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COLLECTIVE ACTION AND THE URBAN COMMONS

Sheila R. Foster*

Urban residents share access to a number of local resources in which they have a common stake. These resources range from local streets and parks to public spaces, to a variety of shared neighborhood amenities. Collectively shared urban resources suffer from the same rivalry and free-riding problems that Garrett Hardin described in his Tragedy of the Commons tale. Scholars have not yet worked up a theory about how this “tragedy” unfolds in the urban context, particularly in light of existing government regulation and control of common urban resources. This Article argues that the tragedy of the urban commons unfolds during periods of “regulatory slip-page”—when the level of local government oversight and management of the resource significantly declines, leaving the resource vulnerable to expanded access by competing users and uses. Overuse or unrestrained competition in the use of these resources can quickly lead to congestion, rivalry, and resource degradation. Tales abound in cities across the country of streets, parks, and vacant land that were once thriving urban spaces but have become overrun, dirty, prone to criminal activity, and virtually abandoned by most users.

Proposed solutions to the rivalry, congestion, and degradation that afflict common urban resources typically track the traditional public-private

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* Albert A. Walsh Professor and Vice Dean, Fordham Law School. This Article has gestated for much longer than originally anticipated and is the product not only of my own thinking over the past few years, but also the product of thoughtful conversations with many colleagues and friends. My deepest gratitude to the following individuals who have commented on the Article at various stages of its development: Nestor Davidson, Nicole Garnett, Sonia Katyal, Aaron Saiger, and Benjamin Zipursky. I also want to thank participants at the following meetings/gatherings where this Article was presented: the 2008 Local Government Panel at the annual American Association of Law Schools meeting in San Diego; the 2009 Property Works-in-Progress Conference at University of Colorado School of Law; and the 2009 Fordham Law Faculty scholarship retreat. I am indebted to my two excellent research assistants, Jacob Press and Jeffrey Douglas, who brought an exceptionally high level of creativity and skill to each task assigned to them. Finally, I am thankful for the research support provided by Fordham Law School.

dichotomy of governance approaches. These solutions propose either a more assertive central government role or privatization of the resource. Neither of these proposed solutions has taken root, I argue, because of the potential costs that each carry—costs to the local government during times of fiscal strain, costs to communities where the majority of residents are non-property owners, and costs to internal community governance. What has taken root, however, are various forms of cooperative management regimes by groups of users. Despite the robust literature on self-organized management of natural resources, scholars have largely ignored collective action in the urban context. In fact, many urban scholars have assumed that collective action is unlikely in urban communities where social disorder exists.

This Article highlights the ways in which common urban resources are being managed by groups of users in the absence of government coercion or management and without transferring ownership into private hands. This collective action occurs in the shadow of continued state and local government ownership and oversight of the resources. Formally, although the state continues to hold the regulatory reins, in practice we see the public role shifting away from a centralized governmental role to what I call an “enabling” one in which state and local governments provide incentives and lend support to private actors who are able to overcome free-riding and coordination problems to manage collective resources. This Article develops this enabling role, marks its contours and limits, and raises three normative concerns that have gone unattended by policymakers.

INTRODUCTION

Urban residents share access to a number of local tangible and intangible resources in which they have a common stake. These resources range from local streets and parks to public spaces to a variety of shared neighborhood amenities. These collectively shared urban resources—what I call “urban commons”—are subject to the same rivalry and free-rider problems that Garrett Hardin wrote about in his *Tragedy of the Commons* tale. In this classic tale, Hardin warned of the depletion of open-access natural resources where it is difficult to exclude potential users who lack incentives to conserve or sustainably use the resource.¹ Many collectively shared, open-access urban resources have much in common with Hardin’s conception of the “pasture open to all” prone to overuse or misuse if improperly managed or regulated.²

The urban “commons” generally shares with traditional public goods both a lack of rivalry in consumption (nonrivalrous) and lack of excludability in access to and enjoyment of their benefits (nonexclud-

¹ Garrett Hardin, *The Tragedy of the Commons*, 162 *Sci.* 1243, 1244 (1968).

² *Id.*

able). But they share these characteristics only up to a point.³ That point is what I will refer to as “regulatory slippage,” and it occurs when the level of local government control or oversight of the resource significantly declines, for whatever reason.⁴ During periods of regulatory slippage, the temptation to create rivalrous conditions exists for a variety of actors whether they are ordinary pedestrians, opportunistic criminals, or frequent park users. Such users might be tempted to use or consume the common resource in ways that degrade the value or attractiveness of the resource for other types of users and uses. It is at this point when the shared urban resource comes to resemble less of a public good (nonexcludable, nonrivalrous) and more of a traditional “commons” (nonexcludable, rivalrous), subject to the sort of tragedy depicted in Hardin’s tale.⁵

Too much usage (either in volume or intensity) of a park or a neighborhood street, for example, can quickly result in congestion. Similarly, certain types or intensity of uses can create incompatibilities with many ordinary uses and conservation of such spaces.⁶ Overuse or unrestrained competition in use of the space creates conditions which begin to mimic the type of commons problem that Hardin wrote about—that is, such resources become rivalrous and prone to degradation and perhaps destruction.

Tales abound in many cities of dirty and unsafe streets, parks, and vacant lots that were once thriving urban spaces, but became overrun and degraded in a classic tragedy of the commons scenario. Roy Rosenzweig and Elizabeth Blackmar’s history of Central Park recounts one of the most famous examples of how a common urban resource

3 See Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 13 (2003) (comparing “pure” and “impure” public goods and arguing that parks and other open spaces “admit of nonrivalrous uses only to a certain point”).

4 See Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 299–300 (1999) (defining positive and negative regulatory slippage; the former refers to action which gets ahead of regulatory baselines or standards, whereas the latter refers to actions that fall behind those baselines or standards).

5 Traditionally, the “commons” or “common-pool resource” is a natural or man-made resource in which (a) “it is costly to exclude individuals from using the good either through physical barriers or legal instruments and, (b) the benefits consumed by one individual subtract from the benefits available to others.” See ELINOR OSTROM, *GOVERNING THE COMMONS* 30 (1990). That is, the resource is characterized by nonexcludability and rivalry. See *id.*

6 For example, low intensity uses of urban parks (such as bird watching) are nonrivalrous, whereas other high intensity uses (like intensive hunting) are incompatible with other uses (e.g., intensive hiking) and with conservation or long-term sustainability of the resource. See Bell & Parchomovsky, *supra* note 3, at 13.

became rivalrous and subject to overuse and degradation.⁷ After years of opening up the park to permit a wide variety of events and groups to use the park, Central Park quickly became a space in which access to the “whole community” posed inevitable conflicts and competition between users.⁸ Many saw the park as deteriorating rapidly due to its openness to various events and a potpourri of users, resulting in increased maintenance and cleanup costs which the city was not able to absorb. This deterioration escalated with the onset of the fiscal crisis in the 1970s and the decline in city appropriations, which devastated the entire urban park system, leaving many parks and recreational areas unsafe, dirty, prone to criminal activity, and virtually abandoned by most users.⁹

A similar story can be told about the “neighborhood commons” in many urban communities.¹⁰ The quality of a neighborhood commons—of its street life, sidewalks, open spaces, and public parks—might begin to decline through increasing demands by different users and uses of the space. Demands may overwhelm or confound the ability of government resources to manage and that makes managing the rivalry between users difficult. Lacking such management, the increase in certain types of uses of common space—such as in the case of excessive loitering, aggressive panhandling, graffiti, or littering—will eventually begin to rival, if not overwhelm, other users and uses of this space.¹¹ Such “chronic street nuisances,” for example, will ultimately require either a system of more assertive government control,

7 See generally ROY ROSENZWEIG & ELIZABETH BLACKMAR, *THE PARK AND THE PEOPLE* (1992) (discussing the evolution of Central Park and the different classes of people who have used it over time).

8 See *id.* at 498.

9 See *id.* at 501–02; see also Michael Murray, *Private Management of Public Spaces: Nonprofit Organizations and Urban Parks*, 34 HARV. ENVTL. L. REV. 179, 230 (2010) (telling a similar story about Bryant Park in New York City).

10 Bradley Karkkainen theorizes a conception of the “neighborhood commons” as a set of local tangible and intangible resources in which neighborhood residents share a stake. See Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 68 n.91 (1994). Rather than constituting a single clearly-defined resource, the neighborhood commons is multi-dimensional, consisting of a web of sometimes overlapping and sometimes unrelated resources that may be used in different combinations and some parts of which are “open access” in that they may be used by nonresidents as well. See *id.*

11 See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1223 (1996) (“In open-access spaces thronged with strangers . . . free-riding is apt to afflict the informal sector.”).

enforcement of social norms through criminal law, or some form of private governance of these spaces.¹²

The commons problem is in part a problem of open access to rivalrous resources and in part a problem of local governance. Efforts to manage the “commons” typically vacillate between two governance approaches that Hardin and others have developed as a response to commons dilemmas.¹³ Averting the tragedy has traditionally been thought to require either a system of private property rights in the commons, in which individual owners could most efficiently internalize the costs imposed on the resource, or a central government management approach which would constrain individual users by regulating access and use of the resource.¹⁴ In the urban context, Robert Ellickson’s proposal for “public space zoning”—which would allow cities to more comprehensively regulate open public spaces to control chronic street nuisances—is a contemporary example of the latter.¹⁵ Gated communities—a form of common interest development in which individual property owners own and control shares/parts of the development, including its common spaces—is a contemporary example of the former.¹⁶

The choice between government regulation and privatization of the commons does not capture the full range of approaches to com-

12 *Id.* at 1169 (defining chronic street nuisances as “when a person regularly behaves in a public space in a way that annoys—but more than annoys—most other users, and persists in doing so over a protracted period”).

13 See OSTROM, *supra* note 5, at 8–21; Hardin, *supra* note 1, at 1245.

14 See Garrett Hardin, *Living on a Lifeboat*, in MANAGING THE COMMONS 210, 213 (John A. Baden & Douglas S. Noonan eds., 2d ed. 1998) (“Under a system of private property the man of group of men who own property recognize their responsibility to care for it, for if they don’t they will eventually suffer.”); *id.* (remarking that overpopulation of the commons had no “technical solution” and therefore required “mutual coercion, mutually agreed upon”). See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967) (discussing the concept and role of property rights).

15 See Ellickson, *supra* note 11, at 1226.

16 See Setha Low, *How Private Interests Take Over Public Space: Zoning, Taxes, and Incorporation of Gated Communities*, in THE POLITICS OF PUBLIC SPACE 81, 88 (Setha Low & Neil Smith eds., 2006) (demonstrating that the dramatic increase in the development of these communities, along with the continued growth of homeowner associations, has marked a “social revolution in governance” of the urban commons with private organizations responsible for maintaining residential common areas and where private enforcement of covenants has replaced municipal oversight in regulating the environment by zoning); Shin Lee & Chris Webster, *Enclosure of the Urban Commons*, 66 GEOJOURNAL 27, 27 (2006) (noting that in many different cultures and economies around the world new forms of local territorial governance are emerging in cities to make joint consumption more sustainable).

mons management, as Elinor Ostrom has famously demonstrated in her work on self-organized, cooperative natural resource management regimes.¹⁷ Her work, and the work of others,¹⁸ introduces a third option for avoiding the tragedy of the commons; namely, a regime in which a group of users is able to overcome collective action problems and manage a common resource without government coercion or the vesting of individual (or group) property rights in the commons.

Although the literature on self-organized management of natural resources has been well developed by Ostrom and others,¹⁹ such collective action has been largely neglected and underdeveloped in the context of urban resources. Instead, social scientists and legal scholars have tended to highlight the lack of collective efficacy in urban communities where social disorder in public spaces exists.²⁰ This Article instead highlights the ways in which rivalrous and degraded common urban resources are being collectively restored and managed by groups of users in the absence of government coercion and (often) oversight, and without transferring ownership of the resources into private hands. As others have noted, an important element of collective resource management regimes is that such regimes are often supported in important ways by central government authorities.²¹ The support of central authorities is an important element in users' ability to overcome free-riding and coordination problems to manage collective urban resources. In the urban context, this enabling role is especially important to understand given the local government's ownership, authority, and control over common urban resources.

17 See OSTROM, *supra* note 5, at 8–21.

18 See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* 123 (1991) (demonstrating that people resolve disputes cooperatively without regard to laws applying to those disputes); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 749 (1986) (discussing as a “middle ground” between government ownership and private property rights the possibility and existence of a “managed commons, where usage as a commons is not tragic but rather capable of self-management by orderly and civilized people”).

19 See generally OSTROM, *supra* note 5 (examining case studies focused on natural resources). But see Rose, *supra* note 18, at 739–50, 765–66 (discussing “inherently public property” doctrines from the nineteenth century which vested some property rights in the “unorganized public” to open access land capable of customary self-management).

20 See *infra* note 132.

21 See OSTROM, *supra* note 5, at 190 (finding that the activities of external public authorities can be positive factors in helping collectivities to self-organize); see also Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 578 (2001) (recognizing that background legal rules can provide a “safety net” that “enables commoners, without taking prohibitive individual risks, to gain benefits that flow from trusting one another”).

This type of enabling of cooperation among private actors to manage an open access, common resource is what I term *collective action enabling*. There are clear benefits, and costs, to collective action enabling which I describe in this Article. However, the main point is to delineate and develop the concept of collective action enabling and to compare and contrast it with the traditional public-private binary approaches to urban commons management. By articulating the contours of collective action enabling in this Article, I hope to bring a theory to a practice that has become ubiquitous in cities across the nation, and to provoke a more sustained examination of the relationship between public and private actors in managing common urban resources.

The Article proceeds as follows: Part I introduces the concept of regulatory slippage and its role in transforming a previously managed and restricted common resource to an increasingly open and rivalrous one. It argues the need for a new governance regime to restore the equilibrium of users that sustain the commons for the benefit of the public. Part II reviews the different responses proposed by scholars responding to the tragedy of urban resources that have become rivalrous. These proposals include suggestions to re-zone public spaces to better allocate that space among rivalrous users or, alternatively, to privatize those spaces as a way of placing control in the hands of neighboring property owners. This Part posits that these proposals have yet to fully take root because of their potential costs—costs to the government during times of fiscal strain and costs to the communities in which these resources are located. It then introduces the possibility that resource users can manage these resources collectively and highlights the important role that central governments can play in incentivizing and supporting these efforts.

Part III offers examples of some of the urban collective management regimes. These examples include those already familiar to legal scholars: Business Improvement Districts (BIDs), which allow commercial property owners and merchants to maintain the neighborhood commons,²² and Park Conservancies, which involve the coordinated efforts of private actors working in partnership with the local government to manage major urban parks.²³ Less discussed

22 Scholars have written about BIDs, mainly through the lens of sublocal governance. See, e.g., Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 365 (1999) (discussing the rapid spread of BIDs as one of the most important developments to occur recently in American cities).

23 See generally ALEXANDER GARVIN ET AL., URBAN PARKS AND OPEN SPACE (1997) (describing derelict areas that were developed into thriving parks and discussing the

examples in the literature include more informal groups, like neighborhood foot patrols and community gardeners that establish and enforce positive norms of conduct in neighborhood open spaces. In each of these examples, private actors overcome collective action problems (primarily the temptation to free-ride on others' efforts) and pool their efforts to maintain, oversee, and manage a common urban resource.

Part III also observes an inverse relationship between the level of enabling offered by central government authorities and the endogenous factors that are highly correlated with the success of cooperative management regimes—factors like community size and knittedness, shared norms, and relatively small size of the resource. Where those factors are present in the examples discussed, there seems to be less of a strong government-enabling role that supports the collective management regime. There is a much more significant government-enabling role present as the scale and complexity of the resource, and the heterogeneity of the users, increases.

Part IV then turns to the nature of the government-enabling role and marks its contours and limitations. While local (and state) governments provide various levels of support and incentives to cooperative resource management regimes, they retain their regulatory authority and ultimate control over the resource. Central governments neither transfer ownership of the resource to private actors nor cede (or delegate) to those actors their regulatory or policymaking role over these resources. We might instead understand these groups as supplementing, and not supplanting, the goods and services that local government traditionally provides.

Part V identifies some of the risks, or costs, of collective action enabling. Specifically, it articulates three concerns that scholars and policymakers should attend to as this form of enabling is considered more carefully. These three concerns are the risks of scaling up collective management of common urban resources, the distributional issues inherent in enabling discrete groups of private actors to manage urban commons, and the real threat of ossification when these groups or collectivities become deeply entrenched and prove difficult to disband.

I. THEORIZING THE URBAN COMMONS

Contemporary urban commons dilemmas arise not from an unregulated space “open to all,” as in Hardin’s example, but rather

revitalization of urban areas); Murray, *supra* note 9 (discussing how nonprofit organizations take responsibility for and create positive outcomes for public spaces).

from a highly regulated space which has slipped significantly behind previous levels of public control or management.²⁴ The traditional commons has as its baseline an open access resource, the use of which is unrestricted or unregulated and which allows uncoordinated actors to overuse or overexploit the resource. This conception of the commons is illustrated first and foremost by the logic of Hardin's tale. As he explains, each herdsman is motivated by self-interest to continue adding cattle to an open pasture until the combined actions of the herdsmen results in overgrazing, depleting the shared resource for all herdsmen.²⁵ In other words, the result of the overgrazing is suboptimal.²⁶

The idea of the commons in Hardin's tale captures property in its natural, pre-political, undisciplined state in which "everyone has privileges of inclusion and no one has rights of exclusion."²⁷ As he argued, absent a system of private enterprise or government control (i.e., allocation of use and other rights), it would be difficult, if not impossible, to restrain the impulse of users to pursue their individual self-interests even when pursuit of those interests result in the degradation or exhaustion of the resource.²⁸ Such "freedom in the commons"—i.e., the lack of controls on individual behavior and self-interest—ultimately leads to its ruin and hence to the "tragedy."²⁹

24 See Farber, *supra* note 4, at 301–03 (describing "negative" slippage as a failure to act or lax supervision by regulators, as well as noncompliance with existing standards by regulated parties).

25 See Hardin, *supra* note 1, at 1244 ("As a rational being, each herdsman seeks to maximize his gain. . . . [Thus e]ach man is locked into a system that compels him to increase his herd without limit—in a world that is limited."); see also Garrett Hardin, *The Tragedy of the Unmanaged Commons*, 9 TRENDS IN ECOLOGY & EVOLUTION 199, 199 (1994) ("[A]ll exploiters suffer in an *unmanaged* common.").

26 See, e.g., Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. L. REV. 907, 914 n.31, 919–22 (2004) (pointing out the distinction between distributive problems in the commons, in which users consume more than their "share," and Hardin's tragedy, in which users consume the resources beyond the point that they produce marginal benefits for anyone).

27 Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES LAW 79, 84 (2001).

28 See Hardin, *supra* note 1, at 1244–45 (arguing that individual users of the commons would always enjoy the full benefit of their use, but absorb only a small fraction of the marginal cost of that use).

29 Hardin, *supra* note 1 at 1244. As others have pointed out, there are many assumptions embedded in this tale that may not bear out in reality. One such assumption is that of scarcity. For example, in the case of "plenteous" goods—those resources that are so plentiful or unbounded—it may be that there is enough supply relative to demand that the difficulty or cost of imposing a system of controls outweighs the gains of careful resource management. See Rose, *supra* note 18, at 717–18.

Conceived as such, there are very few “pure” commons that exist today in the United States. That is, there are few open access resources without some controls imposed on access and use, either by public authorities or private owners of open space. The nation’s natural resources—the quintessential commons³⁰—are controlled and regulated by federal and state agencies. Similarly, open spaces in the urban environment—streets, parks, sidewalks, etc.—are governed by a host of regulations.

The potential for the commons dilemma, or “tragedy,” exists notwithstanding the type of government control that Hardin and others posited as one way out of the tragedy.³¹ The contention of this Article is that a similar dynamic can arise with shared urban resources as a result of regulatory slippage. Under conditions of regulatory slippage, government authorities fail to enforce existing regulatory controls and/or tolerate widespread noncompliance with them by users of the resource. This slippage, in turn, can lead to congestion and/or rivalry as users who may have been previously excluded from, or constrained in their use of, the common resource are able to more freely access and exploit the resource for their own use. The overuse, or overconsumption, of the type of urban resources can lead to “tragedy” in the sense that overuse or overexploitation increases the cost for all users of the resource while providing a benefit only to a limited class of users. Under conditions of regulatory slippage, the governance question arises anew. In other words, when unrestrained competition for collectively shared resources intensifies, so too does the impetus to reassign the structure of rights to protect against degradation or overexploitation of the resource.³²

A. *Regulatory Slippage*

Open access urban resources—streets, sidewalks, empty lots, parks, etc.—are regulated by local governments under their traditional land use authority and police power.³³ Such regulations tend to prohibit or constrain specific types of uses, conduct and/or activities in open public spaces as a way of managing shared resources in light of the volume and diversity of users who have access to them.³⁴ For

30 See, e.g., Hardin, *supra* note 1, at 1245 (using the example of the National Parks, which are “open to all, without limit”).

