

Urban Development and Human Development

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Along with economically disadvantaged rural areas, the ghettos or slums of our cities form an entrenched Third World of the United States.¹ Levels of ghetto unemployment and underemployment, substandard and nonexistent housing, malnutrition, health care, and education approximate those found in many Third World countries, where drug addiction and crime rates are usually less severe. Ghetto government often feels like a Third World authoritarianism: the police and other officials can act in random and bizarre ways because they are not accountable to their charges, and residents have little reason to vote for a candidate who is handpicked in what is usually a one party rule locally. Ghetto residents can thus reasonably expect a "subsistence urbanization"² that is akin to the means that Third World peasants use to win the bare necessities of a life that is nasty, brutish, and short.

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1. Michael Harrington argues that our affluent nation at "the same time . . . contains an underdeveloped nation," where the "mechanism of the misery" is similar to those in African and Asian countries. Public housing projects are often "income ghettos" and the "modern poor farms where social disintegration is institutionalized." MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 138 (Penguin Books 1968) (1963). Heibroner and Singer add that:

Visitors to America from underdeveloped lands marvel at first at the cars and TV antennas in the slums and cannot believe that slumdweller are not rich. Soon, however, they learn that the *feeling* of poverty is not determined by what a family possesses so much as by what *other* families possess.

. . . .

. . . Poverty is a social condition, not just an economic fact.

ROBERT L. HEIBRONER & AARON SINGER, *THE ECONOMIC TRANSFORMATION OF AMERICA* 233, 236 (1977).

2. GERALD BREESE, *URBANIZATION IN NEWLY DEVELOPING COUNTRIES* 5 (1966). See HARRINGTON, *supra* note 1, at 10, 24 (describing "the economic underworld of American life," where to be poor is to be "an internal alien"); LAWRENCE E. HARRISON, *UNDERDEVELOPMENT IS A STATE OF MIND: THE LATIN AMERICAN CASE* 30 (1985) (the kisses and blows given capriciously to children form the model for the individual's relation to the state); DAVID HARVEY, *SOCIAL JUSTICE AND THE CITY* 79 (1973) (the "slum is the catch-all for the losers, and in the competitive struggle for the cities' goods the slum areas are also the losers in terms of schools, jobs," and services); PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 8 (1989) (homelessness is the aggravated state of a more prevalent but less visible extreme poverty, where the hold on the basic amenities taken for granted by most Americans is precarious); CHARLES SACKREY, *THE POLITICAL ECONOMY OF URBAN POVERTY* 45 (1973) (The subjugation and segregation of dual markets creates "an urban peasantry destined to live off welfare payments and white paternalism.").

In the United States and in most other places, the causes of such a Hobbesian life are social rather than natural, no matter how many economists swear that poverty and powerlessness merely indicate a lack of success, or even of effort, in "free" or "natural" markets. The central problem is, rather, the slumdweller's lack of access to lucrative markets due to the existence of socially created barriers to entry into these markets. The United States has thus been left with greater ghetto underdevelopment than is found in the other advanced capitalist nations.³ Like that observed in the Third World, this developmental "dualism" locks America's poor into low (and sometimes no or illicit) wages and productivity. Here and elsewhere, the poor are unable to postpone their consumption and save capital and thus, they are usually left with property rights only in their own, often unskilled, labor-power. Although they have few if any "competitive advantages"⁴ to bring to bear in their few exchanges, the poor are seen by mainstream economists as participants in "informal" markets.

Like many Third World urbanites, American slumdweller's are *in* but not *of* the city; theirs is a segregated and thus a smaller universe of contact and experience. Any economic growth that occurs cannot lead to development, so long as the kinds of institutions conducive to growth remain underdeveloped. The "trickle down" solutions offered by the federal government are closely paralleled by the policies that a Reaganite World Bank and International Monetary Fund impose on some Third World governments. Even if America's local government officials are sympathetic to the poor's plight, they must deal with a growing, Third World-style dependence. Local resources must be allocated in socially and politically suboptimal ways to attract badly needed corporate resources from outside of the community. Local resources that might otherwise be directed toward solving the problems of the poor are thus dissipated through increasingly fierce competition for the highly mobile capital of the global economy.⁵ The United Nations' Conference on

3. HARVEY, *supra* note 2; HEILBRONER & SINGER, *supra* note 1, at 239. See *infra* notes 62-84 and accompanying text.

4. See MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 10 (1990) (a firm's competitive advantage either lowers costs or promotes differentiated products that command premium prices).

5. See SEVERYN T. BRUYN, *A FUTURE FOR THE AMERICAN ECONOMY: THE SOCIAL MARKET* 343, 346, 360-61 (1991) ("Global capital disenfranchises local communities because powerful corporations buy and sell local property, both land and firms, in competition for the greatest return on invested capital." The U.S. is thus "becoming a colony of foreign investors."); PORTER, *supra* note 4, at 15-16 (developing nations are frequently trapped because they have no strategy for moving beyond their fleeting competitive advantages); Pierre Clavel & Nancy Kleniewski, *Space for Progressive Local Policy*:

Human Settlements concludes that the unacceptable circumstances of urban life largely result from an inequitable economic growth, which is incapable of satisfying basic needs⁶ and which cannot be repaired through the piecemeal approach of market economies.⁷

Robin Malloy's excellent book, *Planning for Serfdom*,⁸ points out another similarity between American and Third World cities: "development" policies that amount to planning for a serfdom, at least for the poor and powerless. Like the pyramid-building pharaohs of ancient Egypt, urban politicians and planners appear to suffer from an Edifice Complex. They seem unable to distinguish the essential from the merely desirable — a distinction which is seldom drawn in marketplace transactions or analyses. Succumbing to developers' blandishments and facing an inevitable and growing gap between municipal resources and the demands placed on them, the temptation is to ignore unmet needs and to spend scarce resources on prestigious buildings. The gleaming surfaces of these buildings impress the outside world, reflect attention away from ghetto scenes, and enhance the "lifestyle" of the upper middle class through a gentrification that attracts this group's political support. This Edifice Complex is most likely to be indulged when the poor have no effective means to express complaints and when mutual suspicion already exists between the poor and the city leaders.⁹ Former Indianapolis Mayor Hudnut may thus not be so very different from a Kwame Nkrumah or Bung Sukarno, or so a Hoosierdome filled with Baltimore Colts might suggest.¹⁰

Examples from the United States and the United Kingdom, in BEYOND THE CITY LIMITS: URBAN POLICY AND ECONOMIC RESTRUCTURING IN COMPARATIVE PERSPECTIVE 199, 228 (John R. Logan & Todd Swanstrom eds., 1990) [hereinafter BEYOND THE CITY LIMITS]; James Coleman, The Resurrection of Political Economy, in THE POLITICAL ECONOMY OF DEVELOPMENT 30, 33 (Norman T. Uphoff & Warren F. Ilchman eds., 1972); Rita J. Bamberger & David W. Parham, Leveraging Amenity Infrastructure: Indianapolis's Economic Development Strategy, 43 URB. LAND, Nov. 1984, at 12. See also infra notes 26-27 and text accompanying.

6. United Nations Conference on Human Settlements, *Declaration of Principles*, in THIRD WORLD URBANIZATION 342, 342-43 (Janet Abu-Lughod & Richard Hay, Jr. eds., 1977) [hereinafter *Declaration of Principles*].

7. *Id.*

8. ROBIN P. MALLOY, *PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT* (1991) [hereinafter MALLOY, SERFDOM]. Malloy's title suggests his fondness for the ideas expressed in Friedrich A. Hayek, *Road to Serfdom* (1944), which treats many similar themes in similar ways.

9. BREESE, *supra* note 2, at 96-97. See MALLOY, SERFDOM, *supra* note 8, at 10 (discussing how the "visible monuments of political power" come together with an "invisible restructuring of cultural values and norms," in an Indianapolis which is no longer "Indiana-place"). In America's heralded "urban renaissance," the visibility of a project is almost synonymous with its viability. *Id.* at 9.

10. See MALLOY, SERFDOM, *supra* note 8, at 110. Indianapolis subsidized the Colts

Perhaps without realizing it, Malloy is also speaking about some formerly progressive Third World countries when he concludes that:

American society has become so driven by a myopic quest for the visible results of its materialistic designs that it fails to see how the end product . . . may promote an ideological framework that . . . [undercuts] the values and norms of natural and inalienable rights, human dignity, and the individual autonomy once held dearly.¹¹

Like Malloy, the United Nations' Conference pleads for "the human scale" among all of the skyscrapers, for political participation, and for other needs of disadvantaged groups.¹² These factors are seldom considered in marketplace transactions or analyses. The development of things rather than of people frequently turns the poor and powerless into its victims, if for no other reason than that the eviction of the

for the political (presumably as opposed to the economic) purpose of providing a basis for local identification, for supporting the "home team's political agenda" by stimulating an almost collegiate pride in municipal athletics. *Id.* The subsidies that prompted the Colts' exit from Baltimore (where a different and perhaps more interesting urban development policy is being implemented) came in large part from nonprofit (foundation) sources. Subsidies include revenue guarantees, a low-interest loan, and public aid for a training camp. See Bamberger & Parham, *supra* note 5, at 15. Having built the Hoosierdome (a name that offends some Hoosiers from my end of the state) at vast public expense, the city presumably believed that it had to *do* something with it. Unless my economic analyses are disqualified by virtue of my being a Bears fan — a vice that calls economic (or any other) rationality into question — the City was trying to take advantage of the monopoly or economic rents that stem from the fact that the number of NFL franchises is tightly limited. It is difficult to imagine the Colts earning money for any other reason or to calculate the net outcome from city leaders and team owners trying to exploit each other. Yet, it seems plausible that, like those in many Third World countries, the Indianapolis poor are left with less bread and mediocre circuses. See HARVEY, *supra* note 2, at 115; W. Arthur Lewis, *On Assessing a Development Plan*, in *LEADING ISSUES IN ECONOMIC DEVELOPMENT* 716, 721 (Gerald M. Meier ed. 2d ed. 1970) ("In every country . . . politicians believe that the greatness of their country is demonstrated by one or another kind of large useless expenditure"; for example, by doing on a "lavish . . . scale what could be done much more cheaply."). See also Joseph T. Hallinan, *Blacks Sharing Little of Midtown Development Wealth*, *INDIANAPOLIS STAR*, May 29, 1988, at A1 (a redevelopment agreement promised blacks a significant role in revitalization, but blacks have not participated to a great extent). To be fair, we should note Indianapolis's media-praised "can-do spirit." MALLOY, *SERFDOM*, *supra* note 8, at 10. Also, as in Houston, the Indianapolis city limits encompass areas that are in the suburbs of other cities. *Id.*

11. MALLOY, *SERFDOM*, *supra* note 8, at 140. Humanistic Third World values would presumably be more social democratic and less classically liberal democratic, than Malloy's enumerated values, however. See *infra* notes 160-65 and accompanying text.

12. *Declaration of Principles*, *supra* note 6, at 344. See MALLOY, *SERFDOM*, *supra* note 8, at 4 (urban life and development are more than the efficient accumulation of capital goods).

poor to make room for one edifice after another eventually leaves them with nowhere to go.

I. GHETTOS AND ECONOMISTS

We would presumably learn much from Third World efforts to force a peoples' *right* to development onto an agenda set by the governments and corporations that are otherwise indifferent toward or hostile to this concern. Exposure to the Third World realities of our often invisible slums might shake American complacency and strengthen our resolve to try more creative solutions.¹³ The search for solutions is an important task because, as Malloy notes, "it is the urban environment with its dense population, its diversified and specialized enterprises, its ability to generate excess capital, and its influence on surrounding regions that first reveals the emergence, stagnation, or death of a great society."¹⁴ As "monuments to the possibilities of civilized cooperation,"¹⁵ many of our cities are now falling behind those in other advanced capitalist countries in terms of the value (the real income, the accessibility and the proximity) they offer to all but their most affluent residents. American cities remain the locus of power, but their ability to offer economic opportunities to unskilled rural migrants, to promote social change, and to offer the means of adjustment and social integration, seems truncated. Cities offer slumdwellers "high rents, high density, low amenities" instead.¹⁶

A. Recent Changes

Many mainstream economists, especially those active in the law and economics enterprise, are stumbling blocks to, rather than facilitators

13. See HARRINGTON, *supra* note 1, at 11-12; Ronald I. Meltzer, *International Human Rights and Development*, in HUMAN RIGHTS AND DEVELOPMENT IN AFRICA 208, 214 (Claude E. Welch & Ronald I. Meltzer eds., 1984); Paul H. Brietzke, *Consorting with the Chameleon, or Realizing the Right to Development*, 15 CAL. W. INT'L L.J. 560 (1985); Hector G. Espiell, *The Right of Development as a Human Right*, 16 TEX. INT'L L.J. 189, 189-91 (1981).

14. MALLOY, SERFDOM, *supra* note 8, at 2. See BREESE, *supra* note 2, at 143 ("There is no worse combination than urbanization without development, because to the lack of urban facilities is added the want of employment opportunities.").

15. Mark C. Berger & Glenn C. Blomquist, *Income, Opportunities, and the Quality of Life of Urban Residents*, in URBAN CHANGE AND POVERTY 67, 67-68 (Michael G.H. McGreary & Laurence E. Lynn, Jr., eds., 1988) ("synergistic interactions" in cities are largely responsible for our standard of living).

16. HEILBRONER & SINGER, *supra* note 1, at 154. See BREESE, *supra* note 2, at 40-41; HARRINGTON, *supra* note 1, at 138; HARVEY, *supra* note 2, at 68-70; John Walton, *The International Economy and Peripheral Urbanization*, in URBAN POLICY UNDER CAPITALISM 119, 120, 122-23 (Norman I. Fainstein & Susan S. Fainstein eds., 1982).

of, creative new solutions to urban problems. Robin Malloy adroitly details some of the reasons for their failings, but urban problems have admittedly been complicated by recent and rapid economic and political changes. Historically, cities offered the "economies of agglomeration,"¹⁷ achieved by the location of large factories near one another, and a union-sponsored prosperity for middle and lower-middle income groups. Yet, we are said to now be living in "postindustrial" cities, where a "restructuring" has been prompted by changes in transport, communications, and computer technologies. Fordist production, the extreme division of labor on assembly lines which requires fixed accumulations of resources,¹⁸ is giving way to the more profitable flexibility of multilocational corporations and economic activities. The result is a deconcentration and reorganization of capital, labor, and government and a rapid growth in the service sector of the economy and in suburbs as productivity (as well as residential) centers.¹⁹

These economic changes are global in effect; stateless money circles the globe in seconds, through stateless banks that seem immune to regulation. To date, these changes have served further to marginalize the Third World and the inner cities of the United States, although a few escapees like Singapore and Hong Kong play roles analogous to some of our suburbs and Sun Belt cities. A Third World and inner-city marginalization have also resulted from an international explosion in the service economy. Some of the causes of this explosion are an increased consumer affluence and sophistication, an increased demand for leisure that can be satisfied by having others perform personal service tasks, growth in the youthful and elderly segments of the population that demand more services, the privatization of many formerly public services, and technological changes that reduce the costs of delivering

17. WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS* 252-54 (1985).

18. John R. Logan & Todd Swanstrom, *Urban Restructuring: A Critical View*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 1, 11.

19. See BRUYN, *supra* note 5, at 343; FISCHER, *supra* note 17, at 252-54; Logan & Swanstrom, *supra* note 18, at 3, 4; Harvey Molotch, *Urban Deals in Comparative Perspective*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 175, 179 [hereinafter Molotch, *Urban Deals*]; Kenneth J. Neubeck & Richard E. Ratcliff, *Urban Democracy and the Power of Corporate Capital: Struggles Over Downtown Growth and Neighborhood Stagnation in Hartford, Connecticut*, in *BUSINESS ELITES AND URBAN DEVELOPMENT* 299, 302 (Scott Cummings ed., 1988); Edmond Preteceille, *Political Paradoxes of Urban Restructuring: Globalization of the Economy and Localization of Politics?*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 27, 51; Paul Kantor, *The Dependent City: The Changing Political Economy of Urban Economic Development in the United States*, 22 *URB. AFF. Q.* 493, 506-07 (1987). See also Berger & Blomquist, *supra* note 15, at 72 (a significant correlation exists between a city's unemployment rate and its share of Fordist manufacturing employment).

services.²⁰ Mainstream economists have difficulty analyzing this shift to services because they are reluctant to abandon Adam Smith's assumption that wealth is created out of material resources. The "new" services (as opposed to slinging burgers at McDonald's, the low-wage kind of service occupation that slumdwellers are lucky to command) create wealth by applying information, knowledge, human resources, and culture to the transformation of social life. Only those cities with superb universities and a highly-educated labor force will serve as command and control centers for the diffuse service empires that are emerging.²¹

Sparked by the deterioration in Fordist production processes, the decentralization of economic activities into the suburbs results in redistribution of skills, wealth, and governmental revenues away from the cities. Many suburbs have serious entry-level job shortages. There is a long-term mismatch between these jobs and the would-be employees living in the inner city, due to residential and job segregation, the paucity of suburban job information, and the deterioration in public transport. Decentralization also has political consequences and none is more revealing than the recent use of "public entrepreneurship" to describe qualities that were formerly called political (or policy) leadership or, less flatteringly, machine politics. This change in nomenclature marks a resurgence in the influence that a 1920s-style business managerialism exerts on politics: the most pressing urban need is usually considered to be the establishment of a good "business climate" through the nominally supply-side policies that operate on the demand side by appealing to corporations in their capacity as consumers of public resources. Instead of winning re-election merely by licensing elaborate planning and redistribution schemes, municipal politicians feel an increased dependence; their bargaining and logrolling opportunities have been eroded by recent economic changes and changes in federal policies.²²

20. Interestingly, America leads Japan and Germany in the export of many services, although these countries have large domestic service sectors. Americans' distinct advantage of a fluency in English is one explanation.

21. BRUYN, *supra* note 5, at 332-34. Economists have difficulty measuring the price component of services, partly because many services are intricately linked to industrial production. *Id.* at 324. The service economy is a process based on mutual engagement, and social value is inherent in the activity itself. *Id.* See PORTER, *supra* note 4, at 240-45; Committee on National Urban Policy, National Resource Council, *Committee Report*, in URBAN CHANGE AND POVERTY, *supra* note 15, at 1, 5; Logan & Swanstrom, *supra* note 18, at 4, 7.

