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## Fairness, Equity, and a Level Playing Field: Development Goals for the Resilient City

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# FAIRNESS, EQUITY, AND A LEVEL PLAYING FIELD: DEVELOPMENT GOALS FOR THE RESILIENT CITY

CHRISTOPHER K. ODINET\*

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## INTRODUCTION

*“Nations, governments and religions, and all arts and knowledges, rest on the basic phenomenon of human existence, the city.”<sup>1</sup>*

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1. 1 MCQUILLIN: THE LAW OF MUNICIPAL CORPORATIONS, ch. 1, pt. I, § 1:4 (3d ed., 2013). See generally T.R. GLOVER, THE ANCIENT WORLD: A BEGINNING (1937).

Few societal institutions have been as integral to the growth and prosperity of human civilization as the city.<sup>2</sup> It not only serves as an enclave for development, education, business, and culture to prosper, but it also represents the common goals and shared values that link together society.<sup>3</sup> Some have said, “when you look at a city, it's like reading the hopes, aspirations and pride of everyone who built it.”<sup>4</sup>

History has seen the rise and fall of many great cities.<sup>5</sup> Great moments in the story of humanity, as well as the birth and the end of eras, have often centered on the beginning or the end of cities.<sup>6</sup> Although agriculture has always held a prominent place in the story of human flourishing, the city is where a greater level of development and the rise of sophisticated and civilized societies were made possible.<sup>7</sup>

Similarly, American cities have also enjoyed a special place at the heart of the national spirit and the history of the country.<sup>8</sup> Great political movements, noted industrial and commercial enterprises, and countless innovations leading to a rise in quality of life expectations all sprang up in or around America's cities.<sup>9</sup> And while Thomas Jefferson's dreams of an agrarian America have not been completely blotted out, it is unquestionable that the country's development and growth has been nurtured and blossomed within the walls of the city.<sup>10</sup>

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2. See LEWIS MUMFORD, *THE CITY IN HISTORY: ITS ORIGINS, ITS TRANSFORMATIONS, AND ITS PROSPECTS* 3–4 (1961); Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 311–12 (2010) [hereinafter Schragger, *Rethinking the Theory*].

3. See generally Schragger, *Rethinking the Theory*, *supra* note 2, at 312 (discussing the influence cities have over the well being of their citizens).

4. Hugh Newell Jacobsen, *Aspirations Quotes*, FINESTQUOTES.COM, [http://www.finestquotes.com/select\\_quote-category-Aspirations-page-1.htm](http://www.finestquotes.com/select_quote-category-Aspirations-page-1.htm) (last visited May 21, 2014).

5. See RICHARD LAWTON, *THE RISE AND FALL OF GREAT CITIES: ASPECTS OF URBANIZATION IN THE WESTERN WORLD* (1989); Schragger, *Rethinking the Theory*, *supra* note 2, at 313.

6. See Schragger, *Rethinking the Theory*, *supra* note 2, at 313.

7. See MASON HAMMOND, *THE CITY IN THE ANCIENT WORLD* 33 (1972); Schragger, *Rethinking the Theory*, *supra* note 2, at 313–14.

8. See generally DONALD L. MILLER, *CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA* (1996); JAMES HOWARD KUNSTLER, *THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE* (1993); Schragger, *Rethinking the Theory*, *supra* note 2 (showcasing that cities are an important part of American history).

9. See ALAN EHRENHALT, *THE GREAT INVERSION AND THE FUTURE OF THE AMERICAN CITY* (2013); Schragger, *Rethinking the Theory*, *supra* note 2, at 315–17.

10. See EHRENHALT, *supra* note 9; see also THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA* 197 (1785), available at <http://web.archive.org/web/20110221130550/http://etext.lib.virginia.edu/etcbin/toccer-new2?id=JefVirg.sgm&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=all> (“Those who labor in the earth are the chosen people of God, if ever he had a chosen people, whose breasts he has made his peculiar deposit for substantial and genuine virtue. It is the focus in which he keeps alive that sacred fire, which otherwise might escape from the face of the earth. Corruption of morals in the mass of cultivators is a phenomenon of which no age nor nation has furnished an example. It is the mark set on those, who not looking up to heaven, to their own soil and industry, as does the husbandman, for their subsist-

However, in the past several decades the city has been tested and tried by changing political winds, the harsh storms of economic downturns, and shifts in sociological decision making.<sup>11</sup> General governmental power and authority has shifted between a model favoring a more centralized federal or state government and a structure focused more on the autonomy and control of local governments.<sup>12</sup> Similarly, the city—with its often limited financial resources compared to its much larger federal or state counterparts—has often been subjected to the ever-changing economic winds which, when combined with poor local government decision making, can crush a municipality under the weight of reduced revenue streams and burdensome financial obligations.<sup>13</sup> And importantly, the waves of desegregation and psychological shifts that favor individualism over collectivity have brought many inhabitants of

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ence, depend for it on the casualties and caprice of customers . . . . The mobs of great cities add just so much to the support of pure government, as sores do to the strength of the human body. It is the manners and spirit of a people which preserve a republic in vigor. A degeneracy in these is a canker, which soon eats to the heart of its laws and constitution.”)

11. *See generally*, JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (an attack on principles that have shaped modern city planning, designing, and rebuilding) [hereinafter *THE DEATH AND LIFE OF GREAT AMERICAN CITIES*].

12. MILDRED J. LOOMIS, *DECENTRALISM: WHERE IT CAME FROM—WHERE IS IT GOING?* 5–25, 105–10 (2004); *see also* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543, 543–44 (1954); JAMES MADISON, *THE FEDERALIST PAPERS: NO. 47* (1788), *available at* [http://avalon.law.yale.edu/18th\\_century/fed47.asp](http://avalon.law.yale.edu/18th_century/fed47.asp); MIKHAIL FILIPPOV, PETER C. ORDESHOOK & OLGA SHVETSOVA, *DESIGNING FEDERALISM: A THEORY OF SELF-SUSTAINABLE FEDERAL INSTITUTIONS* 11 (2004); Larry Kramer, *Understanding Federalism*, 47 *VAND. L. REV.* 1485, 1498 (1994); Alison L. LaCroix, *The Authority for Federalism: Madison’s Negative and the Origins of Federal Ideology*, 28 *LAW & HIST. REV.* 451, 485 (2010); Andrew N. Parker, *Decentralization: The Way Forward for Rural Development?*, in *POLICY RESEARCH WORKING PAPERS* 1475, 18–19 (1999), *available at* <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-1475>; JON C. TEAFORD, *CITY AND SUBURB: THE POLITICAL FRAGMENTATION OF METROPOLITAN AMERICA 1850-1970* (1979). *See generally* MILLER, *supra* note 8.

13. Howard Chernick, Adam Langley, & Andrew Reschovsky, *The Impact of the Great Recession and the Housing Crisis on the Financing of America’s Largest Cities*, UNIVERSITY OF WISCONSIN-MADISON, WORKING PAPER SERIES NO. 2011-008, 1–3 (2011), *available at* <http://www.lafollette.wisc.edu/publications/workingpapers/reschovsky2011-008.pdf>; *see* Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 *U. CHI. L. REV.* 425, 425–26 (1993); *Bankrupt Cities, Municipalities List and Map*, GOVERNING, <http://www.governing.com/gov-data/municipal-cities-counties-bankruptcies-and-defaults.html> (last visited May 21, 2014) (a list of municipal bankruptcies since 2010); *see also* Christopher B. Leinberger, *Business Flees to the Urban Fringe*, *THE NATION*, July 6, 1992, *available at* [http://www.chrisleinberger.com/docs/By\\_CL/Business%20Flees%20to%20the%20Urban%20Fringe.pdf](http://www.chrisleinberger.com/docs/By_CL/Business%20Flees%20to%20the%20Urban%20Fringe.pdf); Jim Christie, *Stockton, California Files for Bankruptcy*, *REUTERS* (June 28, 2012, 11:49 PM), <http://www.reuters.com/article/2012/06/29/us-stockton-bankruptcy-idUSBRE85S05120120629>; Ashley Oakey, *A Cautionary Tale for Municipalities Considering Chapter 9*, 31-MAY AM. BANKR. INST. J. 44, 44 (2012).

the city to scatter across the vast suburban landscape away from the city's urban core.<sup>14</sup>

In the wake of the Great Recession and the rise of a political climate that enthusiastically endorses the devolution of governmental power from upper, centralized tiers to lower, localized levels, there has been a reinvigoration in recent years of the importance of the city.<sup>15</sup> However, in a world of limited resources, uncertain economic growth, and an electorate with little appetite for increasing taxes, the city must be more resilient than ever in formulating policies that are targeted to best serve its citizenry and maintain its place at the center of American life, culture, and prosperity.<sup>16</sup>

As the economy begins to rebound from the Great Recession, competition between cities has become palpable in recent years.<sup>17</sup> Landing a lucrative economic development project or the race to capture a large business or commercial venture often dictates a city's agenda.<sup>18</sup> Success can lead to a larger tax base, job creation and growth, private investment, and, importantly, increased revenues.<sup>19</sup> Cities often compete with one another to lure these economic development projects by each offering their own package of public incentives for the private business or developer to consider.<sup>20</sup> In fact, in the waning hours of negotiations between the project investor and the final two or three perspective cities,

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14. See Thomas Bray, *Better Term for Sprawl: Decentralization*, DET. NEWS, Oct. 24, 2001, at 8; see also Stephen E. Ambrose, *Beware the Fury of an Aroused Democracy*, WALL ST. J. (Oct. 1, 2001), <http://www.freerepublic.com/focus/news/536781/posts>; ROBERT EZRA PARK, *The City: Suggestions for the Investigation of Human Behavior in the Urban Environment*, reprinted in ROBERT EZRA PARK, HUMAN COMMUNITIES: THE CITY AND HUMAN ECOLOGY 13–52 (Everett Cherrington Hughs et al. eds., 1952); KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 3–11 (1985). See generally WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1987) (discussing racial and poverty issues in the urban areas).

15. See John Parisella, *The Rising Importance of Major Cities*, AMERICAS QUARTERLY (Oct. 6, 2010), <http://www.americasquarterly.org/node/1859>; Sam Casella, *Let Cities Be Cities*, PLANETIZEN (Nov. 26, 2001, 12:00 AM), <http://www.planetizen.com/node/34>; David Lowenthal, *Visible Cities*, HARV. DESIGN MAG. 78 (Winter/Spring 2001).

16. See Eric Rosenbaum, *In Great Recession, Far Better to be a State than a City*, CNBC (Oct. 3, 2013, 12:22 PM), <http://www.cnbc.com/id/101084062>; Richard Florida & Stephanie Garlock, *America's Biggest City Governments Are Still Struggling to Recover From the Recession*, ATLANTIC CITIES (Nov. 13, 2013), <http://www.theatlanticcities.com/jobs-and-economy/2013/11/americas-biggest-city-governments-are-still-struggling-recover-recession/7556/>; Stephen J. Alexander, *Fiscal Challenges Facing U.S. Cities* (Chi. Mun. Policy Grp., Working Paper No. 1, 2012).

