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The Privatizing of Public Wealth

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Cover Page Footnote

Executive Director, Guild Law Center for Economic and Social Justice. The author would like to thank Meena Upadhyay, Michael LaFave, Cynthia Stevens and the staff at the Fordham Urban Law Journal for their assistance in the preparation of this Article. In addition, I would like to thank Greg LeRoy, Richard Grossman, and Carl Meyer for their useful comments on early drafts. I would also like to recognize the fine efforts of Greg LeRoy, Richard Healey and Jim Benn, who took the initiative in this area with their publication of *No MORE CANDY STORE: STATES AND CITIES MAKING JOB SUBSIDIES ACCOUNTABLE* (1994), published by the Federation for Industrial Retention and Renewal (FIRR) and the Grassroots Policy Project. The book provides comprehensive documentation of the phenomenon of tax abuse.

THE PRIVATIZING OF PUBLIC WEALTH

By Kary L. Moss, Esq.

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Introduction

In 1991, General Motors Corporation (GM), the world's largest automaker, announced that the company would close 21 plants, thereby terminating 74,000 jobs by 1995.¹ As part of the plan, GM would cease its Willow Run Plant operations in Ypsilanti Township and move them to Arlington, Texas.² Seven years earlier, GM had promised to maintain 4,900 jobs at its Willow Run plant for 12 years after receiving significant tax abatements.³ In total, combining all abatements received since 1975, GM obtained an estimated \$1.3 billion in tax abatements.⁴ Under the 1991 plan, 4,014 jobs were lost at the Willow Run plant, and 10,000 to 18,000 jobs were lost at parts suppliers and other related industries.⁵ The Township's effort to force GM to comply with its earlier promises by taking the company to court was ultimately not successful.⁶

This example is one of many that demonstrate the emergence of a newly recognized phenomenon called "corporate welfare:"⁷ a series of tax abatements and other financial advantages given to companies by states and municipalities with the expectation of increased employment opportunities for its residents.⁸ The most

1. WILLIAM SCHEWEKE, ET. AL., *BIDDING FOR BUSINESS: ARE CITIES AND STATES SELLING THEMSELVES SHORT?* CORPORATE ENTERPRISE DEVELOPMENT 26 (1994)[hereinafter CED REPORT].

2. *Id.*

3. *Charter Township of Ypsilanti v. General Motors Corp.*, No. 92-43075-CK, 1993 WL 132285 at *7 (Mich. Cir. Ct. Feb. 9, 1993), *rev'd*, 506 N.W.2d 556 (Mich. Ct. App. 1993).

4. *Id.* at *4.

5. Stephen Franklin, *GM Tale One of Many Twists, Uncertainties*, CHI. TRIB., Mar. 2, 1992, at C1; Jolie Solomon, et. al., *Can GM Fix Itself*, NEWSWEEK, Nov. 2, 1992, at 54.

6. *Charter Township of Ypsilanti v. General Motors Corp.*, 506 N.W.2d 556 (1993) (reversing lower court's order, which enjoined General Motors from transferring its automobile production at the Willow Run plant).

7. See GREG LEROY, ET. AL., *FEDERATION FOR INDUSTRIAL RETENTION AND RENEWAL NO MORE CANDY STORE: STATES AND CITIES MAKING JOB SUBSIDIES ACCOUNTABLE* (1994).

8. As Secretary of Labor Robert Reich recently suggested, it is time to "choke off as much as \$200 billion in 'corporate welfare' as a way of finding money for jobs programs." Catherine S. Manegold, *Labor Secretary Urges Cuts for 'Corporate Welfare Too'*, N.Y. TIMES, Nov. 23, 1994, at A19. In 1992, the Associated Press reported that the Federal Agricultural Department gave \$465,000 in tax money to subsidize

significant cost of these agreements between cities and companies to bring in or maintain jobs is the loss of a substantial amount of public money to corporate pockets, with little or no return. To make matters worse, in the current legal realm, municipalities have little ability to hold corporations to the job creation promises that they make in exchange for the tax incentives granted to them. The Willow Run case demonstrates the irony of recent attacks on the welfare system,⁹ given the abuses of the tax incentive system perpetrated by corporations. Tax breaks for corporations are draining our cities and states by taking much needed revenue from essential public services.¹⁰

Whether tax subsidies take the form of property tax reductions, industrial development bonds,¹¹ or benefits designed to decrease

McDonald Corporation's commercials boosting Chicken McNuggets, \$450,000 to Campbell Soup Co., much of it to promote V8 juice overseas, and \$146,000 to Seagram and Sons Corporation, to promote Four Roses whiskey. These ads were part of a Market Promotion Program funded with \$200 million in taxpayers' money in order to promote American products abroad. But, as observed by Rep. Dick Armey of Texas: "This is a classic example of welfare for the rich in the worst possible way. You go down the list of companies and it's hard to imagine they need a handout from the American taxpayer to market their products abroad." Jennifer Dixon, *\$200 Million From Taxpayers Help Finance Ads*, THE ORANGE COUNTY REGISTER, Feb. 3, 1992, at A1.

9. For example, in 1976 Ronald Reagan stated, "There's a woman in Chicago. She has 80 names, 30 addresses, 12 Social Security Cards, and is collecting veteran's benefits on four nonexistent deceased husbands . . . She's got Medicaid, is getting food stamps and . . . welfare under each of her names. Her tax-free cash income alone is over \$150,000." Jason DeParle, *Better Work than Welfare. The Real World of Welfare*, N.Y. TIMES, Dec. 18, 1994, at 48. For more information concerning welfare proposals, see Robert H. Haverman & John Karl Scholz, *The Clinton Welfare Reform Plan: Will It End Poverty As We Know It?* IRP DISCUSSION PAPER No. 1037-97 (Aug. 1994); Thomas Corbett, *Welfare Reform in the 104th Congress: Goals, Options and Tradeoffs*, 17 FOCUS 29 (1995).

10. See *infra* note 173 and accompanying text.

11. These are municipal bonds, issued by state and local governments to finance industrial projects. They offer a lower rate of interest because they are tax-free to the consumer. They include revenue bonds, which are repaid from the project's revenues, and general obligation bonds, which make the locality responsible for repayment. Typically, a state or municipality purchases or builds a facility, leases it back to the investor, thus freeing the investor from paying property taxes or requiring an initial capital investment from the investor. See MARTIN TOLCHIN & SUSAN TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION* 59 (1988). They are used primarily by smaller industries because they are capped at \$10 million for federally tax-exempt IRBs. *Id.*; see also William H. McBride & David Dreifus, *Industrial Development and Pollution Control Financing in North Carolina*, 61 N.C. L. REV. 419 (1983) (discussing limitations placed upon use of industrial development bonds).

the cost of doing business in a state,¹² they are not going away any time soon.¹³ Communities rely upon them to attract industry, jobs, and growth.¹⁴ Yet, these anticipated results have not taken place.¹⁵ Policy makers have largely failed to include this problem in economic development policies and programs.¹⁶ Their neglect is especially evident with respect to subsidies offered to businesses not by the federal government but by states and cities. As a result, billions of dollars of taxes or other public money are lost from cities whose leaders are either unaware or do not care about the magnitude of the loss, or use tax incentives to shore up their political fortunes.¹⁷

This Article examines the emergence of the problem of corporate welfare, and identifies and discusses various legal solutions.¹⁸

12. This would include assistance in improving accessibility to transportation, sewers and water facilities, designing new plants, research and development facilities, and state supported job training programs. TOLCHIN, *supra* note 11, at 59-60. For example, Pennsylvania offered Volkswagen a \$10 million bond for a railway spur linking a plant with a main line, and a \$3.8 million training program for Volkswagen workers. The plant is now closed. See William Fulton, *VW in Pennsylvania: The Tale of the Rabbit that Got Away*, GOVERNING (Nov. 1988).

13. In Michigan, for example, Governor Engler recently signed into law a bill creating the Michigan Economic Growth Authority empowered to grant tax abatements to businesses in an effort to promote job creation and economic development. M.C.L. § 207.808 (1995). Michigan will offer eligible businesses a tax credit for up to twenty years of up to 100% of the incremental Single Business Tax liability attributable to expansion or relocation for personal income tax withholding for the net new jobs being created. See Leah Samuels, *Taxpayers Lose Under Engler's MEGA Deal*, METROTIMES, July 12-18, 1995; Review & Outlook, *A Governor's Gimmick*, WALL ST. J., Mar. 17, 1995, at A10. They have also surfaced in the form of empowerment zones which are premised on the laudable desire to revitalize our cities, but which do not always deliver the expected outcomes. See Ellen P. Aprill, *Caution: Enterprise Zones*, 66 S. CALIF. L. REV. 1341 (1993) (discussing recent Congressional efforts to include tax breaks for enterprise zones and an analysis of their effectiveness); see also Nicholas Lemann, *The Myth of Community Development*, N.Y. TIMES, Jan. 9, 1994, at 27.

14. See Samuels, *supra* note 13.

15. This is not to suggest that abuse of the tax incentive system is primarily responsible for the crisis situations facing most cities. Peter Drier identifies five trends contributing to the urban crisis: corporate flight and economic restructuring, suburban exodus, Pentagon drain, redlining and federal cutbacks. Peter Drier, *America's Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1372-1386 (1993).

16. Lemann, *supra* note 13.

17. Sometimes, of course, tax abatements are used to advance personal political objectives. Tim O'Brien, *For a City Tax Abatement, Hire the Mayor's Lawyer*, N.J. L.J., Oct. 24, 1994 (discussing use of tax abatements as a source of political influence).

18. It is outside the purview of this Article to discuss generally the nature of the corporation, or the range of vehicles that could be used to incorporate a principle of accountability in the law. Instead, this article focuses only upon the use of tax subsidies as an opportunity to negotiate enforceable promises and contracts. For a thor-

It differs from other articles addressing the subject of plant closings and industrial relocations¹⁹ by focusing primarily upon state incentives and subsidies, as opposed to those granted by the federal government.²⁰ It identifies state and local governments, in conjunction with unions, workers and community organizations, as the appropriate actors to reform a system which has become an abuse of public trust and the general welfare.

Part I of this Article examines the emergence of the tax abuse phenomenon and documents its impact on local economies in this country. Part II discusses the legal scheme which frames the various legal strategies that have been employed by communities to challenge subsidy arrangements. Part III identifies several solutions, including legislative initiatives that require that tax subsidy arrangements be subject to express, written, contractual agreements.²¹ This Article concludes that greater accountability of the

ough treatment of corporations today see WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE* (1992).

19. See Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty and America's Eroding Industrial Base*, 81 GEO. L.J. 1757 (1993) (evaluating efficacy of common law and statutory frameworks as "inhospitable" terrain upon which workers and communities are forced to fight); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing the Fiduciary Duty to Protect Displaced Workers*, 69 N.C. LAW REV. 1189 (1991) (arguing that corporations should be legally responsible for alleviating the harsh effects that corporate restructuring has on employees); Robert J. Weinberg, *The Use of Eminent Domain to Prevent an Industrial Plant Shutdown: The Next Step in an Expanding Power*, 49 ALB. LAW REV. 95 (1984) (focusing on legality of seizing assets of an ongoing business in order to prevent its departure); J. Bradley Russel, *Implied Contracts and Creating a Corporate Tort, One Way State and Local Governments Are Starting to Fight Plant Closings*, 90 W. VA. L. REV. 1249 (1988) (discussing implied duty to operate for a reasonable time upon acceptance of economic incentives); Mark Taylor, *A Proposal To Prohibit Industrial Relocation Subsidies*, 72 TEX. L. REV. 669 (1994) (proposing federal solution to abuses of relocation subsidies).

20. E.g. STEPHEN MOORE AND DEAN STANSEL, CATO INSTITUTE, *ENDING CORPORATE WELFARE AS WE KNOW IT*, (Mar. 6, 1995); JAMES DONAHUE, *ESSENTIAL INFORMATION, INC., AID FOR DEPENDENT CORPORATIONS (AFDC)* (1994).

21. As used by many, the term "corporate welfare" has become popular because it sounds good: many opposed to current widespread attacks on the public assistance system seek to transform the term "welfare," which has come to imply that its recipients are trying to get something for nothing, and impose it instead upon corporations which receive far greater advantages and economic power. The average single woman with two children can expect to receive \$4,400 a year on welfare. DeParle, *supra* note 9. Compare that with a 1993 Government Accounting Office report that revealed that more than 40 percent of corporations doing business in the United States with assets over \$250 million "either paid no income taxes or paid income taxes of less than \$100,000." GENERAL ACCOUNTING OFFICE, *INTERNATIONAL TAXATION, TAXES OF FOREIGN- AND U.S.-CONTROLLED CORPORATIONS*, GAO/GGD-93-112FS, (June 1993).

tax incentive system is needed to provide the kind of efficiency necessary to allow these foregone tax dollars to instead be used wisely.

I. The Rising Tide of Tax Incentives

A. Background

Tax subsidies are not a new phenomenon. They were documented as long ago as the 17th century,²² and drove much of the industrialization of this country, especially the creation of the railroad industry.²³ They proliferated in the 1970s and 1980s, however, when government officials sought remedies to "stagflation:" simultaneous high unemployment and inflation.²⁴ According to the Council of State Governments, more than forty states offer businesses incentives that were not common fifteen years ago.²⁵

Once available in a state, tax subsidies tend to be granted at an ever-increasing rate. For example, in 1974, Louisiana voters passed an amendment to their constitution creating an industrial property

The term "welfare," however, really needs to be restored to its rightful position as an acknowledgment of a common humanity and collective responsibility for our society. This is best expressed by the Preamble to the Constitution, which recognizes the "promotion of the general welfare" as a basic obligation of citizenship, and as a basic goal of the compact among the people. Instead of calling for an end to "corporate welfare," and in so doing join the onslaught against the term "welfare", the phenomenon of corporate tax abuse needs simply to be recognized for what it is right now: a subsidy for the richest at the expense of us all. In *Loan Ass'n v. Topeka*, Justice Miller opined, after holding that a bondholders' contract with the city for a hundred-thousand dollar subsidy for the building of wrought-iron bridges was not enforceable: "To lay with one hand the power of government on the property of the citizen, and with the other to bestow it upon favored individuals to . . . build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation." 87 U.S. 655, 664 (1874).

22. EDWARD REGAN, GOVERNMENT, INC., CREATING ACCOUNTABILITY FOR ECONOMIC DEVELOPMENT PROGRAMS," GOVERNMENT FINANCE RESEARCH CENTER OF THE GOVERNMENT FINANCE OFFICERS ASSOCIATION 25 (Apr. 1988). One early example was when the state of New Jersey granted Alexander Hamilton a tax abatement in 1791 in exchange for starting a business. *Id.*

23. Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 990-91 (1975) (noting that by 1870 fifty-five railroad companies had secured tax exemptions worth \$13 million from at least nineteen states); see also Taylor, *supra* note 19, at 671-72.

24. REGAN, *supra* note 22, at 25.

25. LEROY, *supra* note 7, at 3 (citing KEON CHI, COUNCIL OF STATE GOVERNMENTS, THE STATES AND BUSINESS INCENTIVES: AN INVENTORY OF TAX AND FINANCIAL INCENTIVES (1989) and STATE BUSINESS INCENTIVES, IN STATE TRENDS FORECASTS (June 1994)).

tax exemption.²⁶ Since then, the issuing agency granted almost every request for a tax abatement.²⁷ In 1982 alone, the issuing agency approved 559 applications and rejected only one.²⁸ In 1983 and 1984, the state approved \$3.7 billion in exemptions and denied none.²⁹ Louisiana is not alone in this practice.³⁰ In New York, for example, it is estimated that \$500 million a year is lost in tax abatements.³¹

It is not easy to document the full extent of the problem, however, because most cities and states do not maintain records of potential lost earnings, or even of direct subsidies themselves.³² Former New York State Comptroller Edward V. Regan observed that "the very people entrusted to oversee fiscal affairs of state and local governments — treasurers, auditors, comptrollers — as well as those responsible for formulating public policy — governors, mayors, county executives, legislators — have no idea of the extent of such tax benefits, at least in most jurisdictions."³³

Driving the tax subsidy wars is the corporate threat of flight, which forces workers, communities and countries to compete to attract investment. Journalist Jon Pepper writes: "There's something irritating about subsidizing people who don't need our assistance. The problem is that if we don't, Indiana, Ohio, or Nebraska certainly will."³⁴ This "competitiveness," no matter how well-founded, is shortsighted because it ignores the fact that the nation's

26. THE GREAT LOUISIANA TAX GIVEAWAY: \$2.5 BILLION: A DECADE OF CORPORATE WELFARE, LOUISIANA COALITION FOR TAX JUSTICE 37, 39 (1989) [hereinafter LOUISIANA REPORT].

