sales tax design. State policymakers and scholars have increasingly sought more uniformity in taxation between states and local governments and between states relative to each other. In part, this effort reflects concerns about the costs of administering separate tax rules in each jurisdiction, along with the hope that, with greater uniformity, Congress will be persuaded to expand state authority to tax internet sales. This Article argues that a properly structured grant of greater taxing authority would still leave room for state uniformity in the sales tax base while providing more revenue options to municipalities.

23 See, e.g., FRUG & BARRON, supra note 9, at 75–87 (discussing various methods used by cities to raise tax revenue); Richard Briffault, Home Rule for the Twenty-First Century, 36 Urb. L. 253, 269–70 (2004) (arguing that giving local governments power to tax strengthens home rule and thus improves democratic accountability); Clayton P. Gillette, Who Should Authorize a Commuter Tax?, 77 U. Chi. L. Rev. 223, 235–39 (2010) (arguing that local governments are able to effectively represent the interests of both local residents and commuters in deciding whether and how to implement commuter tax); Gillette, supra note 22, at 1246 (discussing increasing importance of fees as source of local revenue and arguing that allowing local governments to charge fees can be economically efficient).


25 See, e.g., DAVID BRUNORI, STATE TAX POLICY: A POLITICAL PERSPECTIVE 125–26 (2d ed. 2006) (urging state policymakers to coordinate to draft more uniform tax laws and discussing favorably the Multistate Tax Compact for taxation of business activity).

26 See infra Section III.D for a more detailed discussion of these administrative issues. 27 See Marketplace Fairness Act, S. 698, 114th Cong. § 2 (2015) (conditioning greater sales tax authority on greater state uniformity); Andrew J. Haile et al., A Potential Game Changer in E-Commerce Taxation, 67 St. Tax Notes 747, 748–49 (2013) (describing number of bills considered during 113th Congress to reform and coordinate collection of state taxes on internet sales).
Part I provides background on the current powers granted to local governments over spending and revenue and gives a brief description of current municipal revenue sources. Part II outlines the benefits to expanding municipal taxing authority, examining the ways restricted taxing authority limits city economic development options and local accountability as well as the ways that expanded authority could increase municipal revenue innovation and improve regulatory policy. Part III considers state interests in municipal tax policy. Part IV discusses the presumptive taxation proposal in detail.

I
HOME RULE AUTHORITY

Municipal governments provide many of our most basic public goods and services, including much of our sanitation (water treatment facilities and waste disposal); public safety (law enforcement, courts, and jails); infrastructure (sewage, electric, and water lines, and roadway maintenance); and public spaces (parks, libraries, and swimming pools). These are the sorts of publically provided goods that are easily forgotten until problems arise. There is unlikely to be a headline about the sanitation department unless sanitation employees strike. Similarly, while the opening of a new road or public space may garner media attention, local politicians rarely campaign on a promise to efficiently maintain the city’s current infrastructure. In addition, today’s municipalities also play important roles in public health,

29 HOWARD CHERNICK & ANDREW RESCHOVSKY, LOST IN THE BALANCE: HOW STATE POLICIES AFFECT THE FISCAL HEALTH OF CITIES 3 (2001), http://www.brookings.edu/~media/research/files/reports/2001/3/cities-chernick/chernick.pdf. Of course, this list excludes perhaps the most important public good provided at the local level: elementary and secondary education. While some school systems are under the direct control of municipal government, the majority of school systems are under the authority of independent school districts. There are 13,051 independent school districts in the country, but only 1510 school systems that are part of other local or state governments. Local US Governments, NAT’L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-structures/local-us-governments (last visited Mar. 12, 2016). Mayoral control of school districts has received significant press and policy attention in recent years. See Frederick M. Hess, Looking for Leadership: Assessing the Case for Mayoral Control of Urban School Systems, 114 AM. J. EDUC. 219, 221–23 (2008) (discussing attention paid to mayoral control as mechanism of education reform). Because only a handful of districts are subject to mayoral control, this Article does not directly address the literature regarding school funding. See List of Mayor-Controlled Public Schools, NAT’L LEAGUE OF CITIES, http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-officials/list-of-mayor-controlled-public-schools (last visited Feb. 20, 2015) (listing public school systems subject to mayoral control). Recent research, however, suggests more centralized funding of public schools may have played an important role in the recent growth of central cities. See Liscow, supra note 5, at 4.

29 See Betty Bekemeier et al., Local Health Department Food Safety and Sanitation Expenditures and Reductions in Enteric Disease, 2000–2010, 105 AM. J. PUB. HEALTH
human services,\textsuperscript{30} regional transportation policy,\textsuperscript{31} and local economic development.\textsuperscript{32}

The American political tradition has long romanticized local government—the New England town hall meeting remains the civic discourse’s ideal of grassroots, accountable democracy.\textsuperscript{33} And yet, American political philosophy has remained deeply skeptical of urban local government. These dual impulses understandably conflict and lead to the pendulum-swinging treatment of local government powers.

At the turn of twentieth century, state law reform pushed by progressive-era activists gave municipalities much greater autonomy in the form of “home rule.”\textsuperscript{34} However, home rule has delivered less than promised, especially when it comes to municipal tax authority.\textsuperscript{35}

This Part offers a general description of the policymaking authority typically given to municipalities under state law. The first section provides a general introduction to the legal framework of local government law. The second section provides some background on municipal revenue. The third section examines specific state home rule provisions in detail. As this Part will show, there is a considerable discrepancy between tax authority, which cities are restricted from

\begin{footnotesize}
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\item See Amy Crawford, For the People, by the People, Slate (May 22, 2013, 2:17 PM), http://www.slate.com/articles/news_and_politics/politics/2013/05/new_england_town_halls_these_experiments_in_direct_democracy_do_a_far_better.html (discussing history of New England town meetings).
\item See David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255, 2279, n.69 (2003) (providing citations to historical literature on home rule).
\item See Goodnow, supra note 9, at 17 (noting that court decisions have not “fulfilled the expectations of those who advocated for their [home rule] message”).
\end{itemize}
\end{footnotesize}
exercising, and spending and regulatory authority, which are much more liberally granted to municipalities.

A. The Concept of Home Rule

Local governments have been termed mere creatures of the state;\textsuperscript{36} as a consequence, their powers are limited to those enumerated in their state’s constitution and laws.\textsuperscript{37} For much of the nineteenth century, states granted municipal governments very little independent authority.\textsuperscript{38} Progressive-era urban activists, fearing state legislatures would fail to respond to the increasing problems faced by growing urbanization and industrialization, advocated for greater home rule authority, at least over some policy decisions.\textsuperscript{39} Home rule provisions are state laws that give some local governments independent lawmaking authority over local affairs.\textsuperscript{40} Without such provisions, much of the activity of local government required the explicit authorization of its state government.\textsuperscript{41}

Although the specific powers conferred by the state to local governments via home rule laws and constitutional provisions vary from state to state,\textsuperscript{42} the National League of Cities identifies four categories of home rule authority that may be granted: structural, personnel,


\textsuperscript{37} See generally Barron, supra note 34 (discussing history of home rule).

\textsuperscript{38} See Barron, supra note 34, at 2280–81 (discussing early approaches to municipal authority).

\textsuperscript{39} See id. at 2291 (discussing motives of early home rule advocates).

\textsuperscript{40} See Home Rule, BLACK’S LAW DICTIONARY (10th ed. 2010) (defining home rule as “[a] state legislative provision or action allocating a measure of autonomy to a local government, conditional on its acceptance of certain terms”).

\textsuperscript{41} While Dillon’s Rule establishes a presumption that a municipality would need the state’s explicit grant of authority, it has often been interpreted to give local governments the necessary and proper powers to effect grants of explicit permissions. See Gillette, supra note 36, at 963 (“As formulated by its author—judge and treatise writer John F. Dillon—the doctrine limits localities to exercise of those powers expressly delegated to them by the state legislature or necessary to implement or necessarily implied from express legislative grants.” (footnote omitted)).

\textsuperscript{42} See generally Krane et al., supra note 12 (surveying home rule authority in fifty states).
functional, and fiscal authority. Structural authority allows a local government to design its own form of government. For example, structural authority gives a local government the ability to choose how to allocate power between the mayor and members of the city council. Personnel authority gives a local government the ability to set employment policies for their employees. Functional authority gives a local government the ability to pass laws and, more generally, the “power to exercise local self-government in a broad or limited manner.” Functional authority would allow a city to pass an ordinance regulating street vendors within city boundaries, for example. Fiscal authority gives a local government the ability to raise revenue, either through taxation or borrowing.

Home rule municipalities have the greatest authority over structural and personnel decisions. The degree of functional authority varies considerably amongst states. Generally speaking, home rule municipalities have less authority over fiscal affairs than over other policy areas. According to one summary of municipal home rule, only twelve states have laws that give local governments any fiscal control. Of those twelve, the survey classified five as granting only limited fiscal authority. Even in states that grant more expansive fiscal authority to local governments, “state constitutional provisions . . . restrict the set of fiscal policy choices and the set of fiscal tools [local governments] are able to employ.”

States differ in how they grant home rule authority. In most states, only “larger” cities are eligible for home rule, and these cities must enact a home rule charter to legislate with home rule authority. For example, only Texas cities with populations over 5000 can elect to pass home rule charters in a general municipal election. About a quarter of Texas cities have adopted home rule charters, including

\begin{footnotes}
43 \textit{Local Government Authority}, supra note 36.
44 \textit{Id.}
45 \textit{Id.}
46 \textit{Id.}
48 See \textit{Krane et al.}, supra note 12 at 476–77 tbl.A1 (showing that majority of states grants deferential authority to local governments on matters of structure and personnel).
49 See \textit{id.} (showing regulatory authority of government varies considerably).
50 See \textit{id.} (describing greater powers states grant in areas other than home rule).
52 \textit{Id.} (listing extent of fiscal home rule authority in each state).
53 Gillette, \textit{supra} note 22, at 1246.
55 See \textit{Tex. Mun. League}, \textit{supra} note 54, at 7, 10 (showing 329 of 1196 cities had adopted home rule charters); \textit{Cities in Texas}, \textit{Ballotpedia}, http://ballotpedia.org/
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POWERFUL CITIES?  

all of the state’s largest cities. In Minnesota, by contrast, any city (no matter the size) can adopt a home rule charter, \(^{56}\) but only about twelve percent of Minnesota cities have done so. \(^{57}\)

Section III.C will provide illustrative examples of different states’ home rule provisions with a focus on the fiscal, and especially taxing, authority granted to home rule municipalities. In thinking about how states provide these grants of authority, however, it is useful to understand a bit more about municipal revenue sources. The next section provides some background on how cities raise revenue.

B. Municipal Revenues Generally

One of the challenges of discussing “local government” generally, and municipal finance in particular, is that states vary a great deal in the revenue options they grant to municipalities. In addition, cities vary in the tax policy choices they make. However, some general observations can be made about municipal “own-source revenue,” i.e. revenue the city receives from user fees and taxes as opposed to money from intergovernmental grants or municipal borrowing.

First, the property tax provides municipalities with their largest source of own-source revenue. \(^{58}\) This pattern of tax utilization reflects state grants of municipal revenue authority. While virtually all municipalities are authorized to impose property taxes, fewer have sales tax authority, and only a fraction of cities have income tax authority. \(^{59}\) As a result, about half of municipal governments receive sales tax revenue, while the National League of Cities estimates that only about...
ten percent of municipalities receive revenue from income or wage taxes.60

Second, state regulation of the property tax has limited local control in many states. The debate over assessment limitations like Proposition 13 in California often dominates criticism of property tax law.61 These assessment limits prevent local authorities from taxing the full market value of property. In addition to assessment limits however, the state restricts the local property tax base in other ways, including liberally granting local property tax exemptions.62

Third, since the 1980s, local governments have begun to rely more and more on user fees rather than general revenue taxes.63 User fees are charges residents pay for services provided, as opposed to taxes levied to provide public services generally, whether or not those particular public services are used by individual taxpayers. As Dick Netzer has noted, a portion of this increase is attributable to increasing use of services traditionally associated with user fees.64 But municipalities have also shifted to user fees to supplement general tax revenue in the wake of property tax assessment limits and other restrictions on the local property tax base.65

One driving force in the shift to user fees is that local governments have a much greater authority to impose such charges without explicit state authorization.66 While user fees have increased

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61 See supra note 15 (providing citations to examples of this literature).

62 See DAVID BRUNORI, LOCAL TAX POLICY: A FEDERALIST PERSPECTIVE 66–67 (2d ed. 2007) (discussing other state policies that also restrict property tax revenue authority).


64 ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, supra note 63, at 57 n.9.

65 Reynolds, supra note 63, at 392.

66 See, e.g., JOINT LEGISLATIVE AUDIT COMM., BEST PRACTICES REPORT: LOCAL GOVERNMENT USER FEES 9–11 (2004), http://legis.wisconsin.gov/lab/reports/04-userfeesfull.pdf (discussing ability of Wisconsin municipalities to impose user fees more easily than taxes). At the local level, the benefits principle of taxation (i.e., the idea that taxes represent a payment by a resident for a bundle of public goods) plays a much greater role in policy design than it does at the state and federal levels, where the ability to pay principle has generally carried the day. See JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES 227–29 (4th ed. 2008) (providing overview of both theories); see also A AJAY K. MEHOTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, at 193–96 (2013) (providing historical account of rise of “ability to pay” principle at state and federal levels). Nevertheless, many scholars have criticized increasing
throughout the country, there are some regional patterns. Western and southern states took the lead initially in creating user fees.\(^6\) Robert Tannenwald has suggested that New England lagged behind on this trend in part because local governments there spent less money on the types of services that readily lend themselves to user fees.\(^6\)

Finally, a city’s own-source revenue is only one component of municipal revenue. In addition to local taxes and user fees, cities also receive funding through state grants-in-aid and federal grant programs.\(^6\) And cities also use borrowed funds, ideally, though not always, to make investments in capital infrastructure.

\section*{C. Specific Home Rule Provisions}

Because every state home rule provision is different, it is worth exploring in detail specific states as examples of what authority is granted to municipalities. This section looks at the home rule laws of Washington, Wisconsin, and Ohio. Of the three, Washington offers an example of the typically limited powers of local government over revenue. Wisconsin offers an example of the ways that even seemingly broad delegations of authority can end up being quite restrictive. Finally, Ohio offers an example of what more expansive revenue authority for municipalities might look like.

In all three states, municipalities have greater authority over user fees than taxes. This is the general trend in municipal law. Traditionally, municipalities were given greater control over user fees. Such fees were understood to provide their own checks on excessive utilization, as they can typically only be charged for the cost of a service and reliance on user fees as taking the benefits principle too far. See Suellen M. Wolfe, \textit{Municipal Finance and the Commerce Clause: Are User Fees the Next Target of the “Silver Bullet”?}, 26 \textit{Stetson L. Rev.} 727, 785 (1997) (stating concern that user fees may be targeted for constitutional scrutiny).

\(^6\) See Advisory Comm’n on Intergovernmental Relations, \textit{supra} note 63, at 12–13 (depicting user-charge intensity ratio by region in 1972 as compared to later years).


residents (and nonresidents) can choose whether or not to utilize that service.\footnote{16}{EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 44:24 (3d ed. 2013). For a discussion of the trends that have encouraged municipalities to rely more significantly on user fees, see generally Reynolds, supra note 63, at 407–15, 430.}

1. Washington State

In Washington, the home rule provision of the state constitution provides that local government “may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”\footnote{71}{WASH. CONST. art. XI, § 11. Such sweeping language granting broad police power has typically not been construed as granting taxing power. This is likely the case for two reasons. First, as is the case in both New York and Washington, such sweeping language is sometimes followed by specific language explicitly granting taxing authority to the state and not the municipalities except by delegation. See, e.g., N.Y. CONST. art. XVI, § 1; WASH. CONST. art. XI, § 12. Second, the police power was generally understood to be regulatory in nature. See Police Power, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “police power” as “inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice”).} The constitution’s very next provision, however, makes clear that the state retains taxing authority, which it may grant to local governments by general rule.\footnote{72}{WASH. CONST. art. XI, § 12 (“The legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations, or upon the inhabitants or property . . . for county, city, town, or other municipal purposes, but may . . . vest in the corporate authorities . . . the power to assess and collect taxes for such purposes.”). Similarly, New York State’s constitution specifically limits municipal taxing authority in its home rule provisions. The New York State Constitution declares that “[t]he power of taxation shall never be surrendered, suspended or contracted away, except as to securities issued for public purposes pursuant to law.” N.Y. CONST. art. XVI, § 1. The constitution allows the legislature to delegate its taxing authority, but requires the legislature to specify in that delegation “the types of taxes which may be imposed thereunder and provide for their review.” Id. In other words, the Municipal Home Rule Law reasserts that New York State retains the power to review actions taken under the authority delegated to local government. In contrast, the more general legislative authority over regulatory matters is considered to be primarily under local control. See N.Y. MUN. HOME RULE LAW § 10 (Consol. 2011) (providing for review of authorized taxes by State where permitted).} As a result, “[a] local government does not have the power to impose taxes without statutory or constitutional authority.”\footnote{73}{Okeson v. City of Seattle, 78 P.3d 1279, 1285 (Wash. 2003).}

However, cities can impose user fees on services the city provides. They also can impose fines and other fees if the revenue generated is incidental to a regulatory purpose. Thus, in Kimmel v. City of Spokane, the Washington Supreme Court upheld Spokane’s parking meter regulations, noting that “since the declared purpose of the ordinance is regulatory, the court will not go behind the legislative declaration in the absence of evidence tending to show that the
declaration is sham, and that the ordinance is, in reality, a revenue measure."  

While the default grant under Washington law is narrow, the state legislature has provided municipal governments with a number of specific grants of taxing authority, including the property tax and a local option sales tax. A local option sales tax allows localities to opt into the state sales tax base, in adding a municipal or county surcharge on top of the state-level sales tax. Washington also has several smaller, local option taxes to raise municipal revenue for specific purposes authorized by the state. For example, cities can enact local option transportation taxes to fund regional transportation infrastructure in excess of what would be done via general revenue and state support alone. The state, however, can also take away this municipal taxing authority through legislation or the referendum process.

2. Wisconsin

Wisconsin’s constitution grants cities the power to “determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village.” The constitution further allows cities to issue direct taxes to cover interest and principal for any debts. However, there are strict limits on how much debt a city can take on.

The Wisconsin Supreme Court has found that state legislation unconstitutionally interferes with “local affairs and government” when it seeks to regulate either matters that are purely of local concern or matters that are a “mixed bag” of local and state concern, but where the local concern is predominant. Despite this apparently broad authority granted to municipalities, the court has only held a handful of legislative enactments to violate the local affairs delegation under the constitution.

Other constitutionally delegated powers are also subject to state control. Perhaps most significantly, the state legislature has the exclusive authority to approve changes to charters. Further, the

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74 109 P.2d 1069, 1070 (Wash. 1941).
76 Wis. Const. art. XI, § 3, cl. 1.
77 Wis. Const. art. XI, § 3, cl. 3.
78 Wis. Const. art. XI, § 3, cl. 2.
80 See Wis. Const. art. XIV, § 13 (“Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue
Wisconsin Supreme Court’s public policy doctrine limits municipalities’ ability to spend tax-collected dollars outside its geographic confines.\(^{81}\) This can affect or even prohibit joint projects between municipalities or between other levels of government.\(^{82}\) The Wisconsin constitution also limits municipalities’ taxing authority by delegating certain tax decisions to the state legislature.\(^{83}\) For example, cities are not permitted to designate tax exemptions, because the authority to do so is vested in the legislature.\(^{84}\)

As in Washington, cities are granted more authority to levy fees. The revenue generated by fees can only be used to cover the enforcement costs of the regulation imposed by the fees and cannot be used as general revenue for the municipality,\(^{85}\) though enforcement of the regulation can encompass reasonably related activities to the purpose of the fee.\(^{86}\)

3. **Ohio**

Washington and Wisconsin offer examples of the typical pattern of fiscal home rule, i.e., very limited fiscal home rule power. Ohio, on the other hand, offers a model of much greater fiscal home rule. Ohio’s home rule provision provides that “municipalities shall have authority to . . . adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws.”\(^{87}\) Because Ohio courts have interpreted general law part of the law of this state until altered or suspended by the legislature.”); State ex rel. Mueller v. Thompson, 137 N.W. 20, 23 (Wis. 1912) (describing power to grant, change, and repeal corporate charters as “a legislative function at common law” and further stating that “[w]hile power, in general, was reserved to the Legislature to change the common law it was withheld in case of reservation to the Legislature of exclusive authority in a particular field, as that of granting, amending and repealing municipal charters”).

\(^{81}\) See Michael E. Libonati, “Neither Peace nor Uniformity”: Local Government in the Wisconsin Constitution, 90 Marq. L. Rev. 593, 604 (2007) (“[T]he doctrine has been an obstacle to legislation impacting on intergovernmental fiscal arrangements.”).

\(^{82}\) Id. For example, in Buse v. Smith, 247 N.W.2d 141, 155 (Wis. 1976), the court struck down a school district revenue-sharing plan.

\(^{83}\) See Libonati, supra note 81, at 603–07 (discussing the incorporation of precise fiscal policies into the Wisconsin Constitution).

\(^{84}\) See Libonati, supra note 81, at 605. Thus, in University of Wisconsin La Crosse Foundation v. Town of Washington, 513 N.W.2d 417, 420 (Wis. Ct. App. 1994), the court found that the legislature’s express grant of authority to cities to determine tax exemptions was unconstitutional.

\(^{85}\) See Rusk v. City of Milwaukee, 727 N.W.2d 358, 363 (Wis. Ct. App. 2006) (discussing cases where Wisconsin cities were authorized to levy charges).

\(^{86}\) See id. at 362 (holding that registration fee does not become tax if revenue is used for purposes that are reasonably related to fee (citing State v. Jackman, 211 N.W.2d 480, 487 (Wis. 1973))).

\(^{87}\) **Ohio Const.** art. XVIII, § 3 (Home Rule Amendment).
narrowly, Ohio municipalities have significant regulatory authority.88

Further, Ohio courts have interpreted this grant of authority to include the power to tax.89 As a result, Ohio municipalities have general taxing authority, and under Ohio law, there is no conflict preemption of local taxing authority.90 Instead, the Ohio courts have held that the taxed entity may be taxed by both the state and the municipality.91 Although this would appear to give municipalities unchecked taxing power, the constitution also gives the General Assembly the power to limit municipal taxing authority.92

Because Ohio’s statutory home rule regime is similar to the presumptive municipal taxing reform proposed in Part IV, it is worth discussing in detail the state’s experience with more expansive municipal taxing authority. This expansive taxing authority has led to one major difference between Ohio’s municipal revenue and other states: Ohio’s municipalities impose municipal income taxes.93

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88 See City of Canton v. Van Voorhis, 22 N.E.2d 651, 652 (Ohio Ct. App. 1939) (permitting city to prohibit private refuse collections as not in conflict with general laws on refuse collection). Further, Ohio law construes “general law” narrowly. For a state legislative enactment to constitute “general law,” it must meet a four-part test. First, the general law must be part of a statewide and comprehensive legislative enactment. Second, the general law must apply to all parts of the state alike and operate uniformly throughout the state. Third, the general law must set forth police, sanitary, or similar regulations. Fourth, the general law must apply to citizens generally, and not to municipal bodies. See, e.g., Ohioans for Concealed Carry, Inc. v. City of Clyde, 896 N.E.2d 967, 973 (Ohio 2008); Mendenhall v. City of Akron, 881 N.E.2d 255, 261 (Ohio 2008); City of Dublin v. State, 909 N.E.2d 152, 156–67 (Ohio Ct. App. 2009); 16 OHIO JUR. 3D Constitutional Law § 223, Westlaw (database updated Nov. 2015).

89 Cincinnati Bell Tel. Co. v. City of Cincinnati, 693 N.E.2d 212, 214 (Ohio 1998) (holding municipality’s power to tax valid); State ex rel. Zielonka v. Carrel, 124 N.E. 134, 136 (Ohio 1919) (“There can be no doubt that the grant of authority to exercise all powers of local government includes the power of taxation.” (citation omitted)); see also C. Emory Glander, The Uniform Municipal Income Tax Act, 18 OHIO ST. L.J. 489, 489–90 (1957) (discussing history of Ohio’s municipal income tax authority).

90 See Cincinnati Bell Tel. Co., 693 N.E.2d at 218 (holding that public utility excise tax does not impliedly preempt municipalities from enacting tax on net profits of public utility company that can be attributed to business activity of that company within that municipality).

91 See id. (“[T]he Constitution presumes that both the state and municipalities may exercise full taxing powers . . . .

92 See OHIO CONST. art. XIII, § 6 (“The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation . . . so as to prevent the abuse of such power.”); OHIO CONST. art. XVIII, § 13 (“Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes . . . .

Ohio’s local income taxes were enacted in the wake of the Great Depression, as declining property values shrunk the property tax base.\footnote{See id. (explaining that declining property tax revenues caused by rising foreclosures during the Great Depression forced local governments, including Ohio, to look for other ways to raise revenue); see also Elizabeth Deran, An Overview of the Municipal Income Tax, 28 PROC. ACAD. POL. SCI. 19, 19–24 (1968) (discussing contemporaneous state of municipal income tax).} In the postwar era, as white flight shrank the population of cities, municipal income taxes offered municipalities an opportunity to capture some of the costs imposed on the city by suburban commuters by taxing the income they earn within the municipality.\footnote{Paul J. Hartman, Municipal Income Taxation, 31 ROCKY MTN. L. REV. 123, 123–24 (1958); Joe G. Davis, Jr. & Arthur J. Ranson, III, Note, An Evaluation of Municipal Income Taxation, 22 VAND. L. REV. 1313, 1313 (1969); see Deran, supra note 94, at 25 (“[T]he income tax has not been supplemental so much as substitutive, and has taken some of the pressure off the property tax.”); Leonard Kirschner, The Municipal Income Tax, 20 U. CIN. L. REV. 343, 348 (1951) (“The most convincing argument in favor of the tax is that it will reach the non-resident using city facilities, who currently contributes nothing to the city government.”). See generally ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, SR-10, LOCAL REVENUE DIVERSIFICATION: LOCAL INCOME TAXES (1988), http://www.library.unt.edu/gpo/acir/Reports/staff/SR-10.pdf (discussing municipal revenue sources); Gary Sperling, Municipal Income Taxation and Home Rule, 1 URB. LAW. 281 (1969) (discussing municipal income tax feasibility under current home rule provisions).}

As a policy matter, economists are generally skeptical of municipal income taxes.\footnote{See, e.g., Richard M. Bird, Fiscal Federalism, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 147, 147 (Joseph J. Cordes et al. eds., 2005) (discussing consensus).} At the local level, opportunities for exit and evasion are higher than they are at the national (or even state) level, leading to relatively inefficient revenue collection.\footnote{Id.} In Ohio, local administration of the municipal income also increases the compliance burden on taxpayers, i.e., the cost above and beyond the tax paid of complying with tax laws.\footnote{See, e.g., Richard M. Bird, Fiscal Federalism, in THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 147, 147 (Joseph J. Cordes et al. eds., 2005) (discussing consensus).} Research also suggests the municipal income tax may be partly capitalized in property tax values, reducing property tax collection.\footnote{See generally William J. Stull & Judith C. Stull, Capitalization of Local Income Taxes, 29 J. URB. ECON. 182 (1991).}

of the property and sales tax bases have left Ohio municipalities dependent on income taxes as an important stream of revenue. Recently enacted state-level reforms have increased uniformity in municipal income tax law and should reduce some compliance costs, especially for businesses.

Ohio’s experience with municipal income tax suggests that providing cities with independent taxing authority can lead to some revenue innovation, but it also highlights the fact that increased authority does not guarantee such innovation. Aside from the municipal income tax, Ohio cities have not taken full advantage of their municipal taxing power to experiment with other streams of revenue.

However, it seems hardly surprising that Ohio has not been at the center of municipal innovation in recent years. Ohio built its prosperous, midcentury economy on a manufacturing industry that has been under tremendous pressure for decades. Some politicians blame local tax policy for inhibiting economic growth. However, the structural economic issues the state faces far outweigh its fiscal problems, at either the state or local level.

Ohio’s experience also highlights both the opportunities and challenges of giving cities more power to choose their revenue sources. Because Ohio law gave cities the ability to enact taxes presumptively (without seeking prior state approval), cities developed a new tax base. Despite the fact that the state has the legal authority to regulate this base, however, municipal interest in defending the existing base has made reform challenging. Of course, state legislative action limiting other sources of revenue has increased municipal interest in the income tax base. Had the state allowed greater municipal control over opposition to reform subsequently passed by Ohio legislature due to concern for impact on municipal budgets).


104 See, e.g., id. at 113 (stating that local tax policy creates confusion for businesses).

105 See, e.g., Letter from Susan J. Cave, supra note 100 (summarizing Ohio municipal opposition to reform subsequently passed by Ohio legislature due to concern for impact on municipal budgets).
property and sales tax law, the politics of municipal income tax reform might be different.

In looking at the home rule provisions of a sample of specific states, a few patterns emerge. First, the language of the grants of home rule authority bears some striking similarities to one another. Second, as the examples of Washington and Wisconsin suggest, most states have significantly restricted municipalities’ independent taxing authority. Third, Ohio’s broad grant of municipal revenue authority makes it an outlier with regards to typical home rule grants of authority across the country.

II

THE CASE FOR MORE EXPANSIVE MUNICIPAL TAXING AUTHORITY: FREEING POLICY SPACE

Limits on city revenue authority hamper city policymaking for a number of reasons. First, such limits encourage specific types of development patterns in cities over other (perhaps preferable) options for growth. Second, limits on local revenue authority hamper democratic accountability, as the state’s role in limiting local fiscal options may be obscure to voters, or at least less salient than the decisions local officials make within the parameters offered under state law. Third, limits on local revenue authority stifle revenue innovation at the local level. Fourth, limits on municipal taxing authority also restrict municipal regulatory choices in ways that may discourage cities from making optimal policy choices. This Part will consider each of these arguments in turn.

A. Limits on Revenue Authority Distort City Development Choices

Limits on municipal revenue options distort cities’ economic development choices because state-level restrictions on a city’s sources of revenue will encourage a city to develop those sources of economic activity from which it derives the most revenue.\textsuperscript{106} For example, state-based tax restrictions can distort local governments’ zoning decisions, a development strategy termed the “fiscalization” of land use law. Studies in California suggest that the state’s constitutional limits on the property tax have encouraged municipal governments to increase land zoned for retail development so as to increase local sales tax revenue, at the expense of other kinds of develop-

\textsuperscript{106} FRUG & BARRON, supra note 9, at 98 (“[E]xisting rules about revenues and expenditures tend to push cities to favor some ideas about their future over others, regardless of the desires of their citizens or their elected leaders.”).
As longtime city planner Peter Pollock observes, “[Y]ou are what you eat, but in local government you develop what you tax.”

Pollock decries the inevitable result of this maxim on city planning in Colorado, as cities chase retail sales tax dollars with a “boom/bust cycle of mall developments and a general overbuild of retail.”

As Richard Briffault and others have noted, nationally, the growth in tax increment financing (TIF) across the country reflects the broader fiscalization trend. Municipalities create tax increment financing districts to spur local economic development and fund increased public services in those districts with the (hopefully forthcoming) increases in property tax revenue created by rising property values there. Critics of TIF note that such development is often zero-sum, shifting economic investment that might have occurred elsewhere in the municipality to a location inside the TIF instead of encouraging new economic development. The fiscalization of land use creates economic development patterns that crowd out other kinds of development, including development that residents (or prospective residents) might otherwise prefer, including more residential development.

107 See Paul G. Lewis & Elisa Barbour, California Cities and the Local Sales Tax iv (1999) (analyzing effects of California’s point-of-sale or situs-based sales tax on land-use decisions and evaluating how California cities vary in benefits they receive from the tax).


109 Pollock, supra note 108, at 1012.


112 See Dye & Merriman, supra note 111, at 4–7 (arguing that “tax increment financing is an alluring tool”).

113 See Frug & Barron, supra note 9, at 108–10 (analyzing limits of fiscal tool adopted in urban land development).
B. Limits Make Lines of Accountability Unclear

When local voters are unhappy with the fiscal decisions of their elected officials, they naturally seek to hold them accountable. Local voters may think a greater portion of the property tax should fall on commercial rather than residential property, for example. Or they may not like city officials' decisions to cut the budget for local human services or the city police force.

On some of these decisions, city officials have other policy options. They may be able to find alternate budget cuts or propose a bond that would increase the city’s borrowing capacity. However, if revenue drops precipitously, city officials in many states have few options other than budget cuts. While many (though not all) states imposing property tax limits allow tax limit overrides, state law often limits the amount of the override, may require the override to be time-limited, and may also require additional votes for an override to continue, or may provide some combination of all three restrictions. For example, under Massachusetts’s Proposition 2 \( \frac{1}{2} \), levy overrides cannot exceed a set levy ceiling unless they are used for very limited purposes.\(^{114}\) And in many states, localities do not control the assessment limits or the assessment ratios of commercial-to-residential property.\(^{115}\) Assessment limits reduce the value of property being taxed below its market value. Assessment ratios fix the relationship between commercial and residential property valuations for purposes of applying property tax rates. Such decisions rest with the state legislature and, in the case of constitutional tax limits, the statewide voting population.

Many of the limits placed upon local officials were imposed by constitutional reform at the ballot box.\(^{116}\) Nevertheless, voters may still hold local elected officials responsible for the limited set of policy

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\(^{114}\) DIV. OF LOCAL SERVS., MASS. DEPT OF REVENUE, LEVY LIMITS: A PRIMER ON PROPOSITION 2 \( \frac{1}{2} \), at 12 (2007), http://www.mass.gov/dor/docs/dls/publ/misc/levylimits.pdf.


\(^{116}\) See FRUG & BARRON, supra note 9, at 75–80 (using Boston to illustrate how state law exerts control of local budget). Of course, this may be a natural feature of multilevel governance, but the problems here may be exacerbated by the low level of salience as to the responsible political actors. I address whether these state restrictions on local autonomy may serve their own policy purpose in Section III.A.
options, failing to recognize their own role in limiting local fiscal options. Voters may also find their political choices further restricted as local candidates conform their policy platforms to the limits of state law. (Of course, candidates could always campaign promising to enact policies the state has prohibited, but those candidates would have little to show when up for reelection.) It would be quite difficult for public officials and political candidates to educate the electorate about these different divisions of responsibility, especially on technical matters such as assessment ratios, and such education would inevitably fall short. Moreover, local voters may fail to hold statewide officials accountable for their role in limiting local policy options.\(^{117}\)

Further, even absent concerns about the salience of decision-making at different levels of government, there is reason to believe that local elected officials may be better fiscal agents for local voters. Responding to traditional concerns that greater fiscal authority might lead to greater municipal mismanagement, both Clayton Gillette and Richard Briffault have noted that local exit may check these concerns.\(^ {118}\) As Briffault writes, “The ability of mobile residents and firms to flee a high-tax jurisdiction to a low-tax neighbor, along with local electoral control, provides a significant check on local taxing decisions.”\(^ {119}\) It is therefore “far from clear whether the extra constraint of state legislative and gubernatorial approval is necessary or desirable.”\(^ {120}\) In other words, local market mechanisms—including the exit concerns triggered by tax hikes—may be a better way of regulating municipal finance.

\section*{C. Limits Restrict City Policy Innovation}

There are some good ideas (and some pretty bad ones) about how cities can improve their fiscal futures. The Center for American Progress, for example, published a lengthy report detailing its ideas for “progressive local policies to rebuild the middle class,” including municipal revenue options.\(^ {121}\) Unfortunately, one has to turn to the

\begin{itemize}
\item \(^{117}\) Cf. New York v. United States, 505 U.S. 144, 169 (1992) (“Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.” (internal citations omitted)).
\item \(^{118}\) See Gillette, supra note 22, at 1254–55 (arguing that home rule will not encourage local officials to deviate from taxpayers’ preferences); Briffault, supra note 23, at 270 (arguing that home rule shall include “state fiscal support”).
\item \(^{119}\) Briffault, supra note 23, at 270.
\item \(^{120}\) Id.
\end{itemize}
endnotes to find a warning that “local tax policy is an area more heavily circumscribed by federal and, especially, state law than many, so many of the approaches [we] recommend[] are subject to state authorization and may not be options in a given locality depending on the vagaries of state tax law in that state.”122 Whether or not one agrees with the recommendations in the report, it is clear that limited home rule authority restricts municipal ability to pursue innovative revenue policies.

Innovations in municipal revenue are desirable for three reasons. First, many municipalities need new sources of revenue. In most states, state aid to local governments is declining, while at the same time municipalities are confronting budget shortfalls in their pension obligations.123 At the same time, statewide electorates have shown only minimal interest in reforming property tax limits which have weakened municipal control over a major source of local revenue. Providing additional revenue options for cities will be important if the electorate prefers to sustain current municipal service levels (or even see them expanded).

Second, municipal revenue innovation may spur ideas for reform at the state level. Just as states can serve as laboratories of democracy at the federal level, cities can experiment with policy (including tax policy) that may be appropriate for later adoption at the state level or by other cities.124 As Richard Briffault observes, “[I]f the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation and reform.”125

122 Id. at 167 n.2.


125 Briffault, supra note 23, at 259.
Third, such innovations may discourage municipal innovation in borrowing. Recent experience with municipal finance innovation has suggested that city officials (and the municipal electorate) lack the technical expertise to monitor more sophisticated borrowing arrangements, and this has led to inefficient municipal borrowing practices.\footnote{See Andrew Ang & Richard C. Green, Lowering Borrowing Costs for States and Municipalities Through CommonMuni 15–17 (2011), http://www.brookings.edu/~/media/Research/Files/Papers/2011/2/municipal-bond-ang-green/02_municipal_bond_ang_green_paper.PDF (arguing for using CommonMuni to establish “best practices for municipal bond issuers and to provide advice directly to municipalities”).} Tax innovations are likely to be easier to understand and encourage more successful monitoring by local voters who are directly and immediately affected by new tax policies. Providing more revenue options for cities would lower the temptation to turn toward municipal borrowing to balance the budget.\footnote{See also James M. Poterba & Kim Rueben, State Fiscal Institutions and U.S. Municipal Bond Market, in Fiscal Institutions and Fiscal Performance 181, 204–05 (James M. Poterba ed., 1999) (finding that tax limits also increase borrowing costs). See generally James C. Clingermayer & B. Dan Wood, Disentangling Patterns of State Debt Financing, 89 AM. POL. SCI. REV. 108, 115–16 (1995) (discussing role of revenue limits in increasing borrowing).}

Expanded municipal taxing authority does not guarantee innovation. For example, Ohio’s significant grant of revenue authority to its municipalities has not created significant revenue innovation.\footnote{See supra Section I.C.3 (discussing Ohio’s municipal income tax).} Such innovation requires other necessary conditions, like innovative local leaders and interested in-state policymakers. However, absent expanded revenue authority, even with good leadership, such innovation would not happen. And not all innovation is good. Certainly, expanded authority will also give municipalities the power to make poor policy choices; not all municipal revenue policies are equal.

D. Expanding Municipal Taxation Improves Regulatory Policy

In addition to allowing municipalities greater authority over their fiscal affairs, expanding municipal taxing authority could also improve municipal regulatory policy. By regulatory policy, I mean incentives and sanctions designed to change behavior, in contrast to traditional revenue policies, which ought to be designed so as to raise revenue while minimizing impacts on taxpayer behavior.

Current limits on municipal taxing authority distort local regulatory policy because they prevent local officials from pursuing many tax-based regulatory policies. In a number of situations such tax-based solutions may be more effective and more efficient than traditional
regulatory approaches. When taxation is the right tool, policymakers should be able to use it.

There are at least two situations where municipal policymakers should strongly consider implementing a regulatory policy through tax tools. First, a tax solution makes sense when combating an externality. Second, a tax often makes sense as a policy to curb undesirable behavior that is not purely an externality.

When confronting an externality, cities should be able to decide whether cost internalization is better accomplished through regulation or taxation. Governments can design taxes that address negative externalities, such as pollution and congestion. Such taxes force agents to consider the “uncompensated cost[s] that [they] impose[ ] on others.” Economists call such taxes Pigovian taxes, after the English economist Arthur Pigou, who first developed the idea of imposing a tax equal to the magnitude of the harm caused by the externality.

Congestion pricing is a good example of a Pigovian tax. Generally, public roads are nonrival goods; without congestion, one car’s enjoyment of a roadway is not hindered by additional cars. However, when the number of cars on a road exceeds capacity, a road can become a “congestible public good.” Congestion impedes the normal flow of traffic, imposing costs on other drivers measured in time delays and the increased wear-and-tear on vehicles in stop-start traffic. While drivers experience the costs congestion imposes on them directly, they do not internalize the cost of their presence on

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130 Consider, for example, smoking. Sin taxes like cigarette taxes make the costs smokers bear more salient in addition to requiring smokers to internalize the costs society bears because of their smoking. The costs to the smokers themselves is likely higher than the cost to society as a whole. See Ted O’Donoghue & Matthew Rabin, Studying Optimal Paternalism, Illustrated by a Model of Sin Taxes, 93 Am. Econ. Rev. 186, 188–89 (2003); see also Kamhon Kan, Cigarette Smoking and Self-Control, 26 J. Health Econ. 61, 79 (2007) (providing evidence of time-inconsistent preferences of smokers).


132 Id. at 443–44.


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others.\textsuperscript{135} Raising the costs of driving, by increasing or imposing tolls on congested roadways, or increasing parking costs, would counter this problem.\textsuperscript{136} The increased cost would require drivers to partially internalize the costs their driving imposes on others, which, in turn, would decrease the number of cars on the streets.

Of course, congestion, like other private market failures, can also be combated via regulation. For example, a government could limit the types of cars that can enter congested areas or use congested roadways. Regulations, however, can create perverse incentives that price-based solutions like Pigovian taxes can often avoid.\textsuperscript{137}

While current municipal authority may allow cities to combat congestion by increasing the cost of parking, cities rarely have the authority to impose other price-based solutions to congestion. While

\begin{itemize}
  \item \textsuperscript{135} Nash, supra note 133 (quoting Tirza S. Wahrman, \textit{Breaking the Logjam: The Peak Pricing of Congested Urban Roadways Under the Clean Air Act to Improve Air Quality and Reduce Vehicle Miles Traveled}, 8 DUKE ENVTL. L. & POL’Y F. 181, 196 (1998)). The best way to understand this is to think about two drivers. One driver, Jane, is a plumber, and she drives because her tools are too heavy for her to carry on the subway. Her customers prefer that she come before or after work, so she makes more money going to their homes during rush hour. The more homes she visits during these peak periods, the more money she earns. Not only does Jane have no easy substitute for driving, the delays cost her and her clients. The other driver, Joe, is a Manhattan office worker who lives in the Bronx. In the mornings, he could take the subway to Manhattan from the Bronx, or he can drive to work, which takes longer due to rush hour congestion. He likes driving, however, and has his routine. The congestion certainly is an opportunity cost for Joe since he could be using the extra time on the road to sleep for an extra hour or meet with clients. However, he does not lose any business as a result of being on the road. When Joe chooses to drive during rush hour, he only considers his own costs (in terms of time and gas) in the calculation; he does not take into account that his presence on the road costs Jane and her clients.
  \item \textsuperscript{136} As discussed below, the opportunity for drivers to avoid local gas taxes by purchasing their gas outside a municipality may make such taxes an inefficient means of reducing congestion. I mention it here only to suggest the range of pricing-based solutions to the congestion problem.
  \item \textsuperscript{137} For example, primarily to reduce air pollution, Mexico City restricted access to a central business corridor to cars with certain license plate numbers during peak travel hours each weekday. So, for example, license plate numbers that end in two and five could not enter the corridor on Wednesdays. Policymakers implemented this restriction to reduce the number of cars on the road. However, the plan backfired, as wealthier drivers responded to these regulations by buying additional cars with alternate license plate numbers. \textit{See CAMBRIDGE SYSTEMATICS, INC., CONGESTION MITIGATION COMMISSION TECHNICAL ANALYSIS: LICENSE PLATE RATIONING EVALUATION, at ES-2 (2007), https://www.dot.ny.gov/programs/repository/Tech%20Memo%20on%20License%20Plate%20Rationing.pdf (“Mexico City became a net importer rather than net exporter of used vehicles from the rest of the country, meaning that residents sought to evade the restrictions by becoming multi-vehicle households (with variably coded license plates) . . . .”). Many of these newly purchased cars are older models with significantly worse emissions controls, exacerbating Mexico City’s long-standing air pollution problems. Id.}
\end{itemize}
gas taxes and tolls may seem akin to user fees, restrictive definitions of user fees at the state level limit municipal authority in this area.\textsuperscript{138}

In addition to their role in combating externalities, taxes can also serve as a policy tool to curb undesirable behaviors that are not solely (or even primarily) externality problems.\textsuperscript{139} Cigarette taxes, for example, have kept tobacco costs high and are thought to have played a role in reducing teen smoking.\textsuperscript{140} Soda and other “fat taxes” may play a similar role in combatting the obesity epidemic.\textsuperscript{141} Berkeley and Chicago both have municipal soda taxes.\textsuperscript{142} If these taxes prove successful, other municipalities may seek to adopt similar policies.

While these policies could also be adopted at the state or federal level, there are three reasons to give municipalities the opportunity to act independently of state and federal actors. First, there may be majorities at the municipal level that support policies that may lack statewide support, and such local majorities should be allowed to pursue their policy preferences absent concerns about these preferences imposing external costs on nonresidents. Second, experimenta-

\textsuperscript{138} State law generally requires user fees to be charged for a particular service and also requires the charge to relate to the cost of providing such a service. Pigovian taxes are hard to conceptualize under this framework as the charge does not relate to a service provided by the municipality but rather a cost a certain behavior imposes on the public generally. In Florida, for example, user fees (as distinct from taxes) must be “charged in exchange for a particular governmental service.” I-4 Commerce Ctr., Phase II, Unit I v. Orange Cty., 6 So. 3d 134, 136 (Fla. Dist. Ct. App. 2010). In Michigan, “[f]ees charged by a municipality must be reasonably proportionate to the direct and indirect costs of providing the service for which the fee is charged.” Kircher v. City of Ypsilanti, 712 N.W.2d 738, 744 (Mich. Ct. App. 2005). While Michigan courts grant municipalities considerable deference in determining proportionality, see id. (describing presumption of reasonableness of fees), congestion pricing fees are not based on the costs of providing a service at all. For a discussion of the judicial confusion surrounding user fees in Washington, see Hugh D. Spitzer, Taxes vs. Fees: A Curious Confusion, 38 Gonz. L. Rev. 335, 343–45 (2003).


\textsuperscript{140} Christopher Carpenter & Phillip J. Cook, Cigarette Taxes and Youth Smoking: New Evidence from National, State, and Local Youth Risk Behavior Surveys, 27 J. Health Econ. 287, 288 (2008).


tion at the local level may encourage (and inform) state and federal reforms. Third, to the extent that the externalities are local, locally imposed Pigovian taxes are the most efficient ways to price the cost and, even for externalities that are not purely local, the magnitude of the externality may differ by city, so that the optimal level of the tax is different in different cities.

III
THE STATE’S ROLE IN MUNICIPAL TAX POLICY

Innovative cities need the authority to act independently of the state. In its most expansive form, greater municipal taxing authority could resemble the state’s sovereign taxing authority. Cities would have the power to tax subject only to the limits of federal law. While such a law would be easy to craft, it is not a serious reform option because it does not provide a way for the state to vindicate its myriad of interests in municipal tax policy. This Part considers these state interests: vertical tax competition, horizontal tax competition, ultimate fiscal responsibility, and administrability of local taxation. Of these interests, the state concerns about administrability present the most important limit on expanded municipal taxing authority. The subsequent proposal is informed by the limits suggested by these state interests.

A. Vertical Tax Competition

Vertical tax competition is tax competition between two concurrent taxing jurisdictions (e.g., state and local governments) that seek to tax the same, or an overlapping, revenue base.143 Vertical tax competition reflects the fact that overlapping tax jurisdictions create externalities. In other words, the tax rate of a locality will affect the revenue that can be collected by the state, and the tax rate of the state will affect the tax revenue that can be collected by the locality. As a result, states have a direct revenue interest in municipal taxing authority to the extent municipal taxes compete with the state base.

A simplified example illustrates the vertical tax competition concern.144 Assume Illinois wants to levy a five percent tax on retail sales. If Chicago decides to implement an additional local sales tax of three percent, the total tax rate on retail goods becomes eight percent. This

144 See also Gillette, supra note 23, at 244–45 (discussing vertical tax competition with respect to implementing commuter tax).
increased tax means that for consumers, the cost of the good has gone up. For goods with relatively elastic demand, purchases will decrease, resulting in lower revenue from the tax itself.\textsuperscript{145} The higher tax rate may also increase incentives for evasion.\textsuperscript{146} Further, if combined state and local retail tax rates in Indiana or Wisconsin are only six percent, consumers are going to shift some of their purchase of retail goods to these other states, thus depriving Illinois (and Chicago) of revenue. If Illinois reduces its tax rate, some of this lost revenue stream may return, but it will not fully offset the revenue it would be able to collect if only a state sales tax was imposed. To the extent that the state wants to make use of a specific tax base, it has an interest in minimizing local government’s use of the same base. (The state, of course, also has a corresponding interest in preventing the federal government from using that base.)\textsuperscript{147}

Much of the work on vertical tax competition has looked at competition in federal systems of government between the central government and subnational governments.\textsuperscript{148} More recently, theoretical and empirical economists have begun to think about vertical tax competition between subnational and local governments.\textsuperscript{149} As the

\textsuperscript{145} Even if some of the demand elasticity causes retailers to lower their prices, this will still result in less revenue collected from the sales tax as the sales tax rate applies to the retail sales price.


example above suggests, vertical tax competition is likely to be a greater problem near state borders, and recent work by economist David Agrawal supports this intuition. Agrawal explores the extent to which a municipality’s proximity to a bordering county with a different tax rate accounts for changes in the municipality’s own tax rate.\textsuperscript{150} Using local sales tax data, Agrawal models the ways municipal and county sales taxes interact. His findings suggest that “[w]hen the neighboring county changes its tax rate, towns bordering it will react to this change and adjust their tax rates accordingly.”\textsuperscript{151} In other words, vertical tax competition limits municipal tax rates.

The economic literature on vertical tax competition has generally explored competition between overlapping jurisdictions imposing taxes on the same base. However, cross-base vertical tax competition may also be a problem.\textsuperscript{152} For example, local property tax rates must act as a limit on state income tax revenue. To take a simple example, think about a small retailer who owns her own retail location. In determining the prices she charges customers, she considers all of her costs, including the property tax she pays on the retail location. If her property taxes go up, she will either increase her prices to reflect the increased costs of selling the good or decrease her own profits. If she increases prices, her price increase will have an impact on consumer demand, and, as a result, the state sales tax will collect less revenue. If she simply accepts lower profit margins, perhaps because demand for her products is relatively elastic, she will earn less income and thus state income tax revenue shrinks. The lower price may also reduce state sales tax collection.

Such cross-base tax competition suggests that the state has a direct revenue interest in the taxing decisions of municipalities even when there are not overlapping tax bases at stake. Taken to its extreme, this vertical tax competition story suggests that states have an interest in minimizing local revenue collection.\textsuperscript{153} After all, local


\textsuperscript{151} \textit{Id.} (manuscript at 13).

\textsuperscript{152} To the best of my knowledge, neither the economic nor the legal tax literature has considered this type of tax competition. I will explore this type of competition in further work.

\textsuperscript{153} Recent work by David Gamage suggests that there may also be reasons that taxing authorities should consider using multiple tax bases. Gamage suggests that the use of multiple bases can eliminate some tax gaming because many tax gaming efforts can only reduce tax liability along one base. See David Gamage, \textit{The Case for Taxing (All of) Labor}}
Governments would have no effect on state revenue collection if local governments imposed no taxes. States could reduce vertical tax competition by increasing intergovernmental grants or directly funding services currently administered by local governments. However, in the current fiscal climate, states have moved in the opposite direction, decreasing grants.\footnote{I am generally critical of this trend of balancing state finances on the backs of local government, but as a practical matter, I think we will see states continue to cut local government aid. On the trend of reducing state aid, see generally, Pew Charitable Trs., The Local Squeeze: Falling Revenues and Growing Demand for Services Challenge Cities, Counties, and School Districts (2012), http://www.pewtrusts.org/~media/assets/2012/06/pew_cities_local-squeeze_report.pdf.} These state policies have increased the need for more local revenue options.

But it’s not just shrinking state support that justifies local revenue autonomy. Providing municipal governments with their own revenue authority ensures that some level of government can honor local spending and taxation preferences. As discussed in Part II, expanded local revenue authority allows local governments to better reflect local demand for services and may also encourage more efficient government administration.

While vertical tax competition does suggest a legitimate state interest in local tax policy, this concern should be balanced with the recognition that there are competing values, especially local autonomy, that justify limits on the state’s power to fully vindicate this interest.

\section*{B. Horizontal Tax Competition}

States may also have an interest in minimizing tax competition between local governments. Such competition is known as horizontal tax competition.\footnote{See John Douglas Wilson, Theories of Tax Competition, 52 Nat’l Tax J. 269, 289 (1999) (arguing that horizontal tax competition occurs when “governments doing the competing are all at the same level”).} Much of the concern about local government tax incentives focuses on economic development tax incentive packages offered to businesses. Such packages can include reductions in property taxes and sales tax rates as well as other subsidies designed to encourage business generally or specific businesses to relocate. To the extent these tax incentives encourage out-of-state businesses to relocate in-state, such programs may be good for the state.
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However, a number of scholars and policymakers have concluded that these programs often only encourage intrastate business relocation, which does not benefit the state as a whole.\textsuperscript{156} Further, some studies suggest that many businesses would make the same location decisions even absent local tax incentives, turning these programs into windfalls for these businesses to the detriment of local revenue and other taxpayers.\textsuperscript{157}

For these reasons, scholars have criticized local tax incentives as inefficient.\textsuperscript{158} Because such tax incentive programs create competition for local development, it becomes hard for local governments to resist offering tax incentives on their own, as there is political pressure for politicians to encourage economic development and attract new businesses and jobs to the locality. As a result, calls for state-level restrictions on local government authority to offer such programs are common.\textsuperscript{159} In effect, these proposals argue that it is local control over the property tax base that fuels this inefficient competition. (Of course, this is local control authorized by state statute. In almost every state the incentive packages offered by localities are authorized under state law.) Few states have adopted such restrictions,\textsuperscript{160} in part because tax incentives are still incredibly popular among the business community and elected officials at both the state and local level.\textsuperscript{161}

In the absence of state reform, some policymakers have argued that regional cooperation is the best way to curb the excesses of such horizontal tax competition. Local governments in the Denver-metropolitan area, for example, have reached an agreement between themselves to limit competition.\textsuperscript{162} The seventy cities, counties, and economic development organizations that are members of the Metro Denver Economic Development Corporation adopted a shared “Code of Ethics” in the mid-1980s.\textsuperscript{163} Among other promises, the members

\begin{itemize}
  \item \textsuperscript{156} See Daphne A. Kenyon et al., Rethinking Property Tax Incentives for Business 29 (2012), https://www.lincolninst.edu/pubs/dl/2024_1423_Rethinking%20Property%20Tax%20Incentives%20for%20Business.pdf (noting evidence that such incentives encourage businesses to move around within state but do not significantly increase new development within state).
  \item \textsuperscript{157} Id. at 4–5.
  \item \textsuperscript{158} See, e.g., id., at 29, 52; Brunori, supra note 25, at 28–37 (explaining inefficiency of targeted tax incentives); Peter D. Enrich, Constraining State Business Tax Incentives: The Commerce Clause’s Role, 46 State Tax Notes 157, 157 (2007) (identifying dangers of “parochial” tax incentives for national economy).
  \item \textsuperscript{159} See generally Enrich, supra note 158 (arguing that Dormant Commerce Clause should restrict such developments).
  \item \textsuperscript{160} See Kenyon et al., supra note 156, at 59 (finding property tax incentives are “widespread”).
  \item \textsuperscript{161} Id. at 5–6.
  \item \textsuperscript{162} Id. at 54.
  \item \textsuperscript{163} Id.
\end{itemize}
of the corporation pledged to notify a local community if a business is considering relocating within the metropolitan area and to prevent solicitation of other localities’ business prospects. Programs like the one implemented in the Denver-metropolitan area minimize the harms of horizontal tax competition.

Of course, local governments can also engage in other forms of horizontal tax competition, for example, by offering lower sales tax rates. To the extent such tax cuts produce a race to the bottom, with local governments setting taxes below their residents’ preferences for taxes and spending programs, this competition is not good either. On the other hand, this type of tax competition may limit local officials’ ability to increase tax rates to fuel unwanted government spending.

While state action could significantly reduce horizontal tax competition, so far it has failed to significantly address these issues. Some states have tried to discourage local tax incentives by penalizing localities which offer such programs. Arizona, for example, reduces its intergovernment aid to local government in proportion to tax revenue they lose due to the grant of tax incentives. Many states, however, actively facilitate such programs, often by increasing intergovernment aid to replace lost tax revenue.

Granting greater municipal taxing authority poses the risk of exacerbating existing problems in local economic development. On the other hand, the existing distribution of taxing authority has not curbed tax incentive programs, and in many cases state policy actively facilitates this negative competition. States should retain the legislative power to curb horizontal tax competition and should exercise that power more frequently than they do now. States considering granting municipalities greater taxing authority should consider simultaneously restricting the ability of localities to offer tax incentives for business relocation.

C. The State’s Fiscal Role in Municipal Affairs

In addition to its direct interest in minimizing vertical tax competition and its more indirect interest in limiting horizontal tax competition, the state also has a broader interest in municipal finance decisions. State stewardship over municipal financial conditions has

164 Id.
165 See Wilson, supra note 155, at 288–89 (discussing modeling assumptions for such races to the bottom to occur).
166 See Kenyon et al., supra note 156, at 59–60 (describing policy toward local governments in Phoenix area).
167 Id. at 59.
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long been a key justification for limiting local taxing authority. Some of this concern has been fueled by distrust of the “urban populace” that reflects the nativism and racism of the turn-of-the-century Progressive Movement.168 But part of this concern reflects the real state interests implicated in local financial affairs.

State officials legitimately worry about “contagion.” Clayton Gillette describes the threat of contagion as “the possibility that local distress is indicative of more general fiscal difficulties or that unresolved local distress will cause disruption in other markets, because the risks of one are interconnected with risks elsewhere.”169 Concerns about contagion have led state lawmakers to ensure that the states’ powers over municipal fiscal affairs often expand in times of fiscal crisis.

Nineteen states have laws allowing states to intervene in municipal governance in times of fiscal crisis, and other states have intervened in a more ad hoc fashion.170 For example, Pennsylvania’s Act 47 allows the State’s Department of Community and Economic Development to appoint a private-firm recovery coordinator if a local government becomes “fiscally distressed” according to any of eleven statutorily defined categories.171 The coordinator then works with local officials to improve financial governance, and the law provides additional authority to cities (including additional taxing authority) to help manage the distress.172

State interventions can also include direct financial aid to local governments, either by issuing state-backed bonds for the benefit of

168 As David Barron has discussed, home rule was crafted to “restore the idealized small-scale, low-tax, low-debt, highly privatized (and thus incorruptibly public) ideal of local government . . . .” Barron, supra note 34, at 2294; see also Richard Briffault, Local Government and the New York State Constitution, 1 HOFSTRA L. & POL’Y SYMP. 79, 90–96 (1996) (discussing role of city fiscal mismanagement in the Tweed era on city fiscal limitations); Lewis A. Grossman, James Coolidge Carter and Mugwump Jurisprudence, 20 L. & Hist. Rev. 577, 595–601 (2002) (discussing concerns about political corruption in New York City).


172 Id.
the local government,\textsuperscript{173} providing loans directly, or accelerating or providing additional intergovernment transfers.\textsuperscript{174} One state, North Carolina, takes an even more hands-on approach to local financing even prior to distress. Its localities must seek approval from the State’s Local Government Commission before any general obligation debt is issued.\textsuperscript{175}

Other states are decidedly more hands-off. California, for example, provided very little in the way of oversight or aid to any of the three California local governments (Stockton, San Bernardino, and Orange County) that filed for Chapter 9 bankruptcy in the 1990s.\textsuperscript{176} States worry that intervention may encourage fiscal mismanagement, as local decision makers (and possibly the bond markets) may rely on potential state bailouts. Studies suggest, however, that well-designed state intervention can improve the fiscal health of a state’s local governments, and North Carolina’s hands-on approach has led to some of the lowest state and municipal bond rates in the country.\textsuperscript{177}

States have justified limiting municipal taxation and borrowing authority as an additional check on local finances. Recent scholarship, however, has persuasively argued that the state may not reliably serve this accountability function. For example, Clayton Gillette argues that market mechanisms better serve to check the potential excesses of local officials. State lawmakers may not have the interest or ability to

\textsuperscript{173} For example, in response to New York City’s near bankruptcy in the 1970s, New York State created the Municipal Assistance Corporation for the City of New York (MAC), which was authorized to issue state-backed bonds as a form of bridge financing for the City. See Donna E. Shalala & Carol Bellamy, A State Saves a City: The New York Case, 1976 DUKE L.J. 1119, 1127–28 (1976).

\textsuperscript{174} Pennsylvania contributed $3.6 million to Harrisburg’s budget ahead of schedule when it came close to defaulting in September 2010. Michelle Kaske, Pennsylvania Gov. Steps into Harrisburg Political Standoff to Prevent Default, BOND BUYER (Sept. 12, 2010), http://www.bondbuyer.com/news/-1017177-1.html; see also PEW CHARITABLE TRS., supra note 170, at 19 (noting that emergency financing measures includes both loans and grants).


\textsuperscript{176} See EIDE, supra note 171, at 6 (attributing bankruptcies to states’ “traditional disinclination to call for or pursue intervention” in local finances); MOODY’S INVESTOR SERVICE, WHY SOME CALIFORNIA CITIES ARE CHOOSING BANKRUPTCY 1 (2012), http://www.cacities.org/Resources-Documents/News/News/2012/August/Moody-s-s-Report-Why-Some-California-Cities-Are-Choo.aspx (discussing reasons for California bankruptcies, including “the state’s hands off ‘home rule’ policy”).

\textsuperscript{177} See Fehr, supra note 175 (describing effects of North Carolina’s interventions on the state’s bonds).
appropriately judge the risk factors of municipal fiscal distress. And reforms to the municipal bond market could improve the market’s ability to regulate by increasing transparency in municipal finance.

State limits on municipal fiscal authority have also been justified by concerns about the potential for special interests to capture local officials. Off-cycle municipal government elections have lower turnout than state elections, suggesting that state officials may be accountable to a broader portion of the electorate, and in some (especially rural) areas, there may be less media coverage of local government decisions. On the other hand, local residents may find changes to local public service quality more salient than changes to spending programs at other levels of government. Further, local residents have repeatedly demonstrated that they are aware of their property tax burdens and willing to take political action should that burden become too great. Indeed, in some respect it is the high salience of local government revenue that has created many of the limits imposed by state law on property taxation. And state lawmakers have not shown themselves to be free of either capture or corruption.

Further, giving municipalities greater control over city revenues could improve municipal fiscal health. Studies suggest that municipalities have become more reliant on bonds as their ability to control tax revenue has decreased, and this increased interest in borrowing has encouraged municipalities to issue more complex debt instruments. These complex debt instruments, which have interest rates tied to a variety of market mechanisms and ballooning interest payments, have

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178 See Gillette, supra note 22, at 1255, 1260–61 (arguing that market mechanisms are true checks on levels of municipal debt).

179 See ANG & GREEN, supra note 126, at 2, 5 (proposing that a not-for-profit advisory firm increase transparency and information flow in municipal bond market).


181 The political salience of property taxes and the resulting “taxpayer revolt” in the 1970s is the subject of an extensive literature. For a critical assessment of the lessons learned from this revolt, see generally ISAAC WILLIAM MARTIN, THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS 75–79, 98–100 (2008). Specifically, Martin suggests that accidents of timing led in part to the success of the conservative property tax reform movement and the existence of the parallel progressive property tax movement. Id.


183 See Clingermayer & Wood, supra note 127, at 116 (“Tax and expenditure limitations may actually increase growth in state debt, as self-interested politicians evade formal constraints through alternative means of financing.”); see also Poterba & Rueben, supra note 127, at 204 (finding that tax limits also increase borrowing costs).

184 See ANG & GREEN, supra note 126, at 10 (highlighting downsides of complex municipal debt instruments).
proven unsound for many municipal debtors.\textsuperscript{185} Innovation on the revenue rather than the borrowing side of municipal finance could improve municipal fiscal health.\textsuperscript{186}

States have a legitimate interest in reducing municipal fiscal distress. However, restricting local revenue authority is not necessary to vindicating this interest. As the preceding discussion suggests, expanded revenue authority may, in fact, reduce municipal fiscal distress. (Of course, for cities already in the throes of fiscal problems, additional revenue authority may come too late.)\textsuperscript{187}

D. Administrability of Local Tax Bases

In tax policy discussions, administrative concerns can sometimes get pushed aside as second-order concerns.\textsuperscript{188} In the context of federal tax policy debates, this decision may be reasonable. Even an underfunded IRS\textsuperscript{189} has the budget for staff economists, technical advisors, lawyers, and auditors, and the administrative costs of enforcing the federal tax code are spread out among all U.S. taxpayers. Further, the United States imposes relatively high income tax rates as compared to state and local governments. As a result,

\textsuperscript{185} See id. at 10, 16 (noting common practice of including derivatives in municipal bond transactions can flout accounting rules to appear cheaper today but require higher interest payments in future).

\textsuperscript{186} See supra Section II.C.

\textsuperscript{187} Detroit’s problem, for instance, is not that taxes are too low. In fact, because of declining property tax collection and declining property values, tax rates were high relative to neighboring jurisdictions. See Gary Sands & Mark Skidmore, Making Ends Meet: Options for Property Tax Reform in Detroit, 36 J. Urb. Aff. 682, 697 (2013) (analyzing challenges of property taxation in Detroit). Fewer and fewer residents, however, found the services provided by the city justified the tax rates imposed, increasing out-migration, and creating a spiral that meant additional taxation would not solve Detroit’s problems. See Living in Detroit: Surprisingly Expensive, ECONOMIST (Feb. 4, 2015, 2:45 PM), http://www.economist.com/blogs/democracyinamerica/2015/02/living-detroit (exploring costs and challenges of living in Detroit). A study by the Brookings Institution was similarly critical of a Pennsylvania program for fiscally distressed cities because it gave additional revenue authority only during periods of fiscal distress, making it difficult to encourage cities to leave the program as they would forgo this extra source of revenue. METRO. POLICY PROGRAM, BROOKINGS INST., COMMITTING TO PROSPERITY: MOVING FORWARD ON THE AGENDA TO RENEW PENNSYLVANIA 29–30 (2007), http://www.brookings.edu/~/media/research/files/reports/2007/3/pennsylvania-metro/committingtoprosperity.pdf.

\textsuperscript{188} See Michael A. Livingston, Radical Scholars, Conservative Field: Putting “Critical Tax Scholarship” in Perspective, 76 N.C. L. Rev. 1791, 1796 (1998) (“A fourth area, simplicity, is perpetually on the back burner.”).

\textsuperscript{189} The problems of funding at the IRS have received widespread media attention. E.g., Michelle Singletary, Don’t Expect Help from the Underfunded IRS, WASH. POST (Jan. 16, 2015), http://www.washingtonpost.com/business/2015/01/15/79d9ec8e-9d03-11e4-bcfe-0590c7a93dce_story.html.
enforcement costs are not that high, especially as a percentage of revenue collected.190

Even at the state level, governments often lack the resources necessary to support compliance with, and enforce, complex tax laws.191 This is why many states choose to piggyback on the federal income tax system.192

At the local level, these concerns are magnified; administrative concerns are of primary importance in evaluating local tax systems. Local government tax rates are low as compared to the federal and state rates, meaning that administrative costs will always represent a greater portion of revenue collected. As a result, local governments may lack the resources to provide guidance to assist taxpayers in compliance with complex tax laws, let alone the funding necessary to detect noncompliance and take enforcement action.

Further, as the Supreme Court has noted repeatedly in its Dormant Commerce Clause jurisprudence,193 the sheer number of local jurisdictions in the United States means that local taxation has significant compliance costs. The more the tax laws of these jurisdictions differ from each other, the more costly it is for multijurisdictional taxpayers to comply.

As a result, the conventional wisdom is that both state and local governments should attempt to minimize tax base differences. For example, Daniel Shaviro has suggested that state control over the tax rate structure should be sufficient to ensure policy autonomy and has therefore advocated greater conformity of tax bases.194

Because it is administrative costs, and not just pure efficiency concerns, that are animating this conventional wisdom, scholars have been much less concerned about differential rates between jurisdictions with similar tax bases.195 Rate differentials also increase compli-

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191 See id. (noting studies of compliance for states is between three and eight times greater than for federal government).

192 See id. at 703–04 (explaining piggybacking); see also id. at 708 (discussing advantage of piggybacking).

193 See, e.g., Quill Corp. v. North Dakota, 504 U.S. 298, 313 n.6 (1992) (“Thus, absent the Bellas Hess rule . . . a corporation whose telephone sales force made three calls into the State . . . would be subject to the collection duty. What is more significant, similar obligations might be imposed by the Nation’s 6,000-plus taxing jurisdictions.”) (citation omitted).

194 See Daniel Shaviro, An Economic and Political Look at Federalism in Taxation, 90 Mich. L. Rev. 895, 979 (1992) (“A more ambitious set of proposals—plainly desirable under the analysis in this article, but politically less likely—would involve prescribing the content of entire tax bases. States that levy income taxes could be required to use the federal income tax base, possibly with . . . specified allowable variations.”).

195 See id. at 967–99 (arguing for smoothing of tax bases between jurisdictions).
ance costs for taxpayers, as they encourage tax planning to take advantage of lower rates. Further, these rate differentials (like economic development incentives) also encourage inefficient horizontal tax competition.196 However, it is much easier for taxpayers to keep track of rate differentials on a common base than to keep track of multiple bases.

This is true as long as the bases are fairly broad, a policy most scholars would favor even absent administrative concerns.197 If jurisdictions adopt similar tax laws but rely on multiple, narrow bases subject to separate tax bases, the easy distinction between rate and base complexity may prove harder to maintain. For example, if a state’s municipalities imposed different tax rates on different types of business activity (construction, auto sales, general retail sales, printing, etc.), the opportunities for tax planning, record keeping, and compliance costs for businesses engaged in multiple business lines across multiple jurisdictions, and enforcement costs within each jurisdiction, all rise.

Arizona, for example, has long allowed its municipalities significant autonomy in designing their local consumption tax bases. Arizona is one of a handful of states that imposes a consumption tax that applies to more than simply retail sales transactions. At the state level, Arizona’s Transaction Privileges Tax198 reaches not only retail sales but also restaurant and bar sales, hotel stays, and advertising, among other activities.199

Arizona law allows local governments to impose their own, separate transaction privilege taxes.200 State law allows local governments to impose transaction privilege taxes on the activities the state taxes as well as a state-created menu of additional activities.201 Further, state

196 See supra Section III.B.
197 See, e.g., JOHN F. DUE & JOHN L. MIKESSELL, SALES TAXATION: STATE AND LOCAL STRUCTURE AND ADMINISTRATION 15–16 (2d ed. 1994) (suggesting broad base for consumption taxes like retail sales taxes); SLEMRod & BAKia, supra note 66, at 216–18 (discussing support for broad base in income tax context).
198 Arizona’s Transaction Privilege Tax, unlike most state retail sales taxes, does not impose on the consumer the legal obligation to pay. For the most part, this is a legal distinction without import. The main difference is that because Arizona’s tax is on the business and not the consumer, sales to the federal government are still taxable. See DUE & MIKESSELL, supra note 197, at 29 (surveying state sales taxes).
201 See id. § 400(a)–(b) (ARIZ. DEP’T OF REVENUE 2015), http://modelcitytaxcode.az.gov/Index/Article_IV.htm (laying out provisions of code for Arizona municipalities).
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POWERFUL CITIES?

The law allows Arizona municipalities to deviate from state base definitions as long as those deviations are part of an approved menu of variations.202

Businesses operating in the state have long complained that this patchwork system creates needless administrative complexity.203 In addition to requiring businesses to understand differences between localities’ tax bases, Arizona also allowed localities to separately administer their own transaction privileges tax (TPT).204 The largest municipalities took advantage of this flexibility, and businesses thus had to file separate TPT returns for sixteen different sales taxes (one for the state of Arizona and the municipalities which relied on state enforcement and fifteen separate municipal tax forms).205

As a result of recent reforms, the State will soon begin to administer all local consumption taxes.206 This change was part of an effort to simplify transaction privilege tax compliance and bring Arizona in compliance with the Streamlined Sales and Use Tax Agreement (SSUTA). The SSUTA is a voluntary effort to provide more uniformity between state sales tax bases and thus hopefully convince Congress to allow states to require out-of-state retailers to collect sales and use taxes on goods purchased by state residents.207 The proposed Marketplace Fairness Act, which would increase state authority to tax internet and catalog sales, would provide this increased

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202 See id. (noting that taxes imposed under local options are in addition to other state levies, while those that vary in base are noted in model code).


206 The state takeover of local TPT administration has been more complicated than anticipated. As of now, it has been delayed two years. See TPT Simplification, STATE OF ARIZ. DEP’T OF REVENUE, http://www.azdor.gov/TPTsimplification.aspx (last visited Mar. 12, 2016) (informing taxpayers that Non-Program Cities will continue to administer their own taxes for calendar year 2016).

authority only to those states which had adopted the SSUTA or similar reforms. Arizona’s simplified administration moves it one step closer to SSUTA compliance. While Arizona cities have attempted to jealously guard their (now more limited) authority over the TPT base, this increased authority comes at the cost of significant administrative costs for businesses operating within the state and the inability of the state to benefit from the SSUTA.

As the example of Arizona suggests, any proposal that grants local government greater taxing authority must be sensitive to the competing demands on the state to create more uniform tax law in order to improve the administration of state taxes. Given this important interest, states should maintain a role in defining the limits of municipal revenue options. As will be discussed in the next section, cities can gain more autonomy while allowing the state to retain some role in regulating municipal fiscal affairs.

IV

PRESUMPTIVE MUNICIPAL TAXING AUTHORITY

A. The Proposal

One option for reform is what this Article terms “presumptive taxing authority.” Presumptive taxing authority would allow cities to enact tax ordinances without prior state permission as long as the ordinances did not conflict with state law. Thus, if state law expressly prohibited municipalities from imposing an income tax, a municipal ordinance authorizing a local income tax would not be enforceable. But if state law were silent as to municipal income taxation, such an ordinance would be a valid exercise of the municipality’s home rule authority.

Such a grant of taxing authority would expand municipal taxing authority in almost every state. For example, as discussed above, Washington State’s constitution grants local government the authority to “make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws” but does not provide similar protection for municipal taxing authority.

By granting only presumptive taxing authority, such a reform acknowledges the state’s clear interests in municipal tax policy. State lawmakers can still override local taxing authority to vindicate these

209 Ohio is virtually the only state that truly treats taxation as a home rule power. See supra Section I.C.3.
210 WASH. CONST. art. XI, § 11.
211 Id. § 12.
interests. Even under a presumptive taxation system, if the state legislature thought that a city tax ordinance was encroaching on a state tax base, it could pass legislation restricting the city’s use of that base. Or, if the state wanted to harmonize the sales tax base across jurisdictions to minimize horizontal tax competition or to reduce tax compliance costs, it could require cities to comply with the state sales tax base, as is true currently.

Presumptive municipal taxation would effectively change the default rule with regard to municipal taxing authority. This reform shifts the onus onto the state to act to block municipal tax ordinances. Because it is always harder to pass legislation than it is to block it, municipalities should find that the shift in the default rule expands their municipal taxing power.

Under the current distribution of power, cities may have trouble marshaling the political support to get needed legislative approval through the state legislature. In some states, the city’s interests are not directly represented in state houses because state legislative districts cross municipal boundaries, resulting in fewer lawmakers who represent only constituents in a single municipality. And even when district lines do not cross municipal boundaries, state representatives will often represent only a portion of the city, rather than a city at large. Thus, the policy views of the municipal electorate as a whole are unlikely to be directly represented by any member of the state legislature.

Further compounding the problems of effective municipal representation in the state capital is the disproportionate influence of rural interests. As a result of having more unified voting patterns than their colleagues from urban and suburban areas and greater seniority, studies suggest that lawmakers from rural areas are more likely to be legislatively successful than their urban counterparts. Big city delegations seem to be especially ineffective at marshaling their size to further legislative success.

The mayor of New York City, Bill de Blasio, campaigned on a program to pay for preschool education

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212 While forty-two states require state legislative districts to follow political boundaries, in fourteen of those states, the relevant political boundary is the county line, not the municipal boundary. Jason Levitt, Where the Lines Are Drawn - State Legislative Districts, ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/where-tablestate.php (last visited Mar. 12, 2016).


expansion by raising income taxes on the city’s wealthiest residents, but his tax program was a nonstarter in Albany, whose approval the city would need to enact the mayor’s proposal. As a result of these political forces, it may be difficult for cities to get such legislative authorization.

Presumptive taxing authority would flip this political economy. To restrict municipal taxing ordinances, a majority of the legislature would have to decide that a potentially local issue was worth the expense of legislative capital and reach agreement on the scope of such a restriction. Thus, the vetogates that right now could block municipal requests for expanding taxing authority would instead block efforts to reduce municipal authority. Weak representation of municipal interests in state legislative bodies matters less if, by default, municipalities have the power to decide for themselves whether to exercise taxing authority.

In addition to providing municipalities with better revenue options, presumptive taxation may also improve state lawmaking in this area. If presumptive taxation gives local officials more taxing authority than state lawmakers find desirable, the reform gives them an incentive to explicitly weigh the tradeoffs of state preemption and expanding municipal taxing authority. The current scheme of state-municipal power discourages meaningful debate about municipal authority precisely because the legislature does not have to act to prevent municipal taxation.

Of course, by flipping the presumption and requiring the state to act to block municipal taxation, the reform also makes it more difficult for state lawmakers to block local tax reform successfully. Legislation blocking municipal taxing authority will be subject to the same vetogates that currently face legislative efforts to expand municipal taxing authority. Further, by allowing cities to be first movers with regard to revenue policy, presumptive taxing authority may make it more difficult to reach a statewide agreement about municipal tax reform. The difficulties encountered by Ohio and Arizona lawmakers

as they have sought to reform their respective municipal income and municipal sales tax regimes suggest that city policies can be serious obstacles to reform.\textsuperscript{216}

Presumptive taxing authority would allow cities to impose taxes on bases untapped by the state without waiting for state legislative approval. As a result, presumptive taxing authority would expand municipal revenue options, allowing cities to explore new revenue sources and create more effective tax policy. For example, the reform would make it easier for cities to experiment with soda and other “fat taxes.” The reforms would also make municipal Pigovian taxation more likely. Such reforms would allow cities to explore more fundamental tax changes, like including services in their consumption tax base. These possibilities are discussed in more detail below.

Presumptive taxation would make it easier for municipal governments to impose taxes on soda and other “fats.” New York City’s now-failed soda ban came in the wake of the state’s refusal to consider a soda tax that might have been better targeted.\textsuperscript{217} There is some evidence to suggest that such fat taxes might improve health outcomes,\textsuperscript{218} and more municipal experimentation with such taxes could provide valuable information about their effectiveness (or lack thereof).\textsuperscript{219}

In many states, however, such a tax could not be imposed at the municipal level without state legislation. Connecticut law, for example, does not provide the authority for municipal experimentation in this area.\textsuperscript{220} Of course even under presumptive taxation, the state would retain the right to ban local fat taxes or include the tax in

\textsuperscript{216} See supra Section I.C.3 (discussing Ohio’s municipal income tax); Section III.D (discussing Arizona’s municipal Transaction Privileges Tax).


\textsuperscript{218} See, e.g., Kelly D. Brownell & Thomas R. Frieden, Ounces of Prevention—The Public Policy Case for Taxes on Sugared Beverages, 360 NEW E ENG. J. MED. 1805, 1806 (2009) (summarizing research suggesting that tax on sugared beverages would improve health outcomes).

\textsuperscript{219} See Lisa M. Powell et al., Associations Between State-Level Soda Taxes and Adolescent Body Mass Index, 45 J. ADOLESCENT HEALTH S57, S57 (2009) (suggesting that current soda tax levels are not changing adolescent consumption of soda or health outcomes but that significantly higher taxes might).

a statewide base, but cities would not have to wait for a statewide majority to act before putting such a policy in place.

Other municipal tax reforms could have the potential to raise even greater revenue. For example, cities could experiment with imposing municipal consumption taxes on services. Scholars have criticized the exemption of services from sales taxes on the grounds that it is both inefficient (because it raises the cost of goods as opposed to services) and regressive (because those with higher incomes spend a greater proportion of their consumption dollars on services). Estimates suggest that service purchases account for almost sixty percent of total consumer expenditures.

Because most state sales tax bases do not tax (or at least the majority of the) services sold in the state, such consumption taxes would not directly compete with the state’s sales tax base, and a plausible argument could be made that municipal taxation of such services would not conflict with most existing state sales tax laws. Such an attempt to impose a city-based service tax would, of course, present significant administrative challenges for the municipality and for businesses subject to the tax. Cities would have to enforce such consumption taxes without the help of state audits, and would have to craft potentially complex sourcing rules to determine whether the service was sold within the relevant municipality. Perhaps few cities

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222 See DUE & MIKESSELL, supra note 197, at 91; Stark, supra note 221, at 449–50.


224 In a state where the courts have interpreted the legislature’s preemptive authority quite broadly, it is possible that the existence of a state sales tax that fails to tax services could be interpreted as a decision by the state not to tax services.

225 Many cities have the authority and have chosen to levy “business license fees” or “business activity taxes” that are measured by gross receipts or gross payroll. See MCKINNON supra note 70, at § 44:248; TASK FORCE ON BUS. ACTIVITY TAXES AND NEXUS, AM. BAR. ASS’N, Report of the Task Force on Business Activity Taxes and the Nexus of the ABA Section of Taxation State and Local Taxes Committee, 62 TAX LAW. 935, 936 & n.2 (2009). These kinds of taxes often mimic the effect of a sales tax on services. And to the extent cities are able to successfully implement these taxes, they suggest that administrative concerns may be surmountable. As implemented, however, they still ensure that retail sales are taxed at higher rates (even at the local level) than the sale of services because these types of local taxes are generally imposed in addition to (rather than in lieu of) retail sales taxes. See, e.g., TREASURER & TAX COLLECTOR, CNTY & CNTY. OF S.F., SAN FRANCISCO’S NEW GROSS RECEIPTS TAX AND BUSINESS REGISTRATION FEES 2–4 (2013), http://sftreasurer.org/sites/sftreasurer.org/files/migrated/FileCenter/Documents/Business Zone/GRP_Summary_7_15_13.pdf (laying out San Francisco’s gross receipts tax).

226 One especially tricky issue would be how to coordinate with state sales tax exemptions for items “sold for resale,” which typically exempt from retail sales taxes items that will be subject to the tax when resold to the ultimate consumer. Cities could decide to
would be interested in imposing such taxes given these challenges. But even a few cities experimenting with local service taxation might spur interest among other municipalities or (as would be desirable from an administrative efficiency perspective), the state itself.

B. Enacting Reform

In most states, presumptive taxing authority could be established as a matter of either statutory or constitutional law. Providing an explicit grant of taxing authority in the state’s constitutional home rule provisions would secure such a grant against a changing legislative majority. A legislative grant of additional taxing authority could be overturned by a vote of the legislature, though some states do require additional legislative action to revoke previously granted authority. For example, for New York to revoke previously granted municipal authority, the state constitution requires two successive votes on the proposal in separate calendar years.\(^\text{227}\)

Further, in states with a constitutional initiative process, it is possible that constitutional revision would be as easy as (or even easier than) statutory reform.\(^\text{228}\) Obviously in states that require constitutional conventions, such constitutional change would be more difficult, though in such states a successful constitutional amendment is less likely to be later overturned.\(^\text{229}\) While a constitutional approach might be preferable, the choice between statutory reform and constitutional amendment is likely a strategic choice about which pathway seems more promising, and as a result, the choice will differ depending on both state law and state politics.

Before evaluating the strengths and weaknesses of this proposed reform, one additional detail deserves more attention: What should be the scope of the state’s preemptive authority?

Presumptive taxing authority, in effect, seeks to grant municipalities taxing authority that parallels their police powers. Municipal regu-

\(^\text{227}\) N.Y. CONST. art. IX, § 2(b)(1).


latory ordinances are routinely challenged as preempted by state law, and state courts have typically interpreted state authority to preempt local regulation quite broadly.230 States should not invent a new preemption doctrine for local government tax powers. Instead, the judiciary should draw on existing state preemption doctrine to interpret the scope of municipal taxing authority and the effect of state legislation on this authority. Under the preemption doctrine of many states, the existing, detailed statutory enactments concerning local property and sales taxes would be given some preemptive effect. In an ideal world, a reform expanding local revenue authority would be coupled with other state-level property tax reforms.

C. Evaluating the Proposal

As a policy change, presumptive municipal taxation would give municipalities additional revenue flexibility while still respecting the significant interests states have in municipal tax policy. The proposed reform strikes this balance by giving states the ability to override municipal taxing authority through general state law. Such a reform, without additional legislative changes, would have a limited effect on existing municipal tax bases, which are currently controlled by detailed state law provisions.

As a result, presumptive municipal taxation cannot, by itself, address the major challenges facing existing municipal revenue sources. Presumptive municipal taxation would not repeal Proposition 13 in California or TABOR in Colorado, for example. Nevertheless, presumptive municipal taxation would improve municipalities’ ability to respond to changing fiscal conditions with new sources of revenue.

230 See supra Section I.C for a discussion of the preemptive authority of state law under Washington, Wisconsin, and Ohio home rule provisions. The federal statutory presumption against preemption, after all, is based in the federal judiciary’s concerns about offending state sovereignty. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 533 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The principles of federalism and respect for state sovereignty that underlie the Court’s reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken, though ambiguously,” quoted in Ernest A. Young, “The Ordinary Diet of the Law”: The Presumption Against Preemption in the Roberts Court, 2011 SUP. CT. REV. 254, 273 (2012)). Such sovereignty concerns are absent in the context of a state court interpreting the state’s grant of authority to municipalities that lack any claim to sovereign authority. Some state courts have nevertheless applied something akin to the presumption against preemption in considering challenges to local laws under state law. See Briffault, supra note 14, at 909 (“There is an enormous gap between the written provisions of state constitutions and actual practice. State legislatures and local governments have repeatedly sought to expand the scope of ‘public purpose’ and to slip the restraints of the tax and debt limits.”).

231 See supra note 15 and accompanying text.
As discussed above, municipalities could consider a variety of taxes that they currently lack the authority to impose.

There is, of course, no guarantee that municipalities will take advantage of these new powers. City officials may be reluctant to impose new local taxes, and they may lack the administrative and technical resources to implement such tax reforms. However, even if only a handful of municipalities take advantage of their new legal authority, it would be a major change.

Perhaps the greatest challenge of the proposal is the possibility that cities (or at least city officials) would rather not have this authority in the first place. There is some evidence that city officials are not particularly enamored of local option taxes (i.e., taxes the state authorizes localities to impose at their option). City officials often prefer increases in state intergovernmental grants, which provide funds from the entire state tax base and therefore do not require them to take the potentially unpopular step of proposing new taxes or tax increases on local residents or businesses.232

Further, municipal revenue capacity varies widely.233 As such, expanded revenue authority will assist some municipalities more than others, and the additional revenues may flow to more resource-rich localities. If offering municipalities greater revenue autonomy were to decrease state aid to local governments, the measure could leave some cities worse off. However, in the status quo, states are already reducing their intergovernmental aid, and cities need additional revenue options to make up this shortfall. While it is possible that giving cities more taxing authority could accelerate this trend, it is also possible that providing cities with opportunities to create more own-source revenue will allow state aid to better target jurisdictions that are revenue poor.

In addition, a city’s revenue capacity may not map neatly onto revenue need. Thus, in the Boston Federal Reserve’s detailed report on how the benefits of expanding a local option tax in Massachusetts would benefit the state’s local governments, it noted that the beneficiaries included not just wealthy suburbs, but also Boston and other commuting centers in the state.234

234 Id.
For the reasons discussed above, the cities most able to take advantage of this greater taxing authority are likely to be larger cities in major metropolitan areas. These cities are more likely to have the capacity to both generate innovative ideas for municipal revenue and to administer these programs. Presumptive taxing authority would not save Detroit—or necessarily even help it—but it might offer a city like Seattle, St. Paul, or Phoenix a way to meet increasing pension obligations without cutting social service budgets. And while problems of poverty certainly are not limited to core urban areas, these cities are likely to have a greater share of regional poverty than the average municipality, and thus are more likely to need additional sources of revenue.235

Finally, as scholars like Richard Briffault have noted, local control is not an unmitigated good. Rather, it can contribute to the “pervasive privatism that is the hallmark of contemporary American politics.”236 For example, localities have used zoning rules to restrict (or actually prohibit) homebuilders from developing residential real estate for lower and middle-income households.237 And greater local control may also hamper efforts to encourage more regional planning and economic development.

In addition, scholars and policymakers may worry that municipal autonomy hampers efforts to encourage regional urban planning and economic development. For at least a quarter of a century, scholars have suggested that both cities and suburbs would benefit from more regional cooperation.238 Regional solutions are even suggested to address problems created by state restrictions on local autonomy. For example, city planner Peter Pollock suggests that greater municipal revenue sharing might help local governments address the distortions in local development decisions caused by Colorado’s state-imposed

235 See Liscow, supra note 5, at 3–4 (identifying school financing as one area where this occurs).
238 For more recent work in the area that surveys the history of calls for regional economic development, see generally Peter Dreier et al., Place Matters: Metropolitics for the Twenty-First Century (3d ed. 2014); Myron Orfield, Metropolitics: A Regional Agenda for Community and Stability (1997).
limits on local taxation. \(^{239}\) Such cooperation has not been common however, and it does not address the common need cities have for stable, own-source revenues that they control.

Presumptive municipal taxation is not a panacea for the fiscal challenges facing municipal governments, and as the preceding discussion suggests there are real risks and limits to this proposal. However, the current division of municipal taxing authority rests too much authority with state legislatures, who are often unresponsive to the revenue needs of municipalities. Presumptive taxation would open the door to more innovation in revenue sources at the local level and might offer a pathway to a more fiscally sound future for municipalities, with more efficient revenue sources that better reflect the needs and strengths of the locality.

**Conclusion**

Cities currently lack the home rule authority to implement many changes to their revenue system. Such extreme limits on municipal taxing authority are unjustified, and states can address their interest in municipal tax policy even while granting municipalities more taxing authority. States should consider amending their home rule provisions to include taxation as a home rule power. Presumptive taxation is not without its risks, but it is a reform worth serious consideration.

\(^{239}\) See Pollock, *supra* note 108, at 1011–12 (noting incentives for retail sales development in Colorado and contrasting that with Wyoming’s experience). Pollock praises Wyoming’s approach, where local sales tax funds are collected by the state and then redistributed to cities, towns, and counties based on their respective populations, as opposed to the location of the sale. *Id.* at 1012; *see also* Wyo. Stat. Ann. § 39-15-211 (West 2015).
MOVEMENT LAWYERING

Scott L. Cummings

This Article explores an important development in American legal theory and practice over the past decade: the rise of “movement lawyering” as an alternative model of public interest advocacy focused on building the power of nonelite constituencies through integrated legal and political strategies. Its central goal is to explain why movement lawyering has gained prominence, define its essential features, and explore what it reveals about the current state of efforts to work out an empirically grounded and normatively appealing vision of the lawyer’s role in social change. Toward that end, this Article shows how movement lawyering has long been an important part of progressive legal practice—complicating the standard historical account—while also illuminating the contemporary political and professional shifts that have powered the recent social movement turn. Synthesizing insights from social movement theory and practice, the Article then defines and analyzes the core features of the movement lawyering model—representing “mobilized clients” and deploying “integrated advocacy”—and explores how these features respond to long-standing critiques of public interest advocacy by presenting movement lawyers at their most accountable and effective: taking instructions from activist organizations in client-centered fashion and using law in politically sophisticated ways designed to maximize the potential for sustained social reform. In doing so, the new movement lawyering literature usefully refocuses attention on fundamental questions about the lawyer’s role in social change and thereby offers a crucial opportunity to jumpstart a contemporary dialogue—less freighted with the critical canon of the past and more rooted in empirical inquiry—about the conditions in which lawyering is most likely to produce accountable and effective democratic transformation.

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I. INTRODUCTION

Over the past decade, scholars and practitioners have turned greater attention to the role of lawyers in social movements. Although lawyers’ work on behalf of movements spans the ideological divide, most recent interest in movement lawyering has come from legal academics and lawyers on the political left. Inspiration has been drawn from diverse quarters: the legal mobilization against repressive antiterrorism policies launched after 9/11; efforts by the labor and immigrant rights movements at the local level to challenge economic exploitation and raise standards in the low-wage economy; the dramatic march to marriage...
equality by LGBT rights lawyers; the outburst of protest against economic unfairness ignited by Occupy Wall Street’s reaction to the Great Recession; grassroots activism in response to police violence against communities of color, ignited by the Ferguson riots and coalescing around the Black Lives Matter movement; and recently the explosion of grassroots activism and street protest under the banner “Not Our President” to contest the divisive policies of Donald Trump—igniting around the Muslim Ban, immigration raids, efforts to repeal Obamacare, and the reversal of climate change regulation. Against this backdrop, progressive scholars have produced a rich new literature that places social movements at the center of legal and political transformation, pushing aside a focus on courts and lawyers that has long dominated scholarly analysis.8

This literature has made essential contributions to understanding how social movement mobilization can change law and society—captured in ideas of “popular constitutionalism”9 and “demosprudence”10—while also showing how lawyers may support that change through an approach to representation in which they collaborate with social movements but do not control them.11

This scholarship has complemented and reinforced developments in progressive legal practice, where the label “movement lawyer” has resurfaced after decades of dormancy12: now claimed as a call to action by a new generation seeking to surmount the perceived disjuncture between the legalism of conventional public interest law and the dynamism of emerging grassroots movements.13 In signs of change, legal organizations such as the Center for Constitutional Rights (which fought post-9/11 repression and Guantánamo detention14) have created movement-lawyering programs,15 bolstered by support from foundations that seek to advance the work of movement lawyers around the globe.16 The aim of these programs has been to profile, and thereby promote, “lawyers and organizers working together within grassroots social justice movements to build power.”17

This renewed attention to movement lawyering has come at a time in which progressive law and politics are at a crossroads.18 More than six-

10. See Lani Guinier, Demosprudence Through Dissent, 122 Harv. L. Rev. 4, 15–16 (2008) (defining demosprudence as “democracy-enhancing” “legal practices that inform and are informed by the wisdom of the people”).
14. See Scott L. Cummings, The Internationalization of Public Interest Law, 57 Duke L.J. 891, 894 nn.5–6 (2008) [hereinafter Cummings, Internationalization of Public Interest Law].
18. The term “progressive” is used here to correspond to the range of views associated with the political left in the United States, beginning in the Progressive Era, focused on shifting power and resources to those at the bottom of social hierarchies, including the poor, racial and ethnic minorities, women, LGBT people, and political dissidents. Its basic tilt is toward the achievement of greater equality as opposed to individual liberty. Progressive in this sense does not refer to a specific set of political policies or legal ideas, but rather to the contest on the political left over fundamental democratic questions: the role of the state in regulating the economy, the redistribution of wealth (and other
ty years after Brown v. Board of Education,19 fifty years after the March on Selma and the passage of the Voting Rights Act, and in the wake of a presidency many saw as the best hope for progressive revival, scholars have begun to reexamine America’s civil rights legacy.20 Particularly as progressives confront an aggressively hostile post-Trump political landscape, this reexamination has spotlighted the question of how social movements should engage with law and lawyers in ways that promote progressive transformation while avoiding mistakes of the past.21

Yet the social movement turn in legal scholarship presents new puzzles. When progressive social movements played a dramatic role disrupting and reshaping American politics, they were of little interest to legal scholars. Now that movements have become more constrained by their incorporation in mainstream political processes,22 they have attracted serious intellectual attention from legal scholars interested in transformative progressive reform. Further, while the law and social movement literature builds on a foundation of empirical research (following the general trajectory of legal scholarship),23 there remain analytical gaps between the treatment of movements in law and social science. Whereas legal scholars have tended to emphasize social movement solidarity and the power of protest to produce sustainable political and cultural change,24 social movement scholars have highlighted conflicts both within and across movement organizations,25 constraints on disruptive political tactics and collective action frames,26 the limits of movement influence

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21. In constitutional law, some progressives have argued for a minimalist role for the Court in deciding cases of contested social policy. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10–11, 46 (1999); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 14 (1999); cf. J ACK M. BALKIN, CONSTITUTIONAL REDEMPTION 70–71 (2011) (arguing for a theory of constitutional change in which courts are responsive to social movements that succeed in legitimating new constitutional interpretations).
24. See, e.g., Guinier & Torres, supra note 8, at 2757–58.
25. See DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930–1970, 56 (1982) (arguing that the pursuit of external funding was associated with the “dissolution of indigenous support” in social movement organizations); DAVID S. MEYER, THE POLITICS OF PROTEST: SOCIAL MOVEMENTS IN AMERICA 130–32 (2007) (noting splits within social movement coalitions between more institutionally oriented and more radical groups as movements gain greater access to policy making); see also Elisabeth S. Clemens & Debra C. Minkoff, Beyond the Iron Law: Rethinking the Place of Organizations in Social Movement Research, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS 155 (David A. Snow et al. eds., 2004); Herbert H. Haines, Black Radicalization and the Funding of Civil Rights, 1957–1970, 32 SOC. PROB. 31 (1984).
26. See STEVEN M. BUECHLER, UNDERSTANDING SOCIAL MOVEMENTS: THEORIES FROM THE CLASSICAL ERA TO THE PRESENT 153 (2011) (discussing the role of the media in framing social
over policy reform (particularly in the face of countermovement mobilization), and the inevitably cyclical nature of struggle. As legal scholars look to movements as a way to fuse law and transformative politics, social movement scholars point to the professionalization and cooptation of social movement organizations as signs that social movements may become less transformative over time. Against this backdrop, the central goal of this Article is to explore why movement lawyering has gained new prominence in theory and practice, define its essential features, and explore what it reveals about the current state of efforts by progressive scholars to work out an empirically grounded and normatively appealing vision of the lawyer’s role in social change.

Toward that end, Part II examines the relation between movement lawyering and progressive legal theory. It argues that the rise of movement lawyering in legal scholarship should be understood as part of the foundational debate over the legacy of legal liberalism—a critical account of how lawyers sought to advance progressive social change through impact litigation during the Warren Court era. In this account, lawyers are portrayed as placing “trust in the potential of courts, particularly the Supreme Court” to produce “those specific social reforms that affect large groups of people . . . .” Critical scholars have claimed that the legal liberal approach hampered social movements by diverting political challenges into legal channels, emphasizing individual rights over collective action, confusing rule change for social change, and empowering lawyers to make crucial political decisions without accountability to movement grievances and the greater potential for sympathetic media reception when movement goals are “narrowly defined”;


29. See Meyer & Tarrow, supra note 22, at 20–24 (arguing that social movements have become “institutionalized,” resulting in the “routinization” of collective action, the “inclusion” of conventional challengers into mainstream politics, and greater “cooptation”).


31. See generally Mack, supra note 8, at 258.


the constituencies they purported to represent. Overall, these critiques have coalesced around two foundational problems: the accountability of lawyers to movement constituencies and the efficacy of law in producing social change. Part II claims that the new scholarly interest in movement lawyering may be read as the latest effort to respond to these problems and thereby resolve a fundamental tension in the progressive lawyering literature: how to avoid the defects of the old legal liberal model while embracing a vision of lawyering that is at once client-centered and politically transformative.