17. See, e.g., Rebecca Hendrick, Yonghong Wu & Benoy Jacob, *Tax Competition Among Municipal Governments: Exit Versus Voice*, 43 URB. AFF. REV. 221, 221–255 (2007), available at <http://uar.sagepub.com/content/43/2/221>.

18. DOUGLAS J. WATSON, THE NEW CIVIL WAR—GOVERNMENT COMPETITION FOR ECONOMIC DEVELOPMENT 3–10 (1995).

19. See Schragger, *Rethinking the Theory*, supra note 2, at 315.

20. Rachel Weber, *Why Local Economic Development Incentives Don't Create Jobs: The Role of Corporate Governance*, 32 URB. LAW. 97, 97–100 (2000).

hundreds of millions of public dollars can be promised in order to obtain the final, coveted prize.<sup>21</sup>

But the resilient city, only recently rebounding from the harsh economic downturn,<sup>22</sup> must be prudent when completing and championing these private projects that are clothed in the ever-seductive mantle of economic development.<sup>23</sup> An unbridled desire for growth and obtaining a perceived economic development “win” can often cloud local government decision making, leading to the support of projects and developments that inure to the benefit of the few, at the expense of the many.<sup>24</sup> The city, armed with public authority, has many powers at its disposal.<sup>25</sup> Various incentive packages achieved through public-private partnerships can be bestowed or created in order to attract a particular investor or company.<sup>26</sup> And while such partnerships and use of public resources can be positive and beneficial in theory, it is the decision making that goes into these incentive packages that must be most closely considered and tempered with wisdom and forethought. The granting of an advantage to one necessarily creates a disadvantage to another.<sup>27</sup> And

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21. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. OF POL. ECON. 416, 418 (1956), available at [http://www.unc.edu/~fbaum/teaching/PLSC541\\_Fall08/tiebout\\_1956.pdf](http://www.unc.edu/~fbaum/teaching/PLSC541_Fall08/tiebout_1956.pdf); Hongbin Cai & Daniel Treisman, *Does Competition for Capital Discipline Governments? Decentralization, Globalization, and Public Policy*, 95 AM. ECON. REV. 817, 817 (2005), available at <http://www.sscnet.ucla.edu/polisci/faculty/treisman/Papers/compoct06.pdf>.

22. Jonathan House, *U.S. Cities Still Reeling from Great Recession*, WALL ST. J., Oct. 23, 2013, <http://blogs.wsj.com/economics/2013/10/23/u-s-cities-still-reeling-from-great-recession/>.

23. See GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND: HOW STATES STIFLE URBAN INNOVATION* (2008); PAUL E. PETERSON, *CITY LIMITS* 17–38 (1981); Richard C. Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 HARV. L. REV. 482, 483–88 (2009); Richard C. Schragger, *Cities, Economic Development, and the Free Trade Constitution*, 94 VA. L. REV. 1091, 1092–99 (2008).

24. See Schragger, *Rethinking the Theory*, *supra* note 2, at 331–39; Weber, *supra* note 20, at 101–05.

25. See generally Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990); Barney Cohen, *Urban Growth in Developing Countries: A Review of Current Trends and a Caution Regarding Existing Forecasts*, 32 WORLD DEV. 23 (2004), available at <http://archive-iussp.org/Activities/wgc-urb/cohen.pdf>; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980).

26. See Margaret E. Dewar, *Why State and Local Economic Development Programs Cause So Little Economic Development*, 12 ECON. DEV. Q. 68, 68–69 (1998), available at <http://edq.sagepub.com/content/12/1/68.full.pdf>; Wallace E. Oates, *Fiscal Decentralization and Economic Development*, 46 NAT'L TAX J. 237, 237–42 (1993), available at [http://ntj.tax.org/wwtax%5Cnjrec.nsf/AF19747D3B64B6848525686C00686D27/\\$FILE/v46n2237.pdf](http://ntj.tax.org/wwtax%5Cnjrec.nsf/AF19747D3B64B6848525686C00686D27/$FILE/v46n2237.pdf); Michael J. Wolkoff, *Chasing a Dream: The Use of Tax Abatements to Spur Urban Economic Development*, 22 URB. STUD. 305–315 (1985), available at <http://usj.sagepub.com/content/22/4/305.full.pdf>; Harold Wolman, *Local Economic Development Policy: What Explains the Divergence Between Policy Analysis and Political Behavior?*, 10 J. URB. AFF. 19, 19–28 (1988).

27. See Therese J. McGuire, Book Review, 45 NAT'L TAX J. 457, 458 (1992), available at [http://ntj.tax.org/wwtax%5Cnjrec.nsf/57C3AA98879532958525686C00686E2E/\\$FILE/v45n4457.pdf](http://ntj.tax.org/wwtax%5Cnjrec.nsf/57C3AA98879532958525686C00686E2E/$FILE/v45n4457.pdf).

thus, by using public power to give one private group benefits that are not enjoyed by others, the field of economic opportunity is necessarily skewed to the prejudice of other similarly situated parties.<sup>28</sup>

This symposium posits the question: what is a resilient city? This Article offers that a truly resilient city is one that places equity and fairness at the forefront of its economic decision making.<sup>29</sup> Resilient cities do not blindly give way to the unbridled temptations of economic development, which can so easily lead to division and injustice.<sup>30</sup> Rather, the resilient city is one that seeks, in exercising its public prerogatives, to create a level playing field where economic opportunity is afforded equally to all persons.<sup>31</sup> And in those cases where it is decided that the public power should be accorded to the benefit of a particular private interest because it significantly serves the greater good, the process from which this decision ultimately derives must be considered, sober, tempered, and informed.<sup>32</sup> In adopting such a policy view, new developments and physical systems, which are vital to making a city thrive, must be rooted in a philosophy that not only engenders a business climate of opportunity and equality, but also lays an economic foundation for the city that will allow it to weather future economic cycles.<sup>33</sup>

Part I of this Article explores the history of the city and its role as an economic driver, as well as how the economic downturns of the past several years have impacted its standing in light of the recent renaissance of the city's place in American society.<sup>34</sup> Part II discusses the economic development decision making process that is so tightly bound up in this new era of intense municipal competition, which permeates the post-recession economy.<sup>35</sup> This part also questions the wisdom of current decision-making processes regarding public incentive packages, specifically through the public-private partnerships, by considering the ways in which these arrangements diminish market competition and economic equality.<sup>36</sup> Finally, this Article concludes by calling for cities, in their quest for resilience in the aftermath of the Great Recession, to place fairness and equality at the forefront of their economic development policy-making processes so as to ensure that the field of economic opportunity is level and open to all.<sup>37</sup>

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28. See ROGER WILSON, STATE BUSINESS INCENTIVES AND ECONOMIC GROWTH: ARE THEY EFFECTS? A REVIEW OF THE LITERATURE 2-7, 27-28 (1989).

29. See *infra* Part II.C and accompanying discussion.

30. See *id.*

31. See *id.*

32. See *id.*

33. See *id.*

34. See *infra* Part I.

35. See *infra* Part II.

36. See *id.*

37. See *infra* Conclusion and accompanying discussion.

PART I. THE TALE OF THE CITY—THE HIGHS, THE LOWS, AND  
NEW BEGINNINGS

The city tells the tale of human civilization.<sup>38</sup> The growth and decline of empires, the rise of the great religions, and the birth of modern political structures all revolved around the ethos of the city.<sup>39</sup> Often times as cities rose and fell, so too did great periods of history.<sup>40</sup> American society hewed to a similar pattern as the fortunes of cities ebbed and flowed over the course of the country's history.<sup>41</sup>

The most recent low point for America's many great cities came as a result of the Great Recession, which struck the U.S. economy in the latter half of the first decade of the twenty-first century.<sup>42</sup> The havoc that this period wrought on U.S. cities cannot be understated, and it is only in recent times that these centers of business, culture, and social life have begun to rebound and find stable footing again.<sup>43</sup> It is against the backdrop of the celebrated and often turbulent history of cities that opportunities to retool local government decision-making for economic development are made possible.<sup>44</sup>

## A. The History and Tradition of the City

The idea of the city is historically rooted in notions of collectivism.<sup>45</sup> It is the notion that every individual who comprises the metropolis is linked together by a common remembrance of the past, mutual efforts in the present, and the desire to achieve a greater good in the future.<sup>46</sup>

The first cities can be traced back to the third millennium BCE.<sup>47</sup> These first cities began to develop in Asia along the eastern rivers in what is now China, Egypt, India, and in the valleys of the Nile Euphra-

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38. See MUMFORD, *supra* note 2, at 110. See generally HAMMOND, *supra* note 7; JEFFERSON BARNES FORDHAM, *LOCAL GOVERNMENT LAW: LEGAL AND RELATED MATERIALS* (2d ed., 1986); CLAYTON P. GILLETTE & LYNN A. BAKER, *LOCAL GOVERNMENT LAW* (4th ed., 1999).

39. See generally FORDHAM, *supra* note 38; GILLETTE & BAKER, *supra* note 38; HAMMOND, *supra* note 7; WILLIAM D. VALENTE & DAVID J. MCCARTHY, *LOCAL GOVERNMENT LAW: CASES AND MATERIALS* (4th ed., 1991); Daniel B. Rodriguez, *Localism and Lawmaking*, 32 *RUTGERS L.J.* 627 (2001).

40. See generally MUMFORD, *supra* note 2.

41. See generally KUNSTLER, *supra* note 8.

42. See Rosenbaum, *supra* note 16; see also Florida & Garlock, *supra* note 16.

43. Alexander, *supra* note 16.

44. See generally Jonathan House, *U.S. Cities Still Reeling from Great Recession*, WALL ST. J. (Oct. 23, 2013, 6:17 PM), <http://blogs.wsj.com/economics/2013/10/23/u-s-cities-still-reeling-from-great-recession/>.

45. See MUMFORD, *supra* note 2, at 56–57.

46. See Edward L. Glaeser, *Why Humanity Loves, and Needs, Cities*, N.Y. TIMES, Apr. 13, 2010, <http://economix.blogs.nytimes.com/2010/04/13/why-humanity-loves-and-needs-cities/>; see also FREDERIC WILLIAM MAITLAND, *TOWNSHIP AND BOROUGH* (1898).

