

Fordham Urban Law Journal

Volume 40

Number 5 Symposium - "What is Urban Law Today?": A Symposium on the Field's Past, Present, and Future in Honor of the Urban Law Journal's Fortieth Anniversary

Article 11


March 2016

Local Government Law's "Law and _____" Problem

David Schleicher

George Mason University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Law and Economics Commons](#), [Law and Philosophy Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

David Schleicher, *Local Government Law's "Law and _____" Problem*, 40 Fordham Urb. L.J. 1951 (2013).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol40/iss5/11>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

LOCAL GOVERNMENT LAW'S “LAW AND ___” PROBLEM

Essay

*David Schleicher**

Introduction	1951
I. Local Government Law and Urban Economics	1955
II. Local Government Law and Positive Political Science	1965
III. Local Government Law’s “Law And ___” Problem More Generally: Local Government Law, Social Science and Legal Scholarship	1969

INTRODUCTION

Local government law scholarship has a “law and ___” problem. It should be relatively uncontroversial to note that, over the last forty years, most fields of legal scholarship have been profoundly transformed by the incorporation of the tools and analytical methods used in economics, political science, and other social scientific disciplines. Local government law has not been immune. It is not hard to find in local government law scholarship discussions of concepts drawn from economics and political science, as well as from a host of other disciplines. What is notable, and what I will show in this Essay, is that these references are, for the most part, extremely dated.

Specifically, I will argue that local government law has not kept up with the intellectual movements that have defined the last twenty or so years in the study of cities or politics. I will focus on the two areas of social science that have been among the most important influences on legal scholarship generally: economics and positive political science. But as I will discuss in the conclusion, the same point could be made with respect to other social scientific disciplines. Our field

* Associate Professor, George Mason University School of Law.

has had many successes, but it is being held back by a failure to keep up with contemporary social science.

The Essay is divided into three parts. Part I addresses local government law's interaction with economics. In local government law scholarship that deals with economic issues, there is frequent discussion of the work of Charles Tiebout, who showed in the 1950s that under certain assumptions, if local governments provide purely local public services and individuals are mobile and able to choose among local governments in an area, local public services will be provided at an efficient level.¹ But, although there have been many advances in the use of the Tiebout model through the years, and useful criticisms of it,² it is far from the only economic model relevant to cities or local government law. But until very recently at least, scholars failed to notice a revolution in urban economics, specifically research on agglomeration economics.³

Agglomeration economics focuses on why cities exist in the first place, given the higher rents for property in urban areas.⁴ Scholars working in this field argue that urban residents pay higher rents, but receive gains from reduced shipping costs, increased market size, and information spillovers.⁵ Changes in the form of these gains can explain major changes in urban form, or the gains from public policies. Agglomeration economics has become the dominant tool for understanding the effect of changes in land use and other local policies.⁶ But while other fields incorporated the newest things in

1. See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956); see also Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 503 (1997) ("The dominant law and economics model of local government, based on the work of Charles M. Tiebout, assumes that decentralization of power to local governments promotes the efficient delivery of public goods and services."); David Schleicher, *The City as a Law and Economic Subject*, 2010 ILL. L. REV. 1507, 1508 (2010) ("The study of the relationship between local government law and economics has long had one central text: Charles Tiebout's famous 1956 article, *A Pure Theory of Local Expenditures*.").

2. See *infra* notes 14–20 and accompanying text.

3. See *infra* notes 32–64 and accompanying text for a discussion of research in agglomeration economics and the limited degree it has been incorporated into legal scholarship.

4. For a literature review of contemporary work in agglomeration economics, see Schleicher, *supra* note 1, at 1515–29.

5. See Edward L. Glaeser & David C. Mare, *Cities and Skills*, 19 J. LAB. ECON. 316, 316–19 (2001); Schleicher, *supra* note 1, at 1522–23.

6. See EDWARD L. GLAESER, *CITIES, AGGLOMERATION AND SPATIAL EQUILIBRIUM* 1–12 (2010) (discussing agglomeration economics and spatial equilibrium as key insights of economics for studying cities).

2013]

“LAW AND ___” PROBLEM

1953

economic research—from antitrust’s embrace of industrial organization theory to behavioral economics’ influence throughout the legal academy⁷—advances in urban economics have largely been absent from local government scholarship.

Part II discusses local government law’s interaction with political science and finds similar problems to the ones discussed in Part I. One can find discussion in local government law scholarship of work in political science on growth machines, “city limits,” regime theory, and pluralism, some of the dominant methodologies in urban politics studies since the middle of the last century.⁸ But there is almost no discussion of positive political theory, rational choice models of legislative behavior, models of political party organization and competition, empirical research on voting and legislative behavior, or any of the other moves that have characterized the last few decades of political science.⁹ Here the problem is not only in legal scholarship, but also in the urban politics sub-discipline of political science, which one scholar has called a “black hole” for its own refusal to use contemporary methodologies.¹⁰

But problems in urban politics research should not stand in the way of local government law scholars using the tools of modern political

7. See Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School’s Influence on Antitrust*, 5 COMPETITION POL’Y INT’L 1, 1–5 (2009) (discussing influence of Chicago and Post-Chicago Schools of industrial organization economics on antitrust law and scholarship); Joshua D. Wright & Douglas H. Ginsberg, *Behavioral Law and Economics: Its Origins, Fatal Flaws and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1036–66 (2012) (discussing the rise of behavioral economics and the related rise of behavioral law and economics).

8. The classic citations for each of these theories are ROBERT DAHL, WHO GOVERNS? 329–43 (1961) (explaining New Haven politics as a relatively open forum in which competing interests on different issues collectively make policy); JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 262 (1987) (developing the theory of “growth machine” cities); PAUL PETERSON, CITY LIMITS 31–65, 150–66 (1981) (arguing that the threat of residents leaving in the face of efforts to redistribute wealth limits the policy options and shapes the politics inside cities); CLARENCE N. STONE, REGIME POLITICS: GOVERNING ATLANTA 1946–88 (1989) (explaining Atlanta politics as the product of a “regime” of downtown business elites that incorporated black leaders into their public and private sector governing apparatus).

9. See *infra* note 67 and accompanying text for a discussion of the dominance of formal modeling and empirical work in modern political science (and reaction to it among some political scientists).