22. HARVEY, *supra* note 2, at 61, 86; Kantor, *supra* note 19, at 512; John D. Kasarda, *Jobs, Migration, and Emerging Urban Mismatches*, in URBAN CHANGE AND POVERTY, *supra* note 15, at 148, 193; Logan & Swanstrom, *supra* note 18, at 11; Molotch, *Urban Deals*, *supra* note 19, at 179. See MALLOY, SERFDOM, *supra* note 8, at 85 (politicians speak of public entrepreneurship rather than urban socialism or a state capitalism to

Urban politicians try to adjust to an era of "bidding down, bailing out, and building on the basics"²³ by striking a politically viable balance between the ideal of local popular control and the reality of pleasing economic elites. These elites, many of whom are nonresidents, evaluate politicians on the basis of marketplace criteria that are not relevant to the poor, who lack the price of admission to most markets. Robin Malloy describes the way this balance is struck in Indianapolis as follows: "The thought of government power and tax dollars being used to acquire a football team, a Saks Fifth Avenue department store, and luxury waterfront apartments seems to be contrary to the down home and traditional values of Indiana folklore."²⁴ This also seems contrary to the (traditional, at least) public purpose doctrine in constitutional law. Examples from other cities are given by Malloy and others, and these show a rather consistent pattern that is also seen in the Third World: the creation of independent development authorities to respond to capital markets and to circumvent a political accountability, the channelling of public involvement into such "nondevelopmental" concerns as job creation and housing rehabilitation, and the co-opting or isolating of people who oppose the implementation of the Edifice Complex.²⁵

forestall an examination of underlying premises that are inconsistent with individualism, capitalism, and other values we hold dear); Scott Cummings, *Private Enterprise and Public Policy: Business Hegemony in the Metropolis*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note 19, at 3 (government is perceived to be too large, expensive, and intrusive; therefore, private entrepreneurship becomes an urban planning device through the privatization of services and revenue sources); John J. Kirlin & Dale R. Marshall, *Urban Governance: The New Politics of Entrepreneurship*, in URBAN CHANGE AND POVERTY, *supra* note 15, at 348, 364 (recording "a shift from a tax-supported, grants-lubricated policy system toward a . . . system based on charges and fees").

23. Clavel & Kleniewski, *supra* note 5, at 200 (widely accepted "typology" of responses to recent economic changes: *inter alia*, local elites bail out of manufacturing and use "development" policies and financial institutions to shift capital into office construction and inner city gentrification). Explanations of urban restructuring are diverse, from passive adjustments to global processes to "willful action by local operators of growth machines," with a midpoint of everyone making the best of a bad bargain. Saskia Sassen, *Beyond the City Limits: A Commentary*, in BEYOND THE CITY LIMITS, *supra* note 5, at 237, 250.

24. MALLOY, SERFDOM, *supra* note 8, at 110-11. *Compare id.* at 10-11 (Indianapolis is engaged in "invisible restructuring of cultural values and norms," building on a "simplistic and egotistical conception of community" that is anchored in a "zero-sum game vision of the world.") with Bamberger & Parham, *supra* note 5, at 12, 16, 18 (charting developmental winners and losers is an interesting exercise, and Indianapolis pioneered a "new civics," in which "community involvement is as much a matter of enlightened self-interest as . . . of obligation," while using "leverage capital" from a local foundation to develop "a unique niche in a specialized economy — sports").

25. Kantor, *supra* note 19, at 512-13. *But see* Harvey Molotch, *Strategies and Constraints of Growth Elites*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note

Top city politicians are sometimes venal, but they are seldom stupid or malign. Spurred on by cutbacks in federal funding, politicians spend their time courting providers of capital, rather than pursuing other urban agendas.²⁶ The “[i]rrational and unrestrained competition” that ensued “has led some municipal jurisdictions to compromise seriously their revenue base with lucrative tax abatement incentives or to make rash commitments to finance infrastructure improvements or initiate land use changes through high-risk public indebtedness or fiscally questionable bonding programs.”²⁷ Like Third World countries, our cities are played off against each other by business people. Politicians are thus tempted into neomercantilist policies of dubious legality. As in the mercantilism of old, these policies represent a public-private “partnership” that is largely a private determination of the levels and types of public goods and services. These determinations ignore the needs of the poor and

19, at 25, 35 [hereinafter Molotch, *Strategies*] (Political entrepreneurs can mobilize both elites and public opinion through “grace and cunning, energy and wit, information and training.”). The constitutionality or legality of many of the tactics used is dubious, perhaps because the tactics are so new that definitive court tests are still forthcoming. See FISCHER, *supra* note 17, at 41 (Supreme Court will rarely interfere with local government decisions on zoning or land use); MALLOY, SERFDOM, *supra* note 8, at 13-14 (Tactics similar to those used in Indianapolis are used in Boston, St. Louis, Pittsburgh, and Louisville. In Louisville, the Louisville Riverfront Project was given a 30 acre site, \$13.5 million in financing, and \$11.5 million in federal funding, thereby creating a long-term business relationship); Cummings, *supra* note 22, at 16 (Houston displays a “developmental chaos,” as a “free market disaster area” incapable of financing social services.); Daniel Mandelker, *Public Entrepreneurship: A Legal Primer*, 15 REAL EST. L.J. 3 (1986) (discussing state laws that determine the legal acceptability of public entrepreneurial powers). *But see* M. Bruce Johnson, *Introduction*, in RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY, DECONTROL AND THE PUBLIC INTEREST 1, 14 (M. Bruce Johnson ed., 1982) [hereinafter RESOLVING THE HOUSING CRISIS] (“Houston’s lack of land use controls is actually a more efficient system in protecting neighborhoods than the scandal-ridden, bribery-prone zoning boards found elsewhere. The market really is capable . . . if given the chance.”). Notwithstanding Hartford’s transformation into a corporate city at the forefront of high-tech services, it is the fourth poorest city in the nation, plagued by severe fiscal problems and an acute class polarization. Cummings, *supra* note 22, at 18. See Neubeck & Ratcliffe, *supra* note 19, at 299. See also Thomas J. Keii, *Disinvestment and Decline in Northeastern Pennsylvania: The Failure of Local Business Elite’s Growth Agenda*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note 19, at 269 (discussion of Wilkes-Barre, Pennsylvania).

26. Molotch, *Urban Deals*, *supra* note 19, at 176. See Preteceille, *supra* note 19, at 51-52 (given the need to compete for capital and the structure of local tax systems, the ability to redistribute resources to the poor is limited); Sassen, *supra* note 23, at 250 (City leaders have been “routed by financial capital, conservative states, and privatization ideologies.”).

27. Cummings, *supra* note 22, at 11. See BRUYN, *supra* note 5, at 360-61; Logan & Swanstrom, *supra* note 18, at 19-20; Kantor, *supra* note 19, at 510-11; Mandelker, *supra* note 25, at 3; Lowdon Wingo & Jennifer R. Wolch, *Urban Land Policy Under the New Conservatism*, 5 URB. L. & POL’Y 315, 326 (1982).

may prove to be impoverishing for the nonpoor as well. They also miss the significance of recent economic changes, by emphasizing the least mobile resource which is thus the one least attractive to investors implementing a flexible global strategy: urban land and the uses to which it is put.

Although the magnitude of recent economic changes strongly suggests the need for federal solutions that will enable cities to adjust to the "externalities" of these changes and to reduce wasteful competitions for capital, such solutions are unlikely so long as the federal government is widely perceived as too large, expensive, and intrusive. State governments are unlikely to help much either, because their responsibilities are swollen by a "new federalism" and their revenues are reduced under the local equivalents of Gramm-Rudman. The "old slums" had meaningful votes and could make their political influence felt, especially during the New Deal and its aftermath. At that time, perceptions of misery and the need for governmental solutions were more widespread, and governmental policies were made more openly.²⁸ Since then, "[t]he mobilization of interest groups, their representation . . . their incorporation into and effects on urban political processes," and even the groups' "theory base"²⁹ have all changed radically.

What effects have recent economic and political changes had in the ghettos? Rapid increases in catastrophic joblessness and homelessness, teen pregnancies, female-headed families, welfare dependence, serious crime, and the outmigration of middle and working class families that further concentrates poverty may have been some of the outcomes. Although many points of contact are likely to exist between these miseries and other recent economic and political changes, the chains of causation are long and not yet fully explored, least of all by mainstream economists.

28. See HARRINGTON, *supra* note 1, at 15; Kirlin & Marshall, *supra* note 22, at 352-53; Lewis, *supra* note 10, at 721; Robert H. Freilich, et. al., *The New Federalism — American Urban Policy in the 1980s: Trends and Directions in Urban, State and Local Government Law*, 15 URB. L. 159, 161 (1983). See also Cummings, *supra* note 22, at 9 (arguing that large Reagan-era budget deficits hurt both capitalists and the underclass, and that these deficits limit the ability of cities to manage and divert capital accumulation crises or to help local industries deal with similar crises); Kirlin & Marshall, *supra* note 22, at 349 (arguing that recent federal government expenditure policies are much less location-specific, involving the procurement of defense hardware, for example, rather than sewer grants); Kantor, *supra* note 19, at 495, 511 (arguing that the federal system of government creates special obstacles that exacerbate local-level tensions between political and marketplace accountabilities and that federal programs accommodate rather than limit economic warfare among cities). *But see* Committee on National Urban Policy, *supra* note 21, at 8-9 (stating that although local taxes have increased and city services and employees have declined, cities are generally healthier fiscally than they were early in the 1980s).

29. Kirlin & Marshall, *supra* note 22, at 357.

One can confidently conclude, however, that these economic and political changes overshadowed new ghetto miseries, making the amelioration of misery more difficult and less rewarding politically. Equity, representation, and the other social welfare issues concerning access to public goods and services are given lowly positions on the policy agenda of entrepreneurial politics. In any event, a San Diego or a downtown district will have more entrepreneurial opportunities than a Des Moines or a ghetto. African-Americans bore the brunt of deindustrialization (the deterioration in Fordist production processes) in the auto, rubber, steel, and other industries hurt most by the erosion of America's competitive position in manufacturing. These unemployed people lack the mobility to claim suburban jobs, and they lack the skills and education to enter the burgeoning new service occupations. Their schools and housing are deteriorating, and the slums may thus be expanding geographically.³⁰ Scott Cummings concludes that "[u]nrestrained free enterprise is reproducing the same patterns of urban blight that ravaged American cities during the 1960s,"³¹ while Moore and Squires believe that a "new social contract is emerging, one which calls for additional financial rewards for the wealthy but punitive sanctions for the poor."³²

B. *The Ideology of Analysis*

My necessarily brief description of recent economic and political changes is no doubt imperfect because little is reliably known about these changes. Mainstream economists seem to lack the information, the theoretical framework, and the incentives to acquire the facts and theories for analyzing these changes effectively and devising legal and political arrangements for ameliorating the attendant miseries of the poor and

30. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 135 (1987); Logan & Swanstrom, *supra* note 18, at 12. See Committee on National Urban Policy, *supra* note 21, at 11-12 (the most troublesome trend is the growing concentration of central city poverty, as the effects of deindustrialization are felt and as persons with marketable skills move away); Susan S. Fainstein, *Economics, Politics, and Development Policy: The Convergence of New York and London*, in *BEYOND THE CITY LIMITS*, *supra* note 5, at 119, 140 ("Using the tools of development corporations, tax subsidies, advertising and public relations, and financial packaging, officials [in London and New York] have stressed the economic development function of government to the detriment of social welfare and planning."); Neubeck & Ratcliff, *supra* note 19, at 301-02 (where deindustrialization has destroyed a union-led prosperity, the effects of trickle-down policies are at best uncertain and uneven).

31. Cummings, *supra* note 22, at 12.

32. Thomas S. Moore & Gregory D. Squires, *Public Policy and Private Benefit: The Case of Industrial Revenue Bonds*, in *BUSINESS ELITES & URBAN DEVELOPMENT*, *supra* note 19, at 97, 108.

powerless. In *Planning for Serfdom* and in *Law and Economics*,³³ Robin Malloy artfully describes how ideology will rush in to fill these vacuums of fact, theory, and empathy for the poor.³⁴ What Malloy calls legal economic "discourse"³⁵ among conservative (mainstream, Chicago School) economists is somewhat varied and sometimes passionate, but can be summarized briefly:

If we assume that everyone is economically rational and that their interactions are typified by exchanges in markets assumed to be nearly perfect, then these interactions will be efficient and serve to maximize society's wealth. It follows that statutory and regulatory interventions in these interactions can only be inefficient and serve to reduce society's wealth. The best law is thus the non-interventionist common law, which is seen to mimic efficient-by-definition market processes.³⁶

Although this theory may be contradicted by the recent economic and political changes I sketched, the analysis (from the "then" clause onwards) remains elegant, original, powerful, and internally consistent. Ideology is smuggled into the assumptions (the "If" clause) that must be made if the analysis is to operate properly.³⁷

33. ROBIN P. MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990) [hereinafter MALLOY, *LAW AND ECONOMICS*].

34. See *id.* at 5, 10, 51, 52, 55, 64, 66, 156. See also Paul H. Brietzke, *Review: A Law and Economics Praxis*, 25 VAL. U. L. REV. 51 (1990) (reviewing Malloy's book).

35. MALLOY, *SERFDOM*, *supra* note 8, at 82. This discourse is "a battle of often unspoken and implicitly assumed first principles of faith." *Id.* at 84.

36. PAUL H. BRIETZKE, *THE LAW AND ECONOMICS OF THE CONSTITUTION* (forthcoming). This is a Kantian theory of knowledge, or Kelsen's *Grundnorm*, that distinguishes legal truth from falsity. *Id.* See Frank I. Michelman, *Microeconomic Appraisal of Constitutional Law* in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENT LAW* 137, 139 (Daniel Rubinfeld ed., 1979) ("[V]alue is perceived as strictly individual, private, and subjective, and law as strictly a device for removing or minimizing obstacles and elemental, frustrations."). The common law is "the organic carrier of popular morality," while "enacted law is taken to reflect specific dictates of sophisticated policy or particularistic formations of power." *Id.* at 140. See also *id.* at 158-59; *infra* note 145 and accompanying text.

37. See MALLOY, *SERFDOM*, *supra* note 8, at ix. Malloy's book is both a study of ideology in law and economics and a theory defending liberty, dignity, and freedom. Freedom is also an ideology, but one that we presumably accept. By way of contrast, the less influential "[c]ommunitarian (altruistic) and state-centered views of law and economics generally lead to conceptual frameworks of liberty that focus on the importance of groups, experts, and planners at the expense of the individual decision makers in the marketplace." *Id.* at 62. Economics theories differ in their ideological assumptions about the roles of the individual, the community, the state, and economic and political power. These roles form the basis for rival law and economic notions of property, contract, free choice, and justice. *Id.* at 62, 83. This ideological rivalry is fueled by the fact that

By no stretch of the imagination do the assumptions of mainstream law and economics offer relevant descriptions of life in the ghetto or in the corridors of power, in Indianapolis or elsewhere. Yet, these assumptions are widely admired and adopted. As I have written elsewhere: "It is not that Americans are stupid or unideological; it is that they have a high tolerance for dissimulation in pursuit of what they want"³⁸ and have the wealth and power to grab. Mainstream law and economics thus "works" for "us," even if we know that the economic rationality assumption cannot hold. It cannot hold because it ignores a host of factors that make us human, including altruism, habit, bigotry, panic, genius, luck or its absence, and factors such as peer pressures, institutions, and cultures that turn us into social animals. A dehumanized, desocialized, and often sexist "economic man" supposedly goes through life as if it were one long series of analogies to isolated transactions on the New York Stock Exchange.

Markets are the original sources of an economic and political pluralism, a diversification of risks and opportunities that could be made to create more viable niches for the poor and powerless. Paul Peterson's *City Limits*³⁹ builds this history into a conservative's brief for markets as dictators of urban policy and as legitimators of the economic growth demanded by elites.⁴⁰ In Peterson's extensively criticized view,⁴¹ implementing "welfare" concerns leads only to stagnation and decline.⁴² Yet, the markets he praises are not all there is to law or life, especially

Keynesianism (and its tendency to favor the poor and powerless) is no longer dominant, but there is no consensus on a replacement for the theory. Kirlin & Marshall, *supra* note 22, at 352. Severyn Bruyn rejects this notion of rivalry in favor of "a new synthesis . . . evolving in the private sector of the postindustrial economy . . . [It] is becoming socialized through its own internal dynamic, with different norms and values [that are] . . . not yet fully visible." BRUYN, *supra* note 5, at 331. Bruyn's many excellent analyses are undercut by the 1920s-style trade associational ideology he discerns in recent events. Such an ideology has historically demonstrable leanings toward cartels and even fascism.

38. Brietzke, *supra* note 34, at 57.

39. PAUL E. PETERSON, *CITY LIMITS* (1981).

40. Logan & Swanstrom, *supra* note 18, at 4 (citing PAUL E. PETERSON, *CITY LIMITS* (1981)).

41. *See id. passim.*

42. *Id.* at 4-5. A neoclassical micro model "assumes a two-commodity world, without history or politics, and occupied by two sexless people, without race or philosophy, one the owner of a business, the other a consumer." SACKREY, *supra* note 2, at 81. According to this view, the city "has no legitimate existence prior to or superior to the claims of the market." Moore & Squires, *supra* note 32, at 110. This view also ignores the political and cultural forces that shape markets. *But see* MALLOY, *SERFDOM*, *supra* note 8, at 3 (stating that market theory sets ideological and classically liberal boundaries to legal economic discourse through an emphasis on individual empowerment and counterbalancing power sources).

because the main marketplace criterion for policy evaluations, the willingness to pay, excludes persons whose evaluations may differ precisely because they are *too poor* to pay. The poor may have stronger objections to some of the ways in which market-generated "surpluses" are spent: conspicuous consumption by Yuppies, the Edifice Complex (a quasi-public conspicuous consumption), military hardware, and other conspicuous public consumptions. Elites may use their wealth and power to alter market conditions in their favor, to the point where Adam Smith's "invisible hand" becomes a thumb on the scales of production and distribution. The market metaphor cannot explain the indeterminacy that sometimes results from bargaining between social groups or communities with very different "utility functions" (wants and needs). Other bargains are all-too-determinate: the rich rarely surrender even marginal advantages at a price the poor can afford, while the poor frequently surrender important interests for a pittance.⁴³

Political "markets" may thus differ from economic markets simply because they are political, a possibility that a conservative law and economics largely ignores. Stimuli and responses may differ subtly or significantly, and the poor *may* find an effective representation on the basis of, for example, nonmarket judgments that past distributions of wealth and power were unfair.⁴⁴ Yet, a Third World style of political underdevelopment remains evident in many cities, as an inability to cope with a bewildering variety of demands old and new without lurching towards an authoritarianism. The Chicago School's model of law and economics ignores these problems and possibilities, in pursuit of what Bruce Ackerman calls "an ideological smokescreen for a reactionary assault on the American activist state"⁴⁵ and presumably, on activist

43. HARVEY, *supra* note 2, at 80-81. See also FISCHER, *supra* note 17, at 95 ("The problem created by nonrival, nonexclusive goods is that there is no *voluntary, market* mechanism by which preferences can be reliably revealed."); HARVEY, *supra* note 2, at 114 ("To postulate scarcity as an absolute condition from which all economic institutions derive is . . . to employ an abstraction which serves only to obscure the question of how economic activity is organized."); HEILBRONER & SINGER, *supra* note 1, at 238. Markets arise to cope with scarcity, but scarcity is also socially organized to permit markets to function: "We say that jobs are scarce when there is plenty of work to do, that space is restricted when land lies empty, that food is scarce when farmers are being paid not to produce." HARVEY, *supra* note 2, at 114.

