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The City as a Commons

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YALE LAW & POLICY REVIEW

The City as a Commons

*Sheila R. Foster** & *Christian Iaione***

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INTRODUCTION

City space is highly contested space. As rapid urbanization takes hold around much of the world, contestations over city space—how that space is used and for whose benefit—are at the heart of many urban movements and policy debates. Among the most prominent sites of this contestation include efforts to claim vacant or abandoned urban land and structures for affordable housing and community gardening/urban farming in many American cities,¹ the occupation and reclamation of formally public and private cultural institutions as part of the movement for *beni comuni* (“common goods”) in Italy,² and the rise of informal housing settlements on the periphery of many cities around the world.³

1. See *infra* Part I.

2. See *infra* Part I.

3. See *infra* Part I.

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The impetus for much of this contestation is rooted in the neoliberal critique of contemporary urban development; namely the idea that public officials in cities around the world, and in particular “global cities,”⁴ are commodifying and selling to the highest bidders the collective resources of the city.⁵ As Saskia Sassen recently and provocatively queried, “[W]ho owns the city?” in an era of “corporatizing access and control over urban land” and “corporate buying of whole pieces of cities,” which is transforming the “small and/or public” into the “large and private” across so many cities around the world.⁶ As public officials relax local regulations and other rules to accommodate the preferences of powerful economic interests, the poor and socially vulnerable populations are being displaced by an urban development machine largely indifferent to creating cities that are both revitalized and inclusive.⁷

In tandem with the neoliberal critique, there is a powerful intellectual and social movement to reclaim control over decisions about how the city develops and grows and to promote greater access of urban space and resources for all urban inhabitants. First articulated by French philosopher Henri Lefebvre,⁸ the “right to the city” movement has manifested in efforts by progressive urban policymakers around the world to give more power to city inhabitants in shaping urban space.⁹ While the movement has had some policy successes, some worry that it remains unclear what exactly is the “right” to the city and, specifically, the scale and scope of enhanced participation by urban inhabitants and expanded access to urban resources.¹⁰ Moreover, to the extent that the “right”

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4. SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2001).
 5. These collective resources include not only the land of the city and its open spaces and infrastructure, but also its culture and the array of goods and services that it provides its inhabitants. *See generally* DAVID HARVEY, *REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION* (2013).
 6. Saskia Sassen, *Who Owns our Cities and Why this Urban Takeover Should Concern Us All*, *GUARDIAN* (Nov. 24, 2015), <http://www.theguardian.com/cities/2015/nov/24/who-owns-our-cities-and-why-this-urban-takeover-should-concern-us-all>.
 7. In line with the much heralded theory advanced by Charles Tiebout, even struggling cities find themselves competing for mobile residents and mobile capital, skewing their policies toward attracting the “creative class”—high knowledge, entrepreneurial residents attracted to a host of urban amenities and promoting business-friendly, growth oriented policies. *See generally* Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 *U.C. DAVIS L. REV.* 63 (2013); Richard Schragger, *Mobile Capital, Local Economic Regulation, and the Democratic City*, 123 *HARV. L. REV.* 482 (2009).
 8. Henri Lefebvre, *The Right to City*, in *WRITINGS ON CITIES* (1996), originally published as HENRI LEFEBVRE, *LE DROIT A LA VILLE* (Anthropos 1968).
 9. *See, e.g.*, EDWARD W. SOJA, *SEEKING SPATIAL JUSTICE* (2010); David Harvey, *Right to the City*, 27 *INT’L J. URB. REGIONAL RES.* 939 (2003).
 10. What seems to matter most to advocates, however, is that the “right” be viewed as a collective and not individual right—that urban inhabitants have increased voice

to the city is dependent on a rights-endowing government, local or national, the odds again are quite low. Our current era is one of rights-entrenching and not rights-enhancing states, especially when it involves the protection of socially and economically vulnerable populations.

Increasingly, progressive urban reformers are looking beyond the state (and for that matter the city) to sublocal forms of resistance, and cooperation, to make claims on urban resources and city space as a “commons.” These claims consist not simply of the assertion of a “right” to a particular resource; rather, they assert the existence of a common stake or common interest in resources shared with other urban inhabitants as a way of resisting the privatization and/or commodification of those resources.¹¹ In other words, the language of the “commons” is being invoked to lay claim to, and protect against the threat of “enclosure” by economic elites, a host of urban resources and goods which might otherwise be more widely shared by a broader class of city inhabitants.¹²

in local decision making processes and exercise greater control over the forces (economic, social and political) shaping city space. See Mark Purcell, *Excavating Lefebvre: The Right to the City and its Urban Politics of the Inhabitant*, 58 GEO. L.J. 99, 102 (2002) (stating that Lefebvre is clear that the decision making role of *citidans*—urban inhabitants—must be *central*, but that he is not explicit about what that centrality would mean, nor does he say clearly that decisions that produce urban space should be made entirely by inhabitants). Some would even include users of the city, in addition to its inhabitants, as part of the class of *citidans* who would hold this right. See WORLD URBAN FORUM, PROPOSED WORLD CHARTER ON RIGHT TO THE CITY (2004), http://portal.unesco.org/shs/en/files/8218/112653091412005_-_World_Charter_Right_to_City_May_051.doc/2005+-+World+Charter+Right+to+City+May+051.doc (web download); EUROPEAN COUNCIL OF TOWN PLANNERS, THE NEW CHARTER OF ATHENS (2003), <http://www.ectp-ceu.eu/images/stories/download/charter2003.pdf>. The “right to the city” has also been incorporated into Brazil’s Constitution and City Statute. See C.F. arts. 182-183 (Braz.); E.CID., Lei No. 10.257, de 10 de Julho de 2001, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 11.7.2001 (Braz.).

11. See, e.g., DAVID BOLLIER, THINK LIKE A COMMONER: A SHORT INTRODUCTION TO THE LIFE OF THE COMMONS 55-64 (2014); HARVEY, *supra* note 5, at 67-75; Dan Webb, *Urban Common Property: Notes Toward a Political Theory of the City*, 17 RADICAL PHIL. REV. 371 (2014).
12. See Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor*, 17 SOC. & LEGAL STUD. 311, 315-26 (2008) (arguing that the poor may have a legitimate property interest in a department store or other land use in their community that is predicated on use, occupation and domicile); Patrick Bresnihan & Michael Byrne, *Escape Into the City: Everyday Practices of Commoning and the Production of Urban Space in Dublin*, 47 ANTIPODE 36, 42 (2015) (describing the creation of “independent spaces” outside of market and city control for a range of noncommercial activities, events and forms of social life “excluded by high rents and over-regulation”); Amanda Huron, *Working with Strangers in Saturated Space: Reclaiming and Maintaining the Urban Commons*, 47 ANTIPODE 963 (2015) (theorizing limited equity housing cooperatives as a commons).

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What we are interested in is the potential for the commons to provide a framework and set of tools to open up the possibility of more inclusive and equitable forms of “city-making.”¹³ The commons has the potential to highlight the question of how cities govern or manage resources to which city inhabitants can lay claim to as common goods, without privatizing them or exercising monopolistic public regulatory control over them. Yet, the “urban commons” remains under-theorized, or at least incompletely theorized, despite its appeal to scholars from multiple disciplines. Although the literature on natural resource “commons” and “common pool resources” is voluminous, it remains a challenge to transpose its insights into the urban context in a way that captures the complexity of the “urban”—the way that density of an urban area, the proximity of its inhabitants, and the diversity of users interact with a host of tangible and intangible resources in cities and metropolitan areas.¹⁴

The “commons,” of course, has a long historical and intellectual lineage ranging from the enclosure movement in England,¹⁵ to Garret Hardin’s famous *Tragedy of the Commons* parable,¹⁶ to Elinor Ostrom’s Nobel prize-winning work on governing common pool resources.¹⁷ More recently, scholars across an array of specialties have conceptualized and articulated new kinds of commons, beyond those recognized in the traditional fields of property and environmental law. These “new” commons include knowledge commons, cultural commons, infrastructure commons, and neighborhood commons, among others.¹⁸ Like other newer forms of commons, the emerging literature on the urban commons must endeavor to conceptualize, identify, mark the boundaries of, and articulate the implications of its framework for different kinds of resources at different scales in various urban contexts.

As an initial matter, we contend that any articulation of the urban commons needs to be grounded in a theory of property, or at least a theory about

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13. GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (2001).
 14. The most recent literature on the urban commons is beginning to recognize this complexity. See generally *URBAN COMMONS: MOVING BEYOND STATE AND MARKET* (Mary Dellenbaugh et al. eds., 2015); *URBAN COMMONS: RETHINKING THE CITY* (Christian Borch & Martin Kornberger eds., 2015).
 15. See, e.g., PETER LINEBAUGH, *THE MAGNA CARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL* (2008); TINE DE MOOR, *THE DILEMMA OF THE COMMONERS: UNDERSTANDING THE USE OF COMMON-POOL RESOURCES IN LONG-TERM PERSPECTIVE* (2015).
 16. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243, 1244 (1968).
 17. ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1990).
 18. Charlotte Hess, *Mapping the New Commons* 5 (Working Paper, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356835 (reviewing the vast literature and attempting to cohere similarities in the use and articulation of the commons across fields).

the character of particular urban resources in relationship to other social goods, to other urban inhabitants, and to the state.¹⁹ This is especially necessary given the centrality of property law in resource allocation decisions that affect owners, non-owners and the community as a whole.²⁰ As David Super has poignantly written, property law has an important role in addressing widespread economic inequality by protecting those goods most essential to the well-being of a broad swath of society, rather than just protecting the goods that are disproportionately held by the wealthy.²¹ As long as large segments of the population lack the security that property rights provide, he argues, many social problems will remain quite intractable.²² Although not invoking the utility of the commons, his poignant call for property law's centrality in supporting the "wealth" of the poor is consistent with progressive urban reformers and scholars' invocation of the commons on behalf of city inhabitants subject to the dispossession and displacement that inevitably result from unfettered capital accumulation.²³

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19. Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Communities*, 10 THEORETICAL INQUIRIES IN L. 127, 128 (2009) ("[S]ystems of property have as their subject matter the allocation among community members of rights and duties with respect to resources that human beings need in order to survive and flourish" and thus "whenever we discuss property, we are unavoidably discussing the architecture of community and of the individual's place within it.").
 20. *Id.* at 128; JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 32 (1988) (describing the problem of allocation as the central concern of property law).
 21. David Super, *A New, New Property*, 113 COLUM. L. REV. 1773 (2013). His suggestion is that longstanding concepts from property can be applied to recognize and protect the most important assets of low-income and other vulnerable people, most of which are relational rather than tangible assets. *Id.* at 1800, 1821-25 (arguing in part for property law to honor and protect reliance interests in certain benefits and goods, per Charles Reich's classic thesis on the subject, and relational interests in community and social ties of low-income and vulnerable populations subject to dispossession and dislocation); see also Sheila Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 NOTRE DAME L. REV. 527 (2006).
 22. As he argues, "broader access to the security that comes with property rights could go a long way toward addressing many of this country's most salient said problems . . . security that allows [low-income and low-asset people] to make the most advantageous use of those resources they have." Super, *supra* note 21, at 1792-93.
 23. See, e.g., Blomley, *supra* note 12, at 315-26 (arguing that the poor may have a legitimate property interest in a department store or other land use in their community that is predicated on use, occupation and domicile). The roots of progressive reformers' commons analysis is traceable to the work of Michael Hardt and Anthony Negri, who refer to the "common" (rejecting the term "commons" as a reference to "pre-capitalist shared spaces that were destroyed by the advent of private property") as the product of shared efforts by city inhabitants. Cities are, as they argue, "to the multitude what the factory was to the industrial working class"; in other words, it is the "factory for the production of

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Progressive urban scholars do acknowledge the necessity of a theory of property for the utility of an urban commons framework, even if that framework is deployed in the service of a political movement rather than as a legal tool.²⁴ Nevertheless, these scholars have neglected to develop the commons as a property concept or to engage the quite significant legal scholarship on the commons.²⁵ To be fair, the legal literature on the commons is ideologically and theoretically far from where these progressive scholars begin and end their analysis of the urban commons. Legal scholars have tended to hew very closely to neo-classical economic assumptions when theorizing the issue of the commons and related property concepts.²⁶ Even those legal scholars, including these authors, who have taken a stab at theorizing the urban commons, do so through the analytical lens of Hardin's *Tragedy*, which in much of legal literature is interpreted as a story about suboptimal results from the cumulative actions of rational actors.²⁷ That is, legal scholars have taken as the starting point the idea that the commons is an unrestricted and unregulated open access resource which allows uncoordinated actors to overconsume or overexploit the resource and then discuss solutions to avoid those tragic outcomes.²⁸

In this Article, we offer a more articulated and pluralistic account of the urban commons than currently exists in legal scholarship. In some instances, the characteristic of the resource under certain conditions mimics the conventional characteristics of what legal scholars and Elinor Ostrom refer to as a "common

the common," a means of producing common wealth. MICHAEL HARDT & ANTHONY NEGRI, *COMMONWEALTH* 250 (2009).

24. See e.g. Blomley, *supra* note 12, at 325-26 ("[A]lthough there are many potential problems with using a language of property . . . it can provide a powerful, extant, political register for naming, blaming and claiming;" also noting that property rights "for too long have been the exclusive domain of the Right, configured in restrictive and antisocial ways").
25. This is not to say that they do not quote legal scholars. They cite to Joseph Singer's work on the reliance interest and property rights and other scholars, but not to scholarship on the commons. See, e.g., Blomley, *supra* note 12, at 325-26.
26. See, e.g., Michael Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998); Henry Smith, *Semicommon Property Rights and Scattering in Open Fields*, 29 J. LEGAL STUD. 131 (2000); Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 913-14 (2004).
27. See, e.g., Fennell, *supra* note 26, 919-22 (2004) (describing Hardin's tragedy as one in which users consume the resources beyond the point that they produce marginal benefits for anyone).
28. See Lee Anne Fennell, *Agglomerama*, 2014 B.Y.U. L. REV. 1373 (2015); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57, 60 (2011); Nicole Stelle Garnett, *Managing the Urban Commons*, 160 U. PA. L. REV. 1995 (2012); Christian Iaione, *The Tragedy of Urban Roads: Saving Cities from Choking, Calling on Citizens to Combat Climate Change*, 37 FORDHAM URB. L.J. 889 (2009).

pool resource.”²⁹ That is, the difficulty and cost of excluding competing users or uses of the resource render it an open access resource vulnerable to the tragic conditions of rivalry, overexploitation, and degradation. Under other circumstances, we argue, particularly for some property or urban goods “in transition” from private or public ownership to some future use (public or private), the commons is less a *description* of the resource and its characteristics and more of a *normative claim* to the resource.³⁰ In these situations, the claim is to open up (or to re-open) access to a good—i.e., to recognize the community’s right to access and to use a resource which might otherwise be under exclusive private or public control—on account of the social value or utility that such access would generate or produce for the community.

This pluralistic conception of the commons also captures the ways that we can conceive of the city *itself* as a commons. From the descriptive framing of the commons, the city is an open access good subject to the same types of rivalry, or contestation, and congestion that needs to be managed to avoid the kinds of problems or tragedies that beset any other commons. Moreover, the ways in which progressive urban reformers and movements are making claims on the city resonates most strongly with the normative conception of the commons that we offer. In line with this conception, or claim, the city *is* a commons in the sense that it is a shared resource that belongs to all of its inhabitants. As such, the commons claim is importantly aligned with the idea behind the “right to the city”—the right to be part of the creation of the city, the right to be part of the decisionmaking processes shaping the lives of city inhabitants, and the power of inhabitants to shape decisions about the collective resource in which we all have a stake.³¹

The commons framework, we argue, can provide a bridge between the normative claim to the city, and its resources, and the way in which those resources and the city itself is governed. Recognizing that there are many tangible and intangible resources in the city in which many users and other actors have a stake, or claim, the question that this Article asks is: what are the possibilities of bringing more collaborative governance tools to decisions about how city space and common goods are used, who has access to them, and how they are shared among a diverse urban population?

The analytical traction offered by invoking the literature on the commons to think through resource allocation problems is the window that it offers into

29. She defined a common pool resource as natural or manmade resource system “that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining the joint benefits from its use.” Ostrom, *supra* note 17, at 30. That is, the resource is characterized by non-excludability and rivalry. See *id.* Note also that she rejected Hardin’s conceptualization of the commons, distinguishing his scenario as an “open access” resource with no boundaries, distinct from her conception of the common pool resource.

30. See *infra* Part I.C.

31. See, e.g., Purcell, *supra* note 10.

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questions of management and control over those resources. Hardin famously postulated that threats of degradation and destruction of the commons give rise to either a system of centralized public regulation or the imposition of private property rights in order to avoid the “tragedy.”³² Ostrom’s groundbreaking work, on the other hand, demonstrated that there are options for commons management that are neither exclusively public nor exclusively private. Ostrom identified groups of users who were able to cooperate to create and enforce rules for using and managing natural resources—such as grazing land, fisheries, forests and irrigation waters—using “rich mixtures of public and private instrumentalities.”³³

In previous work, we identified a number of small- and large-scale urban resources—neighborhood streets, parks, gardens, open space, among other goods—which are similarly being collaboratively managed by groups of heterogeneous users, often with minimal involvement by the state or the city.³⁴ Some examples that we have analyzed in previous work include community gardeners, business improvement districts (BIDs) and community improvement districts (CIDs), neighborhood park groups and park conservancies, and neighborhood foot patrols.³⁵ The emergence of these user-managed, but not user-owned, resources, we think, represent not only a new way of managing urban commons but indeed a democratic innovation for how we distribute and manage common urban assets.³⁶

In this Article, we tease out from these examples (and others) a set of democratic design principles that can be replicated to manage or govern a range of shared urban goods and resources. These principles—horizontal subsidiarity, collaboration, and polycentrism—reorient public authorities away from a monopoly position over the use and management of common assets and toward a shared, collaborative governance approach. In other words, the Leviathan state

32. Hardin, *supra* note 16, at 1245-47.

33. Ostrom, *supra* note 17, at 182.

34. See Foster, *supra* note 28, at 91-93; see also Christian Iaione, *Local Public Entrepreneurship and Judicial Intervention in a Euro-American and Global Perspective*, 7 WASH. U. GLOBAL STUD. L. REV. 215 (2007); Iaione, *supra* note 28.

35. See Foster, *supra* note 28 (describing BIDs, community gardens, foot patrols, neighborhood park groups, and park conservancies as institutions that manage or govern common urban resources).

36. As Anna di Robilant has argued, our conceptions of property are constantly changing and many new forms of property involve and require mechanisms of democratic and deliberative governance structures to sustain them. Anna di Robilant, *Property and Democratic Deliberation: The Numerus Clausus Principle and Democratic Experimentalism in Property Law*, 62 AM. J. COMP. L. 367, 367 (2014) (“[W]e have come to believe that, for some critical resources that involve public interests, use and management decisions should be made not by a single owner, whether public or private, but through a process that is democratic and deliberative.”).

gradually becomes what we call the facilitator, or enabling, state. The governance regime for shared urban resources becomes one without a dominant center but instead one in which all actors who have a stake in the commons are part of an autonomous center of decision making as co-partners, or co-collaborators, coordinated and enabled by the public authority.

Similarly, by thinking of the city itself as a commons, we might look beyond the reigning public regulatory regime in most cities to more collaborative and polycentric governance tools capable of empowering and including a broader swath of urban residents in decisions about resource access and distribution in the city. Most cities around the world have a system of land use laws (the public regulatory option that Hardin proposed as one solution) that manage city space and its resources to avoid conventionally tragic outcomes such as negative spillovers from incompatible land uses.³⁷ There is healthy skepticism, however, about the effectiveness of the current regulatory regime to navigate the very urban politics of which progressive reformers complain,³⁸ particularly the hold that the economic “growth machine”³⁹ seems to have on urban development and local officials.⁴⁰

In the last part of the Article, we begin to muse about what it might look like to scale up from the individual resource to the city level the democratic design principles that already characterize existing urban commons management structures.⁴¹ We conclude by proposing a new governance model—“urban collaborative governance”—for managing the city as a commons. This model re-situates the city as an enabler and facilitator of collaborative decision making structure(s) throughout the city, and attends to questions of political, social and economic inequality in cities. We then explore two innovations in city governance—the “sharing city” and the “collaborative city”—which embody many of the principles, or pillars, of our urban collaborative governance model.

