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LEAPS AND BOUNDS

*Nestor M. Davidson**

CITY BOUND: HOW STATES STIFLE URBAN INNOVATION. By *Gerald E. Frug and David J. Barron*. Ithaca and London: Cornell University Press. 2008. Pp. xvii, 260. \$35.

INTRODUCTION

Imagine how stunted our understanding of the federal government would be without any detailed scholarly examination of the U.S. Constitution itself. As remarkable as that sounds, that is essentially the problem that Gerald Frug¹ and David Barron² have set out to remedy for local governments in their superb *City Bound*. In the book, Frug and Barron take a comprehensive, empirical look at the legal frameworks under which cities and other local governments operate, providing an invaluable roadmap for understanding the hidden architecture of legal constraints that—largely without notice—are shaping America’s urban future.

Why this kind of analysis has rarely been attempted may have something to do with the fact that there are nearly twenty thousand municipalities and nearly ninety thousand local governments all told in the United States today.³ It likely has even more to do with the fact that, by comparison to the federal or state constitutions, divining the precise nature of local legal power is not as simple as reviewing a municipal charter. As Frug and Barron note, the precise contours of what they call “city structures” must be culled from a detailed examination of the bewildering “mix of grants of, and restrictions on, local power” (p. 3) through which states shape the authority of their localities.

Frug and Barron tackle this daunting task through a comparative analysis of the legal structures that bind seven large, relatively successful central cities. In their study, Frug and Barron examine not only the contours of home rule—the default scope of local authority to act and resist state preemption—but also plumb the particular empowerment and disempowerment of those seven cities in matters of revenue and expenditure, land use and development, and education policy.

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3. See U.S. CENSUS BUREAU, 2007 CENSUS OF GOVERNMENTS tbl. 3 (2007), <http://www.census.gov/govs/cog/GovOrgTab03ss.html> (last visited Aug. 7, 2009) (reporting 19,492 municipalities and 89,476 total local governments, a category that also includes counties, special districts, school districts, and other nonmunicipal entities).

Frug and Barron's foray into the mottled reality of contemporary home rule serves as a springboard for their larger ambition of reforming the oversight of local authority. They acknowledge, and do not shy away from, the reality that states will always play a central role in structuring the terms of local power. They argue nonetheless that states can be much more thoughtful and deliberate in how they create and manage these structures to empower local governments to address urban issues, particularly on a cooperative and regional basis. To frame this advocacy, Frug and Barron outline a series of what they call "city futures"—possible paths of development and identity toward which cities might strive—and convincingly argue that cities face an odd array of state-created enticements and barriers in trying to chart their own democratically accountable destinies.

Frug and Barron's analysis of the unfortunate incentive effects that city structures place on potential urban futures is persuasive. As compelling as their portrait of home rule is, however, it paints an image of local governments that might be overly static in terms of the reaction those governments have to the incentives they face. Frug and Barron hint at the practical challenges to change that the political economy of state oversight poses, and suggest that local governments—even the thriving central cities they highlight—often acquiesce to that oversight as a practical matter. Although it is no doubt true in many instances that local governments react to the legal-structural constraints they face in an inert, rather than dynamic, fashion, emphasizing those constraints risks obscuring the many ways in which local governments struggle to change and transcend the legal playing field on which they operate.

Accordingly, this Review, after describing Frug and Barron's central claims, seeks to add a layer to their conception of local authority by exploring ways in which local governments engage as active agents within the framework of that authority. Many local governments—from Frug and Barron's big cities to far-flung micropolitan rural towns—work to change the state laws that bind them, forge partnerships with other public and private sources of authority, apply traditional legal tools in novel ways when barred from responding to problems more directly, and undertake similar activities that represent a collective refusal to take the scope of their legal authority as a given.

This kind of agentic, entrepreneurial approach to legal authority is unlikely to fundamentally solve the very real structural problems facing local governments that Frug and Barron so ably highlight. It does suggest, however, that some city officials have managed to take pragmatic steps to recalibrate their own power. Encouraging these kinds of leaps by cities and other local governments may be a more promising avenue of reform than hoping for change from the very states that have, intentionally or unintentionally, so often bound their localities.

I. A NEW UNDERSTANDING OF LOCAL AUTHORITY

In *City Bound* and the previous work on which it builds,⁴ Frug and Barron aim to move conceptions of local power away from a stale dichotomy between plenary state authority over their so-called “creatures” (surely not the most flattering way to describe any entity) and the equally unrealistic image of absolute local autonomy.⁵ As they argue throughout, local power must be understood not as a monolithic grant of authority or as a blanket denial of local autonomy by the state. Rather, current legal structures unevenly supply and withhold power in a variety of important areas. This legal landscape has the “key feature” of “direct[ing] the substantive ways in which local power is exercised through the complex mix of grants and limits that it establishes” (p. 35).

