

Impeding Local Laboratories: Obstacles to Urban Policy Diffusion in Local Government Law

*Jacob Alderdice**

INTRODUCTION

After the tragic school shooting in Newtown, Connecticut, in December 2012, the mainstream news cycle was flooded with discussions of gun control legislation proposals.¹ Yet amidst the contentious national debate over gun control, a few voices noted that in “urban communities, Newtown happens every day.”² While much of the recent national discussion has centered on banning assault weapons, American cities have long incurred high death tolls caused by handguns.³ Due to federal and state inaction on gun control, local actors and advocates are left on their own to deal with the problem of handgun violence. In response, they have banded together to create national advocacy networks, such as Mayors Against Illegal Guns, an organization of big- and small-city mayors promoting gun control policies and attempting to implement them in their own cities.⁴ The theory of policy diffusion describes this spread of policies among governments as these governments emulate, imitate, or compete with one another.⁵ However, this theory requires that actors have similar legal powers in order to be able to enact the same policies.

* J.D. Candidate 2014, Harvard Law School. The author previously worked as an intern for the New York City Law Department and the Office of the Mayor of New York City. I wish to thank Professor David Barron for guidance and feedback, Professor Gerald Frug for comments, and the Harvard Law & Policy Review editorial team for all of their helpful feedback and revisions. Thanks also to my mom, dad, sister, family, Z, and all of my friends for their constant love and support.

¹ See, e.g., Sabrina Siddiqui & Elise Foley, *Obama on Connecticut Shooting: We Need ‘Meaningful Action,’* HUFFINGTON POST (Dec. 15, 2012, 12:33 AM), http://www.huffingtonpost.com/2012/12/14/obama-connecticut-shooting_n_2303017.html; Jennifer Steinhauer, *Senator Unveils Bill to Limit Semiautomatic Arms*, N.Y. TIMES (Jan. 24, 2013), http://www.nytimes.com/2013/01/25/us/politics/senator-unveils-bill-to-limit-semiautomatic-arms.html?_r=0.

² *Faith Groups Start Antiviolence Drive; “Newtown Happens Every Day,”* CRIME REP. (Jan. 30, 2013, 10:03 AM), <http://www.thecrimereport.org/news/crime-and-justice-news/2013-01-clergy-group-and-violence>.

³ See Ann-Marie Adams, *Newtown Exposes Politics and Privilege of Gun Violence*, ROOT (Dec. 25, 2012, 12:35 AM), <http://www.theroot.com/buzz/newtown-exposes-politics-and-privilege-gun-violence>.

⁴ *Coalition History*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstillegalguns.org/html/about/history.shtml> (last visited May 7, 2013).

⁵ See Charles R. Shipan & Craig Volden, *The Mechanisms of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 841 (2008).

Local actors and advocates, or a mix of the two,⁶ often need to work together to spread policies because urban local governments face many of the same problems—not just gun violence, but also higher levels of poverty, inequality, corruption, and homelessness.⁷ U.S. cities are becoming increasingly more liberal and progressive compared to the rest of the country, and, as such, are more likely than states or other local governments to advocate progressive policies.⁸ Yet urban governments' and advocates' abilities to work as a common network are stymied by legal obstacles arising within local-government law. This article will both lay out these legal obstacles and describe some problems regarding policy diffusion among urban local governments.

After a brief description in Part I of the theory of policy diffusion and its application to local governments, Parts II–IV of the article will situate policy diffusion into the legal framework of urban local government. Part II will focus on home-rule powers and state preemption, using gun control policies as a representative example.⁹ Despite cities' success in establishing national networks through which to diffuse effective policies, the varying limits imposed on their powers and state courts' varying interpretations of these limits have created unpredictability in the survival of these policies.

Part III will deal with separation of powers within local governments—specifically, the modern emergence of a strong local executive in the mayor-council system of government, and the possibility that mayors will avoid taking risks with innovative legislation.¹⁰ Part IV will examine the centrality of economic development to urban governments and how development coalitions may frustrate progressive policies.¹¹ Both of these aspects demonstrate how the legal regime of local governments favors certain actors and their policy choices. Thus, while these last two aspects can impede policy diffusion, they may also facilitate the diffusion of policies that benefit the favored actors' interests. These parts will provide examples of both impeded policies and diffused policies and note the possibly undemocratic features of policy diffusion that occur because of these policies' beneficial effects on, for example, business interests.

State, mayoral, and business interests will not always frustrate policy diffusion. However, the existing legal structure under which local govern-

⁶ See, e.g., *infra* notes 33–35 and accompanying text (discussing the Mayors Against Illegal Guns coalition).

⁷ See Pascale M. Joassart-Marcelli, Juliet A. Musso & Jennifer R. Wolch, *Fiscal Consequences of Concentrated Poverty in a Metropolitan Region*, 95 ANNALS ASS'N AM. GEOGRAPHERS 336, 336 (2005).

⁸ See Josh Kron, *Red State, Blue City: How the Urban-Rural Divide Is Splitting America*, ATLANTIC (Nov. 30, 2012, 11:17 AM), <http://www.theatlantic.com/politics/archive/2012/11/red-state-blue-city-how-the-urban-rural-divide-is-splitting-america/265686/> (describing the trend among cities toward overwhelmingly voting Democratic and pushing policies within the state such as same-sex marriage or marijuana legalization).

⁹ See *infra* notes 27–46 and accompanying text.

¹⁰ See *infra* notes 47–77 and accompanying text.

¹¹ See *infra* notes 78–105 and accompanying text.

ments operate currently privileges all of these interests over the innovation and spread of urban policy. The concluding section will thus advise local actors and advocates seeking to spread innovative policies to recognize and take account of this framework. However, to the extent that tailoring the policies to this framework is not possible, this article will suggest some changes to the existing structure of local-government law to better accommodate a theory of urban local policy diffusion.