37. See *infra* Part II.A.

38. See Richard C. Schragger, *Is a Progressive City Possible? Reviving Urban Liberalism for the Twenty-First Century*, 7 HARV. L. & POL'Y REV. 231 (2013) (identifying impediments, including a progrowth ideology that continues to dominate city politics, a federal political structure that weakens cities, and cities' general estrangement from mainstream American politics.).

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

40. For a contrary view, expressing doubt that many cities look like growth machines, see Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014) (providing results of an empirical study of over 200,000 lots in New York City that were considered for rezoning, demonstrating that homevoters, and not business and real estate interests, are more powerful in urban land use decisions than scholars, policymakers and judges have assumed).

41. We anticipate a much more in-depth, book treatment of this link in the near future.

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In Part I of the Article, we identify and analyze the variety of commons or common pool resources in the urban context. In Part II we examine some areas of property and land use law that may prove important tools for claiming, protecting and managing urban common pool resources. In Part III we explore and suggest some principles, institutional tools and mechanisms that foster and sustain cooperative efforts to govern urban common resources. Part IV explores what it might look like to scale up these principles to govern the city itself as a commons to promote more inclusive forms of decision making and more equitable distribution of these resources.

I. THE COMMONS AND THE CITY

In this Part, we offer a pluralistic conception of the urban commons, identifying the existence of, and potential for, different commons at different scales in the urban environment. We start by considering some of the conceptual distinctions that legal scholars have offered for understanding the characteristics of a commons. These distinctions matter not only for analytical clarity, but also because they tell us something about the nature of the challenges that such certain goods and resources face and the necessity for different kinds of legal protections and governance solutions.

Building on these distinctions, we then explore the ways in which different kinds of urban resources can be considered a commons, or a common resource. First, we identify “raw” and vacant urban land as a commons; second, a variety of open spaces and infrastructure (streets, roads) in cities can constitute a commons; finally, we examine the claim that some abandoned or underutilized public and private structures and buildings in the city should constitute a commons. Some of these resources, under certain conditions, mimic the conventional characteristics of an open access commons—subject to rivalry and overconsumption or degradation—and giving rise to classic commons management and governance dilemmas. For other resources, the commons claim is intended to open up access of the resource in order to produce other common goods or to enhance the social utility of the asset for a broader class of urban inhabitants.

A. *Conceptualizing the Commons*

Garrett Hardin’s *Tragedy of the Commons* unfolds in the context of a quintessential open access commons—an open pasture in which each herdsman is motivated by self-interest to continue adding cattle until the combined actions of the herdsmen results in overgrazing, depleting the shared resource for all herdsmen.⁴² The open access commons thus has as its baseline a resource in which use is unrestricted or unmanaged, and which allows uncoordinated ac-

42. See Hardin, *supra* note 16, 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.”).

tors to overuse or overexploit the resource.⁴³ 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.⁴⁴

Pivoting off of Hardin's insights, legal scholars and economists distinguish between "open access" and "limited-access" commons, on the one hand, and between public goods and common goods, on the other hand.⁴⁵ Public goods (e.g. highways, transportation systems, public schools) are resources that, although open access due to their "public nature," do not present the problems of traditional commons because one user's share or consumption of the good does not rival, or subtract from, another user's.⁴⁶ Moreover, even when public goods such as infrastructure become partially rivalrous, the government or private provider bears the responsibility of maintaining sufficient capacity and maintaining the good as an open access one, usually on a common carrier basis.⁴⁷

Although certain forms of private property are held "in common" by a collection of individuals and may include shared common space for the collection of rights-holders (e.g. a gated community or a condominium complex), in most respects this property follows the logic of and operates like private property.⁴⁸ These and other "limited-access" common interest communities may look like traditional "commons on the inside" for those who have access through owner-

43. Garrett Hardin, *The Tragedy of the Unmanaged Commons*, 9 TRENDS IN ECOLOGY & EVOLUTION 199, 199 (1994) ("[A]ll exploiters suffer in an unmanaged common.").

44. See Hardin, *supra* note 16, 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).

45. See, e.g., Lawrence B. Solum, *Questioning Cultural Commons*, 95 CORNELL L. REV. 817, 821-22 (2010). Further distinctions are made between toll goods, club goods, public goods, and common pool goods. *Id.* at 823-24; see also OSTROM, *supra* note 17, at 48 (distinguishing between limited and open access commons, the former involving those resources typically operating pursuant to a set of explicit or implicit usage and membership constraints).

46. Solum, *supra* note 45, at 822.

47. Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917, 936-37 (2005).

48. In exchange for their association dues, owners in these common interest communities have access to common facilities, such as roads and recreational areas, and to private services, such as neighborhood security, trash collection, street maintenance, and lighting. The rules of the community can be highly restrictive and are administered by a private residential government elected by the owners. Often these communities are reluctant to pay for public goods outside of themselves and, some would argue, contribute to the privatization of urban space (and enclosure of the urban commons). See generally EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF PRIVATE RESIDENTIAL GOVERNMENTS* (1996).

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ship or usage rights in the community, but very much operate like “[private] property on the outside” in that these communities are endowed with the right to exclude non-owners from their shared spaces or resources.⁴⁹ Limited-access commons are able to avoid tragic outcomes because they operate through a set of explicit or implicit usage and membership constraints designed to protect against overconsumption and exploitation.⁵⁰ On the other hand, truly open access resources, like Hardin’s pasture, in which exclusion is impossible or costly, are vulnerable to the tendency toward rivalry, exploitation and degradation or exhaustion of the resources.⁵¹

Another conception of the commons that appears in the legal literature, and that does not depend on subtractability or rivalry, or “tragedy,” is important for an urban commons analysis. As Carol Rose has written, there are some open-access resources, particularly land, in which increased use does not create rivalry but rather enhanced utility or value for the public, such that these resources become essential or highly functional resources for city inhabitants.⁵² One example Rose offers is the customary right claimed by some communities to hold periodic dances, a custom held over a landowner’s objections, and in which each added dancer brings “new opportunities to vary partners and share the excitement.”⁵³ In this and similar scenarios, the “comedy” of the commons is marked not by the impulse to rival each other to consume the good but instead by the impulse to get more of the public to participate (e.g. “the more the merrier”), thus “reinforce[ing] the solidarity and well-being of the whole community” and enhancing the value of the resource and the activity taking place within it.⁵⁴

Rose found that some British courts considered these resources “inherently public property,” on the basis of the enhanced value that public use generated, and vested in the public the right to use property otherwise subject to exclusive

49. Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 155 (1988).

50. This is illustrated by Elinor Ostrom’s groundbreaking work on the management of natural resources by groups of users who set rules of membership and oversee usage of the resource. See OSTROM, *supra* note 17.

51. Fennell, *supra* note 26, at 913-14.

52. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986) (asserting that the public’s custom of dancing or carousing in a particular place, like the habit of traveling on certain roads, makes various lands essential to the public; by these customs the public communicates the value of certain resources to the community).

53. *Id.* at 767.

54. *Id.* at 767-68, 770 (“In an odd Lockeanism, the public *deserved* access to these properties, because ‘publicness,’ nonexclusive open access, created their highest value.”).

private control.⁵⁵ These courts considered the customary use of the resource by the public a signal of the special social value or emotional investment for the community,⁵⁶ such that the more individuals engaged or participated in the activity the more valuable it became for that community.⁵⁷ As she points out, this vesting of property rights in the “unorganized public” rather than in a “governmentally-organized public” departs strikingly from the neo-classical economic view of the commons.⁵⁸ These cases also suggest, she argues, the means by which a commons may be self-managed by groups of the public as an alternative to exclusive ownership by either individuals or exclusive management by governments.⁵⁹

These two ideas of the commons—one based on the inevitable rivalry or subtractability of an open access resource, and the other based on the inherent public value of an open access resource (even if privately held) customarily utilized in ways that suggest it is an essential or necessary one for the community of users—informs but does not limit our analysis below of different kinds of urban commons. In the next Part, we take the insights from these different conceptions of the commons and expand them to capture urban commons at different scales and the idea that the city itself is a common resource.

B. City Space as a Commons

Before the city, there was the land.

- William Cronon⁶⁰

In his groundbreaking history of the development of Chicago in the 19th century, William Cronon recounts how Chicago was formed out of a city-less landscape, with its own “complex set of natural markers,” by people who migrated there and created the urban landscape through cultural and economic exchanges. “By using the landscape, giving names to it, and calling it home,

55. *Id.* (describing British cases from the early nineteenth and twentieth centuries in which, for example, public use had capacity to expand human social interaction for members of “an otherwise atomized society”); *see also* Frischmann, *supra* note 47, at 926-27 (noting that open access to infrastructure goods is often legally mandated because infrastructure goods are essential to the consumption or production of other goods).

56. Rose, *supra* note 52, at 711, 721 (noting that the custom must have existed for a long time and had to be well-defined and reasonable).

57. *Id.* at 767-68 (describing this as generating positive externalities or spillovers for other members of the public).

58. *Id.* at 711 (also pointing out that these property rights claims lacked the exclusivity that normally accompanies individual property rights entitlements).

59. *Id.*

60. WILLIAM CRONON, NATURE’S METROPOLIS: CHICAGO AND THE GREAT WEST 23 (1991).

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people selected the features that mattered most to them and drew their mental maps accordingly. Once they labeled those maps in a particular way . . . natural and cultural landscapes began to shade into and reshape one another.”⁶¹ In this way, great cities are constructed, shaped, and re-shaped by the inhabitants that are drawn to them and the interactions among them. Like Hardin’s open access field, however, there is also the potential for tragedy resulting from congestion and overconsumption of urban land.

1. Urban Land as a Common Pool Resource

As one commentator succinctly explains, “the city analog to placing an additional cow on the commons is the decision to locate one’s firm or household, along with the privately owned structure that contains it, in a particular position within an urban area.”⁶² Congestion and overconsumption of city space can quickly result in rivalrous conditions in which one person’s use of that space subtracts from the benefits of that space for others. The classic example of rivalry is the creation of negative externalities resulting from locating a particular land use in close proximity to other land uses—for example, where a polluting factory is placed next to a home. As in Hardin’s open pasture, absent a system that allocates use rights, it is 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. As he argued, 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.”⁶³

In most places in the world, threat of tragedy—the urban equivalent of overgrazing cows in Hardin’s example—from these individual choices are addressed through land use rules which control for consumption of city land and negative externalities. Zoning regulations manage much of city space like a commons, controlling density, height and bulk and by separating (or excluding) incompatible land uses as a way of limiting the impacts on the urban environment more generally and on the space inhabited by other users of the commons. Land use regulations are also aimed in large part at controlling and managing a variety of tangible and intangible aspects of the urban environment in which urban residents share a common stake—e.g. shared open spaces, infrastructure, local amenities, and the quality of the physical environment (e.g., air, water, noise levels). In this way, land use regulation is designed to avoid the potential overconsumption of urban space and also reduce (although by no means avoid) potential rivalry in the use of urban space.

61. *Id.* at 25.

62. As she further explains, “[s]uch structures and their operations, like grazing cattles, draw sustenance from, and visit impacts upon, the surrounding community.” Fennell, *supra* note 28, at 1382.

63. Hardin, *supra* note 16, at 1244.

In places without highly regulated systems for land management we can see very clearly the kind of modern day tragedy: where open land is available, including here in the United States, raw urban (and rural) land is literally “up for grabs” for squatters, land speculators, and others who want to subdivide and sell the land (sometimes legally, sometimes illegally) to new settlers.⁶⁴ Informal housing settlements, both in the developing and developed world, exist in uninhabited (and hence unregulated) urban areas, often at the fringe of growing cities, where poor inhabitants occupy land (either through squatting or purchasing) and construct homes on that land. In the absence of building codes and other land use regulations residents often live without water or sewage lines, sidewalks or paved roads, drainage or flood control, creating health and safety risk throughout these communities and to neighboring communities.⁶⁵

This urban self-help, or urban informality, is, in part, a rational response to the scarcity of urban land and the very high entry barriers to formal housing markets.⁶⁶ Urban land is being quickly consumed and its availability is slowly disappearing, raising many of the questions of commons management and governance that beset other unregulated open access resources.⁶⁷ As importantly, urban land is being developed in unsustainable ways and in a manner that places at risk of degradation many other parts of the urban metropolitan commons. These settlements place additional, unaccounted for demands on anarchic traffic patterns and collapsing infrastructure in the metropolitan areas of which they are apart.⁶⁸ The cost of this pattern of informal development—a patchwork of market rate housing in the center city and substandard housing settle-

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64. As Jane Larson argues: “Most colonia settlements are extra-legal rather than illegal. When residents and developers created existing colonias, subdivision and sale of rural land for residential construction without provision of basic infrastructure or access to public services was lawful, and no building codes set housing standards. Yet where the state fails to regulate activities that in other settings are regulated according to accepted patterns, a kind of informality develops, albeit one built on legal and material nonconformity rather than illegality.” Jane E. Larson, *Informality, Illegality and Inequality*, 20 YALE L. & POL’Y REV. 137, 140 (2002); see also Jane E. Larson, *Free Markets Deep in the Heart of Texas*, 84 GEO. L.J. 179 (1995).
65. See Esther Sullivan & Carlos Olmedo, *Informality on the Urban Periphery: Housing Conditions and Self-Help Strategies in Texas Informal Subdivisions*, 52 URB. STUD. 1037 (2015).
66. In part it is also a predictable result of an “economic gravity model of urban development, in which exclusionary zoning interacts with cities’ magnetic pull on wage earners to generate unregulated, peripheral development for low-income families.” Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1099 (2008).
67. See, e.g., Sheila R. Foster, *Urban Informality as a Commons Dilemma*, 40 U. MIAMI INTER-AM. L. REV. 301 (2009).
68. See, e.g., MIKE DAVIS, *PLANET OF SLUMS* 128-29 (2006) (analyzing slum ecology); See also generally ROBERT NEUWIRTH, *SHADOW CITIES: A BILLION SQUATTERS, A NEW URBAN WORLD* (2005).

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ments on the periphery—is but one version of the tragedy of the urban commons.

2. Open Space and Urban Agglomeration

In addition to urban land itself as a commons, much of the infrastructure of the city is a commons. These open access goods—such as the streets, plazas, and parks draw to them the “unorganized public”⁶⁹ and are places where proximity breeds interaction among city inhabitants. It is often the character of these open spaces and the interaction between city inhabitants that create, or at least substantially add to, the culture and “vibe” of a city.

As Lee Fennell has written, urban “interaction space”⁷⁰ becomes the common pool resource that renders public spaces so valuable. In other words, interaction space facilitates a host of other goods that are made possible by the non-excludability of the space and, ironically, from its potential for congestion. Those goods include knowledge exchange, social capital accumulation, and various other agglomeration benefits that accrue to individuals in close proximity to one another. Many scholars couch these benefits in economic terms, as the “positive externalities” that can result from urban proximity and density.⁷¹ Capturing the positive gains of urban “interaction space” is in large part what draws commoners to public open spaces, and is also what in turn gives these spaces value.

On a macro level, urban agglomeration economists argue that one of the main reasons individuals move to cities is to capitalize on the concentration, or agglomeration, of others from whom they can learn and with whom they can interact.⁷² As such, open access interaction spaces have value as an urban amenity that adds to the attractiveness of cities, particular those that seek to draw to them what urban theorist Richard Florida has termed the “creative class”—a category that includes the well-educated and others with particular skills and

69. See generally Rose, *supra* note 52 (describing the “unorganized public” as users comprised of an indefinite and open-ended class of persons).

70. Fennell, *supra* note 28, at 1376-77 (using the term a bit more broadly to mean the place where all economic actors, firms and households choose to locate and choose to access a composite of urban goods).

71. *Id.* at 1373.

72. According to this view, individuals looking to increase their human capital gains are drawn to urban areas because they are able to more efficiently acquire skills due to the greater opportunities to interact with other highly educated, skilled and creative people who live, work and socialize in close proximity to one another—thus increasing the rates of human capital accumulation, technological innovation, and ultimately urban growth. See generally Edward L. Glaeser et al. *Growth in Cities*, 100 J. POL. ECON. 1126, 1127-34 (1992); Edward L. Glaeser & Matthew G. Resseger, *The Complementarity Between Cities and Skills*, 50 J. REGIONAL SCI. 221, 242 (2010).

interests suited to the modern knowledge-based economy.⁷³ The attraction of the creative class to a city or county has significant positive spillovers, creating an environment that is more open to innovation, entrepreneurship, and spurring economic growth in the service sector. This leads not only to improved economic outcomes, which benefit the city and its residents, but also to creating the “buzz” of a “cool” city attractive to other urban migrants.⁷⁴

3. Tragedy of the Urban Commons

Paradoxically, it is the openness of many city spaces that can also quickly result in an urbanized version of the tragedy of the commons. In other words, these same spaces that produce agglomeration benefits and other valuable social goods can quickly mimic the tragic conditions that beset common pool natural resources. Too much usage, either in volume or intensity, of a park or a neighborhood street, for example, can quickly result in the kind of congestion that degrades these spaces. Similarly, certain types of uses can create incompatibilities with many ordinary uses and conservation of such spaces, creating the conditions for rivalry or subtractability.

The tragedy of many city commons arises not, as in Hardin’s example, from a pre-political or pre-regulated space in which “everyone has privileges of inclusion and no one has rights of exclusion.”⁷⁵ Rather, it arises as a result of weakly or poorly regulated space—i.e., what one of us has called “regulatory slippage.”⁷⁶ In other words, these are spaces that were perhaps once heavily reg-

73. Providing the kind of urban amenities that will attract highly mobile creative types, Florida argues, is fundamental to the growth of cities and metropolitan regions. To attract them, cities should offer amenities like the arts and a cultural climate that appeals to young, upwardly and geographically mobile professionals. See RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS, REVISITED* (2012); see also Terry Nichols Clark et al., *Amenities Drive Urban Growth*, 24 J. URB. AFF. 493 (2002).

74. FLORIDA, *supra* note 73, at 46-48; 244-49; see also WILLIAM FREY, BROOKINGS INST., *YOUNG ADULTS CHOOSE “COOL CITIES” DURING RECESSION* 1-2 (Oct. 28, 2011), <http://www.brookings.edu/blogs/up-front/posts/2011/10/28-young-adults-frey> (noting that, to the extent they are moving, young adults are headed toward metro areas that are known to have a certain vibe—college towns, high-tech centers, and so called “cool cities”).

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

76. The government’s inability (or unwillingness) to effectively manage land over which it has exerted its jurisdiction creates the opportunity and the incentive for overuse (or misuse) of the land, and thus represents significant “regulatory slippage.” Foster, *supra* note 67, at 301.

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ulated to avoid rivalry but where such control has slipped, for whatever reason, significantly behind previous levels of public control or management.⁷⁷

This tragedy of the city commons was the story reflected in the decline of many open spaces in U.S. cities in the 1970s and 80s in which a potpourri of users and uses came into conflict, leaving many streets, parks and other open spaces unsafe, dirty, prone to criminal activity, and virtually abandoned by most users.⁷⁸

This urban tragedy can also result from an increase in “chronic street nuisances”—such as in the case of excessive loitering, aggressive panhandling, graffiti, or littering—that eventually begin to rival, if not overwhelm, other users and uses of open spaces.⁷⁹ The resulting deterioration then escalated with the onset of a fiscal crisis and the decline in city appropriations, which many would argue sealed the fate of these cities for at least the ensuing two decades.

This is not to claim that the tragedy of the city commons was a precipitating, or even predominant, cause of the decline of American cities in the latter half of the 20th century. Rather, it is simply to underscore the fragile line that separates out the kind of urban congestion that produces rivalry, or subtractability, and the kind that produces the species of agglomeration benefits and social wealth that endow those spaces with utility and with so much of their value for communities and for the city as a whole. The point is that the kind of open spaces, or commons, that are an essential part of cities and that give cities much of their value can be contested in ways that require rethinking the governance and management of those spaces.

Perhaps not surprisingly, one response to the tragedy of many open access urban public spaces, which called into question the ability of public administrations to steward these resources, has been the rise of the Park Conservancies

77. See Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 301-03 (1999) (describing “negative” slippage as a failure to act or lax supervision by regulators, as well as noncompliance with existing standards by regulated parties).