Part III explores the origins and development of movement lawyering in legal practice. It reframes the standard history of progressive lawyering over the past century by placing social movements at the center of the story and exploring how their evolution has shaped legal advocacy. Doing so spotlights how lawyers from the Progressive era through the post-civil rights period adopted the ideological and methodological perspectives now associated with movement lawyering: accountability to social movement constituencies in defining and executing legal strategy; skepticism about the power of law by itself to transform society without concurrent political organizing and long-term efforts in support of implementation and norm change; and commitment to coordinating legal and political advocacy in context-specific mobilizations to achieve sustainable social change. What varies over time are the conditions in which this legal work takes place: the relative opportunities for political and legal challenges by different social movements, the relative availability of resources for litigation versus other types of movement mobilization, and the relative power of rights discourse as opposed to other frames for expressing collective grievances. Shifts in substantive and strategic emphasis by progressive lawyers and legal organizations over time respond to cyclical changes in social movement activism while also contributing to them. From this vantage point, what is at stake in historical analysis of progressive legal practice is not the presence or intensity of movement lawyering but rather its various historical forms and contested meanings.

This change in historical framing—viewing progressive lawyering through the lens of social movements—yields two important insights. First, it reveals essential continuities in movement-oriented practice that


36. This analysis draws upon key insights of social movement theory. See BUECHLER, supra note 26, at 188–91 (describing an “attempted synthesis” in social movement theory that integrates perspectives focused on political opportunities, resource mobilization, and framing processes to describe and analyze the origins and impacts of social movements). For a discussion of the role of law in social movement theory, see Chris Hilson, New Social Movements: The Role of Legal Opportunity, 9 J. EUR. PUB. POL’Y 238 (2002).

37. Focusing on how structural conditions shape opportunities for legal advocacy does not ignore the agency of lawyers in making choices about whether and how to mobilize law (and the consequences of those choices), but it does present a more complex picture of cause and effect.
call into question the standard legal liberal account, in which lawyer-led, court-centered reform becomes both dominant and distant from social movement activism. In contrast, Part III repositions legal liberalism as the result of movement success, rather than a break from it. Progressive lawyers in the civil rights period took advantage of the very opportunities for impact litigation that social movements themselves had created—opportunities that then diminished as movement power began to decline. Legal liberalism thus represented a pinnacle achievement of mid-century progressive social movements—a high water mark of political liberalism already under assault. This perspective helps explain why public interest law, created to fulfill the legal liberal promise of social change through legal change, was quickly mismatched with an increasingly conservative political environment—casting doubt on the claim that it was legal liberal lawyering that undermined the power of progressive social movements rather than the reverse.

This reframing leads to the second insight: The new wave of movement lawyering, although building on models of the past, represents a distinct professional response to changing political circumstances. Ongoing skepticism of courts among progressives, combined with a more general blurring of traditional boundaries of expertise, has reoriented lawyers toward multidimensional problem-solving strategies, further fueled by the spread of new technologies. Older social movements (labor, civil rights, environmental) have been reborn and reformulated, pushed forward by new organizing-focused and protest-based collectives (worker centers, Dreamers, Occupy Wall Street, Black Lives Matter). In the legal academy, a distinct approach to professional training has promoted a critical stance toward law and an openness to collaboration and power-sharing with nonlegal actors. In this context, the explicit turn by legal organizations, funders, and law schools toward the language and practice of movement lawyering points toward a new phase of progressive legal development in a distinctively pragmatic age marked by collaborative relationships with ambitious social movement organizations committed to principles of democratic governance and operating at different levels of policy making; sophisticated coordination of legal and political strategies; and a broad understanding of the critical legal skills integral to advancing movement goals, which include litigation but also forms of strategic legal counseling, regulatory analysis, transactional planning, and policy negotiation.

Having recovered the origins of movement lawyering and traced its recent evolution, Part IV pivots toward contemporary analysis by examining the meaning and content of movement lawyering in the current professional context. It begins by introducing to the literature a definition of movement lawyering: a model of practice in which lawyers ac-

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38. This framework draws upon the work of legal theorists focused on the relationship between social movements and constitutional change. See Jack Balkin, How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure, 39 SUFFOLK L. REV. 27, 28 (2005).
countable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy. Part IV then outlines two key operational features associated with movement lawyering practice: the representation of mobilized clients and deployment of integrated advocacy. Because movement lawyering aims to help marginalized collectives gain power to change structural conditions of inequality, deepen participation in democratic decision making, and change social attitudes and cultural norms, it depends on lawyer accountability to mobilized clients that can play the critical role of social change agent. This aspect of the movement lawyer-client relationship focuses attention on the criteria by which the lawyer selects clients, the degree to which the lawyer engages in organizational capacity building in the absence of already strong social movement groups, and the lawyer’s approach to counseling complex democratic organizations with multiple decision makers—all classic problems of professional ethics.

Whereas the movement lawyer’s commitment to represent mobilized clients is ultimately a choice of substantive political goals, the adoption of integrated advocacy is a decision about appropriate means. From a tactical perspective, integrated advocacy is a process-based approach to lawyering for social movements designed to support strategic collaboration with nonlawyer activists and encourage analysis about the potential consequences—intended and unintended—of legal interventions. Its essential aim is to break down persistent divisions between lawyers and nonlawyers, litigation and nonlitigation strategies, and court-centered versus politics-centered advocacy campaigns. It does so by deemphasizing the centrality of any one type of legal intervention (like impact litigation) in favor of flexibly coordinating organizational and tactical resources across different institutional spaces—some within formal lawmaking arenas and some outside—to achieve short-term policy reform and long-term cultural and social change.39

The Article concludes by reflecting on what is at stake in the new emphasis on social movement lawyering. Part V suggests that, although the new movement lawyering frame usefully brings scholars and practitioners back to fundamental questions about lawyer accountability and legal efficacy, it ultimately leaves them unresolved. The complexity of social movements means that progressive lawyers are inevitably confronted with unavoidable dilemmas: which interests to represent among competing factions, how much deference to accord to the decision-

39. As discussed later, the term “integrated advocacy” has become part of the vocabulary of institutional actors within the field, including lawyers, social movement organizations, and funders. It relates to similar concepts under different labels identified elsewhere. See Cummings & NeJaime, supra note 4, at 1242 (“multidimensional advocacy”); Sheila R. Foster & Brian Glick, Integrative Lawyering: Navigating the Political Economy of Urban Development, 95 CALIF. L. REV. 1999, 2004–05 (2007) (“integrative lawyering”); John Kilwein, Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania, in CAUSE LAWYERING, supra note 8, at 181, 185 (“mobilization lawyering”).
making processes of social movement clients, whether to pursue strategies of elite negotiation or grassroots disruption, and how to evaluate the pros and cons of litigation as a social movement tactic. Yet, despite these dilemmas, movement lawyering offers occasion for hope: a sign of ambition among a generation of lawyers eager to strengthen alliances with marginalized communities in the pursuit of a transformative social vision that reclaims parts of the old liberalism while also laying claim to something new. In the end, the real promise of the social movement turn lies in repowering a contemporary dialogue—less freighted by the critical canon of the past—in which scholars and practitioners can create a new account, rooted in more sustained empirical inquiry, of the conditions in which progressive lawyering is most likely to produce accountable and effective social change.

II. WHY MOVEMENT LAWYERING NOW: A THEORETICAL PERSPECTIVE

The turn toward movement lawyering in progressive legal thought and practice reflects a turn away from the vision of lawyering associated with the “rights revolution” of the Warren Court era, which is linked in the scholarly literature to the idea of legal liberalism: a model of social change through law in which activist lawyers use impact litigation to advance progressive policy reform that is validated by activist courts. Accounts of legal liberalism are oriented around the mid-century emergence of new legal organizations committed to the “pursuit of legal rights” for underrepresented groups and interests in American society.

In this story, the transformative power of Brown, and the carefully planned impact litigation campaign by the National Association for the Advancement of Colored People (“NAACP”) that produced it, turned attention and resources toward replicating its success in other areas. A new field of public interest law was created and extended through support by the federal government, the organized bar, and liberal philanthropic organizations like the Ford Foundation. The new public interest lawyers—among them towering figures like Ralph Nader, Marion Wright Edelman, Ruth Bader Ginsburg, Gary Bellow, Ed Sparer, and

40. Cf. Duncan Kennedy, The Critique of Rights in Critical Legal Studies, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002) (“The goals of the left project are to change the existing system of social hierarchy, including its class, racial[,] and gender dimensions, in the direction of greater equality and greater participation in public and private government.”).
42. See Simon, Pragmatist Challenge, supra note 35, at 133–45.
44. Id. at 23.
45. Id. at 28–32.
othes—sought to refashion law as a tool to promote justice for the excluded and oppressed in American society.46

It was in response to the perceived limitations of legal liberalism that scholars mounted a critique of the lawyering strategies associated with it. Beginning in the 1970s, two main areas of criticism emerged. The first focused on the problem of lawyer accountability. Derrick Bell articulated this problem most forcefully when he argued that NAACP lawyers pursuing integration were doing so in response to elite funders and organizational supporters—in conflict with the interests of African American community members who preferred quality schools even if they remained segregated.47 The image of NAACP lawyers “serving two masters”—placing their own commitments above client interests48—captured broader concerns with legal liberal lawyers using their authority to pursue a vision of the public good at odds with those whom the lawyers claimed to represent.49

The second area of criticism focused on the efficacy of social reform through law. Critics identified several related problems, all of which focused on the power of law to change social practice and reshape politics. One problem was the difficulty of enforcing new rights pronounced by courts. Critics of legal liberalism argued that courts did not have the institutional capacity to enforce their own judgments and thus reform campaigns centered on judicial law making were misguided. It was in this vein that Gerald Rosenberg made his famous argument against Brown and other civil rights era court decisions, pronouncing that “U.S. courts can almost never be effective producers of significant social reform.”50 This criticism of court-centered reform was linked to criticism of the lawyers who pursued it: by framing court-based reform as a “hollow hope,” Rosenberg was implicitly criticizing those who had dared to hold out hope—that is, the lawyers who had pursued the very court decisions that Rosenberg claimed had such little impact.51 Stuart Scheingold, writing earlier, had made this criticism of lawyers more explicitly, suggesting “that the problem with litigative approaches may be less with the strategy than with the strategists.”52

Schein gold also raised another efficacy-related criticism of legal liberal lawyering, arguing that not only did it produce formal legal change without authentic social change, it also made authentic social change harder to achieve. By pursuing the “myth of rights,” he claimed lawyers undermined the power of collective action by promoting “one-on-one

46. Id. at 29–45.
47. Bell, supra note 35, at 489.
48. Id. at 492–93.
49. See Lobel, supra note 34, at 952; Simon, Pragmatist Challenge, supra note 35, at 162.
51. Gerald N. Rosenberg, Courting Disaster: Looking for Change in All the Wrong Places, 54 Drake L. Rev. 795, 818 (2006) (suggesting that “too many” legal groups are “not really serious” about using litigation as part of a “multi-faceted strategy”).
52. Scheingold, supra note 33, at 95.
conflicts within the framework of the adversary process” in ways that tended to “fractionalize political action—dividing rather than unifying those who seek change.”53 Along these lines, scholars of the profession suggested elite bar support of public interest law was part of a strategy of taming more radical elements in progressive social movements.54 Critical Legal Studies (“CLS”) scholars pushed this criticism further, arguing that legal liberalism—by presuming American democracy could be redeemed through incremental legal reform—legitimated the inequality built into the status quo and misallocated activist resources better spent on grassroots mobilization.55 Outside of CLS, scholars claimed that judicial activism was not only insufficient for social reform but potentially detrimental to social movements, leading to backlash in controversial cases, like Brown, where public opposition to expanding legal rights was strong.56 Overall, elements of this story fit together to form a larger critical narrative in which the pursuit of social transformation through legal transformation discounted the voices of the oppressed, legalized politics, galvanized opposition, and demobilized social movements that had built the crowning achievements of political liberalism.

These critical ideas about law and lawyering have held powerful sway over progressive legal thought for the past half-century.57 They have coalesced around a view of legal liberal lawyering that is disconnected from progressive social movement activism and a contributing cause of movement decline in the post-civil rights era. One can understand the trajectory of progressive legal scholarship over the past twenty-five years as a reaction to this essential narrative: from the critical race theory response to the CLS critique of rights in the 1980s,58 to efforts by poverty law scholars to develop a normatively appealing theory of progressive lawyering in the 1990s.59 Poverty law scholars in particular—rejecting what Gerald López called the “regnant” idea that “subordination can be successfully fought by professionals”60—advanced an alternative to legal

53. Id. at 214.
54. See Thomas M. Hilbink, Filling the Void: The Lawyers Constitutional Defense Committee and the 1964 Freedom Summer 13–14 (describing the elite bar’s support for the Lawyers’ Committee for Civil Rights Under Law as a way of promoting “peaceful solutions” to southern civil rights unrest). In a related vein, Jerold Auerbach describes the corporate bar’s embrace of pro bono as a response to the implicit claim by the public interest law movement that corporate lawyering did not serve the public interest. Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in America 278–82 (1976).
57. Lobel, supra note 34, at 938.
58. For the foundational work in this area, see Kimberlé Williams Crenshaw, Race, Reform, Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331, 1352–56 (1988).
liberalism, rooted in community, in which lawyers sought to empower marginalized people to actively participate in social struggle.  

Critics of poverty law scholarship argued that this empowerment model gave up on structural change for an inchoate ideal of participation that was not clearly connected to viable projects of progressive transformation. From this perspective, critics questioned the poverty law scholars’ focus on liberal lawyers dominating poor clients within the lawyer-client relationship, arguing that such micro-analysis diverted attention from the need to plan and execute large-scale campaigns to fight powerful opponents, which could benefit from dedicated lawyer expertise.

Other critics suggested that the emphasis on community empowerment rested on an undertheorized and overly romantic notion of community that similarly understated the extent to which progressive lawyers could productively contribute to the struggle for social justice. While progressive legal scholars sought to move beyond this internecine feud by developing more politically ambitious concepts of community-centered lawyering, at the turn of the millennium, an alternative approach that wedded the poverty scholars’ commitment to grassroots accountability with the legal liberal commitment to structural transformation remained unrealized.

It is in this context that social movements have gained prominence as key actors in progressive legal theory. The important point is that the new scholarly interest in social movements generally and movement lawyering in particular must be understood as the current response to a longstanding problem in progressive legal scholarship: how to connect authentic bottom-up participation by marginalized groups to an accountable and effective strategy for structural reform that targets legal institutions as a critical site of social struggle. Legal liberalism revealed the risks of a model in which lawyers took the lead and courts became a central site of policy contestation. The arrival of movement lawyering in progressive legal scholarship responds to these risks by positing an alternative that aspires to be both client-centered and politically transformative.

Movement lawyers in the new literature follow the leadership of grassroots actors designing social movement campaigns, often using

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61. White, supra note 59, at 760 (arguing that such lawyering work addressed the “third dimension” of power).
63. See Simon, Dark Secret, supra note 30, at 1107.
multiple legal strategies consciously crafted to complement and advance political goals. In this way, the new focus on social movements points toward an affirmative vision of lawyering that seeks to promote popular mobilizations to change law and society through “contentious politics,” which alter the distribution of resources and the balance of power within democracy. Movement lawyering thus asserts a theory about the connection between legal process and social outcomes. By using law as a tool to build capacity to engage in collective action, movement lawyering aspires to broad and deep reform that moves beyond “law on the books” to embed change in social practice and culture. In so doing, it responds to the perceived deficits of the legal liberal model and its bottom-up successors by emphasizing grassroots accountability, large-scale legal reform, long-term implementation, and proactive planning to avoid backlash. In Lani Guinier and Gerald Torres’ terms, lawyering for movements is a “participatory, power-sharing process within the lawyer/client relationship,” in which lawyers lend their support to nonelites to produce the “cultural shifts that make durable legal change possible.”

As will be described more fully in Part IV, within the recent literature, there are two key features associated with movement lawyering that respond to the legal liberal critiques of lawyer accountability and legal efficacy. First, the new stories of movement lawyering emphasize lawyer accountability to politically-activated clients that have the power to set the agenda and execute campaigns. In these accounts, lawyer deference to movement organizational decision making promotes client empowerment through the representation itself.

Second—responding to the legal liberal portrait of top-down impact litigation at odds with political mobilization—the new literature spotlights lawyers who use complex and coordinated legal strategies to achieve political goals: deemphasizing (though not abandoning) litigation. The new movement lawyers are sophisticated in using their legal expertise to advance campaigns in different policy-making contexts—


67. CHARLES TILLY & SIDNEY TARROW, CONTENTIOUS POLITICS 4 (2006) (“Contentious politics involves interactions in which actors make claims bearing on someone else’s interests, leading to coordinated efforts on behalf of shared interests or programs, in which governments are involved as targets, initiators of claims, or third parties.”).

68. Guinier & Torres, supra note 8, at 2743, 2753.


70. Melanie Garcia, The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda, 24 GEO. J. LEGAL ETHICS 551, 565 (2011) (“[M]ovement advocacy empowers the client to begin more immediately working toward social change with the other members of her community or with members of the relevant social movement.”).

71. Gordon, supra note 11, at 2139; see also Alan K. Chen, Rights Lawyer Essentialism and the Next Generation of Rights Critics, 111 MICH. L. REV. 903, 924 (2013) (reviewing RICHARD THOMPSON
for example, strategically advising coalitions on the legal levers available to resist gentrification,72 drafting legal opinions and policy language to win support for legislative reform,73 negotiating on behalf of coalitions to win community benefits from private developers,74 and drafting reports and using media strategies to publicize the legal exploitation of immigrant workers.75 When litigation is used, it is directed toward advancing specific organizing goals,76 such as supporting low-wage workers’ collective demand for better pay and conditions,77 enabling day laborers to solicit work on street corners without reprisal,78 creating case-by-case precedent in individual LGBT parental rights cases that change facts on the ground in order to gradually build support for broader parenting equality goals,79 representing tenants in housing court as part of a campaign to resist landlords’ efforts to convert affordable housing to market-rate units,80 and defending clients in carefully selected criminal test cases to highlight the unfair application of city zoning laws to undermine immigrant businesses.81 Rights, in this picture, are tools mobilized by social movement actors to expose injustice and pressure government officials and private actors to commit to change.82

72. Foster & Glick, supra note 39, at 2057-65.
73. See Cummings, Preemptive Strike, supra note 3, at 1155.
74. See Scott L. Cummings, Mobilization Lawyering: Community Economic Development in the Figueroa Corridor, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, supra note 8, at 302–35.
75. See Cummings, Hemmed In, supra note 3, at 40, 59.
76. For a historical analysis, see Christopher Coleman et al., Social Movements and Social-Change Litigation: Synergy in the Montgomery Bus Protest, 30 LAW & SOC. INQUIRY 663, 668 (2005).
77. Ashar, supra note 8, at 1908.
78. See Cummings, Litigation at Work, supra note 3.
From a theoretical perspective, the turn to movement lawyering thus represents a proposed reconciliation of contested positions and synthesis of competing approaches. By aligning with mobilized clients, movement lawyering embraces a strong version of lawyer accountability to democratically led collectives that themselves claim to stand in for broader constituency interests. By expanding the meaning of legal problem solving to encompass a flexible repertoire of advocacy modes, movement lawyering recognizes the risks of narrowly framed litigation to the overall effectiveness and durability of complex social change efforts. In these ways, the shift toward movement lawyering in legal scholarship, though built upon an empirical methodology (developed through case studies of how lawyering works in the real world), in fact reflects a deeply normative vision of the progressive lawyer’s role that seeks to fuse accountable and effective legal interventions in order to advance sustainable social change. Movement lawyering, in this sense, seeks to embrace the legal liberal claim to large-scale social change while avoiding the pitfalls of lawyer overreaching and overinvestment in law. What distinguishes this account from previous post-civil rights visions of progressive lawyering is the explicit adoption of social movements as the engines of ambitious, bottom-up political and cultural transformation, and the affirmation of a positive role for lawyers and legal expertise in support of movement-led campaigns. What is ultimately at stake in the new stories of movement lawyering is the possibility of reimagining—and perhaps breaking free of—the critical legacy of legal liberalism itself.

III. REFRAMING LAWYERS IN SOCIAL MOVEMENTS: AN EMPIRICAL PERSPECTIVE

Ever since the advent of the term “public interest law” in the 1970s, there have been ongoing efforts to rename and thus reclaim the role of lawyers in progressive social change. Each of these branding efforts is fundamentally an ideological exercise in defining the relation of law to politics. In this sense, branding is inherently a normative project that simplifies complex reality, identifies problems with a stylized version of conventional practice, and then posits the newly branded model as an appealing solution. One can understand the creation of the public interest law label in the 1970s as perhaps the most important example in the American legal profession of this type of ideological project: an effort to legitimize the political use of litigation and courts to advance liberal social policy reform by tying it to the lawyer’s traditional role to serve the public good. New labels are invariably offered by critics of the old mod-

el and are thus built in opposition to the critics’ version of the old model’s deficiencies.

Legal liberalism is a story of lawyering and adjudication written by its critics—one that presents a view of lawyers seeking to change society by pursuing rights in court as a way of advancing critics’ claims about the appropriate role of law in progressive politics. Scholars are now beginning to question that view by examining the ways in which professional ideology and practice were more contested historically than the conventional legal liberal account suggests.85 As these scholars have pointed out, lawyering before and during the civil rights movement was multifaceted: for example, combining test-case litigation to challenge segregated public accommodations and union discrimination, legislative advocacy to increase funding for African American schools and punish lynching, and community development efforts to build a black business sector and professional class.86 In this revisionist history, although there were examples of lawyer domination and counterproductive legal campaigns, there were also underappreciated efforts by lawyers to combine law and politics to build social movements, challenge entrenched political power, and transform public attitudes about race and equality. In spotlighting the long arc of legal activism throughout civil rights history, this scholarship presents a more contextualized picture of lawyering growing out of and interacting with rich social movement environments—thus inviting deeper inquiry into how changes in those environments shaped progressive legal practice over time.

This Part takes up that invitation by re-presenting the development of movement lawyering from the Progressive era to the present. It does so by placing social movements at the center of the story and thereby re-framing the historical analysis to focus on how such movements have influenced legal practice. This view highlights the ways in which social movements have long relied on legal help while suggesting how the nature of that legal help, and the degree to which it has been coordinated with political strategies, has depended on opportunities for social movements to advance their interests through the political system. Drawing upon the central insights of social movement theory, it explores how the meaning and form of legal mobilization have been shaped by the complex interplay among political opportunities, resources for collective action, and the ideological frames that motivate groups to believe change is possible.87

85. See Mack, supra note 8, at 258–59.
86. See Carle, supra note 8, at 115–16, 141, 148–49; Goluboff, supra note 20, at 195–96; Mack, supra note 8, at 277–80.
87. The classic works are: MCADAM, supra note 25 (focusing on the role of political opportunities in shaping social movements); Robert D. Benford & David A. Snow, Framing Processes and Social Movements: An Overview and Assessment, 26 ANN. REV. SOC. 611 (2000) (discussing role of grievance framing in mobilizing social movement action); John D. McCarthy & Mayer N. Zald, Resource Mobilization and Social Movements: A Partial Theory, 82 AM. J. SOC. 1212 (1977) (focusing on the role of resources and organization in shaping social movements).
By viewing progressive lawyering through the lens of social movements, this Part makes two points. First, it spotlights important continuities in movement-oriented lawyering approaches throughout progressive legal history, extending well before the seminal civil rights period—thereby tracing through a strand obscured by the standard legal liberal account. Doing so calls into question that account by repositioning legal liberalism as a result of movement success rather than a break from it. In this view, although there were lawyers who believed that courts would be the vanguard of progressive transformation, the failure of legal liberalism to achieve its most sweeping social reform aspirations was as much a product of movement decline as its cause. This leads to the second point: the current wave of movement lawyering, although resonating with models developed before and during the civil rights movement, reflects a particular response to contemporary trends in politics and the profession. Movement lawyering now represents a new phase of progressive legal development marked by collaborative relationships with mobilized social movement organizations and integrated advocacy techniques adapted to a new environment of resurgent progressive movements, pluralistic policy making, and problem-solving professionalism. Situating movement lawyering within the broader political economy of social movement activism thus highlights continuities but also critical differences. In particular, while previous progressive lawyering models played out against the backdrop of national political opportunities for reform, current approaches have developed in a context of ongoing national limits, raising issues of scale and synergy.

88. This reframing links together conversations within contemporary scholarship presenting a revisionist historical account that contests the meaning of legal liberalism. Revisionist scholarship emphasizes the deep disagreements before and after Brown over the appropriate types of substantive legal interventions (civil versus economic rights), the appropriate balance between legal and nonlegal strategies, and the amount of investment in impact litigation targeting the Supreme Court. See BROWN-NAGIN, supra note 8 (analyzing the role of movement lawyers in Atlanta from the 1940s through 1980, focusing on their differences with mainstream civil rights advocates); CARLE, supra note 8 (demonstrating how national racial justice organizations at the turn of the twentieth century initiated a range of sophisticated law-related activism that set the stage for later successes); GOLUBOFF, supra note 20 (showing how lawyers prior to Brown advanced a concept of civil rights that targeted economic as well as legal inequality); KENNETH W. MACK, REPRESENTING THE RACE: THE CREATION OF THE CIVIL RIGHTS LAWYER (2012) (providing a collective biography of African American lawyers during the period of segregation to show how their efforts in court redefined what it meant to represent the community); Mack, supra note 8 (contesting the standard legal liberal story by showing how African American lawyers in the pre-Brown era experimented with and debated multiple reform strategies in addition to impact litigation); Christopher W. Schmidt, The Sit-Ins and the State Action Doctrine, 18 WM. & MARY BILL RTS. J. 767 (2010) (analyzing interplay between sit-ins and Fourteenth Amendment jurisprudence by the Supreme Court).
A. From Progressivism to Liberalism

The coordination of legal and political strategies to advance social movements has a history that stretches far before *Brown*, revealing how movements—both with and without power—have long turned to law as a form of politics by other means. Before the Civil War, the abolition movement fought slavery where it could—promoting state-level reforms outside the South that sought to protect ex-slaves who managed to escape their masters’ clutches. Without hope for federal action, abolitionists in the early Republic retained lawyers to ensure enforcement of manumission laws, develop state-level emancipation statutes, and represent African Americans in court, working “on the margins, using loopholes, technicalities, and narrow legal opinions to liberate slaves on a case-by-case basis.” Later groups, such as the New Jersey State Anti-Slavery Society, brought test cases challenging fugitive slave laws in state supreme courts and promoted legal reform affording due process for escaped slaves.

After Reconstruction, new social movement politics emerged that profoundly shaped progressive legal advocacy. This was the Gilded Age, marked by the dominance of the trusts, soaring inequality between the new corporate rich and industrial wage earners, and the increasing clash of capital and labor. Law enabled the growth of industrial capitalism through governmental policy and the dedicated expertise of the new “corporate lawyers.” Industrial inequality was met by the rise of class-based social movements, which stood for a stronger role for government in the economy to counteract monopolies, empower workers and small

91. *Id.* at 61.
92. *See Daniel R. Ernst, Legal Positivism, Abolitionist Litigation, and the New Jersey Slave Case of 1845, in ABOLITIONISM AND AMERICAN LAW 103, 105 (John R. McKivigan ed., 1999); see also ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975) (showing how judges were complicit in legitimizing slavery by issuing legal rulings that upheld its legality out of adherence to professional role).
96. *Those at the bottom clashed with the industrialists: small farmers charged exorbitant rates by the powerful railroads; miners forced to work twelve-hour days in dangerous conditions; small companies crushed by the trusts; and industrial workers exploited by Taylorist production. See, e.g., Friedman, supra* note 94, at 254–56; CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960, at 32–95 (1985).
farmers, and ensure social welfare for the largely immigrant residents of urban slums.97

For these movements, a fundamental challenge was how to protect legislative success from Supreme Court review.98 Building on their majority position, progressive movements channeled efforts into legislative reform, first at the local level and then the federal. Beginning in the 1880s,99 the labor movement sought legislation curbing the worst abuses of industrial capitalism,100 aligning with settlement house reformers to win state laws prohibiting child labor, limiting the work day for women and workers in hazardous occupations, and banning tenement production.101 Outside of this strategy, wider legislative reforms—like the eight-hour workday and minimum wage—were repeatedly invalidated in court under the rationale of “liberty of contract,”102 which was constitutionalized in *Lochner v. New York.*103 *Lochnerism* channeled labor strategy more forcefully into collective bargaining,104 where strike and boycott activity were met with further judicial reprisal,105 this time in the form of the antilabor injunction.106 In these clashes, the labor movement confronted business-backed legal groups—such as the American Anti-Boycott Association and National Lawyers’ Committee—which sought to use litigation to challenge state-level economic regulation, battle unionism, and push back against the progressive effort to promote greater federal regulation of the economy.107 These were incipient right-wing social movements in action. In this battle, courts generally—and the Supreme Court in particular—were seen as the central antagonist of progressive reform-

98. Purcell, supra note 95, at 15.
99. The industrial labor movement began in the immediate aftermath of the Civil War and the American Federation of Labor “was formed in 1886 by craft unionists and dissenters within the Knights . . . .” Diner, supra note 94, at 19.
103. 198 U.S. 45, 61 (1905).
104. Forbath, supra note 100, at 7.
105. In the postwar period, unions had no legal status and their members were prosecuted for criminal conspiracy for “oppressing” the rights of employers. Tomlins, supra note 96, at 48 (citing Old Dominion S.S. Co. v. McKenna, 30 F. 48 (S.D.N.Y. 1887); Walker v. Cronin, 107 Mass. 555, 567–68 (1871)).
106. See, e.g., Vegelahn v. Guntner, 44 N.E. 1077, 1078 (Mass. 1896). The antilabor injunction was issued by courts on the ground of preventing labor union antitrust violations and protecting employer property rights. Forbath, supra note 100, at 66–97. They were later banned by federal statute. Id. at 147–66 (noting that the Clayton Antitrust Act of 1914 banned labor injunctions unless employers could show irreparable harm and then the Norris-LaGuardia Act of 1932 banned them outright).
ers.\textsuperscript{108} It was this core idea—opposing Gilded Age industrial capitalists while affirming the growing power of progressive social movements to mobilize democratic majorities into regulatory and social welfare legislation—that shaped the role of progressive lawyers during this period.

In the Progressive Era, social movements drew legal support from different elements of the bar. In battles over workplace organizing, the labor movement allied with the nonelite bar, securing legal representation from radical lawyers who formed the backbone of what became the National Lawyers Guild (“NLG”) in 1937.\textsuperscript{109} Groups like the National Consumers League turned to different quarters, sometimes relying on pro bono lawyers—most notably Louis Brandeis—in defending state regulation from business-led attacks.\textsuperscript{110} The famous Brandeis brief in \textit{Muller v. Oregon} showed progressive lawyering at its most self-assured:\textsuperscript{111} marshalling social science data on the negative health impacts of extreme hours on women workers to support Court deference to state employment regulation,\textsuperscript{112} it was a strong riposte to \textit{Lochner}'s judicial activism in favor of industrial elites. The Brandeis brief also expressed a progressive vision of corporate lawyer independence with Brandeis as pro bono counsel using his status to push back against the power of private corporate interests in support of public legislation.\textsuperscript{113}

The decline of \textit{Lochnerism} ushered in new roles for progressive lawyers in the New Deal administrative state. President Franklin Roosevelt’s threat to pack the Supreme Court led to the “switch in time that saved nine”—a jurisprudential shift that effectively repudiated \textit{Lochner} by upholding Washington’s minimum wage law\textsuperscript{114}—and thus paved the way for the Court to uphold key aspects of the New Deal. As part of the New Deal, progressive lawyers were called upon to use their expertise to build administrative processes that would help redress economic inequality through technocratic solutions.\textsuperscript{115} In doing so, they could (for the time being) avoid thorny questions about what affirmative role courts and lawyers should play in countermajoritarian social reform—a question to

\textsuperscript{108} Purcell supra note 95, at 14–15.

\textsuperscript{109} See History, Nat’l Law. Guild [hereinafter NLG History], https://www.nlg.org/about/history (last visited July 31, 2017). The NLG was formed in 1937 to challenge discriminatory policies by the American Bar Association, advance industrial union organizing, and support President Roosevelt’s New Deal policies. Id.


\textsuperscript{111} See generally Brief for the State of Oregon, Muller v. Oregon, 208 U.S. 412 (1908) (No. 107).


\textsuperscript{113} See Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 14 (1988) (“Lawyers were to be the guardians, in the face of threats posed by transitory political and economic powers, of the long-term values of legalism.”).

\textsuperscript{114} See W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 412 (1937).

be left to movements advancing justice for African Americans and other minorities in the postwar era.

In the area of civil liberties, the American Civil Liberties Union (“ACLU”) began in response to antiwar movement activism during World War I.\(^\text{116}\) Yet it quickly expanded to address a range of civil liberties issues around labor organizing, free speech for political dissidents, and secularism—interacting with labor and other radical movements, and using a range of tactics that included litigation, legislative advocacy, and public education.\(^\text{117}\) The NLG was also deeply influenced by antiwar activism and political dissidence—with radical lawyers mobilized in the defense of activists prosecuted for antiwar protest and affiliation with the Communist Party.\(^\text{118}\)

Yet it was the “race question” that would redefine the role of progressive lawyers in relation to countermajoritarian movements. For African Americans after the Civil War, subordination was the overwhelming and suffocating reality, codified in a total system of segregation. Courts offered little hope—but neither did legislatures. The immediate postwar decade opened a crack in the impregnable fortress of white supremacy—which was quickly filled. Building on the Reconstruction Amendments, southern blacks, one step away from slavery, aligned with radical Republicans to achieve a level of government representation that, although never complete, constituted a “stunning departure in American politics.”\(^\text{119}\) The failure of the Republicans to convert enough whites to sustain the party in the South, however, brought Reconstruction to a swift and bitter end\(^\text{120}\)—sealed with the Supreme Court’s imprimatur. Just as the Court protected property owners against the claims of workers, so too did it permit white segregationists to erect Jim Crow.\(^\text{121}\) The Court deferred to facially-neutral voting requirements (such as literacy tests and poll taxes) to exclude blacks from the franchise,\(^\text{122}\) and interpreted

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117. Id. 52–54; see also SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 54–60 (1990).

118. See NLG History, supra note 109.


120. Id. at 575, 588–95 (describing tumultuous 1877 election in which Democrat Samuel J. Tilden won the popular vote but Republican Rutherford B. Hayes claimed a controversial victory in the electoral college; explaining that in a compromise to preserve Hayes’s victory, the federal government withdrew from the South, unleashing the “Redeemer Democrats,” who quickly moved to codify pervasive segregation in all aspects of southern life, while reconstituting property rights to ensure that black farmers became locked in a sharecropping system virtually indistinguishable from indentured servitude).

121. In the first case to interpret the Fourteenth Amendment, the Court held that it protected only the narrow range of rights conferred by federal citizenship and not those given by individual states. Slaughter-House Cases, 83 U.S. 36, 80 (1872) (upholding state power to confer a private monopoly over the New Orleans slaughterhouse industry, thereby depriving butchers of the right to exercise their trade, as outside the scope of the Fourteenth Amendment). Thus, the Court signaled its disinclination to use the amendment to restrict the exercise of the state police power in relation to rights deemed to be incident to state citizenship, like education.

122. See FRIEDMAN, supra note 94, at 384–85.
the Reconstruction Amendments to apply only to “state action,” thus undercutting federal legislative efforts to bar discrimination in public accommodations and penalize lynching. It was in this context that the Court upheld racially segregated rail cars in *Plessy v. Ferguson*, concluding that “[i]f one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.”

The political and legal landscape in this “nadir period” framed the black progressive response to law. A key issue was how (and how much) to engage with the state. Early groups, like the Afro-American League, sought to combine work outside and inside the state, supporting race uplift but also engaging in law making when there were opportunities to do so. Tension over the emphasis to put on inside-versus-outside strategies precipitated the demise of important nineteenth century national racial justice organizations; yet, by the time W.E.B. DuBois split from Booker T. Washington to help form the Niagara Movement in 1905, a strategic approach to legal reform had developed targeting a “robust mix of litigation, legislation, and social welfare objectives.” African American organizations thus embraced a pragmatic approach to law that included legislative advocacy and impact litigation valued not only for its direct effects but also for its potential to produce high-profile wins that could shift public opinion. When the NAACP formed in 1909, it adopted this pragmatic approach to leverage judicial review of discriminatory laws when feasible.

The litigation campaign to attack segregated schools grew out of this vision. In pursuing $100,000 from the Garland Fund that would enable it to launch “a large-scale, widespread, dramatic campaign to give the Southern Negro his constitutional rights,” the NAACP initially stressed the pragmatic goals of litigation focused on public school equalization: to “make the cost of a dual school system so prohibitive as to speed the abolishment of segregated schools”; to “serve as examples and give courage to Negroes to bring similar actions”; and to “focus as nothing else will public attention north and south upon vicious discrimination.”

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123. See The Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (nullifying Civil Rights Act barring discrimination in public accommodations on the ground that the government did not have power under the Fourteenth Amendment to bar private discrimination); United States v. Harris 106 U.S. 629, 637 (1883) (invalidating Force Act of 1871 imposing federal penalties on local crimes, which sought to punish the KKK for murders that local officials would not prosecute).
124. 163 U.S. 537, 552 (1896).
125. CARLE, supra note 8, at 58–59 (describing a successful effort in New York after the Civil Rights Cases to pass a bill banning discrimination in insurance). Early test-case litigation resulted in a range of outcomes. See id. at 115–16, 192, 205–06 (noting success in early 1900s of Afro-American Council case challenging segregated seating in Jacksonville street cars and Niagara Movement case challenging fine for violating Virginia segregation law prohibiting black seating in first-class train).
126. Id. at 289.
127. Id.
129. Id. On a 6-5 vote by the Garland Fund, the NAACP received the grant that would shape the next twenty-five years of its litigation agenda. MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950, at 13–14 (1987).
Once funding was secured, the NAACP began to pivot away from equalizing segregated schools toward a legal strategy that would “boldly challenge the constitutional validity of segregation if and when accompanied irremediably by discrimination”—a move that created divisions within the movement, but reflected the NAACP’s pragmatic determination that a direct assault on *Plessy* held the best chance of advancing civil rights despite clear risks.

At the outset of the civil rights movement, lawyers were not single-mindedly committed to pursuing legal rights in court, but rather debated its efficacy in relation to known obstacles and the viability of other options. Richard Kluger’s story of the NAACP’s march toward *Brown* revealed a group of lawyers who recognized the difficulty of the task they confronted and the certainty of resistance to whatever legal victories they achieved. At the earliest stages of planning, there was controversy. Garland Fund board member and ACLU founder Roger Baldwin was “convinced that the legal approach would misfire ‘because the forces that keep the Negro under subjection will find some way of accomplishing their purposes law or no law.’”133 NAACP staff lawyer Nathan Margold, hired to coordinate the legal campaign after the Garland Fund money was secured, noted in his influential report proposing an attack on separate-but-equal that it would cause “intense opposition, ill-will and strife”; but he nonetheless believed that without an effort to destroy “the constitutional validity of Southern school systems as they exist and are administered at the present time, . . . we cannot proceed at all.”134 Former Howard Law School vice dean Charles Hamilton Houston, the man selected to lead the campaign, was pragmatic and politically astute. His correspondence with the central office of the NAACP showed he was focused not just on the litigation campaign, but on supporting legislation promoting economic security and outlawing lynching. In advance of the litigation, he made a documentary of black school conditions in South Carolina as evidence of the discriminatory effect of “separate but equal” to promote the campaign among blacks and whites alike. When confronted with questions about the litigation strategy’s efficacy, Houston responded shortly: “Nobody needs to explain to a Negro the difference between the law in the books and the law in action.”137

131. Worried about the impact on labor solidarity, the Garland Fund—with the NAACP’s acting secretary Walter White on its board—initially split over whether to give money to the NAACP. But White shored up support by stressing the pragmatic goals of the litigation. Tushnet, *supra* note 129, at 13–14. When the Garland funding was granted, W.E.B. DuBois objected, arguing in favor of the position he had long condemned: acceptance of segregation and the project of racial uplift. *Id.* at 8 (citing W.E.B. DuBois, *Segregation*, *Crisis*, Jan. 1934).
133. *Id.* at 132.
135. *Id.* at 162–63.
136. *Id.* at 163–65.
The NAACP, buoyed by the Garland Fund and having transitioned to black leadership, initially set its sights on equalizing resources in K-12 education and creating opportunities for university study. Building off legal work begun by lawyers outside the NAACP staff office, the organization won early victories striking down Missouri’s segregated law school and a Virginia school board’s policy of lower pay for black teachers. Each victory raised the NAACP’s profile but also highlighted problems with the equalization argument, which dragged the NAACP into complex and protracted litigation around the adequacy of separate graduate schools for blacks and the appropriateness of awarding teacher pay based on subjective criteria of “merit.” By the mid-1940s, organizational pressure was therefore building for a new win outside the framework of equalization. Justice Harlan Stone’s Footnote Four in United States v. Carolene Products, issued the same year Thurgood Marshall took over the NAACP’s legal team, signaled the Court’s receptivity to Equal Protection claims directly challenging segregation.

B. Legalism at the End of Liberalism

The NAACP’s epic legal campaign, culminating in Brown, reoriented the field of progressive legal practice. By aligning the federal courts with a countermajoritarian strategy to protect African American rights against southern Jim Crow laws, it represented a pendulum shift in political opportunity that had already begun to occur with the decline of the Lochner era and the legal validation of the New Deal. The NAACP’s victory in Brown thus underscored the consolidation and extension of the political advances made by the labor and forerunner civil rights movements before it. During the two decades that followed, the federal government, progressive foundations, and the elite bar made important investments to replicate the NAACP’s success in other areas, promoting its model of law reform through impact litigation. This was the era of legal liberalism.

By looking at this period through a social movement lens, this Section reframes legal liberalism and its aftermath in two important ways. First, it repositions legal liberalism as the culmination of the liberal political project rather than the cause of its demise. By the time legal liberalism came to full institutional fruition (with the creation of public interest law), the moment of political liberalism had already passed—its more

139. TUSHNET, supra note 129, at 88.
140. Id. at 104 (“The NAACP had not reached the Supreme Court in a segregation case since 1939. By the mid-1940s the staff understood that anything short of a major victory there would have the same effect that strategic litigation was designed to avoid: it would fritter away the NAACP’s limited resources without significantly eroding segregation.”).
141. 304 U.S. 144, 155 n.4 (1937).
142. See TUSHNET, supra note 129, at 180.
radical social change ambitions politically contained. From an organizational standpoint, resources and opportunities became misaligned because the close of the Warren Court litigation window undercut the rationale for investment in law reform. As a result, there was a period of complex adjustment, in which lawyers adapted to different possibilities for playing within the new political structure that linked litigation to other forms of advocacy, such as organizing and policy work. Over time, skill sets oriented toward impact litigation were retooled (though still maintained) in an environment of litigation constraint while a new generation of lawyers with different experiences and ideologies entered the field.

Second, this perspective reveals how progressive lawyering was shaped through interactions between social movements and lawyers located within different sectors of the bar. During the civil rights era, lawyers related extensively to social movements and engaged in movementsensitive advocacy. Although impact litigators were often attuned to how lawsuits would shape organizing—and worked hand-in-hand with organizers—there were also divisions. More radical versions of lawyering seeking broader political change continued to develop as an alternative to impact-litigation-oriented law reform, highlighting ongoing tensions between top-down and bottom-up approaches. The interaction of these approaches, shaped by fractures within progressive movements, defined the development of progressive lawyering in the post-\textit{Brown} era. As top-down investments in impact litigation became poorly adapted to the legal environment, bottom-up practice was challenged by the declining power of movements themselves. Both legal approaches were forced to change in ways that drew them closer together. As a result, the notion of public interest law spread—not just from the left to right, as in the standard story—but from nongovernmental organizations into the private sector and back. Alternative models of progressive lawyering that emerged outside the core public interest field—advanced by radical firms representing nonelites within the civil rights, environmental justice, labor, and other movements—also gained currency, visibility, and funding, which then channeled them back from the periphery into the core.

The founding of liberal public interest law reflected the shifting political opportunity that the Warren Court, and the broader liberal political project, had provided—but simultaneously signaled that project’s decline. The 1964 Civil Rights Act was a crowning legislative achievement of the civil rights movement, but it also marked the moment at which conservatives launched an explicit strategy to use race to attract white voters to the Republican party and thus reshape the southern political

\begin{itemize}
  \item \textbf{144.} \textit{See generally} \textsc{Radical Lawyers: Their Role in the Movement and the Courts} (Jonathan Black ed., 1971) [hereinafter \textsc{Radical Lawyers}].
\end{itemize}
The federal legal services program was created a decade after Brown, the same year Congress passed the Voting Rights Act and riots burned Los Angeles.\(^{146}\) When the Yale Law Journal hailed the creation of the “new public interest lawyers” in 1970,\(^{147}\) urban unrest had already rocked several other major U.S. cities, the Chicago Democratic National Convention ended in bitter protests and arrests, Martin Luther King, Jr. and Robert Kennedy had been assassinated, and the Vietnam War had divided the left and alienated the right. By 1973, when Roe v. Wade was decided,\(^{148}\) President Richard Nixon had begun his second term, and the Burger Court had already issued its ruling in Dandridge v. Williams,\(^{150}\) upholding state limits on welfare payments and effectively ending the welfare rights litigation campaign.\(^{151}\)

The creation of public interest law depended on a unique political convergence: an activist federal government built on New Deal commitments to labor rights and social welfare that fed into investments in antipoverty and civil rights programs;\(^{152}\) an activist Supreme Court willing to translate its economic liberalism into support for equality in other social spheres;\(^{153}\) and a powerful philanthropic community led by the Ford Foundation, which capitalized new organizations that populated the public interest field.\(^{154}\) Public interest law was also supported by the organized bar, which promoted the new efforts while deriving professional benefits from its association.\(^{155}\) The convergence of these forces at this particular moment represented the apex of power for the labor and civil rights movements that built the New Deal and Great Society.

Instability was thus woven into the public interest law’s institutional fabric, which depended on a fragile alliance already under assault.\(^{156}\) The Ford Foundation’s largesse was pivotal to the growth of both legal services and public interest law. Ford funded a pilot project of neighborhood-based legal services and advocated its expansion under the auspices


\(^{149}\) 410 U.S. 113 (1973).


\(^{153}\) TUSHNET, supra note 129, at 179.

\(^{154}\) See COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 40 (1976).

\(^{155}\) See STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 43 (2004).

of federal sponsorship,157 which occurred in 1965 with the creation of the Legal Services Program, whose budget quickly grew to $40 million.158 The program went on a massive hiring spree, recruiting elite law graduates through its prestigious Reginald Heber Smith Fellowship Program, established in 1967.159 Legal services lawyers deployed impact litigation in coordination with newly created back-up centers to quickly and dramatically expand the number of high-court poverty law cases.160

Fearful of subsidized competition, the organized bar’s support for the Legal Services Program was grudging but eventually forthcoming, feeding into broader professional efforts to promote the development of public interest law. In 1964, the Lawyers’ Committee for Civil Rights was created after President John F. Kennedy’s call to the private bar to help promote civil rights enforcement. In 1967, Ford gave the Lawyers’ Committee $2 million dollars to “galvanize the large law firms and the leadership of the organized bar in many of the largest cities in the country to form local committees, hire staff, work out a plan using volunteer attorneys to address urban problems, and focus legal efforts on issues of poverty and race.”161

These top-down efforts to build institutions, supported by elite investment, competed with, but did not displace, bottom-up approaches that sought stronger connections to the frontlines of movement activism. In 1964, the Lawyers Constitutional Defense Committee (a competitor to the bar-sponsored Lawyers’ Committee) was developed by the ACLU and other progressive groups (including the Congress on Racial Equality) to send lawyers to the South to protect and defend activists participating in Freedom Summer.162 Outside this structure, movement lawyers emerged to support direct action in the South, using legal precedent to authorize protest efforts, and deploying litigation as a vehicle to negotiate with cities over the terms of desegregation.163 Movement lawyering

157. From 1950 to 1960, Ford gave $420,000 to the recently established National Legal Aid and Defenders Association, which was given official status within the ABA as the voice of the legal aid community. COUNCIL FOR PUB. INTEREST LAW, supra note 154, at 41–42. In 1963, Ford’s “Gray Areas” program created a neighborhood-based legal services office in New Haven, Connecticut. Id. at 45. That same year, the Johnson Administration’s Committee on Juvenile Delinquency and Youth Crime funded Mobilization for Youth’s legal aid program, which was run by Ed Sparer. Id. at 47. Two years later, Sparer used Ford money to start the Center on Social Welfare Policy and Law at Columbia, where he launched an impact campaign to create procedural and substantive welfare rights modeled on Brown. Id. at 48. In 1966, the Center received $200,000 from the newly established federal Legal Services Program. Id.


159. Id. at 179.

160. Id. at 189 (“[From 1967–1972] 219 cases involving the rights of the poor were brought to the high court, 136 were decided on the merits, and 73 of these were won.”); see also SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 9 (1990) (“During its nine-year tenure, 1965 through 1974, the LSP sponsored 164 cases before the Supreme Court . . . . The eighty LSP cases that received plenary consideration represent 7 percent of all written opinions handed down during by the Supreme Court during this era.”).

161. COUNCIL FOR PUB. INTEREST LAW, supra note 154, at 56.


163. BROWN-NAGIN, supra note 8, at 207.
also developed in connection with the assertive legal activism of the
-growing NLG, whose small law firm members included well-known
figures such as Arthur Kinoy and William Kunstler, who rejected incre-
mentalism and aligned themselves with radical movements in the 1960s
and 1970s: the Black Panthers, the American Indian Movement, Students
for a Democratic Society, and the Weather Underground. These law-
yers deployed their skills in the service of political trials, protest support,
and other advocacy designed to build public consciousness and move-
ment power. In perhaps the most dramatic and well-known example of
the political trial, NLG lawyers representing antiwar demonstrators (the
Chicago 8) outside of the Democratic convention in 1968 used the trial to
reject “the very forms of authority upon which the legitimacy of the war
itself depended.” Other examples included the antiwar coffeehouse
movement, in which lawyers from the War Resisters League and Ameri-
can Friends distributed information about the right not to fight and re-
presented deserting soldiers in courts-martial as a tool to organize against
the war.

Mainstream public interest law was created against this backdrop
and adopted many of its tools. Indeed, there was never any clean line dis-
tinguishing mainstream public interest law from movement-oriented al-
ternatives. Many public interest lawyers invested heavily in movement
strategies during this period. Mark Tushnet’s account of the NAACP’s
campaign to end public school segregation recalls that Houston sought to
bring equalization suits in localities, in part, as a way to increase mem-
bership. Martha Davis’s history of the welfare rights movement re-
counts that the legal campaign to expand access to “special grants” for
welfare recipients in the 1960s, led by Ed Sparer’s Center on Social Wel-
fare Policy and Law, was meant to advance the organizing campaign by
George Wiley’s National Welfare Rights Organization on that issue.
Many of the “new” public interest lawyers of the 1960s and 1970s rejected a go-at-it-alone strategy focused exclusively on court-based reform.\(^{172}\) For instance, Marian Wright Edelman, reflecting on her early career at the NAACP in Mississippi, concluded: “The thing I understood after six months there was that you could file all the suits you wanted to, but unless you had a community base you weren’t going to get anywhere.”\(^{173}\) Echoing this sentiment, Gary Bellow, former deputy director of California Rural Legal Assistance, called test-case litigation “a dead end,” arguing that “‘rule’ change, without a political base to support it, just doesn’t produce any substantial result because rules are not self-executing.”\(^{174}\)

Ralph Nader’s success in publicizing auto safety concerns with his book, *Unsafe at Any Speed*, inspired a league of Nader’s Raiders, who brought research, publicity, and policy advocacy to bear on regulatory enforcement in the New Deal-era agencies that liberals argued had succumbed to industry capture.\(^{175}\) These efforts were then brought into the fold of foundation support, as were those of forerunner legal rights groups, the NAACP and ACLU. Ford grants helped to create Nader’s Public Citizen in 1971, establish the NAACP’s litigation project to abolish the death penalty, and support ACLU projects in the areas of prisoners’ rights, women’s rights, sexual privacy, and objector amnesty.\(^{176}\)

This activity was at the cusp of the public interest law movement’s explosion—but already near the end of the Rights Revolution.\(^{177}\) The Warren Court window, closed by 1969, created genuine opportunity for those membership-based groups, the NAACP and ACLU, which predated the founding of public interest law, as well as federal poverty lawyers in the Legal Services Program and public defenders empowered in the wake of *Gideon v. Wainwright*.\(^{178}\) Many of the seminal Court decisions associated with the Rights Revolution in the United States came from these groups during the Warren Court era,\(^{179}\) although the Supreme

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174. *Id.* at 1077.


176. *COUNCIL FOR PUB. INTEREST LAW*, supra note 154, at 56 (detailing federal legal services cases in the first six years after its founding).
Court expanded women’s rights through the 1970s, and lower courts generally remained more open to liberal rights claims into the 1980s as President Reagan worked to shift the federal bench in a more conservative direction.

Public interest law was thus founded at the moment when the Rights Revolution went into decline. In 1969, there were only fifteen public interest law groups in the United States with less than fifty full-time lawyers. By 1976, the Council for Public Interest Law reported that there were ninety-two nonprofit public interest law organizations, seventy-seven of which were created between 1970 and 1975. Between 1972 and 1975, with President Nixon in the White House and leaders from the Democratic establishment running the Ford Foundation, $130 million was invested in public interest law, with one-third going to the three largest groups. During this period, nearly 40% of all funding for public interest law came from foundations, the majority from Ford, which also supported clinical legal education—the academic counterpart of public interest law.

C. Conservative Contestation and Progressive Adaptation

Public interest law thus began in existential crisis: its strategic raison d’etre, impact litigation and agency enforcement, were seriously undermined; its federal funding was imperiled and foundation funding unsustainable; the social movements that had powered its rise were in retreat; and it faced a conservative counterpart, adopting the public interest law form and label, only now better positioned in the more conservative environment to take advantage of critical political assets. Taken together, these changes produced two critical shifts in the public interest law field.

182. Id. Around the same time, Handler and his colleagues’ study found eighty-six public interest law firms. JOEL F. HANDLER ET AL., THE PUBLIC INTEREST LAW INDUSTRY, IN PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 50 (Burt A. Weisbrod et al. eds., 1978). Only four existed prior to 1965, and there were only nineteen by 1969. Id. The Handler study also found that from 1972 to 1975, foundation grants constituted just over 40% of the total budget of these organizations. Id. at 54 tbl.4.4.
184. Id. at 229.
185. Id. at 229.
186. Margaret Martin Barry et al., Clinical Education for this Millennium: The Third Wave, 7 CLINICAL L. REV. 1, 12–13, 18–19 (2001).
187. For the history of this shift, see SOUTHWORTH, supra note 1, at 8–40; TELES, supra note 1, at 58–89, 220–64.
First, liberal groups had to adjust to the reality of having tooled up to invest in a political and legal regime that no longer existed. And second, they had to increasingly respond to challenges asserted by the incipient conservative public interest law movement.

The institutionalization of public interest law that developed in the first wave after *Brown* both empowered a new type of legal leadership and constrained further innovation. The organizational model of the public interest law firm, with its emphasis on the impact litigation approach pioneered by the NAACP, proved durable as the opportunity structure that enabled its creation changed. The development of the infrastructure for the field and the institutionalization of the concept of “public interest law” was thus a product of historical contingency. As circumstances changed, the firms had to adapt. And while many did, forms and strategies created for court-centered advocacy remained. In the short term, the misalignment between organizational resources and opportunity contributed to frustration on the left as investments in public interest law could not be easily modified in the changing environment. During this period, there was a phase of organizational lag, but also incipient organizational innovation as public interest lawyers, seeking to support progressive movements in retreat, continued to develop multi-faceted strategies, while also testing new private sector organizational formats.

For the main liberal public interest law organizations, conservative political change meant recalibrating the scope and nature of their litigation in the new environment. Within the first few years of public interest law’s founding, litigation was still the central activity of public interest law groups, comprising roughly three-quarters of their activity. Yet the political ambition of this litigation was already being dialed back: liberal lawyers started to craft cases for policy effect in federal circuits or states where the probability of success was high and the likelihood of Supreme Court review was low—either because of the limited geographical scope of the ruling or the ground on which the decision would be rendered. The overall mix of lawyers’ activity also reflected adaptation to changing conditions. In this regard, Handler and his colleagues’ classic early study revealed that public interest law organizations, on average, devoted 60% of their time to legal work, while focusing roughly one-quarter of their effort on legislative advocacy and research.

As politics moved further to the right, the liberal wing of public interest law continued to grow and change. By the early 1980s, a major study reported on the activities of 158 public interest law organizations (excluding legal services groups), most of which focused on liberal causes. Foundation and government funding had fallen dramatically since

189. Handler et al. *supra* note 43, at 79 tbl.4.3.
190. Handler et al., *supra* note 183, at 55 tbl.4.5. The researchers also noted that the percentage of legal work in independent public interest law firms devoted to litigation was 54%. *Id.* at 60 tbl.4.9.
191. Aron, *supra* note 181, at 25–26. The study reported that its 158 respondents constituted 71% of surveyed organizations. *Id.* at 25. The study's appendix lists all surveyed organizations, which in-
the previous decade, only partially made up by the introduction of attorney’s fees available under new civil rights statutes. While litigation and agency participation remained important, public interest groups reported having “diversified their tactics and activities.” Groups were not only expanding the scope of advocacy but were also decentralizing by focusing litigation and other strategies at the state and local level. Even within federal courts, the nature of litigation changed. For example, while the number of prison and jail conditions cases remained stable through the 1970s and 1980s, lawyers’ approach to this litigation changed from a “kitchen sink” model, which lumped together wide-ranging complaints, to more narrowly tailored challenges deemed more likely to succeed on specific points of law. In the legal services domain, lawyers emphasized the importance of connecting litigation to direct action and policy making, which they promoted in national trainings in the 1970s as “multi-forum advocacy.”

Within liberal public interest law groups, external opportunities and internal resources were at odds. Political conservatism meant less possibility for national-level legal success, and the rise of conservative legal groups meant less agenda-setting power and more playing defense. Progressive social movements (both identity-based and issue-based) used the influence they had achieved through political and judicial action in the prior period—which broke down de jure barriers to participation and created new regulatory regimes—to repurpose as political interest groups. The cycle of liberal protest had ended.

Liberal legal organizations sought to adapt by developing new tactical repertoires and ideological frames, supporting local organizing and community development as viable—even if circumscribed—interventions in a period of liberal political quiescence. Some legal services groups, caught in the unresolved tension between their individual

included a small number of known conservative organizations, such as the Pacific Legal Foundation and Southeastern Legal Foundation. Id. at 137–46.

192. Id. at 41 fig.2.4 (stating that foundation grants had fallen to 24% of the overall budget, while the share from the federal government was 18%). The average budget of public interest law organizations had dropped from $815,203 in 1975 to $776,383 in 1983. Id. at 50.

193. Id. at 41 fig.2.4 (reporting that fees accounted for 9% of overall budgets).

194. Id. at 87.

195. Id. at 93 (“There are also clusters of centers across the county and more than two dozen public interest firms which now maintain litigation and advocacy work almost entirely at the state and local level.”).


197. See The New Public Interest Lawyers, supra note 148, at 1075 & n.11.

198. The trainings were developed by Bea Moulton, who at the time was the national training director for the Legal Services Corporation, and focused on how legal services lawyers could support local direct action. Email from James V. Rowan, Professor of Law and Director of the Clinical Programs, Northeastern Law School, to Scott L. Cummings, Visiting Professor of Law, Harvard Law School (Mar. 12, 2014) (on file with author).

199. Meyer & Tarrow, supra note 22, at 26.

service roots and law reform aspirations, experimented with popular education models to rebuild movement consciousness among the disaggregated and disempowered poor, but their efforts were confined by the limits of scale. While these efforts sought to create new connections to reenergize enervated progressive movements, liberal public interest organizations were constrained in their ability to make significant change by preexisting investments in structures and values, as well as funder expectations and the commitments of the lawyers who were drawn to those places to work. This explains the essential continuity in the structure of liberal groups through the 1980s with adjustments in targets (lower-level courts, agencies, and legislatures) and tactics (more policy, education, and research).

On the conservative side, the image was reversed with the rise of various strands of conservative social movement activism that linked back to—and in many respects surpassed—their turn-of-the-century predecessors. This was a story about the changing nature of American federalism and the role of interest group politics within it. Traditionally, conservativism viewed its interests as protected through decentralized governance and judicial restraint, while liberals looked to the federal government to build power from the New Deal through the civil rights period. Yet, the political success of legal liberalism sparked new political investments in national conservative strategies, which culminated in Reagan’s 1980 election (while shifting power to Republicans in the Senate). Twelve years of Republican presidential governance ensued. The opportunity structure then changed in ways that reversed, or at least complicated, the traditional federalism paradigm. Liberal groups sought state and local routes to reform, while conservatives pursued federal legislative and (increasingly) policy change through courts.

The conservative movement created the opportunity for greater investments in legal strategies: conservative movement leaders, acknowledging the power of rights claiming (though sometimes uncomfortable with the ideological tension it created with their general disavowal of judicial activism), sought to build their own legal infrastructure on the right while undercutting that on the left. The “Powell memo,” authored

203. See SOUTHWORTH, supra note 1, at 108.
204. See Michael McCann & Jeffrey Dudas, Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, supra note 8, at 37, 41.
205. See id. at 46–47.
206. See id. at 54.
207. See SOUTHWORTH, supra note 1, at 15.
208. TELES, supra note 1, at 88.
by then Chamber of Commerce lawyer and future Supreme Court Justice Lewis Powell, explicitly acknowledged the success of liberal public interest law and the power of the courts to produce change, prompting one lawyer to later reflect that “liberal [public interest law firms] were ‘extremely successful,’ and conservatives tried to replicate that.”

First-wave conservative efforts in the 1980s, focused on creating regional groups on the model of the Pacific Legal Foundation, were limited by close alliance with corporate sponsors that undermined those groups’ claim to serve the public good. The next wave of organizations, like the Institute for Justice, publicly distanced themselves from corporate backers, realizing that by “[r]epresenting traditionally liberal clients, . . . it would be possible for conservatives to gain a hearing on a wide range of issues.” While conservatives sought to capitalize upon and change the meaning of public interest law’s dominant terms and symbols, they also embraced its tactics: deploying impact litigation in combination with an arsenal of other advocacy approaches designed to support the conservative movement’s goals. In the first wave of conservative public interest law, insiders complained that business funding constrained case selection and undermined credibility, prompting one conservative leader to urge that “funds are raised to support the cases—not vice versa. This rule is critical not only for the organization’s integrity, but also for the mission’s success.” When the first-wave alliance with local business elites failed to propel the movement forward, new groups emerged that sought to mimic liberal counterparts by defining a coherent ideological mission, severing funding from case selection, focusing on policy change through litigation, and setting their own agenda. These groups started to emphasize the art of building cases from the ground up in areas of specialization and patiently waiting for openings to change the law. As Dan Burt from the Capital Legal Foundation put it: “The policy litigators must turn from the high visibility, big press cases of the last eight years and bring repeated cases in their area of special concentration, which they are prepared to litigate and relitigate until they change the law.” Liberal groups during this period learned from conservative success that legal and political strategies were necessarily complementary and mutually reinforcing. Law had to have movements, and movements had to have law.

restrictions on legal services organizations, challenges to IOLTA programs, political interference with law school clinics, and judicial limitations on attorney’s fees).

210. SOUTHWORTH, supra note 1, at 13.
211. TELES, supra note 1, at 68–69.
212. Id. at 239.
213. See SOUTHWORTH, supra note 1, at 149–67.
214. TELES, supra note 1, at 87 (quoting Clint Bollick).
215. Id.
216. Id. at 78–79.
217. See id. at 241 (describing how the Institute for Justice, beginning in the 1990s, used a mix of tactics on cases leading to Kelo).
Cross-fertilization, however, did not simply move along a liberal to conservative spectrum. Organizational interaction also occurred within the liberal field, which contained for-profit groups that sought to reposition themselves in relation to changed funding and social movement activity. The passage of civil rights laws in the areas of employment discrimination (race, sex, age, and disability) and the availability of attorney’s fees in civil rights cases underwrote the expansion of a new wing of the plaintiff’s bar that was more firmly linked to the public interest law movement.\footnote{Stephen C. Yeazell, Brown, The Civil Rights Movement, and the Silent Litigation Revolution, 57 VAND. L. REV. 1975, 1998–2000 (2004) (linking the advent of fee-shifting statutes to the development of a plaintiff’s bar “engaged in litigation as a means of social change”).}

Old-line radical firms transitioned into new civil rights litigation boutiques, some of which came to be run by lawyers who had come out of the nonprofit public interest sector and pursued opportunities to litigate large cases nonprofit groups could not afford to take on.\footnote{See Scott L. Cummings, Privatizing Public Interest Law, 35 GEO. J. LEGAL ETHICS 1, 20–22 (2011).} In this sense, the spillover effects of social movement success in creating civil rights laws continued to shape the nature of progressive lawyering. In addition, labor law firms carried forward by the surge of labor union activism after the New Deal had to adapt to the labor movement’s decline beginning in the 1970s.\footnote{See Jennifer Gordon, Law, Lawyers, and Labor: The United Farm Workers’ Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today, 8 U. PA. J. LAB. & EMP. L. 1, 55 (2005).} They did so, in part, by investing in workplace legal strategies outside federal labor law, such as wage-and-hour and employment discrimination litigation, which brought them closer to the civil rights bar.\footnote{See id. at 62.} Because boutique private firms offered stable employment at a generally higher pay scale than the nonprofit sector, some began to attract public interest minded students and came to embrace the label.\footnote{See, e.g., BERNARD KOTEEN OFFICE OF PUB. INTEREST ADVISING AT HARVARD LAW SCH. & CTR. FOR PUB. INTEREST LAW AT COLUMBIA LAW SCH., PRIVATE PUBLIC INTEREST AND PLAINTIFFS’ FIRM GUIDE 14–65 (2013), http://hls.harvard.edu/content/uploads/2015/08/Private-Public-Interest-and- Plaintiffs-Firm-guide.pdf (listing private public interest law firms).}

As this review has suggested, these organizational shifts were part of a broader political restructuring in which the decline of progressive social movements, and the corresponding political ascendance of conservative movements, imposed constraints on progressive lawyers and legal groups. Tracing this restructuring from the highpoint of progressive political influence during the civil rights period through its nadir in the Reagan Revolution shows how the strategic and institutional development of progressive lawyering lagged behind political change: it was the political success of the labor and civil rights movements that created the judicial opportunities and legislative victories that enabled legal liberalism to develop and grow. As progressive political influence began to
wane, weakened by a complex combination of internal schisms and external opposition, public interest groups established to advance social reform through law were forced to adapt. That adaptation reflected a pendulum swing toward tactical and organizational diversity, alongside a renewed interest in building political power to counter the rise of activated conservatism.

D. Progressive Lawyering in a Pragmatic Age

By the last decade of the millennium, there had been a dramatic realignment of political governance and judicial decision making in American politics. Government regulation of the private sector and funding for social programs had declined, the federal courts had become more conservative, and the economy had become more globalized.223 For progressives, the 1990s carried forward this basic structural architecture but with some new openings for change: a divided federal government, a still-conservative judiciary, and a centrist Democratic president, whose control of the executive branch and support for economic initiatives created some legal opportunities (for example, in housing and community development), while limiting others (with the passage of welfare reform, a harsh new crime bill, and restrictions on legal services attorneys). The power of individual rights to frame injustice had been fundamentally challenged by conservatives who successfully rebranded claims to economic security and antidiscrimination as either special interest rent seeking (as in the case of the labor movement or “welfare queens”), or as incompatible with the rights of other citizens (as in the case of affirmative action trampling on the rights of meritorious whites). The age of progressive pragmatism had arrived. No longer facing the possibility of transformative programmatic change at the level of the New Deal or Great Society, progressive aspirations focused on solving more discrete social problems and playing defense—in the hopes of laying the groundwork for new forms of “extraparliamentary social motion or movements [to] bring power and pressure to bear on the prevailing status quo.”224

Lawyers confronted a changed context. Whereas commentators had long called for lawyers to focus on local enforcement of state and federal standards as a critical part of legal reform, the meaning of the “local” began to change for progressives, serving now a source of new legal norms in areas where the federal context was closed. Because traditional funders were invested in helping to maintain organizations they had started, innovation would come from outside the mainstream, supported by different pots of money than first-wave public interest law. Retrenchment and legal setbacks emerged as opportunities to mobilize new funds and energy for the losing side. Liberal and conservative organizations alike

223. See McCann & Dudas, supra note 204, at 37–49.
sought to break out of the model of one-dimensional advocacy to encompass broader problem-solving strategies that used strategic research and other advocacy efforts to affirmatively reshape the political agenda.225

For progressive lawyers to advance social change in this context, they needed to revamp old skills and build connections with resurgent social movements. Doing so would help to define a distinct approach to movement lawyering in the new millennium—one characterized by a more explicit commitment to multidimensional problem-solving strategies alongside new alignments with social movements and support for protest-oriented campaigns. This approach would build upon changes in social movement politics, funding priorities, and educational opportunities that grew out of, and reacted against, the prevailing pragmatism of the age.

The impetus to forge new linkages to social movement organizations came from outside and inside traditional liberal legal organizations, reflecting mechanisms of ongoing organizational realignment and the renewal of progressive movement activity. Externally, old social movement organizations attempted to recalibrate their approaches in a changed political and economic environment, professionalizing in ways that invited new roles for lawyers, while a fresh wave of protest-based activism emerged. A strain of death penalty abolitionism, for example, reformulated as the innocence movement to gain high-profile exonerations.226 In 2005, more aggressive organizing-centered unions broke from the traditional labor movement to form Change to Win, creating new resources for grassroots legal campaigns in support of low-wage workers.227 The human rights movement, long associated with the fight against authoritarianism abroad, redirected itself back to the United States to fight President Bush’s War on Terror and more generally reframed domestic equality struggles that had languished under the old civil rights paradigm.228 The fight for marriage equality redefined the LGBT rights movement after the HIV/AIDS crisis of the 1980s and 1990s, thrusting it into the center of debates about culture, religion, and personal freedom, while strategically reengaging courts as sites of social policy development.229 In 2006, the immigrant rights movement launched mass demonstrations around the country, signaling its new political strength (built in part on reconciliation with the labor movement), while generating resources for legal organizations to protect immigrants from labor abuse

225. TELES, supra note 1, at 262–63.
226. For analysis of the innocence movement, see BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2012); BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003).
227. See Ruth Milkman, Introduction to WORKING FOR JUSTICE, supra note 3, at 1, 17.
228. See Cynthia Soohoo, Human Rights and the Transformation of the “Civil Rights” and “Civil Liberties” Lawyer, in BRINGING HUMAN RIGHTS HOME: A HISTORY OF HUMAN RIGHTS IN THE UNITED STATES 71–104 (Cynthia Soohoo et al. eds., 2007).
229. See PINELLO, supra note 4, at 31; Cummings & NeJaime, supra note 4, at 1241.
and support those caught in the expanding criminal immigration regime.230

As the country elected a new president whose formative political experience included Alinsky-style organizing on Chicago’s South Side, there was an eruption of social movement protest that both echoed back to the more radical phase of the civil rights movement while also disrupting the more pragmatic approach of established movement organizations. Worker centers—community-based groups providing support to low-wage, mostly immigrant, workers—emerged to fill the space vacated by the traditional labor movement by combining service delivery with more activist strategies like pickets and direct actions against exploitative employers.231 In 2011, responding to the Great Recession and inspired by the Arab Spring, a collection of groups launched Occupy Wall Street—an anti-authoritarian movement that deployed Internet-based organizing and physical occupation of public space to fundamentally challenge the underpinnings of inequality in the American economy, captured in the slogan “We are the 99%.”232 Other movements made sophisticated use of social media and new technology to change the terms of debate. The “Dreamers”—undocumented youth who claimed the right to legalization—deftly fused old and new movement repertoires: occupying public offices (including the office of Arizona Senator John McCain) and engaging in hunger strikes and public protests, while also crafting powerful and expertly produced videos disseminated via YouTube, organizing protests via Facebook, and mobilizing followers on Twitter.233

Then, in August 2014, after Michael Brown—an unarmed African American man—was shot and killed by a white police officer in Ferguson, Missouri, mass protests broke out in that city, fortified by a “freedom ride” by allies from around the country.234 As #BlackLivesMatter became a call to conscience to stop police violence and “(re)build the Black liberation movement,”235 social media became a powerful tool to advance the cause: videos of police killings and other violence against African Americans went viral, sent through Twitter feeds with their own hashtags.236 As protests spread in the wake of other high-profile police killings, a spirit of dissident politics was rekindled, prompting some to

232. See Todd Gitlin, Occupy Nation: The Roots, the Spirit, and the Promise of Occupy Wall Street (2012); see also Michael L. Haber, CED After #OWS: From Community Economic Development to Anti-Authoritarian Community Counter-Institutions, 43 FORDHAM URB. L.J. 1 (2016).
herald the birth of a “new civil rights movement.” Whether this was in fact true was almost beside the point. A new wave of progressive social movement politics had resoundingly arrived—one that sought to fuse aggressive protest actions, savvy media strategy, and credible insider politics into a powerful new challenge to inequality.

It was against this backdrop that a new wave of movement lawyering began to take shape. Some organizations at the center of movement activity hired legal staff in the model of social movement in-house and outside counsel. For instance, the National Day Labor Organizing Network (“NDLON”), a coalition of organizations founded in 2001 to protect the rights of immigrants who solicited work in public spaces like street corners, established an in-house legal department to coordinate legal defense for day laborers prosecuted for violating local antisolicitation laws, while developing broader legal and policy strategies to eliminate those laws. Other movement networks developed relationships with lawyers dedicated to their cause. In the aftermath of the Ferguson protests, a group of attorneys came together to form the Black Movement-Law Project to provide “legal support to local communities throughout the country as they demonstrate against police brutality and systemic racism.” These lawyering models, embedded in movements whose very existence challenged prevailing notions of what counted as “illegal” activity (police shootings, yes; seeking work, no), necessarily combined defensive legal tactics (representing protestors and workers prosecuted for legal violations) with street-level politics, affirmative lawsuits, and policy development to assert and enact new legal norms. In so doing, lawyers used multiple advocacy tools and relied upon the expertise of community leaders and nonlawyer activists to make the public case for reform, which in turn created opportunities for additional legal challenges to underlying conditions of inequality.

New movement activism also promoted similar shifts toward broader advocacy approaches within mainstream public interest legal organizations, whose lawyers continued to be pragmatic about court-centered

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237. Id.
240. For example, one outgrowth of Black Lives Matter has been to spotlight the connection between policing strategies in low-income communities of color and local fiscal strategies for generating city revenue through the collection of fines imposed on the targets of that policing. See Frances Robles, Mistrust Lingers as Ferguson Takes New Tack on Fines, N.Y. TIMES (Sept. 12, 2014), https://www.nytimes.com/2014/09/13/us/mistrust-lingers-as-ferguson-takes-new-tack-on-fines.html (“[T]he city of Ferguson had the highest number of warrants issued in the state relative to its size. Arrest warrants are often served by municipal courts when someone fails to appear in court to pay fines for a traffic or other violation . . . ”). As attention has been drawn to the disproportionate use of fines on poor people to fund city budgets, legal groups like Equal Justice Under Law have brought lawsuits against municipalities that have succeeded in halting arrests for unpaid traffic tickets and preventing jurisdictions from imprisoning poor defendants in misdemeanor cases for not being able to afford posting bail. See Shaila Dewan, Court by Court, Lawyers Fight Policies that Fall Heavily on the Poor, N.Y. TIMES (Oct. 23, 2015), https://www.nytimes.com/2015/10/24/us/court-by-court-lawyers-fight-practices-that-punish-the-poor.html.
strategies while drawn to the dynamism of grassroots campaigns. At the beginning of the new millennium, liberal public interest organizations had survived a strong conservative challenge, which included further restrictions on federally funded legal services lawyers and attempts to limit state funding, combined with efforts to undercut the progressive advocacy work of law school clinics.241 Yet public interest law groups continued to evolve,242 supporting themselves with a more decentralized and privatized set of funders,243 while broadening the range of issues on which they worked.244 Changing politics shifted the substantive focus of public interest law groups from the first wave,245 while placing less emphasis on traditional legal work.246 With federal-court-oriented impact litigation still limited by the presence of a conservative majority on the Supreme Court, liberal organizations sought to build new types of coalitions that could promote policy reform, particularly at the local levels, where governments in the home states of many progressive groups tended to be politically sympathetic to their cause. In one study of prominent public interest groups, nearly all reported significant collaboration with grassroots organizational partners,247 on the theory that “[a]lmost never will a single organization have the capacity to achieve major policy change.”248 These groups also emphasized the strategic use of litigation to gain tactical advantage within movement campaigns and the importance of media strategies to shift public support toward their causes.249 While local efforts resulted in significant policy success in “progressive cities,”250 including important extensions of labor and immigrant rights, they were also constrained by opponents’ efforts to limit their reach on preemption grounds.251

242.  By the mid-2000s, there were approximately 1,000 nonprofit public interest law groups (including legal services organizations) on the left and right. Laura Beth Nielsen & Catherine R. Albiston, The Organization of Public Interest Practice, 1975–2004, 84 N.C. L. REV. 1591, 1605–06 (2006).
243.  State and local funding accounted for 28% of financial support for all groups in 2004, while foundation funding was down to about one-third. Id. at 1616. For the most prominent groups, individual and corporate funding was 28% and 14%, respectively, of overall budgets. Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 STAN. L. REV. 2027, 2055 (2008).
244.  The percent of single-issue groups declined from 29% to 7% between 1975 and 2004. Nielsen & Albiston, supra note 242, at 1615.
245.  Id. (reporting that the overall distribution of work in public interest law organizations shifted away from civil liberties, environmental law, consumer protection, and employment, toward more housing work and investment in issues associated with conservatism).
246.  Id. at 1611. Although the mean percentage of legal activity remained relatively constant, at around 60%, there were signs of shifts: the amount of effort devoted to research, education, and outreach increased from 14% to 19%, while there were far more groups that reported devoting less than 20% of effort to traditional legal work (from 1% in 1975, to 10% in 2004) and fewer that devoted 100% of their effort to legal work (from 3% to 1%). Id.
247.  Rhode, supra note 243, at 2064.
248.  Id. (quoting Marcia Greenberger, co-president of the National Women’s Law Center).
249.  Id. at 2064–65.
251.  See Cummings, Preemptive Strike, supra note 3, at 1117–18 (discussing the use of preemption to limit local expansion of labor protections for low-wage workers).
During this time, mainline public interest law and legal services organizations experienced an infusion of new energy and ideas, sparking innovative initiatives. Postgraduate fellowship programs emerged as an external source of funding attached to the lawyer, rather than the organization, providing a major stimulus. The key funders were the law firm of Skadden, Arps, Slate, Meagher & Flom, which started its program in 1988, and the National Association of Public Interest Law (now Equal Justice Works). These programs were bound by the political and economic interests of their patrons, particularly as Equal Justice Works moved to a law firm funding model. This meant that projects challenging corporate client practices (like those proposing lawsuits against corporate environmental, labor, or consumer violations) were off limits. But they also created new pathways into old organizations that brought opportunities for change. Because fellows developed their own projects and came with their own funding, they had more freedom of action and often used it to fashion different approaches. Although many projects reproduced traditional litigation efforts, there were high-profile examples of innovation by young lawyers whose political sophistication and internalized critiques of past strategies led them to integrate law with other modes of political action and focus on political outcomes rather than legal ones. In a campaign that came to symbolize this innovation, fellows in Los Angeles and San Francisco revealed extensive labor violations in the garment industry, and then used coordinated law and organizing strategies to galvanize an anti-sweatshop movement that ultimately succeeded in making it easier for garment workers to hold manufacturers liable for labor abuse. Campaigns like this became exemplars of successful projects, which were institutionalized around a model in which fellows combined different modes of advocacy (usually litigation, education, and policy advocacy) to achieve results. In advancing a multifaceted strategy, this new generation of lawyers deliberately sought to develop approaches that connected their legal work to the energy created by the immigrant rights, labor, and other progressive movements.

Changes in legal education also promoted these approaches by stressing problem-solving, collaboration, and holistic advocacy. Students engaged in social justice clinics at the turn of the millennium were imbued with a strong sensitivity to client and community-defined political goals. These students entered practice with a critical ethos that they

254. See id. at 116.
256. For examples of texts embodying these ideas, see generally LÓPEZ, supra note 60; Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 YALE L.J.
endeavored to implement. \(^{257}\) Some clinics experimented with movement advocacy models that reinforced the shift toward collaboration and empowerment in practice. \(^{258}\) Outside the clinics, new law school specializations developed to support public interest minded students through targeted curricular, mentoring, and career counseling resources. \(^{259}\) These programs taught students to critically evaluate the use of different “modes of advocacy”—litigation, transactional work, policy development, research, communications, education, and organizing—and helped students find a public interest path that ran through not only traditional nonprofits but also small firm practice and large firm pro bono programs. \(^{260}\) Such educational initiatives reinforced the expansion of the public interest concept across diverse organizational forms and promoted practice models connected to social movements and deploying multiple forms of advocacy to advance their goals. They prepared students for approaches to representation based on shared expertise (with organizers, policy analysts, media strategists, and finance consultants), as well as partnerships with private sector lawyers willing to play important pro bono roles, even if not fully committed to the underlying social movement cause. In this way, legal education contributed to the formation of a distinctive professional identity for progressive lawyers shaped in reaction to the critique of legal liberalism—one that stressed accountability to community, pragmatic problem-solving, and coordinated legal and political advocacy. \(^{261}\)

As a result, movement-centered lawyering models began to appear more prominently within legal education and practice. Legal educators reported offering free-standing courses examining the “ethics and efficacy of multidimensional advocacy,” \(^{262}\) as well as “integrated” clinics seek-
ing to “train social change advocates.” At the 2016 clinical law teaching conference, there were panels focused on promoting “movement lawyering in a clinical setting” and “supervising movement lawyering,” which focused on how to orient clinical casework toward social movement support and how to train clinical students to be effective social movement advocates. Scholars also sponsored a growing number of movement-themed legal conferences outside of clinical education, exploring the “present and future” of social movements, investigating what causes movement “turning points,” and analyzing “current uprisings and movements in the United States and prospects for coalition building.”

Within practice, there were signs of new investments in movement lawyering approaches. ACLU affiliates established special positions to coordinate new programs in integrated advocacy. Under this “new model,” the ACLU proposed a plan to “[a]nalyze legislation before it passes, to determine when and how it undermines constitutionally protected freedoms,” develop “legislation that supports civil liberties priorities,” carry out “aggressive, long-term strategies to address civil liberties under siege,” and “expand a powerful education program” to bolster public engagement and legislative accountability. The Center for Constitutional Rights (“CCR”) took a leadership role in promoting movement lawyering, sponsoring intensive trainings, conferences, and fellowship programs. To advance these efforts, CCR launched the Bertha Justice Institute to “build a new generation of lawyers and legal workers that have the vision, expertise and determination to create social change.” These organizational developments were complemented by


264. Movement Lawyering in a Clinical Setting, ASS’N AM. L. SCHS., EXPLORING COMMUNITY ENGAGEMENT THROUGH CLINICAL EDUCATION 21 (2016) (“This session will explore how clinics can effectively partner with community organizers advocating for political, economic, and/or social change in the communities in which clients live and work.”); Supervising Movement Lawyering, ASS’N AM. L. SCHS., EXPLORING COMMUNITY ENGAGEMENT THROUGH CLINICAL EDUCATION 32 (2016) (“In this interactive workshop, participants will explore how clinical teachers can produce more thoughtful, strategic, and resourceful allies to social movements; help law students work more effectively with community organizers and other stakeholders; and prompt law students to think critically about the power and limits of their professional role.”).


269. Id. at 3.


271. The Bertha Justice Institute, CTR. FOR CONST. RTS. (Nov. 26, 2013), https://ccrjustice.org/home/BerthaJusticeInstitute. Recent CCR events have celebrated “50 Years of Radical Lawyer since Freedom Summer,” and explored “the core strategies, tactics, and skills of movement legal
professional training programs that explored the potential and challenges of coordinating legal and political tactics. For example, the 2014 National Legal Aid and Defenders Association conference asserted as a primary goal the promotion of “aggressive multi-forum advocacy in a changing legal services delivery system.” Efforts to promote lawyers’ connections to social movements and expand multi-dimensional advocacy were being underwritten by some of the same foundations that fifty years earlier had endowed the court-centered model of public interest law to which they now reacted. In this sense, the liberal legal movement had come full circle, attempting to repower the social movements that had brought it into being a half-century ago while avoiding mistakes of the past.

IV. REDEFINING MOVEMENT LAWYERING

As the historical overview in Part III suggests, movement lawyering is both an extension of legal liberalism and a reaction to political and professional change that succeeded it. This Part shifts from past to present to explore the meaning and content of movement lawyering in contemporary progressive legal practice. What are the elements of movement lawyering that differentiate it from other models of progressive practice that have been offered in the post-civil-rights era?

This Part answers this question by introducing a definition of movement lawyering and a descriptive model that rests on two key features: the representation of mobilized clients and the use of integrated advocacy. Although both of these features resonate with movement lawyering traditions from the past, there are new points of emphasis and work.” 50 Years of Radical Lawyering Since Freedom Summer, INST. FOR JUST. & DEMOCRACY IN HAITI, http://www.ijdh.org/2014/06/events-category/50-years-of-radical-lawyering-since-freedom-summer/ (last visited Aug. 21, 2017); Movement and Community Lawyering, CTR. FOR CONST. RTS., https://ccrjustice.org/home/get-involved/events/movement-and-community-lawyering (last modified Mar. 4, 2016). For conversations with movement lawyers sponsored by the Bertha Justice Institute, see Radtalks: What Could Be Possible if the Law Really Stood for Black Lives?, 19 CUNY L. REV. 91 (2015).


274. See, e.g., National Immigration Law Center, CARNEGIE CORP. N.Y., https://www.carnegie.org/grants/grants-database/grantee/national-immigration-law-center/#!grants/grants-data base/grant/52038.0/ (listing grants to the National Immigration Law Center to advance multiple advocacy strategies around immigrant civic integration) (last visited Aug. 21, 2017); Grants Database, FORD FOUND., https://www.fordfoundation.org/work/our-grants/grants-database/ (listing $100,000 grant to the Center for Constitutional Rights for the “creative use of law as a positive force for social change” and $1,225,000 grant to Asian Americans Advancing Justice to “promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities”).
more explicit efforts to connect lawyering to social movement goals and tactics. Contemporary lawyers are thus redefining the movement model to encompass a set of concrete commitments around practical strategies to advance social movement causes and a professional ideology about the appropriate role of lawyers and law that supports those commitments.

As a definitional matter, movement lawyering is the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define. Movement lawyering is therefore a version of cause lawyering in which the cause is defined and advanced by social movement leaders and constituents in dynamic processes of grassroots organization building and community engagement. Movement lawyers are committed to the cause and may participate in its formulation and strategize about its achievement, but their role is anchored by relationships with extant organizations that have ultimate decision-making authority and a legitimate claim to represent the interests of the movement constituency. In this way, movement lawyers seek to help create, sustain, and gain advantages for social movements through their affiliation with and representation of movement organizations and their constituents, typically through the planning and execution of social movement campaigns. This conception depends on a working definition of a social movement, in which the movement itself is understood as a collective challenge to existing authority, advanced through organizational structures, that relies significantly (though not exclusively) upon “noninstitutionalized means of action” (i.e., action that occurs outside of the domain of formally sanctioned law making or dispute resolution). In this model, lawyers either collaborate with or formally represent social movement organizations in devising campaigns to challenge structural causes of inequality and subordination through collective processes of power mapping and campaign design in which movement leaders and constituents identify targets, tactics, and goals—encompassing policy development and implementation, attitudinal change, and movement building. In this way, movement campaigns always have multiple, interconnected purposes: achieving discrete policy wins, building public support, strengthening grassroots participation, and reinforcing the organizational capacity of the movement itself.

Within this framework, movement lawyers view law as a form of politics to be used strategically to advance diverse movement objectives: catalyzing direct action, imposing pressure on policy makers to change and enforce law, and equipping individuals with the power to assert

275. David A. Snow et al., Mapping the Terrain, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, supra note 25, at 3, 10 (discussing the key role of organization in social movements).
276. Id. at 6–11.
rights in their day-to-day lives. Because movements are generally characterized by collective challenges outside of institutionalized political channels, movement lawyers deploy law flexibly as part of problem-solving repertoires, in which legal “skills” are construed broadly to include litigation competencies, like brief writing and oral advocacy, but also encompass educating community members about their rights, advising and defending protestors, researching and drafting policy language, writing legal opinions to support policy positions, counseling movement organizations on legal levers that may be pulled to exert pressure on policy makers or private actors in negotiating contexts, and devising mechanisms for monitoring the enforcement of policy.

Committed to translating law on the books into change on the ground, movement lawyers plan for bureaucratic resistance and formulate plans for implementation; they anticipate countermobilization and backlash, and seek to avoid it or minimize its costs. Reaching for large-scale democratic reform, movement lawyering aspires to build more accountable and effective challenges to power. It does so by adopting a movement-centered approach to defining representational ends and means, in which ends are formed through the representation of mobilized clients and means are advanced through integrated advocacy. In this way, movement lawyering is an effort to respond to foundational concerns about lawyer accountability and legal efficacy by reframing the essential structures of legal representation (aligning with active movement stakeholders) and the strategies of legal reform (coordinating different types of legal and political advocacy).

A. Mobilized Clients

Movement lawyering is focused on supporting challenges by marginalized constituencies to change structural conditions of inequality, deepen democratic participation, and shift cultural norms. It therefore depends on lawyer accountability to mobilized clients that play a leadership role in social change campaigns. The relationship between movement lawyers and mobilized clients serves three functions. First, it associates lawyers with organized groups that have the capacity to disrupt and thereby influence politics. In this way, the movement lawyer’s decision to represent mobilized clients is, in part, a reflection of the lawyer’s commitment to a holistic strategy to influence policy and social outcomes, while building movement power. Second, because mobilized clients come to the lawyer-client relationship with structure and authority, they bring

278. For a comprehensive list of such skills, see Supervising Movement Lawyering, supra note 264, at 34 (listing skills associated with movement lawyering, which include: “integrated, multi-faceted problem-solving,” “persuasive advocacy,” “collaboration,” “cross-cultural competency,” “appreciating context,” “deep listening,” “effective communication,” “understanding bias,” and “critical self-reflection”).
the crucial ability to hold the lawyer accountable for both the construction of representational ends and decisions about strategy to best achieve those ends. Since mobilized clients are empowered, they are better positioned to resist lawyer domination. Third, and relatedly, mobilized clients serve a critical representational role for the broader movement constituency: their organizational structure is built upon a claim to legitimate authority derived from engagement with and leadership of affected constituency members.

Examples of movement lawyering in practice spotlight lawyers representing activist organizations, not the vulnerable or disorganized clients emphasized in the legal liberal model. In 2003, the City University of New York School of Law Immigrant and Refugee Rights Clinic represented a group of workers in a lawsuit against a corporate restaurant chain that had failed to pay them minimum wage and overtime. The lawsuit was coordinated with an organizing campaign targeting the restaurant chain led by the Restaurant Opportunities Center (“ROC-NY”), which was created after 9/11 to “provide support to restaurant workers displaced as a result of the World Trade Center tragedy.” ROC-NY uses a “tri-pronged model of change to build power and voice for restaurant workers”: protest-based “workplace justice campaigns,” partnerships with “high-road” employers, and “research and policy work.” In the campaign, clinic lawyers planned the litigation in connection with ROC-NY’s organizing effort to pressure the restaurant chain into prospective workplace changes. As clinic director Sameer Ashar described, by embedding the litigation in the campaign, the organizers and workers were better positioned to hold the lawyers accountable.

Other examples emphasize client-centered lawyers taking cues from organizational clients with grassroots power. For example, in Sarah London’s account of “integrative lawyering” for reproductive justice, lawyers “reach out to an organized reproductive justice group, such as California Latinas for Reproductive Justice, to determine whether and

279. Thomas M. Hilbink, You Know the Type: Categories of Cause Lawyering, 29 LAW & SOC. INQUIRY 657, 664 (2004); see also Brian Glick, Two, Three, Many Rosas! Rebellious Lawyers and Progressive Activist Organizations, 23 CLINICAL L. REV. 611 (2017).
280. See Gordon, supra note 11, at 2141 (“[L]awyers largely partner with community organizations rather than representing isolated individuals.”).
281. Ashar, supra note 8, at 1879-80.
284. Ashar, supra note 8, at 1898-1911.
285. Id. at 1918.
286. See, e.g., Gabriel Arkles et al., The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change, 8 SEATTLE J. SOC. JUST. 579, 583 (2010) (describing a model in which lawyers “take leadership from, and support the goals of, community organizing projects”); see also Anne Bloom, Practice Style and Successful Legal Mobilization, 71 LAw & CONTEMPO. PROBS. 1 (2008); Eagly, supra note 81; Rebecca A. Sharpless, More than One Lane Wide: Against Hierarchies of Helping in Progressive Legal Advocacy, 19 CLINICAL L. REV. 347 (2012).
how lawyers can play a role in helping them achieve their goals.”287 Along these lines, the Women’s Employment Rights Clinic at the Golden Gate University School of Law represented the California Domestic Worker Coalition—an organizational client with “clearly articulated goals and transparent decision making”—in a policy campaign to pass a statewide domestic worker bill of rights.288

The movement lawyer’s focus on representing mobilized clients spotlights three familiar, yet significant, issues in progressive lawyering. One is client selection. In a context of limited legal resources, movement lawyers must make choices among competing demands for their assistance. Because social movements, by definition, have conflicting interests and opposing claims to leadership and agenda-setting authority, how lawyers make client selection decisions invariably involves choosing sides in internal movement debates—implicating the very questions about accountability to broader movement constituencies that the movement lawyering model seeks to minimize. Accordingly, a movement lawyer’s choice of client is a decision freighted with political significance. It therefore puts the onus on lawyers to exercise discretion to choose which movement organizations to support based on a careful evaluation of the degree to which such organizations do, in fact, represent a constituency’s discernible point of view—so that the choice of client does not simply become a choice of representing the most established or well-funded social movement organization simply by virtue of their power or visibility in the field.

The second issue, also implicating political discretion, is the movement lawyer’s approach both to organizational counseling and to managing conflicts that might arise when representing individuals in the context of a broader movement campaign. Although traditional legal ethics treats the representation of organizations as a straightforward exercise in following the clearly defined instructions of an organization’s “duly authorized constituents,”289 scholars have persuasively shown how this view rests on the unhelpful fiction of organizational personhood that obscures underlying governance complexity and potential conflicts of interest.290 Particularly in a fluid environment of grassroots organizations with nascent or decentralized governance structures, deferring to “authorized constituents” may risk accepting the views of more empowered voices within movement conversations. In these contexts, movement lawyers must make choices about whether to take a more or less activist approach to advising organizational decision makers on how to articulate movement goals, define remedies, or shape strategy.

289. MODEL RULES OF PROF’L CONDUCT r. 1.13(a) (AM. BAR ASS’N 2016).
Scholars have also focused on the potential for conflicts that arise when movement lawyers represent individuals in order to advance broader movement objectives. The potential for conflict between client interests and commitment to the cause—what David Luban has termed the “double agent problem” in cause lawyering—occurs when the lawyer’s commitment runs simultaneously to individual clients and social movement organizations with whom the lawyer is collaborating to further a campaign. This type of conflict may occur, for example, when low-wage workers wish to settle claims of labor violations when organizers seek to keep up the pressure on an employer in order to advance an organizing campaign. Individual clients may theoretically waive such a conflict in advance—effectively agreeing to settle only on terms acceptable to the movement organization—but such waivers have been viewed skeptically by courts, particularly when they are made by less sophisticated clients who are not independently represented by counsel.

Third, the movement lawyering model’s emphasis on mobilized clients begs the question of what to do in situations of weak or even nonexistent organizational leadership. Some scholars suggest that in the absence of existing movement infrastructure, lawyers may help build community capacity in order to create the conditions for subsequent movement mobilization. In the absence of existing organizational structure, movement lawyers may also take the initiative to conduct research and initiate lawsuits challenging institutional inequality with the goal of building publicity and hence generating grassroots attention and organizational investments. The ACLU’s recent challenge to solitary confinement in New York State is a case in point. Prisoners in solitary are an unorganized and underrepresented group by virtue of their incarceration and isolation. After issuing a report in 2012 detailing the extensive and arbitrary use of extreme isolation as punishment for violation of prison rules—with more than 68,000 extreme isolation sentences issued against prisoners from 2007 to 2011—the ACLU’s New York affiliate filed a class action lawsuit against the state’s department of corrections. In conjunction with the lawsuit, the ACLU lawyers helped organize a letter writing campaign to pressure the governor to support changing prison practices while also testifying in front of the Inter-American Commission.

292. RESTATEMENT (THIRD) OF THE LAW OF LAWYERING § 122, cmt. (d) (“A client’s open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent.”).
on Human Rights and collaborating with criminal justice reformers to start a new organization, the New York Campaign for Alternatives to Confinement. Against the backdrop of this legal and political work, the state agreed to a sweeping 2015 settlement, which required it to mandate a massive reduction in the number of prisoners in solitary, a decrease in the length of solitary confinement sentences, and enhanced rehabilitative services. The lawsuit stimulated resources for community organizations to engage in ongoing implementation and to provide transitional support upon reentry, strengthening the organizational base that had been built in connection with the lawsuit itself. Although mirroring the classic lawyer-led reform campaign of legal liberalism, the ACLU’s challenge to solitary confinement suggests how such campaigns may be thoughtfully connected to movement-building activities to create opportunities for sustained political engagement by affected constituents and other stakeholders. In short, it suggests how a lawsuit might help spark a movement.

B. Integrated Advocacy

Whereas the representation of mobilized clients is at bottom a choice by the movement lawyer to advance substantive ends, integrated advocacy is about the most effective means to achieve those ends. The essential thrust of integrated advocacy is to break down divisions associated with legal liberalism—between lawyers and nonlawyers, litigation and other forms of advocacy, and courts and other spaces of law making and norm generation—toward the end of producing more democratic and sustainable social change.

This Section discusses three central features of integrated advocacy, which build on the concepts of organizational, tactical, and institutional integration. Organizationally, integrated advocacy emphasizes horizontal relations: building partnerships with social movement organizations in order to strengthen constituent control over the design and implementation of campaigns. In doing so, it seeks to create networks of lawyers and other problem-solvers—across the public and private sectors—who contribute different types of expertise and support to campaign goals. Tactically, the model stresses the contribution of legal advocacy to a comprehensive political strategy; it thus seeks to break down what proponents view as artificial distinctions between law and politics. Toward this end,


lawyers combine modes of advocacy—litigation, policy reform, transactional work, organizing support, media relations, and community education—in order to maximize political pressure and transform public opinion.299 The utility of litigation is judged relative to campaign goals. It is neither privileged nor discounted, but rather evaluated for its pragmatic impact. Finally, integrated advocacy pursues reform across institutional domains. Depending on the dictates of specific campaigns, lawyers focus efforts in and across plural law-making and norm-generating institutions (courts, legislatures, agencies, and communities) and at multiple scales (local, state, federal, and international).

These features of integrated advocacy are neither completely distinct from each other as a functional matter, nor entirely discontinuous with past movement lawyering practice. As this discussion suggests, there are ways in which each dimension of integrated advocacy is related: organizational relationships will affect tactical choices, which will in turn be shaped by the institutions sought to be influenced in a given campaign. Moreover, because progressive lawyers have long used coordinated legal and political tactics to challenge power and solve social problems, this Section presents integrated advocacy as a pragmatic approach designed to advance movement campaigns based on analysis of specific opportunities for reform in the contemporary political landscape.

