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## Federalism and Municipal Innovation: Lessons from the Fight Against Vacant Properties

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IN THEIR RECENT BOOK, *THE METROPOLITAN REVOLUTION*, Bruce Katz and Jennifer Bradley of the Brookings Institution celebrate the growing strength of America's cities.<sup>1</sup> In doing so, they laudably emphasize the potential for local officials to embrace creative problem-solving in the wake of recession and gridlock in Washington, D.C. One of their suggested responses to this movement, however, deserves further exploration: their call for "a re-sorting of" the traditional interaction of federal and state governments with local officials.<sup>2</sup> "The federalism that best serves the cities and metros that drive economic development in the 21st century is not the traditional 'dual sovereignty' that splits power between federal and state governments according to subject matter," they argue, "but a form of collaborative federalism in the service of cities and metros that set priorities and lead implementation."<sup>3</sup>

This proposal rightly identifies cities as ideal incubators for innovative government strategies and techniques. But it is also critically misleading. Not only is it utopian to suggest that U.S. cities will ever be truly coequal with state and federal governments,<sup>4</sup> but it also gives too little recognition to the substantial power cities retain in our current system. The interaction of the various levels of government in the United States today is already remarkably more tractable than the tired "dual sovereignty" axiom suggests. There is one other thing, however, that Katz and Bradley get right: It is essential to effective

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1. BRUCE KATZ & JENNIFER BRADLEY, *THE METROPOLITAN REVOLUTION: HOW CITIES AND METROS ARE FIXING OUR BROKEN POLITICS AND FRAGILE ECONOMY* (2013).

2. *Id.* at 180.

3. *Id.*

4. Cities are, after all, unmentioned in the U. S. Constitution and get their power from the state. *See infra* pp. 4-5.

municipal governance that local officials understand their role in this country's larger political system.<sup>5</sup>

This article seeks to clarify the role of cities in American government and urge local leaders to approach novel projects with eyes wide open to resistance from state and federal officials. To that end, Part I of this article explains the modern legal status of municipalities in this country and why they retain a greater ability to be trailblazers in addressing nationwide problems than local officials may imagine. Part II clarifies this principle with examples from ongoing efforts to address vacant properties, one of many areas of overlapping local, state, and national concern. Finally, Part III draws on these examples to argue that, given the flexibility of American government, innovative cities must be clear-minded about anticipating troublesome areas of state and federal law.

## I. The Legal Status of Local Governments

The idea of collaborative (or cooperative) federalism proposed by Katz and Bradley is reflected in modern scholarship on the relations between federal and state governments.<sup>6</sup> Erwin Chemerinsky, for example, champions the beauty of federalism as its empowerment of different levels of government to address national problems, emphasizing the benefits achieved by federal and state governments working together.<sup>7</sup> Similar thinking is central to many of today's wide-ranging federal regulatory schemes, such as the Clean Air Act<sup>8</sup> and No Child Left Behind,<sup>9</sup> which demand shared responsibility on the part of state and federal government.<sup>10</sup>

One particularly inspired twist on this idea is Robert Schapiro's description of modern federalism as "polyphonic."<sup>11</sup> Polyphony is a mu-

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5. See discussion *infra* Part I.

6. See Benton Martin, *An Increased Role for the Department of Education in Addressing Federalism Concerns*, 2012 B.Y.U. Educ. & L.J. 79, 92-94 (2012) (discussing modern scholarship on reimagining federalism).

7. ERWIN CHEMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* 146-47, 158, 246-47 (2008). Other scholars call this concept "marble cake" rather than "layer cake" federalism. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 168 (2011); MORTON GROZDINS, *A NEW VIEW OF THE GOVERNMENT OF THE UNITED STATES* 7-8 (Daniel J. Elazar ed., 1984).

8. Air Pollution Control Act, 42 U.S.C. §§ 7401-7671q (2012).

9. No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2012).

10. See Brian Galle, *Federal Grants, State Decisions*, 88 B.U. L. REV. 875, 877 n.5 (2008) (collecting these types of conditional spending statutes); see also Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668-73 (2001) (discussing generally the concept of federal legislation adopting a cooperative federalism approach).

11. See ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* (2009).

sical term for multiple voices or instruments playing independent melodies at the same time.<sup>12</sup> This analogy between music and law was first discussed by the late Harold Berman, who explained, “From the eleventh and twelfth centuries on, monophonic music, reflected chiefly in the Gregorian chant, was gradually supplanted by polyphonic styles.”<sup>13</sup> What began as one voice eventually developed into chorales and opera.<sup>14</sup> This idea of “many voices” at once, Schapiro explains, nicely expresses the concept of multiple independent levels of government actors conflicting or coordinating en route to achieving national goals.<sup>15</sup> Moreover, he argues that these “polyphonic” interactions benefit America by allowing multiple levels of government to hash out important policies in a way that reflects national, state, and local concerns.<sup>16</sup>

There are significant limitations, however, on a municipality’s ability to fully express its voice in regard to national concerns. In their effort to project city officials as pragmatic leaders in an era of frustration with federal and state officials, Katz and Bradley tend to overlook these limitations. But it is impossible for these limits not to surface. One interesting way this occurs is through an analogy running throughout the book: government relations as family relations. Early on the authors quip, “If the states are an irresponsible parent, the federal government is a distinct often clueless relative—who nonetheless controls the family money.”<sup>17</sup> Underlying this statement is an acknowledgement that the local governments, like children, have rules they must follow, no matter their ability to influence family dynamics.