78. See ROY ROSENZWEIG & ELIZABETH BLACKMAR, *THE PARK AND THE PEOPLE: A HISTORY OF CENTRAL PARK* (1992) (recounting story of Central Park in New York City, which began deteriorating due to a poorly managed potpourri of users and events, 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, 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).

79. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1169 (1996) (defining chronic street nuisances as “when a person regularly behaves in a public space in a way that annoys—but no more than annoys—most other users, and persists in doing so over a protracted period” and arguing for a system of “public-space zoning” which would separate incompatible behaviors/conduct in public spaces).

and Business Improvement Districts (BIDs). These public-private partnerships are widely credited for the revitalization of urban parks, streets and commercial areas at a time when those resources were suffering from public neglect and during times of fiscal strain on local governments.⁸⁰ Park Conservancies and BIDs, along with community gardens and neighborhood watch groups, are examples of what we would call urban commons institutions—a subject to which we return in Part III. They are a way of managing common resources without privatizing the resource but allowing a collection of public and private actors to manage the resource within a nested governance structure.⁸¹

As we have previously pointed out, these are not always unproblematic institutions from the standpoint of distributional equity⁸² and certainly should not be embraced uncritically. We highlight them here to suggest the impetus to find new ways of governing shared, open access resources under conditions of regulatory slippage. These examples, and others,⁸³ illustrate that there are viable alternatives to managing these resources that do not involve a more assertive system of government control, enforcement of social norms through criminal law, or private governance of these spaces.⁸⁴

80. See Foster, *supra* note 28, at 101-08 (reviewing the literature on the rise of BIDs and Park Conservancies during the 1990s in response to cities' abdication of their stewardship over parks, "the general decline of city centers and commercial neighborhoods," and "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").

81. *Id.*

82. See, e.g., *id.* at 104 ("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."); *id.* at 107 ("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.").

83. *Id.* at 93-101 (also discussing community gardening collectives, neighborhood park "friends" groups, and neighborhood foot patrols).

84. *Id.* at 108-18 (describing why these institutions involve the relinquishment of some government control of the resources, enabling cooperative or collective management of the resources, yet also do not amount to privatization of the resource in that "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").

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C. *Common Resources in the City*

The openness of cities, and the urban agglomeration that results, is a double-edged sword for many urban communities. Cities are being shaped and re-shaped to meet simultaneously the increasing demands of rapid urbanization and, as in the case of struggling cities, the need to more strategically attract new urban dwellers (such as the “creative class”) capable of revitalizing urban life. In addition to the more traditional concerns about congestion and rivalry, the openness of cities also brings with it the threat of dispossession and displacement from places of deep attachment and meaning for residents.

In these contestations over city space and resources, the commons claim has a distinctly normative flavor. The issue is not consumption of an open-access resource which results in either negative or positive spillovers. Rather, it is a question of distribution and, specifically, of how best to “share” the finite resources of the city among a variety of users and uses.⁸⁵

For many urban inhabitants displaced by the market forces of gentrification, what is being lost, or claimed, are goods (both tangible and intangible) that have meaning by virtue of the way that residents have historically used, or are presently using, the space. For those living amongst the ruins of urban disinvestment, what are being claimed are goods that, although once fully owned and utilized by private or public owners, are now in transition and whose future ownership and use is indeterminate. Residents claim these goods in order for their communities to survive and function and to provide basic goods essential for human flourishing.

1. Property in Transition

In cities and neighborhoods characterized not by growth but rather by shrinkage and decline—think Detroit, Baltimore, Cleveland, Newark, Camden, etc.—many neighborhoods contain significant swaths of vacant land and vacant structures.⁸⁶ Property becomes vacant typically as a result of a combination of factors including population loss, disinvestment, and abandonment. Much of this property is also located on land or in neighborhoods formally regulated by the local government but where the zoning designations governing the property are largely irrelevant because the future use of the property is uncertain. In other words, the land or structure is transitory, both in the sense that the land has been abandoned and not yet reclaimed (at least not formally in terms of transfer

85. See Fennell, *supra* note 26, 914 n.31, 919-22 (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).

86. See, e.g., Georgette Chapman Phillips, *Zombie Cities: Urban Form and Population Loss*, 11 RUTGERS J. L. & PUB. POL’Y 703 (2014) (describing zombie cities as decimated cities and arguing that current zoning and land use laws that focus on growth do not address these cities’ challenges).

of title), and because the land is moving away from a past use and towards a future use that is unknown and unplanned.

While in a transitory state, vacant land and structures are quite vulnerable to contestation of uses. Conflicts often emerge regarding present vs. future uses and different possibilities for future use. These conflicts exist between present owners of the land and the local government, and between the surrounding community and the local government, which may be hoping to sell abandoned property to private developers or investors. There are also conflicts among various users who have near-unfettered access to the property and who may have in mind competing uses for the property.

As we explain below, residents who live in these communities often begin using property that has been abandoned and which may be adding to the conditions of blight in the surrounding community. In many cases, community members may begin to treat the property as an open access resource, utilizing it in ways that add value to the surrounding community and/or which produce goods for that community (as in the case of community gardens or urban farms or using abandoned homes to house the homeless). In other instances, public users conduct illegal activities (dumping, crime, etc.), which clearly does not add value to the surrounding community.

Thus, in addition to creating the potential for tragedy, conflict surrounding the use of vacant or underutilized property in distressed cities also has the potential to capture positive *value* for the community by virtue of using the property to create goods (both tangible and intangible) that can be shared. Unlike Hardin's tale of tragedy, in which adding an additional person to an open access resource subtracts value from the resource, opening up access to abandoned or vacant property instead can enhance its value to the community.⁸⁷

In some cases, however, there are competing ideas about the best use of the property and whom should benefit most directly from its use. For example: local government officials might be interested in selling large swaths of vacant space in a blighted neighborhood to attract commercial intensive development or market rate housing as a means for attracting a new class of residents to their cities. Members of the community, however, might want to claim the land for "commoning" activities—such as to build a community garden or urban farm which enables residents to produce both tangible (food, green space, recreational space, and public safety) and intangible (social networks, mutual trust, fellowship, a sense of security) goods for the surrounding community.⁸⁸

87. See Rose, *supra* note 52 (explaining that the non-exclusivity of the space can make the use of the commons valuable because the activities taking place within that space are exponentially enhanced by greater participation by the public and thus benefit from scale economies).

88. "Commoning" is a term popularized by historian Peter Linebaugh to describe the social practices used by commoners in the course of managing shared resources and reclaiming the commons. LINEBAUGH, *supra* note 15, at 59 (noting that the practice of commoning can provide "mutual aid, neighborliness, fellowship, and family with their obligations of trust and expectations of security").

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In other cases, local residents may be pushing to transform the land or vacant structures into affordable housing units, a town commons, a community center, a charter school, or infrastructure for local businesses. In cities still struggling to revitalize their inner core, residents are working to transform entire neighborhoods pockmarked with vacant lots and abandoned property into livable and affordable communities. This is what, now quite famously, occurred in the Dudley Street neighborhood of Boston in the late 1980s and early 1990s. Known at the time as one of the poorest areas of Boston, residents there claimed fifteen acres of vacant lots owned by the city and fifteen acres of vacant lots privately owned but with tax liens (with the help of the city's eminent domain power) to create an "urban village" of affordable housing, shopping, open green space and a community center.⁸⁹ Members of the neighborhood formed a community land trust into which these properties were placed and which will preserve the village as an affordable and accessible commons for future generations.

2. Occupying the Commons

When there is conflict about the future use of open, abandoned or vacant land or structures, the conflict is often highlighted or magnified by the illegal occupation of the resource as a way of claiming it as a common resource. This characterizes a number of social movements in the United States and abroad in which activists occupy vacant, abandoned or underutilized land, buildings and structures as a means of altering the underlying property arrangement of certain goods away from an exclusively owned good (either public or private) to one that is held open for and managed by a community of users.⁹⁰

These movements are responding to what they view as market failures and the failures of an urban development approach which has neglected the provision of goods necessary to human well-being and flourishing. The tactic of occupation is a form of resistance against the enclosure—through private sale or public appropriation—of these goods. Occupation is also a way of asserting that the occupied property has greater value or utility as a good either accessible to the public or preserved and maintained as a common pool resource.

While not explicitly using the language of the "commons," these contemporary "property outlaws,"⁹¹ are very much staking claim to the property in

89. See *supra* note 71 and accompanying text (discussing the Dudley Street Neighborhood Initiative).

90. Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 248 (2015) (exploring the ways in which property lawbreaking in this context can help "concretize the human right to housing in local American laws, associate the human right to housing with well-accepted constitutional norms, and establish the contours of the human right to housing in the American legal consciousness").

91. See EDUARDO MOISES PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTORS IMPROVE THE LAW OF OWNERSHIP 12, 18

transition as a common good. For example, in many parts of the United States, as well as in countries such as Brazil and South Africa, activists occupy and squat in foreclosed, empty, often boarded up homes and housing units (including public housing units) as a means to convince municipalities to clear title and transfer these homes and units to communal forms of ownership.⁹² This “occupy” or “take back the land” movement is a response to the displacement of homeowners and tenants brought on by the confluence of the housing/mortgage crisis and the forces of gentrification.⁹³ As investors move to buy up foreclosed homes at auctions and flip them, or raise rents, nonprofit organizations propose instead to take some of these properties out of the real estate market altogether and to create either limited-equity apartments or long-term affordable rentals.⁹⁴

Moreover, the difficulty and high cost of excluding users, and the potential for rivalry, sometimes result in such abandoned structures becoming sites for illegal drug activities and other nuisances, adding to the visible blight and overall decline of the surrounding community.⁹⁵ For this reason, it is perhaps not surprising that local officials (and in some instances local laws) often condone the occupation and transformation of these structures by community members who aim to return the asset to productive use in ways that beautify and improve the properties and, by extension, the surrounding neighborhood.⁹⁶ Transferring

(2010) (using “property lawbreaking” to intentional civil disobedience to challenge existing property laws).

92. See, e.g., Colin Moynihan, *Umbrella House: East Village Co-op Run by Squatters*, N.Y. TIMES (July 15, 2015), <http://www.nytimes.com/2015/07/19/realestate/umbrella-house-east-village-co-op-run-by-former-squatters.html> (reporting on a successful effort in New York City in which squatters occupied what was an abandoned city-owned tenement and which the City eventually turned over to the squatters with 10 other buildings they had taken over).
93. Alexander, *supra* note 90, at 268-70 (describing the “take back the land” movements in Philadelphia, Boston, Chicago and other American cities and indicating that these activists and their organizations learned from similar activists in South Africa and Brazil).
94. In at least one case, the houses are owned by Fannie Mae and activists are pushing it to sell them to a nonprofit whose goal is to buy up foreclosed properties with the aim of turning them into long-term affordable rental housing for neighborhood residents. Marisa Mazria Katz, *Occupying Empty Houses and Airwaves to Fight Foreclosures in Boston*, CREATIVE TIME REP. (July 1, 2014), <http://creativetimereports.org/2014/07/01/editors-letter-july-august-2014-occupy-houses-fight-foreclosures-in-boston-john-hulseyl/> (reporting on City Live/Vida Urbana, a Boston based community group).
95. Alexander, *supra* note 90, at 271.
96. *Id.* at 271 (noting that local officials and police often tolerate and condone the “occupations” for this reason and noting that in one state, Illinois, there exists a statutory exception to prosecution for criminal and civil trespass for a person who

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previously privately held structures to a community land trust, or converting them into deed-restricted housing, would keep these properties perpetually affordable for low- and moderate-income households and would allow the residents to self-manage them as an urban commons.⁹⁷

In a similar way, the Italian movement for “beni comuni” (common goods) utilizes occupation to stake public claim to abandoned and underutilized cultural (and other) structures in an effort to have these spaces either retained as, or brought back into, communal use.⁹⁸ The most famous of these occupations is that of the national Valle Theatre in Rome. The theatre had become largely defunct as a result of government cuts for all public institutions, and the Italian Cultural Ministry transferred the management of the theater to the City of Rome. Out of fear by many that the City would then sell it to a developer as part of a larger project for a new commercial center, a collection of art workers, students, and patrons occupied the theater.⁹⁹ This occupation was followed by similar occupations of cultural institutions and other structures that were subject to privatization in cities all over Italy.¹⁰⁰ In each case, the occupants’ aim

“beautifies” unoccupied and abandoned residential and industrial properties). See also 720 ILL. COMP. STAT. 5/21-3(b-15)(d) (2012).

97. See Huron, *supra* note 12 (describing limited equity cooperative housing in Washington, D.C. as an urban commons).
98. See generally Saki Bailey & Ugo Mattei, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, 20 IND. J. GLOBAL. LEGAL STUD. 965 (2013).
99. Saki Bailey & Maria Edgarda Marcucci, *Legalizing the Occupation: The Teatro Valle as Cultural Commons*, 112 S. ATLANTIC Q. 396 (2013) (recounting the occupation and background). According to official documents, the City of Rome and the Italian Cultural Ministry were not able to reach an agreement on the future of the Teatro Valle. The City of Rome appointed a special commission to prepare a proposal through a deliberative democracy process. This commission delivered a report, the *Rapporto sul Futuro del Teatro Valle*, which formed the basis for a new agreement between the two institutions. According to the report and the new agreement, the public use and management of Teatro Valle was reaffirmed and a participatory governance model proposed and agreed upon. See FRANCA FACCIOLI ET AL., ASSESSORATO CULTURA, CREATIVITÀ E PROMOZIONE ARTISTICA DI ROMA CAPITALE, RAPPORTO SUL FUTURO DEL TEATRO VALLE (June 2014); Lorenzo Galeazzi, “This Is The Future Of The Valley Theater”. *But Marino Keeps Hidden The Dossier*, IL FATTO QUOTIDIANO (July 9, 2014), <http://www.ilfattoquotidiano.it/2014/07/09/questo-il-futuro-del-teatro-valle-ma-marino-nasconde-il-dossier/105448> (report embedded).
100. Bailey & Mattei, *supra* note 98, at 996-97 (listing as examples the Cinema Palazzo in Rome, the Marinoni Theater in Venice, the Coppola Theater in Catania, the Asilo Filangieri in Naples, the Garibaldi Theater in Palermo, the Rossi Theater in Pisa, the Pinelli Theater in Messian and the Macao, a thirty-one-story building, in Milan).

was “to recover people’s possession of under-utilized” structures and “open up” these spaces for the flourishing of common goods like culture.¹⁰¹

3. The Production of the Commons

The push to effectuate the transformation of vacant, abandoned or underutilized property from an exclusively private (or public) good to a communally held good is in part an effort to formalize the way in which users are already treating the good—as an open access good or as a user-managed commons. In large part, however, the basis for claiming the property for collective use or consumption is premised on the utility or value that these structures have for a broader group of users than exclusive ownership allows. In other words, the value generated by transforming these vacant structures into a public or community good—say a community garden, an urban farm, affordable housing, or cooperatively owned community assets—is said to outweigh (or at least heartily compete with) the value that these structures would retain under their existing use, whether they remained vacant or sold on the market for profit.

This is not a cold utilitarian calculus according to which the value that maximizes overall social welfare prevails. Rather, it is an argument that the utility of claiming, or reclaiming, property as a commons lies in its normative relationship to the community, whether on the scale of a block, neighborhood or city. Martin Kornberger and Christian Borch make the astute point that what gives the urban commons its value is the function of the human activity and network in which the resource is situated.¹⁰² In other words, “value is the corollary of proximity and density which are both *relational* concepts;” the value of a resource that is collectively produced results from human activity and is contingent on the ability of people to access and use the resource.¹⁰³ The legal owner of the resource is “only able to capture the ‘unearned increment’ through cutting the [resource] off from its surrounding environment and turning it into an isolated, tradeable object—its value results from mistakenly attributing network effects to the [resource] itself.”¹⁰⁴

Consider the case of hundreds of community gardens in previously distressed New York City neighborhoods which local officials proposed to auction off to private developers. These lots were left vacant by the demolition of buildings abandoned by their original owners. Residents cleared the lots of trash and drug paraphernalia, planted and cultivated plants and vegetables, and created

101. *Id.* at 997; see also Alessandra Quarta & Tomaso Ferrando, *Italian Property Outlaws: From the Theory of the Commons to the Praxis of Occupation*, 15 GLOBAL JURIST 261 (2015).

102. Christian Borch & Martin Kornberger, *Introduction to URBAN COMMONS: RETHINKING THE CITY* 6-7 (Christian Borch & Martin Kornberger eds., 2015).

103. *Id.* at 7-8.

104. *Id.* at 8.

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safe community spaces in otherwise socially and economically fragile communities. City officials persistently characterized the land as “vacant,” stripping the land of its social (and economic) value to its users, and argued that in the long run the communities where the gardens sat would benefit from the new development and the affordable housing that the city planned to build on some of the lots.¹⁰⁵ This characterization stripped the resource of any functional value to the community, or to the city for that matter. Yet, by auctioning off the gardens the city was able to capture the “unearned increment” from the resource—the increase in surrounding property values resulting from the improved neighborhoods¹⁰⁶—without accounting for the inevitable dispossession and displacement that ultimately resulted from gentrification of these neighborhoods.

The utility claimed by urban residents who claim, or attempt to claim, urban land or structures as a cooperatively managed resource is linked to the idea that the commons is socially produced—that is, it is created, used, preserved, and managed by some collection of people.¹⁰⁷ In this sense, the commons fosters social relationships between the people within it, and consists of the relationship created between the users and the resource. Community and urban gardens are said to facilitate the development of social capital among its networked participants, which in turns produces a host of other goods such as public safety, recreational opportunities, green space, fresh food, and other critical resources for neighborhood residents, particularly in disadvantaged neighborhoods.¹⁰⁸ As such, when community gardeners resist the taking of these gardens by the city to sell them off to a private developer, they are making a normative claim about value or utility of the resource as it relates to the ability of the community to function and to flourish as a healthy, sustainable community.

4. The Social Function of Property

The idea that an urban resource otherwise subject to exclusive private or public ownership rights should instead be claimed and utilized as a commons can be rooted in the “social function of property” principle found in many con-

105. Foster, *supra* note 21, at 534-38 (recounting the legal struggle over the gardens). In the end, luxury condos and parking lots occupy any of the spaces where these lots stood and it is clear that the city did not have a real plan for affordable housing. *Id.* at 536 n.29; *see also* *In re New York City Coal. for the Pres. of Gardens v. Giuliani*, 670 N.Y.S.2d 654 (Sup. Ct. 1997), *aff'd*, 666 N.Y.S.2d 918 (App. Div. 1998).

106. Notably, researchers have found that property values tend to go up in disadvantaged communities with community gardens. Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 243 (2008).

