

## LOCAL REDISTRIBUTION, LIVING WAGE ORDINANCES, AND JUDICIAL INTERVENTION

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### INTRODUCTION

Approximately 130 municipalities have adopted “living wage” ordinances that require cities, employers that do business with cities, or particular employers located in cities to pay low-wage workers higher hourly rates than would otherwise apply.<sup>1</sup> While many of these ordinances have been enacted in small or mid-size communities, the controversy over the initial enactment and subsequent veto of a Chicago ordinance requiring “big box” stores to pay a wage of at least \$10 per hour plus \$3 in benefits suggests

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<sup>1</sup> See Living Wage Resource Center, Living Wage Wins, <http://www.livingwagecampaign.org/index.php?id=1959> (last visited Feb. 1, 2007). A few of the ordinances were enacted and subsequently repealed.

that this phenomenon is spreading to major cities.<sup>2</sup> The extensive acceptance of these ordinances is testimony to the efforts of activist groups, churches, and labor unions to enhance the earnings of the working poor. Both popular press accounts and academic studies suggest that the ordinances have a positive effect on the income of low-wage workers.<sup>3</sup> Their effect on employers and on the cities that adopt them is more controversial. Some claim that the ordinances distort locational decisions of firms and retard the growth of employment, while others contend that the ordinances have had little or no adverse impact on employment in adopting cities.<sup>4</sup> But perhaps even more puzzling is the fact that these ordinances are proposed at all. Insofar as they are enacted by municipalities, they contravene the conventional wisdom that localities should play little role in fulfilling the redistributive functions of government.

The basis of that orthodoxy, derived from standard theories of fiscal federalism and urban economics,<sup>5</sup> is straightforward: Local governments cannot successfully or efficiently redistribute wealth. That conclusion is predicated on a simple and compelling premise. Residents and firms that bear the burden of local redistribution can too easily exit to neighboring jurisdictions that impose only benefit-based taxes of the sort that underwrite goods and services for taxpayers themselves. Mobile residents who escape redistributive taxes impose a greater redistributive burden on those who remain, inducing them to follow suit in a continuing downward spiral.<sup>6</sup> Localities, therefore, can impose taxes to pave roads and collect garbage, but

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<sup>2</sup> See Fran Spielman, *Daley's Big-Box Veto Holds Up*, CHI. SUN TIMES, Sept. 14, 2006, at 8.

<sup>3</sup> See, e.g., Jon Gertner, *What is a Living Wage?*, N.Y. TIMES, Jan. 15, 2006 (Magazine), at 38; Scott Adams & David Neumark, *The Effects of Living Wage Laws: Evidence from Failed and Derailed Living Wage Campaigns* 18–25 (Nat'l Bureau of Econ. Research, Working Paper No. 11342, 2005), available at <http://papers.nber.org/papers/w11342.pdf> (finding that living wages generate enhanced wages for those who obtain jobs, but have negative effects on low-wage worker employment).

<sup>4</sup> See, e.g., Mark D. Brenner, *The Economic Impact of Living Wage Ordinances* 18–28 (Political Econ. Research Inst. Working Paper Series, Paper No. 80, 2004), available at <http://www.umass.edu/peri/pdfs/WP80.pdf> (arguing that ordinances increase municipal budgets and lead to varied strategies by different employers about laying off workers and passing costs on to customers). For competing studies on the employment effects in one adopting city, Santa Fe, compare AARON S. YELOWITZ, EMPLOYMENT POLICIES INST., SANTA FE'S LIVING WAGE ORDINANCE AND THE LABOR MARKET 1–7 (2005), available at [http://www.epionline.org/studies/yelowitz\\_09-2005.pdf](http://www.epionline.org/studies/yelowitz_09-2005.pdf), with NICHOLAS POTTER, BUREAU OF BUS. & ECON. RESEARCH, MEASURING THE EMPLOYMENT IMPACTS OF THE LIVING WAGE ORDINANCE IN SANTA FE, NEW MEXICO 5–22 (2006).

<sup>5</sup> See JOHN CULLIS & PHILIP JONES, PUBLIC FINANCE AND PUBLIC CHOICE 303–05 (2d ed. 1998); WALLACE E. OATES, FISCAL FEDERALISM 131–40 (1972); PAUL E. PETERSON, CITY LIMITS 182–83 (1981) [hereinafter PETERSON, CITY]; PAUL E. PETERSON, THE PRICE OF FEDERALISM 27–28 (1995) [hereinafter PETERSON, PRICE]; Richard A. Musgrave, *Fiscal Federalism*, in JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, PUBLIC FINANCE AND PUBLIC CHOICE 160–61 (2000). For a view that local governments can use income taxes to redistribute wealth without significant migration effects, see Timothy J. Goodspeed, *A Re-Examination of the Use of Ability to Pay Taxes by Local Governments*, 38 J. PUB. ECON. 319 (1989).

<sup>6</sup> OATES, *supra* note 5, at 132.

not to subsidize a subset of residents. Redistributive exactions, the theory goes, should be the exclusive domain of more centralized jurisdictions—state and federal governments—from which taxpayers cannot easily exit without simultaneously giving up jobs, friends, or lifestyle. Orthodox theory predicts that localities that defy this logic will lose the interjurisdictional competition for residents and tax base. Those same localities will bear increasing costs as their policies attract the direct beneficiaries of redistribution, transforming redistributive localities into “welfare magnets.”<sup>7</sup>

This conventional wisdom may underlie litigation that has followed the adoption of some living wage ordinances. Those legal challenges typically claim that setting wages exceeds municipal authority or has been preempted by state wage regulation. The results of the ensuing litigation have been mixed. The Louisiana Supreme Court invalidated a New Orleans living wage ordinance on various state constitutional grounds,<sup>8</sup> and a Missouri appellate court, in an unreported decision, held that state law preempted a living wage ordinance for St. Louis.<sup>9</sup> But appellate courts in New Mexico<sup>10</sup> and New Jersey<sup>11</sup> have upheld similar ordinances against state constitutional challenges, and a split panel of the United States Court of Appeals for the Ninth Circuit rejected a federal constitutional challenge to a living wage ordinance in Berkeley, California.<sup>12</sup> The Louisiana decision most thoroughly reflects the underlying tensions. In that case, a deeply divided court debated the scope of home rule, the extent to which local wage ordinances generate statewide effects that preclude local regulation, the capacity of localities to regulate private activity, and the appropriate role of the court in engaging those issues. A majority ultimately concluded that state constitutional principles placed wage regulation beyond the municipality’s authority.<sup>13</sup> Nonetheless, the breadth of and divisions among the opinions suggest

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<sup>7</sup> Support for the thesis that high levels of welfare services attracts a high level of beneficiaries is found in PETERSON, PRICE, *supra* note 5, at 108–28. For more on the debate, see William C. Wheaton, *Decentralized Welfare: Will There Be Underprovision?*, 48 J. URB. ECON. 536 (2000) (developing model of welfare provision by states when assistance is decentralized and recipients are mobile); F.H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 SUP. CT. ECON. REV. 141 (1997); Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984 (1996).

<sup>8</sup> *New Orleans Campaign for a Living Wage v. City of New Orleans*, 825 So. 2d 1098, 1100–08 (La. 2002).

<sup>9</sup> See Rachel I. Rosen, Note, *The Rise and Potential Fall of Living Wage Laws: Missouri Hotel & Motel Association v. City of St. Louis*, 21 J.L. & COM. 131 (2001).

<sup>10</sup> *New Mexicans for Free Enterprise v. City of Santa Fe*, 126 P.3d 1149, 1156 (N.M. Ct. App. 2005).

<sup>11</sup> *Visiting Homemaker Servs. v. Bd. of Chosen Freeholders*, 883 A.2d 1074, 1080–85 (N.J. Super. Ct. App. Div. 2005). These decisions follow earlier approvals of local minimum wage ordinances. See, e.g., *Mayor of Balt. v. Sitnick*, 255 A.2d 376 (Md. 1969) (approving local minimum wage ordinance); *City of Atlanta v. Associated Builders & Contractors*, 242 S.E.2d 139 (Ga. 1978) (same).

<sup>12</sup> *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137 (9th Cir. 2004).

<sup>13</sup> *New Orleans Campaign for a Living Wage*, 825 So. 2d at 1102–08.

decisions ultimately motivated less by formal doctrine than by contested views about the merits of local efforts to improve the lot of the working poor.

If living wage ordinances stood alone as local redistributive programs they might be explained as an anomaly—perhaps fostered by the same coalitions that sponsor federal minimum wage increases, or enacted as reactions to idiosyncratic local conditions. But these ordinances are only the most recent illustration of widespread local redistributive programs that orthodox theory predicts should be rare. Their pervasiveness, therefore, presents a puzzle.

Certainly there is significant variance in local redistributive spending,<sup>14</sup> with larger cities spending higher percentages of their budgets on such programs.<sup>15</sup> But redistribution is a staple of local government and has been so for a significant period. The most recent Census of Governments reveals that municipalities paid \$9.7 billion in direct expenditures (not reimbursed by federal or state grants) for public welfare in 2001–02 and an additional \$15.7 billion for hospitals and health care.<sup>16</sup> These expenditures represent about 7% of all municipal direct expenditures.<sup>17</sup> Paul Peterson earlier calculated that total local government expenditures for redistributive goods (as he defined them)<sup>18</sup> tripled (in constant dollars) from \$18 billion in 1962 to

<sup>14</sup> See Elaine B. Sharp & Steven Maynard-Moody, *Theories of the Local Welfare Role*, 35 AM. J. POL. SCI. 934, 935 (1991) (documenting significant variance in the redistributive spending from zero to approximately \$150,000 per thousand population (in 1977 dollars)).

<sup>15</sup> Professors Glaeser and Kahn report that cities with a population in excess of 1 million spend 2.5% of their budget on local welfare expenditures, while localities with populations between 2,500 and 10,000 spend 0.7% of their budget on local welfare expenditures. See Edward L. Glaeser & Matthew E. Kahn, *From John Lindsay to Rudy Giuliani: The Decline of the Local Safety Net?*, FED. RES. BANK N.Y. ECON. POL'Y REV., Sept. 1999, at 117, 117. One potential explanation for this phenomenon is that redistribution requires an economically diverse population. Larger cities tend to have more economic diversity than smaller localities.

<sup>16</sup> U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS: FINANCES OF MUNICIPAL AND TOWNSHIP GOVERNMENTS 11 tbl. 6 (2005), available at <http://www.census.gov/prod/2005pubs/gc024x4.pdf>. The explanation of “Public Welfare” expenditures indicates that they include:

any payments for applicable cash benefits in excess of, or supplementary to, those financed with federal or state participation. General relief, which is wholly financed from state and local sources, makes up most other cash assistance. Other public welfare spending includes: vendor payments under various public welfare programs, including the federally supported medical care program commonly known as Medicaid; institutional care for the needy; and administration of welfare activities.

*Id.* at ix. Thus, it appears that these figures are net of Federal and state contributions. See *id.*

<sup>17</sup> See *id.* at 11. Total direct expenditures were calculated at \$358.6 billion. *Id.*

<sup>18</sup> Peterson includes within “redistributive expenditures” all unreimbursed monies spent on “pensions (including social security), medicare, welfare assistance, housing, medicaid, food stamps, supplemental social insurance, special educational programs for the disabled, and other programs directed at dependent groups in the population.” PETERSON, PRICE, *supra* note 5, at 64. Peterson omits spending on education on the theory that the main effects of those expenditures are developmental, a category that includes expenditures that assist economic growth and are separate from redistributive expenditures. He

\$51.3 billion in 1990, with the bulk of the increase accounted for by health and hospitals.<sup>19</sup> These figures do not include indirect local redistribution, such as progressive local income taxes,<sup>20</sup> financial support for programs or tax exemptions that disproportionately benefit the poor, or property tax limits that apply to the poorest of homeowners. Nor do they include broad mandates that favor poor residents, such as local regulations—including living wage and rent control ordinances—imposed either on the municipality itself or on private individuals to make expenditures or accept submarket prices.<sup>21</sup>

The tendency to focus on redistributive programs that assist the relatively poor, moreover, obscures the extent to which local governments redistribute in favor of the relatively wealthy. While Peterson defines redistribution solely in terms of programs that “reallocate societal resources from the ‘haves’ to the ‘have-nots,’”<sup>22</sup> conventional theory should also foreclose municipal subsidies that disproportionately benefit affluent residents—such as local investments in novel technologies,<sup>23</sup> stadiums to attract or retain professional sports teams,<sup>24</sup> and incentives for businesses to relocate.<sup>25</sup> These programs are traditionally defended on the grounds that they return net financial benefits to the sponsoring locality by increasing local economic activity, employment, and tax base. But these benefits, if they

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contains that educational spending has less to do with student learning than other variables. *Id.* at 64–67.

<sup>19</sup> *Id.* at 71.

<sup>20</sup> Few localities impose income taxes, and many of those that do impose taxes at flat rates. Nevertheless, some cities, such as New York City, introduce at least mild progressivity into their income taxes. See New York City Income Tax Information, <http://dab.nfc.usda.gov/pubs/docs/taxformulas/formulas/statecitycounty/taxny-c/taxny-c.html> (last visited Feb. 1, 2007).

<sup>21</sup> See, e.g., ANTHONY DOWNS, *RESIDENTIAL RENT CONTROLS: AN EVALUATION* (1988).

<sup>22</sup> PETERSON, PRICE, *supra* note 5, at 17; see also PETERSON, CITY, *supra* note 5, at 43.

<sup>23</sup> See, e.g., *Minn. Energy and Econ. Dev. Auth. v. Printy*, 351 N.W.2d 319 (Minn. 1984); *State ex rel. McLeod v. Riley*, 278 S.E.2d 612 (S.C. 1981), *overruled by* *WDW Props. v. City of Sumter*, 535 S.E.2d 631 (S.C. 2000).

<sup>24</sup> See, e.g., *Friends of Parks v. Chi. Parks Dist.*, 786 N.E.2d 161 (Ill. 2003); *Cohen v. City of Phila.*, 806 A.2d 905 (Pa. Commw. Ct. 2002); *CLEAN v. State*, 928 P.2d 1054 (Wash. 1996). The presence or absence of local benefits from local subsidies arouses passions among sports fans and economists. See Gerald Carlino & N. Edward Coulson, *Compensating Differentials and the Social Benefits of the NFL*, 56 J. URB. ECON. 25 (2004) [hereinafter Carlino & Coulson, *Compensating Differentials*] (arguing that public expenditures create quality of life benefits that justify new stadium subsidies); Dennis Coates, Brad R. Humphreys & Andrew Zimbalist, *Compensating Differentials and the Social Benefits of the NFL: A Comment*, 60 J. URB. ECON. 124 (2006) (arguing that they do not); Gerald Carlino & N. Edward Coulson, *Compensating Differentials and the Social Benefits of the NFL: Reply*, 60 J. URB. ECON. 132 (2006) (arguing that they do); DEAN V. BAIM, *THE SPORTS STADIUM AS A MUNICIPAL INVESTMENT* (1994); Donald L. Alexander, William Kern & Jon Neill, *Valuing the Consumption Benefits from Professional Sports Franchises*, 48 J. URB. ECON. 321 (2000); Dennis Coates & Brad R. Humphreys, *The Effect of Professional Sports on Earnings and Employment in the Services and Retail Sectors in US Cities*, 33 REGIONAL SCI. & URB. ECON. 175 (2003).

<sup>25</sup> See *DaimlerChrysler Corp. v. Cuno*, 126 S. Ct. 1854 (2006).

exist at all,<sup>26</sup> are not likely to be shared evenly throughout the community. Local businesses that are displaced by subsidies to national chains, for instance, will likely suffer costs in excess of the personal benefits they receive from economic expansion.<sup>27</sup> In these cases as well, orthodox theory predicts that those who pay redistributive taxes in excess of personal benefits will migrate to less redistributive jurisdictions. Thus, the threat of exit by those who do not receive offsetting gains (if any) from economic development should constrain local subsidies to firms that do not generate broad-based local benefits. Nevertheless, rough estimates of state and local government expenditures for economic development fall in the range of \$20 to \$30 billion annually.<sup>28</sup> These data reveal the scope of the puzzle about local redistribution: While Peterson sought to explain why there is so little local spending on redistribution,<sup>29</sup> the conventional story leaves open the question, why is there so much?

One might expect that state officials would employ legal doctrine to codify the orthodox theory, since they are at greater risk to bear the net negative effects of local redistribution. State constitutions or legislatures might explicitly preempt local living wage ordinances for fear that migration away from and towards redistributing localities could constitute a deadweight loss, disrupt labor markets, or otherwise raise production costs.<sup>30</sup> Localities that fear the need to confer costly subsidies to attract firms might be expected to support centralized restrictions in order to staunch mutually destructive competition.<sup>31</sup>

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<sup>26</sup> There is a lively debate about the extent to which business incentives actually produce enough economic activity to offset the subsidies that localities provide to attract the beneficiaries of the programs. In addition to the sources cited in *supra* note 24, see, for example, the essays included in *SPORTS, JOBS, AND TAXES: THE ECONOMIC IMPACT OF SPORTS TEAMS AND STADIUMS* (Roger G. Noll & Andrew Zimbalist eds., 1997) [hereinafter *SPORTS, JOBS, AND TAXES*]; Timothy J. Bartik, *Evaluating the Impacts of Local Economic Development Policies on Local Economic Outcomes: What Has Been Done and What is Doable?*, in OECD, *EVALUATING LOCAL ECONOMIC AND EMPLOYMENT DEVELOPMENT: HOW TO ASSESS WHAT WORKS AMONG PROGRAMMES AND POLICIES* 113 (2004), available at <http://www1.oecd.org/publications/e-book/8404031E.PDF>.

<sup>27</sup> See, e.g., WILLIAM H. SIMON, *THE COMMUNITY ECONOMIC DEVELOPMENT MOVEMENT* 105–09 (2001).

<sup>28</sup> See Bartik, *supra* note 26, at 118.

<sup>29</sup> See *supra* text accompanying notes 18–19. The local expenditures pale in comparison to redistributive expenditures made by the federal government, which Peterson estimates as increasing from \$114.3 billion to \$560.7 billion during the same period. PETERSON, PRICE, *supra* note 5, at 66. These local outlays are similarly surpassed by the redistributive expenditures of state governments, which Peterson estimates increased from \$34.4 billion to \$136.9 billion. *Id.* at 71.

<sup>30</sup> See, e.g., WIS. STAT. ANN. § 104.001 (2006).

<sup>31</sup> For an argument to create legal barriers to the creation of business incentives, see Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996). For an argument that the competition among localities within a small geographic area may be negative-sum, see Jonathan Schwartz, Note, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183 (1997). Elsewhere, I have given some reasons to doubt claims that interjurisdictional competition is

Legal doctrine, however, has had a more checkered relationship with the orthodox economic theory. Late nineteenth century legal constraints on municipal initiatives were anti-redistributive insofar as they foreclosed public expenditures that would benefit discrete groups. Dillon's Rule, which instructs courts to construe municipal authority narrowly,<sup>32</sup> emerged after local subsidies for private promoters of railroads, canals, and other private enterprises ultimately failed to produce sufficient local economic benefits and forced debt repudiation by many municipalities.<sup>33</sup> The result was not only to preclude further extension of municipal largesse to firms, but also to forestall assistance to the relatively poor.<sup>34</sup> Miserly interpretation of municipal autonomy implied that, at the very least, local redistributive efforts had to receive state approval, presumably on the theory that state legislators were more responsible arbiters of municipal fiscal propriety.<sup>35</sup>

State courts subsequently employed other doctrines to limit local redistribution. Some courts invalidated local rent controls or minimum wage ordinances on the grounds that localities lacked authority to create the programs,<sup>36</sup> that the local program conflicted with state statutes, or that the state had preempted the field into which the locality had injected itself.<sup>37</sup> The home rule movement, which sought to empower municipalities to engage in activities without the state's prior approval, might have been thought to permit greater latitude for municipal redistributive efforts. But even redistributive ordinances enacted by home rule municipalities have been invalidated where courts have either discovered conflict with state statutes or construed home rule authority so narrowly as to exclude the pro-

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necessarily negative-sum. See Clayton P. Gillette, *Business Incentives, Interstate Competition, and the Commerce Clause*, 82 MINN. L. REV. 447 (1997).

<sup>32</sup> As formulated by its originator, John Dillon, the Rule permitted localities only to exercise those powers expressly granted by the legislature, those powers "necessarily . . . implied" from express grants, and those powers "essential to the accomplishment of the declared . . . purposes" of localities. JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-51 (5th ed. 1911). Any doubt was to be resolved against the exercise of a power. See *id.*

<sup>33</sup> See ERIC H. MONKKONEN, *THE LOCAL STATE: PUBLIC MONEY AND AMERICAN CITIES* 57-77 (1995).

<sup>34</sup> See *Lowell v. City of Boston*, 111 Mass. 454 (1873) (invalidating bonds proposed to be issued by city of Boston to reconstruct housing destroyed in conflagration).

<sup>35</sup> Subsequent constitutional restrictions on the state, however, revealed that state legislators could not be trusted to restrain local redistribution. Constitutional amendments that prohibited the legislature from enacting "special legislation" in favor of one or a few localities became popular in the latter part of the nineteenth century. The legislative enactments targeted by the prohibition had tended to permit specific localities to dedicate local resources to particular groups that apparently had more political support in the legislature than in city councils. JON C. TEAFORD, *THE UNHERALDED TRIUMPH: CITY GOVERNMENT IN AMERICA 1870-1900*, at 84-94, 105-07 (1984).