These limits on municipal authority are nothing new. The predominant modern framework for city power was developed in the late 1800s through the work of John Forrest Dillon, a judge who first served on the Iowa Supreme Court and was eventually appointed to the United States Court of Appeals for the Eighth Circuit by President Ulysses S. Grant.<sup>18</sup> After joining the Eighth Circuit, Judge Dillon wrote an influential treatise on municipal law in which he promoted a theory of limited local

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12. *Id.* at 95.

13. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 7 (1983).

14. *Id.*

15. SCHAPIRO, *supra* note 11, at 95.

16. *Id.*

17. KATZ & BRADLEY, *supra* note 1, at 12.

18. ROGER K. NEWMAN, *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 165 (2009).

authority, derived from his time as a state judge, that is now widely referred to as “Dillon’s Rule.”<sup>19</sup> Dillon proposed that municipalities possess only three sources of power: “First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable.”<sup>20</sup>

At the time, Judge Dillon’s view was far from universal. In fact, it stood in stark contrast to the views of Michigan Supreme Court Justice Thomas Cooley.<sup>21</sup> A year before the publication of Dillon’s treatise, Justice Cooley—ruling on a case involving state appointment of local officials—argued that “local government is [a] matter of absolute right; and the state cannot take it away.”<sup>22</sup> Cooley added that the state’s prerogative is “not to run and operate the machinery of local government, but to provide for and put it in motion.”<sup>23</sup> According to Cooley, and scholars that embraced his philosophy, the right to local self-governance was confirmed by America’s history and the necessary role community expression plays in political liberty.<sup>24</sup>

But as noted by Gerald Frug, one of the nation’s leading scholars on municipal law, “[h]istory has not been kind to the [Cooley] thesis.”<sup>25</sup> Most important, perhaps, is that as early as 1891,<sup>26</sup> and even more clearly in 1907,<sup>27</sup> the Supreme Court expressly embraced Dillon’s view. The case in 1907 was *Hunter v. Pittsburgh*, in which the Court was asked to decide whether Pennsylvania could consolidate the cities of Pittsburgh and Allegheny.<sup>28</sup> Ruling in favor of Pennsylvania, the Court explained that the state may “at its pleasure” change or destroy a city’s powers—even the city itself—“with or without the consent of the citizens, or even against their protest.”<sup>29</sup> Today, Dillon’s Rule is

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19. JOHN FORREST DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (1872).

20. *Id.* at 101-02 (italics omitted).

21. See David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 515-21 (1999) (discussing differences between views of Dillon and Cooley).

22. *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 108 (1871).

23. *Id.* at 111.

24. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1113-14 (1980) (commenting on Justice Cooley’s views, along with those of Amasa Eaton and Eugene McQuillin).

25. *Id.* at 1114.

26. *Merrill v. Monticello*, 138 U.S. 673, 681 (1891).

27. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

28. *Id.* at 165-66.

29. *Id.* at 178-79.

so well established that academic debate about its propriety has all but disappeared.<sup>30</sup>

Because of this embrace of Dillon's Rule, cities often run up against the limits of their own authority. In response, states began adopting various types of "home rule" provisions, typically as part of the state constitution, giving local units of government broad authority.<sup>31</sup> Home rule is not, however, a grant of full city autonomy. In their book *City Bound: How States Stifle Urban Innovation*, authors Gerald Frug and David Barron list three common ways home-rule provisions confine city power: (1) limiting cities' authority to "local" concerns, (2) prohibiting cities from regulating "private or civil affairs," and (3) denying cities the power to regulate taxes.<sup>32</sup> But although Frug and Barron argue that cities are restricted too often, they acknowledge the political impossibility of full autonomy.<sup>33</sup> They suggest instead that states update their municipal codes to allow pursuit of specific urban goals, including raising revenue, regulating land use, and reforming schools.<sup>34</sup> Far from a suggestion for a new federalism, theirs is a call for a pragmatic awareness of the "polyphonic" nature of government.