107. LINEBAUGH, *supra* note 15, at 59 (noting that “there is no commons without commoning”).

108. *See generally* Foster, *supra* note 21, at 540-45 (reviewing the literature).

stitutions around the world.¹⁰⁹ The doctrine embraces most broadly the idea that an owner cannot always do what she wants with her property; rather she is obligated to make it productive, which may include putting it at the service of the community.¹¹⁰ In other words, sometimes the state is obligated to require individuals to sacrifice some property rights in order to put property to its productive and socially functional use, or to do so itself.¹¹¹

Leon Duguit, the French jurist who developed this idea in a series of lectures, rooted it in a description of social reality that recognizes solidarity, or the interdependence between individuals in a society.¹¹² Because individuals in society have different needs and capacities, the social division of labor is crucial to ensuring the satisfaction of these needs. In order for the people and the com-

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109. See, e.g., Symposium, *The Social Function of Property: A Comparative Perspective*, 80 *FORDHAM L. REV.* 1003 (2011) (including contributions from American and Latin American scholars exploring the doctrine's applications in Latin America and comparing it with similar "social obligation" norms in American property law) [hereinafter Symposium]; Bailey & Mattei, *supra* note 98, at 981-82 (discussing Article 42 of the Italian Constitution which provides that private property receive constitutional protection only as far as it serves a "social function" and is "accessible to everybody"); see also GRUNDGESETZ [GG] [BASIC LAW] Art. 14(2) (Ger.), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html.
110. The basic idea behind the social function of property is that property has internal limits—not just external ones—which extend to an owner's obligation with respect to what she does with her property. Consequently, the state should protect property only when it fulfills its social function and should intervene when the owner is not acting in a manner consistent with her obligations. Taxation and expropriation are powerful tools for achieving such ends. See Sheila R. Foster & Daniel Bonilla, *Introduction*, 80 *FORDHAM L. REV.* 1003, 1004-08 (2011) (tracing the idea of the social function of property to the French jurist León Duguit).
111. In the Italian legal scholarship, for example, "common goods" are defined as those goods that are "functional" to the exercise of fundamental rights and to human development. See, e.g., Bailey & Mattei, *supra* note 98, at 994 (citing the work of the well-known Rodotà Commission, named after a leading Italian property scholar and former distinguished member of Parliament; the Commission introduced the category of "common goods" into Italian law and defined them as goods that are "functional to the exercise of fundamental rights and to a free development of the human being"). The draft of the Civil Code reform by the Rodotà Commission was never passed into law. However it triggered the debate on the commons in the Italian legal scholarship. For an account of the different positions within the Commission and in the Italian legal scholarship, see Christian Iaione, *Governing the Urban Commons*, 1 *ITALIAN J. PUB. L.* 109 (2015).
112. *Id.* at 103; see LEÓN DUGUIT, *LAS TRANSFORMACIONES DEL DERECHO PÚBLICO Y PRIVADO* (1975). Some of Duguit's works translated into English are LEÓN DUGUIT, *LAW IN THE MODERN STATE* (Frida Laski & Harold Laski trans., 1919) and León Duguit, *Changes of Principle in the Field of Liberty, Contract, Liability, and Property*, reprinted in *THE PROGRESS OF CONTINENTAL LAW IN THE NINETEENTH CENTURY* 65 (Layton Bartol Register & Ernest Bruncken trans., 1918).

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munity to flourish, each individual must comply with a series of functions determined by the position she occupies in society.¹¹³ For Duguit, putting property at the service of the community means putting it into production. The wealth concentrated in property cannot remain unproductive. The social consequences would be profoundly negative. The needs of the community members would certainly not be satisfied and social cohesion would be in jeopardy.¹¹⁴

Although not part of the classical liberal sphere of property rights embraced by U.S. law, progressive property scholars have nonetheless demonstrated that American property law, at least at its margins, contains a similar social obligation norm.¹¹⁵ Gregory Alexander, who has labored the most to develop this concept in American law, has argued that such a norm entails an owner's social obligation to contribute to her community those benefits that the community reasonably regards as necessary for its members' development of those human qualities essential to their capacity to flourish as moral agents.¹¹⁶

Alexander finds scattered throughout American property doctrine examples in which private property owners are required to sacrifice their ownership interest in a way that comports with this social obligation norm. Importantly, he finds such examples in instances where neither law and economics nor classical liberal analysis can justify (or can easily justify) such sacrifices. According to Alexander, the thicker version of the social obligation norm is at work (or potentially at work) in eminent domain cases and cases adjudicating remedies for nuisance, both of which involve state-sanctioned forced sales of private property for the common good or community best interest.¹¹⁷

Both the social function of property and the social obligation norm thus recognize the interdependence of individuals within a society and the role that property can play generally in promoting the common good and, more particularly, in the provision of those goods that society reasonably regards as necessary for human functioning and flourishing.¹¹⁸ The question of which goods are

113. Based on this functionalist description of society, Duguit challenged both the individualism and the metaphysical nature of the liberal right to property. Foster & Bonilla, *supra* note 110, at 1006-08 (summarizing his arguments).

114. His argument has nothing to do with state ownership of the means of production or with class struggle. Normatively, Duguit is committed only to what one might call the "rule of productivity." *Id.* at 1007.

115. See generally Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

116. *Id.* at 774.

117. *Id.* at 775-82. He also invokes his social obligation concept to explain cases in which the owner is prohibited from using his or her property in some way that the community regards as against its collective interest—such as in the case of historic preservation laws, environmental regulations, and beach access rights under the public trust doctrine. *Id.* at 791-810.

118. *Id.* at 760-70 (building on the "capabilities" approach of Amartya Sen and Martha Nussbaum to make the case that property owners have such an obligation); see

necessary in a particular society to foster the capabilities necessary to function and flourish is one without an easy answer, and one on which scholars have posited various thoughtful responses.¹¹⁹

We agree with Alexander and Peñalver that all societies and political communities must struggle with the challenge of providing adequate opportunities for individuals to obtain the goods necessary to function as social beings without undermining the necessary incentive for productive activities.¹²⁰ Yet we also agree that “however the details are conceived, attention to human beings’ social needs pushes strongly in the direction of a state obligation to take steps to provide substantial and realistic opportunities for people to obtain the property required for them to be able to participate at some minimally acceptable level in the social life of the community.”¹²¹ This might require an obligation to share property, or at least to share surplus resources, with those lacking them so that the latter can develop the capabilities that are necessary to human flourishing.¹²²

Preventing the enclosure—through exclusive ownership rights—of resources that communities are able to make productive in ways that support the ability of those communities to function and to flourish helps to mediate contestations over some urban resources.

The urban commons is likely almost always to involve contradictory claims about whose interests are best served by preserving versus commodifying a particular resource, and the “commons” is probably too capacious a concept to completely resolve these conflicts in many cases. However, what the commons can do, both legally and conceptually, is stake out the claim that at least some socially produced common goods are as essential to communities as are water and air and thus should be similarly protected.¹²³ Much in the way that the law restrains owners from doing harm to the natural environment, the state is justified in recognizing limits to an owner’s (private or public) right to use their

also Foster & Bonilla, *supra* note 110, at 1008-11 (comparing the social obligation norm in American property law with the social function of property idea developed by French jurist León Duguit).

119. See Alexander & Peñalver, *supra* note 19, at 137-38 (noting that scholars have listed a number of capabilities and goods necessary for flourishing that leave ample room for debate).

120. *Id.* at 147.

121. *Id.* at 147-48 (also noting that “in the context of a modern post-industrial society like our own, this observation points in the direction of a human right to a social safety net that guarantees a substantial basket of resources”).

122. *Id.* at 148 (naming the capabilities they believe to facilitate human flourishing—freedom, practical rationality, sociality, among others).

123. Bailey & Marcucci, *supra* note 99, at 398; Bailey & Mattei, *supra* note 98, at 996; see also Maria Rosaria Marella, *The Constituent Assembly of the Commons*, OPENDEMOCRACY (Feb. 28, 2014), <https://www.opendemocracy.net/can-europe-make-it/maria-rosaria-marella/constituent-assembly-of-commons-cac>.

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property in ways that significantly harm or degrade socially produced resources that are difficult, if not impossible, to replace or to replenish.

In the next Part, we will address whether our legal norms in land use and property would require or at least support the state's role to limit or expand property protections where necessary to support urban commons claims.

II. LAW AND THE URBAN COMMONS

In the previous Part, we identified a number of urban resources and goods, at different scales, that can be considered a "commons." As we explained earlier, the analytical traction gained by characterizing a resource or good as a commons is that it opens (or re-opens) the question of how best to protect or preserve the resource. Typically, the solutions offered for the protection of a common pool resource fall along the public-private binary requiring either exclusive state control or the use of property rights to endow individuals with the right incentives to utilize the resource efficiently and sustainably. In this Part we examine the public regulatory framework and legal doctrines that are most relevant to claiming, protecting, and managing the urban commons, including governing the city itself as a commons. Understanding the limitations of current regulatory tools and legal doctrines which manage either individual common resources or the city as a common resource is crucial to understanding the need for an alternative governance model, to which we turn in the following parts.

A. Zoning and Land Use Controls

As previously mentioned, zoning and land use laws exist to manage the urban commons so as to avoid the tragic conditions of overconsumption and rivalry. Traditional "Euclidean" zoning separates incompatible land uses and excludes harmful ones to avoid negative spillovers, or externalities, which would result if users were freely able to locate their firms or households wherever they wanted in the city commons. In the same way, zoning restrictions can control the kind of users allowed to consume the commons by excluding those who are likely to take out more than what might be considered their fair share of the commons and leave everyone worse off, at least fiscally.¹²⁴ Through its system of separation and exclusion, zoning protects the commons, at various scales, by

124. For instance, zoning that excludes those unable to pay the level of local property taxes that supports the kind of public goods that the community prefers is referred to as "fiscal zoning." See, e.g., EDWIN S. MILLS & WALLACE E. OATES, THE THEORY OF LOCAL PUBLIC SERVICES AND FINANCE: ITS RELEVANCE TO URBAN FISCAL AND ZONING BEHAVIOR, FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES 1, 6-11 (Edwin S. Mills & Wallace E. Oates eds., 1975).

helping to create and then preserve the “character” of the city, neighborhood, or block.¹²⁵

Known for its controlling and exclusionary tendencies, conventional zoning, and other land use laws, also fall short of being able to comprehensively and satisfactorily manage or govern the city commons. In the first instance, the openness of cities and the variety of commons within them inevitably invite rivalry as different users are drawn to agglomerate in cities. This seemingly magnetic pull, along with the strain of proximity of heterogeneous users, creates the pre-conditions for rivalry even in heavily regulated spaces.¹²⁶ We see evidence of this rivalry both under conditions of regulatory slippage, in which unrestrained competition for collectively shared resources intensifies and the existing regulatory infrastructure is (or becomes) inadequate to manage this rivalry. We also see evidence of this failure in the literal spillover across city borders of urban consumption (in the form of informal housing settlements) on land that falls outside of the scope of zoning and land use controls.

City officials often respond to the strain of proximity, particularly of heterogeneous users of the city commons, by adopting “order maintenance” policies. As Nicole Garnett has so well illustrated in her work, land use policies are often utilized in cities to control and preserve “order” by alternatively separating/dispersing and concentrating disorderly activities, depending on the problem at hand.¹²⁷ An example of the way in which land use rules can manage social disorder in city common spaces is Robert Ellickson’s proposal to more comprehensively regulate through zoning rules so-called “chronic street nuisances”—e.g., annoying behavior by panhandlers, mentally ill squatters, the homeless, and others—that often result in a decline in the attractiveness of open urban space to other users.¹²⁸ Ellickson’s proposal would allow a city to adopt different zoning codes of varying stringency to govern street behavior in public spaces. The idea would be to separate into distinct districts or zones incompatible classes of public users of the commons, much as zoning separates out incompatible land uses to avoid negative spillovers.¹²⁹

125. See, e.g., Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 68-70 (1994) (noting how zoning “protects a neighborhood from encroachments by land uses inconsistent with its character”).

126. See, e.g., Ellickson, *supra* note 79, at 1223 (“In open access spaces thronged with strangers . . . free-riding is apt to afflict the informal sector.”).

127. NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* (2009).

128. Ellickson, *supra* note 79, at 1207-17.

129. *Id.* at 1220. 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. Green zones would promise relative safety and a high level of strictness in regulating disruptive behavior; they would be tailored to accommodate the “unusually sensitive” such as school children, frail elderly, parents with toddlers, etc. Red zones would signal extreme caution, as disorderly

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Order maintenance land use policies can carry tremendous costs to vulnerable individuals and communities, as well as to individual constitutional rights.¹³⁰ But that is not their only shortcoming as a tool for maintaining and governing common pool resources in socially and economically complex cities. More fundamentally, order maintenance policies are primarily oriented toward controlling negative spillovers rather than generating or capturing the positive benefits of urban agglomeration. In other words, much of the challenge of increasing urbanization patterns is how to manage, or balance, the competing demands of heterogeneous users as against local government competition for private capital and the urban elite. Designing a land use system predominantly aimed at harm prevention and negative spillovers elides the challenge of how to create cities and communities that capture the benefits of diverse inhabitants who must live together and share common goods.

It may be that, as Lee Fennell has argued in a recent article, the challenge of managing the city commons, and the city as a commons, is the challenge of “participant assembly”—how to organize city space to attract the right mix of actors or participants that will generate the positive spillovers—i.e., knowledge and cultural exchange, creativity, innovation—that result from urban agglomeration.¹³¹ Because we cannot rely upon markets to assemble urban participants optimally or to maximize the positive agglomeration benefits of urban common space,¹³² she floats the idea of using “performance zoning” as a means of favoring land uses that will produce positive impacts or spillovers to a particular neighborhood or to the City. Such a system would set targets based on positive spillovers—such as knowledge sharing, long-term tenancy or occupation, decreased vehicle traffic, increased foot traffic, etc.—that can be captured from allowing certain kinds of land uses. Zoning permits would be based not on a particular type of land use but rather on the basis of particular targeted out-

conduct in these spaces would be most tolerated by the city; these areas essentially would be “safe harbors” for those who engage in disorderly conduct. Yellow zones would serve as “lively mixing bowl[s]” where some episodic disorder would be tolerated but chronic misbehavior (e.g., panhandling and bench squatting) would not be. *Id.* at 1221-22.

130. Ellickson acknowledges these costs, along with the risk of distributional harms on poor, minority neighborhoods given the uneven political power of urban neighborhoods. *Id.* at 1244-46.
131. Fennell, *supra* note 28, at 1373 (“[P]rime urban space for generating agglomeration benefits would be matched to its most valuable use, taking into account the congestion impacts inflicted and suffered by that use.”).
132. Markets cannot reliably “assemble” urban participants to channel these goods to their highest valuers—or optimal agglomerations—given the potential mismatch between “the privately owned element (access to a given location) and the commonly owned one (the overall urban atmosphere).” *Id.* at 1394; *see also id.* (“[T]he characteristics that cause particular economic actors to derive the most value from a given location may or may not be the same characteristics that would lead them to contribute the most value to that location.”).

comes using performance metrics by which the positive impacts of that land use on communities can be assessed.¹³³

Performance zoning, incentive zoning, inclusionary zoning and similar regulatory mechanisms illustrate that land use regulation is flexible enough to allow for, and even privilege, the use of urban land or property as a means of protecting, producing and sharing common goods. Moreover, as local governments have moved away over time from binding comprehensive plans to *ad hoc* bargaining and dealing with developers,¹³⁴ it is theoretically possible to strike negotiated arrangements to allow particular parcels or properties to transition to another kind of use consistent with a commons.

However, there is a real question, and healthy skepticism, about the willingness of local officials to use the zoning and land use process to recognize claims to the urban commons or to protect existing common pool resources of fragile communities. The reigning account of the politics of urban land use decisions, the “growth machine” account, situates land use officials as acting in concert with an elite coalition of developers and real estate interests primarily concerned with economic growth.¹³⁵ As such, if given a choice between preserving or claiming a common pool resource or selling that resource on the market for economic gain, most often city officials and governments will yield to the latter pressure.¹³⁶

Growth machine politics may not be a given in every zoning and land use decision, to be sure, and the inclination to pursue urban growth machine policies at all costs may even be on the wane in some cities.¹³⁷ Nevertheless, it is fair

133. Thus, for example, zoning might specify that uses locating in the area have a certain minimum average number of employees on site each workday or consume meals in the immediate area, encouraging interaction between workers. *Id.* at 1411. The author also notes that some communities have attempted to use zoning and other land use controls to restrict residential occupancy to those who will be present on a relatively long-term basis, to encourage the formation of social ties and avoid high turnover in communities. *Id.* at 1411-12.

134. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849-50 (1983); see also Mun. Art. Soc’y of N.Y., *Zoning Variances and the New York City Board of Standards and Appeals*, 30 COLUM. J. ENVTL. L. 193, 196 (2005) (noting shift over thirty-year period from “bulk” to “use” variances, which permit, for example, residential units in manufacturing zones; also noting that the frequency of these variances has meant that zoning boards have essentially taken on a planning role theoretically reserved for the City Planning Commission).

135. See *supra* notes 39 & 40.

136. See, e.g., Foster, *supra* note 21, at 534-38 (recounting a dispute in New York City involving the city’s decision to sell to private developers hundreds of community gardens and the failed effort of neighborhood gardeners and residents to stop the auctioning off of the gardens).

137. Been et al., *supra* note 40 (examining rezoning during the Bloomberg administration and finding that the city downzoned a higher percentage of its lots

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to say that the politics and process of zoning and land use decision making does not favor, and likely cuts against, efforts to protect from the market those urban resources that residents want to claim or retain as a common pool resource. Where this is the case, the question is whether legal doctrine offers any means of identifying and/or protecting urban common pool resources as a matter of property law.

B. Public Trust Protection

The public trust doctrine, in which the title to the property is vested in the state to hold in perpetuity for the public, is presumed to apply to environmentally sensitive lakes, rivers and wetlands.¹³⁸ However, the doctrine's origins were not only in the protection of natural resources, but also in their urban equivalents—namely, city streets, public squares, roadways and the like—which courts routinely protected against the pressure to legislatively appropriate or devote to nonpublic purposes during an era of intense industrialization.¹³⁹ Thus, in the 19th century, either as a matter of statute or common law, courts deemed some aspects of the urban commons to be public trust property and as such provided protection under the public trust doctrine, with strict limits on its alienation and use of purposes other than those open and accessible to the public.¹⁴⁰

than would be expected under a growth machine hypothesis, results that support strong attention to the interests of homeowners who are more likely to support land uses that improve the quality of life for residents, including the provision of public amenities and other public goods, and that are in tension with the goals of the growth machine).

138. See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).
139. See, e.g., MOLLY SELVIN, THIS TENDER AND DELICATE BUSINESS: THE PUBLIC TRUST DOCTRINE IN AMERICAN LAW AND ECONOMIC POLICY, 1789-1920, at 102 (Harold Hyman et al. eds., 1987) (stating that the impetus for the assertion of public rights in early nineteenth century courts was industrialization; namely, “[a]s railroad and shipping improved during the century, control of harbor-front property in particular and urban property in general came to mean control of the economic destiny of a particular locality”); Ivan Kaplan, *Does the Privatization of Publicly Owned Infrastructure Implicate the Public Trust Doctrine?* *Illinois Central and the Chicago Parking Meter Concession Agreement*, 7 NW. J. L. & SOC. POL’Y 136, 148-55 (2012) (reviewing the history).
140. See, e.g., Kaplan, *supra* note 139, at 153 (noting that “in the late nineteenth century, state supreme courts, and the United States Supreme Court, began to invalidate legislative appropriations of public trust property;” specifically, many courts “invoked public trust principles to rescind legislative grants for the construction and operation of elevated, for-profit railroads on public streets”); see also *Merriwether v. Garrett*, 102 U.S. 472, 513 (1880) (“In its streets, wharves, cemeteries, hospitals, court-houses, and other public buildings, the [municipal] corporation has no proprietary rights distinct from the trust for the public. It holds them for public use, and to no other use can they be appropriated without

The public trust doctrine is no longer routinely applied to city streets or public squares in American courts. In fact, most modern courts and commentators consider the doctrine to be effectively confined to natural resources having some nexus with navigable waters, although many states have extended the doctrine beyond water-based resources.¹⁴¹ Nevertheless, there are some states that explicitly protect public parks and/or city streets under the public trust doctrine, invoking the doctrine in order to prevent local officials from appropriating or exploiting those resources for non-public uses.¹⁴² Some historic structures and landmarks, for example, are also considered to be held in public trust, usually by legislation, and protected from alienation and destruction.¹⁴³

Even where courts or legislatures do not explicitly extend the public trust doctrine to parks, streets, and other open access urban resources, land can be

special legislative sanction. It would be a perversion of that trust to apply them to other uses. The courts can have nothing to do with them, unless appealed to on behalf of the public to prevent their diversion from the public use.”).

141. See generally Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 719-27 (2006).
142. See e.g., *Friends of Van Cortlandt Park v. City of New York*, 750 N.E.2d 1050, 1053-54 (N.Y. 2001) (“[O]ur courts have time and again reaffirmed the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes.”); *AT&T Co. v. Arlington Heights*, 156 Ill.2d 399, 409 (1993) (rejecting the efforts of two home-rule municipalities to profit by renting or leasing land beneath city streets to a telecommunications provider and holding that “municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public”). *But see* *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 814 (Iowa 2000) (“We think these underpinnings of the public trust doctrine have no applicability to public streets and alleys. Simply stated, an alley is not a natural resource.”).
143. See e.g., CONN. GEN. STAT. § 22a-19a (providing that historic structures are protected from unreasonable destruction and that to gain protection plaintiff must demonstrate “that the conduct of the defendant, acting alone or in combination with others, has or is likely unreasonably to destroy the public trust in such historic structures”); *Hill/City Point v. City of New Haven*, 2000 WL 1172327, at *4 (Conn. Super. Ct. 2000) (stating “plaintiff has shown, prima facie, that the defendants’ conduct is likely unreasonably to destroy the public trust in a historic structure or landmark; however, defendants have established the affirmative defense that considering all the relevant surrounding circumstances and factors, there are no feasible and prudent alternatives to the demolition given the condition of the building and the amount of repair it needs”); *Harris Mem’l Church v. Bridgeport Redevelopment Agency*, No. CV000370421, 2000 WL 33115390, at *2 (Conn. Super. Ct. Dec. 22, 2000) (“In the present case, the church has failed to show that the taking of the church property and the razing of the structure would be an unreasonable destruction of the public trust in the building.”).