31 See Ostrom, *supra* note 5, at 8–9.

32 See Lee & Webster, *supra* note 16, at 28.

33 See generally *infra* Part V.A (examining the concern about scale).

34 A more critical perspective is that some of these laws are often created and used as a form of social control to exclude the socially marginal from public spaces. See, e.g., Katherine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the*

example, local governments often have outright bans or restrictions on loitering, littering, camping, sitting, alcohol use, graffiti, panhandling, etc. in public spaces. Regulations such as designated park hours, limits on dog users, and limits on large gatherings of users in public spaces are ubiquitous examples of how local governments manage open access urban spaces in light of the demands placed on them by different users. Additionally, many criminal laws limit various types of behavior that might occur in a public space and are part of the regulatory landscape of urban spaces.

In simple terms, regulatory slippage refers to a marked decline in the enforcement of these standards and/or the increasing tolerance of noncompliance with these standards by users of a given public space.³⁵ The concept of regulatory slippage used here has no strong normative content; it does not imply that there is necessarily some optimal level of regulation.³⁶ As I argue below, there are many reasons that might account for slippage in regard to the regulation and management of open or public spaces. Rather, the concept of regulatory slippage simply bears witness to a decline in the management or control of a common resource over which public authorities have formal governing authority.

Under certain circumstances, regulatory slippage might be a completely rational choice on the part of a local government.³⁷ Local governments require resources to monitor and enforce access and use restrictions, resources for which many different local needs increasingly compete.³⁸ Notably, regulatory slippage in the urban context often occurs during times of declining government resources or when government is faced with an overwhelming demand on those resources beyond what the government can effectively manage, given its other priorities and limited resources.³⁹

Regulatory slippage might also signal that some access and use restrictions are unreasonable, unrealistic, or insufficiently attentive to

Post-Industrial City, 12 THEORETICAL CRIMINOLOGY 5–30 (2008) (arguing that local governments' adoption of novel social control techniques including off-limit orders, parks exclusion laws, and expansion of trespass laws increases the number of behaviors and people defined as criminal and subject to formal social control).

35 Another way of thinking about the concept is by imagining an increasing gap between regulatory standards and the enforcement of those standards on regulated parties. See Farber, *supra* note 4, at 300 (noting the pervasiveness of regulatory slippage in the environmental law context).

36 See *id.* at 325.

37 See *id.*

38 See ROSENZWEIG & BLACKMAR, *supra* note 7, at 502–03 (using Central Park as an example of this tension).

39 See *id.*

changed usage patterns, giving rise to widespread noncompliance with these restrictions and an increase in monitoring and enforcement costs.⁴⁰ A decline in enforcement of statutory standards or in previous levels of regulatory oversight might be the result of a conscious decision on the part of governing authorities to allow or tolerate minor violations of standards and mandates.⁴¹ Alternatively, or additionally, slippage might signal a simple lack of resources to devote to enforcement of regulatory standards and mandates in the face of widespread violations.⁴²

B. Congestion and Rivalry

Regardless of the reasons underlying regulatory slippage, the government's inability or unwillingness to effectively manage and control common spaces can leave those spaces vulnerable to expanded access by competing and/or incompatible uses. This slippage can result in the transformation of what might have been a previously managed or restricted resource into a more open access, rivalrous "commons."⁴³ "Rivalrousness" is typically a reference to the consumption of a good and the extent to which consumption by one individual diminishes the availability of that good to others.⁴⁴ In Hardin's example, the tragedy of the commons results from the fact that one herdsman's consumption of a unit of the pasture reduces the amount available to other herdsman.⁴⁵ The "tragedy" in many common pool urban resources is in part a consumption problem and in part a congestion, or crowding, problem.⁴⁶ Crowding and congestion create rivalry when the volume and/or type of use (or users) generate excess demand on the resource or demands fundamentally in tension with one another.⁴⁷

40 See Farber, *supra* note 4, at 325.

41 See *id.* at 320.

42 See *id.*

43 See *supra* note 5 and accompanying text.

44 See, e.g., Lawrence B. Solum, *Questioning Cultural Commons*, 95 CORNELL L. REV. 817, 822–23 (2010) (explaining that consumption of a good is rivalrous if consumption by one individual diminishes the opportunity of other individuals).

45 See Hardin, *supra* note 1, at 1244 ("Adding together the component partial utilities, the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy.").

46 See *id.*

47 See, e.g., Bell & Parchomovsky, *supra* note 3, at 13–14 (explaining the rivalry that occurs when one use is conservation, which is fundamentally incompatible with any other use).

As Abraham Bell and Gideon Parchomovsky have astutely pointed out, common resources such as public parks are nonrivalrousness to the extent that they accommodate “low intensity” uses in moderation.⁴⁸ The more frequent or intense a particular use becomes, the more incompatible that use becomes with other uses; this is even more true when the scale of the resource brings these incompatible uses into greater tension.⁴⁹ Moreover, a strong preference for conservation of a resource can be quite incompatible with a strong preference for consumption or exploitation of that resource.⁵⁰ In an environment of regulatory slippage, when certain uses or users are intensified, or ratcheted up, exclusion becomes difficult, if not impossible. That is, the relaxation of government oversight and management creates opportunities for overexploitation of the resource by particular user groups or types of uses.⁵¹ The resulting congestion and rivalry paves the way for the “tragedy,” which occurs when the frequency and intensity of particular types of uses and/or groups of users push out other uses and users that are more compatible with the conservation and sustainability of the resource.⁵² Tragedy can result when the usefulness and quality of the resource is degraded or destroyed for its users—the public.

Imagine a park that is frequented by dog owners, families with young children, teenage skateboarders, and transient populations who sleep on public benches overnight. Intense rivalry between these users is avoided because these uses occur in identifiably distinct sections of the park or at distinctly different times. Coexistence and compatibility are possible either through the enforcement of park rules and regulations, or by customary practice adhered to by virtually everyone. Typically, there are local regulations that designate the time, place, and manner of uses in parks and similar open spaces, and these regulations (and enforcement of them) can either codify or help to create customary practices of usage.⁵³ Significant change in the customary behavior of park users coupled with slippage in the enforcement of rules that reinforce the status quo pattern of park usage can threaten to upset the balance of these uses and can threaten intense

48 See *id.* at 13 (citing birdwatching as an example).

49 See *id.* (“For example, intensive hunting is not likely to be compatible with intensive hiking within a confined area.”).

50 See *id.*

51 See James Grimmelman, *The Internet is a Semicommons*, 78 *FORDHAM L. REV.* 2799, 2808 (2010) (“Exclusion and governance both depend on a source of authority to enforce the rules that recreate excludability.”).

52 See Bell & Parchomovsky, *supra* note 3, at 13–14.

53 See Ellickson, *supra* note 11, at 1232, 1244.

rivalry between them, leading to potential overexploitation of the resource by one or more groups of users.

Now imagine that dog owners began to frequent other parts of the park where families and children play and fail to clean up after their pets, and/or fail to keep them on leashes, and are allowed to continue to do this because of cutbacks in park policing and maintenance. At the same time, the transient homeless population also begins to frequent the park during the day or “peak” hours due to the lack of enforcement of rules prohibiting them from doing so. As has happened with many urban parks, soon one or more groups of users will intensify the frequency and scale of their use in their resource, driving up the cost for all other users of the resource while providing benefits to only a small class of users. By driving out other incompatible uses and users, this rivalry creates the conditions for potential degradation of the resource—typically an increase in lawlessness, a decrease in cleanliness, and a generally dramatic decline in the quality and usefulness of the physical resource. Whether we call this the tragedy of “overexploitation” or the tragedy of “mismanagement,”⁵⁴ the end result is the same. To restore the resource to a state of equilibrium between users and uses will require a new governance regime.

II. MANAGING THE URBAN COMMONS

As the previous Part explained, urban commons “tragedies” often arise as unrestrained competition intensifies between uses and users as a result of regulatory slippage.⁵⁵ Because the resource remains a public one, formally regulated by the government, the impetus to reassign the structure of rights to protect against degradation or overexploitation of the resource can be more complicated than traditional responses to commons tragedies might suggest. To be sure, there is still a collective action problem at the heart of this type of urban commons tragedy, which could be responsive to either more assertive public control or private property rights. However, such solutions are complicated by the existing public ownership and control over the land, posing a different type of governance problem than the one traditionally confronted by the type of pure commons in Hardin’s stylized scenario.

This Part describes examples of two contemporary responses to manage open access, urban resources that have experienced a marked decline in an environment of regulatory slippage. These solutions tend to track the classic public-private dichotomy of responses to com-

⁵⁴ See Bell & Parchomovsky, *supra* note 3, at 9.

⁵⁵ See *supra* Part I.B.

mons tragedies. That is, they propose either a system of regulation designed to cure the original regulatory failures or the granting of private property rights in the resource as a way of realigning the incentives of individual behavior in the commons. Neither solution, however, seems to have taken root in the real world. This Part suggests that each type of solution carries costs that have likely impeded their adoption by states, local governments, and communities.

Part III then introduces a third option in which groups of users cooperate together to manage a resource that has become rivalrous and subject to tragic conditions. Collective management of common resources has been most developed in the natural resources literature as an endogenous solution to the tragedy of the commons, albeit under a specific set of conditions. Here, I introduce it as an option for the management of common urban resources, recognizing that the unique features of the "urban commons" necessitate a more careful consideration of the role of the government in collective commons management regimes. Collective management regimes in the urban context thus come to resemble a type of hybrid solution that is peculiar to its context, in part because of the government's existing regulatory and ownership role over the resources. This portion of the paper will begin to demonstrate that collective management of the urban commons depends both on the cooperation of resource users, some of whom will assume significant responsibility for managing the resource, as well as on the support of the central government to help sustain the collective management regime.

A. Regulation

One response to the congestion and rivalry that intensify in an environment of regulatory slippage is to go back to the regulatory drawing board and impose a new, perhaps more flexible scheme of government control on the public space. The conventional wisdom is that coordination costs and free-riding can pose an insurmountable obstacle to private efforts to protect the urban commons from congestion or degradation.⁵⁶ Affected private users of the commons are unlikely to do anything about misuse or overuse of the commons because the costs of doing so will often outweigh the benefits of taking

56 Zoning can thus be justified because by itself "private collective actions fail to provide sufficient quantities of a desired public good." A. Dan Tarlock, *Toward a Revised Theory of Zoning*, in LAND USE CONTROLS ANNUAL 145-46 (Frank S. Bangs, Jr. ed., 1972); see Ellickson, *supra* note 11, at 1223 ("In open-access spaces thronged with strangers . . . free-riding is apt to afflict the informal sector.").

action to abate or manage the problems.⁵⁷ Instead, many users who view certain uses of the commons as competing with theirs are likely to stay away altogether and cede the space to others. One might view a centralized system of regulation as, at least in theory, seeking to simulate the result that would have been accomplished had users, but for high coordination costs and free-riding, been able to impose a covenant scheme on themselves.⁵⁸

1. Public Space Zoning

Consider Robert Ellickson's proposal to allow cities to more comprehensively regulate through their zoning power "chronic street nuisances"—e.g., annoying behavior by panhandlers, mentally ill squatters, the homeless—that often result in a decline in the attractiveness of open urban space to other users.⁵⁹ Ellickson's proposal to adopt a system of zoning for these types of street nuisances both captures the ways in which a local government might effectively manage rivalrous, open access urban spaces and wrestles with the costs of such a system. Ellickson traces the genesis of increased disorderliness on urban streets to a general relaxation and liberalization of social controls from the mid-1960s through the 1980s.⁶⁰ In particular, courts' constitutional rulings that "swept away the preexisting legal code of the street," coupled with pedestrians' easing of informal standards of behavior for other street users, led to a sort of tragedy of the urban commons.⁶¹

Ellickson's proposal would allow a city to adopt three different zoning codes, of varying stringency, to govern street behavior in public spaces.⁶² An official map would designate Red, Yellow, and Green zones and an accompanying ordinance text would articulate the rules of the road that apply in various districts.⁶³ Green zones would promise relative safety and a high level of strictness in regulating disruptive

57 See Ellickson, *supra* note 11, at 1195 ("A pedestrian who unilaterally attempts to enforce social norms during a particular encounter on the street bears all the risks of a confrontation with the street person, but ineluctably shares the prospective benefits of nuisance abatement with all other users of the same public space.").

58 See Tarlock, *supra* note 56, at 145–46.

59 See Ellickson, *supra* note 11, at 1207–17.

60 See *id.* at 1209, 1214.

61 See *id.* at 1169 ("Because the panhandler's presence inhibits pedestrians, the sidewalk is less used and the restaurant's business suffers; although the bench squatter himself contributes to the daytime population in the plaza, the average headcount falls because fewer pedestrians wish to linger there.").

62 See *id.* at 1220.

63 See *id.*

behavior; they would be tailored to accommodate the “unusually sensitive,” such as school children, frail elderly, parents with toddlers, and the like.⁶⁴ Red zones would signal extreme caution as disorderly conduct in these spaces would be the most tolerated by the city; these areas would essentially be “safe harbors” for those who engage in disorderly conduct.⁶⁵ Finally, Yellow zones would serve as a “lively mixing bowl” where some episodic disorder would be tolerated but chronic misbehavior (e.g., panhandling and bench squatting) would not.⁶⁶ Once the zones have been established, Ellickson’s aspiration is that individual users would enforce the “varying rules of decorum.”⁶⁷

2. The Costs of Regulation

Ellickson’s proposal suffers from many of the shortcomings of conventional zoning, a fact which he forthrightly acknowledges.⁶⁸ As Ellickson argues, enforcing land use rules like his public zoning proposal involves higher administrative costs/less efficiency, less flexibility, may lead to unjust results on vulnerable individuals and communities, and tend to be manipulated or ignored in their application.⁶⁹ For example, in a large city with numerous and varied public spaces, politicians might be apt to distribute Green Zones to favored or more politically powerful neighborhoods and disadvantage less politically powerful ones, imposing distributive harms on poor, minority neighborhoods. There is also the risk that patrol officers might take advantage of the vagueness or plasticity of broad legal standards—“public nuisance,” “disorderly conduct,” etc.—in ways that allowed them to violate the constitutional rights of citizens.⁷⁰

In addition to the above concerns, a system that relies on the enforcement of uniform regulations or rules is also costly to enforce and thus contains within it built-in vulnerability to regulatory slippage, particularly during economically precarious times. What Ellickson does not grapple with are the conditions under which many cities and police departments have found themselves in times of limited resources and high demands on city services, including the cost of enforcing its own rules and standards. In other words, public oversight (either through a formal zoning system or enforcement of gen-

64 See *id.* at 1221–22.

65 *Id.* at 1221.

66 See *id.*

67 See *id.* at 1226.

68 See *id.* at 1244–46.

69 See *id.* at 1244–45.

70 See *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (explaining that a statute without definite rules is unconstitutionally vague).

eral standards by public officials) might be the optimal solution for the unruliness of public spaces, but it can break down terribly under the weight of the demands put upon it. When the demands on local government resources outweigh their availability, or when necessary resource tradeoffs are made in a tough political economy, this can result in slippage away from regulatory baselines and standards. Because regulatory slippage often arises where the demand for the resource far outstrips the government's ability or capacity to exert effective control over it, the result is often that the sheer volume and variety of users and uses of a common resource can overwhelm the ability of a centralized management regime struggling to meet the needs of a complex urban system.⁷¹

B. Privatization

Endowing individual users with property rights in the commons minimizes the incentives for overuse (or exploitation) of the commons and arguably forces users to account for the full social benefits and costs of their use decisions.⁷² Well-defined property rights can help the parties to create or mimic some form of Coasian bargaining in which the parties affected by the externalities will bargain to reach the optimal level of resource use, or bargain their way around conflicting or rivalrous uses of the common space.⁷³ If one believes that a zoning regime imposes transaction costs too high for the most effi-

71 See ROSENZWEIG & BLACKMAR, *supra* note 7, at 502–03 (explaining that New York did not have the necessary funds to continue upkeep in the park, yet demand for the park from users remained high and needs were not met).

72 See Hardin, *supra* note 14, at 213 (“Under a system of private property the man or group of men who own property recognize their responsibility to care for it, for if they don’t they will eventually suffer.”). But see Bell & Parchomovsky, *supra* note 3, at 43 (expressing doubt that private property regimes always achieve a full accounting of costs among property owners and that “generally, some negative externalities of property escape full accounting, creating the need for some external regulatory mechanism such as tort (primarily nuisance) or explicit government regulation”). See generally Demsetz, *supra* note 14, at 350 (explaining why individuals internalize costs when they own property to be consumed); James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL’Y 325 (1992) (explaining that private property forces individuals to internalize their costs on the community, as opposed to individuals in a common-property system).

73 In the context of Hardin’s original tragedy scenario, this might mean that the cattle herders each be given a “right to graze,” that each would have perfect information about the dollar amount of the harm caused by their individual grazing, and about the cost to each herder of refraining from grazing. See Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 562 (2007). Further, it would mean that “all of those harmed and benefitted by the [grazing] can be identified and located without cost, that bargaining is costless, and

cient assignment of property use, then one solution is to provide a neighborhood unit with the ability to assign rights of entry and the discretion to bargain over land use restrictions in common areas.⁷⁴

1. Gated Communities

One of the most extreme private property solutions to urban commons tragedies is the “gated community,” a private residential development governed by a homeowner’s association made up of individual property owners within the development.⁷⁵ These are typically new developments located outside of central cities and which are governed through a system of community-wide covenants and restrictions which control common property and other shared amenities.⁷⁶ While each individual person in a gated community individually owns his or her home, the homeowner’s association (constituted by all homeowners) holds title to all common areas—i.e., to the streets, parks, sidewalks, etc.

Contemporary gated communities are one response to the tragedy of the urban commons in central cities during periods of regulatory slippage. As Setha Low has argued, the contemporary gated community is, in large part, a response to political economic transformations of late-twentieth century urban America and the accompanying “breakdown of traditional ways of maintaining social order,” whereby institutions and mechanisms of social control, such as the police, ceased to be effective.⁷⁷ The gated community became a viable and socially acceptable option for residents fleeing central cities that they saw as increasingly violent and crime-ridden.⁷⁸ The dramatic increase in the development of these communities, along with the

that the bargaining process is not marred by collective action problems or strategic behavior.” *Id.* at 562–63.

74 In other words, neighborhood control over entry to the neighborhood obviates the need for “subsequent users who wish to deviate from the surrounding land-use pattern” to “buy their way in through the political process.” Tarlock, *supra* note 56, at 141; see also Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 828 (1999) (proposing the enactment of “legislation to facilitate the establishment of neighborhood associations in existing neighborhoods”).

75 See generally Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829 (describing the homeowner’s association system).

76 These are servitudes that run with the land and are binding both on the original homebuyer and also on their successors. See *id.* at 831–32.

77 See Low, *supra* note 16, at 86.

78 See SETHA LOW, *BEHIND THE GATES* 111–52 (2003) (discussing fear as a motivating factor for gated communities); Setha Low, *The Edge and the Center: Gated Communities and the Discourse of Urban Fear*, 103 AM. ANTHROPOLOGIST 45, 45 (2008) (exploring

continued growth of homeowners associations, has marked a “social revolution in governance” of the urban commons with private organizations responsible for maintaining residential common areas (including trash collection, security provision, etc.) and where private enforcement of covenants has replaced municipal oversight in regulating the environment by zoning.⁷⁹

2. Private Inner City Neighborhoods

Gated communities are almost exclusively a suburban, or exurban, phenomenon and, along with neighborhood associations, arise as part of new developments. However, it is not difficult to imagine a form of gated community being adopted/embraced by an existing urban community, even one in the middle of a central city. This is the proposal of Robert Nelson, who advocates for legislation that will privatize existing urban neighborhoods to enable collective control over the neighborhood commons.⁸⁰ He models the proposal on existing homeowners associations, a legal entity that allows property owners in a particular development to hold title to the streets, parks, neighborhood buildings, and other “common areas” and to assess fees in order to provide a range of services to residents.⁸¹ Collective private ownership of the neighborhood commons allows developers to provide common amenities that housing owners demand, but for which local governments are often reluctant to pay.⁸²

Nelson’s proposal would allow a group of individual property owners in an existing neighborhood to petition the local or state government to form a private neighborhood association, which the government would then certify based on predetermined standards.⁸³ If

how violence and crime legitimize and rationalize “class-based exclusion strategies and residential segregation”).

⁷⁹ See Low, *supra* note 16, at 88.

⁸⁰ See ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 265–73 (2005); Nelson, *supra* note 74, at 833; see also Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 77 (1998) (discussing a similar idea, “Block Level Improvement Districts”).

⁸¹ These services include garbage collection, street maintenance, snow removal, lawn mowing, gardening, and maintenance of the recreational facilities and the common areas of the neighborhood. See Nelson, *supra* note 74, at 830–31.