To bolster this argument, Frug and Barron tapped a group of leading local-government scholars to help them produce detailed comparative examinations of the city structures of Boston, Seattle, New York, Atlanta, San Francisco, Denver, and Chicago.⁶ In area after area of substantive authority, Frug and Barron unpack the range of alternating empowerment and disempowerment under which these cities operate. Beginning with home rule, they show how pervasive is the structuring and interference that flows from the state level: the city charters of several of their case-study cities were drafted by state legislatures (p. 64); seemingly sweeping grants of home rule—statutory or constitutional—both give and take power (and leave to the courts the task of confronting almost metaphysical questions of the line between “local” and “state” interest) (pp. 66–69); and, depending on the issue and the state, an almost random pattern of state preemption of local law and conversely local preemption of state law prevails (p. 72).

Likewise in the area of revenue and expenditures, Frug and Barron examine the ubiquitous control that states exert over local fiscal decisions. State law allows and disallows various tax options (pp. 76–87); determines which fees may be assessed and how (pp. 87–90); grants aid generally with strings attached (pp. 90–92); and oddly intrudes into a variety of expenditure decisions (pp. 92–95). The same general pattern holds true in the

4. See, e.g., David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003); Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002).

5. Frug and Barron focus their analysis on large, relatively successful central cities. This provides a slightly skewed view of some aspects of local governance—most local governments, for example, do not play the outsized political role in their states that Boston, Atlanta, Chicago and other dominant cities play in Massachusetts, Georgia, and Illinois—but in the main their analysis has salience for the range of generalist, elected local governments.

6. For research on Seattle, New York, Atlanta, San Francisco, Denver, and Chicago, Frug and Barron commissioned reports, respectively, from Keith Aoki of the University of California-Davis, Richard Briffault of Columbia Law School, William Buzbee of Emory Law School, Richard Ford of Stanford Law School, Richard Schragger of Virginia Law School, and Laurie Reynolds of the University of Illinois College of Law. P. xvi. Frug and Barron had also collaborated, with Rick Su, on a report about home rule in Boston that served as a precursor to the comparative analysis in *City Bound*. See DAVID J. BARRON ET AL., *DISPELLING THE MYTH OF HOME RULE* (Rappaport Inst. for Greater Boston 2004), available at http://www.mma.org/component/docman/doc_download/268-dispelling-the-myth-of-home-rule-local-power-in-greater-boston.

exercise of the quintessential local power to regulate land use and development. Here, again, cities are both empowered and disempowered in ways that create incentives for acting that local communities might not otherwise choose (pp. 99–120). And, finally, state law sets the terms of much of the actual decision making of local school districts, constraining local choice even when not directly supplanting it (pp. 121–40).

In all of these areas, and others,⁷ Frug and Barron rightly argue that states structure local power not only directly, but through a myriad of indirect institutions and policy choices. Thus, for example, the fact that Massachusetts and entities under its purview control Logan Airport, the Tobin Memorial Bridge, the tunnels that connect the city to its east end, and much other important property creates a gaping hole in Boston's land-use authority (pp. 105–07). Similarly, the way that Massachusetts fosters charter schools, sets local school district boundaries, and empowers suburbs to veto interdistrict options creates a set of structures and relationships that significantly affects the ability of the Boston public schools to achieve their goals (pp. 128–34). These indirect state-level choices, as with direct mixing of powers and disabilities, warp the decisions that local governments can make.⁸

In the broad sweep of their argument, Frug and Barron's primary normative concern is the problem of democratic deficits that arise from state intervention, with decisions made or controlled at the state level undermining participation and accountability. Frug and Barron do not seem instrumental about this in the main—they are not arguing that local governments will necessarily make better decisions than their state counterparts. Rather, they argue that cities should be allowed to try in a classic experimentalist mode, possibly fail, learn from the experience, and develop the confidence to chart their own destiny.⁹

7. As Frug and Barron note, they could have developed similar analyses for many other areas of local power, including "transportation, public safety, and public health." P. 54.

8. One gap in *City Bound's* descriptive claims is any significant discussion of the federal role both in constraining state authority and in constraining and at times empowering local governments. The federal government, however, does play a role at the local level, at times mandating or encouraging regional cooperation (as with regional air-quality-management districts, *see, e.g.*, Revisions to the California State Implementation Plan, South Coast Air Quality Management District, 73 Fed. Reg. 76,947, 76,948 (Dec. 18, 2008) (to be codified at 40 C.F.R. pt. 52); or metropolitan planning organizations connected to the dispersal of federal transportation funds, *see, e.g.*, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 23 U.S.C. § 134 (2006) (outlining Metropolitan Planning Organizations' responsibilities in connection with the receipt of federal funds)), and at times acting as an intervening source of authority between states and local governments. *See generally* Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007). I will return to this point in Part II, below, but for now it is simply worth noting that the argument Frug and Barron make about the state role in local governments can be made—albeit with less pervasive effect—about the federal role at the state and local level.