<sup>36</sup> See, e.g., *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801 (Fla. 1972) (invalidating rent control ordinance).

<sup>37</sup> See, e.g., *Wholesale Laundry Bd. of Trade, Inc. v. City of New York*, 234 N.Y.S.2d 862 (N.Y. App. Div. 1962) (invalidating local minimum wage ordinance). But see *McMillen v. Browne*, 200 N.E.2d 546 (N.Y. 1964) (upholding local minimum wage ordinance).

posed redistributive program.<sup>38</sup> Courts similarly have used constitutional restrictions on borrowing or expending tax revenues to invalidate municipal expenditures that would finance housing for the poor or for slum eradication.<sup>39</sup>

These restrictions on local autonomy, however, appear to have dissipated. More recent decisions consistently approve subsidies not only to the local poor, but to private enterprises that promise broad-based local benefits, or even to middle-class individuals whose very residence in the city is seen as consistent with the promotion of local welfare.<sup>40</sup> Courts have become more tolerant of local subsidies for economic development, to the point of effectively eviscerating constitutional prohibitions on debt in order to subsidize commercial and industrial enterprises.<sup>41</sup> Recent opinions reveal nearly automatic acceptance of legislative determinations that proposed programs will redound to the public's benefit or do not obligate the locality in the event the project fails.<sup>42</sup> At the federal level, the Supreme Court's recent refusal to interject judicial review into local decisions to use eminent domain for economic development, at least where the locality appears to have proceeded according to a "plan" that indicates a working political process,<sup>43</sup> reveals similar deference to local authority to determine the scope of economic subsidies. Local redistribution, therefore, appears to be gaining momentum at the very time that the increased mobility of those who pay local redistributive taxes would seem to predict its reduction.

In this Article, I assess why the emergence of living wage ordinances and other forms of local redistribution may be appropriate notwithstanding conventional wisdom that rejects them, and analyze the role that legal doctrine plays in evaluating redistributive proposals. I first ask why local redistribution exists at all in the face of the orthodox view that it is antithetical to local interests and inefficient from the broader society's perspective. Several explanations are possible. One set of accounts simply rejects the as-

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<sup>38</sup> See, e.g., *Greater Boston Real Estate Bd. v. City of Boston*, 705 N.E.2d 256 (Mass. 1999).

<sup>39</sup> Some of these opinions indicated antipathy towards redistribution at more centralized levels of government as well, insofar as they blocked assistance by the state as well as local governments. See, e.g., *In re Opinion of the Justices*, 98 N.E. 611 (Mass. 1912) (public funds could not be used to provide homes to wage-earners); *Salisbury Land & Improvement Co. v. Commonwealth*, 102 N.E. 619 (Mass. 1913).

<sup>40</sup> See, e.g., *Mass. Home Mortgage Fin. Agency v. New Eng. Merchs. Nat'l Bank*, 382 N.E.2d 1084 (Mass. 1978); *Mass. Hous. Fin. Agency v. New Eng. Merchs. Nat'l Bank*, 249 N.E.2d 599 (Mass. 1969).

<sup>41</sup> See, e.g., *WDW Props. v. City of Sumter*, 535 S.E.2d 631 (S.C. 2000); ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, *MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE* 114-57 (1992); Richard Briffault, *Forward: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 910-27 (2003).

<sup>42</sup> See, e.g., *In re Okla. Dev. Fin. Auth.*, 89 P.3d 1075, 1081 (Okla. 2004) (stating that a legislative finding of public purpose "should be reversed only upon a clear showing that it was manifestly arbitrary, capricious, or unreasonable").

<sup>43</sup> See *Kelo v. City of New London*, 545 U.S. 469 (2005); Clayton P. Gillette, *Kelo and the Local Political Process*, 34 HOFSTRA L. REV. 13 (2005).

sumption that preferences for redistribution are homogeneous throughout the society. If that assumption were true, redistribution solely at the central level would be sensible, as local variations would be unnecessary to satisfy desires for redistribution. If, on the other hand, preferences for redistribution are heterogeneous, local programs would allow a larger number of individuals to satisfy their preferences for a specific level of redistribution. As I will suggest, there are multiple reasons for a locality to prefer an above-average level of redistribution, even for the poor. These rationales, which rebut arguments that devolution of welfare functions to relatively decentralized governments will create a race to the bottom, suggest that local redistribution deserves support both within the municipality and—at least to the extent that negative external effects are minimal—outside it. Moreover, to the extent that redistribution means that local residents both bear the costs of the program and enjoy the related benefits, support for local subsidies is consistent with even weak endorsements of municipal autonomy.

But the pervasive nature of local redistribution also permits a different interpretation. Local beneficiaries of local redistribution have incentives to be particularly vocal in the political processes by which officials determine local expenditures. Ideally, political processes at the local level, where broad participation is plausible, allow accurate measurement of residents' preferences and, as the orthodox theory implies, the market for residence limits the capacity of any group to exploit mobile nonparticipants. That ideal, however, is subject to traditional caveats about aggregating preferences, measuring and incorporating the intensity of preferences, and interpreting those preferences that are registered in an environment where cycling is possible, where information is imperfect, where choices are limited, and where different groups face different organizational advantages and disadvantages.<sup>44</sup>

These problems complicate any effort to infer majority will from enacted legislation. But explicitly redistributive legislation is particularly problematic in relation to local preferences. Redistribution typically entails the transfer of relatively small amounts from a large number of individuals to a smaller group of beneficiaries, each of whom receives a significant benefit. The result is that the former group is relatively disinterested and the latter highly interested in advocating the transfer. Thus, redistribution raises the specter of legislation that has been enacted either (on the demand side) at the behest of or (on the supply side) to appeal to groups whose narrow interests coincide more with legislators' political desires than with the interests of the legislators' constituents generally.<sup>45</sup> High levels of local re-

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<sup>44</sup> These are the issues that have transformed public choice into a growth industry. See, e.g., KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); DENNIS C. MUELLER, *PUBLIC CHOICE III* (2003); DANIEL FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

<sup>45</sup> See, e.g., Georgette C. Poindexter, *Economic Development and Community Activism*, 32 *URB. LAW.* 401, 405–06 (2000).

distribution, therefore, may reflect the political power of beneficiary groups or their surrogates, rather than true local preferences. Where these motivations generate local redistributive programs in excess of what would be offered by local officials who seek to maximize local welfare, I refer to them as reflecting a “malign” desire for redistribution, a concept on which I elaborate in the next Section.

Of course, in some cases concern about the effects of redistribution may also motivate those who would bear a disproportionate share of the costs of the effort to oppose local interventions. This should occur where those costs are not broadly shared, but are imposed on a select group of residents who can readily express their dissatisfaction. Local businesses that fear displacement by national chains may lobby to discourage subsidies to potential competitors, regardless of whether attracting those businesses would benefit the locality at large. Employers that would bear the brunt of living wage requirements may threaten to exit for more hospitable jurisdictions, even if those ordinances would increase local welfare generally. As a result, local decisions about redistribution may be skewed away from what local residents would actually prefer. Defects in political processes, in short, may mean that what looks like a working market in which localities sort themselves according to redistributive preferences is in reality a skewed system in which localities generate either too little or too much redistribution, either to the wealthy or to the poor.

This mix of possibilities gives rise to my second inquiry: How should courts evaluate legal challenges to local redistributive programs? As the recent decisions on living wage ordinances illustrate, myriad legal doctrines that govern the scope of local autonomy are available to challenge local redistributive efforts. These challenges are not explicitly predicated on claims of capture or other assertions that the beneficiaries of redistribution have skewed local decision-making processes. Nevertheless, the doctrines that courts deploy are consistent with the large body of local government law that can best be understood as a means to neutralize the organizational advantages of groups that could otherwise obtain a disproportionate share of public funds.<sup>46</sup> State constitutional doctrines such as expenditure limitations, debt limitations, prohibitions on unfunded mandates and “special legislation,” and “single subject” requirements—doctrines that have no federal constitutional analogues—arguably authorize judicial constraints on special interests that have the ability to distort local decision making. The structure of state constitutional law, in short, may warrant a different relationship between the judiciary and the legislature than obtains at the federal level.

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<sup>46</sup> See, e.g., Gary Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671 (1973) (arguing that the private law exception to expansive home rule power is consistent with desire to reduce effectiveness of local interest groups); Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991).

Even if state constitutional law provides a doctrinal hook that courts can deploy to review local redistributive proposals, courts are unlikely to have perfect foresight in distinguishing appropriate, or benign cases of redistribution from malign ones. Perhaps the most effective constraints on malign redistribution lie in the orthodox story of interlocal competition rather than in ad hoc inquiries by courts into the motivations of local officials. If so, courts would be well advised to presume that explicitly redistributive programs indicate a widely accepted desire for municipal beneficence. This conclusion, however, rests on some assumptions about a robust market for residence and the concomitant ability of local residents to monitor their local officials. The more we relax those assumptions, the more we might want courts to look askance at programs that fly in the face of the orthodox expectation that publicly interested local governments will not engage in redistribution.

In the next Part, I offer fuller explanations of why, contrary to orthodox, local governments redistribute wealth. In Part II, I explore the extent to which courts use legal doctrines to forestall local redistribution and critique judicial review of those local decisions. I examine possible proxies that courts could use to distinguish benign and malign redistributive efforts and cast doubt on judicial competence to make those distinctions. In Part III, I suggest reasons for judicial caution even where the criteria for malign redistribution appear to be satisfied. These reasons emanate primarily from a concern that even ostensibly malign programs implicate broader social concerns that courts cannot easily evaluate.

## I. WHY DO LOCAL GOVERNMENTS REDISTRIBUTE WEALTH?

### A. Preliminary Matters: Malign and Benign Redistributive Programs

Justifications for local redistribution rest in large part on the likelihood that localities vary in their preferences for redistribution.<sup>47</sup> Similarly, my

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<sup>47</sup> There is obviously a normative element to the conclusion that local preferences should be maximized, since individuals likely do not form their residential preferences after intense, objective consideration and deliberation over alternatives or free of distorting influences. Residential choices may be path-dependent, habitual, or arbitrary. Choices may be further constrained by history, geography, or socioeconomic characteristics of current residents. Some residents will tolerate local characteristics only because they cannot afford their preferred alternatives, suffer from information gaps about available options, or act irrationally in the face of preferences. Where one grows up, what one's peers consider a good place to live, limitations imposed by employment, and socially constructed values about the desirability of urban or suburban life will all affect residential decisions, even without considered reflection. Moreover, attributing preferences to a locality as a whole cannot imply that every resident shares identical preferences or that preferences are perfectly expressed and formed. Residents are likely to disagree over the selection of municipal budgets, ordinances, and governing procedures. Those who prevail may represent those who can best organize rather than those who represent majoritarian preferences or those who feel most strongly about an issue. Localities offer a bundle of services, some of which will be desired by any given resident, some of which will be ignored, and some of which will be disfavored. *See, e.g.,* Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 873–77. The impossibility

distinction between “malign” and “benign” redistributive programs is itself related to the preferences of local residents. I reserve the former term for those policies that local officials pursue, but that cannot credibly be reconciled with their constituents’ interests. Instead, “malign” programs tend to be a consequence of the more personal objectives of local officials, such as securing electoral support from influential groups or increasing chances for post-public service employment. “Benign” programs foster some reasonable conception of constituents’ welfare, even if initially motivated by some personal objective of the enacting officials.

I do not necessarily equate constituents’ preferences with their interests. Officials who believe that economic development will genuinely improve residents’ well-being in ways that justify subsidies for developers, or that redistribution to the poor is a civic obligation notwithstanding its cost, act benignly even if opposed by a majority of constituents. Nor do I equate malign programs with those that inefficiently return economic benefits less than their tax price. The increased tax rates necessary to fund redistributive

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of disaggregating the bundle reduces the likelihood that any part of it accurately reflects constituent preferences. Relatively immobile residents will, by definition, tolerate much more deviation between the local characteristics that they confront and those that they prefer before deciding to vote with their feet.

Nevertheless, it is equally unrealistic to assume that the characteristics that distinguish localities from each other do not reflect the deliberate choices of a critical mass of constituents. Given the wide range of goods and services that a locality could provide, and given the incentive of localities to compete for firms and for residents, the choices a locality does make are likely to reflect to a broad extent the characteristics that numerous residents wish to cultivate. Even localities that initially display characteristics that are purely fortuitous are likely subsequently to attract residents for whom those characteristics are salient and desirable, so that evolutionary processes—if not deliberate ones—will cause localities to develop personalities that stick. See Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211 (1950). It is unlikely that pure coincidence explains why San Francisco is more responsive to the needs of the homeless than other California localities, see Richard Thompson Ford, *Bourgeois Communities: A Review of Gerald Frug’s City Making*, 56 STAN. L. REV. 231, 243–45 (2003) (book review), that Sun City Center finances more services for the elderly than communities that do not actively court retirees, see FRANCES FITZGERALD, *CITIES ON A HILL* 203–16 (1987), or that Boston attracts more colleges and universities than Omaha. I cannot warrant whether these distinctions developed from deliberative decisions. But once these characteristics are entrenched, relatively mobile residents and potential residents emigrate from and immigrate to these localities based on their sympathy with those characteristics. It is this very capacity of local government to permit sorting according to preferences that provides many of the efficiency and community-based benefits that are attributed to local government. See Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (book review).

Even to the extent that local characteristics reveal preferences, for my purposes nothing normative necessarily follows. The willingness of localities to signal preferences is also the basis of many of the most unattractive elements of local government, such as exclusionary zoning and ethnic segregation. When sorting falls along lines that offend important social values, law can intervene to preclude discrimination along the offensive metric. Nor does preference satisfaction necessarily entail treating cities “simply as objects of consumption.” See GERALD FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 169 (1999). Individuals may have residential preferences for amenities that are not easily classified as consumable, such as neighbors who are socioeconomically diverse, close-knit identity groups, or open-air spaces.

programs may in fact reduce local property values and therefore have negative revenue effects.<sup>48</sup> If local residents knowingly tax themselves beyond the efficient level to fund redistributive services, however, it is difficult to contend that they have acted in a way that requires some legal corrective.

Finally, malign conduct is not coterminous with rent-seeking activity. The very nature of public goods suggests that the average beneficiary will have little interest in producing them, because he or she can free ride on the efforts of others. Thus, we typically believe that political systems that rely on the expression of popular will systematically underproduce public goods. Only a subgroup that will attain a disproportionate benefit from production of the public good has the incentive to generate it for all. We do not tend to think, for instance, that the quintessential public good of national defense is undersupplied, in part because defense contractors obtain disproportionately high benefits from producing supraoptimal amounts of the good. But we might prefer overproduction to the underproduction of national defense that might materialize if no one received sufficiently high benefits to lobby for its production. Thus, we might think of the excessive benefit that the activist subgroup attains as payment for its willingness to act as something like a private attorney general in creating the public good. Conduct that fits that description falls as readily within the category of benign as of malign conduct.

### B. Motives for Local Redistribution

#### 1. Benign, but Limited, Explanations for Local Redistribution.—

Although redistributive programs may assist either the relatively wealthy or the relatively poor, the orthodox critique of local redistribution tends to focus on the latter.<sup>49</sup> Local redistribution to the wealthy receives a more mixed response, at least when it takes the form of business subsidies or tax expenditures, as opposed to openly regressive forms of taxation or the disproportionate delivery of municipal services to the wealthy. These subsidies are typically justified as inducements for local economic development that will redound to the benefit of all residents.<sup>50</sup> In short, taxes and tax expenditures that initially appear to be redistributive promise to morph into benefit taxes that assist the taxing locality in interjurisdictional compe-

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<sup>48</sup> See Andrew Haughwout, Robert Inman, Steven Craig & Thomas Luce, *Local Revenue Hills: Evidence from Four U.S. Cities*, 86 REV. ECON. & STAT. 570 (2004).

<sup>49</sup> See sources cited *supra* note 5–7.

<sup>50</sup> See PETER DREIER, JOHN MOLLENKOPF & TODD SWANSTROM, PLACE MATTERS: METROPOLITICS FOR THE TWENTY-FIRST CENTURY 135 (2001); PETERSON, CITY, *supra* note 5, at 41–43. This is the standard assumption of courts that uphold municipal financing for industrial development. See, e.g., CLEAN v. State, 928 P.2d 1054 (Wash. 1996); Friends of Parks v. Chi. Parks Dist., 786 N.E.2d 161 (Ill. 2003).

tition for residents and firms.<sup>51</sup> Numerous studies either contest these claims,<sup>52</sup> or contend that benefits garnered by the attracting locality will be more than offset by losses to other localities from which firms emigrate.<sup>53</sup> But the evidence about the net effects of subsidies is at least sufficiently ambiguous to provide political cover for local officials who pursue these projects.<sup>54</sup>

a. *Fiscal federalism and the prevailing orthodoxy against local redistribution.*—Standard theories of fiscal federalism are less receptive to local redistribution for the poor, such as living wage ordinances. Again, the underlying theory is that local residents and firms can too easily escape redistributive burdens by emigrating to localities that impose only benefit taxes. Emigrants are likely to be the relatively wealthy, who bear a disproportionate share of the redistributive burden and thus have incentives to find alternative residence. As they exit, the redistributive burden falls increasingly on those who remain, heightening incentives for them to emigrate as well. Simultaneously, the promise of redistribution attracts more beneficiaries from outside the locality, creating greater demand for the benefits of redistribution.<sup>55</sup> Indeed, relatively wealthy emigrants who exit for geographically proximate jurisdictions that promise fewer redistributive

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<sup>51</sup> See Timothy J. Goodspeed, *Tax Competition, Benefit Taxes, and Fiscal Federalism*, 51 NAT'L TAX J. 579 (1998).

<sup>52</sup> See, e.g., Coates & Humphreys, *supra* note 24.

<sup>53</sup> See, e.g., Enrich, *supra* note 31, at 380, 397–401.

<sup>54</sup> See, e.g., THE ECONOMICS AND POLITICS OF SPORTS FACILITIES (Wilbur C. Rich ed., 2000); SPORTS, JOBS, AND TAXES, *supra* note 26; Harrison S. Campbell, Jr., *Professional Sports and Urban Development: A Brief Review of Issues and Studies*, 29 REV. REGIONAL STUD. 272 (1999). In the case of stadium construction, some of the evidence suggests that sports franchises generate consumption benefits that augment any financial benefit or offset any financial loss to the financing locality. See, e.g., Alexander, Kern & Neill, *supra* note 24; Carlino & Coulson, *Compensating Differentials*, *supra* note 24. For an argument that localities are likely to use business incentives, i.e., local redistribution to the non-poor, only when expected benefits exceed costs (which is not to say that local officials cannot be overly optimistic in their predictions of benefits), see Gillette, *supra* note 31. Numerous states have offered substantial subsidies in order to attract automobile manufacturers. To date, these programs appear to have had mixed success in terms of generating financial benefits that offset the amount of the subsidy. See *Buying Jobs Can be Expensive*, THE ECONOMIST, Nov. 29, 2003, at 29, 30. The Alabama Supreme Court declared that part of a bill providing subsidies to attract a Mercedes-Benz plant to that state would violate the state constitution. See Opinion of the Justices, 665 So. 2d 1357 (Ala. 1995) (advisory opinion).

<sup>55</sup> For reviews of literature testing the effects of differential welfare benefits, see Jan K. Brueckner, *Welfare Reform and the Race to the Bottom: Theory and Evidence*, 66 S. ECON. J. 505, 514–18 (2000); Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. ECON. LIT. 1, 31–36 (1992). Brueckner finds mixed evidence that welfare recipients migrate for higher benefits, but does not speculate about emigration of the rich from those jurisdictions. For an interesting historical study that suggests that the poor did not migrate from one locality to another nearby one that offered more generous welfare benefits, see Kyle D. Kauffman & L. Lynne Kiesling, *Was There a Nineteenth Century Welfare Magnet in the United States? Preliminary Results from New York City and Brooklyn*, 37 Q. REV. ECON. & FIN. 439 (1997).

taxes, but who continue to work and shop in the redistributing locality may also distort the provision of other public goods. Those who reside in benefit-based jurisdictions will likely demand more roads and other services that facilitate access to employment, culture, or economic activity in the locality from which they moved. Ultimately, employees' dissatisfaction with increased commuting times and increased business taxes may cause some employers to emigrate as well, further reducing the tax base of the redistributing locality.

Redistributive efforts for the poor, therefore, initially seem to offer little attraction for localities. If municipalities engage in redistribution, one might speculate, it must be a consequence of state mandates rather than local volition. It is plausible, for instance, that a state could delegate responsibility for redistribution to political subdivisions, either out of recognition that some redistribution is implemented more efficiently at the local level or as a means of shifting responsibility for inevitable tax increases away from state lawmakers.<sup>56</sup>

Some states do, in fact, require localities to provide services to the poor or fail fully to reimburse local expenditures for welfare services.<sup>57</sup> For instance, Connecticut requires the town of an indigent person's residence to provide support.<sup>58</sup> New York state law requires local governments to pay 9–25% of Medicaid costs for their residents.<sup>59</sup> California requires each county to “relieve and support all incompetent, poor, indigent persons . . . lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.”<sup>60</sup> But mandated programs do not explain the bulk of local redistribution to the poor and certainly do not account for highly localized redistributive initiatives, such as living wage ordinances.

*b. Local redistribution as local preference satisfaction.—*

Instead, contrary to both intuition and the orthodox theory of fiscal federalism, the impetus for these programs arises at the local level. On reflection, this phenomenon can be explained in a manner consistent with the principle that decentralized government maximizes preference satisfaction by permitting like-minded individuals to congregate in jurisdictions that offer a bundle of goods and services that a more centralized jurisdiction might

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<sup>56</sup> See Edward A. Zelinsky, *Unfunded Mandates, Hidden Taxation, and the Tenth Amendment: On Public Choice, Public Interest, and Public Services*, 46 VAND. L. REV. 1355 (1993).