⁸² See *id.* at 832 (“[T]he fiscal crisis of many local governments in the 1970s and 1980s meant that these governments were unwilling to accept new responsibilities for building and maintaining streets, collecting garbage and providing other services. Providing these services privately, through a neighborhood association, often became a condition of municipal approval for a new neighborhood.”).

⁸³ See *id.* at 833 (“The petition should describe: (a) the boundaries of the proposed private neighborhood; (b) the instruments of collective governance intended

the application met the legislative standards, the government would negotiate an agreement with the neighborhood group, which specifies the transfer of ownership of municipal streets, parks, swimming pools, tennis courts, and other existing public lands and facilities located within the neighborhood, as well as the degree to which the neighborhood private association would assume responsibility for various common services.⁸⁴ Once the agreement is executed and a neighborhood election held to approve the association, the legal responsibility for regulating land use in the neighborhood is transferred to the property owners in the association, and the municipal zoning authority for that neighborhood is abolished.⁸⁵

3. The Utilitarian Rationale

Nelson's main argument for privatizing the neighborhood commons, and the zoning function, in existing urban communities rests largely on a utilitarian rationale—that the collective benefits and maintenance far exceeds the collective costs of such regime.⁸⁶ In the first instance, allowing privatization of the commons would introduce more innovation and responsiveness from those who most use and depend upon the resource.⁸⁷ It would allow a more efficient system of neighborhood commons management by placing control directly in the hands of the neighborhood residents, allowing users to more directly bargain for and purchase improved services necessary to maintain the commons.⁸⁸

There are also civic benefits that would flow readily from a privatized commons. The neighborhood association would become a vehicle to “establish and sustain a strong spirit of community in the neighborhood, not usually found in neighborhoods without a formal institutional status.”⁸⁹ Moreover, engaging property owners in the

for it; (c) the services the neighborhood association would perform; and (d) the estimated monthly assessment.”).

84 See *id.* at 833–34.

85 Except where zoning regulates significant adverse impacts of one neighborhood association on properties located outside of its boundaries. See NELSON, *supra* note 80, at 267. This is important because, as Amy Sinden has argued, when an open access commons is converted into one divided and delineated by property boundaries, the private property boundaries should match (or encompass) the full scope of externalities or there will be leakage and externalities will remain. See Sinden, *supra* note 73, at 555–57.

86 See Nelson, *supra* note 74, at 835.

87 See *id.*

88 See *id.*

89 *Id.* at 836.

governance of their communities properly incentivizes local control and increases civic participation by placing decision making in the hands of local residents, rather than in the clutches of a more distant government apparatus.⁹⁰ Thus, from a utilitarian perspective, inner city neighborhoods arguably stand to gain the most in terms of net increases in the level of neighborhood amenities, aesthetics, and services if residents owned and controlled the neighborhood commons.⁹¹ When local governments suffer retrenchment in their resources and control over common areas, it is no surprise that inner city areas suffer the most decline in neighborhood quality and safety.

4. The Distributive Justice Rationale

Distributional equity is typically cited as a *cost* of privatization on the theory that centralization of public goods better ensures that they are distributed as equally as economically and politically feasible. Putting control over the provision, access, and maintenance of public goods in private hands most often results in exclusion and concentration of privilege. Gated communities have become a symbol of the increased racial and class segregation of urban America, with upper class (and often nonminority) residents of gated communities cordoning themselves off from what they perceive to be problems that result from an urban environment that seems unsafe and unruly in its diversity.⁹²

Nelson, however, views the opportunity to “gate” inner city neighborhoods also as a way to create greater equality between social classes:

The real inequality may not be the social divisions resulting from economically and socially segregated patterns of living in the suburbs. The fact that so many people, including people with many options, chose this style of private living is strong evidence that it has much to offer. Rather, the greatest inequality may be the denial of a similar private opportunity to people in the inner city. Many inner city residents would like to exclude criminals, hoodlums, drug dealers, truants, and others who often undermine the possibilities for a peaceful and vital neighborhood existence there. . . . There is no physical or other practical reason why an inner city neighborhood could not become a gated neighborhood. . . . [I]t is the poor who pay a great price in the name of preserving an abstract ideal of an America undivided by racial, class, or other lines. The rich in

90 See *id.* at 876–79.

91 See NELSON, *supra* note 80, at 304–05.

92 See LOW, *supra* note 78, at 111–52.

the suburbs, given wider choices, refuse to make a similar sacrifice.⁹³

Nelson also argues that a privatized neighborhood commons is more just because it excludes outsiders from local decisions.⁹⁴ One problem with municipal zoning, he argues, is that neighborhoods are exposed to, or get imposed upon them, actions and decisions that they do not want.⁹⁵ A privatized scheme ensures governance by those who have to live with these decisions. So too would inner city property owners net a much larger capital gain when they sold property in their gated neighborhood.⁹⁶ Improved neighborhood common amenities will increase the value of properties in the designated neighborhood. The larger these improvements are, the bigger the financial gain.

5. Governance Without Ownership

Both Nelson's utilitarian and distributive equity claims assume that the majority of inner city residents own the property in which they live. Yet property ownership in many inner city neighborhoods suffers from an "absentee landlord" syndrome—many residents live in buildings that are owned by someone else who neither lives in the community nor expresses much interest in the quality of life of its residents.⁹⁷ Privatizing these neighborhoods would, in most instances, turn their governance over to property owners whose interests may or may not align with the majority of neighborhood residents. To be sure, property owners would not have to enfranchise non-property owning residents as a matter of law and in fact may lack powerful enough incentives to do so. Unlike a local government, a private neighborhood association would not be subject to constitutional constraints such as the one-person, one-vote principle which would guarantee non-property owning residents a role in the management of their neighborhood.⁹⁸

93 Nelson, *supra* note 74, at 865–66.

94 *See id.* at 835.

95 *See id.* (“[U]nder zoning the substantial influence on such matters by outsiders leaves the neighborhood exposed to regulatory actions that it does not want.”).

96 *See* NELSON, *supra* note 80, at 305.

97 *See generally* Jorge O. Elorza, *Absentee Landlords, Rent Control, and Healthy Gentrification: A Policy Proposal to Deconcentrate the Poor in Urban America*, 17 CORNELL J.L. & PUB. POL’Y 1 (2007) (delineating the advantages of absentee landlords and the problems they create).

98 *See Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 108 (2d Cir. 1998) (rejecting a challenge by non-property owning individuals residing in a Business Improvement District (“BID”) arguing that a governing structure that weighed the

And it is not clear why property owners would want to give up the power to make neighborhood governance decisions given that they will bear almost all of the risks and rewards of those decisions on their financial investment in the neighborhood.⁹⁹ There is a real concern that tenants would be more prone to under-invest in common neighborhood amenities and more likely to opt for easy exit from the neighborhood when disagreements occur.¹⁰⁰ In the end, the best that can be said of an inner city neighborhood privatization scheme which transfers governance of the neighborhood commons to mostly non-resident property owners is that, despite the potentially significant democracy deficit in such a scheme, it embraces a kind of subsidiary that brings governance of the neighborhood a little closer to the people who reside there. Those closest to the resource, and most dependent upon it, arguably have the greatest incentive to take care of and manage it.¹⁰¹ Bell and Parmochovsky's "antiproperty easement" scheme, in which neighboring property owners (in their case, owners abutting a public park) are vested with a formal, but limited, legal entitlement to enjoin certain activities in a commons space, is a less intrusive means to achieve some control by property owners over the neighborhood commons.¹⁰²

Nelson's proposal very much suffers from a principal-agent problem that fails to adequately equip nonresident property owners with the necessary tools or incentives to effectively solve or govern on-the-ground neighborhood commons problems. One answer to this is that a private neighborhood association formed by property owners might be incentivized to enfranchise non-property owning residents in the

votes of property owners more heavily than residents violated the constitutional guarantee of "one person, one vote").

99 See Ellickson, *supra* note 80, at 92 ("Both theory and evidence indicate that most of the benefits of a localized public good redound to the owners of real estate located within the benefitted territory."); see also Jonathan B. Justice & Robert S. Goldsmith, *Private Governments or Public Policy Tools? The Law and Public Policy of New Jersey's Special Improvement Districts*, 29 INT'L J. PUB. ADMIN. 107, 109 (2006) (arguing that BIDs better protect the long-term interest of an area, as opposed to the short-term interest of temporary tenants).

100 See Ellickson, *supra* note 80, at 93-94 (listing various reasons why giving the power to control a Block Improvement District ("BLID") to property owners is more desirable than giving it to tenants).

101 See Ellickson, *supra* note 11, at 1197 ("Landlords and tenants of street-level properties tend to be especially attentive because the external benefits of greater street civility are capitalized into the value of their assets.").

102 See Bell & Parchomovsky, *supra* note 3, at 32-34 (explaining that adjacent property owners would operate like "public guardians" of the park and have the legal right to enjoin further development in the park as a means of conserving the park, for the benefit not only of the easement holders, but also the public at large).

neighborhood by giving them seats on the association's governing board or a vote in electing property-owning board members. Much like New Governance proponents recognize, private property owners might be inclined to see value in creating opportunities for networks of local stakeholders—e.g., residents—to collaborate and cooperate toward common goals.¹⁰³ However, given the barriers to meaningful participation for inner city residents under conditions of social conflict and economic hardship, it is difficult to imagine how previously unaligned interests would cooperate to create and implement shared/common goals in the way that New Governance theorists envision.¹⁰⁴

C. Collective Management

The choice between private property rights and government coercion in managing common resources is built upon a core assumption: that collective action, involving a group of individuals working to further their common interests, is unlikely in light of the free rider problem.¹⁰⁵ Hardin's famous tale has been subject to critique in part because it assumes a rational actor model in which each individual is concerned with maximizing his or her own gains in the commons.¹⁰⁶ Elinor Ostrom, for example, has questioned this assumption by citing examples of self-organized, cooperative management of small-scale natural or man-made resources (such as fisheries, uncultivated lands, communal forests, groundwater basins, and irrigation systems) where

103 See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 378 (2004) ("Collaboration . . . promotes mutual accountability, defined as 'accountability among autonomous actors committed to shared values and visions and to relationships of mutual trust and influence that enable renegotiating expectations and capacities to respond to uncertainty and change.'" (quoting L. David Brown, *Multiparty Social Action and Mutual Accountability*, in GLOBAL ACCOUNTABILITIES 89 (Alnoor Ebrahim & Edward Weisband eds., 2007))).

104 See Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons from Chicago's Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL'Y 117, 184–85 (2009) (analyzing new governance theory in practice in the context of reform of the Hope VI housing project in Chicago and finding that it was difficult for public housing residents to meaningfully participate in the reform process in the absence of rights-bearing rules, formal rights to participation, and judicial supervision or administrative recourse).

105 This assumption is based on the work of Mancur Olson, Jr. See MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 2 (1965) ("[U]nless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests." (emphasis omitted)).

106 See generally Hardin, *supra* note 1, at 1244 (asserting that humans act selfishly and exhaust resources in common-property areas).

users devise and enforce their own rules in the absence of government coercion or endowment of property rights in the resource.¹⁰⁷ Her work, more than any other scholar, has overturned the assumption that free riding would reign in a commons given the tendency toward individual self-interest. Instead, she has demonstrated that many social groups have struggled successfully against threats of resource degradation by developing and maintaining self-governing institutions.¹⁰⁸

Similar research by Robert Ellickson has highlighted the ability of small, or “close-knit,” communities to solve disputes over resource and land use through a system of informal social norms. His study of ranchers and landowners in Shasta County, California found that, in spite of a well-developed system of legal rules that governed straying cattle and land disputes, the community had developed its own system of informal norms governing disputes and that the system was self-reinforcing.¹⁰⁹ His findings further support the idea that, at least in small, fairly homogenous communities, the existence of strong cooperative norms allows communities to govern themselves in the face of conflict without the aid of the state or other central coordinator.¹¹⁰

There has been no analogous study of the possibility of collective action in managing resource disputes in public urban spaces. To the extent that scholars have focused on this question in the urban context, they have been quite skeptical of the capacity of urban communities for what they call “collective efficacy.”¹¹¹ This skepticism is at its highest when there exists social disorder in urban communities, particularly in public spaces. Where this social disorder exists, these scholars laud the presence, and even coercion, of public authorities as a necessary means of helping to re-instill good social norms in the

107 See OSTROM, *supra* note 5, at 18–21.

108 See *id.*; see also Thomas Dietz et al., *The Struggle to Govern the Commons*, 302 SCI. 1907, 1910 (2003) (demonstrating that the “tragedy of the commons” is not inevitable whenever land is an open resource, rather, many governance systems exist that effectively manage resources).

109 See ELICKSON, *supra* note 18, at 15–64.

110 See *id.* at 167–69; see also Jed S. Elia, *Law and Norms in Collective Action: Maximizing Social Influence to Minimize Carbon Emissions*, 27 UCLA J. ENVTL. L. & POL’Y 93, 114 (2009) (discussing Ellickson’s work and noting that other ethnographic research has documented cooperative norms among close-knit groups as diverse as lobster fishermen, diamond merchants, and molecular biologists).

111 See Yili Xu et al., *Discovering the Impact of Community Policing: The Broken Windows Thesis, Collective Efficacy, and Citizens’ Judgment*, 42 J. RES. CRIME & DELINQ. 147, 147 (2005).

community and to kick-start their collective capacity for self-governance.¹¹²

This section calls attention to the role of the state, or local government, in relationship to collective action. The general assumption is that collective action occurs beyond the shadow of legal rules or government coercion,¹¹³ and without the support of a private property rights system. As such, much of the scholarly literature on collective action has highlighted informal rule making, enforcement, and monitoring within communities.¹¹⁴ This endogenous focus tends to obscure the important role that central government authorities can and do play in both enabling and sustaining collective action over time. This state role can be a particularly important, and even unavoidable, aspect of the ability of users to collectively manage urban common resources. This is at least in part because the urban “commons” is regulated by the local government and, in spite of regulatory slippage, the local government retains its formal ownership and regulatory control of the resource. As such, it would be difficult for users to sustain cooperative management of a common urban resource over time without some enabling from the state or local government.

1. Cooperative Management of Natural Resources

Elinor Ostrom found that many tribal groups, villages, and other local communities have long histories of effective collective action, including in situations where they lacked any formal mechanisms to control individual behaviors through a system of property rights or government regulation.¹¹⁵ Ostrom’s study focused on small-scale resources—what she called “common pool resources”¹¹⁶—affecting a relatively small number of persons (50 to 15,000) who are heavily dependent on the resource for economic returns.¹¹⁷ In these situa-

112 See *id.*

113 See ELLICKSON, *supra* note 18, at 52–53, 72–76 (explaining how community self-governance not conducted “in the shadow of the law” and how ranchers hold each other responsible for straying cattle regardless of whether the formal legal rule mandates compensation).

114 See Robert Sampson, *Neighbourhood and Community: Collective Efficacy and Community Safety*, NEW ECON., 2004, at 108 (noting that collective efficacy depends on “walking trust” and “social interaction,” and does not require a friendly relationship with authorities).

115 See OSTROM, *supra* note 5, at 61–68.

116 This refers to a natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use. See *id.* at 30.

117 See *id.* at 26.

tions, individuals exist in an interdependent relationship, with each other and the resource, and are strongly motivated to try to solve common problems to enhance their productivity over time. Ostrom identified a number of these self-organized resource governance regimes that have survived for multiple generations where the participants invest resources in monitoring the actions of each other and enforcing internal norms so as to reduce the probability of free-riding.¹¹⁸

Collective action in these communities is particularly successful where there exists a resource with clearly defined boundaries and a community with stable membership and a homogenous culture, who also share beliefs, a history, or expectation of continued interaction and reciprocity.¹¹⁹ In actual field settings where these conditions are present, Ostrom found that communities were able to develop and enforce rules, as well as conflict resolution procedures, that govern the use of the resource.¹²⁰ These rules and procedures were recognized as legitimate by the government, which made them easier to monitor and enforce.

Many of Ostrom's cases studies document the existence of wholly endogenous solutions to natural resources management.¹²¹ That is, these groups successfully established and enforced their own rules without resort to external public agencies.¹²² In other cases, however, users were able to enforce and monitor their rules only with the help of external agencies on whom they relied in instituting a complex, nested public-private governance system to regulate the resource.¹²³

118 See *id.* at 65–69 (describing common lands governed by local village communities in Japan); *id.* at 82–88 (discussing irrigation communities in Philippines); *id.* at 144–78 (describing examples of some fisheries and irrigation projects able to manage communally).

119 See *id.* at 88–91; see also Sara Singleton & Michael Taylor, *Common Property, Collective Action and Community*, 4 J. THEORETICAL POL. 309, 309–15 (1992) (finding that a group possesses the capacities for a wholly endogenous solution to the tragedy of commons to the degree it approximates a community of mutually vulnerable actors).

120 This was particularly true where users had the opportunity to participate in rule making and governance. See OSTROM, *supra* note 5, at 90; see also Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, 14 J. ECON. PERSP. 137, 149–53 (2000) (describing how collective action and monitoring problems are solved in a reinforcing manner when users of resources design their own rules that are enforced by local users or accountable to them, using graduated sanctions, that define who has rights to withdraw from the resources, and that effectively assign costs proportionate to benefits.).

121 See OSTROM, *supra* note 5, at 61–68.

122 See *id.*

123 See *id.* at 101–02; see also ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 11–13 (2005) (discussing the many layers of internal processing that results in decision making)

In contrast to self-managed community resource use systems that operate mainly with social sanctions, resources that traverse many communities and user groups may require more complex institutional structures, often involving government coordination and enforcement.¹²⁴

Ostrom's study of a series of groundwater basins located beneath the Los Angeles metropolitan area illustrates this point.¹²⁵ In her findings, groundwater producers organized voluntary associations, negotiated settlements of water rights, and created special water districts to monitor and enforce those rights with the assistance of county and state authorities.¹²⁶ State legislation authorizing the creation of special water districts by local citizens, in particular, was a crucial element in encouraging users of groundwater basins to invest in self-organization and the supply of a local institution.¹²⁷ Once a special district was created, it possessed a wide variety of powers.¹²⁸ Those powers included the ability to raise revenue through a water pump tax and, to a limited extent through a property tax, to undertake collective actions to replenish a groundwater basin.¹²⁹ Without such legislation, a similar set of users facing similar collective action challenges might not be able to supply themselves with transformed "microinstitutions."¹³⁰

124 See ELINOR OSTROM ET AL., *RULES, GAMES, AND COMMON-POOL RESOURCES* 326 (1994) ("Individuals in relatively simple systems are apt to develop rules more nearly optimal than individuals in more complex systems, especially systems involving substantial asymmetries of interest.").

125 See OSTROM, *supra* note 5, at 103–42 (discussing the case studies of user groups in three California groundwater basins).

126 See *id.* at 133–36.

127 See *id.* at 129, 133–34, 139 (noting that the special districts were created by users to tax themselves and then to use those funds to undertake collective actions to replenish a groundwater basin).

128 See *id.* at 129.

129 See *id.*

130 The special district, though central to the relationship among users, was only one public enterprise among a half dozen agencies that were actively involved in the management of the basins. In addition to the public districts, private water associations were also active in each groundwater basin. Ostrom viewed the relationship between the private water associations, public agencies, and special districts as illustrating how a governance system "can evolve to remain largely in the public sector without being a central regulator." *Id.* at 135. The basins became managed as a "polycentric" public-enterprise system that is neither centrally owned nor centrally regulated. *Id.* at 135–36.

2. Collective Efficacy, Social Disorder, and Urban Self-Governance

While scholars have not charted the existence of self-organized groups in the urban context, they have identified the potential for urban communities to do so under certain conditions. Specifically, social scientists have emphasized the importance of “collective efficacy” in (re)instituting and maintaining healthy and safe communities.¹³¹ Collective efficacy exists where there is the social cohesion, working trust, and a shared willingness of residents to intervene on behalf of the common good, including to maintain effective social controls in the community.¹³² A neighborhood or group’s capacity for action thus depends on a certain level of social capital, as well as on informally shared expectations or norms for cooperative action.¹³³ However, strong social ties and dense social networks alone are not enough for collective efficacy to be present. Rather, those ties and networks have to be “activated” through actual engagement that enables residents to exert more effective informal social control on each other.¹³⁴

A lack of collective efficacy is highly correlated with the existence of social disorder in public spaces, enforced by violence or threats of violence.¹³⁵ Violence in particular (or the fear of it) can prevent or impede the development of productive social norms and the collective efficacy necessary for neighbors to maintain effective social controls in their community.¹³⁶ Communities that have high levels of

131 See Robert J. Sampson et al., *Neighbourhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCI. 918, 918 (1997) (finding that a community’s ability to exercise informal control and its collective capacity for action directly predicts lower rates of violence).