10. See Joshua Sapochine et al., *Is Urban Politics a Black Hole? Analyzing the Boundary Between Political Science and Urban Politics*, 43 URB. AFF. REV. 76 (2007) (arguing that methodologies commonly used throughout the rest of political science have not been employed in urban politics research and that the methods and findings of urban politics scholars have not had much influence with other political scientists).

science. While local government law scholars have focused substantially on questions of the power of exit by residents and the benefits of different forms of institutional design—both of voting systems and governmental form—Part II will argue that there has been too little focus on studying the incentives of local officials or strategic interaction between such officials inside existing governmental structures. Similarly, when discussing whether power should be allocated to local or state legislatures, or how regional governments should be structured (if at all), local government law scholars have largely ignored research on how local officials get elected and how local party systems work. Also, very little empirical work has been done on how local political systems or legislatures operate. Again, this is in contrast to other fields of legal scholarship, like statutory interpretation, administrative law, and constitutional law, which have all substantially incorporated and influenced work in contemporary political science.¹¹

Part III will expand the scope of the discussion to other social sciences. Research into cities is booming in a whole variety of fields, particularly in economics, but also in fields ranging from criminology to the “science of cities.”¹² But with a few exceptions, local government law scholars have not used these findings or methodological approaches. Our failure to incorporate the best work by other types of scholars has been harmful to the field. Ignoring contemporary trends in the social sciences has left the field on the

11. Particularly in the areas of statutory interpretation and administrative law, it is hard to understate the influence these approaches have had on legal scholarship. For discussions and examples of the influence of positive political theory on statutory interpretation, see Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 461 (1992); McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1431-32 (2003). For discussions and examples of the use of positive political theory in administrative law, see McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1 (1994); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983). In constitutional law, see Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 662 (2011); Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting and Constitutional Design*, 123 HARV. L. REV. 617 (2010).

12. See *infra* notes 66–88 and accompanying text.

2013]

“LAW AND ___” PROBLEM

1955

margin of mainstream legal academic thought, even though many important contemporary legal debates have a substantial local government law component.¹³

But more importantly, our failure to integrate modern work in the social sciences into local government law has been bad for public and scholarly debate about cities and local governance. As local government law scholars, we have a great deal to add to these debates, as work by social scientists frequently fails to acknowledge or deal adequately with the institutions and legal processes through which public policy in cities is made. But we will only be able to add to these debates if we understand them. The first step to making our field more analytically interesting and practically useful is admitting we have a problem. A “law and ___” problem.

I. LOCAL GOVERNMENT LAW AND URBAN ECONOMICS

At a conference full of local government law scholars, one need not spend too much time explaining the Tiebout Model. Tiebout argued that, under certain assumptions, local policy outputs will be provided at the efficient level: that is, the amount and kind of local public services and taxes would match residents’ preferences.¹⁴ Individuals will choose where to live among many local governments in a region based on their local policies, and this sorting process will result in a

13. For instance, there is extensive literature discussing the huge prison population in the United States. Despite the fact that crime is investigated and deterred by local officials (police officers) and largely prosecuted by local officials (district attorneys), most discussions of mass incarcerations have until very recently ignored any discussion of the types of questions that animate local government law, like whether local officials have the right incentives, whether there are externalities to local governmental behavior or the effects of putting the onus of taxation on local communities. See, e.g., W. David Ball, *Tough on Crime (On the State’s Dime): How Violent Crime Does Not Drive California Counties’ Incarceration Rates—and Why It Should*, 28 GA. ST. U. L. REV. 987, 992–93 (2012) (finding that the fact that states pay for prison while county district attorneys prosecute crimes leads to excessive punishment in California, and noting that the literature has ignored counties’ contribution to over incarceration); John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1106–07 (2013) (reviewing ERNEST DRUCKER, A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA (2011)) (discussing how a leading study of incarceration does not even address in passing the role played by local officials in generating mass incarceration); see also *infra* notes 91–101 for a discussion of how criminal law scholars have begun to focus on problems in local government law as an explanation for changes in crime rates without local government law scholars discussing the issue frequently.

14. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–20 (1956).

good fit between policies and voter preferences.¹⁵ Bruce Hamilton and Wallace Oates fleshed out Tiebout's model, explaining and providing empirical support for the claim that the quality of public policies will be capitalized into property values, and showing how the model has no equilibrium if property taxes are used but there is no zoning (and thus providing a justification local zoning power).¹⁶ Bill Fischel provided the model with a "supply side," arguing that local homeowners are intensely worried about variation in the value of their home, and thus have an incentive to get involved in politics, to ensure that local governmental officials do not cause prices to fall by driving people out.¹⁷ Fischel thus made "voice" speak in the same language as exit, and provided a story why certain powers—property taxation, zoning and schools—were traditionally allocated to local governments.¹⁸

The Tiebout Model has been heavily incorporated into local government law, with scholars like Vicki Been, Lee Fennell, Chris Serkin and many others using Tieboutian arguments to understand the costs and benefits of land use policies, takings by cities, and other local governmental policies.¹⁹ The Tiebout Model has also been heavily criticized by a variety of scholars, including Gerry Frug, who object to its assumption that local government services can or should be understood as a consumption good, and a host of others for failing to consider limits on mobility, inter-local externalities or distributional effects.²⁰ In his opus *Our Localism*, Richard Briffault

15. *See id.*

16. *See William A. Fischel, Introduction to THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 1, 4–18 (William A. Fischel ed., 2006) (describing the development of the Tiebout model); Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975); Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: An Empirical Study of Tax Capitalization and The Tiebout Hypothesis*, 77 J. POL. ECON. 957 (1969).

17. *Fischel, supra* note 16, at 14–18.

18. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES* 8 (2001); Wallace E. Oates, *The Many Faces of the Tiebout Model*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 21, 32 (William A. Fischel ed., 2006).

19. *See* Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 521 (1991); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883 (2007).

20. *See* GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 167–73 (1999) (critiquing Tiebout for treating city services as being

2013]

“LAW AND ___” PROBLEM

1957

argued that Frug’s approach to cities, rooted in participatory political theory, and the Tiebout’s economic model provide two contrasting “tales of the city.”²¹ It is relatively clear that when legal scholars talk about the economic approach to local governments, they mean only one thing: the Tiebout Model.