I. LOCAL POLICY DIFFUSION

Diffusion is defined most generally as the spread of innovations throughout any societal entity.¹² The diversity of scholarship on types of diffusion reflects its many adaptations, from the spread of hybrid corn use among Iowa farmers to the diffusion of the multidivisional form among U.S. corporations.¹³ Policy diffusion, then, is the horizontal spread of policy innovation and adoption among different governmental entities.¹⁴ Of the many forms and mechanisms of policy diffusion, the most common are perhaps the processes of learning, studying the results of a policy and implementing it by reference to its success; imitating, observing the fact of a given policy's implementation and doing likewise; and coercion, implementing a policy not by free choice but because its implementation elsewhere has forced the entity's hand.¹⁵ This article will not advance any new forms of policy diffusion, but rather will examine how these existing forms fit into the legal framework of urban local governments.

Policy diffusion can take place at the national, state, or local level.¹⁶ Within the United States, policy diffusion at the state level may be the most favored form, and the most studied within American political science scholarship.¹⁷ Justice Brandeis famously enshrined the idea of policy diffusion within the American conception of federalism by stating that a "single cou-

¹² See Barbara Wejnert, *Integrating Models of Diffusion of Innovations: A Conceptual Framework*, 28 ANN. REV. SOC. 297, 298 (2002).

¹³ *Id.*

¹⁴ See, e.g., Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395, 396 (1990) (assuming, in the regional diffusion model, that states "emulate their neighbors when confronted with policy problems").

¹⁵ See Shipan & Volden, *supra* note 5, at 842–43. Other terms that have been suggested to describe these general processes are emulation, bandwagoning, mimicry, and competition. See Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 35 (2005).

¹⁶ See generally Note, *When Do Policy Innovations Spread? Lessons for Advocates of Lesson-Drawing*, 119 HARV. L. REV. 1467, 1481–84 (2006) (discussing how diffusion can shape policy outcomes overall).

¹⁷ See, e.g., William D. Berry & Brady Baybeck, *Using Geographic Information Systems to Study Interstate Competition*, 99 AM. POL. SCI. REV. 505, 505–06 (2005) (focusing on policy diffusion among states); Donald P. Haider-Markel, *Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict: Same-Sex Marriage Bans in the 1990s*, 1 ST. POL. & POL'Y Q. 5, 6–7 (2001) (same).

rageous state may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁸ However, this principle extends in even greater force to local governments, for if “the fifty states are laboratories for public policy formation, then surely the 3,000 counties and 15,000 municipalities provide logarithmically more opportunities for innovation, experimentation, and reform.”¹⁹ As with the state laboratory, the benefits of local experimentation are that other localities can then use these experiments as reference points for implementing their own policies.

While some scholarship on local policy diffusion exists, much of it focuses on a specific type of policy being diffused or the process of diffusion without much reference to the unique nature of local government.²⁰ In focusing on local government’s legal framework, this article will draw on two main principles necessary to policy diffusion and attempt to reconcile them with this framework. First, cities must be able to innovate at the local level, experimenting with policies in reaction to the unique problems they face.²¹ Second, other cities must be able to learn from these experimenting cities and, if they so choose, import that policy into their own government.²² For advocates to successfully convince a city to be a pioneer in implementing an innovative policy, that city must be able to take risks and have the freedom to implement new policies that may not be generally applicable to the rest of its home state. An adopting city must be able to situate another city’s policy into its own system, learning about the policy’s success and accounting for differences between the first implementing city and itself. This article contends that cities and advocates face several legal obstacles within local-government law to both of these tasks.

Though this article addresses legal obstacles facing local governments and advocates, many of the points it raises will coincide with political obstacles as well. For example, while the tendency for mayors to veto risky legis-

¹⁸ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Courts have regularly cited this proposition to support state experimentation. *See, e.g., Arizona v. Evans*, 514 U.S. 1, 8 (1995).

¹⁹ Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1, 43 (2006).

²⁰ *See, e.g.,* Rachel Meltzer & Jenny Schuetz, *What Drives the Diffusion of Inclusionary Zoning?*, 29 J. POL. ANALYSIS & MGMT. 578, 579 (2010) (examining the political and economic factors driving the diffusion of inclusionary zoning policies among local governments); Michael Mintrom, *The State-Local Nexus in Policy Innovation Diffusion: The Case of School Choice*, 27 PUBLIUS: J. FEDERALISM 41, 42–43 (1997) (focusing on local actors, but describing their role in influencing state policy diffusion); Shipan & Volden, *supra* note 5, at 845 (grouping state and local actors in its analysis of anticigarette-law diffusion). *But see* Johannes Rincke, *Policy Innovation in Local Jurisdictions: Testing for Neighborhood Influence in School Choice Policies*, 129 PUB. CHOICE 189, 190 (2006) (arguing that the proximity of other neighborhoods and districts favoring school choice influences adoption of school-choice policies).

²¹ *See* GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND* 50 (2008).

²² *See* Shipan & Volden, *supra* note 5, at 841.

lation out of fear of losing office can be seen as a political obstacle,²³ it is the *legal* rule permitting mayoral vetoes that allows some mayors' desires to take precedence over those of city councils.²⁴ Similarly, although Part IV will have a political aspect in its focus on growth politics, it is *legal* rules that force localities to compete with each other for capital.²⁵ Yet given that the problems that cities face are often not addressed by levels of government above them, city officials will often still attempt risky policies that respond to urban problems. Continued local attempts at gun control in response to urban gun violence, and attempts to pass minimum wage laws in response to urban poverty, discussed below,²⁶ are two examples. Yet these attempts are often thwarted through the existing legal regime.

