

April 2016

Comparative Urban Governance for Lawyers

Fernanda G. Nicola

American University, Washington College of Law

Sheila Foster

Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Comparative and Foreign Law Commons](#), [Law and Philosophy Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Fernanda G. Nicola and Sheila Foster, *Comparative Urban Governance for Lawyers*, 42 Fordham Urb. L.J. 1 (2014).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol42/iss1/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

COMPARATIVE URBAN GOVERNANCE FOR LAWYERS

Fernanda G. Nicola & Sheila Foster***

Introduction	1
I. Comparing Local Governance in a Global World.....	4
A. Comparative Law Praxis	4
B. Situating Cities in the Global Economic and Legal Order	7
C. Legal Reform and International Development.....	9
II. From Functionalism to Legal Formants	12
A. Functionalism 101: Kushner’s Institutional Corruption	12
B. Legal Formants at Work: Global Cities’ Bike Share Plans.....	14
III. Contextualism and Expressivism in Comparative Urban Governance	16
IV. International Local Governance in Action	19
Conclusion.....	22

INTRODUCTION

As rates of urbanization continue to rise in cities around the world, there is a marked convergence in both the opportunities and challenges for cities accompanying this trend. Much as economic globalization has made cities into central players in the world economy,¹ so too has urbanization rendered cities key sites for the

* Professor of Law, American University, Washington College of Law.

** Albert A. Walsh Professor of Law, Fordham University School of Law.

1. See SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* 333–34 (Princeton Univ. Press 2d ed. 2001) (noting that “global cities” such as London, Tokyo, and New York have emerged from the concentration of finance industries that in turn impact each city’s urban forms as well as its workers and population-at-large in a way that reorganizes prior capital-labor relations); John Friedmann, *The World City Hypothesis*, 17 *DEV. & CHANGE* 69 (1986) (arguing that the new international division of labor is organized through a class of cities designated as “world cities”).

advancement of social and economic development policy.² Sustainable development and adaptation to climate change, among other challenges, necessitate that cities and metropolitan regions invent nimble approaches to a variety of local policies and practices, such as land-use planning and zoning, housing, transportation, and service delivery arrangements. As such, policymakers and scholars in every part of the world have begun to look abroad for new ideas and models to govern their cities as they grapple with changing fiscal realities and increasing rates of urbanization.

As urban scholars, local officials, and policymakers engage in cross-national comparisons to assess different urban governance and planning models, a number of pertinent questions quickly rise to the surface. How can some cities' experiences guide and enrich our understanding of what cities in other parts of the world should or should not do? What is the relevance of these comparisons in determining what type of economic development agenda is more suitable to a specific political and economic environment? How can interdisciplinary tools be utilized to establish some entry points for cross-national comparisons? What are the limitations of cross-national comparisons given the ways in which most local governments around the world are constrained within a vertical system of legal hierarchy?

Comparative legal scholars have long grappled with similar questions and have developed methodological frameworks and hypotheses to help us understand why some legal rules and institutions travel and others do not, and to determine when it is desirable for some legal regimes to converge and for others to remain divergent. Even though economic globalization has shaped the ways in which cities are governed, local government legal scholars have only recently begun to contribute to the growing field of Comparative Urban Governance (CUG), which has largely been dominated by comparative political theorists, urban planners, and economists committed to best practices for urban growth and modernization.³

2. See Nestor M. Davidson, *What is Urban Law Today? An Introductory Essay in Honor of the Fortieth Anniversary of the Fordham Urban Law Journal*, 40 FORDHAM URB. L.J. 1579, 1592 (2013) ("What is driving the increasing salience of cities and their metropolitan regions in the United States, however, is less that demographic reality (which is mostly a function of the rapid growth of cities in the developing world) than the fact that gridlock in national and state policymaking is increasingly ceding to the pragmatism of local governance.").

3. See, e.g., Alan DiGaetano & Elizabeth Strom, *Comparative Urban Governance: An Integrated Approach*, 38 URB. AFF. REV. 356 (2003) (reviewing the literature and major approaches to the study of comparative urban governance; three

Importantly, local government legal scholars have identified and analyzed the emergence of cities, including transnational networks of cities, as critical actors on the international legal stage, shaping global legal norms and the implementation of international laws around the world.⁴ However, comparative analysis by legal scholars (and practitioners) of similar legal rules and policies adopted by cities around the world, although not uncommon, most often fail to really engage methodological questions underlying such comparisons.

This introductory essay begins to fill what we perceive as a prominent gap existing in the local government and comparative law literature. The task to compare local government law is not only daunting because of the extreme variation among local governments, but also because there is the perception that such comparison is of lesser relevance when comparative legal scholars have traditionally focused on states, constitutions, or geographic regions. Indeed, comparing the policies and practices of local governments may very well require its own mode of analysis. In undertaking this project, we realize that the relevant methodological insights for lawyers and scholars approaching CUG derive from various legal disciplines. In particular, there are at least three legal fields that offer insights, as well as illuminate shortcomings, for those who engage in CUG: local government law, comparative law, and the law of international economic development.

This introductory essay explains the relationship between CUG and these distinct legal fields through the rich contributions that were developed for a joint session of the Sections on State and Local Government and Comparative Law on CUG, organized by the authors of this Introduction, for the 2014 Annual Meeting of the American Association of Law Schools. Each Article offers an innovative and thoughtful approach that links different strands of local government law, comparative law, and international economic development scholarship, while offering a rich menu for urban reformers committed to rethinking sustainability and democratic inclusion as integral parts of economic development strategies for cities. Combined with the Articles collected in this volume, our aim is to sketch out a methodological framework for lawyers and legal

approaches are structural, cultural, and rational actor approaches); *see also* JEFFEREY M. SELLERS, *GOVERNING FROM BELOW: URBAN REGIONS AND THE GLOBAL ECONOMY* (Margaret Levi ed., Cambridge Univ. Press 2002).

4. *See* Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875 (2006); Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

scholars seeking to understand or contribute to this growing field of expertise.