But the Tiebout Model is not, and has never been, the only economic model about cities and local governments. Two stand out: “mono-centric” models of cities and agglomeration economics. When the field of local government law was consolidating in the 1970s and early 1980s, urban economics was in a period of relative stasis, focused on mono-centric models of cities that probably looked only weakly descriptive to the scholars of the time if they were cognizant of them. However, starting in the early 1990s, agglomeration models took off, powered by mathematical innovation and the existence of sufficient computing power to make them work.²² Associated with leading scholars like Edward Glaeser, Paul Krugman, Robert Lucas, and Paul Romer, this work exploded and turned out to be crucial to many modern models of international trade and economic growth.²³ Furthermore, it is extremely relevant to almost everything we as local government law scholars talk about. Until roughly 2007, however, there was little mention of it in the legal literature. Even though there have now been several articles exploring the importance of agglomeration to local government law, the dominant mode of urban economics for the last twenty or so years has only made a small dent in the field.

like a consumption good for residents); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1991–2015 (2000) (criticizing Tiebout for failing to consider distribution); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1834 (2003) (reviewing WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND USE POLICIES* (2001)) (criticizing the Tiebout model for failing to consider externalities).

21. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 426–27 (1990).

22. See MASAHISA FUJITA ET AL., *THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL TRADE* 1–10 (1999).

23. See Schleicher, *supra* note 1, at 1515–28 (summarizing the work in the field); see also Edward L. Glaeser, *Are Cities Dying?*, 12 J. ECON. PERSP. 139, 140 (1998); Edward L. Glaeser et al., *Growth in Cities*, 100 J. POL. ECON. 1126, 1127 (1992); Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 39 (1988); Paul M. Romer, *Increasing Returns and Long-Run Growth*, 94 J. POL. ECON. 1002, 1006 (1986).

In the 1970s, most urban economic work used models based on the pioneering work of nineteenth century German economist Johann Heinrich von Thünen.²⁴ Von Thünen's big insight was that, even without planning, cities would take an organized form due to competition among land users.²⁵ Von Thünen showed that, if each landowner decided what crops to plant based on the yield-per-acre of different crops and the cost of transporting those crops to a center-city market, concentric rings of different crops would emerge around the market.²⁶ Land close to the market will be more expensive because it is cheaper to send goods to market from that land, and hence it will be used for high-yield and expensive-to-ship crops.²⁷ Land uses should be less intense or productive as one gets further from a city center, and unplanned competition will lead to a minimization of the combined costs of transportation and production.²⁸ In the 1960s, scholars like William Alonso, Edward Mills, and Richard Muth adapted this model to modern city forms, suggesting that transportation costs drove where in cities people located—skyscrapers in city centers, surrounded by apartments, followed by dense suburbia, followed by exurbs and so on.²⁹ These “monocentric” models were the workhorses of urban economics of the time.

However, although they yielded some powerful insights about the relationship between methods of transportation and urban form, these models must have seemed rather creaky in the 1970s and 80s, when many of the classic pieces in local government law were written.³⁰ As cities adapted themselves to the fact that the car, which can travel in any direction, replaced walking or trains as the dominant

24. See J.H. VON THÜNEN, *THE ISOLATED STATE* 110–13 (Peter Hall ed., Carla M. Wartenberg trans., Pergamon Press 1966) (1826); see also FUJITA ET AL., *supra* note 22, at 15–17 (discussing the Von Thünen model).

25. THÜNEN, *supra* note 24, at 110–13.

26. *Id.*

27. See *id.*

28. FUJITA ET AL., *supra* note 22, at 15–17 (describing Von Thünen's findings).

29. See generally WILLIAM ALONSO, *LOCATION AND LAND USE* (1964); RICHARD MUTH, *CITIES AND HOUSING* (1969); Edwin S. Mills, *An Aggregative Model of Resource Allocation in a Metropolitan Area*, 57 *AM. ECON. REV.* 197 (1967).

30. See generally Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L. J.* 385, 429, 475–89 (1977); Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1059 (1980); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145 (1977–1978); see also Ellickson, *supra*, at 425 (discussing what was known about the positive externalities of density but acknowledges that knowledge at the time was “fragmentary”).

2013]

“LAW AND ___” PROBLEM

1959

method of transportation, the assumption of a single-central market to which all goods were sent became increasingly problematic. “Monocentric” models had difficulty explaining the changing fortunes of center cities during the period, and they could not easily deal with rapidly developing edge cities, tall office parks, and residential centers far from traditional downtowns.³¹

In the late 1980s and 90s, however, work on agglomeration economics took off. Building upon Alfred Marshall’s turn of the last century insights,³² it started with a more fundamental question: why do cities exist in the first place?³³ The existence of cities cannot simply be assumed, particularly because locating a business (or buying an apartment) is more expensive in cities than in rural areas.³⁴ For an economic model to explain why people and business would move to cities, it needs to explain the gains resulting from locating in urban areas that justify the higher costs. Marshall argued that there were three sources of gains from urban agglomeration: reducing shipping costs, the benefits of large markets, and information spillovers.³⁵ That is, people and businesses moved to make it easier to participate in common markets.³⁶ As Lucas later noted, “What can people be paying Manhattan or downtown Chicago rents for, if not for being near other people?”³⁷ Up until the late 1980s, Marshall’s insights had been extremely difficult for economists to model, largely because any story about why cities develop necessarily involves increasing returns to scale and non-linearity.³⁸ As economics became

31. See GLAESER, *supra* note 6, at 44–50.

32. See ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 267–77 (8th ed. 1920).

33. See GLAESER, *supra* note 6, at 1 (“The foremost question of urban economics is why cities exist.”); see also Schleicher, *supra* note 1, at 1516–28.

34. Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, 22 J. MONETARY ECON. 3, 38 (1988) (“If we postulate only the usual list of economic forces, cities should fly apart. The theory of production contains nothing to hold a city together. A city is simply a collection of factors of production—capital, people and land—and land is always far cheaper outside cities than inside. Why don’t capital and people move outside, combining themselves with cheaper land and thereby increasing profits.”).

35. See MARSHALL, *supra* note 32, at 267–77; see also Schleicher, *supra* note 1, at 1516–28.

36. GLAESER, *supra* note 6, at 6 (“[A] way to understand agglomeration economies is to go back to a fundamental definition of cities: the absence of physical space between people and firms. Cities are density, proximity, closeness.”).

37. Lucas, *supra* note 34, at 39 (emphasis omitted).

38. FUJITA ET AL., *supra* note 22, at 3–9; see PAUL KRUGMAN, *DEVELOPMENT, GEOGRAPHY, AND ECONOMIC THEORY* 1–3 (1995).

1960

FORDHAM URB. L.J.