<sup>57</sup> See Kirk J. Stark, *City Welfare: Views from Theory, History, and Practice*, 27 URB. LAW. 495, 517–20 (1995).

<sup>58</sup> See CONN. GEN. STAT. § 17b-116 (repealed 2004).

<sup>59</sup> See CITIZENS BUDGET COMMISSION, CONFRONTING THE TRADEOFFS IN MEDICAID COST CONTAINMENT II (2004).

<sup>60</sup> CAL. WELF. & INST. CODE § 17000 (West 2004).

reject.<sup>61</sup> That principle may have particular force where, as in the case of redistribution, the central government provides a baseline level of the good, but some individuals desire to fund services in excess of that baseline.<sup>62</sup> As long as satisfying the high-demand group's preferences does not significantly reduce the baseline level of services for others, the ability of the former to obtain a higher level of services seems unobjectionable. If a society comprises groups with different preferences for a particular public good, all suffer a welfare loss if they are aggregated in a single jurisdiction that offers a level of the good that corresponds to the preferences of the median voter. High-demand residents will receive less of the good than they would be willing to pay for and low-demanders will end up paying for more of the good than they desire. It would be desirable (at least from the perspective of preference satisfaction) to allow the groups to separate into different jurisdictions, each of which offers the level preferred by its residents. This is the same motivation that underlies efforts by neighborhoods, residential associations, business improvement districts, and users of private protective services or private schools to exceed the governmentally provided baseline of services.<sup>63</sup> Thus, if residents of one locality desire to have and to pay for a higher level of redistributive services than other localities, there seems little basis for objection.

Most benign explanations for local redistribution to the poor apply this basic conception of heterogeneous preferences to allow individuals to sort themselves into decentralized jurisdictions by preferences for redistribution, just as individuals sort themselves for the delivery of other local public goods. The possibility that some residents would want to provide redistribution to the poor above a state or federal baseline proceeds from Mark Pauly's observation some thirty years ago that there may be a spatial dimension to redistribution.<sup>64</sup> This theory rests on two assumptions. First, it assumes that one individual can obtain utility from the welfare of another.<sup>65</sup> Thus, the spatial theory rejects the orthodox story insofar as it treats local redistributive payments as purely a cost item, which local residents would

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<sup>61</sup> See McConnell, *supra* note 47, at 1493–94; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); DREIER ET AL., *supra* note 50, at 97–98.

<sup>62</sup> See Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996).

<sup>63</sup> See, e.g., Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998). The caveat in the text is important. There are cases in which those who can benefit from an increased level of provision will simultaneously attempt to reduce public levels of expenditure from which they don't benefit. But in many of these cases, even those who wish to supplement the baseline level of provision will want that baseline to be high in order to minimize the cost of supplementation. See Gillette, *supra* note 62, at 1209–10.

<sup>64</sup> See Mark V. Pauly, *Income Redistribution As a Local Public Good*, 2 J. PUB. ECON. 35, 38 (1972).

<sup>65</sup> *Id.* at 57. On the ability of one person to obtain positive utility from satisfaction of the wants of another, see AMARTYA SEN, *RATIONALITY AND FREEDOM* (2002).

prefer someone else to incur. Spatial theory instead assumes that at least some potential subsidizers enjoy benefits from subsidizing redistributive services for others. Second, the theory assumes that the utility *A* obtains from an increase in *B*'s welfare increases as the geographical distance between *A* and *B* decreases. One is assumed to care more about the well-being of neighbors, even unknown neighbors, than about the welfare of distant strangers. To the extent that is true, some local role will be necessary to achieve a socially optimal level of redistribution.

One can readily imagine why residents could vary in their preference for redistribution in the same way that they vary in their preference for schools, municipal parks, proximity to the workplace, or well-paved roads. Residents of a locality may value care for or a sense of well-being among all community members as much as they value efficient delivery of goods and services that localities traditionally provide. The idea that such communities exist is by no means fanciful. While some localities may signal antipathy towards local redistribution to the poor by practices such as large-lot zoning or subsidizing activities primarily engaged in by the wealthy, others court images as localities that favor redistributive policies, notwithstanding that they contain a significant population with the means to live elsewhere.<sup>66</sup> Studies of decentralized redistribution reveal significant local differences in preferences for redistributive expenditures. Paul Peterson, for instance, found that redistributive expenditures among the states over a 25-year period reflected a relatively constant coefficient of variation of .28 to .37 (with an outlier during a period of uneven state implementation of federal aid programs).<sup>67</sup> These figures indicate that about one-third of the states expended about one-third more or less on redistributive services than did the average state. One might imagine that variance increases even more among local governments.

It is important to note that this explanation for local redistribution does not rely on altruism alone. Individuals who simply want to behave altruistically could satisfy their desires by paying redistributive taxes at the state or federal level. Doing so would not risk the negative consequences that orthodox theory attributes to local redistribution. Rather, spatial theories explain and justify local redistribution on the grounds that it generates benefits that centralized governments could not achieve.

*(1) Altruistic and mixed motives for local redistribution.—*

Once we recognize that redistribution need not be a pure cost item in the minds of local residents, and that they may in fact reflect residents' self-interest, those localized benefits are easy to imagine. For in-

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<sup>66</sup> See, for example, the services provided by the Cambridge, Massachusetts Department of Human Services, <http://www.cambridgema.gov/DHSP2/>. The Berkeley, California Municipal Code contains not only a living wage ordinance, but also a rent stabilization ordinance. BERKELEY MUN. CODE ch. 13.27.010–.100, 13.76.010–.190 (1977).

<sup>67</sup> PETERSON, PRICE, *supra* note 5, at 88–89.

stance, subsidizers may enjoy personal psychic benefit from living in the geographic area where their contributions are applied. They may value their ability to observe increases in the quality of beneficiaries' lives that they can attribute to their payments. A payer of redistributive taxes may get more benefit out of seeing a municipally funded women's shelter than out of knowing that a nationally funded one was erected in another jurisdiction. Alternatively, the mix of personal and altruistic motives may lead to local redistribution because it permits subsidizers to publicize their selflessness. Just as philanthropists signal their status by placing their names on buildings, professorships, or law school classrooms, altruists can signal their characteristics to others by living in a locality known for redistributive programs. Residents of redistributive cities may not only have civic pride in their communal culture, but also want to advertise their participation in such a culture. Simply paying national taxes would presumably not send as strong of a signal of one's charitable tendencies.

An alternative explanation that also mixes altruism and self-interest involves an affirmative desire to build a sense of community among those who happen to live in the same area. Individuals may prefer to assist those who live nearby because they feel a sense of camaraderie with their neighbors, notwithstanding differences in socioeconomic status. Local subsidizers, on this account, may fully appreciate that local redistribution will impose excess costs in the delivery of public goods; will cause exit by some who would prefer not to subsidize those less well off; will make labor markets more inefficient by inducing firms to move from productive locations; and that all of these costs are worth incurring in order to construct a community that subordinates principles of efficiency to an ethos of connectedness to its worst-off members. Indeed, for some, that is what it would mean to have a community.<sup>68</sup>

These explanations for local redistribution, however, face significant limitations. The "community building" explanation makes most sense when members have longstanding ties to the community. Mobility of both those who pay for and those who receive subsidies—combined with legal constraints on the denial of benefits to newcomers—means that those who wish to subsidize the local poor will not be able to exclude new entrants in order to reward longstanding community members.<sup>69</sup> Moreover, the sympathy for the local poor felt by some may be offset by countervailing tendencies on the part of others to create sanitized visions of the distant poor, often at the expense of those who live nearby.<sup>70</sup> Daily interactions with the visible poor, especially in the form of aggressive panhandling or discomfiting sights of the homeless, may produce negative feeling towards the local poor

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<sup>68</sup> MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT* 131–32 (1996).

<sup>69</sup> See *Saenz v. Roe*, 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>70</sup> See Helen F. Ladd & Fred C. Doolittle, *Which Level of Government Should Assist the Poor?*, 35 NAT'L TAX. J. 323, 331 (1982).

generally. While this attitude overtly takes the form of calls for more regulation of public spaces,<sup>71</sup> the same sentiment is likely to weaken sympathy for redistribution to those viewed as presenting a public nuisance,<sup>72</sup> and in favor of the distant poor. The latter may be viewed as relatively deserving, existing only in sentimental images in media coverage and organized solicitations for assistance. Given that repeated interactions with the local poor may generate either sympathy or animosity, there is little reason to conclude that one reaction dominates the other. But the fact that different people will have different reactions to the local and distant poor does reinforce the view that local redistribution may allow for sorting among redistributive preferences.

(2) *Redistribution to ensure socioeconomic diversity.*—

Alternatively, local residents may enjoy benefits from local redistribution that have less to do with improving the welfare of beneficiaries than with self-interest. High-income individuals may prefer living in demographically or socioeconomically diverse jurisdictions, either because they enjoy the benefits of relatively high socioeconomic status<sup>73</sup> or because they receive cultural benefits from living in a heterogeneous locality. There is some countervailing evidence that racial differences constrain these effects; at least that is one interpretation of findings that income redistribution decreases in racially heterogeneous areas.<sup>74</sup>

Nevertheless, once high-income individuals decide to reside in a socioeconomically diverse locality, they may have self-interested reasons to support local redistribution. Some reasons simply involve the avoidance of disamenities that are often associated with the poor and of which the relatively wealthy might complain. Local subsidies, for instance, may reduce the number of visible homeless people sleeping on sidewalks in one's neighborhood. These perceived disamenities may have powerful effects even for those who support redistribution. The recent shift in San Francisco to a system of assistance that provides the homeless with shelter rather than money may be illustrative.<sup>75</sup> Support for the change may have been attributable to a desire to remove the homeless from public sight as much as to

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<sup>71</sup> See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996).

<sup>72</sup> See, e.g., *Fifth Ave. Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002) (city prohibited from removing homeless persons from church property notwithstanding apparent complaints from church neighbors).

<sup>73</sup> For the proposition that relative position is an important motivator of consumption, see ROBERT H. FRANK, *LUXURY FEVER* 107–21 (1999).

<sup>74</sup> See Erzo F.P. Luttmer, *Group Loyalty and the Taste for Redistribution*, 109 J. POL. ECON. 500 (2001).

<sup>75</sup> The shift to the “Care Not Cash” program was mandated by the adoption of Proposition N by the San Francisco electorate in November 2002. For a description of the program, see *The Care Not Cash Initiative*, S.F. ADMIN. CODE § 20 (as amended).

provide assistance.<sup>76</sup> Nevertheless, this motivation might only support highly targeted forms of redistribution, such as those directed at reducing violence or removing panhandlers or the homeless from streets, rather than broad redistributive programs that would increase services for the relatively poor throughout the community.

Obviously, one significant disamenity is crime or violence in the community. Accordingly, one may explain local redistribution as a form of “bribe” to the local poor to maintain a level of social peace. Local residents who fear social disorder may be more willing to support local redistribution in the belief that their own personal welfare and property are more at risk from the geographically proximate poor. If the perceived necessary bribe is above the level of social welfare that centrally funded redistribution can achieve, local residents may prefer to make an additional contribution. This motivation is consistent with the “social disturbance” thesis for local redistribution, which was promulgated by Frances Fox Piven and Richard Cloward.<sup>77</sup> They contend that fear of social disruption was the best explanation for the increase in social welfare spending that followed urban riots in the 1960s. Attempts to verify the thesis that redistribution is motivated by fear of social disorder have generated mixed results. The most recent studies, which attempt to correct some methodological shortcomings of earlier analyses, support the proposition that social disturbance has at least some explanatory effect for redistribution, though other characteristics, such as racial composition of the jurisdiction, also have significant effects.<sup>78</sup>

While these motivations seem plausible, they should skew the types of activities funded by localized redistribution. The desire for social order has less explanatory force for municipal senior centers than for after-school programs, for example, because the elderly poor pose less of a threat to property owners than do roaming youths. The desire for social order offers

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<sup>76</sup> Of course, some support may also have been attributable to a desire to remove the homeless—or have them remove themselves—from San Francisco if they could no longer receive cash. See Ford, *supra* note 47, at 243–44. That certainly has been one effect of the program. The San Francisco Department of Human Services reported in July 2005 that its County Adult Assistance Program caseload declined 78% in the first 15 months of the Care Not Cash program. See Care Not Cash Monthly Update (July 2005), <http://www.sfgov.org/site/uploadedfiles/dhs/CareNotCashMonthlyUpdateJuly05.pdf>. But even that effect suggests the willingness of the relatively wealthy to support programs that decrease what they perceive as disamenities.

<sup>77</sup> FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 183–338 (1971).

<sup>78</sup> See Richard C. Fording, *The Conditional Effect of Violence as a Political Tactic: Mass Insurgency, Welfare Generosity, and Electoral Context in the American States*, 41 AM. J. POL. SCI. 1 (1997); Sharp & Maynard-Moody, *supra* note 14; Joe Soss, Sanford F. Schram, Thomas P. Vartanian & Erin O’Brien, *Setting the Terms of Relief: Explaining State Policy Choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378 (2001). For my purposes, these motivations remain “benign” notwithstanding that they emerge from selfishness rather than altruism. Recall that I classify explanations for redistribution as benign as long as they are consistent with the interests of residents, regardless of what motivates the formation of those interests.

mixed support for living wage campaigns, since employees may improve their financial standing, but there is some risk that higher minimum wages will increase the ranks of the unemployed.<sup>79</sup> Moreover, the “bribe” story seems incomplete because the relatively wealthy who fear crime could receive more direct benefits by investing in private protection, supporting additional public expenditures for police, or exercising their exit option. Investment in private protection would afford protection against multiple threats, not simply from crime by poorer residents, and the prevalence of economically segregated neighborhoods would facilitate collective action (e.g., walled neighborhoods, private security patrols) that would reduce the costs to individuals.

(3) *Redistribution as localized investment.*—There is, however, a stronger claim that one can make about the willingness of local residents to support redistributive programs for the relatively poor—namely, that these programs look more like investments than mere cost items and thus can be justified in the same terms that support local redistribution on behalf of the relatively wealthy. Redistributive programs may have either or both of two related effects in this regard. First, local economic growth may itself be correlated with socioeconomic diversity. If attracting a diverse population would provide an advantage in interjurisdictional competition for residents and firms, then localities should be willing to make redistributive expenditures necessary to attract a socioeconomically diverse population.

The argument that socioeconomic diversity increases municipal economic welfare flows from speculation that the value of human capital increases with the diversity of the population; thus, a locality that attracts a socioeconomically heterogeneous population is likely to be more productive than one that is homogeneous. In a summary of theoretical and empirical studies on this issue, John Quigley attributes the relationship between diversity and local economic growth to five effects generated by socioeconomic heterogeneity.<sup>80</sup> First, different groups have different knowledge, and knowledge spillovers may permit greater growth by increasing the variety of options that firms can deploy to increase productivity.<sup>81</sup> This is an application of the observation made in various contexts that exchange among cultures generates change and evolutionary growth. On a more global scale, for instance, intercultural exchange is seen as the predicate for

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<sup>79</sup> Of course, the evidence here is mixed. Compare Adams & Neumark, *supra* note 3, with Michael Reich, Peter Hall & Ken Jacobs, *Living Wage Policies at the San Francisco Airport: Impacts on Workers and Businesses*, 44 *INDUS. REL.* 106, 128–32 (2005) (finding no evidence of employment decline after implementation of living wage policies at San Francisco Airport).

<sup>80</sup> John M. Quigley, *Urban Diversity and Economic Growth*, *J. ECON. PERSP.*, Spring 1998, at 127, 130–32.

<sup>81</sup> See MASAHISA FUJITA & JACQUES-FRANCOIS THISSE, *ECONOMICS OF AGGLOMERATION: CITIES, INDUSTRIAL LOCATION, AND REGIONAL GROWTH* 172–73 (2002).

human development generally. Philip Curtin's work on intercultural exchange begins with the claim:

Trade and exchange across cultural lines have played a crucial role in human history, being perhaps the most important external stimuli to change, leaving aside the unmeasurable and less-benign influence of military conquest. External stimulation, in turn, has been the most important single source of change and development in art, science, and technology.<sup>82</sup>

The mechanism by which this development occurs can be directly related to socioeconomic diversity. Prospective entrepreneurs and employees from different backgrounds presumably have different bases of knowledge, and the interaction among them increases the store of knowledge available to the firm as a whole.<sup>83</sup>

Second, local economies thrive on the capacity to realize economies of scale by supporting amenities that are susceptible to multiple uses. Think, for instance, of activities as varied as sports stadiums or transportation systems. These activities can only be efficiently utilized in an area of significant population, the members of which differ in their use of the amenity and thus make it financially plausible.<sup>84</sup>

Third, heterogeneity increases productivity by permitting more varied outputs for similar inputs. As the different uses for the same inputs expand, unit costs of obtaining them within the local area decrease. Quigley's examples make the point: The same food can be used by different ethnic groups to create different cuisines; identical cloths can be used for different forms of dress; the same facility can be used to accommodate different cultural activities.<sup>85</sup>

Next Quigley suggests that diverse localities may be more productive because the large labor pool they can theoretically attract reduces the costs of matching labor and skills. The possibility that cities will enjoy increased economic growth from redistributive practices is evident from the support for redistributive programs by some of the firms that bear these programs' costs. Presumably, these firms predict that redistribution will increase their own productivity, especially if those firms require only low-skilled labor and demand a steady labor source.<sup>86</sup> The marginal tax payments that they make for redistributive services to others are simply worth the benefits they

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<sup>82</sup> PHILIP D. CURTIN, *CROSS-CULTURAL TRADE IN WORLD HISTORY* 1 (1984).

<sup>83</sup> ANNA LEE SAXENIAN, *REGIONAL ADVANTAGE* 37-49 (1994).

<sup>84</sup> Quigley, *supra* note 80, at 131.

<sup>85</sup> *Id.* at 131-32.

<sup>86</sup> See, e.g., Michael Cooper, *Business Group Backs Raise in New York Minimum Wage*, N.Y. TIMES, July 15, 2004, at B2, (reporting that a business group in New York City seeks an increase in the state minimum wage in order to maintain City's competitive position by attracting high quality workforce).

receive in the form of a workforce that is larger, healthier, and better-educated as a consequence of receiving redistributed goods and services.<sup>87</sup>

Finally, diverse localities may be better able to achieve stability notwithstanding fluctuations in the economy because some firms and consumers may be thriving when others are not.<sup>88</sup> Reductions in variability are likely to be correlated with the diversity of economic activity, which itself depends on diversity of the population.

These productive effects are possible, however, only where the locality is able to attract residents who promote diversified use of public resources or who provide the labor and consumption that allows realization of the benefits of diversity. Thus, a locality may attempt to attract low-wage individuals who at first will need assistance in assimilating into the local environment. The desirability of a low-income population explains why cities that face declining populations, including New York, Boston, Pittsburgh, Philadelphia, and Louisville, have initiated programs to attract immigrants who can reduce labor shortages and forestall the degradation of housing.<sup>89</sup>

Support for these programs can be found in studies that conclude that cities with heavy concentrations of immigrants economically outperformed cities with few immigrants over a recent 15-year period.<sup>90</sup> Preliminary evaluation of the 2000 Census indicates that cities that attracted immigrants grew faster than cities that did not.<sup>91</sup> As a group, medium-sized cities (the second hundred largest cities) grew faster in the 1990s than the largest cities. This growth, however, was largely dependent on attracting Asian and Hispanic residents. The Asian population in medium-sized cities grew 58%, while the Hispanic population grew 67%.<sup>92</sup> At the same time, more than two-thirds of these cities witnessed a decrease in their non-Hispanic white population.<sup>93</sup>

While it is conceivable that much of the Asian and Hispanic influx arrived from other cities, rather than through immigration, and thus might have achieved a level of success that avoided the need for redistributive services in their new jurisdictions, the large transition suggests that new

<sup>87</sup> See PETERSON, CITY, *supra* note 5, at 43.

<sup>88</sup> Quigley, *supra* note 80, at 132.

<sup>89</sup> See Eric Schmitt, *To Fill Gaps, Cities Seek Wave of Immigrants*, N.Y. TIMES, May 30, 2001, at A1.

<sup>90</sup> See, e.g., Stephen Moore, *Immigration and the Rise and Decline of American Cities* (1997), available at <http://www.hoover.org/publications/epp/epp81.html> (finding that high-immigrant cities had double the job creation rate, higher per capita incomes, lower poverty rates and less crime than low-immigrant cities, although they also have high unemployment rates).

<sup>91</sup> See Edward L. Glaeser & Jesse M. Shapiro, *City Growth and the 2000 Census: Which Places Grew, and Why*, BROOKINGS INST. CTR. ON URB. AND METRO. POL. SURVEY SERIES, May 2001, at 12.

<sup>92</sup> Jennifer S. Vey & Benjamin Forman, *Demographic Change in Medium-Sized Cities: Evidence from the 2000 Census*, BROOKINGS INST. CTR. ON URB. AND METRO. POL. SURVEY SERIES, July 2002, at 6.