27. *Id.*

28. *Id.*

29. *Id.*

30. REGAN, *supra* note 22, at 28.

31. *Id.*

32. REGAN, *supra* note 22, at 26, 28; LEROY *supra* note 7, at 5. An estimated twenty-seven states do have tax expenditure budgets.

33. REGAN, *supra*, note 22, at 28. Regan was responding to an incident in which he noticed that a county industrial development agency (IDA) was seeking a mortgage on a building. When he asked his staff to find out the terms of the deal, he discovered that the owner of the building, a local telephone company, was not going to pay sales tax to the county on the construction materials — estimated at \$295,000 — nor the county mortgage recording taxes, which came to \$187,000. The estimated tax abatements for this new building were about \$500,000. Regan discovered that these abatements had been granted so that the company could "locate" in the county in which it was already sited. The county comptroller told Regan that he had not been aware that these tax receipts would be lost to the government. *Id.* at viii.

34. Jon Pepper, 'Corporate Welfare' Is an Investment that Offers the State an Attractive Return, DET. NEWS, Jan. 22, 1995, at C1. Another common reason that governors and mayors offer such packages is to simply appear to their constituents that they are creating jobs. LEROY, *supra* note 7, at 2; see Charter Township of Ypsilanti v.

global economic position is directly related to the health of its states and regions,³⁵ just as declining cities negatively impact upon their suburbs.³⁶ The National Governors Association (NGA) recently pointed out that "[the nation's] economy as a whole suffers when any single region is in distress."³⁷ It also ignores the impact of the "race to the bottom,"³⁸ as communities, workers, and unions, seek to reduce labor, environmental and social costs,³⁹ forcing wage and benefit concessions when corporations use the threat of flight as a bargaining chip.⁴⁰

B. The Ineffectiveness of Tax Subsidies as a Tool of Economic Growth

Bidding wars have been premised on a faulty assumption — that the introduction of a business to a local economy will generate a substantial amount of new jobs and growth.⁴¹ For example, in Baton Rouge, Louisiana, Exxon Corporation received 27 tax abatements totaling \$14,372,600, while the company expected to create just one new permanent job.⁴² This incident also illustrates that the

General Motors Corp., No. 92-43075-CK, 1993 WL 132385 at *10 (Mich. Cir. Feb. 9, 1993).

35. NATIONAL GOVERNOR'S ASSOCIATION, MAKING AMERICA WORK (1987) [hereinafter NGA REPORT (1987)].

36. Drier, *supra* note 15, at 1359-1361.

37. NGA REPORT (1987), *supra* note 35, at 27.

38. Richard J. Barnett, *Lords of the Global Economy*, THE NATION, Dec. 19, 1994, at 754, 758; *see also*, CORPORATION FOR ENTERPRISE DEVELOPMENT, MAKING THE GRADE: THE DEVELOPMENT REPORT CARD FOR THE STATES (1992); Publius, *To Form a More Perfect Union*, NEW LEADER, July 1987, at 11-12 (calling for international regulations on global corporations to restrain this new "aristocracy" which feels no attachment to any country, pitting nation against nation, worker against worker, debasing labor, refusing to pay fair share of taxes, and conducting its affairs without respect for any land).

39. *See* Fergus M. Bordevich, *The Lessons of Bhopal: The Lure of Foreign Capital Is Stronger than Environmental Worries*, THE ATLANTIC, Mar. 1987, at 259-303 (discussing how corporations ignore social costs in their quest for new markets and the disaster in Bhopal, India, where an accident at a Union Carbide Corporation plant killed or maimed hundreds of thousands of people).

40. Ansley, *supra* note 19, at 1757-1773.

41. This conclusion is not surprising or novel, and has been recognized by both the Council on State Governments and the National Governors Association. JAY KAYNE, INVESTING IN AMERICA'S ECONOMIC FUTURE, NATIONAL GOVERNORS ASSOCIATION 10 (1992); *See also*, Aprill, *supra* note 13, at 1347-1348 (discussing failure of § 936 credits to create jobs in Puerto Rico).

42. GREG LEROY, TERRIBLE 10 'CANDY STORE' DEALS OF 1994 NAMED: CORPORATE WELFARE AT ITS WORST (1995). For example, in Iowa, a Canadian mini-mill steel company, Ipsco, won a \$73 million package for a 300-job mill, at a cost of \$243,000 per job. *See* LEROY *supra* note 7, at 1. In Detroit, Michigan, Blue Water Fiber, a paper recycling mill received \$76 million in tax-exempt bond financing from

reasons that subsidies fail to promote job creation is that few tax programs have mechanisms of accountability.⁴³ In addition, tax subsidies are ineffective because the loss of public sector jobs caused by tax reductions can offset many, if not all, benefits to the economy obtained from the tax reductions.⁴⁴ Moreover, there is little evidence that tax subsidies actually influence corporate decision-making about site location. The Federal Reserve Bank of Atlanta noted: "Investment is a long term profit-oriented decision, and virtually no amount of special incentives . . . is likely to attract and keep a firm in an area in which the long-term profitability criteria are not present."⁴⁵ Such profitability criteria include access to high powered universities, transportation, quality of public education, general business climate, infrastructure quality, energy supply, political and fiscal stability, and personal preferences of corporate decision makers.⁴⁶

In addition to the fact that tax programs neither have a significant influence on corporate location decisions nor necessarily lead to significant job growth, the eroding tax base caused by these tax subsidy arrangements, as well as the "suburbanization" of most

Michigan's Strategic Fund, with an additional \$5 million grant from the Michigan Department of Natural Resources' Sold Waste Alternatives Program. This money will net workers in Michigan only 34 permanent jobs.

43. One infamous example of an easily abused program was the federal Targeted Job Tax Credit Program. Established in 1978 to entice businesses into hiring disadvantaged workers, it offered employers federal tax credits based upon wages paid each new employee; yet, the program rarely came through on the anticipated benefits. In 1993 the Office of Inspector General in the Department of Labor, for example, concluded that the Alabama program had not influenced employers' hiring practices but instead had subsidized high turnover rates. "Little return on the dollar was realized in that the cost of the program in Alabama exceeds the benefits it generated by an estimated \$7.7 million, or a return of about \$.10 for each dollar in tax credits employers may have claimed." Memorandum from Carolyn M. Goldberg to Gerald Peterson, Ass't Inspector Gen. for Audit, *Targeted Jobs Tax Credit Program: State of Alabama, Oct. 1, 1990-Sept. 30, 1991*, Aug. 20, 1993, at 2 (Report No. 04-93-027-03-320) (on file with the author). The primary reason was that the types of jobs for which the tax credits were claimed — low-skilled, low-waged, high-turnover, and part time jobs mostly in the retail and service industries — did not require recruitment incentives. Thus, in one instance alone, in the first half of 1994, the Pony Express Courier Corporation had a turnover rate of 69%. While this example may be extreme, studies confirm that this type of problem is fairly typical and is found most often in state and local tax abatement programs.

44. CED REPORT *supra* note 1, at 41-42.

45. TOLCHIN, *supra* note 11, at 65; *see also*, KAYNE *supra* note 41; CED REPORT, *supra* note 1, at 43-44.

46. Richard I. Kirkland, *Why America Creates the Most Jobs*, FORTUNE, Dec. 21, 1987, at 177-78 (reviewing DAVID BIRCH, *JOB CREATION IN AMERICA: HOW OUR SMALLEST COMPANIES PUT THE MOST PEOPLE TO WORK* (1989)); KAYNE, *supra* note 41, at 11, 14.

federal policies affecting housing, transportation and defense,⁴⁷ deprives those same areas of the very capital they need to attract industry.⁴⁸ The sheer magnitude of the dollars lost represents a shift in resources from the public to the private sector which translates into a loss in the provision and quality of public services, such as education, postal services, police, road construction, and various other municipal services. For example, exemptions in Louisiana cost the state's school system \$941 million in the 1980s. The Corporation for Enterprise Development observed:

Tax give-aways take away potential funds for states to invest in education, quality universities . . . and infrastructure [roads, bridges]. The poor education and skills levels of the workforce was measured by a 47th ranking for high school graduates. Louisiana was tied with New York, Mississippi and Texas for the lowest percentage of adult literacy in the nation. [Louisiana ranked] 44th for teacher salaries for beginning teachers and 47th for average teacher pay.

As another example, in Jersey City, residents watched as companies built glittering office buildings, luxury housing and shopping meccas on their waterfront, financed primarily through large tax abatements.⁴⁹ One of these businesses received a \$10 million ex-

47. See Drier, *supra* note 15, at 1355 (defining "suburbanization" as the phenomenon of flight from urban areas to suburban areas as promoted by various federal programs and policies).

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LOUISIANA REPORT, *supra* note 26, at 31 (citing J. McKinney and B. Lamb, *State Graded Worst in Nation in Business, Economy Report*, BATON ROUGE MORNING ADVOCATE, April 24, 1991, at 1 (citing THE 1991 DEVELOPMENT REPORT CARD FOR THE STATES, CFED, (1991))).

In addition, many of these businesses are also among the worst polluters. The Louisiana Coalition for Tax Justice documented, for example, that the state's 50 largest companies, which take almost 90% of the state's tax exemptions, have the worst environmental records. *Id.* at 13, 22.

49. The President of the Jersey City Merchants Association observed: "We gave the city away in tax abatements. If this was supposed to be the Gold Coast, why did

tended revolving credit line from community development block money and \$40 million from the Housing and Urban Development Action Grant, but paid only \$4.3 million a year in taxes.⁵⁰ More importantly, despite the tax incentives and job growth in the area, local residents remain a minority at most waterfront companies. The local workforce remains ill-trained to recover from the loss in manufacturing jobs, and the developments have had no appreciable impact on surrounding neighborhoods.⁵¹

II. Re-Institutionalizing Accountability

A. The Concentration of Power in Corporations

Revitalization of our cities and local economies must proceed from a recognition that corporate power is increasingly concentrated. Ownership of corporations rests in few hands; more than a quarter of the world's economic activity results from the 200 largest corporations.⁵² Corporations are more mobile as a result of international trade agreements such as General Agreement on Tariffs and Trade⁵³ and the North American Free Trade Agreement;⁵⁴ and there has been a marked loss in union activity in the private sector.⁵⁵ Corporations are less accountable to workers and communities, which results in fewer legal tools for workers to use to protect their interests.⁵⁶

The jurisprudential doctrine of corporate personhood, which provides that corporations are "persons" under the law, and may enjoy some of the benefits available under the Bill of Rights has further concentrated power in corporations.⁵⁷ This doctrine has

we give it away like it was sawdust?" Judy Ternes, *What Gold Coast*, CRAIN'S N.Y. BUSINESS, Feb. 8-14, 1993, at 17.

50. *Id.*

51. *Id.*

52. Barnet, *supra* note 38, at 754.

53. General Agreement on Tariffs and Trade, Opened for Signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

54. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Canada-Mexico, 32 I.L.M. 605 [hereinafter NAFTA].

55. For example, from 1980-1990, within the 6 percent overall decline in U.S. manufacturing jobs, unionized jobs dropped by one-third. MIDWEST CONSORTIUM FOR ECONOMIC DEVELOPMENT ALTERNATIVES, METRO FUTURES: A HIGH WAGE, LOW WASTE, DEMOCRATIC DEVELOPMENT STRATEGY FOR AMERICA'S CITIES AND INNER SUBURBS 16 (Mar. 1995).

56. Barnet, *supra* note 38, at 754; *see generally*, RICHARD BARNET, GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER (1994).

57. Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 582-83 (1990) (ascribing the emergence of this theory and its consequent protections to the changing nature of the regulatory state which

defined the terrain upon which taxpayers may challenge subsidy arrangements, and has augmented corporate power to the extent that corporations may invoke the protection of a number of constitutional rights when faced with unattractive economic burdens.

Fortified by the Supreme Court's decision in *Santa Clara County v. Southern Pacific Railroad Co.*,⁵⁸ corporations have successfully used constitutional protections applied to the states through the Fourteenth Amendment,⁵⁹ the Fifth Amendment double jeopardy clause to avoid retrial in a criminal contempt proceeding which resulted from an antitrust action,⁶⁰ the First Amendment to overturn state restrictions on corporate spending for political referendums,⁶¹ and the Fourth Amendment to prevent federal inspection under the Occupational Safety and Health Act.⁶² In sum, corporations have been able to challenge progressive era regulation and maneuver "to protect more traditional forms of property."⁶³

Though the Supreme Court abandoned the substantive due process doctrine in *West Coast Hotel Co. v. Parrish*,⁶⁴ industry continues to invoke the Bill of Rights as a political and economic

has become increasingly federal and intrusive in nature as property has become more intangible (like speech or federal subsidies), and as regulation has become designed to serve social, rather than economic, goals).

58. 118 U.S. 394 (1886) (granting corporations the protections afforded under the equal protection clause of the fourteenth amendment). In this case, the company used the Fourteenth Amendment to prevent California from taxing the property of a railroad differently from that of individuals. *Id.*

59. See, e.g., *Noble v. Union River Logging R.R. Co.*, 147 U.S. 165 (1893) (fifth amendment due process rights); *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Ca.*, 475 U.S. 1 (1986) (first amendment).

60. See, e.g., *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977).

61. See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

62. See, e.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

63. Mayer, *supra* note 57, at 589 (citing BENJAMIN TWISS, *LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* (1942)).

64. 300 U.S. 379 (1937) (upholding Washington statute that set a minimum wage for women). The substantive due process doctrine describes the jurisprudence which evolved from use of the due process clause of the fifth and fourteenth amendments as a means to review and invalidate the substantive laws that regulated various areas of economic and non-economic life. See generally, Russell N. Gallaway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625 (1992). From 1897 through 1937, this doctrine was used to invalidate laws which restricted the "liberty" of the right to contract and operate in the free market. For example, a law limiting the number of hours a bakery worker could work was deemed to violate these liberties. *Lochner v. New York*, 198 U.S. 45 (1905). During the depression, a series of cases chipped away at this doctrine, with the Supreme Court eventually determining that it would no longer reevaluate the legislative determinations. *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

weapon.⁶⁵ In one notable example, when Anchor Hocking Corporation sought to relocate after obtaining \$2,500,000 in industrial development loans (with a 1.126% interest rate), the state of West Virginia sued Anchor Hocking Corporation.⁶⁶ The company responded by charging that state officials violated its due process rights,⁶⁷ its right to equal protection,⁶⁸ its Fifth and Fourteenth Amendment rights to be protected from an unlawful taking of its property without just compensation,⁶⁹ and its right to not be subjected to cruel and unusual punishment in violation of the Eighth

65. See Mayer, *supra* note 57, at 605. With the advent of what Mayer has called a "social responsibility school," which challenged the unfettered growth of corporations, the corporation is now increasingly viewed as "a coalition of competing interests and claims, all bargaining with one another . . . Instead of pursuing the optimal, textbook goal, of increasing share value, the modern firm often sets different goals, including sales volumes, management returns, market share, stability or growth." *Id.* at 641-43. This school would include environmental, consumer and public interest movements. See NEIL H. JACOBY, *CORPORATE POWER AND SOCIAL RESPONSIBILITY* (1973); JAMES W. MCKIE, *SOCIAL RESPONSIBILITY AND THE BUSINESS PREDICAMENT* (1974); CHRISTOPHER D. STONE, *WHERE THE LAW ENDS* (1975). Nonetheless, certain rights of the corporation remain, and may expand with increased regulation. Mayer, *supra* note 58, at 605-06.

66. *Anchor Hocking Corp. v. Moore, et. al.*, No. C2-88-0738, Ex. A at 2 (S.D. Ohio, filed July 14, 1988).

67. The complaint alleged:

Defendants' conspiracy and activities to 'get something on' Anchor Hocking, reorganization and production of its glassware; and Defendants' filing and prosecution of the groundless action, all conducted and brought under color of state law in bad faith and with the intent to injure, harass, hinder and punish Anchor Hocking in retaliation for its decision to close its Clarksburg, West Virginia plant and to relocate the Clarksburg equipment in interstate commerce to Ohio, constitute arbitrary and capricious conduct, an abuse of discretion and authority by Defendants as elected or appointed state officials, an abuse and misuse of the state's judicial system and a bad faith and selective enforcement of state laws and administrative procedures without any reasonable expectancy for success.