44. See MALLOY, SERFDOM, *supra* note 8, at 3. *But see id.* at 36 ("We no longer seem able to accept the natural dynamic of winning and losing in a competitive marketplace."). Presumably, "natural" is not used here as it is in "natural science" or "the natural order of things" because markets are created by society and are subject to the exertion of wealth and power, fragmentations, and other failures that may lead us to reject marketplace outcomes and to attempt to cure the failures.

45. BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 7 (1983). See *infra* notes 91-111 and accompanying text.

cities as well. Ackerman may exaggerate a bit, and he is a bit out of date: Chicagoans seem amazingly tolerant of a "public entrepreneurship" that creates a good "business climate," even though redistributions favoring the rich are fully as interventionist as redistributions that favor the poor.

The Chicago School provides a strange picture of two socially created giants: almost flawless markets, giving individuals exactly and only what they are willing to pay for, and almost wholly pernicious governments, providing what no one is willing to pay for. Although Chicagoans almost always view government as the problem, government is almost always the solution for contemporary liberals like Ackerman.⁴⁶ Yet, we may have seen enough to know that governmental interventions will be problems and solutions in roughly equal measure, sometimes simultaneously.

C. *Markets and the Poor*

How do mainstream economists analyze the plight of the poor and powerless? The brief answer is: Seldom, and not very well. The desire to preserve their theory intact, in the face of seemingly inconsistent ghetto facts, usually wins out over the desire to help people. Cento Veljanovski accuses the Chicago School of having a necessarily "pro-rich, anti-poor bias."⁴⁷ There must be losers as well as winners in the zero-sum game of neoclassical microeconomics that Chicagoans play. Their analyses retain a tinge of the Social Darwinism that grew up with their beloved neoclassicism late in the nineteenth century, and their

46. Ross Cranston, *Creeping Economism: Some Thoughts on Law and Economics*, 4 BRIT. J.L. & Soc. 103 (1977). For a description of the debate as one of compliant (conservative) versus progressive (contemporary liberal) responses by local government, see Sassen, *supra* note 23, at 250-51. Needless to say, a liberal or radical law and economics is no less ideological than that of the Chicago School, but the Left focuses on "unemployed blue-collar workers left behind by capital flight, the 'missing middle' in the wage structure, displacement caused by gentrification, and the fiscal crises of local governments." Logan & Swanstrom, *supra* note 18, at 9-10. See also MALLOY, LAW AND ECONOMICS, *supra* note 33, at 81 ("Rules are the opiate of the masses" through which mainstream economists legitimate hierarchy and inequality in America.); Fainstein, *supra* note 30, at 140-41 (The failure of the Left to organize a coherent and compelling political program is a major reason for the success of the conservative's "resurgent market ideology."). Ideology cannot be expelled from law and economics analyses; its role should thus be made more explicit, as Malloy tries to do.

47. CENTO VELJANOVSKI, THE NEW LAW-AND-ECONOMICS: A RESEARCH REVIEW 7 (1982) (published by the Centre for Socio-Legal Studies at Oxford, this mildly-critical book is a helpful commentary). See MALLOY, LAW AND ECONOMICS, *supra* note 33, at 64 (conservative law and economics advances the *de facto* morality of "protecting the market model"); DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA 134 (1980).

market metaphors require that the poor be deemed responsible for their failure to compete. Under their School's more charitable interpretations, the poor are assumed to be facing different but unspecified constraints on their competitiveness. These constraints usually get lost in the analytical shuffle because the analyst does not understand them, and macroeconomic solutions (fiscal policies, programmatic interventions) are cheerfully dispensed with because everything can be accounted for at the micro level of individual behavior. Peter Steinberger generalizes the policy recommendations that result: "when a problem becomes *really* a problem, then something *will* be done about it, if at all possible; though of course, some problems are utterly intractable and must simply be endured."⁴⁸ The specific policy recommendations echo those regularly offered to the Third World: "[b]y reducing taxes and government regulations, cutting social spending to reduce the federal deficit, and creating a good 'business climate' (i.e., one conducive to private capital accumulation), entrepreneurs will flourish again and more wealth will be generated, with enough trickling down to benefit all income groups."⁴⁹

It is difficult for an analyst to make sense of poverty, chiefly that of minorities, when she is neither poor nor a minority, but I will try to sift through a mass of misinformation and polemics. The Kerner Commission tried to do this in 1968 and saw a nation rapidly moving

48. PETER J. STEINBERGER, *IDEOLOGY AND THE URBAN CRISIS* 130 (1985). See HEILBRONER & SINGER, *supra* note 1, at 200, 219 (As in all ideologies, the old — Social Darwinism and the myth of rugged individualism — coexists with the new. This is a departure from the New Deal liberalism that retains some influence today and that refused to blame the victims of an admittedly more widespread economic disaster.); SACKREY, *supra* note 2, at 59, 65; Coleman, *supra* note 5, at 33 (the poor become part of the *ceteris paribus* assumptions of a Chicago School theory enamored with the logical structure that economics gives to legal analysis); Rubinfeld, *Introduction, in* *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS*, *supra* note 36, at 1, 6. A conservative law and economics seems to harken back to the ideas of Alexander Hamilton, who "simply accepted social inequality, propertyless dependence, and virtually unbridled avarice as the necessary and inevitable concomitants of a powerful and prosperous modern society." MCCOY, *supra* note 47, at 134. This approach would make some of the critics of mainstream law and economics into modern-day Jeffersonians. See Paul H. Brietzke, *The Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur*, 22 VAL. U. L. REV. 275 (1988) [hereinafter Brietzke, *Constitutionalization*].

49. Moore & Squires, *supra* note 32, at 98 (describing the "prevailing [American] perspective on economic development" that is arguably based largely on Chicago School theories). See HARVEY, *supra* note 2, at 114; SACKREY, *supra* note 2, at 94 ("The conservative's program to combat urban poverty is ordinarily a simple indifference, buttressed by occasional suggestions . . . about how best to maintain law, order, and civility in poor neighborhoods."). Similar to their advice for the Third World, conservative (and Leftist) prescriptions for the poor and powerless are frequently arrogant, neocolonial, and motivated by a desire to maintain a theoretical purity. See HARRISON, *supra* note 2, at 18-21 (discussing the ideas of Gunnar Myrdal).

toward two separate Americas.⁵⁰ The consequences of this separate development are now fully-formed; ghettos are a persistent sectoral problem that acts as a drag on, and a reproach to, the rest of the economy. No amount of the "free market dynamism" prescribed by conservative law and economics has effected a cure to date. Ghettos and their residents have been the consistent losers in recent economic and political changes. "Free market adjustments" have involved abandoning additional urban areas, areas with crumbling infrastructures and few apparent uses, to the unemployables who cannot join the exodus.⁵¹ There remains "no market pull for . . . low-cost housing, better police protection, cleaner streets" in the inner city.⁵² Just as the poor are in but not of the city, so are they in but not of the markets. They are caught in a grand, Chicagoite *non sequitur*: markets promote economic growth, but it simply does not follow that the life-chances of the poor are naturally as great as they can be.⁵³

Consider a Chicago "market" that exists in the shadows of the Chicago School itself: new car buyers who live in the black Englewood ghetto are "free to choose" (as Chicagoan Milton Friedman puts it) between two finance companies, each charging fifty-two percent interest per year. These creditors may be earning "economic rents,"⁵⁴ illegally fixing prices through a "conscious parallelism,"⁵⁵ or charging interest that is indeed cost-justified by the magnitude of the risks they run. This transaction was formerly called a "juice" loan and (prior to deregulation)

50. KERNER COMMISSION, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 401 (1968). See HARRINGTON, *supra* note 1, *passim*.

51. Wingo & Wolch, *supra* note 27, at 329.

52. HEILBRONER & SINGER, *supra* note 1, at 238-39 (slums have proliferated because economic growth is market-directed); SACKREY, *supra* note 2, at 38-39; STEINBERGER, *supra* note 48, at 130; Sassen, *supra* note 23, at 239 (Studies show that "the natural tendencies of . . . economic forces, if left alone, override local concerns and undermine the socio-economic conditions of significant sectors of the population." This statement may be true, but the author relies on the same naturalistic fallacy used by the Chicago School.). Rather than opt for New Deal orientations, Robin Malloy prefers the view expressed in Adam Smith's *Theory of Moral Sentiments*: true happiness is attained through a voluntary and almost altruistic compassion and understanding, rather than through wealth. MALLOY, SERFDOM, *supra* note 8, at 22-23. This worthy view can all too easily be trivialized as a "thousand points of light" in today's more cynical political era.

53. See HARVEY, *supra* note 2, at 114-15.

54. See *infra* note 58.

55. See *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."). This doctrine has been considerably weakened by the Chicago School of antitrust in recent years.

usury or redlining, and it certainly possesses few of the virtues that the Chicago School claims for markets. We could stretch our imaginations and describe such arrangements as occurring in informal or marginal markets, but the reality is that they occur in market *surrogates* designed for survival rather than for the Chicago School's wealth maximization.⁵⁶ These surrogates spring up because the formal structure of the ghetto economy has collapsed, yet ghetto residents remain segregated from conditions in the "real" markets, such as "below-market" interest rates designed to sell overpriced cars and car lease terms that confer tax breaks as "business" expenses. The surrogates erect barriers to entering the real markets and perpetuate the separate (under)development of poverty. With interest payments loaded forward, try paying off one of these loans, even in Chicago School theory, if you don't have so much money that you don't need the loan in the first place because you don't live in an Englewood.

Unable to afford a car and living without reasonable access to public transport, residents of an Englewood lack the mobility to obtain a job in the suburbs. They rationally see little reason to move from one segregated community to another, where conditions will be much the same, and they lack the educational background to enable their retraining for a skilled occupation. They are thus immobile, in contrast to the Chicago School assumption of (near-)perfect mobility of "factors of production" (a dehumanizing characterization) that is epitomized by a multinational capital. In markets, information exposes new threats and opportunities, and it thus overcomes inertia by providing incentives for action. This information does not reach the ghetto because informational "networking" through friends, schools, and other community organizations is segregated and thus restricted. The Chicago School assumption

56. See BRUYN, *supra* note 5, at 27 (discussing the theories of Karl Polany: the Chicago School economic man assumptions apply in the "formal economy," while the "elemental facts of survival" apply to the "substantive economy"). A "market" presupposes site, available goods, a supply and a demand, and the equivalencies necessary for exchange. *Id.* at 28. These conditions are not always present together in slums, where Karl Polanyi's "primitive" (Third World subsistence, in my usage) reciprocal and redistributive systems frequently dominate instead. *Id.* Kasarda argues that "the vast underground economy . . . enables many of those displaced from the mainstream economy to survive." Kasarda, *supra* note 22, at 189. Conservative economists can and do make markets of everything, including marriage. The substantive, underground economy violates so many Chicago School assumptions, however, that it is less confusing to adopt the notion of market surrogates. For examples of ghetto violations of Chicago School assumptions, see *infra* notes 57-60 and accompanying text. These market surrogates are in, but not of, the markets themselves. For example, public welfare assistance serves as a partial surrogate for jobs lost or never found in the first place. See Kasarda, *supra*, note 22, at 190.

of perfect (or at least very good) marketplace information is thus inapplicable to the slums.⁵⁷

In sum, city markets are much more fragmented, uncompetitive, and full of barriers to entry than the Chicago School assumes, especially because the wealthy and powerful seek to keep certain city markets "closed" so as to earn economic rents⁵⁸ and to keep the markets from curing themselves. These conditions foster the nonmarket allocations of resources that can be commanded only through a political entrepreneurship or influence over an entrepreneur — capacities in short supply in the ghetto. There is no *Mount Laurel*⁵⁹ or any other "open city" for the poor and powerless, whose economic isolation better explains the loose attachment some of them feel to the "system" than do sociologists' problematic explanations of "alienation" or "anomie." For example, it is difficult to measure the costs of being cut off from physical and social activities by the fear of crime, a fear that is more rational in the slums than it is in other parts of the city. Cut off from the "real" markets in many ways, ghetto residents are "steered" by market surrogates into certain, uncompetitive neighborhoods, schools, jobs, and sources of credit. A Chicago School analysis could show this steering to be efficient, as a method of subjugation that serves as a barrier to entering the more lucrative markets.⁶⁰

57. See MALLOY, SERFDOM, *supra* note 8, at 67; PORTER, *supra* note 4, at 639; WILSON, *supra* note 30, at 40, 134. See also BREESE, *supra* note 2, at 98-99 (describing an immobility of many Third World city dwellers that is similar to that of American slumdweller); MALLOY, SERFDOM, *supra* note 8, at 67 (The Chicago School's assumption of "the ability to move freely implies a value judgment against the hardship claims of those who fail to uproot their families and relocate."); Kasarda, *supra* note 22, at 190 (discussing the slumdweller's "low perceived marginal utility of migration relative to the opportunity costs of giving up their in-place assistance").

58. Economic rents are the difference between the rate of return in a market where the supply is temporarily or permanently fixed and the rate of return in a competitive market. Talented baseball players earn economic rents because the supply of their skills is narrowly limited. The holder of an exclusive catering franchise at a city airport also earns economic rents because the city has artificially restricted the supply of food and drink. Logan argues that in "place of union jobs at moderate hourly wages, cities now offer a more polarized job market: increasing opportunities in highly rewarded professional and technical occupations . . . and even greater expansion in low-wage clerical, sales, services, and non-union manufacturing." John R. Logan, *Fiscal and Developmental Crises in Black Suburbs*, in BUSINESS ELITES AND URBAN DEVELOPMENT, *supra* note 19, at 333, 334. Even if they are lucky, slumdweller tend to obtain the low-wage jobs, like selling newspapers and serving "casual" food. See Rossi, *supra* note 2, at 135; SACKREY, *supra* note 2, at 45.

59. Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), *cert. denied*, 423 U.S. 808 (1975) (striking down suburban land-use controls as economically exclusionary and developing attendant doctrines and remedies). See FISCHER, *supra* note 17, at 261-62 (discussing the *Mount Laurel* "open cities" model and comparing it with the "closed cities" model found almost everywhere else).

60. See HARVEY, *supra* note 2, at 79; SACKREY, *supra* note 2, at 45 (In a "dual"

Several explanations for this separate development have been advanced. The most popular explanation, at least among conservatives, is that slumdweller live in the "culture of poverty."⁶¹ This explanation has also been widely used to explain discrimination and dependence in the Third World. It is certainly true that America's poor are "degraded and frustrated at every turn"⁶² and "that responsiveness to the market economy cannot be taken for granted because it reflects values and ideas even more than material conditions."⁶³ Yet, unlike other cultures, the "culture" of poverty is not self-perpetuating once it is absorbed during childhood. In fact, it usually disappears rather quickly when the poverty is removed. Moreover, the culture of poverty explanation stigmatizes the poor by suggesting that the poor are essentially different from the middle and upper class, and it creates the comforting illusion that we can cure poverty by making "them" think more like "us," that is, in more market-like ways.⁶⁴

The most plausible explanation of poverty and its concentration in minority communities is the discrimination that leads to segregation. That this explanation is not altogether obvious is suggested by William Fischel's excellent book.⁶⁵ On the one hand, Fischel notes "that it is more difficult to enforce antidiscrimination laws in owner-occupied housing. A consequence, perhaps unforeseen, of the acceptance of the primacy of the single-family housing district is the perpetuation of racial segregation in areas hostile to minorities."⁶⁶ Suburban zoning laws are thus

market, "public and private employment agencies, unions, and employers have quite simply reserved certain jobs for black people." These practices are as efficient a means of subjugation as is segregation in housing and education.) and at 96 (discussing an argument, from a structuralist economics, that full employment could return and some people would still be unable to compete); WILSON, *supra* note 30, at 60-61, 133.

61. The culture of poverty assumes that people are conditioned to think of "themselves as unworthy or unable to compete in labor markets, and that ultimately there is established a vicious circle of behavior . . . inconsistent with competition." SACKREY, *supra* note 2, at 54. Demeaning jobs become further evidence of unworthiness. *Id.* at 53. This thesis was originally developed by an anthropologist, Oscar Lewis, to explain conditions in Puerto Rico and elsewhere in Latin America.

62. HARRINGTON, *supra* note 1, at 73.

63. JOYCE APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790s* 47 (1984). If this is indeed the case, the process cannot be as "natural" as a conservative law and economics assumes.

64. See SACKREY, *supra* note 2, at 55; WILSON, *supra* note 30, at 6, 8, 13, 60-61. The notion that the poor are different from us "enables Americans to evade hard questions about changes in the distribution of resources and the structure of society." SACKREY, *supra* note 2, at 55 (quoting Charles Valentine, *The Culture of Poverty: Its Scientific Significance and Its Implication for Action*, in *THE CULTURE OF POVERTY* 216 (Eleanor B. Leacock ed., 1971)).

65. FISCHEL, *supra* note 17.

66. *Id.* at 62 (citation omitted).

a "surrogate" for "racism." Denied access to suburban houses and jobs, the poor bear higher central-city taxes for poorer services and higher housing costs that result from being forced or steered into fewer communities. The poor also lose access to the better "public" schools, those that are open at little or no cost to local residents rather than to the general public.⁶⁷ Armed with such insights, Fischel nevertheless concludes: "The puzzle about the desire of suburbs to exclude the poor is that it does not exist as much in other societies, and it does not seem to have occurred very much in earlier days in the United States."⁶⁸ This puzzle solves itself when we remember that "earlier days" were those of a *de jure* segregation. Times have changed, and the bigotry of discrimination⁶⁹ (which is much less prevalent in most Western European communities) must now assume subtler forms, such as marketplace transactions or zoning and other laws with ostensibly nondiscriminatory purposes that today's judges are reluctant to probe too deeply.

If the main or only criterion for marketplace evaluations is the willingness to pay, this willingness can be based on bigotry with a virtual impunity. Indeed, the Chicago School commands that it be so: the preferences on which this willingness is based are assumed to be subjective and nobody's business but that of the parties to the transaction. Government should not second-guess their willingness or unwillingness by probing its bigoted basis because this would violate efficient private property rights and make the transaction less wealth-maximizing for society. (This is a circular argument. Property rights and social wealth maximization are also defined on the basis of a willingness to pay, and those who are too poor to pay are thus excluded from the Chicagoans'

67. *Id.* at 317.

68. *Id.* at 333. Fischel adds that there is little opposition to low-income housing for the elderly in the suburbs, so that the fear is not of poverty itself. *Id.* at 333-34. See also WILSON, *supra* note 30, at 30, 32. But see MALLOY, SERFDOM, *supra* note 8, at 51 (institutional frameworks of the past provide no guidance because they were biased against women and minorities).