47. See MUMFORD, *supra* note 2, at 55.



tes, Tigris, and Indus rivers.<sup>48</sup> The purpose of these early cities was confined mostly to providing security, public services, and linkage to a common tribe or culture.<sup>49</sup>

Over time, the vast benefits of the city system became evident as these centers began to blossom across the ancient world.<sup>50</sup> Describing Alexander the Great, it has been noted that his “genius in fighting battles was not greater than his genius in founding cities, not merely as outposts, but as marts through which commerce and culture should be spread throughout the world.”<sup>51</sup> With the spread of cities—particularly under the dominance of the Greeks and their “polis” system—intellectual thought, art, language, architecture, and trade flourished.<sup>52</sup>

The Romans followed many aspects of the Greek polis system in the spreading of their empire, and it was often noted that the enduring influence of the Romans throughout the known world was largely attributable to the strength of their early municipal institutions.<sup>53</sup> In fact, even after the fall of the Roman Empire, the Germanic tribes that came to dominate Europe continued the ideas of the Roman “municipium” in the formation of their hamlets, villages, towns, and capitals.<sup>54</sup>

However, the cities of the medieval era, the age of the Renaissance, and later periods were dominated by what was known in England as the borough system, whereby extraordinary authority was given to local government officials in the regulation and promotion of trade and commerce.<sup>55</sup> These officials almost always comprised a “self-perpetuating oligarchies of merchants and artisans.”<sup>56</sup> In essence, cities came to be controlled solely by commercial interests that viewed the city as an instrumentality to be used for pecuniary gain.<sup>57</sup> And so even in this very early period, the idea of private interests coupling with the trappings of

48. *Id.* at 55–56. See generally V. GORDON CHILDE, *THE URBAN REVOLUTION* (1950); NUMA DENIS FUSTEL DE COULANGES, *THE ANCIENT CITY: A STUDY ON THE RELIGION, LAWS, AND INSTITUTIONS OF GREECE AND ROME* (1874); WILLIAM H. MCNEILL, *THE RISE OF THE WEST: A HISTORY OF THE HUMAN COMMUNITY* (1964); MAX WEBER, *THE CITY* (1958).

49. MUMFORD, *supra* note 2, at 57.

50. See MCQUILLIN, *supra* note 1, at § 1:3.

51. MCQUILLIN, *supra* note 1, at § 1:3 (quoting J. P. MAHAFFY, *GREEK LIFE AND THOUGHT: FROM THE DEATH OF ALEXANDER TO THE ROMAN CONQUEST* 33 (1896)).

52. *Id.*

53. See *id.*; MUMFORD, *supra* note 2, at 205.

54. See MCQUILLIN, *supra* note 1, at § 1:3. See generally LIDIA STORONI MAZZOLANI, *THE IDEA OF THE CITY IN ROMAN THOUGHT* (S. O'Donnell trans., 1970).

55. See MCQUILLIN, *supra* note 1, at § 1:9. See generally MAITLAND, *supra* note 46; JOSEF REDLICH & FRANCIS WRIGLEY HIRST, *THE HISTORY OF LOCAL GOVERNMENT IN ENGLAND* (2d ed. 1970); SUSAN REYNOLDS, *AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS* (1977); PERCY HENRY WINFIELD, *THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE* (1921).

56. Maxwell Bloomfield, *The Municipal Corporation Revisited*, 4 *REVIEWS AM. HIST.* 27, 27 (1976); see also LEOPOLD GENICOT, *RURAL COMMUNITIES IN THE MEDIEVAL WEST* 62–89 (1990); MCQUILLIN, *supra* note 1, at § 1:9; GÉRARD SIVÉRY, *TERROIRS ET COMMUNITÉS RURALES DANS L'EUROPE OCCIDENTALE AU MOYEN AGE* (1990).

57. Mark A. Kishlansky, *Community and Continuity: A Review of Selected Works on English Local History*, 37 *WM. & MARY Q.* 139, 142 (1980).

public governance for purposes of economic growth was prevalent, if not dominant, among local government decision making.<sup>58</sup> The eventual movement toward a system of local government that provides public services and the maintenance of the common good would only arise later as central governments gained ground and were able to curtail the traditional strongholds of local power.<sup>59</sup>

But despite the images of the classical cities of Rome, and even the rise of the commercial centers of the Middle Ages and the Renaissance, the most significant periods of urban growth as we know them today occurred in the eighteen and nineteen hundreds.<sup>60</sup> This growth was due primarily to significant advances in channels of transportation; increased productivity in commerce, trade, and agriculture; and the birth of the industrial/factory structure.<sup>61</sup> Alongside these advances came political changes, which heralded greater individual freedoms, more access to rights in land, and the consolidation of governmental power and decision-making within city centers.<sup>62</sup> And lastly, the desire of the populace to enjoy the higher standards of living and the opportunities for entertainment, amusement, and learning caused people to flock to cities.<sup>63</sup>

Traveling across the waters of the Atlantic, America's first cities arose in the middle of the 1600s by way of royal charters and in the form of English colonial institutions.<sup>64</sup> During what is commonly known as the colonial period, roughly twenty-four municipalities were authorized—consisting of such places as Albany, New York, Elizabeth, and Westchester—although few enjoyed any longstanding duration.<sup>65</sup> Although formed to provide an impetus for commercial growth in the New World, these early inhabitants feared that their cities would come to be dominated by the tradesmen, merchants, and artisans as had occurred in England and that monopolies and price-fixing would soon follow.<sup>66</sup>

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58. *See id.* at 143–44.

59. JOHN P. DAWSON, *A HISTORY OF LAY JUDGES* 139, 140 (1960). *See generally* MCQUILLIN, *supra* note 1, at § 1:9; REYNOLDS, *supra* note 55, at 102–14.

60. *See generally* ADNA FERRIN WEBER, *THE GROWTH OF CITIES IN THE NINETEENTH CENTURY: A STUDY IN STATISTICS* (1899); JOHN MARTINEZ, *LOCAL GOVERNMENT LAW* pt. I, ch. 1, § 1:4 (West 2013).

61. *See generally* WEBER, *supra* note 60; MARTINEZ, *supra* note 60, at § 1:4. *See also* GIDEON SJOBERG, *THE PREINDUSTRIAL CITY* (1960).

62. *See generally* JOSEF W. KONVITZ, *THE URBAN MILLENNIUM: THE CITY-BUILDING PROCESS FROM THE EARLY MIDDLE AGES TO THE PRESENT*, at xvi (1985) (explaining three different periods of city building and the criteria each period was affected by, with the nineteenth century being most subordinate to “political and social institutions”); 1 MCQUILLIN: *THE LAW OF MUNICIPAL CORPORATIONS*, ch. 1, pt. I, § 1:3 (3d ed. 2011).

63. WEBER, *supra* note 60; MARTINEZ, *supra* note 60, at § 1:4.

64. CHARLES NELSON GLAAB & A. THEODORE BROWN, *A HISTORY OF URBAN AMERICA* (1969); 1 MCQUILLIN: *THE LAW OF MUNICIPAL CORPORATIONS*, ch. 1, pt. II § 1:10 (3d ed. 2011).

65. *See* MARTINEZ, *supra* note 60, at § 1:4; MCQUILLIN, *supra* note 64, at § 1:9 (3d ed. 2011).

66. CARL BRIDENBAUGH, *CITIES IN THE WILDERNESS: THE FIRST CENTURY OF URBAN LIFE IN AMERICA 1625–1742*, 79 (1955) (explaining that social changes in England were caus-

Many of these concerns proved valid, as most municipalities rejected any expanded responsibilities regarding health, safety, and public welfare, as evidenced by one writer's characterization of Philadelphia—then the largest colonial city—as being dominated by an “inbred oligarchy.”<sup>67</sup> Much like the cities of today, which thirst for economic development opportunities at every turn, so too did these early American cities march to the beat of commerce and business in guiding their decision-making processes.<sup>68</sup>

It would not be until the smaller towns of New England arose, which were then dominated by religious communities, that the city would morph into an institution that was chiefly concerned not just with the flourishing of commerce and industry, but also with the provision of health, safety, and the welfare of its people.<sup>69</sup> These trends continued throughout the 1800s as cities came to be viewed as instruments for problem solving.<sup>70</sup> As such, urban centers began to expand their offerings to include a wide array of amenities and services that had been little known prior to this period.<sup>71</sup>

A simple list of urban functions and the date when they first began to be performed illustrates [this] problem-solving approach[:] . . . provision of a municipal water system (1822); sewage and sanitary works (1823); street railways (1832); public education (1840); municipal police force (1844); public parks (1840's); tax-supported public libraries (1854); bridges financed by municipal funds (1863); public health boards (1866); outdoor lighting (1880's).<sup>72</sup>

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ing a burden on many communities, and New World colonists feared experiencing a similar burden on their new communities through the migration of artisans, tradesmen, and the like); *see also* JON C. TEAFORD, *THE MUNICIPAL REVOLUTION IN AMERICA: ORIGINS IN MODERN GOVERNMENT* (1975); MCQUILLIN, *supra* note 64, at § 1:10; MARTINEZ, *supra* note 60, at § 1:4.

67. TEAFORD, *supra* note 66, at 57; MARTINEZ, *supra* note 60, at § 1.4; *see also* DAVID GRAYSON ALLEN, *IN ENGLISH WAYS: THE MOVEMENT OF SOCIETIES AND THE TRANSFERAL OF ENGLISH LOCAL LAW AND CUSTOM TO MASSACHUSETTS BAY IN THE SEVENTEENTH CENTURY* (1981); BRIDENBAUGH, *supra* note 66; GLAAB & BROWN, *supra* note 64.

68. *See* DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS 150–70* (1980). *See generally* PAGE SMITH, *AS A CITY UPON A HILL: THE TOWN IN AMERICAN HISTORY* (1966); Henry Wade Rogers, *Municipal Corporations, in TWO CENTURIES' GROWTH OF AMERICAN LAW* 203 (1901).

69. MARTINEZ, *supra* note 60, at § 1:4; *see also* BRUCE C. DANIELS, *THE CONNECTICUT TOWN: GROWTH AND DEVELOPMENT, 1635–1790, 171–80* (1979) (describing the way in which Connecticut towns grew and developed); SMITH, *supra* note 68.

70. TEAFORD, *supra* note 66.

71. *Id.*

72. MARTINEZ, *supra* note 60, at § 1:5; ARTHUR MEIER SCHLESINGER, *THE RISE OF THE CITY: 1878–1898* (1933).

By 1910 the U.S. census indicated “for the first time in American history the urban population outnumbered the rural.”<sup>73</sup>

And, in some way returning to their merchant and commerce-dominated roots, in the beginning of the 1900s, cities began to incorporate the first trappings of an economic development and planning apparatus through the use of planning departments, housing codes, zoning, and building regulations.<sup>74</sup> Cities began to view their role in even broader terms—encompassing not only providing for the general welfare, safety, and health of its residents, but also returning to its historical role as an architect of economic growth and development, and as a partner in endeavors of private commerce and business.<sup>75</sup> It is in this expanded role that cities have often found themselves captive to an unrestrained hunger for development and growth that, in turn, has frequently led to an imbalance of opportunity and an atmosphere of favoritism that not only clouds the public judgment but, as discussed below, also breeds economic injustice.<sup>76</sup>

#### B. Contemporary Decline of the City—The Great Recession

While cities have enjoyed a prominent place in the story of humans flourishing throughout history, these institutions have also faced their share of trials and tribulations.<sup>77</sup> For instance, just as the nineteenth century saw the dramatic growth of the city in terms of its functions and ambitions, the mid-twentieth century heralded a wave of challenges and tribulations.<sup>78</sup> It was around this time older cities that had reached their zenith during the American industrial boom began to age and decline.<sup>79</sup>

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73. MARTINEZ, *supra* note 60, at § 1:5; *see also* James E. Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in our Early State Constitutions*, 62 VA. L. REV. 999 (1976).