[Vol. XL

more rigorously mathematical, agglomeration economies were largely ignored.

But in the late 1980s, new mathematical tools, such as Dixit-Stiglitz constant elasticity of substitution utility functions, and cheaper computing power made it easier to model agglomeration gains.³⁹ Paul Krugman, Anthony Venables, Masahisa Fujita and others focused on how shipping costs can drive regional development, showing that where shipping costs were real but not extremely high, producers of intermediate goods (such as auto parts) would cluster near final goods producers (such as auto manufacturers) to reduce shipping costs.⁴⁰ Regions with easily obtainable input parts would then get more final goods manufacturers. They found that city development is likely heavily path-dependent.⁴¹ A history of development that led to many input goods producers being in one region could lead to final good producers staying in that region (to be close to those firms) even if today's transportation costs would not lead to the same grouping of firms if location decisions were made entirely anew.⁴² But if transport costs continued to fall, city economies could destabilize in ways that cities would not recover from even if the fundamentals improved. This helps explain much of the history of twentieth-century urban areas, with manufacturing clustering in cities linked to the transportation network (ports or railroad hubs).⁴³ As shipping costs fell with innovations like the combustion engine and shipping container, the economies of cities that relied heavily on manufacturing, like Detroit and Cleveland, held on for a while and then quickly fell apart.⁴⁴ However, as it became cheaper to move goods around the country, shipping costs became relatively less important as an explanation of urban success and failure in recent years.⁴⁵

The other stories have become important for understanding why cities succeed. The existence of large labor markets provides residents with opportunities to specialize, easier matching with employers needing their skills, and insurance against the failure of

39. FUJITA ET AL., *supra* note 22, at 3.

40. *Id.* at 9–10, 61–77; Schleicher, *supra* note 1, at 1517–20.

41. Schleicher, *supra* note 1, at 1520.

42. *Id.* at 1518–20.

43. Edward L. Glaeser & Giacomo A.M. Ponzetto, *Did the Death of Distance Hurt Detroit and Help New York?*, in AGGLOMERATION ECONOMICS 303–05 (Edward L. Glaeser ed., 2010).

44. *Id.*

45. *Id.*

2013]

“LAW AND ___” PROBLEM

1961

their employers. An actor in Los Angeles can focus on being an expert in playing a narrow type of role because there are enough productions that feature that specialty, he can match with many different movie studios and theaters until one works well, and he will likely be able to find employment without having to move if his employer goes bankrupt.⁴⁶ On the other hand, an actor in Salt Lake City will not see the same gains from specialization, matching, and insurance against the failure of a single firm. The same dynamics explain why certain retailers cluster, from bars to diamond sellers.⁴⁷ It even helps explain why unmarried people find cities particularly attractive, as being in a deep dating market has the same specialization, matching and insurance benefits.⁴⁸

The final Marshallian category is perhaps the most important today: information spillovers. People learn from informal discussions with their neighbors, whether they are in the same industry or across industries. People participating in these informal discussions become more productive. Glaeser and David Maré, among others, have shown that urban location improves wage growth: people who move to cities develop skills and then see their wages grow.⁴⁹ The result is an “urban wage premium”—people in cities make much more money due to their developing skills, and as a result, can pay the higher rents.⁵⁰ Modern theories of endogenous economic growth often turn on human capital spillovers in cities.⁵¹ Information spillovers are particularly important in today’s knowledge-based economy. Technology companies pay top rents to be near other technology companies, be they in Silicon Valley in the Bay Area or Silicon Alley in New York.

46. Dan Rodriguez and I have used this example before. See Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 642–43 (2012).

47. *Id.* at 643.

48. *Id.*

49. See Edward L. Glaeser & David C. Maré, *Cities and Skills*, 19 J. LAB. ECON. 316, 316–19 (2001); Schleicher, *supra* note 1, at 1522. An excellent recent paper used random lotteries for H1-B visas to test the effect of geography on wages and suggests that there are large level effects from location. See Michael A. Clemens, *The Effect of International Migration on Productivity: Evidence from Randomized Allocation of U.S. Visas to Software Workers at an Indian Firm* 1, 10 (Ctr. for Global Dev., Working Paper, Dec. 3, 2012), available at www.aeaweb.org/aea/2013conference/program/retrieve.php?pdfid=459. Clemens found that workers in the same Indian firm that were sent to the U.S. instantly became more productive.

50. Glaeser & Maré, *supra* note 49, at 316.

51. That is, those that do not assume a level of technological growth, like the famed Solow model. See Schleicher, *supra* note 1, at 1523–25.

Agglomeration economics has become the dominant economic approach to thinking about cities, and has been for quite a long time. Until roughly five years ago, it was barely mentioned in local government law scholarship. In recent years, however, there have been a few papers that began exploring the importance of this work for local governments and its interaction with the Tiebout Model. For instance, Clay Gillette argued that, contrary to assumptions of scholars using the Tiebout Model, local governments do engage in substantial economic redistribution and that agglomeration economies are likely the reason they are able to do so without promoting exit by taxed residents.⁵² More generally, in my paper *The City as a Law and Economic Subject*, I showed that Tiebout sorting and agglomeration should have an inverse relationship.⁵³ Strong agglomeration economies can reduce the efficiency of sorting as they make location decisions stickier, and extensive sorting reduces the efficiency of agglomeration by changing the economically important decision of where people would locate absent laws that condition the receipt of a jurisdiction's services on living in it.⁵⁴ Work by Robert Inman, Andrew Haughwout, and Rich Schragger have fleshed out some other implications for local government law, from urban development to contracts between cities and suburbs.⁵⁵ Many of these scholars—including Peter Byrne, Steve Eagle, Rick Hills, Gideon Parchomovsky, Dan Rodriguez, Peter Seligman, and myself, have focused on the myriad implications of this literature for land use law.⁵⁶

52. See CLAYTON P. GILLETTE, LOCAL REDISTRIBUTION AND LOCAL DEMOCRACY: INTEREST GROUPS AND THE COURTS 74–105 (2011).

53. See Schleicher, *supra* note 1, at 1525–35.

54. *Id.*

55. See generally ANDREW F. HAUGHWOUT & ROBERT P. INMAN, HOW SHOULD SUBURBS HELP THEIR CENTRAL CITIES? (2004) (discussing economic interdependence of cities and suburbs as an argument for intercity contracts); David Schleicher, *I Would, but I Need the Eggs: Why Neither Exit nor Voice Substantially Limits Big City Corruption*, 42 LOY. U. CHI. L.J. 277, 281–84 (2011) (arguing strong agglomeration gains in cities reduce the threat of exit and thus can help explain big city political corruption); Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311 (2010) (arguing that local economic development policies are largely futile).