9. Frug and Barron's picture of the inconsistently constrained nature of local government could, in some ways, apply to every other level of government. The federal government has (theoretically) limited and enumerated powers, is constrained (perhaps at the margins) by the separation of powers and by reservations of power to the states (and to the people), and must not contravene the individual rights provisions of the federal constitution. A similar set of bounds constrains state gov-

City Bound's theoretical construct and empirical investigation allow Frug and Barron to insert themselves into major debates in urban theory and also to outline a reform agenda. On the former, they show that argument after argument among theorists about the nature of cities proceeds without a clear sense of, or even much engagement with, the ways in which states structure local authority. Urban theorists have long debated, for example, whether local politics is dominated by elites or pluralist interest-group jockeying;¹⁰ whether cities have the ability to transcend the external limitations they face;¹¹ and how to shift toward a paradigm of local governance that privileges coalition building to achieve pragmatic goals.¹² In each of these debates, Frug and Barron argue, there is an important misunderstanding of the nature of *legal* constraints that shape local governments and the prescriptions that flow from various advocates are destined to fail without a sense of the state-generated legal filters through which they must pass. Frug and Barron are careful not to overstate their claim,¹³ but note that any substantive urban agenda must take cognizance of the structure of local-government law itself.¹⁴

In terms of a reform agenda moving forward, Frug and Barron return to the broader urban discourse to show how state-generated legal structures constrain cities' ability to choose among possible urban futures. Say local officials, for example, decide to try to become a "global city"—an amorphous concept, but one that generally emphasizes a city's role as an international financial capital or immigration destination. Those officials would likely have a number of tools at their disposal, validated by state law, to attract global financial and related service industries. These tools might include land-use policies that favor high-end office construction and relative freedom to provide incentives to companies to relocate—tools that might not be available to pursue other urban futures. Conversely, those officials would be constrained by the fragmentation of local governments (any expenditures, for example, on attracting foreign investment could easily go to a central city's free-riding suburban neighbors), limited control over regional

ernments, buffeted between federal preemption and, in some states, constitutional home-rule preemption by local governments. In practice, the federal government and the states may have relatively broad powers compared to the cities on which Frug and Barron focus. But that said, Frug and Barron's point is a powerful one: for every public entity, and particularly for local governments, there is no such thing as pure autonomy or pure control.

10. The community power debate pitted theorists who focused on the power of elites to control city policies against pluralists who saw local decisions as the outcome of interest-group politics. Pp. 14–15 (discussing, for example, ROBERT A. DAHL, *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY* (1961)).

11. Pp. 16–20 (discussing PAUL E. PETERSON, *CITY LIMITS* (1981)).

12. Pp. 20–22 (discussing CLARENCE N. STONE, *REGIME POLITICS: GOVERNING ATLANTA, 1964–1988* (1989)).

13. P. 22 (noting that their discussion of urban theory "is not intended to suggest that law is the primary, let alone the only, external structure influencing city decision making").

14. Pp. 22–23 ("As long as the rules of local government law evade serious analysis, they are unlikely to be changed. . . . Reformation of the state legal structure must therefore be the primary means by which city power is enhanced.").

infrastructure, and other practical barriers flowing from state-created legal structures that make it difficult for the Bostons and San Franciscos of the country to compete with London and Beijing (to say nothing of New York).

Frug and Barron apply a similar analysis to several other city futures. Thus, a “tourist city”—a haven for visitors, with Las Vegas as perhaps the prime example—can be fostered by the local government’s (albeit controversial) ability to promote privatized public space but might be hampered by state control over regional facilities like sports arenas and convention centers. A “middle class” city that focused on income diversity, preserving broad economic opportunity, and providing good public schools as well as other quality city services may not have the power to achieve the right mix of these goals. And any city that wants to embrace a regional future—an agenda that Frug and Barron favor—must confront a structure of state law that pits local governments against each other in a fragmented scramble for limited resources and power.

As they note, Frug and Barron’s four futures do not exhaust the possible paths cities might choose, inviting speculation about how their frame might apply to other urban destinies. Consider, for example, an increasingly important potential path for urban development toward what some commentators have labeled the sustainable city.¹⁵ This urban future would emphasize density and transit orientation in development, promote walkability and a mix of uses to reduce car dependency, encourage renewable energy and urban agriculture, and foster other ways of making cities more livable while reducing the carbon footprint of the built environment. Some cities are already moving in this direction, experimenting with a broad range of policies, including land-use regulatory changes, subsidies, alternative economic-development strategies, creative financing mechanisms, and others.¹⁶

Do cities have the power to embrace this future as robustly as many advocates argue they must? One can almost instantly hear Frug and Barron replying that the answer is *yes and no*—that there are likely many poorly conceived and often misunderstood state-created legal structures that might alternatively incentivize cities to pursue this path or deter them from doing so. The great value of Frug and Barron’s approach is that it provides such a useful vocabulary for understanding the baseline of empowerment and disempowerment that undergirds any substantive agenda that policymakers, advocates, and community members might seek.¹⁷

15. See, e.g., KENT E. PORTNEY, *TAKING SUSTAINABLE CITIES SERIOUSLY* (2003); see also DOUGLAS FARR, *SUSTAINABLE URBANISM* (2008).