II. THE FRUSTRATION OF LOCAL POLICY DIFFUSION BY STATE PREEMPTION AND HOME-RULE DOCTRINE

Although home rule and preemption are distinct issues within local-government law, in practice they often become linked. Home rule deals with the grant of powers to local governments by state constitutions or laws,²⁷ while preemption deals with states' decisions to take power away from local governments by preempting their powers with legislation. Home rule is generally thought of as generating autonomy for city governments; however, by explicitly defining a city's reserved powers, it may actually limit them.²⁸ Not only do different states have different grants of power, but state courts' interpretations of these powers will also vary by state.²⁹ These courts' interpretations come into effect if a city law is challenged as pre-

²³ See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980) (describing political obstacles to state policy innovation such as public officials' risk aversion and the desire to free ride off of other governments' experiments); Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J., 1333, 1339 (2009) (arguing that Rose-Ackerman's arguments still largely apply to state and local governments). Though more focused on legal obstacles than political, this article may assist Rose-Ackerman's account in explaining entities' hesitance to innovate.

²⁴ See William DeSoto, Hassan Tajalli & Cynthia Opheim, *Power, Professionalism, and Independence: Changes in the Office of the Mayor*, 38 ST. & LOC. GOV'T REV. 156, 156–59 (2006).

²⁵ See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1108 (1980) (describing how state law favors private activity over local activity); see also *infra* notes 83–84 and accompanying text.

²⁶ See *infra* notes 33–46, 86–99 and accompanying text.

²⁷ See, e.g., MINN. CONST. art. XII, § 4 (granting local government units the ability to “adopt a home rule charter for its government”); N.Y. CONST. art. IX, § 2 (granting powers to local governments “including but not limited to those of local legislation and administration in addition to the powers vested in them by this article”).

²⁸ See FRUG & BARRON, *supra* note 21 at 60–61.

²⁹ See *id.* at 67–68 (noting that despite “mirror image” constitutional home-rule grants in Massachusetts and Illinois, the Massachusetts state courts have denied powers to local governments that have been upheld by Illinois state courts). Compare COLO. CONST. art. XX, § 6 (allowing local laws of home-rule cities to supersede state law), with WASH. CONST. art. XI, § 11 (denying cities this power).

empted by state law. If a city ordinance is found to conflict with state law, the court will weigh the local interest against state interests, giving great weight to the state's determination that an issue on which they have legislated is an important statewide concern.³⁰ Inherent in both this balancing test and the different grants of power by states is a large degree of unpredictability and variance between states in the policies cities can enact. This unpredictability is especially troublesome if cities are attempting to work with each other across state borders in enacting policy.

This type of coordination is implicated by one popular form of policy diffusion, which involves active coordination in the assembling of national coalitions of local government officials, such as the National Civic League or the U.S. Conference of Mayors.³¹ Here, city actors have a national forum to meet with like-minded actors, learn about policy innovations, and attempt to bring their favored policies to their own cities.³² The aforementioned Mayors Against Illegal Guns coalition presents another example. The coalition includes over nine hundred mayors of both big cities and small towns, dedicated to "making America's cities safer by cracking down on illegal guns."³³ The coalition is able to use its shared resources to promote gun control policies nationwide,³⁴ and keep track of the cities that are experimenting with innovative policies to counteract higher levels of violent crime in urban areas.³⁵ Yet because the mayors in these coalitions have substantively different powers within their governments to address this issue due to differences in home rule and preemption, the diffusion of these policies is not as effective.

A gun control law enacted by Cleveland and its subsequent court battles illustrates the frustration of diffused policies by state preemption. One local policy innovation suggested by the Mayors Against Illegal Guns is limiting the carrying of guns in "sensitive locations."³⁶ After Cleveland's local council and Mayor Frank Jackson (a member of Mayors Against Illegal Guns)

³⁰ See, e.g., *Commerce City v. State*, 40 P.3d 1273, 1280 (Colo. 2002) (considering "the need for statewide uniformity," the impact of the municipal law on others outside the locality, historical considerations, and the state constitution "in weighing the importance of the state interests with the importance of the local interests").

³¹ See generally NAT'L CIVIC LEAGUE, www.ncl.org (last visited May 8, 2013); U.S. CONF. MAYORS, www.usmayors.org (last visited May 8, 2013).

³² See, e.g., *80th Winter Meeting*, U.S. CONF. MAYORS, <http://www.usmayors.org/80thWinterMeeting/> (last visited May 8, 2013).

³³ *Coalition History*, *supra* note 4.

³⁴ For example, during Super Bowl XLVI in 2012, New York City Mayor Michael Bloomberg and Boston Mayor Thomas Menino appeared in a commercial together urging "common sense [gun control] reforms that would save lives" and directing viewers to the Mayors Against Illegal Guns website. *Putting Football Rivalries Aside, Mayors Unite Against Illegal Guns*, YouTube (Feb. 2, 2012), <http://www.youtube.com/watch?v=BO94AdhCg0k>.

³⁵ *State and Local Initiatives*, MAYORS AGAINST ILLEGAL GUNS, <http://www.mayorsagainstilllegalguns.org/html/local/local.shtml> (last visited May 8, 2013) (listing various initiatives being pursued in different cities and states).