## II. Local Innovation, Spread Nationwide: Two Examples Regarding Vacant Properties

In 1932, Supreme Court Justice Louis Brandeis famously wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>35</sup> The adage applies to cities as well, perhaps more today than ever. Although they sometimes lack deep pockets, and their author-

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30. See Frug, *supra* note 24, at 1115 (remarking that "[n]o other serious academic challenge to the Dillon thesis has ever been made" beyond that of Eugene McQuillin); WILLIAM BENNETT MUNRO, *THE GOVERNMENT OF AMERICAN CITIES* 53 (1923) ("Municipal authority may be enlarged, abridged, or entirely withdrawn by the legislature at pleasure. In other words, the state authorities have the right to govern the city just as they govern any other area within their jurisdiction. This is a fundamental principle of American law, so well recognized that it is not nowadays open to question.").

31. Frug, *supra* note 24, at 1115-17 (describing the "political challenge to state control of cities launched under the rallying cry of 'home rule'").

32. GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* 61 (2008).

33. *Id.* at xii ("Every city will always operate under some kind of state control.").

34. *Id.* at chs. 4-6.

35. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

ity to regulate is often limited, cities still offer many advantages over state and federal government. As Edward Glaeser argues, successful cities are often smaller geographically and denser with human potential, accelerating the spread of ideas.<sup>36</sup> Comparatively minimal bureaucracy allows cities to respond quickly to changing technology and, in many instances, to act more pragmatically. And of course, there is Brandeis's idea about contained risk: If a municipal initiative fails, it does not even affect an entire state.

The instances of local officials pioneering inventive solutions to nationwide problems are too numerable to describe here.<sup>37</sup> Thus, this article will focus on two useful examples, both addressing the same issue: vacant property. Vacant property is a fundamental area of local concern, and a growing problem. Frank Alexander, a law professor who specializes in housing policy, explains that, since the early 2000s, addressing vacant and tax-delinquent properties has become "a key component of smart growth initiatives" as city planners increasingly seek to diminish the effects of past exclusionary zoning by promoting inner-city, mixed-use housing developments.<sup>38</sup> Yet it is not only those cities pursuing "smart growth" that must address vacancies. Controlling the local housing stock is important to every city because empty buildings raise the risk of crime and fires and can cost municipalities millions of dollars in nuisance abatement and lost tax revenue.<sup>39</sup> Moreover, the problem is growing rapidly. According to Alan Mallach, a senior fellow at the Brookings Institution, "[f]rom 2000 to 2010, the total number of vacant housing units in the United States grew by over 4.5 million, an increase of 44 percent."<sup>40</sup>

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36. See Edward Glaeser, *The Historical Vitality of Cities*, in REVITALIZING AMERICAN CITIES 7, 12-13 (Susan M. Wachter & Kimberly A. Zeuli eds., 2013); EDWARD GLAESER, TRIUMPH OF THE CITY: HOW OUR GREATEST INVENTION MAKES US RICHER, SMARTER, GREENER, HEALTHIER, AND HAPPIER (2011).

37. For collections of examples, see, e.g., REVITALIZING AMERICAN CITIES (Susan M. Wachter & Kimberly A. Zeuli eds., 2013); KATZ & BRADLEY, *supra* note 1; GLAESER, *supra* note 36.

38. Frank S. Alexander, *Land Bank Strategies for Renewing Urban Land*, 14 J. AFFORDABLE HOUS. & CMTY. DEV. L. 140, 141 (2004).

39. See FRANK S. ALEXANDER, LAND BANKS AND LAND BANKING 15-16 (2011), available at [http://www.smartgrowthamerica.org/documents/ccp\\_land\\_banks.pdf](http://www.smartgrowthamerica.org/documents/ccp_land_banks.pdf) (describing the costs associated with vacant property); FUNDERS' NETWORK FOR SMART GROWTH AND LIVABLE COMMUNITIES, VACANT PROPERTIES AND SMART GROWTH: CREATING OPPORTUNITY FROM ABANDONMENT 4-6 (2004), available at [http://www.fundersnetwork.org/files/learn/LCW\\_4\\_Vacant\\_Properties.pdf](http://www.fundersnetwork.org/files/learn/LCW_4_Vacant_Properties.pdf).

40. ALAN MALLACH, LAYING THE GROUNDWORK FOR CHANGE: DEMOLITION, URBAN STRATEGY, AND POLICY REFORM 3 (2012), available at <http://www.brookings.edu/~media/Research/Files/Papers/2012/9/24%20land%20use%20demolition%20mallach/24%20land%20use%20demolition%20mallach.pdf>.