69. "There has never been a disability in American society to equal racial prejudice. It is the most effective single instrument for keeping people down that has ever been found." HARRINGTON, *supra* note 1, at 144. Part of this bigotry is the perception that many minority people choose poverty through a fear of work. *Id.* at 21. After decreasing somewhat, racial antagonisms have increased recently because many "whites" have also been hurt by recent economic and political changes, and the whites will seek to protect their "turf." Cummings, *supra* note 22, at 353. See also WILSON, *supra* note 30, at 136. But see Perry Shapiro & Judith Roberts, *Information and Residential Segregation*, in RESOLVING THE HOUSING CRISIS, *supra* note 25, at 337, 338 (concluding that "patterns of racial residential segregation do not approximate a minimum-contact pattern" and that "white flight" is a suspect theory). The reader is free to draw his or her own conclusions concerning, *inter alia*, where Shapiro and Roberts's Ivory Tower might be located because they offer no justifications for their conclusions.

calculations at the property, market, and social levels.) Chicago Schoolers like Gary Becker “generally are suspicious of results that depend on prejudiced behavior. “We know that the competitive market exacts a large penalty on agents whose economic actions are governed by irrational prejudice.”⁷⁰ This argument is true, by definition, *if* there are no barriers to entering the market (no segregation for example), *if* the market is indeed competitive, and *if* economic actions consistently win out over irrational prejudice.

Even though the Chicago School does not offer plausible descriptions of life in the ghetto, we cannot assume that poverty flows solely from people having been imported as slaves from Africa centuries ago or that it results exclusively from a contemporary bigotry or from other recent economic and political changes. Robin Malloy offers a sensibly moderate view: “we cannot find guidance on such issues as minority or women’s rights by . . . accepting the institutional frameworks of the past, since such frameworks are from the start biased against women and minorities.”⁷¹ Indeed, he continues, the analysis of these issues “facilitates the political deconstruction of traditional [Chicago School] neoclassical economics because it challenges the very assumption that law should validate market choices.”⁷² Moreover, “[t]he discourse of conservative law and economics is a discourse of exclusion.”⁷³ Kain and Thurow show how the obnoxious economic features of bigotry would remain, even if all minority incomes rose above some minimum level.⁷⁴ Although

70. Shapiro & Roberts, *supra* note 69, at 338 (citing GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957)). If reality matched this description, the slums would still be performing their former role as a “melting pot, a way station, a goad to talent.” HARRINGTON, *supra* note 1, at 139. For a critique of Becker’s position, see BRUYN, *supra* note 5, at 36 (habits, informal networks, and associations affect market behavior, as do social norms concerning property, custom, and the organizational rules that dictate goals other than profit or efficiency); MALLOY, *SERFDOM*, *supra* note 8, at 51; SACKREY, *supra* note 2, at 81. For an example of the confusion generated when Becker’s and Coase’s Chicago perspective is applied to the real world, see Robert C. Ellickson, *The Irony of “Inclusionary” Zoning*, in *RESOLVING THE HOUSING CRISIS*, *supra* note 25, at 135, 161, 162 (“The fact that market forces tend to produce economically stratified neighborhoods creates a *prima facie* case that this stratification is efficient — that is, if residency rights were fully transferable, richer residents would generally be willing to pay enough to persuade poorer residents to move to other neighborhoods.”).

71. MALLOY, *SERFDOM*, *supra* note 8, at 51. See SACKREY, *supra* note 2, at 62-63; WILSON, *supra* note 30, at 10-11, 30-32.

72. MALLOY, *SERFDOM*, *supra* note 8, at 63.

73. *Id.* at 69-70 (“wealth maximization discourse can ignore the issue of whether African Americans or Hispanics, for instance, have anything to exchange in the marketplace” and whether they “have been systematically deprived of an opportunity to acquire the wealth [and dignity] necessary to bargain voluntarily”).

74. SACKREY, *supra* note 2, at 56-57, 85 (discussing studies by John Kain and Lester Thurow and ascribing this effect to an “institutionalized racism”).

the creation of minority-controlled neighborhoods, businesses, and labor markets would undoubtedly improve the economic position of minorities, it would also further entrench the dualism of a separate development that has already been exacerbated by recent economic and political changes.

D. Poverty as a Market Failure

If slums nurture poverty and if markets nurture slums, then Gary Becker is wrong—unregulated markets do not discipline bigots adequately—and we have a “market failure” on our hands, an “externality” of an otherwise often-marvelous system of social organization. The Chicago School of law and economics recognizes market failures, including externalities and problems with providing public goods,⁷⁵ as the *only* justification for governmental intervention, but Chicagoans then proceed to define these failures so narrowly as to justify only a “night-watchman” form of government. Any wider governmental intervention becomes an externality-by-definition to an efficient-by-definition marketplace transaction. Any regulation or redistribution is criticized because it interferes with the broadly defined property rights that form the basis for a wealth-generating creativity.⁷⁶ Under the Chicago School’s beloved

75. FISCHEL, *supra* note 17, at 95. Unfortunately, the theory of market failure is not as well developed as one might like; it consists of little more than a series of policy recommendations. *Public goods* are those things that belong to everyone and for which no one thus wishes to pay. The per capita benefits from a park or a road may exceed its per capita costs, yet the economically rational consumer will try to reap the benefits without bearing the costs (will try to be a “free rider”). This justifies government’s construction of the park or road (under powers of eminent domain). Beneficiaries pay for the park through their taxes (thus eliminating “free riders” and “holdouts”). *Externalities* are costs (and benefits) to society that are not taken into account by private parties in their transactions. For example, the producer and the consumer of an automobile do not take into account the social costs of the auto’s contribution to air pollution. The consumer may want clean air, yet rationally conclude that his auto makes too small a contribution to overall air pollution to justify the extra cost of buying a pollution-abating auto. Knowing of this consumer attitude, the producer views the manufacture of a more expensive, pollution-abating auto as a recipe for bankruptcy. The only way to reduce pollution may be for the government to order manufacturers to abate pollution or to impose a “tax” on pollution.

76. For the “new” conservatism, government is the ultimate externality. Wingo & Wolch, *supra* note 27, at 317-18. This cannot be taken too literally because a market system requires state intervention in the form of infrastructure and public services. Through coercion, propaganda, and social service expenditures, social control is maintained. Norman I. Fainstein & Susan S. Fainstein, *Restoration and Struggle: Urban Policy and Social Forces*, in *URBAN POLICY UNDER CAPITALISM*, *supra* note 16, at 9, 11. Malloy argues that Houston, the fourth largest, and the last major city without a comprehensive zoning and planning code, evidences both an efficient control of land use without governmental

Coase Theorem,⁷⁷ a utopian construct that is frequently applied without appropriate modifications to the real world, government merely defines property rights initially and then enforces any bargains that subsequently go awry. The Coase Theorem seems to be all but irrelevant to ghettos. Black people, for example, may be unwilling, and they certainly are unable, to exit from a group defined by the color of their skin. They will thus often be unable to contract out of disadvantages that have become attached to their group through a history of past Coasian "bargains" with majority groups.

Other, less conservative economists—such as Pigouvians and other welfare economists, who are common in Europe but an endangered species here,⁷⁸ and the growing number of domestic practitioners of a "progressive" law and economics⁷⁹—assume that markets fail regularly,

regulation and qualities of "congestion, incompatible land use, and urban sprawl." MALLOY, SERFDOM, *supra* note 8, at 90. *But see* Cummings, *supra* note 22, at 16; Johnson, *supra* note 25. One example of a conclusion drawn from Chicago School analyses is the following: people correctly adjust their activities to account for the health risks of smog; the reduction of smog is therefore an unanticipated pecuniary benefit. Carl J. Dahlman, *An Economic Analysis of Zoning Laws*, in RESOLVING THE HOUSING CRISIS, *supra* note 25, at 217, 230. This may be true for some people, but the poor are often unable to move away from the smog or partially to filter it out with home or auto air conditioners.

77. Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). *See* James M. Buchanan, *The Coase Theorem and the Theory of the State*, 13 NAT. RESOURCES J. 579 (1973); Warren J. Samuels, *The Coase Theorem and the Theory of Law and Economics*, 14 NAT. RESOURCES J. 1 (1974). A brief formulation of the Coase Theorem is as follows: If transaction costs (costs of information, negotiation, monitoring, enforcement, and legal errors) are zero, then (1) the parties will contract about all of the costs and benefits of the transaction (they will "internalize the externalities") and (2) the identical (and most wealth-maximizing) allocation of resources will come about through negotiation, regardless of which party is legally liable or has the relevant property right. Transaction costs are obviously not zero in the real world, but the precise significance of this fact is frequently ignored when the analytical frame shifts from theory to practice. *See also* Rubinfeld, *supra* note 48, at 2 (discussing White and Whitman's analysis of a "classic" nuisance law externality problem and the conventional solutions based on private damages suits or a tax on the externality). For a (loosely) Coasian analysis, see Robert C. Ellickson, *Public Property Rights: Vicarious Intergovernmental Rights and Liabilities as a Technique for Correcting Intergovernmental Spillovers*, in ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS, *supra* note 36, at 51, 71 ("What is customary in a particular time and place cannot be a nuisance. Customary behavior tends to be cost-justified behavior (especially when transaction costs are low) because bargaining tends to eliminate inefficient practices."). Note the bias in favor of the status quo and the assumption that bargaining will be feasible (the sufferer will have something with which to bargain) and moral.

78. *See* ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920); CHARLES K. ROWLEY & ALAN T. PEACOCK, *WELFARE ECONOMICS: A LIBERAL RESTATEMENT* (1975).

79. *See* Susan Rose-Ackerman, *Progressive Law and Economics — and the New Administrative Law*, 98 YALE L.J. 341 (1988). Malloy is moderately critical of this and related approaches: "Communitarian (altruistic) and state-centered views of law and ec-

or at least often enough to license an economically activist government. According to this view, governmental regulation stems from the lack of social norms and structures of accountability in the marketplace, and private property rights must be construed more narrowly. The contingency and complexity of the real world makes these ideologically colored interpretations possible. Whatever one believes about the general issue of the frequency of market failure, it follows almost by definition, from the wealth and power allocating functions of markets, that markets must regularly fail the poor and powerless.⁸⁰ Indeed, this is the main reason why there are poor and powerless people in a country that accords so much power to markets, *unless* one adopts one or more of the conservatives' ideological explanations: the poor are stupid, lazy or unlucky, or everything is government's fault.

Few economists realize or admit that market failures (such as fragmentation, barriers to entry and other means of segregation, and a lack of competition) are literally matters of definition, of what we want markets to do that they are not doing. If we want them to ameliorate poverty, the failure to do so becomes a market failure, and by analogy, the failure of a public entrepreneurship to alleviate poverty becomes a *political* market failure. If, on the other hand, we want to preserve the Chicago School theory of the paucity of market failures, we will tend to ignore issues related to poverty.

Needless to say, governments create or exacerbate as well as ameliorate market failures. Analysts attempting an ideological neutrality will thus do a careful cost-benefit analysis of governmental behavior in what

onomics generally lead to conceptual frameworks of liberty that focus on the importance of groups, experts, and planners at the expense of the individual decision makers in the marketplace." MALLOY, SERFDOM, *supra* note 8, at 62. Malloy adds that Bruce Ackerman "delivers us into the Keynesian world of market failures, insurmountable transaction costs and externalities, and the need for liberal intervention and management of social institutions for the common good." *Id.* at 73. For Malloy, this is presumably a deliverance gone astray.

80. See FISCHER, *supra* note 17, at 121 ("Proponents of the property rights approach tend to be politically conservative or libertarian, while proponents of the externality [the "pervasive market failure"] approach tend to be modern liberals or socialists."); *id.* at 122 ("If the externalities approach can be criticized for being perfectionist or utopian, the property rights approach can come dangerously close to a Panglossian outlook."); HARVEY, *supra* note 2, at 88 ("There are . . . good theoretical reasons for expecting that the market mechanism will be no more efficient in guiding the location of privately supplied impure public goods to Pareto equilibrium than it is in the housing market."); MALLOY, SERFDOM, *supra* note 8, at 71 (Liberals and left communitarians reject natural rights and place great emphasis on the state.); ROSSI, *supra* note 2, at 203 (Clearly, the housing "market has failed to meet the special needs of unattached poor persons."); WILSON, *supra* note 30, at 42 ("Heavily concentrated in central cities, blacks have experienced a deterioration of their economic position on nearly all the major labor market indicators.").

amounts to a market for urban externalities: amenities and "disamenities." Externalities encompass benefits as well as costs, and neighbors will try to use governments and markets to capture and retain the benefits while passing the costs on to other neighborhoods. This is one market in which the poor are allowed to "participate," so that many of the costs of urban life — crime, pollution, congestion, noise, aesthetic blight — come to rest in the ghettos because the poor can shift these costs no further. In Indianapolis, the "amenity infrastructure" — convention, sports, museum, and performing and visual arts facilities — benefits relatively few but is paid for by all in the form of governmental subsidies that could be used for other purposes.⁸¹ Zoning laws further this game of recouping benefits and passing on costs because, contrary to popular belief, these laws serve to emit, rather than to internalize or otherwise control, externalities. These laws are designed to recoup benefits by keeping what are seen as undesirable people and things *out*,⁸² and their (virtual) absence from ghetto areas serves as a magnet for disamenities.

Poverty may be an externality of unregulated market processes, depending on the economic theory that is adopted. The theory adopted in turn depends on ideological preferences, although the Chicago School account of poverty and its amelioration is particularly implausible and will be repugnant to some.⁸³ Like the rhetorical justifications for nuclear weapons, the discourse of a conservative law and economics has perhaps fallen on hard times, but it similarly remains a powerful legitimation device. Its "science," mathematics, and technical rationality evoke associations of objectivity and inevitability.⁸⁴ More importantly for our

81. See MALLOY, SERFDOM, *supra* note 8, at 108; Bamberger & Parham, *supra* note 5, at 12-13. For another, very different externality that flows from this process, see *supra* text accompanying note 11.

82. Dahlman, *supra* note 76, at 218. See FISCHER, *supra* note 17, at 252-54, 269-70; HARVEY, *supra* note 2, at 66, 72 (The spatial organization of the city is designed to "protect external benefits and eliminate extreme costs." Externalities are thus distributed through location, and "in general the rich and privileged obtain more benefits and incur lower costs than do the poor and politically weak.").

83. Consider the applicability of G.K. Chesterton's words:

[T]here is that stink of stale and sham science which is one of the curses of our times. The stupidest or the wickedest action is supposed to become reasonable or respectable, not by having found a reason in scientific fact, but merely by having found any sort of excuse in scientific language.

G.K. Chesterton, *Music with Meals*, in PLEASURES OF MUSIC 161, 162 (Jacques Barzun ed., 1951). See MALLOY, SERFDOM, *supra* note 8, at 62, 83.

84. See Carol Cohn, *Emasculating America's Linguistic Deterrent*, in 6(1) PERSPECTIVES ON PEACE AND WAR 3, 3-4 (1988-89) (published by the University of Wisconsin Center for International Cooperation and Security Studies). See also Roger Pilon, *Property Rights and a Free Society*, in RESOLVING THE HOUSING CRISIS, *supra* note 25, at 369, 375 (Although a theory of rights tied to property is objective and consistent, its justification is weak because it relies on the argument that rights are "God-given.").

purposes, Chicagoans offer trenchant criticisms of the governments on which the more liberal theories pin their hopes, criticisms of political processes which are not constrained by strong rights of private property.

II. GHETTOS AND GOVERNMENTS

Political elites feel insecure in all countries. They thus seek the means to re-election, or to retaining power in other ways, by influencing the outcomes of economic processes. Robin Malloy, who is no particular friend of the Chicago School of law and economics, introduces a critique of governmental practices that is echoed and developed further by the Chicagoans: "All of the virtues and vices that make up American society can be found in the give and take, the politics, and the economics of real estate development."⁸⁵ The vices quickly come to the fore in downtown Indianapolis and many other cities. Malloy finds that "most of the [city's] commercial real estate activity . . . is heavily subsidized, administered by central planning boards, and owned in some significant way by the 'state.'"⁸⁶ He prefers to call this an "urban socialism" or a "state capitalism," rather than a public entrepreneurship, to highlight the otherwise hidden restructuring of our "communal order" and erosion of our traditional values.⁸⁷ State capitalists use "political means and the expansion of the state as a way of avoiding the effort and potential failure of competition,"⁸⁸ that is, of avoiding the good as well as the bad that economic markets bring to society. We thus witness a triumph of the public over the private, of planning over spontaneity, and a drift towards "serfdom where, once again, personal status rather than individual talent and human dignity become the measure of one's worth."⁸⁹

85. MALLOY, SERFDOM, *supra* note 8, at 2. See Coleman, *supra* note 5, at 35 (quoting Lloyd A. Fallers, *Social Stratification and Economic Processes, in ECONOMIC TRANSITION IN AFRICA* 126, 127, 129-30 (Melville J. Herskovits & Mitchell Harwitz eds., 1964)).

86. MALLOY, SERFDOM, *supra* note 8, at 12.

87. *Id.* at 10, 12, 85. I prefer Malloy's "state capitalism" characterization because "urban socialism" implies something not in evidence: an explicit attempt (at least) to meet the needs of the poor and powerless. This is "a simplistic and egotistical conception of the community," which is anchored in a "zero-sum game vision of the world." *Id.* at 10-11. "Corporate syndicalism" is perhaps an even better term, with progress being measured through the glorification of urban structures — an Edifice Complex tactic used by Hitler and Mussolini.

88. *Id.* at 35. Economic competition protects against the tyranny of the state, which then offers institutional protections against private coercion. *Id.* at 34. Yet, the displacement of "impersonal" economic means, by the personal dynamics of special interest groups exploiting each other, impairs officials' "impartiality" and reduces the ability of private capital to act as a check on governmental power. *Id.* at 124-25.

89. *Id.* at 1. An outcome-specific zoning subordinates an "impersonal marketplace" to the personal status-oriented sphere of state." *Id.* at 93.

Malloy does not define who the new serfs are and will be, but we can safely assume that the poor and powerless, who do not loom large in his analyses, will swell their ranks.

A. *Chicago (and Some Other) Critiques*

Malloy provides much grist for the (perhaps dark and satanic) mills of Chicago, mills described for us by Daniel Farber:

[S]pecial interest groups frequently obtain government help in extracting money ["*economic rent*"] from the general public as taxpayers or consumers. . . . These special interest groups [of property developers, for example] are relatively easy to organize because they are small and their members have much to gain. For corresponding reasons the public finds it difficult to protect itself: members of the public have small, individual stakes in any piece of legislation [or land use project], and the large number of people affected makes organization difficult [especially among the poorly organized, and perhaps unorganizable, poor]. . . . Most legislation [and projects], then, will really involve some rip-off of the public, even if it purports to serve the public interest.⁹⁰

Except for the last normative sentence, this seems a fairly accurate description of what goes on in Indianapolis and elsewhere if "government" is understood to encompass the mayor, the mayor's planners and other handlers, and a majority of the city council. The Chicagoans' argument is that these worthies cannot be differentiated on the basis of

90. Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1359 (1988) (citations omitted). Farber's main footnote to this statement is worth quoting in its entirety:

See G. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-78 (1975). The fountainhead of this theory is M. OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). More recently, Olson has argued that prolonged rent-seeking ultimately saps stable societies of their economic vitality. See M. OLSON, *THE RISE AND DECLINE OF NATIONS* 41-47 (1982).