³⁶ *Guns in Sensitive Locations*, MAYORS AGAINST ILLEGAL GUNS, http://www.mayorsagainstilllegalguns.org/html/local/sensitive_locations.shtml (last visited May 8, 2013).

attempted to put such laws in place, the Ohio state legislature responded in 2007 by enacting section 9.68 of the Ohio Revised Code, a law establishing uniform state firearm regulations.³⁷ The City of Cleveland sought a declaratory judgment that the state law was unconstitutional because it violated Cleveland's home-rule powers.³⁸

The Ohio Supreme Court upheld section 9.68, displacing the Cleveland law as preempted.³⁹ The court relied on a three-part test for when a state statute takes precedence over a local ordinance: the ordinance will be preempted "when (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute."⁴⁰ The court stated that the first and third parts were not at issue, and found that the second was satisfied because the statute was a "statewide and comprehensive legislative enactment."⁴¹ While the majority focused entirely on the statute and state interests, the dissent argued that the statute infringed upon home-rule rights by preventing municipalities from "tailoring ordinances concerning the regulation of guns to local conditions."⁴²

Cleveland is not the only city that has had its attempts at gun regulation rebuked by its state legislature and courts.⁴³ And gun regulation is not the only area in which cities have faced uncertainty over how courts would interpret their home-rule powers.⁴⁴ The differences in the form and application of home-rule powers among cities thus undermine cities' abilities to adopt policies as they have observed them elsewhere. While cities may still attempt to legislate in preempted policy areas, as Cleveland has in proposing

³⁷ OHIO REV. CODE ANN. § 9.68 (West 2012). Cleveland's local laws not only dealt with open carrying in public but also required handgun registration, restrictions on children's access to firearms, and bans on assault weapons. See Bob Driehaus, *Ohio Court Limits Powers of Localities on Gun Laws*, N.Y. TIMES, Dec. 29, 2010, at A15. The state law specifically provides that a person "may own . . . or keep any firearm" without any "further license, permission, restriction, delay, or process." OHIO REV. CODE ANN. § 9.68.

³⁸ The Ohio Constitution's home-rule grant provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." OHIO CONST. art. XVIII, § 3.

³⁹ *Cleveland v. State*, 942 N.E.2d 370, 378 (Ohio 2010). The court reversed the appellate court, which had held that the state statute unconstitutionally violated Cleveland's home-rule powers by restricting the "legislative power of municipal corporations." *Cleveland v. State*, 923 N.E.2d 183, 189 (Ohio Ct. App. 2009).

⁴⁰ *Cleveland*, 942 N.E.2d at 374 (internal quotation marks omitted).

⁴¹ *Id.* at 377.

⁴² *Id.* at 379 (Pfeifer, J., dissenting).

⁴³ Philadelphia and Pittsburgh also had their attempts to regulate assault weapons held to be preempted in state court. *Ortiz v. Commonwealth*, 681 A.2d 152, 155 (Pa. 1996). *But see* *Pac. Nw. Shooting Park Ass'n v. Sequim*, 144 P.3d 276, 282 (Wash. 2006) (holding that Seattle could regulate firearm possession in convention centers).

⁴⁴ See Richard Briffault, *Home Rule for the Twenty-first Century*, 36 URB. LAW. 253, 254 (listing several local issues that courts are confronting on home-rule grounds with divergent results, including gay and lesbian rights, campaign-finance laws, and living-wage laws).

far more limited gun restrictions,⁴⁵ courts may still strike down innovative local laws “even when they do not conflict with state law.”⁴⁶ Key to policy advocates spreading policies amongst cities is their ability to act as a like-minded network in facing urban problems, as represented by the Mayors Against Illegal Guns. State courts’ diminishment of local conditions hinders the success of these networks.

III. STRONG MAYORAL CONTROL OVER A POLICY’S SUCCESS

Given their increasingly broad powers within the local-government legal regime, urban mayors are playing an important role in the field of policy innovation and adoption.⁴⁷ The two most dominant forms of local government are the mayor-council government, in which the mayor has a larger role similar to a state or federal executive branch, and the council-manager government, in which the council appoints and works with an administrative manager in running the city, and the mayor is largely a figurehead.⁴⁸ Although the council-manager plan is the predominant form among all municipalities, the mayor-council form is increasingly prevalent among larger cities.⁴⁹

Changes from one form of government to the other in recent years illustrate the arguments put forth in support of and against each arrangement. In November of 2004, San Diego became the largest U.S. city to switch from a council-manager system to a mayor-council system.⁵⁰ Amidst falling city credit ratings and federal investigations into the city’s finances, the city manager had resigned in April.⁵¹ Soon after, a coalition titled Citizens for Strong Mayor Reform put forth Proposition F, arguing that the council-manager structure was outdated, and that the mayor would be better suited to lead, make changes, and be held accountable.⁵² The coalition also made a checks-

⁴⁵ Mayor Jackson has proposed preventing firearm sales to people under twenty-one years old, but even this proposal has been described as “dead on arrival” at the state capital. Mark Naymik, *State Lawmakers Should Help Cleveland Stem Gun Violence*, CLEVELAND PLAIN DEALER, (Sept. 22, 2011, 9:20 AM), available at http://www.cleveland.com/naymik/index.ssf/2011/09/lawmakers_should_help_cleveland.html.

⁴⁶ Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 384 (2008).

⁴⁷ Although this article discusses the increasing legal empowerment of mayors through methods such as changes in state law or judicial interpretation, there are several historical instances of big-city mayors exercising power through other means, such as machine politics. See generally MILTON L. RAKOVE, DON’T MAKE NO WAVES—DON’T BACK NO LOSERS: AN INSIDER’S ANALYSIS OF THE DALEY MACHINE (1975) (describing the operation of Richard J. Daley’s twenty-year plus tenure as mayor of Chicago).

⁴⁸ OSBOURNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW §§ 19, 21 (3d ed. 2009).

⁴⁹ See *id.*; see also 25 *Largest Cities*, STRONG MAYOR-COUNCIL INST., <http://strongmayor.council.org/25largestcities.html> (last visited May 8, 2013).