<sup>93</sup> *Id.*

immigration was also a factor.<sup>94</sup> Indeed, recent analyses of the 2000 Census reveal that the foreign-born population of the United States grew by 57.4% in the 1990s, and that immigrants reside in a broader range of gateway municipalities than had previously been the case, with new gateway cities experiencing the most rapid growth of foreign- and native-born populations.<sup>95</sup> Moreover, it appears that these immigrants require some redistributive assistance. Many of the recent arrivals, especially those in new gateways, are poorer than the average local resident and have low English proficiency.<sup>96</sup>

These findings are not definitive. Glaeser and Shapiro determined that immigrant rates and growth rates were not perfectly correlated; cities with moderate immigrant growth grew faster than cities with high immigrant growth. Additionally, one possible explanation for the relationship is that the Census Bureau has simply improved its counting of immigrants. Finally, it may be that growing cities attract immigrants rather than that immigration fuels growth.<sup>97</sup> Nevertheless, the fact that cities deliberately undertake to attract immigrants suggests both that local officials conclude that the causal chain runs in the opposite direction and that they are willing to invest in redistributive programs as a means to local economic development.

An alternative, but related explanation for local redistribution is that the median voter seeks to shift the local budget to support benefits that she will enjoy, so median voters will seek redistribution from wealthier voters.<sup>98</sup> The median voter story, however, is not very persuasive, at least if it is separated from the story about the indirect benefits that subsidizers of redistributive programs receive. First, the median voter story does not explain redistribution to the relatively poor. Second, voting rates tend to rise with income, so that median voters are likely to represent the preferences of the higher end of the socioeconomic scale.<sup>99</sup> That should exacerbate the locality's unwillingness to subsidize the relatively poor, contrary to the expenditures that are made. Third, to the extent that median voters recognize that those who pay redistributive taxes have incentives to exit, they will realize that local redistribution may push them above the median, so that in the future, they will be net contributors to redistributive programs. This realiza-

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<sup>94</sup> Some confirmation of this can be found in Roberto Suro & Audrey Singer, *Latino Growth in Metropolitan America: Changing Patterns, New Locations*, BROOKINGS INST. CTR. ON URB. AND METRO. POL. SURVEY SERIES, July 2002, at 7 ("Many Hispanics, by choosing the suburbs, are following the familiar path from city neighborhoods to the urban periphery. In addition, some suburban areas are serving as ports of entry for newly arriving immigrants.").

<sup>95</sup> Audrey Singer, *The Rise of New Immigrant Gateways*, BROOKINGS INST. LIVING CITIES CENSUS SERIES, Feb. 2004, at 1.

<sup>96</sup> *Id.* at 12–15.

<sup>97</sup> Glaeser & Shapiro, *supra* note 91, at 12–13.

<sup>98</sup> See, e.g., ROBERT COOTER, *THE STRATEGIC CONSTITUTION* 36 (2000).

<sup>99</sup> Phillip Nelson, *Redistribution and the Income of the Median Voter*, 98 PUB. CHOICE 187, 188 (1999).

tion should at least temper median voters' support for redistributive programs.

Finally, redistributive programs may be efficient for a locality that receives some reimbursement of the programs' costs. Return, for instance, to New York State's requirement that local governments pay 25% of Medicaid costs for acute care services and 10% of the cost of long-term care services for Medicaid beneficiaries. In the 2002–03 fiscal year, New York City spent approximately \$4 billion of nonreimbursed funds on these obligations, which amounted to 13% of the City's local tax revenues.<sup>100</sup> These costs are not voluntarily incurred by the City, and thus may be viewed as inefficient unfunded mandates. Nevertheless, the program may actually return localized benefits that justify the local contribution. The 25% limitation means that we could recharacterize the "obligation" as a program in which New York City obtains matching funds from the state or federal government on a 3-to-1 basis for its expenditures on Medicaid. Assuming that the recipient localities benefit from the economic activity generated by the matching funds, the required local expenditure may ultimately create net benefits for the localities that make them.

2. *Agglomeration Effects As a Constraint on Exit.*—The previous section offers various benign explanations for the widespread presence of local redistribution. Some of these rationales suggest that we will get more, and more highly tailored redistribution at the local level than at more central levels because potential subsidizers will be more willing to pay redistributive taxes when they internalize the benefits of the resulting expenditures.<sup>101</sup> Thus, the puzzle of local redistribution is not a puzzle at all—it is a rational response to local needs that could not be satisfied as readily by more central levels of government.

Unfortunately, this optimistic story threatens to collapse once we reintroduce the premises of the more conventional theory of local redistribution.

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<sup>100</sup> See Citizens Budget Commission, *Fixing New York State's Fiscal Practices 6* (2003), available at <http://www.cbcny.org/fixingnys.pdf>. New York City residents pay local taxes approximately 72% higher than the national average, and the City's generous Medicaid payments account for approximately one-quarter of that difference. It is perhaps difficult to explain this significant deviation from the average as an indication of local preference.

<sup>101</sup> In theory, it would be possible to address some of these local redistributive needs by collecting redistributive taxes at the central level, but allocating them in accordance with formulas that consider local needs. The combination of central funding and decentralized implementation would simultaneously discourage exit from the redistributive burden and permit response to idiosyncratic local needs. These effects, however, must be balanced against the costs of centrally identifying and satisfying local needs. One would anticipate that the process of collecting data and evaluating competing applications for funding could be so burdensome and error-prone (in part because the process would be susceptible to politicization, especially if the central and decentralized governments were dominated by different political parties) as to offset losses that arise as a result of local emigration to escape the redistributive burden. The central pool would take on many of the features of a commons, since localities would have made payments and would have incentives to overutilize the pool, indifferent to the effects of their use on needier localities.

If potential subsidizers can obtain many of the benefits of local redistribution while migrating just outside the redistributive jurisdiction, then why would any but the most altruistic remain? A suburban resident could still take advantage of the central city for employment, shopping, or culture without directly contributing to redistributive programs.<sup>102</sup> Local firms could migrate to suburban jurisdictions that commit to a lower rate of non-benefit taxation, such as through zoning and expenditure regulations,<sup>103</sup> and attract non-resident workers by supporting transportation networks that make the workplace accessible. Hence, the risk of free riding may dampen implementation even of locally beneficial redistributive programs.

Benign explanations for successful local redistribution, therefore, still require a mechanism by which cities either can restrain residents from exiting or can attract new residents who obtain sufficient benefits from city residence to offset their personal redistributive burden. Cities will be better able to implement benign redistribution, that is, if they can exploit a situational monopoly that discourages residents from departing and encourages potential new subsidizing residents to immigrate, notwithstanding redistributive taxes.

Of course, current residents who have made location-specific investments in jobs and friends, or to particular houses, neighborhoods, customers, and suppliers face serious obstacles to emigrating and thus give the locality some form of situational monopoly.<sup>104</sup> But municipal officials may avoid taking advantage of those investments because exploiting them could deter potential new residents from migrating to the locality. Other local characteristics, however, may raise the costs of emigration sufficiently to permit implementation of benign redistributive programs without fear of free riding.

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<sup>102</sup> This effect, of course, may be reduced if the redistributive burden is partially financed through commuter taxes or exactions that are largely paid by nonresidents, e.g., hotel surcharges, taxes on parking fees, and meal taxes.

<sup>103</sup> The use of pre-commitment devices to withhold exercise of authority is a traditional way in which governments spur economic growth by attracting firms who might otherwise fear exploitation once they have made location-specific investments. See WILLIAM FISCHER, *THE HOMEVOTER HYPOTHESIS* 35 (2001); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 J. ECON. HIST. 803, 803–04 (1989).

<sup>104</sup> This is an example of an “endowment effect,” which occurs when individuals value a good more highly when they own it than when they do not own it. See RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* 8, 28 (1994). For empirical support of the endowment effect, see, e.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990). This is not to say that endowment effects are infinite, as evidenced by the Boeing Corporation’s decision to leave the Seattle area for Chicago. See *Boeing Chooses Chicago: Windy City Beats Out Denver and Dallas in Luring Aircraft Maker from Seattle*, CNN MONEY, May 10, 2001, <http://money.cnn.com/2001/05/10/companies/boeing/index.htm> (reporting decision to move Boeing’s corporate headquarters from Seattle to Chicago).

Localities' ability to constrain exit by firms largely depends either on geographical advantages that a city enjoys or on agglomeration economies—benefits realized by proximity to other firms within the industry or related to the industry—that cannot readily be duplicated in other jurisdictions.<sup>105</sup> Geographical benefits, such as proximity to a river or a necessary source material,<sup>106</sup> obviously are not easily substitutable. But interaction among firms within an industry or related industries may be equally effective in retaining firms clustered within a small geographic area.<sup>107</sup> Firms benefit from locating near professionals with whom they consult, such as their lawyers, bankers, and accountants, and near other firms in the same business so that they can exchange ideas about issues of common interest.<sup>108</sup> They will want to be near transportation networks so that they can readily ship products to distant purchasers or be accessible to prospective suppliers or purchasers.<sup>109</sup> Hence, highways, airports, and railroads can take the place of mineral deposits or other resources that motivated geographic location decisions of manufacturers.<sup>110</sup>

These agglomeration economies constrain the locational decisions of firms. There is at least some evidence that agglomeration benefits dissipate rapidly beyond short geographical distances.<sup>111</sup> Thus, those who wish to take advantage of these benefits cannot readily migrate far from the cluster that generates them; instead, they must stay in a relatively concentrated geographic area, and it is unlikely that suburban areas will be able to accommodate all related firms that wish to take advantage of these economies. Moreover, once a cluster has formed, and given the benefits that networks of firms provide to their members, no individual member has an incentive to depart except in the unlikely event of a simultaneous movement by large numbers of other network participants. These characteristics apply to relatively large cities—the very localities that I have suggested are most likely to implement local redistributive programs.

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<sup>105</sup> See, e.g., & FUJITA & THISSE, *supra* note 81, at 5–9 (2002); Glenn Ellison & Edward L. Glaeser, *The Geographic Concentration of Industry: Does Natural Advantage Explain Agglomeration?*, 89 AM. ECON. REV. 311, 315–16 (1999).

<sup>106</sup> See W. Brian Arthur, *Industry Location Patterns and the Importance of History*, in INCREASING RETURNS AND PATH DEPENDENCE IN THE ECONOMY 49, at 49–50 (1994).

<sup>107</sup> See DREIER ET AL., *supra* note 50, at 35 (noting presence of 380 specialized geographical clusters in U.S. economy).

<sup>108</sup> See Quigley, *supra* note 80, at 130–32; SAXENIAN, *supra* note 83, at 5–6.

<sup>109</sup> See Andrew F. Haughwout, *Infrastructure and Social Welfare in Metropolitan America*, 7 FED. RES. BANK N.Y. ECON. POL'Y REV., Dec. 2001, at 1, 5.

<sup>110</sup> Edwin Mills reports that “nearly half of the one million jobs located in the city of Chicago are in its CBD [central business district] and 200,000 are located within a mile of the periphery of O’Hare Airport.” Edwin S. Mills, *Earnings Inequality and Central-City Development*, FED. RES. BANK N.Y. ECON. POL'Y REV., Sept. 1999, at 133, 135.

<sup>111</sup> See, e.g., Stuart S. Rosenthal & William C. Strange, *Geography, Industrial Organization, and Agglomeration*, 85 REV. ECON. & STAT. 377, 378 (2003).

These constraints on mobility can reduce exit by free riders from redistributive cities. But before concluding that these effects increase the level of desirable local redistribution, consider three points. First, firms are likely to recognize that they are locked into a location once they make their initial investment, and thus will be susceptible to the imposition of redistributive taxes. As a result, they may seek ex ante compensation in the form of tax abatements or low-cost financing before agreeing to locate in a particular jurisdiction.<sup>112</sup> These concessions offset subsequent redistributive payments, and, by reducing local tax revenues, may limit the locality's future capacity to redistribute income.<sup>113</sup> At the same time, the possibility of ex ante compensation answers claims that immobile firms are being exploited when redistributive payments are demanded from them. Moreover, fear that firms will either eschew a redistributive locality or will demand ex ante compensation before locating there should serve as a check on the locality's ability to exploit immobile firms.<sup>114</sup>

Second, while geography and agglomeration economies may constrain exit by firms, these local characteristics have less impact on individuals. Relatively mobile individuals who prefer not to bear redistributive burdens could still migrate to suburban locations, pay only benefit taxes to their jurisdiction of residence, and continue to receive significant financial and cultural benefits from the central city. Suburban and exurban residents may desire a culturally and financially productive central city, but that does not mean they will pay significant redistributive taxes for projects they believe fail to generate suburban benefits. Central cities may be able to impose some charges on commuters in the name of defraying the costs that non-residents impose on the city, and those taxes may discourage emigration by reducing its benefits. But central cities that are surrounded by less redistributive suburbs will have difficulty imposing redistributive taxes on those who are more mobile than altruistic.

Third, even if constrained exit makes redistribution more plausible, it does not follow that constrained exit is an unqualified benefit. As my ma-

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<sup>112</sup> Glaeser & Kahn, *supra* note 15, at 119.

<sup>113</sup> The locality, however, may be more willing to grant concessions in order to attract residents, including firms, if it is able to externalize some of the costs of compensation. For instance, a locality that issues tax-exempt bonds on behalf of a new firm will not suffer tax collection reductions equal to the benefit conferred on the firm, since the tax-exemption typically provides a subsidy from the state and federal governments, rather than from the locality. The tax-exemption on bonds applies to the interest earned by bondholders. That interest is not included in federal income or state income (where the bond is issued by a locality within the state of the bondholders' residence). Since few cities have income taxes, the subsidy comes from federal and state sources, not from local ones. This may mean that the locality is engaged in socially inefficient behavior, but the ability to externalize costs does, at least, reduce the negative effects that ex ante compensation would otherwise impose on the ability of localities to attract potential subsidizers of redistributive taxes.

<sup>114</sup> See, e.g., JAMES M. BUCHANAN & RICHARD A. MUSGRAVE, PUBLIC FINANCE AND PUBLIC CHOICE 179 (2000); Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 475-78 (1991).

lign–benign dichotomy suggests, not all redistributive programs are desirable. Redistribution may simply transfer wealth from one poorly organized group in the city to a well-organized group rather than enhance the welfare of the locality as a whole. At least since Albert Hirschman’s illuminating dichotomy of voice and exit,<sup>115</sup> we have understood that mobility could provide an effective check on the capacity of local officials to engage in this form of wealth transfer. Competition for residents and tax base constrains officials who, but for fear of emigration or loss of desirable immigrants, might commit public funds to private ends. Mobility permits those who cannot command an electoral majority, but for whom fiscal management is a salient issue, to signal their dissatisfaction with undesirable levels of taxation simply by removing their assets to less exploitative jurisdictions. In theory, the threat of exit should check the willingness of even self-interested local officials to impose inefficient levels of taxation or service.<sup>116</sup>

But the same situational monopoly that permits a locality to impose redistributive exactions for benign reasons without fear that dissenters and free riders will exit also reduces the ameliorative effects that exit provides against undesirable redistribution. Just as firms cannot obtain agglomeration benefits without paying benign local redistributive taxes, so are immobile residents unable to avoid redistributive taxes imposed for objectives that serve much narrower interests. A firm that enjoys higher productivity because of its proximity to networks of competitors, suppliers, and customers is unlikely to exit even though it understands that its tax payments are applied to malign objectives, as long as the costs of being exploited are less than the agglomeration benefits the firm receives. Of course, the firm may publicly oppose programs that it perceives as malign, or work to unseat the officials behind these programs. But a firm is unlikely to do so where the costs of opposition are high or where opposition may generate a reputation for animosity towards redistributive programs, a reputation that the firm might prefer to avoid in order to cultivate its status as a good citizen in the community. The very tool on which localities can rely to restrain exit by potential subsidizers of benign redistribution, therefore, also enables local officials to impose malign programs. I next turn to a more thorough exploration of that possibility.

3. *Malign Explanations for Local Redistribution.*—Recall that malign redistribution involves publicly financed programs that cannot be justified in terms of advancing local welfare. Officials may, for instance, seek to maximize their own chances for re-election or enhance their opportunities for higher office by dedicating tax revenues to projects that are favored by potential supporters or that promise to increase budgets. Local officials may face little opposition in making these expenditures for the reasons that

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<sup>115</sup> See ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970).

<sup>116</sup> *Id.* at 23.

have now become standard in the theory of collective action—the cost imposed on any individual subsidizer is insufficient to induce protest or to be the salient point on which the majority determines how to vote, even though costs outweigh benefits in the aggregate.<sup>117</sup> The benefits to those who favor the expenditure, however, are sufficient to induce them (or some entrepreneur acting on their behalf) to offer electoral support to cooperative officials. As a result, potential beneficiaries constitute an intense and discrete interest group, more capable than the diffuse subsidizers of overcoming obstacles to organized lobbying.<sup>118</sup> Malign redistributive programs, therefore, seem highly plausible at the local level, especially if one accepts the Madisonian proposition that decentralized governments are less susceptible to multiple, offsetting interest groups.

In an ideal world, we would retain benign local redistribution and invalidate its malign forms. But the various rationales for local redistribution, combined with the conundrum in which the same phenomena explain the availability of both malign and benign distributive programs, reveal the difficulty in classifying any given proposal as either an effort to enhance local welfare or as a sop to narrower political interests. Is the proposed living wage ordinance a signal of an enlightened community's sympathy for low-wage workers? Does it reveal a preference for avoiding labor strife or offset what might be higher tax payments for welfare services? Or is it a concerted effort by local unions to increase wages for more skilled workers or to enhance their ranks in ways that may ultimately reduce local employment? Is the publicly financed stadium a source of civic pride that generates additional fiscal and communal benefits, even if it is not financially self-sustaining? Or is it a subsidy for a vocal and politically effective minority that was enacted over the silent opposition of a diffuse majority?

One might conclude that resolution of these difficult issues necessarily lies outside the domain of legal doctrine. Malign local redistribution will have effects primarily within the locality. Thus, one might claim, all the reasons that support broad interpretations of local autonomy arguably apply to permit local redistribution as enacted by local officials.<sup>119</sup> The proper remedy for any official defalcations arguably lies either at the ballot box or in the market for residence. Attempts to interfere with local decisions that have primarily local effects, the argument may continue, either results in erroneous decisions about local preferences, or dilutes the benefits of local autonomy by imposing the will of more centralized entities on municipalities.

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<sup>117</sup> See, e.g., *CLEAN v. State*, 928 P.2d 1054, 1056–58 (Wash. 1996) (describing efforts of supporters of football stadium to obtain local funding); DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* 349–50 (2003) (detailing efforts of neighborhood group to obtain funding from city agency).

<sup>118</sup> See Poindexter, *supra* note 45, at 404–05.

<sup>119</sup> For a litany of reasons to interpret local autonomy broadly, see Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 200–01 (2001).

On reflection, however, neither the ballot box nor the market for residence is likely to provide sufficient controls on malign redistribution. Individual projects that confer benefits on a small group are unlikely to be sufficiently salient to the disinterested majority to generate a negative reaction at the polls. After all, if the majority were, in fact, sufficiently agitated about a project, one might think that some entrepreneur would have been able to organize the opposition into a viable political force to prevent its passage. But that means projects that do not enjoy popular support will proceed, not that the redistributive projects evince an accurate expression of local autonomy that warrants deference from other political institutions. Moreover, no single project—even one of little benefit to the locality as a whole—is likely to affect the local economy sufficiently to be the focal point of voter revolt against incumbents who are otherwise perceived as performing adequately. Residents may have a sense that local management is imperfect, but given that their residential experience is limited, they are less likely to consider that alternative managements will bring significant improvement.<sup>120</sup> The market for residence, in turn, will be distorted by the same agglomeration economies that induce firms to remain within a particular jurisdiction, notwithstanding that it would prefer that all those within its network migrate to some alternative jurisdiction. Exit will only occur if the costs related to exploitation exceed the significant costs related to emigration.

Thus, as the cases involving living wage ordinances demonstrate, courts ultimately are asked to resolve the legitimacy of local redistributive programs. Those who have challenged local redistribution have employed a variety of legal doctrines to convince courts that localities have limited authority to redistribute. Most frequently, these doctrines involve the legal scope of municipal authority, the reach of home rule, and the resolution of alleged conflicts between local ordinances and state statutes. It is tempting, therefore, to argue that these challenges should be decided by reference to the standard factors that dominate debates about the scope of municipal autonomy: the extent to which local decisions generate negative externalities, the need for statewide uniformity, the fit between the proposed regulation and traditional local functions. Those factors do not directly address distinctions between benign and malign redistribution. At best, they serve as proxies for investigations into alliances between interest groups and officials that may have produced legislation intended to serve private gain. But any such judicial mission necessarily confronts the perception that courts

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<sup>120</sup> There is some anecdotal evidence of this phenomenon in the experience of New Orleans residents after Hurricane Katrina. Apparently refugees who had been removed to cities that operated more efficiently than New Orleans, and who had never previously questioned New Orleans services, returned to complain about the inferior services that New Orleans had traditionally provided. See Clifford J. Levy, *Seeing Life Outside New Orleans Alters Life Inside It*, N.Y. TIMES, Nov. 20, 2005 (Week in Review), at 43.

lack both legitimacy and institutional capacity to perform the task of reverse engineering legislation to discover the process by which it was produced.

The structure of state constitutional law, from which these doctrines are derived, however, potentially invites a more interventionist response. State constitutional doctrines that define the scope of municipal autonomy can perhaps best be explained as preventatives against interest groups that seek favorable treatment from the state or local legislature. Doctrines that pervade state constitutions, such as public purpose clauses, prohibitions on special legislation or special commissions, expenditure limitations, prohibitions on unfunded mandates, and single-subject requirements—which by and large have no federal constitutional counterparts—arguably create a presumption that malign redistributive legislation is a serious threat to which the judiciary is authorized to attend.<sup>121</sup> Arguably, the very presence of these provisions and the doctrines to which they give rise invites judicial inquiry into legislative processes in ways that would raise significant skepticism if practiced by federal courts.