74. MARTINEZ, *supra* note 60, at § 1:5. *See generally* ERNEST STACEY GRIFFITH, *A HISTORY OF AMERICAN CITY GOVERNMENT: THE PROGRESSIVE YEARS AND THEIR AFTERMATH, 1900–1920* (1938); HAROLD L. PLATT, *CITY BUILDING IN THE NEW SOUTH: THE GROWTH OF PUBLIC SERVICES IN HOUSTON, TEXAS, 1830–1910* (1983).

75. MARTINEZ, *supra* note 60, at § 1:4–1:5. *See generally* KENNETH FOX, *BETTER CITY GOVERNMENT: INNOVATION IN AMERICAN URBAN POLITICS, 1850–1937* (1977); Frug, *supra* note 25; BLAKE MCKELVEY, *THE URBANIZATION OF AMERICA: 1860–1915* (1963).

76. *See generally* GLAAB & BROWN, *supra* note 64; MARTIN V. MELOSI, *GARBAGE IN THE CITIES: REFUSE, REFORM, AND THE ENVIRONMENT 1880–1980* (1981); SCHLESINGER, *supra* note 72; CLYDE F. SNIDER, *LOCAL GOVERNMENT IN RURAL AMERICA* (1957); Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83 (1986) (explaining how courts define a city’s status).

77. *See* KUNSTLER, *supra* note 8, at 9–15 (describing the development of cities as a “process of destruction”).

78. *See generally id.*

79. *See generally id.*; CHARLES C. EUCHNER & STEPHEN J. MCGOVERN, *URBAN POLICY RECONSIDERED: DIALOGUES ON THE PROBLEMS AND PROSPECTS OF AMERICAN CITIES* (2013); MARTINEZ, *supra* note 60, at § 1:6.

As decay crept through the neighborhoods and enclaves of these older cities, slums and ghettos began to emerge.<sup>80</sup> As residents moved away from the city center and further into the suburban areas, abandoned and unmaintained buildings gave rise to urban blight.<sup>81</sup> Further, from ill-kept buildings and structures emerged slums where there had once stood thriving communities.<sup>82</sup> The decay of these cities across the U.S. prompted a federal response that ultimately resulted in the Housing Act of 1954, and its successors which have since created a partnership approach to combating the problems that plague cities.<sup>83</sup> This involves a process whereby the federal government allocates funds which are authorized and received by the state, and then passed on to be administered directly by local governments.<sup>84</sup> True to their traditional role as problem solvers, most cities have been proactive—and continue to be so—in combating these problems with the help of state and federal stakeholders.<sup>85</sup>

But aside from these distresses of the past, the most recent bevy of difficulties facing the American city have stemmed from the economic woes of the Great Recession.<sup>86</sup> The substantial hit in municipal tax revenues can hardly be understated.<sup>87</sup> Cuts resulting from these revenue shortfalls have led to increased privatization and consolidation of government services such as city zoos, parks, 911 call centers, and the use

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80. See PETER HALL, *CITIES OF TOMORROW: AN INTELLECTUAL HISTORY OF URBAN PLANNING AND DESIGN IN THE TWENTIETH CENTURY* 13–46 (1988) (describing the reactions to nineteenth-century slum); see also MARTINEZ, *supra* note 60, at § 1:6.

81. See, e.g., EDWARD WEINER, *URBAN TRANSPORTATION PLANNING IN THE UNITED STATES: HISTORY, POLICY, AND PRACTICE* 143 (3d ed., 2008) (describing the severity of urban congestion in the 1980s and 1990s); see also PAUL BOYER, *URBAN MASSES AND MORAL ORDER IN AMERICA, 1820–1920*, at 85–94 (1978) (describing the emergence of slums in urban landscapes throughout the mid-century); MARTINEZ, *supra* note 60, at § 1:6.

82. See, e.g., MABEL L. WALKER ET AL., *URBAN BLIGHT AND SLUMS: ECONOMIC AND LEGAL FACTORS IN THEIR ORIGIN, RECLAMATION, AND PREVENTION* (1938); see also SIMON EISNER ET AL., *THE URBAN PATTERN* 103 (6th ed., 1993) (describing emergence of slums in American towns).

83. See, e.g., PETER D. SALINS, *HOUSING AMERICA'S POOR* 91 (1987); PATRICK SHARKEY, *STUCK IN PLACE: URBAN NEIGHBORHOODS AND THE END OF PROGRESS TOWARD RACIAL EQUALITY* 8 (2013) (describing the passage of the Fair Housing Act of 1968 in response to racial inequality); MARTINEZ, *supra* note 60, at § 1:6.

84. See, e.g., LORETTA LEES ET AL., *GENTRIFICATION* (2008); MARTINEZ, *supra* note 60, at § 1:6.

85. See, e.g., Dirs. of the Columbia Law Review Ass'n, Inc., *The Federal Courts and Urban Renewal*, 69 COLUM. L. REV. 472 (1969); see also John E. Hayes & Paul D. Godec, *Taxation Innovations: Enhanced Sales Tax Incentive Programs*, 22 URB. LAW. 143 (1990); Daniel R. Mandelker, *The Comprehensive Planning Requirement in Urban Renewal*, 116 U. PA. L. REV. 25 (1967); MARTINEZ, *supra* note 60, at § 1:6; James H. Scheuer, Eli Goldston & Wilton S. Sogg, *Disposition of Urban Renewal Land—A Fundamental Problem in the Rebuilding of Our Cities*, 62 COLUM. L. REV. 959 (1962).

86. THE PEW CHARITABLE TRUSTS, *THE LOCAL SQUEEZE: FALLING REVENUES AND GROWING DEMAND FOR SERVICES CHALLENGE CITIES, COUNTIES, AND SCHOOL DISTRICTS* 1 (June 2012) [hereinafter *THE LOCAL SQUEEZE*], available at [http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/American\\_Cities/Pew\\_Cities\\_Local\\_Squeeze.pdf](http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/American_Cities/Pew_Cities_Local_Squeeze.pdf).

87. See *id.*

of many “one-time” fixes, such as the sale of city assets and the use of rainy-day funds.<sup>88</sup> For instance, in 2011, lawmakers in Cleveland, Ohio cut \$35.7 million (7%) from the city’s budget, which resulted in the laying off of over 300 municipal employees (mostly consisting of firefighters and police officers).<sup>89</sup> The small town of Saline, Michigan, in order to absorb their drop in revenue and diminished state and federal aid, cut eighteen schoolteachers.<sup>90</sup> And hardly a day went by in either 2012 or 2013 that headlines were not filled with the latest news regarding the Stockton, California, and Detroit, Michigan, municipal bankruptcies.<sup>91</sup>

The main source of these municipal woes originated from the ever-declining local tax revenues that were brought about as a result of the 2007–2008 financial crisis and accompanying recession.<sup>92</sup> Traditionally, a decline in local government revenues was counterbalanced by grants from state and federal government sources.<sup>93</sup> However, the Great Recession deeply affected state and federal revenues such that neither was any longer in a place to serve as a support system to cities and municipalities in hard times.<sup>94</sup> For instance, by the end of 2009, the majority of states were seeing a 13% decline in local tax revenues from prior years

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88. *Id.* at 13–21 (“From trash pickup and public safety to welfare programs and schools, local services affect residents’ everyday lives. In many places, the recession has put greater strain on government programs by driving up demand.”).

89. CITY OF CLEVELAND, STATE IMPOSES BUDGET DEFICIT ON CITY OF CLEVELAND: IMPACTS ON SERVICE DELIVERY AND STAFFING 2–5 (May 16, 2011), available at [http://www.city.cleveland.oh.us/clnd\\_images/PDF/ImpactBudgetCuts.pdf](http://www.city.cleveland.oh.us/clnd_images/PDF/ImpactBudgetCuts.pdf); Tracy Carlross, *Cleveland Mayor Says All Departments Affected by City Layoffs*, NEWSNET5 (May 16, 2011), <http://www.newsnet5.com/news/local-news/cleveland-metro/cleveland-mayor-says-all-departments-affected-by-city-layoffs>.

90. Lisa Allmendinger, *Saline School Board Approves ‘Structurally Deficient’ \$51.5 Million Operating Budget for 2011–2012*, ANN ARBOR NEWS (June 29, 2011), <http://www.annarbor.com/news/saline-school-board-approves-final-515-million-operating-budget/>.

91. *See, e.g., 2011 Year-End Foreclosure Report: Foreclosures on the Retreat*, REALTYTRAC (January 9, 2012), <http://www.realtytrac.com/content/foreclosure-market-report/2011-year-end-foreclosure-market-report-6984>. *See generally* THE DEPARTMENT OF ADMINISTRATIVE SERVICES, CITY OF STOCKTON COMPREHENSIVE ANNUAL FINANCIAL REPORT (2010), available at <http://www.stocktongov.com/files/CAFR%202010.pdf>; Alison Vekshin, *Stockton Going Broke Shows Cop Pay Rising as Property Collapsed*, BLOOMBERG (Feb. 29, 2012, 9:01 PM), <http://www.bloomberg.com/news/2012-03-01/stockton-going-broke-shows-cop-pay-rising-as-california-property-collapsed.html>.

92. THE LOCAL SQUEEZE, *supra* note 86, at 1 (“While states slowly recover in the wake of the Great Recession, local governments have been hit with a one-two punch: State aid and property taxes, which together account for more than half of local revenues, are dropping simultaneously for the first time since 1980. The blow comes as demand for government services rises, driven by stubborn unemployment rates, population growth, and other factors.”).

93. *Id.* (this report obtained information from the National Conference of State Legislatures Survey of Legislative Budget Offices from March 2011 and the National Governors Association and National Association of State Budget Officers report entitled *The Fiscal Survey of States* from Fall 2010 and 2011).

94. *See id.* at 5–8.

while budget shortfalls continued to rise.<sup>95</sup> Some states increased taxes to account for the loss, but most cut services and grants—particularly those which had previously gone to local governments to support everything from “education, libraries, police and fire protection” to “roads and transportation, health, and housing.”<sup>96</sup> At the same time, federal dollars began to wane as well.<sup>97</sup> The emerging political climate that favored reducing deficits and cutting spending resulted in less direct aid to local governments from Congress and federal departments.<sup>98</sup> The 2011 Budget Control Act alone contained numerous cuts to “education programs, low-income housing vouchers, community development, and workforce development programs.”<sup>99</sup>

And even as the economy begins to slowly recoup from the worst economic storm since the Great Depression, cities still lag far behind states in terms of recovery.<sup>100</sup> This is mostly due to the fact that many of

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95. See Lucy Dadayan, *Tax Revenues Surpass Previous Peak but Growth Softens Once Again: Local Property Tax Collections Resume Modest Gains*, 87 ROCKEFELLER INST. 1, 2 (April 2012), available at [http://www.rockinst.org/pdf/government\\_finance/state\\_revenue\\_report/2012-04-19-SRR\\_87.pdf](http://www.rockinst.org/pdf/government_finance/state_revenue_report/2012-04-19-SRR_87.pdf).