132 See Sampson, *supra* note 114, at 108.

133 See *id.*

134 See *id.*

135 See NICOLE STELLE GARNETT, *ORDERING THE CITY* 55 (2010) (charting a four-category taxonomy of disorder in urban communities and explaining that social disorder usually “describes the disfavored behaviors thought to signal a breakdown in healthy social norms in struggling communities” and noting some of these social disorders, such as prostitution and drug trafficking, are also crimes); Sampson et al., *supra* note 131, at 918 (controlling for a wide range of individual and neighborhood characteristics, including poverty and the density of friendship ties, collective efficacy directly predicts lower rates of violence).

136 See Sampson et al., *supra* note 131, at 918; Robert J. Sampson & Stephen W. Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 637–38 (1999); see also Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 387 (1997) (“[H]ighly visible private precautions might in fact erode deterrence by emboldening law-breakers and demoralizing law-abiders.”); Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1604 (2002) (“Whether infrastructure supports a community’s

social disorder are assumed to lack the capacity for collective action that would enable them to (re)establish and maintain order in their communities.¹³⁷ Where social disorder prevails, more aggressive public intervention can provide an “exogenous shock” to re-establish positive social norms of conduct.¹³⁸ In communities with high levels of social capital and social order, however, public intervention is presumed to be unnecessary given the capacity for self-governance.¹³⁹

Scholars have cited a number of ways that local governments, in particular, can bolster collective efficacy in communities beset by social disorder. These include shoring up social capital through programs designed to attract and retain residents likely to purchase homes and put down roots in their neighborhoods.¹⁴⁰ The move toward community policing is another example of the kind of local government effort that scholars have found can “kick-start” or “reinvigorate” collective efficacy in neighborhoods with high levels of disorder and little possibility of self-governance.¹⁴¹ Community policing practices seek to change prevailing norms of public-space allocation “in part by asking police officers to suppress ‘bad’ norms and enforce ‘good’ norms.”¹⁴²

efforts to resist crime will depend on the kinds of norms transmitted among individuals who live in a neighborhood.”); James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC, Mar. 1982, at 31 (“[U]ntended behavior . . . leads to the breakdown of community controls.” (internal quotation marks omitted)).

137 Cf. GARNETT, *supra* note 135, at 136 (arguing that low levels of social capital deprive communities of the ability to effectively organize); Sampson & Raudenbush, *supra* note 136, at 637 (stating that the data supports the theory that social disorder coincides with lowered collective efficacy).

138 See Robert C. Ellickson, *The Market for Social Norms*, 3 AM. L. & ECON. REV. 1, 23–26 (2001).

139 See GARNETT, *supra* note 135, at 136 (“[I]t is clear that the healthiest, safest urban communities enjoy high levels of collective efficacy without public intervention.”).

140 See Nicole Stelle Garnett, *Affordable Private Education and the Middle Class City*, 77 U. CHI. L. REV. 201, 209–10 (2010) (noting the findings that collective efficacy increases along with residential tenure and homeownership).

141 See GARNETT, *supra* note 135, at 136; see also Dan M. Kahan, *Privatizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City*, 46 UCLA L. REV. 1859, 1865 (1999) (explaining how prayer vigils organized by the police and churches on the south side of Chicago acted as a “visible display of community solidarity against crime”); Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1604–08 (2002) (noting the effectiveness of community-wide action); Tracey L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 WM. & MARY L. REV. 1315, 1334–35 (2007) (recounting the prayer vigils).

142 See Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL RTS. J. 183, 184 (2009).

Nicole Garnett has argued that community policing programs situate police officers as both “norm-entrepreneurs” and “norm-enforcers.”¹⁴³ Police officers act as norm-entrepreneurs when they assert themselves in the community to suppress bad group norms and/or to establish normatively superior group norms.¹⁴⁴ The police practice of “assertive vigilance” is cited as an example of norm entrepreneurship by police; this practice can mean that police work with local leaders to organize marches in high crime areas, prayer vigils at the sight of gang- or drug-related shootings, barbeque picnics in drug market areas, and positive loitering campaigns in areas frequented by prostitutes.¹⁴⁵ Police act as “norm-enforcers” in communities by soliciting information about, and then enforcing, informal community norms.¹⁴⁶ The result is that police shift their patrol and enforcement priorities to pay more attention to the types of disorders identified by the community.¹⁴⁷ The effect of public intervention is not simply to reestablish superior social norms but also to re-allocate public space in urban communities.¹⁴⁸

3. Cooperation and the State

As Ostrom argued, the effort by user groups to create new institutions for resource governance is a second order collective action dilemma.¹⁴⁹ Much of the literature heralding self-management regimes have focused on the endogenous variables embedded in common resource management regimes.¹⁵⁰ That is, many commentators stress how self-governing communities are very dependent on the size and knittedness of the community and the existence of shared norms

143 See *id.* at 189–90.

144 See *id.* at 184, 193–94.

145 See *id.* at 190, 194; see also Kahan, *supra* note 141, at 1865 (explaining how prayer vigils “enervate the norms that fuel gang membership”).

146 See Garnett, *supra* note 142, at 192.

147 See *id.*

148 See *id.* at 194–96.

149 See Ostrom, *supra* note 5, at 136. As she points out, resource users must invest tremendous resources to design institutional arrangements that incorporate the new processes and rules that will govern the resource. See *id.* at 136–37 (noting that her case studies do not bear out the assumption that individuals caught up in a rivalry for extraction of resources would refrain from expending resources to design, negotiate, and supply new institutions).

150 Although it should be noted that in a later work, Ostrom refers to some attributes of the user community as an “exogenous” variable. See Ostrom, *supra* note 123, at 13–15.

and social capital among resource users.¹⁵¹ A small homogenous community is thus more likely to succeed at managing a commons than a larger and more diffuse one, for example.¹⁵² Far less attention has been paid to the role of central governments in creating and sustaining these regimes. Yet, Ostrom's own work, as well as the work of others, suggests that central governments can play a significant role in supporting, and potentially lowering the costs involved in, the creation of these institutions without subsuming them into a centralized governance regime.¹⁵³

The free rider problem, as well as the high transaction costs and potential fragility of collective action efforts, means that the government is not necessarily an irrelevant actor in groups' ability to endogenously manage a common resource.¹⁵⁴ These transaction costs include, among others, search costs (identifying the possibilities for pareto-optimal mutual gains), bargaining costs (negotiating an agreement to take action toward one or more of those gains), and enforcement costs (monitoring and enforcing the agreement).¹⁵⁵ As scholars like Ann Carlson and Michael Vandenberg have pointed out, these costs are particularly difficult to overcome in situations dealing with large-scale commons problems—e.g., individual recycling and carbon emissions reductions—which require a large number of diffuse individuals to engage in small or modest actions to effect what might appear to be small (or even initially negative) payoffs for the commons.¹⁵⁶ Overcoming large-number, small (or initially negative) pay-

151 See, e.g., ELICKSON, *supra* note 18, at 15–40, 177–82 (suggesting that norm-based self-governance works best in “close-knit groups”); Ellickson, *supra* note 80, at 83 (noting that informal social networks and a high level of solidarity are helpful when creating a Block Level Improvement District); Grimmelmann, *supra* note 51, at 2808–09 (noting that community cohesion and size are the factors that stand out as essential to the success of a cooperatively managed commons regime).

152 See Ellickson, *supra* note 80, at 83 (discussing how smallness and homogeneity are key elements of ability to cooperatively manage neighborhood and block level amenities); Grimmelmann, *supra* note 51 at 2809 (“The bigger the group, the greater the tendency towards ruin.”).

153 See OSTROM, *supra* note 5, at 139 (“[T]he difference between an active effort by a central government to regulate appropriation and provision activities and an effort to provide arenas and rules for microinstitutional change is frequently blurred.”).

154 See OSTROM, *supra* note 5, at 40 (“The costs involved in transforming a situation from one in which individuals act independently to one in which they coordinate activities can be quite high.”); Grimmelmann, *supra* note 51, at 2809 (noting that “strong and well-defined communities will be able to sustain the constant work of self-control required” of cooperatively managed commons regimes).

155 See Singleton & Taylor, *supra* note 119, at 319.

156 See Ann E. Carlson, *Recycling Norms*, 89 CAL. L. REV. 1231, 1244 (2001); Michael Vandenberg, *Order Without Social Norms: How Personal Norm Activation Can Protect the*

off collective action problems proves very difficult from a policymaking perspective.¹⁵⁷ This is in part because, even with the existence of strong social norms, government intervention is often necessary to incentivize norm activation and to make collective action less costly to undertake.¹⁵⁸

For smaller scale, higher payoff collective action problems, like managing a discrete geographic common resource, the incentive structure is much simpler. Government support can reduce the costs of cooperation and help the actors to leverage their efforts to achieve high economic and social payoffs from their collective action. For example, the institution of “architectural changes” by government can induce the desired collective action, particularly where such action is relatively inconvenient or requires significant individual efforts.¹⁵⁹ These architectural changes might include regulatory mechanisms, which remove barriers to cooperation or make it more beneficial or convenient for individuals to engage in cooperative behavior.¹⁶⁰

Government support can also help stabilize groups who are able to initially cooperate but may face endogenous (and exogenous) threats over time. The existence of strong social ties and social norms, for example, may be hard to sustain over the long run without government support. Among the threats to even small, tight-knit groups are the disruption of trust and community stability that come with high levels of in- and out- migration.¹⁶¹ So too can subtle changes in future

Environment, 99 NW. U. L. REV. 1101, 1102, 1164 (explaining how individuals can struggle to accept that a diffuse, ubiquitous problem like climate change can be mitigated through such a seemingly insignificant action as flicking off one’s light switch); see also Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117, 140 (2009) (“[W]hen second generation environmental harms are at issue, it is extremely difficult to ‘conceptualize individual behavior as a distinct source of social problems.’” (quoting Vandenberg, *supra*, at 1164)).

157 See Carlson, *supra* note 156, at 1241–45 (describing the challenges presented for policymakers seeking to enforce recycling).

158 See *id.* at 1264–66 (discussing the importance of government assistance in creating and sustaining recycling norms and behavior); Vandenberg, *supra* note 156, at 1105–06 (noting the interplay between social norms and government intervention).

159 See Carlson, *supra* note 156, at 1231–32 (noting that “norm creation or management is by itself not likely to be terribly effective” in resolving larger scale environmental problems).

160 See *id.* at 1265–67.

161 See Ostrom, *supra* note 120, at 153 (“Since collective action is largely based on mutual trust, some self-organized resource regimes that are in areas of rapid settlement have disintegrated within relatively short times.”); *id.* (listing a number of other threats identified in the empirical literature). Other researchers have also identified migration in and out of communities as detrimental to social capital. See generally

pay-offs, the costs of individual defections, shifts or modifications in the rule of cooperation, and other group dynamics which may bring about preference changes and reorientation of values within the group.¹⁶²

The supportive or enabling role of government in the collective management of common urban resources is unavoidable on some level. The urban “commons” is regulated by the local government, which typically retains regulatory control and proprietary ownership of the resource. Although private actors are motivated to act on behalf of preserving the commons under conditions of regulatory slippage—i.e., when government authorities are either unable or unwilling to—they are not completely free to do so. What we will see in the next Part is that collective management of common urban resources occurs not just in the shadow of the state, but very much dependent on some level for state (or local government) support. How much dependence on government there is, however, will depend on the strength of the endogenous variables mentioned above. The next chapter will posit that there is a strong correlation in the urban context between the endogenous variables that can shape and strengthen collective action and the level of government support associated with the new management regime.

III. COLLECTIVE ACTION IN THE URBAN COMMONS

If we were to ask the same question that Ostrom and others have asked in their work—whether there are groups of resource users able to cooperate together, allocate shared resources, and obtain joint benefits from the resource when all face temptations to free-ride, shirk or otherwise act opportunistically¹⁶³—the clear answer is yes. The ability of collective commons management regimes to remain stable and endure over time can be very much dependent on community size and knittedness, community makeup, stability of community membership, resource scale, and shared social norms/social capital. However,

Manual Pastor, Jr. et al., *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. URB. AFF. 1 (2001) (hypothesizing that “ethnic churning”—changing demographic conditions—weakens the bonds between residents in a community and thus weakens political power, makes community mobilization more difficult, and increases susceptibility to siting hazardous facilities).

162 See Pranab Bardhan, *Symposium on Management of Local Commons*, 7 J. ECON. PERSP. 87, 89–90 (1993) (noting for example, “[c]ontact with outsiders and the option to exit reduce the effectiveness of social norms” in small groups and “[p]rolonged repetition of the game also becomes more uncertain in a mobile world, raising incentives for short-run opportunism”).

163 See OSTROM, *supra* note 5, at 29.

these endogenous factors tell only part of the story. As the examples below will illustrate, there is much more variability in how these factors play out in the urban context.

Collective management of urban resources does not occur only in small, homogenous, close-knit communities with stable membership. Many large-scale resources are in fact being cooperatively managed by groups of heterogeneous, and sometimes transient, users who access the resource for different purposes. Moreover, in contrast to the assumptions of urban scholars, the presence of social disorder does not strongly correlate with a lack of positive social norms, social capital, and collective efficacy in user groups and communities. Even where social disorder exists in public spaces, we see communities come together to develop and enforce a new set of norms and practices in that space to replace the social disorder that had existed. That is, users themselves become positive norm entrepreneurs even in contexts where there exists a fairly high level of social disorder.

What I want to highlight, however, is the relationship between the endogenous factors that drive many forms of cooperative resource management and the role of the state or local government. My key insight is the following. There is an inverse relationship between those endogenous variables and a strong central government role in supporting a collective resource management regime. What we will see in the following examples is the greater ability of smaller, more homogenous (and perhaps more tight-knit) user groups to cooperatively manage a discrete neighborhood resource in the absence of a strong governmental role. On the other hand, we will see a much stronger government role where there exists an increase in the scale and complexity of the resource. This is particularly so, as in the case of larger scale resources, where resource users are more heterogeneous, transient, and lack a high level of social cohesion. As the examples in this Part illustrate, as the presence of endogenous factors decrease, the government's role tends to increase and is much more embedded in the ability of the collectivity to sustain itself over time. Conversely, where endogeneity is strongest, the government role is at its most minimal.

The examples below are thus arranged to demonstrate that collective action enabling exists along somewhat of a spectrum. On one end of the spectrum are examples of largely endogenous collective efforts involving *de minimis* government enabling. In the first two examples, community gardens and park "friends" groups, the support provided by the government simply allows, either explicitly or implicitly, the collective to exercise management prerogatives over the resource. It does so by not interfering in the group effort or by pro-

viding consent to engage in efforts on behalf of the resource. The government has virtually no affirmative role in coordinating the collective effort or in establishing the group, although it may provide them with financial or other incentives to sustain their efforts.

In the middle of the spectrum there is a more significant government role in supporting the collectivity or group to sustain itself, although the government has virtually no role in enabling the formation of the collectivity which is largely an endogenous effort. However, there can be a closer relationship between the government and the collectivity in which the government shares its resources with the group and exercises some degree of oversight of the group's activities. Neighborhood foot patrols and, more specifically, the Guardian Angels are an example of groups existing in the middle of the spectrum of government enabling. Government enabling is an important stabilizing force for the group and the group works closely with government officials. However, the relationship between the government and the group falls short of a fully realized partnership.

On the other end of the spectrum are collective efforts that are very much dependent on the government to coordinate, establish, and sustain themselves. That is, the group takes its form only as a result of government support and entanglement. Which is to say: government support is a precondition to the existence of the collectivity. In these latter examples—park conservancies and business improvement districts—the support provided by the government is an essential element in the existence of the collectivity *and* the government is an indispensable partner or participant in the ongoing collective effort (including collecting or sharing the revenue that sustains the group). In the case of park conservancies, government support takes the form of a formal partnership in which the collectivity and local government co-manage the resource. In the case of "BIDs," it is the passage of special legislation that creates the structure of the BID and defines and formalizes the contours of BIDs' responsibilities over the shared resources within their districts.

A. *Community Gardens*

Consider the widespread creation and management of community gardens by local residents in many central cities across the country.¹⁶⁴ These gardens are created on vacant urban lots in the midst of economically and socially fragile communities. Many of these lots

164 The following account is based on a previous article. See Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527, 534–43 (2006).

were left vacant by the demolition of buildings abandoned by their original owners, or cleared but not redeveloped in the wake of defunct urban renewal programs, and whose ownership was assumed by the city through tax foreclosure.¹⁶⁵ These lots had often become “rivalrous” spaces—overrun by drug users, car strippers, and illegal dumpers of all kinds of waste—and thus became safe havens for a host of criminal and other illicit activities.¹⁶⁶

Coalitions and networks of local residents in cities across the country have come together to clear these vacant lots of trash and drug paraphernalia, and to plant and cultivate trees, flowers, and vegetables. Transformation of the space from a barren, degraded one to an aesthetically pleasing green one provides increased public surveillance through an increase in “defensible space”—areas in which “escape routes for criminal perpetrators are limited and public range of vision is maximized to prevent illicit conduct.”¹⁶⁷ In addition to offering infrastructure for community recreation and interaction (e.g., benches, playgrounds, water ponds and fountains, summer-houses, etc.), the gardens also provide a local source of fresh vegetables in neighborhoods often lacking these resources.¹⁶⁸

The transformation of these small spaces into productive land uses—community gardens—is a largely endogenous effort. Local residents manage to come together, construct and maintain these fully functioning gardens in the absence of government coercion or intervention, or the divestment of property rights in the lots/gardens.¹⁶⁹ Reclaiming and preserving the gardens instead depends upon, and fosters, collaborative relationships and social ties among neighborhood residents who see their quality of life and the future of

165 Many of these lots are city-owned, while others are on the brink of being city-owned because of outstanding municipal tax liens against them. *See id.* at 534.

166 *See* Antonio Alves et al., *Environmentalism in the Dudley Street Neighborhood*, 14 VA. ENVTL. L.J. 735, 737 (1995) (“[O]ver a thousand such lots [in the Boston neighborhood] are now overrun with candy wrappers, beer bottles, hypodermic needles, fuel oil tanks, tires, refrigerators, and construction debris. These lots also serve as sites for drug dealing, car stripping, and illegal dumping of solid and hazardous waste.”).

167 Jane E. Schukoske, *Community Development Through Gardening: State and Local Policies Transforming Urban Open Space*, 3 N.Y.U. J. LEGIS. & PUB. POL’Y 351, 356 (2000). The gardeners become the “eyes and ears” of the community, resulting in sometimes dramatic reductions in crime in the host neighborhood. *See id.* at 356–59.

168 *See id.* at 359–60 (noting that the production of fresh produce by community gardens is at least “partial relief to the problem of substandard grocery stores, which often operate in low-income urban neighborhoods where a lack of transportation limits consumer options”).

169 *See generally supra* notes 167–68 and accompanying text (explaining how no exogenous forces were required to spur the cultivation of these gardens).

their neighborhoods deeply implicated by these barren spaces.¹⁷⁰ This social capital, and the norms that they generate, enable residents to cooperatively work toward common neighborhood goals and create a sense of control over their space. Without this mutual cooperation, many of these open, vacant lots would likely have remained blighted and dangerous, threatening the economic and social health of the community.

The creation of these gardens in predominantly low-income neighborhoods, often with high levels of social disorder, renders problematic the widespread assumption that such neighborhoods suffer from weak social capital and are incapable of “collective efficacy.”¹⁷¹ It also undermines any assumption that government officials, such as police officers, are necessary for “norm-entrepreneurship” in communities or in common spaces beset by social disorder. Instead, what we see at work is just the opposite. Neighborhood residents themselves become norm-entrepreneurs. Their actions transform not just the physical space but also the norms and behavior that govern that space. And they do so without the “exogenous shock” of aggressive state or local government intervention to manage the space.¹⁷²

To be sure, the lots have been transformed into community gardens with the implicit, and often explicit, consent of the local government. Local governments provide long-term, renewable leases of these city-owned lots to community gardeners for a nominal fee.¹⁷³ Other forms of support include the provision of small grants, technical support, and gardening tools.¹⁷⁴ The provision of even modest financial incentives or subsidies to collectivities like community gar-

170 Continuing and multiple interactions among members of the group both increase the likelihood and the ability to find cooperative solutions and overcome the fear of free riding. See Foster, *supra* note 164, at 541.

171 See *supra* notes 164–66 and accompanying text.

172 See *supra* notes 167–68 and accompanying text.

173 See Karl Linn, *Reclaiming the Sacred Commons*, 1 NEW VILLAGE J. 1999, at 44, available at <http://www.newvillage.net/Journal/Issue1/1sacredcommon.html> (noting that many cities have made land available to communities via short-term leases). In this sense, however, the gardens remain vulnerable to extinction if and when a city decides to revoke this consent and reclaim the gardens for another purpose or land use. See Foster, *supra* note 164, at 535–38 (recounting the dispute between New York City and community gardeners when then Mayor Giuliani threatened to auction off some of the gardens to private housing developers).