The essay proceeds as follows: In Part I, we bring together a number of insights from scholars writing in three disparate but, for our purposes, intersecting fields, as we tease apart what might be unique about comparing the policies and practices of local governments, particularly city governments. This Part sketches an outline of a methodological framework for CUG, drawing attention to the analytical tools we believe are essential for lawyers and legal scholars. Parts II to IV review the Articles written for this symposium to illustrate how each of the authors employs the tools within our framework in their study of urban policies and practices that migrate across national borders. Finally, we end the essay by musing on the important role that lawyers and legal scholars can play in the field of CUG.

I. COMPARING LOCAL GOVERNANCE IN A GLOBAL WORLD

This symposium uses insights from strands of scholarship in comparative law, local government law, and law and development as a starting point to carve out a space for lawyers to engage in CUG. This entails mapping a methodology or a blueprint to compare the competing “legal formants”—the various actors and contexts—at work in different local government regimes, and analyzing the political, economic, and social stakes underlying each local regime.

A. Comparative Law Praxis

Legal scholars engaging in comparative analysis of legal rules and policies adopted by cities to address urban challenges tend to adopt one of two approaches. They analyze the impact of globalization on local government regimes typically through either a convergenist or divergenist approach.⁵ Work of scholars like James Kushner, a contributor to this symposium and author of a major textbook on Comparative Urban Planning Law, is characterized by a prescriptive impulse in finding common policies, or best practices, which can be used to solve similar local problems.⁶ Other urban scholars, on the other hand, acknowledge the diversity and fragmentation of local

5. See Daniel B. Rodriguez & Nadav Shoked, *Comparative Local Government Law in Motion: How Different Local Government Law Regimes Affect Global Cities' Bike Share Plans*, 42 FORDHAM URB. L.J. 123 (2014).

6. JAMES KUSHNER, *COMPARATIVE URBAN PLANNING LAW: AN INTRODUCTION TO URBAN LAND DEVELOPMENT LAW IN THE UNITED STATES THROUGH THE LENS OF COMPARING THE EXPERIENCE OF OTHER NATIONS* (2003)

government rules and practices under the pressure of economic globalization and/or historical and geographical path dependencies.⁷

Comparative legal scholars have largely tread this analytical terrain, although the tension between convergence and divergence remains central to the discipline. Nevertheless, over time comparative scholars have developed methods and ambitions that have led to important insights into these and other methodological questions.

Since the beginning of the twentieth century, comparative lawyers perceived their role as actors and promoters of social change with varying degrees of awareness of their actual involvement in governance and politics. However, by the mid-century, functionalist comparative scholars began showing a discomfort with politics that altered the value of their seemingly neutral scientific approach.⁸ In other words, at this point comparative law scholarship had become largely insulated from the power struggles and the socio-economic tensions embedded in questions of lawmaking. Some of the most resilient concepts in the field were developed around this time—such as Rene David’s idea of “legal families;”⁹ Konrad Zweigert and Hein Kötz’s functional assessments of doctrinal and institutional differences and similarities between legal regimes;¹⁰ and Alan Watson’s now widespread theory of “Legal Transplants.”¹¹ All these were presented as products of scientific comparative law knowledge operating within a deductive doctrinal framework and having little to do with changes in societies, as if the legal profession was insulated from the real world.

Since the 1990s, critical theory scholars have called upon comparative lawyers to regain confidence in the realm of politics, and to openly acknowledge the professional and academic commitments that underlie their efforts.¹² As a result, some comparative lawyers

7. See generally Richard C. Schragger, *Decentralization and Development*, 96 VA. L. REV. 1837 (2010).

8. David Kennedy, *The Methods and Politics of Comparative Law*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 345 (Pierre Legrand & Roderick Munday eds., 2003).

9. RENÉ DAVID, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* (John E. C. Brierley trans., The Free Press 1978).

10. KONRAD ZWEIFERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (Tony Weir trans., Oxford Univ. Press 3d ed. 1998).

11. See generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

12. See Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT’L L.J. 411 (1985).

rejected or called impossible the notion of legal transplants,¹³ while others replaced this notion with better-articulated concepts of ‘migration of ideas’¹⁴ or ‘legal diffusion.’¹⁵ In dismantling the fiction of legal families, for example, Jorge Esquirol effectively demonstrates how this notion produced and consolidated standard images in the law that bear no resemblance to reality but instead carry an ethnocentric bias. For instance, the creation of Latin American law ended up using one country’s legal system to generalize about the whole of the region.¹⁶ Moreover, western-centrism embodied the assumption that certain institutions and procedures are preferable to the failed local ones that should be continuously reformed.¹⁷

With the challenges posed by post-colonialism and legal globalization, comparative lawyers have put forward the need for a more politically responsible comparative law discipline by pushing back against problematic assumptions regarding the economic efficiency of the common law at the expense of the civil law.¹⁸ They seek a more structural approach to understanding how legal institutions have a “dynamic, or dialectical, or constitutive” relationship to economic globalization.¹⁹

Comparative law brings important insights to CUG, especially in its ability to map formal and informal regimes influencing city governance, as well as vertical and horizontal influences on city power. Namely, comparative law methodology asks how local institutions are reproduced by other local governments or how the city becomes the recipient of an idea that migrates from a nation state or international legal regime. Finally, CUG should resist the tendency to valorize per se Western institutions and to rely on “macro-generalizations” about legal regimes.²⁰ Rather, it should show how a variety of cities are playing a central role in the

13. See Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 116–20 (1997).

14. See THE MIGRATION OF CONSTITUTIONAL IDEAS 1, 2–3 (Sujit Choudhry ed., 2011).

15. See generally William Twining, *Diffusion of Law: A Global Perspective*, 1 J. COMP. L. 237 (2006).

16. See Jorge L. Esquirol, *The Failed Law of Latin America*, 56 AM. J. COMP. L. 75, 84–86 (2008).

17. See *id.* at 86–109.

18. See e.g., Nuno Garoupa & Carlos Gómez Ligüerre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT’L L.J. 287 (2011).

19. See Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19 (David Trubek & Alvaro Santos eds., Cambridge Univ. Press 2006).

20. Garoupa & Leguerre, *supra* note 18, at 288.

globalization of local government law since legal change happens not because of a single social purpose, but through a multiplicity of local and global factors, both internal and external, to urban governance.