Id. at 1359 n.147. Stigler, Landes, and Posner are gurus of the Chicago School of law and economics, and Mancur Olson is a fellow-traveller. See FISCHER, *supra* note 17, at 107; SACKREY, *supra* note 2, at 87-89 (the Chicago model is related to those of a pluralism in political science, and in a heterogenous society, those with problems will organize and enter politics); Kantor, *supra* note 19, at 496 (local popular control is separate from, but not independent of, the market). *But see* FISCHER, *supra* note 17, at 71 (doubting that government can auction off all regulatory advantages because this would turn it into a "protection racket").

their dips into the "porkbarrel," regardless of such municipal separation of powers as the law provides.

To elaborate, ordinances and municipal projects are (like congressional statutes or components in the latest Rivers and Harbors bill)⁹¹ auctioned off to the highest bidder, the person or special interest group paying the biggest "bribe." The bribe may take the legally sanitized form of a political action committee's contribution to a campaign fund or it may be a credible promise (or threat) to deliver a certain number of votes on election day. In any event, this process is *politically* wealth-maximizing in terms of lining the official's pocket or, in what often amounts to the same thing, mitigating his or her political opposition. Entrepreneurship, organizing the "logrolling" of voting and other support for each other's pet, bribed-for projects, ensures that the bribes will keep flowing, especially to the best entrepreneurs who thus acquire seniority and high office because their political opposition has been more fully mitigated. The "honest" councillor or bureaucrat who pursues a purer ideological vision of the public interest and refuses to play the more tawdry games will be dismissed, defeated, co-opted, or if she is committed, talented, and lucky, she will attain a leadership position in a more-or-less permanent political opposition.⁹²

91. H.R. 404, 102nd Cong., 1st Sess. (1991).

92. See FISCHER, *supra* note 17, at 36-37 (zoning as a game in which property rights are expanded "at the expense of the politically effete members of the community"); *id.* at 262 ("closed" cities offer opportunities for economic rents); *id.* at 318 (low-income housing projects are an inefficient way to redistribute income, but they become politically attractive transfers within a geographically based political system); *id.* (the politicians' need to seek re-election doomed the "open-suburbs movement" that presumably entailed few bribes); HARVEY, *supra* note 2, at 73-75 (local government develops and exploits resources, including allocations of governmental funds, in an extraordinarily complex, n-person, non-zero sum game, in which side payments are allowed and are, indeed, essential to the formation of coalitions); MALLOY, SERFDOM, *supra* note 8, at 114 (federal and state government assistance is a cross-subsidy to special interests who can employ political means, at the expense of other cities and projects, to avoid paying many of the costs); MCCOY, *supra* note 47, at 43 (quoting GEORGE WHATLEY, PRINCIPLES OF TRADE 337 (London 2d ed., 1774)) (most European statutes are "either political Blunders, or Jobbs obtained by artful Men, for private Advantage, under Pretence of public Good.") and at 47 (merchants and manufacturers dupe government and the public into believing that "'the private interest of a part, and of a subordinate part of the society' was identical to 'the general interest of the whole.'"); JOHNSON, *supra* note 25, at 8-9 ("in an era when the political system has everyone's property rights 'up for grabs', the owner-occupied single-family dwelling is the safest private property around, given that two-thirds of Americans own their own homes" and they would presumably vote out of office people who decrease their house values too much — especially in the suburbs); MICHELMAN, *supra* note 36; MOLOTCH, *Strategies*, *supra* note 25, at 42 ("Within the growth machine perspective, the paramount underlying force operating within the city is the drive for rents and profits that come from place-specific development.").

Why do courts go along with this apparent (if Chicago School descriptions are accurate) travesty of democracy? Two Chicagoans, Landes and Posner,⁹³ argue that judges ratify porkbarrel outcomes to keep politicians from truncating their jurisdictions or lowering their salaries.⁹⁴ Where judges are elected, they can dip into the porkbarrel themselves, in more limited ways of course. A judicial acquiescence in porkbarrel outcomes, plus the time-consuming procedural due process requirements courts have imposed on legislation over time, serve to increase the permanence of legislation.⁹⁵ This in turn increases the value of the bribes that successful bidders are willing to pay for more permanent legislation.

This is an ingenious analysis. A more plausible one is that courts are caught in a conceptual trap of their own making. Having repudiated their "substantive due process" doctrines after the 1937 "switch in time," courts now believe they have little choice but to defer to legislative judgments about the public interest. In our balkanized federal system that offers so many opportunities to extract economic rents, judges need not pay the same degree of deference to judgments by local governments, yet the cases display a similar reluctance to intervene.⁹⁶ It makes little sense for courts bravely to declare "one person, one vote" and to then permit economic rent-seeking behavior to dilute and corrupt that vote, perhaps to the point where few will vote because organizing for purposes of making bribes is the way results are achieved.⁹⁷

93. William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1985).

94. *Id.* at 885.

95. *Id.*

96. After *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Court abandoned substantive due process in favor of a "police power model." Except where fundamental rights or suspect classifications are involved, "the Court defers to and adopts as conclusive the legislative decision as to what constitutes the public interest or the general welfare." Norman Karlin, *Zoning and Other Land Use Controls*, in *RESOLVING THE HOUSING CRISIS*, *supra* note 25, at 35, 42. *But see infra* notes 137-39 and accompanying text. Fischel argues that economists neglect the limitations imposed by this police powers model when they argue that "any regulation could be passed and the exceptions sold to the highest bidder. A government that did that would appear more like a protection racket, and not one that operated for the benefit of its citizens." FISCHEL, *supra* note 17, at 71. If the police powers model indeed offers few meaningful constraints, this "protection racket" becomes possible and, the Chicago School argues, likely. The police powers model certainly seems to impose few constraints on the "development" activities of local government. *See id.* at 41; MALLOY, *SERFDOM*, *supra* note 8, at 96 (in state eminent domain proceedings, courts use the "flimsy" test of requiring a governmental statement that the project will ultimately benefit the public).

97. *Compare Baker v. Carr*, 369 U.S. 186 (1962) ("one man, one vote," as it then was) with *Buckley v. Valeo*, 424 U.S. 1 (1976) (invalidating expenditure limits in the Campaign Finance Act, and thus facilitating the "bribes" of special interest groups

Like the Chicago School, Robin Malloy sees an overexploitation of the public good of state power.⁹⁸ He continues in a much less cynical vein, however: "Local politicians should engage in a convincing dialogue in order to get sufficient local support for their proposed projects," and "the local residents should be willing to pay the full cost of the benefits they hope to enjoy."⁹⁹ Alas, it is not yet so, for reasons that the Chicago School may exaggerate, but not by very much. The result from this overexploitation of state power is a panoply of government subsidies that rarely create or improve competitive advantages for a community. Rather, these subsidies stifle creativity and market incentives, delay adjustments, and create a dependence.

For Thomas Hazlett, grabbing for the "quick fix" turns us into "regulatory junkies."¹⁰⁰ His druggie metaphor may prove too much, at least about the rent control laws he finds to have subverted the "democratic processes . . . in that no intelligible dialogue is possible."¹⁰¹ If a housing market failure has occurred, perhaps because "democratic processes" had landlords and developers dipping from the porkbarrel too often, then a balance-of-power use of the porkbarrel on behalf of tenants may be necessary to reestablish the "dialogue." (This is an illustration of the economic "theory of the second-best" that the Chicago School disdains, a theory which proves useful when the "best," elimination of the porkbarrel altogether, is unattainable.)¹⁰²

Rent control ordinances may indeed curb the earning of economic rents for the benefit of middle and lower-middle income tenants. Yet, the poor and powerless are the biggest and most consistent losers when nominally democratic processes are played as economic rent-seeking games by the special interests. (Jefferson would be appalled.) A porkbarrel politics operates further to truncate the choices of people who already have too few choices. The poor and powerless balance the costs and benefits of political performances and find these performances seriously

that devalue the votes of those unwilling or unable to bribe). *But see also* MALLOY, SERFDOM, *supra* note 8, at 30-31 (voting offers direct accountability and immediate feedback only at very localized levels, such as the New England town meeting).

98. MALLOY, SERFDOM, *supra* note 8, at 44, 46. A major reason for overexploitation of state power ("overgrazing" of the "commons") is that we allow the state to define the concept of limited government. *Id.* at 44. Real estate development is a good example of overgrazing. *Id.* at 46. For a discussion of overgrazing as a cause of "simmering discontent" in Indianapolis, especially among blacks, see Bamberger & Parham, *supra* note 5, at 18; Hallinan, *supra* note 10.

99. MALLOY, SERFDOM, *supra* note 8, at 136-37.

100. Thomas Hazlett, *Rent Controls and the Housing Crisis*, in RESOLVING THE HOUSING CRISIS, *supra* note 25, at 227, 296-97. See PORTER, *supra* note 4, at 640, 682.

101. Hazlett, *supra* note 100, at 297. See Freilich, *supra* note 28, at 178, 198.

102. See *infra* note 103.

wanting. Their reactions range along a continuum of bemused apathy, anger, and open rebellion, and their only hope is that a few political elites will espouse their causes honestly and effectively. This hope is frequently betrayed; as in the Third World, many opposition elites are co-opted by being given access to the porkbarrel.¹⁰³ Urban governments are thus "soft states,"¹⁰⁴ a concept Gunnar Myrdal devised to explain events in underdeveloped Asian states: they are soft on organized special interests, but far from soft on the unorganized poor and powerless.¹⁰⁵ This is but one facet of a growing political underdevelopment in urban America. Local elites are increasingly incapable of managing by and for themselves because they face a growing dependence on the "foreign" capital and entrepreneurship that seeks to co-opt them and wring them dry.

Is all of this gloom and doom what the New Deal model of political leadership and administrative expertise ultimately brought us? Did the War on Poverty and Community Action Programs so threaten local elites with rival centers of power that they fought their way back into the present system, after the public's memory of the mediocre performance of markets and businesspeople during the Depression had faded?¹⁰⁶

103. An example that probably cuts both ways occurred during the 1991 budget battles in the Indiana legislature. Rep. Brown (D-Gary) proposed a \$450,000 "sprinkle" for a National Civil Rights Hall of Fame and Museum, to be located in Gary. Nancy J. Winkley, *Gary 'Hall' Debate*, GARY POST-TRIB., May 28, 1991, at A1. Believing that this was "the best way to use his clout," he extolled the employment, tourism, and national recognition that the project (the brainchild of former Mayor Hatcher) would bring. *Id.* This caused Senator Rogers (D-Gary) to observe:

I understand what (House) Democrats are doing, and I understand it's our time to be the recipients of projects in our communities. . . . The Republican Party has done that for years.

But I do think there ought to be a method of distribution that is broader than an individual legislator's wishes.

Id. at A6. Senator Rogers believes that a local marina and the Gary Regional Airport have greater revitalization potential than the Museum. *Id.* Prior to the recent shift in legislative power in Indiana, Republicans indeed siphoned off state funds for years to gratify the Edifice Complex in Republican strongholds, most notably in "downtown" Indianapolis and not in Democratic Gary. The residents of Gary lack the resources to create a local porkbarrel with much "fat" in it, and they might be as proud of making the State porkbarrel work for them as they would be of the Museum. Power follows capital, MALLOY, SERFDOM, *supra* note 8, at 20, and there is little of either in Gary. Does it follow that the state porkbarrel should be perpetuated, in a game that the poor and powerless consistently lose in the long run? Democrats could use their power to change the system itself, *if* they are not already wedded to it.

104. See GUNNAR MYRDAL, *ASIAN DRAMA: AN INQUIRY INTO THE POVERTY OF NATIONS* 182 (Seth S. King ed., 1977).

105. See *id. passim*.

106. See MALLOY, SERFDOM, *supra* note 8, at 116 (the New Deal carries "all the

As you might imagine, the Chicago School has a very different explanation, one that denies expertise to planners and other bureaucrats and that turns them into key players of special interest politics.¹⁰⁷ Their existence, to say nothing of their salaries and opportunities for “bribes,” depends on the inefficient, porkbarrel interventions by governments that license bureaucrats to exercise discretion. Co-opted by the special interest groups active within their sphere of influence, bureaucrats also become a special interest in their own right; their incessant lobbying for greater departmental budgets and discretion thus proceeds apace, to increase governmental power further. Lacking the information and skills to regulate sensibly and to beat marketplace results, bureaucrats nevertheless make much policy to cure or to defend past policy mistakes. Edifice Complex projects have come to be emphasized over those promoting social welfare because elites who pay the planning piper get to call the tune.¹⁰⁸

Chicago Schoolers probably prove too much. We all know selfless bureaucrats who serve a genuine public interest (call them public servants), and there are more than a few politicians (Harold Washington, for example) who give the lie to Chicagoans’ pronouncements, at least for a time. Chicago School theories are behind the times¹⁰⁹ and excessively emphasize the local model: the atypical machine politics of Daley the Elder and a Chicago City Council notoriously above average in its venality. The recent economic and political changes I described are not

baggage of the welfare state,” most notably that federal solutions are needed for state and local problems).

107. See William A. Niskanen, *Bureaucrats and Politicians*, 18 J.L. & ECON. 617 (1975); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

108. See FISCHER, *supra* note 17, at 32 (planning literature stresses technocratic responses to market failures, but much actual planning reflects planners’ self-interest rather than community preferences); HARVEY, *supra* note 2, at 78 (urban planning comes to resemble solitaire because of an imbalance in intergroup bargaining in, for example, the suburban “exploitation” of the central city) and at 90-91 (the lack of information necessary to regulate, and a succumbing to voting pressures, lead to inequity because the poor are unable to leave); MALLOY, SERFDOM, *supra* note 8, at 43, 92, 113; Ellickson, *supra* note 77, at 169-70 (trained in law or urban planning, “professional housers” benefit from an inclusionary zoning, which requires the use of their bureaucratic skills in getting a project approved and funded — in ways that frequently bypass local legislatures); Preteceille, *supra* note 19, at 48, 51 (decentralization has made local governments more interventionist, while the “crisis of Fordist accumulation” challenges the old planning and welfare norms).

109. See Kantor, *supra* note 19, at 509-10 (race and class now divide our cities more than anything else, especially because minorities and prosperous whites have increased both in numbers and in their political activism). Kantor’s statement is no more ideologically-charged than statements made by Chicagoans, for whom race and class play little or no analytical role.

adequately accounted for by the Chicago theory, most notably the resurgence of a 1920s-style business managerialism in government and the related political need to attend to marketplace evaluations. These changes are in no small measure a result of the Chicago School political influences for which its own theory does not account. The logic of their theory is that Chicagoans are themselves a special interest group, vying with many others, but consistently against the poor.

The Chicago School is so widely praised and excoriated precisely because it is widely perceived to serve a (neo-)conservative political agenda.¹¹⁰ Regardless of whether this is the Chicagoans' purpose, it is certainly the effect of their attempt to transform America's myth of a rugged individualism into an ideology of the possessive individualism¹¹¹ that government is seen to dull and repress. Chicagoans are right: special interest groups and their bribes certainly do matter, but empirical studies by political scientists and economists show that legislators' ideological visions of the public interest ultimately matter as much or more. Economic growth is not the province of the private sector alone, and redistributions are not attributable to governments exclusively, regardless of the dogmas of neoclassical economics.¹¹² Efficiency is important, and there is too little of it in government, but there are other goals such as environmentalism, ameliorating poverty and racism, and making the rubble bounce several times in the unlikely event of a nuclear war, that are legitimated in a democracy by the public support they periodically receive.¹¹³ In other words, governments are much more than the alternative suppliers of goods and services to households that the Chicago School believes them to be.

B. *The Unrealized Potential*

Samuel Beer has long made an argument similar to one heard in the Third World: an American nation-building, "within a liberal dem-

110. See ACKERMAN, *supra* note 45; VELJANOVSKI, *supra* note 47, at 7; Moore & Squires, *supra* note 32, at 98; Michael W. McConnell, *The Counter-Revolution in Legal Thought*, 41 POL'Y. REV. 18 (1987); Wingo & Wolch, *supra* note 27, at 317-29.

111. See CRAWFORD B. MACPHERSON, *THE THEORY OF POSSESSIVE INDIVIDUALISM* (1962). See also HEILBRONER & SINGER, *supra* note 1, at 199 ("The workable basis for rugged individualism had gone with the industrialization and urbanization of the country.").

112. See Clavel & Kleniewski, *supra* note 5, at 228.

113. Farber, *supra* note 90, at 1361. See BRUYN, *supra* note 5, at 331-33 (community development corporations, ideally "social democratic corporations acting on behalf of the whole community," and the Albany Symphony Orchestra are syntheses of the private and public sectors which are essentially new organizational forms); MALLOY, *SERFDOM*, *supra* note 8, at 11 ("Structural changes in legal economic discourse reveal inconsistencies between surviving forms of free market rhetoric and dramatic ideological shifts in foundational social norms.").

ocratic framework . . . in which vast numbers of both black and white people live in free and equal intercourse," is now no less important and challenging than was the Founders' initial formation of our nation-state.¹¹⁴ The United Nations' Conference on Human Settlements defines the relevant issue: "Basic human dignity, is the right of people, individually *and* collectively, to participate directly in shaping the politics and programs affecting their lives."¹¹⁵ These are brave words and a tall order, in light of the Chicago School's political cynicism that often seems so well taken. A beginning can be made, nonetheless, along the lines suggested by Robin Malloy: the "continuous tension between the benefits and costs of government activities requires a concern for process."¹¹⁶

A necessary, but not a sufficient, step is clearing the policymaking streams that have arguably become clogged and polluted since the New Deal. We could eliminate much of the conceptual underbrush that has grown up, in law and in economics, by applying a *Baker v. Carr*¹¹⁷ writ large among the branches and levels of government. Accordingly, we could ascertain more precisely the limits on effective government posed by constitutions *and* by an institutional incompetence, foster a more efficient pursuit of public policy by revising the division of labor among the branches and levels of government, provide the means for creating more manageable and consistent legal standards, strike a better procedural balance between the desires to avoid inflexibility and delay and the needs for considering all relevant factors and for an adequate representation of the underrepresented, preserve judicial power to question political decisions when there is an "unusual need" to do so, and open up public *and* private channels of communication.¹¹⁸

Justice Brennan sees the First Amendment as playing a "*structural* role," in this process, one of promoting an informed and robust debate

114. Freilich, *supra* note 28, at 175 (quoting Samuel H. Beer, *The Idea of the Nation*, THE NEW REPUBLIC, July 19 & 26, 1982, at 23)). See HARRINGTON, *supra* note 1, at 155-56 (a "mobilization of the spirit" would arguably be required, something that "the wall of affluence," and socialism for the rich and free enterprise of the poor do not seem to permit at present).

115. *Declaration of Principles*, *supra* note 6, at 348.

116. MALLOY, SERFDOM, *supra* note 8, at 26. Falsely, "[w]e believe that the right people in the right positions with the right resources can solve all of our difficulties." *Id.* at 36. "We no longer seem able to accept the natural dynamic of winning and losing in a competitive marketplace." *Id.* Yet, it is not necessarily "natural" that the poor are consistent losers or that markets are competitive.