174 See GreenThumb Community Gardens, N.Y.C. DEP'T OF PARKS & RECREATION, http://www.nycgovparks.org/sub_about/partners/greenthumb/greenthumb.html (last visited Sept. 25, 2011) (discussing the nation's largest urban gardening program providing members with technical support and materials).

deners or local park groups helps to reduce some of the high transaction costs that they may be facing in pooling their resources to transform decrepit vacant lots or degraded parks space into productive spaces. For community gardeners, their efforts would be quite costly if they had to purchase or rent the lots at market rates. This support helps to sustain the work of the collectivity, no doubt, but it is not inducement enough to bring the actors together in the first place. Thus, although local government support is present, it is de minimis support, enabling the group continue using the space and to sustain its gardening efforts.

B. *Neighborhood Park "Friends" Groups*

Much like the vacant urban lots on which community gardens have been constructed, many urban parks—large and small—became empty havens for illicit or illegal activity during periods of reduced oversight and management by local governments. Central Park in New York City is the classic example of this. In the 1970s and 1980s, a steep decline in city appropriations for parks devastated the entire urban park system, leaving many parks and recreational areas unsafe, dirty, prone to criminal activity, and virtually abandoned by most users.¹⁷⁵ The story of this historic park is mirrored to a smaller extent in neighborhood parks in many urban cities across the country.¹⁷⁶ The emergence of neighborhood parks' "friends" groups to revitalize and maintain urban parks in the 1980s and 1990s is a direct response to this regulatory slippage.¹⁷⁷ Like community gardeners, residents who live near these parks, or are otherwise invested in their upkeep, mobilize to plan and raise support for their restoration, maintenance, and preservation. Throughout the country, there are hundreds (if not thousands) of these groups that have revitalized neighborhood public parks and filled the void left by the loss of most of their public

175 See ROSENZWEIG & BLACKMAR, *supra* note 7, at 502 ("More than five hundred parks and playgrounds received only weekly cleaning from mobile task forces. In the absence of regular maintenance, supervision, or policing, many parks and playgrounds suffered vandalism and were filled with piles of garbage. Even after the city's financial plight eased three years later, the parks continued to decay.").

176 See Murray, *supra* note 9, at 230 (recounting the history of Bryant Park in which poor park design which limited visibility and poor lighting combined with insufficient municipal funding for maintenance and security rendered the park unsafe and underutilized).

177 See KATHY MADDEN ET AL., PUBLIC PARKS, PRIVATE PARKS 13–22 (2000); see also DORCETA E. TAYLOR, THE ENVIRONMENT AND THE PEOPLE IN AMERICAN CITIES, 1600s–1900s 346–47 (2009) (explaining how "after decades of neglect," citizens began to notice the parks' "state of disrepair," causing conservations groups to act).

operating funds and active local government management.¹⁷⁸ Many of these groups remain an informal collection of volunteers, while others have become more formal. The more formal groups establish themselves as a membership organization, elect board of directors, write bylaws, and apply for nonprofit status.¹⁷⁹

Groups that form to revitalize and manage neighborhood urban parks, typically “Friends of [Park X],” are largely endogenous efforts undertaken by abutting park neighbors or frequent users who lend their time, give money, or help raise funds to recover and maintain the park. These groups consist of volunteers who provide labor for park maintenance and assist in community outreach and park programming.¹⁸⁰ They organize park cleanups and community events, build or donate simple infrastructure or facilities for community activities (e.g., small pools, sand pits, etc.), and patrol the park as a way of deterring criminal and other undesirable activities.¹⁸¹ They have small operating budgets and no formal responsibility for the park but play an important role in park upkeep and sustainability.¹⁸²

Community-based “friends groups” are often assisted by local governments in a de minimis way. Like local programs to support community gardeners, local governments help to develop and nurture these groups by providing them with technical assistance, training, and funding and sometimes more.¹⁸³ They also award small grants to neighborhood park organizations.¹⁸⁴ The provision of training or financial support to local groups willing to assume some responsibility for some park management functions can provide a powerful signal and incentive for individuals to pool and coordinate their efforts

178 See Amnon Lehari, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1, 34 (2004) (noting that there are over 200 “friends groups” in New York City alone).

179 See *id.*

180 See MADDEN ET AL., *supra* note 177 (“[T]hey derive their power from their ability to rally a constituency for a park or potential open space, and in many cases, to raise outside funds.”).

181 See *id.* at 51–115.

182 See *id.*

183 See *id.* at 107–10 (describing New York’s Partnerships for Parks, a joint venture between the New York City Parks Foundation and the New York City Department of Parks & Recreation, which encourages the formation, and nurtures the development of, neighborhood parks groups across the city.); *About Us*, P’SHPIS FOR PARKS, http://www.partnershipforparks.org/about_us/index.html (last visited Sept. 25, 2011) (describing New York’s Partnership for Parks program).

184 See MADDEN ET AL., *supra* note 177, at 107–10. The staff shares offices with the Department of Parks and Recreation. Its two million dollar operating budget is funded jointly by the city and from private and corporate donations. See *id.*

toward this end. So too can an agreement that recognizes private efforts and formalizes their relationship with the local government support the development of group norms and reduce uncertainty over the rules of cooperation and thus support the sustainability of the enterprise over time. Like community gardeners, the local government role largely exists to support and sustain the collectivity of residents that has already formed.

C. *Neighborhood Foot Patrols*

When citizens or residents come together to engage in surveillance of their streets and other open spaces as a means of deterring crime, they often do so as part of small scale foot patrols. These foot patrols generally operate on a limited geographic scale, such as a neighborhood, often work in tandem with local police departments, and are careful not to engage in law enforcement activities such as apprehending criminal suspects.¹⁸⁵ Many endogenous factors have been cited for determining the success and endurance of these small neighborhood patrol groups—among them are the existence of charismatic leadership, the urgency or saliency of the immediate problem, and the size of the group (both too small and too large can be problematic).¹⁸⁶ Most of these groups are short-lived, however, because of difficulties in recruitment, training, and commitment.¹⁸⁷

The most long-sustaining, and famous, foot patrol organization perhaps in the country, The Guardian Angels, owes much of its sustainability to the relationships that it has formed with local governments. The Angels' relationship with local police governments and police officials, and the support that accompanied those relationships, strengthened and helped to sustain their role as "guardians" of neighborhood safety. Founded in New York in the late 1970s, but with patrol chapters in cities all over the country, the Guardian Angels have trained thousands of local community members across the country to patrol neighborhood streets in order to deter and, when necessary, to intervene in criminal activity. The Angels arose to prominence as an arguably rational response to cutbacks in municipal services and the inability of local police departments to control the intractable crime plaguing many metropolitan cities. Its members had strong social ties to the communities they served and sometimes

185 See ROBERT K. YIN ET AL., NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE ET AL., CITIZEN PATROL PROJECTS 4 (1977).

186 See Susan Pennell et al., *Guardian Angels: A Unique Approach to Crime Prevention*, 35 CRIME & DELINQ. 378, 379 (1989).

187 See *id.*

to the criminals with whom they engaged.¹⁸⁸ The red berets and red jackets made them a recognizable presence during the 1980s in residential neighborhoods and high crime areas in at least fifty metropolitan cities. Angel chapters typically were initiated either by citizen request or by the head of the organization, Curtis Sliwa, when he perceived a community in need of Angel support.¹⁸⁹

Initially, the Angels were met with a negative reaction by local government and police officials, many of whom viewed the organization as nothing more than a vigilante group whose activities violated the law or at a minimum failed to significantly reduce crime.¹⁹⁰ Over time, however, city officials and the police departments around the country began to lend them considerable support, bolstering the Angels' popularity, which was widespread during the 1980s. By the 1990s the Angels were largely accepted by local government officials in the fifty plus cities where they operated.¹⁹¹ A study documenting the activities of the Guardian Angels in twenty-one cities found that a number of police departments and city agencies had developed informal and formal agreements with the Angels in which the Angels received training, free subway and bus passes, assigned police liaisons, and were promised and given various information (such as crime statistics and information related to citizen arrests).¹⁹²

188 See *The History of the Guardian Angels*, THE GUARDIAN ANGELS, <http://guardianangels.org/about.php> (last visited Sept. 25, 2011). In this respect they are very different from other "self-help" groups like the Minutemen operating along the U.S.-Mexico border. See Douglas Ivor Brandon et al., *Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845 (1984).

189 See Pennell, *supra* note 186, at 394 (noting that over one-third of the Angel chapters in their study were initiated by Angels founder Curtis Sliwa with the remaining chapters started by Angel members in other cities or on the basis of a community request).

190 See Brandon, *supra* note 188, at 896-98; Pennell, *supra* note 186, at 389-91, 397.

191 Since then, the group's membership has shrunk from its peak of 1000 to about 125; many chapters of the Guardian Angels have opened up all around the world to very mixed receptions from local governments. See Editorial, *Angels Out East*, N.Y. TIMES, Aug. 7, 2005, at L113.

192 See Pennell, *supra* note 186, at 390. In 1981, for example, the City of New York had signed a memorandum of understanding ("MOU") with the organization stating that the Angels and police would cooperate, share information and keep lines of communication open. Specifically, the Angels agreed to register their members with the police department and to wear city issued identification cards. The MOU also prevented them from performing citizens' arrests while not in uniform. In addition, the group agreed to receive training from NYPD community liaisons. Members receive training in CPR, first aid, conflict resolution and martial arts and are taught the legal limitations of citizens' arrest powers. The organization's rules spell out specific, standardized procedures for engagement and specifically forbid members from carrying

The agreement between New York City and the Guardian Angels to share information and to lend its members training, for example, served an important stabilizing mechanism for the group and arguably lent considerable legitimacy to their activities, even as those activities were deemed controversial.¹⁹³ The Memorandum of Understanding provided that the Angels and police would cooperate, share information and keep lines of communication with the city open. Specifically, the Angels agreed to register their members with the police department and to wear city issued identification cards. In addition, the group agreed to receive training from NYPD community liaisons in CPR, first aid, conflict resolution, and martial arts, as well as in the legal limitations of citizens' arrest powers.¹⁹⁴ This agreement, and similar ones like it in cities across the country, has been an important factor in giving the group legitimacy, establishing it as a supplement to local policing efforts and fueling its national expansion and sustainability over many decades.¹⁹⁵

Mayor Giuliani of New York City notably, and publicly, fully embraced the group as part of his law and order campaign and

weapons (although some carry handcuffs and their code allows them to use force when necessary to confront suspected criminals). See Henry C. Collins, *Municipal Liability for Torts Committed by Volunteer Anticrime Groups*, 10 FORDHAM URB. L.J. 595, 596, 611, 615, 626-28 (1981) (describing the memorandum of understanding generally).

193 See *Guardian Angels' Growing Pains: Mixed Success as the Young Crime Fighters Go National*, TIME, Jan. 18, 1982, at 21 (describing the effort of the Angels to go national after the MOU with New York City and the controversy that haunted them as they sought to do so); see also Owen Thomas, *Citizen Patrols: Self-Help to an Extreme?*, CHRISTIAN SCI. MONITOR, July 5, 1988, at 3, 8 (describing the controversy surrounding the Angels and similar groups).

194 The agreement also specified the conditions of cooperation with the group, including detailing the types of watchdog activities by which the groups' members must agree to abide (such as wearing ID badges and uniforms). The MOU also prevented them from performing citizens' arrests while not in uniform. See Pennell, *supra* note 186, at 390.

195 See *Guardian Angels' Growing Pains*, *supra* note 193; see also Santiago Esparza, *Guardian Angels Back in Detroit: Controversial Citizen Patrollers Return to Help Fight City's Crime*, DETROIT NEWS, June 16, 2008, at 1B (recounting effort to bring the Guardians back to the city after being chased from the city twenty years earlier, and the effort to draft a memorandum of understanding between the Angels and the City which would outline the appropriate boundaries of the group's activities); Matthew Plum, *Guardian Angels May Put Hartford Under Their Wings*, EXAMINER (Jan. 20, 2007, 3:00 AM), www.guardianangels.org/pdf/1716.pdf (describing Angels coming to Hartford County and the possible drafting of a Memorandum of Understanding with the County sheriff).

helped them to gain credibility in the law enforcement community.¹⁹⁶ Later, the group's founder, Curtis Sliwa, was given a position on Mayor Giuliani's commission on community-police relations.¹⁹⁷ The group's methods arguably anticipated the arrival of community policing strategies adopted by Giuliani's Police Commissioner, Raymond Kelly. The NYPD's adoption of community policy strategies during the 1990s suggests that the Angels' active incorporation of local residents into the protection of their streets was a necessary but missing component of neighborhood security. In this sense, the group filled a need unmet by the police.

D. *Park Conservancies*

Unlike park "friends" groups formed to support small neighborhood parks, Park Conservancies depend much more on a stronger local government role and partnership to establish and sustain them. Park Conservancies are nonprofit entities which raise significant amounts of money and co-manage large urban parks in partnership with the local government by collaborating on planning, design, and implementation of capital projects as well as sharing responsibility for park maintenance and operations.¹⁹⁸ In some cases, park conservancies share with the local government a portion of concession revenues each year.¹⁹⁹

The prototype for park conservancies around the country is the Central Park Conservancy, which was founded by several local leaders and groups that initially established the Central Park Task Force, an organization that began to encourage direct involvement of the public as park volunteers and donors, but later incorporated itself as the Conservancy.²⁰⁰ In a groundbreaking power-sharing arrangement,

196 See Katharine Q. Seelye, *Giuliani's Angel Posse*, THE CAUCUS BLOG, N.Y. TIMES (Dec. 28, 2007, 6:13 PM), <http://thecaucus.blogs.nytimes.com/2007/12/28/giulianis-angel-posse>.

197 See *id.* Mayor Bloomberg too lent them considerable support and as recently as 2007 was quoted as saying that the group "makes our streets safer." Michael Wilson, *Guardian Angels Seek out More Mean Streets*, N.Y. TIMES, Mar. 22, 2007, at B1.

198 See MADDEN ET AL., *supra* note 177, at 20–21. See generally Murray, *supra* note 9 (discussing the differences between friend groups and conservancies like the Central Park Conservancy).

199 See TAYLOR, *supra* note 177, at 352 (noting that Central Park Conservancy agreement with the City allows up to two million dollars per year from concession revenues; but for other parks, revenues generated from concessions disappear into a city's general funds).

200 See MADDEN ET AL., *supra* note 177, at 75; *Central Park Conservancy at a Glance*, N.Y.C. DEP'T OF PARKS & RECREATION (2008), <http://www.centralparknyc.org/assets/pdfs/cpc-at-a-glance.pdf>.

the Central Park administrator was appointed to serve as the chief executive officer of both the park and the Conservancy signaling the important role that the Conservancy would have in the restoration and maintenance of the park.²⁰¹ Almost two decades after its founding, the Conservancy and the City of New York formalized their relationship by signing a renewable management agreement, transferring official management functions and day-to-day maintenance and operation of the park from the City to the Conservancy.²⁰²

The Conservancy is run by a Board of Trustees, which includes city officials and representatives from nonprofit organizations and private corporations, among other interests.²⁰³ It combines donations from individuals with corporate donations and government funding to fulfill its budgetary needs and build its endowments.²⁰⁴ A variety of public bodies have oversight over the Conservancy's management decisions.²⁰⁵ The agreement also provides protection from a "reverse crowd out" of public funds by establishing clear expectations for city funding that are easy to monitor and police.²⁰⁶ While Central Park Conservancy may be the most widely known of park co-managers, its

201 See ROSENZWEIG & BLACKMAR, *supra* note 7, at 510 ("The administrator would be appointed (or fired) by the mayor and would report to the park commissioner but would be paid by the conservancy."). Indeed, this new administrator became the driving force behind the master plan for rebuilding Central Park and ultimately behind the formation of the Conservancy itself. See *id.* at 512.

202 See *Central Park Conservancy at a Glance*, *supra* note 200 (noting that the agreement was renewed in 2006). Under the agreement, the Conservancy, working in concert with the parks commissioner and City Hall, oversees the restoration and maintenance of Central Park, "including the provision of programs and activities that will increase public interest and awareness of Central Park." Oliver Cooke, *A Class Approach to Municipal Privatization: The Privatization of New York City's Central Park*, 71 INT'L LAB. & WORKING-CLASS HIST. 112, 121 (2007) (citing the 1998 Agreement between the Conservancy and the City of New York Parks and Recreation Department); see TAYLOR, *supra* note 177, at 347.

203 See TAYLOR, *supra* note 177, at 350.

204 See *id.*

205 These bodies include the Art Commission of the City of New York, the five community planning boards in the city, the Landmarks Preservation Commission, and the City Council. See ROSENZWEIG & BLACKMAR, *supra* note 7, at 521.

206 See Murray, *supra* note 9, at 211 (citing Memorandum between the Central Park Conservancy and the City of New York (Mar. 31, 1993) (on file with the Harvard Law School Library)). According to the Conservancy's website, it employs eighty percent of the Park's maintenance and operations staff and provides eighty-five percent of the Park's twenty-seven million dollar annual budget through its fundraising and investment revenue. See *Central Park Conservancy at a Glance*, *supra* note 200. The City pays an annual fee to the Conservancy for its services and also funds lighting and maintenance of the Park drives and enforcement. See *id.*

model has been widely replicated, though sometimes with much less success.²⁰⁷

Agreements or partnerships between local governments and park conservancies serve an important coordinating and stabilizing function which enables these groups to cooperate together to undertake significant responsibility for park management. Private involvement in the management of urban parks is a phenomenon stretching back to the early twentieth century.²⁰⁸ Neighbors that live near urban parks, as well as wealthy donors and residents, have long exerted some power over park management—providing donations, labor, advocacy efforts, and planning ideas.²⁰⁹ Often, though, these efforts have suffered from a lack of coordination and efficiencies of scale; without leadership to harness these private efforts, they often falter over time as old groups fade and new ones appear to renew the effort to resuscitate and improve park management.²¹⁰

Agreements, such as the one between the City of New York and the Central Park Conservancy, both serve to establish important norms regarding the limits of the group's responsibility for the resource—i.e., reverse crowd-out protection that ensures public funds will not be replaced by private donations—as well as formalize the contours of the conservancy's responsibility for the day-to-day manage-

207 See ROSENZWEIG & BLACKMAR, *supra* note 7, at 524; TAYLOR, *supra* note 177, at 350.

208 See EUGENE KINKAD, CENTRAL PARK 115–16 (1990) (discussing private involvement in Central Park and fact that nearly fifty groups formed since the 1920s to resuscitate Central Park).

209 See Murray, *supra* note 9, at 208–09 (recounting the history of private support and involvement in the management of Central Park over the years).

210 See *id.* As Murray notes about Central Park:

[T]hough private involvement existed in the 1960s and 1970s, in the late 1970s, no one entity coordinated, and in fact no one even approved, private participation in the park's affairs. [Robert] Moses' efforts to involve private resources, furthermore, did not generate established mechanisms to harness volunteer labor or donated funds. Donations generally went into the park's overall operating fund. In other words, friends of the park could not count on the efficacy of their contributions—monetary or in-kind. The costs of monitoring the manager and his use of private funds could not be higher.

In short, by the end of the 1970s, the park lacked a responsible leader. Poor management, lack of advocacy for public support, and non-coordination of private support contributed to its decline. The conditions were ripe for a strong leader to advocate for the park and coordinate private involvement, harnessing donations and improving outcomes by reducing monitoring costs for donors.

Id. at 209.

ment of the park.²¹¹ These public-private partnerships have been widely credited for the revitalization of urban parks at a time when some cities had “all but abdicated their role as stewards of the public parks.”²¹² They have the virtue of being able to avoid the red tape, bureaucracy, and inaction in which city parks departments often become mired; they are able to make decisions faster, raise funds, save money, and serve as effective advocates for urban parks.²¹³

This is not to say that there are not dangers and costs attendant to these types of public-private partnership. Park conservancies are criticized for imposing many of the costs that attend to the (at least partial) privatization of any public good—i.e., enabling gentrification, exacerbating ethnic and class tensions, and creating a two-tiered park system which disadvantaged parks in less affluent neighborhoods.²¹⁴ Another danger worth mentioning here, but will be developed later on, is the danger is that such agreements can lead to the ossification of a commons management regime. This ossification can occur when particular management practices of the group or partnership become so entrenched that it is difficult to change course when those practices prove to be ineffective or flawed. While, technically, the municipality can always withdraw its support from the group’s management—e.g., agreements are in place for a renewable time period and thus expire at the end of that period if not renewed—in practice it is often extremely difficult to disband the organization and the city’s reliance upon it to manage the particular common resource. Thus, while such the public role in conservancies can serve to incentivize and stabilize collective actions to manage an urban commons, they might also be crafted to avoid the danger of excessive ossification.

E. Business Improvement Districts

Business Improvement Districts (“BIDs”) are now a ubiquitous feature of urban governance in most cities across the nation, provid-

211 See *id.* at 211–15 (describing the Memorandum of Understanding and the ways it has developed over the years to shift more responsibility for park management to the Central Park Conservancy).

212 TAYLOR, *supra* note 177, at 346–47 (noting also the emergence of these groups after decades of neglect and declining budgets which left many urban parks in a state of “utter despair”).