B. Situating Cities in the Global Economic and Legal Order

Although many view local government law as the quintessential domestic field of law, economic globalization, coupled with global migration, have turned cities into central players in the world economy.²¹ Sociologists like Saskia Sassen have pointed out how ‘global cities’ such as London, Tokyo, and New York have emerged from the concentration of financial industries to affect the urban form of these cities, as well as its workers and larger populace in a way that reorganizes prior capital-labor relations.²² The burgeoning literature on ‘world’ or ‘global’ cities is important in the local governance literature not only for highlighting the internationalization of cities, but also for the critiques of the ways in which cities are developing and being embraced in the new global economic order.²³

If legal globalization has lagged behind its economic counterpart, lawyers have nevertheless become adept at tracing how economic globalization has impacted constitutional law regimes,²⁴ legal thought,²⁵ transnational legal regimes,²⁶ and eventually trickled down to local government law. Jerry Frug and David Barron, in particular, have demonstrated how cities interact with each other, through transnational networks of cities, and with international legal regimes, to become “independent international actors” while remaining formally subordinate to state governments.²⁷ As global regimes lend autonomy to cities and facilitate their independence from the states that endow them with legal power, these cities are in turn able to shape international legal rules and norms.²⁸

“International local government law,”²⁹ as developed by Frug and Barron, and others, furthers our understanding of what kind of cities

21. See Friedmann, *supra* note 1.

22. See SASSEN, *supra* note 1.

23. See Rodriguez & Shoked, *supra* note 5 (explaining the non-prescriptive nature of the initial authors, such as Sassen and Friedmann, and the more normative position of later ones, especially agglomeration economists such as Glaeser).

24. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65–103 (2005).

25. See, e.g., Kennedy, *supra* note 19.

26. See, e.g., Peer Zumbansen, *Transnational Law, Evolving, in* ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 898 (Jan M. Smits ed., 2d ed. 2012).

27. See Frug & Barron, *supra* note 4, at 1–2.

28. *Id.* at 3.

29. See *id.* at 2.

globalization is promoting while warning us against the perils of the “private city.”³⁰ As cities become more independent in the new global legal order, obtaining voice and influence on the international stage, they have also become prime disseminators of global capital and the main promoters of private economic development.³¹ This development, although perhaps inevitable given the political and market forces at work, harkens back to a well-established tradition of ‘privatism’³² in the United States. That is, the privatization of cities, under the gist of international economic development and modernization, appears increasingly consequentialist in a way that foregrounds market actors rather than city governments,³³ middle class rather than the poor, and shopping malls rather than public spaces.³⁴

While cities have become influential actors on the international policy and lawmaking stage, it is also true that international law and institutions increasingly shape the governance approach and local policies adopted by cities around the world. As Illeana Porrás has argued, the “new intimacy” between cities and international organizations such as the World Bank (WB) and the International Monetary Fund (IMF) is shaping the vision of the ideal city in ways that are increasingly divorced from “the people” to whom the city is supposed to be responsive and closer to the normative commitments of these institutions.³⁵ As international institutions play a larger role in directly funding urban projects and attracting foreign investment to cities, it is no surprise that their respective development agendas become more closely aligned.³⁶

This literature suggests that CUG, in comparing the local practices and policies of cities around the world, be ever attentive to the ways that international laws and institutions shape those policies and practices. As cities become more autonomous actors, it is important

30. *Id.* at 4.

31. Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT’L. L.J. 263 (2006).

32. See Frug & Barron, *supra* note 4, at 57 (tracing this notion back to SAM BASS WARNER, *THE PRIVATE CITY: PHILADELPHIA IN THREE PERIODS OF GROWTH* (1968)).

33. See *id.* at 58.

34. See, e.g., Priya S. Gupta, *Constructing Modernity in Urban India: The Role of the Judiciary in Slum Clearance*, 42 FORDHAM URB. L.J. 25 (2014) (explaining the transformation of New Delhi).

35. Illeana M. Porrás, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537, 555 (2009).

36. See *id.* at 555–56.

that CUG engage in questions of democratic and political accountability to a variety of local, international, and transnational actors. For instance, because cities have become the natural site for sustainable development policies, CUG should discern whom development policies are designed to serve and toward what ends.³⁷ One question that CUG might address is whether the influence of international and transnational organizations necessitates that development patterns replicate themselves in global cities.

C. Legal Reform and International Development

Understanding the important role that international legal institutions can assume in urban governance, both substantively and procedurally, requires some appreciation of the law and development literature. The beginning of the law and development literature dates back to the 1960s, when U.S. legal academics participated in international development projects under the auspices of the United States Agency for International Development (USAID) and the Ford Foundation.³⁸ These projects aimed to export U.S. legal education to Latin America in support of efforts there to ‘modernize’ Latin American legal education.³⁹ The comparative lawyers and academics involved in these projects had little self-consciousness about the local perception of their missionary intervention.⁴⁰ What marked the end of this period of ostensible legal reform was a groundbreaking essay by David Trubek and Marc Galanter explaining the self-estrangement scholars like themselves experienced while advancing the Western framework of ‘liberal legalism,’ which operated on assumptions that were at odds with Brazilian, Argentinian, or Chilean realities in which these scholars were asked to collaborate to bring about legal and institutional reforms.⁴¹

37. *Id.* at 584 (“While political and fiscal decentralization, without question, free the city from a certain degree of subservience to the state, the new ‘autonomous’ city is expected to exercise its public capacity only to the point of ensuring a free market environment amenable to private investment and to ensure that residents who can afford them will be efficiently provided with good services.”).

38. *See, e.g.,* José A Gómez-Ibáñez, *Alternatives to Infrastructure Privatization Revisited: Public Enterprise Reform from the 1960s to the 1980s* 8 (The World Bank: Sustainable Dev. Network, Policy Research Working Paper No. 4391, 2007).

39. *See, e.g.,* John Henry Merryman, *Law and Development Memoirs I: The Chile Law Program*, 48 AM. J. COMP. L. 481, 481 (2000).

40. *Id.* at 492–93.

41. *See* David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (1974).