16. See Neal Peirce, *Sustainable Cities*, AM. PROSPECT, Dec. 17, 2006, available at <http://www.prospect.org/cs/articles?articleId=12322>.

17. It would be interesting to apply Frug and Barron’s analysis retrospectively, to try to isolate how varying legal structures shaped the choices that cities sought to make in response to past junctures. Although the cities they describe vary in many important ways, in certain respects there is a kind of uniformity in governance structures at the metropolitan level. A retrospective analysis might reveal the link between certain legal constraints and specific outcomes, or might help explain why similar outcomes result from different specific constraints. The methodological challenges to this kind of analysis would no doubt be formidable, but could bolster (or perhaps challenge) the

To the extent there is any limitation to the framework that Frug and Barron have laid out in *City Bound* it is that the “city structures” it describes and the resulting constraints Frug and Barron outline seem to exist in one-way state-local relationships. In these relationships, states create legal structures and cities essentially work within those structures. This leads Frug and Barron to focus their advocacy toward reforms at the state level, which is certainly appropriate. But do cities and other local governments always take the structures they are given at face value?

II. LOCAL-GOVERNMENT AUTHORITY ENTREPRENEURSHIP

On one level, Frug and Barron’s claims about the importance of recalibrating home rule deploy conceptions of democratic accountability and slightly less explicitly a kind of law of unintended consequences to focus on the need for state-level reform. On another level, however, *City Bound* throughout describes a kind of learned helplessness of local governance, with these laboratories of experimentalism hobbled by their inability to set their own agenda. Repeatedly, Frug and Barron describe local officials (primarily in the Boston area) in psychological terms that suggest a kind of state-law-induced timidity or collective flinch reaction. Local officials, Frug and Barron write, lack “self-confidence” (p. 163); “have reason to doubt” the extent of their power (p. 187); act to preserve their self-interest out of “a feeling of not being in control” (p. 207); express “hesitancy” about collaborating with neighboring jurisdictions; and experience “deep . . . fear” over loss of competitive advantage (p. 209). Putting city governments on the couch in this striking way suggests to Frug and Barron something of a psychological cure: restoring clarity (although not full autonomy) to the scope of local governance will, they suggest, give officials the requisite sense of self-mastery to chart their own urban future.¹⁸

This is a very interesting way to think about the unintended consequences of the ubiquitous state involvement in local power and it describes a dynamic too often ignored in explorations of the legal structure of local governance. It would be hard, moreover, to quibble with the depth of the empirical work that Frug and Barron have done to bolster their claims about the psychology of local helplessness. Because their study focuses on a handful of particular cities, with characteristics that might not be generalizable, it is hard to know how widespread the ingrained timidity they

theoretical move that Frug and Barron make in linking the current structure of the state law of local government to urban futures.

18. As Frug and Barron argue, for example, in discussing how to reform the current structure of local parochialism, a “better alternative” to conditional state aid, would be “to promote regionalism by responding seriously to the widespread sentiment that the state has unduly limited home rule.” P. 211. Thus, the problem is perhaps less a question of the actual limits of city power than a psychological barrier to local action.

describe actually is.¹⁹ There is evidence, however, that some local officials take a decidedly less passive approach to the legal constraints they face.

To begin, many local governments—at times alone although often in concert with other localities—actively work at the state level to change state law.²⁰ Almost every state has an organization representing local governments—various leagues and associations of cities²¹—and some states have multiple coalitions, representing different types of local governments.²² These coalitions pool local-government resources and political capital to focus on a range of state-level legal issues, often mounting explicit lobbying and grass-roots political campaigns.²³ These efforts not only highlight the shared interests that local governments have in mutual empowerment, but also bolster the political strength that any given city or other local government might have in isolation.²⁴

Frug and Barron have elsewhere noted an international analogue to this kind of coalition building.²⁵ They have described international networks of cities, such as United Cities and Local Governments, Sister Cities International, the International City/County Management Association, and other

19. One can speculate that large, relatively successful central cities that are the focus of state-wide attention might be more constrained than jurisdictions more at the margins of such attention. Conversely, such cities might have more political power to navigate the shoals that Frug and Barron describe.