1. Organizational

In addition to representing mobilized clients, movement lawyers seek to further build and deepen relationships with social movement organizations outside of direct representation in order to strengthen claims to constituent accountability. In this organizational dimension of integrated advocacy, the impulse is to push away from the legal liberal model of the heroic lawyer, toiling in isolation to craft legal theory that persuades appellate judges of a novel legal position.300 Instead, examples of integrated advocacy show lawyers embedded in thicker movement contexts, connected by different types of organizational relationships.

There are two main categories of organizational integration. One connects lawyers to nonlawyer activists and community members through horizontal relationships arrayed along a spectrum: from short-term, issue-specific campaign coalitions to long-term, multi-issue political partnerships. The other type of integration connects lawyers across organizational settings (nonprofit, private, government, and educational),

299. For an overview, see generally CHEN & CUMMINGS, supra note 116, at 201–72.
300. See Bell, supra note 35, at 491 (noting the view of an education expert who opined that “the civil rights attorney labors in a closed setting isolated from most of his clients”). Martha Davis’s account of the Center on Social Welfare Policy and Law’s welfare rights litigation under Lee Albert epitomized this model. In Davis’s terms, Albert’s “interests centered around legal principles; his ambitions involved Supreme Court arguments rather than revolution. According to Albert, ‘I believed in using lawyer’s expertise to provide a leadership role in the movement of cases through higher courts.’” DAVIS, supra note 151, at 74.
linking together those with different types of expertise and commitments to the underlying cause. In each case, the move is to decentralize (but not abandon) professional expertise—strengthening its ultimate impact by integrating other forms of organizational knowledge and power.301

Cross-disciplinary collaboration between lawyers and nonlawyers is a foundation of integrated advocacy. In this approach, lawyers build relations with nonlegal organizations to amplify their legal claims, connect to organizing campaigns, promote monitoring and compliance over time, and shift public opinion.302 Building upon the movement lawyer’s commitment to representing mobilized clients—and similarly responding to the legal liberal critiques of lawyer accountability and legal efficacy—these collaborations seek to deepen the participation of marginalized communities in movement activities and the impact of those activities over time.303

Examples of integrated advocacy from practice reveal various types of organizational collaboration, which may be roughly grouped by their duration and the issue areas around which they coalesce. In one category, movement lawyers engage in legal work in connection with coalitions of organizations that are formed for the purpose of advancing a particular policy reform or organizing goal, typically within a discrete time frame. Coalitions bring together social movement organizations to show depth and breadth of political support for an issue, combine different tactical strengths and access to institutional decision makers, and more effectively use resources and expertise.304 At times, coalitions allow constituencies that may not be aligned on every issue to come together around campaigns based on interest convergence.

One high-profile example in this regard is visible in the national effort to promote a “blue-green alliance”: a coalition of labor and environmental groups that come together intermittently and strategically to solve problems of mutual concern.305 In a prominent recent blue-green campaign, labor groups (led by the Teamsters union) and environmental groups (led by the Natural Resources Defense Council, or “NRDC”) collaborated on a decade-long effort to upgrade conditions for the roughly 16,000 truck drivers serving the ports of Los Angeles and Long Beach—together the largest port complex in the United States.306 At the outset of

301. This was a core insight of Gerald López in REBELLIOUS LAWYERING, supra note 60, at 70.
303. See Guinier & Torres, supra note 8, at 2743, 2753.
304. See, e.g., Suzanne Staggenborg, Coalition Work in the Pro-Choice Movement: Organizational and Environmental Opportunities and Obstacles, 33 SOC. PROB. 374, 375 (1986) (finding that coalitions emerged both when external opportunities “are ripe for the achievement of movement goals” and in response to a “crisis”); see also Caroline Bettinger-Lopez & Susan Sturm, International Union, U.A.W. v. Johnson Controls: The History of Litigation Alliances and Mobilization to Challenge Fetal Protection Policies, at 2–3 (Columbia Pub. Law, Research Paper No. 07-145, 2007) (arguing that, in high-stakes impact litigation, amicus brief mobilization can promote coalition-building to win legal victories, but perhaps is not as effective in producing sustainable social change as more integrated problem-solving approaches combining litigation with public education and legislative advocacy).
305. See Cummings, Preemptive Strike, supra note 3, at 1043.
306. Id. at 940–45, 980.
the campaign, most of these drivers were legally designated by trucking companies as independent contractors, which meant they were responsible for the acquisition and operating costs of their trucks and were excluded from labor protections, including the right to organize. As a result, port drivers constituted a low-wage, heavily immigrant, work force whose poverty prevented them from basic truck maintenance and upgrading—leaving them with an aging fleet that ran on diesel fuel, a known carcinogen. The goal of the campaign was to help pass a local policy that would require port trucking companies to treat their drivers as employees, rather than independent contractors (a change referred to as “employee conversion”), while purchasing new clean fuel trucks. By doing so, the campaign sought to force the companies to internalize the costs of labor and environmental compliance, and thereby provide a long-term solution to the joint problems that port trucking produced: low-wage work and environmental pollution. In 2008, the campaign succeeded in passing a local ordinance, called the Clean Truck Program, and, although the employee conversion provision was struck down in court, the overall policy was hailed for successfully reducing diesel emissions and advancing new green initiatives at both ports.

Such coalition efforts create diverse lawyering roles. Movement lawyers in coalition-based campaigns may sometimes directly represent the coalition, as in the earlier example of the Golden Gate law clinic’s representation of the California Domestic Worker Coalition to help analyze and draft the Domestic Worker Bill of Rights. At other times, though, movement lawyers may represent only one coalition member, or even none at all, and yet play active roles as co-participants with other organizational leaders in helping to design, plan, and execute campaigns. In the Los Angeles port trucking campaign, for example, an environmental justice lawyer for the NRDC—which joined the coalition to “build effective power”—served on the coalition steering committee, “where his role was to put legal issues ‘on the table’ so that coalition members could understand the ‘legal constraints’ before evaluating the policy issues.” Although technically representing the NRDC, the lawyer used his legal expertise to analyze issues from two perspectives: “trying to do what’s best for the environment [and] broader coalition, but [also] mindful of: if this ends up in the courtroom, how is this policy going to play out before a judge?”

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307. Id. at 978.
308. Id. at 980.
309. Id. at 943.
310. Id.
311. Id. at 1145.
312. That coalition included a membership organization of immigrant women (Mujeres Unidas y Activas), a domestic worker cooperative (La Colectiva), a worker center (Pilipino Workers Center), an immigrant rights group (the Coalition for Humane Immigrant Rights of Los Angeles), and a labor organizing group (People Organized to Win Employment Rights). Shah, supra note 288, at 403–04.
314. Id. at 1050.
In another example from Los Angeles, community development and labor groups formed a coalition to fight against gentrification and the displacement of low-income residents from downtown Los Angeles. The coalition—led by an affordable housing developer, an economic justice organizing group, and a community-labor organization—succeeded in negotiating the nation’s first community benefits agreements with the developer of a major sports and entertainment complex adjacent to the Los Angeles Staples Center, now known as L.A. Live.315 In that effort, a movement lawyer with his own solo practice was retained to represent one of the coalition partners.316 Although the lawyer went “out of [his] way not to have conversations with other coalition members in order to [avoid making] them [his] client,” he did play a key role in advising the negotiating team, which was comprised of leaders from the respective coalition organizations.317 In that capacity, the lawyer viewed his role as trying to “minimize the amount [his] skills were needed” and “let the organizers and the clients do most of the talking,” while catching contracting traps set by the developer and fine-tuning details of the agreement as worked out by the parties.318 Another lawyer in the campaign, who worked at an environmental justice group, viewed her role as “translator”: taking the complex legal material coming out of the developer negotiations and making it understandable for community members, while also providing crucial legal leverage in the campaign by identifying flaws in the developer’s environmental impact report.319

Unlike these coalition efforts, partnerships tend to develop between legal and nonlegal groups in the same social movement field to advance a coordinated strategy, often encompassing multiple issues over a long-term time horizon. Such partnerships rest on social movement organizational specialization, in which movement lawyering organizations build sustained relationships with policy or grassroots counterparts with which they strategize and plan over time in order to advance a suite of related political and culture-shifting goals. A prominent example came out of the LGBT rights movement, where movement lawyers in a key battleground state, California, worked closely with leaders from two organizations—Equality California, the public education and legislative advocacy arm of the LGBT movement, and the Williams Center, a research think tank based at UCLA—to develop the legal and political strategy to challenge restrictions on same-sex marriage in California and beyond.320 At key points in the campaign, movement lawyers from the ACLU, Lambda Legal, and the National Center for Lesbian Rights closely collaborated with

315. See Cummings, Mobilization Lawyering, supra note 74, at 302–335.
316. Id. at 320.
317. Scott L. Cummings, An Equal Place: Lawyers in the Movement to Transform the Los Angeles Economy, Chapter 7, Retail Workers: Negotiating Community Benefits (unpublished manuscript) (on file with author).
318. Id. at 11.
319. Id.
320. Cummings & NeJaime, supra note 4, at 1316.
Equality California and Williams Center leaders to achieve critical victories. 321 In a pivotal example, the state’s comprehensive domestic partnership law, passed in 2003, was drafted by Lambda Legal lawyers, while Equality California’s director coordinated outside pressure on key legislators and the Williams Center issued an influential report demonstrating that the law would increase state tax revenues by over $10 million per year—helping to persuade Governor Gray Davis to sign the bill into law. 322 When the San Francisco mayor’s decision to issue marriage licenses to same-sex couples the following year ended up in court, that domestic partnership law became a linchpin of the movement’s central legal argument on behalf of marriage: domestic partnership—a status that was explicitly “inferior to marriage”—was so comprehensive as to constitute “marriage in all but name,” and, thus, the move from domestic partnership to marriage should be viewed as only a “small step” for the court to take. 323

The anti-sweatshop campaign introduced in Part III provides another example of the value of organizational partnerships. There, movement lawyers from the Asian Pacific American Legal Center (“APALC”) developed strategic partnerships with policy and grassroots organizations to challenge sweatshop conditions in the Los Angeles garment industry. 324 The campaign was ignited by a historic legal victory by APALC lawyers in a case finding garment manufacturers jointly liable as employers for their contractors’ enslavement of Thai workers in an El Monte, California sweatshop. 325 The campaign focused on extending the joint liability principle of that victory to transform labor relations in the broader garment industry by holding retailers and manufacturers legally responsible for the pervasive labor violations committed through the extensive network of contract shops that actually produced garments. 326 The strategy combined impact litigation to hold individual garment companies accountable and to create precedent, a statewide legislative campaign to extend the joint liability model throughout the industry, and a grassroots organizing effort to empower workers and put pressure on companies. It was spearheaded by a carefully designed partnership between APALC lawyers and activists from two other organizations: Sweatshop Watch, established with allies from key immigrant rights and labor organizations “to be the media advocacy and public policy arm of the anti-sweatshop movement,” 327 and the Garment Worker Center, created with support from APALC, Sweatshop Watch, and other immigrant worker organizational partners to be “the Los Angeles anti-sweatshop movement’s organizing arm to target labor abuse in the garment indus-

321. See, e.g., id. at 1300.
322. Id. at 1265–67.
323. Id. at 1253, 1274, 1287.
324. Cummings, Hemmed In, supra note 3, at 39–51.
325. Id. at 20.
326. Id. at 40.
327. Id. at 43.
try—one of the first ‘multiracial, multilingual garment workers’ centers in the country.’” This trio of organizations—held together by steering committees with overlapping movement leaders—tightly coordinated various pieces of a campaign that succeeded in winning settlements from major garment companies, passing a new state law requiring companies to guarantee the unpaid wages of contract employees, and helping such employees navigate a new administrative process in the state labor commission established under the law to recover lost wages.

In addition to these inter-disciplinary organizational connections, integrated advocacy also relies upon linkages built among lawyers across legal practice sites. Professional trends toward greater specialization, the rise of organized pro bono, a well-developed plaintiff’s bar, and restrictions on funding for nongovernmental legal organizations have boosted public-private partnerships within progressive legal practice, particularly when high-stakes and expensive litigation is a salient feature of a social movement campaign. In addition, government lawyers charged with legally evaluating and defending policy may be thrust into the center of movement campaigns, working closely with movement lawyers to play key roles in advancing reforms. Law school clinics, at times more autonomous and open to experimentation, may also provide critical legal support. What is notable about these intra-professional connections is that they bring together lawyers with different experiences and commitments in the service of movement goals.

In the ports campaign discussed earlier, labor lawyers from a small private firm provided critical legal analysis in support of the coalition’s argument to policy makers that converting truck drivers from independent contractors to employees was within local government power, while the city retained big-firm lawyers from powerhouse Kaye Scholer to defend the Clean Truck Program against industry litigation once it was enacted. Government lawyers were also important gatekeepers in the Clean Truck Program’s passage: lawyers from the Los Angeles city attorney’s office and the mayor’s general counsel met with movement attorneys to solidify the legal justification for the program and draft operational language; city attorneys also worked with Kaye Scholer lawyers in defending the program, all the way through the Supreme Court.

Similarly, in the California marriage-equality campaign, movement lawyers (along with private firm pro bono counsel) joined with attorneys

328. Id. at 48.
329. Id. at 65–70.
333. Cummings, Preemptive Strike, supra note 3, at 1068, 1070, 1097.
from the San Francisco city attorney’s office—who were assigned to defend the city’s decision to issue marriage licenses to same-sex couples in 2004—to litigate the California Supreme Court case striking down California’s marriage ban. Although initially at odds over how to approach the suit, movement lawyers and city attorneys became “joined at the hip,” coordinating strategy and dividing issue areas for briefing in order to present the most effective arguments to the Court. These examples illustrate how the multi-faceted nature of movement campaigns invite, and sometimes require, legal participation by nonmovement lawyers—both in private practice and “inside the state”—to achieve ultimate success. A key skill of movement lawyers in these contexts therefore is identifying pragmatic legal partnerships, even with lawyers with whom movement advocates may not see ideologically or strategically eye-to-eye, and building relationships to maintain support for the ultimate cause or minimize the risk of a bad outcome.

Law school clinics have been important organizational partners in movement campaigns. The Immigrant Rights Clinic at the University of California, Irvine School of Law represented eighteen hotel workers denied meal and rest breaks by the Hilton Long Beach Hotel in the state labor commission process as part of a multi-year unionization campaign led by the hotel workers union, UNITE HERE Local 11. Other clinics have provided criminal defense representation in connection with movement campaigns. The Criminal Defense Clinic at the UCLA School of Law represented a Latino lunch truck vendor prosecuted for violating a local ordinance limiting the amount of time such trucks could be parked. The case grew out of an organizing campaign led by La Asociación de Loncheros L.A. Familia United de California, a network of immigrant lunch truck owners who asked the clinic “to pursue a single member’s case to test the validity of the law.” The clinic succeeded in winning the vendor’s case on appeal, in which the judge held the ordinance to be unconstitutional, permitting the vendor to receive a refund of his fines and giving the Asociación “the legal victory [it] hoped for.”

More recently, the St. Louis University Litigation Clinic gained acquittals for two protestors who were arrested on failure-to-comply charges in...
Ferguson, Missouri following the 2014 shooting of Michael Brown. These collaborations illuminate how law school clinical programs—with access to resources, control over case dockets, and incentives to participate in and thereby expose students to innovative advocacy—can serve as important organizational partners in social movement campaigns: playing the role of movement counsel as they train the next generation of movement lawyers.

2. Tactical

In addition to broadening the scope of organizational relationships in which movement lawyers participate, integrated advocacy also re-frames the work that movement lawyers do: moving from the narrow lens of technical legal skill (especially litigation) to the broader art of persuasion. Within this framework, advocacy is understood as the process of telling compelling stories to those in positions of decision-making power and the wider public. Such stories exert pressure and build support for political and cultural change. To do this, lawyers deploy different, but interrelated, modes of advocacy: litigation, but also policy advocacy, organizing support, media work, and community education. Law-Lawyers add value to movement campaigns by using their problem-solving skills to integrate these tactical modes, contributing to the construction of movement narratives that seek to shift understandings of the structural underpinnings of inequality and offer ways to address them.

Two preliminary points are important. First, it is necessary to distinguish movement goals, strategies, and tactics. Goals refer to ultimate movement objectives: for example, changing an unjust law, increasing access to services, enhancing conditions for workers within a particular industry, or changing cultural norms to promote diversity and inclusion. Strategies refer to overall plans for achieving a goal: conscious decisions made by movement actors in pursuit of an objective, encompassing a plan of action that generally targets particular decision makers, identifies resources and pressure points, and proceeds through sequential steps to-
ward the predefined goal.347 Although ideally deliberate and forward-looking, movement strategies in the real world are never neat or precise; instead, they are developed under conditions of deep uncertainty through a contest of competing views espoused by leaders with different organizational and normative perspectives.348 Nonetheless, out of the welter of intra-movement exchange, strategies develop and adapt: sometimes through structured planning and other times through more informal processes of leadership give-and-take. In contrast, tactics are the discrete means that movement actors use to advance goals pursuant to strategies. A movement’s tactical repertoire consists of activities such as public education and media relations, litigation and lobbying, and disruptive activities (for example, protests, marches, boycotts, and sit-ins). The crucial point is that, in the movement lawyering model, such tactics are deliberately coordinated by movement lawyers and other stakeholders, and executed according to an overarching strategy designed to maximize their combined power to advance the movement-defined goal. This leads to the second point, which is that, within movement campaigns, there are times when movement lawyers themselves directly implement a diverse range of tactics, while in other instances, lawyers coordinate different tactical approaches with nonlawyer allies.

As Part III described, this model of tactical integration has deep roots in the civil rights period and before. Contemporary examples of movement lawyering pick up on the theme of connecting litigation to base-building and organizing, but also move beyond it in ways that suggest a broader conception of how multi-faceted advocacy tactics might fit together and be mutually reinforcing in social movement campaigns. In contrast to earlier stories, new accounts of movement lawyering reveal a self-conscious and often explicit commitment to a social change methodology built upon sophisticated insights from social movement theory and practice. Through contextualized analyses of legal advocacy embedded within broader social movement activism, these accounts illuminate the interconnected use of tactics outside of court, as well as efforts to synchronize litigation with a comprehensive movement strategy. Overall, these stories underscore both the degree to which campaign objectives shape the range of tactics deployed and how, within a given campaign, movement lawyers attempt to deliberately think through tactical relationships in order to maximize their impact.

Recent examples of movement lawyering make a point of emphasizing the ways that lawyers mobilize law outside of courts, showing how nonlitigation modes of advocacy involve “real” lawyering that can prove valuable—and even decisive—in particular types of social movement campaigns. These stories do not present movement lawyers as operating outside of conventional legal roles, but rather portray their advocacy

347. See MEYER, supra note 25, at 82 (“A strategy is a combination of a claim (or demand), a tactic, and a site (or venue).”).
work as a movement-based application of the type of legal work that lawyers typically do for clients. From this perspective, nonlitigation advocacy is both affirmed as essential to specific campaigns and linked together in ways that reveal deliberate planning and execution.

The significance of nonlitigation tactics is perhaps most apparent in descriptions of social movement policy campaigns. Returning to the campaign to pass a Clean Truck Program at the Ports of Los Angeles and Long Beach, a critical role played by the lawyers was shepherding that policy through the complex process of administrative review. Lawyers for the environmental and labor coalition members each drafted legal opinions supporting the authority of cities to enact a law requiring trucking companies to hire employee drivers and purchase clean fuel trucks under the market participation exception to the federal preemption doctrine. Those opinions were essential documents in policy negotiations with city officials: providing legal credibility that gave officials confidence that if they spent political capital on passing the Clean Truck Program, there was a good chance it would be upheld in court. The legal opinions were used as part of an overall campaign strategy in which environmental lawyers at the NRDC wielded the threat of litigation to bring city officials to the table, labor movement leaders used their political clout to push those officials to cut a deal, and grassroots coalition partners staged public actions (which included a 100-truck caravan to the Port of Long Beach) and mobilized community members to make statements at critical public hearings.

In a related example, Jennifer Gordon describes a policy campaign by a coalition of labor and immigrant rights groups—led by the Workplace Project—to pass the 1997 New York Unpaid Wages Prohibition Act, which dramatically increased civil and criminal penalties against employers who failed to pay their workers minimum wage and overtime. Gordon’s account of the campaign stresses the strategic interrelation among the campaign’s research, lobbying, and media tactics. First, the Workplace Project’s legal clinic, which represented individual workers in wage enforcement cases in the state’s labor agency, compiled research on the labor agency’s drastic under-enforcement of valid worker claims and mistreatment of workers attempting to file cases; this research became the basis for worker affidavits used in sympathetic news reports, filed in public hearings, and presented to the state labor agency and lawmakers. Second, the coalition drafted legislative language to address the problem of under-enforcement, crafted policy arguments framed

349. Cummings, Preemptive Strike, supra note 3, at 1068–70.
350. Id. at 1155.
351. Id. at 1064–65, 1153.
353. Id. at 6–7.
around the key idea of preventing unfair competition by employers “who undercut legitimate businesses by paying less than minimum wage,” and effectively neutralized key Republican legislators hostile to the bill, garnering support from business allies unhappy about unfair competition and buoyed by the powerful voices of immigrant workers who led the lobbying sessions. Finally, the coalition developed a strong outreach and media strategy, stressing the scope of the problem and the support of the business community, which resulted in positive coverage including a lead editorial in the *New York Times*. Together, these tactics helped to gain passage of one of the nation’s strongest pro-labor bills, benefitting a largely immigrant workforce, by legislators known for their anti-labor and anti-immigrant politics.

Even in policy campaigns such as these, in which affirmative litigation is not a centerpiece, movement lawyers nonetheless must anticipate the grounds on which opponents might mount a legal challenge to movement action and seek to prospectively minimize the risk of damage to the movement’s policy goals or public position. In this sense, affirmative movement organizing and policy advocacy always operates in the shadow of potential countermovement legal mobilization to limit or reverse movement gains—and thus requires concurrent defensive worst-case-scenario planning. This was a key feature in the ports campaign for a Clean Truck Program, where policy development and drafting occurred in the shadow of the trucking industry’s threat to challenge the policy on preemption grounds. The fact that the industry challenge succeeded in striking down the critical employee conversion piece of the Los Angeles program, despite careful legal planning to avoid that precise outcome, underscores both how important prospective legal analysis is to movement policy campaigns and how uncertain predictions about judicial behavior ultimately are in the face of doctrinal ambiguity.

Defensive litigation may also be crucial in campaigns that rely on protest. In addition to defending protestors criminally charged with breaking the law, movement lawyers may be called upon to provide additional forms of legal defense. In the anti-sweatshop campaign discussed above, defensive litigation became a central part of the campaign’s culminating case: used to protect coalition members engaged in organizing against prominent Los Angeles-based garment retailer, Forever 21, accused of contracting with manufacturers that systematically violated the labor rights of cut-and-sew workers. In that campaign, Forever 21’s law firm brought suit against activists who staged coordinated boycotts against the retailer’s stores, charging the activists with “defamation, in-

354. *Id.* at 8.
355. *Id.* at 16.
356. *Id.* at 10.
terference with prospective business advantage, unfair business practices, and nuisance.”\textsuperscript{360} In response, movement lawyers from APALC enlisted the ACLU, along with private attorneys from a pro bono law firm and the NLG, to file an anti-SLAPP (“Strategic Litigation Against Public Participation”) suit, arguing that Forever 21 was violating the protestors’ free speech—and ultimately forcing the retailer to withdraw its action.\textsuperscript{361}

When affirmative litigation is a key feature of a social movement campaign, tactical integration focuses on how to link that litigation to different modes of advocacy: either surrounding the litigation with other tactics in order to strengthen its direct impact, designing the litigation to indirectly advance advocacy in other domains—or both. In so doing, movement lawyers seek both to affirm the significant power that litigation has to change institutional behavior and potentially influence public attitudes, while also responding to some of its limits.\textsuperscript{362} Movement lawyers thus remain committed to impact litigation, and believe in the value of building favorable precedent, but seek to do so in ways that are responsive to critiques of litigation and sensitive to underwrite broader mobilization efforts.

Within the integrated advocacy framework, movement lawyers recognize that there are times when claiming rights in court is essential to challenge structural injustice: litigation may produce concrete short-term benefits that improve movement constituents’ material conditions, force tangible changes in institutional behavior, or directly expand the possibility of political participation. On the front end of movement campaigns, integrated advocacy seeks to strengthen the potential for litigation to achieve these positive outcomes; on the back end, it directs attention to issues of enforcement and implementation.

At the outset of litigation, movement lawyers plan for how to fold in other modes of advocacy—especially organizing and media relations—\textsuperscript{363} to exert coordinated pressure on litigation targets as part of a broader “mobilization template.”\textsuperscript{364} The anti-sweatshop campaign offers an important case in point. There, movement lawyers from APALC, in collaboration with their policy and organizing partners, designed an impact-litigation campaign to “extend the joint employer theory developed in the Thai worker case more broadly within the industry—setting a precedent that would force other manufacturers and retailers to take seriously

\textsuperscript{360. }Id. at 55.

\textsuperscript{361. }Id.

\textsuperscript{362. }For an assessment of the enforcement value of litigation, see Joanna Schwartz, Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking, 57 UCLA L. REV. 1023 (2010).

\textsuperscript{363. }In a sign that this type of integrated strategy is catching hold within the funding world, the Skadden Foundation, which funds public interest fellowships, has organized webinars on “strategies for increasing access to the media, in order to leverage the media’s power to assist clients and draw public awareness to pressing public interest issues.” Skadden Found., The Power of the Media: How to Gain Access and Leverage It, VIMEO (Oct. 2, 2014) https://vimeo.com/skaddenarps/review/119167685/59f051e04.

\textsuperscript{364. }Cummings, Litigation at Work, supra note 3, at 1649.
their responsibility to ensure labor standards were met." The cases were carefully selected against high-profile targets engaged in egregious (but not atypical) practices in order to maximize their strategic effect. Impact cases were “coordinated with a media campaign: the filing of each suit [was] timed with a press conference and media contacts [were] used to pressure defendants to agree to worker demands.” This strategy also used protest tactics, like the Forever 21 boycott, to place additional pressure on garment companies and succeeded in winning a string of high-profile settlements for garment workers against major fashion companies including Forever 21, City Girl, BCBG, and XOXO.

A similar strategy was used by advocates at NDLON and the Mexican American Legal Defense and Education Fund (“MALDEF”), who developed a blueprint for challenging antisolicitation laws banning day laborers—most of whom were recently arrived immigrant men—from seeking work in public spaces like street corners. By the early 2000s, roughly forty cities in the greater Los Angeles area had passed such laws. “To challenge them, NDLON organized day laborers at key hiring sites into committees, on whose behalf MALDEF filed lawsuits arguing that the laws violated day laborers’ First Amendment right to seek employment.” When the lawsuits were filed, NDLON and MALDEF would “stage a public event, marching from the day labor site to city hall.” This was done to jointly advance the legal strategy (by pressuring city officials to negotiate) and the organizing strategy (by promoting worker participation). In the words of the main MALDEF lawyer in the campaign: “Working together we could accomplish the legal policy goal and NDLON could organize groups around California.” Using this model, the campaign succeeded in winning a dramatic legal victory in the Ninth Circuit Court of Appeals invalidating most of the day labor antisolicitation laws around the region. In addition to coordinating the litigation, organizing, and media efforts in specific legal challenges, movement lawyers supported the campaign by playing a range of other roles: organizing students to pose as day laborers and getting local news media to film their arrest, coordinating favorable news editorials and other media coverage, negotiating with construction retailers to set up day labor sites, testifying at city council hearings against proposed ordinances, drafting legislation, and briefing public defenders charged with representing day

366. Id.
367. Id. at 41–42, 57.
369. Id. at 1649–52.
370. Id. at 1663.
371. Id. at 1652.
372. Id.
373. Id.
374. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011) (en banc) (striking down ordinance prohibiting day laborers from soliciting work in public).
laborers prosecuted under the antisolictitation laws on the larger campaign stakes.\footnote{Cummings, \textit{Litigation at Work}, supra note 3, at 1687.}

At the back end of impact litigation campaigns, integrated advocacy seeks solutions to enforcement problems. In the anti-sweatshop campaign, the failure of garment workers to recover against employers even after winning judgments—owing in part to corporate shell games in which employers would claim to go out of business and reorganize in another guise—gave rise to more systematic enforcement efforts.\footnote{Cummings, \textit{Hemmed In}, supra note 3, at 59–61.} These included the creation of a new organization in 2007, Wage Justice, solely dedicated to using “innovative legal theories and legal tools borrowed from commercial collections law” to collect “back wages and penalties owed to low-income workers.”\footnote{\textit{Legal Strategies}, \textit{WAGE JUST.}, http://wagejustice.org/?page_id=4 (last visited Aug. 4, 2017).} Building on this effort, labor and immigrant rights groups formed the Los Angeles Coalition Against Wage Theft,\footnote{\textit{See Los Angeles Coalition Against Wage Theft, FACEBOOK, https://www.facebook.com/stopLAwagetheft?ref=br_tf (last visited Aug. 4, 2017).}} which produced groundbreaking reports documenting the extent of wage theft in Los Angeles and around the country,\footnote{\textit{ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES} (2009), http://nelp.3cdn.net/e470538ba5a7e7a46_2um688703.pdf (last visited Apr. 22, 2017); Ruth Milkman et al., \textit{Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers} (2010), http://www.labor.ucla.edu/publication/wage-theft-and-workplace-violations-in-los-angeles/; \textit{See Abby Sewell, L.A. County Sets Up Wage Enforcement Program to Police New Minimum Wage Rules}, \textit{L.A. TIMES} (Nov. 17, 2015), http://www.latimes.com/local/lanow/la-me-la-mc-in-county-wage-enforcement-20151117-story.html; David Zahniser, \textit{Will L.A. Put Money Behind Wage Theft Crackdown?}, \textit{L.A. TIMES} (June 8, 2015), http://www.latimes.com/local/cityhall/la-me-wage-theft-funding-20150608-story.html.} and helped lobby for the creation of enforcement divisions in the City and County of Los Angeles to prosecute and enforce wage theft in the region.\footnote{\textit{See Joel F. Handler, \textit{SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE} 209–22 (1978); Marc Galanter, \textit{The Radiating Effects of Courts, in EMPIRICAL THEORIES ABOUT COURTS} 117, 117–42 (Keith O. Boyum & Lynn Mather eds., 1983).} As these campaigns reveal, litigation may be designed by movement lawyers to reinforce other advocacy strategies that are either operating in parallel to the litigation or planned for the future. Litigation, in this sense, is used for its “indirect” or “radiating” effects on other types of movement work.\footnote{Grinthal, \textit{supra} note 65, at 53.} Rather than enervate movements by individualizing conflicts, integrated advocacy seeks to use rights strategically and flexibly to build collective power at the grassroots level. Michael Grinthal’s analysis of movement lawyering shows how litigation may serve as a “scaffolding” for local mobilization, describing a campaign by Christian right groups in which litigation was coordinated with local organizing to advance their goal of using public school space for religious purposes. A recent account of lawyers in the disability rights movement similarly spotlights how they have combined lower court litigation with local mobilization to produce wide-ranging settlements affecting large groups of
disabled people, thus advancing the movement’s goal of promoting social integration while avoiding the barriers erected by narrow Supreme Court rulings that restrict the reach of the Americans with Disabilities Act.383

Other portraits of movement lawyering illustrate the design of litigation campaigns to influence the policy-making process. Commentators have emphasized the potential of litigation to force decision makers to the policy-making table by invalidating existing laws and imposing costs,384 and some of the new movement lawyering stories demonstrate this dynamic. In the lunch truck campaign recounted above, for example, the criminal case was selected by the movement organization to be litigated by the UCLA clinic in order to undermine the existing municipal ordinance, freeing Asociación members to “have sufficient time for other organizational objectives, such as promoting a positive image of catering vendors, building their core leadership, and working with local stakeholders to draft truck-friendly laws.”385 Successful litigation also raises the public salience of issues, reveals significant enforcement gaps, creates models for possible statutory reform, and gives advocates credibility with lawmakers that can push long-stalled legislation forward. In the anti-sweatshop campaign, advocates had repeatedly failed, since the 1970s, to pass a statewide joint employer law holding garment companies liable for the labor violations of contractors.386 Yet, in the wake of the prominent Thai worker litigation, advocates were able to capitalize on the opportunity created by increased public attention to the issue (and state government leadership more receptive to change) to help push through a comprehensive new state law establishing that any company “engaged in garment manufacturing . . . shall guarantee payment of the applicable minimum wage and overtime compensation, as required by law, that are due” from its contractors.387

Sometimes, the interaction between litigation and policy advocacy runs in the opposite direction: with policy advocacy structured to positively influence litigation. In the California campaign for marriage equality described above, movement lawyers coordinated with the movement’s policy advocacy group, Equality California, to draft the state’s domestic partnership law in ways that were deliberately designed to strengthen the planned equal protection litigation challenge to the state’s same-sex marriage ban.388 As drafted, the domestic partnership bill granted same-sex couples the “same rights, protections, and benefits” as opposite-sex spouses and contained extensive legislative findings documenting discrimination against same-sex couples and affirming their role as good parents and caregivers.389 This language was consciously inserted

383. Waterstone et al., supra note 8, at 1338–42.
384. McCann, supra note 277, at 90.
385. Eagly, supra note 81, at 105.
386. Cummings, Hemmed In, supra note 3.
387. Id. at 46.
388. Cummings & NeJaime, supra note 4, at 1313.
389. Id. at 1267–68.
to set up a later equal protection challenge by creating, “through the legislative process[,] a body of findings and policy on same-sex couples [showing] how they are equal in every way . . . [in order to] set up suspect class arguments.”

When a frontal challenge to the same-sex marriage ban in California was successfully litigated five years later, the California Supreme Court specifically referred to the fact that same-sex couples, through domestic partnership, were already accorded the full benefits of marriage to support its holding that their exclusion from marriage could only be based on illegal animus. That decision was ultimately nullified by statewide initiative, Proposition 8, but it marked a turning point in the marriage equality movement: drawing intense national attention and reinforcing similar coordinated efforts to pass marriage and domestic partnership laws in roughly two dozen states—collectively setting the stage for the sweeping Supreme Court victory to come in Obergefell v. Hodges.

The marriage campaign also draws attention to a final dimension of integrated advocacy: the use of litigation and policy development in connection with media strategies in efforts to shape positive public opinion. Scholars have suggested that judicial decision making and policy development tends to follow changes in public opinion, citing the movement for same-sex marriage as a case in point; on this view, premature legal change at large variance with public opinion can produce backlash. As seen in the national marriage movement, however, movement advocates sought to use the pro-movement narratives developed through litigation and the legitimacy conferred by judicial and legislative acceptance of movement policy positions to shape public opinion in pro-movement directions. This approach suggests that movement advocacy to change law, at least when carefully planned and orchestrated with a thoughtful public relations campaign, can help to win hearts and minds as well.

3. Institutional

As the discussion of the relation between legal change and attitudinal change already suggests, the concept of integrated advocacy rests on a complex understanding of how law operates within different types of political and social institutions. Borrowing Susan Strum’s terms, integrated advocacy can be said to operate within a multi-level systems frame-

390. Id. at 1268.
391. Id. at 1293.
395. Although this is an empirically controversial theory, movement lawyers seem to be now poised on the cutting edge of testing it. For example, there is some recent evidence that policy change in favor of same-sex marriage, either through courts or legislatures, accelerated positive shifts in public opinion. Andrew R. Flores & Scott Barclay, Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-Sex Marriage Policy on Mass Attitudes, 69 POL. RES. Q. 43, 43–56 (2015).
work, in which actors are simultaneously situated in interconnected domains of power and normative pluralism, within which law is one tool for influencing values and behavior. In deploying integrated advocacy strategies, lawyers seek to connect change processes together within multiple domains of people’s lived experiences: some within formal law-making institutions, like courts and legislatures, and some outside, on the streets through protest or in everyday interactions at home and work. As with organizational and tactical integration, the key point about these institutional efforts from a movement lawyering perspective is that they are deliberately planned and linked.

Institutional integration draws attention to what Richard Abel calls the “spatial configuration of power”—the idea that “polities allocate power across various levels of the state hierarchy from apex to base” and that within different spatial units, there are opportunities for law to be produced and used as a tool to constrain power. What this means for movement lawyers is that planning and executing strategic campaigns requires thinking through the relationship between distinct domains of law making (for example, courts and legislatures at different levels of government), how they are influenced by extra-legal sites of norm generation (particularly social movement challenges at the grassroots level), how legal change interacts with the public’s preexisting views (potentially shaping pro-movement attitudes or causing backlash), and how legal rights are translated into legal consciousness among movement constituents (equipping them to mobilize law in their day-to-day encounters with power holders). These struggles to leverage law and norms from one institutional site to influence decision making or behavior in another occur across multiple spatial directions—bottom-up, sideways, and top-down—that are mapped out here.

Recent social movement legal scholarship has been most attuned to bottom-up norm generation, legal change, and culture-shifting projects. Scholars in this literature have focused on how social movement mobilization from below may succeed in transforming legal doctrine. In these accounts, legal change occurs after social movements at the grassroots level assert a new interpretation of a social norm, convince the public of the legitimacy of that new interpretation through sustained social struggle, and ultimately persuade courts to validate the interpretation as constitutional law. Central examples of this bottom-up dynamic, in which norms spiral up into law, include: Guinier and Torres’s account of the Montgomery Bus Boycott, in which the Montgomery Improvement Association’s courageous mobilization succeeded in breaking the city’s seg-

398. For the seminal work explicating this idea, see BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Balkin, supra note 38; Barry Friedman, Mediated Popular Constitutionalism, 101 MICH. L. REV. 2595 (2003).
regated bus system and making new law in the form of a decisive Supreme Court ruling\textsuperscript{399}; Reva Siegel’s analysis of how the debate over women’s rights, framed by the clash between Equal Rights Amendment (“ERA”) movement activists and their opponents, profoundly shaped sex discrimination doctrine\textsuperscript{400}; and William Eskridge’s comprehensive treatment of how identity-based social movements, asserting a politics of recognition, “generate constitutional facts” and spark normative contests that create new doctrinal ideas, which sometimes get adopted by the Supreme Court.\textsuperscript{401}

Although generally optimistic about the power of movements to reshape law, this new social movement scholarship also contains stories of failure. In Chris Schmidt’s account of the student sit-ins of the 1960s, it is the Supreme Court’s ultimate reluctance to legitimate civil disobedience by extending the reach of the Fourteenth Amendment to private property owners that prevented the sit-ins from dislodging the linchpin state action requirement.\textsuperscript{402} The role of movement lawyering in these campaigns is not the focal point of analysis. The stories do, however, offer practical lessons: drawing attention to the critical importance of movements naming injustice, framing normative solutions, and defending those solutions in the face of recrimination and reprisal. Movement lawyers can play crucial roles in these normative exchanges by protecting the free speech rights of movement actors, retelling and legitimizing their stories in courts and other law-making bodies, and gradually building precedent that helps influence public opinion and validate new legal principles over time.

In addition to bottom-up efforts to translate norms into law, there are \textit{sideways} strategies to import norms and legal ideas from one institutional arena to produce change in another. Human rights scholars have identified “boomerang” patterns, in which domestic activists enlist international human rights norms external to their legal system as leverage to challenge abuses by domestic power holders.\textsuperscript{403} Movement lawyering can involve similar efforts to leverage external sources of legal legitimacy to fortify movement campaigns. After 9/11, the Center for Constitutional Rights and the ACLU used human rights in multiple fora to contest the detention of so-called enemy combatants at Guantánamo Bay and in se-

\begin{itemize}
\item \textsuperscript{399} Guinier & Torres, \textit{supra} note 8, at 2777--83.
\item \textsuperscript{400} Siegel, \textit{supra} note 8, at 1366--1414.
\item \textsuperscript{401} Eskridge, \textit{supra} note 8, at 2194--2202. Sociolegal scholars have also recently focused on how bottom-up norm generation by activists ends up shaping legal doctrine. George Lovell and his colleagues recount how labor activists in Alaskan canning companies articulated a “radical egalitarian” normative worldview, in which institutional racism against Filipino workers, rather than individualized intent, resulted in their disparate treatment. The study analyzed how labor activists sought to use Title VII litigation to advance a union organizing campaign around that normative view, ultimately running into a hostile Supreme Court, whose ruling in \textit{Wards Cove v. Atonio} narrowed the doctrinal grounds for a disparate impact theory, constituting the “death throe” of progressive workers’ rights advocacy. George I. Lovell et al., \textit{Covering Legal Mobilization: A Bottom-Up Analysis of Wards Cove v. Atonio}, 41 \textit{LAW & SOC. INQUIRY} 61, 61--62 (2016).
\item \textsuperscript{402} Schmidt, \textit{supra} note 88, at 771--72.
\item \textsuperscript{403} MARGARET E. KECK & KATHRYN SIKKINK, \textit{Activists Beyond Borders: Advocacy Networks in International Politics} 12--13 (1998).
\end{itemize}
cret CIA “black sites.”404 The organizations petitioned the Inter-American Commission to determine the legal status of detainees under international law, filed amicus briefs raising international claims in the major Supreme Court cases asserting detainees’ right to habeas corpus and challenging military commissions, and filed appearances before United Nations bodies challenging the validity of secret renditions.405

Within the domestic political system, movement lawyers make similar shifts from one law-making institution to another to advance their positions: asking local jurisdictions to fix problems created by the federal system, courts to correct problems made by legislatures, and vice versa. This type of continuous jurisdictional maneuvering has defined the ports campaign in Los Angeles. There, the labor movement’s effort to devise a local strategy to require port trucking companies to convert their drivers to employees was motivated at the outset by the failure of federal labor law to protect those workers. Local policy makers, in turn, were motivated to pass a Clean Truck Program to avoid further litigation by environmental groups. When industry opponents challenged the program in court, labor activists and lawyers went to Congress to try to amend the federal law that the Ninth Circuit had held preempted the Clean Truck Program—attempting to carve out a specific exception to permit employee conversion.406 When that failed, lawyers associated with the movement represented truck drivers in the state labor commission and court to challenge trucking companies for misclassifying drivers as independent contractors, using that litigation to pressure companies to convert their drivers and accept unionization.407 As that litigation met limited success, movement leaders returned to the city to consider other legal strategies for blocking port entry for independent-contractor firms.408 The ports struggle still continues with concurrent institutional efforts moving forward: misclassification litigation in court, union organizing in the workplace, and rule-making and legislative efforts at the port and local government level.409

Finally, movement lawyering focuses on top-down efforts to bring legal rights from the legal system to the ground level where they can be understood and mobilized by affected individuals to access legal benefits, enforce legal protections, and perhaps galvanize further activism. In this role, movement lawyers seek to translate “law on the books” into “law in action,” raising the legal consciousness of movement constituents so that they can fight for their own rights and help others to do the same. Jennifer Gordon’s analysis of the Workplace Project offers a classic account of this type of movement lawyering work. In it, she recounts how the use of “rights talk” about employment protection in the center’s legal clinics

404. Cummings, Internationalization of Public Interest Law, supra note 14, at 1001–02.
405. Id.
407. Id. at 1141.
408. Id.
409. Id. at 1161.
“became a springboard that launched a vision of justice that went far beyond the law’s provisions,” spurring low-wage immigrant workers to organize collectively against employer abuse and governmental inaction.\footnote{GORDON, supra note 8, at 150.} Other scholars have similarly shown how strategies to promote rights consciousness have helped in some contexts to enhance legal enforcement in the workplace,\footnote{See, e.g., Ashar, supra note 8, at 1911--13 (discussing role of workers in asserting their rights in campaign against restaurant labor violations).} spark grassroots organizing,\footnote{See, e.g., Cummings, Hemmed In, supra note 3, at 48--51 (discussing creation of Garment Worker Center as site for rights education and worker organizing).} and promote feelings of empowerment among movement constituents.\footnote{See, e.g., Melanie Garcia, The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda, 24 GEO. J. LEGAL ETHICS 551, 565 (2011) (“[M]ovement advocacy empowers the client to begin more immediately working toward social change with other members of her community or with members of the relevant social movement.”).}

In practice, these types of legal, policy, and culture-shifting projects are dynamic and iterative: they play out over multiple cycles in complex ways that can never be fully predicted or mapped out. Integrated advocacy reframes these dynamics in affirmative terms: presenting them as empirical facts to be studied, understood, planned for, and (when things do not go as planned) revised. In contrast to the negative spiral story of legal liberalism (in which legal mobilization in court undercut political mobilization on the ground), integrated advocacy envisions a pathway for embedding change at one level that creates positive feedback loops in others: grassroots activism by movement constituents changes norms and practices, those changes shape policy reform, that reform further reinforces norm change so that the reform itself is implemented in daily life, and that implementation then strengthens the movement’s base in ways that produce new changes in a widening circle of democratic transformation.\footnote{Reflecting on the work of economic and social rights advocates in Africa, Peter Houtzanger and Lucie White posit a social change model that connects local mobilization at the grassroots level to processes of institutional change that are translated into reform in the policy arena, creating political openings that deepen local participation in a virtuous cycle. Houtzager & White, supra note 71, at 181--90.} The key is that movement lawyers may intervene at different levels to build and fortify these cycles. Their work is affirmative, prospective, and ongoing. In this regard, movement lawyers do not simply rely on virtuous cycles to emerge nor, once started, do lawyers presume that the cycles will endure. To the contrary, they presume that any struggle for political or economic redistribution is going to provoke strong countermobilization that will persist over time, with opponents seeking out the most favorable institutional levels upon which to assert opposition. Thus, rather than viewing their goal as advancing policy change that constitutes a decisive victory, movement lawyers appreciate that integrated advocacy is a repeat-player process in which success must be defended and extended over time. In this sense, the opposition itself becomes integrated into the movement lawyer’s frame of analysis.
In the end, what is most notable about integrated advocacy is what it suggests about the content and power of the movement lawyering approach to social change. Ultimately, movement lawyering is not just an empirically grounded model, but a prescriptive theory connecting legal means to social change ends. Its fundamental normative claim is that how legal advocacy is conducted affects what it may achieve. By repositioning the role of lawyers within a broader framework of social movement activism, movement lawyering holds out the promise that deepening connections—among organizations, tactics, and institutions—will ultimately yield more accountable and enduring change. Whether movement lawyering can, in fact, achieve that promise is a critical question for this generation of progressive scholars and practitioners to now confront.

V. THE MOVEMENT TURN IN PROGRESSIVE LAWYERING—WHAT IS AT STAKE?

What does the impulse to use the label movement lawyering say about the current state of progressive legal practice? How should scholars and practitioners evaluate both the process by which movement lawyers engage in advocacy and the outcomes they achieve? And what lessons does the new movement lawyering have to teach about the possibility of authentic egalitarian partnership between lawyers and members of marginalized groups in the pursuit of social transformation?

Reacting to these questions, this Part offers a set of preliminary thoughts sparked by the new movement lawyering—an agenda for further inquiry rather than a definitive analysis. It frames these thoughts by returning to the two central issues raised by critics of legal liberalism—accountability and efficacy—to which movement lawyering responds. Accountability, the idea that lawyers act in ways that closely correspond to and directly advance the interests of client and constituency, focuses on the question: who decides? As Part IV argued, movement lawyering seeks to locate decision-making power firmly in the hands of the very people whose lives social movements seek to change by representing mobilized clients and collaborating with nonlegal organizational partners. Efficacy, the idea that law can be an effective tool in changing social norms and practices, while building sustained democratic engagement, focuses on the question: what works? As Part IV suggested, movement lawyering seeks to answer this question by allocating legal resources to support groups with the power to make change, while developing strategies that leverage the comparative tactical advantages of different modes of advocacy and the comparative institutional advantages of different law-making bodies to maximum effect. This Part more deeply explores the movement lawyering response to the problems of lawyer accountability and legal efficacy, suggesting that—although movement lawyering helpfully reframes these central issues—it ultimately leaves them unresolved.
A. Accountability: Who Decides?

In general, lawyering for social movements raises questions of who drives a campaign and how it operates. In gauging accountability risks, it is important to start with precisely what legal representation looks like in movement campaigns and what types of professional values lawyers bring to bear. How do the lawyers involved in movements understand their role and how do they enact that understanding in engaging constituent members and devising legal strategy? How do lawyers structure the specific legal relationships with the constituencies they claim to represent? Are lawyers engaged in traditional models of representation or are they redefining representational structures in ways that seek to respond to the gap between their interests and those of the constituencies?

In terms of primary actors, we can think of movement lawyering as involving a range of individuals and groups, depending on the context. The lawyer-client relationship can be formed either at the initiative of the clients, who seek out lawyers in specific interest-advancing cases, or by the lawyers, who develop a plan of law reform and then seek out the cases and clients that might maximize the chance for a positive outcome. This latter, lawyer-driven approach is associated with the famous “test case” strategy pioneered by the NAACP in its desegregation campaign and adopted by other legal groups. The lawyer’s decision-making power vis-à-vis specific clients in the test case context is the central accountability concern raised by critics of legal liberalism.415

FIGURE 1: LEGAL MOBILIZATION: ACTORS AND TYPES

As Figure 1 shows, lawyering that aims to advance systemic social change (beyond resolving an individual client’s dispute) invariably involves a double representation: (1) the lawyer represents a specific client, and (2) that client is deemed to have some legitimate claim to represent a broader constituency whose interests are at stake. This may occur through: individual representation, in which the lawyer takes on the case of a client whose grievance stands in for collective grievances of a broad-
er group and whose case may be resolved in ways that fix the broader group problem or draw attention and resources to it; class representation, in which the lawyer initiates a class action to redress collective problems of a diffuse or disorganized constituency; and organizational representation, in which the lawyer represents an already-formed group in advancing a group-defined project, which could be promoting policy reform, building affordable housing in the community, or litigating a claim in which the group is deemed to have standing to represent its members (as is typical, for example, in environmental litigation).

The structure of representation in the movement lawyering context depends, in part, on the type of reform campaign. Figure 2 depicts two types of legal campaigns—one that seeks policy reform through court and the other through politics—and corresponding representational structures.

**FIGURE 2: STRUCTURE OF LEGAL REPRESENTATION BY CAMPAIGN TYPE**

Model 1 is the classic impact lawsuit in which lawyers represent clients in asking courts to enforce law against public or private actors to redress a constituent grievance. Here, the ethical concern for the lawyer relates primarily to the degree to which coordination with the outside social movement organization (“SMO”) violates the lawyer’s responsibility to advance client interests without conflicts and to avoid third-party influence. Movement lawyers have sought to use a variety of strategies to enhance the degree to which the clients’ interests correspond to the SMOs without abdicating their primary duties to the clients, most of which focus on organizing and information sharing at the outset of campaigns designed to promote interest convergence. Direct representation of an SMO in a policy reform campaign (Model 2) avoids the potential
divergence between client and SMO interests; here, it is possible for the lawyers to simultaneously adopt the movement’s cause, defined by the SMO, while maintaining a traditional professional relationship. This model, however, does not eliminate accountability concerns but rather shifts analysis to the question of how the lawyer relates to SMO representatives and how accountable those representatives are to the constituency.

As this suggests, in the double-representation format, lawyer accountability concerns tend to arise in two ways. First, the lawyer may select a client whom a substantial portion of the constituency does not accept as a legitimate stand-in for its interests. Second, even if the client is a legitimate representative, the lawyer may resolve the case on terms that present a conflict: by helping the client but not the broader constituency (e.g., by entering into a confidential settlement in which a defendant accepts no responsibility and does not agree to change behavior) or by persuading the client to accept a position that the lawyer believes to be in the constituency’s best interest, even if it conflicts with what the client may want (e.g., by rejecting a settlement in the hope of getting a favorable ruling on the merits that sets precedent).

How to address these concerns has been a question at the center of progressive legal debate since legal liberalism. Scholars have proposed a range of solutions. To address the first problem of client selection, some have argued for a constituency referendum on important collective issues that authorizes lawyers to pursue cases to advance those issues upon which there is substantial agreement. Others have suggested that sustained community engagement by lawyers may help guide them in choosing which clients to represent.

With respect to the second problem of how to resolve conflict between the interests of client and constituency during the course of representation, approaches have ranged from client-centered or facilitative approaches, which counsel for strong lawyer deference to the client irrespective of the lawyer’s own view or those of other stakeholders; to middle-ground alliance or collaborative approaches, in which the lawyer’s active, long-term political and dialogic relationships with the client community give her standing to make discretionary judgments in client matters about how to balance client and constituent concerns; to more

418. Richard D. Marsico, Working for Social Change and Preserving Client Autonomy: Is There a Role for “Facilitative” Lawyering?, 1 CLINICAL L. REV. 639, 659 (1995) (“[R]ather than playing the role of organizer or consciousness-raiser, the facilitative lawyer steps back, does not become deeply involved in the client’s full range of activities, and instead seeks to provide the technical legal advice and assistance the client seeks.”).
419. See Michael R. Diamond, Community Lawyering: Revisiting the Old Neighborhood, 32 COLUM. HUM. RTS. L. REV. 67, 102 (2000) (“[U]nder appropriate circumstances, my own strengths,
assertive justice-based approaches, in which constituent interests are viewed as indeterminate and conflictual, and thus the lawyer— who must inevitably exercise discretion based on her own values—is empowered to make decisions in ways that advance her best judgment about what justice requires.420

Movement lawyering weighs into this debate. It responds to the accountability concerns in the double-representation format by situating lawyers in thick movement contexts in which other stakeholders influence their decisions about who to represent and how to do so, and then emphasizing lawyering for mobilized clients that have the power and authority to hold lawyers to account. In this way, movement lawyers seek to address the double-representation problem in the social movement context by representing clients that, in turn, legitimately represent the movement’s constituency. As the examples in Part IV revealed, lawyers do so by representing a movement organization directly, representing an individual at the direction of a movement organization (or coalition) to advance the movement’s goals, or initiating a class action as part of a strategy designed in conjunction with movement organizations. In each case, lawyers are accountable to “a movement, not a class.”421 Movement lawyering thereby asserts a strong version of lawyer accountability by shifting the perspective from legal liberal lawyers representing vulnerable individuals or diffuse classes to movement lawyers representing mobilized organizations.422

Yet this framing of the accountability issue raises substantial questions at the core of progressive lawyering theory to which movement scholars have paid insufficient attention. What does it mean to represent a movement? Who has organizational or individual standing to legitimately speak on a movement’s behalf? How do lawyers select among conflicting movement viewpoints about goals and strategies? And what happens when there is only a weak or even non-existent movement infrastructure?423 Taking these questions as a point of departure, the remainder of this Section offers observations about the deeper accountability challenges of movement lawyering and how scholars and practitioners might think about them going forward.

One observation, raised in Part IV’s discussion of mobilized clients, relates to the exercise of political judgment by lawyers in their represen-


421. Guinier & Torres, supra note 8, at 2782.

422. Cf. Simon, Pragmatist Challenge, supra note 35, at 162 (“[Legal liberalism] leaves the client vulnerable to the lawyer.”).

423. Sometimes organizational representation is not attainable since there are many instances in which movements are not mobilized yet social wrongs persist that could be addressed by law. Martha R. Mahoney, “Democracy Begins at Home”— Notes from the Grassroots on Inequality, Voters, and Lawyers, 63 MIAMI L. REV. 1 (2008) (detailing the role of lawyers in advancing the right to vote in the absence of political participation and grassroots organization).
tional choices. A key point about the new movement lawyering literature is that it is oriented around a strong version of lawyer deference to autonomous clients. Movement lawyers are presented following the instructions of social movement organizational clients and answering to organizational allies for decisions about which clients to represent and how. In this way, the literature emphasizes the key point that lawyers are not placing their own conceptions of the “public interest” above the client’s interests, but rather are rigorously client-centered. This client-centered approach then meshes with aspirations of political transformation by identifying the client with social movement power. In this way, movement lawyering proposes to combine conventional norms of lawyer deference with ambitious progressive social change—simultaneously avoiding the critique of legal liberalism (not enough lawyer deference) and the critique of client-centered lawyering (not enough ambitious progressive social change).

Yet it is not clear how well movement lawyering ultimately resolves this dilemma both because, as discussed above, the representation of organizational clients raises its own concerns about lawyer influence, agenda setting, and preferring some group interests over others, and because movement lawyers are not accountable for the choice of who to represent in the first instance. This representational ambiguity emerges from the essential ambiguity of a social movement.

The definition of “social movements” is an issue around which there has been much debate within sociology. Social movement scholars generally agree that a movement is typically associated with collective grievances shared by a constituency of “low status or socially marginal citizens”; an organizational structure through which those grievances are expressed and constituent participation mobilized; and the use of insurgent or noninstitutionalized political tactics, like protest and other direct action, that operate outside of, disrupt, and thus put pressure on power holders. Scholars greatly diverge, however, on what each element looks like in practical terms and the degree to which each must be present. The boundaries of movements are porous and contested, and there is particular disagreement about the role of organizations within movements. Resource mobilization theorists view organizational structures as essential to overcoming movement collective action problems. In contrast, political process theorists tend to view organization more skeptically as necessary to initiate direct action, but prone to become ossified, hierarchical, and oriented around organizational maintenance rather than political mobilization. In general, scholars have described movements as at-

425. Id.
426. McCarthy & Zald, supra note 87, at 1218.
427. Frances Fox Piven & Richard A. Cloward, Poor People’s Movements: Why They Succeed, How They Fail xxi (1977) (“Organizations endure . . . by abandoning their oppositional politics.”).
tempting to balance commitments to “participatory democracy” with the need for structure and leadership to frame issues, plan strategy, and minimize internal conflict.428 Within this complex and fluid milieu are organizations with different degrees of funding, participation, and formality (some that are more professionalized and others more grassroots), which are associated with different ideological positions within movements, running from conservative to mainstream to radical.

Movement lawyers intervene in this complex environment, navigating significant representational challenges in contexts in which decision making is diffuse and contested. Collective action is messy precisely because the interests of group members inevitably conflict.429 Work on behalf of coalitions may give lawyers more claim to “represent the movement,” yet coalitions comprised of multiple organizations with different levels of power and resources can submerge internal schisms and sometimes may even give an air of legitimacy to groups that do not genuinely reflect the range of constituent interests. Lawyers who work within coalitions, serving on leadership committees without representing the coalition as a whole, necessarily influence decision making based on their own values or those of movement organizations with which the lawyers are most closely aligned.

The key point is, given the organizational diversity and conflict that defines social movement environments, lawyers must make political choices about which groups to represent, or which interests within complex organizations to support, and such political choices ultimately require taking sides. Whether such side-taking is more or less fraught than in other situations in which progressive lawyers intervene to advance change—such as class representation—is a deeply complicated, context-specific issue that invites greater empirical attention.

This picture of organizational complexity challenges the common framing of movement lawyering, in which clients are depicted as finite organizations having coherent interests that can be communicated to lawyers in determinate ways. As Tomiko Brown-Nagin puts it, to be most effective in pursuing transformative social change goals, “movements approach law and lawyers deliberately and strategically, if at all.”430 Yet, in positing movement clients with discernible interests that can be “deliberately and strategically” communicated to lawyers, the literature may overstate the organizational representativeness and autonomy of particular movement groups and understate the element of lawyer discretion in selecting and shaping them. It seems completely fair to say that specific movement organizations approach lawyers deliberately and strategically. That, however, begs the question of which interests such organizations advance and how representative they are. Also, as

428. STAGGENBORG, supra note 26, at 36.
429. “Poor people are not more likely than non-poor people to have consensus about their interests.” Simon, Dark Secret, supra note 30, at 1107.
Brown shows, there are times when precisely because of the lack of favorable conditions for political mobilization, legal advocacy may precede—and even help spark—social movement activism. The NAACP’s Charles Hamilton Houston and Thurgood Marshall were courageous movement lawyers by all accounts, but their legal challenge to Plessy did more to galvanize organizational development in the civil rights movement than respond to it.

Because lawyers in social movements have to exercise political judgment in choosing sides in contentious intra-movement debates, it can be difficult to differentiate movement from nonmovement lawyers in contexts of political conflict, where it is tempting to identify the “movement lawyer” with the lawyer for the movement interests with which one feels politically sympathetic. In this sense, labeling someone a “movement lawyer”—and casting others outside that category—may be more a political judgment than a professional one. Thus, when scholars criticize lawyers for lacking accountability to movements, they may actually be suggesting that those lawyers have chosen to represent the wrong side in intra-movement disputes. In this way, scholars may conflate first-order representational problems of lawyer accountability to clients (does the lawyer serve the client’s best interests?) with second-order representational problems of organizational accountability to the broader movement constituency (does the client serve the movement’s best interests?).

In the end, the debate over movement lawyer accountability is ultimately one over who should author social change and how. Within this debate, although it makes sense to judge lawyers for their political choices about where to locate themselves within movements and to compare those choices to similar ones by nonlawyer activists, it may be less true to the complex reality of social movements to suggest that some of those choices “count” as movement lawyering more than others. The ultimate question is to whom lawyers are accountable within movements rather than whether they are so. This is true even when lawyers represent movement organizations since their choice of which organization to represent, and which interests within organizations to support, are political choices to be evaluated on their own merits.

So too should lawyers be judged for the other ways that they shape the nature of social movement politics, both deliberately and unintentionally. Lawyers’ conscious political actions range from deciding to help certain individuals to start organizations when none exist to allocating scarce professional resources to particular movement legal cases over others. Even without deliberate intent, decisions to litigate certain issues by lawyers may raise the salience of those issues in ways that divert resources away from more radical elements. How we evaluate these lawyering choices depends on how accountable the choices are to movement

431. Leachman, supra note 8, at 1673.
interests—but also on whether we think the substantive goals are good and the means well-suited to advance them.

One may therefore think of movement lawyering as a perspective that reframes, but does not fundamentally resolve, enduring questions about professional role. Thus, even as lawyers seek to integrate their tactics into broader movement strategy, they invariably confront conflicts of interest that raise concerns about the legitimacy of their efforts. Jules Lobel’s description of lawyers who use “courts as a forum for protest” highlights this problem.432 As he notes, in the movement lawyering context, “[t]he legal struggle is . . . a part of a broader political campaign, not the engine of change itself . . . .” But the process of using court cases to “further a public dialogue or a political movement” “radically redefines the role of the lawyer,” who “does not act as the neutral detached advocate posited by the traditional model, nor even the less detached, elite, sympathetic and empathetic legal expert of the law reform model.”433 Rather, movement lawyers must build their case based on “broad moral and political themes,” looking at “the interaction between the litigation and the broader interests of their clients and the movements they represent,” thus creating “the potential to come into conflict with the needs and interest of the individual clients . . . .”434

Perhaps movement lawyers manage this conflict in more legitimate ways than the legal liberal lawyers that Bell charged with “serving two masters” by anchoring decision making in well-defined movement interests. However, knowing whether this is so requires understanding who gets to define the movement’s interests and how they relate to the interests of clients standing in to represent the movement in a particular case. Claiming the legitimacy of movement lawyering by asserting the legitimacy of movement goals begs key questions: which movement organizations and leaders are empowered to set the movement’s agenda, how inclusive is the agenda-setting process, how strong and widespread are dissenting views, and how well-informed and committed are clients recruited to be involved in movement-centered cases. The accountability problem in movement lawyering thus presents itself in a different guise—not to be easily evaded.

B. Efficacy: What Works?

As the discussion above suggests, assessing the efficacy of law as a social movement tool involves judging whether the means used achieved the end defined. How one measures success turns on the criteria used for evaluation. Those criteria relate to the nature of the particular goal pursued: for example, changing law on the books, promoting enforcement of a law that redistributes material resources or political power, changing

433. Id. at 480, 530, 546.
434. Id. at 548, 550, 555.
attitudes and behaviors in ways that enhance feelings of belonging or participation, or building community and solidarity with a particular group. The criteria for evaluating success also relate to the *scope and ambition of the particular goal selected*: does the goal reflect an incremental change or a radical one, does it require modest adjustments within the system as it exists or significant modifications to the system’s basic architecture, does it ask for an extension of widely held values or does it demand a dramatic change of values? How one thinks about these criteria shapes evaluation of strategy—the means deployed to achieve the social change goal. Strategic decisions rarely, if ever, turn on whether to pursue *either* law or politics, but rather in a given context, the question is what mix of legal and political mobilization makes sense, in what order, and to what effect. Judging these types of strategic decisions also involves deciding on a perspective for evaluation. Should evaluation proceed from some objective reference point, from the political perspective of the person doing the evaluation, from the point of view of the advocates who devise strategy, or from the vantage point of those whose lives are ultimately affected?

The social movement turn in progressive lawyering reflects a set of ideas, some explicit and some not, about how legal means impact political ends. This Section concludes by reflecting on some of these ideas, knitting together insights raised throughout the Article to help start a productive discussion about what movement lawyering promises and what it can achieve.

First, starting with a consideration of *ends*, it is useful to think about the basic political tilt of contemporary movement lawyering in relation to substantive policy objectives as well as goals of constituent activation and political participation. The historical analysis presented in Part III underscored the important role of the broader structure of political opportunity in shaping the aims of progressive legal advocacy. Pre-New Deal progressive lawyering was structured in part by the hostility of the Supreme Court to economic regulation and sought to keep the Court out of majoritarian policy making.435 Civil rights lawyering in the postwar era took the opposite tack, enlisting the Court to reverse the majoritarianism of Southern Jim Crow.436 Radical lawyers and scholars reacting to the legal liberal approach associated with civil rights lawyering rejected its claimed incrementalism in favor of fundamental systemic restructuring—more democratic socialism and less liberal individualism.437 The rise of the conservative movement challenged this aspiration and unraveled many of the policy achievements that the New Deal-Civil Rights coalition had achieved.438

436. *Id.*
437. *Id.*
438. *Id.*
From the most macro-level point of view, one can see in the new movement lawyering literature some element of recovering aspects of what was lost with the decline of political liberalism, combined with continued efforts to deepen that liberalism in ways that are more directly responsive to those most marginalized by entrenched structures of subordination and inequality. Thus, at one level, the stories of movement lawyering recounted in Part IV reflect a domestic project that seeks to rebuild old movements that powered the New Deal,439 and invest in new movements that carry forward the civil rights movement’s equality ideal,440 while simultaneously engaging in a national politics of pragmatism in the hope of saving what remains of progressive institutions. This pragmatic approach is expressed in efforts to preserve the legal services program after decades of funding cuts and substantive restrictions, protect the status and social justice mission of clinical legal education from the new emphasis on market-based skills,441 and defend liberal public interest law from the conservative counter-movement.442 These national-level efforts are coupled with progressive local politics of redistribution, taking advantage of the opportunities afforded by demographic change and municipal power to deepen the rights of workers, immigrants, LGBT people, and members of other marginalized groups.443 The upswing in more radical grassroots activism (Occupy Wall Street, Black Lives Matter, Dreamers, Trans Liberation) reflects ongoing demands within liberalism to make it more inclusive, transparent, and humane. Despite the importance of radical voices in these efforts, however, the political thrust of new movement lawyering, on the whole, is toward advancing projects associated with mainstream political liberalism, rather than representing a radical break from it.

It is important to note that, within movement lawyering projects, activating grassroots participation and sustaining bottom-up political mobilization remain key goals; they are, however, goals advanced through mechanisms that may be distinguished from two other accounts of progressive lawyering that emphasize the value of participation: one associated with the poverty law scholarship of the 1990s focused on client empowerment and the second advanced by William Simon under the rubric of legal pragmatism.

As discussed in Part II, one scholarly reaction to the legal liberal focus on individual rights and lawyer expertise—and its negative conse-

439. See Cummings, Preemptive Strike, supra note 3 (labor movement).
440. See Cummings & NeJaime, supra note 4 (marriage equality); Gordon, supra note 8 (immigrant rights).
441. See Sameer M. Ashar, Deep Critique and Democratic Lawyering in Clinical Practice, 104 CAL. L. REV. 201, 204 (2016).
quences for collective action and client empowerment\textsuperscript{444}—was to argue for greater client and community participation in and around the process of legal representation. Poverty law scholars in the 1990s offered productive ways for lawyers to think about incorporating client voices more directly into legal claim making, and to create spaces within and adjacent to litigation to mobilize client participation.\textsuperscript{445} In contrast, discussions of movement lawyering place less emphasis on lawyer-enabled participation and more emphasis on traditional conceptions of role specialization and lawyer expertise. Lawyers promote participation by using their legal expertise to support movement organizations, which are the vehicles through which participation occurs. At bottom, movement lawyering places more of an emphasis on building power than achieving participation as such—although the two are linked.

Movement lawyering may also be distinguished from an approach to progressive lawyering that William Simon has called “legal pragmatism,” which he associates with promoting civic participation in flexible, negotiated policy processes oriented toward developing sustainable long-term solutions to complex social problems.\textsuperscript{446} In contrast to legal liberalism’s emphasis on litigation in court to protect individual rights against government and corporate invasion, Simon’s approach is focused on the development of new institutional arrangements outside of traditional court settings that enlist stakeholders (including public and private sector representatives) in developing and monitoring new-governance-style arrangements that privilege information production and revisable standards as mechanisms for creating the political buy-in for sustainable reform. Simon’s key examples are drug courts that emphasize diversion and treatment,\textsuperscript{447} and “second-generation” antidiscrimination policies that commit employers to up-front transparency in hiring criteria and “continuous monitoring based on benchmarks, goals, and indicators of various kinds, including data on hiring and promotions by race or gender.”\textsuperscript{448}

Like movement lawyering proponents, Simon starts from a similar critique of legal liberalism but ends in a different place, which rests on a distinctive set of ideas about the relationship between participation and policy reform. He contends that liberal lawyers faltered in the post-	extit{Brown} period by focusing too much on protecting individuals from state and private power through litigation, which disconnected lawyers from other social change actors and organizations.\textsuperscript{449} In response, Simon sug-

\textsuperscript{444} For a classic articulation of this critique, see generally Stephen Wexler, \textit{Practicing Law for Poor People}, 79 \textit{YALE L.J.} 1049 (1970).
\textsuperscript{447} \textit{Id.} at 199–202.
\textsuperscript{448} \textit{Id.} at 204.
\textsuperscript{449} \textit{Id.} at 139.
gests that the appropriate role of legal advocacy is to promote “associative democracy” by fostering “participation through nongovernmental organizations.”\footnote{1728 UNIVERSITY OF ILLINOIS LAW REVIEW [Vol. 2017} The end goal of such participation is to “facilitate a more decentralized and flexible mode of policy implementation,”\footnote{Id. at 175.} in which rules are negotiated by local stakeholders, benchmarks are continuously revised, and information is constantly pooled. In this way, Simon connects a particular form of participation—collective action through nongovernmental organizations in public-private partnerships—with a normative theory of social change through policy experimentation, which is claimed to be more accountable and sustainable because it induces “a type of education and acculturation that potentially creates support for the policies.”\footnote{Id. at 175--76.}

Movement lawyering, though starting with a similar skepticism of individual rights-based approaches, responds by supporting a quite different brand of participation: one rooted in the power of episodic disruption outside of the institutional challenges at the core of the pragmatist vision.\footnote{Indeed, Simon acknowledges this point indirectly, arguing that associative democracy relies on nonprofit groups to protect against government and corporate power, “rather than relying primarily on spontaneous unorganized citizen action.” \textit{Id.} at 175.} In this sense, movement lawyering, particularly through its focus on representing mobilized clients through integrated advocacy, distinguishes itself methodologically and normatively from Simon’s view of legal pragmatism. Movement lawyering views participation primarily as a vehicle of\textit{collective mobilization}: channeling constituent grievances into organized challenges to the status quo.\footnote{WILLIAM GAMSON, THE STRATEGY OF SOCIAL PROTEST 12 (1975).} It thus values participation\textit{insofar as it produces collectives with power to destabilize existing institutional arrangements in order to exert pressure to help constituents win more political voice and material gains}. A movement lawyer would thus view constituent participation in the type of negotiated public-private policy making at the heart of legal pragmatism opportunistically, as one potential strategy in a broader struggle rather than a core goal. While movement lawyering seeks organizational connection to promote participation and enhance accountability, it does so with different political objectives: sometimes to advance new governance, and other times to strengthen old governance; sometimes to decentralize input into state processes, and other times to centralize power in movements outside the state. In this sense, movement lawyering\textit{subsumes} pragmatism in Simon’s sense, but is not\textit{consumed} by it. Rather, organizational connections are created to build power in order to advance strategies “that work” in a specific context.

This discussion of the value of participation draws attention to the second dimension of the efficacy analysis, which is a consideration of which\textit{means} best promote a social movement’s ends. As indicated

\begin{itemize}
\item \textbf{450.} \textit{Id.} at 175.
\item \textbf{451.} \textit{Id.} at 176.
\item \textbf{452.} \textit{Id.} at 175--76.
\item \textbf{453.} Indeed, Simon acknowledges this point indirectly, arguing that associative democracy relies on nonprofit groups to protect against government and corporate power, “rather than relying primarily on spontaneous unorganized citizen action.” \textit{Id.} at 175.
\item \textbf{454.} WILLIAM GAMSON, THE STRATEGY OF SOCIAL PROTEST 12 (1975).
\end{itemize}
above, movement lawyering rests on a theory of social change in which deep transformation comes from outside the conventional political system through collective challenges by organized groups. Disruption of normal politics is the key leverage that movements exert. The emphasis on disruption is in tension with conventional insider strategies, such as litigation, which as legal liberal critics have long argued, have the potential to coopt movements rather than expand their power. And, indeed, much of the current debate over the role of law in social movements—despite the emphasis on multifaceted tactics and integrated advocacy—is still primarily about the degree to which litigation and courts help or hurt social movement mobilization.  

Two strong themes have emerged in the recent social movement literature. First, flowing out of the bottom-up view of social change, scholars have suggested that legal change generally occurs after movements have succeeded in shifting social norms, laying the groundwork for new political coalitions that appoint new judges, who (following their party preferences and also influenced by new social movement-produced norms) find occasion to change the law in pro-movement directions. In this framework, legal change on its own without antecedent norm change cannot force people to change their behavior (leading to the problem of enforcement); further, legal change that occurs too far ahead of norm change is likely to produce backlash, hurting the very movements legal change intends to help. These ideas about the relation of legal and cultural change inform a second important movement lawyering theme, which stresses the circumscribed role of litigation in social movements. Scholars in the new social movement literature have generally accepted critical accounts emphasizing the limited instrumental power of litigation to push society in progressive directions. Accordingly, the literature overall can be read to advance the claim that the most appropriate role for litigation in social movements is the strategic mobilization of rights as tools toward the achievement of goals outside of the litigation itself—indirect effects—such as organizing or gaining favorable publicity.

Both themes reinforce a skeptical perspective toward litigation and courts—echoing ideas first articulated by critics of legal liberalism forty years ago and made famous by scholars who argued that rights were a “myth” and courts a “hollow hope” for social change. It is not surprising that the new movement literature, in responding to the critiques of legal liberalism, would end up accepting some of the core critical claims. Yet, as movement lawyering evolves, scholars and practitioners should be mindful of the ways that it may carry forward empirically contestable ideas about the power of litigation and courts to influence society or privilege a conception of social movement power, rooted in stories from the

455. See generally Albiston, supra note 8.
456. See, e.g., Balkin, supra note 38, at 28–36.
457. See Rosenberg, supra note 50, 363–43 (advancing the “hollow hope” thesis); Scheingold, supra note 33, at 5 (1974) (discussing the “myth of rights”).
civil rights era, which may not be as apt in contemporary politics. There are two concerns. The first, powerfully articulated by Orly Lobel, is that focusing on the indirect effects of litigation—its use as a tool to achieve organizing outcomes—may cause progressive lawyers to understate the ways in which courts do, in fact, exercise coercive power that may change people’s behaviors and attitudes about controversial topics. And the second is that, in building a model of lawyering around social movements, lawyers may be too eager to endow movements with outsized power to change society (particularly now that progressive movements have been evenly matched, even outmatched, by conservative counterparts) or too quick to see movement activity all around—so pervasive that it becomes prosaic. Responding to these concerns going forward, progressives should seek to embrace the potential of movement lawyering, finding the synergy between law and politics, while taking care not to oversell the movement and undersell the lawyering—potentially switching out one “hollow hope” for another.

VI. CONCLUSION

The idea of progressive lawyers lending their skills and power to social movements to achieve greater justice and equality for marginalized groups is both politically appealing and normatively desirable. It is an idea that has come into greater focus as a range of progressive causes have seen revitalized movement activity and a growing number of legal scholars and practitioners have shown new interest in what it means to be a movement lawyer. Against this theoretical and practical backdrop, this Article has advanced three main ideas.

First, it has argued that the turn toward movement lawyering in legal theory and practice reflects ongoing anxieties over the accountability of lawyers and the efficacy of legal strategies in progressive movements for social reform—anxieties that date back to the critique of legal liberalism and are now resurfacing in the new conversation about the potential of movement lawyering.

Second, this Article has claimed that although some version of movement lawyering has long existed within the legal profession, shaped by shifting opportunities and resources for political mobilization by marginalized groups, the contemporary idea of movement lawyering has taken on a particular meaning in the current political context. Thus, on the one hand, what is “new” about movement lawyering is really “old”: drawing upon models of progressive legal practice that have long existed, albeit under different names. Yet, on the other hand, the movement turn in progressive lawyering has responded to elements of real change: a change in progressive politics that has refocused attention on the transformative potential of social movements and a change in the professional

458. Lobel, supra note 34, at 948–58.
self-conception of progressive lawyers that has made them receptive to movement-centered practice.

Third, synthesizing elements of change, this Article has introduced a new definition of movement lawyering, oriented toward building the power of marginalized constituencies through linked legal and political strategies, and premised upon the twin features of representing mobilized clients and deploying integrated advocacy. These twin features, in turn, precisely respond to legal liberal anxieties by presenting movement lawyers at their most accountable and effective: taking instructions from activist organizations in client-centered fashion and deploying law in politically sophisticated ways designed to maximize the potential for deep and sustained democratic change.

In conclusion, this Article has offered a preliminary appraisal of what is at stake—professionally, politically, and practically—in the new social movement turn in progressive lawyering. It has argued that movement lawyering does not ultimately avoid the central legal liberal problems of lawyer accountability and efficacy, but rather reframes them in a different light and thus resurfaces old debates. How lawyers choose to align themselves with different elements of complex movements reprises questions about lawyer control and conflicts. Discussions of backlash and rights mobilization reproduce debates about the tradeoffs of litigation and the power of judicial reform to change society. If critics judged legal liberalism harshly because of perceived failures of accountability and efficacy, it is now fair to appraise movement lawyering by these very same metrics.

Such an appraisal would force a deeper reckoning with both the complexity of lawyer accountability to movements and the challenges to movement-led social change, particularly in the contemporary political environment. The idea of a social movement has become its own brand, an ideology that different interest groups adopt to cloak their activity in the legitimacy of grassroots participation. The dividing lines, however, between authentic social movements and professionalized interest groups are increasingly blurry in the current political environment, raising important questions about just how far progressive movements can go to change society, particularly when conservative movements have risen to claim the legitimacy and repertoire of their liberal counterparts. In this context, what is at stake in debates over movement lawyering is not simply the superiority of different advocacy approaches, but fundamental disagreements about theories of social change—and the role of elite politics, professional expertise, and litigation within them.

Yet the new social movement turn in progressive lawyering, by helping to gain a deeper appreciation of the stakes, provides opportunity for innovation and occasion for hope—which is the fuel that powers progressive lawyers’ pursuit of a better society. On the ground, the thoughtfulness and skill with which progressive lawyers are now engaging movement organizations and developing integrated advocacy campaigns
signals the potential of new partnerships and power. And in the academy, the movement lawyering idea is being carried forward by a new generation of scholars, less weighted down by old fights, who have succeeded in changing the terms of the debate over the legacy of legal liberalism by holding a different mirror to the past that reflects a brighter light toward the future.

Looking backward, the new movement scholarship has focused attention on the ambiguity and contradictions inherent in the practice of legal liberalism itself. Doing so has forced a reconsideration of the conventional historical view of lawyers during the civil rights period by presenting them as less litigation-focused and court-centered than previously understood—while also revealing the ways in which nonlawyer movement leaders faced their own crises of accountability and efficacy. This revised history has created space for rethinking a path forward: rehabilitating the image of sophisticated, pragmatic, and idealistic lawyering in the service of core progressive values, which encompass both a robust regulatory state and an activated democratic public.

It is in this sense that the new movement lawyering may be seen as not just pivoting away from legal liberalism, but as an effort to redeem it on different grounds. For many of the new movement lawyers and scholars, holding a transformative vision means having ideals that reframe pieces of the very liberalism that earlier critics had, in their day, rejected—but which seem like the foundation of a distant project, parts of which are worth struggling to revive, all the while continuing to extend and deepen democratic principles of inclusion, equality, and participation. From this perspective, instead of seeing legalism and liberalism as oppositional or in tension, the new movement lawyering may be read as an attempt to reclaim legal liberalism—smart, savvy legal liberalism—as necessary to the realization of a progressive political project. In this respect, although the social movement turn may not resolve the dilemmas of progressive lawyering, it can help set the agenda for a reenergized dialogue on the integration of progressive legal theory and practice.
The Future of Fast Food Governance

Andrew Elmore†

Introduction

The Fast Food Forward movement has swelled into one of the largest protests by low-wage workers in U.S. history,1 animating efforts at all levels of government to raise and enforce workplace standards.2 One such strategy is to hold fast food franchisors accountable as joint employers of their franchisees’ employees. In what may be a watershed moment, New York Attorney General Eric Schneiderman (NYAG) recently filed suit against Domino’s Pizza, the franchisor, for wage-and-hour-law violations in its franchisees’ stores across New York State.3

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Fast food store employees report widespread wage-and-hour law violations, and the NYAG’s Domino’s lawsuit appears to confirm this trend within one of the largest fast food brands in the United States. The NYAG’s suit is similar to successful nonfranchisor–franchisee wage-and-hour litigation, where courts have assigned liability to lead firms because their subcontractors’ employees economically depend on them. But courts presented with similar evidence in the franchisor–franchisee context have been reluctant to consider franchisors to be joint employers. What accounts for this difference?

The purpose of this Essay is to provide one answer to this question. This Essay argues that the franchise relationship is often misunderstood by the judiciary as an arms-length relationship when, in fact, it is frequently characterized by ongoing dependence. This is an important misapprehension because dependence lies at the heart of how courts evaluate franchisor liability under wage-and-hour and franchise laws. It leads many courts to assume that the franchise agreement reflects an independent relationship between franchisors and franchisees and to disregard the supervisory controls that franchisors write into franchise agreements as routine quality standards.

The difference in judicial interpretations of the franchise relationship relative to other contracting arrangements suggests that improving fast food franchise store compliance with wage-and-hour law requires a reexamination of the franchise relationship. The Essay explores the regulation of franchising under wage-and-hour law and franchise law, finding that both legal regimes create perverse incentives for franchisees to violate wage-and-hour law. This Essay argues that improving wage-and-hour law compliance in franchise stores will require a reconfiguration of the franchise relationship to incentivize

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6. Compare Carrillo v. Schneider Logistics Trans-Loading & Distrib., Inc., No. 2:11-8557, 2014 WL 183956, at *7-17 (C.D. Cal. Jan. 14, 2014) (rejecting Wal-Mart’s argument that it was not a joint-employer with its subcontractor under federal and state wage-and-hour laws based on evidence that Wal-Mart may have exercised a significant degree of supervisory control), with Singh v. 7-Eleven, Inc., No. 05-04534, 2007 WL 715488, at *3-6 (N.D. Cal. Mar. 8, 2007) (denying a joint-employer claim against a franchisor based on similar evidence contained in a franchise agreement).

7. See Gillian K. Hadfield, Problematic Relations: Franchising and the Law of Incomplete Contracts, 42 Stan. L. Rev. 927, 933-37 (1990) (noting that a franchisee typically "purchases or leases virtually all of the franchised outlet’s capital equipment," relies on the franchisor’s "trademark and business format," and "pay[s] ongoing royalties to the franchisor").
franchisor monitoring of franchisee pay practices, notwithstanding the franchisor’s joint-employer status.

This Essay proceeds as follows. Part I explores the franchise relationship, finding that franchising permits national fast food companies to centralize their operations through comprehensive operational standards that franchisees must follow at the risk of losing their investment in the franchise, creating dependency that can cause wage-and-hour-law violations. Part II examines the regulation of the franchise relationship under wage-and-hour and franchise laws. It explains why courts tend to be more skeptical about joint-employer claims in franchising arrangements than other types of contracting arrangements. Specifically, it argues that this skepticism is grounded in an incorrect assumption that franchise agreements are arms-length transactions. This permits franchisors to avoid joint-employer liability by characterizing supervisory control as a more generic form of quality control. Part III briefly explores the claims of the NYAG’s Domino’s lawsuit and explains why franchisors may respond with superficial changes to the franchise agreement instead of measures to improve franchisee compliance with the law. Finally, the Conclusion summarizes the implications of this analysis by identifying two routes to incentivize franchisors to monitor pay practices in franchise stores: (a) through wage-and-hour law, with deep factual records of franchising relationships to overcome the present judicial skepticism of franchisee dependency; and (b) through fraud and franchise laws, by imposing a duty on franchisors to ensure wage-and-hour law compliance in franchise stores, notwithstanding their joint-employer status.

I. FAST FOOD FRANCHISING TO CENTRALIZE OPERATIONS THROUGH FRANCHISEE DEPENDENCE

Franchising is a large and growing business model in the United States. Fast food stores are overwhelmingly operated by franchisees. Domino’s, for example, reports that over 90% of its 5273 domestic stores are franchise-owned, from which it collects over a quarter billion dollars in annual revenue. Franchising is also a dominant operational form in a variety of other low-wage industries, including home health care, the janitorial industry, and hotels.

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8 See Robert W. Emerson, Assessing Awuah v. Coverall North America, Inc.: The Franchisee as a Dependent Contractor, 19 STAN. J.L. BUS. & FIN. 203, 210-11 (2014) (noting that in the United States franchising accounts “for roughly 40% of all retail sales, with approximately 757,453 operating franchised units directly employing about 8.3 million people and . . . yield[ing] about 1.5 trillion dollars in annual retail sales” (footnotes omitted)).


10 WEIL, THE FISSURED WORKPLACE, supra note 4, at 122-42 (discussing franchising in fast food, janitorial services, car rentals, hotels, and home health care).
Franchising permits national firms that operate through a geographically dispersed network of workplaces in the service economy to efficiently centralize operations, while controlling the costs of expanding store operations. Franchising accomplishes this by shifting the cost of store operations to franchisees while imposing comprehensive operational standards that franchisees must follow to preserve their investment in the franchise.

A. Fast Food Franchising

Fast food franchisors build dependence into their franchise agreements, beginning with their unequal bargaining position. National fast food brands are among the largest and most sophisticated firms in the United States, while their typical entering franchisees have little or no previous business experience and operate only one or two franchise stores. Franchisors extend this initially superior bargaining position into the franchise relationship with incomplete contract terms that shift risk to franchisees and leave the

11 See DAVID WEIL, IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT: A REPORT TO THE WAGE AND HOUR DIVISION 41-44 (2010) [hereinafter WEIL, STRATEGIC ENFORCEMENT] (“Franchising is also an attractive ownership form given the [fast food] industry’s geographically dispersed, labor-intensive, and service-based nature. In such an industry, an enterprise’s profitability is closely tied to the productivity and service delivery of its workforce. Assuring workforce productivity, in turn, requires effective management, including careful monitoring of the workplace. A large company with geographically dispersed outlets can therefore use franchising—rather than relying on company-owned and managed outlets—to better align the incentives of the franchisee, whose earnings are linked to the outlet’s profitability.”); WEIL, THE FISSURED WORKPLACE, supra note 4, at 122-29 (discussing how franchises can maintain a strong brand and minimize labor costs while expanding across wide geographic areas).

12 See Robert W. Emerson, Franchising and the Collective Rights of Franchisees, 43 VAND. L. REV. 1503, 1509 (1990) (“Because the franchise contract usually is determined by the franchisor via a standard form agreement, . . . most of the express contractual obligations fall upon the franchisee.”); David J. Kaufmann, An Overview of the Business and Law of Franchising 2 (Aspatore, 2013 WL 3773409, 2013) (“[T]he entire expense of developing, opening, and operating a franchised unit—buying or leasing the real estate, erecting and equipping the business premises, hiring and paying all personnel, paying for all inventory, and being financially liable for all aspects of that unit—is typically borne solely by the franchisee.”).


franchisors’ duties to franchisees undefined. Franchisees must pay an initial fee, often in the hundreds of thousands of dollars, and purchase all store equipment and materials. Fast food franchisors also expressly incorporate their operational standards in the franchise agreement and reserve the right to terminate the agreements of franchisees who they determine have not met these standards. In contrast to the franchisees’ extensive obligations, franchisors in franchise agreements offer only vague commitments to provide operational advice and guidance at the franchisors’ discretion.

Franchisors can thereby centralize operations with standards that routinize every part of the work required to operate a franchise store, subject to unilateral change by the franchisor. Franchisors can track and monitor these performance metrics through required franchisee computer equipment. Detailed operational requirements also permit franchisors to deskill and routiniz e management functions by setting detailed hiring and firing standards that delegate little supervisory discretion and by conducting employee trainings remotely through their required computer systems.

However, unlike directly employed managers, franchisees have an interest in ignoring operational standards that impose costs on franchise stores because

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15 See, e.g., Aff. Supp. V. Pet., supra note 3, ¶ 20 (noting that the Domino’s “Franchise Agreement requires franchisees ‘to fully comply with all specifications, standards and operating procedures and rules from time to time prescribed for the operation of a Domino’s Pizza Store’”); see also id. ¶ 22 (summarizing other features of the Domino’s Franchise Agreement); Hadfield, supra note 7, at 945 (“By 1977, the obligations of McDonald’s franchisees were even more detailed. This contract ostensibly limited the parties’ intent to ensuring the franchisee’s compliance with those obligations, rather than to creating a set of mutual commitments. . . . In contrast, the contract left the franchisor’s duties relatively undefined, a difficult-to-quantify duty to ‘advise and consult.’”).

16 See Hadfield, supra note 7, at 934-35 (demonstrating that fast food franchisee fees may often exceed $100,000); see also Aff. Supp. V. Pet., supra note 3, ¶ 22(a) (specifying that one of the terms of the Domino’s Franchise Agreement is setting the “fees franchisees must pay to Domino’s”).

17 Hadfield, supra note 7, at 970.

18 Id. at 945. According to the franchise agreement annexed in the NYAG Domino’s suit, Domino’s offers franchisees operating and marketing assistance, but only at its discretion and without assuming any responsibility for the franchisees’ success. See Aff. Supp. V. Pet., supra note 3, at Ex. 18 (illustrating the imbalance of power between franchisors and franchisees).


20 According to the NYAG’s Domino’s suit, the moment a franchise store employee logs an order in the system, Domino’s begins a timer that measures each step of the process against its own benchmarks. Aff. Supp. V. Pet., supra note 3, ¶¶ 137-46, 165-66.
franchisees may only recoup their investments in the franchise if the business is profitable. Fast food franchisors address this incentive by monitoring franchisees extensively for compliance with operational standards and by terminating the franchise agreements of those who do not comply with these standards. The franchisor’s unilateral right to terminate a franchise agreement is a catastrophic threat to franchisees, particularly those who are undercapitalized or who have no significant work experience outside the franchise.

B. The Perverse Incentives of Franchisee Dependency

Commentators have criticized franchise law for permitting franchisors to opportunistically require exhaustive contractual specifications and impose draconian remedies for noncompliance without a corresponding obligation by franchisors to exercise reasonableness and good faith. In the words of the former United States Department of Labor (DOL) Wage and Hour Division Administrator David Weil, franchisor opportunism can also “create incentives for franchisees to violate laws.” Franchisors condition the franchise agreement on all manner of operations except wage rates. Since franchisors aggressively police nearly all other cost variables, suppressing employee wages is one of the few ways that franchisees can boost store profit by cutting costs.

22 See Hadfield, supra note 7, at 950 (“A franchisee wants to maximize her profits from the operation of the outlet; she does not wish to undertake any efforts or expenditures that will not compensate the undertaking.”); MinWoong Ji & David Weil, The Impact of Franchising on Labor Standards Compliance, 68 INDUS. & LAB. REL. REV. 977, 979-82 (2015) (arguing that “franchisees are more likely not to comply with labor standards regulations than comparable restaurants owned by franchisors” because they are less likely to be caught, as they own fewer establishments, and that they “will always receive a lower profit per unit than a comparable company-owned establishment” because of owing the franchise fee, and they have less stake in the brand and “face lower incentives to pay an efficiency wage and greater incentive to directly supervise workers who may be of lower productivity”).

23 See Peter C. Lagarias, Franchising in California: Uniformity in California Franchise Agreements, 21 FRANCHISE L.J. 136, 138 (2002) (noting that franchise agreements include termination clauses that permit termination for failing to meet the franchisor’s standards, violating the franchise agreement or violating any law, statute, or violation); Paul Steinberg & Gerald Lescatre, Beguiling Heresy: Regulating the Franchise Relationship, 109 PENN ST. L. REV. 105, 198-216 (2004) (describing complaints by franchisees of onerous inspection requirements and unjustified franchise terminations). According to testimony by a Domino’s representative and Domino’s business records, it reserves the right to terminate the franchise agreement of any franchisee who does “anything that would reflect poorly” on the brand. Aff. Supp. V. Pet., supra note 3, ¶ 23. It has terminated approximately fifty franchise agreements in New York State over a four-year period. Id. ¶ 176.

24 See Hadfield, supra note 7, at 950-55 (describing the “opportunism” problem created by incomplete terms in the franchise contract); Steinberg & Lescatre, supra note 23, at 178-81 (reviewing the interplay of antitrust law and franchises and concluding that, “[u]nconstrained by principles of antitrust or agency, franchisors are free to take opportunistic advantage of franchisees . . . .”).


26 See Lagarias, supra note 23, at 137-38 (discussing various franchise obligations and provisions included in typical franchise agreements without mentioning wage rate requirements).
Studies have shown that franchising is correlated with wage-and-hour law violations in fast food stores. David Weil, comparing DOL investigations of fast food franchisee- and franchisor-owned stores, found that “[t]he probability of noncompliance is about 24% higher among franchisee-owned outlets than among otherwise similar company-owned outlets.” This finding is consistent with the allegation in the NYAG’s Domino’s suit that most franchisees in New York State report wage rates to Domino’s that violate wage-and-hour laws. The franchisor’s incentive to impose operational requirements without a corresponding obligation to act in the franchisees’ benefit can cause these violations. Domino’s, for example, allegedly provides franchisees with a “Payroll Report” that automatically calculates owed wages to use for payroll. But, according to the NYAG’s Domino’s suit, this Payroll Report systematically underreports wages owed to franchise store employees. It is allegedly “impossible” for a franchisee to know that the Payroll Report underreports owed wages because it only provides gross owed wages without showing the underlying calculations. Domino’s has allegedly been aware of flaws in the Payroll Report since 2007 but did not fix the flaws or inform the franchisees about them.

It is difficult to imagine a franchisor allowing its own store managers to use a flawed payroll system that underreported owed wages. That Domino’s allegedly allowed its franchisees to do so for nearly a decade demonstrates the need for greater franchisor accountability.
II. DEFEATING FRANCHISOR ACCOUNTABILITY BY CHARACTERIZING SUPERVISORY CONTROL AS QUALITY CONTROL

Where labor contractors and their employees in low-wage industries economically depend upon a lead firm for work, the lead firm can be held liable as a joint employer. But historically, courts have been reluctant to find that franchisors jointly employ franchise employees. This is anomalous because the economic dependence of the franchisee’s employees is not functionally different from employees of any other labor contractor. A review of joint-employer claims against fast food franchisors reveals that this anomaly stems from the incorrect assumption that a franchise agreement is arms-length. This assumption permits franchisors to sweep supervisory control into franchise agreements by characterizing supervision as “operational” or “quality” control to defeat franchisor joint-employer claims.

Dependency defines the outer boundary of franchisor responsibility for franchise store employees; it separates independent contractor relationships from employee status under wage-and-hour laws and true arms-length transactions from ones of trust, in which a heightened duty is owed. But despite the dependency woven into the franchise relationship, courts considering franchise law and joint-employer claims historically have greeted claims of franchisor supervisory control with skepticism.

Franchise law does not impose a special duty on franchisors outside of requiring good faith in franchise terminations, which cannot override the express provisions of a franchise agreement. Most courts find that this duty is met so long as the franchisor discloses all known, material terms in the franchise agreement and exercises good faith in its exercise of franchise termination provisions. In effect, absent fraud or bad faith in franchise termination, the

33 See infra note 45 and accompanying text.
35 See infra notes 53–55 and accompanying text.
36 See Boat & Motor Mart v. Sea Ray Boats, Inc., 825 F.2d 1285, 1292 (9th Cir. 1987) (“The California Franchise Relations Act has not imposed additional fiduciary duties on the franchisor.”); Murphy v. White Hen Pantry Co., 691 F.2d 350, 354-56 (7th Cir. 1982) (noting that the franchisor owed no fiduciary duty to the franchisee outside of termination); cf. Arnott v. Am. Oil Co., 609 F.2d 873, 881-84 (8th Cir. 1979) (reasoning that “[i]nherent in a franchise relationship is a fiduciary duty,” but describing that duty as merely requiring good faith and fair dealing).
franchise relationship is governed by the franchise agreement, in which franchisors can disclaim all responsibility for franchisee employees.\(^\text{39}\)

Wage-and-hour laws are a different story, or they should be. The Fair Labor Standards Act (FLSA),\(^\text{40}\) like New York Labor Law and many other state wage-and-hour laws, broadly defines the employment relationship as one in which a person or entity “suffer[s]” or “permit[s]” an individual to work,\(^\text{41}\) and an employee may have multiple employers who are jointly responsible for wage-and-hour-law compliance.\(^\text{42}\) The "striking breadth"\(^\text{43}\) of this definition is meant to protect vulnerable workers by extending liability to the lead firms on which the employees economically depend.\(^\text{44}\) Under wage-and-hour laws, courts assign liability to joint employers where the “economic reality” shows that the employee is dependent on the putative joint employer.\(^\text{45}\)

Courts have applied this doctrine in a variety of industries to assign liability to lead firms as joint employers despite a lack of direct supervision. For example, the Ninth Circuit applied the doctrine to the agriculture industry in Torres-Lopez v. May,\(^\text{46}\) and the Second Circuit did the same to the garment industry in Zheng v. Liberty Apparel Co.\(^\text{47}\) In addition to the extent of direct control, such as on-site supervision and assigning wage rates, these courts have reviewed evidence of joint employment across two additional dimensions: (1) indirect supervision over the employee, such as supervisory

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\(^{39}\) Domino’s, for example, opposes the NYAG’s claims of franchisee dependence by reference to the franchise agreement, which characterizes franchisees as “independent contractor[s]” who can, subject to compliance with the terms of the franchise agreement, “operate their stores as they see fit” and are solely responsible for compliance with the law. Memorandum in Opposition to Verified Petition, supranote 29, at 5-6.


\(^{41}\) Id. § 203(g). Many state laws, including New York Labor Law, define the employment relationship in a similarly broad manner. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14(a) (“Employee means any individual employed, suffered or permitted to work by an employer, except as provided below.”).

\(^{42}\) 29 U.S.C. § 203(d); 29 C.F.R. § 791.2(a) (2016).


\(^{44}\) See Reyes v. Remington Hybrid Seed Co., 495 F.3d 403, 405, 408 (7th Cir. 2007) (holding that migrant workers of a subcontractor—who were “furnished only dilapidated and overcrowded housing” and were “not fully compensate[d]”—were also employees, under the FLSA, of the seed company that had contracted with the subcontractor); Bruce Goldstein et al., Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment, 46 UCLA L. REV. 983, 1043-48, 1094-99 (1999) (tracing the origins of the “suffer” and “permit” language to early twentieth century laws meant to protect a particularly vulnerable class—child laborers).

\(^{45}\) See, e.g., Rutherford Food Corp. v. McComb, 331 U.S. 722, 729-30 (1947) (finding that a slaughterhouse jointly employed de-boners—despite labeling them as independent contractors—because of its occasional supervision of the de-boners, evidence that the de-boners depended on the slaughterhouse for their schedules and income, and their performance of routine line-jobs that the slaughterhouse integrated into its production process).