Thus, the structural arguments about institutional legitimacy that arguably justify judicial restraint at the federal level may have less force when considering the propriety of state judicial intervention into local decision making processes. If these provisions signal a constitutional concern about the inordinate influence of special interests in legislative processes, then one might more readily consider it part of a legitimate state judicial function to address the role of interest groups in the promulgation of legislation. In particular, if we believed that courts could fruitfully and accurately make the distinction, we might applaud judicial efforts to invalidate malign local redistribution while upholding its benign counterpart. In the next Part, I explore both the implications of state constitutional structure and the issue of institutional competence that it necessarily raises.

## II. JUDICIAL RESPONSES TO MALIGN LOCAL REDISTRIBUTION

### A. *Judicial Authority to Intervene in Local Redistribution*

Courts that invalidate legislation that they perceive as serving rent-seeking groups may be seen as acting consistently with admonitions by scholars that courts should resolve statutory ambiguities against interest

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<sup>121</sup> See, e.g., *19th Street Assocs. v. N.Y.*, 593 N.E.2d 265 (N.Y. 1992). The prohibition on special legislation which is found in several state constitutions does have an analogue in federal constitutional equal protection analysis. Indeed, some of the living wage ordinances that have been limited in scope to particular industries have been challenged on federal equal protection grounds. See, e.g., *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1154–56 (9th Cir. 2004); *Visiting Homemaker Serv. of Hudson County v. Bd. of Chosen Freeholders*, 883 A.2d 1074, 1081–94 (N.J. Super. Ct. App. Div. 2005).

Some federal constitutional clauses, such as the Takings Clause and the Contracts Clause, are perhaps best understood as warding off interest group grabs in the form of raw majoritarianism. See Richard Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 716–17 (1984).

groups.<sup>122</sup> But these scholars have focused primarily on judicial interpretation of federal Congressional statutes. Proponents of judicial intervention have, therefore, relied on structural arguments about the nature of our federal constitutional system rather than on the language of specific constitutional clauses.<sup>123</sup> Other scholars have asserted institutional reasons, primarily resulting from concerns about democratic legitimacy and institutional design, to disfavor judicial investigations into the political allocations of entitlements.<sup>124</sup> And the literature on statutory interpretation has long been a source of debate about the proper judicial response to legislation that appears to serve private interests, with some commentators suggesting that courts should enforce the deal reached by the legislature and others suggesting narrow construction to limit its effects.<sup>125</sup>

Einer Elhauge makes the most compelling case against judicial efforts to infer interest group dominance. He demonstrates both that judicial decision-making is itself fraught with interest group pressures, and that any judicial effort to detect rent-seeking is susceptible to the difficulties inherent in aggregating preferences, cycling, and institutional limitations on judicial inquiry and logrolling.<sup>126</sup> Given that some amount of interest group activity will always be visible in any political process, it is difficult to assess whether interests have played a nefarious or laudatory role other than by looking at results. Courts that evaluate results, in Elhauge's view, run the risk of becoming involved in discredited substantive due process review and simply substituting judicial judgments for legislative ones.

The characteristics of the federal institutions that drive these analyses map only imperfectly onto their state counterparts. To the extent that differences between federal and state institutions alter the variables on which the literature evaluating judicial intervention relies, it is plausible that an inquiry into the propriety of state court review of local redistributive programs would generate different results. Consider, in this context, the recent body of literature that contends that the constitutional and institutional structures of states legitimize more intrusive judicial intervention in the

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<sup>122</sup> See, e.g., Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15–18 (1984); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 471, 486–87 (1989).

<sup>123</sup> See, e.g., Sunstein, *supra* note 122, at 471 (“Designed to ensure a kind of deliberative democracy, the constitutional system is hostile to measures that impose burdens or grant benefits merely because of the political power of private groups.”).

<sup>124</sup> See, e.g., Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991).

<sup>125</sup> Compare, e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 227 (1986), with William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 279 (1988), and Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983), and JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 81–105 (1997).

<sup>126</sup> *Id.*

creation and protection of individual rights.<sup>127</sup> For instance, Professor Helen Hershkoff's analysis suggests that state courts may be particularly capable of determining the propriety of local redistribution.<sup>128</sup> According to Hershkoff, the relatively amateur nature of state legislatures means that they do not share the institutional safeguards found at the federal level—such as full-time membership or maintenance of a public record—that can serve as substitutes for judicial review. At the same time, the relative ease with which state constitutions can be amended provides a more readily available corrective to misguided governmental activism,<sup>129</sup> and thus arguably justifies more risk taking by all branches of government, including the judiciary. Judicial deference to subfederal legislatures, therefore, is not grounded in formalistic separation of powers. Rather, it is a reflection of the comparative advantage that representative legislative institutions have to engage in lawmaking processes that permit robust fact-finding and exploration of alternatives. But the negative implication of that structure is that the case for judicial deference wanes where legislative processes lack those safeguards.

These same institutional limitations of legislatures on which Hershkoff relies to encourage more intervention by state judiciaries in the protection of rights also increase the likelihood that state legislatures are more susceptible than their federal counterpart to lobbying by rent-seeking groups.<sup>130</sup> Because the institutional safeguards that can provide some check on legislative favoritism—fact-finding committees, limited capacity to impose extra-territorial costs, and public records of deliberations—may be lacking at the local level, judicial deference to legislatures is less warranted.

I am not arguing that the institutional differences between federal and state or local governments necessarily overcome the weighty arguments against intrusive judicial review to detect rent-seeking legislation. State courts also have limited fact-finding ability, cannot initiate litigation on their own, and cannot readily reverse engineer legislation to determine whether there were tradeoffs in (nominally) publicly interested legislation for what ostensibly is an interest-group bargain. State court judges may, by virtue of being elected or by virtue of their political backgrounds, be similarly susceptible to interest group pressures. Moreover, at the local level, considerations of local autonomy and the greater capacity of residents to exit may provide sufficient antidotes to local rent-seeking that greater judicial intervention becomes superfluous. I am, however, suggesting that inso-

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<sup>127</sup> See, e.g., Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1928 (2001); Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 872–74 (1999).

<sup>128</sup> Hershkoff, *supra* note 127, at 1922.

<sup>129</sup> Reed, *supra* note 127, at 887–89.

<sup>130</sup> See Stephen Ansolabehere & James M. Snyder, Jr., *Party Control of State Government and the Distribution of Public Expenditures* (August 2003) (manuscript on file with author) (documenting tendency of state legislatures to allocate expenditures to districts aligned with party in power rather than to swing voter districts); Hershkoff, *supra* note 127, at 1928.

far as the case against judicial intervention rests on considerations of institutional competence, there is at least a theoretical basis for contending that the analysis is different for state and local governments than for their federal analogues.

This theoretical point is buttressed by the presence in many state constitutions of provisions that have no federal constitutional analogue and that are best explained as reflecting a concern about the redistributive tendencies that will emerge from unchecked state and local legislatures. The common theme among state constitutional provisions such as public purpose requirements, limitations on credit, prohibitions on special legislation, gubernatorial line-item vetoes, prohibitions on unfunded mandates, and single-subject requirements is that they all constrain the capacity of state and local legislatures to enact rent-seeking laws.<sup>131</sup> Their history reveals that they were frequently enacted in response to, and as safeguards against, legislative grants of governmental largesse that were perceived as serving narrow interests.<sup>132</sup> One salient feature of much of the underlying legislation, however, was that it benefited the relatively wealthy; for example, it was railroad aid legislation that ultimately motivated constitutional restrictions on private purpose expenditures and lending of public credit.<sup>133</sup> Thus, one may distinguish the applicability of these clauses to forestall redistribution that favors the relatively poor of the community. I return to that issue in a subsequent section of this Article. For now, however, the key point is that these constitutional constraints signal both a concern about legislative rent-seeking and, unless these constitutional clauses are read as stating nonjusticiable political questions or aspirational platitudes, an invitation for judicial intervention.

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<sup>131</sup> Frequently, this concern is expressed as a function of logrolling, in which broad legislation is enacted because different provisions appeal to different groups, none of which could otherwise command a majority. Thus, the legislation as a whole is viewed as an amalgam of provisions intended to benefit particular groups rather than the enacting jurisdiction as a whole. For anti-logrolling interpretations of these constitutional provisions, see, for example, *Advisory Opinion to the Attorney General Re Adoption*, 902 So. 2d 763 (Fla. 2005) (single-subject requirement); *Sloan v. Wilkins*, 608 S.E.2d 579 & n.6 (S.C. 2005) (single-subject requirement); *Cuyahoga County Veterans Servs. Comm'n v. State*, 823 NE.2d 888, 891 (Ohio App. 2004) (single-subject requirement); *Rants v. Vilsack*, 684 N.W.2d 193, 201 (Iowa 2004) (line-item veto); *Mun. City of S. Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003).

<sup>132</sup> See, e.g., *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 394 (Pa. 2005) (“An enormous growth in the corporate form of business organization led to significant concentrations of wealth and the corruption of numerous legislators. . . . Corruption took the form of special laws legislation, logrolling, and arbitrary favoritism and was met with a demand for reform. . . . The Constitutional Convention of 1872–73 was convened to reform corrupt legislative behavior, and to this end, the result was the constitutional strictures contained in Article III. See R. BRANNING, PENNSYLVANIA CONSTITUTIONAL DEVELOPMENT 37 (1960). Thus, while these changes to the Constitution originated during a unique time of fear of tyrannical corporate power and legislative corruption, these mandates retain their value even today by placing certain constitutional limitations on the legislative process.”).

<sup>133</sup> See AMDURSKY & GILLETTE, *supra* note 41, at 90–96.

Judicial interpretation of these state constitutional clauses is necessary because they are written in terms that make their scope of application uncertain. Take, for instance, the common requirement that legislation be limited to a “single subject.” Since, for instance, the “subject” of a legislative enactment can be defined either with great specificity (the Uniform Commercial Code may be considered to deal with various subjects because it governs both remedies for the sale of goods and means of perfecting security interests) or at a higher level of generality (the Uniform Commercial Code may be considered to deal with one subject because all its provisions concern commercial transactions), some construction of the reach of the requirement is necessary. Given that these restrictions on legislative authority emerge out of efforts to restrain legislative excess, it seems unlikely that these clauses were intended to be treated as political questions, the scope of which would be determined by the legislature itself, rather than submitted to judicial examination.<sup>134</sup> The multiplicity of clauses that are directed at constraining special interests, their history, and the necessity of interpreting them create a plausible case that state constitutions invite some degree of judicial intervention into the legislative process. Indeed, state court opinions that apply these constitutional doctrines frequently invoke explicitly the role of interest groups.<sup>135</sup>

State constitutional clauses that implicitly sanction judicial investigation into rent-seeking legislation may, therefore, license similar inquiries when courts interpret doctrines that define the scope of local autonomy generally. For instance, in deciding whether local governments have the authority to enact ordinances that favor one identifiable subgroup at the expense of another—the very definition of a redistributive ordinance—at least some courts appear to be intuiting to results that constrain the ability of one subgroup of residents to extract wealth from others. Courts have narrowly construed local authority to restrict landlords’ ability to convert their property to condominiums or to control rental prices.<sup>136</sup> In construing statutes

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<sup>134</sup> Indeed, after the Illinois judiciary generated a series of cases that made the legislature the arbiter of whether proposed legislation was invalid as “special,” the state constitution was amended to provide explicitly that the question of whether the prohibition had been violated was “a matter for judicial determination.” See ILL. CONST. art. IV, § 13; *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1070 (Ill. 1997); *Bridgewater v. Hotz*, 281 N.E.2d 317, 322 (Ill. 1972).

<sup>135</sup> See, e.g., *Best*, 689 N.E.2d at 1069–70 (quoting legislative history of clause as embodying principle that “Governments were not made to make the ‘rich richer and the poor poorer,’ nor to advance the interest of the few against the many; but that the weak might be protected from the will of the strong; that the poor might enjoy the same rights with the rich”); *Vill. of Chatham v. County of Sangamon*, 814 N.E.2d 216, 225 (Ill. App. Ct. 2004); *Allen v. Woodfield Chevrolet, Inc.*, 773 N.E.2d 1145 (Ill. App. Ct. 2002); *Bd. of Trs. of the Judicial Form Retirement Sys. v. Att’y Gen.*, 132 S.W.3d 770 (Ky. 2003); *World Trade Ctr. Taxing Dist. v. All Taxpayers*, 894 So. 2d 1185 (La. Ct. App. 2005); *Gillis v. Yount*, 748 S.W.2d 357 (Ky. 1988); *Lyon v. Burton*, 5 P.3d 616, 625 (Utah 2000); *Shell v. Metro. Life Co.*, 181 W. Va. 16 (W. Va. 1989); *Soo Line R.R. Co. v. Dep’t of Transp.*, 303 N.W.2d 626, 630 (Wis. 1981).

<sup>136</sup> See *Town of Telluride v. Lot Thirty-Four Venture*, 3 P.3d 30 (Colo. 2000) (invalidating rent control ordinance under home rule grant); *Wagner v. Mayor and Mun. Council of City of Newark*, 132

that authorize municipalities to exact fees for services, courts have limited the ability of localities to impose on developers exactions for infrastructure that would benefit the entire locality as a condition of obtaining building permits.<sup>137</sup>

The living wage ordinance cases illustrate these various judicial strategies. The cases frequently involve municipal authority to enact such an ordinance in the first instance, that is, whether wage rates are a “municipal affair” within the scope of home rule and, if so, whether the issue was nevertheless pre-empted by state law.<sup>138</sup> Neither of these issues generates an obvious response. Some localities may have living costs significantly higher than others in the state, so that a statewide minimum wage is inappropriate. Alternatively, one municipality may desire to create an environment in which the relatively poor are made better off than elsewhere, both to attract unskilled labor and to signal a commitment to the welfare of all residents. In either situation, wage rates might be defined to fall within the malleable scope of “municipal affairs.” Alternatively, the external effects of a high wage rate in one locality on neighboring localities arguably would disrupt labor markets sufficiently to classify the issue as a matter of statewide interest, beyond the scope of home rule. Even if one grants that localities initially possess home rule authority, it may be displaced if there is direct conflict with state law, that is, if the locality permits what the state prohibits or prohibits what the state law permits.<sup>139</sup> When the state creates a minimum wage law that requires an employer to pay a wage rate of \$x, is it simply creating a floor that municipalities may exceed if they believe that local circumstances justify it? If so, a municipal ordinance that requires a wage rate of \$x+y does not permit something that the state has prohibited. Or does the state law, by permitting employers to pay a wage rate of \$x, implicitly prohibit municipalities from requiring higher wages?

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A.2d 794 (N.J. 1957) (invalidating rent control under a home rule grant). Rent control in New Jersey was subsequently upheld in *Inganamort v. Borough of Fort Lee*, 293 A.2d 720 (N.J. Super. Ct. 1972), *aff'd*, 303 A.2d 298 (N.J. 1973). A similar reversal occurred under the Florida constitutional home rule provision. Compare *City of Miami Beach v. Fleetwood Hotel, Inc.*, 261 So. 2d 801, 801 (Fla. 1972), with *City of Miami Beach v. Forte Towers, Inc.* 305 So. 2d 764 (Fla. 1974).

<sup>137</sup> See *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 890 P.2d 326 (Idaho 1995) (invalidating impact fees as improper exercise of municipal police powers); *E. Diversified Props., Inc. v. Montgomery County*, 570 A.2d 850 (Md. 1990) (invalidating impact fees for home rule municipality); *Wielepski v. Harford County*, 635 A.2d 43 (Md. Ct. Spec. App. 1994), *vacated on other grounds*, 648 A.2d 192 (Md. 1994) (invalidating impact fees as improper exercise of police powers).

<sup>138</sup> See, e.g., *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1156 (N.M. Ct. App. 2005). In 2005, the New Jersey legislature explicitly permitted political subdivisions to adopt ordinances setting wage rates higher than those established at the state or federal level. See N.J. STAT. ANN. § 34:11-56a4 (West 2005). Thus, the court in *Visiting Homemaker Services v. Board of Chosen Freeholders*, 883 A.2d 1074 (N.J. Super. Ct. App. Div. 2005), concluded that the issue of state preemption and local authority had been rendered moot while the appeal was pending.

<sup>139</sup> This is the standard statement of conflict between state laws and local ordinances. See *Miller v. Fabius Twp. Bd.*, 114 N.W.2d 205 (Mich. 1962).

There is no inexorable response to these inquiries. The cases rely on different rationales and reach different conclusions. But behind the disagreement may well lie different conceptions of what motivated the localities to adopt minimum wage ordinances. Those courts that uphold the ordinances may view them as publicly interested efforts to subsidize some local residents at the expense of a broad set of employers who are able to pass the costs to the local population at large. On the other hand, those courts that reject the ordinances may see them as the result of capture by groups interested in securing higher wages. Judge Bybee's dissent from the Ninth Circuit decision upholding the Berkeley, California living wage ordinance explicitly invoked this concern. In concluding that the ordinance impaired the obligation of contract that the city had previously struck with the developers of the marina area that was affected by the ordinance, Bybee concluded that the limited scope of the ordinance posed the danger that "the legislature acted less out of concern for the general good than for special interests."<sup>140</sup> As I discuss below, there are reasons to share Judge Bybee's concern, especially where redistributive ordinances apply only to a small portion of the locality that enacts them. But, even if the legitimacy of state court intervention into the legislative process is less controversial than in the federal context, addressing those concerns assumes a level of institutional capacity on the part of courts to make the relevant inquiries about the ordinance's evolution. I turn next to the propriety of that assumption.

### *B. The Propriety of Judicial Intervention*

Even if state courts possess the constitutional authority to safeguard the political processes of local government against interest group exploitation, judicial capacity to fulfill this objective is by no means self-evident. The argument for judicial monitoring of legislatures depends substantially on judicial competence not only to recognize that legislation favors particular interests (it always does), but also that the legislation arose from a process so distorted as to warrant invalidation under one of the state constitutional doctrines intended as a safeguard against rent-seeking laws. There are myriad reasons to be skeptical of the judicial capacity to reverse engineer legislation in the manner necessary to reach these conclusions. Most of the skepticism involves the implicit substantive choices that courts would have to make when deciphering the propriety of interest group influence (for instance, is it disproportionate to the group's numbers?) and selecting which legislative objectives are "public-regarding." While these concerns have

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<sup>140</sup> See *RUI One Corp. v. City of Berkeley*, 371 F.3d 1137, 1172 (9th Cir. 2004) (Bybee, J., dissenting) (quoting Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960)).

been well-rehearsed in the literature,<sup>141</sup> I add here some additional constraints that courts face.

First, let us assume that courts can, in fact, identify legislation enacted at the behest of an interest group with disproportionate influence. For instance, courts may be able to discern that legislation favors members of a highly organized group and imposes costs on those who could not easily coalesce. It does not necessarily follow that the legislation is inconsistent with the broader public interest. Publicly interested legislation is itself, after all, a public good. The implication is that members of the public who will receive only an average benefit from proposed legislation have no incentive to lobby for its enactment, as each member would prefer to free ride on the efforts of others to receive the same benefit. Thus, even those enactments that would serve the public interest will likely require advocacy by parties who will receive a disproportionate benefit. Of course, that result may obtain because the proponent prefers more of the good than the average member of the public. That is, as I have argued above,<sup>142</sup> the good may be oversupplied, rather than undersupplied as the traditional story of public goods suggests. Given that we might prefer oversupply to non-supply, and that narrow judicial construction of any legislation that evinced the influence of a dominant interest group could reduce production of the underlying good or service, we cannot conclude that judicial constraints on interest groups necessarily increase welfare.

Second, courts could misconstrue legitimate legislative deals for rent-seeking activity. Legislative activity takes place in the context of bargains in which different groups compete and receive different benefits, without which coalitions necessary to enact legislation that serves the public interest would not easily be formed. Again, it is not interest group involvement per se that leads to offensive legislation. Rather, it is the intervention of a dominant interest group that is not resisted by a similarly invested and powerful group. The presence of competing interests seems plain enough where the legislative outcome disfavors a group that appears to be “privileged” in the sense that Mancur Olson used the term.<sup>143</sup> For instance, if manufacturers are required to install costly anti-pollution devices or manufacturers are required to add safeguards to their products for consumers’ benefit, we tend to believe that the result emerged from interest group bargains. We are relatively certain that manufacturers’ interests are well represented in the political process, at least compared to those of consumers. We are less certain of the process by which the former win, because we cannot confidently

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<sup>141</sup> See generally Elhauge, *supra* note 124 (summarizing arguments to be skeptical of judicial intervention).

<sup>142</sup> See discussion *supra* Part I.A.

<sup>143</sup> For Olson, a group was “privileged,” in that it could easily organize into an effective lobbying group, if each of its members, or at least one of them, has an incentive to see that the collective good is provided, even if that member must bear the full cost of providing it. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 49–50 (1971).

say whether representatives of diffuse consumers lost the battle, settled for a compromise, or were simply absent.