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“dedicated” as such either expressly, through legislation or private deed,¹⁴⁴ or implicitly, through the actions of a municipality or the commonly accepted use of the land.¹⁴⁵ Courts have held that once a park or other open access urban resource has been either explicitly or implicitly dedicated, and particularly where there is reliance on that dedication, a public trust is created and the city is restricted from alienating or appropriating the property for non-public purposes.¹⁴⁶ An example of an implicit dedication is Chicago’s Grant Park, along Lake Michigan, which was formed by way of a city map which designated the space a

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144. *See, e.g.*, 1996 N.Y. Op. Atty. Gen. (Inf.) 1093 (asserting that village board may act by resolution or by local law to dedicate a parcel as parkland). *See also* Friends of N. Spokane Cty. Parks v. Spokane Cty., 184 Wash. App. 105, 129 (2014) (dedication of lands is “the devotion of property to a public use by an unequivocal act of the owner” such as through a will or deed).
145. Either way, the actions demonstrate that the government considers the land to be parkland or that the public used it as a park. Examples include: a municipality publicly announcing its intention to purchase the lands specifically for use as a park, including by placing parkland in a publicly recorded master plan or map, or constructing recreational facilities, among other ways. *See, e.g.*, *Kenny v. Bd. of Tr. of Vill. of Garden City*, 735 N.Y.S.2d 606, 607 (App. Div. 2d 2001) (finding that property acquired for recreational purposes and used for recreation was instilled with public trust even though never officially dedicated). Dedication through implication can also occur when the common and accepted use of the land is as a park. *See, e.g.*, *Riverview Partners v. City of Peekskill*, 710 N.Y.S.2d 601 (App. Div. 1st 2000) (finding implied dedication due to evidence showing property was purchased for park purposes, named “Fort Hill Park” on maps and sign at entrance, and used as a park by the public since it was purchased); *Vill. of Croton-on-Hudson v. Westchester Cty.*, 331 N.Y.S.2d 883, 884 (App. Div. 2d 1972) (“While the deeds into the county are in fee and contain no restriction of the land to park use and while there does not appear to have been a formal dedication of the land to such use . . . we think the long-continued use of the land for park purposes constitutes a dedication and acceptance by implication.”). *But see* *Pearlman v. Anderson*, 307 N.Y.S.2d 1014, 1016-17 (Sup. Ct. 1970), *aff’d*, 314 N.Y.S.2d 173 (App. Div. 2d 1970) (finding that portion of property purchased for general purposes but which may have been used as a park, the proof of which was not convincing to the court, did not require legislative approval for other public use).
146. *See, e.g.*, *In re Estate of Ryerss*, 2008 WL 4824437, at *10 (Pa. Com. Pl. Aug. 25, 2008) (“Under long-standing Pennsylvania Common Law a public trust is created where a city by ordinance dedicates land to be used as a public park and then in reliance on that dedication, funds are appropriate by the state, city and individuals to improve and maintain that land.”); *see also* *Bd. of Tr. of Phila. Museums v. Tr. of the Univ. of Pa.*, 251 Pa. 115, 123-25 (1915) (stating that the “city holds, subject to the trusts, in favor of the community and is but the conservator of the title in the soil and has neither power nor authority to sell and convey the same for private purposes”).

“public ground for ever to remain vacant of buildings.”¹⁴⁷ This map, along with representations by local officials, formed the backbone of public dedication litigation by owners of property abutting the park.¹⁴⁸

In a historical account of the public dedication litigation involving Grant Park, Joseph Kearny and Thomas Merrill recount how Aaron Montgomery Ward, the famous Chicago catalog merchant, was able to block construction of a variety of structures in the park in a series of actions from 1890 to 1910.¹⁴⁹ He did so by convincing Illinois courts that that map created a public dedication of the land and that, as an abutting property owner, he had standing to secure an injunction against development projects that violated the dedication. Subsequently, “in the wake of Ward’s victories, the public dedication doctrine was wielded by generations of Michigan Avenue landowners to fend off construction of public buildings in what became a 319-acre park.”¹⁵⁰ The precedents established by Ward demonstrate how much power abutting property owners can have over public lands, even in cases where the general public desires development or other activities on that land.¹⁵¹

147. Joseph D. Kearny & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. U. L. REV. 1417, 1426 (2011).

148. The land abutting the Park was sold at a premium based on representations that it would remain an open public space, and on the understanding that prospective purchasers would enjoy direct exposure to Lake Michigan. *See id.* at 1425-27 (also noting that there were no other legal restrictions on how land along the lakefront would be used and that Chicago had not adopted a zoning ordinance during this period).

149. While Ward enjoined nearly all construction in Grant Park, he did consent to the construction of a temporary post office in 1895. *See id.* at 1476.

150. *Id.* at 1419. Although, as they note, by the dawn of the twenty-first century, local officials and private donors had succeeded in building in Grant Park. “Millennial Park,” as it is now known, now resides in the northwest corner of the park, after the city obtained consents to its construction from owners of property abutting the northwest corner of Grant Park. These consents were held by a state court judge, in an unpublished order, to be an effective waiver of the public dedication. *Id.* at 1419 (citing *Boaz v. City of Chicago*, No. 99L-3804 (Cook Cty., Ill. Cic. Ct. Jan. 14, 2000)).

151. Of course, the danger, as Kearny and Merrill note, is that the incentives of abutting property owners and the general public will not align and that there might arguably be “overprotection” of public space. *See id.* at 1421. They argue:

On the largest question—whether to maintain a public space or permit it to be privatized—there is likely to be a convergence of interests. But on subsidiary issues, abutting landowners may harbor very different preferences about how to manage public spaces. To simplify, abutting owners are likely to prefer peace and quiet, whereas the general public may want fun and games. As we have seen, Michigan Avenue owners tended to oppose baseball stadiums, toboggan slides, armories used as venues for prize fights, circuses, political conventions held in wigwams, and pavilions for outdoor concerts. It is likely that a public referendum

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What is interesting for our purposes about this history, and the ensuing doctrinal developments, are the rules of standing that recognize the role of urban inhabitants in protecting open-access common resources from incompatible uses, sale or destruction. As Abraham Bell and Gideon Parchomovsky have argued, one reason to grant such “antiproperty” rights to some members of the public is that parks and other open spaces are vulnerable to the whims of local governments who are captured by interest groups seeking development opportunities.¹⁵² The Ward precedents applying the public dedication doctrine in Chicago to allow abutting property owners veto rights over development on public lands replicates Bell and Parchomovsky’s “antiproperty” proposal.¹⁵³ Much like their proposal, the holders of these veto rights (e.g. abutting property owners) are able to exercise these vetoes because the cost of achieving unanimous consent among them, particularly if they are numerous, are too high.¹⁵⁴ Thus, property owners are able to halt development and other activities, effectively freezing public spaces in their current, open-space state.

While intuitively appealing for purposes of endowing citizens with the ability to protect the open “interaction space” that renders public spaces so valuable, and which facilitates a host of other goods that are made possible by the non-excludability of the space, there are real costs to endowing citizens with these kinds of veto rights. For instance, the problem with the Ward precedents, as others have pointed out, is that the right of Ward (and others) to block development in Grant Park was premised on his *private* right to open space and to an unobstructed view of Lake Michigan.¹⁵⁵ As Kearny and Merrill note, the public dedication line of cases reflects a peculiar hybrid doctrine which grants private rights in public spaces based on the reliance interests of those who purchased land—typically at higher prices—on the understanding that adjacent land would remain subject to public use.¹⁵⁶ The danger is that these property

would yield different views on these activities. Ward, who became the park’s most important enforcement agent, may have harbored even more negative views about public gatherings than most abutting owners.

Id. at 1526.

152. They proposed as a solution that private property owners who benefit disproportionately from parks and similar resources should be given veto power over any proposal to develop these resources. See Abraham Bell & Gideon Parchomovsky, *Of Property and Antiproperty*, 102 MICH. L. REV. 1, 5-6 (2003).
153. Kearny & Merrill, *supra* note 147, at 1421.
154. See *id.* at 1512 (noting that the public dedication doctrine is a “unanimous consent mechanism”; “any abutting landowner can block a forbidden use, provided that he or she is willing to incur the expense of a lawsuit. But if all abutting owners consent to a use, the project can go forward, even if it would otherwise violate the dedication”).
155. Allison Dunham, *The Chicago Lakefront and a Montgomery Ward*, 25 U. CHI. L. SCH. REC. 11, 17 (1979).
156. Kearny & Merrill, *supra* note 147, at 1445-49.

owners can act solely in their self-interest, without any democratic check, and in ways that are not clearly in the public interest or even for the benefit of the particular public space.¹⁵⁷

It is not at all clear from the public trust and public dedication doctrines, both developed by American courts in the nineteenth century, whether members of the public have any legally recognizable interest in open public spaces or other common pool resources that have become contested or subject to rivalry. Because the public trust doctrine is of such limited scope in the type of resources that it covers, even its liberal standing rules, which allow any citizen taxpayer to intervene in decisions about public resources,¹⁵⁸ will not provide a means to stop local officials from selling off community gardens or urban farms or underutilized structures to private developers. These clearly are outside of the scope of public trust properties even under the most expansive interpretation of the public trust doctrine in the urban context.

Similarly, even though the public dedication doctrine covers a wider scope of urban commons or public goods—such as streets, parks, squares, and any other any other land that has been explicitly or implicitly dedicated—its standing rules are limited in such a way that they do not give members of the public veto power over non-conforming activity absent proof of some special injury or interest.¹⁵⁹ Moreover, the public dedication doctrine has long been on the wane

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157. See *id.* at 18 (noting that after twenty years of litigation and expenditures of an estimated \$50,000, Ward had successfully prevented all civic projects for buildings in Grant Park and had done this in spite of the almost unanimous opposition of the newspapers and civic leaders of Chicago; also noting that it is difficult to say what the general citizenry thought given the absence of public opinion surveys back then); see also Kearny & Merrill, *supra* note 147, at 1421 (noting that Ward's adamant refusal to allow the Field Museum of Natural History and erection of pavilions for summer concerts in Grant Park was likely inconsistent with what most persons in Chicago wanted).
158. See, e.g., *Friends of N. Spokane Cty. Parks v. Spokane Cty.*, 184 Wash. App. 105, 124 (2014). Although in some states taxpayers can only bring suit where the Attorney General refused to bring a case or act in the public interest. See, e.g., *id.* at 121-22.
159. See Kearny & Merrill, *supra* note 147, at 1522-26 (comparing the public trust and public dedication doctrines, including their standing rules). As a general rule, for citizens to bring suit, an individual must have a special injury different from the general public or special interest in the trust or dedication. However, each jurisdiction differs in what this means. See *In re Estate of Ryerss*, 2008 WL 4824437, at *8 (Pa. Com. Pl. Aug. 25, 2008) (allowing taxpayer standing on the basis of “a joint nexus of settlor intent and financial contribution”); *Citizens for Pres. of Buehler Park v. City of Rolla*, 187 S.W.3d 359, 362 (Mo. App. S.D. 2006) (taxpayers must assert that government funds were or may be illegally expensed in order to assert standing); *Hinton v. City of St. Joseph*, 889 S.W.2d 854, 859 (Mo. App. W.D. 1994) (stating that nearby landowners have standing but only if they can assert “special injury” beyond property values); *Spokane*, 184 Wash. App. at 122 (stating that taxpayers must first petition the Attorney General).

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and thus is unlikely to be a viable tool for protecting public spaces and other urban common pool resources.¹⁶⁰

C. Eminent Domain

The power of state and local governments to take property, with compensation, has recently been enlarged through the Supreme Court's expansive interpretation of "public use" in *Kelo v. City of New London*.¹⁶¹ Before *Kelo*, the power of the government to take property was arguably limited to an anti-harm principle in which public use was interpreted more narrowly to allow takings only for the purposes of curing social and economic harms such as "blight" or a land oligopoly.¹⁶² *Kelo*, however, makes clear that the government can exercise its power of eminent domain in the name of economic revitalization so long as the taking is part of a "carefully considered" redevelopment plan and not an outright property transfer from one private party to another.¹⁶³ Some states have since limited the reach of *Kelo*, but the jurisprudential signal from the case is quite clear: state and local governments may define public use in ways that are utility maximizing—that is, property may be taken for a higher economic use even if neither the property nor the surrounding area is blighted or otherwise in poor condition.

In some ways, this expansive use of eminent domain maps onto a version of the social function of property doctrine and social obligation norm. Recall that both the doctrine and the norm recognize the idea of "social solidarity"—the interdependence of individuals in a society—and the need to put property to productive use in the service of the common good. The social function of property and social obligation norm has much plasticity, both in theory and in practice.¹⁶⁴ It can be read in its thinnest version to entail an obligation of prop-

160. See Kearny & Merrill, *supra* note 147, at 1518-22 (explaining its decline since the Ward cases in Illinois).

161. *Kelo v. City of New London*, 545 U.S. 469 (2005).

162. See, e.g., *id.* at 494-504 (O'Connor, J., dissenting) (arguing that the majority opinion extended the meaning of public use by eliminating the need to show the types of affirmative social harms that provided basis for finding public use in *Berman* and *Midkiff*; in both cases, the legislative body had found that eliminating existing property use was necessary to remedy harm and a public purpose was realized only when the harmful use was eliminated); see also *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *Berman v. Parker*, 348 U.S. 26, 34-36 (1954).

163. Importantly, as Justice Kennedy highlighted in his concurrence, the "identities of most of the private beneficiaries were unknown at the time the city formulated its plans." *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring).

164. The idea that property owners owe affirmative obligations to the welfare of others, and to societal welfare more generally, can satisfy a number of different ideological orientations, including a classical liberal one as a recent symposium on the various interpretations and applications of the doctrine in Latin America demonstrate. See *generally* Symposium, *supra* note 109 (noting that in some Latin American

erty owners to contribute, through taxation, to the provision of public goods—such as law enforcement, schools, and fire protection¹⁶⁵—or to entail an obligation to curtail an owner's dominion over his property in the presence of market failures (such as free riders and holdouts) in order to promote and maximize public welfare.¹⁶⁶ At its thickest, as Greg Alexander argues, it can be read to require the use of property to contribute benefits and goods that the community reasonably regards as necessary for its members' development of those human qualities essential to their capacity to flourish as moral agents.¹⁶⁷

Eminent domain can be a means to putting property to its social function—or productive use—either in the thin or thick version of the norm. For instance, eminent domain has often been justified on the grounds that allowing the government to acquire private property under certain circumstances produces the most economically efficient result for taxpayers.¹⁶⁸ As such, taking property to promote economic development is justifiable if done to put the property or properties to a socially desirable and economically productive use that will benefit taxpayers. Eminent domain allows the government to avoid the holdout problem that is said to plague land assembly, thereby avoiding the tragedy of the anticommons—the wasteful underutilization of property caused by too many entitlement holders.¹⁶⁹

Under a thick version of the social function of property, or social obligation norm, eminent domain can be utilized to provide those benefits and goods that society reasonably regards as necessary for human flourishing. As Lisa Alexander has recently documented, a number of organized groups and residents across the country that have occupied foreclosed or abandoned homes and vacant land are convincing local governments to use eminent domain to transfer title of the under-utilized properties to community-controlled land trusts.¹⁷⁰ Allowing the community to manage these properties as a common pool resource would keep these homes perpetually affordable to low- and moderate-income

countries, courts have interpreted the doctrine to impose internal limits on the right to property, more in line with a thicker version of the doctrine, but other countries have not interpreted to impose external but not internal limits to the right).

165. Alexander, *supra* note 115, at 753-57.

166. See, e.g., *id.* at 753; Hanoch Dagan, *The Social Responsibility of Ownership*, 92 CORNELL L. REV. 1255, 1259 (2007).

167. See *supra* notes 116-118 and accompanying text.

168. See, e.g., RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 55-56 (6th ed. 2003); Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 81-82 (1986).

169. Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1467 (2008) (noting that, from an efficiency standpoint, eminent domain is necessary to consolidate urban land that is overly fragmented into unusably small parcels).

170. Alexander, *supra* note 90.

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households and provide other common goods, such as green space, important for human flourishing in these communities.

In some instances, both the thick and thin version of the social obligation norm can be put to work, as when eminent domain is used to overcome land assembly problems in the context of providing common goods necessary for human flourishing. Consider the example of the Dudley Street Neighborhood Initiative (DSNI), 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 to assemble land for an "urban village"—consisting of affordable housing, shopping, open green space ("a town common"), and a community center.¹⁷¹

Like many residents in distressed neighborhoods, Dudley Street residents cleaned up many of the vacant lots that littered their neighborhood. However, in order to realize its plan of an "urban village, DSNI needed control over the future use of the fifteen acres of vacant lots owned by the city and the fifteen acres that were privately owned, most of which had municipal tax liens against them or were in foreclosure. DSNI convinced the city to declare a moratorium on the transfer of city-owned vacant lots in the neighborhood. The privately owned vacant lots were another matter, however. DSNI knew that foreclosing on each of the scattered individual private properties would be too time consuming, and instead persuaded the city to grant its newly established affiliate, Dudley Neighbors Inc. (DNI) status as an "urban redevelopment corporation," giving it the power to acquire by eminent domain vacant land within the Dudley Triangle.

Subsequently, DNI was set up as a land trust to acquire the vacant lots and oversee the development of affordable housing as well as community facilities and open space on the land that was formerly constituted of fragmented vacant lots.¹⁷² With the help of additional private and public funding, including a federal Housing and Urban Development (HUD) grant (secured with the help of the City), 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, two community centers, an urban farm, refurbished schoolyards, and numerous playgrounds.

171. See generally PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* 128-39 (1994) (describing DSNI and the history of the Dudley Street neighborhood); Elizabeth A. Taylor, *The Dudley Street Neighborhood Initiative and the Power of Eminent Domain*, 36 B.C. L. REV. 1061 (1995).

172. DSNI/DNI became the first community group in the nation to win the right of eminent domain. 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).

The City's use of its eminent domain power to support a community of active citizens making a claim to vacant land as a common pool resource, then acting as a steward of the resource and collaboratively managing it as a commons for future generations, is an example of the State as a facilitator or enabler in governance of the commons. As we will explore in the next Part, part of the importance of naming and claiming as a "commons" certain resources in the city is that it raises anew the question of how best to manage and govern resources in which citizens have a common stake in ways that are not subject to the whims of a neoliberal state nor to the vagaries of the market.

III. GOVERNING THE URBAN COMMONS

The commons, as we have said, is partly a question of resource characterization and partly a question of governance. This is why both Hardin's *Tragedy of the Commons* and Ostrom's *Governing the Commons* wrestle with how best to manage resources that are (or should be) shared by unaffiliated users who may have their own selfish or utility-maximizing interests in consuming those resources. We have seen that the city and much of its land and other resources are partly managed through a public regulatory system in which the city places limits, through its zoning and land use laws, on the location decisions of individuals and firms as a means of controlling negative spillovers from those decisions. The city may also use zoning and land use tools such as performance zoning and inclusive zoning to structure incentives for sharing the city and for ensuring that a broader group of inhabitants can access and use the city commons. Moreover, the city might also allow the full or partial enclosure, or privatization, of some of the open resources, or commons, in the city in order to ensure their sustainability.¹⁷³

The emergence of user-managed, but not user-owned, resources represents a third way that cities have allowed urban common pool resources to be governed. This third way is consistent with Ostrom's work, which demonstrated, in opposition to Hardin's *Tragedy* scenario, that even self-interested resource users can and do successfully manage their land, water, forests, and fisheries without the coercive hand of the state and without privatizing the resource. Ostrom focused on the concept of local empowerment: under certain conditions local communities can autonomously decide on and enforce the rules for sharing and

173. Privatized neighborhoods, streets, and parks are some examples of the privatization of common goods in the city which allow resident users to set usage rules and take over full responsibility for maintenance. See, e.g., Michelle Hofmann, *When Residents Own the Streets*, L.A. TIMES (May 14, 2006) <http://articles.latimes.com/2006/may/14/realestate/re-private14>; Mike MacLaughlin, *Parking Dream: Residents Can Set Parking and Traffic Rules on City's More Than 900 Private Streets*, N.Y. DAILY NEWS (Aug. 9, 2010), <http://www.nydailynews.com/new-york/parking-dream-residents-set-parking-traffic-rules-city-900-private-streets-article-1.203563>. See also ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 265-73 (2005).