56. See Steven J. Eagle, *Public Use in the Dirigiste Tradition: Private and Public Benefit in an Era of Agglomeration*, 38 FORDHAM URB. L.J. 1023, 1070–74 (2011) (using agglomeration economics to discuss issues in government takings); Roderick M. Hills & David Schleicher, *The Steep Costs of Using Noncumulative Zoning To Preserve Land for Urban Manufacturing*, 77 U. CHI. L. REV. 249, 262–67 (2010) (discussing the effect of noncumulative zoning on agglomeration economies); Gideon Parchomovsky & Peter Siegelman, *Cities, Property and Positive Externalities*, 54 WM. & MARY L. REV. 211 (2012); Rodriguez & Schleicher, *supra* note 46, at 637.

2013]

“LAW AND ___” PROBLEM

1963

As land use regulates where people locate inside cities, it clearly affects how agglomeration economies develop.

However, this is still just the tip of the iceberg. Agglomeration economics is not part of most of the major casebooks in the field,⁵⁷ nor is it featured in much of the literature. There are dozens of local government law articles each year that invoke the Tiebout Model.⁵⁸ But, more than twenty years after agglomeration economics’ renaissance, there have been no more than a handful of papers discussing agglomeration economics.⁵⁹

It is particularly disappointing that agglomeration economics provides local government law scholars with a third “tale of the city.”⁶⁰ Although extremely different, Frug’s approach to understanding cities and the Tiebout Model—the two “views of the city” discussed by Briffault—start from a common methodological assumption that the creation of the local government or polity should be where analysis begins.⁶¹ That is, both take as the unit of analysis the local government (or system of local governments) and seek to determine its/their success in providing goods or serving as a place to engage in collective determination.⁶² Agglomeration economics starts in a very different position. Cities arise on their own for reasons unrelated to local governmental policies: people create market places, build houses near one another, etc., and do so regardless of local governmental form. Local governments can affect these location decisions, either through regulations or by providing (or failing to provide) attractive services or benefits. But people will move and build cities regardless, as there is a market for physical location. Local governments play a role much like administrative agencies do in other markets: they are regulators of the location market.

This third “tale of the city” does not displace Frug or Tiebout’s views of the city; it supplements them. Employing, engaging with, and critiquing agglomeration economics would have legal scholars ask an additional set of normative questions about how local government

57. One exception is LYNN A. BAKER & CLAYTON P. GILLETTE, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* 876 (3d ed. 2004), which includes a discussion of Haughwout and Inman’s work.

58. A rough and ready Lexis search that included the names of leading scholars in the field—Frug and Tiebout—came up with seventy-eight since 2007.

59. *See supra* notes 52–56 and accompanying text.

60. This argument was made in Schleicher, *supra* note 1, at 1545-55.

61. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *COLUM. L. REV.* 346, 391 (1990).

62. *Id.* at 391–92.

law should be judged, such as, “What market failures are there in the location market?” “Are local regulations correcting these market failures?” The harm that ignoring agglomeration economics has done to local government law scholarship is substantial. We have not focused enough on how local laws and systems of local government impact the distribution of residents across the country, the efficiency losses created by limiting entry through land use or simply by encouraging Tiebout sorting, or how changes in the sources of agglomeration gains over time have changed which types of cities succeed and which policies work.

The failure of local government law scholars to incorporate modern economic theory has also made policy discussions featuring agglomeration economics arguments worse. For instance, there have been many recent debates about the benefits of changing land use laws, following Glaeser’s brilliant work revealing the cost of zoning restriction in many metropolitan areas, and insightful books by journalists like Matt Yglesias and Ryan Avent.⁶³ But economic work on the subject has not fully engaged with the legal processes through which land use policy is made.⁶⁴ Enrico Morretti recently released an excellent and much discussed book using agglomeration economics to examine the changing labor market in the U.S., but it features little discussion of how labor law and local regulation affect the development of regional economies.⁶⁵ Legal scholars have much to add to these debates, but can only do so if they engage with it. We simply cannot go on imagining that the last word in the economic study of local governments and cities is the Tiebout Model.

63. For just a taste of Glaeser’s work on zoning, see generally Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265 (2008); Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restriction on Housing Affordability*, 9 FED. RES. BANK N.Y. ECON. POL’Y REV. 21 (2003); Edward L. Glaeser, Joseph Gyourko and Raven Saks, *Why Have Housing Prices Gone Up?* 4–9 (Nat’l Bureau of Econ. Research, Working Paper No. 11129, 2005); Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 331 (2005); Edward Glaeser & Joseph Gyourko, *Zoning’s Steep Price*, REGULATION, Fall 2002, at 24. For additional background, see generally RYAN AVENT, *THE GATED CITY* (e-book, Amazon Digital Servs. 2011); MATTHEW YGLESIAS, *THE RENT IS TOO DAMN HIGH* (e-book, Simon & Schuster 2012).

64. For an effort to do so, see David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013).

65. See generally ENRICO MORRETTI, *THE NEW GEOGRAPHY OF JOBS* (2012). In an interesting recent article, Naomi Schoenbaum explored some of the labor law implications of agglomeration economics. See Naomi Schoenbaum, *Mobility Measures*, 2012 BYU L. REV. 1169, 1231–35 (2012).

2013]

“LAW AND ___” PROBLEM

1965

II. LOCAL GOVERNMENT LAW AND POSITIVE POLITICAL SCIENCE

Just as one can find discussions of traditional economic models in local government law scholarship, one can find discussions of traditional positive political science as well. (I am discussing positive approaches, and notably not democratic theory, a subject that has been much mined in the local government law literature.) The leading approaches to studying city politics from twenty or thirty years ago—Robert Dahl’s work on pluralism, Paul Peterson’s Tiebout-style approach, Harvey Molotch’s scholarship claiming that cities are “growth machines,” and Clarence Stone’s work on “regime theory”—are probably familiar to most local government law scholars.⁶⁶

But there is not much local government law work, theoretical or empirical, discussing interest group formation, voting behavior, or positive political theory analyzing legislative or bureaucratic behavior inside local governments. Such moves are so dominant in political science that they spurred the well-known “Perestroika” movement to push back against the heavy use of rational choice models, statistical methods, and game theory.⁶⁷ But local government law has been—again with some exceptions—largely immune to this way of thinking.