\(^{46}\) 111 F.3d 633, 645 (9th Cir. 1997).

\(^{47}\) 355 F.3d 61, 79 (2d Cir. 2003).
control embedded in operational standards; and (2) *nonsupervisory dependence*, or evidence of economic dependence separate from supervision, such as the extent to which an employee performs routine, unskilled work that is integrated into the production process. For instance, the Ninth Circuit in *Torres-Lopez* found that a grower jointly employed pickers because it controlled the harvest schedule and total workers needed, owned the premises and equipment, permitted the contract to pass from one labor contractor to the next with no material changes, the workers had no business organization that shifted from one unit to another, and the work—picking cucumbers—was integral to the production process. Similarly, the Second Circuit in *Zheng* vacated a trial court’s determination that a garment manufacturer did not jointly employ its labor contractor’s employees because it failed to consider evidence of indirect supervision and nonsupervisory dependency.

Following this and similar precedent, lower courts have considered indirect supervision and nonsupervisory dependence in joint-employer claims under wage-and-hour law in a variety of industries. In one recent and illustrative FLSA case, the Central District of California denied Wal-Mart’s partial motion for summary judgment in *Carrillo v. Schneider Logistics Trans-Loading & Distribution, Inc.*, finding genuine issues of material fact as to whether Wal-Mart jointly employed the employee of a warehouse operator where there was little evidence of direct control. Specifically, the court found that Wal-Mart indirectly supervised the warehouse operator through “operating metrics,” including specific productivity goals for each hour of work, suggestions about how to improve the efficiency of the work, and detailed audits that, if they revealed deficiencies, required the warehouse operator to provide a written action plan along with corrective action.

In contrast to this line of subcontractor cases, courts considering FLSA claims against franchisors often reject indirect supervision and nonsupervisory dependence as grounds for a joint-employer determination. In *Singh v. 7-Eleven, Inc.*, for example, another California federal court held that employees of a franchise convenience store were not jointly employed by the franchisor.

The Fifth Circuit in *Orozco v. Plackis* discounted indirect supervision by

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48 111 F.3d at 640-41.

49 355 F.3d at 70-72.


52 Id. at *3-4.

53 No. 05-4534, 2007 WL 715488, at *3-6 (N.D. Cal. Mar. 8, 2007).
holding in favor of a fast food franchisor in a joint-employer FLSA claim. In *Reese v. Coastal Restoration and Cleaning Services, Inc.*, a Mississippi federal court dismissed evidence of indirect supervision and rejected a franchisor joint-employer claim in the janitorial industry.

In each of these cases, the courts rejected evidence of indirect supervision similar to evidence found sufficient to establish a joint-employer relationship in *Carrillo*. The courts in *Orozco*, *Reese*, and *Singh* minimized the required selection, supervision, and training standards similar to those found probative of indirect supervision in *Carrillo*. Whereas the court in *Carrillo* found that Wal-Mart’s “suggestions” to improve the warehouse operation evidenced nonsupervisory dependence because of the expectation that the operator would follow the recommendations, *Orozco* merely found irrelevant, “non-binding” advice.

What accounts for this difference? Employment scholars have offered different theories to explain the inconsistent outcomes reached by courts considering employment status controversies. Marc Linder criticizes the judiciary’s failure to consider FLSA’s remedial statutory purpose, which leads courts to apply various factors formalistically instead of searching the record to discern the economic reality of the work relationship. Katherine Stone locates this resistance to change in the nature of work itself, finding that the traditional factors showing economic dependence in industrialized work settings do not translate well into a post-industrial work relationship.

To be sure, statutory purposelessness and confusion about how to apply a doctrine developed in the 1940s to post-industrial work relations helps to

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54 757 F.3d 445, 449-52 (5th Cir. 2014).
56 See *Orozco*, 757 F.3d at 451-52 (concluding that a franchisor did not supervise or control its franchisee’s work schedule and conditions, despite evidence that the franchisor trained employees, and further concluding that a provision in the franchise agreement requiring the franchisee to meet the franchisor’s standards did not suffice to establish indirect control); *Reese*, 2010 WL 5184841, at *4 (concluding that a franchisor did not exercise authority in hiring and firing employees, despite the franchisor’s background-check requirement, and that the franchisor did not exercise supervision and control of the work schedule and conditions, despite a provision in the franchise license agreement requiring “vehicles, equipment, supplies, cleaning products, uniforms, computer hardware and software” to meet the franchisor’s standards); *Singh*, 2007 WL 715488, at *3 (concluding that the franchisor was not a joint employer, despite evidence that “employees were subject to the terms and conditions of the training, on-going training, and satisfaction of 7-Eleven service standards,” the franchisor imposed various operational standards on the store, and the franchisor provided payroll services).
58 *Orozco*, 757 F.3d at 449; see also Ochoa v. McDonald’s Corp., 133 F. Supp. 3d 1228, 1238 (N.D. Cal. 2015) (discounting McDonald’s staffing “advice” to store managers outside the franchisee’s presence).
account for the malleability of the FLSA joint-employer test. Some courts have narrowly construed the joint-employer doctrine for jobs that cannot be easily analogized to the mass production work of the industrial era,\textsuperscript{61} while other courts, including the court in \textit{Carrillo}, have grounded their broad application of the joint-employer doctrine in the industrial nature of the work.\textsuperscript{62} But the failure to consider statutory purpose does not explain why the joint-employer doctrine is consistently applied more narrowly in the franchising context. Jobs performed by fast food workers are as analogous to industrial work as those jobs performed by agricultural, garment, and warehousing workers. In these latter cases, courts have broadly applied the economic realities test. Not so in the franchising context.

The courts’ consideration of indirect supervision in \textit{Torres-Lopez}, \textit{Zheng}, and \textit{Carrillo} but not in franchising cases like \textit{Orozco}, \textit{Reese}, and \textit{Singh} appears grounded primarily in the mistaken assumption that the franchise relationship is an arms-length transaction. This assumption pervades franchising cases, extending well beyond wage-and-hour law. “Franchising is different,” reasoned the California Supreme Court in \textit{Patterson v. Domino’s Pizza, LLC},\textsuperscript{63} a state sexual harassment case, because “[t]he franchisee is often an entrepreneurial individual who is willing to invest his time and money, and to assume the risk of loss, in order to own and profit from his own business.”\textsuperscript{64} The franchise agreement, accordingly, reflects an arms-length relationship that seeks to establish uniform quality standards “for the benefit of both parties.”\textsuperscript{65} As explained in Part I, this assumption is incorrect: franchisees are generally not independent entrepreneurs but rather dependent contractors. As a result, the franchise agreement is often an incomplete contract that primarily benefits the franchisor. And this incorrect assumption can lead courts to dismiss the

\textsuperscript{61} See, e.g., \textit{In re Enter. Rent-A-Car Wage & Hour Emp’t Practices Litig.}, 683 F.3d 462, 470 (3d Cir. 2012) (applying only direct control factors to a joint-employer claim by a car rental company’s sales managers).

\textsuperscript{62} In \textit{Carrillo}, for example, the court reasoned that “the manual labor performed by plaintiffs . . . is sufficiently analogous to the [agricultural] labor in \textit{Torres-Lopez} such that the combined application of the [indirect supervision and nonsupervisory dependency] factors is appropriate.” 2014 WL 183956, at *11; see also \textit{Reyes v. Remington Hybrid Seed Co.}, 495 F.3d 403, 408 (7th Cir. 2007) (finding agricultural workers to be jointly employed by a seed company and a labor contractor because “[e]verything the Court said” about work performed by deboners in \textit{Rutherford} is true about plaintiffs’ work); \textit{Ansoumana v. Gristede’s Operating Corp.}, 255 F. Supp. 2d 184, 193-95 (S.D.N.Y. 2003) (finding that a pharmacy jointly employed delivery workers because their work was sufficiently analogous to work performed by deboners in \textit{Rutherford}, as well as agricultural and garment workers in other cases).

\textsuperscript{63} 333 P.3d 723 (Cal. 2014).

\textsuperscript{64} \textit{Id.} at 732, 734. The state law claim in \textit{Patterson} differs from most wage-and-hour laws in requiring a showing of day-to-day supervision to sustain a joint-employer finding. \textit{Id.} at 740.

\textsuperscript{65} \textit{Id.} at 738. Domino’s relies on the reasoning in \textit{Patterson} to argue that “the implementation and enforcement of [quality control] standards does not make a franchisor a joint employer.” Memorandum in Opposition to Verified Petition, supra note 29, at 17.
supervisory authority reserved to the franchisor in the franchise agreement as a form of quality control.  

Julia Tomassetti makes a related critique of the test for determining employment or independent contractor status, distinguishing between control over the means of the work and control over the end result. For Tomassetti, the flaw in this test is that, unlike in a standard contract, performance is never complete in an employment agreement. As a result, all terms can point toward either control over the means or ends. Contractual nonrenewal rights, for example, can either constitute evidence of a right to discipline—which shows an employment relationship—or the completion of a contract term—which shows an independent contractor agreement. In conflating the means of production with its end, courts fail to find a distinction with a difference.  

The courts in Singh, Reese, and Orozco evoked a similarly empty distinction between supervisory and quality controls in the franchise agreement. Each of these courts discounted evidence of supervisory control that served the franchisor’s interest in operational, or quality, control. These cases, then,  

66 See Patterson, 333 P.3d at 739 (dismissing evidence other than direct control because “[a]ny other guiding principle would disrupt the franchise relationship”); see also, e.g., Ochoa v. McDonald’s Corp., 133 F. Supp. 3d 1228, 1235-39 (N.D. Cal. 2015) (disregarding “the welter of” facts showing McDonald’s “strength as a franchisor”—including its power to unilaterally sanction the franchisee and terminate the franchise agreement, give “recommendations” about “crew scheduling and staffing,” utilize extensive monitoring, require training, and use scheduling and payroll programs—as evidence of an employment relationship); Vann v. Massage Envy Franchising LLC, 13-2221, 2015 WL 74139, at *8 (S.D. Cal. Jan. 6, 2015) (discounting evidence of franchisor control over franchise store services and customer interactions as “policies to assist in brand uniformity”); Reese v. Coastal Restoration & Cleaning Servs., Inc., No 1:10-36, 2010 WL 5184841, at *5 (S.D. Miss. Dec. 15, 2010) (noting that a contractual provision in the franchise agreement “is simply one of the quality control standards imposed by the franchisor and that it ‘does not show that [the franchisor] has power to control hiring/firing of [franchisee] employees”). Although the Second Circuit in Zheng distinguished between supervisory and quality control, it held that purported quality control that affects employee schedules is a form of supervisory control. See 355 F.3d 61, 75 (2d Cir. 2003) (“[I]n cases in which the purported joint employees worked exclusively or predominantly for the purported joint employer. . . . [T]he joint employer may de facto become responsible, among other things, for the amount workers are paid and for their schedules, which are traditional indicia of employment.”).  

67 Tomassetti, supra note 34, at 356-57. As demonstrated by a recent Ninth Circuit case, this test is intended to distinguish bona fide independent contractor relationships, which only impose requirements on the end product or service, from those permitting control over the manner in which the work is performed. See Alexander v. FedEx Ground Package Sys., Inc., 765 F.3d 981, 989-90, 993 (9th Cir. 2014) (holding that FedEx employed drivers that it labeled independent contractors because it not only controlled the “results” of customer deliveries but also the means, including driver appearance standards and schedules).  

68 Tomassetti, supra note 34, at 355-56.  

69 Id. at 356-57.  

70 See Reese, 2010 WL 5184841, at *4 (finding that a background check “is simply one of the quality control standards [the franchisor] requires as a condition to granting a franchise for the use of its system, trade name, service marks, trademarks, etc.”); Singh v. 7-Eleven, Inc., No. 05-04534, 2007 WL 715488,
appear to turn on whether this dependence serves the interest of franchisors rather than the degree of dependence by the franchisees' employees on the franchisors. This is circular reasoning. Franchisors have an interest in all manners of franchisee dependence on the franchisor, including dependence achieved through indirect supervision of franchise store employees. By sweeping supervisory control into the franchise agreement under the guise of an arms-length agreement, franchisors have succeeded in persuading courts that dependence suggesting joint employment is somehow a mutually exclusive category from dependence in controlling operations.

At its logical endpoint, this reasoning serves as a threshold test for whether to consider indirect supervision and franchisee dependence at all. In Juarez, one California trial court made this often-unstated test explicit, holding that the state’s presumption of employment in its means–ends test “does not apply in the franchise context” and instead requiring the franchisee to “show that the franchisor exercised control beyond that necessary to protect and maintain its interest in its trademark, trade name, and goodwill to establish a prima facie case of an employer–employee relationship.”

As the Third Circuit recently held in rejecting the reasoning in Juarez, this franchising supervisory control–quality control distinction has no basis in law. Moreover, as the Second Circuit in Zheng observed, it creates incentives for joint employers to hide behind formal trappings of independence to disguise a joint-employment relationship. This incentive is particularly perverse in fast food franchise stores, where franchisee dependence on the franchisor can cause wage-and-hour-law violations.

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at *5 (N.D. Cal. Mar. 8, 2007) (determining that supervisory controls meeting the franchisor’s “goal of attaining conformity to certain operational standards and details” did not create an employer–employee relationship); see also Orozco v. Plakis, 757 F.3d 445, 452 (5th Cir. 2014) (reading the franchise agreement to grant the franchisor “a certain degree of control over the [franchisee’s] location,” but holding such control insufficient to make the franchisor an employer of franchisee’s staff).

71 Domino’s, for example, relies on the supervisory control–quality control distinction to argue that “the [NY]AG’s claim that [Domino’s] is a joint employer impermissibly attempts to transform the standards that [Domino’s] (and every other franchisor) uses to protect its brand and ensure consistency and quality into indicia of an employment relationship.” Memorandum in Opposition to Verified Petition, supra note 29, at 17.

72 Juarez v. Jani-King of Cal., Inc., No. 09-3495, 2012 WL 177564, at *4 (N.D. Cal. Jan. 23, 2012) (internal quotations omitted); see also Courtland v. GCEP-Surprise, LLC, CV-12-00349, 2013 WL 384981, at *3 (July 29, 2013) (relying on Patterson to reject indirect supervision as evidence of a franchisor’s joint employment of franchise store employees, holding that “[a] franchisor is not a joint employer unless it has significant control over the employment relationship”).

73 See Williams v. Jani-King of Phila. Inc., No. 15-2049, 2016 WL 511926, at *7 (3d Cir. Sept. 21, 2016) (“Pennsylvania law does not distinguish between controls put in place to protect a franchisee’s goodwill and intellectual property and controls for other purposes.” (internal quotation marks omitted)).

74 See 355 F.3d 61, 72 (3d Cir. 2003) (discussing the factors pertinent to an FLSA analysis where alleged joint-employers are attempting “to evade the FLSA or other labor laws”).
III. NEW YORK ATTORNEY GENERAL'S DOMINO'S LAWSUIT AND ITS IMPLICATIONS FOR FAST FOOD GOVERNANCE

The NYAG's Domino's suit introduces evidence of franchisee dependence on Domino's and the franchisor's aggressive monitoring of comprehensive operational standards to supervise its franchise store workforce indirectly. If this were the extent of its allegations, this case would risk the same judicial skepticism that greeted the plaintiffs in Orozco, Singh, and Reese. But the allegations in the NYAG's Domino's suit also describe direct interventions by Domino's in the hiring, supervision, discipline, and termination decisions in franchise stores, including that Domino's required franchisees to use software it knew systematically underreported owed wages.75 If credited by a court, these allegations seem sufficient to establish a joint-employer relationship, as several lower courts have recently denied franchisor motions to dismiss joint-employer claims with similar allegations.76

Even if these allegations were insufficient, the NYAG additionally asserts that Domino's alleged failure to correct or disclose the flaws in its payroll program violate both fraud and franchise law statutes.77 Importantly, a court could reject the claim that Domino's is a joint employer of franchise store employees and still find violations of state fraud and franchise law. This outcome would require Domino's to remedy these violations of wage-and-hour law.

76 See, e.g., Ocampo v. 455 Hospitality LLC, No. 14-9614, 2016 WL 4926204, at *7-9 (S.D.N.Y. Sept. 15, 2016) (denying a franchisor's motion to dismiss hotel employees' joint-employer wage-and-hour-law claim based on allegations that the franchisor monitored employee performance through on-site inspections, required employee time and wage recordkeeping, instructed franchisees on how to hire and train employees, and reserved right to audit franchisee records and terminate franchise agreement based on inspection results); Cordova v. SCCF, Inc., No. 13-5665, 2014 WL 3512838, at *5 (S.D.N.Y. July 16, 2014) (denying a franchisor-defendant's motion to dismiss where the franchisee-employee alleged, in part, that the franchisor required "certain record keeping systems, including systems for tracking hours and wages and for retaining payroll records and therefore, that [the franchisor] knew or should have known of, and had the authority to exercise control over, the accuracy of records concerning Plaintiffs' hours and wages and those of similarly situated employees"); Olvera v. Bareburger Group LLC, 73 F. Supp. 3d 201, 207 (S.D.N.Y. 2014) (holding that franchise restaurant employees pleaded sufficient facts to survive a motion to dismiss where the complaint "asserts, inter alia, that the franchisor-defendants: (1) guided franchisees on 'how to hire and train employees'; (2) set and enforced requirements for the operation of franchises; (3) monitored employee performance . . . ."); Cano v. DPNY, Inc., 287 F.R.D. 251, 260 (S.D.N.Y. 2012) (holding that plaintiffs pleaded sufficient facts to survive a motion to dismiss where their complaint alleged, for example, that franchisor-defendants "created management and operation policies and practices that were implemented at the defendants' store . . . and monitor[ed] employee performance by means of required computer hardware and software").
Even if the NYAG prevails in its suit against Domino’s, however, it is unclear whether it will establish a broad, durable baseline of franchisor accountability. Franchisees are likely to resist monitoring franchise store pay practices for fear of expanding their liability to other employment laws and tort claims. Franchisors can seek to insulate themselves from legal liability by reconfiguring their relations with franchisees. For example, franchisors could require franchisees to operate more independently of the franchisor, yet increase the capital investment requirement to ensure their dependency on the franchise relationship. Or, franchisors could shift the risk of joint-employer liability to a third party by subcontracting out their franchising operation. Franchisors could also avoid fraud and franchise law liability by removing franchise store payroll functions and data from their required software. These measures would not remove the perverse incentives for franchisees to violate wage-and-hour laws, or for franchisors to ignore these laws while still imposing comprehensive operational standards. Indeed, by removing franchisors further from franchise store pay practices, franchisees may be even less likely to comply with wage-and-hour law.

These next-generation problems are hardly insurmountable. But they may require going outside of wage-and-hour laws to establish a duty to monitor illegal payroll practices, notwithstanding joint-employer status.

**CONCLUSION**

The NYAG’s Domino’s suit marks an important milestone in protecting labor standards in the fast food industry. Its wage-and-hour-law claim may guide future courts’ joint-employer analysis in the context of fast food franchisors. But the analysis offered in this Essay suggests that its most important impacts may lie elsewhere—in its demonstration of franchisee dependence and its use of fraud and franchise laws to hold franchisors accountable without the need to determine joint-employer status.

The suit’s rich factual record shows that the judicial assumption that franchise agreements are arms-length is overdue for reconsideration. The

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78 Control over employment records is a factor in the traditional test to identify a master–servant relationship, see RESTATEMENT (SECOND) OF AGENCY § 220(g) (AM. LAW INST. 1958), and is used in a variety of employment laws, including the Americans with Disabilities Act (ADA) and Title VII. See Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) (applying the common law agency test to statutes that do not define the employment relationship or “give[e] specific guidance on the . . . meaning” of the term “employee”); see also Clackamas Gastroenterology Assocs., P.C. v. Wells, 538 U.S. 440, 444–51 (2003) (following Darden by applying the common law agency test to the definition of “employee” in the ADA). Title VII uses the same definition of “employee” as the ADA. See 29 U.S.C. § 207(6) (2012) (defining “employee” as “any individual employed by an employer”).

79 Domino’s alleges that it has already done this by restricting access to the Payroll Report for franchisees in New York State. Memorandum in Opposition to Verified Petition, supra note 29, at 13.
myth of the franchisee as an independent entrepreneur is demonstrably false, empowers a legal strategy of misdirection by franchisors, and has led courts to disregard franchisors’ indirect supervision of franchisee employees. Further factual development in this and similar cases may lead courts to reject this assumption and with it, the conflation of supervisory control and quality control urged by franchisors in these suits.

Regardless of the near-future outcomes of wage-and-hour litigation against franchisors, however, franchisors are likely to respond by restructuring the franchise relationship in ways that will insulate them from liability without removing the perverse incentives for franchisees to violate the law.80 This suggests the need to impose a duty on franchisors independent of joint-employer status.

The NYAG’s Domino’s suit offers franchise law as a plausible route to do this. Legislatures have previously used franchise law to address specific opportunistic behavior by franchisors.81 Fast food franchisees’ dependence on franchisors supports the imposition of a duty for fast food franchisors to exercise reasonable care to train franchisees about the requirements of wage-and-hour laws, monitor their payroll practices, and remedy violations of wage-and-hour laws in franchise stores as a condition of franchising.82

Establishing a baseline duty to prevent and redress wage-and-hour law violations through franchise law would address the present perverse incentives for franchisees to violate the law without requiring a joint-employer determination. This solution is available to the federal government and to all states that regulate franchisors. Since courts typically reject monitoring as evidence of supervisory control, if the law specifically requires such

80 A similar franchisor response is likely in response to recent successful claims against McDonald’s under an ostensible agency theory. In Ochoa and Salazar, while rejecting plaintiffs’ joint-employer theory under wage-and-hour law, the courts nonetheless denied summary judgment on their claim that McDonald’s was jointly liable under the ostensible agency theory under which plaintiffs believed that the franchisees were McDonald’s true agents. Ochoa v. McDonald’s Corp., 133 F. Supp. 3d 1228, 1239-40 (N.D. Cal. 2015); see also Salazar v. McDonald’s Corp., No. 14-02096, 2016 WL 4394165, at *13 (N.D. Cal. Aug. 16, 2016) (denying motion for summary judgment on similar ostensible agency theory). McDonald’s recently agreed to pay $3.75 million to resolve Ochoa, even as it continues to litigate Salazar. See Ochoa v. McDonald’s Corp., No. 3:14-02098, 2016 BL 378649 (N.D. Cal. Nov. 14, 2016) (granting approval of the class settlement agreement); Robert Iafolla, McDonald's Fights a Second Class Action Brought by Franchise Workers, REUTERS LEGAL (Nov. 22, 2016), http://www.reuters.com/article/usa-employment-mcdonalds-idUSL1N1DN0GL [https://perma.cc/DC6L-WVBD]. McDonald’s and other franchisors are likely to react to these and future ostensible agency theory claims by requiring franchisees to instruct store employees that they are not employees of the franchisor.


82 This mirrors the injunctive remedy sought in the NYAG’s Domino’s suit. Amended Memorandum of Law in Support of Verified Petition, supra note 77, at 43.
monitoring, this approach is also unlikely to increase franchisor liability in unforeseen ways.\textsuperscript{83}

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\textsuperscript{83} See Moreau v. Air Fr., 356 F.3d 942, 950-51 (9th Cir. 2004) (rejecting mandated safety trainings as evidence of joint employment where an airline was legally required to provide such trainings "to ensure compliance with applicable safety regulations"). Nor would joint liability necessarily increase costs for franchisors. As Chief Judge Easterbrook observed in \textit{Reyes}, a business contracting with "fly-by-night" operators can reduce liability "either \[by\] deal[ing] only with other substantial businesses or hold[ing] back enough on the contract to ensure that workers have been paid in full." 495 F.3d 403, 409 (7th Cir. 2007). In response to a change in franchise law, requiring franchisors to remedy franchisee wage-and-hour law violations, franchisors could include holdbacks for labor performance—common in the construction industry—as a standard franchise agreement term. \textit{Id.} at 409.
Returning to the Tribal Environmental "Laboratory": An Examination of Environmental Enforcement Techniques in Indian Country

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RETURNING TO THE TRIBAL ENVIRONMENTAL “LABORATORY”: AN EXAMINATION OF ENVIRONMENTAL ENFORCEMENT TECHNIQUES IN INDIAN COUNTRY

Elizabeth Ann Kronk Warner*

ABSTRACT

Governments, including tribes, need to protect one of humankind’s most valuable resources: the environment. In addition to environmental regulations, effective enforcement mechanisms are key to successful efforts to protect the environment. While much has been written about the environmental enforcement mechanisms of states and the federal government, little scholarly attention has been paid to how tribal governments are working to protect their environments. Given that there are 567 federally recognized tribes and approximately 56.2 million acres held in trust for tribes in the United States, such oversight is significant. This Article fills a scholarly void with a description of environmental enforcement techniques being utilized by tribes. It builds on past articles examining tribal environmental law and also the idea of tribes, who are uniquely situated to engage in meaningful experimentation, as valuable governmental laboratories of innovation. Such consideration is constructive given that the federal government’s innovation has stagnated, and other levels of government may learn valuable lessons by reviewing the work of tribes. Further, effective enforcement of tribal environmental law may be particularly important to tribes because of the strong connection to specific areas of land that exists for many tribes and individual tribal members.

To accomplish this examination of tribal environmental enforcement mechanisms, this Article provides a descriptive survey on the environmental enforcement provisions found in the tribal code provisions of tribes located within the boundaries of four states. This Article reviews the survey results from respondents for nine tribes to determine how effective the tribes’ environmental enforcement mechanisms have been. This Article concludes that tribes are actively incorporating environmental enforcement mechanisms into their tribal codes, but that they are modifying and adapting such mechanisms to best accomplish enforcement within Indian country.

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APPENDIX A. SURVEY: ENFORCEMENT OF TRIBAL ENVIRONMENTAL LAW ... 393

I. INTRODUCTION

The environment is the most valuable resource available to mankind, and its exploitation has the potential to be devastating to humanity. Recognizing this interconnection, many governments across the globe actively engage in regulation of the environment. All three sovereigns located within the United States—the federal government, states, and tribes—have recognized this interconnection and are engaged in efforts at various levels to effectively regulate the environment and deter polluters from releasing too many pollutants into the environment. Regulatory initiatives, however, are not enough to accomplish the goal of protecting the environment. Enforcement measures must be enacted to prevent unwanted pollution. Much has
been written on environmental enforcement at the federal and state levels, but little has been said regarding environmental enforcement methods used by tribes. Given that there are 567 federally recognized tribes and approximately 56.2 million acres held in trust for tribes in the United States, such oversight is significant. This Article seeks to fill the scholarly void by providing a descriptive discussion of the types of environmental enforcement methods used by federally recognized tribes within the United States.

Beyond a simple scholarly exercise, examining tribal environmental law is helpful for many reasons. From a tribal perspective, it is valuable so that tribes may glean important information following review of how other tribes are developing their environmental law. There are 567 federally-recognized tribes within the United States, which means that there may be a lot of tribes experimenting with the development of tribal environmental law and others that are looking for examples of how tribes have implemented such laws. Further, adoption and adaption of tribal environmental law can be a strong expression of tribal sovereignty. The existence of tribal sovereignty allows tribes to enact laws and be governed by them. The development and enactment of laws are fundamental expressions of sovereignty. Enacting any tribal law, therefore, would buttress tribal sover-

6. Tribal laws incorporate several different types of law, including treaties, constitutions, customary and traditional laws, legislative enactments, and administrative rulemaking. For a general discussion of the various categories of tribal laws, see MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2011) and JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES (2d ed. 2010). Different types of law may express tribal sovereignty in different ways. For example, tribal constitutions establish basic tribal powers and governmental structure. FELIX S. COHEN, COHEN’S HANDBOOK ON FEDERAL INDIAN LAW § 4.05[3] (Nell Jessup Newton et al. eds., 2012) [hereinafter COHEN’S HANDBOOK 2012]. Some tribal constitutions also explicitly reference the inherent sovereignty of the tribe. See, e.g., ROSEBUD SIOUX TRIBE CONST. art. IV, § 3. Tribal customary law may also be developed to recognize the tribe’s important cultural ties to the past and significance of tribal culture in the future. See generally Robert D. Cooter & Wolfgang Fikentscher, Indian Common Law: The Role of Custom in American Indian Tribal Courts, 46 AM. J. COMP. L. 287 (1998). Overall, “[i]n recent decades, the scope of tribal law has been widening to meet the needs of tribal self-government and contemporary self-determination. This explosion in both tribal common law decision making and positive law reflects the growing demand on Indian nations to address a wide array of matter.” COHEN’S HANDBOOK 2012, supra note 6, § 4.05[2]. However, as Profes-
Finally, in addition to being expressions of tribal sovereignty, adoption and adaptation of tribal environmental law may be particularly important for tribes with cultural and spiritual connections to their environment and land. Adoption and adaptation of tribal environmental law may be particularly important for tribes with cultural and spiritual connections to their environment and land. Although certainly not always the case, native cultures and traditions are often tied to the environment and land in a manner that traditionally differs from that of the dominant society. For a variety of reasons, including legal, cultural and spiritual reasons, many tribal nations are “land-based.” Accordingly, for tribes with connections to the land and environment, enacting tribal environmental laws (and learning from the experiments of other tribes) may be especially helpful.

Other sovereigns—states and the federal government—also benefit from our exploration of tribal environmental law. Previously, the federal government engaged in significant experimentation related to environmental law. The period between 1969 and 1980 is often referred to as “the environmental decade”; it was a time of tremendous federal innovation in the field of environmental law. During the environmental decade, the federal government expanded environmental regulations, passing numerous environmental statutes such as the Clean Water Act (CWA), Clean Air Act (CAA), and

sor Christine Zuni Cruz notes, not every sovereign act undertaken by an indigenous nation necessarily promotes [its] sovereignty . . . . Adoption of western law can create a gap between the adopted law and the people . . . . In this respect, an Indian nation’s government can participate in the alienation of its own people.

Christine Zuni Cruz, Tribal Law as Indigenous Social Reality and Separate Consciousness—[Re]Incorporating Customs and Traditions into Tribal Law, 1 Tribal L.J. 2 (2000).

7. For a general discussion of the close spiritual and cultural connection that many tribes and individual Indians have with their tribal environments, see Tribes, Land and the Environment (Sarah Krakoff & Ezra Rosser eds., 2012).

8. The author recognizes that each Native nation has a different relationship with its environment and is hesitant to stereotype a common “Native experience,” recognizing that there is a broad diversity of thought and experience related to one’s relationship with land and the environment. In particular, the author would like to avoid traditional stereotypes of American Indians as “Noble Savages” or “Bloodthirsty Savages.” See Rebecca Tsosie, Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge, 21 Vt. L. Rev. 225, 270 (1996) (“The problems of cross-cultural interpretation and the attempt to define ‘traditional’ indigenous beliefs raise a common issues: the tendency of non-Indians to glorify Native Americans as existing in ‘perfect harmony’ with nature (the ‘Noble Savage’ resurrected) or, on the other hand, denounce them as being as rapacious to the environment as Europeans (the ‘Bloodthirsty Savage’ resurrected.’).”.

9. Id. at 274.

10. Robert L. Glicksman et al., Environmental Protection: Law and Policy 68 (7th ed. 2015); Robert V. Percival et al., Environmental Regulation: Law, Science and Policy 1 (6th ed. 2009) (“Since the late 1960s, spectacular growth in public concern for the environment has had a profound impact on the development of American law. During this period, U.S. environmental law has grown from a sparse set of common law precedents and local ordinances to encompass a vast body of state and federal legislation.”).
National Environmental Policy Act (NEPA). Since 1988, however, “there has been little innovation in environmental programs,” especially at the federal level. Congress has only innovated in a few areas since the late 1980s, such as with the CAA amendments of the 1990s and hazardous waste and oil spill laws. Despite a demonstrated capacity for innovation in the field of environmental law, the federal government has largely ceased such efforts for the past couple of decades.

This reduction in federal innovation is problematic given the emergence of new environmental challenges that current federal environmental laws are not equipped to adequately address. Such challenging contemporary environmental problems include, “climate change and associated greenhouse gases, environmental inequities, ongoing struggles to clean America’s many areas plagued by degraded rivers and substandard air quality, as well as widespread failure to enforce existing laws.” Many existing federal environmental regulations are not properly designed to handle the nuanced environmental challenges of the current era, given the segmented approach of federal environmental laws. As a result, “[m]ulti-media, multi-jurisdiction problems strain the limits of the existing statutes” because the federal statutes tend to focus on only one resource. Not only is the federal government failing to innovate in the area of environmental law, but the existing environmental statutory structure is ill-positioned to address many of the modern environmental challenges.

Given the modern realities, the federal regulatory vacuum creates a need for increased environmental legal experimentation to address this ongoing harm. And states and local governments are indeed experimenting with environmental law, developing “creative local and regional ad hoc environmental conservation and ecosystem restoration experiments.” As a result, not only can the federal government learn from tribal environmental experimentation, but states may also be well positioned to learn from and adopt strategies developed by tribes. For example, this Article demonstrates how some tribes are experimenting with new ways of environmental enforcement outside of application of federal environmental law. Past arti-

14. Id. at 78.
16. Id.
17. Glicksman et al., supra note 10, at 77.
icles have demonstrated evidence of such tribal ingenuity outside of the enforcement context, such as in the development of tribal water codes to protect cultural resources, and tribal climate adaptation plans. Tribal, federal, and state policy makers all benefit from examination of tribal environmental law.

Consideration of tribal environmental law is especially valuable because tribes are uniquely situated to engage in meaningful experimentation. First, greater diversity exists between tribal governments than between state governments. The political structure of most states is nearly identical. Conversely, the political structures of tribal governments can vary significantly, from theocracies to systems utilizing three branches of government, similar to the federal system. Unlike the United States, which is “a heavily homogenized culture with high levels of normative consensus,” real variety exists within tribal political structures. Tribes may also be more motivated to innovate and experiment with environmental law given factors potentially driving tribes that do not have the same impact on states. Although certainly not true in every instance, many tribes and individual Indians possess a strong connection to land and the environment for legal, cultural, and potentially spiritual reasons, as mentioned above. Because of tribal heterogeneity and the strong connections to land and environment for many tribes, tribal governments may be particularly well suited to experiment with tribal environmental law.

This Article fills the existing scholarly void by reviewing tribal environmental enforcement provisions. As mentioned above, effective regulation of any environment cannot occur without enforcement provisions, so it is helpful to look closely at how tribes are enforcing environmental laws.


22. Given that every tribe constitutes a separate and distinct government with its own history and culture, one should avoid generalizing a common Indian experience.


24. This Article builds on three past articles that have examined the existence of tribal environmental law broadly: Warner, Examining Tribal Environmental Law, supra note 18; Warner, Tribes as Innovative Environmental “Laboratories,” supra note 18; Warner, Justice Brandeis and Indian Country, supra note 18. None of these previous articles have specifically examined the existence of tribal enforcement provisions.
within tribal communities. To do this, Part II of this Article introduces both environmental law generally applicable in Indian country, and the importance of effective enforcement. Both topics provide valuable foundations for later discussions, as understanding what environmental law applies in Indian country is crucial to any discussion of tribal environmental law. The second section of Part II demonstrates why specific consideration of environmental enforcement is relevant to any discussion of the overall efficacy of environmental regulations. Part III examines existing tribal environmental enforcement provisions contained within tribal codes. Part III offers a fuller understanding of the types of mechanisms being utilized by tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma. Part IV looks closely at the enforcement mechanisms of nine federally recognized tribes, each of which responded to a survey gathering information on enforcement mechanisms. These survey results provide greater descriptive understanding of how tribes are (or are not) instituting such mechanisms. Part IV ends with reflections on the various mechanisms being utilized by tribes. This Article provides a critical description of tribal environmental enforcement provisions for various tribes across the country. This fuller picture is vital to understanding the extent and value of the tribal environmental “laboratories” that exist within Indian country.

II. A STARTING POINT: APPLICATION OF ENVIRONMENTAL LAW IN INDIAN COUNTRY AND THE IMPORTANCE OF EFFECTIVE ENFORCEMENT

This Part offers background information crucial to fully developing the discussions below. Before delving into how tribes are enforcing their environmental laws, it is helpful to first understand the scope of environmental law applicable in Indian country under both inherent tribal sovereignty and federal delegations. By starting with a brief description, one can better understand the ability of tribes to adopt their own tribal environmental laws within the existing legal regime. This Article is the fourth in a series on

*Indian country* is a legal term of art that refers to designated lands, including:
(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

tribal environmental law, and, as a result, this discussion will necessarily be brief.26

In addition to introducing the application of environmental law in Indian country, this Part discusses the importance of effective enforcement of environmental law generally. Such background information grounds subsequent discussions of what may normatively be “good” types of environmental enforcement. Accordingly, this Part clarifies the contours of environmental law applicable in Indian country and what constitutes effective enforcement generally.

A. A Brief Primer of Environmental Law Applicable in Indian Country

Three sovereigns—tribes, states, and the federal government—can enforce their environmental laws in Indian country. It is helpful to understand not only tribal inherent sovereignty that allows tribes to adopt their own environmental laws, but also the scope of federal and state environmental laws applicable in Indian country.27 If federal or state laws apply, the ability of the tribe to enact laws under its own tribal sovereignty may be limited. This is largely due to the fact that the federal government, through Congress, has plenary power over tribes.28 Accordingly, this subpart starts with a brief introduction to the application of both federal and state environmental law to Indian country, and necessarily begins with a discussion of tribal sovereignty given the connection between sovereignty and environmental law.29

Despite the existence of federal plenary power, tribal sovereignty remains. Prior to the formation of the United States, tribes existed as independent, self-governing communities.30 Despite contact with foreign
governments, tribal governments continued to be recognized as independent, sovereign governments after the formation of the United States. The U.S. Supreme Court acknowledged in *Worcester v. Georgia* that tribes are “distinct, independent political communities.”31 Additionally, the federal government recognized tribal sovereignty through the Indian Commerce Clause of the U.S. Constitution.32 These recognitions of tribal sovereignty remain today because tribal sovereignty has never been extinguished.33 “Tribal powers of self-government are recognized by the Constitution, legislation, treaties, judicial decisions, and administrative practice.”34 Unless Congress acts to divest a tribe of its inherent sovereignty, the tribe’s sovereignty remains.35 Ultimately, “Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate.”36

In addition to inherent tribal sovereignty, Congress may also delegate federal authority to tribes through treaties or statutes.37 Because federal environmental laws are usually considered to be laws of general application, federal courts have generally found that they apply in Indian country unless their application would directly interfere with tribal sovereignty.38 The

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33. United States v. Wheeler, 435 U.S. 313, 322–23 (1978). Although this assertion is generally true, it is worth noting that some tribes were “terminated” during the Termination Era of the mid-twentieth century. *Cohen’s Handbook* 2005, *supra* note 29, § 1.06 (citing Charles F. Wilkinson & Eric R. Biggs, *The Evolution of the Termination Policy*, 5 *Am. Ind. L. Rev.* 139, 151–54 (1977)). “Although the termination acts did not expressly extinguish the governmental authority of such [terminated] tribes, most were unable to exercise their governmental powers after losing their land base. Termination thus weakened the sovereignty of terminated tribes.” *Id.* § 1.06.

34. *Cohen’s Handbook* 2012, *supra* note 6, § 4.01[1][a].

35. *Id.*

36. *Nanomantube v. Kickapoo Tribe in Kan.*, 631 F.3d 1150, 1151–52 (10th Cir. 2011) (quoting *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc)).

37. *Cohen’s Handbook* 2005, *supra* note 29, § 4.01[1][a] (“Whether such statutes actually delegate federal power, as opposed to affirming or recognizing inherent power, is a matter of congressional intent.”).

38. *Cohen’s Handbook* 2005, *supra* note 29, § 10.01[2][a]. However, the application of federal environmental laws does not displace the ability of tribes to enact tribal environmental laws. *Id.* § 10.01[2][b].
federal Environmental Protection Agency (EPA) therefore has the authority to implement federal environmental laws in Indian country. Under several federal environmental statutes, however, tribes may choose to administer the federal environmental programs and standards through tribes-as-states (TAS) mechanisms. The TAS provisions of major federal environmental statutes, such as the CWA, allow tribes to act as states for purposes of implementing the statute under the cooperative federalism scheme. Accordingly, tribes with TAS authority may find themselves implementing federal environmental standards in ways that accord with their tribal norms and customs.

Relevant to the application of environmental law in Indian country is the question of who those laws apply to within tribal territories. Civil jurisdictional uncertainty sometimes arises in relation to a tribe’s authority over the actions of non-members and non-Indians acting within the tribe’s territory. In *Montana v. United States*, the U.S. Supreme Court considered the extent of the Crow Tribe’s inherent sovereignty over non-Indians on non-Indian land. Ultimately, because of implicit divestiture of the Tribe’s inherent sovereignty, the Court determined that the Tribe did not have authority to regulate the hunting and fishing of non-Indians owning fee

39. *Id.* § 10.01[2][a].
41. *Id.*
42. For a discussion of TAS status in Indian country, see generally Warner, *Tribes as Innovative Environmental “Laboratories,”* supra note 18.
43. A “non-member” refers to someone who is Indian, but not a citizen of the particular tribe in question.
46. *Id.* at 557; see also Bruce Duthu, *Implicit Divestiture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353 (1994). “According to this theory, courts can rule that, in addition to having lost certain aspects of their original sovereignty through the express language of treaties and acts of Congress, tribes also may have been divested of aspects of sovereignty by implication of their dependent status.” Gover & Cooney, *supra* note 29, at 35.
land within the Crow Tribe’s reservation boundaries. However, the Court acknowledged that, despite this implicit divestiture, tribes may regulate the activities of such individuals under two exceptions. First, tribes may regulate the activities of individuals who have entered into “consensual relationships with the tribe or its members.” This has commonly become known as the “consensual relations” or first Montana exception. Second, a tribe retains the “inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”

Although the Montana decision was limited to non-Indians on non-Indian land, the rationale of the decision was arguably extended to tribal lands by the U.S. Supreme Court’s decision in Nevada v. Hicks. In Hicks, the Supreme Court considered whether the Fallon Paiute-Shoshone Tribes had jurisdiction over a tribal member’s civil claim against Nevada game wardens, in their individual capacities. When searching the tribal member’s on-reservation property, the aggrieved tribal member alleged that the Nevada game wardens violated certain tribal civil provisions (in addition to violating federal law). The Court found that the tribal court could not hear the claim because the Montana exceptions were inapplicable. It may therefore be argued that the Court implicitly suggested in Hicks that Montana applied to the actions of non-members and non-Indians within Indian country, regardless of the status of land where the activity occurred.

Just like inherent tribal sovereignty plays an important role in the development of tribal environmental law, so too may federal law impact the

47. Since Montana, the Supreme Court has also considered the ability of tribes to regulate the conduct of non-members and non-Indians on other types of lands. For example, in Strate v. A-1 Contractors, the Court held that the Indian tribe did not possess the inherent sovereignty to adjudicate a civil complaint arising from an accident between two non-Indians on a state highway within the tribe’s reservation boundaries. The Strate Court explained that “[a]s to nonmembers, we hold, a tribe’s adjudicative jurisdiction does not exceed its legislative jurisdiction.” 520 U.S. 438, 453 (1997).

48. Montana, 450 U.S. at 564–65 (holding that the “exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation”).

49. Id. at 565.

50. Id. at 566.


52. Id.

53. Id. at 355–69, 374–75.

54. Alternatively, however, it may be argued that the result in the Hicks case came as a result of the sovereignty of the State of Nevada.
law applicable in Indian country. Congress may delegate authority to tribes to implement federal laws. Also, Congress may limit the ability of tribes to enact environmental laws where the federal government is already occupying the field.\textsuperscript{55} The federal government’s limitation on tribal sovereignty as well as its delegation to tribes play important roles in understanding the development of environmental law applicable in Indian country.

Since 1970, the federal government has played an active role in the regulation of environmental pollution.\textsuperscript{56} In the areas where the federal government extensively regulated the environment, questions arose as to whether such regulations applied to Indian country. In 1986, the U.S. Court of Appeals for the Tenth Circuit held that the Safe Drinking Water Act applied to Indian country, consistent with EPA’s authority in Indian country and Congress’ intention for it to be a general statute.\textsuperscript{57} In 1987, Congress acknowledged the right of tribes to enforce their own environmental standards within their territorial boundaries when it adopted “tribal amendments” to several federal environmental statutes.\textsuperscript{58} Assuming tribes meet certain established criteria, these amendments let tribes assume “TAS status” under federal environmental statutes, which in turn allows them to establish environmental quality standards and to issue permits.\textsuperscript{59} Even if the statute does not specifically include TAS provisions, it may include language suggesting that the tribe should be treated like a state.\textsuperscript{60} If a federal environmental statute does not specifically speak to the role of tribes, the EPA may determine whether tribes may be treated similar to states under the statute.\textsuperscript{61} Therefore, under the federal environmental statutes, the EPA regulates in Indian country unless tribes have assumed regulatory authority under TAS provisions or the EPA is treating the tribe similar to a state. Tribes, however, are not always treated like states under federal environmental statutes. For example, “[t]he Resource Conservation and Recovery Act (RCRA), the only major federal environmental law that has not been

\textsuperscript{55} This is consistent with Congress’ plenary authority over tribes. See, e.g., United States v. Kagama, 118 U.S. 375 (1886) (holding that Congress possesses plenary authority over tribes).

\textsuperscript{56} Percival et al., supra note 10, at 94.

\textsuperscript{57} Phillips Petrol. Co. v. EPA, 803 F.2d 545, 547 (10th Cir. 1986).

\textsuperscript{58} E.g., 33 U.S.C. § 1377 (Clean Water Act); 42 U.S.C. § 300j-11 (Safe Drinking Water Act); 42 U.S.C. § 9626 (Superfund); and 42 U.S.C. § 7474 (Clean Air Act).

\textsuperscript{59} 33 U.S.C. § 1377 (Clean Water Act); 42 U.S.C. § 300j-11 (Safe Drinking Water Act); 42 U.S.C. § 9626 (Superfund); and 42 U.S.C. § 7474 (Clean Air Act).

\textsuperscript{60} Cohen’s Handbook 2012, supra note 6, § 10.02[2].

\textsuperscript{61} For example, although both the Emergency Planning and Community Right-to-Know Act and lead-based paint program under the Toxic Substance Control Act are silent as to how tribes are to be treated, the EPA treats tribes as states under both programs. Cohen’s Handbook 2012, supra note 6, § 10.02[2].
amended to accord tribes primary regulator status, defines tribes as municipalities for purposes of the statute. 62

Having considered the role of tribal sovereignty and federal authority in developing environmental law applicable in Indian country, it is helpful to also consider the application of state law to Indian country. States are generally preempted from regulating Indians acting within Indian country. 63 In terms of environmental regulation and otherwise, the state’s role in Indian country is thus severely limited. 64 The EPA generally requires states to show jurisdictional authority over their entire territory, including Indian country, before granting the state authority under federal environmental statutes. 65 Many states have therefore opted to participate under the federal environmental scheme without trying to regulate in Indian country. 66

To summarize, tribes and the federal government have the authority to play a significant role in the development of environmental law in Indian country, while states play a much smaller role. For this reason, the discussion below focuses largely on how tribes are acting to enforce environmental law enacted by virtue of their tribal sovereignty, federal law delegated to the tribes, and laws developed by tribes under their TAS authority that are also consistent with the federal minimum standards.

B. The Importance of Effective Enforcement of Environmental Law

Having a general idea of the scope of environmental law applicable in Indian country, this subpart turns to a general discussion of the need for effective enforcement of environmental provisions. As mentioned above, this Article is the fourth in a series of articles examining tribal environmen-

62. Id. (citing RCRA Section 1004(13), 42 U.S.C. § 6903(13)).
64. COHEN’S HANDBOOK 2012, supra note 6, § 10.02[1] (“In general, states may exercise jurisdiction over Indians and Indian lands only as authorized by Congress, and state jurisdiction over nonmembers on fee lands is constrained both by tribal rights to regulate nonmembers in order to protect core tribal governmental interests and by federal preemption of state authority.”).
65. Gover & Cooney, supra note 29, at 36 (“Accordingly, before a state may assume primary enforcement responsibilities for federal environmental laws on reservations, the state must demonstrate to EPA’s satisfaction that is has jurisdiction.”).
66. See, e.g., Wash. Dep’t of Ecology v. EPA, 752 F.2d 1465 (9th Cir. 1985) (rejecting the state of Washington’s attempt to regulate in Indian country).
tional law.67 Previous articles examined the scope of tribal environmental laws and the different types of laws being enacted by tribes within the boundaries of Arizona, Montana, New York, and Oklahoma. This Article continues the tradition of focusing on federally recognized tribes within these four states, but diverges from previous articles by examining the type of environmental enforcement provisions being used by these tribes. As such, a general introduction to environmental law applicable to Indian country is not enough before launching into a discussion of such enforcement provisions; it is also necessary to discuss the necessity of effective enforcement provisions. In addition to generally discussing environmental enforcement, this subpart offers some insights into how tribal environmental enforcement may necessarily diverge from enforcement schemes used by other sovereigns, such as the federal government.

The United States has been actively engaged in regulating the environment since the late 1960s, and it is helpful to examine the evolution of federal environmental enforcement.68 Civil fines and penalties have played an important role in the environmental enforcement mechanisms used by the federal government. Initially, the civil fines and penalties were relatively insignificant.69 However, the federal government learned that relatively slight penalties yielded ineffective enforcement, because many regulated industries would prefer to pay a low fine than comply.70 In response, the federal government adopted stronger enforcement mechanisms in order to increase compliance.71 Congress increased the complexity of the environmental regulatory scheme and escalated some environmental crimes from misdemeanors to felonies.72 Further, the EPA increased the number of its investigators and the Department of Justice (DOJ) created an Envi-

67. See Warner, Examining Tribal Environmental Law, supra note 18; Warner, Tribes as Innovative Environmental Laboratories, supra note 18; Warner, Justice Brandeis and Indian Country, supra note 18.

68. Admittedly, tribes have likely been regulating the tribal environment since time immemorial through custom, tradition, and community norms. This Article largely focuses, however, on enforcement provisions adopted through tribal environmental code provisions. See infra Part III. Accordingly, given the federal government has largely relied on statutes, codes and regulations to accomplish its environmental goals, considering the evolution of federal environmental enforcement is helpful.

69. See Lazarus, supra note 1, at 2442, 2446–47, 2454.


71. See Lazarus, supra note 1, at 2415–16.

In making these changes, the federal government acted on the theory that environmental compliance would only come with harsher potential sanctions, and sanctions that punished individual corporate officials rather than only the company itself. As a result, the DOJ saw substantial increases in both the number of fines assessed and number of prison sentences for defendants in cases involving environmental crimes.

Although the appropriate “mix” of enforcement options may be a constant work in progress, the federal government has come to rely on a combination of criminal offenses and civil fines to enforce its environmental laws. As discussed below, many tribes have also developed enforcement systems using criminal penalties, civil fines, or both. Notably, tribes may not be able to use those penalties with the same latitude that the federal government can. In 1978, the Supreme Court decided Oliphant v. Suquamish Indian Tribe, holding that tribes had been divested of their inherent tribal sovereignty over non-Indians. At issue were the actions of Mark Oliphant, a non-Indian living as a permanent resident on the Suquamish Indian Tribe’s Reservation. Tribal police arrested and charged Mr. Oliphant for assault on a tribal officer and resisting arrest. Oliphant challenged the Tribe’s exercise of criminal jurisdiction, and won. Although criminal jurisdiction over non-Indians has subsequently been restored in very limited circumstances, tribes today do not have criminal jurisdiction over non-
Indians violating tribal environmental laws within the tribes’ territories as a result of the Oliphant decision. Accordingly, any criminal enforcement provisions adopted by tribes by virtue of their tribal inherent sovereignty would be limited to Indians.81 Similarly, tribes may not have as broad civil environmental enforcement capabilities as the federal government because of the Supreme Court’s decision in Montana v. United States.82 As discussed above,83 the Montana decision found a general presumption against civil regulatory jurisdiction over non-Indians on non-Indian land within Indian country, unless one of the two exceptions applies. If not, tribes cannot apply civil fines against non-Indians on non-Indian lands within their territory. As discussed below,84 many tribes now exercise civil jurisdiction over non-Indians by virtue of the second Montana exception, on the theory that environmental pollution threatens the health and safety of their communities. So, while tribal enforcement mechanisms may look similar to federal enforcement mechanisms, limitations exist due to constraints on tribal enforcement under the Oliphant and Montana decisions.

III. ENVIRONMENTAL ENFORCEMENT PROVISIONS IN TRIBAL ENVIRONMENTAL CODES

With the necessary background information on the extent of environmental law applicable in Indian country and the importance of effective enforcement mechanisms in hand, this Part discusses enforcement mechanisms being used by federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma.85 This Part describes enforcement provisions included in the tribal codes providing insight into the general scope and structure of such mechanisms. To be consistent with past articles on the topic, this Part is generally limited to enforcement provisions related to the regulation of air, water, and solid waste, with some

81. In United States v. Lara, the U.S. Supreme Court held that tribes maintain criminal jurisdiction over all Indians, regardless of whether the Indian in question is a citizen of the tribe. 541 U.S. 193, 198 (2004).
83. See supra notes 48–54 and accompanying text.
84. See infra Part IV.B.4.
85. To be consistent with the past articles written on tribal environmental law, this Article focuses on federally recognized tribes located within these four states, as those were the areas of focus in past articles. See e.g., Warner, Examining Tribal Environmental Law, supra note 18; Warner, Tribes as Innovative Environmental “Laboratories,” supra note 18; Warner, Justice Brandeis and Indian Country, supra note 18.
helpful commentary also provided. This Part builds on this initial structure by taking a close look at the enforcement mechanisms used by nine federally-recognized tribes.

As a starting point, tribes located within Oklahoma may be more restricted in their ability to enact laws under TAS status. Specifically, it may be that tribes located within the boundaries of Oklahoma develop fewer environmental programs under the TAS provisions of various environmental statutes. If true, that is likely a result of the specific provision requiring that any Indian tribe seeking TAS status must enter into an agreement with the appropriate Oklahoma state agency, and that the tribe and state agency jointly administer the program requirements.86 This requirement is only applicable to federally recognized tribes located within Oklahoma. Accordingly, if tribes located within Oklahoma seem to participate in TAS programs under federal environmental statutes at a lower rate than tribes located within other states, there is a strong possibility that it is because of this requirement to obtain approval from the appropriate Oklahoma state agency before a TAS application can be approved.87

In addition to enacting tribal code provisions regulating air, water, and solid waste pollution, some tribes adopted overarching tribal code provisions speaking to environmental quality broadly. For example, the Cherokee Nation of Oklahoma adopted the Environmental Quality Act.88 One of the purposes of the Act is to make “pollution unlawful,”89 and it contemplates penalties where violations are found.90 The Absentee Shawnee Tribe

86. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users, Or “SAFETEA-LU”, Pub. L. No. 109-59, § 10211(b)(2), 119 Stat. 1937 (Aug. 10, 2005) (“[T]he Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing, under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements.”).
87. Completed Enforcement of Tribal Environmental Law Survey by Tribe A (on file with author) [hereinafter Tribe A Survey].
89. Id. § 2.
90. Id. § 1006 (“Except as otherwise specifically provided by law, any person who violates any of the provisions of, or who fails to perform any duty imposed by, the Cherokee Nation Environmental Quality Code or who violates any order, permit or license, or rule promulgated by the Commission pursuant to the Cherokee Nation Code: 1. Shall be guilty of a crime and upon conviction therefore may be punished by a fine of not less than Two Hundred Dollars ($200.00) for each violation and not more than Five Thousand Dollars ($5,000.00) for each violation or by imprisonment for not more than one year, or by both such fine and imprisonment. Each day a violation continues may be considered a separate crime; 2. May be published in civil proceedings in district court by assessment of a civil penalty of not more than Five Thousand Dollars ($5,000.00) for each violation, and for each
of Indians of Oklahoma also has a tribal code provision speaking generally to environmental protection. Interestingly, the Tribe contemplates assessing monetary penalties against any violators of the Act (up to $5,000 per day for each day of such violation or continued violation following non-compliance) in addition to any federal penalties that may be applicable.91 Some tribes have enforcement provisions related to the general maintenance of the environment, in addition to mechanisms associated with specific resources—such as air and water.

A. Enforcement Provisions Related to the Regulation of Air Pollution

A previous survey of tribal environmental codes reviewed the codes of the 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma to determine how many of these tribes possessed tribal environmental code provisions related to air pollution, water pollution, solid waste disposal, and environmental quality generally.92 As to the regulation of air pollution, the survey determined that only four tribes, or 5% of the survey group, enacted tribal code provisions related to the regulation of air pollution.93

As previous research demonstrates, relatively few tribes have enacted tribal code provisions related to the regulation of air pollution.94 It therefore makes sense that, within the scope of this article’s study, only three tribes—the Navajo Nation, Saint Regis Mohawk Tribe, and Cherokee Nation of Oklahoma—have adopted tribal code provisions speaking to the enforcement of such tribal code provisions related to air pollution regulation.

Located partially within the borders of Arizona, the Navajo Nation adopted the Navajo Nation Air Pollution Prevention and Control Act. In adopting the Act, the “Navajo Nation Council . . . is creating a coordinated program to control present and future sources of air pollution on the Navajo Nation,” and it “declared to be the policy of this Nation that no further significant degradation of the air in the Navajo Nation shall be tolerated, and that economic growth will occur in a manner consistent with the preservation of the environment.”

91. ENVIRONMENTAL CODE ch. 3, § 2 (Absentee Shawnee Tribe of Indians of Oklahoma).
92. See generally Warner, Examining Tribal Environmental Law, supra note 18.
93. Id. at 68.
94. Id.
vation of existing clean air resources." The Code provides for potentially both civil and criminal penalties, and also contemplates the potential administrative assessment of penalties and citizen suits under the appropriate conditions.

Located in New York, the Saint Regis Mohawk Tribe adopted a Tribal Implementation Plan (TIP) under the TAS provisions of the CAA. "It is the purpose of this TIP to safeguard the air resources from pollution by: (1) controlling or abating air pollution which shall exist when this Plan shall be enacted; and (2) preventing new air pollution." The TIP provides for enforcement of the Plan, explaining that "[t]he Peacemakers Court, Civil Disobedience Division, shall be the arbiter of all summons and complaints filed under this Plan."

Finally, the Cherokee Nation of Oklahoma adopted an Air Quality Code, as part of its overall Environmental Quality Code. The Code states "that the Nation has an air quality code that is comprehensive and will ensure that the Nation has the authority in place to obtain treatment as state for air programs." The Code establishes that potential violators may be subject to compliance orders, administrative penalties, settlements and/or consent orders. Although the Code does not specify actual pen-

96. Id. § 1154(A) ("The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties not more than thirty-two thousand five hundred dollars ($32,500) per day, which amount shall increase automatically whenever the federal maximum civil penalty increases, in any of the following instances . . . .").
97. Id. § 1154(B).
98. Id. § 1155.
99. Id. § 1156.
100. TRIBAL IMPLEMENTATION PLAN § 2.1 (Feb. 2004) (Saint Regis Mohawk Tribe). The TIP also goes on to explain that the Plan was adopted as part of a federal delegation to the Tribe, "TCR 99-43 expressly states that the Tribe authorizes the SRMT’s Air Quality Program to submit applications for federal assistance and to receive delegation of the federal CAA authority, as allowed by law under the CAA of 1970 and Amendments to the act thereafter." Id.
101. Id. § 18.2(2).
103. Id. § 2-5-110. In relevant part, the Code explains that:
   Any penalty assessed in the order shall not exceed Five Thousand Dollars ($5,000.00) per day for each violation or the maximum established in the Environmental Quality Code. In assessing such penalties, the Commission shall consider the seriousness of the violation or violations, any good faith efforts to comply, and other factors determined by rule to be relevant.
   Id. § 2-5-110(D).
alty amounts, it does explain that violators may be subject to civil and/or criminal fines. Finally, the Code also contemplates the possibility of an injunction being entered against a violator; such an injunction would be limited to the extent of the Tribe’s jurisdiction as defined by federal Indian law.

B. Enforcement Provisions Related to the Regulation of Water Pollution

A previous survey examined the tribal environmental code provisions for the 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma. As to tribal code provisions related to the regulation of water pollution, twenty-three tribes, or 31% of the survey group, enacted some tribal environmental code provision related to the regulation of water.

Looking more closely at enforcement provisions of such tribal environmental codes, several tribes located within the borders of Arizona adopted tribal code provisions on water pollution that are remarkably similar. These Tribes are the Fort McDowell Yavapai Nation, Hualapai Tribe, Salt River Pima Maricopa Indian Community, Tonto Apache Tribe, and Yavapai-Prescott Indian Tribe. In each instance, the provisions related to water pollution are included in the Tribes’ Health and Sanitation Codes. Each code provision is similar to the following: “it shall be unlawful for any Indian to pollute any source of domestic water by disposing of, in or near the water, garbage, dead animals or other polluting items or to locate a privy within fifty (50) feet of said water source.” Similarly, all codes contemplate penalties for violations of these prohibitions against polluting water.

Several other tribes located within the borders of Arizona have adopted comprehensive water codes. For example, the Hualapai Tribe adopted a Water Resources Ordinance, which was designed to allow “the standards set forth in this Ordinance into permits issued pursuant to the NPDES prov-

104. Id. § 2-5-116.
105. Id. § 2-5-117.
106. Warner, Examining Tribal Environmental Law, supra note 18.
107. Id. at 69.
108. LAW & ORDER CODE ch. 13, § 13-2 (Fort McDowell Yavapai Nation).
109. TRIBAL CODE ch. 9, § 9.2 (Hualapai Tribe).
110. CODE OF ORDINANCES ch. 13, § 13-2 (Salt River Pima Maricopa Indian Community).
111. CIVIL & CRIMINAL LAW & ORDER CODE ch. 8, § 8.1 (Tonto Apache Tribe).
112. LAW & ORDER CODE ch. 9, § 9.2 (Yavapai Prescott Indian Tribe).
113. Id.
114. See, e.g., id. § 9.3.
sions of Section 402 of the Clean Air Act or Section 604 of this Ordinance and into the management process for nonpoint source generators.” The Tribe therefore contemplates incorporating its provisions into federal permits. The Tribe’s Ordinance specifically calls for enforcement, including administrative enforcement, judicial enforcement, cease and desist orders, civil penalties, criminal penalties, and potential referral to federal court for enforcement. In relation to civil penalties, the Ordinance recites several factors that the tribal court may take into consideration when determining the penalty amount, and also contemplates potential referral to federal authorities for civil penalties.

The Navajo Nation adopted three code provisions related to water: the Navajo Nation Clean Water Act, the Navajo Nation Safe Drinking Water Act, and the Navajo Nation Water Code. The Navajo Nation Clean Water Act provides for general enforcement authority for the Nation. The Code also contemplates judicial enforcement, allowing for the “assessment and recovery of civil penalties of not less than five hundred dollars ($500.00) and not more than twenty-five thousand dollars ($25,000) per day per violation” under certain circumstances. In addition to judicial enforcement, the Code also contemplates administrative assessment of penalties, and the possibility of citizen suits under the appropriate circumstances. Similarly, the Navajo Nation Safe Drinking Water Act also discusses the Nation’s general enforcement authority. Further, the Act contemplates judicial enforcement, including how a tribal court might calculate civil penalties, and the potential assessment of criminal penalties. Although not speaking directly to the pollution of water re-

115. ENVIRONMENTAL REVIEW CODE pt. 1, ch. 1, § 102(B) (Hualapai Tribe).
116. Id. §§ 701–811
117. Id. § 806. Interestingly, and related to the discussion of trespass actions below (see infra Part III on Common Law Provisions) this portion of the Ordinance also contemplates violations as Trespass, “[v]iolation of any provision of this Ordinance by any person who is not a member of the Hualapai Tribe constitutes a trespass on the Hualapai Indian Reservation, subject to exclusion or expulsion from the Reservation pursuant to the provisions of the Hualapai Law and Order Code.” Id. § 808.
119. Id. § 1383.
120. Id. § 1384.
121. Id. § 1385.
122. “The purpose of this Act is to protect the health and welfare of the Navajo people and the environment by establishing appropriate drinking water standards to ensure that drinking water is safe for consumption, and by protecting underground sources of drinking water from potential contamination by underground injection activities.” Safe Drinking Water Act, NAVAJO NATION CODE ANN. tit. 22, § 2503 (2009) (Navajo Nation).
123. Id. § 2582.
124. Id. § 2583.
sources, the Navajo Nation Water Code does provide sanctions for violation of the code.

The San Carlos Apache Tribe has also adopted a Water Pollution Code. The purpose of the code is to “eliminate all discharges of pollutants into the waters of the San Carlos Apache Reservation.” The Water Pollution Code does establish civil penalties for individuals who violate the Code, and contemplates the possibility of court action and injunctions. A Chapter of the Salt River Pima Maricopa Indian Community’s tribal code is dedicated to water and other resources, which provides that the Tribe is the responsible party for ensuring the health and welfare of its citizens through regulation of the Tribe’s waters. The Code contemplates the enforcement of water quality regulations, and also provides penalties for violators where appropriate.

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125. The purpose of the Navajo Nation Water Code is to provide for a permanent homeland for the Navajo People to protect the health, the welfare and the economic security of the citizens of the Navajo Nation, to develop, manage, and preserve the water resources of the Navajo Nation, to secure a just and equitable distribution of the use of water within the Navajo Nation through a uniform and coherent system of regulation, and to provide for the exercise of the inherent sovereign powers of self-government by the Navajo Nation, the Navajo Nation asserts its sovereign authority over all actions taken within the territorial jurisdiction of the Navajo Nation which affect the use of water within the Navajo Nation.

Id. § 1101.

126. Id. § 2305 (“Violations of this chapter may subject the person(s) or entity(ies) responsible to forfeiture or suspension of rights to the use of water administered under this Code. Sanctions may also include the requirement of payment for water improperly used or adversely affected by the improper use; payment of the costs for all associated remedial actions taken, including the replacement of lost water; payment of associated administrative costs incurred by the Navajo Nation as a result of the violation; and payment of such other costs as are necessary to render the Navajo Nation and its inhabitants whole.”).


128. Id. § 4 (“Any person discharging any pollutant into the waters of the Reservation shall pay a civil fine in an amount not to exceed five thousand dollars ($5,000) for each day in which the violation occurs. The civil fine required by this Section shall be imposed by any court of competent jurisdiction in accordance with Sections 5 and 6 of this Ordinance.”).

129. Id. § 6.

130. CODE OF ORDINANCES § 18-41(2) (Salt River Pima Maricopa Indian Community) (“Consistent with the 1984 statement of policy by the United States Environmental Protection Agency entitled ‘EPA Policy for the Administration of Environmental Programs on Indian Reservations,’ the community develop and fulfill its principal role as the appropriate nonfederal party for making decisions and carrying out program responsibilities affecting the reservation, its environment, and the health and welfare of the reservation populace.”).

131. Id. § 18-44.

132. Id. § 18-80 (“Any permittee who violates the conditions of the permit or the provisions of this code shall be subject to the forfeiture of the permit after notice and hearing as provided for in section 18-77. The Salt River Pima-Maricopa Indian Community shall have..."
Similarly, the Tohono O’odham Nation has also adopted a water code, because the Nation has determined that “[a]ll waters which originate in or flow in, into or through the Tohono O’odham Nation . . . are a sacred and valuable public resource of the Tohono O’odham Nation to be protected for the present and future use of the Tohono O’odham Nation as a whole.” Article 9 of the Code contemplates enforcement of the Code, and specifically allows for potential issuing of orders to comply and penalties for violations. Likewise, the White Mountain Apache Tribe has also adopted a tribal code provision to provide water quality protection. In adopting this portion of its Code, the Tribe recognizes that water is “essential to the survival” of the Tribe.

The Code provides both for the enforcement of the code and potential penalties to be applied against violators. The Code goes on to recognize the jurisdiction to provide injunctive relief in order to prevent the use of surface water in violation of this code upon a petition of the surface water administrator. The Salt River Pima-Maricopa Indian Community Court shall have the jurisdiction over civil actions brought by the surface water administrator against permitees for civil damages resulting from the violation of the permit issued, or for using surface water without a permit, and such damages shall include the value of the water use in violation of this code, the cost of investigations and attorney’s fees, and all hearing and court costs incurred.”).

134. Id. § 3902.
135. Id. § 3903 (“(A) Except as provided in subsection (B), any Person found to be in violation of the Code or any Permit, license to perfect, rule, regulation or order of the Director issues pursuant to the Code, as provided in subsection 3902(B), may be assessed a civil penalty of up to $1,000.00 for each day the violation continues following the issuance of a Final Decision by the Director pursuant to that section. (B) If the Director determines, pursuant to subsection 3902(B), that the violation was willful or that the violation constitutes an illegal use of disposition of any of the Nation’s Water, a civil penalty of up to $10,000.00 per day may be assessed by the Director for each day the violation continues following the issuance of a Final Decision by the Director pursuant to that subsection.”).
136. Environmental Code ch. 3, pmbl. (1999) (White Mountain Apache Tribe) (“Tú water, is one of the gifts of the Creator that is essential to the survival of the White Mountain Apache People. Water is inseparable from our land and culture. Our homeland has always been blessed with a great number of springs, streams, and meadows to sustain a diverse and vibrant community of plants, wildlife, and people . . . . We recognize that we must assert full authority over all the lands and waters of our Reservation to protect them from abuse. The standards for water quality in this Tribal Ordinance will guide the protection of our waters for present and future generations.”).
137. Id. § 3.4. Interestingly, the Tribe provides that its jurisdiction under the Code provision applies to both Indians and non-Indians. Id. § 3.4(A). Moreover, the Code also contemplates potential federal prosecution, which is not prohibited by tribal prosecution. Id. § 3.4(D). In terms of civil citations, the Code provides that “[a]ny Authorized Officer can issue civil citations imposing fines of up to $500 for violations of this Code.” Id. § 3.4(G)(1).
the possibility of liquidated damages\textsuperscript{138} and nothing in the Code precludes the Tribe from applying punitive damages against a violator.\textsuperscript{139}

Located within the boundaries of Oklahoma, the Sac & Fox Tribe of Oklahoma adopted a tribal code chapter focused on crimes against public health, safety, and welfare. The Code provides for a “water offense,” which makes it unlawful to “[i]nterfere with or alter the flow of water in any stream, river, or ditch, without lawful authority to do so, or a permit from the Tribe, and in violation of the right of any other person; or . . . pollute or befoul any water in any of the following ways.”\textsuperscript{140} The Code also provides for specific penalties for violations of this section.\textsuperscript{141}

Located in New York, the Saint Regis Mohawk Tribe has adopted water quality standards effective within its territory. “The purpose of these water quality standards is to facilitate sovereign self-determination and the restoration and preservation of traditional hunting, fishing, gathering and cultural uses in, on and around Tribal Surface Waters.”\textsuperscript{142} The standards provide for compliance schedules, as appropriate.\textsuperscript{143}

\section*{C. Enforcement Provisions Related to the Regulation of Solid Waste}

As mentioned above, a previous survey reviewed the tribal environmental code provisions of 74 federally recognized tribes, and this survey determined that 27 of those tribes, or approximately 36 percent of the survey group, possessed a tribal environmental code provision related to the disposal of solid waste.\textsuperscript{144} In addition to adopting tribal code provisions related to solid waste disposal, many tribes also provide for enforcement mechanisms for their solid waste ordinances. For example, several tribes located within Oklahoma have adopted enforcement provisions for their solid waste code provisions. The Seneca-Cayuga Tribe of Oklahoma proposed recovery costs related to its Solid Waste Code.\textsuperscript{145} The Cherokee Nation of

\begin{itemize}
\item \textsuperscript{138} \textit{Id.} § 3.4(L)–(M).
\item \textsuperscript{139} \textit{Id.} § 3.4(N).
\item \textsuperscript{140} \textit{CODE OF LAWS} ch. 5, § 566 (Sac & Fox Tribe of Oklahoma).
\item \textsuperscript{141} \textit{Id.} § 566(b) (“A water offense shall be punishable by a fine not to exceed Two Hundred Fifty Dollars ($250.00), or by a term of imprisonment in the Tribal jail not to exceed three months, or both.”).
\item \textsuperscript{142} \textit{WATER QUALITY STANDARDS} § I(A) (2013) (Saint Regis Mohawk Tribe).
\item \textsuperscript{143} \textit{Id.} § III(F).
\item \textsuperscript{144} \textit{Warner, Examining Tribal Environmental Law, supra} note 18, at 70.
\item \textsuperscript{145} \textit{SOLID WASTE CODES} IV (2009) (Seneca-Cayuga Tribe of Oklahoma) (“If a person violates this ordinance and the Seneca-Cayuga Tribe arranges for or executes the lawful disposal of solid waste, that person shall be responsible to the Seneca-Cayuga Tribe for all reasonable costs and expenses associated with transportation and disposal of solid waste.”). Attorney’s fees may also be awarded to a prevailing party. \textit{Id.} at IV(B). Notably, although
Oklahoma generally prohibits illegal dumping on tribal land, and “[a]ny violation of this statute shall be subject to any provision for fine and/or other punishment as provided by state or federal law.”\textsuperscript{146} The Apache Tribe of Oklahoma enacted an entire code provision focused on solid waste disposal, titled “Solid Waste Code.”\textsuperscript{147} Section 613 of the Tribe’s Code focuses on enforcement authority, and Section 614b focuses on enforcement actions.\textsuperscript{148}

In terms of enforcement actions, the Code contemplates complaints, cease and desist orders, remedial actions, revocation and suspension of permits, hearings, compliance orders, or appeals.\textsuperscript{149} The Tribe also goes on to specify the penalties associated with violations.\textsuperscript{150} Under the Absentee Shawnee Tribe of Indians of Oklahoma Solid Waste Code, the Tribe contemplates using cooperative compacts with surrounding tribes, states, and the federal government in order to ensure compliance of its solid waste provisions.\textsuperscript{151} In addition to the possibility of inter-sovereign compacts to ensure compliance, the Tribe’s Code also contemplates complaints, cease and desist orders, remedial actions, revocation of permits, hearings, appeals, and compliance orders as methods of potential enforcement of its Solid Waste Code.\textsuperscript{152} Very similar to other tribes in Oklahoma, the Tribe goes on

\textsuperscript{146} A New Act Relating to the Cherokee Nation of Oklahoma Law Regarding Illegal Dumping on Tribal Land, Legislative Act 26-87 (Nov. 14, 1987).
\textsuperscript{147} SOLID WASTE CODE §§ 600–616f (Apache Tribe of Oklahoma).
\textsuperscript{148} Id. §§ 613, 614b
\textsuperscript{149} Id. §§ 613, 614a-c.
\textsuperscript{150} Id. § 614d(A)-(B) (“Any person under Apache jurisdiction who violates any of the provisions of this Act or orders or regulations of the ATEP shall be guilty of a crime and upon conviction thereof may be subject to imprisonment in facilities normally used by the Apache Tribe for detention of criminals for not more than one year, or a fine of not more than $5000 per incident, or by both fine and imprisonment. Each day or part of a day during which such violation is continued or repeated shall constitute a separate offense. B) Any person who violates any of the provisions of the Act or orders or regulations of the ATEP may be subject to a fine of not more than $5000; each day or part of a day during which such violation is continued or repeated shall constitute a separate offense.”).
\textsuperscript{151} SOLID WASTE CODE, ENFORCEMENT ACTIONS (A)(2) (2010) (Absentee Shawnee Tribe of Indians of Oklahoma); id. at COMPLIANCE ORDERS (A)(3).
\textsuperscript{152} Id. at PENALTIES (“(A) Any person under ABSENTEE SHAWNEE TRIBE OF OKLAHOMA jurisdiction who violates any of the provisions of this Act or orders or regulations of the EPC shall be guilty of a crime and upon conviction thereof may be subject to imprisonment in facilities normally used by the Absentee Shawnee Tribe of Oklahoma for detention of criminals for not more than one year, or a fine of not more than $5,000 per incident, or by both fine and imprisonment. Each day or part of a day during which such violation is continued or repeated shall constitute a separate offense. (B) Any Person who violates any of the provisions of the Act or orders or regulations of the EPC may be subject to a fine of not more than $5,000, each day or part of a day during which such violation is
to specify penalties potentially applicable to violations of the Solid Waste Code.

Like tribes located within the borders of Oklahoma, tribes located within the borders of Arizona also have enacted tribal code provisions speaking to the enforcement of tribal solid waste provisions. For example, the Colorado River Indian Tribes adopted an Article of its Health and Safety Code dedicated to the disposal of solid waste, and a chapter of the Article speaks to enforcement. The Code provision also specifies the civil penalties applicable to those who violate the Code. The San Carlos Apache Tribe has adopted a Solid Waste Ordinance, and the Ordinance does provide both for criminal prosecution and civil proceedings dependent or repeated shall constitute a separate offense.”). If someone is deemed to have knowingly violated the Solid Waste Code and put another into imminent danger of death or serious bodily injury, then that person shall be guilty of a crime and or shall be referred to the appropriate prosecutor as provided for in 42 USC 6992d(c) upon conviction under subsection (e) be subject to a fine of not more than $250,000 or imprisonment for not more than 1 year or both as provided for in this Act. The EPC is directed under these circumstances to pursue federal enforcement of the federal provisions.

Id. at KNOWING ENDANGERMENT.

153. HEALTH AND SAFETY CODE art. VIII, ch. 7 (Colorado River Indian Tribes).

154. Id. at ch. 8, § 11-8801 (“Any person who violates or fails to comply with any provision of this Article shall be subject to the following civil fines: (1) for a first violation, a fine not less than one hundred dollars ($100) but not to exceed one thousand dollars ($1,000). (2) Subsequent Violations: (A) Except as provided for in Subsection (2)(b) of this Section, for subsequent violations committed within one year of a previous violation of any provision of this Article, a fine not less than five hundred dollars ($500) but not to exceed one thousand five hundred dollars ($1,500).”). Further, Section 11-8802 discusses the application of punitive damages:

Any person adjudged to have engaged in a pattern or practice of violating this Article may be liable for punitive damages in an amount not to exceed one thousand dollars ($1,000). The Court may assess punitive damages pursuant to this Section 11-8802 for each violation of which the pattern or practice is found to consist.

Id. § 11-8802.

155. SOLID WASTE ORDINANCE § 1004(a) (San Carlos Apache Tribe) (“Criminal Prosecution (i) Any person who commits one or more violations of the provisions of this Code or its regulations shall be subject to criminal prosecution in the Tribal Courts of the San Carlos Apache Tribe. Such prosecution shall be initiated by the Administrator through a sworn statement specifying the violation(s). (ii) Any person found to be guilty of violations of this Code shall be subject to a fine not less than three hundred dollars ($300.00) and/or imprisonment for a period not to exceed six months and/or similar period of community service. Each violation shall be treated as a separate offense. (iii) Any person found to be guilty of repeat violations shall be fined not less than $1,000.00 and/or imprisoned for a period not to exceed one year and/or similar period of community service.”).
ing on the nature of the violation of the Ordinance.156 Likewise, the Tohono O’odham Nation’s Solid Waste Management Code provides both for the Code’s enforcement and penalties, as appropriate.157 The Fort McDowell Yavapai Nation also generally precludes solid waste disposal within its territory without prior approval,158 and provides for an enforcement process in its tribal code.159 The Code also provides information on how civil and criminal penalties are to be determined.160 Unlike other tribal code provisions previously discussed, the Nation includes a list of factors to be taken into consideration by a court when determining the appropriate civil penalty.161 Similar to the Fort McDowell Yavapai Nation, the Navajo Nation has also adopted a robust tribal code provision related to the disposal of solid waste, the Navajo Nation Solid Waste Act.162 The Navajo Nation Solid Waste Act contemplates the Nation’s general enforcement author-

156. Id. § 1004(b)(ii) (“Any person who violates any provision of the Code may be assessed a civil penalty by the Administrator of not more than five thousand dollars ($5,000.00) for each violation; provided, however, that no civil penalty shall be assessed unless the person cited shall have been given notice and opportunity for a hearing on such violation.”).

157. SOLID WASTE MANAGEMENT CODE ch. 7 (1997) (Tohono O’odham Nation). Civil penalties for violating the Code may include any of the following or a combination of the following:

(1) injunction, including an order to clean up or remediate unauthorized dumping;
(2) a civil penalty in an amount not to exceed Twenty Five Thousand Dollars ($25,000) for each day each violation occurs; (3) reasonable attorneys’ fees and costs; and (4) compensatory damages for the damage to the land or natural resources of the Nation, and for the reasonable costs actually incurred or to be incurred by the Nation for cleaning up any solid or hazardous waste, or abating the effects of the conduct complained of.

Id. § 702(a). Moreover, the court may also order a violator to complete community service, if appropriate. Id. § 702(b).


159. Id. § 23-15.

160. Id. § 23-12(A) (“Any person who violates any provision of this Article that is specifically criminalized pursuant to Chapter 6 Section 113 of the Criminal Code shall be guilty of a criminal offense. Any person who violates any provision of this Article shall be subject to civil penalty based upon the severity of the offense and be based on the factors set forth in Subsection B of this Section. The Tribal Court may impose a civil penalty either: 1.) Not less than fifty dollars ($50.00) but not more than ten thousand dollars ($10,000) for each violation, or 2.) The actual damage caused plus up to three (3) times the actual damages sustained by the Tribe, the owner, or possessor of the property.”).

161. Id. § 23-12(B) (“In determining the amount of a civil penalty under this section, the following factors shall be considered: 1. The seriousness of the violation. 2. As an aggravating factor only, the economic benefit, if any, resulting from the violation. 3. Any history of that violation. 4. Any good faith efforts to comply with this chapter. 5. The economic impact of the penalty on the alleged violator. 6. The duration of the violation. 7. Previous violations of the alleged violator. 8. Other factors deemed relevant.”).

ity,163 judicial enforcement,164 administrative assessment of penalties,165 and the ability to bring citizen suits under certain circumstances.166

Located in Montana, the Fort Peck Assiniboine and Sioux Tribes also adopted a Solid Waste Code.167 In addition to creating a plan for the disposal of solid waste and permitting as appropriate, the Code also contemplates enforcement, including establishing an enforcing agency, establishing a compliance schedule, and contemplating potential enforcement mechanisms such as cease and desist orders, and revocation, suspension, or modification of a permit.168 Further, Subchapter 12 of the Code details the potentially applicable criminal and civil penalties.169

Located within the borders of New York, the Saint Regis Mohawk Tribe adopted a Solid Waste Management Code and a Solid Waste Handbook.170 At the start of the Code, the Tribe explains that the Code is enacted as part of the Tribe’s sovereign inherent authority and that, by virtue of this inherent authority, the Tribe maintains its “sovereign power to exercise civil authority and jurisdiction over the conduct of both Tribal and non-Tribal members on all lands within the Akwesasne Mohawk territory.”171 The Code contemplates public involvement and enforcement of the solid

163. Id. § 152.
164. Id. § 153 (“The Director shall request the Attorney General to file an action for a temporary restraining order, a preliminary injunction, a permanent injunction or any other relief provided by law, including the assessment and recovery of civil penalties in a maximum amount per day per violation of not less than five hundred dollars ($500.00) but not to exceed twenty-five thousand dollars ($25,000).”). Section 153 goes on to provide guidance to the tribal court as to how to calculate civil penalties.
165. Id. § 154.
166. Id. § 155.
167. COMPREHENSIVE CODE OF JUSTICE tit. 22, ch. 3 (Fort Peck Assiniboine and Sioux Tribes).
168. Id. §§ 1101–08.
169. Id. § 1202 (explaining that potential violators “shall be liable for a civil penalty not to exceed fifteen thousand dollars ($15,000.00) each day for each violation, to be assessed by the Office of Environmental Protection. Any Person who commits any of the above prohibited acts may be subject to criminal penalties, may be liable for any civil damages caused by the commission of such acts, and may be excluded from the Reservation in accordance with CCOJ. Any Person who commits any of the above prohibited acts, or whose employees of Agent(s) in the course of their employment or agency commit any of the above prohibited acts, may have its rights to engage in activities on the Reservation suspended or terminated.”).
waste provisions, as well as penalties and fines. As an interesting aside: demonstrating how tribes may be able to develop tribal environmental code provisions in a manner that is consistent with their customs and traditions, the Tribe’s Solid Waste Handbook explains that, “[d]eveloping and implementing solid waste management programs consistent with the traditional and cultural beliefs of the Indian Nations will help to instill community ownership of the program and will lead to good community decisions with respect to management of solid waste.” Further, the Tribe believes that “[a] comprehensive solid waste management approach is the best option available to meet the needs of the present generation without compromising the lives of the future generations.”

Interestingly, several tribes located within the borders of Arizona adopted similar tribal code provisions related to illegal dumping. These Tribes are the Fort McDowell Yavapai Nation, Hualapai Tribe, Salt River Pima Maricopa Indian Community, Tonto Apache Tribe, and Yavapai-Prescott Indian Tribe. In each instance, the provision related to illegal dumping is included in the Tribe’s Health and Sanitation Code. For each of these code provisions, the language is similar to: “Any person who shall dump any trash, garbage or refuse within the exterior boundaries of the Nation . . . shall be deemed guilty of an offense and upon conviction shall be subject to a fine . . . .”

In addition to actual solid waste disposal codes, several tribes have adopted littering provisions related to the disposal of solid wastes. Although not specifically denominated as a littering provision, the White Mountain Apache Tribe does have a “sanitation” provision within its Game and Fish Code prohibiting [p]lacing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water; . . . [f]ailing to dispose of all garbage, including any paper, can bottle, sewage, waste water or material, or rubbish either by removal from the site or area, or by depositing it into receptacles or at places provided for such purposes . . . .

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172. *Id.* § 6.1.
173. *Id.* § 6.4 (“The Tribal Court may levy financial penalties and fines and/or other form of penalty, such as restitution, against those who violate any section of this Code. Penalties and fines will be assessed according to the Tribal Court.”).
174. [SOLID WASTE HANDBOOK, supra note 170, § 2.1.](#)
175. *Id.*
176. [LAW AND ORDER CODE ch. 13, § 13-3 (Fort McDowell Yavapai Nation).](#)
177. [ENVIRONMENTAL REVIEW CODE ch. 9, § 9.4 (Hualapai Tribe).](#)
178. [CODE OF ORDINANCES ch. 13, § 13-3 (Salt River Pima Maricopa Indian Community).](#)
179. [CIVIL AND CRIMINAL LAW AND ORDER CODE ch. 8, § 8.2 (Tonto Apache Tribe).](#)
180. [LAW AND ORDER CODE ch. 9, § 9.4 (Yavapai Prescott Indian Tribe).](#)
181. See, e.g., [LAW AND ORDER CODE ch. 13, § 13-3 (Fort McDowell Yavapai Nation).](#)
182. Although not specifically denominated as a littering provision, the White Mountain Apache Tribe does have a “sanitation” provision within its Game and Fish Code prohibiting [p]lacing in or near a stream, lake, or other water any substance which does or may pollute a stream, lake, or other water; . . . [f]ailing to dispose of all garbage, including any paper, can bottle, sewage, waste water or material, or rubbish either by removal from the site or area, or by depositing it into receptacles or at places provided for such purposes . . . .
a littering provision to address pollution. For example, the Ak Chin Tribe provides that “[a] person who dumps, deposits, places, throws or leaves rubbish, refuse, debris, filthy or odoriferous objects, substances, or other trash upon a highway, road, or public place within the AK-CHIN INDIAN RESERVATION is guilty of littering.”183 Similarly, the Sac & Fox Tribe of Oklahoma also enacted a littering provision as part of its criminal offenses tribal code, making littering punishable by a fine and/or potential imprisonment.184 The Hopi Nation also has a provision prohibiting littering, which provides that “[a] person commits an [sic] minor offense by recklessly or negligently discarding any refuse, debris, destructive or other injurious material that he does not remove, without lawful authority,” and the code provision goes on to specify that “[a] person who discharges sewage, oil products or other harmful substances, in excess of three hundred pounds in weight or one hundred cubic feet in volume, or is done in any volume for commercial purposes, into any public waters is guilty of an offense.”185 The Nation requires that anyone convicted of littering remove or remedy the nuisance upon an order from the appropriate court.186 Further, the Fort Peck Assiniboine and Sioux Tribes of Montana adopted a littering provision in addition to their solid waste code.187 Because of this tribal provision’s limitation to public rights of way and highways, it may not be as broadly applicable as some of the other littering provisions discussed above.

D. Common Law Provisions that May be Utilized for Environmental Enforcement

In addition to tribal code provisions specific to different categories of enforcement (i.e., air, water, and solid waste), many tribes have codified what are traditionally known as common law enforcement provisions (e.g., nuisance or trespass) into their tribal codes, which can prove particularly

183. TRIBAL CODE ch. IV, § 4.49 (1975) (Ak Chin Indian Community). The code goes on to explain that anyone found guilty of littering “shall be imprisoned in the Community Jail for a period not to exceed ten (10) days, or fined not to exceed $100.00, or both, for each day such littering occurs.” Id.
184. CODE OF LAWS, ch. 5 § 517(a) (Sac & Fox Tribe of Oklahoma). The code provision generally prohibits littering and “[l]ittering shall be punishable by a fine not to exceed Two Hundred Fifty Dollars ($250.00), or by a term of imprisonment in the Tribal jail not to exceed three months, or both.” Id. § 517(b).
185. HOPI CODE tit. 3, ch. 8, § 3.8.7(B) (2012) (Hopi Nation).
186. Id. at (C).
187. The littering provision is located in the Tribes’ Health and Sanitation Code, and generally prohibits disposal of rubbish alongside any public right of way, public road or highway. COMPREHENSIVE CODE OF JUSTICE tit. 14, ch. 2, § 201 (Fort Peck Assiniboine and Sioux Tribes). Violators of the littering prohibition may be subject to criminal penalties. Id. § 201(d).
helpful in protecting the environment, especially where the statutory law does not develop quickly enough to adequately address new types of pollution. Accordingly, codifying these types of provisions can provide tribes increased flexibility to address environmental challenges not contemplated by more specific provisions elsewhere in the codes. This subpart reviews some of the common law tribal code provisions that have been incorporated into various tribal code provisions in order to gain a better understanding of how tribes may be using common law provisions to address environmental challenges.

Before looking at specific tribal code provisions, it is helpful to consider the role of the common law within tribal law in general. Tribes may adopt and adapt common law developed from other sovereigns, such as the United States or Great Britain, or tribal common law may be developed from the customs and traditions of the tribe. Tribes possess the sovereign ability to recognize and enforce tribal common law, unless divested by the federal government. Expressions of tribal common law must be consistent with tribal civil and criminal jurisdiction.192

As evidence of this, several tribal constitutions and tribal courts have recognized the existence of tribal common law. For example, see the Pueblo of Laguna’s and Ho-Chunk Nation’s constitutional preambles, which both recognize customary law. Further, many tribes have enacted codes recognizing tribal common law. For example, the Sisseton-Wahpeton Sioux Tribe’s Code at Chapter 33-01-01 broadly explains that “[c]ivil matters shall be governed by the laws, customs, and usage of the Tribe not prohibited by the laws of the United States.” Further, the U.S. Supreme Court has recognized the existence and legitimacy of tribal common law. In United States v. Quiver, the Court explained that “[a]t an early period it became the settled policy of Congress to permit the personal and domestic relations of the Indians with each other to be regulated, and offenses by one Indian against the person or property of another Indian to be dealt with, according to their tribal customs and laws.”

Some tribes have incorporated trespass into their tribal code provisions. Trespass can be an effective tool in combating environmental pollution.

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189. See Cohen’s Handbook 2012, supra note 6, § 4.05[8]
190. Id. § 4.05[1].
191. Id. § 4.03[1].
192. Id. § 4.05[1].
193. Pueblo of Laguna of N.M. Const. pmbl.; Ho-Chunk Nation Const. pmbl.
where there is a physical invasion of another’s property – for example, it could reach water pollution or solid waste disposal. As long as the tribe’s actions are consistent with federal law, they are generally free to exercise the right to exclude and bring actions for trespass. For example, the U.S. Court of Appeals for the Ninth Circuit explained that such trespass actions were consistent with the tribe’s right as a landowner to “occupy and exclude.”

The tribe seeks to enforce its regulations that prohibit, among other things, trespassing onto tribal lands, setting a fire without a permit on tribal lands, and destroying natural resources on tribal lands. The Supreme Court has strongly suggested that a tribe may regulate nonmembers’ conduct on tribal lands to the extent that the tribe can “assert a landowner’s right to occupy and exclude.” The tribal regulations at issue stem from the tribe’s “landowner’s right to occupy and exclude.” Trespass regulations plainly concern a property owner’s right to exclude, and regulations prohibiting destruction of natural resources and requiring a fire permit are related to an owner’s right to occupy . . . . Accordingly, the tribe’s ownership of the land may be dispositive here.

For example, the Ak Chin tribal code describes the acts that constitute trespass, and, included within the list are “[d]umping, depositing or throwing refuse or litter upon the property of another.” The tribal code provision goes on to specify that “[a]ny person found guilty of trespass shall be imprisoned in the Community Jail for a period not to exceed three (3) months, or fined not to exceed $250.00, or both. Each day the trespass persists shall be considered a separate offense.” The Hopi Nation also has enacted a tribal code provision respecting trespass, which states “[a] person who enters or remains in any building, structure or land, after being notified by the owner or lawful possessor not to enter or remain, is guilty of a minor offense.” Also, the Colorado River Indian Tribes’ tribal code provides extensive information on prohibited trespass actions, which includes the “unlawful occupation or use of premises and lands within the Reserva-

199. *Id.*
Section 9-203 of the Colorado River Indian Tribes’ Article IX on Civil Proceedings provides:

[t]he Colorado River Indian Tribes Tribal Court is hereby granted the jurisdiction and authority to determine whether a person or entity has committed a trespass or is presently trespassing, including issuing orders requiring the person or entity having been found by the Court to be a trespasser to vacate the subject tribal lands and requiring a tribal Realty Agent, Law Enforcement Officer, and/or Fish and Game Warden to physically remove the person or entity and their personal property from the subject tribal lands.

The Colorado River Indian Tribes therefore recognize removal of the individual engaged in trespass as a potential enforcement method, which is certainly an effective method of enforcement to end a trespass. Similarly, the White Mountain Apache Tribe generally precludes trespass as well, and, under certain circumstances, the trespasser may be excluded from the Tribe’s territory. And, given the limitation on tribes’ criminal jurisdiction following the Oliphant decision, several tribes utilize banishment and exclusion under their civil authority as a way of separating bad actors from the tribal community. In many such cases, banishment and exclusion were also consistent with traditional forms of cultural justice used by the tribes.

Like trespass actions, several tribes have also adopted tribal code provisions related to nuisance. A private nuisance occurs where one’s use of land is intentional, non-trespassing, unreasonable, and constitutes a substantial interference with another’s use and enjoyment of his or her land. The Ak Chin Tribe defines a public nuisance as:

anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of private or community property. A public nuisance is further defined as allowing

201. LAW AND ORDER CODE art. IX, ch. 2, §§ 9-202, 9-205 (Colorado River Indian Tribes).
202. Id. § 9-203.
205. Id.
206. See SPRANKLING & COLETA, supra note 188, at 72.
property, public or private, to remain in such state of disarray so as to be offensive to the senses of a reasonable person or persons. The Tribe enforces the statute with penalties of “imprison[ment] in the Community Jail for a period not to exceed ten (10) days, or fined not to exceed $100.00, or both, for each day such nuisance continues.” Beyond this general prohibition of nuisances, the Tribe also goes on to specifically list “health menaces” as public nuisances, as they are dangerous to the public health. The Tribe considers potential solid waste violations and water pollution to be examples of health menaces. These tribal code provisions therefore demonstrate that some tribes may use typical common law tools, such as nuisance, to address specific categories of pollution—such as solid waste or water.

The Modoc Tribe of Oklahoma treats such pollution similarly, as evidenced by its Ordinance for Adoption of Clean Air and Pollution Codes. The Tribe styles pollution of its natural resources as a public nuisance. Section 4 of the Tribe’s Ordinance goes on to specify administrative proceedings that may be held when such a nuisance arises. The Tribe limits enforcement in such a way as “any penalty assessed or proposed in an order shall not exceed One Hundred Dollars ($100.00) per day of noncompliance.”

IV. A Deeper Examination: Survey of Tribal Environmental Enforcement Provisions

Part III of this Article established that existing tribal code provisions contemplate enforcement and establish mechanisms through which enforcement may be achieved. Several federally recognized tribes located within

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208. Id.
209. Id. ch. VI, § 6.5.
210. As to solid waste, Section 6.5(4) provides that “[a]ll sewage, human excreta, waste water, garbage or other organic wastes deposited, stored, discharged, or exposed, so as to be a potential instrument or medium in the transmission of disease to or between any person or persons,” and Section 6.5(5) goes on to specify “[a]ny vehicle or container used in the transportation of garbage, human excreta, or other organic material which is defective and allows leakage or spillage of contents.” Id. As to water pollution, Section 6.5(7) specifies “[t]he pollution or contamination of any domestic waters.” Id.
211. *Ordinance for Adoption of Clean Air and Pollution Codes* § 3(A) (Modoc Tribe of Oklahoma) (“It shall be unlawful for any person to cause pollution of any air, water, land, or resources of the Modoc Tribe, or to place or cause to be placed any wastes or pollutants in a location where they are likely to cause pollution of any air, water, land or resources of the Modoc Tribe. Any such action is hereby declared to be a public nuisance.”).
212. Id. § 4(F).
the boundaries of Arizona, Montana, New York, and Oklahoma possess enforcement provisions designed to effectuate their tribal environmental code provisions. The foregoing discussion, however, does not speak to the effectiveness of those provisions. Although tribes have put enforcement mechanisms into place, it is possible that such mechanisms are not successful in abating environmental pollution. In an attempt to shed some light on the effectiveness of such provisions while also providing for a more in-depth examination of tribal environmental enforcement provisions used by some tribes, this Part of the Article examines the results of a survey sent to all federally recognized tribes located within the four state scope of this article. The purpose of the survey was to gather information on how effective tribal environmental enforcement provisions are. This Part of the Article therefore begins with a brief discussion of the survey design and dissemination, and then concludes with a discussion of the results of the survey.

A. Survey Design

The survey, “Enforcement of Tribal Environmental Law,” was designed and disseminated to the 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma during the summer of 2015. \(^{213}\) The survey was distributed to all 74 federally-recognized tribes via mail and e-mail, where appropriate. Thirteen tribes appeared to have their own active tribal institutional review boards to review and approve research conducted within the tribes’ territories. \(^{214}\) For these tribes with IRBs, the author submitted specific requests to the tribes consistent with the tribal IRB requirements. Of the 74 tribes contacted to complete the survey, nine tribes returned completed surveys. Of these nine tribes, three requested to not be identified by name, and these tribes will be referred to consistently throughout as Tribe A, Tribe B, and Tribe C. Of the participating tribes, three are located within Arizona, one is located within Montana, one is located within New York, and four are located within Oklahoma.

\(^{213}\) For a copy of the survey, please review Appendix A below. Prior to releasing the survey, the University of Kansas Institutional Review Board (KU IRB) reviewed the survey and determined that it did not involve human research. E-mail from eCompliance: Conflict of Interest and Human Subjects Research to Author, Notification of Not Human Research Determination (Apr. 20, 2015) (on file with author).

\(^{214}\) These tribes included: the Cherokee Nation of Oklahoma, Sac and Fox Nation of Oklahoma, Hopi Tribe, Hualapai Tribe, Tohono O’odham Nation, Fort Peck Assiniboine & Sioux Tribes, Ak Chin Indian Community, Colorado River Indian Tribes, Navajo Nation, Fort McDowell Yavapai Nation, Pascua Yaqui, Gila River Indian Community, and San Carlos Apache Tribe.
B. Results of Survey

The survey was broken into three sections: water regulation, air pollution, and solid waste regulation. Accordingly, the discussion of the survey results is broken into these three parts.