117. 369 U.S. 186 (1962).

118. See *id.* at 217; GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 175 (1981); Ellickson, *supra* note 77, at 72-73 (the central problems are how to draw boundaries, and upon which level of government rights should be conferred). But see JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

on public issues.¹¹⁹ Those steps that bring about effective governmental action are also those that broaden and inform the debates through which a consensus is discovered. A badly informed public (a market failure, as even the Chicago School might admit) sends inconsistent messages to politicians and enables the special interests to dominate by manipulating information and influence. Our consensus-forming institutions have deteriorated in recent decades,¹²⁰ a political market failure that the Chicago School might not admit. Coalitions are fleeting, attention spans are short, and both are directed at choices between polarized, simplistic solutions.¹²¹ These institutions should be rebuilt structurally, so that, subject to constitutional constraints, we may safely implement whatever policy package the majority wants, even if the Chicago School does not like the package.¹²²

This policy package could be implemented only by rather activist governments, and the latest surveys show that Americans are losing their fear of such governments.¹²³ The New Deal or Great Society *may* have diagnosed the wrong market failures or sought to curb them by the wrong means. This does not mean that governments are forever barred from diagnosis, prescription, and otherwise exerting political leadership, if for no other reason than politicians want to remain in office and must therefore try to fix things the public perceives to be broken. The Chicago School is blind to this matter and fails to recognize that America is, has been, and will be a mixed economy.¹²⁴ A politician's failure to

119. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring).

120. IRA C. MAGAZINER & ROBERT B. REICH, *MINDING AMERICA'S BUSINESS: THE DECLINE AND RISE OF THE AMERICAN ECONOMY* 377-78 (1982).

121. *Id.* at 378.

122. MALLOY, *SERFDOM*, *supra* note 8, at 24, 54. See FISCHER, *supra* note 17, at 35 (zoning boards of appeal must serve as mediators between developers and neighbors); Paul H. Brietzke, *Public Policy: Contract, Abortion, and the CIA*, 18 VAL. U. L. REV. 741, 918-22 (1984); Coleman, *supra* note 5, at 36 (a close statistical correlation in the Third World exists between economic development and political competitiveness); Fainstein & Fainstein, *supra* note 76, at 11-12 (the capitalist state plays important roles of mediating between classes and among conflicting goals, and of occasionally responding to the political power of the working class). *But see* MALLOY, *SERFDOM*, *supra* note 8, at 30 (classical liberals like himself seek the "establishment of a process capable of stimulating and maintaining a creative and everchanging spontaneous order," an order which requires "multiple and competing sources of power and authority"). Perhaps I am overly influenced by the Chicago School, but the altruism and spontaneity Malloy hopes for seem implausible.

123. LINDA L.M. BENNETT & STEPHEN E. BENNETT, *LIVING WITH LEVIATHAN: AMERICANS COMING TO TERMS WITH BIG GOVERNMENT* (1991). See Chris Raymond, *Book Review*, CHRON. HIGHER EDUC., May 15, 1991, at A6.

124. See BRUYN, *supra* note 5, at 4-5 ("Despite the popular belief that the market's invisible hand leads to the general good, government policies have always played a major

intervene in economic processes can often be taken as a tacit acceptance of the status quo, because most politicians feel that they can and should change most things they do not like. In cities, the market for "amenities (or lack of disamenities)" is arranged through zoning and other political interventions "to approximate a solution to the public goods problem."¹²⁵ Unlike the Chicago School, politicians know that a fiscal Micawberism¹²⁶ need not prevail; the fiscal limits on governments are different from those on individuals and, "to avoid a crisis of legitimacy [a contingency that Chicagoans totally ignore], the state must compensate for the social outcomes of market processes by offering income support and public services . . . to people unable to achieve a subsistence wage within the market system."¹²⁷

Ideally, governments would be structured to maximize the contributions both they and markets make to the solution of carefully defined policy problems. Markets offer useful standards for comparison with governmental actions in an inevitably mixed economy. Rather than push near-perfect markets and play down fatally flawed governments, as the Chicago School urges them to do, policymakers can easily study the real world results that flow from often fragmented, segregated, and otherwise uncompetitive markets. These results pose a series of questions

role in determining whether the market will function in the public interest." The question is whether the market can regulate itself, with few oligopolies and other destructive and exploitative side effects.); *id.* at 255 (When the profit sector fails in matters of equity, the problem can be corrected through . . . nonprofit organizations such as trade associations or government institutions, which are better prepared to achieve this value."); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 177-79, 440, 454, 465 (1985), *cited in* MALLOY, *SERFDOM*, *supra* note 8, at 162 n.7 (supporting the notion that *laissez faire* in America has been long on rhetoric and short on reality); JAMES W. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* (1977); MALLOY, *SERFDOM*, *supra* note 8, at 162 n.7 (citing JOHN GRAY, *LIBERALISM* 26-36 (1986)) (there has never been a true period of *laissez faire*); Coleman, *supra* note 5, at 31 (whatever role *laissez-faire* may have played in the past, it has "long since been transcended by varying but substantial forms of *étatisme*"); Logan & Swanstrom, *supra* note 18, at 3; Harry N. Scheiber, *The Road to MUNN: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* *LAW IN AMERICAN HISTORY* 327 (Donald Fleming & Bernard Bailyn eds., 1971).

125. FISCHER, *supra* note 17, at 72.

126. Wilkins Micawber was a character in Charles Dickens's *David Copperfield* who was "noted for his alternate elevation and depression of spirit, hearty appetite, reckless improvidence, his troubles, and for his 'waiting for something to turn up.'" WEBSTER'S NEW INT'L DICTIONARY 1551 (2d ed. 1937).

127. Fainstein, *supra* note 30, at 122 (citations omitted). See Kirilin & Marshall, *supra* note 22, at 353-54; Richard R. Mudge & Kenneth I. Rubin, *Urban Infrastructure: Problems and Solutions*, *in* *URBAN CHANGE AND POVERTY*, *supra* note 15, at 308, 341-42. *But see* MALLOY, *SERFDOM*, *supra* note 8, at 62 ("state-centered views of law and economics generally lead to frameworks of liberty that focus on the importance of groups, experts and planners at the expense of individual decisionmakers in the marketplace").

or challenges. Would the outcomes from governmental interventions be better or worse than marketplace results? Should policymakers try to beat market results or to reform markets and then allow them to generate the desired results? To what precise extent is private initiative disciplined by real world markets, and when should public initiatives defer to it? In particular, do markets provide too little or too much of a reward to *political* skills and productivity?

Answers to such questions could be implemented by enacting a neoclassical presumption into law, one that is rebuttable rather than (as the Chicago School would wish) conclusive: leave matters to a private initiative in markets, unless it can be demonstrated (in ways that attract an informed consensus) that governmental interventions will reduce broadly defined market failures on balance. Many of the props are already in place for such a scheme; it amounts to an "economic constitution" with the antitrust laws as its centerpiece,¹²⁸ although a great deal of fine-tuning would be required. Briefly, general principles and a more sophisticated judicial review are needed, rather than the unreviewed, outcome-specific rules that currently favor special interest groups. The logical starting points would be those areas where economic rent-seeking behavior is most prevalent: "tariffs, defense contracts, public works projects, direct subsidies . . . government loans,"¹²⁹ and their equivalents at the municipal level.

Michael Porter's highly regarded book argues that competitive advantage is achieved through a competitive adversity; rather than succumb to "the false allure of concentration, collaboration, and protection,"

128. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (antitrust law is "the Magna Carta of free enterprise" and is as "important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."); Brietzke, *Constitutionalization*, *supra* note 48. See also MALLOY, *SERFDOM*, *supra* note 8, at 3-4 ("we can begin to see our own system of constitutional checks and balances as a legal construct intended to mirror the competitive market metaphor of economics"). My view is slightly different from Malloy's. Checks and balances, federalism, and a separation of powers are political *market failures designed into* the document, to counter the economic market failures that foster the "vice of faction" that worried Madison in Federalist No. 51, and that would now comport with an economics theory of the second-best directed against a special-interest politics.

129. Farber, *supra* note 90, at 1361. See MALLOY, *SERFDOM*, *supra* note 8, at 92. See also RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985) (discussing theoretical issues of political philosophy and jurisprudence, including social justice and economic equality); MALLOY, *SERFDOM*, *supra* note 8, at 136-37 (Under classical liberalism, general principles are preferred to outcome-specific rules. A city's public-private partnerships should be subject to meaningful constitutional constraints; the information required for evaluation and accountability should be widely available, and the standards of the city's liability and obligation should be the same as those imposed on a private developer or lender.).

government should act "as a *pusher* and *challenger*."¹³⁰ Stringent safety, environmental, and energy-efficiency regulations would both improve our standard of living and force an upgrading of American products, perhaps to the point where they could compete successfully with those from Germany and Japan—where producers prosper under stringent regulations.¹³¹ Needless to say, these pushes and challenges need to come from the federal government, and they are unlikely so long as the special interests rule in Washington. If a city were to attempt these tactics, aggrieved producers would move away or argue that the interstate commerce clause stood violated.

III. GHETTOS AND LAWYERS

The analysis so far leaves us between the proverbial rock and hard place. This is a position lawyers regularly find themselves in, but rarely with so little guidance. The Chicago School cleverly demonstrates why governments have done so little to alleviate poverty, but its proposed cure — basically, let markets and strong private property rights do it all — seems inhumane as well as implausible. The best we can do is to build upon an unrealized potential for selective interventions by selectively restructured governments, a solution that will please no one, but that will be rejected outright only by ideological true believers. If politics is too important to be left to the politicians, so too is economics too important to be left to the economists or perhaps worse still, solely to law and economics experts advising politicians.¹³² Lawyers have three roles to play in the process of urban development: as problem-solving generalists, as players who are professionals at dealing with values, and as planners.

First, lawyers have a useful generalist's or synthesizer's role to play, if we can shed some of our formalism and positivism. (This is a feat many economists are unable to manage.) Our method is one of solving problems, and we are much less guardians of a cherished theory than are economists and much less guardians of routine and ghetto underdevelopment than are politicians and bureaucrats. Our technique requires a clear definition of the relevant issues, and we can thus ask economists, politicians, and bureaucrats to clarify matters and to determine relevance.

130. PORTER, *supra* note 4, at 681. *See id.* at 117 ("Among the strongest empirical findings from our research is the association between vigorous domestic rivalry and the creation and persistence of competitive advantage in an industry."); *id.* at 672 (innovation requires activism by companies; government is only an indirect "facilitator, signaller, and prodler").

131. *Id.* at 647-48.

132. KHOR KOK PENG, MALAYSIA'S ECONOMY IN DECLINE 154 (1987).

This may not sound like much, but analysis and public policy frequently drift from one unclear premise to another. Having to explain what one is doing to a lawyer frequently clarifies one's thinking and helps to avoid mistakes. We are trained to deal with changes occurring within a framework of stable but imperfect institutions. Lawyers often succeed in eliminating contradictions, in setting politically acceptable priorities when contradictions cannot be eliminated, or in otherwise finding the basis for a compromise settlement.

A second lawyer's role concerns our familiarity with values. We throw "rights" and "free speech" around as if these were concrete entities. This is unscientific (unquantifiable) behavior for the economist, and it certainly is more than a bit sloppy. Yet, if someone does not actively and constantly pursue these values, they will be forgotten or drowned in a special interest politics. Chicago School economists often deal with values by asking, for example: How much is free speech worth, how much are you willing to pay for it? This is not a useful perspective on distributive justice because, by definition, the poor are unable to pay as much as it takes to protect their rights effectively.¹³³ Devising the means to implement a compelling theory of distributive justice¹³⁴ is, in fact, the single most important contribution lawyers can make, both to urban development and to ameliorating ghetto miseries.

The lawyer's first two roles come together in their third planning role. Someone must systematically link new goals and values with institutions because "[i]deal justice enters into nonideal politics by way of the natural duty to establish just institutions."¹³⁵ The conventional planners' solution is often to cater to special interest groups or to spawn new institutions that create confusion, but seldom work better than the institutions they replace or circumvent. There is too little monitoring of the interaction among policies, of the techniques that the policies call forth, and of institutions. A better balance and more equalizing outcomes can be created through a careful administrative law planning, with precise definitions of bureaucrats' tasks, better means of evaluating their performance,¹³⁶ and a handicapping of the institutional and other interest

133. Like Oscar Wilde's cynic, the economist *ex officio* is said to know the price of everything and the value of nothing. The world the economist would create might be a rather sad place, although wealth maximization is supposed to make everyone happy.

134. See *infra* text accompanying notes 148-68.

135. GERALD M. MEIER, *EMERGING FROM POVERTY: THE ECONOMICS THAT REALLY MATTERS* 232 (1984). See MORTON DEUTSCH, *DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE I* (1985) ("Justice is the first virtue of social institutions, as truth is of systems of thought.") (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971)). For a lawyer, this "natural duty" presumably arises under a natural law (which can but need not fall prey to the naturalistic fallacy).

136. In the Law Reform Commission of Canada, *Policy Implementation, Compliance*

group horse race. Lawyers should advocate a *planned* redistribution of rights and privileges (and the wealth that flows from them), within a scheme that maximizes equality gains from a minimum loss of liberties. Otherwise, a casual proliferation of economic rights through failed markets operates to favor elites and to further entrench ghetto miseries.

A. *Some Tentative Recommendations*

Lawyers should be able to devise the kinds of process-oriented reforms outlined in the last section, to achieve a better fit between democratic governments and the problems these governments face. If our focus is the problems of ghettos, such a step is indeed necessary but it is not sufficient. The rules of the political games could change substantially, and bigotry and ghetto market failures would still be endemic. Lawyers might thus have to do something *substantive* to alleviate ghetto problems. This is a scary prospect, as the attitudes voiced at most law faculty meetings presumably demonstrate. It raises the specter of a substantive due process that was thought to be safely buried after the Supreme Court's 1937 "switch in time." The only recent judicial venture into something that can be characterized as a substantive due process with *some* plausibility is *Roe v. Wade*¹³⁷ and its progeny, but abortion rights have hardly been an analytical or political success. Fortunately, *United States v. Carolene Products, Co.*¹³⁸ could be revived to deal with the issue. Although *Carolene* appears to be a process-oriented decision, it is actually substantive or outcome-oriented in nature, yet it avoids the substantive due process pitfall. *Carolene* triggers a "more exacting scrutiny" when rules or projects discriminate *against* "discrete

and Administrative Law 80 (1986) (Working Paper No. 51), the Commission concludes that the "planning of policy implementation involves important choices about institutions and instruments for influencing private [and public] behaviour. Each has its inherent capabilities and drawbacks in any given political and socio-economic context." Within their context, the Canadians emphasize the following variables as influencing choices of institution and technique by public administrators: the amount and type of change in behavior required and how quickly change should occur; whether public support or resistance is anticipated; the adequacy of resources available for implementation and the characteristics of the relevant administrators; the extent to which the desired behavior can be accurately defined and quantified in law; how easy it is to collect information about compliance and to detect violations, the relative speed, simplicity and predictability of legal mechanisms, and their capacity to deal with initial public opposition; and the normative context within which the law operates. The Commission calls for the use of "compliance specialists" or "internal ombudsmen" who would coordinate activities and force the bureaucracy to control itself. *Id. passim.*

137. 410 U.S. 113 (1973).

138. 304 U.S. 144 (1938).

and insular minorities” and when political processes are unlikely to cure this defect.¹³⁹

A political cure is unlikely so long as the Chicago School analysis of governmental processes remains fairly accurate, and ghetto residents make up a plausible “discrete and insular” minority. Segregated from broader economic and political markets and “kept in their place” by the fears of the affluent majority, most ghetto residents are readily identifiable by the color of their skins or by their accents. The correlation between ghetto residence and a discreteness and insularity is not perfect, but it is close enough. For example, “poor whites” are not much feared by the affluent, especially if they are elderly, but most poor whites no longer live in ghettos. It should be easy to convince interested officials that an affirmative action on behalf of ghetto residents is permitted under *Carolene*, but can today’s judges also be persuaded to apply *Carolene*?

Important urban development cases tend to combine due process, equal protection, and takings (eminent domain and just compensation) issues together in complex and confusing ways. Faced with this mélange, most judges take refuge in the New Deal model of police powers, and they thus defer to political judgments. Yet, a genuine human development is a more proper “public purpose” or “public use” than is the Yuppification that passes for urban development under recent, looser definitions of the public purpose.¹⁴⁰ These definitions should be tightened up, so that government power improves the economic environment for everyone, especially for ghetto residents, rather than merely serving to record the outcomes from bribes by special interest groups. *Carolene* offers an appropriate means to this end. Judges are encouraged to probe deeper, but not much deeper, into the discriminatory bases for political

139. *Id.* at 152-53 & n.4. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-22, at 1523 n.9 (2d ed. 1988); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (a member of the “progressive” school of law and economics, urging an expansive interpretation of *Carolene*); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the “Inside-Outsider”*, 134 U. PA. L. REV. 1291 (1986).

140. Compare *supra* notes 123-24 and accompanying text with *Berman v. Parker*, 348 U.S. 26, 32 (1954) (approving broad use of eminent domain in urban redevelopment because “when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive”) and *People ex rel. City of Urbana v. Paley*, 368 N.E.2d 915, 921 (Ill. 1977) (upholding the government’s use of industrial revenue bonds for downtown commercial development because “stimulation of commercial growth and removal of economic stagnation are also objectives which enhance the public weal”). See FISCHER, *supra* note 17, at 32, 43; MALLOY, *SERFDOM*, *supra* note 8, at 14 (eminent domain powers used in Pittsburgh to transfer substantial property from one private party to another) and at 90-91 (discussing the broad police powers model of *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365 (1926)); Mandelker, *supra* note 25, at 4-5.

action, yet all close judgment calls would be resolved by deferring to political judgments under the police powers model. Some conservative judges, especially those worried about being tarred with the substantive due process brush, would welcome this means of striking down the more blatant of special interest group bargains.¹⁴¹

The United Nations' Conference on Human Settlements states that a "human settlement policy must seek harmonious integration or coordination of a wide variety of components, including for example, population growth and distribution, employment, shelter, land use, infrastructure and services."¹⁴² Market processes provide many, but not all, of the integrations needed to promote the fullest measure of "synergistic interactions" that would enhance urban standards of living in the United States.¹⁴³ As Robin Malloy's book illustrates, conventional planning processes have, at best, made marginal contributions to an urban synergy. Law has a tremendous integrative potential, but this potential is largely ignored if we follow the Chicago School recommendation of having laws that merely mimic markets. Such a recommendation makes little sense in the ghettos, where acute legal failure perhaps mimics chronic market failures. The Chicago School assumes that national and local economies are regularly brought into an equilibrium by marketplace activities, but economies are in fact often in disequilibrium and chronically so in ghettos.¹⁴⁴

141. MALLOY, *SERFDOM*, *supra* note 8, at 552. See Dahlman, *supra* note 76, at 221-23. See also Mandelker, *supra* note 25, at 7-9 (discussing state court decisions that approve exercises of eminent domain over areas that are not blighted). *Pioneer Trust & Sav. Bank v. Village of Mt. Prospect*, 176 N.E.2d 799 (Ill. 1961) contains a cruel value bias: when an "exaction" (such as inclusionary zoning) is imposed as a precondition to permission to develop, this exaction must be uniquely and specifically related to the development in question. The need for additional school and public recreational facilities was not uniquely attributable to the particular development in *Pioneer*. In other words, developers are free to keep the economic rents "earned" as a special interest group, and government cannot siphon off part of them for the benefit of the poor generally. See *supra* note 49. A *Carolene Products* perspective would change this kind of thinking and change case outcomes that deny poor people the standing to challenge political arrangements affecting them precisely because they have been denied access to a special interest politics. See, e.g., *Warth v. Seldin*, 422 U.S. 490 (1975). But see Farber, *supra* note 90, at 1360 ("the rent-seeking model, if taken seriously, would require much broader judicial review than even the *Lochner* Court contemplated"). I disagree with Farber and argue that a *Carolene Products* approach would result in marginal changes that would benefit the poor.