Plaintiff's Complaint, § 27 *Anchor Hocking* (C2-88-0738).

68. The plaintiff further alleged:

The above conspiracy and activities of Defendants in singling out Anchor Hocking, on the basis of its Ohio citizenship and in retaliation for the exercise of its constitutional right to close its Clarksburg plant, and bringing the state court action against it when they have not commenced such actions against others similarly situated; in commencing the state court Action without proper legal standing to do so; and in denying Anchor Hocking its protections provided by West Virginia statutes and laws with respect to the state court injunction and proceeding constitute a continuing deprivation of Anchor Hocking's rights under the Equal Protection Clause of the Fifth and Fourteenth Amendment.

Id. § 29.

69. *Id.* § 31.

Amendment.⁷⁰ Most recently, GM successfully asserted a claim that a county tax assessor and city officials were trying to punish the company for prior tax appeals of assessments on their property in violation of the 1871 Civil Rights Act.⁷¹ GM, in other words, convinced the court to apply the statute, designed to protect individuals, to corporations.

The corporate personhood doctrine co-opts human aspirations, as embodied in the Bill of Rights, and applies them to corporations. Corporate responsibility becomes rooted not in a social compact, but in a relationship that elevates their quest for money and power over the needs of the body politic.⁷² The dividing line between individual and corporate rights has become so blurred that corporations assume rights which were originally intended to be invoked against them.⁷³ By permitting GM to file an action alleging deprivation of its federal constitutional rights, the court allowed GM, with its vastly greater economic power,⁷⁴ to obtain for

70. *Id.* § 33. The complaint alleged "[t]heir filing of an Action alleging \$614 million in damages and seeking an injunction prohibiting the relocation of Anchor's Clarksburg equipment to Ohio constitutes an excessive fine or unusual punishment under color of state law." *Id.*

71. *General Motors Corp. v. City of Linden*, 653 A.2d 568 (N.J. Super. Ct. App. Div. 1995); Joseph Sullivan, *Court Says Taxpayers Can Sue Over High Property Assessments*, N. Y. TIMES, Feb. 4, 1995, at 5. The court reversed the trial court decision dismissing the plaintiff's civil rights claim, and remanded the case to the Law Division for further proceedings.

72. In fact, Justice Hugo Black observed in 1938 that in cases in which the Court applied the Fourteenth Amendment during the first 50 years after *Santa Clara* "less than one half of 1 percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations." *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting).

73. For example, the New Jersey Court in the GM case reasoned that:

[I]f we were to hold that a [civil rights action] is not maintainable in the law division solely because an alleged deprivation of constitutional rights relates to a tax assessment, it would mean that a tax assessor could engage in a practice of racially discriminatory tax assessments without being subject to personal liability under [the Civil Rights Act.] Since prevention of racial discrimination by state officials was the essential reason for the enactment of [the Civil Rights Act], we are unwilling to read a limitation into the scope of its operation which would prevent a state court from granting complete relief, including compensation and punitive damages, for such a violation of constitutional rights.

General Motors, 653 A.2d at 574.

74. A number of studies have documented the obstacles which make it difficult for the economically disadvantaged to pursue civil rights claims in the courts. *E.g.*, Bernadette Chachere, *Welfare and Poverty as Roadblocks to the Civil Rights Goals of the 1980's*, 37 RUTGERS L. REV. 789 (1985); Talbot D'Alemberte, *The Role of the Courts in Providing Legal Services: A Proposal to Provide Legal Access for the Poor*, 17 FLA. ST. L. REV. 107 (1989).

itself what most individuals with far more limited resources may not.⁷⁵ The doctrine of corporate personhood entails the fusion of corporate needs and human needs. Such fusion occurs despite the fact that corporations cannot experience race discrimination,⁷⁶ or other similar harms. The result is a legal system which affords fewer remedies to individuals and greater remedies to industry, and which invokes a conception of the public good that is subverted to industry's needs.⁷⁷

The solution to this problem lies in rethinking and reinstitutionalizing a notion of accountability in the law that holds corporations to the promises that they make, and exacts from them a commitment to provide the public with a concrete return on its money. Any action must account for the conflicting interests of the various affected groups.⁷⁸ Absent such an effort, the balance of interests, when framed in the context of what is good for corporations versus what is good for the community, will inevitably weigh in favor of the corporation under the current legal system.

75. The vast difference in resources turns remedies available under the Constitution into powerful economic weapons. In addition, this development coincides with the increasing difficulty of protected groups to invoke the equal protection clause as a protective measure against discrimination. See David Kairys, *Race Trilogy*, 67 TEMPLE L. REV. 1 (1994).

76. Of course, minority-owned firms may experience discrimination, but these firms do not constitute the most wealthy or powerful.

77. As Professor Carl Mayer observes, this doctrine creates:

a zero sum game that diminishes the rights and powers of real individuals. Fourth amendment rights applied to the corporation diminish the individual's right to live in an unpolluted world or to enjoy privacy. The corporate exercise of the first amendment rights frustrates the individual's right to participate equally in democratic elections, to pay reasonable utility rates, and to live in a toxin-free environment. Mayer, *supra* note 57, at 658.

Mayer also states:

The Bill of Rights, applied to the individual, is an important safeguard against the tyranny of the majority. These same protections, however, when given to the corporation, can lead to a tyranny of the minority in which the corporate form is manipulated to magnify managerial power.

Id. at 657.

78. This has long been recognized. In *Illinois Central R.R. Co. v. Illinois*, for example, the Supreme Court held that a contract for grant of lands to a railroad company was unenforceable. 146 U.S. 387 (1892). McCurdy notes that former Supreme Court Justice Field reasoned that "[t]o allow such a grant was to concede that the public and private sectors had common interests Field believed that public and private institutions had diametrically opposed reasons for existence; legislation that vested public property in private corporations would invariably lead to situations in which the people would be subject to private greed." McCurdy, *supra* note 23, at 259.

B. The Legal Terrain

States and municipalities use a variety of different methods to attempt to have accountability in the tax incentive system.⁷⁹ It has already been shown that such mechanisms often fail to achieve such accountability to any great degree.⁸⁰ The lack of effective enforcement mechanisms, reporting requirements, and accountability has left taxpayers and local governments with the burden of getting a return on these "candy store" agreements. Yet these actors have had few legal remedies at their disposal. They have looked to common law, state and federal legislation, and loan agreements, but with little success.

1. Challenges to Tax Abatement Decisions and Public Development Corporations

Communities and taxpayers opposing specific abatement decisions initially relied upon their state constitutional provisions prohibiting taxation unless the money was spent for a "public use."⁸¹ Some state judiciaries adopted the public use requirement partly as an effort to constrain subsidy abuse by the railroad corporations.⁸² These courts tended to invalidate legislation where the primary beneficiary would be industry.⁸³ The argument relied

79. A survey recently undertaken by the National Association of State Development Agencies revealed that of twenty eight states responding to the question — "how does the state ensure that the recipient company meets the commitments on which incentives are offered?" — eleven relied upon development agreements, ten relied upon loan documentation, nine relied upon reporting requirements, six relied upon penalties, four relied upon state agency review, three relied upon clawbacks, and three relied upon tax credit criteria. They did not indicate the extent to which any of these methods had been employed. KAYNE, *supra* note 41, at 27.

80. See *supra* notes 8, 43 & 57-71 and accompanying text.

81. See, e.g., N.C. CONST. art. V, § 2(1).

82. Taylor, *supra* note 19, at 673 (citing ROBERT S. AMDURSKY AND CLAYTON P. GILLETTE, *MUNICIPAL DEBT FINANCING LAW* 147 (1992)). Taylor explains that eventually the railroad industry became disinterested in tax subsidies because of the establishment of powerful investment banking firms, and the availability of foreign investment capital. This does not explain, however, why the existence of such entities now has not acted as a deterrent.

83. For example, in 1872, one state court found unconstitutional special legislation authorizing a town to lend money to a private firm as encouragement to move from a neighboring town. *Allen v. Inhabitants of Jay*, 60 Me. 124 (1872).

In another case, the North Carolina Supreme Court invalidated as unconstitutional the Industrial Development Financing Act, which authorized expenditures of funds because the Authority's primary function was to acquire sites for private purposes. *Mitchell v. North Carolina Industrial Dev. Financing Authority*, 159 S.E.2d 745 (1968); see also *Stanley v. Dep't of Conservation and Development*, 284 N.C. 15, 199 S.E.2d 641 (1973) (striking down N.C. Pollution Abatement and Industrial Facilities Financing Act); *Feldman & Company v. City Council of Charleston*, 23 S.C. 57 (1884).

upon in these cases is that by being exempt from certain taxes, the city has "spent" revenue that it would normally have received. Thus, it falls under the "public use" requirements.

These court decisions rest upon the principle that tax subsidy arrangements implicate important principles upon which our democracy rests. As one Supreme Court justice noted, the power to tax is necessary for the continued existence of the government. "To hold, then, that any one of the annual legislatures can, by contract, deprive the State forever of the power of taxation, is to hold that they can destroy the government which they are appointed to serve" ⁸⁴

The modern trend, however, is to broadly construe the public use exception.⁸⁵ One commentator has suggested that local governments, faced with the prospect of declining federal aid for local needs in the 1980s, began using more sophisticated financing mechanisms, such as the local development authorities, to evade those restraints established during the first major wave of subsidy financing schemes.⁸⁶ Additionally, two other legal tools that have insulated legislative determinations for tax abatements from critical scrutiny by the courts include the separation of powers doctrine, and the limited level of review utilized in the evaluation of the constitutionality of economic legislation (ie: the rational basis test).⁸⁷

Valid "public uses" now include indirect economic benefits, such as job creation and the "ripple effect" of introducing new businesses, or retaining old ones, in a state.⁸⁸ Thus, legislation supporting the financing of hospital construction, hydroelectric plants, memorials, industrial development, air and water pollution controls, loans for student education, and the development of residen-

(invalidating legislation authorizing the issuance of fire loan bonds); McCurdy, *supra* note 23 (discussing judiciary's assessment of railroads as "exclusively private" and not a legitimate recipient of public subsidies).

84. *Home of the Friendless v. Rousse*, 75 U.S. 430, 443 (1869) (Miller, J., dissenting). Judge Miller went on to state that "[t]he result of such a principle, under the growing tendency to special and partial legislation, would be, to exempt the rich from taxation, and cast all the burdens of the support of government, and the payment of its debts, on those who are too poor or too honest to purchase such immunity." *Id.* at 444.

85. See generally, Arthur L. Coleman, *A Reexamination of the Public Purpose Doctrine: Nichols v. South Carolina Research Auth.*, 39 S. C. L. REV. 565, 570-71 (1988).

86. Taylor, *supra* note 19, at 675.

87. See *Common Cause v. State*, 455 A.2d 1 (Me. 1983). A more extensive discussion of the reasons for the shift to broadly construe the public use exception is beyond the scope of this article.

88. *Id.* at 24; *Wilson v. Conn. Product Dev. Corp.*, 355 A.2d 72, 76 (Conn. 1974).

tial housing for low income families, among other projects, have all been upheld as valid public uses.⁸⁹

One area in which the notion of "public use" has received substantial recent attention is in the area of sports franchise relocation. Owners of sports teams, relying on public loyalty, have used the threat of leaving a hometown, to gain tax abatements, while reaping enormous personal benefits.⁹⁰ These facilities cost taxpayers, in the 1970s and 1980s, an estimated \$850 million, while tending to cause a shift from economic activity in the manufacturing sector to activity in the service sector, which is lower paying.⁹¹

Most taxpayer challenges to such expenditures based on the public use exception have failed because courts are unwilling to second guess legislative determinations in this area. In *Common Cause v. State*,⁹² taxpayers sued the state of Maine, the city of Portland, and a shipping company, after the defendants entered into a tax subsidy agreement that required the state and city to create a facility for ship repairs to be operated by the shipping company.⁹³ Although government officials justified the agreement as improving the harbor, attracting marine commerce and developing the economic potential of the waterfront, plaintiffs pointed out that the shipyard would not be available for use by members of the public, nor would its development and operation directly benefit the public.⁹⁴ Thus, the plaintiffs argued that a general benefit to the economy should

89. *Common Cause*, 455 A.2d at 1. See Coleman, *supra* note 85.

90. For a discussion about why taxpayer efforts to challenge agreements to use public monies to finance sports facilities have been unsuccessful see Pamela Edwards, Note, *How Much Does that \$8.00 Yankee Ticket Really Cost? An Analysis of Local Governments' Expenditure of Public Funds to Maintain, Improve or Acquire an Athletic Stadium For The Use of Professional Sports Teams*, 18 FORDHAM URB. L.J. 695 (1991). Government officials have relied upon below market rent in stadiums, tax exemptions, and tax rebates, in an attempt to keep franchises in their cities. *Id.* at 700 (citing Stephen F. Ross, *Monopoly Sports Leagues*, 73 MINN. L. REV. 643, 650 n. 28 (1989)).

91. Edwards, *supra* note 90, at 699 (citing Robert A. Baade, *Is There an Economic Rationale for Subsidizing Sports Stadiums*, 13 HEARTLAND INST. POL'Y STUDY 2 (1987)).

92. 455 A.2d 1 (Me. 1983).

93. Defendants sought to prevent taxpayers from having standing to assert the claims. The court rejected their arguments, reasoning: "[t]he plaintiffs, as taxpayers, assert their own direct interest in the enforcement of a provision of the Maine constitution which, as construed by this Court, is aimed precisely at protecting taxpayers from having their tax dollars used for private purposes." *Id.* at 10.

94. *Id.* at 19. "[t]he tripartite agreement calls for the state and city to subsidize a private profit-making project where the resulting industrial activity will benefit members of the public only indirectly and where there is no provision for direct recovery of the investment from the industry subsidized." *Id.*

be insufficient to validate a subsidy to a private enterprise.⁹⁵ The project could not reasonably be regarded as a public use without a direct benefit to the public, as in the form of slum clearance, or in the creation of something that the public may use, such as rail transportation.

Nevertheless, the court, employing the rational basis test, declined to second guess the wisdom or efficacy of any abatement decision. The court held that irrationality is not present merely because the business "has not agreed to create any certain number of jobs, or to service all ships in need of repair, or to subject its operations in Portland to more state control than the agreement provides."⁹⁶ There is a presumption of legality unless it is "clearly demonstrated" that the tax subsidies are not for a public purpose.⁹⁷

With respect to whether the arrangement actually served a "public purpose," the court dispensed as "beside the mark," expert testimony that state business incentives do not influence income or employment within the state.⁹⁸ "It does not tend to prove," the court reasoned, "that the *purpose* of the arrangements is not a public one."⁹⁹ The court held that because "economic welfare is one of the main concerns of the city, state and federal government," the test should ultimately turn on whether the costs to the public outweigh the benefit.¹⁰⁰ The court further held that whether a specific program's cost outweighs the public benefits should be decided by the legislature first, and may be invalidated by the courts afterwards only when it has been demonstrated that there existed no rational basis for the legislature's conclusions.¹⁰¹

95. *Id.* at 21.

96. *Id.* at 26. However, the state Supreme Court was unwilling to give as much deference to the legislature as the trial court would have liked. The court declined to adopt the theory of the trial court that the legislature may spend public money "as it sees fit," so long as the electorate has approved, and ruled that the legislative determination must be subject to analysis under the public purpose doctrine by the judiciary. *Id.* at 16. See also *City of Pipestone v. Madsen*, 178 N.W. 2d 594 (Minn. 1970) (upholding Municipal Development Act which entailed the sale of revenue bonds to finance purchase of land and erection of meat packing plant which would be leased back to corporation).

97. *Common Cause*, 455 A.2d at 18. The court rejected plaintiffs contention that the agreement was a "mere fiction" to benefit the company, because the arrangements gave a "certain measure of assurance about the time, place, and manner of installation and operation of the shipyard facilities." There existed "bargained-for exchanges" in the form of the company's legal obligations to improve the harbor. *Id.* at 19.

98. *Id.* at 17 n.20.

99. *Id.*

100. *Id.* at 24 (citing *Faulconer v. City of Danville*, 232 S.W.2d 80, 83 (1950)).

101. *Common Cause*, 455 A.2d at 25 n.21.