96. THE LOCAL SQUEEZE, *supra* note 86, at 5. “State aid declined by \$574 million in Arizona, \$5,715 million in California, \$927 million in Minnesota, \$498 million in New Mexico, \$214 million in Nevada, \$2,199 million in Texas, \$1,016 million in Virginia, and \$185 million in Wyoming.” *Id.* at 24, n. 20; see also Rob Gurwitt, *As States Cut Aid, Localities Learn to Do Less with Less*, PEW CHARITABLE TRUSTS (Oct. 3, 2011), <http://www.pewstates.org/projects/stateline/headlines/as-states-cut-aid-localities-learn-to-do-less-with-less-85899375306>.

97. See generally CONGRESSIONAL BUDGET OFFICE, THE MACROECONOMIC AND BUDGETARY EFFECTS OF AN ILLUSTRATIVE POLICY FOR REDUCING THE FEDERAL BUDGET DEFICIT (2011) [hereinafter MACROECONOMIC AND BUDGETARY EFFECTS], available at [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/123xx/doc12310/07-14-deficitreduction\\_forweb.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/123xx/doc12310/07-14-deficitreduction_forweb.pdf); FEDERAL FUNDS INFORMATION FOR STATES, STATE-BY-STATE ANALYSIS OF BCA SEQUESTER (2011), available at [http://www.ncsl.org/Portals/1/Documents/leaders/SA11-06\\_Sequester.pdf](http://www.ncsl.org/Portals/1/Documents/leaders/SA11-06_Sequester.pdf).

98. Jonathan D. Salant & Kathleen Miller, *Federal Spending Cuts Slice Contract Awards 11% in 2013*, BLOOMBERG (Jan. 15, 2014, 7:05 PM), <http://www.bloomberg.com/news/2014-01-16/federal-spending-cuts-slice-contract-awards-11-in-2013.html>; see also Carrie Dann, *Congress Passes Massive Funding Bill to Keep Government Open (For Now)*, NBC NEWS (Jan. 16, 2013, 3:10 PM), [http://nbcpolitics.nbcnews.com/\\_news/2014/01/16/22328978-congress-passes-massive-funding-bill-to-keep-government-open-for-now?lite](http://nbcpolitics.nbcnews.com/_news/2014/01/16/22328978-congress-passes-massive-funding-bill-to-keep-government-open-for-now?lite) (however, certain governmental emergencies have necessitated large spending bills to be passed by Congress); Wendy Edelberg, *Automatic Reductions in Government Spending -- aka Sequestration*, CONGRESSIONAL BUDGET OFFICE (Feb. 28, 2013), <http://www.cbo.gov/publication/43961>.

99. THE LOCAL SQUEEZE, *supra* note 86, at 8.

100. See *America's Big Cities in Volatile Times*, PEW CHARITABLE TRUSTS 14 (Nov. 2013), available at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2013/America's-Big-Cities-in-Volatile-Times.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/America's-Big-Cities-in-Volatile-Times.pdf); see also Tracy Gordon, *State and Local Budgets and the Great Recession*, BROOKINGS (Dec. 2012), <http://www.brookings.edu/research/articles/2012/12/state-local-budgets-gordon>. See generally Tracy Gordon, *A Great Recession Brief: State and Local Budgets and the Great Recession*, BROOKINGS (July 2012), [http://www.stanford.edu/group/recessiontrends-dev/cgi-bin/web/sites/all/themes/barron/pdf/StateBudgets\\_fact\\_sheet.pdf](http://www.stanford.edu/group/recessiontrends-dev/cgi-bin/web/sites/all/themes/barron/pdf/StateBudgets_fact_sheet.pdf) [hereinafter *A Great Recession Brief*].

the sources of revenue that aided local governments in weathering the recession—such as draining reserve funds, cutting services, and receiving emergency monies from state and federal sources—were only temporary fixes.<sup>101</sup> Although cities vary in their dependence upon sales taxes, these revenue sources declined early in the economic crisis and have continued to remain relatively low.<sup>102</sup> Moreover, some traditional revenue sources have only recently begun to dip.<sup>103</sup> Specifically, the drop in property tax revenues that resulted from the housing crisis of 2007–2008 only began to be felt as recently as 2010.<sup>104</sup> As a result, the desire to engage in activities that will lead to increased tax revenues is stronger than ever in the minds of local government decision makers.<sup>105</sup>

### C. The Modern Renaissance of the City—The Resilient City

Since funds from state and federal partners are so tenuous, and because the life blood of cities consist of their tax revenue streams, cities often find themselves chasing after every economic development project that presents itself in hopes that it will result in a boon to the local fisc.<sup>106</sup> With there being little hope that the spigots of state and federal budgets will begin to flow generous again and come to the rescue, America's cities are having to become innovative and aggressive in finding, building, and maintaining new sources of funding.<sup>107</sup> The pressure is particularly intense due to the many long-term municipal obligations coming due and in light of the rise in pension and retirement obliga-

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101. THE LOCAL SQUEEZE, *supra* note 86, at 21. *See also* *The Risks of Relying on User Fees*, GOVERNING (April 2013), <http://www.governing.com/columns/smart-mgmt/col-risks-of-raising-non-tax-revenue.html> (some cities and states have also collected funds through user fees).

102. *See A Great Recession Brief*, *supra* note 100 at 4–5. *See generally* Laurie S. Goodman, *Perspectives: Dimensioning the Housing Crisis*, 66 FIN. ANALYST JOURNAL 26, (2010), available at <http://lawschool.westlaw.com/Files/Download/9702011/27809192.pdf>.

103. *See* Lucy Dadayan & Donald J. Boyd, *Strong Gains in the First Quarter: Mounting Uncertainty for the Rest of 2013*, 92 ROCKEFELLER INST. 13–14 (Aug. 2013), available at [http://www.rockinst.org/newsroom/revenue\\_reports/2013/2013-08-08-SRR\\_92.pdf](http://www.rockinst.org/newsroom/revenue_reports/2013/2013-08-08-SRR_92.pdf).

104. Nicholas Johnson, *The State and Local Drag on the Recovery*, HUFFINGTON POST (Jun. 6, 2012, 9:57 AM), [http://www.huffingtonpost.com/nicholas-johnson/the-state-and-local-drag-on-the-recovery\\_b\\_1581753.html](http://www.huffingtonpost.com/nicholas-johnson/the-state-and-local-drag-on-the-recovery_b_1581753.html); *see also* Dadayan & Boyd, *supra* note 103; THE LOCAL SQUEEZE, *supra* note 86.

105. *See generally* THE LOCAL SQUEEZE, *supra* note 86.

106. *See generally* FRUG & BARRON, *supra* note 23. *See also* WILLIAM FISCHER, THE HOMEVOTER HYPOTHESIS (2001); PETERSON, *supra* note 23, at 131–49.

107. *See* CHERYL H. LEE ET AL., U.S. CENSUS BUREAU, STATE GOVERNMENT FINANCES SUMMARY: 2010 4 (2011), available at <https://www.census.gov/prod/2011pubs/g10-asfin.pdf>. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, STATE AND LOCAL GOVERNMENTS' FISCAL OUTLOOK: APRIL 2012 UPDATE (2012), available at <http://www.gao.gov/assets/590/589908.pdf>. For a discussion on the short-term and long-term fiscal challenges that cities and states face, *see, e.g.*, J. David McSwane, *City of Sarasota Will Raise Property Tax Rates*, HERALD-TRIBUNE (Sept. 20, 2011), <http://www.heraldtribune.com/article/20110920/ARTICLE/110919541>.



tions.<sup>108</sup> Moreover, as cities were some of the hardest hit victims of the national economic downturn, many local government leaders have pledged to retool and reorganize municipal governance, finances, and functions so as to better fortify themselves in the face of future economic battles.

In the face of a rise in political hostility toward the role of the federal government, as well as a general aversion to the centralization of power, the city has found itself at the center of the national discourse and the focus of post-recession recovery efforts. Perhaps this focus is rightly placed. Cities possess many inherent characteristics and features that make them attractive candidates to become the heroes of the American economic recovery. The question becomes, however, what must such a resilient and robust city do to serve in this role of hero? And how can a city bolster itself so as to ensure that, in the process of seizing on growth and opportunity, it does not make itself susceptible to yet another economic storm in the future?

## PART II. THE RESILIENT CITY—NEW GOALS, NEW DIRECTIONS, AND NEW PERSPECTIVES

As drivers of economic development are concerned, cities are particularly well suited to the task of creating the foundations and infrastructure from which economic progress is generated.<sup>109</sup> As cities strive to be resilient in this period of economic recovery, a frank and straight-

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108. See, e.g., Lindsay Fiori, *Racine County Children Faring Badly in Recession, Too*, JOURNAL TIMES (Sept. 23, 2011, 6:25 AM), [http://journaltimes.com/news/local/racine-county-children-faring-badly-in-recession-too/article\\_4b5367e6-e5d7-11e0-8578-001cc4c03286.html](http://journaltimes.com/news/local/racine-county-children-faring-badly-in-recession-too/article_4b5367e6-e5d7-11e0-8578-001cc4c03286.html); Betsy Hammond, *Portland School Board OKs Budget that Flat-funds Schools, Cuts 70 Teaching Jobs*, OREGONIAN (May 24, 2011, 8:03 AM), [http://www.oregonlive.com/portland/index.ssf/2011/05/portland\\_school\\_board\\_oks\\_budg.html](http://www.oregonlive.com/portland/index.ssf/2011/05/portland_school_board_oks_budg.html); Molly Hottle, *Portland Schools to See Widespread Layoffs, but Deeper Cuts to PE and High Schools Avoided for Now*, OREGONIAN (Jul. 20, 2010, 7:03 PM), [http://www.oregonlive.com/portland/index.ssf/2010/07/portland\\_schools\\_to\\_see\\_widensp.html](http://www.oregonlive.com/portland/index.ssf/2010/07/portland_schools_to_see_widensp.html); Chris Le, *An Uphill Battle: City Cuts Into Backlog of Public Housing Repairs*, UPTOWNER (Dec. 20, 2011), <http://archives.jrn.columbia.edu/2012-2013/theuptowner.org/2011/12/20/an-uphill-battle-city-cuts-into-backlog-of-public-housing-repairs/index.html>; Lynn Olanoff, *Belvidere Still Faces 13 Percent Tax Increase Despite Garbage Cut*, EXPRESS-TIMES (Feb. 9, 2012, 4:15 AM), [http://www.lehighvalleylive.com/warren-county/express-times/index.ssf/2012/02/belvidere\\_still\\_faces\\_13\\_perce.html](http://www.lehighvalleylive.com/warren-county/express-times/index.ssf/2012/02/belvidere_still_faces_13_perce.html); Claudio Sanchez, *Texas Schools Grapple With Big Budget Cuts*, NPR (Dec. 22, 2011, 12:01 AM), <http://www.npr.org/2011/12/22/144079041/texas-schools-grapple-with-big-budget-cuts>; Greg Toppo, *Recession Fuels Shift from Private to Public Schools*, USA TODAY (Jan. 6, 2010, 12:11 PM), [http://usatoday30.usatoday.com/news/education/2010-01-06-1Apublicprivate06\\_CV\\_N.htm?csp=34](http://usatoday30.usatoday.com/news/education/2010-01-06-1Apublicprivate06_CV_N.htm?csp=34); Allison Trobiano, *Harford Families Need \$62,000 to Cover Basic Costs, Study Says*, BALTIMORE SUN (Feb. 23, 2012), [http://articles.baltimoresun.com/2012-02-23/news/bs-md-cns-working-families-harford-county-20120223\\_1\\_food-stamps-families-cash-assistance](http://articles.baltimoresun.com/2012-02-23/news/bs-md-cns-working-families-harford-county-20120223_1_food-stamps-families-cash-assistance); Kevin Wiatrowski, *Tampa Leaders Work to Bolster Solid Waste Finances*, TAMPA TRIBUNE (Mar. 19, 2013, 4:04 PM), <http://tbo.com/news/politics/tampa-leaders-work-to-bolster-solid-waste-finances-364277>.