20. Local governments, moreover, litigate both affirmatively and defensively to assert and protect the scope of their authority, but this discussion will focus on other ways in which local governments seek to change or overcome the baseline of authority they have.

21. For a list of the forty-nine state municipal leagues, see National League of Cities, State Municipal Leagues, http://www.nlc.org/inside_nlc/membership/state_municipal_leagues_v2/SMLlinks.aspx (last visited Aug. 7, 2009). The National League of Cities is an umbrella organization representing these state municipal leagues, and it maintains a full-time lobbying effort at the federal level.

22. Nearly all states have state-level county associations, for example. See *National Association of Counties, State Associations*, http://www.naco.org/Template.cfm?Section=Affiliates_and_Partnerships&Template=/cfiles/naco/stateassoc.cfm (last visited Aug. 7, 2009). This is not to mention the array of associations that represent other actors associated with local governments, including administrators, officials, police, fire, and other service providers.

23. See, e.g., *Governor Called Urgent Meetings with City Officials to Discuss Impact of Borrowing*, CITY ADVOC. WKLY. (Sacramento, Cal.), May 15, 2009, at 4 (describing the Save Your City campaign by the League of California Cities to respond to the local-government aspects of California's budget crisis). Some coalitions of local governments have mounted public-relations campaigns to promote the value of local governance, with an eye toward influencing the state-level political discourse. For example, an effort spearheaded by the Colorado Municipal League, called "Cities and Towns Make it Possible," includes billboards, newspaper ads, essay contests, videos, and other messaging. See <http://www.cml.org/info/cities/cities.aspx> (last visited Aug. 7, 2009). Similarly, the Florida Municipal League formed a coalition called "Building Citizenship in the Community: Back to Basics" to help increase civic awareness and participation, as well as to target specific legislative goals, particularly education. See Casey Cook, *Civics Education: Small Effort, Big Reward*, THE DATAGRAM (Tallahassee, Fla.), May 15, 2009.

24. For some sense of the scale of this kind of activity, in one state alone, Minnesota local governments spent \$35 million to lobby the legislature from 2003 to 2008. See Tom Scheck, *Local Governments Spending More on Lobbyists*, (Minn. Pub. Radio broadcast Apr. 20, 2009) (transcript available at http://minnesota.publicradio.org/display/web/2009/04/17/lobbyists_capitol/).

25. Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

international city networks.²⁶ These organizations collaborate on a global scale to build capacity, exchange knowledge, and influence the formulation of policies at the international level that impact local governments.²⁷

A second strategy that local governments employ to transcend the terms of the legal authority they are given is seeking partnerships that can extend or alter that authority. Perhaps the most significant alternative source to which local governments have turned—and are increasingly turning—is the federal government. In many of the areas of substantive authority that Frug and Barron highlight, including revenue, land use, housing, education, and others, federal-local collaboration provides a source of financing, a means of obtaining legal authority independent from the states (indeed, in some instances, as a shield against the states), and other resources for local government.²⁸ As with state efforts to work with local governments, there is a constant risk in the federal-local relationship that collaboration becomes coercion. But local governments have the capacity to engage in this kind of partnership willingly and for their own reasons.

Frug and Barron are skeptical of the privatization of local governance,²⁹ and there are certainly many strong reasons to be cautious about ceding too much public authority. However, in many instances public-private partnerships involving local governments can represent a conscious choice on the part of those governments to leverage private resources, rather than merely a capitulation to local lack of capacity. Indeed, to the extent that cities have been successful in imposing everything from open-space to affordable-housing requirements on private developers, there may be real potential to harness private resources for the public interest rather than inevitably the other way around.³⁰

Third, in the face of ambiguous grants of power—and sometimes even in response to direct preemption—local governments take other legal tools they have been given and use them in creative new ways. Take, for example, the crisis hitting so many cities arising from both predatory lending and more recently from subprime mortgages and widespread foreclosures.³¹ As years of equity stripping, fraudulent practices, and, more recently, the collapse of mortgage markets have devastated already fragile neighborhoods across the country, local officials have struggled to respond. An early wave of reaction involved attempts to regulate lenders directly to hold them

26. *Id.* at 24–25.

27. *Id.*

28. See Davidson, *supra* note 8, at 971–75 (describing federal-local collaboration on a variety of policy issues).

29. See, e.g., pp. 175–77 (describing Disney World as an extreme example of the privatization of public authority and public space).

30. Cf. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1314–29 (2003) (discussing the process of “publicization” through which private entities come to act in ways that reflect public-law norms).