This case is not alone. Several other courts have been unwilling to second guess the decisions of industrial development authorities that operate as alter egos of city governments to help combat job crises, or other development problems, in a state.¹⁰² While it is difficult to object to the assertion of such public benefits as job creation and economic development as valid forms of public use, the expansion of the doctrine has resulted in the preference of the interests of major industry over that of the public time and again.¹⁰³ The free market rationale has rarely been employed by the courts to strike down industry or business-specific preferential legislation.¹⁰⁴ In this context, the interest of big business trumps that of even small business and home owners.

102. In *Wilson v. Conn. Product Dev. Corp.*, for example, taxpayers challenged legislation creating the Connecticut Product Development Corporation, pursuant to a state constitutional provision stating: "no man or set of men are entitled to exclusive public emoluments or privileges from the community." 355 A.2d 72, 75 (Conn. 1974). However, the court found that the constitutional prohibition had not been violated because the project did not seek to benefit specific individuals or industries but rather "types of projects, technologies, inventions, and products sponsored by persons whose assistance this corporation determines would most likely redound to the public good." *Id.* at 76. See also *Pipestone v. Madsen*, 178 N.W.2d 594, 596 (Minn. 1970) (upholding constitutionality of Municipal Industrial Development Act; holding that project which involved sale of \$3 million in revenue bonds to finance purchase of land located near city and erection of meat packing plant, designed to create 100 jobs, a payroll of \$710,000, and \$64,000 in taxes, which would then be leased back to a corporation was reasonable to encourage and develop industry to prevent emergence of blighted and marginal lands and areas of chronic unemployment).

103. See *supra* part I.

104. Free market rationale dictates that economic regulation may lead to misallocation of resources, and thus, significant tax abatements would lead to greater misallocations. Tax abatements, because they single out one business over another, frustrate the precept that the market, if left alone, will result in the most efficient allocation of resources. See Taylor, *supra* note 19, at 678-79.

At least one case has utilized free market rationale to strike down preferential legislation. In *Byrd v. County of Florence*, the court held, a county ordinance authorizing issuance of general obligation bonds for the acquisition and development of an industrial park to be unconstitutional. 315 S.E.2d 804 (S.C. 1984), *overruled in part by*, *Nichols v. South Carolina Research Authority*, 351 S.E.2d 155 (S.C. 1986). The court reasoned that the primary beneficiaries would be private businesses, and deemed the benefit to the public too speculative because the industries to be located in the park had not yet been identified.

The court emphasized its view that general obligation bonds, in which taxpayers can lose, may not be issued for the primary benefit of the private parties, citing a case in which a court, also striking down a project as not sufficiently in the public's interest, reasoned: "The Act undertakes to permit the city to effectually promote business undertakings to compete in free enterprise with other businesses which do not have the advantage which the Act would give." *Byrd*, 315 S.E.2d at 806.

Several years later, the same court revisited its decision, and overruled *Byrd* to the extent that the decision outlawed all state funded industrial development. The court, however, upheld the test articulated in *Byrd* which requires the court to inquire into

The case *Poletown Neighborhood Council v. City of Detroit*¹⁰⁵ provides a dramatic example of how industry has turned the "public use" notion upon its head.¹⁰⁶ In *Poletown*, a Michigan court upheld Detroit's use of its eminent domain authority¹⁰⁷ to condemn

the speculative nature of industrial development projects and weigh the public against the private benefits of such projects. *Nichols v. South Carolina Research Authority*, 351 S.E.2d 155 (S.C. 1986) (upholding constitutionality of legislation establishing the South Carolina Research Authority for the purpose of attracting high technology industry to the state).

See Coleman, *supra* note 85, at 572-77, for a discussion about how South Carolina courts have treated legislation implicating general obligation bonds as opposed to general revenue bonds; see also *Anderson v. Baehr*, 217 S.E.2d 43 (S.C. 1975) (holding no public purpose involved where city proposed to lease land to developer and provide necessary capital for building through issuance of revenue bonds, even though the taxing power of the city was not involved).

105. 304 N.W. 2d 455, 457 (Mich. 1981).

106. This case arose because the city decided to use its eminent domain power, which also contains a "public purpose" requirement. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 63 (1986). Like the public use requirement in the taxing powers, the public use requirement in eminent domain law has also been broadly construed. See *Rindge Co. v. County of Los Angeles*, 262 U.S. 707, 700-07 (1923); see also *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) (upholding state statute under the fifth amendment, allowing Hawaii Housing Authority to take title to real property from lessors and sell it to lessees inhabiting the land at the time after receiving compensation); *Puerto Rico v. Eastern Sugar Assoc.*, 156 F.2d 316 (1st Cir.), *cert. denied*, 329 U.S. 772 (1946) (holding that agrarian reform law allowing condemnation of large estates to transfer land to small farmers constitutes public use); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, (Cal. 1982), *overruled by*, 174 Cal. App.3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied* 106 S. Ct 3300 (1986) (disallowing use of eminent domain power to prevent Oakland Raiders from leaving California); but see, Edward P. Lazarus, *The Commerce Clause Limitation on the Power to Condemn a Relocating Building*, 96 YALE L.J. 1343, 1345 (1987); Robert J. Weinberg, *The Use of Eminent Domain to Prevent an Industrial Plant Shutdown: The Next Step in an Expanding Power*, 49 ALB. L. REV. 95 (1984); Merrill, *supra*, at 61.

Courts have been less willing, however, to defer to legislative determinations as to the meaning of "public use" in the context of eminent domain law because the stakes for private property owners are greater. As one judge observed in the *Poletown* case, "if a legislative declaration on the question of public use were conclusive, citizens could be subjected to the most outrageous confiscation of private property for the benefit of other private interest without redress." 304 N.W.2d at 460-61 (Fitzgerald, J. dissenting).

In at least one case, *Allen v. Inhabitants of Jay*, a court applied the criteria of eminent domain, although eminent domain was not involved in the case, to rule as invalid special legislation authorizing a town to lend money to a private firm to relocate there. 60 Me. 124 (1872). The court ruled that unwilling taxpayers did not receive "just compensation" for the taxes extracted from them. *Id.*

107. See MICH. COMP. LAWS, ANN. § 125.1601-36 (West 1986 & Supp. 1989) ("There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local industrial and commercial enterprises, including employee-owned corporations, to strengthen and revitalize the economy of this state and its

and remove a city neighborhood, displacing thousands of people from their homes and businesses, so that GM could build a new assembly plant. The court found "clear and significant" public benefits, including alleviation of severe economic conditions, revitalization of local industries, and general economic health.¹⁰⁸ The cost to the city was \$200 million and two twelve year tax abatements. The cost to General Motors was just \$8 million.¹⁰⁹

The majority opinion elicited several strongly worded dissents. In this "extraordinary case,"¹¹⁰ Judge Ryan reviewed the economic context in which the decision to locate the facility was made. GM determined that it would terminate its Cadillac and Fisher Body manufacturing operations at old facilities in Detroit and build a new plant to "recapture their competitive edge."¹¹¹ The judge observed that "the fundamental consideration governing the location of the new facility was the corporation's enlightened self-interest as a private, profit-making enterprise."¹¹² He noted the potential loss to Detroit of over 6,000 jobs, as well as loss of millions of dollars in tax revenues.¹¹³

Behind the frenzy of official activity to identify an adequate site for a new facility for GM was the overriding influence of GM itself.¹¹⁴ GM, the judge went on to state, "conceived the project, determined the cost, allocated the financial burdens, selected the site, established the mode of financing, imposed specific deadlines for clearance of the property and taking title, and even demanded 12 years of tax concessions."¹¹⁵ It was not the private property of GM, however, that worried him. Rather, it was the cost of the deal to the community.¹¹⁶ His indictment is powerful:

Faced with the unacceptable prospect of losing two automotive plants and the jobs that go with them, the city chose to march in fast lock-step with General Motors to carve a "green field" out of an urban setting which ultimately required sweeping away a

municipalities . . . Therefore, the powers granted in this act constitute the performance of essential public purposes and functions . . . "). *Id.* § 125.1602.

108. *Poletown*, 304 N.W.2d at 459.

109. *Id.* at 469.

110. *Id.* at 464.

111. *Id.* at 466.

112. *Id.*

113. *Poletown*, 304 N.W.2d at 467 "[I]t was to a city with its economic back to the wall that General Motors presented its highly detailed 'proposal.' ").

114. *Id.* at 468.

115. *Id.* at 470.

116. *Id.* at 464 (Ryan, J., dissenting). He went on to observe that the majority opinion "seriously jeopardize[s] the security of all private property ownership." *Id.* at 465.

tightly-knit residential enclave of first and second generation Americans, for many of whom their home was their single most valuable and cherished asset and their stable ethnic neighborhood the unchanging symbol of the security and quality of their lives.¹¹⁷

He observed that the benefit the public "gained" is from the use and development of property by GM, a private corporation, "in the manner prescribed by [GM]."¹¹⁸ For Judge Ryan, the fact that belied GM's contention was that GM, itself, would control the property and the employment generated by development of the property.¹¹⁹ This is the problem that is objectionable in many of these tax deals:¹²⁰ the corporation decides what to offer and state and local governments are ineffectual in scrutinizing industry promises. In the interests of separation of powers, courts allow legislatures to make the mistake of assuming that what is good for industry is good for the public; however, industry is not compelled to fulfill its promises to provide benefits to the public because governments are not demanding that specific measures be taken to ensure adequate public use of its largesse.¹²¹ It is not in a corporation's interest to specifically fulfill such promises because their primary interest must be to their shareholders. At best, the corporation fulfills the promises because of a chance coincidence with its profit-making motives.

In a ground breaking decision indicating that the tide may be turning,¹²² the Superior Court of North Carolina recently held that

117. *Id.* at 470.

118. *Poletown*, 304 N.W.2d at 477. Central to his objection was the use of eminent domain power "to comply with the specifications of General Motors . . . would work a fundamental shift in the relative force between private corporate power and individual property rights having the sanction of the state." *Id.* at 478.

119. *Id.* at 479.

120. Thomas Merrill explains this case, and others, as evolving from a "historical focus on ends rather than means" which has led to a "hands off posture" regarding questions of public use. Merrill, *supra* note 106, at 64.

121. At least one court has imposed the requirement that legislation should contain sufficient guidelines, including measurable standards, to ensure that industry promises are not unduly speculative. In *In re Opinion of Justice*, a court issued an advisory opinion finding that a legislative proposal to issue bonds by a state agency to construct a stadium would be allowed only if its operation were governed by "appropriate standards and principles" to ensure that professional athletics would not be fostered to the disadvantage of other activities. 250 N.E.2d 547 (Mass. 1969). The court noted that the enabling act imposed no substantive restrictions upon the type of lease or contract for use by the management. *Id.* at 558; *see also*, *Brandes v. Deerfield Beech*, 186 So.2d 6 (Fla. 1966).

122. In another recent opinion from the Attorney General of Georgia, the state agency determined that a loan forgiveness program operated by the Georgia Housing

a statute authorizing tax subsidies and other economic benefits to corporations is unconstitutional because it allows expenditures of public funds for private purposes.¹²³ The plaintiff in *Maready v. The City of Winston-Salem* sued various municipal entities after the city of Winston-Salem and the Forsyth County approved twenty four separate economic incentive projects in a five year period that involved expenditures or commitments of public funds to private corporations for alleged economic development programs.¹²⁴ The expenditures and commitments totaled in excess of \$13 million.¹²⁵ The plaintiff asserted that the case "involved . . . what is most accurately called 'corporate welfare' " because the statute authorizing the economic incentive projects benefitted "those who are the most affluent in our society."¹²⁶ The court held

and Finance Authority (GHFA), costing taxpayers approximately \$4 million, violated the state constitution's public purpose requirement. Michael J. Bowers, Op. Att'y Gen. No. CS 304898 (April 28, 1995). Typically, the Department of Community Affairs enters into a contract with the GHFA each year for the disbursement of money. Then the GHFA loans the money to a local development authority, which then, in turn, loans the money to a private business. The GHFA, the local development authority, and the private business all enter an agreement wherein the loan will be forgiven if the private business meets certain performance goals. The Department of Industry, Trade and Tourism, a different agency, usually determines the performance goals, which involve job retention and creation.

Critical to the Attorney General's determination was that the public functions of the GHFA did not coincide with the private business functions of the loan recipients under the incentive program. The Attorney General reasoned that the GHFA could not enter into the businesses for which the money was to be used and the benefits from those loans would not "accrue to GHFA in the sense that GHFA's public functions are otherwise performed or aided by jobs retained or created by the business activities of the private businesses receiving the loans." *Id.* To illustrate an earlier point, the Attorney General noted in his opinion that he had not even learned of the loans until he read about them in the paper. *Id.*

123. *Maready v. The City of Winston-Salem*, 95-CVS-623 (Sup. Ct. N.C. Aug. 28, 1995).

124. The stated purpose of the grants included on-the-job training, road construction, land development, utilities connections, site improvements, financing of land purchases, expansion and relocation of utilities on site, parking fees, spousal relocation assistance, moving expenses, parking lot construction, and facility upgraded. *Id.* at 4.

125. The primary source of the funds was property taxes; the increase in the tax base resulting from these incentive expenditures was projected to be \$235 million, with an estimated 5,000 new jobs created. *Id.* at 3.

126. In his briefs, *Maready* relied upon a North Carolina Supreme Court decision, *Mitchell v. North Carolina Industrial Financing Authority*, that had held as unconstitutional a statute creating the North Carolina Industrial Development Financing Authority. 159 S.E.2d 745, 760 (N.C. 1968). That law was created with the ostensible purpose to attract new business and enhance economic development. Yet the state Supreme Court ruled that "the people should so declare . . . [through a constitutional amendment] . . . [if] we are to bait corporations which refuse to become industrial

that the authorizing legislation was in violation of Article V of the North Carolina Constitution,¹²⁷ which provides that "[t]he power of taxation shall be exercised in a just and equitable manner, for public purposes only, and shall never be surrendered, suspended or contracted away."¹²⁸ Without elaboration, the court held that the authorizing legislation was unconstitutionally vague and ambiguous.¹²⁹ As a remedy, the court enjoined the City, County and Winston-Salem from making incentive grants or otherwise committing public funds for economic incentive purposes.¹³⁰

One typical example offered by the plaintiff of an economic incentive project gone awry involved the Pepsi-Cola company and Wake Forest University. Pepsi-Cola expressed an interest in renting a portion of a building owned by Wake Forest and occupied by another company, Eduserve.¹³¹ To facilitate Pepsi-Cola, Forsyth County and the City of Winston-Salem agreed in the summer of 1993 to provide \$1,000,000 in grants to relocate Eduserve to another building owned by Wake Forest and to remodel the new premises to suit Eduserve's needs.¹³² The grant was made with the understanding that Pepsi Cola would create 1,000 new permanent jobs and invest \$20 million in assets.¹³³ Wake Forest submitted an invoice for \$1 million to cover actual expenditures, without substantiating any of those expenses.¹³⁴ By the end of 1993, Wake Forest had received \$350,000 from both Forsyth County and the City of Winston-Salem, but Pepsi-Cola had only 140 jobs in place.¹³⁵ Several months later the city of Winston-Salem admitted that "all indications are that [Pepsi Cola] will never reach the 1,000

citizens of North Carolina unless the state gives them a subsidy." Brief for Plaintiff, *Maready* (95-CVS-623).

127. *Maready*, 95-CVS-623.

128. N.C. CONST. art. V, § 2(1).

129. *Maready*, 95-CVS-623.

130. *Id.* at 10.

131. Brief for Plaintiff, *Maready* (95-CVS-623).

132. In addition, 400 of those jobs had to have been in place by Dec. 31, 1993. *Id.* Winston-Salem and Wake Forest entered into a one page agreement that did not reflect Pepsi Cola's commitment to jobs or investments. *Id.*; Phoebe Zerwick, *Winston Gives Business Big Hand in Luring Companies*, WINSTON-SALEM JOURNAL, Apr. 3, 1994, at A1 ("The alderman and commissioner approved the \$1 million to help wake Forest renovate the old AT& T building on Reynolda Road for Eduserve and help pay for Eduserve's moving costs.").

133. Brief for Plaintiff, *Maready* (95-CVS-623).

134. *Id.*; Zerwick, *supra* note 132, at A1 ("According to records on file in the city economic-development office, Wake Forest University sent a three-line bill this year to collect \$1 million in incentives form the city and the county.").

135. *Id.*

new jobs that they were told they would have within three to five years."¹³⁶

The *Maready* case suggests that some courts may find a tax deal unacceptable, although it is more likely that legislation that contains sufficient guidelines, including measurable standards to ensure that industries' promises are not unduly speculative, would be upheld. It also suggests the need to reform the bureaucratic mechanisms that place so much power in the hands of middle-level government officials who are essentially unaccountable to the public through electoral processes.