109. See generally Schragger, *Rethinking the Theory*, *supra* note 2.

forward understanding of the proper role and scope of the city as the architect of economic growth is essential.<sup>110</sup>

#### A. Local Government and Growth Theories in Law and Economics

The legal and economics literature regarding the role of local government often praises the unique role of the city as an impetus for development.<sup>111</sup> Economists and local government scholars have advanced various theories that support the notion that cities play a special, almost distinct, role in the formation and execution of economic development policy.<sup>112</sup>

##### 1. The Marketplace Theory of Local Government

The Tieboutian theory advances the view that local governments create a marketplace of goods in the form of services, which are then used as a tool to compete for citizen residents.<sup>113</sup> As certain goods and services enjoy a higher demand than others, local governments adjust their policy making accordingly so as to improve their offering of those services and amenities.<sup>114</sup>

Thus, because cities can react to increasing demands and competition from neighboring municipalities, it naturally follows that they, through good management, can be equally effective in competing for economic development projects.<sup>115</sup> As one scholar noted “cities can do well by keeping their fiscal houses in order, keeping taxes relatively low, not redistributing monies from rich people to poor people, keeping crime down, and by otherwise providing an environment conducive to capital attraction and retention.”<sup>116</sup> In essence, this view advances the notion that cities must be concerned with allowing competition and private markets to operate in their natural course, all the while ensuring that public power is not unjustly used to skew the field.<sup>117</sup>

##### 2. The Legal Authority Theory of Local Government

Yet another school of thought argues that, although good management is clearly essential to the economic development success of local governments, it is not enough alone.<sup>118</sup> Rather, local governments must

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110. *See generally id.*

111. *See generally id.*

112. *See id.*

113. *See Tiebout, supra note 21, at 421–23.*

114. *See id.* at 423.

115. *See id.*

116. Schragger, *Rethinking the Theory, supra note 2, at 315.*

117. *See generally id.* at 315–17.

118. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1111–18, 1149–50 (1980).

be armed with the sufficient legal tools and powers that make true economic prosperity possible.<sup>119</sup> Some argue that governmental constraints often disallow innovation, such as the ability to more freely annex suburban areas and their accompanying economic benefits.<sup>120</sup>

Along similar lines, others in this same school of thought argue that cities should have more authority in preventing suburbs from shirking their responsibility for the economic well being of the city's urban core.<sup>121</sup> In essence, "the notion here is that certain legal and political structures make cities more or less able to affect their own outcomes, but that these structures can be reformed, thus placing cities in a position to pursue prosperity unconstrained."<sup>122</sup> In essence, this theory calls for more legal authority to be accorded to the city so as to allow local governments to intervene when economic injustice results from marketplace choices.<sup>123</sup>

### 3. The Process Theory of Local Government

But perhaps the most compelling of these theories on the economic prosperity of local governments—most recently espoused by noted economist Paul Krugman and others in their the award-winning work on the "new economic geography"<sup>124</sup>—is that which views the city as a process.<sup>125</sup> As such, this view takes a middle approach in arguing that neither predestination, through the lens of governmental power, nor agency, through the lens of management and administration, determines the fate of cities.<sup>126</sup>

This theory, often centered on the idea that cities are self-arranging, stands on the premise that "there are forces encouraging people and businesses to clump together, and that there are forces en-

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119. See Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L. J. 2542, 2559–62, 2574–77 (2006).

120. See, e.g., *id.* at 2559–60.

121. DAVID RUSK, CITIES WITHOUT SUBURBS: A CENSUS 2010 PERSPECTIVE 85 (Woodrow Wilson Center 4th ed., 1993); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 352–53 (1990); Adam Przeworski, *The Last Instance: Are Institutions the Primary Cause of Economic Development?*, 45 EUR. J. SOC'Y 165, 165–75 (2004), available at [http://politics.as.nyu.edu/docs/IO/2800/archives\\_2004.pdf](http://politics.as.nyu.edu/docs/IO/2800/archives_2004.pdf); Schragger, *Rethinking the Theory*, *supra* note 2, at 316;

122. Schragger, *Rethinking the Theory*, *supra* note 2, at 316.

123. See *id.*

124. Masahisa Fujita & Paul Krugman, *The New Economic Geography: Past, Present and the Future*, 83 PAPERS REGIONAL. SCI. 139, 140–41 (2004), available at <http://www.rrojasdatabank.info/newecgeo04.pdf> [hereinafter *The New Economic Geography*].

125. See THE DEATH AND LIFE OF GREAT AMERICAN CITIES, *supra* note 11; PAUL R. KRUGMAN, THE SELF-ORGANIZING ECONOMY 3 (1996) [hereinafter THE SELF-ORGANIZING ECONOMY]; see also MASAHISA FUJITA, PAUL KRUGMAN & ANTHONY J. VENABLES, THE SPATIAL ECONOMY: CITIES, REGIONS, AND INTERNATIONAL TRADE 1–4 (1999); Schragger, *Rethinking the Theory*, *supra* note 2, at 316.

126. See JANE JACOBS, THE ECONOMY OF CITIES 122–44 (1969) [hereinafter THE ECONOMY OF CITIES]; Schragger, *Rethinking the Theory*, *supra* note 2, at 316.

couraging people and businesses to disperse.”<sup>127</sup> For instance, a city may create certain conditions at the onset of its development that generate two business districts, but—should those initial conditions be changed ever so slightly—three or four business districts may develop along the edges of the city rather than near the center as planned.<sup>128</sup> Thus, one can greatly predict the development of an area by evaluating the conditions that exist at the initial stages.<sup>129</sup> Even the smallest changes can have a long-reaching impact on an area.<sup>130</sup> As noted urban affairs specialist Jane Jacobs argues, “making small changes in a neighborhood—replacing a store with a parking lot, building a road, closing down a local grocery—could lead to a neighborhood's rapid failure.”<sup>131</sup> On the other hand, “the opening of a store, the influx of a few new residents—could result in cascades in the other direction.”<sup>132</sup>

As cities recover from the economic downturn, a comprehension of all these theories of the economic strength of local governments is essential for good policy making.<sup>133</sup> A focus on the way good management, which utilizes effective and meaningful legal authority, in turn creates a marketplace for growth, as well as the process by which this is accomplished, is crucial to ensuring that cities are indeed fortified against future economic storms.<sup>134</sup> And, in particular, the focus of any such self-study by the city into its management, exercises of legal authority, and decision-making processes should be aimed at how the city incentivizes economic growth through the allocation of public resources to private developments.<sup>135</sup> As Jane Jacobs notes, the smallest change in conditions can greatly impact the way in which an area develops.<sup>136</sup> Understanding when and how such changes in conditions occur and the results which stem from such changes in conditions lies at the core of good economic development decision making by local government leaders.<sup>137</sup>

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127. THE SELF-ORGANIZING ECONOMY, *supra* note 125, at 49; Schragger, *Rethinking the Theory*, *supra* note 2, at 318.

128. THE SELF-ORGANIZING ECONOMY, *supra* note 125, at 22–30; *see also* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 21–68 (1991); Schragger, *Rethinking the Theory*, *supra* note 2, at 316.

129. THE SELF-ORGANIZING ECONOMY, *supra* note 125, at 49; Schragger, *Rethinking the Theory*, *supra* note 2, at 316.

130. *See The New Economic Geography*, *supra* note 124, at 146–49.

131. Schragger, *Rethinking the Theory*, *supra* note 2, at 320.

132. *Id.*

133. *See generally id.*

134. *See generally id.*

135. *See* Edward L. Glaeser, *Growth: The Death and Life of Cities*, in *MAKING CITIES WORK: PROSPECTS AND POLICIES FOR URBAN AMERICA* 22, 25–26 (Robert P. Inman ed., 2009).

136. *See* THE ECONOMY OF CITIES, *supra* note 126, at 122–45.

137. *See* Alfred C. Aman, Jr., Law, *Markets and Democracy: A Role for Law in the Neo-Liberal State*, 51 N.Y.L. SCH. L. REV. 801, 809–15 (2007); CURTIS J. MILHAUPT & KATHARINA PISTOR, *LAW AND CAPITALISM: WHAT CORPORATE CRISES REVEAL ABOUT LEGAL SYSTEMS AND ECONOMIC DEVELOPMENT AROUND THE WORLD* 21 (2008).

### B. The Profits and Problems of Public-Private Partnerships

Cities have long engaged in the game of subsidizing private enterprise in hopes of receiving public gain.<sup>138</sup> For instance, New York, quite like most local governments, has long provided special incentives and privileges to its financial district in order to encourage its continued growth.<sup>139</sup> These often do not take the form of direct financial grants—although they sometimes do.<sup>140</sup> Rather they come in the form of various infrastructure improvements or tax breaks.<sup>141</sup> For instance, in 2004 the City of New York allocated \$100 million worth of public incentives to Goldman Sachs when the company threatened to move its headquarters to New Jersey.<sup>142</sup> Similarly, after the 2008 crash and in the face of the threatened departure of many venture capitalists from the city, the local government offered to invest roughly \$45 million in seed capital to private sector enterprises in order to entice them to remain.<sup>143</sup>

Despite being of dubious efficacy, many of the decisions to engage in such giveaways are premised on the idea that maintaining large employers which provide large numbers of jobs are worth the public sector investment.<sup>144</sup> In essence, this process involves subsidizing existing or new businesses in preference to others.<sup>145</sup> Often these arrangements are dressed up under the auspices of creating a partnership between the

138. WILLIAM CRONON, *NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST* 295–309 (1991); *see also* Chasity H. O'Steen & John R. Jenkins, *We Built It, and They Came! Now What? Public-Private Partnerships in the Replacement Era*, 41 STETSON L. REV. 249, 252 (2012) (“The public-private partnerships concept has been around for almost as long as the United States itself. Private parties’ involvement in highway projects dates back to as early as 1792, when ‘the first turnpike was chartered and became known as the Philadelphia and Lancaster Turnpike in Pennsylvania.’”) (quoting U.S. DEP’T OF TRANSP., REPORT TO CONGRESS ON PUBLIC-PRIVATE PARTNERSHIPS 15 (2004), available at <http://www.fhwa.dot.gov/reports/pppdec2004/pppdec2004.pdf>).