⁵⁰ See Glen W. Sparrow, *San Diego: Switch From Reform to Representative*, in MORE THAN MAYOR OR MANAGER 103, 103–04 (James H. Svara & Douglas J. Watson eds., 2010).

⁵¹ *Id.* at 111.

⁵² *Id.*

and-balances argument: a strong mayor would protect taxpayers against a strong council.⁵³ When the initiative passed, Republican Dick Murphy, previously a figurehead mayor under the council-manager system, became a strong mayor by winning the election.⁵⁴

In contrast, Dallas rejected an effort to change its council-manager government to a mayor-council government in 2005.⁵⁵ Dallas's form of government arose out of a history of underrepresentation of its minority population in government.⁵⁶ This inequity sparked a series of litigation in 1971, reaching the Supreme Court and forcing Dallas to eventually implement a new electoral system and governmental system with fourteen council members elected from single-member districts.⁵⁷ The city rejected two 2005 proposals for a stronger mayor, in part due to fears of returning to underrepresentation of minorities and of a strong mayor favoring business interests.⁵⁸

Proponents of strong mayors thus tout the leadership, accountability, and separation of powers that the mayor-council system provides. If big cities have indeed obtained these benefits from their stronger mayors, then this system may encourage policy diffusion by empowering dynamic leaders with democratic mandates to pursue innovative urban policy. The Mayors Against Illegal Guns coalition shows one such example of mayors exhibiting leadership to innovate and coordinate with other cities in policy making, while the U.S. Conference of Mayors presents a far broader example.⁵⁹

However, as the history of Dallas suggests, there are criticisms of strong mayoral powers as well. Some of these criticisms demonstrate how the mayor-council system may hinder policy diffusion. One criticism levied at the idea of mayors innovating and experimenting with policy is that they will be inherently averse to taking risks because they will not want to risk losing office.⁶⁰ Experimenting with policies necessarily risks the experiment going wrong, and mayors may not want to be held accountable for the adverse effects of any failed experiments. While a spate of successful adoptions in other cities may reduce the risk, there will have to be enough initial

⁵³ *Id.* at 113.

⁵⁴ *Id.* at 114. Murphy announced his intention to resign soon after. Known as the "reluctant candidate," Murphy had been named one of the three "worst mayors in America" by Time Magazine. *Id.*

⁵⁵ See Karen M. Jarrell, *Dallas: The Survival of Council-Manager Government*, in MORE THAN MAYOR OR MANAGER, *supra* note 50, at 183, 183.

⁵⁶ See ROYCE HANSON, CIVIC CULTURE AND URBAN CHANGE: GOVERNING DALLAS 72 (2003) ("Blacks and Hispanics were excluded from elective office until the 1960's, and when some were finally elected, it initially was with the endorsement of the Anglo business leaders.").

⁵⁷ See *id.* at 286–309 (describing the passage of the fourteen-member plan); Jarrell, *supra* note 55, at 185–87.

⁵⁸ See Jarrell, *supra* note 55, at 195–98.

⁵⁹ See *Coalition History*, *supra* note 4; U.S. CONF. MAYORS, *supra* note 31.

⁶⁰ See Rose-Ackerman, *supra* note 23, at 594 (suggesting that this is the case for all incumbents, not just mayors).

risk takers for this to happen.⁶¹ Though some mayors have built the political and economic capital necessary to take such risks,⁶² these mayors may still be wary of taking risks that will disturb the business climate in their city. While this article discusses the centrality of local economic development in Part IV, suffice it to say here that “most mayors will do everything in their power to maintain a pro-business climate.”⁶³ For these two reasons, mayors in a mayor-council system may have compelling interests to advocate against or veto innovative legislation.⁶⁴

The modern strength of the mayoralty has produced some extremes in blocking council legislation, and New York City Mayor Michael Bloomberg, as perhaps the representative of the modern strong mayor, is at the forefront. In 2004, the New York City Council passed an ordinance requiring businesses contracting with the City to extend employment benefits to employees’ same-sex domestic partners, following the lead of cities such as Seattle, San Francisco, Los Angeles, and Portland, Maine.⁶⁵ Mayor Bloomberg opposed the law, claiming it would “drive business costs higher in an already-struggling economy.”⁶⁶ The City Council responded by reference to the other cities with such laws, claiming such laws had minimal economic impact.⁶⁷ After the City Council overrode his veto, the Mayor announced that he would not enforce the law because it was preempted by state and federal law.⁶⁸ The City Council brought an action in state court seeking to compel enforcement, and the court granted the action and ordered the Mayor to en-

⁶¹ See Sean Nicholson-Crotty, *The Politics of Diffusion: Public Policy in the American States*, 71 J. POL. 192, 193 (2009) (describing policy diffusion’s often “S-shaped cumulative frequency distribution,” which is due to the “process of communication and emulation among potential adopters”).

⁶² For example, Mayor Bloomberg has used his fortune to protect himself against similar pressures, and has established a super PAC titled “Independence USA PAC” to support candidates with similar positions on controversial issues. Raymond Hernandez, *For Bloomberg, a ‘Super PAC’ of His Making*, N.Y. TIMES, Oct. 17, 2012, at A1.

⁶³ Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2553 (2006) (citing criticism of New Orleans Mayor Ray Nagin being seen as catering to white business owners rather than black constituents in the aftermath of Hurricane Katrina).

⁶⁴ See, e.g., Gary Washbourn & Dan Mihalopoulos, *Daley Vetoes ‘Big Box’ Law*, CHI. TRIB., Sept. 12, 2006, at C1 (describing Mayor Daley’s veto of a minimum-wage ordinance for large retailers due to his belief that it would “drive jobs and businesses from our city”).