2. Common Law Doctrines

A second group of cases derives from challenging business efforts to relocate without fulfilling commitments made in exchange for tax incentives. One theory that has been used is the common law doctrine of promissory estoppel, whereby courts enforce agreements in the absence of express contracts.¹³⁷ The "promisee" traditionally argues that the agreement is enforceable because the language and conduct of a business constituted a promise which the promisee relied upon to its detriment.¹³⁸

The most celebrated case to employ this doctrine is the Willow Run case,¹³⁹ discussed at the beginning of this Article.¹⁴⁰ At the

136. Brief for Plaintiff, *Maready* (95-CVS-623).

137. *Charter Township of Ypsilanti v. General Motors Corp.*, 506 N.W.2d 556 (Mich. Ct. App. 1993).

138. RESTATEMENT (SECOND) CONTRACTS § 90 (1981). Promissory estoppel is defined as "a promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." Proof generally requires demonstrating that: 1) a promise is made; 2) that the promisor should have reasonably expected to induce reliance on the part of the promisee; 3) that the promisee did in fact rely upon the promise; and 4) that enforcement of the promise is necessary to avoid injustice. *Ypsilanti*, 506 N.W.2d at 658; see generally, Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111 (1991) (arguing that reasonable reliance to a detriment upon a promise, like consideration, provides a sufficient indication that the promise was seriously considered for a court to enforce it).

139. See Jim Kise, *Struggle Begins For Autoplant*, YPSILANTI PRESS, May 13, 1992, at A1; Paul Hoversten, 'Real People, Real Blood,' in Mich., USA TODAY, Feb. 24, 1992, at 3A; Stephen Franklin, *GM Tale One of Many Twists, Uncertainties*, CHI. TRIB., Mar. 2, 1992, at C1.

140. Although earlier courts have recognized the possibility of a cause of action based upon this equitable doctrine, the Willow Run case was the first case to meet with some success. See *United Steelworkers v. United States Steel Corp.*, 492 F. Supp. 1, *aff'd in part and rev'd in part*, 631 F.2d 1264 (6th Cir. 1980) (enjoining U.S. Steel from closing the plant pending trial); *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716 (S.D.N.Y. 1986) (dismissing the city's breach of contract and equitable

heart of the lawsuit were the two twelve year tax abatements which totaled, over a 15 year period, close to \$1.3 billion.¹⁴¹ These abatements were authorized pursuant to Michigan's Plant Rehabilitation and Industrial Development Districts Act that allows for the creation of industrial development districts by municipalities.¹⁴²

In a move which attracted enormous national attention, Judge Donald Shelton of the Washtenaw Circuit Court in Michigan granted plaintiffs' motion for an injunction,¹⁴³ holding that the company had made explicit promises to maintain the facilities throughout the duration of the abatement periods.¹⁴⁴ Although Judge Shelton rejected the notion that GM's application form for an abatement pursuant to the statute created a contract, he agreed that GM had breached its agreement. Specifically, Judge Shelton held that it would be perpetuating injustice "if General Motors, having lulled the people of the Ypsilanti area into giving up millions of tax dollars . . . is allowed to simply decide that it will desert 4,500 workers and their families because it thinks it can make these same cars a little cheaper somewhere else."¹⁴⁵

GM appealed this ruling, and the intermediate appellate court reversed Judge Shelton's decision, reasoning that "hyperbole and puffery" in seeking an advantage or a concession does not create a

estoppel claims challenging Otis' decision to close a plant in Yonkers); *City of Norwood v. General Motors Corp.*, No. A-8705920 (Court of Common Pleas, Ohio) (1987) (dismissing complaint challenging General Motor's decision to close its plant in the city of Norwood); *Abbington v. Dayton Malleable, Inc.*, 561 F. Supp. 1290 (S.D. Ohio 1983) (dismissing a union's promissory estoppel complaint challenging a corporation's plans to close a plant); *Local 461 v. Singer Co.*, 540 F. Supp. 442 (D.N.J. 1982) (directing company to pay \$2 million as promised or the value of the concessions made by the workers).

141. In the state of Michigan alone, since the passage of the Michigan tax abatement law in 1974, General Motors has been the recipient of 122 abatements. *Ypsilanti*, No. 92-43075-CK, 1993 WL 132285 at *4 (Mich. Cir. Ct. Feb. 9, 1993), *rev'd*, 506 N.W.2d 556 (1993).

142. MICH. COMP. LAWS § 207.551-571 (1991). Under the act, municipalities may grant tax abatements for industrial rehabilitation and development.

143. *Ypsilanti*, at *13. The plaintiffs also sought relief on theories of breach of contract created by the abatement statute, breach of an implied contract, unjust enrichment, and misrepresentation. Each of these counts were dismissed by the court. *Id.* at *1.

144. *Id.* at *12. According to the parties' stipulations, General Motors did not rely on "economic necessity" as a defense. *Id.* at *8.

145. *Id.* at *13. Judge Shelton went on to state that "[p]erhaps another judge in another court would not feel moved by that injustice and would labor to find a legal rationalization to allow such conduct. But in this Court it is my responsibility to make that decision. My conscience will not allow this injustice to happen." *Id.*

promise.¹⁴⁶ The appellate court stated that "[t]he acts cited by the trial court were acts one would naturally expect a company to do in order to introduce and promote an abatement proposal to a municipality. The acts . . . showed only efforts to take advantage of a statutory opportunity. They did not constitute assurances of continued employment."¹⁴⁷

The appellate court observed that the resolution passed by the Township approving the tax abatement was not based on a promise made by the defendant.¹⁴⁸ By implication, had the Township done so, the employment promises may have been enforceable.¹⁴⁹

In another case, *United Steelworkers v. United States Steel*,¹⁵⁰ workers attempted to assert the existence of a property interest arising from a longstanding relationship between a community and an industry. The union argued that the company should preserve the steel production industry, rehabilitate the community and workers following the company's withdrawal, and be restrained from leaving the community in a state of waste.¹⁵¹ Although ultimately rejecting the argument, the court did recognize that "[e]verything that has happened in the Mahoning Valley has been happening for many years because of steel Expansion . . . is because of steel. And to accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: Steel."¹⁵² Although the court believed that such a relationship should have resulted in a

146. *Ypsilanti*, 506 N.W.2d at 558. In fact, the Court held that "[A]most all of the statements the trial court cited as foundation for a promise were, instead, expressions of defendant's hopes or expectations of continued employment at Willow Run." *Id.* at 559.

147. *Id.*

148. *Id.* at 569. The court noted that continued employment was "the [State Tax] Commissions' expectation, not defendant's promise. *Id.*

149. *Ypsilanti*, 509 N.W.2d 152 (1993).

150. 631 F.2d 1264, 1280 (6th Cir. 1980).

151. See STAUGHTON LYND, *THE FIGHT AGAINST SHUTDOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS, 1977-1980* (1982); Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 616-618 (1988). The plaintiffs also unsuccessfully asserted claims of breach of contract, promissory estoppel, and anti-trust statutes. See Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the Invisible Handshake*, 52 U. CHI. L. REV. 903, 929 & 938-42 (1985) (arguing that "a promise is enforceable when made in furtherance of an economic activity," and that *United States Steel* was wrongly decided because workers had, over the years, developed the kind of interdependent relationship that promotes action on the basis of an "invisible handshake" and U.S. Steel had made the promise in furtherance of an economic activity).

152. *United Steelworkers of America, Local No. 1330 v. United States Steel Corp.*, 492 F.Supp. 1, 9 (N.D. Ohio 1980).

vested property right held by the community, the judge found that there was a "lack of authority" from the United States Constitution, laws, or common law to support that conclusion.¹⁵³ The court rejected any notion that Article V of the Constitution, which protects citizens from deprivation of property rights, created a "legally recognizable property right in a job."¹⁵⁴ As these cases illustrate, these common law doctrines have provided little assistance to those seeking to enforce implied contracts, or to establish novel rights.

3. Federal Laws

A third line of cases derives from use of various federal laws and/or programs, such as the Racketeer Influenced and Corrupt Organizations Act (RICO)¹⁵⁵ and Urban Development Action Grants.¹⁵⁶ Such cases have met with mixed success.

RICO has proved effective in at least one case. In *Oil, Chemical and Atomic Workers Union (OCAW) vs. American Home Products*,¹⁵⁷ the OCAW challenged American Home Products Corporation's (AHP) decision to close its plant in Elkhart, Indiana, and relocate to Puerto Rico.¹⁵⁸ OCAW alleged that AHP's decision to relocate the pharmaceutical plant was based on the substantial tax breaks it would gain under § 936 of the Internal Revenue Code,¹⁵⁹ which allows companies to repatriate all profits from the new plant back to the states without federal taxation, in exchange for setting up operations in United States territories.¹⁶⁰ OCAW also alleged

153. *United Steelworkers*, 631 F.2d at 1280.

154. *Id.* at 1281.

155. RICO prohibits the investment of income received from a pattern of racketeering in an enterprise engaged in interstate commerce, acquiring an interest in an enterprise through a pattern of racketeering, and participating in the conduct of an enterprise's affairs through a pattern of racketeering. 18 U.S.C. § 1962 (a)-(c). In addition, the statute prohibits conspiring to do any of the above. 18 U.S.C. § 1962(d). The definition of racketeering activity includes mail and wire fraud. 18 U.S.C. § 1961.

156. 42 U.S.C. § 5318.

157. *Oil, Chemical and Atomic Workers (OCAW) Union v. American Home Products*, (D.P.R. 1992) (No. 91-1093).

158. Class Action Complaint at 53-60, *OCAW Union* (D.P.R. 1992) (No. 91-1093).

159. *Id.* at 53-60. The plaintiffs alleged that AHP and Commonwealth officials had acted to defraud the plaintiffs, the United States government and the commonwealth of Puerto Rico by using the mails and wires to secure the benefits of an illegal exemption under § 936 and under the Puerto Rico Tax Incentives Act of 1987 for tax-sheltered manufacturing from Commonwealth and Guajama Municipal taxes.

160. Randall Samborn, *Plant Shutdowns: Hundreds of Closings Provoke Legal Struggle*, NAT'L L. J., July 29, 1991, at 1, 14. A 1989 Treasury Department Study reported that in 1983 the Section 936 credit gave employers an average tax savings of \$18,523 per employee for all industries and a high of \$57,761 for pharmaceutical

that AHP misled workers into believing that the company remained committed to the Elkhart plant, schemed with Puerto Rican officials to gain "special treatment" with regard to tax breaks and resources, made numerous false statements to OCAW,¹⁶¹ and illegally used federal funds for on the job training to subsidize the movement of work.¹⁶² In an important preliminary decision, the trial court refused to dismiss the suit, finding that OCAW had provided a general outline of the scheme to defraud with allegations that made it likely that AHP had used interstate mail and telecommunications to do so.¹⁶³ The parties settled for \$24 million.¹⁶⁴ The difficulty with the RICO approach, however, is that its application is limited to cases in which anti-relocation statutes¹⁶⁵ or regulations are in effect, and where the facts are conducive to developing an argument that industry had fraudulently conspired to relocate.¹⁶⁶

workers. *Id.* Specifically, OCAW argued that AHP had fraudulently certified in its Industrial Tax Exemption Application to Puerto Rican officials that the Guayama plant would not affect mainland employment. Class Action Complaint at 53-60, *OCAW Union* (No. 91-1093).

161. Class Action Complaint at 53-60, *OCAW Union* (D.P.R. 1992) (No. 91-1093). AHP was required to fill out an application certifying to Puerto Rican officials that they were not a runaway plant. Otherwise, OCAW may not have had a proper cause of action.

162. *Id.* at 53-60.

163. Samborn, *supra* note 160, at 1, 14.

164. LEROY, *supra* note 7, at 11.

165. Efforts to amend § 936 to include a provision giving jurisdiction to the Federal Labor Department over complaints about runaway industries failed. *Runaway Plank Omitted From Final 936 Version*, SAN JUAN STAR, Aug. 4, 1993, at 10; *see also*, Caribbean Basin Economic Recovery Act, 19 U.S.C. §§ 2701-06 (1988 and Supp. II 1990) (authorizing President to grant duty-free status for certain products originating in the Caribbean).

166. In addition, Economic Development Administration regulations prohibiting the use of its funds to subsidize the removal of jobs from the mainland to Puerto Rico aided OCAW's suit. General Requirements for Financial Assistance, 13 C. F. R. § 309.3. "Anti-piracy" provisions, contained within the federal Urban Development Action Grant (UDAG) Program (authorizing HUD to give money to economically destroyed cities) is another legal tool which have been relied upon at least once by workers. The law prohibits the use of grant funds for "projects intended to aid in the relocation of industrial or commercial plants or facilities from one area to another, unless the Secretary finds that the relocation does not significantly and adversely affect the unemployment or economic basis of the area from which the industrial or commercial plant or facility is to be relocated. Urban Development Action Grants, 24 C.F.R. § 570.451(g)(1); *see also*, Editorial, *End the Hudson Swiping*, N.Y. TIMES, Aug. 11, 1986, at A18. Congress intended that UDAG-inspired economic recovery in one area not occur at the expense of similarly distressed urban areas. *City of Jersey City v. Pierce*, 669 F. Supp. 103, 105 (D.N.J. 1987); H.R. Rep. No. 95-236, 1st Sess. 9; reprinted in 1977 U.S. Cong. Code & Adm. News 2884, 2892. Thus, in *Wilson v. Chrysler Corporation*, workers sued Chrysler Corporation, which had received money from UDAG, claiming that Chrysler had used federal money to prepare a site in De-

4. *Express contracts*

A final line of cases derives from those instances in which plaintiffs have argued that an express contract governs the tax subsidy arrangement. These have proven more successful although that success has been limited by the agreements themselves. For example, in the case involving a loan agreement by the Anchor Hocking Company,¹⁶⁷ the state alleged that Anchor had breached its obligation of good faith and fair dealing by (i) making express representations in its loan applications about the expected future employment levels at the plant, (ii) failing to fulfill an implied term of the loan agreement that the company would continue to operate in Clarksburg for the full duration of the contracts, and (iii) closing a profitable plant and refusing to cooperate in the state's effort to find a buyer. Ultimately, the suit resulted in a settlement after the plaintiffs obtained a preliminary injunction forbidding the company from removing its equipment located at the plant.¹⁶⁸ After the court held that the loan agreement allowed Anchor to retire its debt ahead of schedule, the state dropped its charges and Anchor agreed to offer the plant for sale.¹⁶⁹

Agreements negotiated pursuant to Industrial Development Bonds have also been held enforceable. In 1985, Chicago sued Playskool/Hasbro for using bond money to buy \$1 million worth of new equipment that it shortly thereafter moved out of state in a consolidation move.¹⁷⁰ The case settled, with the union workers receiving extra severance benefits.¹⁷¹

troit to receive jobs in Kenosha. No. 88-C-215 (E.D. Wisc. filed Feb. 2, 1988). The corporation settled the case. This program, however, has not been funded since 1988, and is no longer available as a legal tool.

167. *Anchor Hocking Corp. v. Moore*, No. C2-88-0738 (S.D. Ohio, filed July 14, 1988).

168. Final Order Approving Settlement and Action, *Anchor Hocking*, No. C2-88-0738 (Sept. 23, 1988). The company paid the state one million dollars to obtain the release of some of the equipment. *Id.*

169. *Id.* No buyer was ever found. See J. Bradley Russell, *Implied Contracts and Creating a Corporate Tort: One Way State and Local Governments are Starting to Fight Plant Closings*, 90 W. VA. L. REV. 1249 (1988).

170. Ray Gibson, *Playskool Defection Has Cities Thinking Twice*, CHI. TRIB., June 29, 1985, at C3.; Michael H. Shuman, *Symposium: GATTzilla v. Communities*, 27 CORNELL INT'L L.J. 527, 531 (1994).

171. *Id.* In another case the city of Duluth was able to block Triangle Corporation from moving its entire production out of state, arguing that such an action would violate a \$10 million Industrial Development Bond agreement. In re Indenture of Trust, 437 N.W.2d 430, 437 (Minn. Ct. App. 1989) (finding company had obligation to remain in city during life of bonds).