31. See Jonathan L. Entin & Shadya Y. Yazback, *City Governments and Predatory Lending*, 34 FORDHAM URB. L.J. 757 (2007).

responsible for the consequences of lending practices that caused so much harm to the urban fabric.³² Lenders responded with litigation that raised state and federal preemption and this litigation significantly disrupted direct efforts to regulate at the local level.³³

In response, local governments did not simply take the scope of their authority as given, but rather turned to an array of other legal tools to combat the problem. Some cities, for example, invoked public nuisance, building on the experience that localities have had using such theories against gang activities.³⁴ A few have even begun to explore civil-rights causes of action to combat the harms of “reverse redlining,” which is the targeting of minority neighborhoods for unfavorable loan terms.³⁵ These efforts, in turn, have faced serious challenges, and some have failed.³⁶ Nonetheless, local governments continue to seek ways of solving problems that will not wait on clarifying uncertain home rule or changing the scope of state and federal preemption.³⁷

These myriad examples—which are by no means exhaustive—suggest a landscape of what I will call “authority entrepreneurship.” Each is an instance of local governments responding to constraining legal structures by actively working against or around those structures. Whether in lobbying and coalition building at the state (and federal) level, finding alternative

32. *Id.* at 770–72 (discussing local predatory lending laws).

33. *Id.* at 772–82; cf. David J. Barron, *Foreword: Blue State Federalism at the Crossroads*, 3 HARV. L. & POL'Y REV. 1, 1 (2009) (discussing action by the federal Comptroller of the Currency to block local-government action on predatory lending).

34. Several cities have used public-nuisance injunctions to stem gang activities. *See, e.g.*, *People ex rel. Gallo v. Acuna*, 929 P.2d 596 (Cal. 1997); *Chicago v. Powell*, 735 N.E.2d 119 (Ill. App. Ct. 2000).

35. Ngai Pindell, *The Fair Housing Act at Forty: Predatory Lending and the City as Plaintiff*, 18 J. AFF. HOUS. & COMM. DEV. L. 169, 176–78 (2009).

36. Cleveland's public-nuisance suit against twenty-one financial institutions arising out of the subprime mortgage and foreclosure crisis was dismissed at the District Court level, in part on the grounds of state preemption, *see Cleveland v. Ameriquest Mortgage Sec., Inc.*, 621 F. Supp. 2d 513, 517–20 (N.D. Ohio 2009), but the city is pursuing an appeal. *See Andrew Longstreth, Judge Dismisses Cleveland's Suit Against Subprime Lenders*, AM. LAW., May 18, 2009, available at <http://www.law.com/jsp/tal/digestTAL.jsp?id=1202430792417>.

37. Examples of similar creativity—with similar mixed results—can be found in a number of other policy areas. Cities lacking the authority to respond adequately to gun violence sued gun manufacturers. David Kairys, *The Cities Take the Initiative: Public Nuisance Lawsuits against Handgun Manufacturers*, in GUNS, CRIME, AND PUNISHMENT IN AMERICA (Bernard E. Harcourt ed., 2003). Cities unable to regulate carbon emissions directly have created a variety of locally driven structures to tackle climate change. *See John R. Nolon, Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1 (2006). In the face of deadlock on immigration policy at the federal level, local governments (often quite controversially) have begun to use land-use authority, local police, and other tools to make their communities more or less hospitable to immigrants. *See Clare Huntington, The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008). And a city told it could not foster income diversity through inclusionary zoning because of a state rent-control ordinance that had nothing to do with affordable housing, *see Town of Telluride v. Lot Thirty-Four Venture L.L.C.*, 3 P.3d 30, 40–43 (Colo. 2000) (Mullarkey, J., dissenting), preserved its program by taking advantage of a provision in state law that exempted property in which the housing authority or similar agency had an interest. Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971, 1017 (2002).

sources of authority and resources, or transforming traditional tools to respond to new tasks, cities and other local governments refuse to take the constraints of their legal authority as the final word on their ability to respond to the problems they face. Instead, local officials take on an essentially entrepreneurial role—seeking new opportunities and disrupting existing legal-structural equilibria created by state (and at times federal) law.

There is an extensive literature on public entrepreneurship that highlights the conditions under which political and legal actors innovate within existing structures and may be capable of disrupting those structures in a way that mirrors Schumpeter's creative destruction in economic markets.³⁸ To the extent that this literature has engaged with local governance, it has tended to do so through a Tieboutian lens conceptualizing local governments as quasi-economic actors competing for mobile resources.³⁹ The Tieboutian vision of cities as market actors has well-rehearsed limitations,⁴⁰ but it may be possible to separate the distributional and other negative consequences of aggressive localism from the potential benefits of a kind of creative approach to problem solving.

While there seems promise in the capacity that some local governments have found to confront challenges with creativity, it is certainly worth being cautious about a power dynamic that may favor local governments with greater resources, conversely disenfranchising localities with relatively less capacity for this kind of struggle. It may also be that efforts by local governments to transcend the bounds of their authority merely replicate the worst kind of what Frug and Barron call "defensive localism,"⁴¹ only over a wider scale. These questions—and many others raised by local dynamic reactions to state constraints—are beyond the scope of this Review, but are worth exploring going forward.