139. *See* Patrick McGeehan, *After Reversal of Fortunes, City Takes a New Look at Wall Street*, N.Y. TIMES, Feb. 23, 2009, at A19, available at [http://www.nytimes.com/2009/02/23/nyregion/23wall.html?\\_r=0](http://www.nytimes.com/2009/02/23/nyregion/23wall.html?_r=0).

140. *See generally* Terry F. Buss, *The Effect of State Tax Incentives on Economic Growth and Firm Location Decisions: An Overview of the Literature*, 15 ECON. DEV. Q. 90, 97–99 (2001), available at <http://edq.sagepub.com/content/15/1/90.full.pdf+html>; Yoonsoo Lee, *Geographical Redistribution of US Manufacturing and the Role of State Development Policy* (Fed. Reserve Bank of Cleveland, Working Paper No. 4-15, Dec. 2004), available at <http://www.clevelandfed.org/research/workpaper/2004/wp04-15.pdf>.

141. *See generally* Buss, *supra* note 140, at 97–99; Lee, *supra* note 140.

142. *See* David W. Chen, *Much Vilified, Financial Titans Find a Friend in Bloomberg*, N.Y. TIMES, Apr. 14, 2009, at A17, available at <http://www.nytimes.com/2009/04/14/nyregion/14bloomberg.html?pagewanted=all>; David W. Chen, *Economists’ Forecast: Chance of Change 100%*, N.Y. TIMES, Feb. 16, 2009, at A17, available at <http://www.nytimes.com/2009/02/16/nyregion/16york.html?pagewanted=all>; *Rethinking the Theory*, *supra* note 2, at 316.

143. *See* McGeehan, *supra* note 139; Schragger, *Rethinking the Theory*, *supra* note 2, at 316.

144. *See* Lee, *supra* note 140, at 20–35.

145. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 397–98 (1996).

public and private sectors—indicating that both sides give something up in order to receive something greater in return.<sup>146</sup> Political leaders extol these public-private partnerships as the municipal financing of the future.<sup>147</sup> For instance, during a March 2013 trip to Miami, President Obama lauded the value and unique opportunities presented by public-private partnerships when it comes to rebuilding America’s infrastructure.<sup>148</sup>

### C. Economic Winners v. Losers—The Uneven Playing Field

But public-private partnerships suffer from an inherent defect, although one that is often dismissed or ignored. In general, the hypnotic effect of garnering an economic development “win” often leads local governments head-first into the open arms of private parties seeking development partnerships.<sup>149</sup> The promise of new infrastructure, jobs, and ongoing future growth creates a haze around the local government decision-making process such that many valid considerations are often let go by the wayside.<sup>150</sup> One such important consideration is the role of fairness and competition.

On their face, public-private partnerships serve as an attractive vehicle for economic development projects.<sup>151</sup> By engaging in these endeavors, local governments, at least nominally, are able to share both the risks and the rewards of a successful project with the private partner.<sup>152</sup> However, in truth, the exact nature of the “partnership” is often not well defined.<sup>153</sup> The extent to which both parties—the public and the private—are on the hook for both capital investment and for incurring

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146. See Robert Hockett, *It Takes a Village: Municipal Condemnation Proceedings and Public/Private Partnerships for Mortgage Loan Modification, Value Preservation, and Local Economic Recovery*, 18 STAN. J.L. BUS. & FIN. 121, 136–76 (2012).

147. Laura Barrett, *6 Reasons to Be Wary of Public-Private Partnerships*, HUFFINGTON POST (Apr. 5, 2013, 5:01 PM), [http://www.huffingtonpost.com/laura-barrett/6-reasons-to-be-wary-of-p\\_b\\_3023410.html](http://www.huffingtonpost.com/laura-barrett/6-reasons-to-be-wary-of-p_b_3023410.html).

148. See Colleen Curtis, *In Miami, President Obama Talks About His Plan to Put People to Work Rebuilding America*, WHITE HOUSE BLOG (Mar. 29, 2013, 4:11 PM), <http://www.whitehouse.gov/blog/2013/03/29/miami-president-obama-talks-about-his-plan-put-people-work-rebuilding-america>; Barrett, *supra* note 147.

149. JOEL LEWIN & CHARLES E. SCHAUB, JR., 57 MASS. PRAC. CONSTRUCTION LAW § 17:48 (2012) (stating, “Given the current economic climate and the deteriorating condition of infrastructure in the US, it is likely that public-private partnerships will become an increasingly popular procurement option for public projects in the United States.”).

150. See *id.*

151. *Id.*

152. See, e.g., Brian M. Rowson, *Public Private Partnerships: The Future of Public Construction in Florida?*, 2012 FLA. B.J. 36, 36–41, available at <http://www.babc.com/files/Uploads/Documents/Public%20Private%20Partnerships%20-%20Rowson.pdf>.

153. See O’Steen, *supra* note 138.

losses is often left vague and uncertain.<sup>154</sup> If costs rise, who bears the burden of the additional need for capital?<sup>155</sup> And if the project begins to decline or if unforeseen circumstances arise, who is to bear the loss?<sup>156</sup>

Scholars, policy advocates, and commentators have often warned of the many pitfalls that can accompany poorly conceived public-private partnerships.<sup>157</sup> While clothed in the mantle of a shared endeavor where each party walks into the arrangement with eyes wide open, the end result of these agreements are often quite different than what was anticipated.<sup>158</sup> Specifically, these endeavors represent the use of public power and authority to uplift one private party to the exclusion of others.<sup>159</sup> The private party to the public-private partnership necessarily obtains a number of public benefits—be it funds, access to resources, ease of permitting, looser governmental regulation, etc.—in exchange for entering into the agreement.<sup>160</sup> As such, these favored parties enjoy a leg-up on their competitors in that particular market such that true competition and choice is substantially weakened or even suppressed in favor of the government’s chosen party.<sup>161</sup> In essence, by clothing the private party with the trappings of governmental power, the playing field is necessarily rendered uneven such that other businesses and service providers cannot fairly compete.<sup>162</sup>

And in the face of this unevenness there is very little opportunity for the public to engage in meaningful oversight and management of the public private partnership relationship.<sup>163</sup> The authority to make deci-

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154. See CAL. DEBT & INV. ADVISORY COMM’N, ISSUE BRIEF, PRIVATIZATION VS. PUBLIC-PRIVATE PARTNERSHIPS: A COMPARATIVE ANALYSIS 12 (2007), available at <http://www.treasurer.ca.gov/cdiac/publications/privatization.pdf>. See generally O’Steen, *supra* note 138.

155. See O’Steen, *supra* note 138, at 280. See generally Dominique Custos & John Reitz, *Public-Private Partnerships*, 58 AM. J. COMP. L. 555 (2010).

156. See Nicholas J. Farber, *Avoiding the Pitfalls of Public Private Partnerships: Issues to be Aware of When Transferring Transportation Assets*, 35 TRANSP. L.J. 25, 26–31 (2008).

157. See, e.g., David W. Gaffey, *Outsourcing Infrastructure: Expanding the Use of Public-Private Partnerships in the United States*, 39 PUB. CONT. L.J. 351, 354–56 (2010); see also Ahmed M. Abdel Aziz, *Successful Delivery of Public-Private Partnerships for Infrastructure Development*, 133 J. CONSTR. ENG’G & MGMT. 918, 918 (2007), available at <http://ascelibrary.org/doi/pdf/10.1061/%28ASCE%290733-9364%282007%29133%3A12%28918%29>.

158. See Gaffey, *supra* note 157, at 356.

159. See EDUARDO ENGEL, RONALD FISCHER, & ALEXANDER GALETOVIC, PUBLIC-PRIVATE PARTNERSHIPS TO REVAMP U.S. INFRASTRUCTURE 16 (2011), available at [http://www.brookings.edu/~media/Research/Files/Papers/2011/2/partnerships%20engel%20fischer%20galetovic/02\\_partnerships\\_engel\\_fischer\\_galetovic\\_paper.PDF](http://www.brookings.edu/~media/Research/Files/Papers/2011/2/partnerships%20engel%20fischer%20galetovic/02_partnerships_engel_fischer_galetovic_paper.PDF).

160. See generally Gaffey, *supra* note 157.

161. See generally *id.*

162. See generally *id.*

163. See Barrett, *supra* note 147; ENGEL ET AL., *supra* note 159, at 21 (“In many local, state, and national governments, the same public works agency is in charge of planning the infrastructure, designing and awarding the PPP contract, monitoring compliance, and renegotiating contracts. (Although there may be higher-level supervision, it is generally limited in its reach.) We believe this represents bad governance.”).

sions for the project is often relegated to a small board or commission made up of only a few individuals who hold tremendous power.<sup>164</sup> And, often one or more of these individuals are surrogates for the private party itself.<sup>165</sup> The self-interested nature of these management arrangements can lead to a disproportionate share of risk being allocated to the public partner, rather than being more evenly spread between the two.<sup>166</sup>

Various policy advocates and commentators point to several instances of unfair market advantages that often arise in public-private partnership agreements.<sup>167</sup> For instance, Virginia's Martin Luther King Downtown/Midtown Tunnel extension project was bid on by (and eventually awarded to) only one single business.<sup>168</sup> The fear in these types of single-bidder scenarios is that the contract is not being awarded based on a competitive and open process, but rather through bilateral negotiations between only the single private entity and the public governing body.<sup>169</sup> Similarly, Chicago's parking meter partnership with a private company requires that the city pay to the company the value of any lost revenues in the event the city closes a street or if a natural disaster occurs.<sup>170</sup> In the free market, the private party would assume the risk that streets may occasionally close and metered parking will be unnecessary at certain times in exchange for the possibility of reaping substantial profits from metered parking during the rests of the time.<sup>171</sup> However, this public-private partnership entails the private entity being guaranteed a profit regardless of whatever unforeseen event arises, while substantial risk is saddled with the public.<sup>172</sup>

And further, a major instance of the lack of competition in public-private partnerships can be seen through the renegotiation process.<sup>173</sup> Often at various stages of the project there will be periods whereby unforeseen circumstances will arise that cause the private and the public

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164. See Barrett, *supra* note 147.

165. See generally *id.*

166. *Id.*

167. See *id.*

168. *Id.*; *Project Profiles: Downtown Tunnel/Midtown Tunnel/ MLK Extension*, U.S. DEPT OF TRANSP. FED. HIGHWAY ADMIN., [https://www.fhwa.dot.gov/ipd/project\\_profiles/va\\_midtown\\_tunnel.htm](https://www.fhwa.dot.gov/ipd/project_profiles/va_midtown_tunnel.htm) (last visited May 21, 2014).

169. ENGEL ET AL., *supra* note 159, at 7.

170. Barrett, *supra* note 147; see also *Chicago Parking Meter Rates Will Be Nation's Most Expensive in 2013*, HUFFINGTON POST CHICAGO (Dec. 26, 2012, 9:49 PM), [http://www.huffingtonpost.com/2012/12/27/chicago-parking-meter-rat\\_0\\_n\\_2370192.html](http://www.huffingtonpost.com/2012/12/27/chicago-parking-meter-rat_0_n_2370192.html) [hereinafter *Chicago Parking*].