Judicial invalidation of legislation in the erroneous belief that it emerged from an imposed rather than a negotiated deal may alter the political balance that was struck in a well-operating process. Assume, for the moment, that an interest group that could organize with relative ease obtains a benefit through a legislative enactment, but only because other equally involved groups received discrete benefits either through the same or simultaneously enacted legislation, so that the total package seemed palatable to all involved. If courts subsequently invalidate one part of that deal in the belief that it was motivated by interest group domination, then the compromise that made the legislation possible will be disrupted. While that may leave public-regarding legislation intact, the threat of such invalidation will frustrate subsequent efforts to form public-regarding coalitions.<sup>144</sup>

These institutional limitations are only exacerbated when we move from the federal realm to local government lawmaking. Local legislation is rarely accompanied by anything approximating legislative history, committee hearing reports, or robust debate of the type that characterizes federal enactments. Thus, there is little outside the language of the legislation to which courts, even if so inclined, could look to detect the existence of disproportionate influence. If courts seek to identify acceptable redistribution in the local political process, they are likely to rely on proxies for the benign and the malign. In what follows, I explore the suitability of the proxies that courts could plausibly select to make these investigations.

### C. *Proxies for Distinguishing Benign from Malign Programs*

Redistributive legislation, by definition, aids members of the benefited group by exacting subsidies from non-members. The traditional story of interest group capture concludes that individual non-members pay these subsidies, even when they are socially counterproductive, because incurring the greater personal costs of opposition is not worthwhile. In order to have this effect, the benefited group should keep individual subsidy costs low by diffusing payments widely, shift subsidy payments to non-members who are least likely to have an effective voice before the local decision maker, and increase the cost of monitoring redistributive legislation. While courts could not easily reverse engineer local decisions to determine whether legislation was benign or malign in its effects, it is conceivable that legislation that emerges from such a process would tend to have particular characteristics that can serve as effective proxies for special interest legislation.<sup>145</sup> If

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<sup>144</sup> For further analysis of the interplay among different pieces of legislation or different sections of the same legislation, see Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 657–70 (1994) (discussion of single-subject requirements).

<sup>145</sup> See, e.g., Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue into the Twenty-First?*, 74 S. CAL. L. REV. 101, 114 (2000); Edward J. Janger, *Pre-*

so, then courts might be able to focus on those proxies to draw conclusions about the benign or malign nature of challenged redistribution.

One might initially be skeptical of any effort to conclude from a specific distribution of legislative costs and benefits that the legislation is rent-seeking. By definition, redistributive programs are intended to serve the interests of a small subset of the community at the expense of a larger, more diffuse group. Thus, reflexively equating such distributions with rent-seeking behavior would condemn all such programs, the benign along with the malign. Jerry Mashaw has additionally demonstrated how classification of the costs and benefits of legislation fails to track any underlying asocial intent. Different provisions within legislation involving multiple subjects may entail different distributions of costs and benefits that may change over the life of the legislation and that do not necessarily make courts an appropriate curative even if the distribution signifies the successful intervention of rent-seeking special interests.<sup>146</sup> Only if courts could identify additional characteristics that systematically correlate with malign local redistributive programs would courts have a basis for using those characteristics to construe the scope of local authority to enact the program. In the remainder of this section, I investigate some plausible proxies for redistributive legislation that fails to satisfy local preferences and thus is susceptible to judicial intervention.

*I. Redistribution to the Wealthy and the Poor.*—We might presume that successful rent-seeking is present when the redistribution that is being challenged favors the relatively wealthy, but that the opposite conclusion should obtain where redistribution favors the relatively poor. On the demand side, interest groups that favor the relatively wealthy may better be able to bear the costs of organization and lobbying necessary to procure favorable legislation. On the supply side, legislators may be more desirous of currying support from groups that can provide funds necessary to support political campaigns. It might be appropriate, therefore, to begin by asking who benefits from the proposed subsidy. It is perhaps for this reason that courts, until recently, exhibited a willingness to review and invalidate public financing for commercial and industrial enterprises that appeared to confer benefits primarily on owners of firms rather than on relatively needy residents.<sup>147</sup> Even when the poor can organize to lobby for redistributive

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*dicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race-to-the-Bottom*, 83 IOWA L. REV. 569, 586 (1998).

<sup>146</sup> JERRY MASHAW, GREED, CHAOS, AND GOVERNANCE 94–95 (1997).

<sup>147</sup> Recent court decisions have been more receptive to claims that municipal expenditures on behalf of firms satisfy a public purpose. For a review of the history and evidence of that transition in the context of publicly financing sports stadiums, see, for example, *Poe v. Hillsborough County*, 695 So. 2d 672 (Fla. 1997); *Haney v. Dev. Auth. of Bremen*, 519 S.E.2d 665 (Ga. 1999); *Peacock v. Shinn*, 533 S.E.2d 842 (N.C. Ct. App. 2000), *appeal dismissed*, 546 S.E.2d 110 (N.C. 2000); *Ragsdale v. City of Memphis*, 70 S.W.3d 56 (Tenn. Ct. App. 2001); *Citizens for More Important Things v. King County*, 932 P.2d 135

legislation, on the other hand, the relatively wealthy who bear the redistributive burden presumably constitute an opposing interest group so that there can be no serious claim that the poor dominate the political process. Thus, redistributive legislation that favors the poor may carry a presumption of public interestedness.

This simple dichotomy of the politically powerful wealthy and the politically disenfranchised poor, however, fails. Redistribution to the wealthy does not tend to signify a political process failure, and redistribution to the poor does not necessarily signify a working political market. Even when benefits are concentrated and costs are diffuse, redistribution to the wealthy may have positive effects that would be impeded by judicial invalidation based on the economic status of the immediate beneficiaries. Local subsidies to employers, for instance, are typically justified on the principle that they will increase local employment opportunities or induce other businesses within the network of industries created by the presence of the subsidized business. In addition, extrajudicial checks that are available to retard the use of malign redistribution to the wealthy suggest that a presumption of impropriety is unwarranted. Some of the costs will be imposed on discrete sets of actors who have incentives to oppose the proposed subsidy. A proposal to subsidize a new commercial enterprise is likely to generate opposition from existing local enterprises that will be its competitors.<sup>148</sup> Local media have incentives to scrutinize public expenditures for large projects. And potential political opponents of incumbents may be able to generate support by demonstrating “giveaways” to the wealthy from the public treasury.

Similarly, the interests of the poor may be better represented than a simple identity of the poor with diffuse, disorganized groups would suggest. The variables that make collective action on behalf of redistribution for the wealthy plausible (their repeat play with local officials, their ability to contribute to political campaigns, and their tendency to participate in politics) seem, at least initially, to be absent in the case of the poor. While Glaeser and Kahn state that the poor “are better endowed with votes than they are with income,”<sup>149</sup> low turnout rates for the poor imply that political officials who seek to maximize their chances for re-election are less likely to be

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(Wash. 1997); *CLEAN v. State*, 928 P.2d 1054 (Wash. 1996); *Libertarian Party of Wisconsin v. State*, 546 N.W.2d 424 (Wis. 1996).

<sup>148</sup> See, e.g., *WDW Props. v. City of Sumter*, 535 S.E.2d 631 (S.C. 2000) (suit by business to prevent subsidy to potential competitor).

<sup>149</sup> Glaeser & Kahn, *supra* note 15, at 119.

sympathetic to programs that will assist the poor.<sup>150</sup> Thus, even if we believe that malign interest group explanations are plausible when localities redistribute wealth to attract firms, we might presume that local redistribution that favors the poor is benign.

This presumption, however, rests on too thin a description of the conditions for collective action. First, even if the relatively poor constitute a small percentage of the voting electorate, they may still compose an effective voting bloc if they commonly vote their economic interests. Since redistributive policies will provide discrete benefits whose costs are diffused through the remainder of the population, local officials may be willing to offer such programs in the belief that they will be sufficiently salient to the recipients to translate into significant votes.

Second, even if the poor cannot readily organize, they may have surrogates who comprise relatively powerful groups and whose interests coincide with those of the poor.<sup>151</sup> For instance, labor unions have spearheaded many of the local campaigns for living wages, either out of a sense of solidarity with the poor or in an effort to increase their own membership.<sup>152</sup> Similarly, bureaucrats who work in agencies that assist the poor may lobby for additional benefits, either to expand their own budgets or to assist their clients. Robert Ellickson, for example, suggests that the “poverty services industry” in New Haven exercises significant power in the distribution of local public funds, and often does so in a manner that directs the funds to projects that serve a small subset of the community (the organizers of the funded program) rather than the broader public.<sup>153</sup> Community leaders may obtain funds for their favored anti-poverty projects in return for political support,

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<sup>150</sup> The U.S. Census Bureau reports the following statistics for the November 1998 selection:

Annual Income	Percentage Registered	Percentage Voting
Under \$5000	41.5	21.1
\$5000 to \$9999	44.9	23.9
\$50,000 to \$74,999	71.9	49.9
Over \$75,000	77.3	57.3
Average for all incomes	63.7	43.7

U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1998, tbl. 9 (2000), available at <http://www.census.gov/population/socdemo/voting/cps1998/tab09.txt>.

<sup>151</sup> See Poindexter, *supra* note 45, at 402–03 (describing church-based community organization lobbying on behalf of working poor).

<sup>152</sup> See, e.g., *Visiting Homemaker Servs. v. Bd. of Chosen Freeholders*, 883 A.2d 1074 (N.J. Super. Ct. App. Div. 2005) (applying living wage ordinance only to industry to which sponsoring union members belonged); Erik Eckholm, *City by City, an Antipoverty Group Plants Seeds of Change*, N.Y. TIMES, June 26, 2006, at A12.

<sup>153</sup> See Robert C. Ellickson, *Monitoring the Mayor: Will the New Information Technologies Make Local Officials More Responsible?*, 32 URB. LAW. 391, 396 (2000).

notwithstanding the absence of any correlation between those projects and the preferences of city residents generally.<sup>154</sup>

These political effects are likely to be exacerbated in cities that utilize wards or districts for purposes of electing representatives to a city council. Ward politics encourage a pattern of logrolling in which each representative seeks to generate benefits for his or her constituents, even though the municipal benefits from any of these expenditures are less than its cost. By trading favored projects with other representatives, each can obtain citywide funding for projects that return highly localized benefits and thus represent to his or her constituents that those benefits were obtained at a cost below what the beneficiaries were required to pay. Logrolling of this sort is likely to have significant effects on the municipal budget. One study of city budgeting found that doubling the size of a city council generates a 20% increase in city spending per resident.<sup>155</sup> But for current purposes, the lesson is slightly different. All spending that results from logrolling can be defined as redistributive to the extent that it causes residents from one part of the municipality to subsidize residents in other districts. Much of the resulting legislation is likely to fall within the malign category.<sup>156</sup> To the extent that residents in the relatively poor districts are able to participate in the logrolling process, there is little reason to believe that the relatively poor districts will fail to obtain a share of the “excess” spending. One might contend that such districts are lacking in essential services, and therefore that logrolls involving these district are more likely to involve the extension of those services to poorer areas, but I am not aware of any empirical support for that claim.

Other surrogates for the relatively poor may also exercise political leverage to secure redistributive spending on their behalf. As noted above, welfare bureaucracies may lobby for enhanced budgets in order to serve their constituents.<sup>157</sup> But the evidence on whether these expenditures simply increase spending on the poor to efficient levels or cause more malign over-expenditures is mixed. One would expect that land values would decline in localities that spend either more or less than residents prefer. Consistent with that intuition, Lisa Barrow and Cecilia Elena Rouse find that addi-

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<sup>154</sup> See, e.g., VINCENT J. CANNATO, *THE UNGOVERNABLE CITY: JOHN LINDSAY AND HIS STRUGGLE TO SAVE NEW YORK* 136–38 (2001).

<sup>155</sup> Reza Baqir, *Districting and Government Overspending*, 110 J. POL. ECON. 1318 (2002).

<sup>156</sup> At least this appears to be the result to the extent that malign redistribution correlates with inefficient expenditures. Robert Inman concludes from earlier studies, which indicate that council-only local governments spend more than local governments with mayors who can constrain excess spending, that each extra dollar of council-only spending generates only 33 cents in net economic benefits. See Robert P. Inman, *Financing Cities* 26–27 (Nat’l Bureau of Econ. Research, Working Paper No. 11203, 2005), available at <http://www.nber.org/papers/w11203>.

<sup>157</sup> See *infra* text accompanying notes 157–59; see also Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 625 & n.313 (1999).

tional expenditures on public school education are correlated with decreases in property values in large school districts, those without significant competition, and in areas in which residents are poor and less educated. Nevertheless, they find no evidence that unionized school districts are more likely to spend supraoptimally on education. Other studies, however, are less sanguine on this point. Andrew Haughwout and Robert Inman find that cities with strong unions have significantly depressed land values (by approximately 12%) relative to cities without such unions.<sup>158</sup> Caroline Hoxby finds that teachers' unions increase spending on education, but that those additional inputs are actually correlated with reduced productivity and a negative effect on student performance.<sup>159</sup> For current purposes, these studies demonstrate that surrogates may be able to obtain redistributive expenditures that benefit the poor, but that there is no systemic pattern from which courts could necessarily infer that such expenditures should be classified as either benign or malign.

2. *Salience and Opacity: On- and Off-Budget Expenditures.*—While we cannot presumptively equate redistribution to the wealthy with malign expenditures or redistribution to the poor with benign, the transparency or salience of the redistributive payment may provide a more robust explanatory tool. The intuition here, consistent with the literature on fiscal illusion,<sup>160</sup> is that legislators who implement a redistributive program from publicly interested motives expect that most subsidizers would acquiesce. Thus, legislators should tend to make the costs of the program transparent to signal fidelity to constituents' preferences. Conversely, local legislatures that deviate from constituents' interests will raise constituents' monitoring costs by obfuscating the expenditures.

There are a variety of ways in which transparency, or salience, may become manifest. No individual municipal resident is likely to monitor even a published budget, because the effect of any particular expenditure is too trivial to warrant examination, let alone active opposition. Budgets of

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<sup>158</sup> Andrew Haughwout & Robert P. Inman, *Should Suburbs Help Their Central City?*, in BROOKINGS-WHARTON PAPERS ON URBAN AFFAIRS, 2002, at 45, 60–62.

<sup>159</sup> Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, 11 Q.J. ECON. 671 (1996). An earlier study, Randall W. Eberts & Joe A. Stone, *Teacher Unions and the Productivity of Public Schools*, 40 INDUS. & LAB. REL. REV. 354 (1987), found that unionization increased student productivity for average students, but reduced it for significantly above- or below-average students. That study, however, did not consider any additional financial costs related to unionization. Thus, it is more difficult to estimate the optimality of expenditures under that study.

<sup>160</sup> See, e.g., Bruno Heyndels & Carine Smolders, *Fiscal Illusion at the Local Level: Empirical Evidence for the Flemish Municipalities*, 80 PUB. CHOICE 325 (1994); Geoffrey K. Turnbull, *The Over-spending and Flypaper Effects of Fiscal Illusion: Theory and Empirical Evidence*, 44 J. URB. ECON. 1 (1998).

large cities are likely to approach the impenetrable.<sup>161</sup> But some local actors, such as newspapers and political opponents of incumbents, have idiosyncratically high incentives to monitor officials, and thus may solve the collective action problem.<sup>162</sup> Moreover, funds paid out of a fixed municipal budget create a zero-sum game, so that competitors for public funds are likely to monitor expenditures generally in order to ensure that a sufficient balance remains for their own projects. When the local legislature makes an expenditure, it therefore has incentives to consider not only the costs and benefits of a proposal, but also the opportunity costs. The result is that direct expenditures might tend to coincide with constituents' interests. Common legal doctrines also increase the transparency of the municipal budget process. Statutory requirements of clarity and specificity in appropriations, and competitive bidding have the effect of reducing search costs for citizens who want to examine municipal expenditures to determine the beneficiaries of governmental largesse.<sup>163</sup>

Off-budget expenditures, on the other hand, are less susceptible to constituent scrutiny.<sup>164</sup> Think, for instance, of tax abatements to businesses that the municipality is attempting to attract. The benefits are conferred on a discrete subset of individuals who have incentives to lobby for their implementation and who constitute a sufficiently small group to facilitate organization for political gain. The costs of the programs are spread to all municipal residents through a reduction in municipal revenues. But unlike direct expenditures, these programs have no zero-sum quality to them; the grant of an abatement to one entity does not directly preclude the grant of another tax abatement to another entity. As a result, tax abatements create less incentive for any other resident to monitor or complain publicly, at least where the recipient does not have a local competitor who would be disadvantaged by the grant of the abatement. The result is that legislatures face few inducements to ensure that off-budget expenditures are cost-effective or would be approved by residents who had a benign motivation for redistribution. Redistributive legislation funded by off-budget expenditures, therefore, might systematically be presumed to reflect malign motives.

Nevertheless, there is reason to be cautious about equating on-budget expenditures with benign redistribution and off-budget expenditures with malign redistribution. Those equations rest precariously on the assumption

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<sup>161</sup> New York City's budget for the 2007 Fiscal Year runs 711 pages, with 3975 pages of supporting schedules. The capital budget runs an additional 546 pages. See The City of New York May 2006 Executive Budget, Fiscal Year 2007 Home Page, [http://home2.nyc.gov/html/omb/html/finplan05\\_06.html](http://home2.nyc.gov/html/omb/html/finplan05_06.html).

<sup>162</sup> Bob Ellickson, for instance, cites to articles in the *New Haven Register*, a newspaper in New Haven, Connecticut, that disclose continual grants to private organizations that purport to serve low-income residents. See Ellickson, *supra* note 153, at 396–97 n.8.

<sup>163</sup> See, e.g., *People ex rel. Korzen v. Brewster*, 304 N.E.2d 46 (Ill. App. Ct. 1973).

<sup>164</sup> See John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 *YALE L.J.* 259, 268–69 (2000).

that legislators balance the costs and benefits of on-budget expenditures but not of off-budget expenditures. As Daryl Levinson has suggested, local officials who appropriate the local budget are spending the public's money, not their own. There is little reason to believe that officials who spend the public's money have incentives to internalize the costs of their activities in the manner that residual owners decide how to invest the funds of their own firm.<sup>165</sup> The constraint of maintaining broad-based political support by operating an efficient budget can be offset by the desire to maintain political support of particular groups by allocating funds in a manner consistent with their more limited interests.

In addition, some on-budget expenditures may have malign redistributive effects that are difficult to distinguish from benign redistributive expenditures. Think, for instance, of public employment. In theory, municipal employers would hire those individuals who are most qualified for the particular positions. In practice, however, public positions may be filled, or even created, for redistributive purposes. Some of this redistribution may constitute "a disguised way of channeling resources from middle class voters to disadvantaged citizens when an explicit tax-transfer scheme would not find political support."<sup>166</sup> While redistribution through employment may be inefficient, insofar as unqualified employees do not perform at a level that warrants the wage they are paid, it may also be benign insofar as it circumvents opposition to more direct efforts at desirable redistribution.<sup>167</sup> Thus, Alesina, Baqir, and Easterly find that cities that suffer more income inequality utilize a greater amount of public employment, perhaps to reduce inequalities that would otherwise frustrate urban growth.<sup>168</sup> But inefficient employment may also be used to redistribute revenues to politically favored groups that are essential to the political success of the official who authorizes the expenditures.<sup>169</sup> These inefficient and arguably malign transfers can occur notwithstanding that they are part of a fully disclosed program, in large part because their inefficiency cannot readily be detected, even if the expenditure itself can be.

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<sup>165</sup> See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347–48 (2000).

<sup>166</sup> Alberto Alesina, Reza Baqir & William Easterly, *Redistributive Public Employment*, 48 J. URB. ECON. 219, 220 (2000).

<sup>167</sup> Recall that my definition of "benign" does not require that redistribution be efficient or supported by the majority of municipal voters.

<sup>168</sup> See Alesina, Baqir & Easterly, *supra* note 166; Edward L. Glaeser & Andrei Shleifer, *The Curley Effect: The Economics of Shaping the Electorate*, 21 J.L. ECON. & ORG. 1 (2005).

<sup>169</sup> See, e.g., Stephen Coate & Stephen Morris, *On the Form of Transfers to Special Interests*, 103 J. POL. ECON. 1210 (1995) (arguing that politicians may prefer inefficient redistribution with concealed costs in order to avoid detection where same redistribution could be more efficiently achieved, but only with more transparent subsidy); James A. Robinson & Thierry Verdier, *The Political Economy of Clientelism* (Center for Econ. Pol. Research, Discussion Paper No. 3205, 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=303185](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=303185).

The identity of off-budget expenditures and malign redistribution is similarly suspect. True, off-budget expenditures may be used to make municipal budgets more opaque. But off-budget expenditures may be perfectly appropriate financial tools for achieving local preferences where legal constraints preclude on-budget expenditures for reasons that are unrelated to efficiency. Tax abatements may encourage prospective employers to migrate to or remain in the locality. More direct appropriations might violate constitutional restrictions on municipal expenditures, even though those restrictions reflect neither an ability to make the associated payments nor the need to attract investment. As a result, subsidies structured in a manner that circumvents these constitutional restrictions may reflect the obsolescence of the latter more than a prophylactic against rent-seeking redistribution. Mandates imposed on private employers, such as living wage obligations, are necessarily “off-budget” in the sense that they do not directly implicate municipal expenditures, although those mandates effectively constitute subsidies to beneficiaries. As a result, any effort to identify the opaque with the malign, and thus to create any judicial presumption about such expenditures, is unlikely to be successful.