The second wave of law and development literature in the 1990s was pervaded by neoliberal policies⁴² which sought to reform markets and private law, rather than the public law regimes promoted globally by the Washington Consensus in the first wave.⁴³ However, the joint focus of economists and lawyers to tailor development strategies to neoliberal legal reforms began waning as a result of disappointment with market shock therapies in Russia and Latin America, and opposition to structural adjustment policies across East Asia with active state intervention.⁴⁴ The critiques of the Washington Consensus began to take root in law and development strategies, pushing those strategies to include civil society as well as human and social goals in the post-neoliberal development agenda.⁴⁵

The space created by the demise of the Washington Consensus led to renewed attention to law in several forms, but, from our perspective, with an increasing attention to localism and local governmental institutions. In particular, the ‘New Institutionalism’ of Douglass North aimed to foreground the role of government institutions in regulating formal and informal markets so that ‘good governance,’ meaning fiscal integrity and strong economies without corruption, would take hold.⁴⁶ Reinforcing this vision centered on the relevance of property rights and Hernando de Soto’s work became predominant in spreading the notion that informality was the main obstacle to why entrepreneurs and land owners could not generate new surplus from their hidden assets in the informal economy.⁴⁷ Many of these goals have become part of the eight Millennium

42. We use neoliberal here to refer to the set of political and economic policies designed to preserve free markets, private property rights, and free trade. See DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 2 (2005).

43. See David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 25, at 1, 6.

44. See Joseph E. Stiglitz, *Is There a Post-Washington Consensus Consensus?*, in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* 41–48 (Narcis Serra & Joseph E. Stiglitz eds., 2008).

45. See David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 25, at 95.

46. See ROBERT H. BATES, *THE NEW INSTITUTIONALISM. THE WORK OF DOUGLAS NORTH*, available at <http://scholar.harvard.edu/rbates/publications/new-institutionalism-work-douglas-north>.

47. See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2003).

Development Goals (MDGs), which attempt to reduce poverty while spurring economic development by 2015.⁴⁸

The innovation to move beyond the MDGs, driven by the economist Jeffrey Sachs, provided the foundational ideas as well as key indicators that the IMF, Organization for Economic Co-operation and Development (OECD), and WB later adopted.⁴⁹ While some have embraced this initiative, which offers indicators on how to measure development, others have questioned the conspicuous absence of the rule of law and human rights, and sensed that law has become simply a technocratic tool with which to quantify and spur economic efficiency.⁵⁰ Some scholars have pushed back against the formal neutrality and scientific orientation undergirding the idea that law is neither shaped by, nor shapes, economic globalization.⁵¹ In the same vein, they have shown the failures of de Soto's assumption that informality is per se a lawless regime, when informality is really a result of legal regimes.⁵² For example, the informal sector is nurtured where high cost land-titling causes de facto low-income housing, such as in shantytowns in Panama City.⁵³

CUG can contribute to these insights by showing how the neoliberal development agenda has created specific features for cities, like the rise of consumption and privatization of urban spaces, gentrification, and the attraction of foreign capital through rapid urbanization.⁵⁴ Through the reduction of public spaces and the weakening of the democratic ties between the city and the people inhabiting it, the development agenda has replaced the inclusive and tolerant nature of cosmopolitan cities⁵⁵ with market efficiency and

48. *See generally* United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc A/RES/55/2 (Sept. 18, 2000).

49. *See* Thomas Kelley, *Beyond the Washington Consensus and New Institutionalism: What is the Future of Law and Development?*, 35 N.C. J. INT'L L. & COM. REG. 539, 547 (2010).

50. *See id.* at 550.

51. *See* CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* (2008).

52. *See* Jorge L. Esquirol, *Titling and Untitled Housing in Panama City*, 4 TENN. J.L. & POL'Y 243, 245–46 (2008); *see also* Sheila R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. MIAMI INTER-AM. L. REV. 261 (2009).

53. *See* Esquirol, *supra* note 52, at 249–50.

54. *See* Gupta, *supra* note 34, at 74–85 (explaining how the neoliberal development agenda has operated in New Delhi through specific urban policies as well as legal strategies such as the formalization of property rights).

55. *See* IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (2011).

gentrification values that displace the poor under the rhetoric of public safety, public health, and property rights.⁵⁶

II. FROM FUNCTIONALISM TO LEGAL FORMANTS

The first hurdle for comparative lawyers is to overcome the so-called static method or ‘comparison by columns’ that is indifferent to the law in action. The disregard of the law in practice and the implementation of legal norms make this type of comparison superficial, if not inaccurate, when the law in the books is the only one described in each column. If the comparison by columns is still dominant among think tanks, and even the WB, the problem is that the columns portray legal systems as isolated legal islands rather than as systems influenced by a broader legal culture, society, and legal rationality. Finally, comparison by columns is under-selective and limited to formal, rather than informal, rules resulting in an inability to consider much of the reality of how law operates in practice.

What was revolutionary with the widespread use of the functional approach since the twentieth century was that lawyers engaged in comparative law research by addressing legal rules in practice, in their context, without limiting themselves to law in the books.⁵⁷ This functionalist method relies on the notion that there are similar problems that can be compared, even though these might involve distinct doctrines of legal institutions in different legal systems, by tackling the same functional question.⁵⁸

A. Functionalism 101: Kushner’s Institutional Corruption

James Kushner’s essay, published in the *Fordham Urban Law Journal’s* online companion to this issue, *City Square*, and his pioneering work on CUG, have marked important efforts in tearing down both the impression that it is impossible to compare this field of law and the tendency to pursue comparisons merely by columns by showing that similar local problems deserve a full-fledged functional comparison.⁵⁹ Kushner’s contribution to this conference sheds light

56. See Gupta, *supra* note 34.

57. See Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 677–78 (2002).

58. Michele Graziadei, *The Functionalist Heritage*, in COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS, *supra* note 8, at 100, 110–27.