One veteran combatant in the fight against vacancy and blight is Genesee County, Michigan, home to the city of Flint. Due largely to the loss of manufacturing jobs, Flint has seen its population cut in half since the 1960s.<sup>41</sup> The effect on Flint's housing stock is manifest, as starkly described by Gordon Young in his recent memoir about trying to buy a house in Flint: "[R]oughly one-third of Flint is abandoned. If all the empty houses, buildings, and vacant lots were consolidated, there would be ten square miles of blight in the city."<sup>42</sup>

Seeking an efficient way to gain ownership of these vacant properties, Genesee County turned to land banking. Proposed by urban planners in the 1960s, and pioneered by St. Louis in the 1970s, land banking involves creating a local government entity (the land bank) to acquire vacant properties, often through tax foreclosure on delinquent properties.<sup>43</sup> After taking possession, the land bank then works to abate liabilities and transfer the property to new owners for productive use.<sup>44</sup>

Typically, the biggest obstacle to land banking is that cities lack specific authority to create land banks because creating a new government entity to acquire and manage vacant properties is outside the scope of most cities' home-rule powers.<sup>45</sup> Because of this, it is often necessary for the state to enact enabling legislation.<sup>46</sup> In this sense, the Genesee County Land Bank is unique because it was started *before* the state specifically authorized its creation: local officials cleverly used Michigan law authorizing cooperation agreements among municipalities to set it up.<sup>47</sup> The land bank also took advantage of recent legislation reforming the Michigan tax code to allow streamlined judicial

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41. Megan Masson-Minock & Deirdra Stockmann, *Creating a legal framework for urban agriculture: Lesson from Flint, Michigan*, 1 J. AGRIC., FOOD SYS., & CMTY. DEV. 91, 93 (2010), available at [http://www.agdevjournal.com/attachments/133\\_JAFSCD\\_Legal\\_Framework\\_for\\_Urban\\_Ag\\_in\\_Flint\\_Nov-2010.pdf](http://www.agdevjournal.com/attachments/133_JAFSCD_Legal_Framework_for_Urban_Ag_in_Flint_Nov-2010.pdf); MICHIGAN INFO. CTR., 1960 TO 1990 CENSUS COUNT BY FOR MICHIGAN AND SUBCOUNTIES, [http://www.michigan.gov/documents/MCD1960-1990C\\_33608\\_7.pdf](http://www.michigan.gov/documents/MCD1960-1990C_33608_7.pdf); MICHIGAN DEP'T OF TECH., MGMT., & BUDGET, POPULATION OF MICHIGAN CITIES AND VILLAGES: 2000 AND 2010 (2010), <http://www.michigan.gov/cgi/0,4548,7-158-54534-252541-,00.html>.

42. GORDON YOUNG, TEARDOWN: MEMOIR OF A VANISHING CITY 3 (2013).

43. ALEXANDER, *supra* note 39, at 10. At its origins, the technique was designed to fix the problem of people abandoning their property when the accumulated taxes exceeded its fair market value. *Id.*

44. *Id.*; see also Catherine La Croix, *Urban Agriculture and Other Green Uses: Re-making the Shrinking City*, 42 URB. LAW. 225 (2010) (explaining how land banking is used in Cleveland).

45. ALEXANDER, *supra* note 39, at 76.

46. *Id.*

47. *Id.*

foreclosure of tax-delinquent properties.<sup>48</sup> The old process took up to seven years; the new process as little as one year, allowing the land bank to take control at a much earlier stage.<sup>49</sup> Two years after the land bank started, Michigan officially endorsed the concept, enacting groundbreaking legislation that not only allows cities and counties to create land banks but even gives them special authority to obtain tax-increment financing for rehabilitating vacant properties.<sup>50</sup> Since being reorganized under this new law in 2004, the Genesee County Land Bank has taken control of more than 10,000 properties, demolished 1,000 houses, and renovated hundreds of others.<sup>51</sup>

After the adoption of Michigan's land bank legislation, the approach gained steam rapidly. More than forty Michigan municipalities created land banks.<sup>52</sup> Then, other states took notice: within a decade, eight states had enacted some form of land-bank enabling legislation.<sup>53</sup> The federal government even commended the idea. Congress expressly authorized the use of some of the \$4 billion it appropriated as part of the Housing and Economic Recovery Act of 2008 for establishing land banks.<sup>54</sup> Further, in 2009, the U.S. Department of Housing and Urban Development—citing the model of Genesee County, along with Atlanta and Baltimore City—recognized land banks as “an effective tool for stabilizing communities burdened by a large number of vacant, abandoned, or foreclosed properties.”<sup>55</sup> By 2013, the number of land banks had grown to around 150.<sup>56</sup>

Another example of local innovation spread nationwide is vacant-property registration. The first registration ordinances required property owners to provide government officials with their contact infor-

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48. *Id.* at 53.

49. See *History*, GENESSEE COUNTY LAND BANK, <http://thelandbank.org/history.asp>.

50. See MICH. COMP. LAWS § 124.751-124.774 (2014); Teresa Gillotti & Daniel Kildee, *Land Banks as Revitalization Tools: The Example of Genesee County and the City of Flint, Michigan*, GENESSEE INSTITUTE, [http://metrostudies.berkeley.edu/pubs/proceedings/Shrinking/17Gillotti\\_PA\\_final.pdf](http://metrostudies.berkeley.edu/pubs/proceedings/Shrinking/17Gillotti_PA_final.pdf) (last visited Dec. 13, 2013).