3. *Regulatory Mandates and Interest Group Size.*—Although conclusions about the malign or benign nature of local redistributive legislation cannot, as a general matter, be drawn from its salience or opacity, perhaps there are specific situations in which such an inference is appropriate. I noted above that living wage ordinances typically require private employers to subsidize the benefited group—that is, they are redistributions effected through regulation of private actors. In this sense, living wage ordinances mimic requirements that employers make “reasonable accommodations” under the Americans with Disabilities Act,<sup>170</sup> or that factories install pollution control equipment pursuant to environmental laws. Since the government does not make the redistributive payments, the legislature has neither the incentive to compare a proposal’s costs and benefits, nor the same fear of retribution from constituents who will blame lawmakers for higher taxes. Indeed, some residents may be willing to support mandates that impose the payment obligations on a discrete group, rather than on taxpayers generally, because it allows them to satisfy redistributive preferences without requiring any financial outlay on their part. Residents who do not employ low-wage workers, for instance, might be more supportive of a living wage ordinance that assured covered workers of higher pay, but imposed the payment obligation on a small subset of employers rather than on the public fisc. The risk of either raw majoritarianism or interest group capture, in short, is exacerbated where the off-budget expenditure has few implications for the vast majority.<sup>171</sup>

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<sup>170</sup> 42 U.S.C. §§ 12101–12112b (2000).

<sup>171</sup> See Jeffries, *supra* note 164, at 268; Julie A. Roin, *Reconceptualizing Unfunded Mandates and Other Regulations*, 93 NW. U. L. REV. 351, 353 n.6 (1999).

Justice Scalia seized on just these concerns to explain his conclusion that a rent control law effected a taking if it permitted a hearing officer to take into account “hardship to a tenant” when determining whether to approve a proposed rent increase.<sup>172</sup> For Scalia, redistribution through regulation allows interest groups to obtain benefits outside the scrutiny that taxpayers and perhaps applicants competing for the same funds would apply to explicit appropriations of tax dollars.<sup>173</sup> Saul Levmore had earlier made a similar point in a different context. In attempting to distinguish those state subsidies and preferences to domestic firms that violated the dormant commerce clause from those that did not, Levmore noted that courts tended to allow state interventions into the market that were directly funded by the state government, but to reject interventions that were contracted for privately, outside the scrutiny of the political process that characterized explicit appropriations.<sup>174</sup> Levmore suggested that a judicial preference for “conscious funding,” a concept echoed by Scalia’s “intelligent democratic process,”<sup>175</sup> provided an explanation for this phenomenon. A legislature that appropriates funds for a subsidy, Levmore suggested, presumably has balanced the costs that its action would impose on the treasury against anticipated benefits. But no such inference applies, Levmore implied, where the legislature has conferred a preference, such as a preference to hire in-state workers, the costs of which are borne by private parties.<sup>176</sup> Hence, one might presume that the opacity of redistribution through regulation reflects malign motives. Certainly, this opacity suggests a cautious re-

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<sup>172</sup> *Pennell v. San Jose*, 485 U.S. 1, 15–24 (1988) (Scalia, J., concurring in part and dissenting in part).

<sup>173</sup> *Id.* at 22–23 (Scalia, J., concurring in part and dissenting in part) (“The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved ‘off budget,’ with relative invisibility and thus relative immunity from normal democratic processes. San Jose might, for example, have accomplished something like the result here by simply raising the real estate tax upon rental properties and using the additional revenues thus acquired to pay part of the rents of ‘hardship’ tenants. It seems to me doubtful, however, whether the citizens of San Jose would allow funds in the municipal treasury, from wherever derived, to be distributed to a family of four with income as high as \$ 32,400 a year—the generous maximum necessary to qualify automatically as a ‘hardship’ tenant under the rental ordinance. The voters might well see other, more pressing, social priorities. And of course what \$ 32,400-a-year renters can acquire through spurious ‘regulation,’ other groups can acquire as well. Once the door is opened it is not unreasonable to expect price regulations requiring private businesses to give special discounts to senior citizens (no matter how affluent), or to students, the handicapped, or war veterans. Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.”); see also Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1651 (2001).

<sup>174</sup> Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 584 (1983); see also Gillette, *supra* note 31, at 473–74.

<sup>175</sup> *Pennell*, 485 U.S. at 23.

<sup>176</sup> *Id.*

action to those mandated expenditures that could, in theory at least, have been implemented through explicit subsidies. Justice Scalia, for instance, implied that he would not have had the same objection if the local legislature had offered the tenants hardship assistance funded from the city treasury.<sup>177</sup>

But here again, the issue of benign or malign legislation is more complicated. Put to the side Julie Roin's very plausible claims that administrative convenience, a sense of fairness, or the presence of compensating sources of accountability complicate the public choice arguments that Levmore and Scalia employ against regulatory redistribution.<sup>178</sup> The more problematic objection for Justice Scalia's analysis emerges from the very principles of collective action theory on which he relies. Scalia's concern about "relative invisibility and thus relative immunity" imputes a greater transparency to the process of taxation and spending than to the process of regulation. His claim is that the beneficiaries of redistribution effected through regulation will be able to obtain benefits without public scrutiny or the comparison of alternative expenditures that inheres in dividing a fixed budget. Expenditures from a fixed budget, after all, have a zero-sum quality that is absent from regulations, which can simply accumulate. Groups that seek redistributive transfers through the regulatory process, in Scalia's view, would likely face the collective opposition of the majority were they to seek benefits of equal value through a budgetary allocation.

Collective action theory cautions skepticism of Scalia's dichotomy between regulation and budget making. He assumes that constituents will ignore regulatory decisions that only impose costs on private parties (for instance, landlords of rent-controlled units), but will be sufficiently attentive to the opportunity costs of public funding decisions that they will scrutinize proposed redistributive programs funded from the local treasury.<sup>179</sup> But think about the structure of the local budgetary process that Scalia finds so democratically transparent. Redistribution through the municipal tax system involves the allocation of small per capita tax payments from large numbers of residents to a relatively few beneficiaries. The resulting characteristic of any redistributive program is that it will impose diffuse costs throughout the municipality and confer concentrated benefits. This is the standard situation in which collective action theory tells us the burdened majority has the least incentive to monitor expenditures. Since, for any net payer, the per capita payment from the treasury for the redistributive program is likely to be trumped by the costs of monitoring the program, and

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<sup>177</sup> *Id.* at 22–23.

<sup>178</sup> These claims have been forcefully made in the context of unfunded mandates in Roin, *supra* note 171 (demonstrating that unfunded mandates may be superior to other forms of regulation).

<sup>179</sup> This is not to say that any process in which all are represented will necessarily pass muster. If all municipal residents (except landlords) approved the rent control ordinance, I take it that Justice Scalia could still object on the grounds that it constituted a raw majoritarian grab that violated any of a variety of legal constraints, ranging from state uniformity of taxation clauses to the Takings Clause.

since any net payer can provide the public good of monitoring, oversight of specific expenditures is likely to be undersupplied. Thus, it is unclear that Scalia's preferred process for conferring subsidies will, in practice, be any more democratic than the regulatory one he disdains.

Consider next the "spurious" benefits that Justice Scalia suggests can more readily be attained by groups that employ the regulatory process. If we focus solely on the beneficiaries, then Scalia's implicit contention that per capita benefits may be sufficient to justify individual participation in the regulatory process seems reasonable enough, though not necessarily more so than if the same beneficiaries pursued transfer payments from the public fisc. But once we look at those who bear the costs, matters change. Some regulation will impose costs on diffuse groups whose members cannot readily identify each other or who do not bear sufficient costs to justify collective opposition. Roin suggests, for instance, that minimum wage legislation (of which living wage ordinances are a variant) imposes costs on those who will not receive jobs they otherwise would obtain and on consumers who will pay more for goods or services.<sup>180</sup> Neither of these groups, however, is likely to be directly involved in the debate about the legislation.

Nonetheless, the fact that the regulation does not require interest group competition does not mean that interested groups will not object. The same wage regulation is likely to be at least initially applied to a discrete group—employers—so that the costs of the program, as well as the benefits, are borne by members of a discrete group.<sup>181</sup> Similarly, in the rent control case, a small number of residents may qualify as hardship tenants, but a small number of landlords will bear the burden of stabilizing the rents of the beneficiaries. As a result, those who bear the costs of the program also qualify as the small, privileged group that standard theory suggests is able to overcome obstacles to collective action. Thus, even if the population at large is unaffected by, and hence indifferent to the regulation, the costs will be highly salient to a group that has an intense interest in not bearing the redistributive burden for the entire locality. One might initially believe, therefore, that neither the beneficiaries nor the subsidizers of regulatory mandates will be able to dominate legislative debate. This sounds like the Madisonian Nirvana in which legislatures proffer publicly interested proposals after hearing from all interested parties rather than Scalia's prediction of minority tyranny.

But here, too, the issue is more complicated than first impressions suggest. Small group size may indeed facilitate communication among and collective opposition by those who bear regulatory costs. The willingness of decision makers to consider the interests of those who do monitor may

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<sup>180</sup> See Roin, *supra* note 171, at 357–58.

<sup>181</sup> *Id.* at 358. Employers may be able to pass some of the increased costs to consumers of their goods and services. But unless they can do so costlessly and with certainty, they will continue to bear some of the redistributive burden of regulation.

further depend on the capacity of those monitors to translate their interests into political capital. The relevant group to which the expenditure is salient may be too small to have significant political effect. For example, assume that the proposed subsidy is to be paid by a relatively small number of residents for whom the personal stakes of defeating the proposal are sufficiently great to offset the costs of marshalling opposition. Members of the burdened group have incentives to identify and oppose the proposal, to emphasize competing priorities, and to serve as surrogates for others adversely affected by the proposal, but who have neither the information nor the incentive to defend those interests. Under these circumstances, there is little reason to believe that decision makers will be left unaware of opportunity costs. But what happens at that point is uncertain. In some cases, those few residents who bear the immediate costs of a program will be able to represent others whose interests are otherwise too remote to warrant participation in the public debate. For instance, independent bookstore owners within a municipality may object to a development grant to attract a Borders or a Barnes & Noble to the area, as may booklovers who fear the demise of boutique, locally owned bookstores. While the latter may have insufficient concern to warrant vocal public opposition to the grant, they may take low-cost measures, such as joining a downtown rally or signing petitions where those activities are subsidized by the independents. In such a case, even the small group that bears the immediate burden of the expenditure may be able to command legislative attention.

At times, however, a group that suffers disproportionate costs from the regulation may have too few members or allies to translate their interests into political influence, notwithstanding their capacity to coalesce.<sup>182</sup> The local landlords whom Scalia suggests will be ignored in the decision to impose municipal rent control requirements may fall into this category, as they may lack sufficient numbers to generate political support and will have difficulty identifying allies, such as prospective tenants who might be willing to pay market rents and thus share landlords' concerns about artificially depressed rents that induce existing tenants to remain in stabilized apartments. Some living wage ordinances evince similar possibilities. In these cases, proponents may tailor the ordinances to affect only a small percentage of employers within the locality, perhaps to reduce the numbers, and political influence, of those who will bear the costs. For instance, the contested Hudson County, New Jersey ordinance required that higher wages be paid only to employees of contractors that supply food service workers, janitorial workers, and unarmed security guards to the County.<sup>183</sup> An amendment to the ordinance in Berkeley, California extended coverage to employers of a

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<sup>182</sup> See, e.g., RUSSELL HARDIN, COLLECTIVE ACTION 72-75 (1980).

<sup>183</sup> See *Visiting Homemaker Servs. v. Bd. of Chosen Freeholders*, 883 A.2d 1074, 1077 (N.J. Super. Ct. App. Div. 2005).

certain size or that are located in certain areas of the city.<sup>184</sup> The recent Chicago living wage ordinance applied only to retailers that occupy more than 90,000 square feet and make more than \$1 billion in annual gross revenue.<sup>185</sup>

It is perhaps this sympathy for the imposition of costs on a distinct minority that underlies much of the judicial invalidation of municipal programs that impose costs on groups that seem capable of organizing, but that arguably have insufficient membership to translate organization into influence. For instance, the common rejection of “impact fees” that require developers to pay the costs of municipal improvements that have only tangential relation to the developers’ projects implies a concern about the majority ganging up on developers, notwithstanding that few would describe real estate interests as suffering an incapacity to organize.<sup>186</sup>

One might object that those concentrated costs may be less problematic where benefits are similarly concentrated, since the size of the relevant groups would then suggest that they might have approximately equal political power. If few firms face the mandate of a living wage ordinance, then, by hypothesis, few employees will enjoy the benefits. Moreover, one might suggest, since the immediate beneficiaries will necessarily be low-wage workers, a group that traditionally has little political influence, those firms that bear the cost would presumably be able to hold their own in the political forum against a relatively equally sized group of advocates for increased wages. Thus, the fact that unorganized, low-wage workers are able to prevail over the expressed interests of organized firms may signal a benign local commitment to redistribution.

There are two difficulties with this rosy analysis, however. The first is that, organizational capacity aside, the fact that only a small subset of residents bears the redistributive costs belies, or at least renders more uncertain, the notion that the locality as a whole has some redistributive intent. It is one thing to infer some local willingness to redistribute where residents are willing to bear the relevant costs, but arguably quite another where those costs fall almost exclusively on a subset of residents. Thus, one might reasonably distinguish between ordinances that impose living wage requirements on public entities or those who do business with public entities, and those ordinances that only require high wage payments by a subset of private employers. In the case of public contracts, that higher wage presumably will be reflected in the cost the city incurs when dealing with its employees or contractors. As a result, individual residents will bear the full cost of the ordinance, and its imposition will be somewhat salient, since the

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<sup>184</sup> See *One Corp. v. City of Berkeley*, 371 F.3d 1137, 1145 (9th Cir. 2004).

<sup>185</sup> See Deanna Bellandi, *Chicago Council Passes ‘Living Wage’ Act*, WASHINGTONPOST.COM, July 27, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/27/AR2006072700197.html>.

<sup>186</sup> See e.g., *Idaho Bldg. Contractors Ass’n v. City of Coeur d’Alene*, 890 P.2d 326 (Idaho 1995); *New Jersey Builders Ass’n v. Mayor and Twp. Comm. of Bernards Twp.*, 528 A.2d 555 (N.J. 1987).

additional payments must come directly from the municipal budget. The local legislature presumably will internalize these costs of the mandate, at least to the extent that the local legislature ever internalizes the costs of direct expenditures.<sup>187</sup>

The imposition of the same obligation only on private employers, however, entails a cost that is not internalized by the local legislature or most of the public. As the number and location of firms who bear the cost narrow, the extent of internalization decreases. Thus, where, as in the case of Berkeley, the ordinance applies only to a limited geographical area within the city, inference of local largesse becomes more problematic. One might respond that the per capita cost that any resident incurs from a given city expenditure is so small that the distinction between costs imposed by the city on itself and costs imposed on private firms is irrelevant for purposes of inferring residents' intent. Perhaps, but it is not clear which way that argument cuts. If the per capita costs are so small as to discourage residents from contemplating the relative costs and benefits at all, then there is less reason to believe that the ordinance reflects broad-based commitment to any position.

The second problem with simply matching a small set of burdened residents against a small set of beneficiaries is that, while group size matters, it may be misleading. The relatively unorganized group that, of itself, may appear to have little political influence may enjoy the support of more dominant proxies. Here, again, living wage ordinances are instructive. Organized labor has been a proponent of and active participant in local campaigns for living wage ordinances, either out of altruism or in an effort to increase the ranks of union membership.

For instance, the Berkeley, California living wage ordinance contains an exemption from pay requirements for those employees who would otherwise be eligible, but who are subject to a collective bargaining agreement that explicitly waives the provisions of the ordinance.<sup>188</sup> It is, of course, plausible that the presence of such an exemption reflects a local policy to promote collective bargaining and ensure that labor has sufficient tools to negotiate effectively with firms.<sup>189</sup> But that is not the only plausible explanation for the exemption. The exemption provides unions with a powerful tool for reducing opposition to union organizing. An employer that enters a collective bargaining arrangement enjoys the prospect of paying employees less than would be mandated under the living wage ordinance, although more than the employer would be paying in the absence of a union agreement. The employer is therefore less likely to oppose the union-organizing efforts in its workplace. The prospective benefit to the union of increased membership encourages unions to support living wage ordinances, regard-

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<sup>187</sup> See *supra* note 170 and accompanying text.

<sup>188</sup> See BERKELEY MUN. CODE § 13.27.070(H) (2006).

<sup>189</sup> I thank David Barron for this suggestion.

less of whether employees would receive the mandated wage. The result, however, is that what initially looks like a contest between a small number of low-wage beneficiaries and relatively wealthy employers in which the latter may have an organizational edge might actually become one in which the employers are dominated by more numerous and highly organized proxies of the ordinance's immediate beneficiaries. Again, the presence of the dominant group does not guarantee a malign outcome. It does, however, complicate efforts to explain the redistributive outcome as an expression of majoritarian municipal preference.

4. *Externalized Costs.*—Local legislators may also avoid rigorous comparison of costs and benefits, and thus be more likely to enact malign legislation, where redistributive costs are imposed on nonresidents. The inability of nonresidents to influence local decisions that have significant external effects is frequently the basis of claims that such decisions should be made at more centralized levels of government.<sup>190</sup> For that same reason, the scope of local autonomy, even for home rule jurisdictions, is typically constrained to an area designated “municipal affairs.”<sup>191</sup> While the boundaries of that area are certainly ambiguous, the underlying concept that local decisions should not impose extraterritorial consequences seems to arise as much from a concern that local actors would otherwise externalize the costs of local benefits as from a concern for fairness or representation. That, at least, appears to be the motivation that underlies the justifiable critique of ordinances, such as exclusionary zoning, that externalize the social costs of poverty to less affluent areas.

The risk of externalized costs argues for judicial suspicion of municipal exactions that are likely to be disproportionately borne by nonresidents. Facially neutral local taxes on hotel rooms, parking garages, or theater tickets fall into this category. Some of the living wage ordinances arguably have similar implications. For instance, a proposed living wage ordinance in Santa Monica, California would have affected almost exclusively hotels and restaurants in an area populated by tourists.<sup>192</sup> Although the living wage ordinance was initially imposed on resident firms, one would imagine that those firms would have attempted to pass as much of the increased cost of doing business as possible on to nonresident patrons. Similarly, the living wage ordinance in Santa Fe, New Mexico excludes private employers

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<sup>190</sup> See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Gillette, *supra* note 119.

<sup>191</sup> See Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1 (1975).

<sup>192</sup> See Santa Monica City Council Meeting Ordinance 07-10-01, available at [http://santamonica.org/cityclerk/Election2002/text\\_Minwage.htm](http://santamonica.org/cityclerk/Election2002/text_Minwage.htm). The proposal was initially adopted by the City Council, but defeated in a November 2002 referendum.

with fewer than twenty-five employees.<sup>193</sup> In a city as dominated by tourism as Santa Fe, it is plausible that most of the firms subject to the ordinance would be hotels, restaurants, museums, and other businesses that cater to nonresident tourists.

There may, however, be legitimate reasons to impose exactions in the form of taxes or fees on nonresidents. The tourists and commuters on whom these exactions typically fall, after all, consume municipal services such as police and fire protection, but do not help defray their costs through the standard system of local property taxes. Thus, to the extent that the exactions reflect the pro rata costs of the municipal services that tourists and commuters consume, the fact that those costs disproportionately affect nonresidents does not appear to reflect an effort to exploit those without political voice.

But this argument for imposing exactions on nonresidents also defines the limit of their appropriate use. Exactions may be more suspicious where they exceed the value of the services that the city makes available to those who pay the exactions, since nonresidents are both unable to vote on the measures and unlikely to object, given the small individual amounts of the exactions to which they are subject.<sup>194</sup> One might contend that this limitation provides courts with a basis for intervening on a more objective basis. Courts arguably could review the costs of supplying municipal services to nonresidents and determine whether the exactions roughly approximate the per capita expenditure. But the literature on the issue of whether nonresidents contribute their fair share of municipal expenses suggests that a simple comparison of costs and payments is more elusive than the recommendation for judicial intervention implies.<sup>195</sup> Nonresidents and tourists, after all, contribute to the local economy both by making direct expenditures and by enabling the locality to support businesses that disproportionately serve nonresidents. If the local financial benefits of nonresident activity offset the additional costs of serving tourists and commuters, then the economic case for additional exactions collapses. In theory,

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<sup>193</sup> See *New Mexicans for Free Enter. v. City of Santa Fe*, 126 P.3d 1149, 1156 (N.M. Ct. App. 2005).

<sup>194</sup> See, e.g., *Ace Rent-A-Car, Inc. v. Indianapolis Airport Auth.*, 612 N.E.2d 1104 (Ind. Ct. App. 1993) (construing exaction on car rental revenues as a user fee, not a tax); *City of New York v. State*, 730 N.E.2d 920 (N.Y. 2000) (holding that tax on nonresident commuters was not a "fee" for services provided by the city); *Bold Corp. v. County of Lancaster*, 801 A.2d 469 (Pa. 2002) (holding that a hotel room rental tax was not invalid where benefits of tax were commensurate with burdens); *Cavanaugh v. Town of Narragansett*, No. WC 91-0496, 1997 R.I. Super. LEXIS 21 (R.I. Super. Ct. Oct. 10, 1997) (construing higher exaction required of nonresidents for beach access to be a fee, not a tax). The very existence of these cases, of course, reveals that sometimes nonresident litigants can be found who object. That same phenomenon suggests that nonresidents may be virtually represented by residents, such as restaurant owners and garage owners, whose business depends on attracting nonresidents.

<sup>195</sup> See, e.g., Howard Chernick & Olesya Tkacheva, *The Commuter Tax and the Fiscal Cost of Commuters in New York City*, 25 ST. TAX NOTES 451 (2002); R.S. Smith, *Are Nonresidents Contributing Their Share to Core City Revenues?*, 48 LAND ECON. 240 (1972).

the judiciary could assess the evidence on costs incurred by and benefits conferred on the locality as a result of nonresident activity. But given that the judiciary will likely have limited capacity to evaluate the available evidence—an enterprise that even bedevils trained economists who attempt to resolve the debate—it is doubtful that courts would be able to arrive at a reliable calculation about whether exactions were exploitative or simply recovered the costs of providing public services to nonresidents.