213 See *id.* at 347.

214 See *id.* at 356 (“In New York City, for instance, Central Park Conservancy has raised vastly more money than other city parks.”); *id.* at 352 (noting that Marcus Garvey Park in Harlem, and others, languish in the shadows of fundraising behemoths such as Central Park). See generally Murray, *supra* note 9, at 192–93 (reviewing some of the literature exploring the costs of public-private partnerships).

ing physical improvements, security, and maintenance of commercial districts throughout the country. The rise and ubiquity of BIDs in cities across the United States is attributable to a number of political and socioeconomic factors. Among them are the general decline of city centers and commercial neighborhoods through middle class flight and urban sprawl, the attendant deterioration of street safety and consumer activity, as well as the inability of local governments to respond to these forces due to declining tax bases and limited resources.²¹⁵ BIDs are nonprofit entities formed by property owners or businesses in a defined area of a city to improve and maintain the neighborhood as a means to promote economic activity in the area.²¹⁶ BIDs provide street-level services and small-scale improvements to streets, parks, and other common areas beyond what local government is willing or able to provide.

BIDs are enabled by state and local legislation that allows a majority of commercial property owners in a defined neighborhood to vote to form a BID, agree to pay special assessments and assume (at least partial) control and management (maintenance) of the neighborhood commons—i.e., streets, sidewalks, parks and playgrounds.²¹⁷ BIDs are governed by local property owners in partnership with representatives from businesses, local governments, and sometimes neighborhood resident non-property owners.²¹⁸ The impetus for a BID creation typically will arise from a significant portion of the property owners or businesses in the neighborhood, or representatives of one

215 See David J. Kennedy, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283, 283–85 (1996) (giving examples of the genesis of the Bryant Park and Grand Central BIDs in New York City); see also Briffault, *supra* note 22, at 394–95 (describing improvements made to Bryant Park); Lorraine Hoyt & Davika Gopal-Agge, *The Business Improvement District Model: A Balanced Review of Contemporary Debates*, GEOGRAPHY COMPASS 946, 948 (2007) (outlining reasons for BID formation).

216 See generally Kennedy, *supra* note 215, at 285–88 (describing the basics of BIDs).

217 See generally Briffault, *supra* note 22, at 412–14 (describing BID governance). The key features of BIDs are that: (a) they cover a defined (and limited) geographic territory in which commercial property owners or businesses in the area are subject to additional taxes; (b) they typically fund supplemental street-level services and small-scale maintenance and capital improvements (e.g., street cleaning, garbage collection, landscaping, sidewalk widening, security patrols, etc.) over and above those offered by city government; and (c) they are granted the limited authority by legislation to undertake services and projects within the district. See *id.* at 367–69, 413–30.

218 See *id.* at 412; Jill Simone Gross, *Business Improvement Districts in New York City's Low-Income and High-Income Neighborhoods*, 19 ECON. DEV. Q. 174, 174–75 (2005).

or more of those groups, that organize the BID and agree to tax themselves in order to fund these additional services.²¹⁹

Because BIDs exist only by virtue of specific legislative authority, enabling legislation is what allows local commercial property owners to minimize free-rider and coordination problems in order to provide neighborhood services beneficial to the local business environment.²²⁰ BID legislation lowers property owners' transaction costs by arranging for the municipality to collect the mandatory assessment from the property owners who then utilize the funds to provide services to maintain and improve the neighborhood commons.²²¹ BID legislation also serves a less tangible function by enhancing the capacity of local private sector interests to achieve collective outcomes among diverse actors whose interests may not appear at first to be well aligned.²²² Nevertheless, the second order collective action problem is not completely taken care of by BID legislation. BID formation is often costly in terms of time, energy, and money to coordinate and prepare the necessary groundwork—and it can take years before the

219 See Briffault, *supra* note 22, at 377–86 (describing the formal and practical aspects of BID formation).

220 See *id.* at 369 (noting that the free-rider problem “plagues the efforts of chambers of commerce and merchants’ associations to raise funds to pay for services for their areas” and that BIDs help overcome that problem by assessing all properties or firms in the area); Mark S. Davies, *Business Improvement Districts*, 52 WASH. U. J. URB. & CONTEMP. L. 187, 201 (1997) (describing how BID assessments circumvent the free-rider problem).

221 See Briffault, *supra* note 22, at 369–70. Briffault writes:

BIDs appeal to many—albeit not all—commercial area merchants and property owners because the districts kill two birds with one stone: They provide a means of solving the free-rider problem that plagues the efforts of chambers of commerce and merchants’ associations to raise funds to pay for services for their areas, while ensuring that the revenues generated by the supplemental taxes imposed on district businesses and property owners are reserved for programs these taxpayers want, and are controlled by their representatives.

Id.

222 See Gross, *supra* note 218, at 178. For communities in transition, BIDs offer a forum to bring together diverse social and economic groups and in which mutual interests can be identified and bridges can be built to local government. See *id.* Gross cites an interview with a BID manager who held out the following example:

Take a BID like Flatbush Avenue in Brooklyn. That's an area that's really changed. I wasn't there, but people tell me that it was a very Jewish business area, and it really changed to an Indian and Caribbean business area. And the cohesion that was there was no longer there. The BID was able to pull these new ethnic groups and the different kinds of businesses together.

Id.

process is complete.²²³ However, despite the cost and patience involved, local government approval of a BID allows commercial property owners and businesses within a defined geographical area to overcome collective action problems and at the same time provide the resources to govern and manage their local commons.

BIDs vary greatly in their size and in the range of services that they provide for their neighborhood public environment.²²⁴ Some BIDs cover large and wealthy commercial districts, such as the Times Square BID in New York City or the Downtown District in New Orleans and are akin to a small local government in the amount of resources and the type of functions they perform.²²⁵ The majority of BIDs in the United States, however, are smaller in size and in scope; they fulfill a narrower set of functions and are often located in commercial strips that are far from their cities' central business districts, both physically and economically.²²⁶

BIDs, both large and small, have generated a vigorous debate about the extent to which they exacerbate the uneven distribution of public services, create negative spillover effects (e.g., crime), over-regulate public space, displace marginal populations from those spaces, and suffer from a severe democratic accountability deficit.²²⁷ The governance structure of BIDs has also been challenged, both in academic commentary and in the courts, for lacking democratic accountability and in part for its exclusion of non-property owner residents from participating in BID management of their neighborhood.²²⁸

223 See Briffault, *supra* note 22, at 383–84.

224 See Gross, *supra* note 218, at 176–88 (analyzing data revealing differences in form, function, and operating practices for large and small BIDs).

225 See *id.* at 175 (noting that these large BIDs control multi-million dollar budgets, have large staffs, cover large geographic areas, and manage large portfolios of activities).

226 See *id.* (noting that in contrast to the larger BIDs which tend to be located in neighborhoods with a large commercial or retail base, high property values, and ample flow of pedestrian foot traffic, the smaller BIDs tend to be located in neighborhoods with declining retail and commercial sectors, failing property values, and dwindling pedestrian traffic flows); see also Briffault, *supra* note 22, at 424 (referencing New York's smaller BIDs that are centered away from Midtown Manhattan).

227 See Hoyt & Gopal-Agge, *supra* note 215, at 955–56 (summarizing the literature on both sides of the debate).

228 See *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 108 (2d Cir. 1998) (holding that a BID voting structure was not a violation of one-person, one-vote); Briffault, *supra* note 22, at 455–62 (calling for more active city monitoring and control of BIDs as a solution to the problem of BID accountability); Daniel R. Garodnick, Note, *What's the BID Deal? Can The Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 U. PA. L. REV. 1733, 1760–64 (2000) (noting the lack of municipal oversight of BIDs, the broad functions of some BIDs, and the significant

Moreover, once they are established, there is very little oversight of them in fact, even though most BID legislation provides the authority for oversight by politically accountable government officials.²²⁹

On the other hand, BIDs have been credited with revitalizing deteriorated urban neighborhoods left unattended by local governments, having positive spillover effects outside of their districts, reducing the inequality of public services between cities and their suburbs, and increasing democratic accountability by enhancing the voice of local property owners and neighborhood residents.²³⁰ Given the diversity in size and function of BIDs,²³¹ it is easy to give credence to the arguments of both BID proponents and opponents. However, this diversity also highlights the importance of thinking about how issues of scale can embed many of the costs and benefits of collective activities, a subject to which I will return in the next Part.

IV. ENABLING COLLECTIVE ACTION

In each of the above examples, local actors are able to overcome collective action problems to manage common urban resources in the absence of government coercion and in the absence of property rights in the resource. While these users cooperate in the shadow of existing local government control over the resource, they depend, to varying degrees, on the support or enabling of local authorities. This support is important to their ability to overcome collective action obstacles and/or to sustain the collectivity over time. In this Part, I turn to this enabling role to articulate its contours and limits.

In each of the examples in Part II, the local government is loosening its control over a common resource by allowing a private collectivity to provide supplementary services and goods within a geographically bounded area. However, the authority and control exercised by these collectivities lack the formal legal relationship, or the broad regulatory authority, that local governments typically possess vis-à-vis common urban resources. That is, these groups cannot regulate access to the resources, control or impose restrictions on individual behavior, or otherwise usurp the local government's role in making various policy choices about use of the resource. Moreover,

influence that BIDs can have on non-property owning residents as reasons for more democratic accountability).

229 See Briffault, *supra* note 22, at 456–57 (noting that municipal governments devote more attention to BID formation than regulation). But see Kennedy, *supra* note 215, at 310–12 (noting that it may be tougher in practice than in theory to regulate BIDs under the New York regime).

230 See Hoyt & Gopal-Agge, *supra* note 215, at 954–56.

231 See Gross, *supra* note 218, at 175 (comparing large and small BIDs).

none of these collectivities hold any alienable title or property interest in the resource. Enabling these collective management regimes to manage or maintain common resources also does not supplant the local government's role over that resource. We might understand these groups as supplementing, not supplanting, the goods and services that local government traditionally provides.

A. *Limited Authority and Control over the Resource*

Much in the way that states create, and restrict, the power of local governments,²³² local government enabling also entails a mix of grants and restrictions of power and control over a common resource. It is a truism of local government law that local governments derive their power exclusively from the state, either legislatively or constitutionally (e.g., home rule authority).²³³ This authority typically extends to the power to control land use within its borders and to adopt laws that govern a variety of local affairs, so long as those laws do not conflict with general or preemptive state laws.²³⁴ As explained above, some of the ways that these collectivities are empowered involve different forms of central government assistance and support that incentivize and reduce the cost of collective efforts. As important a role as this assistance and support can play in these collectivities' empowerment, it is also important to examine the limitations on their power over the common resources that they manage. As this section will argue, the scope of the government enabling role in this context is limited in important ways that distinguish collective action enabling from "privatization" of a common resource—be it a park, street, lot, or neighborhood—and that distinguish this role from the creation of a sublocal unit of government.

1. Not Privatization

The enabling of private actors to manage common pool resources could be viewed as a form of "privatization" of the resource. It is, however, only to the extent that the term "privatization" is a reference to a broad spectrum of policy choices or mechanisms that shift some responsibility from the government to private actors. That is,

232 See generally GERALD E. FRUG & DAVID J. BARRON, *CITY BOUND* 1–11 (2008) (emphasizing the power state governments have over cities).

233 See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 15, 23 (1990) (noting that local governments are technically creatures of their state government and enjoy delegated power subject to the authority of the state to amend or abolish local powers and the localities themselves).

234 See *id.* at 15.

collective action enabling shares some important features of privatization to the extent that it allows private actors to perform traditionally public functions over the resource. Like privatization, collective action enabling introduces greater flexibility and efficiency in the management and oversight of public goods.²³⁵ However, because it transfers over the management and not the ultimate policymaking function to private parties, it should be contrasted with the "privatization" of common resources in which ownership and control are transferred completely into private hands.²³⁶

Privatization typically entails the establishment of private property rights in the resource, allocation of those rights to private actors, and a virtually complete relinquishment of public authority over the resource to its users. A useful contrast is a homeowners' association in which the residents set policy for and manage the community's streets, parks and neighborhood buildings. Most importantly, the private association holds title to those common areas. The association has regulatory autonomy in establishing and enforcing not only land use rules in the community but also rules governing private behavior. These rules can include very strict zoning regulations, restrictions on construction and painting, the placement of fences and shrubbery, street signs, parking, pets, etc.²³⁷

The type of enabling that local governments give to the collectivities of users in the examples above does not entail a shift in the ownership (or the legal stewardship) of open-access common resources, nor giving up policymaking control over it. The scope of the enabling power granted to collective efforts to manage public resources like parks, or to engage in limited intervention on the streets, does not include policymaking with regard to these resources. That is, the local government and public officials retain the power to set policies regarding access to, and use of, the resource. Collective management regimes lack the power to tax or impose fees on users of the resource, to limit access to the resource, or to impose health or other safety standards on users of the resource.

235 See Jeffrey R. Henig, *Privatization in the United States: Theory and Practice*, 104 POL. SCI. Q. 649, 653-54 (1990) (noting that privatization premised in part on idea that private actors should have the opportunity to break up government monopolies and provide more efficiently these goods).

236 See Demsetz, *supra* note 14, at 350 (discussing the emergence of private property from common resources).

237 See Nelson, *supra* note 74, at 831.

2. Nor Delegation

By shifting the responsibility for much of the maintenance and management to some users, it might be said that the city delegates to private actors a great deal of power and influence over common resources and creates the risk that these resources will be less responsive to public needs. Local and state governments can, and do, delegate or relinquish certain functions to nongovernmental entities, or sublocal units of government, while retaining their ownership over the resource.²³⁸ A classic example of this type of delegation is the creation of special districts for limited purposes, usually to provide for and/or manage common resources—e.g., management of groundwater supply in a Groundwater Management Water District or delivery of water in an Irrigation District.²³⁹ The districts are coterminous with either an entire city or region, generally matching the scale of the resource being managed (e.g., a water basin). Special districts are able to collect taxes, user fees and assessments from users within the district to fund the services they provide. They are also often created in part to respond to the deficiencies of the local government (or the private sector) to manage or provide for local goods.²⁴⁰

At first glance, the most formal of collective urban resource management regimes, the BID, resembles the type of delegated authority that characterizes a special district. However, as Richard Briffault has written, BIDs are quite distinct from special districts in their functions and power.²⁴¹ While most special districts operate with a great deal of legal autonomy from local governments, BIDs are legally subordinate to the local governments that create them and have very limited policymaking authority.²⁴² Unlike many special districts, BIDs lack the

238 See Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 508–09 (1997) (describing four types of sublocal governance: enterprise zones, tax increment finance districts, special zoning districts, and BIDs).

239 See Stephen N. Bretsen & Peter J. Hill, *Irrigation Institutions in the American West*, 25 UCLA J. ENVTL. L. & POL'Y 283, 312–30 (2006) (providing a general description of irrigation districts); Ella Foley-Gannon, *Institutional Arrangements for Conjunctive Water Management in California and Analysis of Legal Reform Alternatives*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 1105, 1133 (2007) (discussing local water agencies managing water rights efficiently).

240 See Barbara Coyle McCabe, *Special-District Formation Among the States*, 32 ST. & LOC. GOV'T REV. 121, 121–22 (2000) (explaining the factors that influence formation, including the “restricted power theory”—when states constrain their cities’ ability to raise revenue from property taxes).

241 See Briffault, *supra* note 22, at 419–20 (comparing BIDs with special districts).

242 See *id.* at 420 (noting that for the thousands of special districts that overlap multiple local governments or operate outside unincorporated areas, they are generally free from control by other local governments; others that are coterminous with

power (a) to tax or impose fees on users of the common resource,²⁴³ (b) to limit access to the resource to paying customers, and (c) to regulate property use or resource users—e.g., the power to control land uses within the district or the power to impose health, safety, or aesthetic standards on either property owners, residents, or visitors to the area.²⁴⁴ BIDs also do not hold any property rights in the resource being managed, whereas some special districts do own such rights and can transfer those rights for the benefit of the private interests that govern the district.²⁴⁵ The legal position of BIDs is nicely summed up by Briffault as follows: “[U]ltimately lacking both the police power and the power that comes from property ownership, [BIDs] are dependent on either municipal government action or voluntary landowner compliance to achieve their goals.”²⁴⁶

Nevertheless, the line between the day-to-day management of resources and policymaking can be murky and, in practice, the two can shade into one another. Where this happens, an important aspect of the relationship between public authorities and these collective efforts is the ability of the local government to intervene in management of the resources, scale back the functions of the group, and/or disband the collectivity if necessary. A very forthright assertion of control that municipalities place on their enabling of local collectivities is to impose sunset provisions on their support of the collective management regime.

The life of a BID, for example, is generally limited to a few years at which time the local government may renew and extend the BID by

local governments are likely to have closer ties to the counties or municipalities that create them but still maintain a significant degree of formal autonomy of their program and finances); *id.* at 439 (“[BIDs’] authority over the citizenry is so narrow, and their autonomy relative to city government is so constrained, that they do not ‘govern’ in any meaningful sense.”).

243 Recall that the city collects the assessment from property owners and gives it to the BID to use for the neighborhood services it provides. *See id.*

244 *See Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 104 (2d Cir. 1998) (finding that although one of Manhattan’s largest BIDs performs some services that a government would perform, its responsibilities and powers are so circumscribed that it cannot be said to exercise the core powers of sovereignty typical of a general purpose government). *But see id.* at 115–16, 124–25 (Weinstein, J., dissenting) (noting that despite lacking formal policymaking or regulatory control, the BID nevertheless enjoys considerable discretion in carrying out its functions).

245 *See Bretsen & Hill, supra* note 239, at 327 (noting that in most irrigation districts, the district itself owns the water rights in a form that could easily be transferred for the benefit of the landowners within the district).

246 Briffault, *supra* note 22, at 429.

means of a standard reauthorization process.²⁴⁷ Park conservancy agreements between the City and the Conservancy also have a limited term, but are renewable.²⁴⁸ Similarly, local governments lease empty lots to gardening collectivities to construct and maintain a community garden, but the leases are for a particular term albeit presumptively renewable by the city. In theory, any of these management arrangements enabled by the local government can be disbanded at the discretion and pleasure of municipal authorities. This kind of temporal limitation embedded in many enabling mechanisms signals, at least as a formal matter, the possibility that central government authorities are monitoring the line between management and policymaking. Moreover, this limitation reinforces the local government's ultimate sovereignty over the resource.

What remains to be seen is how strong these temporal limitations operate in practice. They are only as effective as the actual oversight that they provide by central authorities. A different signal would be sent, for example, if these temporal limitations were only mere formalities which gave way to presumptive renewal of the enabling support provided by the local government.

B. Provision of Supplementary Goods and Services

A defining characteristic of voluntary efforts to manage an urban "commons" is that they share many of the attributes of nonprofit entities organized by groups of individuals (or interests) who pool their resources to provide additional public goods, or a level of service, that the government does not (or no longer does) provide. As Burton Weisbrod argued some time ago, governmental entities will provide public goods up to a point, beyond which there can be residual unsatisfied demand among individuals whose taste for such goods is greater than what is provided.²⁴⁹ Nonprofits arise, in part, to meet this residual demand by providing public goods or services in amounts

247 See *id.* at 387–89 (describing BID termination and noting that many states allow BIDs to be created for a five or ten-year period before requiring reauthorization); Hoyt & Gopal-Agge, *supra* note 215, at 949.

248 See *Central Park Conservancy at a Glance*, *supra* note 200 (noting that the agreement was renewed for eight years in 2006).

249 See Burton A. Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 171, 181–83 (Edmund S. Phelps ed., 1975); see also BURTON A. WEISBROD, *THE VOLUNTARY NON-PROFIT SECTOR* 59–60 (1977) (arguing that people will turn to voluntary organizations as the "second best" solution to meet their demand for collective goods).

supplemental to those provided by government.²⁵⁰ The unmet demand provided for by these groups is over and above the existing level of existing public goods or services.

Much like traditional nonprofit organizations, the collectivities that manage common urban resources provide, to varying degrees, goods and services supplemental to what the local government already provides. Thus, what is important to highlight here are the ways in which the goods and services that local government provides differ both qualitatively and quantitatively from those provided by local collectivities.

1. Secondary Responsibility for Goods/Services

The bundle of local government goods and services that citizens expect in exchange for their tax assessments typically include the provision of schools, hospitals, parks, transportation, sanitation, police and firefighting, housing for the poor, and the like.²⁵¹ The level at which a particular municipality provides these services can vary widely across local governments and neighborhoods, and is quite dependent on not only the demand for particular goods or services but also on the depth of its tax base.²⁵² *Primary* responsibility for the provision of these public goods and services is typically a core function of local government.²⁵³ When a local government (or any level of government) decides to essentially get out of the business of being the pri-

250 See WEISBROD, *supra* note 249, at 59–61; see also Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 845 (1980) (offering an economic theory for the rise of nonprofits as “contract failure,” in which nonprofits are “a reasonable response to a particular kind of ‘market failure,’ specifically the inability to police producers by ordinary contractual devices”). Arguably neither theory fully captures the role of nonprofits in providing or managing public goods. See Murray, *supra* note 9, at 197–98 (stating that even a synthesized model “fails to explain why non-median voters do not give their funds to the government to supplement services, even though the government also operates under the nondistribution constraint [that binds nonprofits]”). The Weisbrod model does seem to best capture the role of nonprofits where local government turns some, if not most, of the responsibility for managing a common urban resource to a nonprofit collectivity but retains significant responsibility for that commons, including financial support and policymaking.