51. ALEXANDER, *supra* note 39, at 53.

52. YOUNG, *supra* note 42, at 150.

53. BERNARD H. ROSS & MYRON A. LEVINE, *URBAN POLITICS: CITIES AND SUBURBS IN A GLOBAL AGE* 287 (8th ed. 2012).

54. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2850 available at <http://www.gpo.gov/fdsys/pkg/PLAW-110publ289/pdf/PLAW-110publ289.pdf>; see ALEXANDER, *supra* note 39, at 22-23.

55. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., *REVITALIZING FORECLOSED PROPERTIES WITH LAND BANKS 3* (2009), available at <http://www.huduser.org/portal/publications/landbanks.pdf>.

56. Bryan Chambers, *Land Bank plays role in improving city housing*, THE HERALD-DISPATCH, Nov. 27, 2013, <http://www.herald-dispatch.com/news/briefs/x1584262133/Land-Bank-plays-role-in-improving-city-housing>.

mation if their property remained vacant for a specified amount of time.<sup>57</sup> The goal was to maintain a list of such properties in order to enforce maintenance codes, monitor the quality of the housing stock, and prevent vacancies.<sup>58</sup>

In the early 2000s, however, local officials got more creative. First came escalating fee schedules: in 2003, Wilmington, Delaware, began imposing higher fees for every year a property remained vacant.<sup>59</sup> This was intended to encourage the demolition or rehabilitation of vacant buildings, partially in response to a study identifying vacancies as a major contributor to crime.<sup>60</sup> Then, in 2007, Chula Vista, California, took a different approach, enacting an ordinance that required *mortgage lenders*—rather than merely property owners—to register property when it went into foreclosure and to ensure that it remained compliant with local housing codes throughout the foreclosure process.<sup>61</sup> Because of vigorous enforcement by the city’s code-enforcement office, and compliance from the mortgage industry, Chula Vista collected nearly \$1 million from fees and code-violation citations during its program’s first year alone.<sup>62</sup>

Perhaps unsurprisingly given this success, foreclosure-initiated registration programs spread like wildfire, no doubt aided by the economic pressures on local government from the recession and the perceived ability to use registration as a fundraising mechanism.<sup>63</sup> A study led by Dan Immergluck, a professor of city and regional planning, concluded that the number of local registration ordinances grew from under 20 in 2000 to more than 550 in 2012, an increase of more than 2,600%.<sup>64</sup> By 2013, a journalist for the Chicago Tribune

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57. See *id.* at 14; Joseph Schilling, *Code Enforcement and Community Stabilization: The Forgotten First Responders to Vacant and Foreclosed Homes*, 2 ALB. GOV’T L. REV. 101, 130-31 (2009).

58. See Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL ESTATE L.J. 6 (2010) (describing the rise of and different types of registration ordinances for vacant property).

59. WILMINGTON, DEL., MUN. CODE ch. 4, § 4-27, 125.0(a) (2003).

60. UNITED STATES CONFERENCE OF MAYORS, *COMBATING PROBLEMS OF VACANT AND ABANDONED PROPERTIES: BEST PRACTICES IN 27 CITIES* 40 (2006), available at <http://www.usmayors.org/bestpractices/vacantproperties06.pdf>.

61. CHULA VISTA, CAL., ORDINANCE No. 3080 (2007).

62. Martin, *supra* note 58, at 21, 33, 35-36.

63. See, e.g., Patrick Hall, Julia Taylor, & Tom Clark, *Opinion: Trenton must get more aggressive in approach to abandoned properties*, TIMES OF TRENTON, Apr. 3, 2012, [http://www.nj.com/times-opinion/index.ssf/2012/04/opinion\\_trenton\\_community\\_grou.html](http://www.nj.com/times-opinion/index.ssf/2012/04/opinion_trenton_community_grou.html) (advocating use of registration ordinance to raise fees for enforcing property-maintenance codes).

64. See Dan Immergluck, Yun Sang Lee, & Patrick Terranova, *New Data on Local Vacant Property Registration Ordinances*, 15 CITYSCAPE 259, 260 (2013) [hereinafter

estimated the number of ordinances at more than 1,000.<sup>65</sup> Many of these ordinances have been enacted in states with high levels of foreclosures during the recent mortgage crisis.<sup>66</sup> Further, a number of states have passed enabling legislation for local registration ordinances,<sup>67</sup> and two states, Connecticut and Maryland, have even mandated statewide registration.<sup>68</sup>

### III. Polyphonic Government at Work in Regard to Local Innovation

Neither land banking nor property registration is a perfect or stand-alone solution to urban blight, and both have their critics.<sup>69</sup> But the reaction of state and federal governments—promoting land banks while inhibiting registration ordinances—demonstrates well the type of government “polyphony” described by Professor Shapiro. When local techniques like these spread so quickly among cities, it can be easy to forget how much their ultimate success turns on responses of state and federal officials. Each technique faces its own challenges: land banks confront outdated state tax codes; registration ordinances arguably encroach on federal housing policy. It is precisely these avenues of opposition that local officials must be keenly aware of to succeed in creative problem-solving.