59. See James A. Kushner, *A Tale of Three Cities: Land Development and Planning for Growth in Stockholm, Berlin and Los Angeles*, 25 URB. LAW. 197 (1993); James A. Kushner, *Comparative Urban Governance: Why the United States is Incapable of Reform*, 41 FORDHAM URB. L.J. CITY SQUARE 20 (2014) [hereinafter

on how, in U.S. municipal governments, land-use planning and regulation often appear structured to allow the maximum amount of corruption possible. Developers and contractors are expected to make political contributions to local politicians who possess the power to block or facilitate development and public contracts. For example, in Los Angeles there is an understanding among city council members that they will defer to the council representative from the district where the development is proposed on zoning matters, such as variances, subdivisions, and zoning amendments.⁶⁰ This allows legislators to have free reign over the projects and facilitates exactions as a price of development.⁶¹

In his comparison, the examples coming from the European land-use planning context appear to be welcoming attempts to ameliorate these problems significantly. For example, in Stockholm, despite a large legislative body of elected members that makes the decision-making process lengthy and complex, the system actually creates more transparency.⁶² As another example, Germany requires the government of the State or the German Land to be consulted and to approve of significant local projects and plans.⁶³ Finally, the Netherlands requires shared decision-making between local and state government in development projects, subject to the national standards.⁶⁴ Despite the seemingly built-in safeguards against the kind of influence and corruption that private developers exercise over local land use decisions in the United States, Kushner nevertheless is able to discern that these European systems are still prone to corporate capture in an environment of global competition for investment capital and shrinking municipal budgets.⁶⁵

In Kushner's examples, it is not clear if each of the lauded European solutions really advance his social-purpose goal of anti-corruption, even if they advance other policy goals. For example, the city of Stockholm was trying to achieve social inclusion, gentrification, or decentralization of power rather than combat corruption when it adopted its policy. The social-purpose functionalist approach used by Kushner certainly narrows the comparison to a particular goal aiming

Kushner, *Comparative Urban Governance*], available at <http://urbanlawjournal.com/comparative-urban-governance-why-the-united-states-is-incapable-of-reform/>.

60. Kushner, *Comparative Urban Governance*, *supra* note 59, at 22.

61. *See id.*

62. *See id.* at 22–23.

63. *See id.* at 23.

64. *See id.*

65. *See id.* at 24–25.

to find ‘best solutions’ to important problems. However, critiques to this comparative approach have shown that such a narrow framework often collapses the distinction between facts versus ends, and neglects the potential that best institutional solutions might not solve social problems in different social contexts.⁶⁶

B. Legal Formants at Work: Global Cities’ Bike Share Plans

As explained earlier, Rodolfo Sacco’s legacy in comparative law has been the structural analysis of legal systems through the lens of “legal formants.”⁶⁷ These are not selections of a single social purpose or functions in the law; instead they capture legal outcomes as a product of conflicting forces that must be contextualized before they can be explained. Thus, to understand legal norms, comparative lawyers must understand the particular configuration, competition, and compromises among the formants that produce them.⁶⁸ The structuralist element in Sacco’s legal formants approach highlights the recurrent opening of a gap between declaratory statements and operative rules—a gap that recurs throughout various legal sources of each legal system.⁶⁹ Daniel Rodriguez and Nadav Shoked’s insightful Article in this volume, *Comparative Local Government Law in Motion: How Different Local Government Law Regimes Affect Global Cities’ Bike Share Plans*, develops a structural comparative approach that bears resemblance to Sacco’s ‘legal formants’ approach.⁷⁰

Sacco’s legal formants approach offers a dynamic understanding of comparative law. In refusing the principle of ‘the unity of the law,’ Sacco insists that each legal rule becomes the product of the

66. See Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777 (2010) (explaining how positive-sociology functionalism takes into account the context as well as the political choices made by comparative lawyers in addressing legal reforms).

67. See Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 AM. J. COMP. L. 1 (1991) [hereinafter Sacco, *Formants Part I*]; see also Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)*, 39 AM. J. COMP. L. 343 (1991) [hereinafter Sacco, *Formants Part II*].

68. See Pier Giuseppe Monateri & Rodolfo Sacco, *Legal Formants*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 531 (Peter Newman ed., 1998) (providing that, contrary to the liberal bias of the legal process, the legal formant approach does not see equilibrium and commitment to liberal values in the process, which is a complex set of strategies between conflicting legal actors).

69. See Sacco, *Formants Part I*, *supra* note 67, at 33–34; Sacco, *Formants Part II*, *supra* note 67.

70. Rodriguez & Shoked, *supra* note 5.

interaction, competition, and struggle among the different legal formants (legislation, case-law, scholarly work, ideology such as in the Soviet legal system, etc.).⁷¹ Moreover, there is a second level of deconstruction of legal rules that is relevant to each legal formant—namely the disjuncture between the declaratory statement and its operative rule.⁷² This structural method allowed Sacco to show the limits of the deductive method and, more generally, to internally criticize the dogmatism pervading post-WWII Italian legal academia depicting its legal system as gapless and coherent.⁷³

The starting point of legal formants is to show how the law works in practice with very different outcomes. For example, even though the French and Belgian civil codes might have the same legal provisions, outcomes in these legal systems might be strikingly different. Likewise, although Italy and France have different declaratory statements in their civil codes, their courts may nonetheless apply the same operative rule.⁷⁴ Thus, the operative rule, or the ‘law in action,’ determines the decision and is imperative to understand. Rather than a fixed law on the books, the operative rule determines the real content of the norm. But it is dynamic rather than static, and it can change over time. In contrast to operative rules, declaratory statements, which are purported explanations of operative rules, can be true or false.

Rodriguez and Shoked’s project is ambitious and original not only because of its rigorous structure, but also for mapping what is a truly global diffusion of bike share plans in Paris, London, Barcelona, Chicago, New York, Boston, Washington, D.C., Mexico City, Buenos Aires, Taipei, Vancouver, Montreal, Melbourne, and Tel Aviv. Each local government jurisdiction is not a unitary ‘black box,’ but is instead dissected by the authors through an elegant typology of four different axes mapping the source of cities’ administrative and jurisdictional authority internally, vertically vis-à-vis the states and other smaller levels of authority, and horizontally with other local and regional bodies.⁷⁵

The point of this exercise is not just a deconstruction of local governments’ authority, but rather a powerful insight on the diffusion and the successful implementation of urban policies ‘in motion.’ Through the analytics of the four axes of authority, it becomes clear