171. See Natalie Martinez, *Chicago to Have Most Expensive Parking Meters in North America*, 5 NBC CHICAGO (April 5, 2013, 12:36 PM), <http://www.nbcchicago.com/traffic/transit/chicago-parking-meters-2013-rates-184874621.html>.

172. See generally *Chicago Parking*, *supra* note 170.

173. See ENGEL ET AL., *supra* note 159, at 12.



partners to meet around the negotiating table to hammer out new provisions that address situations that were not initially contemplated.<sup>174</sup> For instance, perhaps the project ends up needing to be larger than originally thought or perhaps the user-fee arrangement proves inadequate to meet the financial needs and must be increased.<sup>175</sup> As a study by The Brookings Institute points out, even if the initial awarding of the public-private partnership was conducted in a competitive environment, “renegotiations occur in the absence of competition, [where] the results can be very profitable to the private party.”<sup>176</sup> During renegotiation, the private party holds a superior position at the onset in that it has already been engaged in the project for a significant period of time and the cost to the public to go out and engage a new private company would often be unreasonable.<sup>177</sup> Thus, the local government will more easily meet the demands of the private entity because the municipality feels wed to the deal and the particular developer.<sup>178</sup>

#### D. Reconsidering Public Financing Incentives—Leveling the Field

There are many goals and objectives that have been ascribed to the city in this era of municipal resilience. As one commentator noted:

Whether it has to do with climate change and other environmental concerns, it is obvious that large cities have a greater responsibility because of the density of their populations and their jurisdiction over local public transportation. If the issue revolves around employment, cities can play a pivotal role in keeping and in creating jobs by virtue of the quality of life they offer and their receptivity to businesses. When it comes to security and crime, city officials are the best guarantee for the needed security to enhance community life. And when we search for creativity and cultural expression, increasingly we see the inspiration and leadership coming from cities and their artistic communities.<sup>179</sup>

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174. *Id.*

175. *Id.*

176. *Id.*

177. *See id.*

178. *See id.*

179. Parisella, *supra* note 15 (“It is becoming increasingly obvious that large cities are centers of economic, political, cultural, and community life. Together, they are doing more to increase their efforts to share best practices on safety, environmental, educational, and community integration issues. For instance, the C40 Large Cities Climate Leadership Group—involving 40 major cities from five continents—is committed to fight against climate change and improve energy efficiency. Other regroupings such as the ICLEI, which represents local governments, is dedicated to sustainable development. The International Cities of Peace involves an international alliance promoting peace conferences and hosting international organizations. Finally, the *Association Internationale des Maires Francophones*, which includes cities from 48 French-speaking nations, is a forum to share best practices and new ideas regarding diversity.”)

However, one function of the city that has been left out is the idea that the city ought to fill the role of moderator, referee, and balancer.<sup>180</sup> As discussed above, the city has a long history, both in theory and in practice, of serving as the architect, impetus, and partner of and in economic development projects.<sup>181</sup> Whether it is through direct grants, the waiving of tax obligations, or the building of infrastructure, cities enjoy a long legacy of being intimately involved in the creation of economic growth.<sup>182</sup>

But in the age of resiliency, where cities must be concerned with how to rebuild and reconfigure themselves so as to best meet the demands of a new and different economy, an unbridled and overly-enthusiastic agenda of subsidizing private development must be seriously curtailed and reconsidered.<sup>183</sup> While seizing upon a potentially lucrative project may seem attractive in the short term, the long-term impact of bestowing upon a singled-out private entity the largesse of the public purse can have long-term effects.<sup>184</sup> And while many of these effects are discussed above—including, but not limited to, an undue risk being imposed on the city or the one-sided nature of the renegotiation process—the most important effect in the post-recession era is that it tilts the playing field in favor of one private group over another.<sup>185</sup> In essence, public-private partnerships of this nature send a message to other private businesses in the area that the local government selects certain chosen winners, and thereby implicitly (although unintentionally) creates disfavored losers.<sup>186</sup> While some groups enjoy infrastructure subsidies and breaks from their tax obligations, others are forced to shoulder the burden on their own without public assistance.<sup>187</sup> This creates a malaise throughout the municipality as private enterprise refuses to further invest within the city's boundaries—either out of resentment or because they believe any such investment should be coupled with a public subsidy of their own.<sup>188</sup>

And aside from merely the internal strife that such an uneven playing field can create among existing businesses, other private enterprises

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180. *See generally id.*

181. *See* Part II.A–C and accompanying discussion.

182. *See* Part II.A–C.

183. *See* Part II.C and accompanying discussion of the negative implications of public-private partnerships.

184. *See* Part II.C.

185. *See id.* For a discussion of the drive to provide a level playing field in other areas of the law, see Gilbert R. Serota, *Potholes on the Level Playing Field—The Role of Courts and Counsel in Takeovers*, 39 HASTINGS L.J. 699 (1988); *see also* Robert E. Hudec, *Differences in National Environmental Standards: The Level-Playing-Field Dimension*, 5 MINN. J. GLOBAL TRADE 1 (1996); Scott W. Dunlap, *Interstate Banking Developments in Florida: Pushing Through Legal Barriers and Toward A Level Playing Field*, 9 NOVA L.J. 1 (1984).

186. *See* Part II.C.

187. *Id.*

188. *See generally id.*

searching for places to invest may be dissuaded from coming into such a market because of the perception that only those businesses “on the inside” are given the resources they need to succeed.<sup>189</sup> Without the right connections, political ties, or a project that meets the flavor *de jour*, the outsider may believe its project will not be able to obtain public-private partnership benefits and thus will not prosper.<sup>190</sup> And even if it is not necessarily the case that the awarding of these public subsidies is totally an insider’s game, the perception that is created by the marketplace imbalance can have an equally damaging impact on the city’s ability to attract new businesses and maintain existing ones.<sup>191</sup>

So although the resilient city should not abdicate its place as an economic driver and stimulator of growth, it must don a new and different mantle—that of an equalizer, a balancer, and a leveler.<sup>192</sup> When allocating public resources to private enterprises under the auspices of public-private partnerships, local government leaders must understand and be ever cognizant of the importance of keeping the playing field balanced. Every new business and private investment that garners the possibility of using public resources must be weighed against the impact it will have on other competitors in the area, as well as how the market imbalance created by any such partnerships will impact the municipality’s ability to attract new economic development projects to the area. So while the resilient city must wear many hats, some new and some greatly refashioned, a new such hat is that of providing balance and fairness when it comes to the allocation of public resources for economic development. To do otherwise is to sacrifice the much larger goal of providing meaningful and lasting economic growth for the mere chance to capture a project that, although perhaps significant on its face in the short term, can be damaging to the city’s long-term development strategy and economic viability.

## CONCLUSION

Although certainly battered and worn by the ages and the ever-changing history of human society, the city remains at the center of civilization.<sup>193</sup> In everything from the development of economies, heightened attention to public health, and the proliferation of the arts and culture, the importance of the city cannot be understated.<sup>194</sup> It is, in essence, a mirror to humanity, which reflects both the highs, the lows, and the great moments in history.<sup>195</sup>

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189. *See generally* RUSK, *supra* note 121.

190. For a brief discussion of “economic favoritism,” see Greater Houston Small Taxicab Co. Owners Ass’n v. Houston, 660 F.3d 235 (5th Cir. 2011).

191. *See generally* Part II.C

192. *Id.*

193. MUMFORD, *supra* note 2; Schragger, *Rethinking the Theory*, *supra* note 2.

194. HAMMOND, *supra* note 7; Schragger, *Rethinking the Theory*, *supra* note 2; KUNSTLER, *supra* note 8.

195. MUMFORD, *supra* note 2; Schragger, *Rethinking the Theory*, *supra* note 2.

But the history of the city itself has not always been so fanciful and idyllic.<sup>196</sup> Rather, changes in social norms, shifting economic pressures, and political strife have brought immense challenges to the city.<sup>197</sup> Over time, traditional sources of revenue and support have dried up, large sectors of the population have packed up and moved into the outlying suburbs, and crime and violence have infiltrated the urban core of many of America's great cities.<sup>198</sup> And most recently, the Great Recession has imposed a host of new challenges upon America's local governments, with many of these challenges being here to stay.<sup>199</sup>

As cities emerge from the wake of the economic downturn, the landscape has been altered and cities are being forced to adapt and re-tool so as to meet this new world order.<sup>200</sup> As this Symposium so aptly inquires, how can a city be resilient in today's world? In that vein, reduced tax revenues and financial support from the state and federal sources have caused cities to search for new and innovative ways to produce funds to support local government functions.<sup>201</sup> One such avenue involves the creation of new and inventive public-private partnerships, whereby local governments and private parties pool resources and share in risks so as to achieve a goal or complete a project that the municipality alone would not have been able to accomplish.<sup>202</sup> However, in doing so, the city necessarily endows this favored private party with many of the benefits of public power.<sup>203</sup> And through these public benefits the atmosphere of competition and equity in the marketplace is slanted.<sup>204</sup> A city can only be resilient if it can both sustain and further grow its economy.<sup>205</sup> But such favoritism in public-private partnerships can have wide-ranging adverse effects, not only for local enterprises, but also for new businesses that seek to locate or invest in the area.<sup>206</sup> Thus, while cities must be ever vigilant in seizing upon economic development opportunities to couple private investment with public resources in order to achieve a significant and positive overall result, the city must be equally committed to ensuring that it behaves in such a way so as to

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196. MUMFORD, *supra* note 2.

197. *See id.*

198. *See id.*; *see also* EHRENHALT, *supra* note 9.

199. Chernick, Langley & Reschovsky, *supra* note 13. For a list of municipal bankruptcies since 2010 *see Bankrupt Cities, Municipalities List and Map, supra* note 13; Leinberger, *supra* note 13, at 11. *See also* Christie, *supra* note 13; McConnell & Picker, *supra* note 13; Oakey, *supra* note 13.

200. Rosenbaum, *supra* note 16; Florida & Garlock, *supra* note 16; Alexander, *supra* note 16.

201. Rosenbaum, *supra* note 16; Florida & Garlock, *supra* note 16; Alexander, *supra* note 16.

202. *See* O'Steen & Jenkins, *supra* note 138; *see also supra* Part II.B.

203. *See supra* Part II.C.

204. *See id.*

205. *See id.*

206. *See supra* Part II.D.

encourage competition and fairness for all those who wish to invest or do business within its borders.<sup>207</sup>

So while the resilient city must wear many hats and step into roles that have previously been foreign to generally accepted notions of local governance, one that cannot be overlooked is the city's role in keeping the marketplace level so that private parties have confidence that everyone plays by the same rules and has the same opportunities to thrive and prosper.<sup>208</sup> By creating a business environment where parties feel assured that their achievements (and failures) occur by the work of their own hands, rather than through municipal largesse, cities can truly become resilient and ready to face any challenges ahead.<sup>209</sup>

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207. *See id.*

208. *See id.*

209. *See id.*