⁶⁵ Serena Longley, *Mayor Opposes Implementing Equal Benefits Law in City*, COLUM. SPECTATOR (Nov. 30, 2004, 12:00 AM), <http://www.spectrum.columbiaspectator.com/2004/11/30/mayor-opposes-implementing-equal-benefits-law-city>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See Winnie Hu, *Mayor Need Not Enforce Certain Laws, Court Rules*, N.Y. TIMES, Feb. 15, 2006, at B3. Non-enforcement by a local executive is a novel issue. See Lisa-Beth C. Meletta, Note, *Non-Enforcement by a Local Executive: Limitations of Judicial Review and Considerations to Restrain the Use of Executive Power*, 63 N.Y.U. ANN. SURV. AM. L. 511, 511 (2008). Gavin Newsom’s decision not to enforce laws against same-sex marriage and issuance of marriage licenses to gay couples is another prominent example. See David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2224 (2006). However, Mayor Bloomberg’s decision not to enforce a local law passed by another branch in his government rather than a state law remains quite unique.

force the law.⁶⁹ After the appellate court reversed, the New York Court of Appeals affirmed reversal of the order in a 4–3 opinion, holding that the Equal Benefits Law conflicted with state contracting law and the federal Employee Retirement Income Security Act (ERISA), and thus “the City Council has not demonstrated a clear legal right to have the Equal Benefits Law enforced.”⁷⁰

Granting the mayor a power not to enforce local laws allows him to usurp a “legislative authority he does not possess”⁷¹ and stifles legislative innovation in favor of business interests. This aggrandizement of local executive power is increasingly being seen in other forms as well, such as the growing tendency of mayors to wrest control of their cities’ school systems. After Mayor Bloomberg successfully petitioned the state to allow him to take control of New York City schools, other mayors such as Washington, D.C., Mayor Adrian Fenty visited New York in “well-publicized sojourns to gain insights into how to shape their own efforts to take over the schools.”⁷² Mayor Fenty then successfully took control of the D.C. school system, firing the superintendent and hiring Michelle Rhee, a leader in the school-choice movement.⁷³ Although the policy innovation and adoption through learning involved here is a form of policy diffusion, achieving this diffusion by aggrandizing the executive branch could lead to local separation-of-powers concerns.⁷⁴ Although proponents of strong mayors tout the democratic accountability of the system,⁷⁵ the examples of the history of Dallas and Mayor Bloomberg’s non-enforcement of the Equal Benefits Law suggest that local separation-of-powers concerns can be problematic democratically. If a city council is more representative of an entire city’s makeup whereas a mayor is more concerned with the city’s financial sector, a system spreading policies based on mayoral preferences alone becomes more questionable.

It is not this article’s contention that strong mayoral powers must be done away with if policy diffusion among cities is to be effective. On the

⁶⁹ Sabrina Tavernise, *Judge Rules Bloomberg Must Carry out Equal Benefits Law He Vetoed*, N.Y. TIMES, Nov. 9, 2004, at B3.

⁷⁰ Council of N.Y.C. v. Bloomberg, 846 N.E.2d 433, 440 (N.Y. 2006). In 2011, New York State extended state benefits to same-sex couples across the state. Marriage Equality Act, ch. 95, 2011 N.Y. Laws 749. The law now reaches most kinds of employment benefits, except for self-funded health insurance plans of private employers. See *Know Your Rights: Frequently Asked Questions About New York’s Marriage Equality Act (2011)*, N.Y. C.L. UNION, <http://www.nyclu.org/marriage-faq> (last visited May 8, 2013).

⁷¹ *Bloomberg*, 846 N.E.2d at 447 (Rosenblatt, J., dissenting).

⁷² Jeffrey R. Henig, *Mayoral Control: What We Can and Cannot Learn From Other Cities*, in *WHEN MAYORS TAKE CHARGE* 19, 20 (Joseph P. Viteritti ed., 2009).

⁷³ *Id.* at 28.

⁷⁴ Cf. BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (arguing that aggrandizement of the executive branch threatens our constitutional tradition); E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 140 (1960) (“[T]he people are powerless if the political enterprise is not competitive. It is the competition of political organizations that provides the people with the opportunity to make a choice.”).

⁷⁵ See, e.g., Sparrow, *supra* note 50, at 111.

contrary, strong mayors advocating for the spread of effective urban policy can champion urban interests at the national level while coordinating the innovation of policies interlocally.⁷⁶ However, increased mayoral power alone is not likely to be an equitable solution to urban problems nationwide. The expansion of the local executive branch and administrative agencies may yield an effective conduit of policy diffusion, but if unchecked, this expanded executive branch could implement policies that are harmful to the city's citizens.⁷⁷

IV. POLICY DIFFUSION IN A "GROWTH MACHINE"

The final structural limitation to local policy diffusion lies at the intersection of urban theory and local-government law: cities are fundamentally restricted in the policies they pursue by the supreme need to promote growth and economic development. A brief survey of urban sociological and legal literature illustrates this tendency. In his seminal work, *City Limits*, urban theorist Paul Peterson argues that due to interlocal competition between local governments, the urban political agenda favors policies that attract capital investment and produce economic benefits, growing their limited resources.⁷⁸ Thus, cities will not be likely to pursue redistributive policies that have more than "symbolic value" out of a fear of "negative economic consequences."⁷⁹ Separate but related to this theory is the earlier conception expounded by Harvey Molotch of the city as a "growth machine."⁸⁰ According to Molotch, urban political elites find common ground in pursuing economic and physical growth of the city, and "this growth imperative is the most important constraint upon available options for local initiative in social and economic reform."⁸¹ Distinct from Peterson's focus on economic limits to city policies, Molotch focuses on the political makeup of pro-growth coalitions, the growth imperative's distributional effects by "place," and the common political arguments marshaled in favor of growth.⁸²

⁷⁶ See Schragger, *supra* note 63, at 2575–76 ("[I]f one views the city as a polity with a collective identity and interests independent of the particular ends of the citizens who inhabit it, then the embodiment of those interests in one executive office becomes more attractive.").