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“New Data”], available at <http://www.huduser.org/portal/periodicals/cityscape/vol15num2/ch22.pdf>; DAN IMMERGLUCK, YUN SANG LEE, & PATRICK TERRANOVA, LOCAL VACANT PROPERTY REGISTRATION ORDINANCES IN THE U.S.: AN ANALYSIS OF GROWTH, REGIONAL TRENDS, AND SOME KEY CHARACTERISTICS (2012) [hereinafter “Analysis of Growth”], available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2130775](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2130775).

65. Mary Ellen Podmolik, *Chicago loses court challenge to vacant building registry*, CHI. TRIB., Aug. 26, 2013, [http://articles.chicagotribune.com/2013-08-26/business/chi-chicago-vacant-building-registry-20130825\\_1\\_fhfa-federal-housing-finance-agency-fannie-mae](http://articles.chicagotribune.com/2013-08-26/business/chi-chicago-vacant-building-registry-20130825_1_fhfa-federal-housing-finance-agency-fannie-mae).

66. New Data, *supra* note 64, at 262 (listing states with the most local registration ordinances and noting that many of them “have been among the leaders in foreclosure statistics during the prolonged U.S. housing crisis”).

67. *Id.*

68. Analysis of Growth, *supra* note 64, at 4 n.7.

69. See, e.g., Richard E. Gottlieb, Margaret Rhiew, & Brett Natarelli, *Reckless Abandon: Vacant Property Ordinances Create Legal Uncertainties*, 68 BUS. LAW. 669 (2013) (raising concerns about registration ordinances aimed at imposing requirements on mortgagees); Tim Logan, *City’s land plan has successes, shortcomings*, ST. LOUIS POST-DISPATCH, Feb. 25, 2012, [http://www.stltoday.com/business/local/city-s-land-plan-has-successes-shortcomings/article\\_cb0f6e66-5f09-11e1-94ca-001a4bcf6878.html](http://www.stltoday.com/business/local/city-s-land-plan-has-successes-shortcomings/article_cb0f6e66-5f09-11e1-94ca-001a4bcf6878.html) (examining the pros and cons of St. Louis’s land-banking efforts over the past 40 years); Keith H. Hirokawa & Ira Gonzalez, *Regulating Vacant Property*, 45 URB. LAW. 627 (2010).

The tale of the Genesee County Land Bank provides a useful lesson about how to overcome the type of restriction imposed by state legislation. As discussed, the County had the unique ability to begin land banking before the enactment of state enabling legislation, but not until Michigan passed official land-bank legislation did the County's land bank truly become a national leader, empowered by the state to take advantage of special financing. Although the land bank was novel, the key to its success was old-fashioned political know-how. As explained by Professor Alexander in his leading guide on land banking, the successful aspiring land banker "builds a strong coalition of many constituencies," including "elected officials, community members, business leaders, and interested stakeholders."<sup>70</sup>

The importance of "building constituencies"—frankly, politics—in the success of local programs touches on the marked ability for strong community leaders to influence the national agenda. In Flint, it was Dan Kildee, a longtime figure in local politics, who when serving as Genesee County Treasurer lobbied for Michigan's groundbreaking land-bank legislation, founded the county's land bank, and oversaw the project for seven years.<sup>71</sup> Kildee's accomplishments as head of the land bank led to Flint's approach being hailed as a model for urban reinvention,<sup>72</sup> to Kildee founding and leading a national non-profit advocating sustainable solutions to vacant properties (the Center for Community Progress),<sup>73</sup> and eventually to Kildee's successful bid for Congress.<sup>74</sup> In a similar vein, the success of Chula Vista's innovative registration program was greatly spurred by an especially vigilant code enforcement officer, Doug Leeper.<sup>75</sup> After Harvard named the city's program one of the top 50 "Innovations in American Government" in 2009,<sup>76</sup> the city announced that over 350 other cities had contacted

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70. ALEXANDER, *supra* note 39, at 72.

71. YOUNG, *supra* note 42, at 87-90.

72. See, e.g., YOUNG, *supra* note 42, at 150; David Streitfeld, *An Effort to Save Flint, Mich., by Shrinking It*, N.Y. TIMES, Apr. 21, 2009, <http://www.nytimes.com/2009/04/22/business/22flint.html>.

73. *Full Biography*, HOUSE.GOV, <http://dankildee.house.gov/about/full-biography> (last visited Mar. 21, 2014).