One would think using tools that try to predict and explain how differing political arrangements will change the behavior of office holders would be natural in a field that focuses on the comparative capacity of different political institutions to solve policy problems.⁶⁸ Indeed, it is not as if these scholarly ideas have not made their way into law schools. The use of positive political theory, game theory, and structural models of legislatures that assume they consist of rationally-maximizing politicians has remade the fields of statutory interpretation and administrative law and has even made serious inroads into constitutional law theory.⁶⁹

66. See STONE, *supra* note 8.

67. See Catarina Kinnvall, *Not Here, Not Now!: The Absence of a European Perestroika Movement*, in PERESTROIKA!: THE RAUCOUS REBELLION IN POLITICAL SCIENCE 21 (Kristen Renwick Monroe ed., 2005) (describing the movement).

68. See BAKER & GILLETTE, *supra* note 57, at 1 (“The study of local government law, therefore, necessarily requires that we consider which level of government should exercise a particular power and which limits we want to place on any given level of government. A course in local government law, in short, is in large part a course in institutional competence and institutional design.”).

69. See sources cited *supra* note 11.

Some blame for this can be pointed at the field's closest sister discipline, the urban politics sub-field in political science. Unlike the rest of the field, urban politics has remained somewhat immune to rational choice scholarship and empirical methods. In a well-known piece, Joshua Sapatichne, Bryan Jones and Michelle Wolfe asked, *Is Urban Politics a Black Hole?* Their answer was yes.⁷⁰ They argued that political science scholarship about urban politics was neither influenced much by, nor had much influence in, mainstream political science.⁷¹ Urban politics is dominated by Stone's regime theory approach, a largely descriptive theory that suggests cities are governed by "regimes" of businesses and local government officials who work together to assemble the power to govern.⁷² As it is neither predictive nor easily generalizable, regime theory is not much used outside the subfield of urban politics.⁷³ Questions of interest in much of the rest of contemporary political science, ranging from the importance of agenda setting and game theoretic interactions between legislatures to empirical studies of voting behavior and influence and the like, have not much influenced urban politics scholarship.

Blame can also be pointed at scholars using public choice or rational choice models in political science and economics more generally for not paying much attention to local (and state) politics. Rick Hills wrote that public choice scholarship on federalism and localism "is voluminous in size but narrow in focus."⁷⁴ Public choice scholarship focuses almost entirely on mobility between jurisdictions, but little of it looks at "how political activity by voters or politicians in federal regimes differs from unitary states' politics. The literature, in other words, focuses on exit, not voice."⁷⁵ There is, of course,

70. *Id.*

71. Sapochine et al., *supra* note 10, at 76.

72. *Id.* at 81. "Regime analysis views power as fragmented and regimes as the collaborative arrangements through which local governments and private actors assemble the capacity to govern. The primary reason for the fragmentation of power is the division of labor between market and state." Karen Mossberger & Gerry Stoker, *The Evolution of Urban Regime Theory: The Challenge of Conceptualization*, 36 URB. AFF. REV. 810, 812 (2001).

73. Regime theory, as Karen Mossberger and Gerry Stoker note, is "more a concept or a model rather than a theory because it has limited ability to explain or predict variation in regime formation, maintenance, or change." Mossberger & Stoker, *supra* note 72, at 811.

74. Roderick M. Hills, Jr., *Federalism and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 207 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

75. *Id.*

2013]

“LAW AND ___” PROBLEM

1967

excellent rational choice and empirical work on how local and state politics differ from national politics, aside from the potential for exit. Some pieces that immediately come to mind include Elinor Ostrom’s Nobel Prize-winning scholarship on how local commons are governed, Susan Rose-Ackerman’s work on why laboratories of democracy are less innovative than one would think, Bill Fischel’s *Homevoter Hypothesis*, and Eric Oliver’s work on how jurisdiction’s size and demography affect political and civic behavior.⁷⁶ But as Hills notes, this is not the major focus of the literature.⁷⁷ Studies of voting behavior are not much better: most political scientists studying voter choice focus on national or at least state politics, although there have been a few neat recent papers looking at voter behavior in local elections.⁷⁸

The absence of modern methods in the urban politics subfield should be an opportunity for local government law scholars. There is much territory to cover, in discussing both the use and limits of these tools. Some truly exceptional scholarship has seized on this opportunity. Early in the field’s development, Frank Michelman famously compared public choice and public interest explanations for a variety of cases.⁷⁹ More recently, Lynn Baker, Clay Gillette, Rick Hills, and Dan Rodriguez have used public choice and positive political theory more generally to discuss issues as disparate as how local initiatives and referenda work,⁸⁰ the operation of Dillon’s Rule,⁸¹

76. See FISCHEL, *supra* note 18, at 6–14; ERIC OLIVER, DEMOCRACY IN SUBURBIA 29–32 (2001); ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980).

77. Hills, *supra* note 74, at 207.

78. Recently, there have been a few excellent studies of the determinants of local voting in Mayoral and other races in recent years. See, e.g., KAREN KAUFMANN, THE URBAN VOTER: GROUP CONFLICT AND MAYORAL VOTING BEHAVIOR IN AMERICAN CITIES (2004); R. Douglas Arnold & Nicholas Carnes, *Holding Mayors Accountable: New York’s Executives from Koch to Bloomberg*, 56 AM. J. POL. SCI. 949 (2012); Cheryl Boudreau et al., *Lost in Space?: Shortcuts and Spatial Voting in Low-Information Elections* (UC Davis Legal Stud. Research Paper Series, Research Paper No. 328, March 2013), available at <http://ssrn.com/abstract=2232371>.