1. Water Regulation Survey Responses

In relation to water regulation, survey participants were asked one to four questions, depending on their responses to the first question. The first question asked: “Does the Tribe you work for regulate water pollution? If yes, what tribal laws regulate water pollution?” If the respondent answered yes to the first question, they were then asked to complete three subsequent questions:

(2) what mechanism(s) does the Tribe you work for use to enforce its laws regulating water pollution?; (3) What is the Tribe’s goal in relation to regulating water pollution? Assuming enforcement mechanisms related to the regulation of water pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain; and, (4) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the Montana exceptions, etc.)?

Of the nine participating tribes, six answered “no” to the first question—that they did not regulate water pollution. Of these, only Tribe C answered “no” without any additional explanation. The other five tribes provided some explanation. Respondent for Tribe A explained that, “[n]o, currently Tribes in Oklahoma cannot regulate water pollution standards due to the infamous “Midnight Rider” or Subtitle B “Other Miscellaneous Provisions” within the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005.”

Several of the tribes indicated that they relied on federal environmental laws for water regulation. The respondent for the Fort McDowell Yavapai Nation responded “[n]o-federal laws apply,” suggesting that the Nation was not actively regulating water given federal environmental regulations are in place. Respondent for Tribe B stated, “[n]o, we currently operate a

216. Completed Enforcement of Tribal Environmental Law Survey by Fort McDowell Yavapai Nation (on file with author) [hereinafter Fort McDowell Yavapai Nation Survey].
CWA 106 Surface Water Monitoring Program, 217 which also suggests a reliance on federal law. Similarly, the respondent for the Kickapoo Tribe of Oklahoma stated that:

[a]t this time, the tribe has not completed its own environmental regulation on water pollution that should be applied to the Kickapoo Tribe of Oklahoma. However, the Kickapoo Tribe of Oklahoma has created an ordinance adoption of environmental regulations as it relates to CFR, Title 40, as applicable, and other federal regulations to regulate activities related to the environment as to Kickapoo Tribe of Oklahoma Indian Country. 218

The respondent for the Crow Tribe explained that, “[c]urrently the Crow Tribal Water Quality Protection Code is in Legislation—with the NR Subcommittee, to be followed up by the Water Quality Standards,” 219 which suggests that the Tribe is currently in the process of adopting provisions to regulate water.

Although the Kickapoo Tribe of Oklahoma answered “no” to the first question, the respondent for the Tribe provided answers to the three follow up questions. In response to question 2, the respondent explained, “[t]he only mechanism to enforce its laws is the Kickapoo Tribal Courts.” 220 In response to question 3, the respondent stated, “I have to assume the tribe’s goal would be creating their own water pollution standard based off the State of Oklahoma’s water pollution standard. Any enforcement mechanism would help meet the regulatory goal or the tribe’s water pollution standards.” 221 And, finally, in response to question 4, the respondent provided:

I am not sure of how regulations would be interpret [sic] on this issue. With the tribe’s new utility board, I have to assume in order to receive drinking water from the tribe’s water line (i.e., from a right-of-way agreement), there must be a clause intact to ensure non-tribal members to furnish proof from the Oklahoma Depart-
ment of Environmental Quality of an approved waste water system.\footnote{222} Three tribal respondents—Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe—responded yes to question 1. In response to question 1, the Hualapai Tribe, which is located within the boundaries of Arizona, explained that the Tribe enacted six laws related to the regulation of water—the Hualapai Water Quality Standards Ordinance, the Hualapai Wetland Ordinance, Hualapai Ground Water Overlay Protection Ordinance, Hualapai Air Quality Ordinance, Hualapai Solid Waste Ordinance, and the 2470 Hualapai Wildlife Ordinance.\footnote{223} In response to question 2, the Tribe provided: “[t]hrough our established Tribal Ordinances the Director of Natural Resources and Resource Managers have regulatory authority to enforce the above mentioned ordinances, and activities that have the potential to contaminate as well as reckless actions that have caused contamination.”\footnote{224} In response to question 3, the respondent for the Tribe explained:

[o]ur Goal is to maintain, protect and conserve all surface and ground water resources on Hualapai Tribal Lands. All proposed activities and projects, are sent to our Tribal Environmental Review Commission where any proposed project or activity is scoped and all necessary environmental clearances must be adhered to. We emphasize the need to protect all water resources and insist on protective measures to be in place as construction and activities occur on our lands. Issuing 401 certification permits to activities occurring on our lands.\footnote{225}

And, finally, in response to question 4, the respondent explained:

[a]ny person entering our tribal lands are subject to our laws and ordinances, our reservation is not considered an open reservation. Meaning that some of our primary roads through our reservation may be public roads, non-Indian visitors are still subject to our tribal laws. Roadways not designated as public roads non-Indian visitors are required to get access permits and some areas of tribal lands have restrictions on access. Burlington, Northern, Santa Fe Railroad has tracks through our land and rights of way. In one instance, their construction contractors cut through the right of

\footnote{222} Id.
\footnote{223} Completed Enforcement of Tribal Environmental Law Survey by Hualapai Tribe (on file with author) [hereinafter Hualapai Tribe Survey].
\footnote{224} Id.
\footnote{225} Id.
way fence, disturbed tribal lands, by creating roads and a staging area for construction. The construction company was charged with trespass and all of their equipment was impounded and they were cited and scheduled a court hearing in our tribal court. The construction company paid trespass fines, impoundment fees, and fees for damages, through our tribal courts, before they were allowed to reclaim their equipment and knew certainly where the railroad right of way was and tribal lands were.226

The respondent for the Navajo Nation, located partially within the boundaries of Arizona, also answered yes to question 1, explaining that “[y]es; Navajo Nation Clean Water Act (4 N.N.C. § 1301 et seq.) and Navajo Nation Safe Drinking Water Act (22 N.N.C. § 2501 et seq.). The Navajo Nation also has various regulations related to water pollution.”227 In response to question 2, the respondent explained that, “[p]ermits are a primary mechanism. The Nation also has water quality standards to protect the designated uses of waters of the Navajo Nation.”228 In response to question 3, the respondent stated:

[a]mong other things, the Nation’s goal is to protect the health, safety, welfare and environment of the Navajo Nation and its residents; to prevent, reduce and eliminate pollution of the waters of the Navajo Nation; and to plan the development and use (including restoration, preservation, and enhancement) of land and water resources within the Nation. See 4 N.N.C. § 1303. Concerning drinking water, it is the policy of the Nation to recognize, preserve, and protect the health and welfare of the Navajo people by ensuring that water is safe for drinking and to protect underground sources of drinking water from contamination by the subsurface emplacement of fluids by injection wells as by surface and subsurface discharges. See 22 N.N.C. § 2502.

Generally, the mechanisms do assist the Nation in meeting its goals in regards to air pollution. The Nation has limited resources and does the best with what it has.229

And, in response to question 4, the respondent for the Navajo Nation stated, “[y]es, under Montana’s second exception.”230

226. Id.
227. Completed Enforcement of Tribal Environmental Law Survey by Navajo Nation (on file with author) [hereinafter Navajo Nation Survey].
228. Id.
229. Id.
230. Id.
Last, the Saint Regis Mohawk Tribe also answered yes to question 1, explaining that “Water Quality Standards as developed, adopted and approved by the SRMT and EPA.” \footnote{231} In response to question 2, the respondent for the Tribe explained that “Tribal courts and compliance office within the Tribe” were responsible for enforcement. \footnote{232} In response to question 3, the respondent provided, “[y]es, they assist by requiring permitting by the Tribe and preventing contamination [sic] of waterbodies that might violate our WQS.” \footnote{233} And, finally, in response to question 4, the respondent for the Tribe stated that “they apply to outside agencies and as approved by EPA are recognized and followed by state and federal agencies.” \footnote{234}

2. Air Pollution Survey Responses

In relation to the regulation of air pollution, survey participants were asked one to four questions, depending on their responses to the first question. The first question (question 5 in the actual survey) asked, “[d]oes the Tribe you work for regulate air pollution? If yes, what tribal laws regulate air pollution? (Please list. There is no need to list federal laws that may be applicable.).” If the tribal respondent answered yes to question 1, they were asked to answer three additional questions. The second question stated, “[i]f you answered yes to question 5, what mechanism(s) does the Tribe you work for use to enforce its laws regulating air pollution?” The third follow up question asked, “[w]hat is the Tribe’s goal in relation to regulating air pollution? Assuming enforcement mechanisms related to the regulation of air pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.” And, the final follow up question asked, “[d]o these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the Montana exceptions, etc.)?” The tribal respondents’ responses to these questions are detailed below.

As with the responses to the survey questions related to the regulation of water, six tribal respondents indicated that the tribe they worked for did not regulate air pollution (outside of potentially applicable federal regulations). Two tribal representatives, representing the Crow Tribe and Tribe C, simply responded “[n]o” or “[n]ot currently” and did not provide any

\footnote{231}{Completed Enforcement of Tribal Environmental Law Survey by Saint Regis Mohawk Tribe (on file with author) [hereinafter Saint Regis Mohawk Tribe Survey].}
\footnote{232}{Id.}
\footnote{233}{Id.}
\footnote{234}{Id.}
additional information. The Kickapoo Tribe of Oklahoma explained that “[t]he Kickapoo Tribe of Oklahoma does not have their own air pollution standard.” Two of the tribal respondents—one for the Fort McDowell Yavapai Nation and one for Tribe B—indicated that the Tribes did not regulate air pollution, but that federal laws were applicable. The final tribal respondent represented Tribe A, and stated, “[n]o, Same as Response to Question 1.” In response to question 1, as explained above, the respondent indicated that the “Midnight Rider” or Subtitle B “Other Miscellaneous Provisions” within the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 effectively resulted in tribes within Oklahoma not being able to regulate pollution. As mentioned above, the effect of this “Midnight Rider” provision may be that tribes in Oklahoma are not acting to regulate their environments to the extent tribes in other states may be.

The same three Tribes that answered yes to question 1 discussed in the previous section also answered yes to the first question on regulating air pollution—the Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe. In response to the first question, the Hualapai tribal representative explained, “[t]he tribe has an air quality ordinance, that we have enforced against other tribal departments in the burning of solid waste materials, that have caused unhealthy air to breathe and unnecessary smoke to vulnerable populations.” In the first follow up question, the respondent went on to explain that,

In our air quality ordinance there are prohibitions against activities that create unhealthy air conditions and excessive amounts of smoke. There are posted fire restrictions that are posted during different times of the seasons, that are strictly enforced for the protection of the environment and the health of the Hualapai community.

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235. Completed Enforcement of Tribal Environmental Law Surveys by the Crow Tribe and Tribe C (on file with author) [hereinafter Crow Tribe and Tribe C Surveys].
237. Fort McDowell Yavapai Nation Survey, supra note 216 (“No—federal laws apply”).
238. Tribe B Survey, supra note 217 (“No, we currently operate a Clean Air Act CAA-103 ambient air monitoring program.”).
240. Id.
241. See supra Part IV.B.1 (regarding “Tribe A”).
243. Id.
In response to the second follow up question on air pollution regulation, the tribal representative stated, "[t]he Hualapai Air shed is predominantly a class 1 air shed and air quality as well as visibility concerns are the tribes, since our northern boundary is 108 miles of the Grand Canyon to the middle of the river, from this tribal members perspective."\(^{244}\) And, finally, in response to the third follow up question, the Hualapai representative explained:

> [a]ny person on Hualapai Tribal Lands is subject to the laws of the Hualapai Indian Reservation. Our tribal lands are not free and open space, access through most of our tribal lands requires a permit and entering and leaving our reservation there is signage informing the public of the limited access.\(^{245}\)

The respondent for the Navajo Nation also answered yes to the first question regarding the regulation of air pollution, explaining, "[y]es, Navajo Nation Air Pollution Prevention and Control Act 94 N.N.C. § 1101 et seq.). The Navajo Nation also has regulations related to air pollution."\(^{246}\) In response to the first follow up question, the respondent stated that the "[p]rimary mechanism is the issuance of permits."\(^{247}\) As to the second follow up question and the Nation’s goals, the respondent provided:

> [a]s stated in 4 N.N.C. 1102(A)(2), the tribe is committed to the regulation of air pollution activities in a manner that ensures the health, safety and general welfare of all residents of the Navajo Nation, protects property values and protects plants and animal life.

> Generally, the mechanisms do assist the Nation in meeting its goals in regards to air pollution. The Nation has limited resources and does the best with what it has.\(^{248}\)

And, finally, in response to the third follow up question inquiring as to whether the Nation’s regulations apply to non-members of the Nation, the respondent provided:

> [y]es; U.S. EPA has taken the position that the federal Clean Air Act (CAA) constitutes a statutory grant of jurisdictional authority to tribes, which authorizes U.S. EPA to treat a tribe in the same

\(^{244}\) Id.

\(^{245}\) Id.

\(^{246}\) Navajo Nation Survey, supra note 227.

\(^{247}\) Id.

\(^{248}\) Id.
manner as a state for the regulation of “air resources within the exterior boundaries of the reservation or other areas within the tribe’s jurisdiction.” CAA § 301(d)(2)(B); see also U.S. EPA’s Tribal Authority Rule, 63 FR 7254-01. U.S. EPA believes that this statutory provision, viewed within the overall framework of the CAA, establishes a territorial view of tribal jurisdiction and authorizes a tribal role for all air resources within the exterior boundaries of Indian reservations without distinguishing among various categories of on-reservation land.249

Finally, the respondent for the Saint Regis Mohawk Tribe also answered yes to the first question regarding the regulation of air pollution, stating “[y]es we regulate under our own EPA accepted Tribal Implementation Plan.”250 The respondent went on to explain that the tribal court was responsible for enforcing the Tribe’s air pollution regulations.251 In response to the second follow up question, the respondent explained that the Tribe’s goal was to “[p]rotect our air quality and maintain attainment of all priority air pollutants.”252 Finally, without providing any additional explanation, the representative for the Tribe did indicate that its regulations apply to non-members of the Tribe.253

### 3. Solid Wastes Survey Responses

And, finally, in relation to the regulation of solid wastes, survey participants were asked one to four questions, depending on their responses to the first question. The first question asked respondents, “[d]oes the Tribe you work for regulate solid waste disposal? If yes, what tribal laws regulate solid waste disposal? (Please list. There is no need to list federal laws that may be applicable.).” If respondents answered in the affirmative to the first question, they were asked three follow up questions: 1) “[i]f you answered yes to question 9, what mechanism(s) does the Tribe you work for use to enforce its laws regulation solid waste disposal? 2) “[w]hat is the Tribe’s goal in relation to regulating solid waste disposal? Assuming enforcement mechanisms related to solid water disposal exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.”; and, 3) “[d]o these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement

249. Id.
250. Saint Regis Mohawk Tribe Survey, supra note 231.
251. Id. ("Our own Tribal Courts enforce our regs.").
252. Id.
253. Id.
Based on the survey results, it appears that more tribes have enacted tribal environmental laws related to the regulation of solid waste than either water or air pollution. Respondents for six Tribes indicated that they do have some form of tribal law related to the regulation of solid wastes, three Tribes do not have any such regulation. The three Tribes falling into the latter category are the Crow Tribe, Tribe B, and Tribe C. The respondents for both the Crow Tribe and Tribe C indicated simply that neither Tribe had such tribal environmental laws. The respondent for Tribe B did go on to provide some additional information, explaining, “[n]o, our tribal members are not in one location but spread among several areas. We currently operate a recycling project locally.”

The respondents for the remaining six tribal survey participants all indicated that the Tribes had some sort of tribal environmental law directed toward the regulation of solid wastes. First, the Fort McDowell Yavapai Nation indicated that it has a tribal law in its Tribal Environmental Code that prohibits illegal dumping. Enforcement is accomplished through the Code, and the solid waste laws “apply to anyone on Tribal land.”

The Hualapai Tribe “adopted a solid waste ordinance that prohibits illegal dumping of any refuse on tribal lands not designated as a transfer station or landfill.” The Tribe enforces this ordinance by prescribing a “fee that covers water, sewer and solid waste service to the tribal community and tribal businesses. There are prohibitions of dumping household trash on tribal lands not designated as a transfer station or landfill. In addition to the prohibitions there are fees and penalties associated with different illegal activities.” The goal of the program is “to ensure that all tribal members participate in the solid waste program and comply with established fees and responsibilities.” And, finally, the law does apply to both members and non-members of the Tribe, as the “reservation is a closed reservation that for the most part requires a permit for access or if accessing the tribal lands from public roads there is an assumption of the tribe that all persons are subject to our tribal laws; when they access our tribal lands.”

256. Fort McDowell Yavapai Nation Survey, supra note 216.
257. Id.
258. Hualapai Tribe, supra note 223.
259. Id.
260. Id.
261. Id.
Also, the Kickapoo Tribe of Oklahoma regulates illegal dumping on tribal lands through an “ordinance . . . used to regulate solid waste with penalty fees for illegal dumping.” Specifically, the Tribe has enacted a criminal ordinance to regulate the illegal dumping with the goal of preventing illegal dumping within the Tribe’s territory. The respondent for the Tribe was uncertain whether the ordinance applied to both members and non-members of the Tribe.

As with water and air pollution regulation, the Navajo Nation has adopted a tribal law, the Navajo Nation Solid Waste Act, to regulate solid waste disposal. The Act is enforced primarily through permits, and the Nation prohibits “open dumping” of waste. “The Nation’s overall goal is to protect the health, safety, welfare and environment of the Navajo Nation; to manage, protect and preserve the resources of the Nation; and to maintain and improve the aesthetic appearances of the Nation. See 4 N.N.C. § 103(B).” Further, the Act does apply to both members and non-members of the Nation.

So, too, the Saint Regis Mohawk Tribe adopted a Tribal Solid Waste Management Code, approved by both the Tribe and the EPA, to regulate solid waste disposal on the reservation. The respondent for the Tribe indicated that the Code provision is enforced through the tribal court and that it is applicable to both members and non-members of the Tribe.

Finally, Tribe A also adopted tribal laws to regulate solid waste, as it has “solid waste codes within their Policies and Regulations.” The Tribe enforces these laws through “their Tribal Court and their Marshals.” The respondent for the Tribe explained that “the Environmental Department has been trying to eliminate illegal dumping within [a certain area]. The mechanisms that exist to enforce regulations are bleak and are difficult to administer.” Also, the laws apply to both members and non-members of the Tribe, and the respondent stated that, “[i]f non-tribal members are caught, the hope is that they will be prosecuted to the maximum extent.

263. Id.
264. Id.
266. Navajo Nation Survey, supra note 227.
267. Id.
268. Id. The respondent explained, however, that “I don’t work on solid waste regulation for the Nation, so I’m not sure what the specific legal justification is.” Id.
269. Saint Regis Mohawk Tribe Survey, supra note 231.
270. Id.
272. Id.
273. Id.
Many illegal dumpers have to cross no-trespassing signs to commit these acts.”

4. Reflections on Survey Responses

Although very few tribes responded to the Enforcement of Tribal Environmental Law survey, the responses that were received are helpful in gaining greater insight into how tribes are enforcing their tribal environmental laws. Even the responses from those tribes that indicated they have not developed their own tribal environmental laws regulating water are helpful for a couple of reasons. First, the response from Tribe A identifies that the “Midnight Rider,” or Subtitle B “Other Miscellaneous Provisions” within the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005, has seemingly impacted the development of tribal environmental law for tribes located within Oklahoma.274 Although the respondent for Tribe A does not provide additional detail as to why this may be the case, perhaps it is because the State of Oklahoma must agree to any proposed provision, enacted under federal law (TAS status), and to jointly regulate the program. Such a requirement for State cooperation could very likely have a chilling impact on the development of tribal environmental law in Oklahoma. Further, three of the tribes answering ”no” to the first question— Fort McDowell Yavapai Nation, Tribe B, and Kickapoo Tribe of Oklahoma—did indicate that they are relying on the application of federal environmental laws within their territories, suggesting that there is not a lack of environmental regulation within such territories. And, finally, at least one tribe—the Crow Tribe—appears to be in the process of developing its own set of tribal environmental laws.

Three tribal respondents, or one-third of the survey participants, indicated that they do regulate water resources within their territories using tribal environmental law. These Tribes are the Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe. This finding is roughly consistent with past research demonstrating that 25 to 35 percent of tribes have developed their own tribal environmental law.275 The responses of these three participants is helpful in understanding the nature of tribal environmental law enforcement. Interestingly, unlike federal environmental laws that may

274. Pub. L. 109-59, 119 Stat. 1937, § 10211(b)(2) (Aug. 10, 2005) provides that: the Indian tribe and the agency of the State of Oklahoma with federally delegated program authority enter into a cooperative agreement, subject to review and approval of the Administrator after notice and opportunity for public hearing under which the Indian tribe and that State agency agree to treatment of the Indian tribe as a State and to jointly plan administer program requirements.

275. E.g., Warner, Examining Tribal Environmental Law, supra note 18, at 87 n.237.
distinguish between surface and ground water, the Hualapai Tribe makes clear that its tribal environmental regulations are applicable to all water within the Tribe’s territory—surface and ground water, alike.

Further, the Hualapai Tribe’s response to question 4 of the survey is particularly instructive for a couple of reasons. First, the Tribe’s respondent indicated that it does not distinguish between Indian and non-Indian individuals when applying tribal environmental laws related to water regulation. Although the Tribe does not explain the legal basis for this, it may be that the Tribe is relying on the second exception to the general rule prohibiting regulation of non-Native individuals on non-Native land as articulated by the U.S. Supreme Court in *Montana v. United States*. Given the Hualapai Tribe’s indication that it regulates “any person entering our tribal lands,” the Tribe seemingly does not distinguish between Indian and non-Indian, and, as a result, may be said to be regulating under the second *Montana* exception. Admittedly, this is conjecture, given the respondent does not provide an explanation for the application to “any person.”

The Tribe’s response to the fourth question also provides evidence that the Tribe limits access to its tribal lands through use of permits and potential trespass actions. The Tribe explains that non-Indians are required to obtain permits in order to gain access to roads that are not designated public roads. Further, when the construction contractor for a major railroad impermissibly entered the Tribe’s territory, the Tribe utilized a trespass action against the contractor in order to remedy the situation. This is consistent with the discussion above demonstrating that some tribes may use trespass actions to provide a remedy for environmental pollution.

Similar to the Hualapai’s response to question 4, the Navajo Nation’s response to the same question indicates that it too regulates Indian and non-Indian individuals within its tribal territories under the second *Montana* exception. Further, the Navajo Nation’s respondent explained that the Nation uses permits and designated uses of water in order to effectively enforce its tribal environmental laws.

And, finally, the respondent for the Saint Regis Mohawk Tribe explained that effective enforcement of its tribal environmental laws is obtained, in part through EPA approval. Overall, therefore, the three tribes utilizing their own tribal environmental laws have selected different forms

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279. *See supra* Part III.D.

280. Navajo Nation Survey, *supra* note 227 (answering the following in response to the fourth question, “[y]es, under Montana’s second exception.”).
of enforcement, including tribal courts, identified environmental officials, permits, designated uses, and, as appropriate, approvals by the EPA.

As with tribal regulations governing regulation of water pollution, the provisions regulating air pollution also yield interesting insights into enforcement of tribal environmental laws. Only three tribal respondents—Hualapai Tribe, Navajo Nation, and Saint Regis Mohawk Tribe—indicated that they actively regulate air pollution through tribal environmental laws. This is consistent with past research demonstrating that fewer tribes engage in the regulation of air pollution. The responses from several of the tribal representatives to the first question on the regulation of air pollution suggests that many of the tribal respondents are relying on the application of federal environmental laws to effectively regulate air pollution. Further, respondent for Tribe A rearticulated the concern that the “Midnight Rider” or Subtitle B “Other Miscellaneous Provisions” of the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 is likely have significant impact on the development of TAS programs within tribes located inside the boundaries of Oklahoma, as previously discussed.282

Further, much can be learned from those three tribes indicating that they do have tribal environmental laws regulating air pollution. First, although tribes do generally appear to rely on the federal government for regulation of air pollution as demonstrated by past research and survey results, the survey results reveal that tribes are still finding ways to actively regulate outside of the federal environmental laws—as evidenced by the Hualapai Tribe’s regulation of burning and the Navajo Nation’s Air Pollution Prevention Act. Further, the Tribes are utilizing permits and tribal courts to ensure effective enforcement of their tribal laws. And, all three Tribes indicate that their laws are applicable to any person, regardless of whether the person is a member of the Tribe or not. The respondent for the Navajo Nation explained that this is consistent with the EPA’s view of the TAS provisions of the Clean Air Act, under which tribes have the authority to regulate based on territorial jurisdiction and not the political identity (i.e. non-member versus member) of the individual being impacted by the regulation.

Interestingly, the respondent for the Hualapai Tribe also explains that, “[o]ur tribal lands are not free and open space, access through most of our tribal lands requires a permit and entering and leaving our reservation there


is signage informing the public of the limited access.\textsuperscript{284} Although admittedly speculation, this focus on the Tribe’s lands not being “free and open space” may be a reference to the U.S. Supreme Court’s decision in \textit{Brendale v. Confederated Tribes & Bands of Yakima Indian Nation}.\textsuperscript{285}

\textit{Brendale}, a consolidated case, involved two non-Indian parties, Brendale and Wilkinson, each of whom privately owned land within the Tribe’s territory and desired to develop that land.\textsuperscript{286} A treaty between the United States and the Tribes provided that the reservation land shall be for the “exclusive use and benefit” of the Tribes.\textsuperscript{287} The Tribes’ reservation land was largely located within Yakima County, Washington.\textsuperscript{288} Roughly 80 percent of the reservation land is held in trust by the United States for the Tribe or its individual members, and the remaining 20 percent is owned in fee by Indian or non-Indian owners.\textsuperscript{289} The Tribes’ reservation was divided into two parts: a “closed area,” which is so named because it has been closed to the general public, and an “open area,” which is not so restricted.\textsuperscript{290} Only a small portion of the closed area consists of fee land, while almost half of the open area is fee land.\textsuperscript{291} Brendale’s land was located within the “closed” portion of the reservation, and Wilkinson’s property was located within the “open portion.”\textsuperscript{292} The Tribes’ zoning ordinance applied to all lands within the reservation, including fee lands owned by Indians or non-Indians, while the county’s zoning ordinance applies to all lands within its boundaries, except for Indian trust lands.\textsuperscript{293} The Tribes’ zoning ordinance precluded the proposed development, but the County’s ordinance would have allowed such development.\textsuperscript{294}

In a plurality decision, the Court ultimately held that the Tribes had exclusive jurisdiction over the Brendale property, located within the closed portion of the reservation, but lacked authority over the Wilkinson property.\textsuperscript{295} The Court explained that Brendale’s proposed development, but not Wilkinson’s, posed a threat to the Tribe’s political integrity, economic security, and health and welfare, and therefore was impermissible under the

\textsuperscript{284} Hualapai Tribe Survey, \textit{supra} note 223.

\textsuperscript{285} \textit{See} 492 U.S. 408 (1989).

\textsuperscript{286} \textit{Id.} at 414.

\textsuperscript{287} \textit{Id.} at 414–15.

\textsuperscript{288} \textit{Id.} at 415.

\textsuperscript{289} \textit{Id.}

\textsuperscript{290} \textit{Id.} at 415–16.

\textsuperscript{291} \textit{Id.}

\textsuperscript{292} \textit{Id.} at 417–18.

\textsuperscript{293} \textit{Id.} at 416.

\textsuperscript{294} \textit{Id.} at 416–17.

\textsuperscript{295} \textit{Id.} at 432–33.
second *Montana* exception.296  The Court also determined that the County was unable to exercise concurrent zoning authority over closed area lands because its interests in regulating those lands were minimal, while the Tribes' were substantial.297

Accordingly, by explaining that the Tribe's lands are not “open,” the Hualapai Tribe may be trying to track the rationale of the U.S. Supreme Court in *Brendale* in that the second *Montana* exception applies in these instances because of the strong likelihood that the actions of non-members will directly affect the Tribe. And, second, that the Tribe has a much stronger interest in regulating a “closed” section of a reservation than some other party, such as a county in the *Brendale* case.

And, finally, the survey responses provide interesting insights into how the Tribes regulate and enforce laws related to the disposal of solid wastes. As mentioned above, the majority of survey respondents, six out of nine, or approximately 67% of respondents, adopted some tribal law related to solid waste disposal. This result is twice as many Tribes as compared to air and water pollution regulation where only three of nine, or approximately 33% of respondents, had adopted tribal laws. This finding (that more tribes adopted regulations related to solid waste disposal) is consistent with past findings reviewing the tribal code provisions of all 74 federally recognized tribes located within the boundaries of Arizona, Montana, New York, and Oklahoma.298  The past survey determined that 36 percent of all 74 federally recognized tribes possessed tribal code provisions related to the disposal of solid waste, which was a larger percentage than any of the other three categories studied—air pollution, water pollution, and environmental quality generally.299

Only three of the respondents indicated that the Tribes did not possess any tribal laws related to the regulation of solid waste. Tribe B’s explanation is that it does not possess such regulations because its members are spread out in several different areas. This may shed some light on why some tribes may be less likely to adopt such tribal laws.

Of the Tribes that do possess such laws, most of the Tribes (Fort McDowell Yavapai Nation, Hualapai, Navajo Nation, Saint Regis Mohawk Tribe, and Tribe A) all apply their solid waste disposal laws to both members and non-members of the Tribes. Although not explicit, the Navajo Nation’s response to the survey suggests that such application to members and non-members may be justified based on the second *Montana* exception,

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296. *Id.* at 429–31.
297. *Id.* at 466–68.
299. *Id.* at 70.
as the Nation incorporated language very similar to the second Montana exception into its Navajo Nation Solid Waste Act.\textsuperscript{300} Also, the Hualapai again references the importance of the “closed” nature of its reservation in relationship to applying its solid waste tribal laws to both members and non-members,\textsuperscript{301} which could be a reference to the U.S. Supreme Court’s decision in \textit{Brendale} as discussed above.\textsuperscript{302} And, finally, all of the tribal respondents reference using some combination of fines, penalties, permits, or tribal courts to enforce their tribal environmental laws related to solid waste disposal.

\section*{V. Conclusion}

Because the environment is arguably humankind’s most valuable resource, effective regulation of environmental pollution is of great importance. Within the United States, the federal government once engaged in substantial innovation within the field of environmental regulation, but, at the present time, such federal innovation has stagnated. It is therefore necessary to look to the environmental laws of other sovereigns to gain insight into how to best tackle new and emerging challenges. To date, few have considered the contributions of tribal environmental law, and this article has helped to fill that void by providing descriptive analysis of tribal environmental enforcement mechanisms utilized by many federally recognized tribes within the United States. Consideration of enforcement mechanisms is vital given that environmental regulations are likely to be unsuccessful without them.

Reviewing tribal environmental enforcement provisions yields several insights. First, the examination of tribal code provisions demonstrated that tribes are actively including enforcement provisions into their environmental codes. Many of these provisions look similar to mechanisms used by the federal government, such as the use of civil penalties and criminal sanctions in some instances. Some notable differences also appear—such as the use of banishment and exclusion, which were traditional remedies used by many tribes and may be effective tools against non-Indian actors especially given

\begin{itemize}
\item \textsuperscript{300} \textit{Compare} Montana v. United States, 450 U.S. 544, 566 (“A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.”), \textit{with} Navajo Nation Survey, \textit{supra} note 227 (“The Nation’s goal is to protect the health, safety, welfare and environment of the Navajo Nation . . . .”).
\item \textsuperscript{301} Hualapai Tribe Survey, \textit{supra} note 223 (“[R]eservation is a closed reservation that for the most part requires a permit for access . . . .”).
\item \textsuperscript{302} Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 408 (1989).
\end{itemize}
the limitations placed on tribes by the U.S. Supreme Court’s decision in Oliphant. Second, review of the survey results from nine federally recognized tribes yielded a deeper understanding of tribal enforcement of environmental laws. Again, many tribal enforcement mechanisms mirror federal mechanisms, yet differences do exist. For example, tribes must take into consideration how to effectively regulate non-Indians given the limitations of Montana and Brendale. The survey results demonstrate that tribes are actively considering these limitations and arriving at creative solutions to overcome such obstacles. In sum, the description of tribal environmental enforcement provisions offered by this article presents a useful starting place in better understanding tribal environmental law. Through such increased understanding, all sovereigns within the United States will hopefully realize more effective and efficient environmental regulation.
APPENDIX A

SURVEY

Enforcement of Tribal Environmental Law

Introduction and Purpose of the Survey

The University of Kansas supports the practice of protection for human subjects participating in research. The following information is provided for you to decide whether you wish to participate in the present study. You may refuse to participate in this study. You should be aware that even if you agree to participate, you are free to withdraw at any time. If you do withdraw from this study, it will not affect your relationship, in any, with the University of Kansas.

To date, not much has been written about the environmental laws enacted by tribes under either federal delegated authority or inherent sovereignty (collectively referred to as “tribal environmental law”). Accordingly, the purpose of the survey is to gather information on how tribes are enforcing their tribal environmental laws. Overall, it is hoped that tribes and other sovereigns interested in the enforcement of tribal environmental law will benefit from the results of this survey.

Procedures

This study will be based on one survey. You are asked to complete the survey that is provided below. Information gathered from this survey will only be used for this study’s purposes. If you wish, your name and the tribe for which you work will not be included in the publication of the survey results.

Payment to Participants

There will be no compensation provided to participants.

Participant Confidentiality

Your name will not be used in any publication or presentation of the material collected from this survey. However, identifying information may be required to be shared under University policy or federal law. In such circumstances, however, it would not be included in the resulting article.

Consent

By completing and returning the survey below, you consent to the researcher’s use of the information provided consistent with the participant confidentiality provisions listed above.
You may withdraw your consent to participate in this survey at any time. To withdraw your consent, please send your written request to:
Elizabeth Kronk Warner
University of Kansas School of Law
1535 W. 15th St.
Lawrence, KS 66044
elizabeth.kronk@ku.edu

Questions about Participation
Questions about procedures should be directed to Professor Elizabeth Kronk Warner at (785) 864-1139, elizabeth.kronk@ku.edu, or the address listed above.

Survey
Enforcement of Tribal Environmental Law

Position within Tribe: _________________________
Name of Tribe for which you work: _________________________

May the Tribe be identified in the proposed article? Yes/No

Water Regulation

1) Does the Tribe you work for regulate water pollution? If yes, what tribal laws regulate water pollution? (Please list. There is no need to list federal laws that may be applicable.)

If yes, please answer questions 2-4. If no, please continue to question 5.

2) If you answered yes to question 1, what mechanism(s) does the Tribe you work for use to enforce its laws regulating water pollution?

3) What is the Tribe’s goal in relation to regulating water pollution? Assuming enforcement mechanisms related to the regulation of water pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.

4) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the Montana exceptions, etc.)?
Air Pollution

5) Does the Tribe you work for regulate air pollution? If yes, what tribal laws regulate air pollution? (Please list. There is no need to list federal laws that may be applicable.)

If yes, please answer questions 6-8. If no, please continue to question 9.

6) If you answered yes to question 6, what mechanism(s) does the Tribe you work for use to enforce its laws regulating air pollution?

7) What is the Tribe’s goal in relation to regulating air pollution? Assuming enforcement mechanisms related to the regulation of air pollution exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.

8) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the Montana exceptions, etc.)?

Solid Wastes

9) Does the Tribe you work for regulate solid waste disposal? If yes, what tribal laws regulate solid waste disposal? (Please list. There is no need to list federal laws that may be applicable.)

If yes, please answer questions 10-12. If no, please continue to question 13.

10) If you answered yes to question 9, what mechanism(s) does the Tribe you work for use to enforce its laws regulating solid waste disposal?

11) What is the Tribe’s goal in relation to regulating solid waste disposal? Assuming enforcement mechanisms related to solid waste disposal exist, do these mechanisms assist the Tribe in meeting its regulatory goal? Please explain.

12) Do these regulations apply to non-members of the Tribe? And, if yes, what is the legal justification that the Tribe employs to apply these enforcement regulations against non-members (e.g. territorial sovereignty, one of the Montana exceptions, etc.)?
13) May I contact you with any follow-up questions? And, if yes, what is the best way to contact you?

Please return the completed survey to Professor Elizabeth Kronk Warner at elizabeth.kronk@ku.edu or mail the completed survey to:

Professor Elizabeth Kronk Warner  
University of Kansas School of Law  
1535 W. 15th St.  
Lawrence, KS 66044  
Chi Miigwetch! (Thank you!)
Plaintiff Cities

Sarah L. Swan†

VAND. L. REV. ___ (forthcoming 2018)

When cities are involved in litigation, it is most often as defendants. However, in the last few decades, cities have emerged as aggressive plaintiffs, bringing forward hundreds of mass-tort style claims on behalf of their constituents. From suing gun manufacturers for the scourge of gun violence, bringing actions against banks for the consequences of the sub-prime mortgage crisis, and initiating claims against pharmaceutical companies for opioid-related deaths and injury, plaintiff cities are using litigation to pursue the perpetrators of the huge social harms that have devastated their constituents and their communities.

Many courts and commentators have criticized these plaintiff city claims on numerous grounds. They argue that, as a doctrinal matter, cities lack standing, fail to meet causation standards, and stretch causes of action like public nuisance beyond all reasonable limits. Further, they argue that, as a theoretical matter, plaintiff cities are impermissibly using litigation as regulation, overstepping their limited authority as “creatures of the state,” and usurping the political and legislative process. This Article demonstrates that each of these critiques is mistaken. Plaintiff city claims are legally, morally, and sociologically legitimate. And, as a practical matter, they are financially feasible, even for cash-strapped or bankrupt cities. Moving beyond mere economic accounting, though, plaintiff city claims have value of a different sort: political currency. In short, plaintiff cities use litigation as a form of statebuilding. By serving as plaintiffs and seeking redress for the harms that impact a city’s most vulnerable residents, plaintiff cities are defining and demanding recognition not just for those impacted constituents, but also for themselves, as distinct and meaningful polities. In so doing, plaintiff cities are renegotiating the practical and theoretical meaning of cities in the political order, and opening up new potential paths for urban social justice.

† Many thanks to the following for their comments and conversations:
INTRODUCTION

Traditionally, city attorneys have two basic roles. First, they advise city officials. Second, they defend cities when legal claims are brought against them. And claims are indeed brought, many and often. Because they occupy the front line between citizen and state, cities will “routinely and forever defendants in civil rights cases.” Their constant role as litigative defendants can create the impression that cities are

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2 Id.
3 Id.
4 Noah M. Kazis, American Unicameralism: The Structure of Local Legislatures, 67 HASTINGS L. J. 1, 8 (noting that local government employees are “the front-line workers in basic governmental functions from education to law enforcement to sanitation”).
5 Morris, supra note 1, at 201.
“intractable defenders of awful power structures,”6 who “can only be heard to deny, rather than support, the rights and interests of their residents.”7

But cities often have another face, too.8 Despite the “paradigm in many public law offices [...] to be principally defensive,” in the last thirty years or so, some cities have resolved to become “so much more than that.”9 These cities have added a new litigative role to their roster: that of plaintiff. In contrast to their standard defensive litigative posture, (but complementing their well-publicized efforts to advance socially-progressive regulation like ordinances that raise the minimum wage, mandate sick leave, or prohibit fracking),10 cities have been bringing forward hundreds of mass-tort style claims seeking redress for the widespread harms that substantially injure themselves and their constituents.11 Cities like San Francisco, Los Angeles, and New York now have specialized units within their law departments devoted to bringing these claims and developing their role as plaintiff cities.12 Other, less well-resourced cities pursue such claims as

6 Id.
8 Technically, cities are “public corporations,” i.e. “not-for-profit, publicly funded corporate entities” that “essentially come into being by applying to state governments for permission to exist.” Morris, supra note 1, at 210.
11 After the tobacco litigation, municipal securities litigation became very popular as well. See Joe Palazzolo, More Cities Suit Up for Legal Actions, WALL STREET JOURNAL, (May 3, 2016) https://www.wsj.com/articles/more-cities-suit-up-for-legal-actions-1462218870. Cities have also been bringing more constitutional claims on behalf of their constituents. See, e.g., David J. Barron, Why (and When) Cities Have a Stake in Enforcing the Constitution, 115 YALE L.J. 2218 (2006).
12 Morris, supra note 1, at 190. Other cities, like Buffalo, New York; Central Falls, Idaho; Washington, D.C., and Philadelphia, Pennsylvania, have also created these units. See https://www.ci.buffalo.ny.us/Home/City_Departments/LawDepartment/Divisions; www.centralfallsri.us/affirmativelitigation; Rachel Dovey, D.C. Renters Get More Legal Help for ‘Housing Justice’ Cases, Next City (Feb. 27, 2017), https://nextcity.org/daily/entry/dc-renters-legal-help-housing-
well, but on a more ad hoc basis, or through partnering with private law firms.\textsuperscript{13}

The first fledgling plaintiff city claims happened in the 1980s, but they were largely hidden within the broader auspices of claims brought by state attorneys general.\textsuperscript{14} In the tobacco and asbestos litigation of that era, a few cities joined the high-profile and high-powered consortiums of states litigating these claims. Approximately ten years later, in the mid-1990s, cities matured into their own litigative force, as a multitude of plaintiff cities advanced controversial claims against the gun industry. Nearly a decade later, the federal Protection of Lawful Commerce in Firearms Act brought an abrupt end to that line of litigation,\textsuperscript{15} but plaintiff cities refocused to target a new mass harm: lead paint. More recently, in the last ten years or so, a new wave of plaintiff city litigation has expanded to include claims against banks and other financial entities for the consequences of the sub-prime mortgage crisis, against pharmaceutical companies for deaths from prescription drugs, and against a variety of actors who have sold or created toxic or otherwise harmful products.

The early plaintiff city claims did not fare well. Most were defeated on doctrinal grounds like a lack of standing, a failure to show causation, or non-fulfillment of the public nuisance cause of action. These issues still derail many plaintiff city claims. But some of the more recent plaintiff city cases have achieved substantial in-court and out-of-court victories. Despite these recent successes (or perhaps because of them), plaintiff city detractors continue to impugn these actions, arguing that they are doctrinally and politically suspect. In the

\footnotesize{
justice; and www.phila.gov/law/litigation/Pages/GeneralLitigation.aspx. Other cities, like Providence, Rhode Island, for example, engage in affirmative litigation without a separate department. See Palazzolo, supra note 11. Some cities have also partnered with law schools to aid in affirmative litigation. San Francisco has partnered with Yale Law School and Berkeley Law School, and Detroit has partnered with the University of Michigan. See Morris, supra note 1 at 190, and Katie Vloet, DLaw: Class Explores Affirmative Litigation Opportunities for Detroit, Law QUADRANGLE: NOTES FROM MICHIGAN LAW, https://www.quadrangle.law.umich.edu/spring2017/umichlaw/dlaw-class-explores-affirmative-litigation-opportunities-for-detroit.

\textsuperscript{13} See infra, Part III.


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doctrinal register, these arguments cluster around issues of standing and causation, and in the political one, critics argue that plaintiff cities are usurping the democratic process by regulating through litigation what they cannot regulate directly, and grossly overstepping the appropriate city-state allotment of power.

These criticisms arise mostly piecemeal in court cases and commentary, and scholarship has yet to fully grapple with them. In fact, scholarship has not yet offered a comprehensive descriptive and normative account of the plaintiff city trend itself. This Article is the first to fill that gap. After descriptively accounting for the plaintiff city phenomenon, this Article addresses the controversies surrounding these claims, and demonstrates that plaintiff city claims are a legitimate litigative activity: legally, morally, and sociologically. And, as a practical matter, they are financially feasible, even in the current economic climate of cash-strapped or bankrupt cities. Moving beyond mere economic measures, though, plaintiff city claims have another sort of value: they have political currency. In short, plaintiff cities use litigation as a form of statebuilding. By serving as plaintiffs and seeking redress for the harms that

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16 Two articles not specifically about cities nevertheless offer criticisms relevant to plaintiff city claims. See Richard C. Ausness, Public Tort Litigation: Public Benefit or Public Nuisance, 77 TEMP. L. REV. 825 (2004), and Donald G. Gifford, Impersonating the Legislature: State Attorneys General and PARENTS PATRIAE Product Litigation, 49 B.C.L. REV. 913 (2008).

17 There is a smattering of scholarship focused on discrete issues related to city litigation. For instance, for scholarship on city standing, see, e.g. Raymond H. Brescia, On Public Plaintiffs and Private Harms: The Standing of Municipalities in Climate Change, Firearms, and Financial Crisis Litigation, 24 NOTRE DAME J. ETHICS & PUB. POL’Y 7, 21 (2011) (discussing how plaintiff cities can attain standing in gun, mortgage, and environmental litigation); Ray Brescia, When Cities Sue: The Standing of Municipalities in Nuisance Litigation to Combat Climate Change, in Greening Local Governments: Legal Strategies for Promoting Sustainability, Efficiency, and Fiscal Savings 1-18 (K. Hirokawa and P. Salkin, eds., 2012) (discussing standing in environmental cases); and Caruso, supra note 7 (discussing associational standing for cities). There are also some helpful short pieces on the general topic. See, e.g., Morris, supra note 1 (arguing that cities should “bolster civil law enforcement); Gail Rubin, Taking the Offensive: New York City’s Affirmative Suits, 53 N.Y.L. SCHOOL L. REV. 491, 493 (2008) (describing New York City’s affirmative litigation docket); and Laura L. Gavioli, Comment: Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue, 78 TUL. L. REV. 941 (2004) (outlining city affirmative litigation and offering the views of some city attorneys general).
impact a city’s most vulnerable residents, plaintiff cities are defining and demanding recognition not just for those impacted constituents, but also for themselves, as distinct and meaningful polities. In so doing, plaintiff cities are renegotiating the practical and theoretical meaning of cities in the political order, and opening up new potential paths for urban justice.

Part I describes the rise of plaintiff cities. It sketches out the most common plaintiff city claims, and the nature of the harms underlying them. This descriptive account reveals three important insights. First, plaintiff city claims usually target public health injuries. Second, those public health harms tend to have their most significant impact on minority or vulnerable populations. Finally, the harms are usually forms of “slow violence.” They accumulate gradually, often leaving a lapse between the beginning of the injurious activity and the full manifestation of the harm.

Part II addresses the main criticisms of plaintiff city claims, and demonstrates that plaintiff city litigation is legally, morally, and sociologically legitimate. Legally, most plaintiff city claims can meet standing requirements through a number of potential paths, including statutory standing, direct injury standing, associational standing, or special public nuisance standing. And, although the slow violence of many plaintiff city claims creates complications for causation, and the tension between the collective nature of plaintiff city claims and the kind of individual harm most easily addressed through tort law poses a challenge, plaintiff city claims can often meet causation requirements. Morally, arguments that plaintiff city claims unjustly bind dissenters, or undemocratically amount to litigation as regulation, are best answered through analogies to other contexts, most notably state-driven public interest litigation. Sociologically, the “tort reform” movement has generally succeeded in impugning civil litigation as a whole, but litigation is eventually deemed acceptable and worthwhile if the information-forcing function reveals misconduct, as it has in many plaintiff city claims.

Part III considers the relevance of plaintiff city claims in this current time of fiscal crisis for many municipalities. It asserts that plaintiff city claims are financially feasible, even for

\[18 \text{ RON NIXON, SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR (2013).}\]
cash-strapped or bankrupt cities. In fact, the harms that plaintiff cities allege in these suits are often at least in part responsible for the plaintiff city’s precarious financial position.

In addition to their economic value, plaintiff city claims also have political currency. Part IV argues that through these claims, plaintiff cities are establishing themselves as entities responsible for and capable of achieving justice for their populations. In short, for plaintiff cities, litigation is a form of statebuilding. Through these claims, cities are renegotiating the meaning of cities, both politically and theoretically, and suggesting new possibilities for urban social justice.

I. Cities Become Plaintiffs

Although cities have brought one-off, piecemeal litigation to advance their interests and that of their constituents since their first charters were established, and continue to bring constitutional claims and other types of public interest litigation, cities started targeting systemic, mass-tort style harms in the 1980s, first through the asbestos litigation, and then through the tobacco cases. Although these litigative moves were mainly state-driven enterprises, with cities playing only a relatively minor role, the twinned successes of these two lines of litigation (tobacco, for example, resulted in one of the largest settlements in American history) meant that a handful of pioneering plaintiff cities received substantial

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19 For a descriptive sampling of these cases, see Morris, supra note 1.


21 The localities which were part of the 1998 Master Settlement Agreement included New York City, San Francisco, Los Angeles, as well as Cook County (Illinois), and Erie County (New York). Laura L. Gavioli, Comment: Who Should Pay: Obstacles to Cities in Using Affirmative Litigation as a Source of Revenue, 78 TUL. L. REV. 941, 947 (2004).

22 David M. Cutler et al., The Economic Impacts of the Tobacco Settlement, 21 J. OF POL’Y ANALYSIS AND MANAGEMENT 1, 1 (2002). When it was entered into, the estimate present value of the settlement was $105 billion. Id.
settlement funds.\textsuperscript{23} The tobacco and asbestos litigation thus signalled to municipalities that plaintiff city litigation could be a potentially viable route for cities looking to address systemic, widespread, public health harms and to recover the costs associated with them.\textsuperscript{24}

\textbf{Guns}

Buoyed by the successes in the tobacco and asbestos litigation, plaintiff cities mobilized and initiated litigation against another systemic, widespread, and devastating public harm: gun violence.\textsuperscript{25} “Whether measured by mortality or morbidity statistics, by cost to society, or by sheer grief and disruption” to communities, gun violence has been one of the most significant public harms to plague American society.\textsuperscript{26} Cities, who have born significant economic costs associated with such violence, and who have witnessed the human and social cost for victims and their families, became increasingly interested in targeting gun manufacturers. Given the already-recognized overwhelming lobbying power of the gun industry,

\begin{itemize}
\item \textsuperscript{23} New York City, for instance, received more than $130 million and “is the single largest recipient of asbestos bankruptcy recoveries.” Gail Rubin, \textit{Taking the Offensive: New York City’s Affirmative Suits}, \textit{53 N.Y.L. SCHOOL L. REV.} 491, 493 (2008).
\item \textsuperscript{24} Fox Butterfield, \textit{Results in Tobacco Litigation Spur Cities to File Gun Suits}, \textit{N.Y. TIMES} (December 24, 1998). The successful asbestos suits were rooted in the property ownership rights of municipalities and school boards. The suits that instead “claimed that the manufacture and distribution of asbestos products constituted a nuisance [...] were rejected by most courts.” Lindsay F. Wiley, \textit{Rethinking the New Public Health}, \textit{69 WASH. AND LEE L. REV.} 207, 238 (2012). Also, the most successful tobacco litigation, that in which states sued for health care cost reimbursement, was premised on “equitable grounds such as unjust enrichment” and on state consumer protection statutes. Robert L. Rabin, \textit{The Tobacco Litigation: A Tentative Assessment}, \textit{51 DEPAUL L. REV.} 331, 337 (2001). Prior to the state tobacco claims, individual suits against tobacco companies had been almost unanimously unsuccessful: of the approximately 800 claims filed in state courts in the forty years between 1954 and 1994, plaintiffs succeeded at the trial level only twice, and neither success survived appeal. See Arthur B. La France, \textit{The Changing Face of Law and Medicine in the New Millenium: Tobacco Litigation: Smoke, Mirrors and Public Policy}, \textit{26 AM. J. L. & MED.} 187, 190-1 (2000).
\item \textsuperscript{25} Butterfield, \textit{supra} note 21.
\item \textsuperscript{26} Julei Samie Mair et al., \textit{A Public Health Perspective of Gun Violence Prevention}, \textit{in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL & MASS TORTS} 39-61, 39 (Timothy D. Lytton, ed. 2006).
\end{itemize}
litigation appeared to be a good option.\textsuperscript{27}

In 1998,\textsuperscript{28} New Orleans brought the first plaintiff city gun suit, using product liability laws to claim that gun manufacturers had “defectively designed” their firearms because they lacked easily-implementable safety mechanisms like child safety locks.\textsuperscript{29} Days after New Orleans filed, Chicago brought its plaintiff city gun suit, framing their claim as one of public nuisance, not product liability.\textsuperscript{30} An onslaught of plaintiff city suits followed: nearly two years after the New Orleans and Chicago filings, “over thirty cities” had filed their own gun litigation claims.\textsuperscript{31}

The bulk of these claims were dismissed.\textsuperscript{32} The few that did

\textsuperscript{27} Id.

\textsuperscript{28} Howard M. Erichson, Private Lawyers, Public Lawsuits: Plaintiffs’ Attorneys in Municipal Gun Litigation, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL & MASS TORTS, 129-151, 137 (Timothy D. Lytton, ed. 2006).


\textsuperscript{31} Michael I. Krauss, Public Services Meet Private Law, 44 San Diego L. Rev. 1, 3 (2007). States and other governmental actors also subsequently became more active in this area. At the state level, in 1999, the New York and Connecticut attorneys general started investigating “several” gun manufacturers. The same year, at the federal level, the then-Secretary of Housing and Urban Development (Andrew Cuomo) and the then-President (Bill Clinton) “jointly announced that they were planning a lawsuit against gun manufacturers on behalf of 3,200 public housing authorities across the country, based on the notion that the actions of gun manufacturers had increased federal expenditures.” Paul Nolette, Law Enforcement as Legal Mobilization: Reforming the Pharmaceutical Industry Through Government Litigation, 40 Law & Soc. Inquiry 123, 143 (2015).

\textsuperscript{32} A few claims settled, though sometimes the successful was more regulatory than compensatory. San Francisco’s case, for example, cost $1 million to bring, but “in a settlement, gun distributors paid only $70,000 to the dozen cities and counties [involved].” Lee Romney, Activism Defines S.F. City Attorney’s Office, L.A. TIMES (March 23, 2004) articles.latimes.com/2004/mar/23/local/me-cityatty23. However, the
survive were eventually terminated by legislation. In addition to many state bills prohibiting such lawsuits, in 2005 Congress passed the Protection of Lawful Commerce in Arms Act, which effectively foreclosed nearly all municipal civil suits against the gun industry.

Lead

Before Congress killed the gun litigation, plaintiff cities had already begun litigating against another public health harm: lead paint. Lead paint remains “the most significant childhood environmental problem” in many states, as even very low levels of exposure cause decreased IQ, reduced attention span, learning disabilities, damage to reproductive
distributors and dealers also “agreed to certain restrictions on sales and better training to prevent firearm sales to criminals.” As one commentator noted, “[o]ne problem is that powerful interests, when poked with the stick of a municipal lawsuit, sometimes can get higher government entities to snarl back on their behalf.” Hiltzik, supra note. A similar phenomenon occurred in relation to obesity, when “relatively quick action by many state legislatures immunized the food industry to tort lawsuits seeking obesity-related damages.” Paul Diller, Obesity Prevention Policies at the Local Level: Tobacco’s Lessons, 65 ME. L. REV. 459, 459 (2013).

Louisiana and Georgia are examples of states that enacted gun litigation prevention statutes. In Morial v. Smith & Wesson Corp., 785 So.2d 1 (La. 2001) the city unsuccessfully challenged the Louisiana statute. Gary, Indiana, has had some success in arguing around the statute’s edges. See Morris, supra note 1, at 200-1. And while city attorneys may have lost the litigative battle, they continue to fight the larger war. Today, “prosecutors from 30 major cities” have formed “a new coalition,” Prosecutors Against Gun Violence, to “exchange expertise and tactics” on how best to address the “urgent public health and safety issue” of gun violence. This coalition is co-chaired by Los Angeles City Attorney Mike Feuer. Editorial Board, When Prosecutors Align on Guns, N. Y. TIMES, (October 27, 2014).

Cases included City of St. Louis v. Benjamin Moore & Co, 226 S.W.3d 110 (Mo. 2007); City of Chicago v. American Cyanamid Co., 823 N.E.2d 126 (Ill. App. Ct. 2005); In re Lead Paint Litig., 924 A.2d 484 (N.J. 2007) (where the plaintiff was the city of Newark); and City of Milwaukee v. NL Indus., Inc., 691 N.W. 2d 888 (Wis. Ct. App. 2004). Columbus City (Ohio), Philadelphia (Pennsylvania), Houston, (Texas) and a number of other municipalities in Ohio also filed suit. Eric Tucker, R.I. Lead Paint Loss Gives Industry Huge Win, USA TODAY (July 6, 2008), http://www.usatoday.com/money/economy/2008-07-06-1044394103_x.htm?csp=34.

organs and the nervous system, and “permanent neurological damage.” Lead poisoning has no cure; “once the damage is done, it is irreversible.”

To stop childhood lead paint poisoning and remediate tainted properties, many cities and other local public authorities sued, alleging that the lead paint companies knew as early as the 1920s or 30s of the dangers lead paint posed, but deliberately hid this information. Like the gun litigation, most of this initial plaintiff city litigation against lead manufacturers failed. However, in 2013, one plaintiff city claim, involving a consortium of ten Californian cities and counties, had a remarkable victory, receiving a $1.15 billion damage award. Four years later, the appeal remains pending. If the verdict is affirmed, it will both provide the population most affected by lead paint poisoning, “poor and minority children living in older housing,” with “the opportunity to live safe, healthier lives,” and fortify the

39 Id.
40 Ausness, supra note 25, at 853-4. See also infra, fn. 32.
41 Ausness, supra note 25, at 854. The early litigation was described as “uniformly unsuccessful.” Id. In 2006, though, it looked like a state-led suit had managed a victory, when a Rhode Island jury issued a $2.4 billion verdict against a number of lead paint companies. The Rhode Island Supreme Court overturned this verdict two years later. The Rhode Island suit itself was an exception to the typical state-level response to lead paint, which did not use litigation. Instead, “most state attorneys general [were] cautious about getting involved with lead paint.” Alan Greenblatt, Lead Into Gold?, GOVERNING: THE STATES AND LOCALITIES (May 2006), www.governing.com/topics/health-human-services/Lead-Gold.html. Indeed, “in 2003, 47 of the 50 AGs signed an agreement with paint makers calling for tougher warning labels about the danger of stirring up lead paint dust in home renovation [and] [t]hat seemed to dampen their enthusiasm for further litigation.” Id.
42 People v. Atlantic Richfield Co., Cal. Super Ct., No 1-00-CV-788657, 1/7/14.
position of the other cities still fighting on this front.\(^{45}\)

**Sub-prime Mortgages**

The next major area of plaintiff city litigation targets the financial institutions responsible for the subprime mortgage crisis. The subprime mortgage crisis brutalized both the physical and the metaphorical landscapes of hundreds of U.S. cities.\(^ {46}\) In addition to the financial ruin of individuals and families,\(^ {47}\) cities were stuck “bearing the brunt of the fallout from [this] crisis.”\(^ {48}\) Foreclosures caused “massive property devaluations,” resulting in a plundered tax base for cities, and the abandoned properties themselves demanded extensive city resources in the form of police and fire services.\(^ {49}\) For example, Cleveland, in 2014, had 12,000 condemned or abandoned buildings that required demolition, at an estimated cost of approximately $120 million.\(^ {50}\) It is estimated that in general, each abandoned property in a city costs “between $7,000 and

\(^{45}\) Baltimore, for example, believes that litigative success is possible. It is currently urging state legislators to pass the Maryland Lead Poisoning Recovery Act, which would not rely on the standard “personal injury” style causation requirement, but would instead allow the city to sue lead paint companies on a market-share liability theory. See Jack Chavez, *Lead-Paint Bill Would Let Baltimore Sue For Past Damages*, U.S. NEWS (March 8, 2017), https://www.usnews.com/news/best-states/maryland/articles/2017-03-08/lead-paint-bill-would-let-baltimore-sue-for-past-damages. For an example of the opposite dynamic, where the state is seeking to pass legislation that would limit a plaintiff city suit, see Carole Carlson, *Senate Bill Targets Gary Gun Lawsuit*, CHICAGO TRIBUNE (Feb. 16, 2015), www.chicagotribune.com/suburbs/post-tribune/news/ct-pth-gary-gun-suit-bill-focus-st-0217-20150216-story.html.


\(^{47}\) The fact that these consequences were in many cases the results of racially discriminatory acts is a further source of injury. The Supreme Court in *Curtis v. Loether*, 415 U.S.189 (1974) indicated that emotional harm arising from housing discrimination “was similar to defamation or intentional infliction of emotional distress in tort law.” Victor M. Goode, and Conrad A. Johnson, *Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem*, 30 FORDHAM URB. L. J. 1143, 1153 (2002).


\(^{49}\) Id.

\(^{50}\) Engel, supra note 43, at 629.
$30,000” to address.\footnote{51}

Nearly a dozen plaintiff cities have commenced litigation to redress these harms.\footnote{52} While no municipality has yet achieved a final court victory in this area, some have achieved handsome settlements,\footnote{53} and many cases are still active and pending.\footnote{54}

One case, Miami v. Bank of America Corp.,\footnote{55} reached the Supreme Court, where the Court confirmed the Fair Housing Act gives cities standing to bring such claims. Less auspiciously, though, the Court reaffirmed that these claims are subject to a rigorous causation standard, under which the city will have to show “some direct relation between the injury asserted and the injurious conduct alleged” if it is to be successful.\footnote{56} To date, then, plaintiff city claims in this area have faced significant hurdles,\footnote{57} but litigative success remains possible.\footnote{58}

\footnote{51} Id.


\footnote{53} Memphis received a “substantial financial settlement.” Jonathan L. Entin, City Governments and Predatory Lending Revisited, Fordham Urb. L. J. City Square 108, 110 (2014). Baltimore’s suit was dismissed, but it received some funds from a lawsuit the federal government filed. Id. Massachusetts and Nevada also received settlement funds, but from state-led suits. Id.

\footnote{54} Id.

\footnote{55} 581 US (2017).

\footnote{56} Id.

\footnote{57} Entin, supra note 49, at 115. See also Brescia, supra note 48, at 28. Brescia notes one additional problem: “many of the subprime lenders [...] were so aggressive in extending subprime loans [that they] are now bankrupt.” Id.

\footnote{58} See Engel, supra note 42.
The Opioid Epidemic

Most recently, there has been an uprising of plaintiff city litigation in response to the opioid epidemic. Since 2000, “[n]early 165,000 people have died from overdoses of prescription narcotics,” helping to make drug overdoses the now “leading cause of death among Americans under 50.” An estimated “2.1 million people are currently addicted to prescription painkillers.” There is also a direct link between opioids and heroin addiction: “75% of heroin users started using heroin after getting into opioid painkillers first.”

In addition to the profound human costs, opioid addiction poses significant costs to cities. For instance, as Chicago alleged in their claim, in 2009, opioid abuse caused “about 1,100 emergency room visits” and “$12.3 million in insurance claims for painkiller prescriptions.” Several other cities have now brought suit to recover these and other costs of providing opioid-related services, with more continually joining their

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59 The Center for Disease Control has officially labelled the problem an “epidemic.” In addition to these plaintiff city claims, cities have also created a coalition, similar to that created in response to the failure of gun litigation. The Big Cities Health Coalition has banded together to lobby the federal government to help address the problem. The Public Health Commissioner of Boston, Barbara Ferrer, noted the importance of this lobbying effort: “We don’t come forward a lot,” she said. “When big cities say there is need for [a] federal policy agenda, people should stand up and listen.” Eliza Gray, Cities Ask the Federal Government to Fight Painkiller Deaths, TIME MAGAZINE (Sept. 16, 2014) http://time.com/3387136/painkiller-deaths/.


62 Bernstein, supra note 56.

63 Eliza Gray, Chicago Blames Big Pharma for Epidemic Addictions to Painkillers, TIME MAGAZINE (June 4, 2014) time.com/2822381/chicago-blames-big-pharma-for-epidemic-addictions-to-painkillers/.

64 Bernstein, supra note 56.
Dayton, Ohio, for example, commenced a suit, noting that their “law enforcement, fire and EMS personnel have already responded to more than 1,800 calls related to suspected overdoses since the start of 2017,” a “remarkable number in a city with around 140,000 residents.” In Delray Beach, Florida (where “between 72 and 82 opioid prescriptions are written for every 100 people”) the mayor noted that litigation was one thing that city could do to address the problem: “With virtually no help from our federal government and little from our state...cities like ours are now frantically searching for answers for our own population.” Like many other cities, Delray Beach hopes litigation might be one of those answers.

A. Features of Plaintiff City Claims

Plaintiff cities hope that the current litigation will benefit from an important lesson learned from the tobacco suits: when governmental entities became plaintiffs, defensive arguments

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68 Id.
based on individual litigants can be neutralized. The tobacco litigation experience taught that when individual litigants brought forward claims, “juries often blame[d] the smoker and [were] unwilling in most cases to reward smokers for [their perceived] self-imposed harm.”69 When the plaintiff was a government entity, “it was much more difficult to blame the state for the lung cancer of many of its citizens.”70 In other words, changing the plaintiff changed how the harm was understood. By bringing forward claims, plaintiff cities emphasize the public nature of the harm. Rather than being understood as the result of individual choices for which individuals should bear the cost, harms are reframed as harms to the public, caused by a third-party wrongdoer, who should themselves bear the cost of their activities.71

In fact, plaintiff city litigation tends to center around a specific type of public harm: those affecting public health. Further, plaintiff city claims usually focus on public health harms that have either deliberately targeted or most impacted vulnerable populations. Finally, these public health wrongs often inflict their injuries through a process of slow violence, a gradual accretion and development of injury that is temporally distanced from the cause.

1. Public Health

Lead and opioids are easily understood as stereotypical public health harms.72 But, less obviously, the subprime mortgage crisis and gun violence are also matters of public health. In the 1990s, when plaintiff cities first brought the gun litigation, the idea that gun violence could be a public health

69 Erichson supra note 24, at 143.
70 Id. Many individual litigants suing gun manufacturers faced a similar obstacle: courts and juries found that the blame for gun violence fell on individual shooters, rather than the gun industry. Id. One much-publicized 1995 case, though, Hamilton v. Accu-Tek, appeared to buck this trend, and garnered a jury verdict awarding the plaintiff approximately $4m. This case, though was overturned on appeal. 76 N.Y.2d 222 (2001).
71 Butterfield, supra note 20.
problem, and not merely a problem of individual criminal wrongdoing, was new. The seeds of the idea began in the 1960s and 70s, with the release of the 1964 Report to the Surgeon General regarding tobacco and the publication of Ralph Nader’s ground-breaking book Unsafe at Any Speed. Both writings helped to shape the idea of “public wrongs,” and contributed to important theoretical and methodological shifts that were occurring in the field of public health. Most notably, injury prevention was emerging as an important heuristic and subfield. Public health researchers began to examine “violence as a source of injury,” which lead to the consideration of the connections between gun violence and widespread injury. Then, using the methodological tools of public health, and its particular focus on populations, rather than individuals, public health scholars performed the then-novel act of thinking about gun deaths in the aggregate. As basic as that idea sounds to contemporary ears, this different view of injury revealed the theretofore unknown fact that “after motor vehicle deaths, guns were the next leading cause of injury-related death in the United States.”

With epidemiological tools, public health scholars were

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73 Public health is commonly defined as “what we, as a society, do collectively to assure the conditions in which people can be healthy.” Wendy E. Parmet, Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy, 36 Hous. L. Rev. 1663, 1665 (1999) (noting this common definition from the Institute of Medicine).

74 Environmental law also underwent a similar transformation. See Brascia, supra note 6, at 1142.

75 Parmet, supra note 69, at 1700.

76 Id.

77 Id. at fn. 65 (citing Samual Jan Brakel, Using What We Know About Our Civil Litigation System: A Critique of Base-Rate Analysis and Other Apologist Diversions, 31 Ga. L. Rev. 55, 157 (1996)).

78 Another corresponding legal evolution was that “[a]s part of the development of environmental law in the 1970s and 1980s, courts began to allow for mass product torts that were not limited solely to individuals suffering a discrete injury, but that were conceived as collective harms that could be governed by other areas of law (namely public nuisance).” Sarah Staszak, Private Power and Public Policy: Rights Enforcement in the Modern Litigation State, 47 Tulsa L. Rev. 77, 78 (2013).

79 Lytton, supra note 2 at 38. See also Richard J. Bonnie, Injury as a Field of Public Health: Achievements and Controversies, 30 J.L. Med. & Ethics 267, 271 (2002).

80 Lytton, supra note 2, at 40

81 Id.

82 Id.
then able to “identify [...] causes and distribution of gun violence injury” that differed from the usual narrative that gun violence was simply a result of individual choice.\textsuperscript{83} They discovered that the way that firearms were designed (i.e. without easily implemented safety mechanisms) and marketed (i.e. with manufacturers and dealers overlooking obvious regulatory breaches and highlighting factors that would only be of interest to people intending to use guns for interpersonal violence) was a significant factor in the high rate of gun violence.\textsuperscript{84} These insights formed the basis of the litigation.

The subprime mortgage crisis also has a significant public health dimension. As detailed in a Harvard School of Public Health Special Report, \textit{The Financial Crisis as a Public Health Crisis}, the financial crisis is related to not only the usual stress and stress-related diseases to be expected following the loss or foreclosure on one’s home.\textsuperscript{85} There are also surprising spillover effects, including an associated increase of .2 body mass index units for those living “within 100 meters of a foreclosed home.”\textsuperscript{86} Other harms not immediately identifiable as involving public health shed light on this relationship. For instance, American Psychiatric Association’s president has argued that the BP oil spill’s impact on mental health should be compensable.\textsuperscript{87} He notes “mental illnesses brought on by difficult situations surrounding the BP oil spill may be less visible than other injuries, but they are real. An entire way of life has been destroyed, and this is causing anxiety, depression, post-traumatic stress disorder, substance abuse disorders, thoughts of suicide and other problems” in much of the population affected.\textsuperscript{88}

2. Vulnerability

Public health, with its focus on the health of particular

\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{86} Id.
\textsuperscript{88} Id.
populations, illuminates the significant racial dimensions of many of these harms. Gun violence, for instance, is a public harm “disproportionately affecting the country’s African American population.” In fact, “Black Americans are more than twice as likely to die from gun violence than whites.” This, stunningly, is actually an improvement on the situation thirty years ago, in the early 1990s, when “African Americans were more than three times as likely to die from gun violence than white Americans.”

Lead paint poisoning is also a racialized harm, “a disease that primarily impacts African-Americans.” There is “a correlation between cities with high percentages of African-American residents and elevated lead poisoning rates” and one study found that in the five year period from 1999 to 2004, “black children were nearly three times more likely than white children to have highly elevated blood-lead levels, the type of lead poisoning where the most damaging health outcomes occur.” In Detroit, for example, “where the population is 84 percent black,” over 1,500 children were found to have lead poisoning in 2014. In Baltimore, Freddie Gray, whose death in the back of a police van lead to the criminal prosecutions of six officers, was a “lead kid,” “one of thousands of children in the city with toxic levels of lead in their blood from years of

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90 Id. (noting that “between 2000 and 2010, the death rate due to firearm-related injuries was more than 18.5 per 100,000 among blacks, but only nine per 100,000 among whites”).
91 Id. (emphasis mine).
92 In some ways this is not surprising, since “current tort law contains incentives to target individuals and communities based on race and gender.” Ronen Avraham, Torts and Discrimination, OHIO ST. L.J. (forthcoming 2017).
94 Id. According to the Centers for Disease Control and Prevention, children of color whose families are poor and who live in housing built before 1950 have the highest lead poisoning risk. Id.
95 Id.
96 Id. Unfortunately, the now-bankrupt Detroit only had enough money for 100 to 200 lead paint abatements each year. Id.
living in substandard housing.” Currently, in wealthy neighborhoods, lead hazards have been “largely eliminated,” but in poorer ones, it remains a widespread problem with devastating consequences.

The sub-prime mortgage crisis also had its greatest impact on minority populations, and specifically on African-American homeowners. Up until the 1990s, banks discriminated against minority would-be home owners mainly through redlining, meaning they would not issue loans in majority-minority neighborhoods. As part of this redlining practice, banks “collected reliable data on the most economically vulnerable households.” “Later, when market practices shifted, banks used that data “to flood minority neighborhoods with high-cost subprime loan offers.” As a result, in the ten year period from 1996 to 2006, “the national subprime loan market grew from $97 billion to $640 billion.” Through subprime lending, banks lent to “black and Hispanic borrowers” at rates that were on national average “three times and two-and-a-half times more than whites, respectively.” Then, “when the housing market started to tank,” minority homeowners were “the hardest hit,” and “were much more likely than Caucasians to lose their homes.” Finally, “adding insult to injury, after the economic meltdown the same lenders disproportionately refused minority borrowers’ requests to refinance the original loans so they could stay in their homes,” which “meant that majority-minority neighborhoods saw more foreclosures than majority-Caucasian neighborhoods.” In Los Angeles, for example, a loan made to a homeowner in a majority-minority

97 Id.
98 Id. For example, “alarming levels of brain-damaging lead are poisoning more than a fifth of the children tested from some of the poorest parts of Chicago, even as the hazard has been largely eliminated in more prosperous neighborhoods.” Michael Hawthorne, Lead Paint Poisons Poor Chicago Kids as City Spends Millions Less on Clean Up, CHIC. TRIB. (May 1, 2015). As detailed earlier, Chicago brought an unsuccessful lead case in 2003. Twelve years later, Chicago is still struggling to absorb the cost of addressing that harm, and has now slashed its lead-abatement budget, essentially “leaving certain neighborhoods to fend for themselves.” Id.
99 Morris, supra note 1, at 195.
100 Id.
101 Id.
103 Morris, supra note 1, at 195. See also Engel, supra note 43, at 630.
104 Morris, supra note 1, at 195.
neighborhood [was] “more than twice as likely to result in foreclosure as a loan in a majority Caucasian neighborhood.”

Further, “since home equity represents a disproportionately high percentage of overall wealth, these actions will impact generations.”

Vulnerability is a theme in the opioid litigation, as well, though opioids targeted a different vulnerable population: people in pain. Patients experiencing pain and difficulty functioning are the most common victims of opioid addictions, and a new “growing body of studies” suggests that patients with mental illnesses receive approximately half of all opioid prescriptions, creating a situation where “the very folks who are most vulnerable to opioids’ deadliest effects are unusually likely to get a long-term supply of the drugs.” Their access to opioids was fueled by pharmaceutical companies “aggressively market[ing] their products as safe alternative[s] to short-acting narcotics.”

3. Slow Violence

The public harms that target these vulnerable populations are both aggregative and accretive. Rather than the discreet, relatively quick harms that the law is most adept at addressing, these harms are forms of “slow violence,” a violence that

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105 Id.
106 Id.
occurs gradually and out of sight, a violence of delayed destruction that is dispersed across time and space.” Indeed, this “attritional violence” is not usually understood “as violence at all.” Violence or injury is most commonly “conceived as an event or action that is immediate in time, explosive and spectacular in space, and as erupting into instant sensational visibility.” Slow violence, on the other hand, “is neither spectacular nor instantaneous.” It is “incremental and accretive, its calamitous repercussions playing out across a range of temporal scales.”

This “temporal dispersion of slow violence affects the ways we perceive and respond” to it, and makes it difficult for the law to fully address these harms. One challenge of harms arising from slow violence is that “in the long arc between the emergence of slow violence and its delayed effects, both the causes and the memory of catastrophe readily fade from view as the casualties incurred typically pass uncounted and unremembered. Such discounting in turn makes it far more difficult to secure effective legal measure for prevention, restitution, and redress.” Vulnerable populations are often the “long-term casualties [of] slow violence.” Through it, these populations are “discounted as political agents” and the bearers of injuries that tend to go “unobserved, untreated,” and unaddressed.

II. Legitimacy

Because they are the level of government closest to the people, and “interact with their residents each day,” cities and municipal governments have “an excellent vantage point for recognizing patterns of harm affecting their communities.” “Simply by performing their ordinary functions – running a

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111 Nixon, supra note 15 at 2.
112 Id. at 3.
113 Id. at 3.
114 Id. at 9.
115 Id.
116 Id. at 6.
117 Caruso, supra note 7, at 61.
hospital or identifying blighted properties – cities become potent information aggregators.”\textsuperscript{118} Also, because “a city’s welfare is intimately intertwined with that of its residents,” cities are motivated to “take remedial action, including suing to protect its residents from things like fraud, public nuisance, and infringement of their rights.”\textsuperscript{119} In other words, they can see the problem, and they suffer injury from the problem. It therefore seems logical that they would also be a good choice for attempting to remedy the problem. But even though cities are in a good structural position to be litigants, the legitimacy of them bringing forward these kinds of mass-tort, public interest suits is hotly contested. Thus far, a city’s potential power to bring claims has been quite circumscribed: “a city’s power to sue for those collective harms is minimal and often subordinate to state enforcement by attorneys general.”\textsuperscript{120}

Not surprisingly, then, when cities do try to bring these claims, critics argue that they “exceed the City’s legal or political authority.”\textsuperscript{121} In terms of doctrine, critics argue that plaintiff cities cannot meet standing requirements; that they fail to establish causation; that, if public nuisance is relied on, it is an inappropriate cause of action; and that a variety of municipal-specific rules prevent cost recovery.\textsuperscript{122} In political terms, they argue that plaintiff city claims violate the correct relationship between cities and states, impermissibly use litigation as regulation, and are generally undemocratic.

This Part argues against those critiques. It explicates the many reasons why plaintiff cities are in fact legitimate: legally, politically, and sociologically. Although “legitimacy” means many different things to different people, Richard Fallon has offered a useful framework for unpacking arguments related to legitimacy, identifying the three sub-meanings that the term is most often meant to encompass: (1) legal legitimacy, (2) moral or political legitimacy, and (3) sociological legitimacy.”\textsuperscript{123} These three are “interrelated and not always distinguishable from one another, but they “[n]evertheless [...] provide

\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Troutt, supra note 54, at 27.
\textsuperscript{122} See, e.g., Ausness, supra note 26.
\textsuperscript{123} Richard H. Fallon, Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1790 (2005).
valuable ways of thinking about this contested term.”  

And, as Alexandra Lahav demonstrated in the class action context, they can be a useful architecture for analyzing controversial legal mechanisms.  

A. Legality  

Legal legitimacy refers to whether the impugned mechanism can meet the spirit or letter of the usual doctrinal standards. It is “measured by compliance with legal norms.”  

Normally, a claim that complies with civil procedural rules will be deemed legally legitimate (though not necessarily morally or sociologically legitimate).  

Standing presents the biggest doctrinal hurdle of legal legitimacy for plaintiff cities.  

1. Standing  

The threshold doctrinal hurdle regarding the legal legitimacy of plaintiff city claims concerns the city’s standing. In general, “[m]any U.S. cities have explicit authorization to sue under their city charters.” These cities can thus bring claims in both federal and state courts qua cities, as, for instance, they often do when making claims based on their proprietary interests.  

The situation becomes more complicated when cities bring mass-tort style, public interest litigation. States typically carry their version of this litigation into federal court through the door of parens patriae. Cities, however, cannot use this
same entry point. Courts have almost uniformly held that cities have no parens patriae power to bring claims related to the general health and welfare of their citizens. The reason for this denial of parens patriae status is that parens patriae is rooted in the state’s quasi-sovereign interest “in the well-being of its residents,” and the city, lacking sovereignty, has no such privilege. Although cities can frequently bring actions in state courts, where “their standing is dependent upon home rule provisions and the extent of Dillon’s Rule observance,” this is also not typically rooted in parens patriae.

To many observers and scholars, it seems like cities should of course have parens patriae powers. Thus, off-the-cuff comments in scholarship often refer to the parens patriae powers of cities. More explicitly, many scholars offer compelling arguments that cities “plainly have [such] a ‘quasi-sovereign’ interest in protecting the well-being of their residents” and therefore should also be granted parens patriae standing. Until these academic arguments are more widely accepted or adopted, however, the current legal consensus denying municipalities parens patriae powers means that legal legitimacy is not readily available through this route.

Even without parens patriae, though, plaintiff cities can establish standing and demonstrate legal legitimacy in other ways. As the Supreme Court affirmed in Bank of America v. Miami, statutes like the Fair Housing Act can grant cities standing. In addition to statutory standing, cities can also meet federal court standing requirements on the basis of direct

133 Caruso, supra note 7, at 65.
134 Id.
135 Ausness, supra note 8, at 861-2. The parens patriae doctrine does not let states “step into the shoes of its residents,” but instead allows states to bring actions if it can identify a “broader interest” or “widely shared” harm. Caruso, supra note 7, at 66.
136 Troutt Disappearing Neighbors 27
137 See, e.g. Lindsay F. Wiley, Rethinking the New Public Health, 69 WASH. & LEE L. REV. 207, 217 (2012) (“If a state or city government bringing suit in parens patriae”) and Rustad, supra note 54, at 78 (“Federal courts have been more receptive to the long-established remedy of parens patriae environmental tort actions filed by states and municipalities than to comparable class actions).
138 David J. Barron, Why (and When) Cities Have a Stake in Enforcing the Constitution, 115 YALE L.J. 2218, 2243 (2006). See also Gavioli, supra note 70, at 959 (“Arguably, a city as a governmental entity has an interest in the health and welfare of its citizens”).
standing rules, associational standing doctrine, or common law public nuisance standing. Each of these emphasizes a different facet of cities. Direct standing focuses on cities as landowners; associational standing focuses on cities as public corporations; and public nuisance standing focuses on cities as public or governmental entities. In addition to these differing emphases, these three ways of establishing standing also reflect different understanding of the kind of representational litigation cities are engaged in when they bring plaintiff city claims. Though they vary in emphases and framing, these three forms of standing, direct standing, associational standing, and public nuisance standing, are all paths to legal legitimacy.

\footnote{Margaret Lemos has argued that state parens patriae actions are similar to class actions, and thus should attract similar procedural protections. Margaret Lemos, 	extit{Aggregate Litigation Goes Public: Representative Suits by State Attorneys General}, 126 HARV. L. REV. 486. However, Lemos’ view “that public compensation is a government form of class action litigation” is not universally accepted. Howard Erichson, for example, argues that “the nature of the litigative representation differs significantly in the two types of cases.” Erichson, supra note 12, at 7. Similarly, Prentiss Cox argues that Lemos relies on a “mistaken premise,” and that “[t]he decision by a government enforcer to pursue public compensation does not diminish the public nature of the enforcement action and does not convert public officials into representatives of private interests.” Prentiss Cox, 	extit{Public Enforcement Compensation and Private Rights}, 100 MINN. L. REV. 2313, 2316 (2016). In the context of state opioid litigation, at least one court has agreed with Erichson and Cox. In the context of a state and county public action, where Kentucky and Pike County sued pharmaceutical manufacturer Purdue for its role in the opioid crises, there was much wrangling over whether the case properly belonged in state or federal court, with the case bouncing between the two. Purdue wanted the case heard in federal court, and argued that it belonged there because it was essentially a class action, and subject to the Class Action Fairness Act. In re OxyContin, 821 F. Supp. 2d 591 (S.D.N.Y. 2011). It argued that the Attorney General was “assert[ing] representative claims for restitution on behalf of individual OxyContin users.” Richard C. Ausness, 	extit{The Role of Litigation in the Fight Against Prescription Drug Abuse}, 116 W. VA. L. REV. 1117, 1154 (2013). The court, however, disagreed, and held that “the lawsuit was not a class action because there were only two plaintiffs involved.” \textit{Id.} In doing so, the court rejected Purdue’s claim that Kentucky consumers were the real parties in interest. Instead, it declared that the suit was a parens patriae action which sought to vindicate the state’s quasi-sovereign interests. The court found that “parens patriae actions, such as the one in question, had few, if any, class-like characteristics.” \textit{Id.} at 1155. “Accordingly, the court concluded that ‘[i]n form as well as function,’ parens patriae suits” differed from class actions,” and “rejected Purdue’s CAFA-based analysis and ordered the case remanded to state court.” \textit{Id.} at 1154.
i) Direct

Because cities own property,141 they can sue when another party “dimin[ish]es the value of that property.”142 These “city cases” are generally the least controversial basis for city litigation,143 as they rely on a city’s “private” rights as a landowner.144

Property rights are a capacious category here. Cities and residents have deeply entangled interests, and their close relationship means that a harm to residents almost inevitably affects the city, often in its proprietary capacity. Cities therefore have successfully argued that a harm to their property interests gives them standing, even when that harm also affects a city’s residents. For instance, in City of Olmsted Falls v. Federal Aviation Administration,145 the federal appellate court held that the city had standing to bring an action challenging a Federal Aviation Administration decision about an airport runway project. The court found that the city’s argument that its citizens would be impacted by the environmental pollutants entering the air and water supply did not give the city standing, but that standing could be based on the city’s allegation of “harm to its own economic interests based on the environmental impacts of the approved project,” and this was sufficient to find standing.146

Ever since the Supreme Court found in Massachusetts v. EPA147 that Massachusetts had standing to bring a claim against the Environmental Protection Agency because of its status as a landowner “with property allegedly affected by rising sea tides due to climate change,”148 cities have been putting forth arguments that, as property owners, too, they have similar standing rights.149 Indeed, New York City and Baltimore were actually plaintiffs in Massachusetts, “but their

141 often including “commercial real estate where municipal office can be found, properties seized for delinquent taxes, or park land”)
142 Brescia supra note 45, at 45.
143 Morris, supra note 1, at 221.
144 Ausness, supra note 7, at 883.
145 City of Olmsted Falls v. Federal Aviation Administration, 292 F.3d 261 (D.C. Cir. 2002).
146 Id.
148 Brescia, supra note 14, at 28.
standing was not passed upon."\textsuperscript{150} As these property-based environmental cases become more common, they may make it easier for other types of plaintiff city claims to come under this rubric as well.\textsuperscript{151}

\textbf{ii) Associational Standing}

As scholar Kaitlyn Ainsworth Caruso has persuasively argued, associational standing provides an additional doctrinal basis for plaintiff city standing.\textsuperscript{152} Associational standing emphasizes the city’s corporate nature, and would allow cities to pursue associational standing in the same way that any other corporation or not-for-profit can have associational standing.\textsuperscript{153} Associational standing allows “associations to assert their member’s rights”\textsuperscript{154} and “bring suit on behalf of its members”\textsuperscript{155} when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”\textsuperscript{156}

Courts have differing opinions regarding whether cities can meet this test.\textsuperscript{157} In Justice Brennan’s concurring opinion in

\begin{footnotesize}
\textsuperscript{150} Caruso, supra note 7, at fn 34.
\textsuperscript{151} Plaintiff city environmental claims have included suits against companies for polluting water ways with polychlorinated byphenyls, and for harms connected to the gasoline additive Methyl Tertiary Butyl Ether. San Jose, Berkely, Oakland, San Francisco Bag, San Diego, Spokane, Seattle, Portland, and Long Beach have sued Monsanto, Solutia, and Pharmacie for depositing their PCBs. See Ed Barrena, City Sues Monsanto, EASTCOUNTYMAGAZINE.ORG, (March 18, 2015). For a discussion of the MTBE litigation, see Elizabeth Thornton, \textit{Public as Private and Private as Public: MTBE Litigation in the United States, in Class Actions in Context: How Culture, Economics, and Politics Shape Collective Litigation} 342-261 (Deborah R. Hensler, Christopher Hodges, Ianika Tzankova eds. 2016)\textsuperscript{152} Caruso, supra note 7.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 71.
\textsuperscript{155} Id.
\textsuperscript{156} Hunt v. Wash. State Apple Adver. Comm’n , 432 U.S. 333, 343 (1977). Associations can also have “organizational” standing, on behalf of themselves, if (1) some or all of the association’s members have suffered individual injury, or (2) the association, likened to a single person, has suffered an injury comparable to one to which an individual could be vulnerable.” Id. See also Heidi Li. Feldman, \textit{Note: Divided We Fall: Associational Standing and Collective Interest}, 87 Mich. L. Rev. 733, 733.
\textsuperscript{157} Caruso, supra note 7, at 9.
\end{footnotesize}
Snapp v. Puerto Rico, four members of the Supreme Court suggested that they can. In deciding whether Puerto Rico had parens patriae powers to bring a suit based on discrimination against its citizens, Justice Brennan noted, “At the very least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations.” He then cited a number of cases in support of this proposition, some where the plaintiffs were private organizations, and some where the plaintiffs were municipalities. Justice Brennan explicitly likened Puerto Rico’s interest to those of private organizations and municipalities, saying, “There is no doubt that Puerto Rico’s interest in this litigation compares favorably to interests of the private organizations, and municipalities, in the cases cited above.” Thus, for Justice Brennan at least, organizations, states, and municipalities all had representational legitimacy. Additionally, the Seventh Circuit has also suggested municipalities can have standing if they can meet the requirements of associational standing, stating “where a municipal corporation seeks to vindicate the rights of its residents, there is no reason why the general rule on organizational standing should not be followed.”

The initial threshold matter is whether a city is, in fact, “an association.” It is becoming fairly evident that, whether or not they have always been so, cities have become associations. In the current political order, cities are “distinct, democratic communities of interest” – “[e]ven the Supreme Court of the United States has at time described cities this way.” They are acknowledged as “sites of association,” as distinct “polities,”

159 Id.
160 See also discussion in Caruso, supra note 7, at 70.
161 City of Milwaukee v. Saxbe, 564 F.2d 693 (7th Cir. 1976). Milwaukee v. Saxbe is somewhat odd in that the court raised the issue of the city’s standing sua sponte. The court used the analogy to organizations to find that the city did not have standing, but the analogy remains apt. Although the Seventh Circuit accepted that cities could in some circumstances achieve associational standing, the D.C. Circuit in City of Olmstead Falls v. FAA, 292 F.3d 261 (D.C. Cir. 2002) held the opposite. See Caruso, supra note 7, at 74-5.
163 Barron, supra note 11, at 2238.
164 Bendor, supra note 160, at 391.
and as “important political institutions that are directly responsible for shaping the contours of ‘ordinary civic life in a free society.’”¹⁶⁵ As Richard Briffault put it: “Localities are not simply arbitrary collections of small groups of people who happen to buy public services or engage in public decisions making together. They are often communities, that is, groups of people with shared concerns and values, tied up with the history and circumstances of the particular places in which they are located. People live in localities, raise their children there, and share many interests related to their homes, families, and immediate neighborhoods. Much of the power of the idea of home rule is connected to the idea of the locality as ‘home’ and of the distinctive connection of government as ‘rule’ with place-based association.”¹⁶⁶

Indeed, through its physical situs, “a city is a “specialized group – though geographically rather than (necessarily) ideologically or economically specialized.”¹⁶⁷ And, as Carol M. Rose has suggested, living in a locality “represents a choice,” even more so than states or nations.¹⁶⁸ In many ways, municipal “residence is a reflection of one’s own needs and wants.”¹⁶⁹ People tend to “emotionally affiliate with their city of residence,” and “a city can argue that its residents chose where to live” and “who to affiliate with,” and thus, in some sense, have also chosen “to be represented by [] that city.” Indeed, “the idea that cities compete for capital and residents,” and residents sort themselves accordingly, has been relied on in “both local government scholarship and even some case law.”¹⁷⁰ Such mobility, for some commentators, makes these “territorially based relations akin to voluntary contracts.”¹⁷¹ When people “move to a given city [they may bring] certain expectations - such as a safe environment or a health care

¹⁶⁷ Caruso, supra note 7, at 74.
¹⁶⁸ Carol M. Rose, The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on ‘Monarchism’ to Modern Localism, 84 N.W.U. L. Rev. 74, 9708 (1989), quoted in Caruso, supra note 7, at 76.
¹⁶⁹ Id.
¹⁷⁰ Caruso, supra note 7, at 76.
safety net - and may expect cities to defend those expectations however necessary."\textsuperscript{172} Moreover, “city residents alone elect, comprise, and at least partially finance their local government. This gives city residents a better claim to ‘membership’ than many members of litigating associations, who may donate to an organization but have no real further hand in its activities.”\textsuperscript{173} 

After clearing this threshold hurdle, many plaintiff city claims could plausibly meet the three-part test of associational standing. To meet the first prong, and show that a city’s “members would otherwise have standing to sue in their own right,” a city attorney could “readily present the individual stories of multiple residents to show both the breadth of the harm and the concreteness of the injury.”\textsuperscript{174} To meet the second prong, and show that the interests being protected are germane to the city’s purpose, cities could point to their grants of home rule, which often explicitly state the purposes of cities,\textsuperscript{175} and to numerous court decisions where courts state that one of the city’s purposes is to “protect the ‘health and welfare’ of their residents.”\textsuperscript{176} To meet the third prong, and show that neither the claim asserted nor the relief requested requires the participation of individual members, cities would also typically be able to meet this by showing that the suit was “properly authorized” and that the proceeding was generally consistent with “the important policy considerations behind associational standing.”\textsuperscript{177} 

iii) Special Standing for Public Nuisance

For the plaintiff city claims that rely on public nuisance,
an additional font of standing is sometimes available. In the particular context of public nuisance cases, the common law has traditionally offered a kind of plenary public nuisance standing to municipalities.\textsuperscript{178} Under the traditional common law, “courts have often said that [...] local governmental bodies have the ability to commence public nuisance actions on their own, independent of grants of power by the legislature.”\textsuperscript{179} In these cases, “regardless of whether the city suffered some harm to its own interests,” courts “did not question the ‘standing’ of municipal plaintiffs.”\textsuperscript{180} Instead, they “simply assessed these claims on the merits to determine whether the municipal plaintiff had, in fact, proven that the defendant was causing a public nuisance.”\textsuperscript{181} Although this traditional common law standing rarely receives mention by contemporary courts, it suggests that municipalities bringing public nuisance claims might legitimately be subject to a different kind of standing test, and not have to demonstrate that they “suffered some special and individualized injury sufficient to grant [...] standing under the \textit{Lujan} analysis.”\textsuperscript{182} Rather than the so-called private-law model for standing, which “espouses a view of standing recognizing only types of ‘cases’ and ‘controversies’ that were available under ‘traditional’ causes of action, and typically requires some sort of direct harm to a litigant in order for that litigant to have standing to sue,” this public-law model would “recognize[] municipal plaintiffs as the proper parties to challenge [...] the actions of private actors carrying out a public nuisance.”\textsuperscript{183}

Public nuisance standing and associational standing are legitimate possibilities for establishing plaintiff city standing. However, unless statutory standing is available, cites are ultimately “in the strongest position to claim standing when they assert rights as property owners, and when they allege a reduction in their tax base due to the defendant’s direct

\begin{itemize}
  \item \textsuperscript{178} Brescia, \textit{supra} note 45, at 50.
  \item \textsuperscript{179} \textit{Id.} at 43.
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{Id.} at 9.
  \item \textsuperscript{182} \textit{Id.} at 45.
  \item \textsuperscript{183} See also Brescia, \textit{supra} note 11, at 113 (noting that “recently, at least two federal circuit courts of appeals have said that municipalities may pursue public nuisance actions under federal common law, particularly as it relates to air quality.” The two cases are \textit{Connecticut v. Am. Elec. Power}, 582 F.3d 309 (2d Cir. 2009), aff’d in part and rev’d in part, 2001 Lexis 4565 (June 20, 2011), and \textit{City of Evansville v. Kentucky Liquid Recycling, Inc.}, 604 F.2d 1008 (7th Cir. 1979)).
\end{itemize}
actions. This is true even when other forces might also negatively affect the value of the property that the municipality itself owns, or the value of the property comprising its local tax base. Thus, municipal plaintiffs are most likely in their strongest position when they characterize the injuries they suffer as ‘private harms,’ as opposed to the harms suffered by them as ‘public’- that is, governmental-litigants.”

Because these two realms are so entangled, however, most injuries can reasonably be characterized as harming the city’s direct or proprietary interests.

2. Other Critiques

Two additional critiques are directed at the legality of plaintiff city suits. They focus on whether public nuisance is an appropriate cause of action, and the tension between traditional causation concepts and plaintiff city claims. Many commentators find fault with public nuisance as a cause of action, not just in relation to plaintiff cities, but in relation to any government entity bringing such a claim. To be sure, many plaintiff city claims do not rely on public nuisance at all, or if they do, they do not rely on it exclusively, so this critique is limited to the subset of cases where it is the main framing of the wrong. The causation issues are also not restricted to plaintiff city claims, and in other similar contexts, courts have addressed these tensions.

a. Public Nuisance

In the abstract, public nuisance sounds like “[t]he best ‘general’ legal theory available to all cities.” It protects against “an ‘unreasonable interference with a right common to the general public,’ including ‘interference with the public health, the public safety, the public peace, the public comfort or the public convenience.’” It often allows for “flexible fault and causation doctrines,” sometimes creating space for

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184 Brescia, supra note 43, at 45.
186 Id.
187 Morris, supra note 1, at 202.
188 Wiley, supra note 165, at 232.
189 Id. at 247.
“epidemiological harms”: those that “can be established at the population level [through the tools of public health] but not necessarily at the individual level.”\textsuperscript{190}

Although public nuisance sounds great in theory, in practice, state and local governments “have been largely stymied in their efforts to use public nuisance litigation against harmful industries to vindicate collectively-held, common law rights to non-interference with public health and safety.”\textsuperscript{191} While the 2013 victory in the lead paint litigation may signal a shift in public nuisance’s usefulness, public nuisance has thus far been largely unsuccessful.\textsuperscript{192}

The flexibility of public nuisance doctrine has, ironically, been one of the biggest impediments to its success. Many courts have dismissed public nuisance claims on the paradoxical basis that these claims are too powerful. For instance, one court dismissed a gun litigation suit because: “[G]iving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities.”\textsuperscript{193} Another court stated that if gun litigation could proceed as a public nuisance claim, it “would become a monster that would devour in one gulp the entire law of tort.”\textsuperscript{194}

\textsuperscript{190} Id. at 213.
\textsuperscript{191} Id. at 207
\textsuperscript{192} (“The ‘watershed event’ for industry-wide public nuisance litigation came in the 1990s, when several state attorneys general added public nuisance claims to their suits against tobacco manufacturers, shortly before the Master Settlement Agreement(MSA) was reached. Most of these suits did not produce a court ruling prior to the MSA, but one federal district court did rule on a public nuisance claim in Texas v. American Tobacco Co. [...dismissed...] Overall, however, the MSA was hailed as an enormous achievement by the state attorneys general. Many have pointed to this practical success as generating a groundswell of interest in public nuisance litigation, even though it had not produced any court opinions supporting its use.” Id. at 240.
nuisance would become too large has tempered public nuisance’s potential potency.

Complimenting these concerns with public nuisance as a cause of action, there is a school of scholarship which debates the “true nature” of public nuisance law. Virtually all commentators agree that in its early common law form, public nuisance protected things like “the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases.”195 From this history, some scholars argue that public nuisance is a property-based action196 or a special form of public action,197 some emphasize its’ quasi-criminal aspects,198 some argue it is simply a tort,199 and others argue that it is not a tort at all, but is instead an exercise of police power.200

These scholarly contests are best resolved by acknowledging that these categories are not necessarily mutually exclusive, and public nuisance may have elements of all of these identified features, while none defines the cause of action in its entirety.201 Plaintiff city claims fit into this plurality of public nuisance categories. The lead litigation is, at heart, about property, and whether paint companies should have to pay to remediate the properties that contain toxic paint.202 And focusing on the quasi-criminal nature of traditional public nuisance reveals an interesting feature of many plaintiff city claims: many of them retain some of this

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196 Gifford, supra note 160, at 818.
198 Rustad, supra note 7, at 8 (arguing that “the conduct that [public nuisance] enjoins is a crime as well as a tort”).
199 Gifford, supra note 160, at 820.
202 See infra, Part II.
quasi-criminal nature. In both the mortgage and opioid contexts, defendant corporations were also prosecuted criminally. Criminal charges were laid in the opioid context, and “[i]n 2007, Purdue pleaded guilty to criminal charges of misleading physicians, regulators and the public about the drug’s addictive qualities.” Purdue paid $634.5 million dollars to resolve the case, and “three company executives were also charged with felonies but avoided paying fines.” The sub-prime mortgage crisis resulted in very few successful criminal prosecutions, but it was widely agreed that much of the preceding activity was criminal.

Plaintiff city claims thus often function like crimtorts, “civil actions that simultaneously advance societal purposes such as punishment, deterrence, and the social control of corporate wrongdoers.” As Professors Rustad and Koenig explain: “[c]rimtorts vindicate societal injuries by bridging the gap left by inadequate regulation, the limitations of the criminal justice system, and the shortcoming of tort law and class actions. Crimtort litigants seek to uncover health, safety, environmental, employment, or other mass tort hazards that are inadequately policed under public law.” Many state attorney general parens patriae actions are crimtorts, which “fill in the interstices between criminal law, tort law, and regulation,” and plaintiff city claims are starting to fulfill this role as well.