⁷⁷ See, e.g., Jason Deparle, *What Welfare-to-Work Really Means*, N.Y. TIMES MAG., Dec. 20, 1998, at § 6, at 50 (describing the Giuliani administration's attempts to purge the New York City welfare rolls through procedural means, rather than job placement). Recruiting administration members from a city with desired policies, as Mayor Giuliani did with a veteran of Wisconsin's "famed welfare-eradication" program, is another way to achieve policy diffusion. *Id.* at 51.

⁷⁸ PAUL E. PETERSON, *CITY LIMITS* 29 (1981).

⁷⁹ *Id.* at 174.

⁸⁰ Harvey Molotch, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. SOC. 309, 310 (1976).

⁸¹ *Id.*

⁸² For example, Molotch describes one argument put forth in favor of economic development in order to sustain support from working-class majorities as the "claim that growth 'makes jobs.'" *Id.* at 320.

Local-government law scholars have tied this urban theory to the legal constraints that cities face. Gerald Frug makes an argument similar to Peterson's, stating that cities are unable to control their economic well-being because this well-being depends on "the willingness of taxpayers to locate or do business within city boundaries."⁸³ However, Frug argues that rather than the city being limited by its own actors' political choices, it is state decision making that has curbed local autonomy, restricting "city activity in favor of private activity."⁸⁴ Richard Schragger focuses on the mobility of private capital, arguing in line with Peterson that cities must be "business friendly" due to mobile capital's "propensity to flee regulation."⁸⁵

The spread of local living-wage laws and forceful resistance to them in each city presents the most representative example of the centrality of growth hindering the spread of redistributive policies. Intended to supplement the inadequacy of the federal minimum wage with respect to the urban cost of living,⁸⁶ the first living-wage law was passed in Baltimore in 1994, with over twenty cities following suit in the next seven years.⁸⁷ Living-wage laws' success in diffusing among cities has been due in large part to a successful advocacy network, made up of both local and outside actors. For example, three years after Baltimore's minimum-wage ordinance, St. Paul, Minnesota, passed a similar law arising from advocacy efforts led by the local Twin Cities New Party coalition, and the national Association of Community Organizations for Reform Now (ACORN).⁸⁸ ACORN has figured prominently in various cities' living-wage debates, backing a citywide living-wage law in New Orleans passed in 2003.⁸⁹ Organized labor has been a powerful force in nearly every campaign, even extending to the most recently passed living-wage law in New York City in March of 2012.⁹⁰ Advocates have stressed guaranteeing a living wage as "the way to end poverty as we know it."⁹¹

⁸³ Frug, *supra* note 25, at 1064.

⁸⁴ *Id.* at 1108; *see also* FRUG & BARRON, *supra* note 21, at 26 (noting that cities could potentially pursue redistributive policies that could also be justified on pro-growth terms, but are limited in their reach by state laws).

⁸⁵ Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 484–85 (2009).

⁸⁶ STEPHANIE LUCE, FIGHTING FOR A LIVING WAGE 15 (2004).

⁸⁷ *See* Isaac Martin, *Dawn of the Living Wage: The Diffusion of a Redistributive Municipal Policy*, 36 URB. AFF. REV. 470, 470 (2001).

⁸⁸ *See* Andy Merrifield, *The Urbanization of Labor: Living-Wage Activism in the American City*, SOC. TEXT, Spring 2000, at 31, 46.

⁸⁹ Stephanie Luce, *Life Support: Coalition Building and the Living Wage Movement*, NEW LAB. F., Spring/Summer 2002, at 81, 83; *see also* Martin, *supra* note 87, at 483 (noting the effect of ACORN's presence on the successful passage of living-wage laws). New Orleans's ordinance was rare in its citywide application. Most living-wage laws apply selectively, covering city contractors in particular. *See, e.g.*, LUCE, *supra* note 86, at 45–47.

⁹⁰ *See* Kate Taylor, *City Council Approves Wage Bill and Condemns Florida Killing*, N.Y. TIMES, Mar. 28, 2012, at A23.

⁹¹ WILLIAM P. QUIGLEY, ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE 159 (2003).

Yet despite these initial successes, living-wage campaigns have faced ardent opposition, non-enforcement,⁹² mayoral vetoes,⁹³ and often fatal legal challenges.⁹⁴ As discussed above in Part II, courts have varied widely in their application of state preemption and home-rule doctrines, striking down the laws in New Orleans, St. Louis, and Detroit on state preemption grounds while upholding laws in Santa Fe, Berkeley, and Hudson County, New Jersey.⁹⁵ Mayors have also been strongly opposed to living-wage laws, often citing business interests.⁹⁶ Even after the recent New York City living-wage law's scope was limited to accommodate the city's business community, Michael Bloomberg again refused to enforce the law.⁹⁷ Mayor Bloomberg is now suing the City Council in state court, alleging that the law illegally curtails his contracting power as mayor and is preempted by state law.⁹⁸ Given local governments' predisposition against redistributive policies and the legal mechanisms that can impede local policies, it is perhaps surprising "that these ordinances are proposed at all."⁹⁹

While the centrality of business interests can impede the spread of innovative policies, as with strong mayoral powers, policies that are suited to these interests may diffuse more successfully. Business Improvement Districts (BIDs) are practices unique to local governments that first began in Toronto, which were then introduced in New Orleans in 1975, eventually taking off more rapidly across the United States in the 1990s.¹⁰⁰ BIDs have been touted as a success nationwide, credited with revitalizing some especially blighted areas like New York City's Bryant Park.¹⁰¹ Yet the spread of

⁹² Angela Y. Jones, Note, *Bittersweet Victory: Non-Enforcement of Detroit's Living Wage Ordinance Plagues the Community's Living Wage Standard*, 5 J.L. Soc'y 617, 637-39 (describing problems with enforcement of Detroit's living-wage law).