71. See Sacco, *Formants Part II*, *supra* note 67, at 343–50.

72. See *id.* at 350–58.

73. See *id.*

74. See Sacco, *Formants Part I*, *supra* note 67, at 23.

75. Rodriguez & Shoked, *supra* note 5, at Part III.

that the most contested policies surrounding the implementation of bike sharing plans, such as the process of the plans' adoption, the funding scheme, and the location of bike docking stations, will determine whether these plans will be successful in a particular place.⁷⁶ The structural correlation between the institutional and jurisdictional organization of local government powers explains the triumph or failure of bike sharing plans in a city. For instance, the authors show that after the initial decision to implement a bike share plan, there are corollary policies, such as the existence of state road safety helmet requirements, which can cause the failure of the plan's implementation if the city does not obtain permission from the state to modify these provisions.⁷⁷

The authors conclude with the ambition that their model will become a blueprint for comparative local government law that will enable urban planners, politicians, and lawyers to anticipate the likelihood of success of the complex set of operative rules underpinning any urban policy. Yet they also acknowledge the limitation of their comparative local government method. Namely, even their account does not fully capture the variation in legal and political culture, not to mention history, that influence local actors' ability to adopt and design policies. This limitation explains the shortcomings of even a well-executed structural comparative analysis of legal rules and institutional design without paying enough attention to the path dependencies, histories, and cultures shaping each city.⁷⁸

III. CONTEXTUALISM AND EXPRESSIVISM IN COMPARATIVE URBAN GOVERNANCE

In comparative constitutional law, Mark Tushnet has powerfully illustrated some of the main methods adopted by lawyers in this discipline. While 'normative universalism' seeks to unearth the founding normative principles of a constitutional order, 'functionalism' compares instead to the institutional design laid out by the constitution. Tushnet refers to a set of more critical methods: while 'contextualism'⁷⁹ is geared towards demonstrating how law is

76. *See id.* at Part III.

77. *Id.* at 170–72 (noting the failure of the bike share plan in Melbourne).

78. *Id.* at 188–90.

79. *See* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* 3–17 (2008) (focusing on the methods of comparative constitutional law as functionalism, expressivism and contextualism).

embedded in a particular society and history, ‘expressivism’⁸⁰ reflects the way nations use constitutional rules to define themselves. An expressivist analysis captures, for instance, the ‘inward-looking’ United States and ‘outward-looking’ Canada vis-à-vis the deeply contested question of capital punishment.⁸¹ In combining some of the different constitutional methods from different nations, comparative lawyers become *bricoleurs*.⁸² They also discover and debunk ‘false necessities’—salient institutional, doctrinal, and ideological features that emerge as seemingly necessary but that in fact may preclude legal change in a particular context.⁸³

Both critical methods—contextualism and expressivism—emerge in Priya Gupta’s Article in this issue.⁸⁴ Gupta situates the ongoing jurisprudence of the Indian courts vis-à-vis property rights, the relocation of slums, and the definition of city space in a broader historical and socio-economic context shaped by, and in turn contributing to, a global development agenda being promoted simultaneously in Washington and New Delhi.⁸⁵ New Delhi is a global city where, despite the fact that globalization has created economic opportunities for many, there is new fragmentation, local resistance, and, as Saskia Sassen explains, ‘deurbanizing’ processes through expulsion of the poor, surveillance, and privatization.⁸⁶ However, Gupta sheds new light on the interpretation of the Supreme Court’s jurisprudence. Her contextual and historical analysis of the Indian city shows that the road not taken in New Delhi is an economic development strategy that includes the urban poor. The false necessity created by economic development and modernization ideologies has prevented Indian courts from embracing less rigid and formalistic conceptions of property to accommodate, as Gupta explains it, “different lifestyles.”⁸⁷

Gupta’s Article contends that marginalization of populations living in urban slums is being accomplished legally through shifts in how urban space, and its associated rights, have been conceptualized by

80. *See id.* at 12.

81. *Id.* at 13.

82. Tushnet uses this term to refer to constitutional borrowing in the modern age. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1285–1306 (1999).

83. TUSHNET, *supra* note 79, at 14.

84. Gupta, *supra* note 34.

85. *See id.*

86. *See* Saskia Sassen, *Does the City Have Speech?*, 25 *PUB. CULTURE* 209, 219–20 (2013).

87. *See* Gupta, *supra* note 34.

the Indian courts.⁸⁸ She traces the trajectory of this jurisprudence back to a prominent 1985 case in the Indian Supreme Court, which was a thin victory for the slum residents, based on the right to life rather than a social interpretation of public property.⁸⁹ This jurisprudential turn is striking, she argues, if one accounts for the historical context, specifically the Indian constitutional moment of the 1950s through the 1970s, in which early jurisprudential interpretation of property rights promoted India's legislature to pass laws to redistribute land.⁹⁰ Much to the dissatisfaction of the Indian people, however, the land reforms failed to produce the economic growth the state strived for.⁹¹ Consequently, with state-centric policies being discredited in India, more modern policies gave rise to neoliberalism in the 1980s.⁹² The reforms advocated by the government under the leadership of the Washington Consensus included deregulation, privatization of state-owned industries, and opening India to more international trade and capital.⁹³ It is through this more recent history and context that Indian courts deny access to shelter to indigent people and people living in slums.

Although Gupta's Article does not explicitly undertake a comparison with other countries of Indian jurisprudence regarding property rights and economic development, it illustrates the kind of contextualism that is a precursor to rigorous comparisons of similar (or the same) legal doctrines between different legal regimes.⁹⁴ Likewise, her analysis embodies the expressivist analysis of comparative constitutional methodology, which captures the ways in which places define themselves. As Gupta powerfully argues, court decisions since 2000 which involve New Delhi have strengthened a version of the 'modern' city that goes hand-in-hand with a neoliberal development agenda in which workers in the waste management sectors implicitly belong to lower caste communities, which makes it increasingly more difficult for the most marginalized people to inhabit

88. *Id.* at Part IV.

89. *Id.* at Part III.A (discussing the *Olga Tellis* case).

90. *Id.* at 44–48.

91. *Id.* at 48–49.

92. *Id.* at Part II.B3.

93. *Id.*

94. In this vein, see a recent symposium comparing how the social function of property doctrine was developed, codified, and implemented in strikingly contextualized ways by different Latin American countries. See Sheila R. Foster & Daniel Bonilla, *Symposium Introduction: The Social Function of Property: A Comparative Perspective*, 80 FORDHAM L. REV. 1003 (2011).

city space anywhere.⁹⁵ In subsequent cases, the jurisprudence continues to blame city problems on migrants and the marginalized people in society and abolishes any settled expectation, or right, to housing.⁹⁶ When framing the actors of these cases, Gupta is explicit about the expressive elements of the jurisprudence in the way that courts label the residents of the slums as ‘trespassers’ and blame the victims for their own lot in life.⁹⁷ This expressivism is ironically decontextualized due to courts’ unwillingness to examine the historical, geographical and political economy characterizing the circumstances in which informal housing emerged in the country.