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managing common pool resources, in the process developing and maintaining self-governing institutions.¹⁷⁴

A. *Existing Urban Commons Institutions*

In user-managed scenarios, individuals exist in an interdependent relationship with each other and with the resource, and are strongly motivated to overcome collective action problems, collaboratively manage the resource, and enhance their productivity over time.¹⁷⁵ In many of these cases, users are able to enforce and monitor their rules only with the help of external state agencies on whom they rely in instituting a complex, “nested” governance system to regulate the resource but without subsuming these institutions into a centralized governance regime.¹⁷⁶

As we have written before, there are some urban commons-based institutions—e.g. business improvement districts, park conservancies, community gardens, and neighborhood foot patrols—that resemble Ostrom’s governance examples¹⁷⁷ These institutions allow users to manage open-access resources but without transferring ownership of the resource or the ultimate policymaking authority to private parties.¹⁷⁸ They are all born out of a group of neighborhood or city residents who desire to maintain an open-access commons and who are willing to contribute to the restoration, maintenance, and preservation of that commons. Many of these efforts are a response to the failure of local govern-

174. Ostrom’s study focused on small-scale resources affecting a relatively small number of persons (fifty to 15,000) who are heavily dependent on the resource for economic returns. See OSTROM, *supra* note 17, at 26.

175. See *id.* 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).

176. 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. 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.”).

177. Foster, *supra* note 28, at 91-108.

178. 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, limit access to the resource, or impose health or other safety standards on users of the resource. See *id.* at 110.

ments to actively manage and fund common pool resources, leaving them subject to rivalry and degradation.

While some of these groups operate only as an informal collection of volunteers, others have become more formalized. The more formal groups establish themselves as a membership organization, elect boards of directors, write bylaws, and apply for nonprofit status. Both formal and non-formal groups alike rely to some extent on the local government to facilitate or enable their activities in managing and governing the commons. In this sense, they are “nested” governance regimes that “claim” the urban resource as an open-access common resource, allowing some class of users to work cooperatively and collaboratively to care for and manage it.¹⁷⁹

The manner in which some urban commons are being user-managed with active support of the local government is a model that we believe can be replicated for other kinds of urban commons, and even scaled up to the city itself. In the next Part, we want to step back and propose that there exist democratic design principles that characterize these efforts and that can be replicated in a variety of formats and institutional structures. Only after setting out these principles can we imagine what it might look like to scale up to the city level these collaborative, polycentric forms of commons governance.

B. *Urban Commons as Democratic Innovation*

Existing commons institutions share a number of characteristics that set them apart from merely sublocal forms of urban governance.¹⁸⁰ In this Part we describe these characteristics as: horizontal subsidiarity (or sharing), collaboration, and polycentricism. We offer them as design principles that can guide the scaling-up of cooperative forms of commons governance to the city level.

1. Horizontal Subsidiarity

As existing commons institutions illustrate, subsidiarity is a first possible design feature for urban commons governance. Subsidiarity is the idea that power should be shared with “the lowest practicable tier of social organization,

179. Some refer to the activities of managing a commons as “commoning.” See, e.g., *What is Commoning Anyway? Activating the Power of Social Cooperation to Get Things Done and Bring Us Together*, ON THE COMMONS MAG. (Mar. 3, 2011), <http://www.onthecommons.org/work/what-commoning-anyway> (“[C]ommoning represents a new way for everyday citizens to make decisions and take action to shape the future of their communities without being locked into the profit-driven mechanics of the market or being solely dependent on government agencies for funding.”).

180. See Nadav Shoked, *The New Local*, 100 VA. L. REV. 1323 (2014) (arguing that small subsets of local residents, or “micro-local” units, make decisions that affect the public; these includes many one-off decisions such as the location of bicycle lanes, neighborhood school closings, historic district designation, etc.).

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public or private.”¹⁸¹ In particular, we are interested in the principle of “horizontal subsidiarity,” a principle that we borrow from the 2001 reform of the Italian constitution which effectuated a significant change in local government power and the relationship between citizens and their local governments.¹⁸² This principle of “horizontal subsidiarity” dictates that powers, where possible, be assigned on the basis of the local/nonlocal dimension of the collective interest and of the capability of the actors to fulfill such interest.¹⁸³ The reform also requires the promotion of “the autonomous initiatives of citizens, both as individuals and as members of associations, relating to activities of general interest, on the basis of the principle of subsidiarity.”¹⁸⁴

The principle of horizontal subsidiarity represents the foundation, we believe, of innovative, bottom-up strategies to care for, regenerate, and manage urban common pool resources. The principle of horizontal subsidiarity conceptualizes the citizen as an active citizen and encourages local officials to put in place appropriate public policies that foster the activation and empowerment of citizens in managing and caring for shared resources.¹⁸⁵ Active citizenship means that urban inhabitants are able to participate not only in the public life of the city, but also in creating the city and in maintaining it for the collective welfare. This can range from maintaining streets, to taking care of public

181. Roderick M. Hills, *Is Federalism Good for Localism?*, 21 J. L. & POL. 187, 190 (2005).

182. See Gian Franco Cartei & Vincenzo Ferraro, *Reform Of The Fifth Title Of Italian Constitution: A Step Towards A Federal System?*, 8 EUR. PUB. L. 445 (2002); Erminio Ferrari, *Planning, Building And Environmental Law After The Recent Italian Devolution*, 8 EUR. PUB. L. 357 (2002).

183. The reforms place on equal footing, albeit with different powers, all the sub-national levels of government and the entities composing the Italian Republic. Article 114 of the revised constitutional text states that “the Republic is composed of municipalities, metropolitan cities, provinces, regions and the State.” Art. 114 Costituzione [Cost.] (It.). The previous text, instead, stated: “the Republic is divided into regions, provinces and municipalities.” Article 114 now also extends to provinces, metropolitan cities and municipalities the legal status previously granted only to regions by the repealed Article 115. *Id.* Accordingly, they share with regions the same nature of autonomous entities with their own home rules and constitutionally entrenched powers and functions. Indeed, they are “autonomous entities having their own statutes, powers and functions in accordance with the principles laid down in the Constitution.” *Id.* The text of the Italian Constitution is available at CONSTITUTION OF THE ITALIAN REPUBLIC, http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (last visited June 4, 2016) (current Italian Constitution). For the purpose of comparison, the text of the pre-amendment Italian Constitution is available at THE CONSTITUTION OF THE ITALIAN REPUBLIC, http://legalportal.am/download/constitutions/110_en.pdf (last visited June 4, 2016) (former Italian Constitution). See also Iaione, *supra* note 34.

184. The principle of horizontal subsidiarity is stated in the Italian Constitution at Article 118, paragraph 4. Art. 118, para. 4 Costituzione [Cost.] (It.).

185. See Iaione, *supra* note 28.

squares and parks, to turning vacant lots and underutilized space or structures into useful resources for communities.

As Ostrom argued, positive externalities occur when action taken with one decision making unit simultaneously generate costs or benefits for other units, organized at different scales.¹⁸⁶ Although higher level governments or officials might take the lead on a large-scale problem, the idea is that the responsibility lies at different levels. Instead of trying to solve a large (and diffuse) issue alone, governments look for allies at different hierarchical levels to facilitate the initiatives of proactive citizens who, individually or in groups, are willing to take direct care of the commons.

Consider one example of the relationship between individual actions and larger scale problems: climate change. Climate change is not only a global phenomenon but it also suffers from a classic collective action problem. As such, much conventional thinking suggests that this global commons problem is best addressed and regulated at the international level. Yet, even a problem at this global scale benefits from active citizenship at the local (and even sub-local) level. As legal scholars have pointed out, individual behavior accounts for one-third of U.S. contributions to greenhouse gases and thus it is possible to achieve significant greenhouse gas emissions by focusing policy on changing individual norms and behavior.¹⁸⁷ Changes in behavior at a small individual scale may seem only to have diffuse benefits, but they in fact end up generating global benefits as well as local ones.¹⁸⁸

Horizontal subsidiarity thus prompts governments to look for, and accept, allies to facilitate the initiatives of proactive citizens who, individually or in groups, are willing to take direct care of the common assets of the city. In a sense, the government is looking to share the responsibility of caring for common goods with an active citizenry. This “sharing” implies that citizens are willing to act for the general interest—to be a *city-maker* rather than just a *city-user*.¹⁸⁹

186. See Elinor Ostrom, *Nested Externalities and Polycentric Institutions*, 49 *ECON. THEORY* 356 (2012).

187. Michael P. Vandenberg & Anne C. Steinemann, *The Carbon-Neutral Individual*, 82 *N.Y.U. L. REV.* 1673, 1687-95 (2007).

188. See, e.g., Hope M. Babcock, *Assuming Personal Responsibility for Improving the Environment: Moving Toward a New Environmental Norm*, 33 *HARV. ENVTL. L. REV.* 117, 140-42 (2009) (explaining how individuals can struggle to accept that a diffuse, ubiquitous problem like clean air or climate change can be mitigated through such a seemingly insignificant action as flicking off one’s light switch); John C. Dernbach, *Harnessing Individual Behavior to Address Climate Change: Options for Congress*, 26 *VA. ENVTL. L.J.* 107, 160 (2008) (suggesting that individuals must be actors of climate change regulatory strategies because “[t]he problem is too daunting to focus simply on the large polluters”).

189. See FRUG, *supra* note 13.

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Some have argued that this kind of active citizenship constitutes a “third sector” of both informal and formal organizations (or collections of individuals) outside of the state or market, capable of providing goods and services for the well-being of citizens, even as it risks putting too much pressure on residents.¹⁹⁰ We do not mean to equate subsidiarity with devolution of responsibility by local authorities over the provision of basic public goods and services to city residents. Rather, the principle of horizontal subsidiarity is intended to reorient public authorities away from the central state to an active citizenry willing to cooperatively govern common resources.

2. Collaboration

Collaboration is another core aspect of commons institutions, more generally, and of urban commons institutions, more particularly. Collaboration has strong political and democratic ramifications. Collaboration, as a general matter, has emerged as a form of governance to replace adversarial and managerial modes of policy making and implementation.¹⁹¹ In this model, several stakeholders interact in order to implement public policies, or manage crucial assets for the community.¹⁹² At the level of a common pool resource, active citizens become problem solvers and resource managers, able to cooperate and make strategic decisions about common assets and to implement them with other citizens and other urban stakeholders.¹⁹³ The kind of collaborative governance re-

190. See, e.g., H.P. Bang & E. Sorensens, *The Everyday Maker: A New Challenge to Democratic Governance*, 21 ADMIN. THEORY & PRACTIS 325 (Sept. 1999).

191. Chris Ansell and Alison Gash define collaborative governance as

[a] governing arrangement where one or more public agencies directly engage non-state stakeholders in a collective decision-making process that is formal, consensus-oriented, and deliberative and that aims to make or implement public policy or manage public programs or assets.

Chris Ansell & Alison Gash, *Collaborative Governance in Theory and Practice*, 18 J. PUB. ADMIN. RES. & THEORY 543, 544 (2008).

192. The term “stakeholder” can be used to refer both to participation of citizens as individuals and to the participation of organized groups, public agencies and non-state stakeholders. As Lisa Bingham has argued:

“Collaboration” means working together with diverse interests to achieve common goals across boundaries and in multi-agency, multi-sector, and multi-actor relationships and may include the general public, state, regional, and local government agencies, tribes, non-profit organizations, businesses, and other nongovernmental stakeholders to address issues that cannot easily be addressed by any one organization on its own.

Lisa Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 10 WIS. L. REV. 297, 350 (2010).

193. Cooperation is a crucial factor in the conceptualization of collaborative governance. See Philippe C. Schmitter, *Participation in Governance Arrangements:*

flected in commons institutions deeply engages citizens in public-public and public-private partnerships with the goal of implementing an arrangement in which citizens are *governing* and not simply *being governed*.¹⁹⁴ Similarly, a commons-based approach to governance at the level of the city can utilize collaboration as a methodological tool through which heterogeneous individuals and institutions co-create or co-govern the city, or parts of the city, as a common resource.

One way to think of collaborative governance is through the lens of the “triple helix” concept, utilized in innovation studies, in which there occurs a shift from an industry-government dyad characterizing the Industrial Society to a triadic relationship between university, industry, and government in the Knowledge Society.¹⁹⁵ The basic idea is that the potential for innovation and economic development in a Knowledge Society lies in the hybridization of elements from university, industry, and government to generate new institutional and social formats for the production, transfer and application of knowledge.¹⁹⁶ The knowledge transfer and interactions between these elements are a function of the complex set of formal and informal linkages between higher education

Is There Any Reason To Expect it Will Achieve “Sustainable and Innovative Policies in a Multi-Level Context”?, in PARTICIPATORY GOVERNANCE: POLITICAL AND SOCIETAL IMPLICATIONS 51, 53 (Jürgen Grote & Bernard Gbikpi eds., 2002) (“Governance is a method/mechanism for dealing with a broad range of problems/conflicts in which actors regularly arrive at mutually satisfactory and binding decisions by negotiating with each other and cooperating in the implementation of these decisions.”) (italics removed).

194. When we refer to the “public” we want to acknowledge that there are two forms of “public” actors: the public conceived as the public sector or as a specific community or polity. Collaboration is a methodological tool that enables these two kinds of public to work with each other, or to work with private actors that exist outside of these two publics.
195. See Loet Leydesdorff & Henry Etzkowitz, *The Triple Helix as a Model for Innovation Studies*, 25 SCI. & PUB. POL’Y 195 (1998).
196. The triple helix has components and sub-components among them. Distinctions are made between (a) “[i]ndividual and institutional innovators”; (b) “R&D and non-R&D innovators”; and (c) “[s]ingle-sphere’ and ‘multi-sphere’ (hybrid) institutions.” Marina Ranga & Henry Etzkowitz, *Triple Helix System: An Analytical Framework for Innovation Policy and Practice in the Knowledge Society*, 27 INDUS. & HIGHER EDUC. 237, 242 (2013). According to the authors, there are two complementary perspectives from which is possible to see the triple helix system theory: the neo-institutional perspective, which sees the university as the main innovation actor, and the neo-evolutionary perspective, which sees the “university, industry and government [as] co-evolving sub-sets of social systems that interact through an overlay of recursive networks and organizations that reshape their institutional arrangements through reflexive sub-dynamics, such as markets and technological innovations.” *Id.* at 239-40.

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systems, businesses, and the government.¹⁹⁷ “The interactions between the three strands of the ‘helix’ creates the unique and distinctive characteristics of an innovation system . . . at either a national or regional level.”¹⁹⁸

Building on this kind of highly interactive, collaborative governance model represented by the triple helix, a quintuple helix model is being experimented throughout cities in Italy. There, universities (and also other knowledge-bearing institutions such as schools and research and cultural centers) are facilitating the creation of partnerships between public and private organizations, on the one hand, and social innovators and citizens, on the other hand. In these experiments, urban, environmental, cultural, knowledge, and digital commons are co-managed through loosely coupled systems by five actors—the unorganized public (i.e., social innovators, active citizens, makers, digital innovators, urban regenerators, urban innovators, etc.), public authorities, businesses, civil society organizations, and knowledge institutions (i.e., schools, universities, cultural academies, etc.)—to establish public-private-community partnerships.¹⁹⁹ These partnerships have three main aims: living together (collaborative services), growing together (collaborative ventures), and making together (collaborative urbanism)²⁰⁰ These different elements interact together to produce shared value or collective goods in the growth and revitalization of cities.

Designing collaborative processes, or institutions, to include a wide range of citizens, particularly those most vulnerable to being excluded from decision making processes on account of their social or economic status, is important for governing any common pool resource. We must be careful not to romanticize collaboration as a commons principle. It is important for urban reformers to heed the lessons of failed collaborative urban governance practices which simply devolve planning processes to the sublocal level without offering new tools and resources to enable meaningful collaboration, or to make truly accessible urban assets, for a broader class of city residents.²⁰¹ The best collaborative urban

197. Morten Berg-Jensen et al., *Forms of Knowledge and Modes of Innovation*, 35 RES. POL’Y 5 (2007).

198. Rebecca Harding, *Fostering University-Industry Links*, in ORG. FOR ECON. CO-OPERATION AND DEV., STRENGTHENING ENTREPRENEURSHIP AND ECONOMIC DEVELOPMENT IN EAST GERMANY: LESSONS FROM LOCAL APPROACHES 139, 142 (Mar. 2009), <http://www.oecd.org/site/cfecpr/42367462.pdf>.

199. See *infra* Part III.C. On the quintuple helix governance model, see also Christian Iaione & Paola Cannavò, *The Collaborative and Polycentric Governance of the Urban and Local Commons*, 5 URB. PAMPHLETEER 29 (2015).

200. Christian Iaione, *CO-Mantova as the Trigger for a Co-Cities Movement*, LABGOV (Nov. 27, 2014), <http://www.labgov.it/co-mantova-co-cities/>.

201. Here we acknowledge the literature critiquing collaborative planning experiments in cities around the world as prone to domination by economic elites and/or strong or corrupt sublocal leadership, excluding the poor and vulnerable from claiming and sharing in the revitalization of neighborhoods and cities. See, e.g., Sarah Elwood, *Partnerships and Participation: Reconfiguring Urban Governance in Different State Contexts*, 25 URB. GEOGRAPHY 755 (2015) (comparing the discourses

development processes, in our view, deeply engage and empower a wide range of actors in the revitalization of city space and in the management of neighborhood assets.

We embrace urban commons-based experimentation which has both a governance component and resource-sharing component that allows residents access to, and use of, local assets (even if temporary). This promotes not only inclusive development practices but also new forms of urban welfare provisioning through commons management. An example of a collaborative urban commons framework that bridges these two elements—the commons as shared assets and governance—is the recently implemented Bologna regulation on the urban commons, which is described below.

3. Polycentricism

Collaboration with other stakeholders and institutions (both public and private) can lead to common resources being managed in a “polycentric” manner—i.e., neither exclusively owned nor centrally regulated. The polycentric approach to governance was first proposed by Vincent Ostrom, Charles Tiebout, and Robert Warren to connote “many centers of decisionmaking which are formally independent of each other” but which “may function in a coherent manner with consistent and predictable patterns of interacting behavior.”²⁰² Instead of a global, top down regime in which lower levels of government carry out the mandates from above, the polycentric approach “provides for greater experimentation, learning, and cross-influence among different levels and units of government, which are both independent and interdependent”²⁰³

and practices of purportedly collaborative or “partnership” rapprochements to urban governance in the United States and United Kingdom as enacted through nationally directed planning and revitalization program); Sarah Elwood, *Neighborhood Revitalization Through ‘Collaboration’: Assessing the Implications of Neoliberal Urban Policy at the Grassroots*, 58 GEOJOURNAL 121 (2002) (using example of a collaborative revitalization program in Minneapolis, Minnesota); Marie-Hélène Zérah, *Participatory Governance in Urban Management and the Shifting Geometry of Power in Mumbai*, 40 DEV. & CHANGE 853 (2009) (questioning the participatory dimension of urban governance in Mumbai based on surveys of a number of collaborative public private partnerships for urban services and infrastructure provision); Soumyadip Chatapadhyay, *Contesting Inclusiveness: Policies, Politics and Processes of Participatory Urban Governance in Indian Cities*, 15 PROGRESS IN DEV. STUD. 1 (2015) (examining participatory governance arrangements in major Indian cities characterized by the involvement of neighborhood associations/residents’ welfare associations (RWAs) and NGOs).