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203 Bernstein, supra note 57.
207 Rustad, supra note 160, at 95.
208 Id. at 96. Public nuisance tends to become popular during times of regulatory failure. For instance, the “‘comprehensive statutory and regulatory’ reform of the New Deal era limited the need to utilize the tort of public nuisance to correct social ills.” Matthew R. Watson, Note: Venturing
To succeed on a public nuisance theory, plaintiff cities generally have to prove that there was an unreasonable interference, and that “(1) the corporate acts have resulted in an injury (‘the injury requirement’); (2) the injury is being felt not only by constituents but by the city itself (‘the standing requirement’); and (3) the nuisance is the direct rather than indirect cause of the injury (‘the causation requirement’).” 209

But even before getting to these elements, there are initial arguments over what counts as “public” in public nuisance. 210 Courts generally insist that the “public” part of public nuisance is not synonymous with “widespread.” 211 In other words, mere “aggregated private harms” are not equivalent to a public nuisance: 212 there must be something about the right that “is collective in nature.” 213 The question is whether “the harm to health and welfare caused by industries that manufacture and distribute dangerous products [can] be legitimately understood as interference with a public right?” 214 Usually, impairing public health or safety, which plaintiff city claims often allege, is understood to satisfy this collective requirement. 215

Public nuisance actions allow for a long temporal span, and allow for a longer backward look than many other causes of action. In this sense, public nuisance is particularly well-suited to the slow violence nature of plaintiff city claims. Other causes of action can “run into [a] statute of limitations [problem] when harms arise much later.” 216 But public nuisance allows plaintiffs to focus on harm occurring today, even if the product was used a long time ago [...] There are all sorts of products [...] that could be the subject of public nuisance suits where manifestation of harm is delayed.” 217

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209 Morris, supra note 1, at 202.
210 Wiley, supra note 60, at 212.
211 Id. at 254 (quoting Mark A. Hall, The Scope and Limits of Public Health Law, 46 PERSP. BIOLOGY & MED. 199, 204 (2003).
212 Wiley, supra note 60, at 255.
213 Id.
214 Id. at 234.
215 Id. at 212.
216 Id.
This positive feature comes with a cost. It creates difficulties for the causation requirement. The causation requirement “significantly limits cities’ ability to halt and remedy corporate malfeasance,” and many public nuisance suits are dismissed on the basis of no causation. As one scholar wrote in the context of gun litigation: “many courts were overwhelmed by the substantial public costs attributable to gun violence, yet were underwhelmed by the lack of specific gun-industry conduct that could be reasonably attributable to such harm. In essence, courts refused to hold the gun industry liable for public nuisance absent a more ‘direct’ causal link to, or ‘control’ over, the gun violence that results in harm to the public.”

Some courts, however, have been open to plaintiff city public nuisance claims. As aforesaid, the Californian city and county consortium’s 2013 victory in the lead paint litigation relied on public nuisance. Some of the gun litigation (before the legislative prohibition) was allowed to proceed on a public nuisance basis, and several more contemporary cases have also withstood challenges to their public nuisance basis. These successes, while perhaps relatively few and far between, demonstrate that although not every case will successfully make out the element of public nuisance, the cause of action is generally accepted and within the bounds of legal legitimacy.

3) Causation, Broadly

Causation challenges in plaintiff city claims are not limited to the public nuisance context, and causation is often the most difficult part of a plaintiff city claim. This critique is thus trenchant, but it identifies a challenge of the traditional American legal system writ large, rather than a particular

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218 Morris, supra note 1, at 202.
220 Id.
221 Bloomberg, supra note 211.
shortcoming of plaintiff city claims. American law does focus on “the centrality of individuals over groups,” and, accordingly, tort law as currently constituted does a much better job of handling individual issues. Tort law emphasizes “individual plaintiffs, individual causation, and individual responsibility,” and plaintiff city claims are an awkward fit within this mould.

Plaintiff city claims are based on a series of collectivities: many constituents, together, and those many constituents and a city, together. Individual causation requirements do not map well onto these collective or public health harms. While public health has created more acceptance of using “statistical and epidemiological evidence” in some contexts, courts have generally been “reluctan[t] to dispense with notions of individual responsibility and individual causation.” The “ontological shift from individual to population,” which looking at things in the collective or from a public health perspective requires, “creates significant tension both within the population perspective and between it and much of American law, which largely reflects the influence of liberal individualism.”

As we saw in Miami v. Bank of America, where the court imposed a stringent causation standard on a Fair Housing Act claim, courts are frequently unsure that plaintiff city actions can meet traditional causation requirements. Nevertheless, legal legitimacy does not require legal success. Rather, it only

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224 Id.
225 Wylie, supra note 200, at 200.
226 Id. at 230-1. The debate regarding the appropriateness of market-share liability reflects this. Since the court used market share liability in the DES cases 25 years ago, they have been strongly reluctant to expand the use of that approach to cases involving other products, albeit with some exceptions such as lead paint. Id. at 229.
227 Id. at 20. “From the perspective of tort doctrine, epidemiology has a significant drawback: It cannot be used to prove specific causation but instead is only able to show risk and probability. This is a problem because tort law is focused on the specific cause of an individual plaintiff’s realized harm, rather than on the risk of harm.” Alexandra D. Lahav, Mass Tort Class Actions – Past, Present, and Future, 93 N. Y. U. L. REV. 101, 107 (2017). Scientific developments, though, can sometimes assist, as they do in the environmental litigation. As one commentator phrased it, it is now possible to look at a PCB in the water and say “these are Monstanto’s PCB’s.” Bloomberg, supra note 215.
demands that a case fall generally within the established parameters of being worthy of determination. While causation may, in some plaintiff city cases, prove a challenging obstacle, some plaintiff city claims have overcome it, and it seems likely that at least some others eventually will as well.

B. Moral or Political Legitimacy

Critics of plaintiff city claims have issued three main critiques that sound in the moral or political legitimacy register. One concern is the role that plaintiff cities play “in the larger political order,” and the extent to which they advance certain accepted political and moral values, including democracy. Critics argue that plaintiff city claims are problematic because they bind dissenters, they bypass democratic regulation, and they are a task best left to states. These arguments falter in the following ways: first, plaintiff city claims do, in some sense, bind dissenters, but no more so than occurs in any number of analogous contexts in which the practice is accepted as legitimate. Second, the argument that plaintiff cities bypass democratic regulation, fails to acknowledge that the only parties affected are those who chose to be bound by the negotiated terms of a settlement agreement, and does not account for why cities should be any less entitled to negotiate these settlements than any other litigating party. Finally, because of the structural relationship between cities and states, states almost always have the legal authority to prohibit or prevent city litigation (though whether they can feasibly do so as a political matter is a different question).

1. Binds Dissenters

For some critics, plaintiff cities raise democratic concerns. One problem involves the possibility of dissenting constituents. Some critics “argue that cities lack the legitimacy to sue on behalf of their constituents and bind them

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228 Fallon, supra note 17, at 118.
229 Id.
to positions with which some may disagree.” To be sure, it would be highly unlikely that every single constituent would wish to support every single plaintiff city claim. It is even entirely possible that “not all cities have a majority of constituents who would want their city law offices to pursue public interest cases.” Indeed, there are specific examples of constituent interests not always aligning: in Cincinnati, “a group of citizens [...] threatened to sue the city for misuse of public funds if its safe gun lawsuit went forward,” and in Texas, the “Citizens Against Lawsuit Abuse (CALA)” organization regularly “opposes Houston’s affirmative litigation efforts.”

Internal disagreement within a polis or organization, however, happens in virtually every context where there is a collective component to litigation. In these other contexts, though, we accept this as politically legitimate. Thus, “[e]ven if a city does bring a controversial suit, it is not consistent with either established parens patriae or associational standing doctrine to require perfect consensus. In parens patriae suits, a problem need only impact a ‘substantial portion’ or a state’s population, and an attorney general need not have anyone in particular’s blessing to sue.” The same standard can fairly be applied to plaintiff cities.

Moreover, dissension can also occur when cities defend themselves in litigation. When cities mount vigorous, expensive defenses in response to allegations of police brutality or other civil rights violations, many citizens would prefer that cities would instead acknowledge these harms, settle the claim for an appropriate amount, and adopt safer procedures for the future. Nevertheless, just as plaintiff city actions bind dissenters, the litigative choices of defendant cities do so as well.

Indeed, the vocal resistance of plaintiff city claim

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231 Morris, supra note 11, at 62.
232 Morris, supra note 1, at 190 (emphasis mine).
233 Gavioli, supra note 6, at fn. 169.
234 Caruso, supra note 7, at 79. This does not present a problem for associational standing, either: “The presence of contradictory interests within an association does not create problems under prong (c). See Nat’l Mar. Union of Am. V. Commander, Military Sealift Command, 824 F2d1228, 1233 (D.C. Cir. 1987). Bendor, supra note 19, at 899.
detractors can be heralded as a moment of democratic deliberation.\textsuperscript{236} It ensures that the issue will be discussed publicly, with both sides offering their viewpoints.

2. Bypasses Democratic Regulation

One reason why cities turn to litigation is because they are unable to regulate the harmful conduct. City leaders have sometimes explicitly stated that failed attempts to regulate have driven them to seek alternatives, one of which is litigation.\textsuperscript{237} Because of industry capture and limitations on their legislative authority, cites often cannot implement ordinances to target the wrongs that most impact their residents and themselves. Their “legislative efforts” are easily thwarted, and “subject to challenge under preemption and powers doctrines.”\textsuperscript{238} Indeed, “[a] city’s legislative departures from state legislation will be deftly torpedoed by a preemption challenge when that departure affects a business interest,”\textsuperscript{239} and municipalities are generally “severely limited in their ability to act against commercial interests that cause harm to their communities.”\textsuperscript{240}

The turn to litigation as a solution, however, is not an affront to democracy. First, the idea that regulation is somehow more purely “democratic” is belied by contemporary political realities. Taking the opioid epidemic as an example, the lack of regulation over opioids was not because of the political will of the people. Instead, it was the result of a massive financial operation to discourage any regulatory efforts. In the last decade, “opioid makers and their allies spent more than $880 million to lobby against tougher regulations, state and federal, according to a recent report by the Associated Press and the Center for Public Integrity. Groups favoring regulation, by contrast, spent $4 million. The industry’s money supported 7,100 candidates for state-level offices, and funded an average

\textsuperscript{236} Lahav, supra note 17, at 413.
\textsuperscript{237} For example, “In the New Orleans [gun] litigation, Mayor Marc Morial stated that a motivation for the gun litigation was the city’s failed lobbying attempts in the state legislature.” Gavioli, supra note 10, at 951.
\textsuperscript{239} Id. quoting Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1115 (2007).
\textsuperscript{240} Engel, supra note 6, at 611.
of 1,350 lobbyists nationwide.”

Second, the American system of political and legal governance is set up to rely on litigation as a mode of governance. America is rooted in what Robert Kagan “famously described” as “adversarial legalism,” meaning that “lawyer dominated litigation” is a primary means of “policymaking, policy implementation, and dispute resolution.”242 The powerful role of litigation in American society is a deliberate choice of legislators: “private litigation [is] a means of enforcing or even establishing government policy”243 because legislators often want it to be.

Third, the choice to settle under terms that looks like regulation is one that corporate defendants can choose to take or not take. Corporate defendants have massive, sophisticated means of assessing what sort of risk tolerance they are comfortable with, and what actions are in their best interest. They typically have more legal and economic resources available that cities do,244 and could easily continue a path of litigation if they thought that would yield a better outcome. As sophisticated, well-resourced parties, and skilled negotiators, their choice to be bound by particular terms is not aptly described as “undemocratic.”245 Corporations weigh the likelihood of legal liability against the terms of a negotiated settlement, and make an independent decision that best serves their interest.246

Moreover, the lever that creates the possibility of litigation functioning as regulation is a violation of existing law.247 The regulatory effects of litigation are only possible when corporations open themselves up to litigation through wrongdoing. And only these specific parties are bound by the

243 Staszak, supra note 75, at 4.
244 See infra, Part III.
246 Id.
247 Id.
terms of the agreement: a negotiated settlement has no impact on other industry actors not party to the lawsuits.248

3. City-State Tensions

In contemporary America, cities are no longer tiny microcosms of states (if in fact they ever were). Many have their own independent and political identities. Arguably, cities are the new states: “The states’ role as our most salient community has decreased,” and states “no longer play the role in today’s polity that they did at the time of the Founders.”249 In many instances, cities now occupy that politically salient role.

As was stated in Romer v. Evans: “Our towns and cities are what we know them to be: important political institutions that are directly responsible for shaping the contours of ‘ordinary civil life in a free society.’”250 And cities may differ from states in their understanding of what harms most affect themselves and their constituents.251 “Home rule government is based on the theory that local governments are in the best position to assess the needs and desires of the community and, thus, can most wisely enact legislation addressing local concerns.”252 It is no great stretch to say that this applies to litigation addressing local concerns, as well.

In the regulatory context, “federal, state, and local [governments] have sometimes collaborated and sometimes

248 Id.
251 Barron, supra note 241, at fn. 77 (noting that “The City of Santa Cruz’s amicus brief in Lockyer suggested that cities, by virtue of their closeness to the community and their responsibility for carrying out myriad governmental functions - from law enforcement to schooling - are acutely aware of the social consequences of constitutional judgments. For that reason, the city argued, cities might be expected to have insight into the actual lived consequences of a ban on same-sex marriage well before the state as a whole would”).
252 Quilici v. Village of Morton Grove, 695 F.2d 261, 167-68 (7th Cir. 1982). See also the discussion in Josh Blocher, Firearm Localism, 123 YALE L. J. 1, at fn. 243.
competed for regulatory pieces of various problems.”

253 Again, the same holds true in the litigation context. Collaboration is a frequent occurrence in the often multi-level attempts to redress major social harms. For instance, in the opioid litigation, plaintiff cities are not the only litigants: individuals, classes of individuals, and states have all brought claims, and sometimes shared expertise.254 Thus far, the individual suits have “almost always failed because the company has successfully argued lack of causation, misuse, wrongful conduct and expiration of the statute of limitations.”

255 Class actions on this front “have also failed, primarily because class representatives have been unable to satisfy the Rule 23 requirements of numerosity, commonality, typicality and adequacy.”

256 States’ parens patriae suits, to date, “have been somewhat more successful, despite the weakness of their doctrinal foundations, primarily because the company has chosen to settle these suits in order to avoid the bad publicity and expense of protracted litigation.”

257 Plaintiff city suits often draw from the legal expertise developed in these other suits, and many city and state suits co-exist peacefully. Even in these situations of peacefully co-existing claims, there is still value in cities proceeding independently. When issues are “sensitive or politically contentious,” consensus at the local level might happen “long before a statewide one, and so the city may be easier to mobilize to action than a state.”

258 Because cities are so “close to the ground,”

259 they often can best ensure that the needs of communities and constituencies are met.

Sometimes, though, plaintiff city suits and state suits are in competition. Such was the case in State v City of Dover.260 There, both cities and the state of New Hampshire had sued


255 Ausness, supra note 24, at 1165.

256 Id.

257 Id. (concluding that the overall effectiveness of civil litigation in this area is highly questionable).

258 Caruso, supra note 7, at 62.

259 Barron, supra note 222, at 2239.

260 891 A 2d 524, 531 (N.H. 2006).
various defendants for the harms caused by the gasoline additive MTBE. The court ultimately held that the cities’ suit “must yield” to the state’s parens patriae suit. Even though the “cities were pursuing different legal theories and seeking different types of compensation,” the court found that the cities’ suit was redundant because “[t]here is no reason for the Court to conclude...that the State will not seek to obtain full compensation for all communities, including the [c]ities. While the compensation sought may not be the same as that which the cities would desire, a difference of that nature does not demonstrate an interest that is not properly represented by the State.”

In State v. Dover, the cities “argue[d] that they ha[de] a compelling interest in maintaining separate litigation because the State’s suit d[id] not represent their interests.” Specifically, the cities argued that “the State’s suit name[d] fewer defendants, fail[ed] to allege a number of theories of liability alleged by the cities, fail[ed] to seek the remedies sought by the cities, and [wa]s subject to defenses based upon the State’s history of regulating MTBE which [we]re not applicable to the cities.” This type of disagreement over the best way to bring forward litigation is not uncommon. Further, there might be some disagreement over who to sue and which approach to adopt, as there was in the recent example of Ohio, which has sued opioid manufacturers, and two Ohio cities, Dayton and Lorraine, which sued not only the manufacturers, but also doctors and distributors. When asked about the city’s decision to litigate despite the state’s action, the mayor of Dayton asserted that the city lacked faith in the state’s approach, stating, the cities were “taking matters into our own hands to get things done right...We can’t wait for the state to do the right thing.”

In these instances, cities and states both agree that litigation is appropriate, but disagree about how to go about it. In other instances, cities may mobilize because they are unhappy with the results that states have achieved. The

261 Id.
262 Id. See also the discussion in Lemos, supra note 180, at fn. 99.
263 Id.
265 Id.
financial disaster caused by the sub-prime mortgage crisis also prompted a response at multiple levels. Federal and state agencies and attorney-generals mobilized to try to hold the relevant banks and financial entities responsible for the predatory lending practices and other misconduct that created the mortgage crisis, but for the most part, that action has resulted in settlements that sound good at first blush, but have been heavily criticized for being extremely lenient. For instance, in 2012 four major banks, Wells Fargo, Bank of America, Citi, JP Morgan, and Ally Financial, settled a federal and 49-state complaint about fraudulent mortgage practices for what was touted as a $25 billion settlement.\(^\text{266}\) However, the fine print revealed that the banks were actually “on the hook for only $5 billion in cash,” a “tiny fraction of the cost to individuals and communities.”\(^\text{267}\) One analyst estimated that this settlement “set a price for forgeries and fabricating documents” of approximately $2000 per loan," the “equivalent of a ‘rounding error’ to the banks.”\(^\text{268}\) Plaintiff cities were dissatisfied with this achievement, and have initiated their own litigation instead.

In still other instances, plaintiff cities and states may disagree about whether litigation is an appropriate response at all. Not infrequently, cities and states have divergent interests. For instance, Pennsylvania is currently considering initiating a claim against opioid manufacturers. But Pennsylvania is “home to 76 firms that manufacture a variety of drugs and employ 12,700 people,”\(^\text{269}\) a fact that many other cities in Pennsylvania may weigh differently than the state.

Further, states may be more subject to industry capture.\(^\text{270}\) For instance, in “a departure from the usual role of the state attorney general, who traditionally sues companies to force compliance with state law,” Republican “attorneys general in at least a dozen states are working with energy companies and other corporate interests” to “back lawsuits and other challenges against the Obama administration on environmental issues, the Affordable Care Act and securities

\(^{266}\) Hiltzik, supra note 19.

\(^{267}\) Id.

\(^{268}\) Id.


\(^{270}\) Id.
regulation.”271 In return, those companies “are providing them with record amounts of money for their political campaigns including at least $16 million [in 2014].”272 Known as the “Rule of Law campaign,” these states and attorney generals “operate like a large national law firm” and join with industries that they regulate (or, perhaps more accurately, do not regulate) to bring these claims.273

As we saw in the gun litigation context, if states do not want plaintiff city litigation, they usually have the authority to stop it.274 In the American system of government, “policy clashes between separately elected city and state governments, and between state and federal regulatory officials, are common.”275 Normally, “city and town governments are seriously constrained by the domination of state and corporate imperatives,” though “they do make decisions, especially about land use and zoning.”276 “State governments already limit the powers of local government, variously empowering and constraining cities, towns and counties in manners that shape what ends local governments can pursue. In addition to that static structuring of local government’s powers, states can intervene in local affairs at will, whether in one-off decisions or broader limitations of local power. Depending on the form of home rule, state legislatures have the power to preempt between some and all of a local government’s action. As a

272 Id.
273 Id.
275 ROBERT KAGAN, ADVERSARIAL LEGALISM 23 (2001).
276 Iris Marion Young, City Life as a Normative Ideal, in PHILOSOPHY AND THE CITY: CLASSIC TO CONTEMPORARY WRITINGS 163-174, 170 (Sharon M. Meagher, 2008).
practical matter, states can overrule nearly any local decision they find troubling. And states use this power constantly.”

In this sense, plaintiff city claims are, and will continue to be, bounded by the power of the state to neutralize them. Although whether states have such a power, and whether it is politically feasible to use it in a given moment are different questions, this framework provides the structure that plaintiff cities operate within. Plaintiff cities do lay claim to pursuing justice on behalf of themselves and their constituents, but they do so from within the confines of this extant edifice.

C. Sociological Legitimacy

After legal legitimacy and political legitimacy, the third type of legitimacy is sociological legitimacy. Sociological legitimacy is about “public acceptance” and “the extent to which members of the relevant political community regard a law as justified.” Largely as a result of the efforts of the pro-business tort reformers movement, which seeks to minimize civil litigation generally, litigation is often maligned in American popular culture. Stories of abusive or frivolous litigation abound, and even meritorious suits, like the “hot coffee” case, for example, are told as tales of plaintiff greed and overreaching. “Tort reform long ago declared war on the citizen-initiated complaint generally,” and the city-initiated complaint has been similarly impugned.

In fact, although the story most often circulated is that America is an overly-litigious society, and has a problem of too much litigation, numerous scholars have demonstrated that the problem is actually one of too little litigation.

277 Kazis, supra note 4, at 63.
278 Michael L. Wells, Sociological Legitimacy in Supreme Court Opinions, 64 Wash. & Lee L. Rev. 1011, 1021 (2007).
279 Lahav, supra note 24, at 3195.
280 Id.
281 Id.
284 Comparatively, on the international stage, the US “barely cracks the Top 5 of the most litigious countries in the world.” On a per capita basis, Germany, Sweden, Israel, and Austria, respectively, win. See Christian Wollschlager, Exploring Global Landscapes of Litigation, in SOZIOLOGIE DES RECHTS: FESTSCHRIFT FUR ERHARD BLANKENBURG ZUM 60 GEBURTSTAG (Jurgen Brand and Dieter Strempel, eds. 1998); and Clements, Risk
Specifically, a plethora of factors operate to deter those who actually do suffer tortious injury from bringing suit. First, they often “don’t realize that they are injured.” Particularly when injuries involve the slow violence of toxic substances like lead, “where [] years [may] elapse between exposure and the ultimate manifestation of injury,” it is difficult to conceptually connect those dots. Moreover, “once a victim realizes she’s hurt, she may not realize that the injury was tortiously inflicted.” Continuing the lead example, the parents of “a child dismissed as ‘slow’ may not realize her trouble is traceable to chipped paint.” Further, “even when victims have the information they need to make sensible choices,” their very injury often prevents many victims from taking action. “Often suffering from depression, disorientation, and anxiety – and sometimes overcome by guilt and self-blame – for some injury victims, ‘[d]ecisive action and follow-through may seem nearly impossible.’” And “[f]inally, even if an injury victim navigates the various hurdles above and decides to claim, she still has to overcome several structural impediments to make that desire a reality. Most notably, she has to know how to find a decent lawyer [and] convince that lawyer to take her claim. And that’s tough – as the majority of lawyers reject the vast majority of would-be claimants who come calling. Last but not least, the would-be claimant has to do all of the above within a short period, lest the statute of limitations expire.”

As a result of these factors, and because of the significant psychological and legal consequences to serving as a


286 Id.
287 Id.
288 Id.
289 Id.
290 Id.
plaintiff, many potential plaintiffs with viable claims simply bear the loss, and do not litigate them. In some cases the “harms are [simply] too diffuse,” and “the expense of litigation too great.”

Plaintiff cities take on responsibility for pursuing claims against the entities that cause these harms. Doing so has some benefits for sociological legitimacy. First, “according to a recent 2012 Pew Research Center Poll, Americans trust local governments at a significantly higher level than both state and federal governments.” City attorneys thus may be able to imbue these claims with sociological legitimacy by virtue of generally being seen as bona fide actors. With the imprimatur of local government, city attorneys may be “well positioned to gain the attention and sympathies of the mass media.” City actors “are in a strong position to gain media standing unavailable to private litigators and thus exert meaningful pressure through their legal mobilization campaigns.”

Plaintiff city claims also benefit from past litigative moments that demonstrate when litigation “produce[s] privately held industry information that documents important public harms in the face of regulatory failure - as it has in the asbestos, DES, lead, Dalkon Shield, and tobacco cases - the litigation is reluctantly acknowledged as legitimate, in spite of the fact that its approach to solving these problems is costly.” Thus, such litigation “ultimately emerge[s] as victorious as information surface[s] to validate the claims.”

Contemporary plaintiff city claims may follow this same trajectory, creating transparency which then translates into sociological legitimacy. For instance, one of the individual lead plaintiff lawsuits, filed in 1999, led to the release of a trove of

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292 Engel, supra note 271, at 5.
293 Caruso, supra note 7, at 61.
296 Id.
297 Lytton, supra note 26, 286.
298 Id. at 291.
historical letters and documents which offers a series of morally repugnant revelations regarding what company officials knew about the toxicity of their product and the populations affected. The documents showed that in the 1950s, Baltimore city officials “sent weekly reports to the lead paint industry’s top health official [...] alerting him to the harm being caused, and informing him of the “dozens of Baltimore children dead from lead poisoning.”  

He responded with “mockery.” Referring to those who lived in housing poisoned by the toxic paint as “Baltimore’s little human rodents,” he blamed not the toxicity of his product, but instead the lack of education of black and minority parents. He joked about the children ingesting lead paint, acknowledging that “there appears to be all too much ‘gnaw-ledge’ among Baltimore babies,” but refusing to make any industry changes to prevent or curb the toxic exposure. Shortly after these letters were publicized, numerous media articles were published denouncing these actions and suggesting that both the litigation which drove the document discovery, and future city litigation, are positive developments.

Similar revelations occurred in the sub-prime mortgage context. Baltimore and Memphis both brought claims that specifically alleged that Wells Fargo engaged in reverse red-lining. “In addition to data that revealed what appear to have been discriminatory patterns of lending, the plaintiffs also produced sworn statements from former Wells Fargo employees that revealed that bank officials would refer to subprime loans as ‘ghetto loans’ and borrowers of color as ‘mud people.’ These claims settled, with Well Fargo agreeing to “make hundreds of million dollars in loans to in Memphis and Shelby County and $7 million in loans in Baltimore.”

300 Id.
301 Id.
302 Id.
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Through these sociological, political, and legal legitimacy strands, plaintiff city litigation can achieve normative legitimacy. While disagreements may persist about whether plaintiff city claims are, in fact, a good idea, such claims are, at the very least, a legitimate activity of municipal government.

III. Fiscal Feasability in the Age of Minimal Cities

Plaintiff city cases are not only sociologically, morally, and legally legitimate; they are also fiscally feasible. Well-resourced cities can pursue litigation through their own city attorney offices or specialized units. Cities with less financial resources can also pursue plaintiff city litigation, albeit through a slightly different means. Currently, many cities are in significant financial distress and there are an unprecedented number of municipal bankruptcies. Even though these “[c]ities may feel they cannot afford to create public interest units or even pursue the occasional public interest case,” and many “[l]ocal governments are often so cash-strapped it may be difficult for their law officers to imagine doing more,” private-public partnerships with private plaintiff’s attorney firms offer a viable option. Although bringing forward a plaintiff city claim for the most distressed cities, where “the city government itself is no longer pursuing a

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305 Morris, supra note 1, at 202.
307 See Michelle Wilde Anderson, The New Minimal Cities, 123 YALE L. J. 1118, 1118 (2014) (noting Detroit was the “twenty-eighth city to declare municipal bankruptcy or to enter a receivership for fiscal crisis since late 2008, a window of time that has seen five of the six largest municipal bankruptcies in American history.” Puerto Rico has also declared bankruptcy. Nathan Bomey, Puerto Rico Declares Bankruptcy. Here’s How it’s Going to Unfold, USA TODAY, (May 3, 2017), https://www.usatoday.com/story/money/2017/05/03/puerto-rico-bankruptcy/101243686/.
308 Morris, supra note 1, at 190.
309 Morris, supra note 183, at 1922.
vision beyond public safety in true emergencies” might be unrealistic, for all but the worst hit cities, and “[p]articularly for smaller cities, with smaller law departments, private contractual agreements allow cities to attempt affirmative litigation without the burden of significant expenditures in developing the cases. “A carefully-constructed affirmative litigation docket should pay for itself with recouped damages, costs, and civil penalties.”

Cities sometimes partner with plaintiff attorneys who have developed particular expertises in relevant areas to help them bring forward their cases. These are frequently done on a contingency fee basis. This practice has been controversial. However, at least one court, the California Supreme Court, has held governmental entities can legitimately use private counsel, “as long as the entities exercise control over the case.”

In addition to this stamp of judicial approval, these public-private partnerings are in fact a ubiquitous practice in public enforcement generally, with public enforcers in a variety of domains routinely employing outside counsel. As John Coffee notes, these partnerships are mutually beneficial and

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310 Anderson, supra note 295, at 1122.
311 Gavioli, supra note 6, at 966.
312 Morris, supra note 119, 61.
313 This can be understood as part of coalition building generally. “Decision-making processes take place in interactions between a variety of actors (including private), rather than only inside the formal institutions of government. These actors form policy networks or coalitions, based on the different kinds of resources they bring together (material, institutional and so on [...]). The coalitions are often formed on an informal basis with the purpose of creating a power to act or are centered on a specific discourse. This concept highlights the idea that coalitions can be based on a common world of imaginations, rather than on a shared interest and that they might exercise ‘discursive power’ rather than generate governing capacity.” Tove Dannestam, Rethinking Local Politics: Towards a Cultural Political Economy of Entrepreneurial Cities, 12 SPACE AND POLITY, 353, 365 (2008).
315 John C. Coffee Jr., When Smoke Gets in Your Eyes: Myth and Reality and the Synthesis of Private Counsel and Public Client, 51 DePaul L. Rev. 241, 242 (2001). He notes that the Private Securities Litigation Reform Act of 1995 lets a “lead plaintiff” control securities class actions. That plaintiff is typically a state pension fund, who relies on private counsel. Further, the federal Justice Department hired private attorney David Boies when they sued Microsoft for antitrust violations. Id.
“creat[e] enormous synergy.”\textsuperscript{316} Public actors “gain specialized human capital that they could not otherwise afford,” and private attorneys “gain[] the legitimacy, credibility, and home field advantage that only the state can confer.”\textsuperscript{317} Most importantly, though, contingency fee arrangements transfer the risk of financial loss from the public to the private.\textsuperscript{318} Essentially, in these arrangements, “the state is [] compensating the private attorney with lottery tickets.”\textsuperscript{319}

In fact, even though there may be a perception that governments have almost limitless resources, multinational corporations are often able to rally significantly more legal and financial resources than local governments can. For instance, even at the state level, in the Rhode Island lead paint litigation, “there were more attorneys working for the defense than in the entire attorney general’s office.”\textsuperscript{320} Orange County’s district attorney made a similar observation about being out-personelled and out-resourced in its pharmaceutical litigation. He noted that “when you fight multi-billion dollar companies, we’re the little guy.”\textsuperscript{321} The multi-national corporations “have substantial funds” and “try to wear you down, basically, with paperwork.”\textsuperscript{322} The corporate behemoths who are defendants in plaintiff city cases have access to extensive reserves of both financial and work capital. Hiring private counsel allows plaintiff cities to come closer to achieving a symmetry of scope and scale with the massive resources of these large corporate actors.

Through such partnerships, even financially-distressed cities can tap into plaintiff city claims as a potential source of revenue that can help minimize the extensive expenditures resulting from the impugned harms, without requiring significant financial investment to do so. In general, insolvent cities (or those close to it) have “very little [that they] can do to

\textsuperscript{316} Schwartz, supra note 57.
\textsuperscript{317} Coffee, supra note 303, at 242.
\textsuperscript{318} Id.
\textsuperscript{319} Id. at 252.
\textsuperscript{322} Id.
increase revenues”\textsuperscript{323} Since state law generally “controls eligible sources of revenue and withholds self-governance,” “asset-poor cities” have “limited flexibility to raise revenues in creative ways.”\textsuperscript{324} Cities can see plaintiff city claims as, among other things, an opportunity to “recover for proven injuries and use damage awards to fund needed city services and social welfare programs.”\textsuperscript{325} “The need for revenue is more urgent than ever due to decades of urban decline, the new federal emphasis on local solutions to social problems, and new demands on city revenue like the costs of homeland security.”\textsuperscript{326}

Plaintiff city claims, though, can serve as a source of revenue, and one that maps neatly onto some of the reasons for city insolvencies in the first place. Many of the parties targeted in plaintiff city claims significantly contributed to the city’s distress. Part of the very reason why many cities are in financial distress connects to the wrongs alleged in plaintiff city litigation. The subprime mortgage crisis, in particular, emptied many city coffers. Since “the single largest source of local revenues” is property taxes,\textsuperscript{327} and the subprime mortgage crisis meant that many residents could not pay property taxes, it had a particularly significant effect on city finances. “The plummeting housing market meant that property tax revenues to cities decreased by $11.9 billion from 2009 to 2010, and by another $14.6 billion from 2010 to 2011. Between 2007 and 2011, home prices across the country fell by nearly 20\% and 1.5 million homes went into default or foreclosure.”\textsuperscript{328} Already struggling cities were hit particularly hard by this, since “long-term structural challenges and high rates of poverty” meant that these cities depended more on property taxes and “housing industry employment” than they should have or otherwise would have.\textsuperscript{329}

The subprime mortgage crisis created “[s]teep population

\textsuperscript{323} Anderson, \textit{supra} note 303, at 1126.
\textsuperscript{324} Id. at 1145-6 (noting that “For asset-poor cities […] these constraints allow local government limited flexibility to raise revenues in creative ways, such as using payroll or commuter taxes to claim revenue from persons who use the city (and thus, its services) during their working hours”).
\textsuperscript{325} Gavioli, \textit{supra} note 6, at 944.
\textsuperscript{326} Id. See also TIM WU, \textsc{The Attention Merchants: The Epic Scramble to Get Inside Our Heads} (2016) (describing how some municipalities are selling advertising in schools to corporations).
\textsuperscript{327} Anderson, \textit{supra} note 303, at 1128.
\textsuperscript{328} Id. at 1142.
\textsuperscript{329} Id. at 1143.
loss,” a phenomenon that is “dramatically bad for budgets.” The housing market “crashed particularly hard in poor cities, because subprime lending disproportionately affected poor neighborhoods and middle-class neighborhoods of color. Spatially-constructed lending patterns triggered spatially-concentrated foreclosures, which in turn caused rising numbers of vacant and neglected homes as well as downward pressure on remaining residents’ housing values.” It is telling that in Michelle Wilde Anderson’s study of insolvent cities, she found that “16 of the 28” cities in insolvency were majority-minority cities. She notes that “these cities were hit extremely hard by subprime lending. Empirical evidence has shown that such high-cost, high-risk loans were concentrated in minority neighborhoods for reasons beyond class and creditworthiness.” Instead, “persistent discriminatory mortgage lending,” along with a history of “racially restrictive covenants [and] white flight, is an “important cause[] of urban decline in many majority-minority cities, including the intensification of concentrated poverty and population loss.”

Further, the high rates of poverty and the structural challenges of many insolvent cities connect to other targeted plaintiff city claims. For instance, Gary, Indiana, a “high-poverty, insolvent city” which is currently grossly underpoliced, has been trying, for nearly twenty years, to

330 Id. at 1125.
331 Id. at 1143.
332 Id.
333 Id. at 1141. Cities have often participated in creating this structural inequality. Of particular note, although Baltimore sued Wells Fargo for issuing sub-prime mortgages that resulted in massive foreclosures in predominantly minority-majority areas, Wells Fargo noted, “The City’s…own tax lien sales…have resulted in over 19,000 foreclosure actions being filed against City homeowners during this same seven-year period...The City places liens on homes for any type of unpaid municipal bill over $100, and then sells the liens to private investors, knowing the investors will threaten to foreclose on the homes unless the homeowners agree to pay exorbitant fees...The City’s tax lien sales, moreover, have disproportionately injured minority homeowners in the City’s poorest neighborhoods. Over half of the 2006 tax lien sales based on small unpaid water bills or municipal fees involved properties in census tracts that are more than 80% African-American and over two-thirds involved properties in tracts that are over 60% African-American, but fewer than 11% involved properties in tracts that are 20% or less African-American.” Richard E. Gottlieb and Andrew J. McGuiness, When Bad Things Happen to Good Cities: Are Lenders to Blame, 17 AM. BUS. L. SECTION 1, 5-6.
334 “The most underpoliced city in the country is the high-poverty, insolvent
hold the gun industry responsible for the damages it inflicted on that city. Back in 1999, Gary filed a public nuisance suit against various gun dealers and manufacturers, alleging that their “negligent marketing, decepting advertising, [...] and negligent design [...] increased violent crimes and required [Gary] to pay more for crime-related expenditures.”

The now bankrupt cities of Detroit and Camden had also brought gun litigation. “Fairness dictates that cities, which (despite their current struggles) overwhelmingly produce the wealth of this country,” should not be left with the disproportionate financial burdens that others’ misconduct has visited upon them. Through partnering with private attorneys, these distressed cities that have been injured by the various forms of misconduct targeted in plaintiff city claims can and should pursue claims against them.

D. Litigation as State-Building

Even the new “minimal” cities, by partnering with private firms, may find that bringing forward plaintiff city claims is in fact financially feasible and can help to recoup some of the expenses that cities undertake in trying to address or stem these impugned harms. But economic impact is not the only meaningful yardstick by which to judge the desirability of a particular course of action. Other factors, like furthering goals of equality and enhancing the quality of life for all city

The city of Gary, Indiana, which has 266 officers per 100,000 population, nearly the same staffing ratio as the 261 officers per 100,000 population in Cambridge, Massachusetts. Yet the annual cost of crime per capita - a measure that estimates the private costs of crime, such as injury, lost income, and stolen property - is more than 15 times higher in Gary than it is in Cambridge. Because of this high cost of crime, the benefits of public spending on law enforcement in Gary are dramatically higher than they are in Cambridge. Every additional dollar spend on policing in Gary would yield $14 in benefits of reduced crime, whereas every new dollar spent on policing in Cambridge would yield only 30 cents in such benefits.”

Andersen, supra note 303, at 1162.

335 Ausness, supra note 8, at 851.
336 Id.
337 Gavioli, supra note 6, at 968.
338 Andersen, supra note 303, at 1161.
citizens should also be taken into account. In fact, “[a]s income inequality within nations continues to rise, as evictions and displacement multiply and poverty becomes more concentrated, attention to justice – not only economic efficiency – as the criterion for evaluating urban policies is more important than ever.” In addition to acknowledging the reality of fiscal concerns, municipal decision making should also be governed by questions of “whether actions are consistent with democratic norms, whether their outcomes enhance the capabilities of the comparatively disadvantaged, and whether they recognize and respect who benefits from a [particular] policy” or course of action.

Many plaintiff cities are paying attention to these criteria. Indeed, through serving as plaintiff cities, cities are in part establishing themselves as entities responsible for and capable of achieving justice for their populations. In short, plaintiff city claims use litigation “as a source of statebuilding.” The litigation is a means through which cities construct themselves as meaningful political entities. By taking on litigation similar to that which is sometimes taken on by states in the public interest, cities are defining themselves as like states, as governmental entities that can and will act on behalf of vulnerable constituencies. Plaintiff cities are an example of how “by focusing on the work of entrepreneurial agents (both inside and outside the state), the subnational level, and the generation of capacity wherever it can found,” we can see the often “porous nature” of statebuilding.

\[340\] Id.
\[342\] Id.
\[343\] MEGAN MING FRANCIS, CIVIL RIGHTS AND THE MAKING OF THE MODERN AMERICAN STATE (2014) (describing The Litigation State: Public Regulation and Private Lawsuits). In some ways, the plaintiff city phenomenon may be a flip of the one Sean Farhang analyzed. Rather than private actors enforcing public law, which was the subject of his study, plaintiff cities could be understood as public actors enforcing private law.
\[344\] In so doing, plaintiff city litigation is a “form of state building in which courts and judges – sometimes even the mere existence or threat of them – play a crucial role.” Staszak, supra note 17, at 999.
Plaintiff cities are, in many ways, renegotiating the “on-
going construction of ‘the city’ as a relevant political category at various scales.”\footnote{346} This “renaissance for new [local] political spaces” is “part of state restructuring processes at various scales.”\footnote{347} These scales, local, state, national, and international, are mutable and constantly being redefined. They are “socially constructed in negotiations and struggles between different actors,” not “natural and static layers of political and territorial organization.”\footnote{348}

The litigation can be seen as part of a general movement of municipal empowerment and maturation, and a renegotiation of the meaning of a city, both in a theoretical and a political sense. Often statebuilding moments are a time when “boundaries between public and private shifted.”\footnote{349} Plaintiff city litigation straddles the border between public and private litigation: a public actor brings the claim, but with no special public actor privileges. Instead, this public actor achieves standing through meeting the same standing tests that private entities must meet.

As public actors, though, cities are increasingly showing a willingness to rebel against state and federal authority and to offer their citizens a different form of governance.\footnote{350} Moreover, “political entities, such as cities and regions, are gaining in importance,”\footnote{351} and at least “[i]n the international literature, there is a near consensus that fundamental changes in the policy orientation of local governments are occurring.”\footnote{352} Part of this involves new coalitions of cities as “cities and regions are becoming actors on different political levels, linked together in various networks which increasingly bypass the nation-state.”\footnote{353} In the United States, former New York City Mayor Michael Bloomberg has pledged $200 million to fund the American Cities Initiative, a foundation “which aims to empower city governments and mayors to innovate and solve problems, such as gun violence, climate change and

\footnote{346} Dannestam, \textit{supra} note 301, at 367.\footnote{347} \textit{Id}.\footnote{348} \textit{Id}. quoting Gonzalez 2006 p 838\footnote{349} Nackenoff, \textit{supra} note 329, at 1.\footnote{350} \textit{Id}.\footnote{351} Dannestam, \textit{supra} note 307, at 354.\footnote{352} \textit{Id}. at 356.\footnote{353} \textit{Id}. at 354.
addiction.” Such alliances may become “instrumental in the creation of new public powers and administrative capacities.”

The renegotiation that plaintiff cities are forcing also implicates the meaning of cities. Cities are simultaneously a literal place, and an “ideology” or “practice.” They are both physical and socio-cultural entities. “Philosophers have differed in whether they understand the city primarily in terms of ‘urbs,’ that is, the physical layout and space of the city, or ‘civitas,’ that is, the people and their way of life, or some combination of the two.” Philosophies of the city have long theorized them as the quintessential “place of the political,” “the main locus where people meet, work and create, on the one hand, but also [] a place where tensions, separation and conflict are exposed, on the other.” Plaintiff cities are using litigation to confront some of these tensions and conflicts.

A. Constructing the Polis

Plaintiff city claims have a sociological and sociolegal function. Plaintiff city claims have important framing and shaping and relational functions. Aggregating the claims frames the harmed individuals underlying them into a population or a collectivity, and not just any collectivity, but one with stature and dignity that the city will defend. The claims that plaintiff cities bring can be viewed as defensive, as a “cry of protest” made to defend particularly vulnerable groups from the injuries that various industry actors inflict. In recognizing that these groups are not disposable, and harms to them deserve redress, cities are affirming the place and inherent value of these groups within the polity itself. The

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355 Nackanoff, supra note 329, at 10.
356 James Conlon, Cities and the Place of Philosophy in PHILOSOPHY AND THE CITY: CLASSIC TO CONTEMPORARY WRITINGS 199-209, 200 (Sharon M. Meagher, 2008).
357 Id.
359 Id.
360 Bernstein, supra note 212, at 37.
claims creates the city as “a polis, a political collectivity, a place
where public interest is defined and realized.”

Plaintiff cities offer a thick relational conception of their
relationship with their constituents. This helps to reduce the
“legal estrangement” that minority groups may otherwise
experience. “Legal estrangement” is a concept that incorporates
“legal cynicism – the subjective ‘cultural orientation’ among
groups ‘in which the law and the agents of its enforcement,
such as the police and courts, are viewed as illegitimate,
unresponsive, and ill equipped to ensure public safety’” and
“the objective structural conditions […] that give birth to this
subjective orientation.”

It “treats social inclusion” as a
valuable goal, and analyses how contemporary regimes often
operate to “effectively banish whole communities from the
body politic.”

Legal estrangement considers how there is a “signalling
function of […] law to groups about their place in society.”

Often, the signal to vulnerable or minority groups (sometimes
even sent by cities themselves, in different contexts) is one of
“symbolic community exclusion.” There is often “legal
closure, a means of hoarding legal resources for the socially
and socioeconomically advantaged” while simultaneously
“lock[ing] marginalized groups out of the benefits of law
enforcement.”

Plaintiff city litigation resists this legal estrangement.
Instead, it “reassure[s] community members that society has
not abandoned them, that they are engaged in a collective
project of making the social world.”

These benefits accrue even when plaintiff city litigation is

361 Mustafa Dikec, Justice and the Spatial Imagination, in SEARCHING FOR
THE JUST CITY: DEBATES IN URBAN THEORY AND PRACTICE 72-88, 83 (Peter
Marcuse et. al, eds. 2009)., quoting ETIENNE BALIBAR, ECRITS POUR

362 Monica C. Bell, Police Reform and the Dismantling of Legal

363 Id. at 2067.

364 Id. at 2071.

365 Id. at 2099.

366 Id. at 2115.

367 This may be an example of tort law building community in a different
way. For a discussion of community values in tort, see Christina Carmody

368 Bell, supra note 351, at 2085.
Even when plaintiff cities do not ultimately emerge legally victorious, the signaling function and community-building impact remains. Further, they signal to corporate wrongdoers that cities are willing to litigate these kinds of claims, which itself may encourage corporations to engage in less injurious behaviors.

B. Creating the Just City

Plaintiff city claims can play an important role in the creation of the “just city.” The ideal of the just city “desire[s] to rearticulate the political and moral connections between inhabitance, social provision and social justice.”

“The search for a Just City […] begins by examining the everyday reality of city life and then seeks a means to reshape that reality and re-imagine that life. It begins with the injustices that have come with rapid urbanization – the violence, insecurity, exploitation, and poverty that characterize urban life for many, as well as the physical expressions of unequal access to social, cultural, political, and economic capital that arise from intertwined divisions between race, class, and gender categories.”

The just city, as Susan Fainstein originally theorized, is one in which decisions are guided by the three lodestars of equity, diversity, and democracy. Although usually theorized as a useful directive for urban planning, plaintiff cities show that litigation can play an important role in furthering these objectives, as well.

Plaintiff cities advance the goal of equity. Equity is similar to equality, but differs in that equity is a “realistic” goal which recognizes that urban policies do not ultimately have “sufficient scope to [unilaterally] bring about equality” writ large. Equity requires distributive justice, and insists that

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370 James Connolly and Justin Steil, Introduction: Finding Justice in the City, in SEARCHING FOR THE JUST CITY: DEBATES IN URBAN THEORY AND PRACTICE 1-16, 8 (Peter Marcuse et. al, eds. 2009).
371 Id. at 1.
372 Id.
374 Nancy Fraser, Scales of Justice: Reimagining Political Space in a Globalizing World 100 (2008).
“both material and nonmaterial benefits derived from public policy” are distributed in a way “that does not favor those who are already better off at the beginning.”

The second important consideration for the just city is diversity. By diversity, Fainstein means to refer to “the social composition of places.” Diversity as an ideal connects to the justice of recognition: “the equal recognition of different identities/groups within a society.”

Finally, democracy “invokes the idea of meaningful public participation and reasoned public deliberation about the best measures to secure the general community interest.” Meaningful participation is only possible if populations are healthy: communities must be “healthy enough to participate in civil life and pursue their own life’s goals.” Plaintiff city claims, and their attempted protection of public health, try to ensure this circumstance. The ‘ecological’ model of health has demonstrated that “socially, culturally, and materially disadvantaged people live shorter, less healthy lives,” and are often unable to vigorously participate in civic life. Plaintiff city claims give political expression to “a right to inclusion and social responsibility – a right that suggests that one’s own illness [ or injury] it not solely one’s own concern,” but something that the polity should be concerned with as well.

Litigation about public health “has an important role to play in the political struggle to protect the rights of the community and its more vulnerable members.” Such litigation “helps construct the perception and recognition of what constitutes the public interest. In a world in which the risks to health and safety are untold, litigation is but one means by which we come to decide which of those risks are matters of

375 Fainstein, supra note 337, at 765.
376 Id.
377 Fraser, supra note 362, at 56.
378 David A. Dana, Public Interest and Private Lawyers: Toward a Normative Evaluation of Parem Patriae Litigation by Contingency Fee, 51 DePaul L. Rev. 315, 322 (2001). (But, as Dan Kahan noted in his brilliantly titled piece, Democracy Shmemocracy, “democracy is an essentially contested concept: there is not just one, but rather a plurality of competing conceptions of democracy, each of which emphasizes a different good commonly associated with democratic political regimes.”) Id.
379 Parmet, supra note 101, at 1.
380 Wiley, supra note 63, at 22.
381 Id.
382 Parmet, supra note 127, at 1665.
public health and public concern.”\textsuperscript{383}

CONCLUSION

Plaintiff cities rise on the swell of two developing strands, one political, and one legal. At the political level, cities are in a moment of emergent statebuilding. Cities are becoming increasingly important actors, and citizens are increasingly expecting their local governments to further their opportunity for human flourishing. “The city is the scale where questions of justice are felt concretely as part of everyday life,”\textsuperscript{384} and as nimble and often progressive public actors, cities are well-positioned to bring forward claims to redress the injuries from harms like lead paint toxicity, the sub-prime mortgage crisis, and the opioid epidemic.

Indeed, “the public health threats of an era have always found their way before the courts and lawmakers of the time,”\textsuperscript{385} usually through tort law. Tort law “showcases the most salient activities or agents of disease and injury in an era:” the railroad cases of the nineteenth century gave way to the motor vehicle claims of the early twentieth, and those in turn to the toxic chemical cases as that century came to a close.\textsuperscript{386} And, in this new millennium, massive economic harms like those at issue in the financial crisis, and massive health harms, like those of the opioid epidemic, demand a response. As with the harms of era’s past, tort law will almost inevitably be asked to grapple with these injuries, and will also almost inevitably change and develop “as a result of its encounter.”\textsuperscript{387}

Plaintiff cities find themselves at the nexus of these two evolutions. The claims they are advancing have legitimacy, in the sense that they are legally, politically, and sociologically legitimate, but it remains to be seen whether they will ultimately lead to legal victory. At the very least though, advancing these claims expressively communicates to the vulnerable populations who are most harmed by these wrongs, and to broader populations and to corporate parties as well, that these wrongs will not go unremarked. This communicated “[a]wareness of exploitation, and [the] attempt[,] to challenge

\textsuperscript{383} Id. at 1703.
\textsuperscript{384} Connolly, supra note 350, at 6.
\textsuperscript{385} Parmet, supra note 101, at 37.
\textsuperscript{386} Id.
\textsuperscript{387} Id.
it, bring us closer to realizing the too often unfulfilled promise that cities have long represented – the promise of liberation and opportunity.”388 Plaintiff cities are not, by any means, perfect cities, but their litigative acts press for political recognition, both for vulnerable populations within the polis, and for the city itself.

388 Connolly, supra note 370, at 1.
The City as a Commons

Sheila R. Foster* & Christian Iaione**

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Introduction

City space is highly contested space. As rapid urbanization takes hold around much of the world, contestations over city space—how that space is used and for whose benefit—are at the heart of many urban movements and policy debates. Among the most prominent sites of this contestation include efforts to claim vacant or abandoned urban land and structures for affordable housing and community gardening/urban farming in many American cities,¹ the occupation and reclamation of formally public and private cultural institutions as part of the movement for beni comuni (“common goods”) in Italy,² and the rise of informal housing settlements on the periphery of many cities around the world.³

¹. See infra Part I.
². See infra Part I.
³. See infra Part I.
THE CITY AS A COMMONS

The impetus for much of this contestation is rooted in the neoliberal critique of contemporary urban development; namely the idea that public officials in cities around the world, and in particular “global cities,” are commodifying and selling to the highest bidders the collective resources of the city. As Saskia Sassen recently and provocatively queried, “[W]ho owns the city?” in an era of “corporatizing access and control over urban land” and “corporate buying of whole pieces of cities,” which is transforming the “small and/or public” into the “large and private” across so many cities around the world. As public officials relax local regulations and other rules to accommodate the preferences of powerful economic interests, the poor and socially vulnerable populations are being displaced by an urban development machine largely indifferent to creating cities that are both revitalized and inclusive.

In tandem with the neoliberal critique, there is a powerful intellectual and social movement to reclaim control over decisions about how the city develops and grows and to promote greater access of urban space and resources for all urban inhabitants. First articulated by French philosopher Henri Lefebvre, the “right to the city” movement has manifested in efforts by progressive urban policymakers around the world to give more power to city inhabitants in shaping urban space. While the movement has had some policy successes, some worry that it remains unclear what exactly is the “right” to the city and, specifically, the scale and scope of enhanced participation by urban inhabitants and expanded access to urban resources. Moreover, to the extent that the “right”

5. These collective resources include not only the land of the city and its open spaces and infrastructure, but also its culture and the array of goods and services that it provides its inhabitants. See generally DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION (2013).
7. In line with the much heralded theory advanced by Charles Tiebout, even struggling cities find themselves competing for mobile residents and mobile capital, skewing their policies toward attracting the “creative class”—high knowledge, entrepreneurial residents attracted to a host of urban amenities and promoting business-friendly, growth oriented policies. See generally Nestor M. Davidson & Sheila R. Foster, The Mobility Case for Regionalism, 47 U.C. DAVIS L. REV. 63 (2013); Richard Schragger, Mobile Capital, Local Economic Regulation, and the Democratic City, 123 HARV. L. REV. 482 (2009).
10. What seems to matter most to advocates, however, is that the “right” be viewed as a collective and not individual right—that urban inhabitants have increased voice
to the city is dependent on a rights-endowing government, local or national, the odds again are quite low. Our current era is one of rights-retrenching and not rights-enhancing states, especially when it involves the protection of socially and economically vulnerable populations.

Increasingly, progressive urban reformers are looking beyond the state (and for that matter the city) to sublocal forms of resistance, and cooperation, to make claims on urban resources and city space as a “commons.” These claims consist not simply of the assertion of a “right” to a particular resource; rather, they assert the existence of a common stake or common interest in resources shared with other urban inhabitants as a way of resisting the privatization and/or commodification of those resources. In other words, the language of the “commons” is being invoked to lay claim to, and protect against the threat of “enclosure” by economic elites, a host of urban resources and goods which might otherwise be more widely shared by a broader class of city inhabitants.

in local decision making processes and exercise greater control over the forces (economic, social and political) shaping city space. See Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 Geo. L.J. 99, 102 (2002) (stating that Lefebvre is clear that the decision making role of citidans—urban inhabitants—must be central, but that he is not explicit about what that centrality would mean, nor does he say clearly that decisions that produce urban space should be made entirely by inhabitants). Some would even include users of the city, in addition to its inhabitants, as part of the class of citidans who would hold this right. See WORLD URBAN FORUM, PROPOSED WORLD CHARTER ON RIGHT TO THE CITY (2004), http://portal.unesco.org/shs/en/files/8218/112653091412005_-_World_Charter_Right_to_City_May_051.doc/2005+_+World+Charter+Right+to+City+May+051.doc (web download); EUROPEAN COUNCIL OF TOWN PLANNERS, THE NEW CHARTER OF ATHENS (2003), http://www.ectp-ceu.eu/images/stories/download/charter2003.pdf. The “right to the city” has also been incorporated into Brazil’s Constitution and City Statute. See C.F. arts. 182-183 (Braz.); E.Cid., Lei No. 10.257, de 10 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.7.2001 [Braz.].


12. See Nicholas Blomley, Enclosure, Common Right and the Property of the Poor, 17 SOC. & LEGAL STUD. 311, 315-26 (2008) (arguing that the poor may have a legitimate property interest in a department store or other land use in their community that is predicated on use, occupation and domicile); Patrick Bresnihan & Michael Byrne, Escape Into the City: Everyday Practices of Commoning and the Production of Urban Space in Dublin, 47 ANTIPODE 36, 42 (2015) (describing the creation of “independent spaces” outside of market and city control for a range of noncommercial activities, events and forms of social life “excluded by high rents and over-regulation”); Amanda Huron, Working with Strangers in Saturated Space: Reclaiming and Maintaining the Urban Commons, 47 ANTIPODE 963 (2015) (theorizing limited equity housing cooperatives as a commons).
THE CITY AS A COMMONS

What we are interested in is the potential for the commons to provide a framework and set of tools to open up the possibility of more inclusive and equitable forms of “city-making.”13 The commons has the potential to highlight the question of how cities govern or manage resources to which city inhabitants can lay claim to as common goods, without privatizing them or exercising monopolistic public regulatory control over them. Yet, the “urban commons” remains under-theorized, or at least incompletely theorized, despite its appeal to scholars from multiple disciplines. Although the literature on natural resource “commons” and “common pool resources” is voluminous, it remains a challenge to transpose its insights into the urban context in a way that captures the complexity of the “urban”—the way that density of an urban area, the proximity of its inhabitants, and the diversity of users interact with a host of tangible and intangible resources in cities and metropolitan areas.14

The “commons,” of course, has a long historical and intellectual lineage ranging from the enclosure movement in England,15 to Garret Hardin’s famous Tragedy of the Commons parable,16 to Elinor Ostrom’s Nobel prize-winning work on governing common pool resources.17 More recently, scholars across an array of specialties have conceptualized and articulated new kinds of commons, beyond those recognized in the traditional fields of property and environmental law. These “new” commons include knowledge commons, cultural commons, infrastructure commons, and neighborhood commons, among others.18 Like other newer forms of commons, the emerging literature on the urban commons must endeavor to conceptualize, identify, mark the boundaries of, and articulate the implications of its framework for different kinds of resources at different scales in various urban contexts.

As an initial matter, we contend that any articulation of the urban commons needs to be grounded in a theory of property, or at least a theory about

14. The most recent literature on the urban commons is beginning to recognize this complexity. See generally URBAN COMMONS: MOVING BEYOND STATE AND MARKET (Mary Dellenbaugh et al. eds., 2015); URBAN COMMONS: RETHINKING THE CITY (Christian Borch & Martin Kornberger eds., 2015).
the character of particular urban resources in relationship to other social goods, to other urban inhabitants, and to the state.\textsuperscript{19} This is especially necessary given the centrality of property law in resource allocation decisions that affect owners, non-owners and the community as a whole.\textsuperscript{20} As David Super has poignantly written, property law has an important role in addressing widespread economic inequality by protecting those goods most essential to the well-being of a broad swath of society, rather than just protecting the goods that are disproportionately held by the wealthy.\textsuperscript{21} As long as large segments of the population lack the security that property rights provide, he argues, many social problems will remain quite intractable.\textsuperscript{22} Although not invoking the utility of the commons, his poignant call for property law’s centrality in supporting the “wealth” of the poor is consistent with progressive urban reformers and scholars’ invocation of the commons on behalf of city inhabitants subject to the dispossession and displacement that inevitably result from unfettered capital accumulation.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{19} Gregory S. Alexander & Eduardo M. Peñalver, Properties of Communities, 10 THEORETICAL INQUIRIES IN L. 127, 128 (2009) (“[S]ystems of property have as their subject matter the allocation among community members of rights and duties with respect to resources that human beings need in order to survive and flourish” and thus “whenever we discuss property, we are unavoidably discussing the architecture of community and of the individual’s place within it.”).
\item \textsuperscript{20} Id. at 128; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 32 (1988) (describing the problem of allocation as the central concern of property law).
\item \textsuperscript{21} David Super, A New, New Property, 113 COLUM. L. REV. 1773 (2013). His suggestion is that longstanding concepts from property can be applied to recognize and protect the most important assets of low-income and other vulnerable people, most of which are relational rather than tangible assets. Id. at 1800, 1821-25 (arguing in part for property law to honor and protect reliance interests in certain benefits and goods, per Charles Reich’s classic thesis on the subject, and relational interests in community and social ties of low-income and vulnerable populations subject to dispossession and dislocation); see also Sheila Foster, The City as an Ecological Space: Social Capital and Urban Land Use, 82 NOTRE DAME L. REV. 527 (2006).
\item \textsuperscript{22} As he argues, “broader access to the security that comes with property rights could go a long way toward addressing many of this country’s most salient said problems . . . security that allows [low-income and low-asset people] to make the most advantageous use of those resources they have.” Super, supra note 21, at 1792-93.
\item \textsuperscript{23} See, e.g., Blomley, supra note 12, at 315-26 (arguing that the poor may have a legitimate property interest in a department store or other land use in their community that is predicated on use, occupation and domicile). The roots of progressive reformers’ commons analysis is traceable to the work of Michael Hardt and Anthony Negri, who refer to the “common” (rejecting the term “commons” as a reference to “pre-capitalist shared spaces that were destroyed by the advent of private property”) as the product of shared efforts by city inhabitants. Cities are, as they argue, “to the multitude what the factory was to the industrial working class”; in other words, it is the “factory for the production of
\end{itemize}
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Progressive urban scholars do acknowledge the necessity of a theory of property for the utility of an urban commons framework, even if that framework is deployed in the service of a political movement rather than as a legal tool. Nevertheless, these scholars have neglected to develop the commons as a property concept or to engage the quite significant legal scholarship on the commons. To be fair, the legal literature on the commons is ideologically and theoretically far from where these progressive scholars begin and end their analysis of the urban commons. Legal scholars have tended to hew very closely to neo-classical economic assumptions when theorizing the issue of the commons and related property concepts. Even those legal scholars, including these authors, who have taken a stab at theorizing the urban commons, do so through the analytical lens of Hardin’s Tragedy, which in much of legal literature is interpreted as a story about suboptimal results from the cumulative actions of rational actors. That is, legal scholars have taken as the starting point the idea that the commons is an unrestricted and unregulated open access resource which allows uncoordinated actors to overconsume or overexploit the resource and then discuss solutions to avoid those tragic outcomes.

In this Article, we offer a more articulated and pluralistic account of the urban commons than currently exists in legal scholarship. In some instances, the characteristic of the resource under certain conditions mimics the conventional characteristics of what legal scholars and Elinor Ostrom refer to as a “common

the common,” a means of producing common wealth. MICHAEL HART & ANTHONY NEGRI, COMMONWEALTH 250 (2009).

24. See e.g. Blomley, supra note 12, at 325-26 (“[A]lthough there are many potential problems with using a language of property . . . it can provide a powerful, extant, political register for naming, blaming and claiming;” also noting that property rights “for too long have been the exclusive domain of the Right, configured in restrictive and antisocial ways”).

25. This is not to say that they do not quote legal scholars. They cite to Joseph Singer’s work on the reliance interest and property rights and other scholars, but not to scholarship on the commons. See, e.g., Blomley, supra note 12, at 325-26.


27. See, e.g., Fennell, supra note 26, 919-22 (2004) (describing Hardin’s tragedy as one in which users consume the resources beyond the point that they produce marginal benefits for anyone).

pool resource.” That is, the difficulty and cost of excluding competing users or uses of the resource render it an open access resource vulnerable to the tragic conditions of rivalry, overexploitation, and degradation. Under other circumstances, we argue, particularly for some property or urban goods “in transition” from private or public ownership to some future use (public or private), the commons is less a description of the resource and its characteristics and more of a normative claim to the resource. In these situations, the claim is to open up (or to re-open) access to a good—i.e., to recognize the community’s right to access and to use a resource which might otherwise be under exclusive private or public control—on account of the social value or utility that such access would generate or produce for the community.

This pluralistic conception of the commons also captures the ways that we can conceive of the city itself as a commons. From the descriptive framing of the commons, the city is an open access good subject to the same types of rivalry, or contestation, and congestion that needs to be managed to avoid the kinds of problems or tragedies that beset any other commons. Moreover, the ways in which progressive urban reformers and movements are making claims on the city resonates most strongly with the normative conception of the commons that we offer. In line with this conception, or claim, the city is a commons in the sense that it is a shared resource that belongs to all of its inhabitants. As such, the commons claim is importantly aligned with the idea behind the “right to the city”—the right to be part of the creation of the city, the right to be part of the decisionmaking processes shaping the lives of city inhabitants, and the power of inhabitants to shape decisions about the collective resource in which we all have a stake.

The commons framework, we argue, can provide a bridge between the normative claim to the city, and its resources, and the way in which those resources and the city itself is governed. Recognizing that there are many tangible and intangible resources in the city in which many users and other actors have a stake, or claim, the question that this Article asks is: what are the possibilities of bringing more collaborative governance tools to decisions about how city space and common goods are used, who has access to them, and how they are shared among a diverse urban population?

The analytical traction offered by invoking the literature on the commons to think through resource allocation problems is the window that it offers into

29. She defined a common pool resource as natural or manmade resource system “that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining the joint benefits from its use.” Ostrom, supra note 17, at 30. That is, the resource is characterized by non-excludability and rivalry. See id. Note also that she rejected Hardin’s conceptualization of the commons, distinguishing his scenario as an “open access” resource with no boundaries, distinct from her conception of the common pool resource.

30. See infra Part I.C.

31. See, e.g., Purcell, supra note 10.
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questions of management and control over those resources. Hardin famously postulated that threats of degradation and destruction of the commons give rise to either a system of centralized public regulation or the imposition of private property rights in order to avoid the “tragedy.”  

Ostrom’s groundbreaking work, on the other hand, demonstrated that there are options for commons management that are neither exclusively public nor exclusively private. Ostrom identified groups of users who were able to cooperate to create and enforce rules for using and managing natural resources—such as grazing land, fisheries, forests and irrigation waters—using “rich mixtures of public and private instrumentalities.”

In previous work, we identified a number of small- and large-scale urban resources—neighborhood streets, parks, gardens, open space, among other goods—which are similarly being collaboratively managed by groups of heterogeneous users, often with minimal involvement by the state or the city. Some examples that we have analyzed in previous work include community gardeners, business improvement districts (BIDs) and community improvement districts (CIDs), neighborhood park groups and park conservancies, and neighborhood foot patrols. The emergence of these user-managed, but not user-owned, resources, we think, represent not only a new way of managing urban commons but indeed a democratic innovation for how we distribute and manage common urban assets.

In this Article, we tease out from these examples (and others) a set of democratic design principles that can be replicated to manage or govern a range of shared urban goods and resources. These principles—horizontal subsidiarity, collaboration, and polycentrism—reorient public authorities away from a monopoly position over the use and management of common assets and toward a shared, collaborative governance approach. In other words, the Leviathan state

32. Hardin, supra note 16, at 1245-47.
33. Ostrom, supra note 17, at 182.
34. See Foster, supra note 28, at 91-93; see also Christian Iaione, Local Public Entrepreneurship and Judicial Intervention in a Euro-American and Global Perspective, 7 WASH. U. GLOBAL STUD. L. REV. 215 (2007); Iaione, supra note 28.
35. See Foster, supra note 28 (describing BIDs, community gardens, foot patrols, neighborhood park groups, and park conservancies as institutions that manage or govern common urban resources).
36. As Anna di Robilant has argued, our conceptions of property are constantly changing and many new forms of property involve and require mechanisms of democratic and deliberative governance structures to sustain them. Anna di Robilant, Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law, 62 AM. J. COMP. L. 367, 367 (2014) (“[W]e have come to believe that, for some critical resources that involve public interests, use and management decisions should be made not by a single owner, whether public or private, but through a process that is democratic and deliberative.”).
gradually becomes what we call the facilitator, or enabling, state. The governance regime for shared urban resources becomes one without a dominant center but instead one in which all actors who have a stake in the commons are part of an autonomous center of decision making as co-partners, or co-collaborators, coordinated and enabled by the public authority.

Similarly, by thinking of the city itself as a commons, we might look beyond the reigning public regulatory regime in most cities to more collaborative and polycentric governance tools capable of empowering and including a broader swath of urban residents in decisions about resource access and distribution in the city. Most cities around the world have a system of land use laws (the public regulatory option that Hardin proposed as one solution) that manage city space and its resources to avoid conventionally tragic outcomes such as negative spillovers from incompatible land uses. 37 There is healthy skepticism, however, about the effectiveness of the current regulatory regime to navigate the very urban politics of which progressive reformers complain, 38 particularly the hold that the economic “growth machine” 39 seems to have on urban development and local officials. 40

In the last part of the Article, we begin to muse about what it might look like to scale up from the individual resource to the city level the democratic design principles that already characterize existing urban commons management structures. 41 We conclude by proposing a new governance model—“urban collaborative governance”—for managing the city as a commons. This model re-situates the city as an enabler and facilitator of collaborative decision making structure(s) throughout the city, and attends to questions of political, social and economic inequality in cities. We then explore two innovations in city governance—the “sharing city” and the “collaborative city”—which embody many of the principles, or pillars, of our urban collaborative governance model.

37. See infra Part II.A.

38. See Richard C. Schragger, Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century, 7 HARV. L. & POL’Y REV. 233 (2013) (identifying impediments, including a pro-growth ideology that continues to dominate city politics, a federal political structure that weakens cities, and cities’ general estrangement from mainstream American politics.).


40. For a contrary view, expressing doubt that many cities look like growth machines, see Vicki Been et al., Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?, 11 J. EMPIRICAL LEGAL STUD. 227 (2014) (providing results of an empirical study of over 200,000 lots in New York City that were considered for rezoning, demonstrating that homevoters, and not business and real estate interests, are more powerful in urban land use decisions than scholars, policymakers and judges have assumed).

41. We anticipate a much more in-depth, book treatment of this link in the near future.
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In Part I of the Article, we identify and analyze the variety of commons or common pool resources in the urban context. In Part II we examine some areas of property and land use law that may prove important tools for claiming, protecting and managing urban common pool resources. In Part III we explore and suggest some principles, institutional tools and mechanisms that foster and sustain cooperative efforts to govern urban common resources. Part IV explores what it might look like to scale up these principles to govern the city itself as a commons to promote more inclusive forms of decision making and more equitable distribution of these resources.

I. The Commons And The City

In this Part, we offer a pluralistic conception of the urban commons, identifying the existence of, and potential for, different commons at different scales in the urban environment. We start by considering some of the conceptual distinctions that legal scholars have offered for understanding the characteristics of a commons. These distinctions matter not only for analytical clarity, but also because they tell us something about the nature of the challenges that such certain goods and resources face and the necessity for different kinds of legal protections and governance solutions.

Building on these distinctions, we then explore the ways in which different kinds of urban resources can be considered a commons, or a common resource. First, we identify “raw” and vacant urban land as a commons; second, a variety of open spaces and infrastructure (streets, roads) in cities can constitute a commons; finally, we examine the claim that some abandoned or underutilized public and private structures and buildings in the city should constitute a commons. Some of these resources, under certain conditions, mimic the conventional characteristics of an open access commons—subject to rivalry and overconsumption or degradation—and giving rise to classic commons management and governance dilemmas. For other resources, the commons claim is intended to open up access of the resource in order to produce other common goods or to enhance the social utility of the asset for a broader class of urban inhabitants.

A. Conceptualizing the Commons

Garrett Hardin’s Tragedy of the Commons unfolds in the context of a quintessential open access commons—an open pasture in which each herdsman is motivated by self-interest to continue adding cattle until the combined actions of the herdsmen results in overgrazing, depleting the shared resource for all herdsmen.42 The open access commons thus has as its baseline a resource in which use is unrestricted or unmanaged, and which allows uncoordinated ac-

42. See Hardin, supra note 16, at 1244 (“As a rational being, each herdsman seeks to maximize his gain... [Thus e]ach man is locked into a system that compels him to increase his herd without limit—in a world that is limited.”).
tors to overuse or overexploit the resource.\textsuperscript{43} As he argued, absent a system of private enterprise or government control (i.e., allocation of use and other rights), it would be difficult, if not impossible, to restrain the impulse of users to pursue their individual self-interests even when pursuit of those interests result in the degradation or exhaustion of the resource.\textsuperscript{44}

Pivoting off of Hardin’s insights, legal scholars and economists distinguish between “open access” and “limited-access” commons, on the one hand, and between public goods and common goods, on the other hand.\textsuperscript{45} Public goods (e.g., highways, transportation systems, public schools) are resources that, although open access due to their “public nature,” do not present the problems of traditional commons because one user’s share or consumption of the good does not rival, or subtract from, another user’s.\textsuperscript{46} Moreover, even when public goods such as infrastructure become partially rivalrous, the government or private provider bears the responsibility of maintaining sufficient capacity and maintaining the good as an open access one, usually on a common carrier basis.\textsuperscript{47}

Although certain forms of private property are held “in common” by a collection of individuals and may include shared common space for the collection of rights-holders (e.g., a gated community or a condominium complex), in most respects this property follows the logic of and operates like private property.\textsuperscript{48} These and other “limited-access” common interest communities may look like traditional “commons on the inside” for those who have access through owner-

\textsuperscript{43} Garrett Hardin, \textit{The Tragedy of the Unmanaged Commons}, 9 TRENDS IN ECOLOGY \& EVOLUTION 199, 199 (1994) (“[A]ll exploiters suffer in an unmanaged common.”).

\textsuperscript{44} See Hardin, \textit{supra} note 16, at 1244-45 (arguing that individual users of the commons would always enjoy the full benefit of their use, but absorb only a small fraction of the marginal cost of that use).

\textsuperscript{45} See, e.g., Lawrence B. Solum, \textit{Questioning Cultural Commons}, 95 CORNELL L. REV. 817, 821-22 (2010). Further distinctions are made between toll goods, club goods, public goods, and common pool goods. \textit{Id.} at 823-24; \textit{see also Ostrom, supra} note 17, at 48 (distinguishing between limited and open access commons, the former involving those resources typically operating pursuant to a set of explicit or implicit usage and membership constraints).

\textsuperscript{46} Solum, \textit{supra} note 45, at 822.


\textsuperscript{48} In exchange for their association dues, owners in these common interest communities have access to common facilities, such as roads and recreational areas, and to private services, such as neighborhood security, trash collection, street maintenance, and lighting. The rules of the community can be highly restrictive and are administered by a private residential government elected by the owners. Often these communities are reluctant to pay for public goods outside of themselves and, some would argue, contribute to the privatization of urban space (and enclosure of the urban commons). \textit{See generally Evan McKenzie, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF PRIVATE RESIDENTIAL GOVERNMENTS} (1996).
ship or usage rights in the community, but very much operate like “[private] property on the outside” in that these communities are endowed with the right to exclude non-owners from their shared spaces or resources. Limited-access commons are able to avoid tragic outcomes because they operate through a set of explicit or implicit usage and membership constraints designed to protect against overconsumption and exploitation. On the other hand, truly open access resources, like Hardin’s pasture, in which exclusion is impossible or costly, are vulnerable to the tendency toward rivalry, exploitation and degradation or exhaustion of the resources.

Another conception of the commons that appears in the legal literature, and that does not depend on subtractability or rivalry, or “tragedy,” is important for an urban commons analysis. As Carol Rose has written, there are some open-access resources, particularly land, in which increased use does not create rivalry but rather enhanced utility or value for the public, such that these resources become essential or highly functional resources for city inhabitants. One example Rose offers is the customary right claimed by some communities to hold periodic dances, a custom held over a landowner’s objections, and in which each added dancer brings “new opportunities to vary partners and share the excitement.” In this and similar scenarios, the “comedy” of the commons is marked not by the impulse to rival each other to consume the good but instead by the impulse to get more of the public to participate (e.g. “the more the merrier”), thus “reinforce[ing] the solidarity and well-being of the whole community” and enhancing the value of the resource and the activity taking place within it.

Rose found that some British courts considered these resources “inherently public property,” on the basis of the enhanced value that public use generated, and vested in the public the right to use property otherwise subject to exclusive

50. This is illustrated by Elinor Ostrom’s groundbreaking work on the management of natural resources by groups of users who set rules of membership and oversee usage of the resource. See Ostrom, supra note 17.
51. Fennell, supra note 26, at 913-14.
52. Carol Rose, The Comedy of the Commons: Custom, Commerce, and Inherently Public Property, 53 U. CHI. L. REV. 711 (1986) (asserting that the public’s custom of dancing or carousing in a particular place, like the habit of traveling on certain roads, makes various lands essential to the public; by these customs the public communicates the value of certain resources to the community).
53. Id. at 767.
54. Id. at 767-68, 770 (“In an odd Lockeanism, the public deserved access to these properties, because ‘publicness,’ nonexclusive open access, created their highest value.”).
private control.\textsuperscript{55} These courts considered the customary use of the resource by the public a signal of the special social value or emotional investment for the community,\textsuperscript{56} such that the more individuals engaged or participated in the activity the more valuable it became for that community.\textsuperscript{57} As she points out, this vesting of property rights in the “unorganized public” rather than in a “governmentally-organized public” departs strikingly from the neo-classical economic view of the commons.\textsuperscript{58} These cases also suggest, she argues, the means by which a commons may be self-managed by groups of the public as an alternative to exclusive ownership by either individuals or exclusive management by governments.\textsuperscript{59}

These two ideas of the commons—one based on the inevitable rivalry or subtractability of an open access resource, and the other based on the inherent public value of an open access resource (even if privately held) customarily utilized in ways that suggest it is an essential or necessary one for the community of users—inform but does not limit our analysis below of different kinds of urban commons. In the next Part, we take the insights from these different conceptions of the commons and expand them to capture urban commons at different scales and the idea that the city itself is a common resource.

\textbf{B. City Space as a Commons}

\begin{displayquote}
\textit{Before the city, there was the land.}
- William Cronon\textsuperscript{60}
\end{displayquote}

In his groundbreaking history of the development of Chicago in the 19\textsuperscript{th} century, William Cronon recounts how Chicago was formed out of a city-less landscape, with its own “complex set of natural markers,” by people who migrated there and created the urban landscape through cultural and economic exchanges. “By using the landscape, giving names to it, and calling it home,

\begin{itemize}
\item \textit{Id.} (describing British cases from the early nineteenth and twentieth centuries in which, for example, public use had capacity to expand human social interaction for members of “an otherwise atomized society”); \textit{see also} Frischmann, \textit{supra} note 47, at 926-27 (noting that open access to infrastructure goods is often legally mandated because infrastructure goods are essential to the consumption or production of other goods).

\item \textit{Rose, supra} note 52, at 711, 721 (noting that the custom must have existed for a long time and had to be well-defined and reasonable).

\item \textit{Id.} at 767-68 (describing this as generating positive externalities or spillovers for other members of the public).

\item \textit{Id.} at 711 (also pointing out that these property rights claims lacked the exclusivity that normally accompanies individual property rights entitlements).

\item \textit{Id.}

\end{itemize}
people selected the features that mattered most to them and drew their mental maps accordingly. Once they labeled those maps in a particular way . . . natural and cultural landscapes began to shade into and reshape one another.”

In this way, great cities are constructed, shaped, and re-shaped by the inhabitants that are drawn to them and the interactions among them. Like Hardin’s open access field, however, there is also the potential for tragedy resulting from congestion and overconsumption of urban land.

1. Urban Land as a Common Pool Resource

As one commentator succinctly explains, “the city analog to placing an additional cow on the commons is the decision to locate one’s firm or household, along with the privately owned structure that contains it, in a particular position within an urban area.” Congestion and overconsumption of city space can quickly result in rivalrous conditions in which one person’s use of that space subtracts from the benefits of that space for others. The classic example of rivalry is the creation of negative externalities resulting from locating a particular land use in close proximity to other land uses—for example, where a polluting factory is placed next to a home. As in Hardin’s open pasture, absent a system that allocates use rights, it is difficult, if not impossible, to restrain the impulse of users to pursue their individual self-interests, even when pursuit of those interests result in the degradation or exhaustion of the resource. As he argued, such “freedom in the commons”—i.e., the lack of controls on individual behavior and self-interest—ultimately leads to its ruin and hence to the “tragedy.”

In most places in the world, threat of tragedy—the urban equivalent of overgrazing cows in Hardin’s example—from these individual choices are addressed through land use rules which control for consumption of city land and negative externalities. Zoning regulations manage much of city space like a commons, controlling density, height and bulk and by separating (or excluding) incompatible land uses as a way of limiting the impacts on the urban environment more generally and on the space inhabited by other users of the commons. Land use regulations are also aimed in large part at controlling and managing a variety of tangible and intangible aspects of the urban environment in which urban residents share a common stake—e.g. shared open spaces, infrastructure, local amenities, and the quality of the physical environment (e.g., air, water, noise levels). In this way, land use regulation is designed to avoid the potential overconsumption of urban space and also reduce (although by no means avoid) potential rivalry in the use of urban space.

61. Id. at 25.
62. As she further explains, “[s]uch structures and their operations, like grazing cattle, draw sustenance from, and visit impacts upon, the surrounding community.” Fennell, supra note 28, at 1382.
In places without highly regulated systems for land management we can see very clearly the kind of modern day tragedy: where open land is available, including here in the United States, raw urban (and rural) land is literally “up for grabs” for squatters, land speculators, and others who want to subdivide and sell the land (sometimes legally, sometimes illegally) to new settlers. Informal housing settlements, both in the developing and developed world, exist in unincorporated (and hence unregulated) urban areas, often at the fringe of growing cities, where poor inhabitants occupy land (either through squatting or purchasing) and construct homes on that land. In the absence of building codes and other land use regulations residents often live without water or sewage lines, sidewalks or paved roads, drainage or flood control, creating health and safety risk throughout these communities and to neighboring communities.

This urban self-help, or urban informality, is, in part, a rational response to the scarcity of urban land and the very high entry barriers to formal housing markets. Urban land is being quickly consumed and its availability is slowly disappearing, raising many of the questions of commons management and governance that beset other unregulated open access resources. As importantly, urban land is being developed in unsustainable ways and in a manner that places at risk of degradation many other parts of the urban metropolitan commons. These settlements place additional, unaccounted for demands on anarchic traffic patterns and collapsing infrastructure in the metropolitan areas of which they are apart. The cost of this pattern of informal development—a patchwork of market rate housing in the center city and substandard housing settle-

64. As Jane Larson argues: “Most colonia settlements are extra-legal rather than illegal. When residents and developers created existing colonias, subdivision and sale of rural land for residential construction without provision of basic infrastructure or access to public services was lawful, and no building codes set housing standards. Yet where the state fails to regulate activities that in other settings are regulated according to accepted patterns, a kind of informality develops, albeit one built on legal and material nonconformity rather than illegality.” Jane E. Larson, Informality, Illegality and Inequality, 20 YALE L. & POL’Y REV. 137, 140 (2002); see also Jane E. Larson, Free Markets Deep in the Heart of Texas, 84 GEO. L.J. 179 (1995).


66. In part it is also a predictable result of an “economic gravity model of urban development, in which exclusionary zoning interacts with cities’ magnetic pull on wage earners to generate unregulated, peripheral development for low-income families.” Michelle Wilde Anderson, Cities Inside Out: Race, Poverty and Exclusion at the Urban Fringe, 55 UCLA L. REV. 1095, 1099 (2008).


68. See, e.g., MIKE DAVIS, PLANET OF SLUMS 128-29 (2006) (analyzing slum ecology); See also generally ROBERT NEUWIRTH, SHADOW CITIES: A BILLION SQUATTERS, A NEW URBAN WORLD (2005).
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ments on the periphery—is but one version of the tragedy of the urban commons.

2. Open Space and Urban Agglomeration

In addition to urban land itself as a commons, much of the infrastructure of the city is a commons. These open access goods—such as the streets, plazas, and parks draw to them the “unorganized public” and are places where proximity breeds interaction among city inhabitants. It is often the character of these open spaces and the interaction between city inhabitants that create, or at least substantially add to, the culture and “vibe” of a city.

As Lee Fennell has written, urban “interaction space” becomes the common pool resource that renders public spaces so valuable. In other words, interaction space facilitates a host of other goods that are made possible by the non-excludability of the space and, ironically, from its potential for congestion. Those goods include knowledge exchange, social capital accumulation, and various other agglomeration benefits that accrue to individuals in close proximity to one another. Many scholars couch these benefits in economic terms, as the “positive externalities” that can result from urban proximity and density. Capturing the positive gains of urban “interaction space” is in large part what draws commoners to public open spaces, and is also what in turn gives these spaces value.

On a macro level, urban agglomeration economists argue that one of the main reasons individuals move to cities is to capitalize on the concentration, or agglomeration, of others from whom they can learn and with whom they can interact. As such, open access interaction spaces have value as an urban amenity that adds to the attractiveness of cities, particular those that seek to draw to them what urban theorist Richard Florida has termed the “creative class”—a category that includes the well-educated and others with particular skills and

69. See generally Rose, supra note 52 (describing the “unorganized public” as users comprised of an indefinite and open-ended class of persons).

70. Fennell, supra note 28, at 1376-77 (using the term a bit more broadly to mean the place where all economic actors, firms and households choose to locate and choose to access a composite of urban goods).

71. Id. at 1373.

72. According to this view, individuals looking to increase their human capital gains are drawn to urban areas because they are able to more efficiently acquire skills due to the greater opportunities to interact with other highly educated, skilled and creative people who live, work and socialize in close proximity to one another—thus increasing the rates of human capital accumulation, technological innovation, and ultimately urban growth. See generally Edward L. Glaeser et al. Growth in Cities, 100 J. POL. ECON. 1126, 1127-34 (1992); Edward L. Glaeser & Matthew G. Resseger, The Complementarity Between Cities and Skills, 50 J. REGIONAL SCI. 221, 242 (2010).
interests suited to the modern knowledge-based economy. The attraction of the creative class to a city or county has significant positive spillovers, creating an environment that is more open to innovation, entrepreneurship, and spurring economic growth in the service sector. This leads not only to improved economic outcomes, which benefit the city and its residents, but also to creating the “buzz” of a “cool” city attractive to other urban migrants.

3. Tragedy of the Urban Commons

Paradoxically, it is the openness of many city spaces that can also quickly result in an urbanized version of the tragedy of the commons. In other words, these same spaces that produce agglomeration benefits and other valuable social goods can quickly mimic the tragic conditions that beset common pool natural resources. Too much usage, either in volume or intensity, of a park or a neighborhood street, for example, can quickly result in the kind of congestion that degrades these spaces. Similarly, certain types of uses can create incompatibilities with many ordinary uses and conservation of such spaces, creating the conditions for rivalry or subtractability.

The tragedy of many city commons arises not, as in Hardin’s example, from a pre-political or pre-regulated space in which “everyone has privileges of inclusion and no one has rights of exclusion.” Rather, it arises as a result of weakly or poorly regulated space—i.e., what one of us has called “regulatory slippage.” In other words, these are spaces that were perhaps once heavily reg-

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73. Providing the kind of urban amenities that will attract highly mobile creative types, Florida argues, is fundamental to the growth of cities and metropolitan regions. To attract them, cities should offer amenities like the arts and a cultural climate that appeals to young, upwardly and geographically mobile professionals. See Richard Florida, The Rise of the Creative Class, Revisited (2012); see also Terry Nichols Clark et al., Amenities Drive Urban Growth, 24 J. URB. AFF. 493 (2002).

74. Florida, supra note 73, at 46-48; 244-49; see also William Frey, Brookings Inst., Young Adults Choose “Cool Cities” During Recession 1-2 (Oct. 28, 2011), http://www.brookings.edu/blogs/up-front/posts/2011/10/28-young-adults-frey (noting that, to the extent they are moving, young adults are headed toward metro areas that are known to have a certain vibe—college towns, high-tech centers, and so called “cool cities”).


76. The government’s inability (or unwillingness) to effectively manage land over which it has exerted its jurisdiction creates the opportunity and the incentive for overuse (or misuse) of the land, and thus represents significant “regulatory slippage.” Foster, supra note 67, at 301.
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ulated to avoid rivalry but where such control has slipped, for whatever reason, significantly behind previous levels of public control or management.77

This tragedy of the city commons was the story reflected in the decline of many open spaces in U.S. cities in the 1970s and 80s in which a potpourri of users and uses came into conflict, leaving many streets, parks and other open spaces unsafe, dirty, prone to criminal activity, and virtually abandoned by most users.78

This urban tragedy can also result from an increase in “chronic street nuisances”—such as in the case of excessive loitering, aggressive panhandling, graffiti, or littering—that eventually begin to rival, if not overwhelm, other users and uses of open spaces.79 The resulting deterioration then escalated with the onset of a fiscal crisis and the decline in city appropriations, which many would argue sealed the fate of these cities for at least the ensuing two decades.

This is not to claim that the tragedy of the city commons was a precipitating, or even predominant, cause of the decline of American cities in the latter half of the 20th century. Rather, it is simply to underscore the fragile line that separates out the kind of urban congestion that produces rivalry, or subtractability, and the kind that produces the species of agglomeration benefits and social wealth that endow those spaces with utility and with so much of their value for communities and for the city as a whole. The point is that the kind of open spaces, or commons, that are an essential part of cities and that give cities much of their value can be contested in ways that require rethinking the governance and management of those spaces.

Perhaps not surprisingly, one response to the tragedy of many open access urban public spaces, which called into question the ability of public administrations to steward these resources, has been the rise of the Park Conservancies

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77. See Daniel A. Farber, Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law, 23 Harv. Envtl. L. Rev. 297, 301-03 (1999) (describing “negative” slippage as a failure to act or lax supervision by regulators, as well as noncompliance with existing standards by regulated parties).

78. See ROY ROSENZWEIG & ELIZABETH BLACKMAR, THE PARK AND THE PEOPLE: A HISTORY OF CENTRAL PARK (1992) (recounting story of Central Park in New York City, which began deteriorating due to a poorly managed potpourri of users and events, resulting in increased maintenance and cleanup costs, which the city was not able to absorb; this deterioration escalated with the onset of the fiscal crisis in the 1970s, which devastated the entire urban park system, leaving many parks and recreational areas unsafe, dirty, prone to criminal activity, and virtually abandoned by most users).

79. See Robert C. Ellickson, Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning, 105 Yale L.J. 1165, 1169 (1996) (defining chronic street nuisances as “when a person regularly behaves in a public space in a way that annoys—but no more than annoys—most other users, and persists in doing so over a protracted period” and arguing for a system of “public-space zoning” which would separate incompatible behaviors/conduct in public spaces).
and Business Improvement Districts (BIDs). These public-private partnerships are widely credited for the revitalization of urban parks, streets and commercial areas at a time when those resources were suffering from public neglect and during times of fiscal strain on local governments.\textsuperscript{80} Park Conservancies and BIDs, along with community gardens and neighborhood watch groups, are examples of what we would call urban commons institutions—a subject to which we return in Part III. They are a way of managing common resources without privatizing the resource but allowing a collection of public and private actors to manage the resource within a nested governance structure.\textsuperscript{81}

As we have previously pointed out, these are not always unproblematic institutions from the standpoint of distributional equity\textsuperscript{82} and certainly should not be embraced uncritically. We highlight them here to suggest the impetus to find new ways of governing shared, open access resources under conditions of regulatory slippage. These examples, and others,\textsuperscript{83} illustrate that there are viable alternatives to managing these resources that do not involve a more assertive system of government control, enforcement of social norms through criminal law, or private governance of these spaces.\textsuperscript{84}

\textsuperscript{80} See Foster, supra note 28, at 101-08 (reviewing the literature on the rise of BIDs and Park Conservancies during the 1990s in response to cities’ abdication of their stewardship over parks, “the general decline of city centers and commercial neighborhoods,” and “the attendant deterioration of street safety and consumer activity, as well as the inability of local governments to respond to these forces due to declining tax bases and limited resources”).

\textsuperscript{81} Id.

\textsuperscript{82} See, e.g., id. at 104 ("Park conservancies are criticized for imposing many of the costs that attend to the (at least partial) privatization of any public good—i.e., enabling gentrification, exacerbating ethnic and class tensions, and creating a two-tiered park system which disadvantaged parks in less affluent neighborhoods.”); id. at 107 ("BIDs, both large and small, have generated a vigorous debate about the extent to which they exacerbate the uneven distribution of public services, create negative spillover effects (e.g., crime), over-regulate public space, displace marginal populations from those spaces, and suffer from a severe democratic accountability deficit.”).

\textsuperscript{83} Id. at 93-101 (also discussing community gardening collectives, neighborhood park “friends” groups, and neighborhood foot patrols).

\textsuperscript{84} Id. at 108-18 (describing why these institutions involve the relinquishment of some government control of the resources, enabling cooperative or collective management of the resources, yet also do not amount to privatization of the resource in that “these groups cannot regulate access to the resources, control or impose restrictions on individual behavior, or otherwise usurp the local government’s role in making various policy choices about use of the resource”).
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C. Common Resources in the City

The openness of cities, and the urban agglomeration that results, is a double-edged sword for many urban communities. Cities are being shaped and reshaped to meet simultaneously the increasing demands of rapid urbanization and, as in the case of struggling cities, the need to more strategically attract new urban dwellers (such as the “creative class”) capable of revitalizing urban life. In addition to the more traditional concerns about congestion and rivalry, the openness of cities also brings with it the threat of dispossession and displacement from places of deep attachment and meaning for residents.

In these contestations over city space and resources, the commons claim has a distinctly normative flavor. The issue is not consumption of an open-access resource which results in either negative or positive spillovers. Rather, it is a question of distribution and, specifically, of how best to “share” the finite resources of the city among a variety of users and uses.85

For many urban inhabitants displaced by the market forces of gentrification, what is being lost, or claimed, are goods (both tangible and intangible) that have meaning by virtue of the way that residents have historically used, or are presently using, the space. For those living amongst the ruins of urban disinvestment, what are being claimed are goods that, although once fully owned and utilized by private or public owners, are now in transition and whose future ownership and use is indeterminate. Residents claim these goods in order for their communities to survive and function and to provide basic goods essential for human flourishing.

1. Property in Transition

In cities and neighborhoods characterized not by growth but rather by shrinkage and decline—think Detroit, Baltimore, Cleveland, Newark, Camden, etc.—many neighborhoods contain significant swaths of vacant land and vacant structures.86 Property becomes vacant typically as a result of a combination of factors including population loss, disinvestment, and abandonment. Much of this property is also located on land or in neighborhoods formally regulated by the local government but where the zoning designations governing the property are largely irrelevant because the future use of the property is uncertain. In other words, the land or structure is transitory, both in the sense that the land has been abandoned and not yet reclaimed (at least not formally in terms of transfer

85. See Fennell, supra note 26, 914 n.31, 919-22 (pointing out the distinction between distributive problems in the commons, in which users consume more than their “share,” and Hardin’s tragedy, in which users consume the resources beyond the point that they produce marginal benefits for anyone).

86. See, e.g., Georgette Chapman Phillips, Zombie Cities: Urban Form and Population Loss, 11 RUTGERS J. L. & PUB. POL’Y 703 (2014) (describing zombie cities as decimated cities and arguing that current zoning and land use laws that focus on growth do not address these cities’ challenges).
of title), and because the land is moving away from a past use and towards a future use that is unknown and unplanned.

While in a transitory state, vacant land and structures are quite vulnerable to contestation of uses. Conflicts often emerge regarding present vs. future uses and different possibilities for future use. These conflicts exist between present owners of the land and the local government, and between the surrounding community and the local government, which may be hoping to sell abandoned property to private developers or investors. There are also conflicts among various users who have near-unfettered access to the property and who may have in mind competing uses for the property.

As we explain below, residents who live in these communities often begin using property that has been abandoned and which may be adding to the conditions of blight in the surrounding community. In many cases, community members may begin to treat the property as an open access resource, utilizing it in ways that add value to the surrounding community and/or which produce goods for that community (as in the case of community gardens or urban farms or using abandoned homes to house the homeless). In other instances, public users conduct illegal activities (dumping, crime, etc.), which clearly does not add value to the surrounding community.

Thus, in addition to creating the potential for tragedy, conflict surrounding the use of vacant or underutilized property in distressed cities also has the potential to capture positive value for the community by virtue of using the property to create goods (both tangible and intangible) that can be shared. Unlike Hardin’s tale of tragedy, in which adding an additional person to an open access resource subtracts value from the resource, opening up access to abandoned or vacant property instead can enhance its value to the community.

In some cases, however, there are competing ideas about the best use of the property and whom should benefit most directly from its use. For example: local government officials might be interested in selling large swaths of vacant space in a blighted neighborhood to attract commercial intensive development or market rate housing as a means for attracting a new class of residents to their cities. Members of the community, however, might want to claim the land for “commoning” activities—such as to build a community garden or urban farm which enables residents to produce both tangible (food, green space, recreational space, and public safety) and intangible (social networks, mutual trust, fellowship, a sense of security) goods for the surrounding community.

87. See Rose, supra note 52 (explaining that the non-exclusivity of the space can make the use of the commons valuable because the activities taking place within that space are exponentially enhanced by greater participation by the public and thus benefit from scale economies).

88. “Commoning” is a term popularized by historian Peter Linebaugh to describe the social practices used by commoners in the course of managing shared resources and reclaiming the commons. LINEBAUGH, supra note 15, at 59 (noting that the practice of commoning can provide “mutual aid, neighborliness, fellowship, and family with their obligations of trust and expectations of security”).

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In other cases, local residents may be pushing to transform the land or vacant structures into affordable housing units, a town commons, a community center, a charter school, or infrastructure for local businesses. In cities still struggling to revitalize their inner core, residents are working to transform entire neighborhoods pockmarked with vacant lots and abandoned property into livable and affordable communities. This is what, now quite famously, occurred in the Dudley Street neighborhood of Boston in the late 1980s and early 1990s. Known at the time as one of the poorest areas of Boston, residents there claimed fifteen acres of vacant lots owned by the city and fifteen acres of vacant lots privately owned but with tax liens (with the help of the city’s eminent domain power) to create an “urban village” of affordable housing, shopping, open green space and a community center. Members of the neighborhood formed a community land trust into which these properties were placed and which will preserve the village as an affordable and accessible commons for future generations.

2. Occupying the Commons

When there is conflict about the future use of open, abandoned or vacant land or structures, the conflict is often highlighted or magnified by the illegal occupation of the resource as a way of claiming it as a common resource. This characterizes a number of social movements in the United States and abroad in which activists occupy vacant, abandoned or underutilized land, buildings and structures as a means of altering the underlying property arrangement of certain goods away from an exclusively owned good (either public or private) to one that is held open for and managed by a community of users.

These movements are responding to what they view as market failures and the failures of an urban development approach which has neglected the provision of goods necessary to human well-being and flourishing. The tactic of occupation is a form of resistance against the enclosure—through private sale or public appropriation—of these goods. Occupation is also a way of asserting that the occupied property has greater value or utility as a good either accessible to the public or preserved and maintained as a common pool resource.

While not explicitly using the language of the “commons,” these contemporary “property outlaws,” are very much staking claim to the property in

89. See supra note 71 and accompanying text (discussing the Dudley Street Neighborhood Initiative).

90. Lisa T. Alexander, Occupying the Constitutional Right to Housing, 94 Neb. L. Rev. 245, 248 (2015) (exploring the ways in which property lawbreaking in this context can help “concretize the human right to housing in local American laws, associate the human right to housing with well-accepted constitutional norms, and establish the contours of the human right to housing in the American legal consciousness”).

91. See Eduardo Moises Penalver & Sonia K. Katyal, Property Outlaws: How Squatters, Pirates, and Protestors Improve the Law of Ownership 12, 18
transition as a common good. For example, in many parts of the United States, as well as in countries such as Brazil and South Africa, activists occupy and squat in foreclosed, empty, often boarded up homes and housing units (including public housing units) as a means to convince municipalities to clear title and transfer these homes and units to communal forms of ownership. This “occupy” or “take back the land” movement is a response to the displacement of homeowners and tenants brought on by the confluence of the housing/mortgage crisis and the forces of gentrification. As investors move to buy up foreclosed homes at auctions and flip them, or raise rents, nonprofit organizations propose instead to take some of these properties out of the real estate market altogether and to create either limited-equity apartments or long-term affordable rentals.