251 Much of what citizens come to expect depends very much on the allocation of responsibility for providing these services between state and local government, which can vary by state. See generally FRUG & BARRON, *supra* note 232, at 92–94 (discussing the various services cities must fund).

252 This is the core of Charles Tiebout’s theory. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–24 (1956).

253 See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (arguing that “traditional governmental functions” include fire prevention, police protection, sanitation, public health, and parks and recreation). Local governments, of course, pro-

mary provider of these goods and services, it often does so by contracting out (or outsourcing) for their provision by private actors.²⁵⁴ The government may not release its regulatory authority, or sovereignty, over the public good or service when it outsources its provision. But it nevertheless ceases becoming its sole provider.

Collective efforts to provide goods and services for common urban spaces—such as cleaning and maintenance, security, block patrols, planting trees and flowers, street lights and signs, etc.—are tailored to the specific needs and preferences of a geographically defined resource or community. In this sense, they are *secondary* to the basic public goods and services provided by the local government, which are typically provided on a citywide basis. This is not to say that the private provision of goods and services does not sometimes displace those provided by the local government. In the case of *some* Common Interest Communities (i.e., Homeowners Associations), government services are in fact supplanted by locally delivered services in exchange for a tax rebate or the ability to assess property owners for neighborhood services.²⁵⁵ In most cases, however, the local government does not withdraw completely from its role as the primary provider of these services. Rather, the goods and services purchased by the additional fees (or labor) paid by local residents are in addition to those provided by the municipality. In cases where the government has reduced its services, it would presumably restore its efforts to provide such services if and when the collectivity dissolves or ceases to function as a service provider.

2. Quantitative and Qualitative Differences in the Provision of Goods/Services

One way to think about the secondary nature of the services that these collectivities provide is to ask how much they differ, qualitatively and quantitatively, from those typically provided by the local government. This was the approach taken by the Second Circuit in *Kessler v. Grand Central District Management Ass'n*, in response to a constitutional challenge to the Grand Central BID, one of the largest BIDs in New York City.²⁵⁶ There, non-property owner plaintiffs claimed that the

vide these up to the point where the state has delegated such responsibility to the local government. See FRUG & BARRON, *supra* note 232, at 244.

254 See generally GOVERNMENT BY CONTRACT (Jody Freeman & Martha Minow eds., 2009) (discussing government outsourcing).

255 See EVAN MCKENZIE, PRIVATOPIA 122–44 (1996) (describing homeowner associations as private governments).

256 158 F.3d 92 (2d Cir. 1998). The BID encompasses 337 properties on sections of seventy-five blocks in midtown Manhattan, including the Grand Central Terminal

weighted voting pattern of the BID violated the "one person, one vote" requirement under the Equal Protection Clause.²⁵⁷ Previous Supreme Court precedent had established that the requirement applied to governing bodies that have general governmental powers over the entire geographic area served by the body.²⁵⁸ However, the one person, one vote requirement had been held to be inapplicable to governing bodies that have a special limited purpose—i.e., performs limited activities that have a disproportionate effect on a definable group of constituents.²⁵⁹

In assessing the services provided by the BID (e.g., sanitation, security, and social services) in relation to the typical services traditionally provided by local governments, the Court found that indeed the BID services do overlap with those of those provided by the city. However, the BID's provision of these services was deemed to be secondary to those provided by the city.²⁶⁰ They are secondary because the BID's services are quantitatively dwarfed by those of the city and are qualitatively different from so-called "core municipal functions."²⁶¹ This conclusion was driven, first, by the language of the state law that enables BID creation; this language requires that the municipal services provided by BIDs must be "in addition to or an enhancement of those provided by the municipality."²⁶² Second, the Court noted that the City's provision of sanitation, security, and other services is far more extensive than the limited provision of those services by the BID.²⁶³ As an example, the BID employs sixty-three mostly unarmed security guards, while the District is served primarily by three City police precincts that it overlaps.²⁶⁴ Moreover, "[a]lthough they patrol the district in the expectation that their visible

railroad station, and approximately 930 residences. *See id.* at 95. The property within the BID constitutes approximately 19% of the total commercial space in Manhattan and exceeds the entire space inventory of the central business districts in cities such as Houston, San Francisco, Dallas, Denver, and Boston. *See id.*

257 *See id.* at 98.

258 *See Avery v. Midland Cnty.*, 390 U.S. 474, 485–86 (1968) (involving a challenge to selection of judges for a County Commissioners Court from single member districts).

259 *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728–29 (1973) (finding that the primary purpose of the district "is to provide for acquisition, storage, and distribution of water for farming in the Tulare Lake Basin;" it does not provide other general public services).

260 *See Kessler*, 158 F.3d at 105.

261 *Id.*

262 *Id.* (citing N.Y. GEN. MUN. LAW § 980-j(a)).

263 *See id.*

264 *See id.*

presence will deter the incidence of serious crime, if law enforcement is needed [the BID] security personnel call in the City police.”²⁶⁵

Similarly, the sanitation services provided by the BID are quite limited when compared to those of the City. While BID workers bag loose trash, they do not cart it away; the City retains the primary responsibility for municipal refuse removal service. The BID’s physical improvements to the areas—such as installing street lights, removing graffiti, cleaning street signs, providing more attractive trash bins—are “efforts to improve the physical appearance of the district” and not an exercise of general governmental authority.²⁶⁶ Even the BID’s provision of homeless outreach services, the Court reasoned, was overwhelmingly dwarfed by the services provided by the City. The BID funded “a single outreach facility,” while “the City has an entire Department devoted to assisting the homeless.”²⁶⁷

The Court’s analysis provides a useful framework with which to assess the activities of the type of collectivities discussed in Part III, above. First, it asks whether the relative level of services and goods provided by these collectivities constitutes a very small portion of the similar goods and services provided by the municipality. Second, it asks whether the type of the services provided by these collectivities are distinct in scope from those provided by the local government. Presumably the provision of services to maintain or manage a commonly held public resource that is quantitatively and/or qualitatively dwarfed by similar services provided by the local government would withstand the suspicion that it is supplanting those services, as opposed to simply supplementing them in geographically specific ways.

3. Scale and Supplementarity

The above analysis is simplistic on some level. It fails to account for the scale of these collective efforts when viewed cumulatively—both as an aggregate measure of the services provided by one collectivity and as an aggregate measure of the services provided by similar collectivities (e.g., BIDs, park groups, etc.) across a municipality. Large, corporate-dominated BIDs that manage central city commercial districts, for example, are often engaged in a very wide range of

265 *Id.*

266 *Id.* The same can be said of the operation of information booths for tourists, the opening of a restaurant near Grand Central Terminal, and the sponsorship of public events; all are efforts to make the district more attractive to tourists and other consumers.

267 *Id.*

services and enjoy a broad grant of authority to render and expand their services.²⁶⁸ They arguably become, in effect, “cities within cities” administering their services in largely unaccountable ways, with little oversight by local government, and with substantial budgets that allow them to self-govern much like a private neighborhood.²⁶⁹

Even when the scale of each individual collectivity is relatively small (when compared to the totality of the metropolitan commons), it might be that, if viewed cumulatively across the municipal landscape, the scale of these efforts combined begins to rise to a level that begins to crowd out those provided by the city.²⁷⁰ It is not difficult to imagine a city withdrawing, or significantly further cutting back, its resources and services from the provision of park maintenance and support, for example, due to the increase in collectivities or groups dedicated to managing urban parks in a city.²⁷¹

The crowding out effect may not be as likely to occur with some city services—police services or garbage removal services, for example—that would be more difficult for small collectivities to completely take over or for the city to easily abdicate. Thus, for example, no matter how large a crime foot patrol group becomes or expands its territory (such as the Guardian Angels), it is highly unlikely to supplant or crowd out a local government’s provision of police and other security services to its residents and common areas. These services are delegated, or mandated, by the state to local governments in exchange for their ability to impose taxes and fees on its residents. Moreover, as a political matter, residents are unlikely to support the withdrawal of basic or core municipal services such as security and sanitation. Thus, no matter how many BIDs provide for garbage removal or street maintenance, the local government is not very likely to get out of the business of providing those services—which are quintessentially a function of local governments.

268 See *id.* at 112–15 (Weinstein, J., dissenting) (discussing the BID’s permissible activities and noting this about the Grand Central BID in New York City); Gross, *supra* note 218, at 179–80 (describing the wide range of services and huge budgets of “corporate BIDs” as compared with “main street BIDs”).

269 See *Kessler*, 158 F.3d at 114 (Weinstein, J., dissenting) (citing N.Y.C. COUNCIL, CITIES WITHIN CITIES (1995)).

270 See Murray, *supra* note 9, at 197–98 (describing “reverse crowding out”).

271 Although, as noted previously in the case of the Central Park Conservancy, it is possible to contract around this risk of crowding out public dollars dedicated to park management and maintenance. See TAYLOR, *supra* note 177, at 356 (discussing the agreement between the Conservancy and the City).

V. THREE NORMATIVE CONCERNS

Up to this point, this Article has described the ways in which local governments enable groups of private actors who are able to overcome collective action problems to cooperate to manage open access, common urban resources. The Article has also situated collective action enabling along the spectrum of public and private governance strategies for the urban commons. What the Article has not done, up to now, is to go beyond describing this form of enabling to evaluating it in purely normative terms.

At the outset, it is important to acknowledge that there are clear economic and community development benefits attendant to collective action enabling. The specter of unsafe or unkept streets, public parks, and other common amenities can drive away (and repel) existing residents, visitors, new development and commercial life from the city. Encouraging collectivities of local, private actors to manage common urban resources when the government cannot do so (at least at a sufficient level) can preserve the social viability of neighborhoods and city life, particularly in times of economic and social instability. Even in times of social and economic stability (and even vibrancy), enabling collective management of a local commons can produce efficiency and innovation in the provision, oversight, and use of those resources. Moreover, there is a convincing empirical link between the provision or existence of certain public goods such as parks, community gardens, and other local amenities provided by these collectivities and the economic value of surrounding property.²⁷² Local residents and property owners thus receive a direct economic payoff on their cooperation with each other in improving the common resources in their neighborhoods.²⁷³

272 This has been referred to as the “proximate principle” to capture the idea that, in the same way that neighborhood goods and amenities are capitalized in the cost of housing in the most exclusive suburban communities, so too are they reflected in the increased value of properties located closest to it in central cities. See John L. Crompton, *The Impact of Parks on Property Values: Empirical Evidence from the Past Two Decades in the United States*, 10 *MANAGING LEISURE* 203, 203 (2005); Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 *REAL EST. ECON.* 241, 241 (2008); Ingrid Gould Ellen et al., *The Impact of Business Improvement Districts on Property Values: Evidence from New York City* 31–32 (Realtors Nat’l Ctr. for Real Estate Research, Working Paper No. 07-01, 2007).

273 Increase in property values, and attendant rents, can also spur gentrification and the inevitable displacement of long-term residents and community members. See Kennedy, *supra* note 215, at 283 (noting the improvements brought about by the Bryant Park BID allowed neighborhood landlords to charge higher rents).

In this Part, however, I identify some of the risks, or costs, of some forms of collective action enabling to which policymakers have not yet attended. The three main concerns articulated in this Part are: The risks of scaling up this form of enabling, the distributional issues inherent in enabling discrete groups of private actors to manage urban commons, and the real threat of ossification when these groups are difficult to disband.

A. *Scale*

Let us return for a moment to Ostrom's groundbreaking study of small scale resource management by local users and examine the question "why is scale important" to these collective efforts. Recall that one of Ostrom's critical insights was that successful collective action efforts involved a community of users who are heavily dependent on the resource for economic returns and exist in an interdependent relationship with one another.²⁷⁴ Under such circumstances, users are strongly motivated to cooperate with one another to govern themselves to obtain joint benefits notwithstanding that each face temptations to free ride or act opportunistically.²⁷⁵ Further, an important aspect of successful collective management is the ability of the users to establish shared norms, police each other, and sanction violators.²⁷⁶ Scale is important, then, because it identifies (and defines) the class of users most economically and socially dependent upon the resource and who thus have the most incentive for collective action. Scale is also very important, as we have seen, to the ability of resource users to cooperate together. As we have seen, scale of the resource and the community are very strongly correlated with the ability of groups to govern themselves through informal norms, and to create and enforce rules for resource allocation.

Scale also importantly constrains the degree of autonomy and control that private actors have over a public resource. It is telling that Ostrom confined her study to geographically small-scale resources. The size of the resource very much influences both its manageability by a collectivity of private actors, but also can dictate how much authority and control the group will need or attempt to seize for itself.²⁷⁷ The larger the resource the more likely it is to be complex, both in terms of its functionality and in terms of the hetero-

²⁷⁴ See OSTROM, *supra* note 5, at 26–27.

²⁷⁵ See *id.* at 26.

²⁷⁶ See *id.* at 22.

²⁷⁷ See GROSS, *supra* note 218, at 179 (noting that smaller BIDs take control of fewer functions).

geneity of user groups it attracts. This complexity may very well dictate a broader range of functions, and discretion, be placed in the hands of user groups in order to effectively manage that resource.

1. Size and Authority

Not much empirical study has been devoted to the collective management of common urban resources; however, at least one study suggests that size matters in how these groups function and the characteristics that these groups possess.²⁷⁸ Jill Gross examined forty-one BIDs in New York City and analyzed them based on their size and the neighborhood context (high vs. low-income) in which they exist.²⁷⁹ Her study found that the largest (“corporate”), medium (“main street”), and smallest (“community”) BIDs each have very distinctive characteristics which largely track their size. Importantly, the function of BIDs vary by size (and hence the variety of services they provided), and those with the widest ranging functions were the large, corporate BIDs.²⁸⁰ Their services range from providing large-scale capital improvements and security to marketing, street maintenance, and social services. These BIDs cover large areas of land, brought in large revenues, and have large boards of directors which include many members with professional expertise (lawyers, developers, and financial experts).²⁸¹ Main Street BIDs, on the other hand, are characterized by a small board of directors, consisting mainly of second generation immigrant property owners with limited formal education, and with much less revenue intake.²⁸² Main Street BIDs’ primary functions focus on marketing and promotion of local businesses with more limited services for security, sanitation, and street maintenance.²⁸³ Community BIDs are the smallest in size, revenue, and scope of services. They primarily focus on the maintenance of the area that they govern—specifically by providing sanitation services—and also engage in sporadic marketing efforts.²⁸⁴

278 *See id.* at 179–80.

279 *See id.* The study analyzed BIDs based on three sizes—largest (Corporate), medium (Main Street), and small (Community)—and based on whether they were situated in high-income areas or low-income areas. *See id.* Within each size, the study examined the revenue, number of businesses, size of businesses, size of board of directors, number of services provided, and geographical size of the district. *See id.*

280 *See id.* at 180.

281 Examples of these types of BIDs (eleven in total) include the Times Square and Grand Central Partnership BIDs. *See id.* at 179.

282 *See id.* at 179–80.

283 *See id.* at 180.

284 *See id.* at 181.

It is perhaps no surprise that much of the controversy around this form of enabling has involved groups that manage a relatively large and complex “commons,” requiring either a wide range of functions and/or, concomitantly, wide discretion in exercising those functions.²⁸⁵ Both the size of the geographic commons managed by certain groups and the type and range of functions required or delegated to the group make it difficult for local authorities to effectively monitor these groups. A distinct danger, identified by Robert Ellickson and others, is the ways in which “insider” group norms designed to maximize group welfare do so at the expense, or exclusion, of non-group members.²⁸⁶ Consider the controversy over the Grand Central BID in New York, which was investigated for using its “social services” function to hire low-wage homeless individuals to go out and harass other homeless individuals from sidewalks, doorways and other public spaces, using violence if necessary.²⁸⁷ Commentators have rightly suggested that the size and wide range of functions assumed by this BID, one of the largest in the country, led to its exclusionary practices.²⁸⁸ Similarly large-scale collective management regimes pose these same risks. The Guardian Angels, while forbidden from carrying weapons, do carry handcuffs and use force when necessary to confront suspected criminals in large swaths of urban areas. Their “citizen patrol” and arrest function can easily cross the line into over-zealous “vigilantism” and the use of illegal force.²⁸⁹ Large park conservancies are also inevitably involved in daily decisions about how urban parks are used and by whom.²⁹⁰

285 This is particularly true when the entity is able to raise large sums of money—such as in the case of large park conservancies and large BIDs. In those cases, the amount of money and steady source of income is an important lever of autonomous decision-making. See Briffault, *supra* note 22, at 441 (“The funds enable BIDs to hire professional staff to plan the future development of the districts, formulate and implement design criteria, and lobby for the districts’ interests with the city government. As a result, BIDs can undertake initiatives that affect the overall appearance and quality of life in their districts even in the absence of the power to directly tax and regulate district residents.”).

286 See ELICKSON, *supra* note 18, at 169; Garnett, *supra* note 142, at 195.

287 See Kennedy, *supra* note 215, at 321–24.

288 See *id.* at 323–24.

289 See Thomas, *supra* note 193, at 3.

290 ROSENZWEIG & BLACKMAR, *supra* note 7, at 519 (citing Central Park Conservancy’s attempts to set a policy for what types of events would occur on the Great Lawn, first proposing to continue opera and symphony concert but not mass concerts and political rallies and then finally recommending, after some pushback, that “efforts should be made to limit gatherings to 100,000 people”).

As we have seen in the examples of collective management regimes in Part III, there is an inverse relationship between the endogenous variables that Ostrom and Ellickson have identified and the degree of central government involvement. At least formally, as I have argued, the government retains its ownership, policymaking and regulatory authority over the resource. Yet, as a practical matter, the size and scale of the resource necessarily influences the degree of responsibility, range of function, and discretion allowed the collective regime. As previously mentioned, the size and complexity of the resource and the range of functions often mirror each other. In these cases, the broad range of functions assumed and the discretion often inherent in exercising those functions raises the specter of significant slippage between the policymaking authority of central authorities and the more limited functions of private actors managing the resource.

2. Size and Accountability

The above examples reveal that there can be real questions about the extent to which the line between the regulatory and policymaking sphere of municipal authorities who formally govern the resource and the managerial sphere exercised by private collectivities managing the resource begins to blur. Avoiding this line blurring might entail nothing more than ratcheting up the oversight and monitoring of these groups, a task that, as the literature suggests, is more challenging in practice than in theory.²⁹¹ In each of the above examples there exists an oversight mechanism in place for local officials and bodies to review the decisions of the group. For the Conservancy, a variety of public bodies have oversight over its decisions and it has limited authority to make policy choices without the assent of city government.²⁹² Large BIDs, too, are subject to significant local government monitoring; representatives of city officials sit on the BID's managing board and their recommendations for significant changes in land use or policy in their districts cannot be implemented without approval by elected city officials.²⁹³ Similarly, the Angels' memorandum of understanding with cities like New York includes training and oversight by

291 See Kennedy, *supra* note 215, at 310–12.

292 ROSENZWEIG & BLACKMAR, *supra* note 7, at 521 (identifying relevant actors including the five community boards adjacent to the park, the Art Commission of New York City, the Landmarks Preservation Commission, and the City Council).

293 See Briffault, *supra* note 22, at 439, 442.

municipal police departments designed to constrain the Angels' autonomy and to limit their citizens' arrest powers.²⁹⁴

In practice, however, it is not at all clear how much attention city officials devote to monitoring these groups. While it is true that private groups formed to manage an urban commons cannot engage in altering the formal rules or policies of the space that they manage, as the previous examples illustrate, they do enjoy tremendous autonomy in managerial decisions, many of which have larger policy implications—e.g., access and use decisions. We simply do not know enough about the degree to which these groups' managerial decision making intrudes into the policymaking domain of local government authority over public and common goods.

Additional empirical research into the functioning of these groups would further refine the model I have sketched here, and perhaps even alleviate the concerns over large scale collective action enabling. Future research might include asking what types of decisions are required for the management of the resource at issue, what type and level of authority is sought to make those decisions, and in what ways a groups' decision making authority is legally and practically constrained.

B. Distribution

When the government relies on private actors to provide or manage local goods and resources, it is taking the risk that, at a minimum, those actors will do so in ways that either create or aggravate inequalities in the distribution of public goods.²⁹⁵ Collective action enabling allows the decentralization and fragmentation of services devoted to managing commons resources, inevitably raising distributional concerns.²⁹⁶ The distributional issue in this context has at least two dimensions.