These results indicate the necessity for explicit, written, contractual arrangements. In their absence, the legal doctrines of promissory estoppel, the assertion of property rights as legally cognizable interests, and other legal theories, will be ineffective in creating enforceable promises. While a legitimate question may be raised as to why a business would be willing to enter into such agreements given the status quo, companies do so when they believe it is in their long term interests. General Motors, for example, entered into a comprehensive tax abatement contract with Arlington, Texas, in 1989, which included clawback and job guarantee provisions.¹⁷²

IV. Legal Solutions

A. Reform on the Horizon

Reform requires accountability and policies which encourage collaboration between states so that competition between states, or "whipsawing," will no longer be the driving force behind tax subsidy arrangements. Rather than focusing on who can give away the most money, states should strive to improve the overall business climate by using the tax subsidy arrangement as an opportunity to improve such areas as education, transportation, telecommunications, and the provision of quality public services."¹⁷³

Solutions lie in what one scholar has called a strategy of "upward leveling." This strategy targets efforts to raise the standards of those at the bottom and thus reduce the pull on everyone else: "That requires a cumulative increase in both power and well being for the poorest and least powerful — working people, women, marginalized groups and their communities."¹⁷⁴ Holding corporations to their promises and investing that money in jobs and public services, will raise the collective standard.¹⁷⁵ This strategy seeks to

172. When such agreements become the norm, instead of the exception, we will ask how this situation went on for so long. LEROY, *supra* note 42, at 9.

173. See REGAN *supra* note 22, at 49. See also, KAYNE, *supra* note 41, at 41 ("Most of these studies do indicate that new non-economic factors are gaining importance in the site selection process. These include quality of public education, general business climate, infrastructure, energy supply, political and fiscal stability, and personal preferences of the corporate decision makers.").

174. Barnet, *supra* note 38, at 758.

175. As Dan Luria, of the Industrial Technology Institute, and Joel Rogers, of the Center on Wisconsin Strategy, urge:

Declare a norm, assist firms in reaching it, use the revenues and other material benefits of their reaching it to fuel further assistance, and drive the benchmark of performance ever higher, in a dynamic process of upgrading that aims to include an ever wider population of firms in the region.

facilitate business stability and economic growth through a system of incentives at least equal to any potential savings due to relocation. The density of "good" firms would increase, more joint projects and efficient use of resources would ensue, and "hedgies" against unstable markets would improve.¹⁷⁶

In addition, reform efforts must rejuvenate our cities by providing for reinvestment in the general welfare. Corporations which receive tax subsidies should be required to invest in the institutional infrastructures upon which we all depend. "Mature, metropolitan communities thrive," one article observes:

when their core businesses upgrade, link to one another to realize new economies of 'scope' for specialized practice, or attract or spin off related enterprises, benefitting from spatial proximity to industry leaders. Upgrading, networking, and incubating indigenous firms, however, requires an infrastructure of support in the form of technical assistance, training and efficient supply of modern public goods."¹⁷⁷

This will reward modernization and improve labor productivity.

Tax incentives can be used as leverage when accountability is a norm and when they play a clearly defined role within the context of a comprehensive economic development policy.¹⁷⁸ These goals can be accomplished only when we begin to make the tax abuse and corporate rule phenomenon part of the daily discourse of our nation's problems and develop strategies to respond to those areas which have made these abuses possible. The discourse must also analyze the extent to which we should even rely upon tax incentives to address the problems of our inner cities.¹⁷⁹

B. State Legislative Responses

The preceding discussion suggests the need for political and social organizing strategies, in which legal tactics play some, but not the entire role in holding corporations accountable for their use of public wealth. Passage of more effective legislation comprises one component of an overall strategy; the use of contracts comprises

Dan Luria & Joel Rogers, *Metro Futures: A High Wage Democratic Development Strategy for America's Cities and Inner Suburbs*, (Mar. 1994) (unpublished) at 29.

176. *Id.* at 30-31.

177. Luria & Rogers, *supra* note 175, at 23. For a fine discussion about the various errors inherent in conventional economic development strategies, see *id.* at 24-26.

178. See CED REPORT, *supra* note 1, at 49-54 (listing five proposed guidelines to govern the use of development incentives).

179. See Aprill, *supra* note 13, at 1346 ("They should not serve as the centerpiece of urban policy in general or urban economic policy in particular.").

another. Ultimately any strategy, at a minimum, must provoke debate in the public arena about the use of public wealth to address public needs. It should also aspire to allow citizens and communities to control the funds that subsidize corporations in order to ensure that the funds promote the public interest. We need strategies that challenge the "stacked deck" of corporate privileges and immunities so that metropolitan communities may wield their inherent power.

One logical place to begin to advance such strategies is in state legislatures. Legislators possess the authority¹⁸⁰ and the obligation¹⁸¹ to enact laws that serve the interests of their constituents. While federal leadership and policies are also essential to solving many problems, including poverty, urban decay and violence, state legislative action is better suited to achieve these ends especially because tax abatement decisions generally are local in character. The local nature of the decisions results in (i) courts that are deferential to legislative decisions affecting local economic policies and (ii) increased opportunities for grassroots and community participation in the decision-making process surrounding abatement decisions.

Key to this strategy is that any effort be driven by the needs and voice of the local communities. The advantage of focusing reform efforts on local governments is that it provides a greater opportunity for partnership with community organizations, workers and unions.

In Gary, Indiana, the Calumet Project, working with a committee of citizens and local trade unionists, organized against what they identified as an "open purse" policy, through a petition drive, neighborhood canvassing, public meetings, talk radio programs, and accountability sessions with local legislators.¹⁸² The end result was the passage of an ordinance that requires companies (i) show clear financial need for the abatement, (ii) provide a complete health care package to employees working an average of twenty-

180. The state's authority to regulate private property in the public interest derives from *Munn v. Illinois*, 94 U.S. 113 (1877) (holding that the Illinois legislature could, within the power of the federal commerce clause and due process clause of the federal constitution, "fix by law the maximum of charges for the storage of grain in warehouses at Chicago and other places in the State . . .").

181. In *Local 1330, United Steelworkers of America v. U.S. Steel, Corp.*, the Sixth Circuit proclaimed: "[The] formulation of public policy on the great issues involved in plant closings and removals is clearly the responsibility of the legislatures of the states or of the Congress of the United States." 631 F.2d 1264, 1282 (6th Cir. 1980); see O'Connor, *supra* note 19, at 1257-59.

182. LEROY, *supra* note 7, at 26-27.

five or more hours, (iii) pay prevailing wages for the industry, and (iv) terminate abatements if the firm fails to live up to the terms of the ordinance.¹⁸³ Additionally, the New Party, and other grass-roots groups, have organized a multi-state campaign to put on the ballot a provision that any corporation receiving tax money must show a net increase in jobs, pay a living wage, and demonstrate a good faith effort to hire workers from the area.¹⁸⁴

There have been other ordinances, and laws, passed in other jurisdictions which suggest that this is a viable, if until now, underutilized avenue to police corporate use of public wealth. In addition, any of these laws could be included in state corporate codes, or in corporate charters themselves.¹⁸⁵ Their violation could constitute a basis for revoking corporate charters. Each of the following sections analyze different legislative approaches to achieve more just and reasonable abatement strategies.

1. *Laws Addressing Quality of Life*

Recent legislative efforts have focused on addressing several types of problems.¹⁸⁶ The first category of laws consists of measures that improve the quality of life for workers and their families.¹⁸⁷ Thus, businesses which qualify for subsidies may be required to provide health insurance.¹⁸⁸ Minimum wages may be

183. *Id.* at 36-37.

184. Interview with M.J. Maynes, Twin Cities New Part, Aug. 7, 1995; Interview with Craig Robbins, Acorn, St. Louis, Sept. 7, 1995.

185. The Environmental Legal Defense Fund has been initiating actions with the Delaware Attorney General seeking to revoke the charters of CSX Corporation and WMX Technologies for environmental transgressions. See Thomas Linzey, *Awakening A Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. (forthcoming, Winter 1996) (on file with author).

186. It is not the author's intent to identify every single law which is currently on the books which fit into one of the specified categories outlined below. Rather, the reader is referred to LEROY, *supra*, note 7, for a thorough discussion of these laws or to the Guild Law Center, 2915 Cadillac Tower, Detroit, MI 48226, which maintains a comprehensive collection of all relevant statutes and ordinances designed for use by attorneys.

187. See LEROY *supra* note 42, at 84-114.

188. A new law in St. Paul, Minnesota, for example, specifies wage and job goals, with a clawback if these goals are not met. Interview with Alexa Bradley, Lobbyist and Organizer for the Minnesota Alliance for Progressive Action, Aug. 5, 1995. In another example, a bill proposed in the 1994 session of the Iowa legislature, for example, provided that qualifying businesses must "[p]rovide and pay for at least eighty percent of the cost of a standard medical and dental insurance plan for all full-time employees working at the facility in which the new investment occurred." H.F. 2180, 75th Gen. Assembly, 1994 Iowa, § 6 (1)(c).

specified.¹⁸⁹ Capital investment may be required.¹⁹⁰ Public capital may be generated through, for example, the pooling of pension funds, directed towards social investment in cities.¹⁹¹ Business applications may be evaluated against additional factors, including the quality of jobs to be created. Those business that offer jobs with a higher wage scale, low turnover rate, full time employment, professional positions, and comprehensive health benefits are more desirable.¹⁹² They may also be evaluated against the impact of the proposed project on other competing businesses and against the impact on the state.¹⁹³

2. High Performance Enterprise Zones

The idea of creating "high performance enterprise zones" was first suggested by Dan Luria and Joel Rogers.¹⁹⁴ In return for significant tax abatements, "high performance zones" would impose certain requirements, such as mandating that; (i) payroll per employee in excess of 125 percent of the national manufacturing average would be refundable against taxes up to 50 percent of tax liability; (ii) investment in equipment, software, etc. beyond 125 percent of the average value of U.S. manufacturing capital investment per employee would be fully depreciable in year of purchase; (iii) investments for the production of tools, dies, molds, etc. would be eligible for a 25 percent refundable investment tax credit; and (iv) value added goods produced in the zones and shipped out of the country would be eligible for a 5 percent export credit against tax liability.¹⁹⁵

189. See H.F. 2180, 75th Gen. Assembly, 1994 Iowa, § 6 (1)(a). A bill introduced in Iowa last year would have required qualifying businesses to "agree to pay a median wage for new full-time hourly non-management production jobs of at least eleven dollars per hour indexed to 1993 dollars . . ." *Id.* Note that the average wage obtained by workers who take advantage of the Job Training and Partnership Act was, on average, only \$5.69 an hour (1990). Oil, Chemical and Atomic Workers Union, *Understanding the Conflict Between Jobs and the Environment: An Economic Agenda for Workers* (unpublished, on file with author). The Iowa bill would also require these businesses to offer a pension or profit sharing plan to full-time employees, make day care services available to its employees, and have an active productivity and safety improvement program. H.F. 2180, 75th Gen. Assembly, 1994 Iowa, § 6(2)(a).

190. Thus, the Iowa bill requires such investments of at least ten million dollars indexed to 1993 dollars. H.F. 2180, 7th Gen. Assembly, 1994 Iowa, § 6 (1)(e).

191. Luria & Rogers *supra* note 175, at 27.

192. See H.F. 2180, 75th Gen. Assembly, 1994 Iowa, § 6.

193. *Id.*

194. Samborn, *supra* note 163, at 1.

195. Luria & Rogers, *supra* note 175, at 27.

Luria and Rogers suggest promoting efforts that generate retention, renewal, upgrading and linkage. For example, they argue that states should work with existing producers of machines driven by sophisticated software created in-house and encourage such companies to link those efforts to university and other researchers.¹⁹⁶ Efforts could also require the reinvestment in public goods that "hold the city together," such as mass transit, libraries, police, and public health.¹⁹⁷

3. *Laws Directed at Enhancing Public Influence*

Initiatives should be directed towards increasing public control over the institutional infrastructure. When improved, this would enhance the attractiveness of an area to other businesses.¹⁹⁸ Within this category falls legislation affecting the "right to know,"¹⁹⁹ public participation,²⁰⁰ and reporting of hidden costs.²⁰¹ Right to know laws encompass both application information and performance information after the subsidy has been granted.²⁰² Public participation laws include the public in the decisions of a corporation in applying for subsidies (providing for worker or union involvement) or in the decisions of government in granting subsidies.²⁰³ Hidden cost laws require that the governmental units keep records of and provide annual reports on their expenditures in the form of tax exemptions or abatements.²⁰⁴

196. *Id.* The Iowa bill would require qualifying businesses to produce or manufacture high "value-added goods" or services in one of ten industries, invest annually no less than one percent of pretax profits from the facility to Iowa or expanded under the program in research and development and worker training and skill enhancement. H.F. 2180, 7th Gen. Assembly, 1994 Iowa § 6(2)(b), (d).

197. Luria & Rogers, *supra* note 175, at 27.

198. The Iowa bill would require the Department of Economic Development to maintain a record of business violations of the law, including but not limited to environmental and worker safety statutes, and when such violations "tend to show a consistent pattern," prohibit the business from seeking economic development assistance. H.F. 2180, 7th Gen. Assembly, 1994 Iowa, § (6)(4).

199. See LEROY, *supra* note 7, at 26.

200. *Id.* at 27.

201. *Id.* at 29.

202. See CONN. PUB. ACTS 231 (1994); MICH. COMP. LAWS. § 705.554 (West 1991); GARY, INDIANA ORD. NO. 89-45 (1989); WIS. STAT. § 66.521.10 (1994).

203. See *id.*

204. For example, a 1987 amendment to New York's Economic Development Zone Act requires each local administrative board created to run these zones to report on abatements to each affected jurisdiction (city, county or state), and record on an annual basis the value of all abatements and exemptions they grant. REGAN *supra* note 22, at 31. They are also required to report annually the amount of tax relief they grant to businesses, and each report required under the legislation must include an estimation of the benefits, including job creation. *Id.*

One other type of legislation includes the advance termination of notice laws which would require those corporations receiving subsidies to provide advance notice before they close. One state law penalizes those corporations failing to give notice with a clawback of the subsidy.²⁰⁵

4. *Laws Affecting Recapture of Public Money*

Laws have been enacted that have provisions for recapturing public money. Laws that fit within this category, include clawback legislation, which enable states to cancel subsidies or recoup them,²⁰⁶ and "anti-poaching" laws,²⁰⁷ which attempt to prohibit a corporation from relocating within a state's or city's border or prevent states from providing subsidies to corporations moving into the state. Clawbacks can take several forms: they may include: recapture of a subsidy equal to unrealized benefits, recovery of the subsidy costs in excess of any realized benefits, and/or recapture of the entire subsidy.²⁰⁸

Other forms of deterrence include mandatory liability for those corporations seeking to renege on a contract for the losses its departure would cause. Such liability includes reduced tax payments, increased welfare benefits and job retraining costs. Commentators have also suggested that damages should be awarded for violations of the public trust.²⁰⁹ Companies may also be required to repay any public grants received, including tax abatements,²¹⁰ specially provided public utilities, land, or educational services and inter-

205. See LEROY, *supra* note 7, at 81-83. See Kevin C. Forsythe, Comment, *National, State and Local Perspectives on the Regulation of Business Dislocations; Smaller Manufacturers Council v. City of Pittsburgh*, 45 U. PITT. L. REV. 439 (1984) for argument that advance notice requirements should be an integral part of any incentive campaign.

206. See, e.g., MICH. COMP. LAWS ANN. §§ 445.601-06 (West 1991) (requiring repayment, with interest, of any benefits given a company to induce its presence). New Haven, Connecticut, Article VII (1985); Calif. Bus. and Community Relations Act of 1987.

207. LEROY, *supra* note 7, at 72-80.

208. See Larry C. Ledebur & Douglas Woodward, *Adding a Stick to the Carrot: Location Incentives with Clawbacks, Rescissions and Recalibrations*, ECON. DEV. Q., Aug. 1990, at 228-29.