142. *Declaration of Principles*, *supra* note 6, at 347.

143. Berger & Blomquist, *supra* note 15, at 67-68.

144. See HARVEY, *supra* note 2, at 63 ("the inflexibility of a city's spatial form [generates] almost permanent disequilibrium in the city's social system"); Coleman, *supra* note 5, at 33 ("Economics is concerned with market phenomena in nationally-integrated economies. Where these do not exist, its analytical techniques are non-operative."). See

Even more centrally, the Chicago School ignores a democratic government's right and duty to mediate among groups in society. So far as the ghettos are concerned, this integrative function often takes the form of an activist enforcement of broadly defined civil rights laws, although the Reagan-Bush Administration would not have it so. The forms of bigotry grow ever more subtle and sophisticated as people become more skilled at dissimulating their prejudices. Civil rights enforcement must therefore be tied to broader moral issues and questions of social organization. A zealous "guarding of someone's civil rights assuredly cannot mean leaving that person in a condition of immediate and considerable physical risk, else the concept of 'civil rights' is stripped of all practical meaning."¹⁴⁵ Integration of a few schools, neighborhoods, and jobs — deeply problematic steps by themselves — does much less to integrate markets for production and distribution than is commonly supposed. Ghetto market surrogates must also be forced back from the periphery and into mainstream markets, through improvements in the mobility of resources that should also enhance marketplace efficiencies in the long run. For example, a stricter enforcement of fair housing and fair hiring laws is a necessary, but not a sufficient, cure for market failures when entry-level jobs are located in the suburbs while would-be employees live in the ghettos. Access to computerized job search facilities, van pooling, and relocation subsidies are also needed to make this "civil right" effective.¹⁴⁶

B. *Distributive Justice*

Inevitably, the implementation of civil rights measures raises issues of distributive justice. This may be why some conservatives oppose the enforcement of civil rights. Lawyers of all political persuasions should feel some responsibility for implementing distributive justice simply be-

also supra note 36 and accompanying text. Perhaps the most interesting kind of integration concerns (perhaps a sociological theory of) knowledge about urban development. Some economists know that the benefits of economic growth will "trickle down" to the poor, while some of the poor know this to be nonsense and an unjust perspective on their plight. How can this knowledge be shared and otherwise put to good use under law, given that no one has a monopoly on wisdom?

145. ROSSI, *supra* note 2, at 198. See WILSON, *supra* note 30, at 132-33; Fainstein & Fainstein, *supra* note 76, at 11-12. Since 1980, the federal government's passivity in civil rights enforcement and its abdication of responsibility for the poor have become part of a program to remove government from the business of promoting social change, except in those areas where neoconservatives take an interest, such as imposing national moral standards over abortion. Freilich, *supra* note 28, at 161-63, 177-79.

146. Kasarda, *supra* note 22, at 193. See HARVEY, *supra* note 2, at 63 (without public housing constructed near suburban job opportunities, there is little hope of a "natural equilibrium solution").

cause it is a part of justice as most legal philosophers define it. If lawyers do not look out for endangered species of justice, who else will? Certainly not politicians looking for bribes from special interest groups and certainly not mainstream economists.

Most economists have little patience for something so vague and "unscientific" as theories of distributive justice. Admittedly, these theories often take the form of an imprecise formula: from each according to his ability, to each according to his needs, his moral or social merits, his contribution to political success, or his efforts. The economist is also frequently caught applying a tacit formula of justice: from each according to his ability and to each according to his "marginal productivity" measured in terms of the willingness of others to pay. Thus a rock star is manifestly more valuable to society than a teacher or a garbage collector (a "waste transfer specialist"), because a rock star is paid more through "competitive markets." (This is little more than a tautology: a rock star is paid more because a rock star is paid more.) Theodore Schultz may be right: "if we knew the economics of being poor we would know much of the economics that really matters."¹⁴⁷ Yet, poverty too seldom provides economists with much intellectual stimulation, and economists seldom worry about the "less analytically rigorous" distributive consequences of their efficiency prescriptions. Practitioners of a conservative law and economics frequently see themselves as guardians of a rationality that curbs lawyers' and others' soft-headedness in economic matters. Economists' hardheadedness frequently comes across as a hard-heartedness towards the poor, however, and lawyers may thus want to offer policymaking options that combine hardheadedness with a soft-heartedness toward the poor.¹⁴⁸

The advocacy of creative policy options is all the more urgent in light of recent changes. "Market forces" have redistributed additional resources away from the poor, who have been relegated to a lowly position on the agenda of an entrepreneurial politics. They have been treated to "so-called free enterprise solutions,"¹⁴⁹ solutions that are cheap

147. Gerald M. Meier, *The Meaning of Economic Development*, in LEADING ISSUES IN ECONOMIC DEVELOPMENT, *supra* note 10, at 2 (quoting Theodore W. Schultz, on accepting the Nobel Prize in Economics, 1979). See William R. Cline, *Distribution and Development*, 1 J. DEV. ECON. 359, 370, 374, 380 (1975).

148. See Meier, *supra* note 147, at 3-5; PIGOU, *supra* note 78, at 5 ("It is not wonder, but rather the social enthusiasm which revolts from the sordidness of mean streets and the joylessness of withered lives, that is the beginning of economic science."). This has not often proved to be the case, in economics *or* in law, but it has provided the poor with some useful allies.

149. Freilich, *supra* note 28, at 177. See HARVEY, *supra* note 2, at 61, 79, 86; McCoy, *supra* note 47, at 134; Moore & Squires, *supra* note 32, at 98, 108; Wingo &

if nothing else, and recurrent fiscal crises at all levels of government appear to constrain additional redistributions through taxation and expenditure policies. Recent public opinion surveys on the subject seem ambiguous. While people continue to complain about paying taxes and the young report a declining sense of civic obligation, we increasingly favor more government spending on a wider variety of social programs.¹⁵⁰ Under an adroit political leadership such as Roosevelt's, ambiguities in public opinion could be made into a consensus over a greater measure of distributive justice. Some Democrats will combine altruism with self-interest and follow the lead of Jesse Jackson's Rainbow Coalition, but in their own ways and for their own programs, if they can find the votes by organizing poor people into more effective interest groups and by making the plight of the poor more compelling to the general public. Homelessness is currently a "social problem" because the homeless are visible, sleeping on grates and in airports, and their manifest inability to attain the warmth and security most of us associate with "home" is deeply affecting.¹⁵¹ Yet, other poor people will remain invisible and

Wolch, *supra* note 27, at 317 (the "new conservatism" believes a bigger pie to be more important than redistribution, in what is seen to be a zero-sum game); Hallinan, *supra* note 10 (Blacks were promised much, but obtained little, from redevelopment in Indianapolis).

150. BENNETT & BENNETT, *supra* note 123, at 20-50; Raymond, *supra* note 123, at A6.

151. Rossi, *supra* note 2, at 14. See HARVEY, *supra* note 2, at 81 ("the rich are unlikely to give up an amenity 'at any price', whereas the poor who are least able to sustain the loss are likely to sacrifice it for a trifling sum"); Bamberger & Parham, *supra* note 5, at 18 (group protests in Indianapolis focus on "approaches . . . to foster development, the openness of the decisionmaking process, the nature of the projects being undertaken, and the longer term impacts"); Clavel & Kleniewski, *supra* note 5, at 223-24 (Chicago's populist mayor, Harold Washington, was a skilled political dramatist, but his coalition proved fragile and he was succeeded by the developer-dominated Richie Daley); Kirlin & Marshall, *supra* note 22, at 356 (conflicts over redistribution are seen by some as a crisis in governance and by others as insufficient to force change); Walton, *supra* note 16, at 131 (as in the Third World, urban protests increasingly involve the "conditions of collective consumption — transportation, urban services, housing . . . health, and education"). Harvey Molotch offers a plausible diagnosis:

It takes time for grievances to accumulate and find modes of effective expression. Capital moves faster [since it is already tightly organized] than culture and more rapidly than victims of change can organize for reform. . . . In the United States, without a strong left tradition, reform is always ad hoc and operates through social movements rather than party. As change upsets former arrangements for exacting social justice, there is no ongoing system to make certain that the new economic order is socially continuous with the old.

Molotch, *Urban Deals*, *supra* note 19, at 193 (citation omitted). Kirlin & Marshall add that a "dependence on established economic interests limits the extent to which minority political power can be translated into redistributive policies. It also subjects minority

ignored unless politicians and lawyers somehow dramatize their plight.

Theories of a distributive justice insist that political and moral precepts be considered along with the economic ones. For example, a minimal physiological integrity is often deemed a moral precondition to the bargaining over production and distribution stressed by the Chicago School in its Coase Theorem.¹⁵² Without such integrity, bargains will automatically favor the rich and powerful, and the autonomy assumed by Chicagoans to be in everyone's possession will never develop for the poor. The history of intergroup relations is ignored by the Chicago School. Robin Malloy notes that Chicagoans' "wealth maximization discourse can ignore the issue of whether African-Americans or Hispanics, for instance, have anything to exchange in the marketplace," or whether they "have been systematically deprived of an opportunity to acquire the wealth [and dignity] necessary to bargain voluntarily."¹⁵³

Fortunately, Malloy's classical liberalism contains "the egalitarian principle that individuals are not doormats and that there is a personal autonomy beyond which no outsider or state should be allowed to penetrate coercively."¹⁵⁴ This principle cannot be derived from the "institutional frameworks of the past," as the common law and marketplace orientations of the Chicago School would require, where these "frameworks are from the start biased against women and minorities."¹⁵⁵ In practical terms, Malloy's principle imposes a duty on governments to provide food, shelter, medical care, and education for people who do not have the purchasing power to obtain these necessities through private markets.¹⁵⁶ This principle and duty can be squared with the neoclassical economics of the Chicago School only if one accepts Gerald Meier's morally defensible view that "[p]er capita real income is only a partial index of economic welfare [or wealth maximization] because a judgment regarding economic welfare will also involve a value judgment on the desirability of a particular distribution of income."¹⁵⁷ Malloy thus comes

officials to criticism from minority groups." Kirlin & Marshall, *supra* note 22, at 359. Judges are seldom of any help. See, e.g., Mandelker, *supra* note 25, at 16 (discussing *Meierhenry v. City of Huron*, 354 N.W.2d 171 (S.D. 1984), in which the court held that the state constitution's uniformity of taxation clause applied to the property tax levy rather than to the distribution of revenues from the property tax).

152. See Coase, *supra* note 77.

153. MALLOY, SERFDOM, *supra* note 8, at 70. See WILSON, *supra* note 30, at 10-11, 146 ("long periods of racial oppression can result in a system of inequality that may persist for indefinite periods of time even after racial barriers are removed").

154. MALLOY, SERFDOM, *supra* note 8, at 50.

155. *Id.* at 51.

156. *Id.* at 80. See *id.* at 77 (discussing the libertarian philosophy of government's legitimate role).

157. Meier, *supra* note 147, at 5, 8.

close to rejecting the wealth maximization goal of neoclassical economics and to adopting instead the goal of the developmental economists, "the improvement in human well-being."¹⁵⁸

Malloy's classical liberalism is thoughtful and humane, but we can go beyond it if we *choose* to do so. The mixed economy of private and public sectors has its counterpart in a mixed polity of liberal democratic and social democratic tendencies. (More than a little authoritarianism runs through both tendencies, especially into the ghettos.) An evenhanded analysis of these often rival tendencies would illustrate that "[t]he trade-off between efficiency and equity [or between liberty and equality] need not be as severe as it currently seems to be,"¹⁵⁹ at least for the Chicago School. The social democratic tendency involves a more collective pursuit of human dignity than Malloy seems comfortable with, perhaps as an implementation of Frank Michelman's moral precept that "civilized people should not sacrifice the well-being of identifiable individuals for the benefit of the majority,"¹⁶⁰ regardless of whether markets dictate such an outcome. A redistribution from the less basic needs of the affluent to the more basic needs of the poor could be accomplished through a system of "Pigouvian taxes"¹⁶¹ which would redistribute the economic rents obtained through zoning, redevelopment projects, and the other bounties flowing from a special interest politics. Some of the benefits from this redistribution would flow back to the temporary losers, through a hydraulic "trickle up" from the poor that seems more plausible than a trickle down, and the dominance of politics by special interests would be eroded by a reluctance to pay large bribes for privileges which would be heavily taxed.

158. HARRISON, *supra* note 2, at 1.

159. FISCHEL, *supra* note 17, at 336. See ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY: THE BIG TRADEOFF* (1975). *But see* MALLOY, *SERFDOM*, *supra* note 8, at 20 (if you have it, private capital creates a power base for the individual to challenge and constrain the state, especially from within a special interest group) and at 63 (attempts to validate collective values dehumanize by substituting the community for a differentiation among individuals); Kirlin & Marshall, *supra* note 22, at 369 (different governmental institutions may have different roles: a service-delivering bureaucracy may easily meet equity criteria by treating like cases alike, while a public entrepreneurship is more particularistic and perhaps more efficient, corrupt, or both).

160. FISCHEL, *supra* note 17, at 151. See *Declaration of Principles*, *supra* note 6, at 348 (human dignity is a basic right to shape policies and programs affecting one's life).

161. Under Pigouvian taxes, "activities that confer negative effects on others ought to be taxed and activities that confer positive effects on others ought to be subsidized." Dahlman, *supra* note 76, at 229. This is a better solution than a discrete, nonmarginal market intervention like zoning, because these taxes are calculated on the margin and thus alter incentives *within* the relevant markets. *Id.*

Once again, this scheme must be federalized to prevent the aggrieved from opportunistically switching communities or crying foul under the Interstate Commerce Clause. The rich would then have no constitutional or moral right to keep all of the economic rents they obtained from the special interest porkbarrel, but the Chicago School would give them such a right in economics: everyone is entitled to keep whatever they can get as a consequence of their absolutist "property" rights. A theory of distributive justice must ultimately flow from a theory of rights, perhaps less from Locke's or Hobbes's theory than from the second-best theory that we must all somehow live with governments and their institutions, at least until we can make some inevitably marginal changes. (Revolution is decidedly not wealth-maximizing.) Suffice it to say that, contra the Chicago School, private property rights will always be restricted in some ways; therefore, the key constitutional question is: Which impediments have been imposed and how are they enforced? Since the New Deal, it has been broadly recognized that private property rights are stumbling blocks to, as well as foundations for, freedom. The property rights of a few can stand in the way of those who have none, who have been denied reasonable opportunities for acquiring some, and who thus have an undemocratic power exercised over them. Many wealth-maximizing outcomes are possible, so the ones that occur will depend in part upon which rights and processes are chosen democratically. The conservatives' fear is that, once begun, there will be no end to redistribution.¹⁶² Yet, politics and the Constitution would impose fairly definite limits on redistribution, as they have in the past.

Urban property rights have little value apart from their proximity to a similarly valued property. The organization of urban space by special interest groups thus amounts to organizing an inequality through

162. *Id.* at 254; HARVEY, *supra* note 2, at 115; Pilon, *supra* note 84, at 372-73, 377-78, 383-84; Rubinfield, *supra* note 48, at 7. See HARVEY, *supra* note 2, at 89 ("local public services bid fair to become the chief means of income redistribution") (quoting W.R. THOMPSON, A PREFACE TO URBAN ECONOMICS 118 (1965)) and at 112 (capital flows bear little relation to need, and it is impossible to cure this defect by capitalist means); MALLOY, SERFDOM, *supra* note 8, at 71 (disagreements between liberals and conservatives in law and economics are usually played out over private property) and at 79-80 ("The requirements of human dignity mean that we cannot legitimize the tragedies and hardships of individuals by cloaking them in the language of protecting private property rights or of following the natural consequences of a market process that should be protected for its own sake." The state must serve as an "appropriate counterbalance to private coercion."). Ellickson offers some examples: taxes on new house construction are inefficient or inequitable only "when they fall partially on consumers, or on landowners who have not received zoning windfalls." (These tax revenues *could* then be used to benefit the poor.) Ellickson, *supra* note 77, at 155. However, an inclusionary zoning achieves little distributive justice because the developer will serve the wealthiest portion of the eligible group, to the extent that the developer can control the identity of the occupants. *Id.* at 156.

the vehicle of private and quasi-public property rights and to protecting the group's "turf" thereafter. Distributive justice would involve organizing a set of spatial structures that maximize equity along with efficiency. Once a sensible framework for bargaining between communities is thus established, once political market failures are curbed, in other words, the "free play of market forces" could also be distributively just.¹⁶³ Once again, this is a *Baker v. Carr* and a *Carolene Products* writ large.¹⁶⁴

Inequality is a conspicuous market failure by definition, if equality is a goal we want to pursue through markets. Even as we quarrel over the finer points of symptoms and solutions, people are almost uniformly scandalized by the injustice of governments that do little or nothing to ameliorate preventable miseries. Yet, equality is a value missing from much of the conventional economic and legal analyses and from most attempts at urban development. Liberty, on the other hand, is conventionally defined as encompassing some property rights, most notably the extensive and near-absolute property rights found in Chicago School definitions. The unresolved tensions between a variously defined liberty and equality drive our "higher" or constitutional politics.¹⁶⁵ This dilemma of liberty versus equality can be resolved only through development, a genuine upward movement of the whole society, with fairly rapid reductions in the numbers of people in the most disadvantaged categories (rather than a delusive "trickle down"). Some liberties can then be created or reinforced programmatically, even as new equalizations are attained, in a "planning for freedom" rather than for Malloy's serfdom.

163. HARVEY, *supra* note 2, at 117. See *id.* at 93 ("the poor need neighborhood government to secure the liberty to achieve prosperity") (quoting M. KOTLER, *NEIGHBORHOOD GOVERNMENT: THE LOCAL FOUNDATIONS OF POLITICAL LIFE* 71 (1969)). High negotiation costs with other communities necessitate a series of uneasy compromises, so that "we do not lose more in 'x-efficiency' than we gain in economic efficiency." *Id.* Harvey's analysis builds to a Rawlsian "sense of territorial social justice":

1. The distribution of income should be such that (a) the needs of the population within each territory are met, (b) resources are so allocated to maximize interterritorial multiplier effects, and (c) extra resources are allocated to help overcome special difficulties stemming from the physical and social environment.
2. The mechanisms (institutional, organizational, political and economic) should be such that the prospects of the least advantaged territory are as great as they possibly can be.