IV. INTERNATIONAL LOCAL GOVERNANCE IN ACTION

Embedded in the lessons of International Local Government Law, Andrea McArdle’s Article argues that municipalities now play a prominent role in preparing for weather disasters and climate change.⁹⁸ Given the relationship that local governments have to land use, infrastructure, public health, and safety obligations in cities, they are the first line of defense in preparing for weather disasters.⁹⁹ While municipal governments are at times vertically limited in terms of their ability to shape policies or initiate legislation, McArdle’s Article illustrates the ways that cities have acquired the power to engage with international soft law regimes such as transitional governance networks. These regimes have proliferated as ‘information-driven’ ones¹⁰⁰—endeavoring to share information, seek collaboration for problem-solving, and develop best practices for local governance.¹⁰¹ They are an important illustration of the move from local ‘government’ to ‘governance,’ partly the result of cities’ new and increasingly autonomous role on the international stage and encouraged by international policymaking institutions.¹⁰²

McArdle’s Article adds to the International Local Government blueprint the notion that soft law, as developed by vertical-public as well as private-public collaboration, opens up new avenues for

95. See Gupta, *supra* note 34, at Part III.B.1 (discussing the case of *Almitra Patel*).

96. *Id.* at Part III.B.3 (discussing the case of *Okhla Factory Owners*).

97. *Id.* at 66–67.

98. See Andrea McArdle, *Lessons for New York: Comparative Urban Governance and the Challenge of Climate Change*, 42 *FORDHAM URB. L.J.* 91 (2014).

99. *Id.* at 95.

100. *Id.* at 93.

101. *Id.* at 102–11.

102. Porras, *supra*, note 35, at 539–40.

innovation and legal design by cities. The notion of soft law reflects two major trends in the globalization of law: the striking multiplication of producers of law and, in turn, of bodies of law, and also the increasing privatization of legal regimes.¹⁰³ Her Article highlights the need for a more soft and horizontal approach of ‘city-to-city engagement’ in order to tackle climate change.¹⁰⁴ This approach will enable cities to take a more active role in the prevention of weather disasters, and in shaping climate change policy generally. Cities can become more active by developing networks to adapt to changing circumstances and to allow for public and private partnerships.¹⁰⁵ Ultimately, these regulations emanate through the use of soft law—goal and target-setting, data aggregation related to outcomes, and information sharing.¹⁰⁶

C40 Cities Climate Leadership Group (C40 C Group) is an example of how cities have become generators of policies and practices that “can spread and gain adherents among other cities.”¹⁰⁷ The C40 C Group operates by congregating a network of the world’s largest cities seeking to reduce greenhouse gas emission and take other actions to decrease climate-related risks.¹⁰⁸ These transnational networks position urban governments horizontally, rather than just vertically, and very much operate autonomously within an international framework.¹⁰⁹ C40, for instance, works in conjunction with partners such as the WB, World Resource Institute, and International Council for Local Environmental Initiatives (ICLEI) to finance and support such initiatives.¹¹⁰ By engaging with these partnerships, McArdle argues that cities are better able to participate in the global response to climate change. Cities that face the most direct threats from extreme weather events also carry the advantage of being highly knowledgeable about local conditions, resources, and

103. See McArdle, *supra* note 98, at 102–03.

104. *Id.* at 114.

105. *Id.* at 103–04.

106. *Id.* at 102–03.

107. *Id.* at 102.

108. *Id.* at 105.

109. *Id.* at 102.

110. For example, the World Bank institutes a metric to facilitate cities’ measuring and reporting emissions and demonstrating progress in qualifying for financial assistance for major projects, the World Resources Institute developed an instrument to measure city-level emissions, and ICLEI helps develop a broadly applicable standard for tabulating and reporting for measuring city-level emissions. *Our Partners & Founders*, C40 CITIES, <http://www.c40.org/partners> (last visited Oct. 17, 2014).

vulnerabilities that must be considered in developing appropriate responses.¹¹¹

In a genealogical study of soft law, Anna di Robilant has shown that its genealogy can be traced either to medieval legal pluralist *lex mercatoria* or later on in the social tradition developed by nineteenth-century jurists echoing notions of flexibility and organicism.¹¹² These genealogical strands, however, tend to obscure the distributive consequences and the power dynamics that lie behind soft law and governance networks promoted globally. By responding to this critique, McArdle puts forward the limitations of her soft law approach in explaining that “well-resourced non-state participants will dwarf the role of local government actors and, perhaps, reinforce dynamics of dependency among cities in less developed regions.”¹¹³ As to the underlying power dynamic, McArdle acknowledges that these networks lack legal accountability and might be driven by economic growth rather than a sustainability rationale.¹¹⁴

To tame the ‘growth imperative’¹¹⁵ spread by economic globalization, McArdle’s hope lies in a robust involvement of cities through democratic deliberation in transnational horizontal networks pressured by civil society mobilization and commitment to urban sustainability and resilience.¹¹⁶ We believe that such hope could be furthered by empirical work showing how civil society is empowered to put pressure on, rather than be coopted by, transnational networks including other cities as well as private and international actors.¹¹⁷ Despite the important challenges that McArdle’s Article engages with, her preliminary intervention is to show that horizontal networks enhance the ability of cities to take independent action, to influence policy, and to access valuable information on how cities around the world are responding to climate change.

111. McArdle, *supra* note 98, at 113.

112. See Anna di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499 (2006).

113. McArdle, *supra* note 98, at 119.

114. *Id.* at 120–21.

115. *Id.* at 120.

116. *Id.*

117. The Peoples’ Climate March (PMC) in New York City is a timely example of civil society mobilization for urban sustainability even though some have expressed criticism about popular involvement when backed by corporate interest. See Jonathan Smucker & Michael Premo, *What’s Wrong with the Radical Critique of the People’s Climate March*, NATION (Sept. 30, 2014), <http://www.thenation.com/article/181799/whats-wrong-radical-critique-peoples-climate-march#>.