202. Vincent Ostrom, Charles Mills Tiebout, & Robert Warren, *The Organization Of Government In Metropolitan Areas: A Theoretical Inquiry*, 4 AM. POL. SCI. REV. 831, 831 (1961).
203. Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395 (2011).

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The polycentric approach to commons governance was fully embraced by Elinor Ostrom in her studies of commons institutions in the natural resources context. According to Ostrom, the two organizational forms for commons management theorized in the mid-twentieth century—the market and the state, the first for the production of private goods and the second for non-private goods—do not “adequately deal with the wide diversity of institutional arrangements that humans craft to govern, provide and manage public goods and common-pool resources.”²⁰⁴ A polycentric approach to local governance locates commons institutions in between the market and the state.

Polycentrism is not just about the participation of several levels of governments in providing public goods or delivering services; “polycentric governance requires a certain level of independence and interdependence between governance institutions and organizations at various levels.”²⁰⁵ As Daniel Cole has argued, to understand the polycentric approach is to understand the distinction between *government* and *governance*: governance is not just ‘what governments do’²⁰⁶ because governance is not a function limited to the State; rather, myriad non-governmental organizations, local neighborhood associations, individual property owners, etc. can (and already do) play an important role in governing resources.²⁰⁷ A polycentric system is thus, ideally, “a system in which governmental units both compete and cooperate, interact and learn from one other, and responsibilities at different governmental levels are tailored to match the scale of the public services they provide.”²⁰⁸

Some urban commons institutions, like BIDs and Park Conservancies, possess many of the characteristics of polycentric governance. In fact, such institutions very much resemble those identified in Elinor Ostrom’s study of a series of groundwater basins located beneath the Los Angeles metropolitan area.²⁰⁹ 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. State legislation authorizing the creation of special water districts by local citizens, in particular, was a crucial element in encouraging users of groundwater

204. Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 642 (2010).

205. Cole, *supra* note 203, at 396.

206. See also Jouni Paavola, *Climate Change: The Ultimate “Tragedy of the Commons”?*, in PROPERTY IN LAND AND OTHER RESOURCES 417 (Daniel H. Cole & Elinor Ostrom eds., 2011).

207. Cole, *supra* note 203, at 397.

208. *Id.* at 405.

209. See Ostrom, *supra* note 17, at 103-42 (discussing the case studies of user groups in three California groundwater basins).

basins to invest in self-organization and the supply of a local institution.²¹⁰ 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.”²¹¹

Thus, all the actors in a polycentric governance regime are part of an autonomous center of decision and can realize activities for the urban commons, coordinated and enabled by the public authority. The role of the State becomes that of providing them necessary tools (including appropriate public policies packaged as collaborative devices), connecting the several networks of actors, and helping the so-called “collaborative class” to enlarge the boundaries of innovation. In this kind of system, “many elements are capable of making mutual adjustments for ordering their relationships with one another within a general systems of rules where each element acts with interdependence of other elements.”²¹²

IV. THE CITY AS A COMMONS

As we have argued, the city *is* a commons by virtue of its openness and potential for rivalry. It is this very openness that lends the city commons a paradoxical quality that often puts it in tension with itself. On the one hand, it is the openness of cities that allows them to make and remake themselves, and to compete for the people and goods that help to grow and sustain them. On other hand, the city has finite resources that, by virtue of being open, are subject to congestion and exhaustion, rendering those cities vulnerable to rivalry. This rivalry often puts in conflict different kinds of commons, or commons claims, leading not only to the sacrifice of one urban good (e.g. a park or garden) for another (e.g. housing) but the sacrifice of the needs of the socially and economically powerless for the desires of the more powerful.

How cities manage, or govern in the face of, the potential for rivalry and tensions between competing claims to the commons is at the heart of the governance question that we address in this Part. There is no one system that can satisfactorily mediate the tensions that arise from rivalry for common resources, nor that can resolve distributional inequalities with regard to those resources.

210. 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. Once a special district was created, it possessed a wide variety of powers. 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. *Id.* at 129.

211. *Id.* at 135-36.

212. See Vincent Ostrom, *Polycentricity*, in POLYCENTRICITY AND LOCAL PUBLIC ECONOMICS 57 (Michael McGinnis ed., 1999).

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However, there are alternatives to the current system—one in which local governments hold a monopoly over common resources and in which the vastly unequal influence over relevant decisions by elites and narrow interest groups operates to the detriment of large swaths of the urban population.

In this Part, we begin to sketch out an alternative vision of city governance in which heterogeneous individuals and institutions can collaborate together to co-create or co-govern the city, or parts of the city, as a common resource. Here we lay out the conceptual pillars of what we call an “urban collaborative governance” which conceives of the role of the state according to the design principles set out in the previous Part and introduces a strong element of social and economic equity or inclusion. We also provide and explore two emerging examples on the ground of what this model of urban collaborative governance might look like in practice: the sharing city and the collaborative city.

A. *Urban Collaborative Governance*

The core impetus to conceive of the city as a commons aims at changing the democratic and economic functioning of the city. This change is necessary not only to create a city that better functions according to the needs of all of its citizens, but also to acknowledge the trend towards massive urbanization and the reality that cities are becoming the center of political life.²¹³ As we have seen with the above examples of existing urban commons institutions, it is possible to re-situate the role of the state, or city, as an enabler and facilitator of collaboration and ultimately of political and economic redistribution.

The idea of the state as a facilitator—a relational state²¹⁴—is part of the move from a “command and control” system of governance to what we call “urban collaborative governance,” a system which at its core redistributes decision making power and influence away from the center and towards an engaged public. The facilitator state creates the conditions under which citizens can develop collaborative relationships with each other, and cooperate both together and with public authorities, to take care of common resources, including the city itself as a resource.²¹⁵ Further, if the city itself is a shared resource, then a strong collaborative system of decision making should also nudge towards redistributing some of the assets of the city to support differently-situated individuals and communities within the city. This idea is akin to the “city-making”

213. See BENJAMIN BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* (2013).

214. See generally Geoff Mulgan, *Government With the People: The Outlines of a Relational State*, and Marc Stears, *The Case for a State That Supports Relationships, Not a Relational State*, in *THE RELATIONAL STATE: HOW RECOGNISING THE IMPORTANCE OF HUMAN RELATIONSHIPS COULD REVOLUTIONISE THE ROLE OF THE STATE* 20, 35 (Graeme Cooke & Rick Muir eds., 2012).

215. See R. Quentin Grafton, *Governance Of The Commons: A New Role For The State?*, 76 *LAND ECON.* 504 (2000).

that Frug proposed in which he advocated transforming cities, and city services, into vehicles for community building across local government boundaries.²¹⁶ In a similar way, a commons-based governance approach envisions cities as vehicles for collaboration across formal governance arrangements toward social and economic inclusion.

1. Re-Designing City Hall

To imagine the morphology of the City government as a facilitator, it is necessary to move away from the Leviathan, or the Gargantua,²¹⁷ and design an institutional system without a dominant center—one which involves other actors in decision making and administrative implementation processes, considering such actors as peer co-workers or co-designers. As we discussed earlier, commons-based institutions are characterized by a move away from a vertically (top-down) oriented world to a horizontally organized one in which the state, citizens, and a variety of other actors collaborate and take responsibility for common resources. The institutional settings where urban collaborative democracy can take place are places of networking, of connecting and coordinating different and autonomous actions for the same shared goals.

The challenge of networked governance may be that its structure resembles a loosely coupled system, subject to fraying at the margins and not glued together enough to be organizationally coherent.²¹⁸ As Daniela Piana has emphasized, the concept of a loosely coupled system, introduced by Karl Weick,²¹⁹ describes a system where the connections among its units are weak, but flexible enough to easily react and adapt to horizontal patterns of coordination.²²⁰ However, although loosely coupled systems may be adaptive, they can lose consistency and predictability if repeatedly confronted with abrupt and unpredictable change.²²¹

216. See FRUG, *supra* note 13.

217. Ostrom, Tiebout, and Warren use the Gargantua name in order to describe the organization of metropolitan governance as a political system with a single dominant center for making decisions. See Ostrom, Tiebout, & Warren, *supra* note 202, at 831. The term is taken from the work of Robert Wood. See Robert Wood, *The New Metropolis: Green Blets, Grass Roots or Gargantua*, 52 AM. POL. SCI. REV. 108-22 (1958). “Gargantua” is “the invention of a single metropolitan government or at least the establishment of a regional superstructure which points in that direction.” Ostrom, Tiebout, & Warren, *supra* note 202, at 831.

218. Karl Weick, *Educational Organizations as Loosely Coupled Systems*, 21 ADMIN. SCI. Q. 1 (1976).

219. Daniela Piana, *Assessing and Filling the Gap as a New Mode of Governance, Lessons from a Preliminary Study Carried Out in the Cosenza’s Public Prosecutors’ Office*, 4 INT’L J. FOR CT. ADMIN. 46 (2012).

220. *Id.* at 50.

221. *Id.*

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What stabilizes the kind of collaborative institutional ecosystem that we envision is the role of the public authority, which becomes that of coordinator and mediator in co-design processes. In this sense, the networks, actions and reactions of others in the ecosystem are independent and free but nested within the local government, consistent with a polycentric system. Elected officials behave no longer as “citizens’ representatives” but rather as “collaborative institutional ecosystem managers.” City officials and staff are tasked to assist, collaborate, and provide technical guidance (data, legal advice, communication strategy, design strategies, sustainability models, etc.) to enable themselves to manage, mediate, and coordinate the ecosystem. The role of a public official is therefore that of manager, enabling and supporting (and perhaps coordinating) parts of the ecosystem to allow it to “nest” within the larger policy of the city.

2. Co-Designing the City

In general, public decision making processes typically follow three different logics: a majoritarian logic, a negotiated logic, or a deliberative logic.²²² In an urban collaborative democracy, the logic should be a collaborative logic based on the development of shared norms and shared goals. This logic is focused on the collaborative decisionmaking and collaborative design, both processes which have as their task the identification of common goals, means to achieve those goals, and the mechanisms by which to share roles and responsibilities in the implementation of them. Public authorities and public officials are still engaged in policymaking, but debate about public policy is no longer developed inside political parties, or inside city councils, but instead inside other civic arenas. This transformation thus implies the development of collaborative devices, inspired by the design principles described in this Article, that help local authorities to facilitate and foster this debate and decision making along the logic of collaboration. Collaborative decision making, like other forms of democratic innovation beyond representative democracy, is designed to increase and deepen public participation in public decisionmaking processes.²²³

One example of these new civic arenas are Urban Collaborative Labs, or living labs,²²⁴ which are user-centered open innovation ecosystems that can be focused on a neighborhood, city, or region.²²⁵ Regardless of the geographic or ter-

222. DONATELLA DELLA PORTA, *LA POLITICA LOCALE* 254 (2006).

223. See generally GRAHAM SMITH, *DEMOCRATIC INNOVATIONS: DESIGNING INSTITUTION FOR CITIZEN PARTICIPATION* (2009).

224. More information about the Living Lab model, active both in the European and American contexts, is available at *Living Labs*, MASS. INST. OF TECHNOLOGY, <http://livinglabs.mit.edu> (last visited June 4, 2016), and *Open Living Labs*, EUR. NETWORK OF LIVING LABS, <http://www.openlivinglabs.eu> (last visited June 4, 2016).

225. An inspiration may come from the Assembly of The Commons, a proposal developed by P2P Foundation. See *Assembly of the Commons*, P2P FOUND., http://p2pfoundation.net/Assembly_of_the_Commons (last visited June 4, 2016).

ritorial focus, they are a co-design process that has the effect of profoundly shaping and affecting the urban planning process. There are no requirements or selection criteria to access the Labs, and participation is elective and open to everyone who is interested. The living lab approach has proven well suited for instantiating urban collaborative governance ideals because of its user co-creation approach to identify and integrate the most innovative approaches to planning and for navigating the constraints posed by existing institutional frameworks.²²⁶ These informal spaces should be at the heart of the collaborative institutional ecosystem and are important for managing the city as a commons.

The governance output that emerges from this collaborative process is the co-design of particular urban commons, and neighborhoods, as well as the co-production of community services at the city and neighborhood level. However, these very sophisticated processes and institutional architectures are new and complex to design. This is why they do not always function as they should. For instance, these collaborative, co-design processes can break down when local (or sublocal) factions no longer agree with the governance process in which they are involved, or no longer agree with the goals or plans designed for a neighborhood or for a particular local good. When this occurs, the potential of public officials in their active role as co-designer, or mediator, is perhaps at its highest. In the mediator role, city officials might find an informal solution to the conflict, helping the parties find common synergies and perhaps even infusing the governance arrangement with different proposals or decision making tools.

If the conflict continues to exist, the solution might then be found through instruments of direct and deliberative democracy, including a larger portion of city inhabitants (direct neighborhood referendum or public consultation or resorting to mini-publics and other deliberative procedures²²⁷ to reach consensus). If all else fails and a real stalemate emerges, cities could establish a Commons Court to mediate the conflict. Collaborative policymakers and bureaucrats, for example, might establish “deliberative or participatory processes,” “local commons courts,” or other dispute resolution-like mechanisms that perform an arbitrage role where the co-design process is not able to lead to integration or coordination of different collaboration proposals.

226. Frank Nevens et al., *Urban Transition Labs: Co-creating Transformative Action for Sustainable Cities*, 50 J. CLEANER PRODUCTION 111-22 (2013).

227. For a more comprehensive introduction to deliberative methods and techniques, see KIMMO GRÖNLUND ET AL., *DELIBERATIVE MINI-PUBLICS: INVOLVING CITIZENS IN THE DEMOCRATIC PROCESS* (2014). See also James Fishkin & Robert Luskin, *Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion*, 40 ACTA POLITICA 284 (2005); Ian O’Flynn, *Deliberative Democracy, the Public Interest and the Consociational Model*, 58 POL. STUD. 572 (2010).

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3. Redistributing Political Power

The concept of urban collaborative governance is not simply another articulation of deliberative democracy.²²⁸ Supporters of deliberative democracy may, for instance, argue that a certain institutional design or procedure is able to “produce a reflexive change of beliefs through deliberation,”²²⁹ and that “preferences of citizens and their representatives can be transformed in the process of exchanging arguments.”²³⁰ Collaborative democracy instead involves a different type of institutional complexity because it requires “a resymbolisation of the place of power that is thicker than a ‘network of actors or stakeholders.’”²³¹ In an urban collaborative democracy, governance is in need of an institutional platform where the politics can become visible, equal, contestable, and legitimate. These are platforms where the relationship between power, law, and knowledge is re-defined. It is a place where instead of hierarchies of power and wildly unequal bargaining positions, we see networks of empowered members where the inhabitants and stakeholders are co-creating, co-designing, and co-implementing planning and other public policy solutions for complex urban environments together with policymakers and local officials.

Nevertheless, the institutional scenarios envisioned and discussed here as co-design spaces for collaborative policies can present problems of accountability and legitimacy because the decision-making process takes place in settings that bypass representative channels of democracy. In the traditional model of a representative democracy, what a government decides is assumed to represent the will of the people. Governance arrangements are usually voluntary arrangements and therefore bind only those who are actually involved in the governance scheme. However, in the case of urban commons governance institutions the governance arrangement may affect the everyday life of all city inhabitants that fall within the boundaries of the governance scheme (think of the BIDs, the decisions of which can have an impact also on those who are not part of the BID governance). As a consequence there is a real concern about the legitimacy of these collaborative governance settings.²³²

228. See, e.g., JAMES S. FISHKIN, *WHEN THE PEOPLE SPEAK: DELIBERATIVE DEMOCRACY AND PUBLIC CONSULTATION* (2011); JAMES S. FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORM* (1991).

229. Rainer Baubock, *Normative Political Theory and Empirical Research*, in *APPROACHES AND METHODOLOGY IN THE SOCIAL SCIENCES* 40, 55 (Donatella Della Porta & Michael Keating eds., 2008).

230. *Id.* at 46, 65.

231. Matthias Lievens, *From Government to Governance: A Symbolic Mutation and Its Repercussions for Democracy*, 63 *POL. STUD.* 2, 14 (2014).

232. See, e.g., Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 *COLUM. L. REV.* 365, 455-62 (1999) (discussing problems with accountability of BIDs and calling for more active monitoring of them).

There are other concerns, to be sure, with these new co-design processes that we want to flag but cannot yet resolve. One is related to social equality: are collaboration arenas able to guarantee equal access by underrepresented groups who are too often unable to access political and larger decision making processes, or can the potential of such collaborative processes represent a significant step towards a more egalitarian process than currently exists? How can we avoid the risk that the collaborative ecosystem produces output that results in a patchwork, instead of a network, of governance arrangements for the urban commons? If the Urban Collaborative Democracy can serve as an integration of representative democracy at the hyper-local level, we should investigate whether it provides political legitimacy; in other words, as Jody Freeman highlights, “[H]ow can we be sure that the products of collaboration . . . will be legitimate?”²³³ How can we provide accountability and legitimacy in an urban collaborative democracy where elected and public officials act as co-designers? We do not have answers to these questions but agree only that they should be raised and constantly invoked to interrogate collaborative processes designed in line with our vision of urban collaborative governance.

4. Social and Economic Inclusion

At the heart of the idea that city is a commons is the idea that its resources should be shared more widely throughout its communities and on behalf of its inhabitants, particularly the least powerful. As such, reconceiving the city as a commons can be a powerful tool to fight inequality in cities. The argument is two-fold: urban commons can be both a tool to increase the private wealth of single households and a stock of resources that can be used to more fairly distribute social and economic resources.

First, individual common resources in the city can be a way to improve the quality of life (and also the value of owned assets) and a means to improve income and find or create jobs. On the one hand, we know that the provision of housing is essential for the livelihood of all²³⁴ and that the value of a particular dwelling is highly dependent on the quality of the surrounding shared neighborhood amenities (e.g. public space, infrastructure, schools, etc.).²³⁵ On the other hand, these shared amenities can be a way to foster social inclusion if they are used as places or means for people to learn skills, obtain access to job opportunities, socialize, and to access social services that increase economic inclu-

233. Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1, 82 (1997).

234. Jim Kemeny, *Comparative Housing and Welfare: Theorising the Relationship*, 16 *J. HOUSING & BUILT ENVT.* 53 (2001).

235. ROBERT FRANK, *THE DARWIN ECONOMY: LIBERTY, COMPETITION, AND THE COMMON GOOD* (2011).

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sion and urban livability.²³⁶ The concept of “makerhoods”—an urban planning and economic development strategy that seeks to unleash micro-entrepreneurs to strengthen communities through natural and affordable live/work accommodations—embodies this mix of inclusive, affordable, and shared space in which people can earn a living and still sustain themselves while establishing small businesses.²³⁷

The second aspect is that repositioning the city as a commons, as a resource belonging to us all, gives legitimacy to the city government to enact redistribution policies and accommodate as many people as possible in a city. Taxing the wealthy²³⁸ does not, by itself, help the poor. The city as commons can be instead the object of an innovative planning and distribution of the resources of the city. First, high-income citizens could be nudged to philanthropically transfer or grant “civic use” of private assets to low-income people. Second, the local government could use its assets to grant either permanently or temporarily a “commons endowment” or a “commons minimum inheritance” at adulthood or upon losing a job to enable individuals to become retrained or to find a new means of making a living. This is very similar to what has been proposed by supporters of basic income policies or by Atkinson, who advanced the idea of a minimum heritage for all citizens.²³⁹ The point is that thinking of the city as an institution that promotes collaboration all the way across and down as a way to “share” the resources it controls can spur a host of innovative and progressive policies that address the social and economic inequality that is becoming a feature of 21st century urbanization.

5. Pooling Economies

Another pillar of urban collaborative democracy is the change in economic functioning of the city. Poolism may be an appropriate definition to describe current economic trends in the urban context. Forms of co-production of goods and sharing practices are spreading in cities all over the world. Experiences like co-working spaces (profit or nonprofit) and Fab Lab networks are emblematic of this process. A clear distinction should be made, however, between a sharing and a pooling economy. The phenomena that has recently been defined as a sharing economy builds on new or revived social patterns that have important business, legal and institutional implications, particularly in cities.²⁴⁰

236. Christa Pelikan et al., *Welfare Policies as Resource Management*, in *WELFARE POLICY FROM BELOW: STRUGGLES AGAINST SOCIAL EXCLUSION IN EUROPE* 255 (Heinz Steinert & Arno Pilgram eds., 2003).