Judicial inquiry into exactions imposed on nonresidents might be less appropriate if there existed alternative constraints on municipal exploitation of outsiders. In theory, at least, the same market mechanisms that arguably neutralize inefficient municipal redistribution among residents should also hamper inefficient externalization of municipal costs. Residents whose livelihood depends on nonresidents who shop or work in the locality may serve as surrogates for those who are nominally disenfranchised. Resident restaurant or garage owners, for instance, may depend sufficiently on commuter or tourist patronage that they are able to represent the interests of nonresidents. In other cases, the incidence of the redistributive exaction is more complicated. As discussed above, the burden of some living wage ordinances initially falls on employers who depend on nonresident, tourist patronage. As long as these businesses believe that they cannot fully pass the higher wage costs on to nonresidents, they have incentives to oppose the redistributive program and thus to serve as surrogates for those who have no direct access to the decision making process. Where surrogates effectively represent the interests of the disenfranchised, nonresidency alone provides little reason for believing that local officials are acting exploitatively.

### III. THE LIMITS OF JUDICIAL INTERVENTION

Let us assume that there are cases in which courts could reliably conclude that local redistribution reflected malign motives. Presumably, judicial interventions could reduce the amount of interest group legislation that may induce the type of exit that threatens central cities. Are there still reasons why we would not want courts to take such motives into account when construing the permissibility of local redistribution?

In this part I examine three reasons for a cautious approach to judicial intervention, even where we are confident that courts can identify malign local redistributive programs. First, the argument about constraining interest groups at the local level is necessarily a comparative one. Recall that judicial intervention is likely to take the form of narrowly construing the state constitutional or statutory authority for localities to initiate such programs. When courts deny such authority, however, they do not conclude that the programs are beyond the competence of government. Rather, they conclude that local governments have not received the appropriate dispensation from the state to implement the challenged redistributive program. Groups that favor the invalidated programs can still seek approval at more

centralized levels of government. Thus, judicial invalidation of local redistributive programs makes sense only if those more centralized levels of government are less likely than local governments to engage in malign redistribution.

Second, I raise a question related to what I refer to as the problem of local justice.<sup>196</sup> Courts do a satisfactory job of addressing discrete disputes based on limited facts that can be presented in an adversarial proceeding. Courts are less competent to decide how the discrete issue before them in any given case fits into a more global analysis. For instance, even if courts can discern that interest group influence has skewed a particular redistributive program, they will be less successful in analyzing how government programs as a whole distribute wealth throughout the society. The implications for local redistribution are twofold. Redistributive programs come in many forms, some of which are susceptible to judicial review, and some of which are less so. If programs that are susceptible to review tend to favor one segment of society, while programs immune from judicial review tend to benefit another, then judicial invalidation of programs within the former group may distort the overall mix of redistribution in the society.

Third, judicial intervention has the potential to exacerbate the distorting effects of local redistributive programs. Courts can only address redistributive programs that are enacted and then challenged by opponents. Interest groups, however, may exercise influence both to enact programs that they support and to block programs that they oppose. In the latter case, where the result of interest group intervention is legislative inaction, there is nothing for a court to review. Hence, if one group is better able to block legislation than other groups and is equally capable of having legislation enacted, judicial invalidation of some programs may skew the total mix of redistribution. In the balance of this section, I consider these difficulties in greater depth.

#### *A. Local and State Susceptibility to Interest Group Politics*

I have suggested that, in theory, courts could interpret the scope of local autonomy narrowly to invalidate malign local redistributive programs. Invalidation, however, does not necessarily foreclose the malign redistribution. Rather, it induces those who favor local redistribution to seek explicit authority from the state for these programs. While state legislatures will still be unable to authorize programs that run afoul of state constitutional

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<sup>196</sup> See JON ELSTER, LOCAL JUSTICE: HOW INSTITUTIONS ALLOCATE SCARCE GOODS AND NECESSARY BURDENS (1992). For my purposes, local justice involves decisions about allocation of a particular resource at a highly decentralized level, without attention to how the decision in a particular case fits into a more centrally determined decision about allocation of multiple resources, any of which may be traded against another.

constraints, such as public purpose or special legislation restrictions,<sup>197</sup> explicit grants would at least remove obstacles to local redistribution predicated on the absence of local authority. Thus, judicial intervention in the name of a more socially desirable allocation of resources makes sense only if those more centralized levels of government are less likely than local governments to engage in malign redistribution.

There is some reason to believe that local governments are more susceptible than more centralized entities to the entreaties of interest groups. After all, the basic theory that I have suggested determines the capacity of dominant interest groups to influence decision makers—the absence of competing interest groups—stems from Madison’s argument for strong centralized governments in *The Federalist No. 10*.<sup>198</sup> That argument relies on the relative capacity of large polities to generate a multiplicity of interest groups. Indeed, since Madison was speaking of the choice between state governments and the federal government, one would think that if his point about the relationship between size and competing factions were true, then it would be all the more telling in the choice between local governments and states, given the relatively small populations of the former.

On the other hand, one-sided lobbying of the type that would generate malign redistribution might be more likely to occur at the state, rather than the local level.<sup>199</sup> State officials are likely to need more substantial contributions to mount election campaigns, so that fewer groups will be able to afford the rents that officials demand to provide government largesse. Transportation costs of organizing at the state capitol may be within the reach of a smaller number of groups. Groups that seek legislation face increased costs at the state level, due to a need to survive committee hearings and bicameral legislatures that do not exist at the local level.<sup>200</sup> These costs may reduce the number of groups that are able to coalesce at the state level; as a result, a group that can successfully organize is less likely to be met by effective opposition. Even those groups that seek to influence state decision makers may simultaneously have to lobby local decision makers to implement municipal programs that state officials authorize. The result is that smaller, less wealthy, and less organized latent groups may have greater access to the local than to centralized legislatures, but they are also more likely to be opposed at the local level by wealthier groups that can organize at multiple levels of government. If that is the case, then the state legisla-

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<sup>197</sup> Nevertheless, the constraints of public purpose requirements have loosened considerably in recent years. See, e.g., *Peacock v. Shinn*, 533 S.E.2d 842 (N.C. Ct. App. 2000) (upholding payment of “operating expenses” for professional basketball team playing at municipally funded arena); *WDW Props. v. City of Sumter*, 535 S.E.2d 631 (S.C. 2000) (upholding financing for retail and commercial development); *CLEAN v. State*, 928 P.2d 1054 (Wash. 1996) (upholding public financing of baseball stadium).

<sup>198</sup> THE FEDERALIST NO. 10, at 62–70 (James Madison) (Edward Bourne ed., 1937).

<sup>199</sup> See Gillette, *supra* note 46, at 996–97.

<sup>200</sup> See COOTER, *supra* note 98, at 185–88.

ture may be more inclined explicitly to authorize malign redistributive programs advocated by dominant, wealthier groups that are likely to have unopposed access at the state level.

There are, however, some countervailing reasons that suggest dominant factions that seek malign programs are more likely to prevail at the local level, while state legislatures would be more likely to be the focal point of interest group competition. For instance, party competition tends to be less effective at the local level, so that entrenched local officials may be more solicitous of narrow interests without triggering criticism from political opponents. Moreover, the availability of gubernatorial vetoes and bureaucratic implementation that can frustrate malign redistribution at the state level may have no local analogue.

It is therefore difficult to generalize about whether local or state legislatures are more susceptible to lobbying by dominant interest groups. Instead, different groups may have an organizational advantage at different levels of government. Some local political entrepreneurs, such as leaders of local ethnic communities on whom latent groups may free ride, may be repeat players and thus have significant influence at the local level, but have little constituency at the state level. Other political entrepreneurs, such as heads of corporations that play an important role in the state economy or organizations that have small numbers of members in each of multiple jurisdictions throughout the state, may be more effective at the state level than at the local level.

While this agnosticism may be appropriate for legislation generally, perhaps more can be said about explicitly redistributive legislation. If we assume that proposed redistribution will have the support of beneficiaries of the proposed program, then the characteristics of state and local decision making sketched above may mean that there is a difference in the forum most vulnerable to proposed redistribution in favor of the wealthy and the poor. Groups that favor redistribution to the relatively wealthy are more likely to be able to exercise influence at the state level because they have the resources to overcome structural impediments to effective lobbying (committees, bicameralism, co-extensive branches of government). Groups that assist the poor may have greater difficulty organizing and gaining access and influence at more centralized levels of government, simply because the combination of transportation costs and the multiple barriers to enactment require resources beyond their means. I noted above that the relatively poor may be sponsored by other groups, such as labor unions or church-based groups, whose interests coincided with those of the poor. Those groups may have sufficient funds to overcome the obstacles presented by more centralized governments. But because these groups, by definition, represent a broader constituency, it is less clear that they would deploy these resources to support efforts for which their members are only indirect beneficiaries. Moreover, while these groups may be willing to invest some resources in programs that will assist the poor at the local level

(especially if the union members are themselves highly localized), they may be reluctant to use the significant capital necessary at the state level to support the same effort.

The somewhat perverse result is that judicial invalidation of local redistributive efforts to assist the poor is more likely to “stick” than invalidation of local redistributive efforts to assist the wealthy, since the latter will more readily be able to substitute state decision makers, who are not susceptible to the same grounds for invalidation, for local ones. States, for instance, may be more likely to override judicial invalidation of local subsidies for economic development than judicial invalidation of living wage ordinances.

### *B. Local Redistribution and Local Justice*

An additional reason for a cautious approach to judicial intervention in local redistributive programs stems from the institutional limitations on courts. At best, courts can allocate a good (e.g., a risk in a contract or torts case) by applying legal principles governing the case to the facts before them. But courts cannot easily decide how a legal principle at issue in one case fits into the overall allocation of goods in the society. Thus, we would be surprised to hear a court say, “Under the legal principles applicable to this case, the plaintiff has been negligently injured by the defendant and thus has a right to recover. Nevertheless, there are other situations in which persons in the position of defendant are injured by persons in the position of plaintiff and do not have the opportunity to recover. Thus, to balance the parties, we have decided not to make any award to plaintiff.”

In this sense, courts can do local justice, but have little capacity to do global justice. The consequence is that judicial intervention may exacerbate rather than cure broader societal misallocations. As applied to the case of local redistribution, the institutional constraints on courts affect the desirability of judicial intervention in at least two ways. First, courts may not comprehend the manner in which individual decisions implicate the mix of redistributive programs in an implicit bargain among different groups. Second, courts will only review redistributive programs that are enacted. They will be unable to review proposed programs that are not enacted. If those that are enacted systematically favor one group while those that are defeated systematically favor another group, then the availability of judicial review may skew the balance of distribution in the society at large.

*1. Judicial Review and the Redistributive Mix.*—Local redistributive programs constitute parts of a much larger redistributive puzzle. When seen from a broader perspective, that puzzle may satisfy overall social preferences for redistribution, even though individual pieces are inconsistent with those preferences. Imagine, for instance, a community that consists of the very wealthy and the very poor, the local budget of which includes redistributive allocations in the form of subsidies for a local opera that is fre-

quented primarily by the rich, support for a municipal golf course also frequented primarily by the rich, subsidy of a municipal homeless shelter, and grants to small businesses in low-income areas. This combination may represent an implicit bargain within the community about how to spend redistributive dollars in order to ensure that different groups (here, the rich and the poor) receive pro rata shares of the budget.<sup>201</sup> Now assume that a court invalidates municipal funding of a golf course on the grounds that the proposed expenditure fails to serve a “public purpose.”<sup>202</sup> The consequence may be to overturn the compromise among municipal residents about proper expenditures from the municipal budget. If golf course financing was included in order to create a majority coalition in favor of the small business grants, for instance, then invalidation of the former threatens the willingness of constituents to fund the latter.

This is not to say that legitimate redistributive funding for the poor should be held hostage to illegitimate funding for the wealthy or that courts should ignore explicit violations of municipal authority in order to uphold redistributive programs that may be part of an implicit local bargain. Rather, it is to say that municipal budgetary decisions necessarily reflect tradeoffs between competing interests. Our willingness to allow courts to examine these processes emanates from a concern about legislative disregard for constituents’ interests. But the complexity of budgetary compromises frustrates efforts to determine whether a particular program does, in fact, reflect constituent preferences. Courts may correctly perceive a single expenditure to be contrary to the interests of a majority of constituents, but fail to perceive how multiple minority coalitions could have created a global mix of redistributive expenditures that attracted majority support.

The risk of upsetting the global mix is exacerbated if some of the redistributive expenditures are susceptible to judicial review, while others are not. The redistributive elements of a progressive local income tax, for instance, may not be subject to judicial review, while explicit local expenditures or tax expenditures may be. Progressivity will favor the poor, while an explicit application of tax-exempt financing, such as to obtain funds to landscape a private housing development, may favor the wealthy.<sup>203</sup> In this example, even if the same level of malign legislation and the same standards of judicial review exist with respect to all redistributive programs (those that benefit the wealthy and those that benefit the poor), judicial in-

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<sup>201</sup> I ignore for purposes of this example the difficult issue of what it would mean for the rich and the poor to receive “pro rata” shares of the budget. That is, should the budget be allocated according to tax revenues paid (so that the wealthy receive a greater than per capita share of municipal services) or should the budget be allocated according to need (so that the poor receive a greater than per capita share of municipal services). I assume only that the parties have agreed on the allocation that exists.

<sup>202</sup> *See, e.g., City of East Orange v. Bd. of Water Comm’rs*, 191 A.2d 749, 752–56 (N.J. Super. Ct. App. Div. 1963) (invalidating municipal lease of 151 acres for golf course where rent was nominal and city agreed to pay first \$1500 of property taxes).

<sup>203</sup> *N. Palm Beach County Water Control Dist. v. State*, 604 So. 2d 440 (Fla. 1992).

tervention will systematically affect the net effects of redistribution on local residents, because some forms of redistribution will not be reviewed, while others are. If programs that are reviewable systematically benefit a different group than those that are not, again the mix will be affected. More perverse results would obtain if, contrary to my example, the set of programs susceptible to judicial review, and hence to invalidation, tends to benefit the poor, while the second set, which escapes judicial review and potential invalidation, tends to benefit the wealthy.

2. *Balancing Malign Motives in Enacted and Defeated Programs.*—

The potential objection that I have raised to local redistribution arises from defects in the political process. That objection suggests that local interest groups may be able to lobby for enactment of programs that would not be enacted by local officials whose actions coincided perfectly with the interests of their constituents. Those same defects in the political process, however, may also *forestall* enactment of programs that would serve the local public interest. Assume, for instance, that a prospective employer is considering locating in Locality A and that it will create 500 badly needed jobs for low-income workers there. Locality A is considering a cost-effective tax abatement to attract the prospective employer. Locality A is already the home of Firm X, which would have to compete for workers and customers if the prospective employer locates in the municipality. Firm X, therefore, lobbies against enactment of the proposed tax abatement and is joined by other local residents who do not want to pay additional redistributive taxes. Even if the tax abatement—hypothetically necessary to attract the prospective employer—would return net benefits to the locality, the proposal may be defeated because those who would benefit (prospective employees who cannot easily identify each other and residents who would each receive a small individual benefit, albeit one that is large in the aggregate) cannot readily organize to lobby for enactment. Opponents (such as Firm X) can more readily organize since they can identify each other and, as current taxpayers and likely repeat players within the municipality, already have significant access to the local legislature. If the efficient abatement is not enacted, the interest of the public has been no less ignored than in the case where a locality enacts a program to satisfy a private interest. But the failure of the locality to enact the legislation means that there is no action for a court to review.

My example is crafted to involve a situation in which the locality fails to enact legislation that would redistribute wealth to the wealthy, a prospective employer, even though that redistribution would, by hypothesis, benefit the locality as a whole. But my intuition is that when special interests defeat proposed local redistribution, they are more likely to do so with respect to programs that directly benefit the poor. The reason for the intuition should be familiar by now. Prospective wealthy employers have access to the decision-making process and, by virtue of repeat play within the local-

ity, are likely to have the capacity to organize effectively to obtain the benefits of redistributive programs. We might be less confident of that result with respect to proposed redistribution that would benefit the poor. While I have suggested that there may be surrogates who offset the relative inability of the poor to organize, those surrogates are likely to be most willing to intercede in support of programs that they have proposed and that also fit within the overall agenda of the surrogate group, such as in the case of union support for the living wage ordinances.

The result is that interest group intervention that *defeats* desirable redistribution, the consequences of which are not reviewable, may be more likely in the case of proposals to assist the poor than those to assist the wealthy. The effect of judicial review and invalidation of enacted malign local redistributive programs could be to skew significantly the mix of redistribution within a locality. Redistribution for the wealthy will be more readily implemented than redistribution for the poor. Unless there is also a reason to believe that redistribution for the wealthy will be less commonly enacted in the first instance or more frequently judicially invalidated than redistribution for the poor, the sum of redistributive programs that ultimately are implemented (that is, that are enacted and that avoid judicial invalidation) will, perversely, be skewed in favor of those that assist the wealthy and against those that favor the poor. Benign programs that benefit the poor will be frustrated at the enactment level, while those that benefit the wealthy will not. Malign programs that benefit each group will be frustrated at the judicial review stage.

One possible implication of this argument is that courts should be reluctant to invalidate even malign local redistributive legislation that assists the poor in order to maintain a balance with local redistributive programs that assist the wealthy. If, as I have suggested, there are justifications for local redistribution in the first instance, then that objective may be better attained by allowing offsetting deviations from the public interest (that is, by judicial refusal to interfere with local decisions) than by invalidating all cases of malign redistribution apparent to the court. Otherwise, judicial invalidation would leave intact a distribution of local resources that failed to satisfy the locality's overall interest in redistribution. In short, the "wrong" of failure to enact benign redistributive programs as a result of interest group opposition could be offset by the "wrong" of judicial refusal to invalidate malign programs that assist the poor.

But even if this "two wrongs make a right" conception is defensible in theory, it is less clear that courts are able to analyze how their decisions in particular cases affect the net redistribution within the locality. If courts cannot analyze how their decisions would affect this global redistribution, perhaps it would be better for them to address individual cases without regard to global consequences.<sup>204</sup> Even skepticism about judicial competence

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<sup>204</sup> See ELSTER, *supra* note 196, at 189–90.

to measure global justice, however, does not allay the concern about the consequences of judicial intervention in local redistribution. Courts cannot avoid affecting the net amount of malign redistribution. Whatever courts do, whether it is to uphold or to invalidate admittedly malign redistributive programs, will inevitably leave intact some maldistribution. If the “two wrongs” argument is accepted, courts may minimize global discrepancies, but will preserve inappropriate distributions in individual cases. If courts invalidate malign programs, they may minimize maldistribution in particular programs, but only at the expense of global distributive justice within the locality. In the absence of a way of comparing the benefits of these outcomes, I ultimately remain agnostic on the best judicial strategy.

#### IV. CONCLUSION

The current campaign for living wages in municipalities represents only the most recent example of broadly supported local redistributive efforts. But the efforts of that campaign also exemplify the puzzle that surrounds local redistribution. The conventional wisdom that local redistributive programs will encourage exit to localities that impose only benefit-based taxes, I have suggested, ignores the spatial benefits of redistribution that may make local programs efficient and effective. The agglomeration economies and situational monopolies that make these programs plausible, however, simultaneously permit localities to exploit residents by enacting malign redistributive programs that are intended primarily to benefit favored interests rather than local residents generally.

Ideally, courts would be able to determine whether legislation is so tainted with private interests as to render it invalid and to employ that determination in defining the ambiguous legal authority of localities to enact such programs. State constitutional provisions that appear to be motivated by concerns about dominant interest groups may authorize such judicial interventions. But it is less clear that, as a practical matter, courts have the competence to reverse engineer the legislative process. Even potential proxies for interest group domination prove, on examination, to be more complex than might initially appear, and thus are less reliable guides for courts to use in deciding whether local redistributive efforts are sufficiently reflective of resident preferences.

This is a complex story. But it is worth understanding the sources of this complexity, since they reveal something about the proper role of a variety of actors in implementing government’s redistributive role. The proper functions of localities, courts, and even private interest groups are implicated in the lessons that emerge from living wage ordinances and similar redistributive programs. The inherent difficulty of distinguishing between malign and benign redistribution makes it difficult to emerge from this analysis without some level of agnosticism or frustration. Most local redistributive programs, such as living wage ordinances, are not easily classified

as either expressions of municipal largesse or as the result of interest group dominance. Neither the imperfect market for residence nor a less than omniscient judiciary is capable of perfectly sorting malign from benign redistributive programs. The possibility that state courts have some doctrinal basis for unraveling at least the most pathological cases of rent-seeking provides some comfort for those who wish to provide protections for the political process, until one recognizes that even those cases defy identification.

Concerns about the effects of judicial intervention may lead one to a more restrictive view about invalidating local redistributive programs. If I am correct that institutional constraints prevent courts from considering the global effects of invalidation, however, then selective intervention may actually increase the amount of malign legislation by moving decision making about local activity to a forum (the state) more susceptible to capture by dominant interest groups, or may perversely alter the mix of benign and malign legislation in ways that disfavor local redistribution to the poor in favor of local redistribution to the rich. Ultimately, perhaps even a desire to provide some safeguard against distortions of the political process must yield to the possibility that cures by constrained institutions could only exacerbate the disease.