79. See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 187 (1977).

80. See generally Clayton P. Gillette, *Plebiscites, Participation and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

81. See generally 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).

the dynamics of state and local and federal interactions,⁸² inter-local contracts,⁸³ and how courts should address local government efforts at redistribution.⁸⁴ I have used these tools to write about how election laws inhibit electoral competition at the state and local levels based on a model of party behavior,⁸⁵ and (with Rick Hills) how cycling preferences and distributive politics norms in local legislatures in the absence of parties can produce excessively restrictive land use policies.⁸⁶ Outside the narrow tribe of local government law scholars, Brian Galle and Joseph Leahy have usefully revisited Rose-Ackerman's work on local policy innovation,⁸⁷ and Gerald Gamm and Thad Kousser have done fascinating work on how competition in state legislatures explain variation in the number of district bills and special legislation.⁸⁸

As the last paragraph showed, public choice has been used to analyze behavior of groups inside cities, game theory to understand the interaction between cities, and positive political theory to understand the behavior of legislators, political parties, and voters inside cities. These tools do not hold the same place in the field of local government law as they do in other fields of public law, from statutory interpretation to administrative law, and their potential utility should be quite clear.

82. See generally Lynn A. Baker, *Direct Democracy and Discrimination*, 67 CHI.-KENT L. REV. 707 (1991); Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187 (2005).

83. See Clayton P. Gillette, *The Conditions of Interlocal Cooperation*, 21 J. L. & POL. 365, 367-69 (2005). See generally Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190 (2001).

84. See Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 NW. U.L. REV. 1057 (2007); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627 (2001); Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243 (2011).

85. See David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419-22 (2007).

86. See Schleicher, *supra* note 64, at 1672-76; see also Roderick J. Hills, Jr. & David Schleicher, *Balancing the "Zoning Budget"*, (George Mason Univ. Sch. of Law & Econ. Research Paper No. 11-18, 2011), available at <http://ssrn.com/abstract=1816368>.

87. See Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1347-60 (2009).

88. See Gerald Gamm & Thad Kousser, *Parties and Pork: Historical Evidence from the American States*, 22-26 (Am. Political Sci. Ass'n, Meeting Paper 2011), available at <http://ssrn.com/abstract=1900816> (finding that polarized parties bias statewide spending towards their constituents). See generally Gerald Gamm & Thad Kousser, *Broad Bills or Particularistic Policy? Historical Patterns in American State Legislatures*, 104 AM. POL. SCI. REV. 151 (2010).

2013]

“LAW AND ___” PROBLEM

1969

When we propose (or oppose) the creation of certain forms of regional governments, suggest power be shifted among actors inside cities, or discuss the power of certain groups inside existing local governments, we ought to note that there is extensive literature discussing when and under what conditions these changes will promote certain democratic advantages (and disadvantages) like party competition or distributive pork-barrel politics. Local government law is full of such proposals, and they would be far stronger and more convincing if they were grounded in clear assumptions about political behavior. In addition, they would be more easily understood by political scientists and policy-makers.

Again, as with its engagement with economics, the problem local government law faces is keeping up with the fast changing and often extremely technical nature of modern political science. But it is important that we do so. In order to understand how local politicians use or are limited by the formal powers of local governments, we need models for understanding their incentives and behavior. These models have proven extremely powerful when they have been used, allowing legal scholars to provide explanations regarding what legal impediments stand in the way of local governments working together on problems at the regional level,⁸⁹ or how land use procedures serve to limit the creation of affordable housing.⁹⁰ There is great potential for other applications of this type of research.

III. LOCAL GOVERNMENT LAW’S “LAW AND ___” PROBLEM MORE GENERALLY: LOCAL GOVERNMENT LAW, SOCIAL SCIENCE AND LEGAL SCHOLARSHIP

The previous two sections discussed how local government law scholarship has not kept up with new work in economics and political science. The same is true with respect to other types of social science and law.

Take criminal law and criminology. A whole series of scholars have argued that a myriad of crime and justice problems—excessively harsh penalties, reduced police presence in high crime areas, mass

89. See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 N.Y.U. L. REV. 190, 190–96 (2001) (arguing that impediments to enforcing inter-local contracts—and not coordination problems among local governments—stand in the way of inter-local approaches to regional problems).

90. See Schleicher, *supra* note 64, at 1674–78 (arguing that the absence of parties and strategic interaction between local legislators has led to excessive restrictions on housing supply).

incarceration, and even limits on our ability to remove dangerous teens from high-crime situations—are rooted in what are properly understood as local government law problems. In his final works, the late, great Bill Stuntz tried to explain why we rely far more on harsh punishments rather than extra policing as a method of crime control, even though all evidence points to the greater efficiency of spending marginal dollars on police.⁹¹ He argued that since police officers are being paid out of local government's own source funding, while the costs of imprisonment are born by the state, American cities have few police officers and excessively harsh punishments.⁹²

Further, Stuntz argues that district attorneys have become increasingly willing to punish severely because crime has localized, with a huge share of crime taking place in a small number of neighborhoods.⁹³ For much of the twentieth century, crime spread through jurisdictions, such that victims, offenders, and the populations that produced them were part of a district attorney's electoral calculus.⁹⁴ As crime has localized, an increasingly large number of county voters have begun to see crime as a distant, although terrifying, problem.⁹⁵ This has led to wild swings between lenity and severity in punishment, as policies chase preferences formed by casual viewings of the evening news rather than lived experience.⁹⁶ One way to look at Stuntz's argument is that local government law—the way local government revenue is raised as well as jurisdiction size and shape—bears substantial blame for the size of America's crime and prison problems.⁹⁷

91. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, 5–6 (2011); see also FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* 108–17 (2012) (discussing the efficacy of an increased numbers of police). See generally William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1997–2040 (2008).

92. See Stuntz, *Unequal Justice*, *supra* note 91, at 2014–16.

93. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE*, *supra* note 91, at 6.

94. See *id.* at 5–8.

95. *Id.* at 4–8.

96. *Id.* at 36.