74. *Id.* (highlighting Kildee's founding of "Michigan's first land bank, and a model for others around the nation" and the land bank being "responsible for over \$100 million in redevelopment in Flint, including during the throes of the 'Great Recession'").

75. See Martin, *supra* note 58, at 19-21 (discussing the diligent enforcement of Chula Vista's registration ordinance).

76. Press Release, Harvard Kennedy School, Ash Center for Democratic Governance and Innovation, Top 50 Innovations in Government Announced (Mar. 31, 2009) <http://www.ash.harvard.edu/Home/News-Events/Press-Releases/Top-50-Innovations-in-Government>.

Leeper personally for guidance in drafting their own ordinances.<sup>77</sup> On top of that, in the wake of the foreclosure crisis, Leeper was called to testify before the House of Representatives subcommittee on Domestic Policy about broader adoption of Chula Vista's policy.<sup>78</sup>

Although similar to land banking in showcasing the power of strong leadership, registration ordinances elicited markedly different responses from state and federal governments. As noted by Dan Immergluck and his team of researchers, although some states have enacted enabling legislation or even mandated statewide registration, "[a]t least some of these laws appear to be aimed primarily at *weakening or preempting* local [registration ordinances]."<sup>79</sup> Some states cap the permissible amount of fees; others limit local discretion by requiring the option of private registration with companies like the Mortgage Electronic Registration System.<sup>80</sup> Many of these restrictions may be to appease the mortgage industry, which has its own powerful constituents.

The federal response, at least from one agency, was even more blatantly antagonistic. In 2008, the Federal Housing Finance Agency became the conservator of Freddie Mac and Fannie Mae,<sup>81</sup> the two government-sponsored enterprises that, with the enfeebling of private mortgage markets, now back a majority of mortgages.<sup>82</sup> When Chicago strengthened its registration ordinance in 2011, imposing stronger maintenance requirements on mortgagees, the Agency sued, alleging that Fannie and Freddie-backed properties (of which there were nearly 260,000 in Chicago)<sup>83</sup> are exempt from the law.<sup>84</sup> The federal

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77. See, News Release, City of Chula Vista, C.V.'s Abandoned Property Program Places in Top 50 of Harvard Kennedy School Innovations in American Government (2013), [http://www.chulavistaca.gov/Whats\\_New/details.asp?NewsID=1354](http://www.chulavistaca.gov/Whats_New/details.asp?NewsID=1354).

78. See, *Neighborhoods: The Blameless Victims of the Sub-Prime Mortgage Crisis: Hearing on H.R. 5818 Before the H. Subcomm. on Domestic Policy*, 110th Cong. 89-116 (2008) (statement of Doug Leeper, City of Chula Vista Code Enforcement Manager), available at <http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg49971/html/CHRG-110hhrg49971.htm>.

79. Analysis of Growth, *supra* note 64, at 4 n.7 (emphasis added).

80. *Id.*

81. Fed. Housing Fin. Agency v. City of Chicago, 962 F. Supp. 2d 1044, 1048 (N.D. Ill. 2013) (citing 12 U.S.C. § 4617).

82. Jason Gold, *Still No Appetite for Risk*, U.S. NEWS & WORLD REP., Aug. 28, 2013, <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/08/28/more-evidence-that-ending-fannie-mae-and-freddie-mac-is-a-mistake> ("No one doubts that since Fannie and Freddie were taken into conservatorship in 2008, private capital in mortgage markets has been scarce. Having lost billions when the housing bubble burst, private investors were in no hurry to resume lending. That's why Fannie and Freddie were forced to expand their lending, from roughly 40 percent of the market pre-crisis to 77 percent in 2012.")

83. Podmolik, *supra* note 65.

84. *Fed. Housing Fin. Agency*, 962 F. Supp. 2d at 1050-51.

court in Chicago sided with the Agency, concluding that Chicago's ordinance ran afoul of the prohibition on state taxation of federal agencies and was implicitly preempted by the Housing and Economic Recovery Act of 2008, which gives the Agency broad discretion in acting as conservator of Fannie and Freddie.<sup>85</sup> The decision left a sizable gap in the city's ability to regulate vacant properties.<sup>86</sup>

The strikingly different responses to registration ordinances and land banks from other levels of government are usefully contrasting. Many states have enacted legislation to encourage land banks, and Congress has directed substantial funding toward their creation and management. Not so with registration ordinances. State legislatures have limited the permissible scope of local ordinances, and the Federal Housing Finance Agency, with the aid of federal courts, has successfully obtained a major exemption from local registration requirements. The reason for this difference may be that land banking internalizes to local officials the heavy burden of repurposing vacant properties, while registration ordinances externalize this task to property owners and mortgagees, putting local officials in the adversarial role of policing compliance.