To claim that local-government entrepreneurship plays a role within the realm of legal authority is not to argue with Frug and Barron's central claim. It would be hard to deny that states (and the federal government) largely define "the extent to which cities can and cannot deal with the critical problems they face" (p. 231), and the need for local governments to struggle in this way only reinforces the basic dilemma that Frug and Barron illuminate. Moreover, local governments seeking creative solutions to the myriad

38. See, e.g., Adam D. Sheingate, *Political Entrepreneurship, Institutional Change, and American Political Development*, 17 *STUD. AM. POL. DEV.* 185, 187–91 (2003) (surveying the literature); see also David E. Pozen, *We Are All Entrepreneurs Now*, 43 *WAKE FOREST L. REV.* 283, 290–91 (2008) (discussing Schumpeter and theories of entrepreneurship).

39. See, e.g., Mark Schneider & Paul Teske, *Toward a Theory of the Political Entrepreneur: Evidence from Local Government*, 86 *AM. POL. SCI. REV.* 737, 742–44 (1992) (modeling and testing the role of entrepreneurship in Tieboutian game-theoretical terms); see also Christian Iaione, *Local Public Entrepreneurship and Local Self-Government—The Rule of Law and the Role of the Judiciary: The Aftermath of Global Competition among Local Governments?* (working paper, on file with author), available at <http://ssrn.com/abstract=977321>.

40. See, e.g., Aaron J. Saiger, *Local Government Without Tiebout*, 41 *URB. LAW.* 93, 102–15 (2009) (discussing the distributional consequences of Tieboutian sorting).

41. Pp. 207–09; see David J. Barron & Gerald E. Frug, *Defensive Localism: A View of the Field From the Field*, 21 *J.L. & POL.* 261 (2006).

problems they face would no doubt rather have clear authority than have to work around state-imposed constraints. And, regardless of the success of any entrepreneurial activity, such efforts may be doomed to remain on the margins.⁴²

Nonetheless, these examples of local governments attempting to overcome the constraints they face do suggest that Frug and Barron's picture of the learned helplessness of local governance may be incomplete. And to the extent that some commentators have suggested that formal legal structure is less outcome determinative than what local governments actually *do* within that structure,⁴³ understanding the capacity that some local governments have, at least some of the time, to transcend the constraints they face may be nearly as important as understanding the constraints themselves.

The other primary reason to focus on local authority entrepreneurship is that *City Bound* is in many ways a call to arms for reform. This, in turn, raises the question of the political and practical viability of Frug and Barron's prescriptive vision of a reformulated home rule. Frug and Barron are not merely interested in changing our conception of local authority—they want to change the way cities and metropolitan regions actually operate. Some of their proposals seem promising, such as a more self-conscious balancing of local, regional, and state interests and a kind of conditional grant of state authority to local governments that collaborate on a regional basis. Conversely, some of their proposals, while wonderfully creative and thought provoking, seem politically unlikely, particularly their proposal for a regional legislature drawing on the governance structure of the European Union, something they acknowledge has never been tried in the United States.

Given the inherent challenges of convincing states to foster regionalism, promote middle-class cities, or any other substantive vision that Frug and Barron discuss (and others beyond), local entrepreneurship and a structure of local collaboration that does not rely on traditional state supervision might have more immediate promise. There are a number of practical mechanisms for fostering this kind of approach. As noted, for example, the federal government has been at times a facilitator of interlocal collaboration and this is an ideal role for the federal government to play. In the current policy environment, a number of creative models are being proposed to foster enhanced capacity at the local level by the federal government, with some reflecting Frug and Barron's admonition that incentives for collaboration should empower local governments not undermine them.⁴⁴

42. Cf. Jan Schnellenbach, *Public entrepreneurship and the economics of reform*, 3 J. INSTITUTIONAL ECON. 2, 183 (2007) (arguing that institutional checks and balances in democracies make entrepreneurial strategies to affect fundamental change unlikely to succeed).

43. See, e.g., JESSE J. RICHARDSON, JR. ET AL., IS HOME RULE THE ANSWER? CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT (Brookings Instit. Ctr. on Urban and Metro. Policy 2003), available at http://www.brookings.edu/~media/Files/rc/reports/2003/01metropolitanpolicy_jesse_j_richardson_jr/dillonsrule.pdf.