CONCLUSION

Among the central lessons of this symposium is the striking influence of economic globalization and international development trends on urban spaces and local legal regimes. The changes triggered by these phenomena have opened new possibilities for urban governance—from the legal diffusion of urban policies as global cities begin to replicate each other to knowledge and information sharing via transnational urban government networks. However, the Articles in this issue also warn that public space is shrinking as local government regulation is replaced by contractual arrangements, and that there is a real deficit in public accountability and participation.¹¹⁸

Take, for instance, what has become one of the most provocative ideas of the past few years: Paul Romer’s notion of a ‘charter city’—an independent city in a country aiming to reduce poverty around the world.¹¹⁹ Charter cities would attract foreign investment and, like a ‘technological oasis,’ become a big attraction for capital flows.¹²⁰ The inspiration for charter cities, Romer claims, comes from the Hong Kong and Macao transfer of sovereignty via long-term leases. In 2011, Romer’s idea was put in action by President Porfirio Lobo Sosa of Honduras to form an independent or ‘model city’ with a very high degree of autonomy that would foment development in the region.¹²¹ The President’s decree to amend the constitution to adopt model cities was ratified by the Honduran Parliament.¹²² In the aftermath of his parliamentary victory, Lobo signed a memorandum of understanding with a private development firm, the MKG Group, a consortium of investors led by Michael Strong investing an initial fifteen million dollars toward infrastructure, to develop and run the

118. See Saskia Sassen, *Visible Formalizations and Formally Invisible Facticities*, 20 IND. J. GLOBAL LEGAL STUD. 3 (2013).

119. See Sebastian Mallaby, *The Politically Incorrect Guide to Ending Poverty*, ATLANTIC (June 8, 2010, 9:00 AM), <http://www.theatlantic.com/magazine/archive/2010/07/the-politically-incorrect-guide-to-ending-poverty/308134/>.

120. *Id.*

121. Arthur Phillips, *Charter Cities in Honduras?*, OPEN SECURITY (Jan. 7, 2014), <https://www.opendemocracy.net/opensecurity/arthur-phillips/charter-cities-in-honduras>.

122. See Decreto No. 123-2011, de 29 de Julio, Gaceta No. 32,601 del martes 23 de Agosto de 2011, *translation available at* <http://patrifriedman.com/projects/fcd/RED%20Legislation%20-%20Official%20English%20Translation.pdf> (modifying Article 329 of the Constitution of the Republic of Honduras, which authorizes the creation of Special Development Regions (SDR’s)).

areas.¹²³ However the MKG Group’s vision of the model city was different from the diverse city of ten million people that Romer had in mind, as the Group envisioned the building of few factories that employed a few hundred thousand people that would attract investors due to low taxes and low wages.¹²⁴

Even though the Honduras model city decree was not a formal cession of territory, the responsibility for the legal regime was contracted out to a corporate entity that would administer civil and criminal matters through an independent commission, using as a court of appeal the Supreme Court of Mauritius.¹²⁵ This would be a nightmare for contemporary comparative constitutional lawyers to imagine, considering that the Supreme Court of Mauritius has absolutely no contextual or expressive understanding of what happens in the model city in Honduras and yet must interpret the law and the constitutional rights of people that are not living in its territory. Not surprisingly, in 2012 the Honduran Supreme Court declared the decree unconstitutional because the grant of legal authority to the Special Development Regions—in exchange of the future possibility of economic development—was in violation of the “territorial integrity, sovereignty and independence of the Honduran State.”¹²⁶ In 2013, the Honduran legislature again overwhelmingly passed another bill that would allow autonomously governed cities on its territory.¹²⁷ At this point, Paul Romer distanced himself from the project and its role in a governmental commission, which, after a number of years, would transfer its full authority to the city’s residents.¹²⁸

Beyond the fact that Romer’s idea was transplanted in Honduras by an alleged corrupt administration, this action was witness to the creation of what Frug and Barron call the ‘private city’—one in which the authority over residents, rather than citizens, was exercised by independent commissions, a corporate board and a foreign supreme

123. See Maxim Lott, *Private City in Honduras Will Have Minimal Taxes, Government*, FOX NEWS (Sept. 22, 2012), <http://www.foxnews.com/world/2012/09/11/private-city-in-honduras-will-have-minimal-taxes-government/>.

124. Mallaby, *supra* note 119.

125. See Steven Press, *Honduran Model-Cities: A Historical Perspective*, CENTERPIECE, Fall 2012, at 6, available at <http://wcfia.harvard.edu/files/wcfia/files/cpfall2012.pdf>.

126. *Id.*

127. *Honduras Once Again Passes ‘Model Cities’ Law*, ASSOCIATED PRESS (Jan. 23, 2013, 11:17 PM), <http://bigstory.ap.org/article/honduras-once-again-passes-model-cities-law>.

128. See Phillips, *supra* note 121.

court.¹²⁹ The story embodies the prediction of the “*Jewish question*”¹³⁰ about the changing nature of the participants to our civil society. These have become abstract citizens instead of real human beings who are politically committed to participate and shape a democracy. In charter cities, the abstract citizen who is a mere resident rather than a participant in government and governance of her space has no political rights because the territory no longer includes a public sphere.

In our symposium, the important role of lawyers in CUG has emerged in different ways. Gupta’s work shows how lawyers are able to reject false necessities in the framing of formal property rights that reserve the construction of urban spaces for middle and upper classes while excluding the poor. The lesson of the Honduras charter city teaches us that comparative urban governance requires not only economists and urban planners, but most importantly lawyers who can develop original blueprints to compare local government laws in the case of Rodriguez and Shoked’s contribution, and, as McArdle demonstrates, share knowledge through transnational horizontal networks that build cities’ capacity to grow sustainably and democratically.

129. Frug & Barron, *supra* note 4, at 3.

130. See Karl Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 26–52 (Robert C. Tucker ed., 1978). For an insightful application of the young Marx’s insights to U.S. local government law, see Kenneth A. Stahl, *Local Government, “One Person, One Vote,” and the Jewish Question*, 49 HARV. C.R.-C.L. L. REV. 1 (2014).