1. Distribution in Two Dimensions

The first dimension of the distributional concern is that enabling might result in the creation of different tiers of common resource stewardship, depending on the demographics of those who live closest to the resource and/or frequent it the most.²⁹⁷ Another way of stating

294 See Collins, *supra* note 192, at 596.

295 See Hoyt & Gopal-Agge, *supra* note 215, at 953.

296 See *id.*

297 For example, research suggests that special districts are formed in large part out of demand for special or additional services by the most affluent citizens. See McCabe, *supra* note 240, at 126 (stating that the probability of special district creation

the problem is that although local government “enabling” is available to any group of private actors able to overcome free-rider and other collective action obstacles, the scope and success of the management or stewardship effort will depend in no small part on the assets of those individuals involved (as well as their ability to attract additional assets). Park management is a key example of this, as mentioned earlier. Park conservancies are able to raise and dedicate private funds toward the improvement of larger, more prominent city parks while parks and playgrounds in poorer neighborhoods are left underfunded and relatively unattended.²⁹⁸ In a similar vein, “BIDs in low-income neighborhoods have less fiscal and human capital to apply to service provision than do those in high-income neighborhoods.”²⁹⁹ The result is that the BIDs in these neighborhoods provide a very limited range of services, typically that tend to address the most visible aspects of urban decay (e.g., graffiti, sanitation, and sidewalk maintenance) and fall far short of the kind of major capital improvements that characterize BID service in more affluent neighborhoods.

The second dimension of the distributional issue is subtler than the first, but equally as problematic. The more that sublocal communities are able to manage their own commons, and provide for their own public goods, and pay for them directly, the less likely they are to be supportive of citywide services (and taxes) that provide those goods and services to other communities. Residents and users of neighborhoods in which BIDs are perceived to be providing high levels of security and sanitation, citywide patrol teams to be providing adequate levels of security and crime deterrence, and park groups able to maintain and manage their local park, have no real incentive to support this same level of service provided by the municipal government to poorer sections of the city.³⁰⁰ Similarly, when park goers see a pop-

increases with growth in per capital personal income, supporting notion that that more districts are formed as state populations become more affluent).

298 See TAYLOR, *supra* note 177, at 302, 356; Cindi Katz, *Power, Space, and Terror: Social Reproduction and the Public Environment*, in THE POLITICS OF PUBLIC SPACE 105, 105–21 (Setha Low and Neil Smith eds., 2006).

299 See Gross, *supra* note 218, at 184. A large part of the explanation for this is because low-income communities tend to have lower property values than do wealthy communities. See *id.* at 183.

300 For example:

Economist Moshe Adler cites the City's actions during the 1992-1993 fiscal crisis as an example of BIDs' influence on larger City policy. During the crisis, the City fired hundreds of sanitation workers and reduced the number of machine-driven street cleaning days from six to four. Adler charges that as a result of the proliferation of BIDs, “no pressure [was] coming from the city's most influential citizens, and the former street-cleaning schedule was

ular public green space like Central Park in pristine condition, and well managed, they may be less likely to voice their support for greater spending on parks in less heavily trafficked parts of the city.³⁰¹ An appropriate analogy would be to compare the city to a house and the tax-paying voters to a thermostat: When the thermostat registers a great deal of heat emanating from a fireplace in the living room, it automatically reduces the temperature in other parts of the house, leaving them far colder than they should be.³⁰² Less central or popular parts of the city, without the support of wealthy private partners, will suffer from underfunding because of the success of other, more visible areas of the city.

2. Distributing Power

If some groups, or collectivities of local actors, lack the assets or ability to attract sufficient assets to manage complex common resources, one solution might be to expand, or ratchet up, the toolbox of government enabling mechanisms for use by these groups. This toolbox might expand to grant smaller, less resourced groups greater access to funding for large-scale capital improvements in their neighborhoods. Local governments might also play a larger role in assisting less resourced groups to attract resources from other institutional sources, such as private foundations. For example, local government departments or officials could co-sponsor applications for foundation grants (or other private funding) to allow smaller groups to engage in broader service delivery in their neighborhoods and/or to make capital improvements.

In select cases, city (or state) governments might utilize in a very limited fashion, or delegate the limited use of, legal tools such as its eminent domain power, to better enable under-resourced groups seeking to rehabilitate or revitalize neighborhood common areas suffering from widespread urban decay. This strategy obviously carries the risk of abuse, particularly if the use of these tools is not carefully constrained and closely monitored. However, it also has the potential for high payoffs in areas most in need of revitalization.

never restored." Such self-interested pressure from powerful groups could have a devastating impact on poorer sections of the City.

Garodnick, *supra* note 228, at 1763 (2000) (citing Moshe Adler, *Why BID's Are Bad Business*, N.Y. TIMES, Feb. 13, 2000, at CY17) (alterations in original).

301 MARGARET KOHN, *BRAVE NEW NEIGHBORHOODS* 155–57 (2004).

302 I thank my research assistant, Jacob Press, for this excellent analogy.

Consider the case of the Dudley Street Neighborhood Initiative (DSNI),³⁰³ a group of citizens who formed a nonprofit community organization to revitalize their neighborhood, one of the poorest and most desolate in Boston, enabled by the city's delegation of authority to the group to exercise the power of eminent domain.³⁰⁴ After cleaning up many of the vacant lots that littered its neighborhood (a mix of city-owned and privately owned parcels), enabled by various forms of City support,³⁰⁵ DSNI embarked on an ambitious plan to create an "urban village"—consisting of affordable housing, shopping, open green space ("a town common"), and a community center.³⁰⁶ However, one of the major obstacles that faced DSNI in carrying out its plan was that it needed to control the future use of the vacant lots—fifteen acres of vacant lots were owned by the city and fifteen acres were privately owned, most of which had municipal tax liens against them or were in foreclosure.³⁰⁷

DSNI convinced the city to declare a moratorium on the transfer of city-owned vacant lots in the neighborhood.³⁰⁸ The privately owned vacant lots were another matter, however. DSNI decided that foreclosing on each of the scattered individual private properties would be too time consuming and persuaded the city to grant its newly established affiliate Dudley Neighbors Inc. (DNI), status as an "urban redevelopment corporation," with the power to acquire by

303 I am very grateful to Elisia Klinka for research assistance on this case study.

304 See generally PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE* 128–39 (1994) (describing the detailed examination of the Dudley neighborhood in 1973); Antonio Alves et al., *supra* note 166, at 737 (describing the desolate nature of the neighborhood). Neighborhood residents founded DSNI and set up its elected-resident majority board to bring together different stakeholders in the community to address decades of neglect by the local government and a wasteland of vacant lots, which had become a dumping ground for trash and a haven for criminal activity. See MEDOFF & SKLAR, *supra*, at 32.

305 The city of Boston agreed to dedicate funds and material for the resident cleanup of the lots, erect barriers to keep illegal dumpers and criminals out, set up a hotline to report illegal activity, and fully prosecute illegal dumpers. See MEDOFF & SKLAR, *supra* note 304, at 72–74.

306 See *id.* at 105, 117, 128. DSNI had retained its own urban planners with support from a local foundation. See *id.* at 89, 115–17. DSNI also received additional funding from other foundations. See DAC INT'L, INC., *THE DUDLEY STREET NEIGHBORHOOD INITIATIVE REVITALIZATION PLAN 5* (1987), available at <http://www.archive.org/details/dudleystreetneig00daci>; see also *History*, DUDLEY STREET NEIGHBORHOOD INITIATIVE (2008), <http://www.dsni.org/history.shtml> (describing the group's mission and accomplishments, including the use of eminent domain power).

307 See MEDOFF & SKLAR, *supra* note 304, at 117.

308 See *id.* at 90–91.

eminent domain vacant land within the Dudley Triangle.³⁰⁹ Subsequently, DNI was set up as a land trust to acquire the vacant lots and oversee the development of affordable housing,³¹⁰ as well as community facilities and open space,³¹¹ on the land that was formerly constituted of fragmented vacant lots.³¹² DSNI/DNI became the first community group in the nation to win the right of eminent domain.³¹³ With the help of additional private and public funding, including a federal HUD grant (secured with the help of the City),³¹⁴ DSNI/DNI ultimately acquired about twenty-eight of the original thirty acres of vacant land in the Dudley Triangle and has steered the development of hundreds of permanently affordable housing units, six public green common spaces, and two community centers, an urban farm, refurbished schoolyards, and numerous playgrounds.³¹⁵

309 Under Massachusetts law, only the Boston Redevelopment Authority (BRA) or an “urban redevelopment corporation” authorized by the BRA to undertake a [redevelopment project] was authorized to exercise the right of eminent domain. See MASS. GEN. LAWS ch. 121A, § 7A (2011). It was the “ideal taking: one that clearly benefits the affected community while imposing no material burden on residents or businesses” (because no one would be displaced from the vacant lots). See Roberta L. Rubin, *Take and Give*, SHELTERFORCE (Spring 2008), <http://www.shelterforce.org/article/print/215> (discussing the balance required when the eminent domain power is used).

310 See MEDOFF & SKLAR, *supra* note 304, at 119.

311 DSNI received a one million dollar grant from a state agency, and an additional five hundred thousand dollars from the City, to create the Dudley Town Common. See *id.* at 128–29, 153 (noting that the grant from the Massachusetts Department of Environmental Management was quite an achievement because of its rarity, and noting that the grant was later reduced to \$700,000). The Town Common now hosts permanent artwork, farmers’ markets, performances, and green spaces. See Holly Sklar, *No Foreclosures Here*, YES! MAGAZINE (Oct. 31, 2008), <http://www.yesmagazine.org/issues/sustainable-happiness/no-foreclosures-here>.

312 See MEDOFF & SKLAR, *supra* note 304, at 126–27.

313 See *id.* at 119.

314 With the city’s help, DSNI secured a two million dollar loan from the Ford Foundation to purchase the privately owned vacant lots via eminent domain. The city took the “unprecedented action” of designating about \$500,000 worth of city property (the city’s fifteen acres of vacant lots) as collateral to secure the loan. Steve Marantz, *City to Use Own Property as Collateral*, BOS. GLOBE, July 14, 1989, at 18; see also Maureen Mastroieni, *Collaborative and Market-Driven Approaches to Economic Development and Revitalization*, 23 REAL EST. ISSUES 47, 49–50 (2007). After successfully asserting eminent domain over the private vacant lots in the Dudley Triangle, the City of Boston sold the other fifteen acres of city-owned vacant lots to DNI for one dollar. See *id.* at 50.

315 See Brian Ballou, *Saviors of Dudley St.: Residents Work Together To Save Their Neighborhood*, BOS. HERALD, Feb. 27, 2005, at 4–5; Susan Diesenhouse, *Greenhouse Helps Drive Growth in Roxbury: Group’s First Commercial Project Takes Root in Facility to Produce Green Garlic—and Bring Jobs to the Neighborhood*, BOS. GLOBE, May 11, 2005, at C6; Rubin, *supra* note 309.

The Dudley Street example suggests that expanding the toolbox of enabling mechanisms as a way to address distributional concerns has potential under some (and perhaps limited) circumstances. I suggest that there are four aspects of the Dudley Street example that might have made it attractive, and suitable, for the City of Boston to ratchet up its role in enabling the DSNI to rehabilitate and revitalize its neighborhood. The first aspect is that the governance structure of the DSNI was clearly geared toward successful collective action—it was deeply representative/inclusive of the various constituencies who use and depend upon the neighborhood commons, as well as inclusive of other public and private actors who have stakes in the neighborhood revitalization.³¹⁶ The second aspect is that the effort to revitalize the collectively shared, open space areas of the neighborhood is at a scale designed to benefit much of the affected surrounding community while imposing no material burden on any member of the community. The “urban village” that it sought to create by taking over the vacant lots was designed to avoid any loss of home or business in the process.³¹⁷ The third important aspect is that the revitalized “commons” remained a collective asset of the community—not only the town commons, open spaces and community facilities, but also the affordable housing that was built on the land. The vacant lots were acquired by DSNI/DNI as part of a community land trust, held in perpetuity, for the benefit of its community members.³¹⁸ Finally, the

316 DSNI approved a thirty-one member board with sixteen board positions dedicated to community residents from the neighborhood’s four major cultural groups—Black, Cape Verdean, Latino, and White—as a way to “strengthen the collective action and underscore the common stake of all people in rebuilding Dudley.” MEDOFF & SKLAR, *supra* note 304, at 57. The board also contained positions for local non-profit agencies, local community development corporations, local businesses, local religious groups, and one city official and one state official. *See id.* at 58.

317 *See id.* at 105–06 (noting that DSNI was looking to take over lots that were vacant, so that no one lost their home or business in the process). The DSNI focused its revitalization efforts on a 64-acre central, triangle area of the neighborhood (“Dudley Triangle”) because it had the highest concentration of vacant lots as well as the opportunity to encompass benefits for many of the various constituents. *See id.* at 117 (noting that the area was home to 2000 residents who were mostly black, Hispanic, white and Cape Verdean, with about half of the residents living under the poverty line).

318 *See id.* at 158. As for the affordable housing, after leasing its land to developers during construction, DNI would issue long-term 99-year renewable leases to homeowners, so that the community would always own the land underneath the homes people purchased. *See Sustainable and Economic Development, DUDLEY STREET NEIGHBORHOOD INITIATIVE* (2010), http://www.dsni.org/comm_econ_power.shtml; *see also* MEDOFF & SKLAR, *supra* note 304, at 158 (describing the land trust held by DSNI); Rubin, *supra* note 306. Also, through its ninety-nine year ground lease, DNI could

enabling was a key part of the public-private partnership that emerged between the DSNI and the City of Boston in which both, as part of a “memorandum of understanding,” are involved in “every stage of planning for new, city-sponsored projects within the neighborhood.”³¹⁹

C. Ossification

One common characteristic of the enabling relationships between local authorities and collectivities of private actors who manage the urban commons is the existence of agreements that have a limited term.³²⁰ Some examples of these mentioned earlier are sunset clauses for BIDs, park conservancy agreements that expire after a limited period of time, and short term leases for community gardeners.³²¹ In theory, then, local government enabling of private collectivities carries less of a risk of entrenching regulatory standards than traditional land use rules. Unlike zoning and other land use rules, enabling also does not create a collective property right in the commons.

While it is true that government officials in theory can withdraw support at any time from the collectivity or organization managing the resource, as a practical matter this often does not occur. BIDs very rarely dissolve, for instance.³²² Instead, as permitted by state-enabling legislation, BIDs renew and extend their term limits by means of a

require that its properties be used for purposes set forth by the community. See *Sustainable and Economic Development*, *supra*. DNI also established through the lease that homes could only be resold for either 5% per year increase or the rate of inflation, whichever is less. See *id.* Thus, if the residents sell, they will not profit more than the value that the house has appreciated, and any appreciation in land value stays within the community. See *id.* Each homeowner is a voting member of the community land trust and gets to help shape its policies. See *id.*

319 See Rubin, *supra* note 309. This means that the City and DSNI jointly plan and sponsor community meetings for residents to voice concerns “about issues ranging from land-use options and housing needs to traffic, transportation, and physical design.” *Id.* Staff from both the City and DSNI provide visual models and other information to “help community members evaluate the options.” *Id.*

320 See Briffault, *supra* note 22, at 387–89; Central Park Conservancy at a Glance, *supra* note 200.

321 See Briffault, *supra* note 22, at 387–89; Central Park Conservancy at a Glance, *supra* note 200.

322 A New York City BID, for example, can only be dissolved by a City Council resolution or upon written petition of owners of at least fifty one percent of the assessed valuation of benefited real property, and fifty-one percent of the owners of such property. BIDs cannot be dissolved if they retain an outstanding debt, such as bonds or long term loans. See TENANTNET, www.tenant.net/oversight/BID/Gidwy.html (last visited Sep. 25, 2011).

standard reauthorization process.³²³ Agreements with park groups and park conservancies, and leases with community gardeners, are also regularly renewed by local governments. Even when the government decides not to renew an agreement, the expectation that it should can easily morph into a claim that there exists a *de facto*, if limited, property right in the resource that should prevent the government from terminating the arrangement without a strong justification.³²⁴ Even in the absence of a formal agreement, the length of the relationship between the parties and the degree of control that the government has ceded is likely to render it very difficult for the government to disentangle itself from the management relationship.

The presumptive renewal, or continuation, of these arrangements is quite understandable from the local government (legal steward's) point of view. Why would the government want to disturb a management arrangement that has revitalized the commons, maintained it, and perhaps brought in additional sources of revenue (or labor) to sustain it? Nevertheless, the option to terminate or renew is useful, and even critical, from the point of view of building in accountability of the collectivity to the public/public officials. That is, if the management of a collective resource imposes high costs (or externalities) on others, the government can be petitioned to withdraw its support and encouragement from the group and to re-assert its full management and control over the resource. In this way, the local government maintains a degree of accountability to the public for whom the resource is dedicated or held in trust.

At the same time, the longer and more entrenched the group has become, the more difficult it will be for the government to withdraw its support. Such entrenchment raises the danger of ossification that is lurking in the establishment of these collectivities over time. This danger is powerfully characterized by Brigham Daniels as the threat of "commons cartels."³²⁵ As Daniels argues, commons scholars tend to ignore the rigidity that can take hold of institutions created (and sustained) as a solution to the tragedy of the commons. He argues that because commons scholars tend to define successful management of the commons as the establishment of long-enduring institution, it is easy to overlook the ways in which commons management becomes

323 See Hoyt & Gopal-Agge, *supra* note 215, at 949.

324 See Foster, *supra* note 164, at 534–46 (discussing lawsuit brought against community gardeners in New York City to prevent the City from re-claiming the garden spaces for housing development).

325 See Brigham Daniels, *Breaking Commons Cartels* 1 (unpublished manuscript), available at http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/180/Daniels_203301.pdf.txt?sessionid=7B26EE19C3CA9AF02D09589AF2F5139B?sequence=2.

static and commons institutions become rigid in the face of emerging and competing values. Thus,

[t]he very institutions that provided a cure to the tragedy of the commons intentionally favors one commons use. Given what we know about the principles of long-enduring institutions, they work to provide one set of commons users a privileged place at the table. . . . They punish those who challenge the values of incumbent users: credible threats prove credible, and incumbents use them to thrash rivals. Institutions promote cooperation among incumbents: collective action is cheaper for incumbents, and incumbents economize in working together to shore up their holdings and to fend off rivals.³²⁶

The threat of “commons cartels” may be more theoretical than real at this point but it is worth inquiring whether groups that manage an urban commons for a lengthy period of time become ossified in their approaches to that management. This is particularly a risk where the identity of a particular commons has become closely identified with the values and preferences of the particular collectivity that has managed it on a long-term basis. If the answer is yes, then we should inquire whether there exist competing or rival claims to the use of the commons and how the collectivity treats and resolves those claims. As Daniels argues, “[o]ur tendency to focus on one use of the commons at a time sets institutions on a path-dependent course at the outset.”³²⁷

If one of the benefits of allowing collectivities to manage an urban commons is the innovation and flexibility these groups bring to task, then ossification of a management regime poses significant dangers. One danger is that some commons management groups may be resisting the type of change in the use of the commons that is healthy over the long run and that best reflects changes in the way that society (or the community) views the commons.³²⁸ Another danger is that incumbent institutions may develop, and even expand, their “grip” on the commons in ways that work to the advantage of particular commons users and political power brokers.³²⁹ Existing commons management regimes, when confronted with emerging values, should ideally be able to remain flexible by maintaining their core identity as

326 *Id.* at 10.

327 Brigham Daniels, *Emerging Commons and Tragic Institutions*, 37 ENVTL. L. 515, 521 (2007).

328 *See id.*

329 *See id.* (“Rent-seeking, agency capture, and symbolic politics naturally follow, and disenfranchised stakeholders are often marginalized.”).

stewards for the various constituencies that use and depend on the commons, both now and in the future.³³⁰

CONCLUSION

This Article has offered a framework for thinking through the governance challenges that arise in the context of rivalrous, common urban resources. The framework begins with an examination of how an urban commons “tragedy” might unfold in the context of a regulated resource. The concept of regulatory slippage is offered to explain how a formally regulated resource can become increasingly more open and rivalrous over time as a result of a retrenchment in government oversight and/or laxity in the enforcement of use restrictions. The resulting degradation and exploitation of the resource raises anew the governance question. Scholars have proposed governance solutions that involve additional regulation or, alternatively, privatization of the resource. This Article charts and develops a third solution that has taken root in cities across the country. Collective management of common urban resources is not a new phenomenon but it has been largely ignored and left underdeveloped by legal scholars. This Article develops the idea, explores its contours and normative limitations, and examines areas for further scholarly study and policymaking reforms.

330 See Kristin A. Carpenter, Sonia Katyal, & Angela Riley, *In Defense of Property* 118 YALE L.J. 101,147–57 (2009) (describing stewardship in shared resources as “involving the fiduciary duty of care or the duty of loyalty to something that one does not own” and developing the concept of stewardship vis-à-vis cultural property).