209. Bill Scheuerman & Sid Plotkin *Get Them Before They Get You*, THE NATION, Oct. 4, 1986, at 309.

210. The Iowa bill, for example, provides that a business that has not met ninety percent of the job creation requirement shall pay "a percentage of the incentive received." H.F. 2180 7th Gen. Assembly, 1994 Iowa, § 7(1). For those that meet fifty percent or less of the requirement, the businesses shall pay the same in benefits. *Id.* § 7(1)(a).

est.²¹¹ Should a company refuse, it could be subject to takeover proceedings using the theory of eminent domain.²¹²

Thus far none of these laws have been subject to constitutional challenge. Legislation that conditions tax abatements on the mobility of capital or specific public benefit goals is not likely to be

211. See H.F. 2180 7th Gen. Assembly, 1994 Iowa, § 7(2).

212. At least one commentator has argued that the use of local eminent domain power to prevent industrial relocation would run afoul of the commerce clause. The Commerce clause provides that "Congress shall have the Power . . . to regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8. The Supreme Court has interpreted it to include a dormant prohibition of state regulation of interstate commerce. *H.P. Hood & Sons v. Du Pont*, 336 U.S. 525, 535 (1949); see Lazarus, *supra*. But see David Schultz & David Jan, *The Use of Eminent Domain and Contractually Implied Property Rights to Affect Business and Plant Closings*, 16 WM. MITCHELL L. REV. 383 (1990); Charles Gray, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329 (1986).

Unlike those condemnations that have been found to violate the commerce clause, such as state statutes pressuring out of state industries to relocate in the regulating state, or state embargo statutes which prevent the exportation of natural resources, utilization of eminent domain power in this context would arise as a remedial measure resulting from broken contracts.

As a general matter, so long as legislatures act reasonably, takings will be allowed as comporting with public use requirement. See *City of Oakland v. Oakland Raiders*, 183 Cal. Rptr. 673, 682 (Cal., 1982); Gray, *supra*. Further, these "regulatory incentives," one commentator suggests, are not unconstitutional because they do not diminish commerce by creating monopoly power. Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563 (1983).

Nor are the same policy issues implied when using eminent domain power as the vehicle to enforce a broken contract as say, the question of whether a state may insulate articles of commerce from the operation of the national market. Instead, as a party to a contract, local governments operate in a "private proprietary role" and should thus fit into the "market participation exception" to the commerce clause.

This exception provides that states, when participating in the marketplace, may enjoy all the freedoms and limitations that adhere to private owners. See *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 809 (1976) (upholding state statute which permitted payment of bounty to companies that processed car hulks in state as the business of destroying old cars was "state-created"); *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 84 (1984) (holding unconstitutional Alaskan statute which regulated timber processing market); *White v. Massachusetts Council of Const. Employers*, 460 U.S. 204, 214 (1983) (upholding minimum requirement that private firms hire certain percentage of city residents on all projects funded or administered by city); *Reeves Inc. v. Stake*, 447 U.S. 429, 446-447 (1980) (upholding restriction on sale of cement from state owned plant to state residents); Richard H. Seamon, Note, *The Market Participation Test in Dormant Commerce Clause Analysis — Protecting Protectionism?*, 1985 DUKE L.J. 697.

Regardless, the commerce clause may be invoked only if interstate commerce is implicated. See *Pike v. Bouce Church Group*, 397 U.S. 137, 142 (1970). And even if it is implicated, the regulation will be upheld only if it "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Pike*, 397 U.S. at 142. The outside limitation is that the regulation may not substantially impede the free flow of commerce. *Pike*, 397 U.S. at 142.

found violative of the Constitution. Such legislation would seem to fall in the purview of the "public purpose" doctrine.²¹³

5. Federal Efforts

Because states often undermine each other's efforts to control relocation incentives, some commentators have suggested greater involvement by the federal government. One suggestion has been that Congress should withhold development assistance from any local government that subsidizes private firms without establishing any legal obligations to the community.²¹⁴ Another commentator has suggested that the federal government ban state incentive programs altogether, and instead create a federal agency to implement a national development policy.²¹⁵ The agency, such as the Department of Housing and Urban Development, would make decisions based on statutory standards designed to encourage growth in economically depressed areas and allow exceptions to the incentives ban in certain cases.²¹⁶ The enforcement stick would be the withdrawal of federal funding if states do not comply. Such an approach would allow an agency to provide a consistent and comprehensive program to ensure that the subsidies deliver the benefits for which they are given.²¹⁷ The biggest obstacle to these solutions is that they are unlikely to pass in the current Congress. Also, any federal law would easily be subject to industry influence.²¹⁸

The Labor Caucus of the National Conference of State Legislatures has suggested the creation of a multi-state Industrial Reten-

213. See *supra* part II.B.1. See also, *City of Gaylord v. Beckett*, 144 N.W.2d 460 (Mich. 1966) (issuance of municipal bonds to secure location of a plywood plant in area of city serves a public purpose as required by constitution, in view of employment and other benefits to the city and area); *Redevelopment Comm'n v. Security Nat'l Bank*, 114 S.E. 2d 688 (N.C. 1960) (condemnation of blighted and slum areas within a municipality for redevelopment under safeguards to prevent such areas from reverting to slum is in the interest of public health, safety, morals and welfare, and there such condemnation is a public use and not a taking of private property in violation of N.C. CONST., Art. § 1 or § 19).

214. See Scheuerman & Plotkin, *supra* note 209.

215. Taylor, *supra* note 19. See also, William J. Barrett VII, Note, *Problems with State Aid to New or Expanding Businesses*, 58 S.C. L. REV. 1019 (1985) (arguing that state inducement programs do not redistribute wealth in a socially desirable manner, are preempted by the Public Works and Economic Development Act, are unconstitutional under the Commerce Clause and should consequently be prohibited).

216. Taylor *supra* note 19, at 706.

217. *Id.*

218. See PHILIPPA STRUM & LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 74-93 (1984) (discussing strategy to reform insurance industry).

tion Commission which would allow states to investigate those corporations that relocate, and take action against those that renege on agreements by ordering divestment of the company's stock by the state's pensions, and/or denying future state economic development incentives, and the right to bid on state purchasing contracts.

C. Contracts

Contracts offer a number of benefits over a simply legislative approach. Their primary benefit is their enforceability.²¹⁹ Express contracts have additional advantages.²²⁰ For example, they allow the parties to specify the bargained for exchange, conditions of breach, and damages. In addition, localities, best suited to estimate potential losses to its community, may tailor the provisions to the particular situation²²¹ and applicants for subsidies may be more careful about job creation projections.²²² Enforceable contracts can also serve as an important bargaining tool for officials interested in at least partial enforcement.²²³

The contract approach will obviously be hindered by the greater bargaining power of corporations.²²⁴ Contracts are often entered into under a veil of secrecy by local officials who feel political pressure to maintain a "friendly" investment environment. Thus, some commentators have argued that municipalities will never impose any real obligations on subsidy recipients.²²⁵ As government officials and community residents become more aware of the problems

219. See Ledebur & Woodward, *supra*, note 208, at 226 (arguing that enforceable penalties are the only viable solution to the "incentive game"). Ledebur & Woodward also point out that Western European nations have long ensured returns on subsidies to industry through contractual relationships. *Id.* at 227.

220. Contrast this with situations, such as in Willow Run, where courts have been unwilling to find the existence of an enforceable contract where a business submitted an application for a tax subsidy pursuant to a statutory provision authorizing abatements. *Charter Township of Ypsilanti v. General Motors Corp.* No. 92-43075-CK, 1993 WL 132285 at *7 (Mich. Cir. Ct. Feb. 9, 1993), *rev'd*, 506 N.W. 2d 556.

221. For example, the relocation of an oil refinery may impose environmental and property costs very different from the relocation of a computer software business.

222. Often the expectations of the municipalities far exceed the actual benefits derived from the subsidy. See Carter Garber, *Saturn: Tomorrow's Jobs, Yesterday's Myths*, in *COMMUNITIES IN ECONOMIC CRISIS* 175, 182-184 (John Gaventa et. al. eds., 1990) (describing miscalculated benefits to Spring Hill Tennessee when it recruited the Saturn Plant).

223. See Joseph B. White, *Worker's Revenge*, *WALL ST. J.*, Mar. 8, 1988, at 1. Under threat of suit, Chrysler set up a \$20 million fund to assist displaced workers in Wisconsin. *Id.*

224. See Taylor, *supra* note 19, at 687, 700.

225. *Id.* at 700.

caused by corporate subsidies, however, there will be more pressure to make corporations accountable for their promises to communities.²²⁶ In addition, the problems associated with secrecy, political influence and bargaining power, may be alleviated by laws requiring better access to information, public participation and governmental accountability.

1. *The Role of Legislation in the Formation, Interpretation and Enforcement of Contracts.*

Most inducement programs are created under constitutional or statutory authority. The language of the authorizing legislation is critical to the formation, interpretation and enforcement of contracts. First of all, authorizing legislation delineates the powers of the entity designated to institute the inducement programs.²²⁷ It identifies the purposes for which the inducement may be offered.²²⁸ If the authorizing legislation is vague, or focuses on economic concerns alone, courts may be unwilling to enforce contract provisions which address non-economic concerns, such as the provision of health care benefits or environmental clean-up. It also provides authority for local governments to condition their approval of applications on applicants agreement to contractual terms.

Authorizing legislation has also played an important role in the interpretation of contract provisions. One municipality, for example, successfully halted the relocation of a plant by enforcing an express contract between the financing authority and the corporation.²²⁹ The industrial revenue bond had been secured by a mortgage that restricted the removal of equipment financed by the bonds.²³⁰ When the corporation transferred equipment from the plant to another out-of-state facility as part of a "plant consolida-

226. Even the world of business and finance is recognizing the detrimental effect of corporate subsidies. See Melvin L. Burstein & Arthur J. Rolnick, *Congress Should End the Economic War Among the States*, in 1994 ANNUAL REPORT ESSAY (1995), Federal Reserve Bank of Minneapolis, Andy Zipser, *Civil War, Round Two, (Butting Heads; When states compete with one another for auto factories, sports teams and casinos, common sense goes out the window)* BARRON'S, Apr. 3, 1995 at 23.

227. Georgia's Attorney General found that the Georgia Housing and Finance Authority lacked the power to create forgivable loans as it had in the incentive loan program and to delegate to other agencies responsibility for determining the terms and performance of GHFA loans. Op. Att'y Gen. Ga. No. CS304898 (1995).

228. See Oliver A. Houck, *This Side of Heresy: Conditioning Louisiana's Ten-Year Industrial Tax Exemption Upon Compliance With Environmental Laws*, 61 TUL. L. REV. 289, 360 (1986).

229. *In re Indenture of Trust*, 437 N.W.2d 430, 431 (Minn. Ct. App. 1989).

230. *Id.* at 432.

tion project," the city challenged the transfer as violating the Minnesota Industrial Development Act.²³¹ The appellate court agreed and required the corporation to continue operating the plant as a manufacturing facility.²³² The authorizing legislation in this case played an important role in the interpretation of the contract and was the primary basis for the enforcement of its provisions.

Similarly, courts have been more likely to uphold provisions of contracts that may have been considered ancillary to the main purpose of a contract, where legislation evidences a policy supporting the purposes furthered by those provisions.²³³

Authorizing legislation also has an impact on the issue of third party enforcement of government contracts. The degree to which courts enforce tax abatement agreements depends upon the degree to which taxpayers assert their authority to seek enforcement. While the legal standing of taxpayers is well established in cases seeking enforcement of state constitutional provisions pertaining to taxation for public use,²³⁴ enforcement of specific government *contracts* by third parties has historically been more ambiguous. Thus, where a contract exists between a governmental body and a developer, for example, taxpayer standing is not guaranteed.²³⁵ Instead, a third party beneficiary could sue, but would then be subject to traditional rules governing third party standing.²³⁶

231. *Id.* at 433.

232. *Id.* at 436.

233. *Rock Island Imp. Co. v. Helmerich & Payne, Inc.*, 698 F.2d 1075, 1079 (10th Cir. 1983). In *Rock Island*, a court held enforceable a land reclamation provision to a coal mining contract which required the lessee to bear the cost of restoring strip-mined land. *Id.* at 1079. Given the public policy of reclaiming strip-mined lands expressed in state legislation, the court reasoned that it was logical to assume that the parties meant what they said, calculated their costs and benefits under the contract, and intended the provision. *Id.*

234. See *infra* notes 235-6 and accompanying text.

235. See *Martinez v. Socoma Cos.*, 521 P.2d 841, 843 (Cal. 1974) (denying class of underprivileged residents of reinvestment zone standing as third party beneficiaries). But see *Zigas v. Superior Court*, 174 Cal. Rptr. 806, 809 (Cal. Ct. App. 1981), *cert. denied*, *Sangiaco v. Zigas*, 455 U.S. 943 (1982) (allowing low income tenants third party beneficiary status furthered policy of the National Housing Act); *Shell v. Schmidt*, 272 P.2d 82, 86 (Cal. App. 1954) (third party beneficiary status granted to veterans where legislation under which the agreement was made included a provision empowering the government to obtain payment of monetary compensation by the contractor to the veteran purchasers for deficiencies resulting from failure to comply with specifications).

236. RESTATEMENT (SECOND) OF CONTRACTS § 313 (1981):

A promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless: a) the terms of the promise provide

2. *The Terms and Conditions*

The terms and conditions of incentive contracts will necessarily vary with the form of the subsidy. Municipalities currently use various mechanisms and structures, such as financing arrangements, tax exemptions, and subsidized leases of municipally owned property to induce corporations to relocate.²³⁷ Each of these mechanisms require attention to, and expertise in, issues which will be relevant in any agreement regardless of the parties and the context. There are, however, particular issues which have special relevance to subsidy agreements between corporations and government entities.

a. *The Quid Pro Quo*

Governmental entities that negotiate contracts must be clear in articulating exactly what they want. Even though common sense indicates that governments offer corporate subsidies in exchange for jobs and economic investment, courts sometimes ignore the obvious. When the City of Yonkers sued Otis Elevator to recover \$16 million dollars spent to condemn and raze neighborhood property it later sold to Otis for \$554,000, the court held that the agreement's failure to include any requirement that the company remain in the city for a specified time, meant that the company could relocate when it chose.²³⁸ The court rejected the city's claim that the company had been "unjustly enriched" because the city had not received "fair value" for the land.²³⁹ Nowhere in its opinion did

for such liability; or b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the policy of law authorizing the contract and prescribing remedies for breach.

237. NATIONAL ASSOCIATION OF STATE DEVELOPMENT AGENCIES, *DIRECTORY OF INCENTIVES FOR BUSINESS INVESTMENT AND DEVELOPMENT IN THE UNITED STATES* (4th ed. 1993). See also, Martin E. Gold, *Economic Development Projects: A Perspective*, 19 URB. LAWYER 193, 193 (1987).

238. *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716 (S.D.N.Y. 1986).

239. *Id.* at 734. The court also treated Otis's improvements on its own facility as a benefit to the city under the contract. *Id.* Yonkers had in fact expended a great deal of city resources and money in obtaining the land for Otis. The Yonkers city council designated the parcel an urban renewal area. The city obtained \$ 8 million in federal funds from HUD, \$ 2 million from the state of New York, \$ 2 million from its own coffers and donated portions of city streets to the parcel and assembled and cleared the parcel. *Id.* at 722. The purchase price for the land was \$1,391,000 and that any site improvement costs borne by Otis could be set off against the purchase price. Otis ended up paying \$539,012 for the parcel and an additional \$63,248 under a termination agreement which removed any possible obligation Otis could have had to the city under the Letter of Intent which had contained the goals and expectations of the parties in the subsidy. *Id.* at 724.

the court recognize the real consideration behind the deal (the \$16 million in resources for the continued operation of the plant). Thus, it was simply not enough to hope that providing Otis with land and requiring it to invest in its own facility would keep the company in Yonkers.

Similarly, in the Anchor Hocking case,²⁴⁰ the state of West Virginia considered the provision of jobs and the continued operation of the Anchor Hocking plant the *quid pro quo* of the incentive package.²⁴¹ This *quid pro quo*, however, was never explicitly expressed in the loan documents. In fact, a provision allowing the company to pay off the loan early without penalty indicated to the court that the company had no obligation to remain in the city.²⁴²

Thus, the governmental body must clearly set out what it seeks to gain; i.e.: the number of jobs, a commitment to remain in the locality, community investment, etc. In addition, the governmental body must delineate the purpose of the contract because a court will give meaning to any term found to be ambiguous by an evaluation of the contract as a whole.²⁴³

b. Defining Breach

The contract must also carefully define what conditions constitute a breach. By delineating the conditions of breach the municipality has more control over the inducement agreement. This is especially important where the inducement agreement is in the form of a contract traditionally associated with other contexts (i.e. loan documents, lease agreements or real estate transfers). Thus, in the case of a mortgage loan without a default provision, a court may not find a default where the corporation continues to make timely payments of its mortgage even if it has not complied with a condition regarding the purposes of the inducement agreement.²⁴⁴

240. See *infra* note 251 and accompanying text.

241. *Id.*

242. See Ansley, *supra* note 19, at 1822.

243. RESTATEMENT (SECOND) OF CONTRACTS § 202, comment c (1979); Chicago Bd. Of Options Exchange, Inc. v. Conn. Gen. Life Ins. Co., 713 F.2d 254, 258 (7th Cir. 1983); see also, *In re Bevil, Bresler & Schulman Asset Management Corp.*, 67 B.R. 557, 586 (D.N.J. 1986) ("In those cases where the express terms of an agreement are ambiguous, conflicting or unclear, and the intended meaning and operation of the contract can not reasonably be derived from the four corners of the writing, New Jersey and New York courts alike allow the introduction and examination of extrinsic evidence of intent as an aid in interpretation.").