44. See, e.g., PENN INST. FOR URBAN RESEARCH, RETOOLING HUD FOR A CATALYTIC FEDERAL GOVERNMENT: A REPORT TO SECRETARY SHAUN DONOVAN 126–27 (2009), available at http://www.upenn.edu/penniur/pdf/Retooling_HUD-EntireReport.pdf (proposing a “Reverse Chal-

One advantage that a federal facilitating role may have is that the federal government is under no obligation to work with local governments through state-created mechanisms only.⁴⁵ This will be an increasingly important fact as the scale of regionalism—of metropolitan governance—expands to encompass what Robert Lang and Dawn Dhavale have described as “megapolitan” regions.⁴⁶ Lang and Dhavale have identified a series of increasingly visible regional clusters of continuous and interrelated development, forming vast urban networks linked by common infrastructure and cultural identity.⁴⁷ These regions almost all cross state lines—indeed, several encompass multiple states—and likely will be the locus of the overwhelming majority of new development in the next several decades.

As transmetropolitan regions come to play an increasingly important role as the appropriate scale for governance around a number of pressing concerns, states may have a difficult time performing their traditional role in policing the scope of local authority. As these new regions coalesce and grow, they will increasingly look to the federal government as the only partner capable of leveraging resources and coordination at the appropriate scale.⁴⁸

This is not the only path toward reform and, as Frug and Barron note, state law will remain pervasive. Frug and Barron, although not focused on many specific proposals in this volume (other than the idea of a regional legislature (pp. 216–25)), accordingly target state-level legal reform. This is understandable and, for fundamental, systemic change to occur, the only game in town, so to speak. But given the political economy of local-government law, if the terms and scope of legal authority is itself the potential subject of local-government agency, we should not ignore the ability of local governments to take an active role in shaping their own legal destiny or at least mitigating the more egregious constraints they face.

lenge Grant Program” that would incentivize collaboration at the state and local level across functional policy areas to create programs with significant regional impact).

45. See Davidson, *supra* note 8, at 1019.

46. See ROBERT E. LANG & DAWN DHAUALE, BEYOND MEGALOPOLIS: EXPLORING AMERICA’S NEW “MEGAPOLITAN” GEOGRAPHY (Metro. Inst. at Va. Tech. 2005), available at www.mi.vt.edu/uploads/MegaCensusReport.pdf. The report identified ten “megapolitan” areas: Cascadia in the Pacific Northwest, NorCal and Southland in California and Nevada, the Valley of the Sun in Arizona, the I-35 corridor running north from central Texas, the Gulf Coast, the Peninsula in Florida, the Piedmont, the Midwest, and the Northeast. *Id.* at 13. The analysis by the Metropolitan Institute at Virginia Tech continues to develop and is projecting additional emerging megapolitan (or “New Metropolis”) regions. See, e.g., Robert Lang & Paul K. Knox, *The New Metropolis: Rethinking Megalopolis*, 43 REGIONAL STUD. 789, 796 (2009) (discussing twenty emerging megapolitan regions). Other commentators have expanded on the idea of megapolitan scale as well. See, e.g., METRO. POLICY PROGRAM, BROOKINGS INST., MOUNTAIN MEGAS: AMERICA’S NEWEST METROPOLITAN PLACES AND A FEDERAL PARTNERSHIP TO HELP THEM PROSPER (2008), available at http://www.brookings.edu/~/media/Files/rc/reports/2008/0720_intermountain_west_sarzynski/LMW_full_report.pdf (discussing emerging megapolitan regions in the Intermountain West).

47. LANG & DHAUALE, *supra* note 46.

48. See METRO. POLICY PROGRAM, *supra* note 46 (discussing the federal role in fostering megapolitan prosperity).

CONCLUSION

City Bound is an invaluable addition to our understanding of the nature of local governance, painting a nuanced picture of the nature of city power. This Review has sought to build on Frug and Barron's analysis to highlight tools that local governments have used to challenge and at times transcend their legal structures. Local governments, alone and in coalition, work to change the laws that define their authority; they form creative partnerships to work around legal constraints and find new sources of authority; and they draw on traditional powers to solve novel problems. In all of these instances, for better or worse, successfully and unsuccessfully, local governments take something of a leap, refusing to accept the bounds of their authority as a given.

If local governments can be entrepreneurial about the authority they have, the dynamic raises a host of questions. Descriptively, what are the conditions and circumstances that seem to lead some local governments to acquiescence and lead others to creativity and innovation?⁴⁹ Normatively, is this kind of creativity and collaboration attractive or should advocates focus more on the deeper structures that local governments face? Should local authority entrepreneurship be channeled in more transparent or democratically accountable ways? Are there distributional consequences to a mode of governance that might be as unevenly distributed as economic, social, and political capital undeniably are at the local level?

These questions will have to await further scholarship, but it is a sign of the strength of Frug and Barron's work that they provide a useful way to begin to approach such issues—and many others. *City Bound* is elegant, passionate, and clear. Frug and Barron's analysis of the actual structure of the legal authority granted and denied to local governments and the consequences of the incentives that the uneven landscape of home rule creates should be required reading for anyone interested in the future of urban America.

49. Cf. Sheingate, *supra* note 38, at 191 (discussing the conditions that might foster public entrepreneurship, including opportunities, resources, and assets).