97. The relationship between crime's location and jurisdictional shape can also tell us things about why policing inside local governments may not be optimal either. Both Frank Zimring and a Department of Justice report by top academic criminologists have found that “hot spot” policing in high crime areas reduced crime overall. ANTHONY A. BRAGA ET AL., *POLICE PROGRAMS TO PREVENT CRIME IN HOT SPOT AREAS*, 4–14 (2012), available at http://www.cops.usdoj.gov/Publications/041218459_CPRS7_Crime_Hot_Spots.pdf. However, in large jurisdictions with highly localized “hot spots,” it takes only a small extension from Stuntz's argument to note that we may see less of this type of policing than is optimal for reducing the

2013]

“LAW AND ___” PROBLEM

1971

Local government law has also been implicated in efforts at innovative crime fighting policy. Mark Kleiman, a leading crime policy scholar, has argued that separating political authority has limited governments' ability to pass some promising crime reduction strategies.⁹⁸ For instance, starting the school day later, or just keeping the school open so that teens are not out of school before most parents return home, has been found to be a very effective technique for reducing teen crime.⁹⁹ But, at least in cities without mayoral control over the schools, the officials held accountable for crime have no control over the schools, and school officials care little about the crime rate. Kleiman tells similar stories about other possible crime reduction strategies that could be enacted by educational and public health professionals.¹⁰⁰ These arguments are about how local government law creates organization structures inside cities and the effect that has on crime fighting. One would think, based on work by Stuntz, Kleiman, and Frank Zimring, who bring issues like this to the forefront, that local government law scholars would find in criminology and criminal law a fertile base for thinking about local government law more generally. But aside from Nicole Garnett and her fantastic work on the interface between land use and criminal law in this area, which both uses and critiques criminological theories, this is not a major feature of local government law study.¹⁰¹

Moreover, it is not just criminology and criminal law. Recently, there has been an uptick in the study of the “science of cities.” Several schools have been formed to do this and companies have

overall crime rate, because it involves removing police from where the large majority of people live to send them to high crime areas.

98. MARK A.R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME AND LESS PUNISHMENT 121–26 (2009).

99. *Id.* at 123–126.

100. *Id.*

101. See NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA (2010); Nicole Stelle Garnett, *Managing the Urban Commons*, 160 U. PA. L. REV. 1995, (2012); Nicole Stelle Garnett, *The Order-Maintenance Agenda as Land Use Policy*, 24 NOTRE DAME J.L. ETHICS & PUB. POL'Y 131 (2010); Nicole Stelle Garnett, *The People Paradox*, 2012 U. ILL. L. REV. 43 (2012). Bob Ellickson has also explored the relationship between land use and street misconduct. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996); see also James M. Anderson et al., *Reducing Crime by Shaping the Built Environment with Zoning: An Empirical Study of Los Angeles*, 161 U. PA. L. REV. 699 (2011) (testing several theories about the interaction between zoning and crime rates).

invested heavily in developing “smart” technologies for cities.¹⁰² Rather than being a specific field of study, this approach uses the very large data sets that local governments can produce (and suggests the creation of even more, from using sensors to study traffic to infrared monitoring of city buildings to study energy use) to make predictions and policy recommendations.¹⁰³ Although “smart city” approaches seem to cover much of the gauntlet of urban policy, there do not appear to be any such efforts to use them to study the effect of local laws and legal innovation. Legal scholars have not helped. While empirical legal studies have become a major part of the landscape of legal scholarship, it has barely touched the field of local government law.

102. The Massachusetts Institute of Technology Media Lab has a project called “City Science,” that uses big data sets and “urban analytics” to study urban planning, and suggests that predictive analytics can improve local policy. *Why Cities?*, MASS. INST. TECH., <http://cities.media.mit.edu/about/cities> (last visited Aug. 11, 2013). New York University’s Center for Urban Science and Progress

will instrument New York City and use existing data from a network of agencies to transform the city into a living laboratory and classroom. It will make sense of the vast amount of data it collects to help cities around the world become more productive, more livable, more equitable, and more resilient.

About CUSP, CENTER FOR URB. SCI. PROGRESS, <http://cusp.nyu.edu/about/> (last visited Sept. 6, 2013). In so doing, it seeks to “set the research agenda for ‘the science of cities.’” *How and Why CUSP Came to Be*, CENTER FOR URB. SCI. PROGRESS, <http://cusp.nyu.edu/about-how/> (last visited Sept. 6, 2013). IBM has developed a business called “Smarter Cities” to propose data-driven consulting services to cities around the world to improve everything from police services to education to urban planning. *Smarter Cities*, IBM, http://www.ibm.com/smarterplanet/us/en/smarter_cities/overview/index.html (last visited Sept. 6, 2013).

103. The Massachusetts Institute of Technology City Science project defines the concept in the following way:

In the future, cities will account for nearly 90% of global population growth, 80% of wealth creation, and 60% of total energy consumption. Developing better strategies for the creation of new cities is therefore a global imperative.

Our need to improve our understanding of cities, however, is pressed not only by the social relevance of urban environments, but also by the availability of new strategies for city-scale interventions that are enabled by emerging technologies. Leveraging advances in data analysis, sensor technologies, and urban experiments, City Science will provide new insights into creating a data-driven approach to urban design and planning. To build the cities that the world needs, we need a scientific understanding of cities that considers our built environments and the people who inhabit them. Our future cities will desperately need such understanding.

Why Cities?, *supra* note 103; *see Smarter Cities*, *supra* note 103 (defining smart city projects in many areas).

2013]

“LAW AND ___” PROBLEM

1973

Why haven't we kept up? I'm not sure. Perhaps it's the heavy theoretical orientation of the field, which, while it provides interesting insights, has made scholars less interested in recent developments in the social sciences. Perhaps it's happenstance. Regardless, there is no barrier to local government law scholars supplementing traditional approaches with the use of more contemporary social science methodologies, as recent work discussing agglomeration economics and the law has shown. To the extent we want the field to be relevant in the broader world of legal scholarship, we will have to, as it will be harder and harder to convince the multidisciplinary scholars in other fields to take the study of local government law seriously if it is not rooted in the best contemporary social science. More importantly, we will have to if we want other scholars and government officials to take seriously the import of law and legal process to state and local policy. Local government scholars argue that local government law is crucially important to the future of cities. But it will be hard to make these claims particularly convincing to other scholars or to policy-makers if the field remains inward looking and ignores the best research from other fields.

The topic of this symposium—the Fortieth anniversary of the *Fordham Urban Law Journal*—may provide us with a way out. Focusing on “urban law” rather than “local government law” suggests a focus on places—specifically dense agglomerations of people in urban areas—rather than on formal governmental institutions. The flaws in local government law discussed above derive largely from a type of formalism, a focus on the formal powers of local governments rather than the behavior of local politicians, a focus on the way formal local boundaries drive individual locational choices rather than informal economic and social relations do. Thinking of ourselves as urban law scholars as well as local governmental law scholars may encourage us to look at these non-governmental, non-formal forces that drive what actually happens in our cities. For this, and many other reasons, I look forward to reading the next forty years of the *Fordham Urban Law Journal*.