237. See, e.g., MAKERHOODS, <http://www.makerhoods.org/> (last visited June 4, 2016).

238. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 515 (2013).

239. See ANTHONY ATKINSON, *INEQUALITY: WHAT CAN BE DONE?* 303 (2015).

240. See Nestor M. Davidson & John Infranca, *The Sharing Economy as an Urban Phenomenon*, 34 *YALE L. & POL'Y REV.* (forthcoming 2016).

Poolism refers instead to practices of “collaborative economy” that foster peer-to-peer approaches and/or involve users in the design of the productive process or transform users into a community.²⁴¹ Thus, “commons-based economy”, “open cooperativism”, or “open platform cooperativism” are better terms, in our view, for sharing economy initiatives that are collectively owned or managed, democratically governed, and do not extract value out of local economies but rather anchor jobs, cultivate respect for human dignity, and offer new forms of social security.

The growth of the sharing economy should only partially be considered a fundamental change in economic functioning as a consequence of the recent economic crisis.²⁴² In some respects it might also represent, thanks to information technologies, the reverse-transformation²⁴³ or the transition²⁴⁴ of some sectors of the current economic model to long-standing economic traditions and economic models (e.g. cooperative economy, social economy, solidarity economy, handicraft production, commons economy etc.) and even to ancient forms of economic exchange (e.g. the bartering economy), which are alternatives to capital-intensive forms of market economy.²⁴⁵

An application of this approach is represented by innovative forms of poolism. Such forms involve collaborative housing, especially when addressed to vulnerable groups in society (we can already see some application of this ap-

241. The distinction between ‘pooling’ and ‘sharing economy’ has been recognized by the European Union in the Committee of the Regions opinion EUR. UNION, COMM. OF THE REGIONS, THE LOCAL AND REGIONAL DIMENSION OF THE SHARING ECONOMY (Dec. 3-4, 2015), <https://webapi.cor.europa.eu/documentsanonymous/COR-2015-02698-00-00-AC-TRA-EN.docx/content> (download).

242. See KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (1944). According to Polanyi and other pre-capitalist historians, allocation in many earlier urban civilizations took place in three ways: redistribution, regulated markets and reciprocity. Sharing economy seems to be inspired to the latter.

243. COMMONS TRANSITION, <http://commonstransition.org/> (last visited June 4, 2016).

244. See PAT CONATY & DAVID BOLLIER, TOWARD AN OPEN CO-OPERATIVISM: A NEW SOCIAL ECONOMY BASED ON OPEN PLATFORMS, CO-OPERATIVE MODELS AND THE COMMONS (Aug. 27-28, 2014), http://bollier.org/sites/default/files/misc-file-upload/files/Open%20Co-operativism%20Report%2C%20January%202015_o.pdf. See also Trebor Scholz, *Platform Cooperativism vs. the Sharing Economy*, MEDIUM (Dec. 5, 2014), <https://medium.com/@trebors/platform-cooperativism-vs-the-sharing-economy-2ea737f1b5ad#.1gg6ctgg7>.

245. See, e.g., JEREMY RIFKIN, THE ZERO MARGINAL COST SOCIETY: THE INTERNET OF THINGS, THE COLLABORATIVE COMMONS, AND THE ECLIPSE OF CAPITALISM 19-20 (2015) (explaining how a market-based, highly competitive economy which has driven marginal costs to zero has helped spawn a hybrid economy—part capitalist and part collaborative economy—assisted by a new technology infrastructure which allows more sharing of goods and knowledge and is leading to the replacement of “exchange value” with “sharable value”).

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proach with regards to elderly people²⁴⁶) as well as co-production of community services (energy cooperatives, water distribution, collaborative waste management).²⁴⁷

B. *The View from the Ground*

Cities worldwide are experimenting with policies that are inspired by the idea of sharing and the commons. Many of them do not use the language of the commons, but some of them do. These cities are emerging in ways that demonstrate some of the pillars of our urban collaborative model. We offer two examples of cities governing themselves along the lines of a “commons.” The first is the now well-recognized “sharing city,” which applies such features embedded within the idea of urban collaborative democracy, particularly on a neighborhood scale.

The other example is the “collaborative city,” which explicitly utilizes the language of the commons and tries to implement an urban vision consistent with principles of urban collaborative democracy. These are two exceptionally innovative attempts to re-situate the city government and to facilitate collaboration in reaching common goals and caring for common goods. We offer them here not as perfect examples of our models but as significant steps towards its realization.

1. The Sharing City

Seoul is the world’s first sharing city. In Seoul, citizens are the “mayor,” according to the formal mayor of Seoul.²⁴⁸ The city government decided to empower “collective governance” of the city, a governance strategy based on communication and collaboration with citizens. The Sharing City Project is made possible thanks to the approval of the “Seoul Metropolitan Government Ordinance for the Promotion of Sharing.”²⁴⁹ The main goal of the Sharing City Pro-

246. See the activities of the New York Foundation for Senior Citizens, N.Y. FOUND. FOR SENIOR CITIZENS, <http://www.nyfsc.org/> (last visited June 4, 2016), and the experience of a digital platform developed by the city of Barcelona, *Vincles BCN*, BARCELONA, <http://smartcity.bcn.cat/en/vincles-bcn.html> (last visited June 4, 2016), to fight against isolation of seniors by sharing the time of relatives and neighbors.

247. See, e.g., Anna Schreuer & Daniela Weismeier-Sammer, *Energy Cooperatives and Local Ownership in the Field of Renewable Energy Technologies: A Literature Review* (Vienna Univ. Econ. & Bus., Res. Inst. for Co-Operation & Co-Operatives, Research Report No. 2010/4, 2010), <http://epub.wu.ac.at/2897/>.

248. Park Won-Soon, *In Seoul, The Citizens Are The Mayor*, 74 PUB. ADMIN. REV. 442 (2014).

249. Seoul Metropolitan Government Ordinance on the Promotion of Sharing, No. 5619 (Jan. 9, 2014), SEOUL METRO. GOV’T, <http://legal.seoul.go.kr/legal/english/front/page/law.html?pAct=lawView&pPromNo=1191> (last visited June 4, 2016).

ject is the promotion of the sharing approach and sharing practices in the city of Seoul.²⁵⁰

Article 8 of the Ordinance provides a number of core defining terms. The term “sharing” means activities that create social, economic and environmental values by jointly using resources, such as space, goods, information, talent and experience. A “sharing enterprise” is an enterprise intending to contribute to the solution of social problems—such as economy, welfare, culture, environment, and traffic—through sharing practices. A “sharing organization” is an organization or corporation designated pursuant to Article 8, i.e., a nonprofit, nongovernmental organization or nonprofit corporation, which intends to contribute to the solution of social problems, such as economy, welfare, culture, environment, and traffic, through sharing.

Under the Ordinance the city mayor can designate sharing organizations and sharing enterprises that “shall endeavor to disseminate sharing culture and promote citizen’s convenience.”²⁵¹ The mayor may also provide subsidies to sharing organizations or enterprises, following deliberations by the Sharing Committee, and provide administrative support. When introducing the program, the mayor announced that ten sharing enterprises were to be subsidized with 250 million Won. The mayor also announced collaborative mobility in the city through the introduction of 492 vehicles for car sharing services.

To strengthen sharing and collaboration with and among citizens—who, according to the mayor, should no longer be at the receiving end of policies but rather play an active role in shaping public policies²⁵²—the city undertook to design new infrastructure to receive information, feedback, and sharing practices from citizens. This new infrastructure includes the Seoul Citizen’s Hall, a public space located at the basement of city hall where citizens can communi-

250. To achieve this goal, in the framework of a collaborative and communicative state:

The Mayor shall actively promote related policies including the following for the promotion of sharing:

- 1.Support for the discovery of sharing areas and practice;
- 2.Promotion of and support for sharing organizations and sharing enterprises;
- 3.Dissemination of awareness for the promotion of sharing;
- 4.Improvement of laws and regulations and systems for the promotion of sharing;
5. Cooperation among Korean and foreign organizations, enterprises and institutions related to sharing; and
- 6.Other matters deemed necessary for the promotion of sharing.

Id. art. 5.

251. *Id.* art. 8.

252. Won-Soon, *supra* note 248.

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cate and collaborate with public administration,²⁵³ and a Social Networking Services administration to pursue active communication with citizens through social networking channels such as Twitter and an online platform that publishes open data to foster transparency and encourage sharing.

The most interesting project established by the City, in order to foster innovation and collaboration, is the Seoul sharing city project. Seoul sharing city is a city-funded initiative and is part of the Social Innovation Bureau (SIB), which itself was established with the aim of engaging citizens to understand problems and generate solutions for governments to develop and adopt.²⁵⁴ In order to advance the Sharing city agenda, the Bureau promotes several projects, including “Generation sharing households,” “Sharing bookshelves,” and workshops for communication between policy makers and citizens²⁵⁵

2. The Collaborative City

The collaborative city is a commons-based city model. What differentiates the sharing city from the collaborative city is the methodological approach: the “co-city” protocol. The protocol, developed and experimented in five cities in Italy so far, is articulated in three main phases: mapping, experimenting and prototyping. Although the aim of the experimentation is to guarantee the *ceteris paribus*²⁵⁶ condition, every field experimentation has its unique aspects due to the specific characteristics of the city itself. The aim of the first phase of the protocol, the mapping phase, is to understand the socio-economic and legal characteristics of the specific urban context.

The second phase, the experimenting process, is a “collaboration camp” where synergies are created between emerging commons projects and the city, filtering the collaborative actors from the predatory ones, on one side, and the participative one, on the other side. In the second phase, co-working sessions organize tests for possible synergies and alignment between projects and relevant actors. These culminate in a “collaboration day,”²⁵⁷ which might take the

253. SUNKYUNG HAN ET AL., A SEOUL CITY’S SOCIAL INNOVATION STRATEGY: A MODEL OF MULTI-CHANNEL COMMUNICATION TO STRENGTHEN GOVERNANCE AND CITIZEN ENGAGEMENT (2013), <http://www.transitsocialinnovation.eu/content/original/Book%20covers/Local%20PDFs/98%20SF%20Han%20Kim%20Rim%20%20Park%20Seoul%20City%20social%20innovation%20strategy%202013.pdf>.

254. See RUTH PUTTICK ET AL., NESTA & BLOOMBERG PHILANTHROPIES, THE TEAMS AND FUNDS MAKING INNOVATION HAPPEN IN GOVERNMENTS AROUND THE WORLD (2014).

255. See *id.* at 85.

256. This is the Latin phrase for “other things being equal.”

257. This is inspired by “Deliberation Day.” The idea of Deliberation Day was conceived by Bruce Ackerman and James Fishkin, born from empirical observation of the deliberative polls experiences. Deliberation Day is proposed as a new national holiday held a week before national elections. Registered voters are

form of placemaking events—e.g., an urban commons civic maintenance festival, temporary utilization of abandoned building or spaces, micro-regeneration intervention—to test, experiment and coordinate the ideas that arise out of the co-working sessions.

The third phase, the governance prototyping phase, leads to a different governance outcome on the basis of the guidelines extracted during the experimentation phase and on the needs of the specific community or city. As a matter of fact a crucial characteristic for urban commons-based governance experimentalism is adaptiveness.²⁵⁸ As the following paragraphs explain, this phase results in the design of governance tools best suited or tailored to local conditions.

The protocol is the necessary step to create the most favorable environment for innovation through urban commoning, by adopting the design principles of sharing, collaboration, and polycentrism. The key is to transform the entire city or some parts of it into a laboratory²⁵⁹ by creating the proper legal and political ecosystem for the installation of shared, collaborative, polycentric urban governance schemes.²⁶⁰ This process of democratic experimentalism reconceptualizes urban governance along the same lines as the right to the city, creating a juridical framework for city rights.²⁶¹

called at the neighborhood level to discuss together the key issues of the political campaign. The goal of Deliberation Day is production of deliberative public opinion at the mass level. See BRUCE ACKERMAN & JAMES FISHKIN, *DELIBERATION DAY* 149 (2004).

258. The polycentric structure of an adaptive legal system offers tremendous opportunities for cities to be leaders in social-ecological resilience. See Craig Anthony Arnold, *Resilient Cities And Adaptive Law*, 50 *IDAHO L. REV.* 245, 254 (2014).
259. The idea is that the urban level is the best testing ground for democratic experimentalism. Democratic experimentalism, and the kind of innovations we propose, help to overcome political apathy, reduce the lack of legitimacy, increase political satisfaction and lead to more effective policies. See, e.g., Brigitte Geissel, *Improving the Quality of Democracy at the Local Level: German Experiences* (May 23-24, 2008), http://www.provincia.tn.it/binary/pat/link_home/geissel_Trento_08_final.1211796325.pdf (presented at “Quality of Democracy, Participation and Governance: The Local Perspective” conference at Trento, Italy).
260. The protocol works as a sort of ‘wind gallery’ for the experimentation of the collaborative/polycentric urban governance scheme. The idea of the ‘wind gallery’ is inspired by the ‘wind tunnel,’ the innovative solution introduced by the Wright brothers that allowed them to successfully perform the first controlled flight at the beginning of the twentieth century. See *1901 Wind Tunnel*, NAT’L AERONAUTICS & SPACE ADMIN., <http://wright.nasa.gov/airplane/tunnel.html> (last visited June 4, 2016).
261. What we mean by this is that through collaborative, polycentric governance-based experiments we can see the right to the city framework be partially realized—e.g., the right to be part of the creation of the city, the right to be part of the decisionmaking processes shaping the lives of city inhabitants, and the right of

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The most successful application of the “co-city” protocol is the CO-Bologna project run in the City of Bologna to design a policy and regulatory framework re-shaping the relationship between inhabitants and the local administration with regard to urban resources and services.²⁶² The main pillar of the CO-Bologna process is the recently enacted regulation on civic collaboration for the urban commons, empowering residents, and others, to collaborate with the city to undertake the “care and regeneration” of the “urban commons” across the city.²⁶³ The “urban commons” covered by the regulation includes mainly public spaces, urban green spaces, and abandoned buildings and other infrastructure.²⁶⁴ However, its definition of the commons is quite expansive, directly relating the concept to the quality of life in the city and the concept of human flourishing:

[T]he goods, tangible, intangible and digital, that citizens and the Administration, also through participative and deliberative procedures, recognize to be functional to the individual and collective wellbeing, activating consequently towards them, pursuant to article 118, par. 4, of the Italian Constitution, to share the responsibility with the Administration of their care or regeneration in order to improve the collective enjoyment.²⁶⁵

The central regulatory tool is the “collaboration agreement,” signed by citizens and the city, which establishes the object of care, and the rules and conditions of collaboration among any group of citizens and the local government, or other actors²⁶⁶ The collaboration could be for long-term care of a common resource, or a single or short-term intervention. The regulation also provides for

inhabitants to shape decisions about the collective resources in which we all have a stake. *See supra* notes 8-10; *see also* JEAN-BERNARD AUBY, *DROIT DE LA VILLE: DU FONCTIONNEMENT JURIDIQUE DES VILLES AU DROIT À LA VILLE* (2013).

262. In the interest of full disclosure, one of the authors, Christian Iaione, was a member of the working group which drafted the Bologna Regulation on public collaboration for urban commons. *See Bologna Regulation on Public Collaboration for Urban Commons*, LABGOV (Dec. 18, 2014), <http://www.labgov.it/2014/12/18/bologna-regulation-on-public-collaboration-for-urban-commons/>.

263. The regulation provides that “[t]he City periodically advertizes the list of spaces, buildings or digital infrastructures which could be target of actions of care and regeneration, specifying the goals to be pursued through the collaboration with active citizens.” *See* COMUNE DI BOLOGNA, *REGULATION ON COLLABORATION BETWEEN CITIZENS AND THE CITY FOR THE CARE AND REGENERATION OF URBAN COMMONS* § 10(6), at 13 (LabGov trans., 2014), <http://www.comune.bologna.it/media/files/bolognaregulation.pdf>.

264. Section 16 speaks of “real estate of the City the buildings [of which are] in [a] state of partial or total disuse or decay which . . . are suitable for care and regeneration interventions.” *Id.* § 16(1), at 17.

265. *Id.* § 2(a), at 6.

266. *Id.* §§ 2(e), 5, at 7, 9-11.

the transfer of technical and monetary support to the collaboration,²⁶⁷ and ways of defining the borders of the particular resource to be managed through a collaborative pact. It also contains norms and guidance on the importance of sustaining common resources, maintaining the inclusiveness and openness of the resource, of proportionality in protecting the public interest, and directing the use of common resources towards the “differentiated” public.²⁶⁸ Finally, the regulation speaks of fostering urban creativity chiefly through regulating urban and street art, and the digital infrastructure.²⁶⁹

The specific applications of the Bologna regulation are just now undergoing implementation as the City has recently signed almost 260 pacts of collaboration, which are tools of shared governance.

The regulation and other city public policies foresee other governance tools inspired by the collaborative and polycentric design principles underlying the Regulation. For example the Regulation foresees also that the City supports the willingness of inhabitants, private owners, and commercial businesses to create street or neighborhood associations, consortiums, cooperatives, foundations to manage public space, public urban green spaces and parks, and abandoned and creative spaces.

Also, the City enacted other commons-based public policies that are not based on the Regulation. In particular the invitation to tender “Icredibol” and the co-design process called “Collaborare è Bologna” are relevant. The first tool is a comprehensive plan to use urban abandoned or unutilized public asset to install collaborative spaces. The second is a neighborhood collaborative planning process for understanding what the communities are willing to run as commons and co-design solutions to install forms of governance of the urban commons.

For our purposes, the Bologna regulation and the Bologna collaborative city program²⁷⁰ are illustrative of the kinds of experimentalist, adaptive, iterative governance and legal tools which allow city inhabitants and actors (i.e., social innovators, local entrepreneurs, civil society organizations, and knowledge institutions willing to work in the general interest) to enter into co-design processes with the city leading to local polycentric governance of an array of com-

267. The regulation makes clear that the city or municipality will make available technical support and other forms of assistance to be able to care for or regenerate these resources. Title VI is dedicated to the forms of support, see *id.* tit. VI, §§ 20-27, at 19-23 (Forms of Support).

268. In other words, the care and regeneration depends on the type or nature of the urban common and the people whose well-being depend upon it.

269. The regulation is a social innovation enabling tool, seeking to promote the birth of collaborative economy or sharing economy ventures. Indeed, it has specific sections dedicated to “social innovation and collaborative services,” “urban creativity,” and “digital innovation.” *Id.* §§ 7-9, at 11-12.

270. The “Bologna Collaborative City” program is a program jointly developed by the City of Bologna and the Fondazione del Monte di Bologna and Ravenna. *Id.* at 2.

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mon goods in the city. The regulation is at the same time a form of social innovation “enabling” tool which fosters the interaction between urban commoning and the collaborative or sharing economy. Indeed the regulation has dedicated specific articles to “social innovation and collaborative services,” “urban creativity” and “digital innovation” which we believe can be the centerpiece of a “collaborative city.”

CONCLUSION

We have argued that, in ever-changing urban contexts worldwide, an “urban commons” framework captures much of the debate around contested city space and urban resources. This framework, which until now has been insufficiently developed by scholars, considers important urban goods—open squares, parks, abandoned buildings, vacant lots, roads and other urban infrastructure—as part of the collective, or shared, resources of cities. Such common goods, or the “commons”, require a more open governance regime than currently exists in most cities. The urban commons framework, in addition to its basis in property theory, also provides alternatives for managing common goods, and even the managing the city itself as a commons.

The study of commons institutions represents a fundamental transformation in the way we think about urban law and governance, and perhaps sheds new light on burgeoning forms of democratic experimentalism.²⁷¹ We articulated a number of principles, extracted from the various kinds of institutional arrangements already in place, to demonstrate the potential use of an urban commons framework for local governance practices. In and of itself, the potential for what we call *urban collaborative governance* lies in the enabling of ordinary citizens to improve their lives and their communities in ways that promote human flourishing. However, we also hold out hope that forms of democratic innovation that grow out recognition of the urban commons provide alternatives for city-making which foster the development of inclusive and equitable cities.

271. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).