Id. at 116-17.

164. See *supra* notes 139-41 and accompanying text.

165. See Pilon, *supra* note 84, at 372-73 (our "antimony" between private property rights and "people rights" is a radical departure from, rather than a refinement of, Enlightenment theories); *id.* at 377 (that "the free society is not a society of equal freedom, defined as power — is precisely the rub that gives rise to the new theory of property"); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984).

Equalization is a viable goal of development and distributive justice because it subjects equality to the constraint of minimizing the loss of liberties, liberties that are defined to exclude the more extreme, Chicago School blandishments concerning property rights. A rough balance between liberty and equality can be attained through an almost dialectical process of fitting rights together in different configurations over time, rather than by allowing a liberty defined by the Chicago School to prevail every time. The Achilles' Heel of the Chicago School is the lack of justification for, or legitimation¹⁶⁶ of, the outcomes it prescribes, "unless the internal logic of the market economy itself is regarded as a form of justification."¹⁶⁷ This "internal logic" is powerful and persuasive, but does it justify the existence of the ghettos? If not, we may want to devise more compelling justifications. Our familiarity with value inquiries could make lawyers into effective ideologists for development and distributive justice, a role which is perhaps necessary because many ideologists have opposing viewpoints. At the least, we should subject these opposing viewpoints to an analytical strict scrutiny. This would be less a deconstruction than an opportunity for rival theories to self-destruct, once their analytical underpinnings and overreachings are made more apparent.

C. Enter Robin Malloy

Ronald Dworkin says something which sounds better coming from Malloy: "If [the reader] leaves my argument early, at some crucial abstract stage, then I have largely failed for him. If he leaves it late, in some matter of relative detail, then I have largely succeeded. I have failed entirely, however, if he never leaves my argument at all."¹⁶⁸ I

166. See BRUYN, *supra* note 5, at 65 ("I see a trend toward a matching of opposing traits: competition with cooperation, profit with non-profit, command with mutual governance, maximizing with optimizing profits, self-interest with public interest, financial standards with ethical standards"); *id.* at 325 (criteria of effectiveness and legitimacy will be added to market evaluations in the future); MALLOY, SERFDOM, *supra* note 8, at 11 ("Structural changes in legal economic discourse reveal inconsistencies between surviving forms of free market rhetoric and dramatic ideological shifts in foundational social norms.") and at 75 ("Rules . . . are socially chosen criteria for legitimizing socially biased arrangements."); Cummings, *supra* note 22, at 7 (the capitalist state fulfills two contradictory functions, accumulation and legitimacy; the state loses legitimacy if it helps one class at the expense of another, while the sources of its power dry up if accumulation is neglected); Fainstein & Fainstein, *supra* note 76, at 11-12. For the Chicago School, equalization is not worth pursuing precisely because it is not a zero-sum game, yet the poor need not lose before the affluent can win. Moreover, the means of pursuing equalization promise independent benefits, such as improved planning, coordination, implementation, and accountability.

167. HARVEY, *supra* note 2, at 115.

168. RONALD DWORKIN, *LAW'S EMPIRE* 413 (1986).

left Malloy later and with more regret than I leave Dworkin, despite my greater agreement with Dworkin ideologically. Malloy's thoughtful arguments move from the general theory of law and economics to the specifics of downtown development, while my commentary considers what the specifics of ghetto miseries have to say about the general theory. I deliberately chose the limiting case of the ghetto, as one of the few exceptions that perhaps prove the "rules" of Malloy's classical liberalism. My analyses thus seem to exaggerate our disagreement. His framework is more sensible and humane than any that currently plays in America, and it deserves our enthusiasm and support.

Like Malloy, I seek the best balance attainable in the uses of private and public wealth and power. Seeing more market failures and fewer apt marketplace analogies than Malloy, I come out in favor of more state power. Ideally, my governmental power would be more centralized than Malloy's, but it would also be fairly tightly constrained by the Constitution and the goals it pursues, such as a genuine urban development. Although I cannot muster Malloy's enthusiasm for the ideas of Friedrich Hayek and Milton Friedman, who seem to mix conservatism and libertarianism with their liberalism, Malloy properly draws his central inspiration from Adam Smith. When Smith described governments as meddling culprits, it was mercantilist governments he had in mind, rather than the social democracies and welfare states that developed more than a century after he wrote.¹⁶⁹

Like J.S. Mill, Jeremy Bentham, and the Physiocrats, Adam Smith put more politics into his political economy¹⁷⁰ than Malloy seems willing to do. Malloy tries to build a modern political economy on a foundation of neoclassical economics,¹⁷¹ an economics which seeks to expel politics,

169. MALLOY, SERFDOM, *supra* note 8, at 14, 17-19, 96; MCCOY, *supra* note 47, at 41-42. *But see* MALLOY, SERFDOM, *supra* note 8, at 16-17, 49-50, 62-63 (unlike conservatives and liberals, who quarrel over who should exercise state power and for what purposes, classical liberals seek to limit state power).

170. James Coleman calls political economy a "non-purist" and historically validated "ancient and honorable discipline" that has been eroded by the increased academic specialization that reifies artificial boundaries among social scientists studying "a single concrete whole." Coleman, *supra* note 5, at 30-31. He states that "economists have lost touch with the bold generalizations of Adam Smith, Ricardo, Malthus, and Marx about the basic growth variables. . . . Indeed, during this century economists have had sadly little to say about the 'causes of the wealth of nations.'" *Id.* at 34 (quoting Walter T. Newlyn, *The Present State of African Economic Studies*, 64 AFR. AFF. 39 (1965)).

171. Malloy finds that:

The statist tendencies of the conservative [Chicago School] approach are furthered by . . . reliance upon the outcomes they generate from the application of neoclassical economic methods to pressing social problems. It is not the neoclassical model itself, but the indeterminate and almost dogmatic manner in

philosophy, and history from a pure economic "science." This foundation works surprisingly well for the topics Malloy analyzes, but it fails with respect to ghettos. For this reason, I stressed analogies to the Third World throughout my commentary, so as to pose a developmental economics as a better response to the plight of the poor and powerless. As lawyers, we know that a single economics theory that accounts for all of the disparate phenomena of the real world has yet to be devised. We can comfortably apply one type of analysis, developmental economics, to certain problems, even though another analysis, neoclassical economics, better addresses other problems. Rather than feel compelled to enforce a theoretical purity, we can treat economics as a plumber treats her bag of tools. We can also put up with the messiness of the theoretical and policy compromises that will result.

This is not the place fully to rehearse the arguments, but most theories of developmental economics have a built-in emphasis on a distributive justice, especially with regard to the unmet basic needs of the poor and powerless. These theories attempt to minimize the opportunities for falling to or below subsistence, chiefly by upgrading people's productive capacities as a means of maximizing wealth. The circumstances of a particular underdevelopment (even in the midst of an American abundance) usually stem from outcomes created and distributed in the past, outcomes that also create the current constraints on elites dealing with each other and with the poor and powerless. The patterns or terms of trade formed by these interdependent outcomes and constraints often displace markets and can be fundamentally changed through development: a nation-building in America and, with regard to race relations and our urban infrastructures, a national reconstruction.¹⁷²

which Posnerian conservatives employ the model as an end in itself, which causes problems for people concerned with individual liberty. . . . The real attack on the neoclassical model, as used by Posner . . . centers on the question of the values incorporated into it apart from any discussion of its realistic or predictive qualities.

MALLOY, SERFDOM, *supra* note 8, at 66. See also Harvey, *supra* note 2, at 96 ("It is not normative modelling which is at fault but the *kind* of norms built into such models.").

172. Development can be defined as "higher standards of living, longer lives, and fewer health problems; education . . . that will increase their earning capacity and leave them more in control of their lives; a measure of stability and tranquility; and the opportunity to do things that give them pleasure and satisfaction." HARRISON, *supra* note 2, at 1. Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) contains the germ (no more than that) of an idea of the development of people rather than of things: the "dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." BRUYN, *supra* note 5, at 65. See *Declaration of Principles*, *supra* note 6, at 344, 347-48; MEIER, *supra* note 147 *passim*; PORTER, *supra* note 4, at 560; Coleman, *supra* note 5, at 33 (mainstream economics has not promoted development because it does not seek to create the institutions conducive to development).

Robin Malloy's focus on urban land use, obviously worthy in and of itself, misses the point from a developmental perspective, both for the ghettos and for multinational investors. The poor have almost no access to land uses capable of earning economic rents, and it is doubtful that such an access is the most cost-effective way of reducing poverty. Multinational investors are not primarily interested in such access because their flexible strategies usually avoid tying up large chunks of capital in immovable assets for long periods of time. Some of Malloy's policy recommendations for urban development echo those of the import-substitution strategy that was discredited in developmental economics a decade ago.¹⁷³ Import substitution often leads to excess capacity, because producers in other cities lose some of their "export" markets, and to new assembly or unpackaging operations with little local value added. These operations seldom develop a competitive advantage because they are almost always one or more technological generations behind the leaders and they usually need continued subsidies ("tariffs") to compete for local consumers. (Are the Indianapolis Colts an import-substitution policy gone astray?)

The popular strategy of a local government bribing a producer to locate or remain in its city amounts to subsidizing local jobs today, so that the city can continue to subsidize them tomorrow. Most of the producers that actively court this strategy are at the low cost end of the relevant market, and these producers appeal to the most price sensitive consumers. (Consider Sears's attempt to coerce Chicago over remaining in the city and Chicago's subsequent bribe that failed.) Such producers lag behind the quality and performance leaders who will dominate markets in the future and who have a substantial "export" potential. A better strategy is an urban policy which bets on productive new *clusters* of mutually-supporting goods and services. Silicon Valley and the North Carolina Research Triangle are ideas already used up, but other good ideas remain to be implemented.¹⁷⁴ Governmental stimuli would largely take the form of signalling the opportunities and investing in the appropriate infrastructures, research, and education.¹⁷⁵ Superb universities

173. MALLOY, *SERFDOM*, *supra* note 8, at 121. Malloy places central reliance on Jane Jacobs, *Cities and the Wealth of Nations: Principles of Economic Life* (1984) and Israel M. Kirzner, *Discovery and the Capitalist Process* (1985). A much more useful source is arguably Michael E. Porter's book, which was presumably unavailable to Malloy while he was preparing his manuscript. See PORTER, *supra* note 4.

174. PORTER, *supra* note 4, at 655-56.

175. See *id. passim*; Kantor, *supra* note 19, at 511 (we must stimulate the conversion of municipal economies to fit their new, more specialized functions by changing patterns of land use, housing, and employment). Porter makes much of government helping to fill in *some* of the elements in the "diamond" of mutually dependent factors that are

serve as magnets for the clusters worth having, and assuring access to universities for the poor would require the substantial upgrading of city schools that would pay other dividends as well. An explicit, federalized urban policy is needed, one akin to the industrial policy that most economically successful countries use to good effect. We already have an urban and industrial policy, in which deference is given to those who pay the biggest bribes in a special interest politics, so there would be little loss of liberty in making these policies more beneficial to the country.

The federal government must assume a large role because ghetto problems require macroeconomic solutions.¹⁷⁶ No amount of programs which operate at the individual level can match the effects of tight labor markets (a relatively full employment) in overcoming ghetto miseries. (Even the best of job training programs will fail if there are no jobs.) Out of self-interest, employers would be forced to abandon their racism and the skill and educational qualifications for jobs that do not require them to attract employees they need. With skills and some seniority, minority workers would no longer be an easily abused “underlayer of cheap labor,” a last hired, first fired buffer for “white” workers.¹⁷⁷ The price of full employment policies *might* be some inflation, but probably less than imagined and hardly any if the sectoral inflation of defense budgets and other porkbarrels can be brought under control. Although these policies may make sense from an eclectic, problem-oriented perspective, they are beyond the pale for neoclassical economics and the neoconservative politics it influences.

conductive to a competitive advantage: company strategy, structure, and rivalry; factor of production conditions; demand conditions; and related and supporting industries. PORTER, *supra* note 4, at 127. Higher education is a significant force for integration within the diamond. Education equalizes opportunities, reduces labor market fragmentations and the economic rents that the owners of scarce skills can command, improves the ability of a “human capital” to create other resources, and otherwise helps to sustain competitive advantages.

176. Malloy’s only reference to macroeconomic concerns that I could find occurs in the context of microeconomic discussions of rent control in New York City: “[W]e all eventually end up paying for misguided policies, by way of inflation, unemployment, increased taxes, or the financial consequences of a large national deficit.” MALLOY, SERFDOM, *supra* note 8, at 57.

177. HEILBRONER & SINGER, *supra* note 1, at 155; ROSSI, *supra* note 2, at 200. See Wilson, *supra* note 30, at 16 (affirmative action increases demand for what are perceived as “qualified” minorities but decreases demand for the less qualified, due to increased costs and welfare programs that reduce self-reliance) and at 121 (“rational government involvement in the economy” is needed — “wage and price stability, favorable employment conditions, and the development and integration of manpower training programs with educational programs.”) and at 128 (despite antidiscrimination legislation and affirmative action, things have gotten worse).

A sensible macroeconomics will apparently not be forthcoming for awhile, so what can cities do in the meantime? Briefly, they must seek to change constraints (attempt development) as well as adjust to them. Cities must curb their special interest politics that distract and dissipate public and private resources before they can rationalize their systems of incentives and disincentives. As much as possible should be done through the most efficient taxes and expenditures, especially by creatively appropriating some of the currently untapped "surplus" from an explosive service economy.¹⁷⁸ The most inefficient of in-kind redistributions should be avoided, although a few strategic interventions like education and housing integration are essential to a long-term efficiency. Credit unions and consumers' and employees' cooperatives should be promoted as a means of integrating ghetto economies into the mainstream. Finally, the welfare system must be improved as the means of meeting immediate and serious need. These programs would cost substantially less than the savings and loan bailout, to say nothing of other welfare programs for the relatively affluent.¹⁷⁹

IV. CONCLUSION

Drew McCoy writes that, in the 1790s,

republican America was to be characterized by an unprecedented degree of social equality, whereby even the poorest man would at least be secure, economically competent, and independent. Indeed, the United States was to be a revolutionary society precisely because it would not have the permanent classes of privileged rich and dependent poor that Americans associated with the "old" societies of mercantilist Europe.¹⁸⁰

178. Clavel & Kleniewski, *supra* note 5, at 209.

179. See CHRISTOPHER GUNN & HAZEL D. GUNN, *RECLAIMING CAPITAL: DEMOCRATIC INITIATIVES AND COMMUNITY DEVELOPMENT* (1991); Dahlman, *supra* note 76, at 229; Ellickson, *supra* note 77, at 155-56, 176; Molotch, *Urban Deals*, *supra* note 19, at 180. See also Rossi, *supra* note 2, at 204, 207-08 (holes in the social welfare net are typically those that attract little sympathy from the legislature or the public, such as mental illness); Clavel & Kleniewski, *supra* note 5, at 221 ("the space for local policy is greater than it was," and "local governments have more maneuvering space than is commonly assumed").

180. McCoy, *supra* note 47, at 237. See *id.* at 185-86 (Jeffersonians said that 1800 was the substance of that which 1776 was the form, a move away from the English "court" model. Jeffersonians nevertheless felt that it was unsafe to dismantle Hamilton's system, and they sought to control its pernicious effects instead.). But see APPLEBY, *supra* note 63, at 14-15 (classical republican virtue enabled "men to rise above private interests in order to act for the good of the whole," yet by the end of the 18th century, this virtue came to mean the exact opposite — the capacity to look out for oneself) and at 23 (Jeffersonians were influenced by Tom Paine's *Common Sense*, in which society, and

Our revolutionary enthusiasms have faded, and two centuries of an American economic growth that outstripped our development, and of bigotry and an inattention to distributive justice, have left us with more of the permanently "dependent poor" than are found in the successors to the "old" European societies we once scorned.

Robin Malloy illustrates how ideologically colored interpretations of this economic history are both possible and likely. The hard fact remains, however, that the ghettos (where the "dependent poor" are concentrated) are a drag on, and a reproach to, the rest of the economy and the Chicago School of law and economics. A cost-benefit analysis, using methods that Chicagoans would approve but on a longer time horizon than they would likely countenance, would show that this state of affairs cannot long continue. We spend fantastic sums to police the crime and despair of ghettos, and almost nothing to integrate markets and to enhance productivity. If we think about it, we may indeed want to be a "throw-away society" with regard to people as well as soft drink containers. Science fiction writers are fond of projecting the consequences of such behavior into the grim, Arnold Schwarzeneggerean future that awaits us. Theirs is not the kind of evidence we would accept as probative, but we act daily to increase the risk that these projections will be proved correct.

All is not lost, of course. Law is more than a mouse under the chairs of markets or under a land use porkbarrel. As lawyers, we can refocus the perspective on complex and interrelated problems and generate clear political choices. We should aim at a genuine institutional pluralism, a diversification of risks and opportunities that creates more viable niches for the poor. Institutions and processes must be reformed to make them more conducive to development. Markets must play an important, but not an overweening, role. Solutions must be moderate enough to command a consensus, but they will nevertheless involve tough moral choices about distributing scarce resources.¹⁸¹ William Fischel could be describing lawyers when he wrote that "economists should be modest in the application of their trade. Using their tools of analysis to create a deterministic analysis of society seems dangerous and wrongheaded."¹⁸² Cities

presumably markets, are "produced by our wants and government by our wickedness; the former promotes our happiness positively by uniting our affections, the latter negatively by restraining our vices.") (quoting *THE COMPLETE WRITINGS OF THOMAS PAINE* 4 (Phillip S. Fonored ed., 1945)); McCoy, *supra* note 47, at 134 (Hamilton accepted the inevitability of "social inequality, propertyless dependence, and virtually unbridled avarice").

181. See HARRINGTON, *supra* note 1, at 145, 170; HARVEY, *supra* note 2, at 117-18; WILSON, *supra* note 30, at 18, 30.

182. FISCHEL, *supra* note 17, at 122. This quote continues: "To tell people, for example, that pollution [or poverty] is not a problem because private transactions might

are said to be "monuments to the possibilities of civilized cooperation,"¹⁸³ and we can hope that cooperation will extend to the efforts of politicians and social scientists who seek to solve city problems. Robin Malloy gives us an excellent start on this road, but the journey is likely to be long and circuitous.

have handled it would be the epitome of presumptuousness." Economics should (but rarely does) provide "a basis for suggesting alternative means of accomplishing social objectives." *Id.* See *supra* note 170.

183. Berger & Blomquist, *supra* note 15, at 67. See Coleman, *supra* note 5, at 32 (an intensive exposure to Third World realities strengthens a "macropolitical (nation-building) and holistic perspective"). The same thing arguably occurs when people are exposed to America's Third World — the slums.