244. In *In re Indenture of Trust*, the Court of Appeals pointed out that the corporation was not in default in making its loan payments and the transfer of equipment did not amount to a default under the contract. Instead, the Court of Appeals ruled that

Although the inducement agreement may be in the form of a loan, the main purpose of the loan is not repayment with interest, but job creation and a commitment to remain in the locality. Considering default in payment as the breach of the agreement fails to recognize and effectuate the true purposes of the parties.

Setting out the conditions of default also allows the municipality both control and flexibility to structure incentive packages. Local governments may then tailor the agreement to achieve varying objectives and fine tune enforcement mechanisms to account for changing economic conditions. The agreement between Arlington, Texas and General Motors illustrates the flexibility required in these contracts. That agreement attempts to account for the cost of the subsidy versus the benefits realized by itemizing three conditions which constitute a breach: (i) failure to use the plant for automobile manufacturing activities;²⁴⁵ (ii) failure to pay certain taxes;²⁴⁶ and (iii) breach of any of the specific terms and conditions of the agreement.²⁴⁷

By clearly articulating the conditions of breach, the municipality has a better chance of achieving its specific objectives.²⁴⁸ By defining failure to meet specified job levels as a breach, and by providing that breach of that condition only results in recapture of taxes for the year in which employment levels are not met, the parties in the Arlington Agreement have allowed for the continued operation of the plant and the expectation of meeting employment levels in other years, while removing the reward if the company has not complied for that year.

the substantial removal of equipment would violate the Minnesota Municipal Industrial Development Act. 437 N.W.2d 430, 433 (Minn. Ct. App. 1989).

245. "OWNER fails to complete the modernization, as provided by this Agreement, or terminates the use of the Facility for automobile assembly, painting or related activities." See Tax Abatement Agreement (on file at the *Fordham Urban Law Journal*).

246. "OWNER allows its ad valorem taxes owed to the CITY or TAXING UNITS to become delinquent and fails to timely and properly follow the legal procedures for protesting and/or contesting the assessment of any such ad valorem taxes." *Id.*

247. "OWNER breaches any of the project requirements, or other terms or conditions of this Agreement." *Id.*

248. Thus, the Arlington agreement also provides that breach of any of the conditions may result in total recapture of subsidized taxes and termination of the agreement if the breach occurs in years 1-5. For years six through ten, breach may result in recapture of taxes for only the year of the breach. Together the breach and recapture provisions effectuate the parties understanding that failure to operate the facility to manufacture cars in the first five years is a total breach of the agreement. See Tax Abatement Agreement, *supra* note 245.

c. Damages

The issue of damages in the context of corporate subsidies is complex. Generally, damage provisions seek to protect the expectations of the parties. In other words, they seek to place the party in as good a position as the party would have been in had the contract been performed.²⁴⁹ In the case of subsidy packages, the expectations of the municipality are often difficult to measure. By their very nature, economic development goals hope to achieve far-ranging effects, from the creation of jobs and economic stability to an expanded tax base.²⁵⁰ The difficulty lies in determining the damages it would take to place the city in as good a position as it would have been had the contract been performed.²⁵¹

Reliance damages are also very difficult to measure in the case of incentive packages. These damages seek to reimburse the party for the losses incurred in reliance on the contract by being put in as good a position the party would have been had the promise not been made.²⁵² For the municipality, reliance damages often include far more than merely the value of the subsidy. In several cases, courts have pointed out that some of the subsidies are federal in nature and consequently are not recoverable by the locality.²⁵³ Nonetheless, allocation of these resources by the municipality represents lost opportunity damages where the municipality could have used the funds for other projects.²⁵⁴ Almost

249. See generally, RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

250. The impact of plant closings reverberates through all facets of city life. See Ansley, *supra* note 19, at 1822, (quoting *City of Norwood v. General Motors Corp.*, No. A8705920 (Ct. Common Pleas Hamilton County, Ohio, filed Aug. 7, 1987)). The City of Norwood anticipated gross reduction of revenue of \$15,688,786 requiring extensive reductions in social services, city personnel, police department budget and elimination of the city's waste department.

251. In the *Anchor Hocking* case, the state of West Virginia asked the courts to grant the benefit of the bargain in its suit against Anchor Hocking, and sought the value of the continued operation of the plant (amounting to \$55 million per year from the date of plant closure to the ending date of the bond term, totaling \$64,610,000). *West Virginia v. Anchor Hocking*, No. 87-C-759-1 (Plaintiff's Complaint, filed Oct. 7, 1987, N.D.W.V.). See also, J. Bradley Russel, *Implied Contracts and the Creating a Corporate Tort, One Way State and Local Government are Starting to Fight Plant Closings*, 90 W. VA. L. REV. 1249, 1273 (1988).

252. See generally, RESTATEMENT (SECOND) OF CONTRACTS on Reliance Damages.

253. See, e.g., *City of Yonkers v. Otis Elevator Co.*, 649 F. Supp. 716, 734 (1986) (the claim of unjust enrichment is based entirely on the fact that Otis received certain land parcels pursuant to the Land Disposition Agreement, a small part of which were funded by the Plaintiffs, but the major part of which were financed with federal funds); *Anchor Hocking*, No. 87-C-759-1, 9-10 (opinion and order) (job training funds were from federal not state sources).

254. See Russel, *supra* note 251, at 1273.

never included in the reliance damages are the value of the resources the state expended in creating the subsidy packages, environmental damage, or social costs associated with relocating businesses. In most cases, municipalities have been satisfied with simply seeking the value of the subsidies and interest.²⁵⁵

Restitution damages are a more unusual choice but one which is also appropriate in this context. They seek to restore to the promisee any benefit he or she has conferred on the breaching party.²⁵⁶ As discussed above, in most cases the benefit of the bargain is hard to measure and prove while the benefit derived by the business is obvious.²⁵⁷ If the plaintiff asks for specific restitution, he or she has preference over other creditors of a financially distressed defendant,²⁵⁸ which is often the case in most plant closing or industry relocation situations. Specific restitution may also be desirable if the property has changed in value.²⁵⁹ Thus, in cases where the subsidy is in the form of a land grant, and the land has increased in value, the municipality would be better off seeking the property itself, rather than the money used to subsidize its sale to the corporation.²⁶⁰

Specific performance should also be appropriate in certain cases. Land reclamation cases, for example, provide an interesting example of instances where private parties have included contract provisions intended to serve a greater public interest.²⁶¹ Land reclamation cases suggest the importance of including clawback or recapture provisions in the contract, and the ways in which "diminution in value" damages should be measured.

Contracts often include liquidated damage provisions when actual damages will be difficult to measure, as is often the case in subsidy agreements. Liquidated damages provisions will be en-

255. See *Otis Elevator*, 649 F. Supp. at 734 (asking for the money expended in condemning and razing the property it provided to Otis).

256. RESTATEMENT (SECOND) OF CONTRACTS § 197 (1981).

257. Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1287 (1989).

258. *Id.* at 1291.

259. *Id.* at 1279.

260. Of course, environmental problems may render the property worthless.

261. See *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (Okla. 1962) *cert. denied* 375 U.S. 906 (1963), *reh'g denied* (Mar. 26, 1993) (enforcing a contract provision requiring Garland Coal Company to rehabilitate leased farm and grazing lands destroyed by the process of strip mining but limiting damages to diminution in value to the property); *Schneberger v. Apache Corp.*, 890 P.2d 847 (Okla. 1994) (reaffirming *Peevyhouse* and holding that damages for pollution caused by oil and gas drilling is limited to the diminution in value of the land if the cost of remediation greatly exceeds the decrease in value of the property).

forced when they are a reasonable estimate of future damages.²⁶² To be valid, the provision must meet three criteria: (i) the parties must intend to provide for damages rather than a penalty; (ii) the injury must be uncertain or difficult to quantify; and (iii) the stipulated amount must be a reasonable pre-estimate of the probable loss.²⁶³

Finally, there exist numerous enforcement options which vary in nature. Debarment provisions which exclude a corporation from contracting or subcontracting with the government, may be the best method to enforce contract conditions not directly related to the primary purpose of the contract. The federal government has long used debarment to enforce public policy conditions to government contracts, including fair labor practices and health and safety. Where explicitly authorized by statute, an agency's power to debar and suspend is beyond question.²⁶⁴ Where the authority is not provided by statute, the courts have generally reached for a means to uphold the debarment sanction.²⁶⁵ Debarment would be most effective in situations in which the contracting company expects to gain from further contracts with the municipality. Debarment would be least effective in situations in which the company is cutting off all relationship with a municipality, as in the relocation context. Rescission clauses would require a cancellation of the subsidy in case of nonperformance. Depending on the timetable of costs versus benefits realized, cancellation could still result in a substantial loss to the city. Moreover, rescission clauses are generally not helpful in cases of plant relocation.²⁶⁶ Clawback clauses seek to recover part or all of the subsidy.²⁶⁷ Finally, recalibrations offer a municipality the freedom to adjust the subsidy in relation to the changing economic conditions and projected benefit stream.²⁶⁸ Unlike many subsidy packages, packages with recalibrations do not give away the whole subsidy before any of the benefits are realized.

262. RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981).

263. JOHN D. CALAMARI & JOSEPH M. PERILLO, *CONTRACTS* § 14-31, at 640-41 (3d ed. 1987); See David Brizzee, Comment, *Liquidated Damages and the Penalty Rule: a Reassessment*, 1991 B.Y.U. L. REV. 1613 (1991).

264. *Horne Bros., Inc. v. Laird*, 463 F.2d 1268, 1270 (D.C. Cir. 1972).

265. *Id.* at 1270.

266. Ledebur & Woodward, *supra* note 208, at 228, tbl. 2.

267. There are several ways to calculate the clawback that should be used. *Id.* at 228.

268. *Id.* at 229.

d. Financing Agreements

In the case of financing agreements, municipalities often offer low interest rate loans to finance the construction or expansion of a facility. If an industrial revenue bond is used to finance a facility, the municipality itself is not directly subsidizing the corporation. The federal government, however, loses tax revenue, while the return on that investment is questionable.²⁶⁹ The municipality is conferring a benefit (low interest financing),²⁷⁰ without getting anything in return. In most of these financing agreements, the corporation is obligated to pay the principal and the low interest rate to the municipality. There are usually no other contractual obligations to the community.

These contracts have several problems that make it difficult for a municipality to obtain expected job creation, economic investment and security goals. Municipalities may, however, include a condition that the low interest financing arrangement is valid only as long as the corporation maintains its facility in the community.²⁷¹ To prevent corporations from avoiding this obligation by paying off the loan early, and leaving the municipality, the contract should also include a prepayment penalty.²⁷² At a minimum, the prepayment penalty should account for the difference in bond interest

269. GAO, Industrial Development Bonds, *Achievement of Public Benefits is Unclear*, GAO/RCED-93-106. The federal government lost over \$ 2 billion in revenues in 1991 because of the tax-exempt status of small issue industrial revenue bonds. It was unclear whether IDBs were achieving the benefits they were intended to produce such as creating jobs, assisting economically distressed areas, fostering start up companies and keeping manufacturing firms in the U.S. In addition, state and local issuers generally did not have any requirements to direct IDBs toward achieving these goals. The GAO recommended that the program not be continued or that requirements be established to ensure that the goals are met.

270. The interest rate is lower than normal taxable bonds because the municipal bonds' tax-exempt status allows for the lower rate of return to be competitive with higher rate, taxable bonds.

271. See *In re Indenture Trust*, 437 N.W.2d 430, 433 (Minn. 1989) (obligation to remain in community for the life of the bond).

272. Robert K. Baldwin, Note, *Prepayment Penalties: A Survey and Suggestion*, 40 VAND. L. REV. 409, 443 (1987). A prepayment penalty may be explicitly provided for in the loan note. The prepayment clause delineates the rights of the borrower to prepay, any limitations, and the fee if the borrower exercises that right. A prepayment clause may prohibit prepayment altogether or may provide for severe penalties in the early life of the loan, with only moderate or completely abolished penalties after a certain time period. In a non-option contract, the note is silent regarding prepayment, and the borrower must negotiate with the lender to prepay. Unless the common law rule has been abrogated, the lender is free to refuse. Typically, the lender will agree to accept prepayment, conditioned on the borrower's willingness to pay a penalty. Some states prohibit prepayment penalties if the note does not contain an explicit provision permitting such a penalty.

rates and the interest the corporation would have paid through other financing arrangements, thereby nullifying the windfall gained by the corporation from the municipal financing arrangement.²⁷³

The municipality may also attempt to account for some of its losses by including those costs in the damages provision. While these penalties may act as a disincentive for corporations to move, they do not accurately reflect the costs of business relocations on the community.

e. Leases on Government Property

Leasing land or facilities to corporations at below market value is another common subsidy method. These leases almost never contain any damage provisions. Municipalities, at a minimum, should include remedies for breaking the lease term and for any damages caused the property, as is typical in most lease agreements between landlords and their tenants. The contract must explicitly provide that the measure of damages for repairing or reclaiming the property is the cost of performance.

Conclusion

The crises facing many of our urban centers is critical. The problems of urban decay, violence, drug use, and deteriorating roads, public schools, and other public services are getting worse, not better. The improvement of accountability measures in the tax subsidy model for growth and development presents one strategy for turning this problem around. It offers an opportunity for: local and citizen involvement to increase measures of accountability and stop the drainage of public money from government coffers; dialogue in the public sector about the proper and appropriate uses of public money; and an improvement of our democratic processes through greater methods of accountability. It also offers an opportunity for examination of the costs associated with unrestrained corporate power and a system whose political leaders have incentives to "sell out the bank" in exchange for temporary political gains.

273. Prepayment of the loan financed by the bonds does not affect the tax exempt status of the bond. As long as the bonds were issued in compliance with the IRC requirements, the interest paid on them will be tax free. The IRC requires that the bonds be issued to finance the building or expansion of small manufacturing projects. I.R.C. § 144(a). Even if the bonds are paid off early, they would still have met this requirement and would be tax-exempt for the bondholders.

The degree to which this strategy is successful depends on many factors including: a willingness of our political leaders, particularly those in the most attractive investment areas, to take the high road and demand a real and meaningful return on these investments; the ability of grassroots organizations to monitor the tax deals in their areas, and mobilize and demand public participation; the existence of national organizations to monitor state developments, and enhance resource sharing and communication among local groups, municipalities and states; and an enhanced understanding that we exist in an interdependent community whose viability is dependent on the success of each other.

The degree to which these conditions may be cultivated must ultimately result from popular attention to this problem. Discussions about this phenomenon still tend, however, to be confined to a relatively small group of economists, union workers, urban development experts, and state and local policy-makers. This is partly because the problems are complex and the solutions of a long-term nature. It has the unfortunate result of keeping out of the debate those most affected by these problems. It will primarily be up to those localities most affected by these bad deals to organize attention to the problem, as happened in the Willow Run case.

The value of providing corporate subsidies in return for promises of benefits to the public is an important issue. The consequences of this practice, in light of the rampant failure of corporations to live up their promises, should alarm the constituents of every community, regardless of political affiliation. Providing tax subsidies and other economic benefits to garner the favor of a corporation's presence without insisting that specific gains be attained is contrary to principles of fairness. For what can be more fair than asking that promises be kept? A steadfast insistence, through community efforts and legislation, that corporations be responsible for their assurances of public gains will revitalize our cities, decrease their political isolation, and improve the infrastructure and quality of the workforce.

This Article proposes two interdependent tools that localities may use to establish accountability in the tax incentive system: legislative reform and insistence upon the use of comprehensive contracts. Neither will be effective without the other. Their viability depends upon the readiness of our political leaders to forego the short term gains and subject their offices to an enhanced accountability, the commitment of local interest groups to act as watchdogs of both public bodies and private entities, and the willingness of

various interest groups historically isolated from each other improve their collaborative efforts.