Moreover, the difficulty and high cost of excluding users, and the potential for rivalry, sometimes result in such abandoned structures becoming sites for illegal drug activities and other nuisances, adding to the visible blight and overall decline of the surrounding community. For this reason, it is perhaps not surprising that local officials (and in some instances local laws) often condone the occupation and transformation of these structures by community members who aim to return the asset to productive use in ways that beautify and improve the properties and, by extension, the surrounding neighborhood. Transferring

(2010) (using “property lawbreaking” to intentional civil disobedience to challenge existing property laws).

92. *See, e.g.*, Colin Moynihan, *Umbrella House: East Village Co-op Run by Squatters*, N.Y. TIMES (July 15, 2015), http://www.nytimes.com/2015/07/19/realestate/umbrella-house-east-village-co-op-run-by-former-squatters.html (reporting on a successful effort in New York City in which squatters occupied what was an abandoned city-owned tenement and which the City eventually turned over to the squatters with 10 other buildings they had taken over).

93. Alexander, supra note 90, at 268-70 (describing the “take back the land” movements in Philadelphia, Boston, Chicago and other American cities and indicating that these activists and their organizations learned from similar activists in South Africa and Brazil).

94. In at least one case, the houses are owned by Fannie Mae and activists are pushing it to sell them to a nonprofit whose goal is to buy up foreclosed properties with the aim of turning them into long-term affordable rental housing for neighborhood residents. Marisa Mazria Katz, *Occupying Empty Houses and Airwaves to Fight Foreclosures in Boston*, CREATIVE TIME REP. (July 1, 2014), http://creativetimereports.org/2014/07/01/editors-letter-july-august-2014-occupy-houses-fight-foreclosures-in-boston-john-hulsey/ (reporting on City Live/Vida Urbana, a Boston based community group).

95. Alexander, supra note 90, at 271.

96. *Id.* at 271 (noting that local officials and police often tolerate and condone the “occupations” for this reason and noting that in one state, Illinois, there exists a statutory exception to prosecution for criminal and civil trespass for a person who
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previously privately held structures to a community land trust, or converting them into deed-restricted housing, would keep these properties perpetually affordable for low- and moderate-income households and would allow the residents to self-manage them as an urban commons.97

In a similar way, the Italian movement for “beni comuni” (common goods) utilizes occupation to stake public claim to abandoned and underutilized cultural (and other) structures in an effort to have these spaces either retained as, or brought back into, communal use.98 The most famous of these occupations is that of the national Valle Theatre in Rome. The theatre had become largely defunct as a result of government cuts for all public institutions, and the Italian Cultural Ministry transferred the management of the theater to the City of Rome. Out of fear by many that the City would then sell it to a developer as part of a larger project for a new commercial center, a collection of art workers, students, and patrons occupied the theater.99 This occupation was followed by similar occupations of cultural institutions and other structures that were subject to privatization in cities all over Italy.100 In each case, the occupants’ aim

97. See Huron, supra note 12 (describing limited equity cooperative housing in Washington, D.C. as an urban commons).
99. Saki Bailey & Maria Edgarda Marcucci, Legalizing the Occupation: The Teatro Valle as Cultural Commons, 112 S. ATLANTIC Q. 396 (2013) (recounting the occupation and background). According to official documents, the City of Rome and the Italian Cultural Ministry were not able to reach an agreement on the future of the Teatro Valle. The City of Rome appointed a special commission to prepare a proposal through a deliberative democracy process. This commission delivered a report, the Rapporto sul Futuro del Teatro Valle, which formed the basis for a new agreement between the two institutions. According to the report and the new agreement, the public use and management of Teatro Valle was reaffirmed and a participatory governance model proposed and agreed upon. See FRANCA FACCIOLI ET AL., ASSESSORATO CULTURA, CREATIVITÀ E PROMOZIONE ARTISTICA DI ROMA CAPITALE, RAPPORTO SUL FUTURO DEL TEATRO VALLE (June 2014); Lorenzo Galeazzi, “This Is The Future Of The Valley Theater”. But Marino Keeps Hidden The Dossier, IL FATTO QUOTIDIANO (July 9, 2014), http://www.ilfattoquotidiano.it/2014/07/09/questo-il-futuro-del-teatro-valle-ma-marino-nasconde-il-dossier/105448 (report embedded).
100. Bailey & Mattei, supra note 98, at 996-97 (listing as examples the Cinema Palazzo in Rome, the Marinoni Theater in Venice, the Coppola Theater in Catania, the Asilo Filangieri in Naples, the Garibaldi Theater in Palermo, the Rossi Theater in Pisa, the Pinelli Theater in Messian and the Macao, a thirty-one-story building, in Milan).
was “to recover people’s possession of under-utilized” structures and “open up” these spaces for the flourishing of common goods like culture.\textsuperscript{101}

3. The Production of the Commons

The push to effectuate the transformation of vacant, abandoned or underutilized property from an exclusively private (or public) good to a communally held good is in part an effort to formalize the way in which users are already treating the good—as an open access good or as a user-managed commons. In large part, however, the basis for claiming the property for collective use or consumption is premised on the utility or value that these structures have for a broader group of users than exclusive ownership allows. In other words, the value generated by transforming these vacant structures into a public or community good—say a community garden, an urban farm, affordable housing, or cooperatively owned community assets—is said to outweigh (or at least heartily compete with) the value that these structures would retain under their existing use, whether they remained vacant or sold on the market for profit.

This is not a cold utilitarian calculus according to which the value that maximizes overall social welfare prevails. Rather, it is an argument that the utility of claiming, or reclaiming, property as a commons lies in its normative relationship to the community, whether on the scale of a block, neighborhood or city. Martin Kornberger and Christian Borch make the astute point that what gives the urban commons its value is the function of the human activity and network in which the resource is situated.\textsuperscript{102} In other words, “value is the corollary of proximity and density which are both relational concepts;” the value of a resource that is collectively produced results from human activity and is contingent on the ability of people to access and use the resource.\textsuperscript{103} The legal owner of the resource is “only able to capture the ‘unearned increment’ through cutting the [resource] off from its surrounding environment and turning it into an isolated, tradeable object—its value results from mistakenly attributing network effects to the [resource] itself.”\textsuperscript{104}

Consider the case of hundreds of community gardens in previously distressed New York City neighborhoods which local officials proposed to auction off to private developers. These lots were left vacant by the demolition of buildings abandoned by their original owners. Residents cleared the lots of trash and drug paraphernalia, planted and cultivated plants and vegetables, and created

\textsuperscript{101} Id. at 997; see also Alessandra Quarta & Tomaso Ferrando, Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation, 15 GLOBAL JURIST 261 (2015).

\textsuperscript{102} Christian Borch & Martin Kornberger, Introduction to URBAN COMMONS: RETHINKING THE CITY 6-7 (Christian Borch & Martin Kornberger eds., 2015).

\textsuperscript{103} Id. at 7-8.

\textsuperscript{104} Id. at 8.
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safe community spaces in otherwise socially and economically fragile communities. City officials persistently characterized the land as “vacant,” stripping the land of its social (and economic) value to its users, and argued that in the long run the communities where the gardens sat would benefit from the new development and the affordable housing that the city planned to build on some of the lots. 105 This characterization stripped the resource of any functional value to the community, or to the city for that matter. Yet, by auctioning off the gardens the city was able to capture the “unearned increment” from the resource—the increase in surrounding property values resulting from the improved neighborhoods 106—without accounting for the inevitable dispossession and displacement that ultimately resulted from gentrification of these neighborhoods.

The utility claimed by urban residents who claim, or attempt to claim, urban land or structures as a cooperatively managed resource is linked to the idea that the commons is socially produced—that is, it is created, used, preserved, and managed by some collection of people. 107 In this sense, the commons fosters social relationships between the people within it, and consists of the relationship created between the users and the resource. Community and urban gardens are said to facilitate the development of social capital among its networked participants, which in turns produces a host of other goods such as public safety, recreational opportunities, green space, fresh food, and other critical resources for neighborhood residents, particularly in disadvantaged neighborhoods. 108 As such, when community gardeners resist the taking of these gardens by the city to sell them off to a private developer, they are making a normative claim about value or utility of the resource as it relates to the ability of the community to function and to flourish as a healthy, sustainable community.

4. The Social Function of Property

The idea that an urban resource otherwise subject to exclusive private or public ownership rights should instead be claimed and utilized as a commons can be rooted in the “social function of property” principle found in many con-

105. Foster, supra note 21, at 534-38 (recounting the legal struggle over the gardens). In the end, luxury condos and parking lots occupy any of the spaces where these lots stood and it is clear that the city did not have a real plan for affordable housing. Id. at 536 n.29; see also In re New York City Coal. for the Pres. of Gardens v. Giuliani, 670 N.Y.S.2d 654 (Sup. Ct. 1997), aff’d, 666 N.Y.S.2d 918 (App. Div. 1998).

106. Notably, researchers have found that property values tend to go up in disadvantaged communities with community gardens. Ioan Voicu & Vicki Been, The Effect of Community Gardens on Neighboring Property Values, 36 REAL ECON. 241, 243 (2008).

107. LINEBAUGH, supra note 15, at 59 (noting that “there is no commons without commoning”).

108. See generally Foster, supra note 21, at 540-45 (reviewing the literature).
The doctrine embraces most broadly the idea that an owner cannot always do what she wants with her property; rather, she is obligated to make it productive, which may include putting it at the service of the community. In other words, sometimes the state is obligated to require individuals to sacrifice some property rights in order to put property to its productive and socially functional use, or to do so itself.

Leon Duguit, the French jurist who developed this idea in a series of lectures, rooted it in a description of social reality that recognizes solidarity, or the interdependence between individuals in a society. Because individuals in society have different needs and capacities, the social division of labor is crucial to ensuring the satisfaction of these needs. In order for the people and the comm-

109. See, e.g., Symposium, The Social Function of Property: A Comparative Perspective, 80 FORDHAM L. REV. 1003 (2011) (including contributions from American and Latin American scholars exploring the doctrine’s applications in Latin America and comparing it with similar “social obligation” norms in American property law) [hereinafter Symposium]; Bailey & Mattei, supra note 98, at 981-82 (discussing Article 42 of the Italian Constitution which provides that private property receive constitutional protection only as far as it serves a “social function” and is “accessible to everybody”); see also GRUNDFESETZ [GG] [BASIC LAW] Art. 14 (2) (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.

110. The basic idea behind the social function of property is that property has internal limits—not just external ones—which extend to an owner’s obligation with respect to what she does with her property. Consequently, the state should protect property only when it fulfills its social function and should intervene when the owner is not acting in a manner consistent with her obligations. Taxation and expropriation are powerful tools for achieving such ends. See Sheila R. Foster & Daniel Bonilla, Introduction, 80 FORDHAM L. REV. 1003, 1004-08 (2011) (tracing the idea of the social function of property to the French jurist León Duguit).

111. In the Italian legal scholarship, for example, “common goods” are defined as those goods that are “functional” to the exercise of fundamental rights and to human development. See, e.g., Bailey & Mattei, supra note 98, at 994 (citing the work of the well-known Rodotà Commission, named after a leading Italian property scholar and former distinguished member of Parliament; the Commission introduced the category of “common goods” into Italian law and defined them as goods that are “functional to the exercise of fundamental rights and to a free development of the human being”). The draft of the Civil Code reform by the Rodotà Commission was never passed into law. However it triggered the debate on the commons in the Italian legal scholarship. For an account of the different positions within the Commission and in the Italian legal scholarship, see Christian Iaione, Governing the Urban Commons, 1 ITALIAN J. PUB. L. 109 (2015).

112. Id. at 103; see LEÓN DUGUIT, LAS TRANSFORMACIONES DEL DERECHO PÚBLICO Y PRIVADO (1975). Some of Duguit’s works translated into English are LEÓN DUGUIT, LAW IN THE MODERN STATE (Frida Laski & Harold Laski trans., 1919) and Léon Duguit, Changes of Principle in the Field of Liberty, Contract, Liability, and Property, reprinted in THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY 65 (Layton Bartol Register & Ernest Bruncken trans., 1918).
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Community to flourish, each individual must comply with a series of functions determined by the position she occupies in society. For Duguit, putting property at the service of the community means putting it into production. The wealth concentrated in property cannot remain unproductive. The social consequences would be profoundly negative. The needs of the community members would certainly not be satisfied and social cohesion would be in jeopardy.

Although not part of the classical liberal sphere of property rights embraced by U.S. law, progressive property scholars have nonetheless demonstrated that American property law, at least at its margins, contains a similar social obligation norm. Gregory Alexander, who has labored the most to develop this concept in American law, has argued that such a norm entails an owner’s social obligation to contribute to her community those benefits that the community reasonably regards as necessary for its members’ development of those human qualities essential to their capacity to flourish as moral agents.

Alexander finds scattered throughout American property doctrine examples in which private property owners are required to sacrifice their ownership interest in a way that comports with this social obligation norm. Importantly, he finds such examples in instances where neither law and economics nor classical liberal analysis can justify (or can easily justify) such sacrifices. According to Alexander, the thicker version of the social obligation norm is at work (or potentially at work) in eminent domain cases and cases adjudicating remedies for nuisance, both of which involve state-sanctioned forced sales of private property for the common good or community best interest.

Both the social function of property and the social obligation norm thus recognize the interdependence of individuals within a society and the role that property can play generally in promoting the common good and, more particularly, in the provision of those goods that society reasonably regards as necessary for human functioning and flourishing. The question of which goods are

113. Based on this functionalist description of society, Duguit challenged both the individualism and the metaphysical nature of the liberal right to property. Foster & Bonilla, supra note 110, at 1006-08 (summarizing his arguments).
114. His argument has nothing to do with state ownership of the means of production or with class struggle. Normatively, Duguit is committed only to what one might call the “rule of productivity.” Id. at 1007.
116. Id. at 774.
117. Id. at 775-82. He also invokes his social obligation concept to explain cases in which the owner is prohibited from using his or her property in some way that the community regards as against its collective interest—such as in the case of historic preservation laws, environmental regulations, and beach access rights under the public trust doctrine. Id. at 791-810.
118. Id. at 760-70 (building on the “capabilities” approach of Amartya Sen and Martha Nussbaum to make the case that property owners have such an obligation); see
necessary in a particular society to foster the capabilities necessary to function and flourish is one without an easy answer, and one on which scholars have posited various thoughtful responses.\(^\text{119}\)

We agree with Alexander and Peñalver that all societies and political communities must struggle with the challenge of providing adequate opportunities for individuals to obtain the goods necessary to function as social beings without undermining the necessary incentive for productive activities.\(^\text{120}\) Yet we also agree that “however the details are conceived, attention to human beings’ social needs pushes strongly in the direction of a state obligation to take steps to provide substantial and realistic opportunities for people to obtain the property required for them to be able to participate at some minimally acceptable level in the social life of the community.”\(^\text{121}\) This might require an obligation to share property, or at least to share surplus resources, with those lacking them so that the latter can develop the capabilities that are necessary to human flourishing.\(^\text{122}\)

Preventing the enclosure—through exclusive ownership rights—of resources that communities are able to make productive in ways that support the ability of those communities to function and to flourish helps to mediate contestations over some urban resources.

The urban commons is likely almost always to involve contradictory claims about whose interests are best served by preserving versus commodifying a particular resource, and the “commons” is probably too capacious a concept to completely resolve these conflicts in many cases. However, what the commons can do, both legally and conceptually, is stake out the claim that at least some socially produced common goods are as essential to communities as are water and air and thus should be similarly protected.\(^\text{123}\) Much in the way that the law restrains owners from doing harm to the natural environment, the state is justified in recognizing limits to an owner’s (private or public) right to use their

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\(^{119}\) See Alexander & Peñalver, supra note 19, at 137-38 (noting that scholars have listed a number of capabilities and goods necessary for flourishing that leave ample room for debate).

\(^{120}\) Id. at 147.

\(^{121}\) Id. at 147-48 (also noting that “in the context of a modern post-industrial society like our own, this observation points in the direction of a human right to a social safety net that guarantees a substantial basket of resources”).

\(^{122}\) Id. at 148 (naming the capabilities they believe to facilitate human flourishing—freedom, practical rationality, sociality, among others).

\(^{123}\) Bailey & Marcucci, supra note 99, at 398; Bailey & Mattei, supra note 98, at 996; see also Maria Rosaria Marella, The Constituent Assembly of the Commons, OPENDEMOCRACY (Feb. 28, 2014), https://www.opendemocracy.net/can-europe-make-it/maria-rosaria-marella/constituent-assembly-of-commons-cac.
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property in ways that significantly harm or degrade socially produced resources that are difficult, if not impossible, to replace or to replenish.

In the next Part, we will address whether our legal norms in land use and property would require or at least support the state’s role to limit or expand property protections where necessary to support urban commons claims.

II. LAW AND THE URBAN COMMONS

In the previous Part, we identified a number of urban resources and goods, at different scales, that can be considered a “commons.” As we explained earlier, the analytical traction gained by characterizing a resource or good as a commons is that it opens (or re-opens) the question of how best to protect or preserve the resource. Typically, the solutions offered for the protection of a common pool resource fall along the public-private binary requiring either exclusive state control or the use of property rights to endow individuals with the right incentives to utilize the resource efficiently and sustainably. In this Part we examine the public regulatory framework and legal doctrines that are most relevant to claiming, protecting, and managing the urban commons, including governing the city itself as a commons. Understanding the limitations of current regulatory tools and legal doctrines which manage either individual common resources or the city as a common resource is crucial to understanding the need for an alternative governance model, to which we turn in the following parts.

A. Zoning and Land Use Controls

As previously mentioned, zoning and land use laws exist to manage the urban commons so as to avoid the tragic conditions of overconsumption and rivalry. Traditional “Euclidean” zoning separates incompatible land uses and excludes harmful ones to avoid negative spillovers, or externalities, which would result if users were freely able to locate their firms or households wherever they wanted in the city commons. In the same way, zoning restrictions can control the kind of users allowed to consume the commons by excluding those who are likely to take out more than what might be considered their fair share of the commons and leave everyone worse off, at least fiscally. Through its system of separation and exclusion, zoning protects the commons, at various scales, by

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124 For instance, zoning that excludes those unable to pay the level of local property taxes that supports the kind of public goods that the community prefers is referred to as “fiscal zoning.” See, e.g., Edwin S. Mills & Wallace E. Oates, The Theory of Local Public Services and Finance: Its Relevance to Urban Fiscal and Zoning Behavior, Fiscal Zoning and Land Use Controls: The Economic Issues 1, 6-11 (Edwin S. Mills & Wallace E. Oates eds., 1975).
helping to create and then preserve the “character” of the city, neighborhood, or block.\footnote{125} Known for its controlling and exclusionary tendencies, conventional zoning, and other land use laws, also fall short of being able to comprehensively and satisfactorily manage or govern the city commons. In the first instance, the openness of cities and the variety of commons within them inevitably invite rivalry as different users are drawn to agglomerate in cities. This seemingly magnetic pull, along with the strain of proximity of heterogeneous users, creates the pre-conditions for rivalry even in heavily regulated spaces.\footnote{126} We see evidence of this rivalry both under conditions of regulatory slippage, in which unrestrained competition for collectively shared resources intensifies and the existing regulatory infrastructure is (or becomes) inadequate to manage this rivalry. We also see evidence of this failure in the literal spillover across city borders of urban consumption (in the form of informal housing settlements) on land that falls outside of the scope of zoning and land use controls.

City officials often respond to the strain of proximity, particularly of heterogeneous users of the city commons, by adopting “order maintenance” policies. As Nicole Garnett has so well illustrated in her work, land use policies are often utilized in cities to control and preserve “order” by alternatively separating/dispersing and concentrating disorderly activities, depending on the problem at hand.\footnote{127} An example of the way in which land use rules can manage social disorder in city common spaces is Robert Ellickson’s proposal to more comprehensively regulate through zoning rules so-called “chronic street nuisances”—e.g., annoying behavior by panhandlers, mentally ill squatters, the homeless, and others—that often result in a decline in the attractiveness of open urban space to other users.\footnote{128} Ellickson’s proposal would allow a city to adopt different zoning codes of varying stringency to govern street behavior in public spaces. The idea would be to separate into distinct districts or zones incompatible classes of public users of the commons, much as zoning separates out incompatible land uses to avoid negative spillovers.\footnote{129}

\footnote{125} See, e.g., Bradley C. Karkkainen, Zoning: A Reply to the Critics, 10 J. LAND USE & ENVTL. L. 45, 68-70 (1994) (noting how zoning “protects a neighborhood from encroachments by land uses inconsistent with its character”).

\footnote{126} See, e.g., Ellickson, supra note 79, at 1223 (“In open access spaces thronged with strangers . . . free-riding is apt to afflict the informal sector.”).

\footnote{127} Nicole Stelle Garnett, Ordering the City: Land Use, Policing, and the Restoration of Urban America (2009).

\footnote{128} Id. at 1220. An official map would designate Red, Yellow, and Green zones and an accompanying ordinance text would articulate the rules of the road that apply in various districts. Green zones would promise relative safety and a high level of strictness in regulating disruptive behavior; they would be tailored to accommodate the “unusually sensitive” such as school children, frail elderly, parents with toddlers, etc. Red zones would signal extreme caution, as disorderly
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Order maintenance land use policies can carry tremendous costs to vulnerable individuals and communities, as well as to individual constitutional rights. But that is not their only shortcoming as a tool for maintaining and governing common pool resources in socially and economically complex cities. More fundamentally, order maintenance policies are primarily oriented toward controlling negative spillovers rather than generating or capturing the positive benefits of urban agglomeration. In other words, much of the challenge of increasing urbanization patterns is how to manage, or balance, the competing demands of heterogeneous users as against local government competition for private capital and the urban elite. Designing a land use system predominantly aimed at harm prevention and negative spillovers elides the challenge of how to create cities and communities that capture the benefits of diverse inhabitants who must live together and share common goods.

It may be that, as Lee Fennell has argued in a recent article, the challenge of managing the city commons, and the city as a commons, is the challenge of “participant assembly”—how to organize city space to attract the right mix of actors or participants that will generate the positive spillovers—i.e., knowledge and cultural exchange, creativity, innovation—that result from urban agglomeration. Because we cannot rely upon markets to assemble urban participants optimally or to maximize the positive agglomeration benefits of urban common space, she floats the idea of using “performance zoning” as a means of favoring land uses that will produce positive impacts or spillovers to a particular neighborhood or to the City. Such a system would set targets based on positive spillovers—such as knowledge sharing, long-term tenancy or occupation, decreased vehicle traffic, increased foot traffic, etc.—that can be captured from allowing certain kinds of land uses. Zoning permits would be based not on a particular type of land use but rather on the basis of particular targeted out-

conduct in these spaces would be most tolerated by the city; these areas essentially would be “safe harbors” for those who engage in disorderly conduct. Yellow zones would serve as “lively mixing bowl[s]” where some episodic disorder would be tolerated but chronic misbehavior (e.g., panhandling and bench squatting) would not be. 

130. Ellickson acknowledges these costs, along with the risk of distributional harms on poor, minority neighborhoods given the uneven political power of urban neighborhoods. Id. at 1244-46.

131. Fennell, supra note 28, at 1373 (“Prime urban space for generating agglomeration benefits would be matched to its most valuable use, taking into account the congestion impacts inflicted and suffered by that use.”).

132. Markets cannot reliably “assemble” urban participants to channel these goods to their highest valuers—or optimal agglomerations—given the potential mismatch between “the privately owned element (access to a given location) and the commonly owned one (the overall urban atmosphere).” Id. at 1394; see also id. (“[T]he characteristics that cause particular economic actors to derive the most value from a given location may or may not be the same characteristics that would lead them to contribute the most value to that location.”).
comes using performance metrics by which the positive impacts of that land use on communities can be assessed.\footnote{133}

Performance zoning, incentive zoning, inclusionary zoning and similar regulatory mechanisms illustrate that land use regulation is flexible enough to allow for, and even privilege, the use of urban land or property as a means of protecting, producing and sharing common goods. Moreover, as local governments have moved away over time from binding comprehensive plans to \emph{ad hoc} bargaining and dealing with developers,\footnote{134} it is theoretically possible to strike negotiated arrangements to allow particular parcels or properties to transition to another kind of use consistent with a commons.

However, there is a real question, and healthy skepticism, about the willingness of local officials to use the zoning and land use process to recognize claims to the urban commons or to protect existing common pool resources of fragile communities. The reigning account of the politics of urban land use decisions, the “growth machine” account, situates land use officials as acting in concert with an elite coalition of developers and real estate interests primarily concerned with economic growth.\footnote{135} As such, if given a choice between preserving or claiming a common pool resource or selling that resource on the market for economic gain, most often city officials and governments will yield to the latter pressure.\footnote{136}

Growth machine politics may not be a given in every zoning and land use decision, to be sure, and the inclination to pursue urban growth machine policies at all costs may even be on the wane in some cities.\footnote{137} Nevertheless, it is fair

\footnote{133} Thus, for example, zoning might specify that uses locating in the area have a certain minimum average number of employees on site each workday or consume meals in the immediate area, encouraging interaction between workers. \textit{Id.} at 1411. The author also notes that some communities have attempted to use zoning and other land use controls to restrict residential occupancy to those who will be present on a relatively long-term basis, to encourage the formation of social ties and avoid high turnover in communities. \textit{Id.} at 1411-12.

\footnote{134} Carol M. Rose, \textit{Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy}, 71 \textit{Cal. L. Rev.} 837, 849-50 (1983); see also Mun. Art. Soc’y of N.Y., \textit{Zoning Variances and the New York City Board of Standards and Appeals}, 30 \textit{Colum. J. Envtl. L.} 193, 196 (2005) (noting shift over thirty-year period from “bulk” to “use” variances, which permit, for example, residential units in manufacturing zones; also noting that the frequency of these variances has meant that zoning boards have essentially taken on a planning role theoretically reserved for the City Planning Commission).

\footnote{135} \textit{See supra} notes 39 \& 40.

\footnote{136} \textit{See}, \textit{e.g.}, Foster, \textit{supra} note 21, at 534-38 (recounting a dispute in New York City involving the city’s decision to sell to private developers hundreds of community gardens and the failed effort of neighborhood gardeners and residents to stop the auctioning off of the gardens).

\footnote{137} \textit{Been et al., supra} note 40 (examining rezoning during the Bloomberg administration and finding that the city downzoned a higher percentage of its lots
to say that the politics and process of zoning and land use decision making does not favor, and likely cuts against, efforts to protect from the market those urban resources that residents want to claim or retain as a common pool resource. Where this is the case, the question is whether legal doctrine offers any means of identifying and/or protecting urban common pool resources as a matter of property law.

B. Public Trust Protection

The public trust doctrine, in which the title to the property is vested in the state to hold in perpetuity for the public, is presumed to apply to environmentally sensitive lakes, rivers and wetlands. However, the doctrine’s origins were not only in the protection of natural resources, but also in their urban equivalents—namely, city streets, public squares, roadways and the like—which courts routinely protected against the pressure to legislatively appropriate or devote to nonpublic purposes during an era of intense industrialization. Thus, in the 19th century, either as a matter of statute or common law, courts deemed some aspects of the urban commons to be public trust property and as such provided protection under the public trust doctrine, with strict limits on its alienation and use of purposes other than those open and accessible to the public.

than would be expected under a growth machine hypothesis, results that support strong attention to the interests of homeowners who are more likely to support land uses that improve the quality of life for residents, including the provision of public amenities and other public goods, and that are in tension with the goals of the growth machine).


139. See, e.g., MOLLY SELVIN, *THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789-1920*, at 102 (Harold Hyman et al. eds., 1987) (stating that the impetus for the assertion of public rights in early nineteenth century courts was industrialization; namely, “[a]s railroad and shipping improved during the century, control of harbor-front property in particular and urban property in general came to mean control of the economic destiny of a particular locality”); Ivan Kaplan, *Does the Privatization of Publicly Owned Infrastructure Implicate the Public Trust Doctrine? Illinois Central and the Chicago Parking Meter Concession Agreement*, 7 NW. J. L. & SOC. POL’Y 136, 148-55 (2012) (reviewing the history).

140. See, e.g., Kaplan, *supra* note 139, at 153 (noting that “in the late nineteenth century, state supreme courts, and the United States Supreme Court, began to invalidate legislative appropriations of public trust property;” specifically, many courts “invoked public trust principles to rescind legislative grants for the construction and operation of elevated, for-profit railroads on public streets”); see also Merriwether v. Garrett, 102 U.S. 472, 513 (1880) (“In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the [municipal] corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without
The public trust doctrine is no longer routinely applied to city streets or public squares in American courts. In fact, most modern courts and commentators consider the doctrine to be effectively confined to natural resources having some nexus with navigable waters, although many states have extended the doctrine beyond water-based resources. Nevertheless, there are some states that explicitly protect public parks and/or city streets under the public trust doctrine, invoking the doctrine in order to prevent local officials from appropriating or exploiting those resources for non-public uses. Some historic structures and landmarks, for example, are also considered to be held in public trust, usually by legislation, and protected from alienation and destruction.

Even where courts or legislatures do not explicitly extend the public trust doctrine to parks, streets, and other open access urban resources, land can be protected from unreasonable destruction and that to gain protection plaintiff must demonstrate "that the conduct of the defendant, acting alone or in combination with others, has or is likely unreasonably to destroy the public trust in such historic structures . . . ."}; Hill/City Point v. City of New Haven, 2000 WL 1172327, at *4 (Conn. Super. Ct. 2000) (stating "plaintiff has shown, prima facie, that the defendants' conduct is likely unreasonably to destroy the public trust in a historic structure or landmark; however, defendants have established the affirmative defense that considering all the relevant surrounding circumstances and factors, there are no feasible and prudent alternatives to the demolition given the condition of the building and the amount of repair it needs"); Harris Mem'l Church v. Bridgeport Redevelopment Agency, No. CV000370421, 2000 WL 3315390, at *2 (Conn. Super. Ct. Dec. 22, 2000) ("In the present case, the church has failed to show that the taking of the church property and the razing of the structure would be an unreasonable destruction of the public trust in the building.").
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“dedicated” as such either expressly, through legislation or private deed,\textsuperscript{144} or implicitly, through the actions of a municipality or the commonly accepted use of the land.\textsuperscript{145} Courts have held that once a park or other open access urban resource has been either explicitly or implicitly dedicated, and particularly where there is reliance on that dedication, a public trust is created and the city is restricted from alienating or appropriating the property for non-public purposes.\textsuperscript{146} An example of an implicit dedication is Chicago’s Grant Park, along Lake Michigan, which was formed by way of a city map which designated the space a

\textsuperscript{144} See, e.g., 1996 N.Y. Op. Atty. Gen. (Inf.) 1093 (asserting that village board may act by resolution or by local law to dedicate a parcel as parkland). See also Friends of N. Spokane Cty. Parks v. Spokane Cty., 184 Wash. App. 105, 129 (2014) (dedication of lands is “the devotion of property to a public use by an unequivocal act of the owner” such as through a will or deed).

\textsuperscript{145} Either way, the actions demonstrate that the government considers the land to be parkland or that the public used it as a park. Examples include: a municipality publicly announcing its intention to purchase the lands specifically for use as a park, including by placing parkland in a publicly recorded master plan or map, or constructing recreational facilities, among other ways. See, e.g., Kenny v. Bd. of Tr. of Vill. of Garden City, 735 N.Y.S.2d 606, 607 (App. Div. 2d 2001) (finding that property acquired for recreational purposes and used for recreation was instilled with public trust even though never officially dedicated). Dedication through implication can also occur when the common and accepted use of the land is as a park. See, e.g., Riverview Partners v. City of Peekskill, 710 N.Y.S.2d 601 (App. Div. 1st 2000) (finding implied dedication due to evidence showing property was purchased for park purposes, named “Fort Hill Park” on maps and sign at entrance, and used as a park by the public since it was purchased); Vill. of Croton-on-Hudson v. Westchester Cty., 331 N.Y.S.2d 883, 884 (App. Div. 2d 1972) (“While the deeds into the county are in fee and contain no restriction of the land to park use and while there does not appear to have been a formal dedication of the land to such use . . . we think the long-continued use of the land for park purposes constitutes a dedication and acceptance by implication.”). But see Pearlman v. Anderson, 307 N.Y.S.2d 1014, 1016-17 (Sup. Ct. 1970), aff’d, 314 N.Y.S.2d 173 (App. Div. 2d 1970) (finding that portion of property purchased for general purposes but which may have been used as a park, the proof of which was not convincing to the court, did not require legislative approval for other public use).

\textsuperscript{146} See, e.g., In re Estate of Ryerss, 2008 WL 4824437, at *10 (Pa. Com. Pl. Aug. 25, 2008) (“Under long-standing Pennsylvania Common Law a public trust is created where a city by ordinance dedicates land to be used as a public park and then in reliance on that dedication, funds are appropriate by the state, city and individuals to improve and maintain that land.”); see also Bd. of Tr. of Phila. Museums v. Tr. of the Univ. of Pa., 251 Pa. 115, 123-25 (1915) (stating that the “city holds, subject to the trusts, in favor of the community and is but the conservator of the title in the soil and has neither power nor authority to sell and convey the same for private purposes”).
“public ground for ever to remain vacant of buildings.”147 This map, along with representations by local officials, formed the backbone of public dedication litigation by owners of property abutting the park.148

In a historical account of the public dedication litigation involving Grant Park, Joseph Kearny and Thomas Merrill recount how Aaron Montgomery Ward, the famous Chicago catalog merchant, was able to block construction of a variety of structures in the park in a series of actions from 1890 to 1910.149 He did so by convincing Illinois courts that that map created a public dedication of the land and that, as an abutting property owner, he had standing to secure an injunction against development projects that violated the dedication. Subsequently, “in the wake of Ward’s victories, the public dedication doctrine was wielded by generations of Michigan Avenue landowners to fend off construction of public buildings in what became a 319-acre park.”150 The precedents established by Ward demonstrate how much power abutting property owners can have over public lands, even in cases where the general public desires development or other activities on that land.151


148. The land abutting the Park was sold at a premium based on representations that it would remain an open public space, and on the understanding that prospective purchasers would enjoy direct exposure to Lake Michigan. See id. at 1425-27 (also noting that there were no other legal restrictions on how land along the lakefront would be used and that Chicago had not adopted a zoning ordinance during this period).

149. While Ward enjoined nearly all construction in Grant Park, he did consent to the construction of a temporary post office in 1895. See id. at 1476.

150. Id. at 1419. Although, as they note, by the dawn of the twenty-first century, local officials and private donors had succeeded in building in Grant Park. “Millennial Park,” as it is now known, now resides in the northwest corner of the park, after the city obtained consents to its construction from owners of property abutting the northwest corner of Grant Park. These consents were held by a state court judge, in an unpublished order, to be an effective waiver of the public dedication. Id. at 1419 (citing Boaz v. City of Chicago, No. 99L-3804 (Cook Cty., Ill. Cir. Ct. Jan. 14, 2000)).

151. Of course, the danger, as Kearny and Merrill note, is that the incentives of abutting property owners and the general public will not align and that there might arguably be “overprotection” of public space. See id. at 1421. They argue:

On the largest question—whether to maintain a public space or permit it to be privatized—there is likely to be a convergence of interests. But on subsidiary issues, abutting landowners may harbor very different preferences about how to manage public spaces. To simplify, abutting owners are likely to prefer peace and quiet, whereas the general public may want fun and games. As we have seen, Michigan Avenue owners tended to oppose baseball stadiums, toboggan slides, armories used as venues for prize fights, circuses, political conventions held in wigwams, and pavilions for outdoor concerts. It is likely that a public referendum
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What is interesting for our purposes about this history, and the ensuing doctrinal developments, are the rules of standing that recognize the role of urban inhabitants in protecting open-access common resources from incompatible uses, sale or destruction. As Abraham Bell and Gideon Parchomovsky have argued, one reason to grant such “antiproperty” rights to some members of the public is that parks and other open spaces are vulnerable to the whims of local governments who are captured by interest groups seeking development opportunities.\(^{152}\) The Ward precedents applying the public dedication doctrine in Chicago to allow abutting property owners veto rights over development on public lands replicates Bell and Parchomovsky’s “antiproperty” proposal.\(^{153}\) Much like their proposal, the holders of these veto rights (e.g. abutting property owners) are able to exercise these vetoes because the cost of achieving unanimous consent among them, particularly if they are numerous, are too high.\(^{154}\) Thus, property owners are able to halt development and other activities, effectively freezing public spaces in their current, open-space state.

While intuitively appealing for purposes of endowing citizens with the ability to protect the open “interaction space” that renders public spaces so valuable, and which facilitates a host of other goods that are made possible by the non-excludability of the space, there are real costs to endowing citizens with these kinds of veto rights. For instance, the problem with the Ward precedents, as others have pointed out, is that the right of Ward (and others) to block development in Grant Park was premised on his private right to open space and to an unobstructed view of Lake Michigan.\(^{155}\) As Kearny and Merrill note, the public dedication line of cases reflects a peculiar hybrid doctrine which grants private rights in public spaces based on the reliance interests of those who purchased land—typically at higher prices—on the understanding that adjacent land would remain subject to public use.\(^{156}\) The danger is that these property owners would yield different views on these activities. Ward, who became the park’s most important enforcement agent, may have harbored even more negative views about public gatherings than most abutting owners.

\(^{152}\) They proposed as a solution that private property owners who benefit disproportionately from parks and similar resources should be given veto power over any proposal to develop these resources. See Abraham Bell & Gideon Parchomovsky, Of Property and Antiproperty, 102 MICH. L. REV. 1, 5-6 (2003).

\(^{153}\) Kearny & Merrill, supra note 147, at 1421.

\(^{154}\) See id. at 1512 (noting that the public dedication doctrine is a “unanimous consent mechanism”; “any abutting landowner can block a forbidden use, provided that he or she is willing to incur the expense of a lawsuit. But if all abutting owners consent to a use, the project can go forward, even if it would otherwise violate the dedication”).


\(^{156}\) Kearny & Merrill, supra note 147, at 1445-49.
owners can act solely in their self-interest, without any democratic check, and in ways that are not clearly in the public interest or even for the benefit of the particular public space.\textsuperscript{157}

It is not at all clear from the public trust and public dedication doctrines, both developed by American courts in the nineteenth century, whether members of the public have any legally recognizable interest in open public spaces or other common pool resources that have become contested or subject to rivalry. Because the public trust doctrine is of such limited scope in the type of resources that it covers, even its liberal standing rules, which allow any citizen taxpayer to intervene in decisions about public resources,\textsuperscript{158} will not provide a means to stop local officials from selling off community gardens or urban farms or underutilized structures to private developers. These clearly are outside of the scope of public trust properties even under the most expansive interpretation of the public trust doctrine in the urban context.

Similarly, even though the public dedication doctrine covers a wider scope of urban commons or public goods—such as streets, parks, squares, and any other any other land that has been explicitly or implicitly dedicated—its standing rules are limited in such a way that they do not give members of the public veto power over non-conforming activity absent proof of some special injury or interest.\textsuperscript{159} Moreover, the public dedication doctrine has long been on the wane.

\textsuperscript{157} See id. at 18 (noting that after twenty years of litigation and expenditures of an estimated $50,000, Ward had successfully prevented all civic projects for buildings in Grant Park and had done this in spite of the almost unanimous opposition of the newspapers and civic leaders of Chicago; also noting that it is difficult to say what the general citizenry thought given the absence of public opinion surveys back then); see also Kearny & Merrill, supra note 147, at 1421 (noting that Ward’s adamant refusal to allow the Field Museum of Natural History and erection of pavilions for summer concerts in Grant Park was likely inconsistent with what most persons in Chicago wanted).

\textsuperscript{158} See, e.g., Friends of N. Spokane Cty. Parks v. Spokane Cty., 184 Wash. App. 105, 124 (2014). Although in some states taxpayers can only bring suit where the Attorney General refused to bring a case or act in the public interest. See, e.g., id. at 121-22.

\textsuperscript{159} See Kearny & Merrill, supra note 147, at 1522-26 (comparing the public trust and public dedication doctrines, including their standing rules). As a general rule, for citizens to bring suit, an individual must have a special injury different from the general public or special interest in the trust or dedication. However, each jurisdiction differs in what this means. See In re In re Estate of Ryerss, 2008 WL 4824437, at *8 (Pa. Com. Pl. Aug. 25, 2008) (allowing taxpayer standing on the basis of “a joint nexus of settlor intent and financial contribution”); Citizens for Pres. of Buehler Park v. City of Rolla, 187 S.W.3d 359, 362 (Mo. App. S.D. 2006) (taxpayers must assert that government funds were or may be illegally expended in order to assert standing); Hinton v. City of St. Joseph, 889 S.W.2d 854, 859 (Mo. App. W.D. 1994) (stating that nearby landowners have standing but only if they can assert “special injury” beyond property values); Spokane, 184 Wash. App. at 122 (stating that taxpayers must first petition the Attorney General).
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and thus is unlikely to be a viable tool for protecting public spaces and other urban common pool resources.\textsuperscript{160}

C. Eminent Domain

The power of state and local governments to take property, with compensation, has recently been enlarged through the Supreme Court’s expansive interpretation of “public use” in \textit{Kelo v. City of New London}.\textsuperscript{161} Before \textit{Kelo}, the power of the government to take property was arguably limited to an anti-harm principle in which public use was interpreted more narrowly to allow takings only for the purposes of curing social and economic harms such as “blight” or a land oligopoly.\textsuperscript{162} \textit{Kelo}, however, makes clear that the government can exercise its power of eminent domain in the name of economic revitalization so long as the taking is part of a “carefully considered” redevelopment plan and not an outright property transfer from one private party to another.\textsuperscript{163} Some states have since limited the reach of \textit{Kelo}, but the jurisprudential signal from the case is quite clear: state and local governments may define public use in ways that are utility maximizing—that is, property may be taken for a higher economic use even if neither the property nor the surrounding area is blighted or otherwise in poor condition.

In some ways, this expansive use of eminent domain maps onto a version of the social function of property doctrine and social obligation norm. Recall that both the doctrine and the norm recognize the idea of “social solidarity”—the interdependence of individuals in a society—and the need to put property to productive use in the service of the common good. The social function of property and social obligation norm has much plasticity, both in theory and in practice.\textsuperscript{164} It can be read in its thinnest version to entail an obligation of prop-

\textsuperscript{160} See Kearny & Merrill, \textit{supra} note 147, at 1518-22 (explaining its decline since the Ward cases in Illinois).


\textsuperscript{162} See, e.g., \textit{id.} at 494-504 (O’Connor, J., dissenting) (arguing that the majority opinion extended the meaning of public use by eliminating the need to show the types of affirmative social harms that provided basis for finding public use in \textit{Berman} and \textit{Midkiff}; in both cases, the legislative body had found that eliminating existing property use was necessary to remedy harm and a public purpose was realized only when the harmful use was eliminated); see also \textit{Hawaii Hous. Auth. v. Midkiff}, 467 U.S. 229, 241 (1984); \textit{Berman v. Parker}, 348 U.S. 26, 34-36 (1954).

\textsuperscript{163} Importantly, as Justice Kennedy highlighted in his concurrence, the “identities of most of the private beneficiaries were unknown at the time the city formulated its plans.” \textit{Kelo}, 545 U.S. at 493 (Kennedy, J., concurring).

\textsuperscript{164} The idea that property owners owe affirmative obligations to the welfare of others, and to societal welfare more generally, can satisfy a number of different ideological orientations, including a classical liberal one as a recent symposium on the various interpretations and applications of the doctrine in Latin America demonstrate. See generally Symposium, \textit{supra} note 109 (noting that in some Latin American
erty owners to contribute, through taxation, to the provision of public goods—such as law enforcement, schools, and fire protection—or to entail an obligation to curtail an owner’s dominion over his property in the presence of market failures (such as free riders and holdouts) in order to promote and maximize public welfare. At its thickest, as Greg Alexander argues, it can be read to require the use of property to contribute benefits and goods that the community reasonably regards as necessary for its members’ development of those human qualities essential to their capacity to flourish as moral agents.

Eminent domain can be a means to putting property to its social function—or productive use—either in the thin or thick version of the norm. For instance, eminent domain has often been justified on the grounds that allowing the government to acquire private property under certain circumstances produces the most economically efficient result for taxpayers. As such, taking property to promote economic development is justifiable if done to put the property or properties to a socially desirable and economically productive use that will benefit taxpayers. Eminent domain allows the government to avoid the holdout problem that is said to plague land assembly, thereby avoiding the tragedy of the anticommons—the wasteful underutilization of property caused by too many entitlement holders.

Under a thick version of the social function of property, or social obligation norm, eminent domain can be utilized to provide those benefits and goods that society reasonably regards as necessary for human flourishing. As Lisa Alexander has recently documented, a number of organized groups and residents across the country that have occupied foreclosed or abandoned homes and vacant land are convincing local governments to use eminent domain to transfer title of the under-utilized properties to community-controlled land trusts. Allowing the community to manage these properties as a common pool resource would keep these homes perpetually affordable to low- and moderate-income

167. See supra notes 116-118 and accompanying text.
169. Michael Heller & Rick Hills, Land Assembly Districts, 121 HARV. L. REV. 1467 (2008) (noting that, from an efficiency standpoint, eminent domain is necessary to consolidate urban land that is overly fragmented into unusably small parcels).
170. Alexander, supra note 90.
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households and provide other common goods, such as green space, important for human flourishing in these communities.

In some instances, both the thick and thin version of the social obligation norm can be put to work, as when eminent domain is used to overcome land assembly problems in the context of providing common goods necessary for human flourishing. Consider the example of the Dudley Street Neighborhood Initiative (DSNI), a group of citizens who formed a nonprofit community organization to revitalize their neighborhood, one of the poorest and most desolate in Boston, enabled by the city’s delegation of authority to the group to exercise the power of eminent domain to assemble land for an “urban village”—consisting of affordable housing, shopping, open green space (“a town common”), and a community center.\footnote{See generally Peter Medoff & Holly Sklar, Streets Of Hope: The Fall And Rise Of An Urban Neighborhood 128-39 (1994) (describing DSNI and the history of the Dudley Street neighborhood); Elizabeth A. Taylor, The Dudley Street Neighborhood Initiative and the Power of Eminent Domain, 36 B.C. L. Rev. 1061 (1995).}

Like many residents in distressed neighborhoods, Dudley Street residents cleaned up many of the vacant lots that littered their neighborhood. However, in order to realize its plan of an “urban village, DSNI needed control over the future use of the fifteen acres of vacant lots owned by the city and the fifteen acres that were privately owned, most of which had municipal tax liens against them or were in foreclosure. DSNI convinced the city to declare a moratorium on the transfer of city-owned vacant lots in the neighborhood. The privately owned vacant lots were another matter, however. DSNI knew that foreclosing on each of the scattered individual private properties would be too time consuming, and instead persuaded the city to grant its newly established affiliate, Dudley Neighbors Inc. (DNI) status as an “urban redevelopment corporation,” giving it the power to acquire by eminent domain vacant land within the Dudley Triangle.\footnote{DSNI/DNI became the first community group in the nation to win the right of eminent domain. Under Massachusetts law, only the Boston Redevelopment Authority (BRA) or an “urban redevelopment corporation” authorized by the BRA to undertake a redevelopment project was authorized to exercise the right of eminent domain. See Mass. Gen. Laws ch. 121A, § 7A (2011).}

Subsequently, DNI was set up as a land trust to acquire the vacant lots and oversee the development of affordable housing as well as community facilities and open space on the land that was formerly constituted of fragmented vacant lots.\footnote{DSNI/DNI became the first community group in the nation to win the right of eminent domain. Under Massachusetts law, only the Boston Redevelopment Authority (BRA) or an “urban redevelopment corporation” authorized by the BRA to undertake a redevelopment project was authorized to exercise the right of eminent domain. See Mass. Gen. Laws ch. 121A, § 7A (2011).} With the help of additional private and public funding, including a federal Housing and Urban Development (HUD) grant (secured with the help of the City), DSNI/DNI ultimately acquired about twenty-eight of the original thirty acres of vacant land in the Dudley Triangle and has steered the development of hundreds of permanently affordable housing units, six public green common spaces, two community centers, an urban farm, refurbished schoolyards, and numerous playgrounds.
The City’s use of its eminent domain power to support a community of active citizens making a claim to vacant land as a common pool resource, then acting as a steward of the resource and collaboratively managing it as a commons for future generations, is an example of the State as a facilitator or enabler in governance of the commons. As we will explore in the next Part, part of the importance of naming and claiming as a “commons” certain resources in the city is that it raises anew the question of how best to manage and govern resources in which citizens have a common stake in ways that are not subject to the whims of a neoliberal state nor to the vagaries of the market.

III. Governing the Urban Commons

The commons, as we have said, is partly a question of resource characterization and partly a question of governance. This is why both Hardin’s *Tragedy of the Commons* and Ostrom’s *Governing the Commons* wrestle with how best to manage resources that are (or should be) shared by unaffiliated users who may have their own selfish or utility-maximizing interests in consuming those resources. We have seen that the city and much of its land and other resources are partly managed through a public regulatory system in which the city places limits, through its zoning and land use laws, on the location decisions of individuals and firms as a means of controlling negative spillovers from those decisions. The city may also use zoning and land use tools such as performance zoning and inclusive zoning to structure incentives for sharing the city and for ensuring that a broader group of inhabitants can access and use the city commons. Moreover, the city might also allow the full or partial enclosure, or privatization, of some of the open resources, or commons, in the city in order to ensure their sustainability.173

The emergence of user-managed, but not user-owned, resources represents a third way that cities have allowed urban common pool resources to be governed. This third way is consistent with Ostrom’s work, which demonstrated, in opposition to Hardin’s *Tragedy* scenario, that even self-interested resource users can and do successfully manage their land, water, forests, and fisheries without the coercive hand of the state and without privatizing the resource. Ostrom focused on the concept of local empowerment: under certain conditions local communities can autonomously decide on and enforce the rules for sharing and

managing common pool resources, in the process developing and maintaining self-governing institutions. 174

A. Existing Urban Commons Institutions

In user-managed scenarios, individuals exist in an interdependent relationship with each other and with the resource, and are strongly motivated to overcome collective action problems, collaboratively manage the resource, and enhance their productivity over time. 175 In many of these cases, users are able to enforce and monitor their rules only with the help of external state agencies on whom they rely in instituting a complex, “nested” governance system to regulate the resource but without subsuming these institutions into a centralized governance regime. 176

As we have written before, there are some urban commons-based institutions—e.g. business improvement districts, park conservancies, community gardens, and neighborhood foot patrols—that resemble Ostrom’s governance examples. 177 These institutions allow users to manage open-access resources but without transferring ownership of the resource or the ultimate policymaking authority to private parties. 178 They are all born out of a group of neighborhood or city residents who desire to maintain an open-access commons and who are willing to contribute to the restoration, maintenance, and preservation of that commons. Many of these efforts are a response to the failure of local govern-

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174. Ostrom’s study focused on small-scale resources affecting a relatively small number of persons (fifty to 15,000) who are heavily dependent on the resource for economic returns. See Ostrom, supra note 17, at 26.

175. See id. at 90; see also Elinor Ostrom, Collective Action and the Evolution of Social Norms, 14 J. ECON. PERSP. 137, 149-53 (2000) (describing how collective action and monitoring problems are solved in a reinforcing manner when users of resources design their own rules that are enforced by local users or accountable to them, using graduated sanctions, that define who has rights to withdraw from the resources, and that effectively assign costs proportionate to benefits).

176. In contrast to self-managed community resource use systems that operate mainly with social sanctions, resources that traverse many communities and user groups may require more complex institutional structures, often involving government coordination and enforcement. See Elinor Ostrom et al., Rules, Games, and Common-Pool Resources 326 (1994) (“Individuals in relatively simple systems are apt to develop rules more nearly optimal than individuals in more complex systems, especially systems involving substantial asymmetries of interest.”).

177. Foster, supra note 28, at 91-108.

178. That is, the local government and public officials retain the power to set policies regarding access to, and use of, the resource. Collective management regimes lack the power to tax or impose fees on users of the resource, limit access to the resource, or impose health or other safety standards on users of the resource. See id. at 110.
ments to actively manage and fund common pool resources, leaving them subject to rivalry and degradation.

While some of these groups operate only as an informal collection of volunteers, others have become more formalized. The more formal groups establish themselves as a membership organization, elect boards of directors, write bylaws, and apply for nonprofit status. Both formal and non-formal groups alike rely to some extent on the local government to facilitate or enable their activities in managing and governing the commons. In this sense, they are “nested” governance regimes that “claim” the urban resource as an open-access common resource, allowing some class of users to work cooperatively and collaboratively to care for and manage it.\(^\text{179}\)

The manner in which some urban commons are being user-managed with active support of the local government is a model that we believe can be replicated for other kinds of urban commons, and even scaled up to the city itself. In the next Part, we want to step back and propose that there exist democratic design principles that characterize these efforts and that can be replicated in a variety of formats and institutional structures. Only after setting out these principles can we imagine what it might look like to scale up to the city level these collaborative, polycentric forms of commons governance.

B. Urban Commons as Democratic Innovation

Existing commons institutions share a number of characteristics that set them apart from merely sublocal forms of urban governance.\(^\text{180}\) In this Part we describe these characteristics as: horizontal subsidiarity (or sharing), collaboration, and polycentricism. We offer them as design principles that can guide the scaling-up of cooperative forms of commons governance to the city level.

1. Horizontal Subsidiarity

As existing commons institutions illustrate, subsidiarity is a first possible design feature for urban commons governance. Subsidiarity is the idea that power should be shared with “the lowest practicable tier of social organization,

\(^{179}\) See, e.g., What is Commoning Anyway? Activating the Power of Social Cooperation to Get Things Done and Bring Us Together, ON THE COMMONS MAG. (Mar. 3, 2011), http://www.onthecommons.org/work/what-commoning-anyway (“[C]ommoning represents a new way for everyday citizens to make decisions and take action to shape the future of their communities without being locked into the profit-driven mechanics of the market or being solely dependent on government agencies for funding.”).

\(^{180}\) See Nadav Shoked, The New Local, 100 VA. L. REV. 1323 (2014) (arguing that small subsets of local residents, or “micro-local” units, make decisions that affect the public; these includes many one-off decisions such as the location of bicycle lanes, neighborhood school closings, historic district designation, etc.).
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public or private.” In particular, we are interested in the principle of “horizontal subsidiarity,” a principle that we borrow from the 2001 reform of the Italian constitution which effectuated a significant change in local government power and the relationship between citizens and their local governments. This principle of “horizontal subsidiarity” dictates that powers, where possible, be assigned on the basis of the local/nonlocal dimension of the collective interest and of the capability of the actors to fulfill such interest. The reform also requires the promotion of “the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity.”

The principle of horizontal subsidiarity represents the foundation, we believe, of innovative, bottom-up strategies to care for, regenerate, and manage urban common pool resources. The principle of horizontal subsidiarity conceptualizes the citizen as an active citizen and encourages local officials to put in place appropriate public policies that foster the activation and empowerment of citizens in managing and caring for shared resources. Active citizenship means that urban inhabitants are able to participate not only in the public life of the city, but also in creating the city and in maintaining it for the collective welfare. This can range from maintaining streets, to taking care of public


183. The reforms place on equal footing, albeit with different powers, all the subnational levels of government and the entities composing the Italian Republic. Article 114 of the revised constitutional text states that “the Republic is composed of municipalities, metropolitan cities, provinces, regions and the State.” Art. 114 Costituzione [Cost.] (It.). The previous text, instead, stated: “the Republic is divided into regions, provinces and municipalities.” Article 114 now also extends to provinces, metropolitan cities and municipalities the legal status previously granted only to regions by the repealed Article 115. Id. Accordingly, they share with regions the same nature of autonomous entities with their own home rules and constitutionally entrenched powers and functions. Indeed, they are “autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution.” Id. The text of the Italian Constitution is available at CONSTITUTION OF THE ITALIAN REPUBLIC, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited June 4, 2016) (current Italian Constitution). For the purpose of comparison, the text of the pre-amendment Italian Constitution is available at THE CONSTITUTION OF THE ITALIAN REPUBLIC, http://legalportal.am/download/constitutions/110_en.pdf (last visited June 4, 2016) (former Italian Constitution). See also Iaione, supra note 34.

184. The principle of horizontal subsidiarity is stated in the Italian Constitution at Article 118, paragraph 4. Art. 118, para. 4 Costituzione [Cost.] (It.).

185. See Iaione, supra note 28.
squares and parks, to turning vacant lots and underutilized space or structures into useful resources for communities.

As Ostrom argued, positive externalities occur when action taken with one decision making unit simultaneously generate costs or benefits for other units, organized at different scales.\(^\text{186}\) Although higher level governments or officials might take the lead on a large-scale problem, the idea is that the responsibility lies at different levels. Instead of trying to solve a large (and diffuse) issue alone, governments look for allies at different hierarchical levels to facilitate the initiatives of proactive citizens who, individually or in groups, are willing to take direct care of the commons.

Consider one example of the relationship between individual actions and larger scale problems: climate change. Climate change is not only a global phenomenon but it also suffers from a classic collective action problem. As such, much conventional thinking suggests that this global commons problem is best addressed and regulated at the international level. Yet, even a problem at this global scale benefits from active citizenship at the local (and even sub-local) level. As legal scholars have pointed out, individual behavior accounts for one-third of U.S. contributions to greenhouse gases and thus it is possible to achieve significant greenhouse gas emissions by focusing policy on changing individual norms and behavior.\(^\text{187}\) Changes in behavior at a small individual scale may seem only to have diffuse benefits, but they in fact end up generating global benefits as well as local ones.\(^\text{188}\)

Horizontal subsidiarity thus prompts governments to look for, and accept, allies to facilitate the initiatives of proactive citizens who, individually or in groups, are willing to take direct care of the common assets of the city. In a sense, the government is looking to share the responsibility of caring for common goods with an active citizenry. This “sharing” implies that citizens are willing to act for the general interest—to be a city-maker rather than just a city-user.\(^\text{189}\)

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\(^{188}\) See, e.g., Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 140-42 (2009) (explaining how individuals can struggle to accept that a diffuse, ubiquitous problem like clean air or climate change can be mitigated through such a seemingly insignificant action as flicking off one’s light switch); John C. Dernbach, *Harnessing Individual Behavior to Address Climate Change: Options for Congress*, 26 VA. ENVTL. L.J. 107, 160 (2008) (suggesting that individuals must be actors of climate change regulatory strategies because “[t]he problem is too daunting to focus simply on the large polluters”).

\(^{189}\) See FRUG, supra note 13.
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Some have argued that this kind of active citizenship constitutes a “third sector” of both informal and formal organizations (or collections of individuals) outside of the state or market, capable of providing goods and services for the well-being of citizens, even as it risks putting too much pressure on residents. We do not mean to equate subsidiarity with devolution of responsibility by local authorities over the provision of basic public goods and services to city residents. Rather, the principle of horizontal subsidiarity is intended to reorient public authorities away from the central state to an active citizenry willing to cooperatively govern common resources.

2. Collaboration

Collaboration is another core aspect of commons institutions, more generally, and of urban commons institutions, more particularly. Collaboration has strong political and democratic ramifications. Collaboration, as a general matter, has emerged as a form of governance to replace adversarial and managerial modes of policy making and implementation. In this model, several stakeholders interact in order to implement public policies, or manage crucial assets for the community. At the level of a common pool resource, active citizens become problem solvers and resource managers, able to cooperate and make strategic decisions about common assets and to implement them with other citizens and other urban stakeholders. The kind of collaborative governance re-


191. Chris Ansell and Alison Gash define collaborative governance as

[a] governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets.


192. The term “stakeholder” can be used to refer both to participation of citizens as individuals and to the participation of organized groups, public agencies and non-state stakeholders. As Lisa Bingham has argued:

“Collaboration” means working together with diverse interests to achieve common goals across boundaries and in multi-agency, multi-sector, and multi-actor relationships and may include the general public, state, regional, and local government agencies, tribes, non-profit organizations, businesses, and other nongovernmental stakeholders to address issues that cannot easily be addressed by any one organization on its own.


193. Cooperation is a crucial factor in the conceptualization of collaborative governance. See Philippe C. Schmitter, Participation in Governance Arrangements:
flected in commons institutions deeply engages citizens in public-public and public-private partnerships with the goal of implementing an arrangement in which citizens are governing and not simply being governed. Similarly, a commons-based approach to governance at the level of the city can utilize collaboration as a methodological tool through which heterogeneous individuals and institutions co-create or co-govern the city, or parts of the city, as a common resource.

One way to think of collaborative governance is through the lens of the “triple helix” concept, utilized in innovation studies, in which there occurs a shift from an industry-government dyad characterizing the Industrial Society to a triadic relationship between university, industry, and government in the Knowledge Society. The basic idea is that the potential for innovation and economic development in a Knowledge Society lies in the hybridization of elements from university, industry, and government to generate new institutional and social formats for the production, transfer and application of knowledge. The knowledge transfer and interactions between these elements are a function of the complex set of formal and informal linkages between higher education

Is There Any Reason To Expect it Will Achieve “Sustainable and Innovative Policies in a Multi-Level Context”? in PARTICIPATORY GOVERNANCE: POLITICAL AND SOCIETAL IMPLICATIONS 51, 53 (Jürgen Grote & Bernard Gbikpi eds., 2002) (“Governance is a method/mechanism for dealing with a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating with each other and cooperating in the implementation of these decisions.”) (italics removed).

194. When we refer to the “public” we want to acknowledge that there are two forms of “public” actors: the public conceived as the public sector or as a specific community or polity. Collaboration is a methodological tool that enables these two kinds of public to work with each other, or to work with private actors that exist outside of these two publics.


196. The triple helix has components and sub-components among them. Distinctions are made between (a) “[i]ndividual and institutional innovators”; (b) “R&D and non-R&D innovators”; and (c) “‘[s]ingle-sphere’ and ‘multi-sphere’ (hybrid) institutions.” Marina Ranga & Henry Etzkowitz, Triple Helix System: An Analytical Framework for Innovation Policy and Practice in the Knowledge Society, 27 INDUS. & HIGHER EDUC. 237, 242 (2013). According to the authors, there are two complementary perspectives from which is possible to see the triple helix system theory: the neo-institutional perspective, which sees the university as the main innovation actor, and the neo-evolutionary perspective, which sees the “university, industry and government [as] co-evolving sub-sets of social systems that interact through an overlay of recursive networks and organizations that reshape their institutional arrangements through reflexive sub-dynamics, such as markets and technological innovations.” Id. at 239-40.
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systems, businesses, and the government. The interactions between the three strands of the 'helix' creates the unique and distinctive characteristics of an innovation system . . . at either a national or regional level.

Building on this kind of highly interactive, collaborative governance model represented by the triple helix, a quintuple helix model is being experimented throughout cities in Italy. There, universities (and also other knowledge-bearing institutions such as schools and research and cultural centers) are facilitating the creation of partnerships between public and private organizations, on the one hand, and social innovators and citizens, on the other hand. In these experiments, urban, environmental, cultural, knowledge, and digital commons are co-managed through loosely coupled systems by five actors—the unorganized public (i.e., social innovators, active citizens, makers, digital innovators, urban regenerators, urban innovators, etc.), public authorities, businesses, civil society organizations, and knowledge institutions (i.e., schools, universities, cultural academies, etc.)—to establish public-private-community partnerships. These partnerships have three main aims: living together (collaborative services), growing together (collaborative ventures), and making together (collaborative urbanism). These different elements interact together to produce shared value or collective goods in the growth and revitalization of cities.

Designing collaborative processes, or institutions, to include a wide range of citizens, particularly those most vulnerable to being excluded from decision making processes on account of their social or economic status, is important for governing any common pool resource. We must be careful not to romanticize collaboration as a commons principle. It is important for urban reformers to heed the lessons of failed collaborative urban governance practices which simply devolve planning processes to the sublocal level without offering new tools and resources to enable meaningful collaboration, or to make truly accessible urban assets, for a broader class of city residents.

199. See infra Part III.C. On the quintuple helix governance model, see also Christian Iaione & Paola Cannavò, The Collaborative and Polycentric Governance of the Urban and Local Commons, 5 URB. PAMPHLET 29 (2015).
201. Here we acknowledge the literature critiquing collaborative planning experiments in cities around the world as prone to domination by economic elites and/or strong or corrupt sublocal leadership, excluding the poor and vulnerable from claiming and sharing in the revitalization of neighborhoods and cities. See, e.g., Sarah Elwood, Partnerships and Participation: Reconfiguring Urban Governance in Different State Contexts, 25 URB. GEOGRAPHY 755 (2015) (comparing the discourses
development processes, in our view, deeply engage and empower a wide range of actors in the revitalization of city space and in the management of neighborhood assets.

We embrace urban commons-based experimentation which has both a governance component and resource-sharing component that allows residents access to, and use of, local assets (even if temporary). This promotes not only inclusive development practices but also new forms of urban welfare provisioning through commons management. An example of a collaborative urban commons framework that bridges these two elements—the commons as shared assets and governance—is the recently implemented Bologna regulation on the urban commons, which is described below.

3. Polycentricism

Collaboration with other stakeholders and institutions (both public and private) can lead to common resources being managed in a “polycentric” manner—i.e., neither exclusively owned nor centrally regulated. The polycentric approach to governance was first proposed by Vincent Ostrom, Charles Tiebout, and Robert Warren to connote “many centers of decisionmaking which are formally independent of each other” but which “may function in a coherent manner with consistent and predictable patterns of interacting behavior.”\(^{202}\) Instead of a global, top down regime in which lower levels of government carry out the mandates from above, the polycentric approach “provides for greater experimentation, learning, and cross-influence among different levels and units of government, which are both independent and interdependent”\(^{203}\)

and practices of purportedly collaborative or “partnership” rapprochements to urban governance in the United States and United Kingdom as enacted through nationally directed planning and revitalization program); Sarah Elwood, *Neighborhood Revitalization Through 'Collaboration': Assessing the Implications of Neoliberal Urban Policy at the Grassroots*, 58 GEOJOURNAL 121 (2002) (using example of a collaborative revitalization program in Minneapolis, Minnesota); Marie-Hélène Zérah, *Participatory Governance in Urban Management and the Shifting Geometry of Power in Mumbai*, 40 DEV. & CHANGE 853 (2009) (questioning the participatory dimension of urban governance in Mumbai based on surveys of a number of collaborative public private partnerships for urban services and infrastructure provision); Soumyadip Chatapadhyay, *Contesting Inclusiveness: Policies, Politics and Processes of Participatory Urban Governance in Indian Cities*, 15 PROGRESS IN DEV. STUD. 1 (2015) (examining participatory governance arrangements in major Indian cities characterized by the involvement of neighborhood associations/residents’ welfare associations (RWAs) and NGOs).


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The polycentric approach to commons governance was fully embraced by Elinor Ostrom in her studies of commons institutions in the natural resources context. According to Ostrom, the two organizational forms for commons management theorized in the mid-twentieth century—the market and the state, the first for the production of private goods and the second for non-private goods—do not “adequately deal with the wide diversity of institutional arrangements that humans craft to govern, provide and manage public goods and common-pool resources.”

A polycentric approach to local governance locates commons institutions in between the market and the state. Polycentrism is not just about the participation of several levels of governments in providing public goods or delivering services; “polycentric governance requires a certain level of independence and interdependence between governance institutions and organizations at various levels.” As Daniel Cole has argued, to understand the polycentric approach is to understand the distinction between government and governance: governance is not just ‘what governments do’ because governance is not a function limited to the State; rather, myriad non-governmental organizations, local neighborhood associations, individual property owners, etc. can (and already do) play an important role in governing resources.

A polycentric system is thus, ideally, “a system in which governmental units both compete and cooperate, interact and learn from one other, and responsibilities at different governmental levels are tailored to match the scale of the public services they provide.”

Some urban commons institutions, like BIDs and Park Conservancies, possess many of the characteristics of polycentric governance. In fact, such institutions very much resemble those identified in Elinor Ostrom’s study of a series of groundwater basins located beneath the Los Angeles metropolitan area. In her findings, groundwater producers organized voluntary associations, negotiated settlements of water rights, and created special water districts to monitor and enforce those rights with the assistance of county and state authorities. State legislation authorizing the creation of special water districts by local citizens, in particular, was a crucial element in encouraging users of groundwater

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205. Cole, supra note 203, at 396.
206. See also Jouni Paavola, Climate Change: The Ultimate “Tragedy of the Commons”? in PROPERTY IN LAND AND OTHER RESOURCES 417 (Daniel H. Cole & Elinor Ostrom eds., 2011).
207. Cole, supra note 203, at 397.
208. Id. at 405.
209. See Ostrom, supra note 17, at 103-42 (discussing the case studies of user groups in three California groundwater basins).
basins to invest in self-organization and the supply of a local institution. Ostrom viewed the relationship between the private water associations, public agencies, and special districts as illustrating how a governance system “can evolve to remain largely in the public sector without being a central regulator.”

Thus, all the actors in a polycentric governance regime are part of an autonomous center of decision and can realize activities for the urban commons, coordinated and enabled by the public authority. The role of the State becomes that of providing them necessary tools (including appropriate public policies packaged as collaborative devices), connecting the several networks of actors, and helping the so-called “collaborative class” to enlarge the boundaries of innovation. In this kind of system, “many elements are capable of making mutual adjustments for ordering their relationships with one another within a general systems of rules where each element acts with interdependence of other elements.”

IV. The City As A Commons

As we have argued, the city is a commons by virtue of its openness and potential for rivalry. It is this very openness that lends the city commons a paradoxical quality that often puts it in tension with itself. On the one hand, it is the openness of cities that allows them to make and remake themselves, and to compete for the people and goods that help to grow and sustain them. On other hand, the city has finite resources that, by virtue of being open, are subject to congestion and exhaustion, rendering those cities vulnerable to rivalry. This rivalry often puts in conflict different kinds of commons, or commons claims, leading not only to the sacrifice of one urban good (e.g. a park or garden) for another (e.g. housing) but the sacrifice of the needs of the socially and economically powerless for the desires of the more powerful.

How cities manage, or govern in the face of, the potential for rivalry and tensions between competing claims to the commons is at the heart of the governance question that we address in this Part. There is no one system that can satisfactorily mediate the tensions that arise from rivalry for common resources, nor that can resolve distributional inequalities with regard to those resources.

210. The special district, though central to the relationship among users, was only one public enterprise among a half dozen agencies that were actively involved in the management of the basins. In addition to the public districts, private water associations were also active in each groundwater basin. Once a special district was created, it possessed a wide variety of powers. Those powers included the ability to raise revenue through a water pump tax and, to a limited extent through a property tax, to undertake collective actions to replenish a groundwater basin. Id. at 129.

211. Id. at 135-36.

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However, there are alternatives to the current system—one in which local governments hold a monopoly over common resources and in which the vastly unequal influence over relevant decisions by elites and narrow interest groups operates to the detriment of large swaths of the urban population.

In this Part, we begin to sketch out an alternative vision of city governance in which heterogeneous individuals and institutions can collaborate together to co-create or co-govern the city, or parts of the city, as a common resource. Here we lay out the conceptual pillars of what we call an “urban collaborative governance” which conceives of the role of the state according to the design principles set out in the previous Part and introduces a strong element of social and economic equity or inclusion. We also provide and explore two emerging examples on the ground of what this model of urban collaborative governance might look like in practice: the sharing city and the collaborative city.

A. Urban Collaborative Governance

The core impetus to conceive of the city as a commons aims at changing the democratic and economic functioning of the city. This change is necessary not only to create a city that better functions according to the needs of all of its citizens, but also to acknowledge the trend towards massive urbanization and the reality that cities are becoming the center of political life. As we have seen with the above examples of existing urban commons institutions, it is possible to re-situate the role of the state, or city, as an enabler and facilitator of collaboration and ultimately of political and economic redistribution.

The idea of the state as a facilitator—a relational state—is part of the move from a “command and control” system of governance to what we call “urban collaborative governance,” a system which at its core redistributes decision making power and influence away from the center and towards an engaged public. The facilitator state creates the conditions under which citizens can develop collaborative relationships with each other, and cooperate both together and with public authorities, to take care of common resources, including the city itself as a resource. Further, if the city itself is a shared resource, then a strong collaborative system of decision making should also nudge towards redistributing some of the assets of the city to support differently-situated individuals and communities within the city. This idea is akin to the “city-making”

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213. See Benjamin Barber, If Mayors Ruled the World: Dysfunctional Nations, Rising Cities (2013).


that Frug proposed in which he advocated transforming cities, and city services, into vehicles for community building across local government boundaries. In a similar way, a commons-based governance approach envisions cities as vehicles for collaboration across formal governance arrangements toward social and economic inclusion.

1. Re-Designing City Hall

To imagine the morphology of the City government as a facilitator, it is necessary to move away from the Leviathan, or the Gargantua, and design an institutional system without a dominant center—one which involves other actors in decision making and administrative implementation processes, considering such actors as peer co-workers or co-designers. As we discussed earlier, commons-based institutions are characterized by a move away from a vertically (top-down) oriented world to a horizontally organized one in which the state, citizens, and a variety of other actors collaborate and take responsibility for common resources. The institutional settings where urban collaborative democracy can take place are places of networking, of connecting and coordinating different and autonomous actions for the same shared goals.

The challenge of networked governance may be that its structure resembles a loosely coupled system, subject to fraying at the margins and not glued together enough to be organizationally coherent. As Daniela Piana has emphasized, the concept of a loosely coupled system, introduced by Karl Weick, describes a system where the connections among its units are weak, but flexible enough to easily react and adapt to horizontal patterns of coordination. However, although loosely coupled systems may be adaptive, they can lose consistency and predictability if repeatedly confronted with abrupt and unpredictable change.

216. See Frug, supra note 13.
217. Ostrom, Tiebout, and Warren use the Gargantua name in order to describe the organization of metropolitan governance as a political system with a single dominant center for making decisions. See Ostrom, Tiebout, & Warren, supra note 202, at 831. The term is taken from the work of Robert Wood. See Robert Wood, The New Metropolis: Green Blets, Grass Roots or Gargantua, 52 AM. POL. SCI. REV. 108-22 (1958). “Gargantua” is “the invention of a single metropolitan government or at least the establishment of a regional superstructure which points in that direction.” Ostrom, Tiebout, & Warren, supra note 202, at 831.
220. Id. at 50.
221. Id.
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What stabilizes the kind of collaborative institutional ecosystem that we envision is the role of the public authority, which becomes that of coordinator and mediator in co-design processes. In this sense, the networks, actions and reactions of others in the ecosystem are independent and free but nested within the local government, consistent with a polycentric system. Elected officials behave no longer as “citizens’ representatives” but rather as “collaborative institutional ecosystem managers.” City officials and staff are tasked to assist, collaborate, and provide technical guidance (data, legal advice, communication strategy, design strategies, sustainability models, etc.) to enable themselves to manage, mediate, and coordinate the ecosystem. The role of a public official is therefore that of manager, enabling and supporting (and perhaps coordinating) parts of the ecosystem to allow it to “nest” within the larger policy of the city.

2. Co-Designing the City

In general, public decision making processes typically follow three different logics: a majoritarian logic, a negotiated logic, or a deliberative logic. In an urban collaborative democracy, the logic should be a collaborative logic based on the development of shared norms and shared goals. This logic is focused on the collaborative decisionmaking and collaborative design, both processes which have as their task the identification of common goals, means to achieve those goals, and the mechanisms by which to share roles and responsibilities in the implementation of them. Public authorities and public officials are still engaged in policymaking, but debate about public policy is no longer developed inside political parties, or inside city councils, but instead inside other civic arenas. This transformation thus implies the development of collaborative devices, inspired by the design principles described in this Article, that help local authorities to facilitate and foster this debate and decision making along the logic of collaboration. Collaborative decision making, like other forms of democratic innovation beyond representative democracy, is designed to increase and deepen public participation in public decisionmaking processes.

One example of these new civic arenas are Urban Collaborative Labs, or living labs, which are user-centered open innovation ecosystems that can be focused on a neighborhood, city, or region. Regardless of the geographic or ter-

223. See generally GRAHAM SMITH, DEMOCRATIC INNOVATIONS: DESIGNING INSTITUTION FOR CITIZEN PARTICIPATION (2009).
225. An inspiration may come from the Assembly of The Commons, a proposal developed by P2P Foundation. See Assembly of the Commons, P2P FOUND., http://p2pfoundation.net/Assembly_of_the_Commons (last visited June 4, 2016).
ritorial focus, they are a co-design process that has the effect of profoundly shaping and affecting the urban planning process. There are no requirements or selection criteria to access the Labs, and participation is elective and open to everyone who is interested. The living lab approach has proven well suited for instantiating urban collaborative governance ideals because of its user co-creation approach to identify and integrate the most innovative approaches to planning and for navigating the constraints posed by existing institutional frameworks. These informal spaces should be at the heart of the collaborative institutional ecosystem and are important for managing the city as a commons.

The governance output that emerges from this collaborative process is the co-design of particular urban commons, and neighborhoods, as well as the co-production of community services at the city and neighborhood level. However, these very sophisticated processes and institutional architectures are new and complex to design. This is why they do not always function as they should. For instance, these collaborative, co-design processes can break down when local (or sublocal) factions no longer agree with the governance process in which they are involved, or no longer agree with the goals or plans designed for a neighborhood or for a particular local good. When this occurs, the potential of public officials in their active role as co-designer, or mediator, is perhaps at its highest. In the mediator role, city officials might find an informal solution to the conflict, helping the parties find common synergies and perhaps even infusing the governance arrangement with different proposals or decision making tools.

If the conflict continues to exist, the solution might then be found through instruments of direct and deliberative democracy, including a larger portion of city inhabitants (direct neighborhood referendum or public consultation or resorting to mini-publics and other deliberative procedures to reach consensus). If all else fails and a real stalemate emerges, cities could establish a Commons Court to mediate the conflict. Collaborative policymakers and bureaucrats, for example, might establish “deliberative or participatory processes,” “local commons courts,” or other dispute resolution-like mechanisms that perform an arbitrage role where the co-design process is not able to lead to integration or coordination of different collaboration proposals.


227. For a more comprehensive introduction to deliberative methods and techniques, see Kimmo Grönlund et al., Deliberative Mini-Publics: Involving Citizens in the Democratic Process (2014). See also James Fishkin & Robert Luskin, Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion, 40 ACTA POLITICA 284 (2005); Ian O’Flynn, Deliberative Democracy, the Public Interest and the Consociational Model, 58 POL. STUD. 572 (2010).
3. Redistributing Political Power

The concept of urban collaborative governance is not simply another articulation of deliberative democracy.\textsuperscript{228} Supporters of deliberative democracy may, for instance, argue that a certain institutional design or procedure is able to “produce a reflexive change of beliefs through deliberation,”\textsuperscript{229} and that “preferences of citizens and their representatives can be transformed in the process of exchanging arguments.”\textsuperscript{230} Collaborative democracy instead involves a different type of institutional complexity because it requires “a resymbolisation of the place of power that is thicker than a ‘network of actors or stakeholders.’”\textsuperscript{231} In an urban collaborative democracy, governance is in need of an institutional platform where the politics can become visible, equal, contestable, and legitimate. These are platforms where the relationship between power, law, and knowledge is re-defined. It is a place where instead of hierarchies of power and wildly unequal bargaining positions, we see networks of empowered members where the inhabitants and stakeholders are co-creating, co-designing, and co-implementing planning and other public policy solutions for complex urban environments together with policymakers and local officials.

Nevertheless, the institutional scenarios envisioned and discussed here as co-design spaces for collaborative policies can present problems of accountability and legitimacy because the decision-making process takes place in settings that bypass representative channels of democracy. In the traditional model of a representative democracy, what a government decides is assumed to represent the will of the people. Governance arrangements are usually voluntary arrangements and therefore bind only those who are actually involved in the governance scheme. However, in the case of urban commons governance institutions the governance arrangement may affect the everyday life of all city inhabitants that fall within the boundaries of the governance scheme (think of the BIDs, the decisions of which can have an impact also on those who are not part of the BID governance). As a consequence there is a real concern about the legitimacy of these collaborative governance settings.\textsuperscript{232}


\textsuperscript{230} Id. at 46, 65.

\textsuperscript{231} Matthias Lievens, From Government to Governance: A Symbolic Mutation and Its Repercussions for Democracy, 63 POL. STUD. 2, 14 (2014).

There are other concerns, to be sure, with these new co-design processes that we want to flag but cannot yet resolve. One is related to social equality: are collaboration arenas able to guarantee equal access by underrepresented groups who are too often unable to access political and larger decision making processes, or can the potential of such collaborative processes represent a significant step towards a more egalitarian process than currently exists? How can we avoid the risk that the collaborative ecosystem produces output that results in a patchwork, instead of a network, of governance arrangements for the urban commons? If the Urban Collaborative Democracy can serve as an integration of representative democracy at the hyper-local level, we should investigate whether it provides political legitimacy; in other words, as Jody Freeman highlights, “[H]ow can we be sure that the products of collaboration . . . will be legitimate?”

How can we provide accountability and legitimacy in an urban collaborative democracy where elected and public officials act as co-designers? We do not have answers to these questions but agree only that they should be raised and constantly invoked to interrogate collaborative processes designed in line with our vision of urban collaborative governance.

4. Social and Economic Inclusion

At the heart of the idea that city is a commons is the idea that its resources should be shared more widely throughout its communities and on behalf of its inhabitants, particularly the least powerful. As such, reconceiving the city as a commons can be a powerful tool to fight inequality in cities. The argument is two-fold: urban commons can be both a tool to increase the private wealth of single households and a stock of resources that can be used to more fairly distribute social and economic resources.

First, individual common resources in the city can be a way to improve the quality of life (and also the value of owned assets) and a means to improve income and find or create jobs. On the one hand, we know that the provision of housing is essential for the livelihood of all and that the value of a particular dwelling is highly dependent on the quality of the surrounding shared neighborhood amenities (e.g. public space, infrastructure, schools, etc.). On the other hand, these shared amenities can be a way to foster social inclusion if they are used as places or means for people to learn skills, obtain access to job opportunities, socialize, and to access social services that increase economic inclu-

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The concept of “makerhoods”—an urban planning and economic development strategy that seeks to unleash micro-entrepreneurs to strengthen communities through natural and affordable live/work accommodations—embodies this mix of inclusive, affordable, and shared space in which people can earn a living and still sustain themselves while establishing small businesses.236

The second aspect is that repositioning the city as a commons, as a resource belonging to us all, gives legitimacy to the city government to enact redistribution policies and accommodate as many people as possible in a city. Taxing the wealthy does not, by itself, help the poor. The city as commons can be instead the object of an innovative planning and distribution of the resources of the city. First, high-income citizens could be nudged to philanthropically transfer or grant “civic use” of private assets to low-income people. Second, the local government could use its assets to grant either permanently or temporarily a “commons endowment” or a “commons minimum inheritance” at adulthood or upon losing a job to enable individuals to become retrained or to find a new means of making a living. This is very similar to what has been proposed by supporters of basic income policies or by Atkinson, who advanced the idea of a minimum heritage for all citizens.239 The point is that thinking of the city as an institution that promotes collaboration all the way across and down as a way to “share” the resources it controls can spur a host of innovative and progressive policies that address the social and economic inequality that is becoming a feature of 21st century urbanization.

5. Pooling Economies

Another pillar of urban collaborative democracy is the change in economic functioning of the city. Poolism may be an appropriate definition to describe current economic trends in the urban context. Forms of co-production of goods and sharing practices are spreading in cities all over the world. Experiences like co-working spaces (profit or nonprofit) and Fab Lab networks are emblematic of this process. A clear distinction should be made, however, between a sharing and a pooling economy. The phenomena that has recently been defined as a sharing economy builds on new or revived social patterns that have important business, legal and institutional implications, particularly in cities.240

Poolism refers instead to practices of “collaborative economy” that foster peer-to-peer approaches and/or involve users in the design of the productive process or transform users into a community.\footnote{The distinction between ‘pooling’ and ‘sharing economy’ has been recognized by the European Union in the Committee of the Regions opinion EUR, UNION, COM. OF THE REGIONS, THE LOCAL AND REGIONAL DIMENSION OF THE SHARING ECONOMY (Dec. 3-4, 2015), https://webapi.cor.europa.eu/documentsanonymous/COR-2015-02698-00-00-AC-TRA-EN.docx/content (download).} Thus, “commons-based economy”, “open cooperativism”, or “open platform cooperativism” are better terms, in our view, for sharing economy initiatives that are collectively owned or managed, democratically governed, and do not extract value out of local economies but rather anchor jobs, cultivate respect for human dignity, and offer new forms of social security.

The growth of the sharing economy should only partially be considered a fundamental change in economic functioning as a consequence of the recent economic crisis.\footnote{See KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944). According to Polanyi and other pre-capitalist historians, allocation in many earlier urban civilizations took place in three ways: redistribution, regulated markets and reciprocity. Sharing economy seems to be inspired to the latter.} In some respects it might also represent, thanks to information technologies, the reverse-transformation\footnote{See COMMONS TRANSITION, http://commonstransition.org/ (last visited June 4, 2016).} or the transition\footnote{See PAT CONATY & DAVID BOLLIER, TOWARD AN OPEN CO-OPERATIVISM: A NEW SOCIAL ECONOMY BASED ON OPEN PLATFORMS, CO-OPERATIVE MODELS AND THE COMMONS (Aug. 27-28, 2014), http://bollier.org/sites/default/files/misc-file-upload/files/Open%20Co-operativism%20Report%2C%20January%202015_0.pdf. See also Trebor Scholz, Platform Cooperativism vs. the Sharing Economy, MEDIUM (Dec. 5, 2014), https://medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b54d#.igg6ctgg7.} of some sectors of the current economic model to long-standing economic traditions and economic models (e.g. cooperative economy, social economy, solidarity economy, handicraft production, commons economy etc.) and even to ancient forms of economic exchange (e.g. the bartering economy), which are alternatives to capital-intensive forms of market economy.\footnote{See, e.g., JEREMY RIFKIN, THE ZERO MARGINAL COST SOCIETY: THE INTERNET OF THINGS, THE COLLABORATIVE COMMONS, AND THE ECLIPSE OF CAPITALISM 19-20 (2015) (explaining how a market-based, highly competitive economy which has driven marginal costs to zero has helped spawn a hybrid economy—part capitalist and part collaborative economy—assisted by a new technology infrastructure which allows more sharing of goods and knowledge and is leading to the replacement of “exchange value” with “sharable value”).}

An application of this approach is represented by innovative forms of poolism. Such forms involve collaborative housing, especially when addressed to vulnerable groups in society (we can already see some application of this ap-
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approach with regards to elderly people as well as co-production of community services (energy cooperatives, water distribution, collaborative waste management).

B. The View from the Ground

Cities worldwide are experimenting with policies that are inspired by the idea of sharing and the commons. Many of them do not use the language of the commons, but some of them do. These cities are emerging in ways that demonstrate some of the pillars of our urban collaborative model. We offer two examples of cities governing themselves along the lines of a “commons.” The first is the now well-recognized “sharing city,” which applies such features embedded within the idea of urban collaborative democracy, particularly on a neighborhood scale.

The other example is the “collaborative city,” which explicitly utilizes the language of the commons and tries to implement an urban vision consistent with principles of urban collaborative democracy. These are two exceptionally innovative attempts to re-situate the city government and to facilitate collaboration in reaching common goals and caring for common goods. We offer them here not as perfect examples of our models but as significant steps towards its realization.

1. The Sharing City

Seoul is the world’s first sharing city. In Seoul, citizens are the “mayor,” according to the formal mayor of Seoul. The city government decided to empower “collective governance” of the city, a governance strategy based on communication and collaboration with citizens. The Sharing City Project is made possible thanks to the approval of the “Seoul Metropolitan Government Ordinance for the Promotion of Sharing.” The main goal of the Sharing City Pro-


ject is the promotion of the sharing approach and sharing practices in the city of Seoul. 250

Article 8 of the Ordinance provides a number of core defining terms. The term “sharing” means activities that create social, economic and environmental values by jointly using resources, such as space, goods, information, talent and experience. A “sharing enterprise” is an enterprise intending to contribute to the solution of social problems—such as economy, welfare, culture, environment, and traffic—through sharing practices. A “sharing organization” is an organization or corporation designated pursuant to Article 8, i.e., a nonprofit, nongovernmental organization or nonprofit corporation, which intends to contribute to the solution of social problems, such as economy, welfare, culture, environment, and traffic, through sharing.

Under the Ordinance the city mayor can designate sharing organizations and sharing enterprises that “shall endeavor to disseminate sharing culture and promote citizen’s convenience.” 251 The mayor may also provide subsidies to sharing organizations or enterprises, following deliberations by the Sharing Committee, and provide administrative support. When introducing the program, the mayor announced that ten sharing enterprises were to be subsidized with 250 million Won. The mayor also announced collaborative mobility in the city through the introduction of 492 vehicles for car sharing services.

To strengthen sharing and collaboration with and among citizens—who, according to the mayor, should no longer be at the receiving end of policies but rather play an active role in shaping public policies 252—the city undertook to design new infrastructure to receive information, feedback, and sharing practices from citizens. This new infrastructure includes the Seoul Citizen’s Hall, a public space located at the basement of city hall where citizens can communi-

250. To achieve this goal, in the framework of a collaborative and communicative state:

The Mayor shall actively promote related policies including the following for the promotion of sharing:

1. Support for the discovery of sharing areas and practice;
2. Promotion of and support for sharing organizations and sharing enterprises;
3. Dissemination of awareness for the promotion of sharing;
4. Improvement of laws and regulations and systems for the promotion of sharing;
5. Cooperation among Korean and foreign organizations, enterprises and institutions related to sharing; and
6. Other matters deemed necessary for the promotion of sharing.

_Id_. art. 5.

251. _Id_. art. 8.

252. Won-Soon, _supra_ note 248.
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cate and collaborate with public administration, and a Social Networking Services administration to pursue active communication with citizens through social networking channels such as Twitter and an online platform that publishes open data to foster transparency and encourage sharing.

The most interesting project established by the City, in order to foster innovation and collaboration, is the Seoul sharing city project. Seoul sharing city is a city-funded initiative and is part of the Social Innovation Bureau (SIB), which itself was established with the aim of engaging citizens to understand problems and generate solutions for governments to develop and adopt. In order to advance the Sharing city agenda, the Bureau promotes several projects, including “Generation sharing households,” “Sharing bookshelves,” and workshops for communication between policy makers and citizens.

2. The Collaborative City

The collaborative city is a commons-based city model. What differentiates the sharing city from the collaborative city is the methodological approach: the “co-city” protocol. The protocol, developed and experimented in five cities in Italy so far, is articulated in three main phases: mapping, experimenting and prototyping. Although the aim of the experimentation is to guarantee the *ceteris paribus* condition, every field experimentation has its unique aspects due to the specific characteristics of the city itself. The aim of the first phase of the protocol, the mapping phase, is to understand the socio-economic and legal characteristics of the specific urban context.

The second phase, the experimenting process, is a “collaboration camp” where synergies are created between emerging commons projects and the city, filtering the collaborative actors from the predatory ones, on one side, and the participative one, on the other side. In the second phase, co-working sessions organize tests for possible synergies and alignment between projects and relevant actors. These culminate in a “collaboration day,” which might take the

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255. See id. at 85.

256. This is the Latin phrase for “other things being equal.”

257. This is inspired by “Deliberation Day.” The idea of Deliberation Day was conceived by Bruce Ackerman and James Fishkin, born from empirical observation of the deliberative polls experiences. Deliberation Day is proposed as a new national holiday held a week before national elections. Registered voters are
form of placemaking events—e.g., an urban commons civic maintenance festival, temporary utilization of abandoned building or spaces, micro-regeneration intervention—to test, experiment and coordinate the ideas that arise out of the co-working sessions.

The third phase, the governance prototyping phase, leads to a different governance outcome on the basis of the guidelines extracted during the experimentation phase and on the needs of the specific community or city. As a matter of fact a crucial characteristic for urban commons-based governance experimentalism is adaptiveness.\textsuperscript{258} As the following paragraphs explain, this phase results in the design of governance tools best suited or tailored to local conditions.

The protocol is the necessary step to create the most favorable environment for innovation through urban commoning, by adopting the design principles of sharing, collaboration, and polycentrism. The key is to transform the entire city or some parts of it into a laboratory\textsuperscript{259} by creating the proper legal and political ecosystem for the installation of shared, collaborative, polycentric urban governance schemes.\textsuperscript{260} This process of democratic experimentalism re-conceptualizes urban governance along the same lines as the right to the city, creating a juridical framework for city rights.\textsuperscript{261}

\footnotesize{called at the neighborhood level to discuss together the key issues of the political campaign. The goal of Deliberation Day is production of deliberative public opinion at the mass level. See BRUCE ACKERMAN & JAMES FISHKIN, DELIBERATION DAY 149 (2004).}

\footnotesize{258. The polycentric structure of an adaptive legal system offers tremendous opportunities for cities to be leaders in social-ecological resilience. See Craig Anthony Arnold, Resilient Cities And Adaptive Law, 50 IDAHO L. REV. 245, 254 (2014).}

\footnotesize{259. The idea is that the urban level is the best testing ground for democratic experimentalism. Democratic experimentalism, and the kind of innovations we propose, help to overcome political apathy, reduce the lack of legitimacy, increase political satisfaction and lead to more effective policies. See, e.g., Brigitte Geissel, Improving the Quality of Democracy at the Local Level: German Experiences (May 23–24, 2008), http://www.provincia.tn.it/binary/pat/link_home/geissel_Trento_o8_final.1211796325.pdf (presented at “Quality of Democracy, Participation and Governance: The Local Perspective” conference at Trento, Italy).}

\footnotesize{260. The protocol works as a sort of 'wind gallery' for the experimentation of the collaborative/polycentric urban governance scheme. The idea of the 'wind gallery' is inspired by the 'wind tunnel,' the innovative solution introduced by the Wright brothers that allowed them to successfully perform the first controlled flight at the beginning of the twentieth century. See 1901 Wind Tunnel, NAT’L AERONAUTICS & SPACE ADMIN., http://wright.nasa.gov/airplane/tunnel.html (last visited June 4, 2016).}

\footnotesize{261. What we mean by this is that through collaborative, polycentric governance-based experiments we can see the right to the city framework be partially realized—e.g., the right to be part of the creation of the city, the right to be part of the decisionmaking processes shaping the lives of city inhabitants, and the right of
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The most successful application of the “co-city” protocol is the CO-Bologna project run in the City of Bologna to design a policy and regulatory framework re-shaping the relationship between inhabitants and the local administration with regard to urban resources and services. The main pillar of the CO-Bologna process is the recently enacted regulation on civic collaboration for the urban commons, empowering residents, and others, to collaborate with the city to undertake the “care and regeneration” of the “urban commons” across the city. The “urban commons” covered by the regulation includes mainly public spaces, urban green spaces, and abandoned buildings and other infrastructure. However, its definition of the commons is quite expansive, directly relating the concept to the quality of life in the city and the concept of human flourishing:

"[T]he goods, tangible, intangible and digital, that citizens and the Administration, also through participative and deliberative procedures, recognize to be functional to the individual and collective wellbeing, activating consequently towards them, pursuant to article 118, par. 4, of the Italian Constitution, to share the responsibility with the Administration of their care or regeneration in order to improve the collective enjoyment."

The central regulatory tool is the “collaboration agreement,” signed by citizens and the city, which establishes the object of care, and the rules and conditions of collaboration among any group of citizens and the local government, or other actors. The collaboration could be for long-term care of a common resource, or a single or short-term intervention. The regulation also provides for inhabitants to shape decisions about the collective resources in which we all have a stake. See supra notes 8-10; see also JEAN-BERNARD AUBY, DROIT DE LA VILLE: DU FONCTIONNEMENT JURIDIQUE DES VILLES AU DROIT À LA VILLE (2013).

In the interest of full disclosure, one of the authors, Christian Iaione, was a member of the working group which drafted the Bologna Regulation on public collaboration for urban commons. See Bologna Regulation on Public Collaboration for Urban Commons, LABGOV (Dec. 18, 2014), http://www.labgov.it/2014/12/18/bologna-regulation-on-public-collaboration-for-urban-commons/.

The regulation provides that “[t]he City periodically advertizes the list of spaces, buildings or digital infrastructures which could be target of actions of care and regeneration, specifying the goals to be pursued through the collaboration with active citizens.” See COMUNE DI BOLOGNA, REGULATION ON COLLABORATION BETWEEN CITIZENS AND THE CITY FOR THE CARE AND REGENERATION OF URBAN COMMONS § 10(6), at 13 (LabGov trans., 2014), http://www.comune.bologna.it/media/files/bolognaregulation.pdf.

Section 16 speaks of “real estate of the City the buildings [of which are] in [a] state of partial or total disuse or decay which . . . are suitable for care and regeneration interventions.” Id. § 16(1), at 17.

Id. § 2(a), at 6.

Id. §§ 2(e), 5, at 7, 9-11.
the transfer of technical and monetary support to the collaboration, and ways of defining the borders of the particular resource to be managed through a collaborative pact. It also contains norms and guidance on the importance of sustaining common resources, maintaining the inclusiveness and openness of the resource, of proportionality in protecting the public interest, and directing the use of common resources towards the “differentiated” public. Finally, the regulation speaks of fostering urban creativity chiefly through regulating urban and street art, and the digital infrastructure.

The specific applications of the Bologna regulation are just now undergoing implementation as the City has recently signed almost 260 pacts of collaboration, which are tools of shared governance.

The regulation and other city public policies foresee other governance tools inspired by the collaborative and polycentric design principles underlying the Regulation. For example the Regulation foresees also that the City supports the willingness of inhabitants, private owners, and commercial businesses to create street or neighborhood associations, consortiums, cooperatives, foundations to manage public space, public urban green spaces and parks, and abandoned and creative spaces.

Also, the City enacted other commons-based public policies that are not based on the Regulation. In particular the invitation to tender “Icredibol” and the co-design process called “Collaborare è Bologna” are relevant. The first tool is a comprehensive plan to use urban abandoned or unutilized public asset to install collaborative spaces. The second is a neighborhood collaborative planning process for understanding what the communities are willing to run as commons and co-design solutions to install forms of governance of the urban commons.

For our purposes, the Bologna regulation and the Bologna collaborative city program are illustrative of the kinds of experimentalist, adaptive, iterative governance and legal tools which allow city inhabitants and actors (i.e., social innovators, local entrepreneurs, civil society organizations, and knowledge institutions willing to work in the general interest) to enter into co-design processes with the city leading to local polycentric governance of an array of com-

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267. The regulation makes clear that the city or municipality will make available technical support and other forms of assistance to be able to care for or regenerate these resources. Title VI is dedicated to the forms of support, see id. tit. VI, §§ 20-27, at 19-23 (Forms of Support).

268. In other words, the care and regeneration depends on the type or nature of the urban common and the people whose well-being depend upon it.

269. The regulation is a social innovation enabling tool, seeking to promote the birth of collaborative economy or sharing economy ventures. Indeed, it has specific sections dedicated to “social innovation and collaborative services,” “urban creativity,” and “digital innovation.” Id. §§ 7-9, at 11-12.

270. The “Bologna Collaborative City” program is a program jointly developed by the City of Bologna and the Fondazione del Monte di Bologna and Ravenna. Id. at 2.
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common goods in the city. The regulation is at the same time a form of social innovation “enabling” tool which fosters the interaction between urban commoning and the collaborative or sharing economy. Indeed the regulation has dedicated specific articles to “social innovation and collaborative services,” “urban creativity” and “digital innovation” which we believe can be the centerpiece of a “collaborative city.”

Conclusion

We have argued that, in ever-changing urban contexts worldwide, an “urban commons” framework captures much of the debate around contested city space and urban resources. This framework, which until now has been insufficiently developed by scholars, considers important urban goods—open squares, parks, abandoned buildings, vacant lots, roads and other urban infrastructure—as part of the collective, or shared, resources of cities. Such common goods, or the “commons”, require a more open governance regime than currently exists in most cities. The urban commons framework, in addition to its basis in property theory, also provides alternatives for managing common goods, and even the managing the city itself as a commons.