Whatever the reason for the contrasting responses to these different tactics for blight abatement, they serve as examples of why federalism in this country is already a much more dynamic process than the old "dual sovereignty" ideal lets on. It is exactly this push and pull that is emblematic of this country's multi-actor approach to problem solving. Local officials may find themselves enabled or disabled by state regulators; they may end up bolstered by federal endorsement or fighting claims of federal preemption. It is in the hammering out of these interactions between different levels of government that the most useful tools for municipal success are forged.

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85. *Id.* at 1059-60. The Act expressly gives the Agency discretion to act as conservator of the GSEs without the supervision of other federal agencies or state government. *Id.* at 1059 (citing 12 U.S.C. § 4617(a)(7)). The court thus reasoned that Congress must have intended to exempt the Agency from compliance with varied local ordinances. *Id.* at 1060-61, 2013 WL 4505413, at \*12. The court added that conflict preemption barred enforcement of the ordinance against the Agency. *Id.* at 1061, 2013 WL 4505413, at \*13-14.

86. Chicago and the Agency settled the dispute in April 2014. The Agency agreed to register its properties with the city and not seek recoupment of already paid fees but not pay future registration fees or fines for noncompliance. *See* Fed. Housing Fin. Agency v. Chicago, No 1:11-cv-08795, ECF Doc. No. 98, at 2 (N.D. Ill. Apr. 3, 2014) (Agreed Order of Dismissal); Mary Ellen Podmolik, *FHFA, Chicago Settle Vacant Property Dispute*, CHI. TRIB., Apr. 7, 2014, available at <http://www.chicagotribune.com/business/breaking/chi-fhfa-vacant-buildings-dispute-20140407,0,2359319.story>.

#### IV. Conclusion

The aim of providing these examples is to demonstrate why Katz and Bradley's proposal for a "new federalism" would be better pitched as a plea to recognize the fluid nature of American governance. Perhaps realizing this, the authors' concrete recommendations on this point are more tepid than their rhetoric implies. Many of their suggestions consist of standard arguments for a stronger social safety net, a tax code debugged of loopholes, and increased federal funding for metro-benefiting policies.<sup>87</sup> They talk of "metro sovereignty" but seemingly not in the sense of city autonomy, as with Buenos Aires, which the Argentina Constitution endows with general legislative authority.<sup>88</sup> Rather, Katz and Bradley seem to use "sovereignty" to mean respect. They think that state and federal officials should acknowledge cities' respective strengths and view them as "coequal" partners.<sup>89</sup> It is telling, however, that their only examples of how this works in practice are situations when local initiatives drove the national agenda, an outcome that does not require status as coequals.<sup>90</sup>

Moreover, this sort of sanguine appeal for inter-government partnership may be a Siren song. It certainly works out best for local governments when state and federal officials back up their initiatives, as they have with land banking. The state is essential for enabling local authority, and the federal government provides crucial financing and national lawmaking in areas like immigration and trade agreements that are important for municipalities to succeed in the global economy. But city officials anticipating coequal treatment from other levels of government are walking a dangerous path. As shown by registration ordinances, conflicts are bound to arise. Officials would do well to prepare for these conflicts in advance.

The key to success in creative local initiatives is not in woolgathering about cooperation from other levels of government but in identify-

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87. KATZ & BRADLEY, *supra* note 1, at 181-83.

88. Art. 129, CONSTITUCIÓN NACIONAL (Arg.) ("The City of Buenos Aires shall have an autonomous system of government with power of legislation and jurisdiction, and the head of its government shall be directly elected by the people of the City.")

89. KATZ & BRADLEY, *supra* note 1, at 183-84.

90. *Id.* at 181, 185-87 (discussing lobbying efforts by the mayor of Los Angeles to change the Transportation Infrastructure Finance and Innovation Act to benefit a local transit project). For more examples, see, e.g., Richard Briffault, *Local Leadership and National Issues*, in WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 67, 67-68 (2008), available at [http://www.law.yale.edu/why\\_the\\_local\\_matters\\_final\\_122109.pdf](http://www.law.yale.edu/why_the_local_matters_final_122109.pdf). They also suggest that local officials host formal sessions with their representatives in state and federal government, though they concede many big cities already do this.

ing potential conflicts and using hard work and political savvy to build constituencies and head off objections. As Professor Alexander advises in explaining how to make a case for land banks, local officials can succeed if they take time to anticipate the arguments in opposition to new programs, identify and assemble important stakeholders, and work to keep these stakeholders engaged over the long process of winning favor from other levels of government.<sup>91</sup> This is good news for municipalities. There is no need to rewrite the fabric of our republic for cities to affect national policy. Because federalism in the United States invites a chorus of actors, it rewards strategy and diligence. Thankfully, the ranks of metropolitan leaders with these qualities are not in short supply.

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91. ALEXANDER, *supra* note 39, at 72-74.