⁹³ See Washbourn & Mihalpoulos, *supra* note 64.

⁹⁴ See Clayton P. Gillette, *Local Redistribution, Living Wage Ordinances, and Judicial Intervention*, 101 Nw. U. L. REV. 1057, 1059 (2007) (listing legal challenges to living-wage laws).

⁹⁵ See *id.*; see also *New Orleans Campaign for a Living Wage v. New Orleans*, 825 So. 2d 1098 (2002); *Rudolph v. Guardian Protective Servs., Inc.*, No. 279433, 2009 WL 3013587, at *3 (Mich. Ct. App. Sept. 22, 2009).

⁹⁶ See Washbourn & Mihalpoulos, *supra* note 64; see also Jean Merl, *Council Approves 'Living Wage' Law for City Contracts*, L.A. TIMES, Mar. 19, 1997, at A1 (noting Mayor Rioridan's planned veto of law).

⁹⁷ See Kate Taylor, *With Tweaks, Quinn's Living-Wage Bill Scales Back Its Ambitions*, N.Y. TIMES, Apr. 13, 2012, at A24.

⁹⁸ Michael M. Grynbaum, *Bloomberg Sues Council to Overturn Two Wage Laws*, N.Y. TIMES, July 28, 2012, at A20.

⁹⁹ See Gillette, *supra* note 94, at 1058.

¹⁰⁰ See Ingrid Gould Ellen, Amy Ellen Schwartz & Ioan Voicu, *The Impact of Business Improvement Districts on Property Values: Evidence From New York City 1* (Furman Ctr. for Real Estate & Urban Policy, Working Paper 07-01, 2007), available at http://furmancenter.org/files/publications/ImpactofBIDcombined_000.pdf. BIDs are agreements by local business owners to tax themselves and use the shared funds for additional neighborhood services, such as clean-up, security, and marketing. *Id.*

¹⁰¹ David J. Kennedy, Note, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283, 283-84 (1996); see also Richard Briffault, *A Government for Our Time? Business Improvement Districts and*

BIDs due to their economic effectiveness led to some troubling results in the past. In litigation that arose regarding the especially controversial Grand Central Partnership BID, which had worked to improve the neighborhood by forcibly removing undesirables such as homeless individuals,¹⁰² the Second Circuit rejected an equal protection challenge to the governing structure of BIDs by city residents.¹⁰³ However, the dissenting judge cautioned against the “constitutional threat posed by the growth of unrepresentative and non-democratically elected BIDs.”¹⁰⁴ Thus, as with strong mayoral powers, the centrality of growth and development to cities may encourage diffusion, but cities should at least be conscious of whether the mechanisms facilitating this diffusion are democratic in nature.¹⁰⁵

CONCLUSION

Given that the existing legal structure facing local government currently privileges state, executive, and business interests over the innovation and spread of urban policy, local actors and advocates seeking to spread innovative urban policies must recognize and take account of this framework. There are already some ways in which they do so. For example, redistributive local policies are often passed while accounting for business interests by “leverag[ing] more place-dependent capital,”¹⁰⁶ such as conditioning city contracts on the provision of higher wages. However, the selective application of such laws often severely limits their scope and effectiveness.¹⁰⁷ If advocates cannot sway the political preferences of urban mayors and state legislatures, the above-described framework will remain a difficult, though not insurmountable, framework for local policy diffusion.

Local actors should thus consider ways of changing the existing system to better accommodate urban policy diffusion. Though such changes are beyond the scope of this article, a few paths are possible. Such changes may consist of stronger political checks on local executives and business interests. Alternatively, advocates could attempt to change the operation of the law by encouraging judicial sensitivity to “local conditions.”¹⁰⁸ Furthermore, judges could take notice of when local actors are engaged in national policy networks and grant them more deference so that they can operate on

Urban Governance, 99 COLUM. L. REV. 365, 377 (1999) (describing BIDs as, despite their private nature, “public institutions with a public mission . . . providing the public services and investment that financially-strapped cities need if they are to survive”).

¹⁰² See Kennedy, *supra* note 101, at 284.

¹⁰³ Kessler v. Grand Cent. Dist. Mgmt. Ass’n, 158 F.3d 92, 93–94 (2d Cir. 1998).

¹⁰⁴ *Id.* at 132 (Weinstein, J., dissenting).

¹⁰⁵ See Briffault, *supra* note 101, at 377 (supporting BIDs as a successful policy innovation, but noting that they require “a degree of oversight by municipal government which, however authorized by law, may be difficult to achieve in practice”).

¹⁰⁶ See Schragger, *supra* note 85, at 526.

¹⁰⁷ See, e.g., Taylor, *supra* note 97 (describing the limited effect of the New York City living-wage law).

¹⁰⁸ Cleveland v. State, 942 N.E.2d 370, 379 (Ohio 2010) (Pfeifer, J., dissenting).

this level.¹⁰⁹ The protections for the federalist system of experimentation that are so valued on the state level should be extended in small part to the local level as well.

¹⁰⁹ See, e.g., David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 610 (1999) (arguing for deference to local decision making that promotes local governments' "role in enforcing the Constitution").