The study of commons institutions represents a fundamental transformation in the way we think about urban law and governance, and perhaps sheds new light on burgeoning forms of democratic experimentalism. We articulated a number of principles, extracted from the various kinds of institutional arrangements already in place, to demonstrate the potential use of an urban commons framework for local governance practices. In and of itself, the potential for what we call urban collaborative governance lies in the enabling of ordinary citizens to improve their lives and their communities in ways that promote human flourishing. However, we also hold out hope that forms of democratic innovation that grow out recognition of the urban commons provide alternatives for city-making which foster the development of inclusive and equitable cities.

Cities, Inclusion and Exactions

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Cities, Inclusion and Exactions

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ABSTRACT: Cities across the country are adopting mandatory inclusionary zoning. Yet, consensus about the appropriate constitutional standard to measure the propriety of mandatory inclusionary zoning has not been fully reached. Under one doctrinal lens, inclusionary zoning is a valid land use regulation adopted to ensure a proper balance of housing within the jurisdiction. Under another doctrinal lens, challengers seek to characterize inclusionary zoning as an exaction, a discretionary condition subject to a heightened standard of review addressing the specific negative impact caused by an individual project on the supply of affordable housing in a jurisdiction. Drawing from the experience of Baltimore, Maryland’s inclusionary zoning ordinance, this Article considers the impact that the uncertainty in the law may have had on the type of inclusionary zoning ordinance adopted by the city. This Article argues that the conversation about inclusionary zoning, land use regulation, and exactions has been formulated in the context of imagery about development that leaves places like Baltimore out. The imagery in these narratives is of an individual landowner powerless in the face of government overreach. The reality is different in those places where land developers are not powerless and instead are often politically influential repeat players. Thus, the real problem presented may be not how to craft doctrine to prevent cities from asking too much of developers, but instead to craft doctrine that ensures cities do not give away too much.

I. INTRODUCTION

II. INCLUSIONARY ZONING

A. HOW ZONING SHAPED THE NEED FOR INCLUSIONARY ZONING

B. THE MECHANICS OF INCLUSIONARY ZONING

1. Mandatory or Voluntary

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I. INTRODUCTION

The project of addressing the need for affordable housing in the United States presents an ongoing dilemma for local government: how to pay for the construction of affordable housing units; and how to find geographic locations to build such units without local opposition thwarting the projects, reconcentrating poverty, or perpetuating racial segregation. These endeavors are a work in progress, and inclusionary zoning has become an increasingly popular, but partial, solution. Under an inclusionary zoning approach, a local government zoning or related housing law will either encourage or require a developer who proposes a new residential construction project to “set aside” a certain number of units for income-restricted sale or lease. This


approach encourages the private production of new affordable housing that is geographically and economically integrated.\(^3\)

Although increasingly widespread, the propriety of inclusionary zoning under the U.S. constitutional doctrine that governs local land use and individual property rights is still somewhat unsettled; the way in which the rights and governmental exercise of authority are framed shapes different answers to whether an inclusionary zoning ordinance is valid.\(^4\) This ambiguity presents two unresolved questions. The first question is whether private developers, by being asked to include units of low- to moderate-income housing in market-rate developments, are being asked to do something extraordinary that unfairly impinges on their property rights—especially when it is costly, either financially or in terms of the upscale image or message that a developer wants to sell.\(^5\) The second question is whether developers are asked to do something both ordinary and consistent with land use regulation because inclusionary zoning promotes uses of land that improves the general welfare of the populace by ensuring housing types that meet the variety of residents’ needs. Tailoring housing types to differing abilities to pay is particularly appropriate considering land use regulation’s history of exclusionary zoning and its pernicious effect in facilitating segregation.\(^6\)

For the most part, there have been relatively few successful challenges to inclusionary zoning ordinances.\(^7\) This is likely so because developers have still found it lucrative to fulfill inclusionary zoning requirements and build profitable residential developments.\(^8\) Some developers even consider it the right thing to do.\(^9\) Also, local governments have mostly been careful in

3.  Id. at 1.

4. Tim Iglesias, Framing Inclusionary Zoning: Exploring the Legality of Local Inclusionary Zoning and Its Potential to Meet Affordable Housing Needs, ZONING & PLAN. L. REP., Apr. 2013, at 1, 4 (arguing that the way the ordinance is framed, as an ordinary land use regulation or a permit with conditions, affects state courts’ receptiveness to either uphold or strike down inclusionary zoning ordinances).

5. See Is Inclusionary Housing the New Normal for High-Cost Places?, HOW HOUSING MATTERS (Mar. 5, 2015), http://howhousingmatters.org/articles/is-inclusionary-housing-new-normal-high-cost-places (“Courts have overturned inclusionary zoning ordinances in some communities, ruling that they are illegal forms of rent control.”).


7. See Iglesias, supra note 4, at 7-9 (describing the various types of legal challenges to inclusionary zoning ordinances, few of which have been successful).

8. See Nicholas J. Brunick, Inclusionary Housing: Proven Success in Large Cities, ZONING PRAC., Oct. 2004, at 1, 3 (finding, in one city, that “[n]ew housing development continues to boom . . . and development projects remain lucrative, even with the affordable unit set-aside requirement”).

9. See URBAN INST., EXPANDING HOUSING OPPORTUNITIES THROUGH INCLUSIONARY ZONING: LESSONS FROM TWO COUNTIES 18 (2012) (“Because [Moderately Priced Dwelling Units (“MPDU”)] are required in nearly all developments and subdivisions in Montgomery County, developers think it is fair.” (footnote omitted)); see also id. at 24 (“Some developers have even expressed pride in their involvement with the MPDU program. They agree that MPDUs are
designing these ordinances to avoid political upset, or worse—legal challenges.10 As a result, either market-rate housing with inclusionary units has been profitably produced notwithstanding the inclusionary zoning requirements, or developers have been insulated from foregone rent or sale income by a combination of strong real estate markets and packages of cost offsets, such as density bonuses or other forms of subsidy.11

Despite the absence of challenges, the experience of a midsized city like Baltimore, Maryland shows a need to consider the extent to which takings law demands that developers must be subsidized to produce inclusionary housing units. Baltimore’s mandatory inclusionary zoning ordinance was deliberately written to only apply if the city completely financially reimburses the developer for creating new affordable housing.12 The assumption is that each developer is required to be made whole for every affordable unit that is created, sold, and rented at the city’s behest.13 The result has been an inclusionary ordinance that has produced very few affordable housing units.14

This Article uses Baltimore’s ordinance to illustrate the impact that the unsettled questions quietly surrounding inclusionary zoning may have, in particular the uncertainty about whether and how the existing constitutional framework governing land use regulation applies to mandatory inclusionary zoning. The hybrid combination of Due Process, takings, and exactions doctrines that guides the analysis of this regulation means the constitutional inquiry is framed in terms of a rigid binary: whether, under Due Process and Takings analysis that has traditionally been applied to zoning, inclusionary zoning is subject to the traditional deferential standard of judicial review that

10. See Is Inclusionary Housing Legal?, INCLUSIONARY HOUSING, http://inclusionaryhousing.org/inclusionary-housing-explained/what-are-the-downsides/is-it-legal (last visited Apr. 23, 2017) (“Policymakers interested in adopting inclusionary housing policies must work closely with legal counsel to design a program that anticipates potential challenges under federal or state law.”).
11. As one developer explained: “Oftentimes, in the location that we’re building, the differential between market and set-aside doesn’t really affect our bottom line . . . . Truthfully, it’s almost beneficial to us because, oftentimes, to have that additional density is meaningful to us from a dollars perspective.” Kim Slowey, Affordable Housing on the Hot Seat: Changing Regulations ‘Force Developers to be More Creative’, CONSTRUCTION DIVE (Mar. 10, 2016), http://www.constructiondive.com/news/affordable-housing-on-the-hot-seat-changing-regulations-force-developers/415335. But see Nicholas Benson, Note, A Tale of Two Cities: Examining the Success of Inclusionary Zoning Ordinances in Montgomery County, Maryland and Boulder, Colorado, 13 J. GENDER RACE & JUST. 753, 771 (2010) (noting that Boulder, Colorado’s mandatory inclusionary housing ordinance does not make density bonuses available to developers).
12. See BALTIMORE, MD. CODE art. 13, §§ 2B-1 to -72 (2016) (establishing the requirements of Baltimore’s inclusionary housing program).
13. See id. § 2B-4(d), (f) (“This subtitle is not intended to impose additional financial burdens on a developer or a residential project. Rather, the intent of this subtitle is that the cost offsets and other incentives authorized under it will fully offset any financial impact resulting from the inclusionary requirements imposed.”).
applies to exercises of the police power, or whether a more probing standard of review should apply under exactions doctrine because a developer is being required to construct a type of unit that is rented or sold at a below-market rate as a condition of being allowed to build. As a result of this binary, one set of legal doctrine defers mightily to local government while the other set protects developers whenever the perception is that a local government is overreaching.

The original framework for land use regulation was conceived when zoning was considered a static affair of defining districts that prescribe land uses. Since then zoning has grappled with accounting for new understandings about the public-private interplay in getting development built as well as the benefits and costs of new development. Not considered relevant to the analysis are other factors that affect the outcomes of development and broader normative questions about how much development should be considered to be already subsidized by the public—for example, an irrelevant factor is the broader impact of the tendency to build upscale, expensive housing. The fundamental issue may instead be whether developers have been adequately required to account for the true cost that a project represents to the public in economic, political, and social terms.

In particular, exactions doctrine, the more restrictive end of the land use constitutional legal framework, is inappropriately conceptualized to take into account the realities and experiences of places that are unlike the locations where the doctrine was largely conceived and formulated. Under exactions doctrine, a local government is prohibited from imposing conditions on landowners seeking permission to intensify the use of their land through development that are found not to relate directly to a specific impact of the

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16. See Iglesias, supra note 4, at 4 (discussing how the framing of the inclusionary zoning issue can affect the legal analysis).

17. Id. at 6–8; see also Mark Fenster, Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions, 58 HASTINGS L.J. 729, 730–31 (2007) (describing exactions as a “confusing line of takings decisions”).

18. See Andrew Auchincloss Lundgren, Beyond Zoning: Dynamic Land Use Planning in the Age of Sprawl, 11 BUFF. ENVTL. L.J. 101, 137–38 (2004) (“Instead of a static, use-based planning medium—one which is based solely on the prerogative of the local governmental body—a . . . new strategy . . . must rather build upon its foundation and be capable of addressing the needs of developer, resident, neighborhood, and landscape. In short, the next step in land use planning will require a dynamism not seen in the previous regimes of nuisance and contract at common law, nor in the regulatory geometry of Euclidian zoning and its offspring.”); see also Robert C. Ellickson et al., Land Use Controls 332 (4th ed. 2013).

19. See Bethany Y. Li, Now Is the Time!: Challenging Resegregation and Displacement in the Age of Hypergentrification, 85 FORDHAM L. REV. 1189, 1190–91 (2016) (explaining how luxury development leads to the negative impact of displacement of low-income residents and in places like New York City is leading to extreme or hypergentrification displacing middle- and upper-income residents).

20. See Saskia Sassen, The Global City: Introducing a Concept, 11 BROWN J. WORLD AFF. 27, 27 (2005) (describing the fact that major cities, as opposed to nation-states, may be the most important regulators of economic activity).
As this Article demonstrates, exactions doctrine reflects a particular narrative that may not be applicable to different development settings. This is especially true for U.S. cities in crisis that are trying to find their footing in a postindustrial world, rely heavily on real estate development, and are very hospitable to real estate developers. This is in sharp contrast to the exactions narrative arc, which accepts as true a story that overbearing governments take advantage of defenseless property owners. As a result, exactions doctrine reflects exaggerated concerns about government overreach, even where developers have a privileged voice and receive ample direct and indirect government subsidies to get even modest improvement projects off the ground.

This Article argues that the failure to fully describe the relationship between developers, local governments, and the general public has detrimentally decontextualized exactions doctrine. In many instances, developers try to improve the value of their real property by encouraging local governments to make investments in public goods and services. The general public is often completely unaware that developers are being subsidized in the process. Far from being victims of overbearing local governments, developers are politically savvy citizens who take advantage of public goods. Also, the stories on which exactions doctrine is based ignore the not uncommon reality that local governments may respond meekly in the face of opposition. Therefore, adding the story of how a struggling city actually responds to developers may help to illuminate the inadequacies of the current framework for much-needed mandatory inclusionary zoning.

Within this context of ever-present direct and indirect subsidy, this Article focuses on an underappreciated question: How can local governments regulate the wide variety of development projects without giving away too

21. See Mark Fenster, Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity, 92 CALIF. L. REV. 609, 613 (2004) (“Exactions include mandatory dedications of land, fees required in lieu of dedication, and impact fees given by property owners in exchange for permits, zoning changes, and other regulatory clearances.”).

22. See Randall K. Johnson, How the United States Postal Service (USPS) Could Encourage More Local Economic Development, 92 CHI.-KENT L. REV. (forthcoming 2017) (describing the economic difficulties that are faced by certain local governments in the United States, as well as one way that these cities in crisis could generate more revenue).

23. See Daniel P. Selmi, Takings and Extortion, 68 FLA. L. REV. 323, 336 (2016) (“Professor Gregory Alexander described the early exaction cases as a story of ‘power and fear,’ one about a ‘perceived imbalance of power’ between private landowners and government regulators. He suggested that courts were not generating takings law by a ‘methodological or theoretical concern, but by the pictures that judges have in their heads about the participants in the public land-use planning arena.’” (footnote omitted) (quoting Gregory S. Alexander, Takings, Narratives, and Power, 88 COLUM. L. REV. 1752, 1752–53 (1988))).


25. See generally Selmi, supra note 23 (arguing that the “extortion narrative” used to support the takings doctrine is not justified).
much—i.e., without oversubsidizing. Part II discusses the goals and methods of inclusionary zoning ordinances and the range of ways to incentivize private sector production of affordable housing. Part III discusses the indeterminate positioning of mandatory inclusionary zoning between traditional land use regulation and exactions doctrine and argues that the traditional land use framework is still the most appropriate lens for inclusionary zoning. But this Article also argues that, even if an exactions framework is applied, the ways in which local governments bestow value on developers should be taken into account by courts. Under that circumstance, Part IV identifies a potential framework under an exactions analysis for evaluating mandatory inclusionary zoning ordinances.

II. INCLUSIONARY ZONING

A. HOW ZONING SHAPED THE NEED FOR INCLUSIONARY ZONING

Zoning, as the predominant form of land use regulation, has enjoyed broad deference from state and federal courts since its approval in Village of Euclid v. Ambler Realty Co. The assumption at the heart of this approval was that, through zoning, government can regulate both compatibility—by keeping incompatible uses of land separate—and exclusion—for example, by keeping certain commercial ventures that may imperil a citizen’s health separate from residential neighborhoods. As history has demonstrated, however, incompatible uses have long been interpreted to include the types of activities taking place on a parcel of land, as well as the types of people who are allowed to engage in such activities.

Thus, zoning has embedded within its framework the legal right for local governments to favor particular classes of land use through what was, in effect, a form of direct subsidization and disfavor others through exclusion. In other words, local governments protect the more expensive and higher-class single-family homes, which creates scarcity that adds economic value, and, as a result, absorbs a hidden cost of excluding the more affordable and lower-class


27. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926) (holding that zoning is a valid exercise of the police power).


29. See Beryl Satter, FAMILY PROPERTIES: RACE, REAL ESTATE, AND THE EXPLOITATION OF BLACK URBAN AMERICA 4 (2009) (describing how “across the nation, most banks and savings and loans refused to make mortgage loans to African Americans, in part because of the policies of the Federal Housing Administration (FHA), which ‘redlined’—that is, refused to insure mortgages—in neighborhoods that contained more than a smattering of black residents”).

multifamily housing. This mostly overlooked regulatory right to exclude certain types of housing from a neighborhood silently undergirds the definition of ordinary land use regulations as good management of a local jurisdiction’s land use for the general benefit of the public. As such, the disadvantages that were imposed upon a segment of the local population and the distortions that arose in terms of the housing types produced by this “free” market, were normalized and zoning has been recognized as an efficient, politically popular, and constitutional practice since 1926.

A separate, yet related, endeavor has been how to encourage the production of additional units of housing by government and private industry. In a series of experiments going back to the days of the public land grant program and during the Great Depression with the formation of the Home Owners’ Loan Corporation (“HOLC”), the federal government has largely shaped and facilitated (some would argue, created) a housing production machine by making financing available to Americans of modest

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31. See Edward Glaeser et al., How Large Lot Zoning and Other Town Regulations Are Driving Up Home Prices, COMMONWEALTH (Jan. 1, 2006), http://commonwealthmagazine.org/uncategorized/how-large-lot-zoning-and-other-town-regulations-are-driving-up-home-prices (“While minimum lot size is one way of managing development, communities have adopted a wide range of other controls that limit growth. The most direct approach is a growth cap, which limits the number of new units that can be built during a given year; a variant is a phasing schedule that limits the pace of [unit] construction within a single subdivision. Such regulations have become more common in the last decade.”).


33. See generally Christopher Serkin & Leslie Wellington, Putting Exclusionary Zoning in Its Place: Affordable Housing and Geographical Scale, 40 FORDHAM URB. L.J. 1067 (2013) (discussing the local and regional impact of exclusionary zoning on the supply of affordable housing).

34. See Guy Stuart, Discriminating Risk: The U.S. Mortgage Lending Industry in the Twentieth Century 206 (2003); Audrey G. McFarlane, The Properties of Instability: Markets, Predation, Racialized Geography, and Property Law, 2011 Wis. L. REV. 855, 911 (“This overall racialized landscape has been created through legal and extra-legal devices to shape geographical reality and limit behavior to racialized geographic patterns, such as racially restrictive covenants and government-sponsored racially exclusionary redlining. It has been maintained by land use and zoning rules that unquestioningly ratify the exclusion of multi-family housing to protect middle- and upper-class homeowners and [to] promote environmental racism through expulsive zoning, locating undeserving or hazardous uses in and near Black communities.” (footnote omitted)).


36. See Alan S. Blinder, From the New Deal, a Way Out of a Mess, N.Y. TIMES: BUS. DAV (Feb. 24, 2008), http://www.nytimes.com/2008/02/24/business/24view.html (“The HOLC was established in June 1933 to help distressed families avert foreclosures by replacing mortgages that were in or near default with new ones that homeowners could afford. . . . Nearly one of every five mortgages in America became owned by the HOLC. Its total lending over its lifetime amounted to $3.5 billion . . . . The HOLC closed its books in 1951, or 15 years after its last 1936 mortgage was paid off, with a small profit.”).
means, making the mortgage interest tax deduction widely available, providing subsidies for publicly- or privately-owned housing projects, and later providing voucher subsidies that follow the individual rather than the project. The recent trend away from publicly-financed housing projects has, in effect, privatized traditional housing subsidies. The government has done so in the low-income housing arena by awarding housing vouchers—i.e., a direct subsidy to a small subset of renters and tax deductions to all homeowners with mortgages. In addition, the redlining and other market failures that were embedded in government’s sponsoring and incentivizing housing production has left the United States with a legacy of racial and economic segregation that the nation still struggles with to this day.

The geographic location of this privatized yet subsidized housing construction was shaped by ordinary land use regulation.


38. See CONG. BUDGET OFFICE, THE DISTRIBUTION OF MAJOR TAX EXPENDITURES IN THE INDIVIDUAL INCOME TAX SYSTEM 17 (2013) (finding that the mortgage interest tax deduction primarily benefits the top fifth of income earners).


40. See David M.P. Freund, Marketing the Free Market: State Intervention and the Politics of Prosperity in Metropolitan America, in THE NEW SUBURBAN HISTORY 11, 14–20 (Kevin M. Kruse & Thomas J. Sugrue eds., 2006) (finding that a project-focused approach to development was codified in a series of federal laws, so as to underwrite the suburbia that has come to be understood as a naturally-produced and market-driven phenomenon).

41. See, e.g., Dorothy A. Brown, Shades of the American Dream, 87 Wash. U. L. Rev. 329, 346–47 (2009) (“Tax subsidies also benefit higher-income taxpayers because only homeownership is encouraged—not housing more generally. . . . [T]ax policies for housing significantly benefit higher-income taxpayers. The overwhelming majority of low-income taxpayers who pay mortgage interest are not able to receive a tax benefit from homeownership.”); Marjorie E. Kornhauser, Cognitive Theory and the Delivery of Welfare Benefits, 40 Loy. U. Chi. L.J. 253, 256 (2009) (discussing the cognitive reasons that tax deductions and credits are more psychologically appealing than direct welfare or benefits payments).


construction took two project-focused forms: (1) a suburban-style, independently-owned (while invisibly subsidized) form of housing that was constructed in the low-density areas outside of central cities; and (2) a rented form of the multifamily home, largely segregated by race and income, which was confined to central cities and stigmatized as the epitome of subsidized.\textsuperscript{44} As a result, ordinary land use regulation has often restricted affordable housing opportunities to locations that are racialized “black” and resulted in an uneven distribution of public sector resources, access to wealth, stigmatized reputation, and constrained opportunities for social mobility.\textsuperscript{45}

Other trends have converged to further revolutionize this project-focused approach to housing production. For example, affordable housing, while stigmatized and often opposed, is generally recognized as necessary to the creation of a robust housing market.\textsuperscript{46} It has also become more accepted for government to use zoning to require or encourage private housing developers to build a mix of housing types that different segments of the population may access, in order to encourage local economic development.\textsuperscript{47}

Among the results of this convergence is the creation of a land use regulatory innovation called inclusionary zoning.\textsuperscript{48} Beginning with an experiment in 1974 in Montgomery County, Maryland,\textsuperscript{49} inclusionary zoning has been used to increase the availability of affordable housing by requiring that developers provide below-market units in exchange for a range of

\textsuperscript{44} See generally \textit{Public Housing Myths: Perception, Reality, and Social Policy} (Nicholas Dagen Bloom et al. eds., 2015).


\textsuperscript{46} See generally S. Leonard Syme & Miranda L. Ritterman, \textit{The Importance of Community Development for Health and Well-Being}, Community Dev. Investment Rev., Dec. 2009, at 1 (discussing the importance of community development to individual well-being and economic health of a community); Lawrence J. Vale et al., \textit{What Affordable Housing Should Afford: Housing for Resilient Cities}, Cityscape: J. Pol'y Dev. & Res., 2014 No. 2, at 21 (arguing that affordable housing is essential to a resilient city).

\textsuperscript{47} Abigail Savitch-Lew, \textit{Skeptics Say City’s Environmental Studies Understate Damage from Development, City Limits} (Sept. 26, 2016), http://citylimits.org/2016/09/26/skeptics-say-citys-enviro-studies-understate-damage-from-development (finding that “many advocates deride the environmental review process and accuse it of shielding developers and city planning agencies from lawsuits while failing to protect neighborhoods from the negative effects of development”).

\textsuperscript{48} See generally Timothy S. Hollister et al., \textit{National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances} 1 (2007) (surveying state inclusionary zoning enabling acts and suggesting ways to structure inclusionary zoning ordinances).

\textsuperscript{49} See Jen DeGregorio, \textit{Baltimore’s Affordable Housing Rules Follow Model in Montgomery County}, Daily Rec. (Balt.) (Dec. 8, 2006), http://www.baltimoresun.com/baltimore/news/bs-balt-montco-06082006.html (“When the Baltimore City Council considers a bill requiring most developers to include affordable housing in new developments, it will not be navigating in uncharted waters. Montgomery County has had a similar law for 32 years...”).
different incentives.50 Usually, this regulation is viewed in a positive light since it creates units at no direct public cost.51

B. THE MECHANICS OF INCLUSIONARY ZONING

Inclusionary zoning ordinances have proliferated across the United States in 27 states and the District of Columbia.52 These laws are authorized by state zoning enabling statutes53 and are increasingly adopted by jurisdictions both large and small.54 These ordinances require that new housing developments contain a mix of units with different prices, amenities, and layouts.55 In order to redress past exclusionary zoning and other government failures, the goal is both affordability and integration based on income.56

1. Mandatory or Voluntary

While inclusionary zoning ordinances can be mandatory or voluntary, the vast majority are required by law.57 Scholars generally agree that the

50. See Danielle Sweeney, Inclusionary Housing Fund Running on Empty, Advisory Board Told, BALT. BREW (Oct. 22, 2014, 6:10 PM), https://www.baltimorebrew.com/2014/10/22/inclusionary-housing-fund-running-on-empty-advisory-board-told (“The [Baltimore City Mandatory Inclusionary Zoning Ordinance] was designed to place no financial burden on the developer or project by requiring the city to buy or rent units at market rate and make the units available to individuals who meet certain income requirements.”); see also HEATHER L. SCHWARTZ ET AL., RAND CORP., IS INCLUSIONARY ZONING INCLUSIONARY? 23 (2012) (“Other common incentives include fee waivers, reductions in parking spaces required by zoning and building codes, and expedited permitting.” (citation omitted)).

51. See Barro, supra note 35.

52. See Hickey et al., supra note 2, at 18.

53. See, e.g., Md. CODEANN., LAND USE § 7-401(a) (West 2012) (authorizing local legislative bodies to impose inclusionary zoning and award density bonuses to promote creation of housing affordable to persons of low and moderate income).

54. See Sherman, supra note 14 (discussing an inclusionary housing ordinance in the city of Baltimore); see generally URBAN INST., supra note 9 (providing an overview of inclusionary zoning in two counties).

55. See U.S. DEP’T OF HOUS. AND URBAN DEV., MIXED-INCOME HOUSING AND THE HOME PROGRAM 16 (2005) (“Developers must evaluate and identify the customer’s housing needs in terms of ideal unit size, amenities, unit layout, and locational preference.”).

56. See CLIFFORD WINSTON, AEI-BROOKINGS JOINT CTR. FOR REGULATORY STUDIES, GOVERNMENT FAILURE VERSUS MARKET FAILURE: MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 2–3 (2006) (“Government failure[s] . . . arise[] when government has created inefficiencies because it should not have intervened [in a particular market] in the first place or when [that government] could have solved a given problem . . . more efficiently . . . by generating greater net benefits.” (emphasis omitted)).

57. See HOLLISTER ET AL., supra note 48, at 2. As of 2007, the authors, summarize the survey of state law as follows:

- thirteen states have statutes or regulations that either expressly authorize inclusionary zoning (using the actual words “inclusionary zoning”) or clearly imply such authority by granting broad powers to promote affordable housing (Connecticut, Florida, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont, and Virginia);
mandatory ones are the most effective to produce affordable housing units.\textsuperscript{58}

The features of a typical inclusionary zoning ordinance break down as follows: The size of a project triggers the application of the ordinance; this trigger leads to the imposition of a set requirement of affordable units; and the developer complies with the requirement.\textsuperscript{59}

2. Which Projects are Subject to Inclusionary Zoning?

The triggering size for inclusionary zoning can range from as few as two units to as many as two hundred.\textsuperscript{60} According to a study conducted by the RAND Corporation, the triggering size of the project will vary based on the strength of the local housing market.\textsuperscript{61} The more expensive the market, the less of an impact the requirement will have on the profitability of a development.\textsuperscript{62} Markets with high real estate prices insulate developers from the relatively smaller costs of additional inclusionary units.\textsuperscript{63}

- seven states have no express authorization for inclusionary zoning, but one or more major municipalities in the state law have adopted inclusionary zoning programs (California, Georgia, Idaho, Maine, New Mexico, New York, and Washington);
- two states (Texas and Oregon) prohibit inclusionary zoning by statute; and
- in 26 states, there is no express or implied authorization or prohibition, and authority to enact inclusionary zoning will depend on home rule powers, which vary widely, and the particular characteristics and facts of the proposed inclusionary zoning ordinance.

\textit{Id.} (footnote omitted).

\textsuperscript{58} See SCHWARTZ ET AL., \textit{supra} note 50, at 21 (describing the voluntary nature of inclusionary zoning as one of a number of program features that diminish the effectiveness of inclusionary zoning ordinances). “At least three studies have concluded that mandatory programs generally yield more units than voluntary programs.” \textit{Id.} at 25 (citing CAL. COAL. FOR RURAL HOUS. & NON-PROFIT HOUS. ASS'N OF N. CAL., INCLUSIONARY HOUSING IN CALIFORNIA: 30 YEARS OF INNOVATION (2003); Nicholas J. Brunick, The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs, \textit{ZONING PRAC.}, Sept. 2004; Vinit Mukhija et al., Can Inclusionary Zoning Be an Effective and Efficient Housing Policy? Evidence from Los Angeles and Orange Counties, \textit{52 J. URB. AFF.} 229 (2010)).


\textsuperscript{60} See ONT. MINISTRY OF MUN. AFFAIRS AND HOUS., LONG-TERM AFFORDABLE HOUSING STRATEGY UPDATE: INCLUSIONARY ZONING CONSULTATION DISCUSSION GUIDE 7 (2016), http://www.mah.gov.on.ca/AssetFactory.aspx?did=14977 (“Threshold sizes vary across inclusionary zoning programs, with examples ranging from buildings with [2] units to 200 units and hectare size ranging from 2 to 10 hectares and more.”).

\textsuperscript{61} See SCHWARTZ ET AL., \textit{supra} note 50, at xi.

\textsuperscript{62} See Barfo, \textit{supra} note 35.

\textsuperscript{63} See SCHWARTZ ET AL., \textit{supra} note 50, at 8.
3. The Financial Costs of Inclusionary Zoning—Incentives for Developers

The most frequently offered incentive is the density bonus. A zoning ordinance typically restricts the height, the bulk, and the percentage of a parcel that can be occupied, which, in turn, ultimately restricts the number of buildable square feet. A density bonus gives developers the legal right to build more square feet than would otherwise be permitted under the applicable zoning ordinance.

Designing the appropriate density bonus has thus far been more art than science. It has become increasingly clear that allowing for taller or more sprawling developments can actually cost a jurisdiction more. This is due to more intensive use of public goods and services. These higher administrative costs, which are rarely acknowledged and fully accounted for by the government, may contribute to financial shortfalls and more borrowing by local governments.

Moreover, design choices often are made without taking into account the characteristics of specific development projects. In the Baltimore ordinance, for example, density bonuses are made available upon approval by the Board of Municipal Zoning Appeals, albeit with no set standards provided for approval or disapproval. As one Baltimore City Council member ruefully noted, there might not have been much significance to prescribing such a review process because the Baltimore zoning ordinance typically provided uses of a right that gave a particular developer all of the density they need upfront.


65. One example is Baltimore’s Zoning Ordinance, which was enacted pursuant to Ordinance No. 1051 in 1971. See Transform Baltimore, CITIZENS PLAN. & HOUSING ASS’N, http://www.cphabaltimore.org/transformbaltimore (last visited Apr. 23, 2017).

66. See DANIEL R. MANDELKER, LAND USE LAW §§ 5.72–.76 (5th ed. 2003); see also HIP Tool: Density Bonuses, PUGET SOUND REGIONAL COUNCIL, https://www.psrc.org/density-bonuses (last visited Apr. 23, 2017) (defining “density bonus” as “a zoning tool that permits developers to build more housing units, taller buildings, or more floor space than normally allowed, in exchange for provision of a defined public benefit, such as a specified number or percentage of affordable units included in the development”).

67. See Helen F. Ladd, Population Growth, Density and the Costs of Providing Public Services, 29 URB. STUD. 273 (1992) (“The increasing per capita spending as the density of counties rises above 250 people per square mile provides important additional evidence to counter the view . . . . that higher density reduces public sector costs.”).


70. CITIZENS PLANNING & HOUS. ASS’N, INCLUSIONARY HOUSING FORUM REPORT 3 (2016) (“Councilman Henry explained that Baltimore’s current inclusionary housing ordinance has produced very few units because a provision in the law designed to hold the developers financially harmless has been interpreted to mean that developers must be paid cash from the inclusionary
In addition to density bonuses and conventional cost offsets, such as direct subsidies, payment in lieu of taxes, or tax credits, some jurisdictions allow developers to construct affordable units offsite or allow the developer to pay an in lieu fee to the local government’s affordable housing fund. The theory is that the local government will use those funds to construct affordable units elsewhere. Although it is difficult to articulate exactly what the legitimate reasons could be for this feature other than political expediency, this feature permits flexibility in terms of how to comply with the law, which is attractive to some developers.

4. Social Preferences and Opt-Outs from Inclusionary Zoning

An underappreciated dimension of designing an inclusionary zoning ordinance is whether to include voluntary opt-out or in lieu of options. According to Tim Iglesias, a number of inclusionary zoning ordinances do not provide these options and, thus, are more easily understood to function as “pure” land regulation by requiring affordable housing units to be built as part of a market-rate development. These inclusionary zoning ordinances are “pure,” because they ensure residential integration (in direct counter to exclusionary zoning) while simultaneously producing additional units of affordable housing.

However, the politics of inclusionary zoning is such that most jurisdictions do not follow the pure integrative approach but instead provide some measure of flexibility with respect to this integrative policy goal, which allows developers to comply by paying in lieu fees for affordable housing located elsewhere.

This means developers utilizing the flexibility device will likely cause affordable housing intended for white, high-opportunity areas to be moved into less central, nonwhite, low- or lower-opportunity areas because of less expensive land prices. This offsite development occurs because developers

71. See URBAN INST., supra note 9, at 49.
72. See Tim Iglesias, Maximizing Inclusionary Zoning’s Contributions to Both Affordable Housing and Residential Integration, 54 WASHBURN L.J. 585, 590 (2015) (noting that in lieu fees may result in affordable housing units being produced because the land costs for sites where such affordable housing is likely to be built will be cheaper).
73. Id.
74. See Iglesias, supra note 72, at 590.
75. See generally Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, & 903) (requiring localities to ensure that their housing and development programs actively promote integration).
76. See Sweeney, supra note 50.
77. See Michael Floryan, Comment, Cracking the Foundation: Highlighting and Criticizing the Shortcomings of Mandatory Inclusionary Zoning Practices, 37 PEP. L. REV. 1039, 1097–1104 (2010) (discussing the shortcomings of provisions offering developers offsite or in lieu options); see also M. Tanner Clagett, If It’s Not Mixed-Income, It Won’t Be Transit-Oriented: Ensuring Our Future Developments Are Equitable & Promote Transit, 41 TRANSPI. L.J. 1, 20 (2014) (noting that although offsite or in lieu options may increase the overall number of available housing units for low-income families, “this
would simply prefer to write a check rather than find ways to build affordable housing that can coexist alongside market-rate housing. It also occurs where developers prefer to avoid the inclusionary aspect of the mandate because of concerns about the “marketing effects of mixing poorer folks with wealthier ones.” Lastly, offsite construction may serve as an indirect way for local governments to avoid increased “administrative costs” in whiter, higher-income areas.

5. Set-Asides and the Tipping Point

Inclusionary zoning ordinances also vary in terms of the required proportion of units that is to be set aside, built, or otherwise made available within a specific geographic location. Other differences revolve around whether the affordable housing will be leased or sold, as well as the size and type of developments to be subject to this regulation. An informal survey found that such ordinances, regardless of how they are structured by local governments, resulted in only a small number of new units, between 4% and 35% of the total stock being produced.

6. How Long Will Inclusionary Housing Remain Affordable?

Another important aspect of inclusionary zoning is that, at least theoretically, it is a type of zoning regulation premised on assuring long-term

\[\text{approach does little for the purposes of mixed-income } \text{[Transit-Oriented Development] and would still likely require low-income families to bear greater transportation costs].}\]

\[\text{78. } \text{See Iglesias, supra note 72, at 591.}\]


\[\text{80. Cf. Catherine Rampell, Who Says New York Is Not Affordable?, N.Y. TIMES MAG. (Apr. 23, 2013), http://www.nytimes.com/2013/04/28/magazine/who-says-new-york-is-not-affordable.html (“According to a recent study by Jessie Handbury, an economist at the University of Pennsylvania’s Wharton School, people in different income classes do indeed have markedly different purchasing habits. That may not be surprising, but once you account for these different preferences, it turns out that living in New York is actually a relative bargain for the wealthy. . . . There is, however, an ominous flip side to Handbury’s findings. When you look at the cost of living for low-income people based on their tastes and preferences, New York’s poor turn out to be even poorer than you think. . . . Real estate is most crushing for all but those lucky enough to get into subsidized housing. For the poor, it is impossible to unbundle [this] from all the perks that help drive up costs.”).}\]

\[\text{81. SCHWARTZ ET AL., supra note 50, at 1–2.}\]

\[\text{82. Id.}\]

\[\text{83. Id. at 23 (“Set-aside percentages in California range from 4 to 35 percent of the total homes in a development . . . . Some programs require that developments . . . set aside as little as 10 percent of total homes . . . . while some require that as much as 30 percent be set aside. The [inclusionary zoning] policies we studied applied to developments with as few as five homes or as many as 50 homes. A few programs required developments with fewer than five or ten homes to either provide one affordable unit or make an in-lieu payment. In Chicago, projects that obtain financial assistance from the city must set aside 20 percent of units as affordable, while projects not requiring city assistance must set aside 10 percent. The City of Irvine requires at least 15 percent of units in all developments with more than 50 units to be made affordable. Montgomery County requires all new subdivisions with 20 or more dwelling units to set aside between 12.5 and 15 percent of the units as affordable.’”).}\]
The units that are constructed are often comparatively modest with simpler, less expensive features, thus building long-term affordability through the dimensions and features of the actual unit itself. Nevertheless, in high-cost markets, even modest, amenity-lean units could rent for higher rents. Therefore, the developer will often also be required to commit to long-term affordability by placing a deed restriction (a restrictive covenant enforceable against present and future owners of the land) that requires the units to remain at affordable levels for a certain length of time. Typical affordability periods range from less than 20 years to as long as 99 years.

7. Critical Assessments of Inclusionary Zoning

There is significant criticism in the literature that inclusionary zoning does not by itself produce nearly enough affordable housing units compared to the need; nor does it create true long-term affordability to address the deficit in affordable housing units. There are also very real and substantial questions about whether producing inclusionary zoning units for the very or extremely low-income individual is actually economically feasible without significant financial subsidies. These and other questions have been largely avoided since it has been more politically palatable that inclusionary zoning results only in providing affordable housing for moderate-income people who are not the very poor.

84. According to a Lincoln Land Institute study of 307 inclusionary zoning ordinances, “[a] sizeable share of inclusionary housing programs requires long-term affordability periods . . . [with e]ighty-four percent of homeownership inclusionary housing programs, and 80 percent of rental programs require units to remain affordable for at least 30 years; and [o]ne-third of inclusionary housing programs requiring 99-year or perpetual affordability for rental and/or for-sale housing.” Hickey et al., supra note 2, Executive Summary (emphasis added).


86. Hickey et al., supra note 2, Executive Summary.

87. See SCHWARTZ ET AL., supra note 50, at 24 (“Some of the programs in our study set relatively short periods of affordability. For example, Denver’s inclusionary housing ordinance requires for-sale units . . . be made affordable for 15 years. Chicago and Irvine have set the period of affordability . . . at 30 years.”).

88. See id. at 7 (“[Inclusionary zoning] policies are intended to add to the supply of affordable housing, but they tend to produce small numbers of homes, potentially at substantial cost.”).

89. See, e.g., Toshio Meronek, Affordable Housing in San Francisco Affordable Only for Upwardly Mobile, AL JAZEERA AM. (Feb. 3, 2015, 5:00 AM), http://america.aljazeera.com/articles/2015/2/3/san-francisco-affordable-housing-is-unaffordable.html (stating that, in San Francisco, “activists argue that . . . [b]ecause lower- to middle-income people still can’t afford this [inclusionary housing,] they say, cities are effectively subsidizing upper-middle-class people to move in and paving the way for gentrification”).

90. See, e.g., Alana Semuels, The Artist Loft: Affordable Housing (for White People), ATLANTIC (May 19, 2016), http://www.theatlantic.com/business/archive/2016/05/affordable-housing-for-white-people/483444 (“Affordable housing sometimes has a bad reputation . . . . But there’s another kind of affordable housing, built with tax credits and city loans, typified in a place like the A-Mill lofts . . . . But . . . the lofts are not accessible to most poor families. . . . Instead, they go
Regardless of whether the current approach best serves the interests of low-income individuals, developers subject to inclusionary zoning requirements have typically been required to include a minimum amount of affordable housing. The idea is that developers are the proper party to create additional units because they are already engaged in residential construction, and, by introducing greater intensities of land use, their projects can and do contribute to higher costs for local governments and the general public, especially for many low-income renters. Inclusionary zoning also represents a rejection of the trickle down, housing filtering approach to low-income housing provision, which is the questionable assumption that over time, higher-cost housing, as it ages, is abandoned by the more affluent and is gradually made affordable through the inability to charge premium prices for an inferior housing product. The reality is that dilapidated housing is costly in terms of its health risks and attendant costs imposed on productivity and well-being. Also, it is incorrect to assume that older housing cannot be renovated or repaired because housing desirability is not just a function of the structure but is always combined with the desirability of the location.

Within this context, it is unclear whether inclusionary zoning fully delivers on its promise. Recent studies, therefore, have tested the relationship between inclusionary zoning and public policy goals, at least in specific geographic areas. Other research asks how inclusionary zoning is administered over time. A third category of work asks if inclusionary zoning to mostly white artists, who have incomes below the median for the area but above the average affordable-housing tenant.

91. See ONT. MINISTRY OF MUN. AFFAIRS AND HOUS., supra note 60, at 6 (“Unit set-aside refers to the basic requirement that developers must meet for providing affordable housing units. This is typically expressed as a percentage of units in a building that must be affordable.”).

92. See, e.g., Greg B. Smith, NYCHA Residents See Little Benefit from Gentrification in Their Neighborhoods, Report Shows, N.Y. DAILY NEWS (Oct. 12, 2015, 2:30 AM), http://www.nydailynews.com/new-york/gentrification-doesn-poor-report-shows-article-1.2393396 (“NYCHA residents do not feel they are benefitting economically from the neighborhood’s increasing development and are very concerned about affordability.” (quoting SAMUEL DASTRUP ET AL., THE EFFECTS OF NEIGHBORHOOD CHANGE ON NEW YORK CITY HOUSING AUTHORITY RESIDENTS 77 (2015))).


94. See Rachel Weinberger, The High Cost of Free Highways, 43 IDAHO L. REV. 475, 481 (2007) (“The value of land is a function of characteristics that include improvements on the land, potential improvements (what is feasible from an engineering perspective or allowed in zoning, for example), location (which serves as a proxy for accessibility to the land and accessibility to other complementary land uses), and other endowments.”); Jens Kolbe et al., Location, Location, Location: Extracting Location Value from House Prices 3 (SFB 649, Discussion Paper 2012–040, http://edoc.hu-berlin.de/series/sfb-649-papers/2012-040/PDF/040.pdf (last visited Apr. 23, 2017)) (“[H]ouse prices contain information on the value of the location.”).


96. See generally URBAN INST., supra note 9.
distorts real estate prices, especially at the low end of the real estate market. 

Nevertheless, the literature on inclusionary zoning does not answer a basic question: How can a midsized city, such as Baltimore, ensure that inclusionary zoning accomplishes what it sets out to do? This question is important because it draws attention to how the assumptions about development shape land use doctrine.

C. BALTIMORE’S MANDATORY INCLUSIONARY ZONING ORDINANCE

In 2007, Baltimore, Maryland adopted its inclusionary zoning ordinance at the tail end of the housing bubble. A midsized city that lost its economic footing as an industrial and manufacturing powerhouse, Baltimore has struggled to find its place and meaning at the end of the twentieth century and the beginning of the twenty-first century. At the time that the city adopted the ordinance, office and residential development was transforming the city’s downtown and waterfront-adjacent neighborhoods. With building cranes in abundance, the city appeared to be finally reversing the steady trend of losing population to the surrounding suburbs since the 1970s.

With the possibility of a new, economically thriving Baltimore on the horizon, a coalition of housing and community activists, sympathetic developers, and union representatives came together to advocate for legislation reflecting a variety of concerns and motivations. But mostly they were seeking acknowledgment that gentrification and displacement were

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97. Compare Benjamin Powell & Edward Stringham, Reason Found, Do Affordable Housing Mandates Work?: Evidence from Los Angeles County and Orange County 21 (2004) (finding that there are high costs associated with inclusionary zoning that are not offset by sufficient benefits for the Los Angeles County and Orange County areas) with Brentin Mock, Inclusionary Zoning Does Not Drive Up Housing Costs, CITYLAB (June 1, 2016), http://www.citylab.com/housing/2016/06/what-we-know-about-inclusionary-zoning-thus-far/485072 (describing a recent study that found that “[t]he most highly regarded empirical evidence suggests that inclusionary housing programs can produce affordable housing and do not lead to significant declines in overall housing production or to increases in market-rate prices” (quoting Lisa A. Sturtevant, Nat’l Hous. Conf., Separating Fact from Fiction to Design Effective Inclusionary Housing Programs 1 (2016))).


102. See generally Balt. City Task Force on Inclusionary Zoning & Hous., At Home in Baltimore: A Plan for an Inclusive City of Neighborhoods (2006) (advocating adoption of inclusionary housing ordinance was comprised of diverse group of members and participants).
likely as Baltimore became more popular with the affluent. The coalition advocated for an inclusionary zoning ordinance to ensure that the revived Baltimore would grow inclusively and provide a place for both the newly arriving affluent professionals as well as citizens of moderate and low income—whether service workers, retirees, artists, or the unemployed. At a minimum, principles of equity and fairness demanded that residents who’d borne the dark days should be able to remain in the city in places with access to affordable housing in vibrant, amenity-rich locations. Also, market-rate luxury housing would not by itself produce decent affordable housing. An inclusionary housing ordinance was a modest effort to work towards that vision.

When the city council passed the inclusionary zoning ordinance, it was a noteworthy achievement in a city that had been the home of the first racial zoning ordinance at the beginning of the twentieth century and was still riven by race and class segregation. But the ordinance as adopted differed greatly from the one that proponents had presented. Rather than strong inclusionary requirements, the ordinance, styled as a mandatory inclusionary requirement, turned out to be riddled with exceptions and onerous requirements for the city to fulfill, including that the city ensure that any developer subject to the inclusionary mandate be made whole. The ordinance required that in every residential project with 30 or more units, the developer must provide between 10% and 20% of the units to eligible households at or below an affordable cost. For those projects receiving a significant land use authorization or rezoning, the set-aside requirement is

103. Coined by sociologist Ruth Glass in 1960, "gentrification" is a term used to refer to the influx of more affluent residents into working-class and lower-income neighborhoods, frequently changing the existing social hierarchy. The term is contested on many grounds, including whether and how such changes result in displacement of existing residents from rising rents, whether such changes are simply reflections of market change or are artificially by government and private developers, and the role of race and class in shaping the disinvestment that precedes gentrification as well as the resulting revitalization. For an introduction to the ample literature on this topic, see generally RUTH GLASS, LONDON: ASPECTS OF CHANGE (1964); MAUREEN KENNEDY & PAUL LEONARD, DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES (2001); Jon C. Dubin, From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color, 77 MINN. L. REV. 739 (1993); Audrey G. McFarlane, The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power, 8 U. PA. J. CONST. L. 1 (2006); and Lance Freeman & Jenny Schuetz, Producing Affordable Housing in Rising Markets: What Works? (Sept. 2016) (unpublished manuscript), http://penniur.upenn.edu/uploads/media/Freeman-Schuetz_PennIUR-Philly_Fed_working_paper_091616v2.pdf.

104. See generally Joan Jacobson, Dismantling the Ghetto: Local Initiatives Attempt to Give Poor Baltimoreans a Choice for Housing, URBANITE, Oct. 2006, at 37 (detailing efforts to give low-income residents greater choice in their housing).


106. See Sherman, supra note 14 (“The design of Baltimore’s law—shaped by 100 amendments to the legislation first introduced in 2007—also made it ineffective . . . .”).

10%.\textsuperscript{108} For those projects receiving a major public subsidy, the set-aside requirement is 20%.\textsuperscript{109} For projects receiving neither subsidy nor rezoning, the requirement is 10%.\textsuperscript{110} Under the terms of the ordinance, however, in all cases, any residential project of 30 or more units with inclusionary units would be entitled to 100\% cost offsets either through cash payments from the city’s Affordable Housing Trust Fund or through discretionary density bonuses, which are available upon application from the Board of Municipal and Zoning Appeals.\textsuperscript{111} Developers are entitled to a cash cost offset even for projects receiving a major public subsidy, and the Housing Commissioner has the discretion to “determine[ if] the major public subsidy is insufficient to offset the financial impact on the developer of providing the [required] affordable units.”\textsuperscript{112}

Although the standard in all cases is seemingly direct, it is actually subjective and vague. The ordinance provides that the developer must be made whole.\textsuperscript{113} To explain this assumption further, at the beginning of the ordinance, under “Findings and Policy,” the ordinance states its assumptions that economic diversity is important, but so is the private sector’s ability “to earn reasonable and customary levels of profitability.”\textsuperscript{114} Thus, this provision indicates the city saw its role as one of ensuring that the developer was made whole because the inclusionary units were viewed as an intrusion rather than a means for ensuring that the city developed in a balanced way—i.e., to encourage thriving diverse neighborhoods as a necessary antidote to the pervasive segregation and shortage of decent affordable housing. As of 2014, the ordinance has produced 32 units of affordable housing, and “[t]he city has spent $2.2 million to compensate builders for the 32 units [that have gone on the market] so far—an average of nearly $69,000 per unit.”\textsuperscript{115}

It may be difficult to pinpoint why the city adopted such a weak inclusionary mandate, but the real estate development context suggests some possible answers. First, the city had strongly prioritized real estate development to attract residents and employers back to the city. Large swaths of vacant and abandoned housing covered the eastern and western areas of the city. Following a triage approach, the city prioritized development where there is a real estate market that can be realistically stimulated. Thus, starting from the waterfront and the spectacular Inner Harbor festival marketplace redevelopment, development has hugged the harbor and radiated out east and to the north and south, with the highest property values now in these

\begin{footnotes}
\footnote{\textsuperscript{108}} Id. § 2B-22(b)(1).
\footnote{\textsuperscript{109}} Id. § 2B-21(b)(1).
\footnote{\textsuperscript{110}} Id. § 2B-23(b)(1).
\footnote{\textsuperscript{111}} Id. § 2B-22(c).
\footnote{\textsuperscript{112}} Id. § 2B-21(c).
\footnote{\textsuperscript{113}} See id. § 2B-6(a) (“If cost offsets and other incentives are not made available to a residential project in accordance with this subtitle, the residential project is not subject to the requirements of this subtitle.”).
\footnote{\textsuperscript{114}} Id. § 2B-4(b), (d)(1).
\footnote{\textsuperscript{115}} Sherman, supra note 14.
\end{footnotes}
areas.116 These areas were and still are largely white. The areas that have not benefitted at all from this development are largely black. The emblematic example of the continued privation of disinvestment is the impoverished Sandtown-Winchester neighborhood in West Baltimore, where an officer fatally injured Freddie Gray following an impromptu police stop.117

Second, Baltimore has traditionally subsidized development heavily.118 These subsidies include tax credits, abatements, enterprise zones, direct expenditures “in the form[s] of grants, bonds, tax increment financing (TIFs),” and other subsidies, such as “payments in lieu of taxes.”119 Critics derided these subsidies as being provided “to private developers with few, if any, standard criteria for determining public value or benefit.”120 In particular, tax increment financing, a form of bootstrap financing in which expected future increases in property tax revenues are pledged entirely to paying off the costs of a development project, has grown increasingly popular.121 From 2003 to 2016, the city has awarded at least 11 tax increment financing subsidies.122 In 2016, the city approved the largest deal in city history by awarding $600 million in TIF subsidies for Under Armor to build a new headquarters at Port Covington.123 The headquarters would be built in an unpopulated industrial area, far from where the city would otherwise have been making infrastructure investments.124 The Under Armor mixed-use

119. CITY COUNCIL OF BALT., A RESOLUTION OF THE MAYOR AND CITY COUNCIL CONCERNING PUBLIC DEVELOPMENT SUBSIDIES [sic]—FAIR DEVELOPMENT STANDARDS 1 (2016).
120. Id.
121. Tax Increment Financing also has become a popular local economic tool in other jurisdictions. See Randall K. Johnson, How Tax Increment Financing (TIF) Districts Correlate with Taxable Properties, 54 N. ILL. U. L. REV. 39, 42 n.25 (2013) (describing how tax increment financing has been used in all 30 townships in Cook County, Illinois).
124. See Rachel M. Cohen, Under Armour’s Slam-Dunk Deal, SLATE (June 20, 2016, 11:10 AM), http://www.slate.com/articles/business/metropolis/2016/06/under_armour_wants_its_port_covington_project_to_transform_baltimore_is.html (describing the Port Covington area as “an underused eyesore”).
project is expected to include 1.5 million square feet of retail and entertainment space, including a distillery, and several new parks and greenways, and over 7,500 residences, most of which would be rental properties.\textsuperscript{125} The debate over this TIF was polarized around undisclosed costs of the development as the project would increase service needs in an area outside of the path of development and whether inclusionary housing should be required.\textsuperscript{126}

The result of this heavy subsidy has been an ever-growing, glittering downtown and ever-decaying outer reaches. Neglected, underresourced, and underserved neighborhoods that are primarily black and lower middle class or poor with fantastic architecture and rich history fall further into decay and violence. These neighborhoods do not gain any benefit from the downtown development and, in fact, likely experience a detriment as custom and contract prioritize scarce city resources to address the service needs of the areas that have become the white, twenty-first century face of the city.\textsuperscript{127} One public health researcher, Lawrence Brown, has mapped the consequences of the investment and disinvestment patterns and has dubbed the disparately treated areas the “white L” and the “black butterfly.”\textsuperscript{128} The researcher found that areas dubbed the “black butterfly” are significantly disadvantaged in nearly every measure of public health, including TIF policy, food access and policing strategies. The opposite is true for the “white L,” which receives most of the publicly-supported private investment.\textsuperscript{129}

This context cannot be ignored in assessing who has voice and who does not in property ownership and development in Baltimore.\textsuperscript{130} Developers dominate the way in which development is structured and deployed in Baltimore mainly because the luxury development is successfully producing profitable, luxury “high-end” places for the affluent to enjoy.\textsuperscript{131} However, it does so in a way that forces the city to pay higher costs to service these areas while reaping no increased property taxes even as property values improve.

\begin{thebibliography}{99}
\bibitem{footnote} Id.; see Mark Reutter, \textit{Hidden from View: $29 Million in Unexpected Infrastructure Costs at Harbor Point}, BALT. BREW (June 2, 2016, 2:31 PM), https://www.baltimorebrew.com/2016/06/02/hidden-from-view-29-million-in-unexpected-tif-costs-at-harbor-point (describing a similar debate over another luxury commercial and residential development).
\bibitem{footnote} See Fern Shen & Mark Reutter, \textit{A Poor, Black City Supporting Kayak and Boat Slips?}, BALT. BREW (July 19, 2016, 2:20 PM), https://www.baltimorebrew.com/2016/07/19/a-poor-black-city-underwriting-port-covingtons-kayak-and-boatslips (criticizing the disconnect between the types of amenities planned for the new development and the dire needs in a resource-strapped city).
\bibitem{footnote} See id. (characterizing these neighborhoods as “hypersegregated”).
\bibitem{footnote} Id. at 13 (discussing the problem of economic inequality leading to political disempowerment of low income city residents).
\bibitem{footnote} Id. at 13 (describing how developers turn economic success into political empowerment).
\end{thebibliography}
dramatically in some parts of the city. By the time the city does start to see returns, the improvements will be old and likely in need of repair. This violates the common sense expectations for development—one would expect the development to enrich Baltimore’s general revenues and enable the benefits to flow to other parts of the city. Instead, there are no expected increased property tax payments to city coffers for 30 to 40 years, yet there is increased demand for city services, which have not been built into the deals.

While the city council was responsive to the demand for inclusionary housing, it ended up adopting an ordinance that subordinated the city’s power over development to the interests of the developers. Under the popular narratives of government dominance and overreach, one would expect a robust inclusionary ordinance once advocates started pressing for it. Yet it was the city council that watered down its own bill to align with developers’ expectations. The enacted ordinance was deeply flawed, with numerous exceptions that made the ordinance essentially unenforceable. With the complexity of politics, finance, and race and class assumptions in the background, the city council accepted the popular developer narrative claims that the margins on a development project in Baltimore are such that the additional financial costs from inclusionary housing could ruin a deal and prevent it going forward.

The other assumption seems to be that inclusionary housing is a gift from developers to the city. The role the city has played in making these profitable deals happen is considered irrelevant. Little thought is given to the impact the increase of luxury housing in the city has on the city and the local housing market. For example, any housing built in connection with a TIF will involve an increased demand by high-demand residents who will pay property taxes that are dedicated to repaying bonds floated to build the development—i.e.,


133 See Reutter, supra note 132 (“Over the next 41 years, [one particular] project will net [Baltimore] $1.8 billion in tax revenues, the bulk of the revenues coming after year 2045.”).


135 To date, research on the impact of inclusionary zoning has focused on the effect on housing prices in general. This literature does not consider the effect of inclusionary zoning on the profitability or feasibility of a particular development deal. See, e.g., Antonio Bento et al., Housing Market Effects of Inclusionary Zoning, CITYSCAPE: J. POL’Y DEV. & RES., 2009 No. 2, at 7, 18 (finding very small increase in housing prices in jurisdictions with inclusionary housing policies); Mukhiya et al., supra note 58, at 249 (concluding that critics of inclusionary zoning “overestimate its adverse effects on housing supply”).
the project’s immediate location.\textsuperscript{136} Local officials may also have been reluctant to require developers to accept low-income residents in buildings that were intended for higher-income citizens or may have been reluctant to seem unfriendly to business interests, both of which could serve as a barrier to future economic development.\textsuperscript{137}

While this story seems local, it is not only so. Apart from the politics that may have made Baltimore reluctant to seem business-unfriendly or to require developers to accept low-income residents, the way that the Baltimore inclusionary zoning ordinance is structured showed, at the very least, a misunderstanding of takings law or exactions law. As Part III will discuss, this misunderstanding about inclusionary zoning doctrine arises from a doctrinal framework that can privilege the concerns of the property developer in a way that ignores the reality of the complex relationship between developers, local governments and the general public.

\section*{III. THE DOCTRINAL PARAMETERS OF INCLUSIONARY ZONING}

\subsection*{A. INCLUSIONARY ZONING AS AN ORDINARY LAND USE REGULATION}

As a land use regulatory innovation, inclusionary zoning has both a settled and unsettled place in land use doctrine.\textsuperscript{138} Iglesias has insightfully observed that its doctrinal place has been largely discussed through litigation and advocates on both sides characterize the regulation in a results-oriented way.\textsuperscript{139} Proponents of inclusionary zoning are likely to focus on the doctrinal approach that leads to validation of a regulation or statute.\textsuperscript{140} In contrast, opponents will seize upon the approach that best leads to invalidation, whether on a facial or an as-applied basis.\textsuperscript{141}

Thus, a developer challenging inclusionary zoning could allege that this regulation impairs individual property rights without adequate justification, in violation of the Takings Clause of the Fifth Amendment.\textsuperscript{142} The concept of takings can be either physical or regulatory. A physical taking occurs when the

\begin{footnotes}
\footnotetext[136]{See Weber, supra note 132.}
\footnotetext[137]{See Audrey G. McFarlane, Putting the “Public” Back into Public-Private Partnerships for Economic Development, 30 W. NEW ENG. L. REV. 39, 49 (2007) (posing the questions as: “Is the public subsidy necessary as an economic, dollars and cents matter, where the deal cannot take place without the subsidy? Is the public subsidy necessary as a signal to the mobile developer that the city is business friendly?”).}
\footnotetext[138]{See generally Floryan, supra note 77 (arguing that inclusionary zoning is an unconstitutional exaction); Barbara Ehrlich Kautz, Comment, In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing, 36 U.S.F. L. REV. 971 (2002) (arguing that inclusionary zoning is ordinary land use regulation).}
\footnotetext[139]{See Iglesias, supra note 72, at 592 (“Affordable housing and fair housing advocates might agree that the design decisions are a function of politics and local conditions, but may not come out on the same side of each issue because of their varied effects on the affordable housing and fair housing goals and their possibly conflicting evaluations of these effects.”).}
\footnotetext[140]{Id.}
\footnotetext[141]{Id.}
\footnotetext[142]{See generally Cal. Bldg. Indus. Ass’n v. City of San Jose, 351 P.3d 974 (Cal. 2015), cert. denied, 136 S. Ct. 928 (2016) (finding an inclusionary housing law to be constitutional).}
\end{footnotes}
government exercises its power of eminent domain to take ownership of a land or a building.143 A regulatory taking can occur when the operation of a government regulation goes too far in impairing an owner’s rights to use their property as they see fit.144 Presumably, the belief is that developers have a “right” to a “reasonable” return on their investment, so a regulatory taking arises from inclusionary zoning’s affordability requirement when it forces the developers to forgo some income. Popular belief about regulatory takings differ with the actual doctrine, which rarely finds something wrong with a regulation that places additional burdens on developers simply because developers believe that regulation to be inconsistent with individual property rights.145

The prevailing test for regulatory takings is an ad hoc factual inquiry, which sounds more precise than it really is.146 This test, which was announced in Penn Central Transportation Co. v. City of New York, asks whether there is a severe enough impact upon investment-backed expectations that the regulation would be viewed as unjustified.147 A related question is whether the regulation would be accepted as ordinary and beneficial to the general public, such that its impact may be justified based on the overall benefits that are generated by state action.148

To date, few challenges have succeeded because of the doctrine’s deference to state and local governments’ broad police powers.149 Since Euclid

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144. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (“While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”).


146. See Lingle, 544 U.S. at 539 (explaining that the ad hoc test’s three factors raise “vexing subsidiary questions”); Robert Meltz, Takings Law Today: A Primer for the Perplexed, 34 ECOLOGY L.Q. 307, 333 (2007) (explaining that “the Court’s recent reinvigoration of the Penn Central test . . . has shed little light on the content of the test’s three factors, or on how to balance them”). See generally Steven J. Eagle, The Four-Factor Penn Central Regulatory Takings Test, 118 PENN. ST. L. REV. 601 (2014).

147. See Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978) (explaining that the economic impact on “distinct investment backed expectations” is one of the relevant considerations in the regulatory takings analysis which is an “essentially ad-hoc factual inquiry[!]”). But see Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (finding a regulatory taking where the property has been stripped of “all economically beneficial uses”).

148. Penn Cent., 438 U.S. at 124 (discussing the role of “the character of the governmental action” as a balancing factor in the analysis).

149. See Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388, 395 (1926) (stating that a zoning regulation will be upheld if its justifications are “fairly debatable” and cannot be expected to be overturned unless “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare”). But see Adam J. MacLeod, Identifying Values in
approved zoning as a valid exercise of the police power, which allows
governments to regulate for the benefit of the health, safety, morals, and
welfare of its residents, courts have largely deferred to zoning regulations
when analyzing a takings issue even where a significant diminution in
property value can be demonstrated.150

The underlying rationale is that land use regulations have a reciprocity
of advantage, which is to say that while any individual property owner gives up
the right to freely use his or her land, other property owners also do the same
in return.151 The touchstone for the standard arises from ordinary land use
regulation and how courts, before and since Euclid, have treated this
governmental action.152 What has been consistent is that courts have accepted,
with respect to ordinary land use regulation, severe decreases in economic
value—up to over 80% to 90% in past cases.153 This result indicates that courts
may accept that a regulation is justified, at least in cases where it is beneficial
to the public, notwithstanding the fact that the regulation may bar owners
from selecting the most lucrative land use.154 Such deference is considered
warranted because a court second-guessing whether an exercise of
governmental regulatory power is valid or invalid would amount to broadly
applying substantive due process assessments of local planning decisions
based on personal sensibilities rather than concrete, objective standards.155
Thus, the strong tradition has been for the courts to defer to local land use
regulations unless the regulation is arbitrary and capricious, such as when a
regulation that prevents an owner from making any use of (or getting any
return from) his land with no discernible benefit or serious justification.156

from this deferential standard without applying transparent or consistent standards).

150. See Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal., 508
U.S. 602, 645 (1993) ("[O]ur cases have long established that mere diminution in the value of
property, however serious, is insufficient to demonstrate a taking."); Penn Cent., 438 U.S. at 131
("[T]he decisions sustaining other land-use regulations . . . uniformly reject the proposition that
diminution in property value, standing alone, can establish a ‘taking’ . . . ."). See generally Daniel
L. Siegel, Evaluating Economic Impact in Regulatory Takings Cases, 19 HASTINGS W.-NW. J. ENVTL.
& POL’Y 373 (2013) (discussing the "economic impact" factor in the ad hoc factual analysis).

(describing the nuisance exception).

152. See Concrete Pipe, 508 U.S. at 645 (citing to zoning cases as the paradigmatic example of
how much diminution in value is constitutionally acceptable).

(noting that 95% would not be a taking but 100% would constitute a taking).

154. See Avery Emison Carson, Comment, Integrating Conservation Uses into Takings Law: Why
(indicating inconsistencies in how courts determine “highest and best use” in valuing land).

155. See, e.g., Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988)
(rejecting a substantive due process challenge to an adverse zoning decision as "present[ing] a
garden-variety zoning dispute dressed up in the trappings of constitutional law").

156. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (Regulations must be
“clearly arbitrary and unreasonable, having no substantial relation to the . . . general welfare
before the Court will declare them unconstitutional."); see also Nectow v. City of Cambridge, 277
The Supreme Court has been largely consistent in this aspect of land use jurisprudence, although an unresolved tension remains about how to strike the proper balance between property rights and the public interest. One perspective is skeptical of governments and concerned that collectivist goals should not disturb existing allocations of property rights, whereas the competing perspective believes that the government is a beneficial steward of the public interest and any adequately justified sacrifice of individual property rights is part of the social contract. 157 This tension has resulted in an effort to identify bright-line, categorical rules for when a regulation rises to the level of a taking, while also retaining Penn Central’s ad hoc factual inquiry and balancing standard. 158

The retention of this contextually-based standard largely reflects the fact that bright-line rules quickly became difficult to administer in an increasingly dynamic world. 159 As a result of this unresolved tension, regulatory takings doctrine has evolved into niche areas of protection wherever a credible exception to the deferential ad hoc analysis can be carved out without upending the prevailing standard of not substituting judicial views for that of the legislature. 160 If not for this approach, takings analysis would be a subset of substantive due process. 161

The question is where does inclusionary zoning fit within the context of constitutional limitations on land use regulation. It would seem to occupy a very strong place as an exercise of the police power, as a remedy, or as an antidote to exclusionary zoning. 162 Without inclusionary zoning and its mandate for low-income housing within market-rate developments plus

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157. See Peter M. Gerhart, Property Law and Social Morality 27 (2014) (arguing that property law should be viewed through the lens of obligations rather than through the lens of rights); see also Eric T. Freyfogle, Private Property—Correcting the Half-Truths, PLAN. & ENVT'L. L., Oct. 2007, at 3, 8 (“Private ownership is sound because it is useful to us collectively as a people. . . . [It] is an individual right only secondarily.”).

158. See, e.g., Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538–40 (2005) (explaining when the per se rules and the Penn Central standard are applied); Audrey G. McFarlane, Rebuilding the Public-Private City: Regulatory Taking’s Anti-Subordination Insights for Eminent Domain and Redevelopment, 42 IND. L. REV. 97, 154–55 (2009) (discussing the use of categorical rules in takings cases and concluding that “[r]egulatory takings cases are really about fairness rather than any bedrock coherent right of property”).

159. See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 321 (2002) (indicating that takings analysis is a fact-specific inquiry where per se rules may not always be applicable); see also Lingle, 544 U.S. at 543–45 (indicating flaws in attempting to create a new bright-line rule for takings cases).

160. See Conston, 844 F.2d at 467 (explaining the high standard for substantive due process challenges). But see Twigg v. Cty. of Will, 627 N.E.2d 742, 745 (Ill. App. Ct. 1994) (applying a multifactor test to a substantive due process challenge, so as to avoid placing the state court in the position of judicially second guessing a legislative policy).


162. See Recent Case, 129 HARV. L. REV. 1460, 1467 (2016) (arguing that inclusionary zoning should be viewed as a restriction on exclusionary residential construction); see also Iglesias, supra note 4, at 3–6.
existing zoning regulations that control what can and cannot be built, there would likely be no remedy for individuals or groups that externalities, such as economic and racial segregation, harm.163

This characterization of inclusionary zoning reflects an acknowledgement that the current land use geography may unjustifiably impose costs on unacknowledged third parties to development, especially members of racially stigmatized groups who experience persistent economic and racial segregation.164 When viewed in this light, inclusionary zoning actually reflects a more informed view that concentrations of affluence and poverty are interrelated.165 By way of comparison, a mere rezoning that allows denser development is incapable of addressing the societal problems created, exacerbated, and enshrined by local zoning.166

Within this context, the “inclusionary” in “inclusionary zoning” is intended as an antidote for past and current racial and economic exclusion, which is to say that the regulation has an important economic integration or compensatory function.167 This type of anti-exclusion regulation also serves as a way to stop private property owners from benefitting from a system of exclusion that would allow them to pass losses to: (1) those who would occupy substandard housing; and (2) their local government that must step in to provide for the unmet need.168 Finally, mandatory inclusionary zoning in particular operates as an anticipatory response to future attempts to create new geographies of exclusion.169 As a result, inclusionary zoning is correctly seen as a much needed and valid correction to land use regulation.

163. See Michael C. Lens & Paavo Monkkonen, Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?, 82 J. AM. PLAN. ASS’N 6, 7 (2016) (arguing that both land use regulation and land use decision-making contribute to “the segregation of the affluent”).


165. See Lens & Monkkonen, supra note 163, at 6–7 (arguing that segregation of the wealthy is as significant a problem as segregation of the poor).

166. By definition, a “rezoning” is a change in use that a local government grants at its discretion. This state action should be distinguished from other public goods and services, which developers and other permit-seekers are automatically entitled to receive. See generally N.Y.C. DEP’T OF CITY PLANNING, ZONING HANDBOOK (2011).

167. See Iglesias, supra note 72, at 590–91, 599 n.4 (discussing how often this is bypassed with waivers or offsite housing).

168. See FENNELL, supra note 43, at 157 (discussing the possibility of forcing property owners to pay for the privilege to exercise the preference for exclusionary zoning).

B. INCLUSIONARY ZONING AS AN EXACTION

Exactions doctrine relies on a different subset of legal principles within land use regulation. The principles set a standard for how a local government must treat potential developers by allowing them to proceed with development and only imposing conditions on that development project—i.e., specific steps or limits on the contemplated project—that offset direct, measurable, physical impacts of that landowner’s particular development. These principles arose out of a specific set of land use cases where a local government demanded a public easement as a condition for signing off on an intensification of land use. These principles reflect judicial concerns that property owners may often be powerless in the face of certain types of governmental action.

Under a regulatory takings analysis, a court would have found no taking in any of the prototypical exactions cases because the government regulation serves a valid purpose and, for the developer, reasonable use and a reasonable return would still be available from the property. Because the landowners seeking to develop were being forced to give up something that was considered illegitimate for the government to require them to give up—in these cases, access by the public to the property—the Supreme Court weighed in on an area of doctrine formerly handled at the state level: exactions doctrine. This area of law, in effect, protects developers from the government if the government requires the developer to satisfy certain requirements before engaging in a proposed intensification of land use when compliance would mean the developer would be complicit in giving up his or her property rights.

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170. See Fenster, supra note 21, at 622 ("The exactions decisions’ rules attempt to limit exactions to a single purpose: the direct abatement of nuisancelike impacts caused by the proposed land use.").

171. See generally Dolan v. City of Tigard, 512 U.S. 374 (1994) (finding that a condition placed on a building permit was unconstitutional because there was not a “reasonable relationship” between the condition and the permit); Nollan v. Cal. Coastal Comm’n, 483 U.S. 825 (1987) (same).


173. See Lee Anne Fennell, Hard Bargains and Real Steals: Land Use Exactions Revisited, 86 IOWA L. REV. 1, 14–15 (2000) ("[T]he choice of the word ‘exaction’ . . . amounts to a linguistic stacking of the deck. . . . [I]t comotes something done by one (powerful) party to another (powerless) party." (emphasis omitted)).

174. See generally Jerold S. Kayden, Celebrating Penn. Central: How the Supreme Court’s Preservation of Grand Central Terminal Helped Preserve Planning Nationwide, PLANNING, June 2003, at 20 (noting the role of Penn Central as the basis of modern land use and planning regulatory power).

175. See Timothy M. Mulvaney, Exactions for the Future, 64 BAYLOR L. REV. 511, 520 (2012) ("[T]he commands of Nollan and Dolan represent a more stringent standard of review than most, if not all, state courts previously employed in the permit condition context.").

176. See Daniel P. Selmi, Negotiations in the Aftermath of Koontz, 75 MD. L. REV. 743: 743 (2016) ("Deterring ‘extortion[ion]’; ‘coercion,’ ‘evas[ion],’ and use of ‘leverage’ by local governments plainly motivated the Court’s decision." (alterations in original) (quoting Koontz, 133 S. Ct. at 2594–95)).
Under this line of cases, inclusionary zoning could be seemingly characterized as an “unconstitutional condition” under a mechanical application of exactions doctrine’s special requirements of a valid and supportable connection between the goal of a development permit condition and what the condition requires of a person undertaking development.\(^\text{177}\) Under this conception, inclusionary zoning operates as a condition, which must be limited to directly offset the potential impacts of development to be valid. Of course, an implicit corollary is that a government would be entitled to identify all potential impacts and ensure that they are accounted for.\(^\text{178}\)

The applicability of the exactions doctrine would seem to depend upon whether an inclusionary zoning program is implemented legislatively or administratively.\(^\text{179}\) If the legislation imposes a particular condition on development, it would mean that the government has announced generally applicable requirements that apply to every developer.\(^\text{180}\) If the requirement involves flexible case-by-case implementation, which would seem to be more administrative than adjudicative and deserving of modestly closer review to ensure legislative standards are met, then a heightened standard of review could apply to review of any challenge to the inclusionary requirement.\(^\text{181}\)

Thus, a valid claim seems more likely whenever a local government adds a certain amount of flexibility, through additional discretion, to an

\(^{177}\) See generally David L. Callies, Mandatory Set-Asides as Land Development Conditions, 42/43 Urb. Law. 307, 325 (2010/2011) (discussing inclusionary zoning as an exaction likely to be unconstitutional without “incentives”).

\(^{178}\) See Selmi, supra note 23, at 340–41 (noting that since the advent of the exaction cases, the number and frequency of offsets for impacts have risen dramatically). “[T]he expansion in the types of impacts that form the basis for exactions imposed as conditions on projects. As concerns over environmental degradation have expanded over the last forty years, local governments have increasingly responded by conditioning project approvals to minimize impacts on a broader variety of environmental concerns.” Id. at 340.

\(^{179}\) Id. at 350, 367 (citing Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994)) (noting that this distinction is mentioned in Dolan only). “[I]n Dolan, the Court placed the burden of proof to uphold the exaction on the city, with the unconvincing explanation that the city was engaged in making an adjudicative decision.” Id. at 367; see also Cal. Bldg. Indus. Ass’n v. City of San Jose, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in the denial of certiorari) (noting the split between lower courts over the legislative–administrative distinction and expressing “doubt that ’the existence of a taking should turn on the type of governmental entity responsible for the taking’” (quoting Parking Ass’n of Ga., Inc. v. City of Atlanta, 515 U.S. 1116, 1117–18 (1995))).

\(^{180}\) See Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2592 (2013) (noting that the challenged conditions were granted by state law, the Warren S. Henderson Wetlands Protection Act, which authorized conditions to mitigate the impact of development in wetlands); see also Fla. Stat. § 373.414(1)(b) (2016) (“If the applicant is unable to otherwise meet the criteria set forth in this subsection, the governing board or the department, in deciding to grant or deny a permit, shall consider measures proposed by or acceptable to the applicant to mitigate adverse effects that may be caused by the regulated activity. Such measures may include, but are not limited to, onsite mitigation, offsite mitigation, offsite regional mitigation, and the purchase of mitigation credits from mitigation banks permitted under s. 373.4136.”).

\(^{181}\) See Iglesias, supra note 4, at 4 (“[O]pponents might selectively present the developer’s situation, e.g. treating a land use regulation-type as a ‘exaction’ by isolating the ‘in lieu fee’ and urging the court to treat the ‘in lieu’ fee as an ‘impact fee.’ Moreover, if a local requirement offers a developer several options for compliance, there is no clear legal rule directing the court how to frame its review of each option or how to interpret severability clauses.” (footnote omitted)).
inclusionary zoning ordinance. One example of flexibility is when a statute permits the number of units to be individually tailored to a particular project or when an ordinance creates a menu of choices for either building units or contributing towards an affordable housing fund. With flexibility comes discretion, and with discretion comes the opportunity for the other part of land use regulation, which is deal-making.

The biggest challenge reflected in this indeterminate area of exactions, as opposed to takings analysis, is the reality that it has become customary in development for a local government to simultaneously act not only as a regulator but also as a dealmaker. This dual role has often troubled courts, especially the U.S. Supreme Court, because of the varying perspectives on the propriety of governmental regulation. From one perspective, the government is viewed as a well-meaning regulator, who is best positioned to assess the needs of the polity and the impact and costs of intensified use. Alternately, the government may be viewed as a rent-seeking and careless oppressor, acting in a proprietary, opportunistic, and potentially arbitrary way, insulated from any political check by some notion of political process failure. In other words, the single or few developers are powerless to democratically protect their interests because they are relatively few in number. As such, the Court has paid increasing attention when a local government requires property owners to accede to what are perceived to be public needs that, based on an invisible metric, the government should purchase rather than be perceived to be forcing an uncompensated trade. This perceived need for scrutiny may be especially acute when these landowners’ individual property rights would normally entitle them to

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182. Id. at 10 (“[F]lexibility is likely to assist in meeting goals. . . . Flexibility in forms of compliance and offering waivers may also help the ordinance withstand legal attacks, but not necessarily.”).

183. Id. at 5–9 (arguing that an inclusionary zoning ordinance is, ironically, more, not less, vulnerable to challenge as an exaction when it provides alternatives).

184. See Ellickson et al., supra note 18, at 332.

185. See Fenster, supra note 21, at 673 (“Formulaic exactions . . . eliminate[] the inclusion, contingency, and openness that might be found in the deal making of political compromise.”).


187. See, e.g., Carlos A. Ball & Laurie Reynolds, Exactions and Burden Distribution in Takings Law, 47 WM. & MARY L. REV. 1513, 1516 (2006) (“Nollan and Dolan have received a great deal of attention from commentators, who can be divided roughly into two camps.” (footnote omitted))).

188. See Fenster, supra note 21, at 675–78 (discussing government as consensus builder).
autonomy and a right to opt-out even if the local government has significant justification for the action.\textsuperscript{189}

Within this context, the government’s efforts in \textit{Nollan v. California Coastal Commission}\textsuperscript{190} could be understood as a valid regulatory effort to generate public value by improving the public’s access to the beach.\textsuperscript{191} Specifically, the California Coastal Commission sought to create more public value by converting the increased intensification of use that would occur due to Mr. Nollan’s expansion of his dilapidated beach house into a tangible benefit for the public, which would otherwise not have the same level of access to the beach.\textsuperscript{192} In other words, Nollan granting the easement would offset the harms caused by his proposed development project.\textsuperscript{193}

The idea of granting physical access to the most desirable part of a private beach, however, seemed to run counter to the Court’s ideas about individual property rights. The exactions doctrine announced in \textit{Nollan} was not unprecedented. Pre-\textit{Nollan} precedents seemed to assume the need for some connection between what is asked for and what purpose it is supposed to serve.\textsuperscript{194} The question is the amount of deference that courts should give to local governments in terms of evaluating the closeness of fit. Recognizing the departure from the deferential standard in Due Process and Equal Protection review, the \textit{Nollan} Court articulated a new standard—a requirement that the permit condition relate closely with a legitimate state interest: the “essential nexus.”\textsuperscript{195}

\begin{footnotes}
\item[189.] See McFarlane, \textit{supra} note 158, at 138–39 (arguing that the suburbs were created as a place to “escape from disadvantage” and this geographical context has shaped regulatory takings doctrine).
\item[190.] See generally \textit{Nollan v. Cal. Coastal Comm’n}, 483 U.S. 825 (1987) (holding that state action requiring property owners to give an easement to the public as a condition for the receipt of a land-use permit is a taking when: (1) the state action fails to advance a legitimate governmental interest; (2) the ceding of an easement is inadequately related to the government’s interest in the harm that is imposed on the public (deprivation of the public’s view of the beach); and (3) the burden to be imposed on the public did not justify an unjustified taking of property by the government).
\item[191.] The term “public value” refers to the process of taking into account “the benefits and costs of public services not only in terms of dollars and cents, but also in terms of how government actions affect important civic and democratic principles such as equity, liberty, responsiveness, transparency, participation, and citizenship.” Shayne Kavanagh, \textit{Defining and Creating Value for the Public}, \textit{GOV’T FIN. REV.}, Oct. 2014, at 53–57 (reviewing \textit{MARK H. MOORE, RECOGNIZING PUBLIC VALUE} (2013)).
\item[192.] See \textit{Nollan}, 483 U.S. at 842 (Brennan, J., dissenting) (“The Commission reasonably concluded that such ‘buildout,’ both individually and cumulatively, threatens public access to the shore.”).
\item[193.] \textit{Id.} at 856 (“Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a ‘reciprocity of advantage.’” (quoting \textit{Pa. Coal Co. v. Mahon}, 260 U.S. 393, 415 (1922))).
\item[194.] See Fenster, \textit{supra} note 21, at 680 (“Before the Court involved itself in exactions, state courts had developed their own approaches to protecting individuals from excessive regulatory conditions, and state legislatures continue to control the authority of local governments to impose exactions.”).
\item[195.] See \textit{Nollan}, 483 U.S. at 837 (“The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes
\end{footnotes}
In a subsequent exactions case, Dolan v. City of Tigard, the government conditioned a permit to expand a commercial building and an adjacent parking lot on the property owner granting a public easement.196 The Court further elaborated on the constitutional standard for exactions that it had announced in Nollan by requiring that any condition requested by local governments must be “rough[ly] proportional[]” to the harm being caused by a development project.197 This requirement also has to be narrowly tailored, as determined by an “individualized determination”—i.e., an individual project assessment.198

Thus, the Dolan Court reinforced that a blanket requirement was discouraged. The local government, instead, has to make some effort to expertly quantify impact and that what the government asked for was somehow equivalent to the development’s impact.199 Why? There seems to be a sense that without the court as referee, the local political process does not shield owners from abusive local government. There is, however, some common sense appeal to the outcome in Dolan because it seems that perhaps, in some respect, the City of Tigard did ask for more than it needed (an easement for a public right of way) in order to offset the impact of the developer’s anticipated project on flooding.200 The question remains, however, why the close scrutiny here and not elsewhere where a deferential standard applies.

The heightened standard of review that applies to imposing such a condition, which must be directly related to the impact of a development project, is hard to reconcile with the separation-of-powers-based judicial deference to legislative policymaking.201 Oddly, Nollan and Dolan provide only modestly helpful guidelines about what local government can and cannot ask for. In doing so, these cases have helped to advance a somewhat restrictive and disempowering view of government regulation.202 This restrictive and disempowering view of government regulation, in turn, could provide an

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197. Id. at 391.
198. Id.
199. See id. (determining that an “individualized determination” is required).
200. Id. at 386.
201. See Mugler v. Kansas, 123 U.S. 623, 660–61 (1887) (“Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.”).
202. But see Fenster, supra note 17, at 731 (“The Court’s exactions rules check government discretion only selectively, while leaving it up to other governmental institutions, as well as to developers, homeowners, voters, and the market for local governments’ packages of taxes and services, to check discretion over exactions to which Nollan and Dolan do not apply.”).
opening for sophisticated developers to advocate for limiting regulation, especially the general health, safety and welfare of all types of its citizens, not only high-income but also middle- and low-income.203

The Court’s initial rationale for \textit{Nollan} and \textit{Dolan}, was that any condition that is placed on a development permit must substantially advance a legitimate state interest.204 This was conceptually quite appropriate, at least in cases where a permit was subject to complying with certain conditions, since any honest of assessment of the exactions standard was that it imposed a heightened standard of review in cases where individual property rights may be impaired by state action. Although this standard was well understood within zoning jurisprudence arising out of \textit{Euclid} as a signal to defer to local government policymaking with respect to land use, the Court ultimately abandoned it in exactions doctrine to avoid its misapplication elsewhere in economic legislation.205

One result of this revision is that the Court had to make changes to the underlying rationale for exactions doctrine. It did so by drawing on a less developed area of analysis: “unconstitutional conditions.”206 Similar to the exactions doctrine, as announced in \textit{Nollan}, unconstitutional conditions analysis assumes that there will be liability whenever landowners seeking to develop are asked to give up something that has little to no connection to the harm that their development imposes upon third parties, such as the general public.207 As a result, the local government is required to limit its demands of developers to mere offsets, in order to ensure that individual and public interests are properly balanced.208

What has not been adequately considered is how the typical unconstitutional conditions case differs from land use takings cases.209

203. See Selmi, supra note 29, at 341 (“[O]nce the Court began articulating the extortion narrative in \textit{Nollan}, development interest groups perceived an important vehicle both for attracting the Court’s attention to appeals and for articulating a theme in briefing them.”).


205. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 532 (2005) (“This case requires us to decide whether the ‘substantially advances’ formula . . . is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.”). Instead, \textit{Dolan} sets the standard as being one of measuring unconstitutional conditions. \textit{Dolan}, 512 U.S. at 985 (“Under the well-settled doctrine of ‘unconstitutional conditions,’ the government may not require a person to give up a constitutional right . . . to receive just compensation when property is taken for a public use . . . where the benefit sought has little or no relationship to the property.”).


207. Id. at 547–48 (“[T]he doctrine of ‘unconstitutional conditions’ . . . is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest.” (citing \textit{Dolan}, 512 U.S. at 383)).

208. See generally Daniel L. Siegel, Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope, 28 Stan. Envtl. L.J. 577 (2009) (arguing that \textit{Lingle} limits the applicability of \textit{Nollan} and \textit{Dolan} to only those permits that require owners to dedicate real property to a public use).

209. Id.
Unconstitutional conditions cases generally involve wholly unrelated requests that are made by governments. In the land use context, the development benefit and its offsetting impact are, in many respects, both a function of regulation. Thus, not only does treating these cases the same elevate the ability to control property to the level of a fundamental right, even though fundamental rights are typically never available for taking by government through payment of compensation, it also provides an elevated level of protection that fails to acknowledge the unique role that government plays in dealing with development-induced social problems, such as racial and economic segregation; the shortage of affordable housing for low-, moderate-, and middle-income households; and in encouraging beneficial uses for private property. At base, the question is whether local government has the discretion to identify the loss to the public then negotiate and trade on behalf of the public for a right or benefit as an indirect offset.

In other words, how does government ensure its ability to assure that developers fully internalize their externalities that arise from more intensive land uses? For example, in Nollan, what could the government have done to assure that the developer did not shift his private costs onto the public—i.e., the loss to the public of the view of the Pacific Ocean? The Court explained that the only supportable possibility would be to require the developer to provide a viewing spot that is permanently held open. But the Court did not seriously consider whether that really would have offset the actual cost to the public of the lost view, particularly when combined with the intensification of development along the entire beach.

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211. See Selmi, supra note 23, at 364 (“[T]he lack of underlying cohesion [in unconstitutional conditions doctrine] has so fragmented the doctrine that it takes different forms depending on the specific constitutional provision at issue—freedom of speech, freedom of association, or here, takings.”).

212. Id. at 365–66 (noting that a property right is not a fundamental right because the government can take it for a price using the eminent domain power). In other words, a right that can be bought is not the same order of right as other traditionally recognized fundamental rights.

213. See Mugler v. Kansas, 123 U.S. 623, 668–69 (1887) (constitutional exercises of the police power must be done in furtherance of the “health, morals, or safety of the community”).

214. Similar questions are being raised in different fields of scholarly inquiry, including economics. See Neva Goodwin, Internalizing Externalities: Making Markets and Societies Work Better, OPINIÓN SUR, Dec. 2007, at 1, 2 (“It is very a [sic] positive development that the discipline of economics is wresting with efforts to ‘internalize’ the costs of economic activity that have been ‘externalized’ to the natural world. In order to assess the likelihood that externalities will in future [sic] be internalized . . . we must ask, first, why have they been allowed to remain external up to now? [sic] and, second, what has changed so that we can expect the future to be different in this respect?”).


216. Id.

217. Id. at 836–39.
These questions, among others, can only be answered in light of judicial concerns about government overreach,\textsuperscript{218} which have continued to surface in the most recent exactions case, \textit{Koontz v. St. Johns River Water Management District}.\textsuperscript{219} Among the consequences of failing to answer these questions, ideally in the affirmative, is that the U.S. Supreme Court winnowed away at the state’s right to negotiate with developers over how to internalize their externalities.\textsuperscript{220} In other words, exactions doctrine fails to acknowledge the key role that local governments play in mitigating the cost of key social problems.\textsuperscript{221}

\textit{Nollan} and \textit{Dolan} broadly suggest that heightened scrutiny of the essential nexus and rough proportionality tests are always required, even for a program like inclusionary zoning because a permit tailored to a particular development is being issued.\textsuperscript{222} However, perhaps the better approach is a narrower one. This Article asserts that \textit{Nollan}’s and \textit{Dolan}’s prohibitions should only apply in two narrow situations: The first situation is where local governments fail to adequately support their claims, such as when there is no evidence that higher than average costs arise from a development; and the second case is where the local government uses its discretion to treat similarly-situated developers in nonstandard ways, at least in cases where that local government seemingly has no adequate justification under the dictates of exactions doctrine’s emphasis on impact.

IV. WHY INCLUSIONARY ZONING SHOULD SURVIVE EXACTIONS ANALYSIS

As discussed above, at least for the modest number of courts that have considered this specific issue, the general view is that inclusionary zoning is an ordinary land use regulation that is covered by the \textit{Penn Central} framework.\textsuperscript{223} Under this view, \textit{Penn Central} applies to inclusionary zoning because what the government requires from developers, an additional condition for the grant of a permit, is not tied to the negative effects that arise from a specific development. Instead, these generally applicable requirements are prescribed in zoning regulations and applied to every single

\textsuperscript{218} See Selmi, supra note 23, at 346 (arguing that the exactions doctrine’s underlying extortion narrative and its concerns about government overreach have extended the doctrine to providing prophylactic protection during the negotiation process preceding a taking).

\textsuperscript{219} See Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2599, 2603 (2013) (holding that failed negotiations over permit conditions are subject to exaction analysis notwithstanding statewide legislation authorizing water management districts to offset impact of wetlands development).

\textsuperscript{220} Id. at 2595 (“Insisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.” (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926))).

\textsuperscript{221} See Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (noting that constitutional exercises of the police power must be done in furtherance of the “health, morals, or safety of the community”).


\textsuperscript{223} See generally Eagle, supra note 146 (discussing conventional views of the \textit{Penn Central} framework).
property owner that meets the qualifying conditions to be regulated. As a result, inclusionary requirements are not likely to be subject to a successful legal challenge. Recent litigation in California and Illinois suggests, however, that there is still a real need to consider how mandatory inclusionary zoning would fare under a Nollan/Dolan exactions analysis. In both cases, developers argued that local governments had exceeded their authority by imposing inclusionary zoning requirements. If case studies, which methodically tracked the facts in various regulatory scenarios were available, then developers could have made more informed decisions about whether to challenge inclusionary zoning.

So, what accounts for the decision to sue over inclusionary zoning? Perhaps it can be explained by the poor framing of the issues presented, as seen in Home Builders Association of Greater Chicago v. City of Chicago and California Building Industry Association v. City of San Jose. This framing may arise from the fact that the story of development is incomplete, at least as it pertains to the costs that individual developers impose upon local governments and the general public. The key issue in recent cases is whether local government can require developers to provide offsets, in the form of inclusionary zoning, at least in the absence of direct subsidies. It would seem that the short answer, under the applicable law, would be yes. Certainly, popular beliefs about regulatory takings, which do not map onto the doctrine that actually delimits the use of inclusionary zoning, could help to explain this disjuncture.
The conventional story about development, as reflected in popular beliefs, is incomplete because it reduces the varied experiences of all developers to that of the unsubsidized developer. \(231\) By definition, an unsubsidized developer is a property owner who does not ask a local government for financial assistance nor requires the government to do any additional work in issuing a permit. By focusing on this extremely rare case, the public is led to believe that most developers are largely unsubsidized and undeserving of regulatory attention. In the process, this incomplete story fails to account for the fact that developers are never asked to offset all the costs of their developments. Thus, claims of government overreach underlying their challenges to regulation are often significantly overstated.

Therefore, in order to tell a more complete story, there are three reasons to account for the experiences of the variety of types of developers and their varied experiences with local governments. First, this accounting process is essential to determining which legal standard applies to inclusionary zoning ordinances. It also helps to place such regulations within their proper context, as a way to hold developers responsible for the numerous costs they impose upon local governments and the general public. \(232\) Lastly, identifying the entire universe of developers helps to correct a common misconception: that developers give more than they receive.

A more complete story would take into account three basic situations. In the first scenario, a highly-subsidized developer may be given a city-owned parcel with an existing use and makes a decision to improve it. \(233\) Permit fees

\(231\) By definition, an unsubsidized developer is a permit seeker who does not receive any government subsidy. For the purposes of this Article, a government subsidy comes in only two forms: additional work in issuing a permit and direct financial assistance. See Jonathan D. Epstein, \textit{Buffalo Is Starting to Lure Out-of-Town Money for Real Estate Development,} \textit{Buffalo News} (Mar. 10, 2016), http://www.buffalonews.com/2016/03/10/buffalo-is-starting-to-lure-out-of-town-money-for-real-estate-development ("Harvey Kaylie is a bit of a rarity in Buffalo—an outsider willing to join an insider’s game…. He already owns real estate elsewhere, not only for his company’s facilities but also investments in housing complexes in Atlanta, Colorado and the Chicago area, with 600 units in all. His surprise bid for One Seneca caught most people off-guard, but he said he has some specific ideas for reusing the 40-year-old building. Moreover, he says he has the financial capacity to do it on his own.").

\(232\) In addition to the economic costs that this Article has described, noneconomic costs also may arise from new development. Examples of the noneconomic costs that may be imposed on members of the general public are social costs, such as emotional distress, due to heightened levels of social conflict. See Smith, supra note 92 ("The Effects of Neighborhood Change on NYCHA Residents," written by the consulting firm Abt Associates with help from New York University’s Furman Center for Real Estate, found that NYCHA tenants often wind up feeling like aliens in their own neighborhoods.").

\(233\) By definition, a highly-subsidized developer is a permit-seeker who receives the greatest amount of subsidy. This definition applies when a highly-subsidized developer asks for: (1) a grant of government land, a zoning change and government funding; (2) a grant of government land and a zoning change; (3) a grant of government land and government funding; or (4) a zoning change and a grant of government funding. See, e.g., Natalie Sherman, \textit{BDC Considers EBDI, West Side Projects,} \textit{Balt. Sun} (Sept. 25, 2014, 10:17 AM), http://www.baltimoresun.com/business/real-estate/wonk/bal-bdc-considers-ebdi-west-side-projects-20140925-story.html ("The Baltimore Development Corp. voted unanimously in a closed session Thursday to start exclusive negotiations with a developer seeking to build market-rate apartments on two city-owned sites…. A final price for the land is subject to negotiation, said BDC President William H. Cole.").
and other user fees, which are modest payments demanded by local governments that give developers access to scarce government resources, such as a grant of government funds, a grant of government land and other public benefits, are the only amounts demanded from heavily-subsidized developers. These modest charges, which are often limited to a nominal amount, are insufficient to offset the amounts that are paid to, or on behalf of, heavily-subsidized developers. The difference between what is charged of developers and what they pay is made up by local governments, often using funds held in public trust. As such, local governments are justified in demanding affordable housing that is valued in the same amount. Additional amounts also may be demanded of developers, especially in cases where their development project has an especially negative impact or has recurring costs.

In the second scenario, a moderately-subsidized developer already owns a parcel and decides to change how it will be used. The developer, again, does not fully pay for the cost of their requested state action, which in this case is limited to a grant of government funds, a grant of government land or an individualized assessment of the net impact of a specific development. These modest amounts, in most cases, are insufficient to completely offset the amounts spent in reliance. Local governments are entitled to recover the difference in cash or in-kind services as a general rule, as well as any additional public funds that it has spent in mitigating the negative impacts of the proposed development project.

The third scenario is the most familiar and involves a situation in which an unsubsidized developer already owns a parcel, does not change the existing land use, and does not request financial assistance. This property owner merely asks a local government to confirm that her improvement complies with the law. The permit fee often fully offsets the cost of this regulation, at least in cases where the proposed change does not have any other negative impacts, which means that a local government would not be justified in demanding anything else from this developer.

This more complete story undercuts exactions and unconstitutional conditions arguments against inclusionary zoning for several reasons. For
example, it highlights the many ways that local governments gratuitously bestow value on developers. Second, this more complete story points out that developers have little problem with imposing their costs on unrelated third parties. Lastly, it illustrates that developers receive more benefits than local governments ever ask them to pay for.

Nonetheless, it is clear that additional reforms may be necessary for local governments to demand an optimal amount from developers. For example, a better connection could be made between the costs and benefits of development projects. By expressly making this connection clear and visible to all, perhaps through something as simple as creating additional marketing materials, it may become clear why more government regulation is needed in the form of inclusionary zoning.

Another option is to undertake better individualized assessments of specific development projects. Such a change would require that local governments determine the actual cost of regulating development projects. Once it is determined, this cost may be subtracted from a standard amount. The amount to be demanded of a developer would be the difference between the two sums.

There is a potential downside to these two reforms, in that each requires a societal consensus about which costs are attributable to each development project and how to quantify such costs. This points to an inherent difficulty that arises from relying upon measurable impacts. It is a challenge to properly account for such impacts, in an objective manner, due to the conflicting interests underlying local zoning laws.

V. CONCLUSION

Situating inclusionary zoning, properly, within constitutional doctrine requires broadening the development narrative to include a wider variety of development settings and realities. Cities are grappling with promoting the health, safety and welfare of all their citizens by ensuring that well-located, affordable housing be built. The current crisis in affordable housing suggests many cities are losing that battle, including midsized cities such as Baltimore. Cities also grapple with the needs and demands of influential citizens like developers, who are not always victims of overreaching government but rather agents acting powerfully in their own interests. That public–private relationship often involves significant direct and indirect subsidy and assistance.

Any evaluation of mandatory inclusionary zoning must take this reality into account. In particular, exactions doctrine’s exclusive focus on

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236. This total cost is equal to the sum of the costs of mitigating the harms that arise from a proposed development project, plus the change from baseline for administrative costs in the immediate area, plus any subsidies that are provided by local governments minus user fees paid by the developer.

237. This standard amount is equal to the total number of hours spent in making assessments of this type times the hourly rate of the individuals that undertook these analyses, divided by the total number of development projects that the local government has analyzed.
unsubsidized developers tells an incomplete story about the true costs of development. This framework assumes that developers are engaged in purely private behavior of little interest to anyone else. Yet the reality is that development actually imposes hidden costs on certain subsets of the public, such as low-income renters, which are not fully accounted for by developers.

The predominant view in the United States is that any increase in land value is an economic windfall that results from a developer’s ingenuity or luck rather than through concerted community planning effort. In many other countries, however, the relationship between increases in land value, community planning, and land use regulation is exemplified by the widespread adoption of land value recapture policies. Land value recapture assumes that new development increases property values but only with the social, political, and economic assistance of local governments and the general public. As such, cities, on behalf of the public, are entitled to receive a share of a development’s rising market value. By analogy, the propriety of mandatory inclusionary zoning should include some recognition that the local government is not seeking a windfall with inclusionary zoning but is merely recouping on past and future investments. By clarifying the interactive nature of land use regulation, local economic development subsidies and investments in private projects, and the real costs of development, the constitutional law governing land use regulation and doctrine may help cities to understand that they do not need to give away as much as they are now so, unfortunately, inclined.

238. See Nico Calavita & Alan Mallach, Inclusionary Housing, Incentives, and Land Value Recaptures, LAND LINES, Jan. 2009, at 15, 17–18 (comparing the United States’ view of the “right to develop” to the European view that land value increases are “unearned”).

239. Id. at 17.

240. See generally id.